**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**Region 2**



| | |
|---|---|
| In the Matter of<br><br>A&I Developers, Inc.,<br><br><br><br>Respondent,<br><br>Proceeding under Section 16(a) of the Toxic Substances Control Act. | Honorable Helen Ferrara<br>Presiding Officer<br><br>Docket No. TSCA-02-2018-9289 |

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT'S MOTION FOR ORDER OF DEFAULT**

# TABLE OF CONTENTS

**COMPLAINANT'S LIST OF EXHIBITS**

**Exhibit 1:** EPA Pre-Filing Letters Notifying of Opportunity to Settle Prospective Federal Enforcement Action under TSCA Mailed to the Respondent's Jamaica address, dated May 18, 2017, and Rockville address, dated August 9, 2017, and Signed Certified Mail Return Receipt Green Cards

**Exhibit 2:** Copy of EPA Complaint against Respondent Filed with the EPA Regional Hearing Clerk and Mailed to the Respondent's Rockville address on September 26, 2018 and Certified Mail Return Receipt Green Card Signed by M. Tain and Dated September 29, 2018 and Cover Letter

**Exhibit 3:** Penalty Computation Worksheet

**Exhibit 4:** Email from Yolanda Majette to Karen Maples, Regional Hearing Clerk, U.S. EPA Region 2, Dated October 10, 2018 Transmitting a Copy of the Return Receipt Card for the Complaint

**Exhibit 5:** EPA Letters for Failure to File an Answer Mailed to the Respondent's Jamaica and Rockville addresses, dated February 1, 2019, by Certified Mail Return Receipt Requested

**Exhibit 6:** EPA Notice Letter for Failure to File an Answer Mailed to the Respondent's Jamaica address, dated March 14, 2019, by First Class Mail

**Exhibit 7:** Email from Karen Maples, Regional Hearing Clerk, U.S. EPA Region 2 Dated June 11, 2024 stating that no Answer had been received

**Exhibit 8:** Declaration of Karen L. Taylor

**Exhibit 9:** Declaration of Demian P. Ellis

**Exhibit 10:** Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule, August 2010 [Revised 4/5/2013] ("LBP Consolidated ERPP")

**Exhibit 11:** Request for Information by U.S. Environmental Protection Agency, Region 2, mailed to Respondent's Jamaica address on March 5, 2016, by Certified Mail Return Receipt

**Exhibit 12:** A&I Developer's Response to Information Request, dated 5/26/16

**Exhibit 13:** Business Information for A&I Developers

Complainant, the Acting Director, Enforcement and Compliance Assurance Division, formerly known as the Division of Enforcement and Compliance Assistance, of the United States Environmental Protection Agency ("EPA"), Region 2, by and through the Office of Regional Counsel, submits this Memorandum of Law in support of her Motion, brought pursuant to 40 C.F.R. §§ 22.16 and 22.17, for an Order of Default against the Respondent A&I Developers, Inc. (hereinafter referred to as "Respondent" or "A&I Developers") finding liability for violations of Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("the Act"), 42 U.S.C. §§ 4851 et seq., and the federal regulations promulgated thereunder, set forth in 40 C.F.R. Part 745, Subparts E ("Renovation, Repair, and Painting (RRP) Rule"), and assessing a penalty of $32,814.

## I. AUTHORITY FOR GRANTING THE EPA MOTION FOR ORDER OF DEFAULT

Pursuant to 40 C.F.R. § 22.17(a), if a respondent fails to file an Answer(s), in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a), to the Complaint, the respondent may be found in default upon motion. "Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). Forty C.F.R. § 22.17(b) further dictates that "A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested." Finally, pursuant to 40 C.F.R. § 22.17(c):

> When the Presiding Officer finds that default has occurred, he/she shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules. The relief proposed in the complaint or the motion for

default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

Accordingly, EPA now seeks an Order for Default on liability and penalty against the Respondent. This motion is based on, and supported by, the following: a) the Complaint (Exhibit 2); b) Motion for an Order of Default, including this Memorandum in Support of Complainant's Motion and Exhibits thereto; c) the attached Declarations of Karen L. Taylor (Exhibit 8) and Demian P. Ellis (Exhibit 9); and, d) the Penalty Computation Worksheet (Exhibit 3). Together, these documents establish a sound justification for a finding of liability and imposing the penalty sought in the Motion for the violations cited in the Complaint.

## II. BACKGROUND

Respondent, A&I Developers, Inc., is a general contractor based in Rockville Centre, NY. On or about July 22, 2016, EPA received a tip/complaint from the New York City Department of Health and Mental Hygiene ("NYCDOHMH") which alleged that Respondent's workers were performing renovations in a manner that created a lead dust condition at 2020 Honeywell Avenue, Bronx, NY 10460 ("the 2020 Honeywell Avenue property"). The tip/complaint was based on a February 24, 2016 NYCDOHMH inspection of the 2020 Honeywell Avenue property. The NYCDOHMH inspector observed active renovation of several apartments and construction dust throughout the 2020 Honeywell Avenue property and collected 15 dust wipe samples during the inspection. NYCDOHMH issued a stop work order requiring the cleanup of all debris and dust generated by the work. A March 2, 2016 analytical report prepared by EMSL Analytical, Inc. (an EPA accredited lab for lead analysis) indicated that 10 of the dust wipe samples collected by NYCDOHMH tested positive for lead. See Exhibit 2, Complaint, paragraphs 18-21.

