UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029



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| **In Re:** | : | |
| | : | |
| **Crespo Realty, Inc.** | : | **Docket No. TSCA-03-2012-0069** |
| **5918 57th Street** | : | |
| **Flushing, NY 11378** | : | |
| | : | **Proceeding under Section 16(a)** |
| **Respondent** | : | **15 U.S.C. § 2615(a), the Toxic** |
| | : | **Substances Control Act** |
| | : | |

## INITIAL DECISION AND DEFAULT ORDER

This Default Order is issued in a case brought under the authority of Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). The Complaint and Notice of Right to Request Hearing ("Complaint") alleged that Crespo Realty, Inc. ("Respondent") violated Section 409 of TSCA, 15 U.S.C. § 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA"), 42 U.S.C. §§ 4851 et seq., and the federal regulations promulgated thereunder, set forth in 40 C.F.R. Part 745, Subpart F (also known as the "Disclosure Rule").

The Motion for Default Order ("Motion for Default")[1] filed by Complainant in this proceeding seeks an Order assessing a

[1] All references herein to the Motion for Default refer to the Complainant's Second Motion for Default Order dated January 3, 2013. The Regional Judicial Officer received Complainant's Motion to Withdraw their initial Motion for Default Order on October 16, 2012. The Motion to Withdraw was granted on October 18, 2012.

forty thousand and ten dollar ($40,010) civil penalty against Respondent in relation to five (5) lease agreements associated with four (4) different target housing units in Reading, Pennsylvania. For the reasons set forth below, Complainant's Motion for Default is granted.

**FINDINGS OF FACT**

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following findings of fact:

1. At all times relevant to the violations, Respondent was a Delaware corporation with a principle place of business located at 5918 57th Street in Flushing, New York, and is a "person" within the meaning of Sections 16 and 409 of TSCA, 15 U.S.C. §§ 2615 and 2689. Compl., ¶ 16.

2. At all times relevant to the violations, Respondent was an "owner" of "residential propert[ies]" including respective housing located at:

a. 945 Elm Street, Reading, Pennsylvania
b. 533 Franklin Street, Reading, Pennsylvania
c. 425 N. 10th Street, Reading, Pennsylvania
d. 609 N. 10th Street, Reading, Pennsylvania

Compl., ¶ 17.

3. The housing at each of these properties was constructed prior to 1978, and, at all times relevant to the violations, was not "housing for the elderly" or persons with disabilities, nor did it include "0-bedroom dwelling[s]" as

those terms are defined in 40 C.F.R. § 745.103. Compl., ¶¶ 18, 26, 31, 36.

4. At all times relevant to the violations, the housing units at each of these properties were "target housing" within the meaning of Section 1004(27) of RLBPHRA, 42 U.S.C. § 4851b(27), Section 401 (17) of TSCA, 15 U.S.C. §2681(17), and 40 C.F.R. §745.103. Compl., ¶¶ 19, 27, 32, 37.

5. Respondent entered into five (5) written agreements to lease a "residential dwelling" to individual lessees as follows:

a. 945 Elm Street
   i. December 12, 2008: 945 Elm Street, 2nd Floor (Front), Compl., ¶ 20.
   ii. February 1, 2008: 945 Elm Street, 1st Floor (Front), Id. at ¶ 23.
b. 533 Franklin Street
   i. January 14, 2008: 533 Franklin Street, 1st Floor (Rear), Id. at ¶ 28.
c. 425 N. 10th Street
   i. January 10, 2008: 425 N. 10th Street, 2nd Floor, Id. at ¶ 33.
d. 609 N. 10th Street
   i. January 15, 2008: 609 N. 10th Street, 1st Floor, Id. at ¶ 38.

(the "Five Leases"). Respondent was a "lessor" with respect to each lease transaction as the term is defined in 40 C.F.R. § 745.103. Compl., ¶¶ 20, 23, 28, 33, 38.

6. Each of these five leases was not a "[s]hort-term lease[] of 100 days or less, where no lease renewal or extension can occur," as provided by 40 C.F.R. § 745.101(c). Compl., ¶¶ 21, 24, 29, 34, 39.

