UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Ms. Dessie L. Brumfield,	)	**Docket No. TSCA-05-2010-0014**
d/b/a Brumfield Properties, LLC,	)	
	)	
Respondent	)	**Issued: December 4, 2013**

INITIAL DECISION

This proceeding arose upon a Complaint filed by the Director of the Land and Chemicals Division ("Complainant") for Region 5 of the United States Environmental Protection Agency ("EPA") on July 8, 2010, against Ms. Dessie L. Brumfield, d/b/a Brumfield Properties, LLC ("Respondent"). The Complaint alleged that in regard to seven leases for residential housing units, Respondent as lessor failed to comply with various provisions of the lead-based paint disclosure rules codified at 40 C.F.R. part 745 ("Disclosure Rule") and promulgated under the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLPHRA"), 42 U.S.C. §§ 4851 through 4856. The Complaint charged Respondent with thirty-two violations of 40 C.F.R § 745.113(b), which constituted violations of section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689. For the alleged violations, Complainant proposed a total penalty of $ 58,060 under section 16(a) of TSCA, 15 U.S.C. § 2615(a). After Complainant made several attempts to serve the Complaint, Respondent, appearing pro se, filed an Answer to the Complaint on September 29, 2011. In the Answer, Respondent denied the alleged violations and enclosed several documents.

After considering the evidence and testimony of record, it is concluded that Respondent is liable for the violations alleged in Counts 1, 2, 4, 6–9, 11, 13, 15, 17, 19–21, 23, 26, 28, 30, and 32 of the Complaint, and that a total civil penalty of $45,904 is appropriate to assess for these violations. It is further concluded that Complainant has not proven that Respondent is liable for the violations alleged in Counts 3, 5, 10, 12, 14, 16, 18, 22, 24, 27, 29, and 31 of the Complaint, and these counts therefore are dismissed.

I. Procedural History

On October 19, 2011, Chief Administrative Law Judge Susan Biro was designated to preside over this matter, after which she issued a Prehearing Order directing the parties to file prehearing information exchanges. Complainant timely filed its prehearing exchange, but

Respondent did not. On January 26, 2012, Respondent was ordered to file a document on or before February 10, 2012, explaining any good cause for failing to file a prehearing exchange and why Respondent should not be found in default. On January 31, 2012, the undersigned Administrative Law Judge ("ALJ") was designated to preside in this matter. After Respondent failed to file a response to the Order to Show Cause by the due date, it was discovered that on December 19, 2011, an attorney had filed a notice of appearance on Respondent's behalf, but that no copy had been sent to the undersigned ALJ. Respondent's counsel was contacted and on March 5, 2012, Respondent's counsel submitted both a Response to the Order to Show Cause and a prehearing exchange. Respondent's Prehearing Exchange did not include any proposed exhibits, but stated that documents in support of Respondent's position are all documents listed by Complainant. Thereafter, the hearing was scheduled to commence on August 7, 2012.

On July 11, 2012, Complainant filed a motion to supplement its prehearing exchange with an additional proposed witness and a report of updated information concerning Respondent's ability to pay the proposed penalty. On July 20, 2012, Respondent filed a motion requesting permission to supplement her prehearing exchange with bank statements for the months of April and May 2012, and copies of five bank deposit slips, to show that Respondent is unable to pay the proposed penalty. Complainant responded to the motion, requesting that it be denied and that the claim of inability to pay be stricken. On July 27, 2012, an order was issued granting each party's motion to supplement its prehearing exchange, but striking Respondent's claim of inability to pay.

On July 26, 2012, Respondent submitted a notice stating that she was no longer represented by counsel and that all communications should be directed to her, and requesting that the hearing be postponed for thirty days. On July 30, 2012, a notice of withdrawal was received from Respondent's counsel, indicating that Respondent had "advised the judge and counsel by independent communications on her own, by e-mail and certified letter, she wished to represent herself forthwith without counsel . . . ." Notice of Withdrawal (July 30, 2012). An order was issued on August 2, 2012, granting counsel's request to withdraw and denying Respondent's request to postpone the hearing. Also on August 2, 2012, the undersigned's staff attorney held an informal prehearing teleconference with Ms. Brumfield and Complainant's counsel.