On or about March 5, 2016, EPA issued an Information Request Letter ("IRL") to Mr. Ashad Ajim, A&I Developers Inc., 159-20 115th Road, Jamaica, New York 11434 regarding A&I Developers' compliance with regulations and requirements pertaining to Residential Property Renovation at the 2020 Honeywell Avenue property. See Exhibit 11 IRL and Exhibit 2 Complaint, paragraph 31. On May 27, 2016, Ashad Ajim, on behalf of A&I Developers, submitted to EPA an email response to the IRL (the "Response") as "President/Owner" for Respondent. See Exhibit 12.

Based on the NYCDOHMH inspection and the response to EPA's IRL, EPA determined that Respondent did not comply with TSCA and the RRP Rule, set forth at 40 C.F.R. Part 745 Subpart E, which requires the implementation of lead-safe work practices during renovations in target housing to protect occupants and their children from lead paint exposure in the home, the chief source of lead poisoning in the United States.

On September 25, 2018, the Complainant commenced a civil administrative enforcement action against Respondent with the issuance of an administrative Complaint pursuant to Section 16(a), 15 U.S.C. § 2615(a), of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 et seq., and the EPA Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22. See Exhibit 2. The Complaint alleged five violations of TSCA. Specifically, the Complaint alleges that Respondent did not comply with five requirements of the RRP Rule, during a residential renovation by failing to: (1) obtain EPA certification as a firm prior to commencing the renovation; (2) provide lead hazard information pamphlet to the owner; (3) establish and maintain records of compliance; (4) ensure that all individuals performing renovation activities were certified renovators or had been trained by a certified renovator; and

(5) assign a certified renovator to the renovation; The Complaint proposed a penalty in the amount of $32,814. The Complaint stated that, pursuant to the Consolidated Rules of Practice, failure to timely file an answer could constitute a binding admission of all allegations in the complaint and could result in the issuance of a default order requiring payment of a civil penalty without further proceedings 30 days after the default order becomes final under 40 CFR § 22.27(c). See Exhibit 2, page 10. Forty C.F.R. § 22.15(d) states that failure to admit, deny or explain any material allegation of fact in a complaint is deemed to be an admission of the allegation. To date, the Respondent has failed to file an Answer to the Complaint. See Exhibit 7.

## III. SERVICE OF PROCESS

### A. Service of the Complaint

On September 25, 2018, EPA, Region 2 issued a civil administrative Complaint against Respondent pursuant to Section 16(a), 15 U.S.C. § 2615(a), of TSCA. See Exhibit 2. The Complaint specifies the TSCA statutory and regulatory background. The Complaint also specifies the factual and legal basis in support of the violations alleged in the counts of the Complaint.

Pursuant to 40 CFR § 22.5(b)(1), on September 26, 2018 a copy of the signed original of the Complaint, including Certificate of Service, along with the Consolidated Rules of Practice, was sent, by United States Postal Service ("USPS") certified mail with return receipt requested ("green card"), to Ashad Ajim, A&I Developers, Inc., at the address listed with the New York Department of State ("NYDOS") Division of Corporations for service of process on the business (265 Sunrise Highway Ste 1-304, Rockville Centre, NY 11570) ("Rockville address"). See Exhibit 13. The Respondent was served with the Complaint on at the Rockville address. The green card was signed by M. Tain and dated September 29, 2018. See Exhibit 2. Pursuant to 40

CFR § 22.5(b)(1)(iii), the green card evidencing proof of service (i.e., properly executed receipt) of the Complaint upon the Respondent was received and provided to the EPA Region 2 Hearing Clerk. See Exhibit 4.

The Complaint advised the Respondent of its right to a hearing and explained that, in order to avoid being found in default upon motion by Complainant, a written Answer, which could include a request for a hearing, had to be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 16th Floor, New York, NY 10007-1866 (the Clerk's address at that time), within 30 calendar days of receipt of the Complaint. In addition, the Complaint (at page 9) stated the following:

> Respondent's Answer to the Complaint must clearly and directly admit, deny or explain each of the factual allegations that are contained in the Complaint with regard to which Respondent has any knowledge. 40 CFR § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 CFR § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that the Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether the Respondent requests a hearing. 40 CFR § 22.15(b).

The cover letter for the Complaint informed Respondent of its right to a formal hearing to contest the allegations and/or proposed penalty in the Complaint within thirty days of receipt of the Complaint and that a default order might be entered against it if it did not Answer the Complaint or request an extension of time to Answer.

The Respondent did not file an Answer to the Complaint with the Regional Hearing Clerk within 30 calendar days of receipt of such Complaint or by November 1, 2018. See Exhibit 7, Karen Maples email, and Exhibit 8, Taylor Declaration, Paragraph 8.

To date, the Respondent has not filed an Answer to the Complaint with the Regional Hearing Clerk nor has it contacted the Presiding Officer to request any extension of time to file

an Answer or communicated with EPA's counsel about doing so. See Exhibit 7, Karen Maples email, and Exhibit 8, Taylor Declaration, Paragraph 8 and 9.

### B. Pre-filing Notices

Prior to the issuance of the Complaint, EPA sent two letters notifying Respondent of the prospective federal enforcement action under TSCA. On May 18, 2017, EPA sent a pre-filing letter, by USPS certified mail return receipt requested, to Ashad Ajim, Owner, A&I Developers, Inc., at the address of the business (159-20 115th Road, Jamaica, NY 11434) ("Jamaica address"). The return receipt for the May 18, 2017 pre-filing letter was signed and returned to EPA, and the USPS tracking notice indicates that the letter was received by an individual at that address on May 22, 2017. See Exhibit 1. On August 9, 2017, EPA sent a pre-filing letter, by USPS certified mail return receipt requested, to Ashad Ajim, Owner, A&I Developers, Inc., at the NYDOS Division of Corporations process service Rockville address for the business. The return receipt for the August 9, 2017 pre-filing letter was signed and returned to EPA indicating that the letter sent to that address was received by an individual on August 12, 2017. See Exhibit 1.