7. Each of these Five Leases was not a "[r]enewal[] of [an] existing lease . . . in which the lessor has previously disclosed all information required under [40 C.F.R.] § 745.107 and where no new information described in [40 C.F.R.] § 745.107 has come into the possession of the lessor," as provided by 40 C.F.R. 745.101(d). Compl., ¶¶ 22, 25, 30, 35, 40.

8. On December 30, 2011, an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") was issued to Respondent by the Director for the Land and Chemicals Division, EPA Region III ("Complainant"), pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a) and the federal regulations set forth at 40 C.F.R. Part 745, Subpart F, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permit, 40 C.F.R. Part 22 ("Consolidated Rules").

9. The Complaint alleged, in 25 counts,[2] that Respondent violated Section 1018(b)(5) of RLBPHRA, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA § 2689, 15 U.S.C. § 2689 by:

a. Counts 1-5: failing to include a Lead Warning Statement either as an attachment or within each of the Five Leases as required by 40 C.F.R. §745.113(b)(1). Compl., ¶¶ 41-43.

b. Counts 6-10: failing to include a statement disclosing the presence of, along with any additional information concerning, known lead-based paint and/or lead-based paint hazards, or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards, ("Disclosure Statement") either as attachments or within each of the Five Leases, as required by 40 C.F.R. § 113(b)(2). Compl., ¶¶ 44-46.

c. Counts 11-15: failing to include a list of records or reports available to the lessor pertaining to lead-based paint and/or lead based paint hazards that had been provided to the lessee, or to indicate that no such records or reports were available, ("Disclosure List") either as attachments or within each of the Five Leases, as required by 40 C.F.R. § 113(b)(3). Compl., ¶¶ 47-49.

d. Counts 16-20: failing to include a statement by the lessee affirming receipt of the information required by 40 C.F.R. §§ 745.113(b)(2) and (b)(3) and the lead hazard information pamphlet required under 15 U.S.C. § 2686 ("Receipt of Information Statement") either as an

[2] The Counts are associated with the each of the Five Leases and provisions of 40 C.F.R. § 745.113 as follows:

| | **945 Elm Street, 2nd Floor (Front)** | **945 Elm Street, 1st Floor (Front)** | **533 Franklin Street, 1st Floor (Rear)** | **425 N. 10th Street, 2nd Floor** | **609 N. 10th Street, 1st Floor** |
|---|---|---|---|---|---|
| **§745.113(b)(1)** | Count 1 | Count 2 | Count 3 | Count 4 | Count 5 |
| **§745.113(b)(2)** | Count 6 | Count 7 | Count 8 | Count 9 | Count 10 |
| **§745.113(b)(3)** | Count 11 | Count 12 | Count 13 | Count 14 | Count 15 |
| **§745.113(b)(4)** | Count 16 | Count 17 | Count 18 | Count 19 | Count 20 |
| **§745.113(b)(6)** | Count 21 | Count 22 | Count 23 | Count 24 | Count 25 |

attachment or within each of the Five Leases as required by 40 C.F.R. § 745.113(b)(4). Compl., ¶¶ 50-52.

e. Counts 21-25: failing to include the signatures of the lessor and lessee, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature, ("Certification of Accuracy") either as attachments or within the Five Leases, as required by 40 C.F.R. § 745.113(b)(6). Compl., ¶ 53-55.

10. The Complaint did not include a specific penalty proposal for the alleged violations, but instead proposed up to the statutory maximum penalty for each alleged violation. Compl., 16.

11. In the Motion for Default, Complainant proposed the specific penalty of forty thousand and ten dollars ($40,010) for the alleged violations. Mot. Default, 2.

12. 40 C.F.R. § 22.15(a) provides that Respondent must file an Answer with the Regional Hearing Clerk within thirty (30) days after service of the Complaint, and 40 C.F.R. § 22.15(c) provides that Respondent has a right to request a hearing upon the issues raised by the Complaint and Answer.

13. 40 C.F.R. § 22.17(a) further provides that a party may be found in default "after motion, upon failure to file a timely answer to the complaint: . . . . 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."

14. On January 19, 2012, Complainant successfully served the Complaint upon Respondent at Respondent's corporate business address via the United States Postal Service by certified mail with a return receipt requested, as specified in 40 C.F.R. § 22.5(b)(1). Mot. Default 2.

15. Respondent did not file an Answer to the Complaint within thirty (30) days of service and has not, to date, filed an Answer or other response to the Complaint.