On August 7, 2012, a hearing was held in this matter in Milwaukee, Wisconsin. At the hearing, Complainant presented the testimony of four witnesses and offered eight exhibits, all of which were admitted into evidence. Respondent, appearing pro se, testified as the sole witness for Respondent and offered eight exhibits, six of which were admitted into evidence.[1] One document was admitted into evidence as an exhibit of the Court ("Court's Exhibit"). The hearing was concluded in one day.

The parties each submitted post-hearing briefs. Respondent did not file any reply brief or notify the office of the undersigned whether Respondent intended to file a reply brief by the due

[1] Complainant's and Respondent's exhibits are referenced herein as "CX" and "RX," respectively. Page numbers within Complainant's exhibits refer to the pagination by Bates numbering, which is continuous through the whole set of exhibits. The transcript is referenced herein as "Tr." Complainant's Post Hearing Brief and Reply Brief are referenced respectively as "C's Br." and "C's Reply." Respondent's Post Hearing Brief is referenced as "R's Br."

date of December 7, 2012. Complainant filed a reply brief, pursuant to an extension of time, on December 10, 2012, on which date the record closed.

II. Statutory and Regulatory Background

Congress enacted the RLPHRA in 1992, finding that "low-level lead poisoning is widespread among American children . . . with minority and low-income communities disproportionately affected." 42 U.S.C. § 4851. Congress further found that "pre-1980 American housing stock contains more than 3,000,000 tons of lead in the form of lead-based paint, with the vast majority of homes built before 1950 containing substantial amounts of lead-based paint," that "the ingestion of household dust containing lead from deteriorating or abraded lead-based paint in the most common cause of lead poisoning in children" and that "the health and development of children . . . is endangered by chipping or peeling lead paint, or excessive amounts of lead-contaminated dust in their homes." *Id.* Congress determined that "the Federal Government must take a leadership role in" creating "an informed public" as part of the effort to achieve "the national goal of eliminating lead-based paint hazards in housing . . . ." *Id.*

A stated purpose of the RLPHRA was "to educate the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards." 42 U.S.C. § 4851a(7). To that end, Congress directed the Secretary of Housing and Urban Development ("HUD") and the Administrator of the EPA to promulgate regulations "for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease." 42 U.S.C. § 4852d(a)(1). In 1996 HUD and EPA issued joint regulations governing the disclosure of lead-based paint hazards, commonly known as the "Disclosure Rule." Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9064 (Mar. 6, 1996) (codified at 24 C.F.R. part 35 and 40 C.F.R. part 745).

The Disclosure Rule requires, among other things, that "[e]ach contract to lease target housing shall include, as an attachment or within the contract," several elements of disclosure. 40 C.F.R. § 745.113(b). Target housing is defined as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any children who is less than 6 years of age reside in such housing), or any 0-bedroom dwelling," the latter of which is defined as any dwelling in which the living area is not separated from the sleeping area. 40 C.F.R. § 745.103. "Housing for the elderly" is defined as "retirement communities or similar types of housing reserved for households composed of one or more persons 62 years of age or more at the time of initial occupancy." *Id.*

The requirements apply to all transactions to lease target housing except: (1) housing that has been found to be lead-based paint free by a certified inspector; (2) short term leases of 100 days or less where no extension or renewal of the lease can occur; and (3) renewals of existing leases in which the lessee has previously disclosed all information required and the lessor has no new information required to be disclosed. 40 C.F.R. § 745.101. Target housing is "lead-based paint free" if it "has been found to be free of paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight." 40 C.F.R. § 745.103.

The required elements of disclosure are set out in 40 C.F.R. Section 745.113(b) as follows, in pertinent part:

> (1) A Lead Warning Statement with the following language: Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.
>
> (2) 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.
>
> (3) 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.
>
> (4) 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. [2686].
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> * * * *
>
> (6) 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.

40 C.F.R. § 745.113(b)(1)–(6).

The lessor also is required to provide the lessee with an EPA-approved lead hazard information pamphlet, as referenced in 40 C.F.R. § 745.113(b)(4) and Section 406 of TSCA, 15 U.S.C. § 2686, "before the . . . lessee is obligated under any contract to . .. lease target housing . . . ." 40 C.F.R. § 745.107(a)(1). In addition, the lessor is required to "disclose to the lessee the presence of any known lead-based paint and/or lead-based paint hazards" and "any records or

