UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
KASHFLO, INC.,	)	**DOCKET NO. TSCA-07-2010-0002**
	)	
Respondent	)	

ORDER ON RESPONDENT'S MOTION TO DISMISS, MOTION FOR MORE DEFINITE STATEMENT, AND MOTION TO SUPPLEMENT PREHEARING EXCHANGE, AND ON COMPLAINANT'S MOTIONS IN LIMINE

I. Procedural Background

On January 21, 2010, the United States Environmental Protection Agency, Region 7 ("Complainant" or "EPA"), initiated this proceeding by filing a Complaint and Notice of Opportunity for Hearing ("Complaint") pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). The Complaint alleges in two counts that Kashflo, Inc. ("Respondent") violated Section 409 of TSCA, 15 U.S.C. § 2689, and Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852(d), by failing to comply with the regulatory requirements of 40 C.F.R. Part 745, Subpart F, which pertain to the disclosure of known lead-paint based and/or lead-based paint hazards upon the sale or lease of residential property. Specifically, the Complaint alleges that, on or about June 8, 2006, and on or about December 21, 2008, Respondent entered into contracts to lease properties constituting "target housing" and failed, prior to the lessees becoming obligated under the contracts, to provide the lessees with EPA-approved lead hazard information pamphlets. For the two violations alleged in the Complaint, Complainant proposes a penalty of $18,740.

On March 1, 2010, Respondent, through counsel, filed an Answer to Complaint ("Answer"), along with a Motion to Dismiss or in the alternative a Motion for More Definite Statement. Complainant filed a Response to Motion to Dismiss and Motion for a More Definite Statement ("Response"), along with a Motion for Leave to File and Showing of Good Cause for Complainant's Response to Motion to Dismiss and Motion for a More Definitive Statement ("Motion for Leave to File"), on April 16, 2010. Respondent did not file a reply.[1]

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[1] Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), requires a moving

(continued...)

Thereafter, the parties filed prehearing exchanges. On May 28, 2010, Respondent submitted a Motion to File Supplemental First Amended Initial Prehearing Exchange ("Motion to Supplement"), to which Complainant filed an opposition on June 8, 2010. Also on June 8, 2010 Complainant filed a Motion in Limine to Exclude Testimony of Addina Hobson and Denise McCloud and a Motion in Limine to Exclude Exhibits RX1 and RX6. To date, Respondent has not filed a response to the motions in limine, but the time allowed under the Rules of Practice, 40 C.F.R. § 22.16(b) for filing a response has not yet expired and, given the ruling herein denying the motions, no response is necessary.

II. Complainant's Motion for Leave to File

As a preliminary matter, it is noted that the captions for Complainant's pending motions and responses identify the Respondent as Kashflo*w*, Inc., rather than Kashflo, Inc., which is the Respondent named in the Complaint. Other documents in the case file, including those filed by Respondent's counsel, refer to Kashflo, Inc. Complainant has not moved to amend the Complaint to modify the name of the Respondent. Accordingly, Complainant is hereby advised to be more accurate in future filings.

Complainant's Motion for Leave to File acknowledges that Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), requires a party's response to any written motion to be filed within 15 days after service of such motion, that its response to the Respondent's Motion to Dismiss or for more definite statement therefore was due March 15, 2010, but that its Response was not filed until April 16, 2010. Nevertheless, Complainant requests that its Response to Respondent's Motions be allowed because it believes that filing the response earlier would have hindered potential negotiations for settlement. Complainant notes that Respondent has no objection to the request, that the undersigned was not designated to preside in this matter until March 23, 2010, after the due date for a response to the Motion to Dismiss, and that the Prehearing Order directed that any response to the Motion to Dismiss be filed separately from the prehearing exchange.

Given the lack of any objection from Respondent, and the nature of the motions as discussed below, for good cause shown, Complainant's Motion for Leave to File is granted.

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[1](...continued)
party's reply to any written response to its motion to be filed within 10 days after service of such response. As noted above, Section 22.7(c) of the Rules of Practice, 40 C.F.R. § 22.7(c), allows an additional five days for the filing of a responsive document when a document is served by first class mail. Respondent did not file a reply by the deadline imposed by the foregoing Rules, nor has Respondent filed a motion for an extension of the filing deadline.