16. On January 3, 2013, Complainant filed a Motion for Default stating that Respondent failed to file an Answer to the Complaint.

17. On January 3, 2013, the Motion for Default was successfully served on Respondent via certified mail, return receipt requested. See Certificate of Service.

18. Respondent did not file a response to the Motion for Default.

**CONCLUSIONS OF LAW**

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following conclusions of law:

19. The Complaint in this action was lawfully and properly served upon Respondent in accordance with the Consolidated Rules. See 40 C.F.R. § 22.5(b)(1)(i)-(ii)(A).

20. Respondent was required to file an Answer to the Complaint within thirty (30) days of service of the Complaint. See 40 C.F.R. § 22.15(a).

21. Respondent failed to file an Answer to the Complaint, and such failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes an admission of all facts alleged in the Complaint, for the purposes of the pending proceeding only, and a waiver of Respondent's right to a hearing on such factual allegations. See 40 C.F.R. §22.17(a)

22. Complainant's Motion for Default was lawfully and properly served on Respondent. See 40 C.F.R. § 22.5(b)(2).

23. The Motion for Default was served by overnight delivery. Respondent was required to file any response to the Motion for Default within fifteen (15) days of service. See 40 C.F.R. §§ 22.7(c) and 22.16(b).

24. Respondent failed to respond to the Motion for Default, and such failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the motion. See 40 C.F.R. § 22.16(b).

25. At all times relevant to the violations, Respondent was an "owner" of "residential propert[ies]" including respective housing located at:

a. 945 Elm Street, Reading, Pennsylvania
b. 533 Franklin Street, Reading, Pennsylvania

c. 425 N. 10th Street, Reading, Pennsylvania
d. 609 N. 10th Street, Reading, Pennsylvania

Compl., ¶ 17.

26. At all times relevant to the violations, the housing units at each of these properties were "target housing" within the meaning of Section 1004(27) of RLBPHRA, 42 U.S.C. § 4851b(27), Section 401 (17) of TSCA, 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103. Compl., ¶¶ 19, 27, 32, 37.

**COUNTS 1-5**

**Failure to Include a Lead Warning Statement in each of the Five Leases**

27. Pursuant to 40 C.F.R. § 745.113(b)(1), each contract to lease target housing shall include, as an attachment or within the contract, a "Lead Warning Statement" containing the language set forth therein.

28. Respondent failed to include a "Lead Warning Statement" containing the language required by 40 C.F.R. §745.113(b)(1) either as attachments or within each of the Five Leases. Compl., ¶ 42.

29. Pursuant to 40 C.F.R. § 745.118(e), Respondent's failure to include the required "Lead Warning Statement" either as an attachment or within the Five Leases constituted five separate violations of Section 1018(b)(5) of RLBPHRA, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA § 2689, 15 U.S.C. § 2689.

## COUNTS 6-10

**Failure to Include a Disclosure Statement in each of the Five Leases**

30. Pursuant to 40 C.F.R. § 745.113(b)(2), each contract to lease target housing shall include, as an attachment or within the contract:

> A statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.

("Disclosure Statement").

31. Respondent failed to include a Disclosure Statement either as attachments or within each of the Five Leases, as required by 40 C.F.R. § 745.113(b)(2). Compl., ¶ 45.

32. Pursuant to 40 C.F.R. § 745.118(e), Respondent's failure to include the Disclosure Statement required either as an attachment or within the Five Leases constituted five separate violations of Section 1018(b)(5) of RLBPHRA, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA § 2689, 15 U.S.C. § 2689. Compl., ¶ 46.

## COUNTS 11-15

### Failure to Include a Disclosure List in each of the Five Leases

33. Pursuant to 40 C.F.R. § 745.113(b)(3), each contract to lease target housing shall include, as an attachment or within the contract:

> A list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the housing that have been provided to the lessee. If no such records or reports are available, the lessor shall so indicate.

("Disclosure List").

34. Respondent failed to include a Disclosure List either as attachments or within each of the Five Leases, as required by 40 C.F.R. § 113(b)(3). Compl., ¶ 48.

35. Pursuant to 40 C.F.R. § 745.118(e), Respondent's failure to include the required Disclosure List either as an attachment or within the Five Leases constituted five separate violations of Section 1018(b)(5) of RLBPHRA, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA § 2689, 15 U.S.C. § 2689. Compl., ¶ 49.