reports available to the . .. lessor pertaining to lead-based paint and/or lead-based paint hazards" in the housing "before the . . . lessee is obligated under any contract to . . . lease target housing." 40 C.F.R. §§ 745.107(a)(2) and (a)(4). Thus, Section 745.107 expressly requires the lessor to provide the pamphlet, disclosure and records or reports referenced in 40 C.F.R. §§ 745.113(b)(2), (b)(3) and (b)(4) prior to the lessee's obligation under the contract. While Section 745.113(b) does not include the phrase "before the lessee is obligated under any contract," its requirement that the lease contract must include the statements, list and signatures of certification required by 40 C.F.R. §§ 745.113(b)(1), (b)(2), (b)(3), (b)(4) and (b)(6), implies that they cannot be added after the contract is in effect, or after the lessee is obligated under the contract. See, 40 C.F.R. § 745.100.

In addition, the lessor "shall retain a copy of the completed attachment or lease contract containing the information required under paragraph (b) of this section [above] for no less than 3 years from the commencement of the leasing period." 40 C.F.R. § 745.113(c)(1).

Failure or refusal to comply with the requirements quoted above "is a violation of 42 U.S.C. 4852d(b)(5) and of TSCA section 409 (15 U.S.C. 2689)." 40 C.F.R. § 745.118(e). Section 1018 of RLPHRA, 42 U.S.C. § 4852d(b)(5) provides that failure to comply with the regulations in 40 C.F.R. part 745 is a prohibited act under section 409 of TSCA, 15 U.S.C. § 2689, which in turn states: "It shall be unlawful for any person to fail or refuse to comply with a provision of this subchapter or with any rule or order issued under this subchapter." 15 U.S.C. § 2689.

III Findings of Fact

The following findings of fact are based on a thorough and careful analysis of the documentary evidence and testimony of record.

A. Preparation for the Inspection

1. Edward Pilny is employed as a multi-program inspector for the Pesticides and Toxics compliance section within the Land and Chemical Division of EPA Region 5. Tr. 68. He conducts inspections to ensure compliance with the Disclosure Rule and the Asbestos Hazardous Emergency Response Act. Tr. 69–72.

2. James O'Neil is employed by Senior Service America, Inc. under a cooperative agreement with EPA through which he works for the Land and Chemicals Division of EPA Region 5 conducting investigations and compliance inspections regarding lead based paint renovation and repair and the Disclosure Rule. Tr. 22-23, 26.

3. Mr. O'Neil selects properties or landlords for inspection by working closely with local health departments, looking for properties that have an "open" lead abatement order or mitigation notice that had not undergone clearance by the health department, older properties in urban and rural areas, and landlords with large inventories of properties. Tr. 27-29. Health departments

provide information as to any abatement orders or mitigation notices which are not cleared and which remain "open orders" on their records. Tr. 27-28.

4. In March 2009, EPA Region 5 asked Mr. O'Neil to "put together some targets for the Milwaukee area" for inspections, and provided Mr. O'Neil and Mr. Pilny with a list from the Milwaukee Public Health Department of inspections, open lead hazard abatement orders, and mitigation notices. Tr. 35–36, 52, 77–78.

5. Mr. O'Neil prioritized the list on the basis of whether the company or individual had unresolved abatement orders or mitigation notices, and the size of the company's or individual's inventory of pre-1978 housing, and ultimately identified six companies or individuals as targets for inspection. Tr. 36. Ms. Brumfield was one of those six companies or individuals. Tr. 36, 77. Mr. O'Neil found during his investigation that the City of Milwaukee health department had an open abatement order for one of Respondent's properties, indicating that the health department never cleared the order. Tr. 52, 55, 57-58, 63.

6. Mr. O'Neil had no previous knowledge of Ms. Brumfield or Brumfield Properties, LLC, and no person or entity identified Ms. Brumfield or Brumfield Properties, LLC, to Mr. O'Neil before he selected Ms. Brumfield for inspection. Tr. 36–37.

7. Mr. O'Neil mailed to Ms. Brumfield, a letter dated May 11, 2009 ("May 11, 2009 Letter"), which was delivered at 3936 N. 18th Street, Milwaukee, Wisconsin, and received by Respondent. CX 1 at 15–17; CX 7 at 45; Tr. 37–40, 42, 60–61.

8. The May 11, 2009 Letter stated: "The United States Environmental Protection Agency is sending you this written request to set up an inspection date and time, to see if you are in compliance with Section 1018, the lead-based paint disclosure rule [of the Residential Lead-Based Paint Hazard Reduction Act of 1992 also known as Title X] on properties built prior to 1978 that you own, manage or sold." CX 1 at 15 (bracketed material in original).