III. Motion to Dismiss and Motion for More Definite Statement

Respondent's Motion to Dismiss consists of one sentence as follows: "Comes Now Respondent pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Rule 55.27(a)(6) of the Missouri Rules of Civil Procedure and Moves to Dismiss the Complaint for the Failure to State a Claim Upon Which Relief May Be Granted." This statement is followed by a one-sentence motion in the alternative for a more definite statement, "Comes Now Respondent pursuant to Rule 12(e) of the Federal Rules of Civil Procedure and Rule 55.27(d) of the Missouri Rules of Civil Procedure and Moves For a More Definite Statement as to Averments Numbered as Paragraphs 14, 15, 17, 18, and 19 as the same are so vague and ambiguous that Respondent cannot be certain that it has reasonably prepared and pleaded an accurate response herein."

As Respondent acknowledges in its Answer, this proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. Complainant correctly points out that Respondent's reliance on the Federal Rules of Civil Procedure and the Missouri Rules of Civil Procedure is misplaced. While Administrative Law Judges may consult the Federal Rules of Civil Procedure as guidance, "these rules are not binding upon administrative agencies." *Euclid of Virginia, Inc.*, 13 E.A.D. 616, 2008 EPA App. LEXIS 13, at *94-95 (EAB 2008). Likewise, state procedural rules are not applicable in federal administrative proceedings. *Id.*

Further, as Complainant also correctly points out, Respondent fails to describe with any particularity the grounds for its contention that the Complaint fails to state a claim upon which relief may be granted. Section 22.16(a) of the Rules of Practice requires that a motion, among other things, "state the grounds therefor, with particularity." 40 C.F.R. § 22.16(a). In its Motion to Dismiss, Respondent simply states, without providing any legal or factual support, that it moves to dismiss the Complaint for failure to state a claim upon which relief may be granted. Such a bare assertion fails to comply with the requirement of Section 22.16(a) to state the grounds for a motion "with particularity." Moreover, as pointed out by Complainant, the Motion to Dismiss "affords Complainant no information with which it can frame a response." Response at ¶ 5.

In any event, the Complaint does not fail to state a claim. "To survive a [Federal Rule of Civil Procedure] 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief - including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The factual allegations set forth in the Complaint, if true, set forth grounds for entitlement to relief for the violations charged.

The Motion for More Definite Statement also does not state the grounds for the motion. However, the responses in the Answer to Paragraphs 14, 15, 17 18, and 19 of the Complaint

include an assertion that the paragraphs do not contain specific information as to the identity of the alleged lessee or the time frame before the lessee became obligated under a contract to lease the apartment, and that Paragraphs 17 and 19 do not identify the unit or apartment number at the 12-unit address.

The paragraphs in the Complaint that Respondent refers to state as follows:

> 14. Respondent failed to provide the lessee of Apartment 2W, 5565 Chamberlain, St. Louis, Missouri, with an EPA-approved lead hazard information pamphlet before lessee was obligated under a contract to lease the target housing unit.
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> 15. Respondent's failure to provide the act as indicated in Paragraph 14 is a violation of 40 C.F.R. § 745.107(a)(1), and in accordance with 40 C.F.R. § 745.118(e), a violation of Section 1018 of the Act and Section 409 of TSCA.
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> * * * *
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> 17. Respondent entered into a contract to lease the target housing located at 5575 Chamberlain, St. Louis, Missouri, on or about December 21, 2008.
>
> 18. Respondent failed to provide the lessee of 5575 Chamberlain, St. Louis, Missouri, with an EPA-approved lead hazard information pamphlet before lessee was obligated under a contract to lease the target housing unit.
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> 19. Respondent's failure to provide the act as indicated in Paragraph 18 is a violation of 40 C.F.R. § 745.107(a)(1), and in accordance with 40 C.F.R. § 745.118(e), a violation of Section 1018 of the Act and Section 409 of TSCA.

Complainant denies that Paragraphs 14, 15, 17, 18, and 19 are "vague and ambiguous," and claims that in accordance with the Prehearing Order's direction to engage in settlement discussions and to submit its initial prehearing exchange by April 30, 2010, Complainant has or will have provided Respondent with documents supporting the factual allegations of Paragraphs 13, 14, 17, and 18 of the Complaint. Complainant contends that Paragraphs 15 and 19, in turn, reference those factual allegations to support the violations charged. Thus, Complainant argues, Respondent will have in its possession "all information necessary to understand the nature of the allegations against it and to timely prepare its responses and defenses." Response ¶ 6.