### C. Follow-up Notices and Copies of the Complaint Package

About four months after the Complaint had been issued, EPA on February 1, 2019 sent, by USPS certified mail with return receipt requested, letters to Respondent at both the business Jamaica address and process service Rockville address. EPA's February 1, 2019 letter included a copy of the Complaint and Consolidated Rules of Practice and alerted the Respondent that the deadline for filing an Answer to the Complaint had passed; stated that EPA intended to seek a default order against the Respondent; set forth the legal effects of such default order; and, requested that the Respondent contact EPA if it intended to file an Answer to EPA's Complaint.

The notice letter mailed to the Jamaica address was returned to EPA by the U.S. Postal Service as refused. The notice letter mailed to the Rockville address was returned to EPA by the U.S. Postal Service as undeliverable. See Exhibit 5.

On March 14, 2019, EPA sent, by USPS First Class Mail, a letter to A&I Development at the Jamaica address. EPA's March 14, 2019 letter included a copy of the Complaint and Consolidated Rules of Practice and alerted the Respondent that the deadline for filing an Answer to the Complaint had passed; stated that EPA intended to seek a default order against the Respondent; set forth the legal effects of such default order; and, requested that the Respondent contact EPA if it intended to file an Answer to EPA's Complaint. See Exhibit 6. The March 14, 2019 mailing was not returned to EPA. See Exhibit 8, Taylor Declaration, Paragraph 7.

## IV. COMPLAINANT HAS SATISFIED THE GOVERNING LEGAL STANDARD FOR DEFAULT

### A. Complainant Used a Proper Method of Service.

The Consolidated Rules of Practice require Complainant to serve the complaint "on respondent, or a representative authorized to receive process on respondent's behalf." 40 C.F.R. § 22.5(b)(1)(i). The regulations further provide that in the case of a domestic or foreign corporation, Complainant shall serve the complaint on "an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process." Id. § 22.5(b)(1)(ii)(A). The rules define "person" to include any "individual, partnership, association [or] corporation," and so contemplates that a corporation may designate under Federal or state law either an individual or a corporation as its agent for service of process. See id. § 22.3(a). The regulations also provide that the Complainant may serve the complaint "by certified mail with return receipt requested." Id. § 22.5(b)(1)(i). "Service of the complaint is complete when the return receipt is signed." Id. § 22.7(c). Reading these

provisions together, the Complainant may serve a corporation by sending the complaint by certified mail, return receipt requested, to the Respondent's agent for service of process, typically by mailing it to the address of record designated for that purpose. See In re Jonway Motorcycle (USA) Co., Ltd., CAA Appeal No. 14-03, 2014 WL 8060919, 4 at n.13 (EAB, Nov. 14, 2014). "To conclude otherwise would allow parties to avoid service by refusing to accept service at their official service addresses or by listing sham service addresses." Id. In the present case, on September 26, 2018, EPA sent copies of the Complaint, along with the Consolidated Rules of Practice, via USPS by certified mail with return receipt requested to Respondent at the Jamaica and Rockville addresses. See Exhibit 2. The documents were received by the Respondent's agent for service of process at the Rockville address, as evidenced by the U.S. Postal Service green card return receipt signed on September 29, 2018. See Exhibit 2 & 13. Thus, EPA satisfied a proper method of service by mailing the Complaint via USPS certified mail with return receipt requested.

B. Complainant Used Proper Service Materials

Forty C.F.R. § 22.5(b)(1)(i) requires that complainant serve "a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice." In the present case, the Complainant sent a copy of the signed original of the Complaint, including a Certificate of Service, a cover letter, and a copy of the Consolidated Rules of Practice to the Respondent. Thus, Complainant used "proper service materials" in compliance with the requirements of 40 C.F.R. § 22.5(b)(1)(i).

C. Complainant Used Proper Addresses for the Respondent for Service on a Corporation

Where respondent is a corporation, 40 C.F.R. § 22.5(b)(1)(ii)(A) requires that the complainant address the service materials to an officer, partner, a managing or general agent, or

any other person authorized by appointment or by Federal or State law to receive service of process. In the present case, EPA addressed the service materials to Ashad Ajim, A&I Developers, Inc., at the address of the business, 159-20 115th Road, Jamaica, NY 11434 ("Jamaica address"). EPA also addressed a set of the service materials to Ashad Ajim, A&I Developers, Inc., at the NYDOS Division of Corporations process service address for the business, 265 Sunrise Highway Ste 1-304, Rockville Centre, NY 11570 ("Rockville address"). Documents that confirm Ashad Ajim as the Owner or managing agent and the Jamaica address as the physical location of the business for Respondent include: A&I Developers Response to EPA's Information Request; a Dun and Bradstreet report for A&I Developers; and, NYDOS Division of Corporations entity information for A&I Developers. See Exhibits 12 and 13. The NYDOS Division of Corporations entity information confirms the Rockville address as the proper service of process address for Respondent. See Exhibit 13. It should be noted that the pre-filing notices sent to these addresses were received.