9. In the May 11, 2009 Letter, Mr. O'Neil stated that he was "an inspector authorized by . . . the Division Director [of the] United States Environmental Protection Agency, Region 5, to conduct lead inspections for compliance with Section 1018," and that his services were "under the direction of" the Chief of the "Pesticides and Toxics Compliance Section, Chemicals Management Branch, Land and Chemical Division, United States Environmental Protection Agency, Region 5." CX 1 at 15.

10. In the May 11, 2009 Letter, Mr. O'Neil advised that "[t]he inspection consists of a random review of lease and sales documents," and that the inspectors would "need to have access to all . . . lease document files and sales contracts for the past 3 years," as well as "(1) [a] list of all properties you own, manage or have sold in the past three years showing the age of all pre-1978 buildings[,] (2) [c]opies of any Lead Abatement Orders or Mitigating Notices and Certificates of Compliance[, and] (3) [c]opies of any testing reports for lead-based paint or lead-based paint hazards." CX 1 at 15.

11. On May 13, 2009, in response to the May 11, 2009 Letter, Ms. Brumfield contacted Mr. O'Neil by telephone and they discussed the inspection referenced in the letter. CX 2 at 19, 21; CX 7 at 45; Tr. 42, 60–61, 201. During that conversation, Ms. Brumfield consented to having the inspection performed on May 21, 2009. Tr. 42, 201; CX 2 at 19; CX 7 at 45.

12. Before the inspection occurred, Ms. Brumfield received a letter dated May 13, 2009, from Mr. O'Neil ("May 13, 2009 Letter"). Tr. 227-228. The letter stated "Confirming our phone conversation today, May 13, 2009, in which you agreed to an on site inspection for compliance with the Lead Based Paint Disclosure Rule." CX 2 at 19; Tr. 43–45. The letter requested access to "the tenant leases for the past three years." CX 2 at 19. The letter further stated: "We ask you have available copies of any lead abatement orders, mitigation notices, notices of violation, certificates of compliance and any lead based paint safe certificates [and] . . . any reports of testing for lead based paint or lead based paint hazards." *Id.*

B. The Inspection

13. On May 21, 2009, Mr. O'Neil and Edward R. Pilny met Ms. Brumfield at 3936 North 18th Street, Milwaukee, Wisconsin, to perform the inspection. CX 7 at 44, 51; Tr. 46-47, 83. The property at 3936 North 18th Street is a duplex residential dwelling owned by Ms. Brumfield. CX 11 at 195, 245-253. Her children resided there at the time of the hearing. Tr. 249-250.

14. When they arrived at 3936 North 18th Street, Mr. O'Neil and Mr. Pilny presented Ms. Brumfield with their credentials and she invited them in. Tr. 47, 85. When they were standing in the foyer, Mr. Pilny asked her whether she understood what the inspection was about, and she said she did. Tr. 86. Ms. Brumfield asked them to sit down in the dining room and she signed the Notice of Inspection. Tr.47-48, 60, 86-87; CX 7 at 51. The Notice of Inspection stated that "This inspection involves the review of . . . copies of Title X, Section 1018 Disclosure Rule documents for . . . lease transactions." CX 7 at 51.

15. During the inspection, Mr. Pilny asked Ms. Brumfield to produce all the leases and lead paint disclosure forms that she had pertaining to buildings she owned that were built before 1978. Tr. 48, 89–93, 111-114. She brought the lease documents to Mr. Pilny and he reviewed them. Tr. 48, 50, 114. Ms. Brumfield confirmed that all the leases for the pre-1978 buildings were at the location of the inspection, and that the lease documents he reviewed were all the leases for the pre-1978 properties that she had. Tr. 87, 90, 92, 94, 110-111, 113-114. During the inspection Ms. Brumfield made copies of the documents Mr. Pilny reviewed, upon his request. Tr. 48, 95. She made copies of 11 lease documents from her files. CX 7 at 45-46, 50; Tr. 95. Ms. Brumfield was provided with a receipt for the documents copied, which she signed. Tr. 47-49; CX 7 at 47, 59. Ms. Brumfield retained the original documents. Tr. 95-96.

16. During the inspection, Ms. Brumfield informed Mr. Pilny that her rental contracts are completed at the rental units using a one-year contract that converts into a month-to-month term agreement, and she indicated that she had some knowledge of the Disclosure Rule. CX 7 at 45.