## COUNTS 16-20

### Failure to Include a Receipt of Information Statement in each of the Five Leases

36. Pursuant to 40 C.F.R. § 745.113(b)(4), each contract to lease target housing shall include, as an attachment or within the contract:

> A statement by the lessee affirming receipt of the information set out in paragraphs (b)(2) and (b)(3) of this section and the lead hazard information pamphlet required under 15 U.S.C. 2696.

("Receipt of Information Statement").

37. Respondent failed to include a Receipt of Information Statement either as an attachment or within each of the Five Leases as required by 40 C.F.R. § 745.113(b)(4). Compl., ¶ 51.

38. Pursuant to 40 C.F.R. § 745.118(e), Respondent's failure to include the required Receipt of Information Statement either as an attachment or within the Five Leases constituted five separate violations of Section 1018(b)(5) of RLBPHRA, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA § 2689, 15 U.S.C. § 2689. Compl., ¶ 52.

## COUNTS 21-25

**Failure to Include a Certification of Accuracy in each of the Five Leases**

39. Pursuant to 40 C.F.R. § 745.113(b)(6), each contract to lease target housing shall include, as an attachment or within the contract:

> The signatures of the lessors, agents, and lessees, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature.

("Certification of Accuracy").

40. Respondent failed to include a Certification of Accuracy either as an attachment or within the Five Leases, as required by 40 C.F.R. § 745.113(b)(6). Compl., ¶ 54.

41. Pursuant to 40 C.F.R. § 745.118(e), Respondent's failure to include the required Certification of Accuracy either as an attachment or within the Five Leases constituted five separate violations of Section 1018(b)(5) of RLBPHRA, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA § 2689, 15 U.S.C. § 2689. Compl., ¶ 4.

**RESPONDENT'S CIVIL PENALTY LIABILITY**

42. Respondent's failure to comply with the requirements of 40 C.F.R. Part 745, Subpart F, constitutes a violation of TSCA Section 409, 15 U.S.C. § 2689, for which Respondent is liable for civil penalties under TSCA Section 16, 15 U.S.C. § 2615.

43. Respondent's failure to file a timely Answer to the Complaint or otherwise respond to the Complaint is grounds for the entry of a default order against Respondent assessing a civil penalty for the violations described above. See 40 C.F.R. § 22.17(a)-(c).

44. Respondent's failure to file a response to Complainant's Motion for Default is deemed a waiver of

Respondents' right to object to the issuance of this Default Order. See 40 C.F.R. § 22.16(b).

**DETERMINATION OF CIVIL PENALTY AMOUNT UNDER TSCA**

45. Complainant requests the assessment of a civil penalty in the amount of forty thousand and ten dollars ($40,010) for the TSCA violations alleged in the Complaint. Mot. Default, 2. The proposed penalty is based upon Complainant's consideration of the statutory penalty factors set forth in Section 16 of TSCA, 15 U.S.C. § 2615, with specific reference to EPA's December 2007 Section 1018 Disclosure Rule Enforcement Response and Penalty Policy ("ERP"). Section 16 of TSCA, 15 U.S.C. § 2615, requires EPA to take into account the nature, circumstances, extent, and gravity of the violations alleged and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior violations, degree of culpability, and other such matters as justice may require (the "TSCA statutory penalty factors"). Pursuant to the December 29, 2008 Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009), penalties for violations in the Complaint, all of which occurred prior to January 12, 2009, need not be adjusted for inflation.

46. The ERP provides a rational, consistent, and equitable methodology for applying the statutory penalty factors enumerated above to the specific facts and circumstances of this case. See ERP, 3. Under the ERP, the penalty calculation relies primarily on two components: the "circumstances" level and the "extent" level. The "circumstance" level looks at the relative risk that the violation would impair the ability of the lessee to evaluate the risks of lead exposure at the property. ERP, 12. Circumstance levels range from Level 1 to Level 6, with Level 1 being the most serious. Id. The "extent" level will focus on the overall intent of the rule, which is to prevent childhood lead poisoning. Id. at 12-13. More specifically, the "extent" level looks at the nature of the persons potentially exposed to lead paint hazards, with the highest levels being assigned where the most vulnerable persons—children under the age of six and/or pregnant women—will occupy the premises. Id.