Proof that mail is properly addressed and mailed has long been accepted as establishing a strong rebuttable presumption of delivery to the addressee. See In the Matter of Tifa Limited, No. I.F. & R.-II-547-C, 1999 WL 549374 (ALJ, July 07, 1999), aff'd 2000 WL 739401 (EAB, June 5, 2000). In the present matter, on September 26, 2018, Counsel for Complainant's secretary, Yolanda Majette, caused to be mailed a copy of the Complaint by certified mail, return receipt requested, to the Jamaica and Rockville addresses for Respondent. See Exhibit 2, Certificate of Service. As previously noted, a green card was signed for the mailing to the Rockville address. Additionally, on March 14, 2019 Ms. Majette sent, by First Class Mail, a letter to A&I Development at the Jamaica address. EPA's March 14, 2019 letter, which included a copy of the Complaint and Consolidated Rules of Practice, was never returned to EPA. This

provides additional evidence that the Complainant used proper addresses for service on a corporate Respondent in compliance with 40 C.F.R. § 22.5(b)(1)(ii)(A).

D. Properly Executed Receipt for Service of Process was Returned to the Region

Forty C.F.R. § 22.5(b)(1)(iii) specifies that "[p]roof of Service of the Complaint must be made by affidavit of the person making personal service, or by properly executed receipt." For the mailing of the September 26, 2018 Complaint to Respondent, proof of service was made by "properly executed receipt." The green card return receipt for the mailing to the Rockville address was signed personally by M. Tain, and a copy of this receipt was forwarded to the Regional Hearing Clerk. See Exhibit 2. As such, the green card for the mailing to the Rockville address constitutes evidence of receipt.

As a matter of the fact and law, as detailed above, Respondent may be found to be in default as a result of the Respondent's failure to file an Answer to EPA's properly served Complaint.

## V. FACTS IN THE COMPLAINANT DEEMED ADMITTED BY VIRTUE OF DEFAULT

Forty C.F.R. § 22.17(a) states, in part, that "[d]efault by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." Accordingly, the following facts, sufficient for a finding of liability for the violations alleged, are deemed admitted by virtue of Respondent's default in this matter.

A. General Facts

The following general facts necessary to a finding of liability for all counts were set out in the Complaint. (The paragraph number of the Complaint where these facts were alleged is referenced at the end of the numbered paragraphs below.)

These facts established that the Respondent is subject to TSCA and subject to the regulations and requirements pertaining to Residential Property Renovation promulgated pursuant to 15 U.S.C. § 2682(c)(3), and set forth at 40 C.F.R. Part 745, Subpart E.

1. Respondent, A&I Developers, Inc., is incorporated under the laws of New York. (Complaint, paragraph 14)

2. Respondent's primary place of business is located at 159-20 115th Road, Jamaica, New York 11434. (Complaint, paragraph 16)

3. Respondent's service of process address is 265 Sunrise Highway Ste 1-304, Rockville Centre, NY 11570. (Complaint, paragraph 17)

4. The 2020 Honeywell Avenue property has 4 stories, 16 residential units and was built in 1931. (Complaint, paragraph 22)

5. The 2020 Honeywell Avenue property is "target housing" within the meaning of Section 401(17) of TSCA, 15 U.S.C. § 2681(17), and the RRP Rule. (Complaint, paragraph 23)

6. The New York City Department of Buildings ("NYCDOB") issued a permit to A&I Developers, Inc. for interior renovation at the 2020 Honeywell Avenue property on or about February 5, 2016. (Complaint, paragraph 24)

7. At the time of the NYCDOHMH inspection, Respondent was performing renovations at the 2020 Honeywell Avenue property. (Complaint, paragraph 25)

8. Respondent's renovation work at the 2020 Honeywell Avenue property was performed on the interior of the entire building and included demolition. The NYCDOHMH inspector observed active renovation of several apartments and construction dust throughout the 2020 Honeywell Avenue property. (Complaint, paragraphs 20 and 26)

9. Respondent is, and at all times relevant to the Complaint was, the "firm" contracted to perform "renovation," as those terms are defined in 40 C.F.R § 745.83 pursuant to TSCA § 402(c)(3), 15 U.S.C. § 2682(c)(3), of the property located at 2020 Honeywell Avenue, Bronx, NY 10460. (Complaint, paragraph 27)

10. Respondent's renovation of the 2020 Honeywell Avenue property was a "renovation for compensation" as specified in 40 C.F.R. § 745.82(a). (Complaint, paragraph 28)

11. In the course of Respondent's renovation of the 2020 Honeywell Avenue property, Respondent disturbed more than six square feet of painted surface per room.

(Complaint, paragraph 29)

B. Failure to Obtain EPA Certification

Under 40 C.F.R. § 745.81(a)(2)(ii), firms performing renovations for compensation on target housing, on or after April 22, 2010, must be certified by the EPA and have obtained initial certification prior to performance of renovations, unless the renovation qualifies for one of the exceptions identified in 40 C.F.R. § 745.82. In addition, 40 C.F.R. § 745.89(a)(1) requires firms that perform renovations on target housing for compensation to apply to EPA for certification to perform renovations.

1. At the time of the renovation of the 2020 Honeywell property, Respondent had neither applied to EPA for certification not obtained certification. (Complaint paragraph 35)

2. In the IRL, EPA inquired whether Respondent obtained certification from EPA to perform renovations to which Respondent replied "No" in the Response. (Complaint, paragraph 36)

3. As of September 19, 2018, Respondent had not applied to EPA for certification and was not listed in EPA's Federal Lead-Based Paint Program ("FLPP") database as a certified firm. (Complaint, paragraph 37)

4. Failure to obtain EPA certification prior to performing a renovation for compensation is a violation of 40 C.F.R. § 745.89(a).

5. Respondent's failure or refusal to comply with 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89(a) constitutes a violation of § 409 of TSCA, 15 U.S.C. § 2689, for which a civil penalty may be assessed.