17. During the inspection, Ms. Brumfield was cooperative, helpful and professional. Tr. 49–50, 113.

18. The 11 lease documents copied during the inspection included the following addresses, move-in dates and tenants:

a. 3072 North 28th Street, January 1, 2009, tenants: Genevieve and Tiffany Carter;
b. 3463 North 13th Street, December 1, 2008, tenants: Leon Evans and April Rush;
c. 2428 West Brown Street, April 15, 2008, tenant: Crystal Garrison;
d. 2230 North Teutonia Avenue, March 1, 2007, tenant: Denise Lindsey;
e. 2230 North Teutonia Avenue, January 1, 2008, tenant: Denise Lindsey;
f. 2230 North Teutonia Avenue, May 15, 2008, tenant: Frederick Goff;
g. 4908 North 40th Street, unit 4908, January 1, 2007, tenant: Elsie Moore;
h. 4908 North 40th Street, unit 4908, January 1, 2008, tenant: Elsie Moore;
i. 4908 North 40th Street, unit 4908A, January 1, 2009, tenant: Ashley Thompson;
j. 2924 North Mother Simpson Way, June 1, 2008, tenant: Diane D. Hunter;
k. 2228 North Teutonia Avenue, May 1, 2007, tenant: Danielle Charleston.

CX 7 at 45-46, 59, 61-115. The copies made during the inspection were attached to Mr. Pilny's inspection report, and were presented at the hearing as Complainant's Exhibit 7 at pages 61 through 131. Tr. 94-95, 101-103.

19. During the inspection, Mr. Pilny asked Ms. Brumfield a list of questions from a questionnaire and wrote her answers on the questionnaire. Tr. 48, 80-81, 90-92. One of the questions he asked was whether any of the properties were found to be lead based paint free by a certified inspector, and she responded in the negative. CX 7 at 49; Tr. 90-92. Other questions he asked included whether the housing is for the elderly or persons with disabilities where no child under six resides, and whether any of the properties involved lease renewals where previous disclosure occurred, and she responded to those questions in the negative. *Id.* The inspection lasted a little over an hour. Tr. 49.

C. Respondent's Properties and Brumfield Properties, LLC

20. At all times relevant to the Complaint, Ms. Brumfield owned a duplex dwelling at 3072-3074 North 28th Street, Milwaukee, Wisconsin, which included a residential unit containing three bedrooms separate from the living area. The unit was built in 1897. CX 7 at 67-71; CX 11 at 195, 237, 243.

21. At all times relevant to the Complaint, Ms. Brumfield owned a single family dwelling containing one or more bedrooms separate from the living area, at 3463 North 13th Street, Milwaukee, Wisconsin. The dwelling was built in 1894. CX 7 at 73-81; CX 11 at 195, 229, 235.

22. At all times relevant to the Complaint, Ms. Brumfield owned a single family dwelling containing one or more bedrooms separate from the living area, at 2428 West Brown Street, Milwaukee, Wisconsin. The dwelling was built in 1891. CX 7 at 95-105; CX 11 at 195, 211, 217.

23. At all times relevant to the Complaint, Brumfield Properties, LLC, owned a duplex dwelling which included a residential unit containing three bedrooms separate from the living area, at 2230 North Teutonia Avenue, Milwaukee, Wisconsin. The unit was built in 1890. CX 7 at 61-66; CX 11 at 195, 203, 219, 225–27.

24. At all times relevant to the Complaint, Ms. Brumfield owned a duplex dwelling, which included a residential unit containing two bedrooms separate from the living area, at 4908 North 40th Street, Milwaukee, Wisconsin, and another residential unit containing two bedrooms separate from the living area, at 4908A North 40th Street. The duplex was built in 1910. CX 7 at 83-86, 89-90; CX 11 at 195, 255- 261.

25. The properties referenced above were not restricted or reserved for elderly or persons with disabilities. CX 7 at 45, 49, 61-64, 67-70, 73-80, 83-86, 95-102; Tr. 90-91.