Indeed, Complainant's initial prehearing exchange contains documents, including the leases for the properties at issue, that provide Respondent with further information on the violations alleged. Further, Respondent's Supplemental First Amended Prehearing Exchange responds substantively to the factual allegations in Paragraphs 14, 17 and 18. Thus, the relief sought by Respondent's Motion for a More Definite Statement is moot, and therefore the Motion

is denied. This conclusion is further supported by the fact that Respondent chose not to file a reply to Complainant's Response and not to respond to Complainant's assertion that the documents provided by Complainant sufficiently clarify the allegations set forth in the Complaint.

IV. Respondent's Motion to Supplement Prehearing Exchange

Respondent moves to supplement its Prehearing Exchange in order "to be complete and to comply fully with the Prehearing Order" and to "present evidence to contest the Complaint." Motion to Supplement ¶¶ 3, 5. In response, EPA asserts that the supplemental Prehearing Exchange "contains fundamental changes as to witnesses, exhibits and statements of Respondent's case, and would require additional time for rebuttal by Complainant with a resulting delay in the resolution of the matter."

Respondent's supplement to its Prehearing Exchange, submitted two weeks after its Prehearing Exchange was filed, adds another exhibit and provides a specific response to several allegations in the Complaint. It does not cause any undue prejudice where a hearing in this case has not yet been scheduled. It also does not suggest any delay tactics or bad faith, and would enhance rather than hinder the parties' preparations for a hearing in this matter. Therefore the Motion to Supplement is granted.

V. Complainant's Motions in Limine

Respondent's Prehearing Exchange lists Addina Hobson and Denise McCloud as "Expected Witnesses," and states that these witnesses "will testify by Affidavit as attached hereto," which Affidavits are identified as RX 1 and RX 6. Complainant seeks exclusion of testimony of Hobson and McCloud on the basis that they are not identified as fact or expert witnesses, and that there is no a summary of their expected testimony provided as part of Respondent's prehearing statement. Complainant infers that Respondent intends not to call them as witnesses at the hearing. Citing to 40 C.F.R. § 22.19(g), providing that where a party fails to provide information within its control, the presiding judge may exclude it from evidence, Complainant argues that Respondent had control over information that witnesses Hobson and McCloud will testify at the hearing, and has not provided that information.

If it prevails on its Motion in Limine regarding Hobson and McCloud, then Complainant also seeks to exclude Respondent's Exhibits RX 1 and RX6. Complainant asserts that these Affidavits may only be admitted in evidence if they meet the requirements of 40 C.F.R. §§ 22.22(c) or 22.22(d). Rule 22.22(c) requires that for written testimony to be admitted into evidence, the witness presenting the testimony "shall be subject to appropriate oral cross-examination," but if proposed witnesses Hobson and McCloud are barred from testifying, they will not be at the hearing available for cross examination. Rule 22.22(d) allows for admission of

an affidavit where a witness is "unavailable" within the meaning of Rule 804(a) of the Federal Rules of Evidence, but Respondent has not established that Hobson and McCloud are "unavailable."

Respondent's submission of Affidavits of Hobson and McCloud comply with the requirement, if not the expected format, of the Prehearing Order, and that of 40 C.F.R § 22.19(a)(2)(i), to provide a summary of expected testimony. Therefore there is no merit to Complainant's Motion in Limine to exclude the testimony of Hobson and McCloud.

Further, there is no basis at this point to conclude that those witnesses will not appear at the hearing and be subject to cross examination. It is premature to determine whether they are "unavailable" for the hearing, which has not yet been scheduled. Accordingly, Complainant's Motion in Limine to Exclude Exhibits RX 1 and RX 6 is also denied.

ORDER

1. Complainant's Motion for Leave to File and Showing of Good Cause for Complainant's Response to Motion to Dismiss and Motion for a More Definitive Statement is **GRANTED.**

2. Respondent's Motion to Dismiss and Motion for More Definite Statement are hereby **DENIED**.

3. Respondent's Motion to File First Amended Initial Prehearing Exchange, submitted on May 28, 2010, is **GRANTED.**

4. Complainant's Motion in Limine to Exclude Testimony of Addina Hobson and Denise McCloud is **DENIED.**

5. Complainant's Motion in Limine to Exclude Exhibits RX1 and RX6 is **DENIED.**

Susan L. Biro
Chief Administrative Law Judge

Dated: June 22, 2010
Washington, D.C.

In the Matter of Kashflo,Inc., Respondent
Docket No.TSCA-07-2010-0002

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion To Dismiss, Motion For More Definite Statement, And Motion To Supplement Prehearing Exchange, And On Complainant's Motions In Limine**, dated June 22, 2010, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Staff Assistant

Dated: June 22, 2010

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