C. Failure to Provide Lead Hazard Information Pamphlet

Under 40 C.F.R. § 745.84(b)(1), no more than 60 days before beginning renovation activities in common areas of multi-unit target housing, the firm performing the renovation must provide the owner with the EPA Renovate Right pamphlet.

1. In the IRL, EPA inquired whether Respondent provided the "Renovate Right" pamphlet to the owner of the property prior to the start of renovation activity to which Respondent replied "No" in the Response. (Complaint, paragraph 42)

2. For the renovation of the 2020 Honeywell Avenue property, Respondent did not provide the "Renovate Right" pamphlet to the owner of the property prior to the start of renovation activity. (Complaint, paragraph 43)

3. Failure to provide the "Renovate Right" pamphlet to the owner of the property prior to the start of renovation activity is a violation of 40 C.F.R. § 745.84(b)(1).

4. Respondent's failure or refusal to comply with 40 C.F.R. § 745.84(b)(1) constitutes a violation of § 409 of TSCA, 15 U.S.C. § 2689, for which a civil penalty may be assessed.

### D. Failure to Establish and Maintain Records of Compliance

Under 40 C.F.R. §§ 745.86(a) and 745.87(b), firms performing renovations must establish, retain, maintain, and make available to EPA upon request all records necessary to demonstrate compliance with the RRP Rule.

1. In the IRL, EPA inquired whether Respondent established records documenting that lead-safe work practices were followed to which Respondent replied "No" in the Response. (Complaint paragraph 48)

2. In the IRL, EPA requested that Respondent submit any records documenting that lead-safe work practices were followed. Respondent submitted no compliance documents in response. (Complaint, paragraph 49)

3. For the renovation of the 2020 Honeywell Avenue property, Respondent did not establish or maintain records demonstrating compliance with the RRP Rule. (Complaint, paragraph 50)

4. Failure to establish retain, maintain, and make available to EPA upon request all records necessary to demonstrate compliance with the RRP Rule is a violation of 40 C.F.R. §§ 745.86(a) and 745.87(b).

5. Respondent's failure or refusal to comply with 40 C.F.R. § 745.86(a) and 40 C.F.R. § 745.87(b) constitutes a violation of § 409 of TSCA, 15 U.S.C. § 2689, for which a civil penalty may be assessed.

### E. Failure to Ensure Certification or Training of All Individuals Performing Renovation Activities

Under 40 C.F.R. § 745.89(d)(1), firms performing renovations must ensure that all individuals performing renovation activities on behalf of the firm are either certified renovators or have been trained by a certified renovator.

1. In the IRL, EPA inquired whether Respondent assigned a certified renovator (as defined by 40 C.F.R. § 745.83) to the job and whether a certified renovator performed on-the-job training for uncertified workers. In the Response, Respondent replied "No" to each question. (Complaint paragraph 55)

2. For the renovation of the 2020 Honeywell Avenue property, Respondent did not ensure that all individuals performing renovation activities on behalf of the firm were either certified renovators or had been trained by a certified renovator. (Complaint, paragraph 56)

3. Failure to ensure that all individuals performing renovation activities on behalf of the firm were either certified renovators or had been trained by a certified renovator is a violation of 40 C.F.R. § 745.89(d)(1).

4. Respondent's failure or refusal to comply with 40 C.F.R. § 745.89(d)(1) constitutes a violation of § 409 of TSCA, 15 U.S.C. § 2689, for which a civil penalty may be assessed.

F. Failure to Assign Certified Renovator

Under 40 C.F.R. § 745.89(d)(2), firms performing renovations must ensure that a certified renovator is assigned to each renovation performed by the firm and discharges all of the certified renovator responsibilities identified in 40 C.F.R. § 745.90.

1. In the IRL, EPA inquired whether Respondent assigned a certified renovator (as defined in 40 C.F.R. § 745.83) to the job to which Respondent replied "No" in the Response. (Complaint paragraph 61)

2. Respondent did not assign a certified renovator to the renovation of the 2020 Honeywell Avenue property. (Complaint, paragraph 62)

3. Failure to assign a certified renovator to the renovation job is a violation of 40 C.F.R. § 745.89(d)(2).

4. Respondent's failure or refusal to comply with 40 C.F.R. § 745.89(d)(2) constitutes a violation of § 409 of TSCA, 15 U.S.C. § 2689, for which a civil penalty may be assessed.

## VI. COMPLAINANT IS ENTITLED TO PENALTIES FOR THE VIOLATIONS ASSESSED IN THE COMPLAINT

### A. The Proposed TSCA Penalties are Appropriate Under TSCA and the Applicable EPA Enforcement Response Policies

The Consolidated Rules of Practice, at 40 C.F.R. § 22.17(c), provide that when the Administrative Law Judge (ALJ) finds that default has occurred, the relief proposed in the complaint shall be ordered unless the penalty requested is "clearly inconsistent" with the record of the proceeding or the Act. See In the Matter of Willie P. Burrell & the Willie P. Burrell Trust, TSCA Appeal No. 11-05, 2012 WL 3641790 (EAB, August 21, 2012). The civil penalties were determined in accordance with Section 16 of TSCA, 15 U.S.C. § 2615 and EPA's Interim Final Policy of August 2010 entitled the "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair, and Painting Rule; and Lead-Based Paint Activities Rule"[1] ("LBP Consolidated ERPP") See Exhibit 10. The proposed penalty calculations are set forth in the Penalty Calculation Worksheet. See Exhibit 3. An explanation of the methodology for EPA's calculation of the penalty in this proceeding is set out below. Also, a detailed explanation of the penalty calculations is found in the Declaration of Demian P. Ellis, which is attached to this Memorandum in Support of Complainant's Motion for Order of Default. See Exhibit 9.

Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), in conjunction with penalty inflation regulations at 40 C.F.R. Part 19, authorized the assessment of a civil penalty for violations of Section 409 of TSCA, 15 U.S.C. § 2689, up to a maximum of $38,892 per violation for violations that occurred after November 2, 2015 and that are assessed on or after January 15,

[1] https://www.epa.gov/sites/production/files/2014-01/documents/revisedconsolidated-erppenaltypolicy4513.pdf

2018, but before January 15, 2019. (This was the statutory maximum penalty at the time EPA issued the Complaint in this matter. The maximum penalty has increased to $48,512 since then, but the Complainant has not raised the penalty in the Complaint.) Each day that such a violation continues constitutes a separate violation of Section 409 of TSCA, 15 U.S.C. § 2614. EPA determined the proposed penalty in this case in light of the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), including the nature, circumstances, extent, and gravity of the violation, and the Respondent's ability to pay and the effect of the penalty on the Respondent's ability to continue in business, using the LBP Consolidated ERPP, which sets forth EPA's policy and procedures for considering these statutory factors and for calculating civil penalties to be assessed against persons who violate the TSCA lead-based paint RRP Rule. See Exhibit 10. The LBP Consolidated ERPP is designed by EPA to provide fair and equitable treatment of the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations in a manner consistent with the statutory factors.

1. Gravity-Based Penalty

a) *Circumstance Level*

Circumstance level is one of the statutory factors in determining a penalty under Section 16 of TSCA. The nature and circumstances of a violation and the extent to which the violation poses a potential for harm are incorporated into matrices in the LBP Consolidated ERPP that specify the appropriate gravity-based penalty for that specific or similar violations. Appendix A of the LBP Consolidated ERPP sets forth gravity levels for each type of TSCA LBP violation. The circumstance level represents an assessment of the probability that harm will result from the violation based on the nature of the requirement. The greater the deviation from the regulations,

the greater the likelihood that people will be uninformed about the hazards associated with lead-based paint and any renovations, that exposures will be inadequately controlled during renovations, or that residual hazards and exposures will persist after the renovation/abatement work is completed. See Exhibit 10 (Appendix A, Violations and Circumstance Levels).

In this case, the Respondent's violations involved the failure to obtain firm certification, 40 C.F.R. § 745.89(a); failure to provide lead hazard information pamphlet, 40 C.F.R. § 745.84(b)(1); failure to establish and maintain records of compliance, 40 C.F.R. § 745.87(b); failure to ensure qualification of all individuals performing renovation activities, 40 C.F.R. § 745.89(d)(1); and, failure to assign a certified renovator, 40 C.F.R. § 745.89(d)(2). Appendix A of the LBP Consolidated ERP designates Respondent's violations of 40 C.F.R. §§ 745.89(a); 745.84(b)(1); 745.87(b); 745.89(d)(1); and, 745.89(d)(2), as Circumstance Levels 3a, 1b, 3a, 3a. and 3a violations, respectively. See Exhibit 10.

b) *Extent of Potential for Harm*

A second statutory factor in determining a penalty under Section 16 of TSCA is the extent. Extent represents the degree, range, or scope of a violation's potential for harm. Measurement of the extent of harm focuses on the overall intent of the rules and the amount of harm the rules are designed to prevent (e.g., serious health effects from childhood lead poisoning). The primary consideration in determining the extent of harm is whether the specific violation could have a serious or significant or minor impact on human health, with the greatest concern being for the health of a child under 6 years of age and a pregnant woman in target housing. Even in the absence of harm in the form of direct exposures to lead hazards, the gravity component of the penalty should reflect the seriousness of the violation in terms of its effect on the regulatory program. The LBP Consolidated ERPP provides three extent categories - Major,

Significant, or Minor - that are used to address the potential for serious damage to human health or the environment. Under these categories, the appropriate extent category for failure or refusal to comply with the provisions of the LBP Rule is based upon: the age of any children who occupy target housing; whether a pregnant woman occupies target housing; and whether a child or children under six had access to the child-occupied facility during renovations/abatements. An extent category of Major is applied to target housing with one or more occupants under age 6 and/or a pregnant woman. The Significant extent category is applied to target housing where there is no information about the age of the youngest occupant, or which have one or more occupants between ages of 6 and 17. The Minor extent category is applied to target housing with no occupants under age 18. See Exhibit 10.

In the present matter, EPA designated Respondent's violations of 40 C.F.R. § 745.89(a), failure to obtain firm certification, as "significant" extent category. A&I Developers' Response to EPA's Information Request indicates that people were residing at the property at the start of the interior renovation work, a stop work order was issued, and occupants were subsequently relocated. Respondent provided no information about the youngest occupant. See Exhibit 12. In view of the relocation of the occupants, EPA designated Respondent's violations of 40 C.F.R. §§ 745.84(b)(1), failure to provide lead hazard information pamphlet; 745.87(b), failure to establish and maintain records of compliance; 745.89(d)(1), failure to ensure qualification of all individuals performing renovation activities; and, 745.89(d)(2), failure to assign certified renovator, as "minor" extent category. See Exhibit 12.

c) *Gravity-Based Penalty Matrices*

The next step is to use the LBP gravity-based penalty matrices to select a base penalty amount associated with the gravity level of violations. See Exhibit 10 (Appendix B, Gravity-

Based Penalty Matrices). This selection takes into account the determinations described above in "a" and "b". Failure to obtain firm certification, 40 C.F.R. § 745.89(a), with a significant extent level corresponds to a penalty of $15,868. Failure to provide lead hazard information pamphlet, 40 C.F.R. § 745.84(b)(1), with a minor extent level corresponds to a penalty of $2,945. Failure to establish and maintain records of compliance, 40 C.F.R. § 745.87(b), with a minor extent level corresponds to a penalty of $4,667. Failure to ensure qualification of all individuals performing renovation activities, 40 C.F.R. § 745.89(d)(1), with a minor extent level corresponds to a penalty of $4,667. Failure to assign certified renovator, 40 C.F.R. § 745.89(d)(2), with a minor extent level corresponds to a penalty of $4,667. EPA staff determined that the violations identified above result in a total recommended base penalty assessment of $32,814. See Exhibit 3 (Penalty Computation Worksheet).