26. As of at least July 2012, Ms. Brumfield owned the properties referenced in the preceding six paragraphs (CX 11 at 195-196) and in addition, real property with residential dwellings at the following addresses in Milwaukee, Wisconsin:

a. 3936 North 18th Street (CX 11 at 195, 245-253);
b. 4830 North 26th Street (CX 11 at 197, 271, 275–77);
c. 3742–3744 North 17th Street (CX 11 at 197, 279, 283);
d. 3261 North 24th Place (CX 11 at 197, 285, 289–91);
e. 2857 North 39th Street (CX 11 at 197, 293, 297);
f. 2770–2772 North 40th Street (CX 11 at 197, 307, 311).

27. As of at least July 1, 2012, Ms. Brumfield, doing business as Brumfield Properties, LLC, owned a real property with a residential unit located at 2946 North Mother Simpson Way, Milwaukee, Wisconsin. CX 7 at 107; CX 11 at 181, 197, 203, 299, 303.

28. As of at least July 1, 2012, Ms. Brumfield owned a commercial real property located 5319–5331 West Center Street, Milwaukee, Wisconsin. CX 11 at 197, 263.

29. Brumfield Properties, LLC, is a limited liability company incorporated in Wisconsin. CX 11 at 359. Ms. Brumfield is the registered agent and chief executive officer/principal of Brumfield Properties, LLC. Tr. 213–15; CX 11 at 201, 203, 359, 365.

30. At all times relevant to the Complaint, Ms. Brumfield maintained a single bank account for her personal finances and the finances of Brumfield Properties, LLC. Tr. 223–26.

D. 3072 North 28th Street, Milwaukee, Wisconsin

31. Brumfield Properties, LLC, entered into a written lease contract with Genevieve and Tiffany Carter to lease the premises at 3072 North 28th Street, Milwaukee, Wisconsin, from January 1, 2009, to January 1, 2010 (the "Carter Lease"). CX 7 at 67, 70.

32. The Carter Lease is signed by both Genevieve Carter and Tiffany S. Carter, and by Ms. Brumfield on behalf of Brumfield Properties, LLC. CX 7 at 67, 70.

33. The Carter Lease identifies the premises as a "three (3) bedroom, one bath unit in a duplex . . . " and states that "[t]he [p]remises may not be occupied by more than three (5) persons(s) [sic], consisting of no more than one adult and two children . . . ." CX 7 at 67-68.

34. Included with the Carter Lease was a one-page document, with several information blocks, titled "Disclosure of Information on Lead-Based-Paint and/or Lead-Based Hazards" ("Carter Disclosure Form"). CX 7 at 71.

35. The first information block in the Carter Disclosure Form is titled "Lead Warning Statement" and contains the following paragraph:

> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed property. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, landlords must disclose the presence of known lead-based paint and/or lead-based paint hazards in the dwelling. Tenants must also receive a federally approved pamphlet on poisoning prevention.

CX 7 at 71.

36. The second information block in the Carter Disclosure Form is titled "Landlord's Disclosure," and contains the following language in bold, underlined text: "Landlord's Disclosure: City of Milwaukee has set a date of 11/3/06 for cleaning the house of lead paint." CX 7 at 71. Ms. Brumfield typed that text in the Carter Disclosure Form to protect the tenant, she testified, "to give them the opportunity still to make their decision" whether to rent the property. Tr. 204. While she testified that she "was not aware of lead based paint" in the dwelling at 3072 North 28th Street, she also testified, "as soon as I made more money, that was going to be the next house that I called the City to do." Tr. 204.

37. The Carter Disclosure Form has printed "X" symbols in the blanks next to the statements: "Landlord has no knowledge of lead-based paint and/or lead-based paint hazards in the housing;" and "Landlord has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing." CX 7 at 71.

38. The third information block on the Carter Disclosure Form is titled "Tenant's Acknowledgment (initial)." CX 7 at 71. The Carter Disclosure Form is not initialed or otherwise marked next to the statements: "Tenant has received copies of all information listed above;" and "Tenant has received the pamphlet Protect Your Family from Lead in Your Home." CX 7 at 71.