47. The penalty proposed by Complainant in this matter was based upon Respondent's failure to comply with certain provisions of the 40 C.F.R. Part 745, Subpart F. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant provided an explanation of the number of and severity of the violations in the Complaint. Mot. Default, 5-12.

48. Complainant explained the proposed extent level as follows:

> At the time of the violations alleged in the Complaint in connection with the 945 Elm Street, 2nd Floor (Front) Lease Transaction, children under the age of six (6) were residing in or [sic] to be residing in the premises. See Exhibit E. Consequently and in accordance with the ERP, the violations alleged in connection with the 945 Elm Street, 2nd Floor (Front) Lease Transaction (i.e. Counts 1,6,11,16, and 21) are assessed as "Major Extent" violations. See Exhibit D, Appendix B, page 29. At the present time, Complainant has yet to obtain information as to the ages of children who may have been living, or as to whether any pregnant women were living, in any of the other four (4) residential dwellings at issue. It might be justified under these circumstances to draw adverse inferences from Respondent's lack of cooperation. Though the ERP instructs EPA to use a "Significant Extent" factor in cases where the age of the youngest individual residing in the premises is not known, Complainant is instead giving Respondent the benefit of the doubt and assuming that no children under the age of six (6) or pregnant women were living in any of the other residential dwellings. See Exhibit D, page 13. Except as described above for violations alleged in connection with the 945 Elm Street 2nd Floor (Front) Lease Transaction (i.e., Counts 1, 6, 11, 16 and 21), Complainant is assessing the level of all other violations as "Minor Extent" violations. See Exhibit D, Appendix B, page 29.

Id. at 9-10.

49. Complainant explained the proposed circumstance level for violations of 40 C.F.R. § 745.113(b)(1) (Counts 1-5) as follows:

> Violations of the disclosure requirements set forth at 40 C.F.R. § 745.113(b)(1) are deemed to represent a "high" level of impairment to a lessee's ability to assess the information required to be disclosed and

have been characterized as Circumstance Level 2 violations in the ERP. . . . Under the ERP, a Level 2 violation with a Major Extent level is assessed a $10,320 penalty (Count 1), and a Level 2 violation with a Minor Extent level is assessed a $1,550 penalty (Counts 2, 3, 4 and 5). See Exhibit D, Appendix B, page 30.

Id. at 10-11.

50. Complainant explained the proposed circumstance level for violations of 40 C.F.R. § 745.113(b)(2) (Counts 6-10) as follows:

> Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(2) are deemed to represent a "medium" level of impairment to a lessee's ability to assess the information required to be disclosed and are characterized as Circumstance Level 3 violations in the ERP. . . . Under the ERP a Level 3 violation with a Major Extent level is assessed a $7,740 penalty (Count 6), and a Level 3 violation with a Minor Extent level is assessed a $770 penalty (Counts 7, 8, 9 and 10). See Exhibit D, Appendix B, page 30.

Id. at 11.

51. Complainant explained the proposed circumstance level for violations of 40 C.F.R. § 745.113(b)(3) (Counts 11-15) as follows:

> Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(3) are deemed to represent a "low" probability of impairing lessees' ability to assess the information required to be disclosed and are characterized as Circumstance Level 5 violations in the ERP. . . . Under the ERP a Level 5 violation with a "Major Extent" level is assess [sic] a $2,580 penalty (Count 11) and a Level 5 violation with a "Minor Extent" level is assessed a $260 penalty (Counts 12, 13, 14, and 15). See Exhibit D, Appendix B, page 30.

Id. at 11-12.

52. Complainant explained the proposed circumstance level for violations of 40 C.F.R. § 745.113(b)(4) (Counts 16-20) as follows:

> Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(4) are deemed to represent a "medium" probability of impairing a lessee's ability to assess the information required to be disclosed and are characterized as Circumstance Level 4 violations in the ERP. . . . Under the ERP a level 4 violation with a "Major Extent" level is assessed a $5,160 penalty (Count 16) and a Level 4 violation with a "Minor Extent" level is assessed a $520 penalty (Counts 17, 18, 19 and 20). See Exhibit D, Appendix B, page 30.

Id. at 12-13.