2. Penalty Modification

After determining the Gravity-Based Penalty discussed in the section above, the LBP Consolidated ERPP allows for penalty modification based on case-by case analysis of factors specific to the violator, including culpability, history of violations and ability to pay or the effect of the penalty on the ability to continue in business.

a) *Degree of culpability*

The culpability factor may be used to increase or decrease the gravity-based penalty. TSCA is a strict liability statute for civil actions, so that culpability is irrelevant to the determination of legal liability. However, knowing or willful violations generally reflect an increased culpability on the part of the violator and may even give rise to criminal liability. In the present case, no decrease or increase was made to the gravity-based penalty for culpability.

b) *History of prior violations*

The gravity-based penalty matrices are designed to apply to first offenders. Where a violator has demonstrated a history of similar violations, the penalty may be adjusted upward. A search of EPA's Enforcement Compliance and History Online database[2] revealed no past enforcement actions for the Respondent in this case. No increase was made to the gravity-based penalty for history of prior violations.

c) *Ability to pay/ability to continue to do business*

Other statutory factors to be considered in determining a penalty under Section 16 of TSCA is the effect of the penalty on the person's ability to continue in business and its ability to pay. Section 16 of TSCA does not impose a burden on the Complainant to prove that the Respondent is able to remain in business notwithstanding the penalty. See In the Matter of New Waterbury, Ltd., 5 TSCA Appeal No. 93-2, 1994 WL 615377 (EAB, October 20, 1994)("a penalty that forces a respondent into bankruptcy is not precluded under TSCA § 16 where the penalty is justified under the totality of the relevant statutory considerations.")

Rather, Complainant must merely show that it considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors.

In order to establish a *prima facie* case that a penalty amount is appropriate in light of a respondent's ability to pay and the effect of the penalty on the Respondent's ability to continue in business, EPA need not provide specific financial information on the matter; instead, it is sufficient to provide general financial information, such as gross sales volume, "from which it can be inferred that the respondent's ability to pay should not affect the penalty amount." In the Matter of William E. Comley, Inc., FIFRA Appeal No. 03-01, 2004 WL 788493 (EAB, Jan. 14,

[2] https://echo.epa.gov/

2004) (citing In re James C. Lin and Lin Cubing, Inc., 5 E.A.D. 595, 599 (EAB 1994), and In re New Waterbury, 5 E.A.D. 529, at 541-42 (EAB 1994)). EPA may obtain general information regarding a respondent's ability to continue in business from the Respondent, independent commercial financial reports, or other credible sources.

In the present matter, A&I Developer's May 26, 2016 response to EPA's information request reported a year 2015 income greater than $1.6 million. See Exhibit 12. A Dun & Bradstreet report for Respondent indicated that Ashad Ajim submitted estimated sales for 2015 of $1,500,000. See Exhibit 13. In the present matter, Respondent has not formally raised any inability to pay defense, has not proffered any financial information to assert inability to pay and has not rebutted the presumption of ability to pay. Thus, the penalty need not be adjusted based on the ability to pay factor.

Moreover, where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, EPA may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules and thus this factor does not warrant a reduction of the proposed penalty. In re New Waterbury, Ltd., TSCA Appeal No. 93-2, 1994 WL 615377 (EAB, Oct. 20, 1994). In the present matter, Respondent has not filed an Answer to the Complaint. Due to Respondent's failure to Answer, the usual pre-hearing process did not occur. However, the cover letter to the Complaint informed the Respondent that it could raise concerns about the penalty amount and the Complaint advised Respondent that it may respond and provide additional information that it believes relevant to the effect the proposed penalty would have on its ability to continue in business and if no Answer was filed, then a default order may be entered against it

and the entire proposed penalty may be assessed without further proceedings. See Exhibit 2. Accordingly, similar to the situation in the New Waterbury case before the EAB, any objection by the Respondent in this present case to the penalty based upon its ability to pay was waived.

3. Summary

In summary, in calculating the proposed penalty, EPA appropriately considered the seriousness or gravity of the violations, Respondent's culpability, Respondent's violation history, Respondent's ability to pay, and the effect of the penalty on Respondent's ability to continue in business to the extent possible and in accordance with TSCA. No other factors as justice may require were deemed to apply to this case. As set out above, the proposed penalty[3] of $32,814 against the Respondent was calculated appropriately and in accordance with the statutory factors identified in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B).

## B. Caselaw Supports Granting Complainant's Motion for a Default Judgment for the Assessment of a Penalty Against Respondent

The proposed penalties sought by Complainant are appropriate and should be granted. That EPA can seek an Order of Default on Liability and Penalty under TSCA on the grounds that a Respondent failed to file an Answer to the Complaint is well-established through EPA Administrative Law Judge or Regional Judicial Officer (RJO) decisions. See In the Matter of John C. Jones, No. TSCA-01-2010-0035, 2012 WL 1956644 (RJO, Feb. 29, 2012); In the Matter of John Laughter, TSCA-01-2010-0007, 2011 WL 7146051 (RJO, Dec. 13, 2011); see generally

[3] EPA staff also considered the economic benefit of non-compliance, which measures the financial benefit gained from a violator's non-compliance. Economic benefit incorporates both "avoided costs," those costs completely averted by the violator's failure to comply with the applicable regulations; as well as "delayed cost," those costs that are deferred but eventually paid by the violator in order to achieve compliance. Absent Respondent's cooperation and provision of financial information, EPA staff had insufficient information to incorporate economic benefit into the proposed penalty. Notwithstanding this lack of information, Complainant believes that the proposed penalties are sufficiently high to capture Respondent's economic benefit and create a deterrent effect.

In the Matter of Tyrone Turner, TSCA-07-2001-0044, 2002 WL 519726 (ALJ Apr. 2, 2002)(Order Granting Complainant's Motion for Default). The EPA Environmental Appeals Board has not hesitated to enter or uphold and affirm Orders of Default in cases such as the present case where the respondent(s) failed to file an answer to the complaint and where circumstances clearly indicate that the imposition of the remedy requested is warranted. See In re Willie P. Burnell & The Willie P. Burrell Trust, TSCA Appeal No. 11-05, 2012 WL 3641790 (EAB, Aug. 21, 2012) (TSCA case affirming default order for failure to file an answer to the complaint); In re Jonway Motorcycle (USA) Co., CAA Appeal No. 14-03, 2014 WL 6599562 (EAB, Nov 14, 2014) (CAA case affirming default order for failure to file an answer to the complaint); In re To Your Rescue! Services, FIFRA Appeal No. 04-08, 2005 WL 2902520 (EAB, Sept. 30, 2005) (FIFRA case affirming Order of Default for failure to file an answer to the complaint); In the Matter of Thermal Reduction Company, Inc., 4 EAD 128, EPCRA Appeal No. 91-2, 1992 WL 190247 (EAB, July 27, 1992) (EPCRA case affirming Order of Default for failure to file an answer to the complaint); see also In the Matter of Midwest Bank & Trust Company, et al., No. V-W-86-R-82, 1989 WL 253205 (ALJ, Sept. 29, 1989)(Final Order Upon Default).

A Respondent's failure to admit, deny or explain any material factual allegation in the complaint constitutes an admission of the factual allegations and a waiver of its right to a hearing on such allegations. 40 C.F.R. § 22.15(d) and 40 C.F.R. §22.17(a). Like the Respondents in the cases cited above, A&I Developers has not filed an Answer to the complaint. Based on the facts and law, an Order of Default is entirely appropriate in this matter and EPA's motion for an order on liability and penalty should be granted pursuant to 40 C.F.R. § 22.17(a).

### C. Imposing a Substantial Penalty is Necessary to Help Deter Future TSCA Violation

A major purpose of the assessment of civil penalties is to deter future violations by Respondents as well as similar violations by other members of the regulated community. See e.g., United States v. Ekco Housewares, Inc., 853 F. Supp. 975, 989 (N.D. Ohio 1994), aff'd in part, rev'd in part, 62 F.3d 806, 816 (6th Cir. 1995); United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314, 322 (D.S.C. 1988) aff'd in part, vacated in part, 865 F. 2d 1261 (4th Cir. 1988); see United States v. Phelps Dodge Indus., Inc., 589 F. Supp. 1340, 1358 (S.D.N.Y. 1984); United States v. Mac's Muffler Shop, Inc., 25 E.R.C. 1369, 1376 (N.D. Ga. 1986); United States v. Swingline, Inc., 371 F. Supp. 37, 47 (E.D.N.Y. 1974). Deterrence is only effective when the probability that a significant penalty will be imposed outweighs the cost-effectiveness of non-compliance, creating a substantial monetary risk to a potential violator. Moreover, "penalties assessed by judges should be sufficiently higher than penalties to which the Agency would have agreed in settlement to encourage violators to settle." Tull v. United States, 481 U.S. 412, 425 (1987)(citing legislative history of Clean Water Act penalty provision).

In the present case, a substantial penalty is necessary to deter the Respondent as well as other lead-based paint contractors from ignoring TSCA statutory and regulatory requirements in the future, particularly where the violations result in potential for harm due to direct exposures to lead hazards.

## VII. COMPLAINANT'S MOTION FOR ORDER OF DEFAULT SHOULD BE GRANTED

In this Memorandum, the Complainant has specified the penalties it seeks under TSCA for the violations committed by Respondent. Complainant has stated the legal and factual grounds for a finding of liability and the penalties requested. 40 C.F.R. Section 22.17(c) states:

*The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act*. In this case the relief requested by Complainant is consistent with the TSCA, the applicable TSCA penalty policy and the Consolidated Rules of Practice, and the relief requested is entirely consistent with the record and appropriate and therefore should be granted.

Based on the foregoing, Complainant respectfully asserts that good cause exists for granting the motion for default with respect to liability and penalty against the Respondent for the violations set forth in the Complaint.

Respectfully submitted,

KAREN TAYLOR

Digitally signed by KAREN TAYLOR
Date: 2024.06.17 16:08:38 -04'00'

Karen L. Taylor
Assistant Regional Counsel
Office of Regional Counsel
Waste and Toxic Substances Branch
U.S. Environmental Protection Agency
290 Broadway, 16th floor
New York, New York 10007-1866
212-637-3637
taylor.karen@epa.gov