53. Complainant explained the proposed circumstance level for violations of 40 C.F.R. § 745.113(b)(6) (Counts 21-25) as follows:

> Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(6) are deemed to represent a "low" probability of impairing a lessee's ability to assess the information required to be disclosed and are characterized as Circumstance Level 6 violations in the ERP. . . . Under the ERP a Level 6 violation with a "Major Extent" level is assessed a $1,290 penalty (Count 21) and a Level 6 violation with a "Minor Extent" level is assessed a $130 penalty (Counts 22, 23, 24 and 25). See Exhibit D, Appendix B, page 30.

Id. at 13.

54. The proposed extent and circumstance levels are summarized as follows:

| | 945 Elm Street, 2nd Floor (Front) | 945 Elm Street, 1st Floor (Front) | 533 Franklin Street, 1st Floor (Rear) | 425 N. 10th Street, 2nd Floor | 609 N. 10th Street, 1st Floor |
|---|---|---|---|---|---|
| §745.113(b)(1) | Major Extent Circumstance Level 2 | Minor Extent Circumstance Level 2 | Minor Extent Circumstance Level 2 | Minor Extent Circumstance Level 2 | Minor Extent Circumstance Level 2 |
| §745.113(b)(2) | Major Extent Circumstance Level 3 | Minor Extent Circumstance Level 3 | Minor Extent Circumstance Level 3 | Minor Extent Circumstance Level 3 | Minor Extent Circumstance Level 3 |
| §745.113(b)(3) | Major Extent Circumstance Level 5 | Minor Extent Circumstance Level 5 | Minor Extent Circumstance Level 5 | Minor Extent Circumstance Level 5 | Minor Extent Circumstance Level 5 |
| §745.113(b)(4) | Major Extent Circumstance Level 4 | Minor Extent Circumstance Level 4 | Minor Extent Circumstance Level 4 | Minor Extent Circumstance Level 4 | Minor Extent Circumstance Level 4 |
| §745.113(b)(6) | Major Extent Circumstance Level 6 | Minor Extent Circumstance Level 6 | Minor Extent Circumstance Level 6 | Minor Extent Circumstance Level 6 | Minor Extent Circumstance Level 6 |

55. The proposed penalties are summarized as follows:

| | 945 Elm Street, 2nd Floor (Front) | 945 Elm Street, 1st Floor (Front) | 533 Franklin Street, 1st Floor (Rear) | 425 N. 10th Street, 2nd Floor | 609 N. 10th Street, 1st Floor |
|---|---|---|---|---|---|
| §745.113(b)(1) | $10,320.00 | $1,550.00 | $1,550.00 | $1,550.00 | $1,550.00 |
| §745.113(b)(2) | $7,740.00 | $770.00 | $770.00 | $770.00 | $770.00 |
| §745.113(b)(3) | $2,580.00 | $260.00 | $260.00 | $260.00 | $260.00 |
| §745.113(b)(4) | $5,160.00 | $520.00 | $520.00 | $520.00 | $520.00 |
| §745.113(b)(6) | $1,290.00 | $130.00 | $130.00 | $130.00 | $130.00 |
| | | | | | |
| | | | | TOTAL | $40,010.00 |

See Mot. Default, Ex. F.

56. Complainant does not propose to make any adjustments to the penalty under the factors set forth in the ERP. Mot. Default, 12.

57. Complainant has not taken into consideration Respondent's ability to pay the proposed penalty other than to note that "there is no current information to support a belief that Respondent cannot pay the full penalty." Mot. Default, 7. The Environmental Appeals Board has consistently held that a respondent's ability to pay a proposed penalty may be presumed until it is put at issue by a respondent. In re Spitzer Great Lakes Ltd., 9 E.A.D. 302, 219-21 (E.A.B. 2000). Furthermore, where a respondent does not raise its ability to pay as an issue in an answer to a complaint and does not produce any evidence to support such a claim, a complainant may properly argue—and the presiding officer may conclude—that any objection to the penalty based upon ability to pay has been waived and that no penalty reduction is warranted. Id.; see also 56 Fed. Reg. 29996, 30006 (July 1, 1991) (stating that "[i]f the [r]espondent has not met its burden of going forward regarding its inability to pay a civil penalty, the complainant carries no burden on this issue; the respondent will be deemed able to pay the maximum statutory penalty.").

58. The official record is devoid of any information submitted by Respondent raising inability to pay the penalty assessed in this manner. Since any financial information

otherwise contained in the record is insufficient, I find that Respondent is able to pay.

## CONCLUSION

Complainant proposes a penalty of forty thousand and ten dollars ($40,010) against Respondent for the violations alleged in the Complaint in accordance with the statutory factors set forth in Section 16 of TSCA, 15 U.S.C. § 2615.

I have determined that the penalty amount of forty thousand and ten dollars ($40,010) proposed by Complainant and requested in the Motion for Default is not inconsistent with TSCA and the record in this proceeding and is appropriate based on the record and Section 16 of TSCA, 15 U.S.C. § 2615.

## ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, Complainant's Motion for Default is hereby **GRANTED**, and Respondent is hereby **ORDERED** as follows:

1. Respondent is hereby assessed a civil penalty in the amount of forty thousand and ten dollars ($40,010) and ordered to pay the civil penalty as directed in this Order.

2. Respondent shall pay the civil penalty to the "**United States Treasury**" within thirty (30) days after this Default Order has become final. See ¶ 7 below. Respondent may use the following means for penalty payment:

a. All payments made by check and sent by Regular U.S. Postal Service Mail shall be addressed and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Contact: Craig Steffen - (513-587-2091)

b. All payments made by check and sent by Private Commercial Overnight Delivery service shall be addressed and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Craig Steffen - (513-587-2091)

c. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA = 021030004
Account = 69010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

(Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency")

d. All electronic payments made through the automated clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

U.S. Treasury REX / Cashlink ACH Receiver
ABA = 051036706
Account No.: 310006 Environmental Protection Agency
CTZX Format Transaction Code 22 - Checking

Physical location of the U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737

Contact for ACH: John Schmid - (202-874-7026)

e. On-Line Payment Option:

WWW.PAY.GOV

Enter "sfo 1.1" in the search field.
Open form and complete required fields.

3. At the same time that payment is made, Respondent shall mail copies of any corresponding check, or written notification confirming any electronic fund transfer or online payment, as applicable, to:

Ms. Lydia Guy
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III (Mail Code 3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

and

Jennifer Abramson
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III (Mail Code 3RC00)

1650 Arch Street
Philadelphia, PA 19103-2029

4. Along with its civil penalty remittance made pursuant to ¶ 2, supra, and with the copy of the check or written notification (confirming any electronic fund transfer or online payment) sent pursuant to ¶ 2, supra, Respondent shall include a transmittal letter identifying the caption (In re Crespo Realty, Inc.) and the docket number (TSCA-03-2012-0069) of this action.

5. In the event of failure by Respondent to make payment as directed above, this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.

6. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debt owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

7. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order forty-five (45) days after it is served upon Complainant and Respondent unless: (1) a party appeals this Initial Decision to the EPA Environmental Appeals

Board in accordance with 40 C.F.R. § 22.30[3]; (2) a party moves to set aside the Default Order that constitutes the Initial Decision; or (3) the Environmental Appeals Board elects to review the Initial Decision on its own initiative. See 40 C.F.R. § 22.27(c).

**IT IS SO ORDERED.**

8/8/13
Date

Renée Sarajian
Regional Judicial Officer
U.S. EPA, Region III

[3] Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty (30) days after this Initial Decision is served upon the parties.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION III**
**1650 Arch Street**
**Philadelphia, Pennsylvania 19103-2029**

| | | |
|---|---|---|
| **In Re:** | : | |
| | : | |
| **Crespo Realty, Inc.** | : | **Docket No. TSCA-03-2012-0069** |
| **5918 57th Street** | : | |
| **Flushing, NY 11378** | : | |
| | : | **Proceeding under Section 16(a)** |
| **Respondent** | : | **15 U.S.C. § 2615(a), the Toxic** |
| | : | **Substances Control Act** |

## CERTIFICATE OF SERVICE

This Initial Decision and Default Order (Docket No.: TSCA-03-2012-0069) was served on the date below, by the manner indicated, to the following people:

**VIA HAND DELIVERY:**

Jennifer Abramson
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III (Mail Code 3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

**VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED:**

David Crespo, President
Crespo Realty, Inc.
5918 57th Street
Flushing, NY 11378

**VIA EPA POUCH:**

Eurika Durr
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

AUG 8 2013

Date

Lydia Guy

Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029