39. The fourth information block on the Carter Disclosure Form is titled "Agent's Acknowledgment (initial)," and the fifth information block, located at the bottom of the form, is

entitled "Certification of Accuracy" and has a partial sentence, "The following parties have reviewed this information above and certify, to the best of their [sic]." CX 7 at 71. The signatures of Ms. Brumfield and Tiffany Carter appear beneath the partial sentence but no date appears on the form. *Id.*

E. 3463 North 13th Street, Milwaukee, Wisconsin

40. The City of Milwaukee Health Department Childhood Lead Poisoning Prevention Program prepared an Order to Correct Condition of Premises, dated September 16, 2002, referencing an inspection on that date of the premises at 3463 North 1^{3th} Street, which revealed the presence of deteriorated lead-based paint. The Order required abatement of lead based paint on windows in the housing unit by a certified lead abatement contractor. CX 7 at 55-57. The Order was addressed to Ms. Brumfield at 2466 N. 60th Street, Milwaukee, Wisconsin 53210. CX 7 at 55. The Order in the evidence of record was stamped "copy," it was not signed, and the Proof of Service form on it was blank. CX 7 at 55, 57. The inspectors had obtained a copy of the Order prior to the inspection and did not observe any copy of the Order during the inspection. CX 7 at 45, 51, 59; Tr. 51, 52, 55, 57-58, 87, 93. The Order stated that failure to correct the conditions within 30 days "will result in the City [of Milwaukee] hiring a contractor and billing you [Ms. Brumfield] for the costs." CX 7 at 55. The Order stated that "The project will not be considered completed until dust clearance is passed with all surfaces OK. If your unit fails dust clearance you must reschedule another sampling with your inspector within 5 days . . . ." CX 7 at 57. The Order stated further that "This record of lead-based paint hazards must be made available to purchasers and tenants under the federal residential Lead-Based Paint Hazard Reduction Act. Failure to disclose this information may result in a fine of up to $11,000." CX 7 at 55.

41. On December 1, 2008, Ms. Brumfield entered into a written lease contract with Leon Evans and April Rush to lease the premises at 3463 North 13th Street, Milwaukee, Wisconsin. (the "Evans and Rush Lease"). CX 7 at 73-80; Tr. 203-204. The Evans and Rush Lease states that "Tenants agree to lease this dwelling annually form [sic] 12/1/08 until 12/1/09, this lease will auto renew unless. . . ." CX 7 at 73. The Evans and Rush Lease is signed by both Leon Evans and April Rush, but not by Ms. Brumfield. CX 7 at 80. Mr. Evans and Ms. Rush's signatures on the lease contract are not dated.

42. Ms. Brumfield showed the property at 3463 North 13th Street to Mr. Evans and Ms. Rush on or before November 24, 2008, the due date for a deposit to hold the property as stated in the lease contract. The next day when she returned to the property, Ms. Brumfield found that they had moved in, before the lease documents were prepared, because they had been evicted from their prior residence due to foreclosure and had no other place to stay. Tr. 203-204; CX 7 at 74.

43. The Evans and Rush Lease states, "Only the following persons may live in this dwelling: April Rush, Leon Evan and three children and one additional family member . . . ." CX 7 at 74.

44. Included with the Evans and Rush Lease was a one-page document entitled "Disclosure of Information on Lead-Based-Paint and/or Lead-Based Hazards" (the "Evans and Rush Disclosure Form"). CX 7 at 81.

45. The Evans and Rush Disclosure Form contains a Lead Warning Statement identical to that included in the Carter Disclosure Form. CX 7 at 71, 81.

46. The Evans and Rush Disclosure Form contains the following language in bold, underlined text: "Landlord's Disclosure: City of Milwaukee has set a date of 11/3/06 for cleaning the house of lead paint." CX 7 at 81.

47. The Evans and Rush Disclosure Form has printed "X" symbols next to the statements: "Landlord has no knowledge of lead-based paint and/or lead-based paint hazards in the housing;" and "Landlord has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing." CX 7 at 81.

48. The Evans and Rush Disclosure Form is not initialed or otherwise marked next to the statements: "Tenant has received copies of all information listed above;" and "Tenant has received the pamphlet Protect Your Family from Lead in Your Home." CX 7 at 81.

49. On the Evans and Rush Disclosure Form, on the line beneath the block entitled "Certification of Accuracy" is a printed statement: "The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate." CX 7 at 81. The statement is signed by Ms. Brumfield and April Rush, and the signatures are dated December 1, 2008, and December 2, 2008, respectively. *Id.*

F. 2428 West Brown Street, Milwaukee, Wisconsin

50. The City of Milwaukee Health Department mailed Ms. Brumfield a letter, dated October 24, 2006, "to inform [Ms. Brumfield] that [her] property, located at 2428 W BROWN ST is considered lead safe as of" August 30, 2006. CX 7 at 105; RX 7. The letter referred to a contractor having performed lead hazard reduction work at the property, and suggested that Ms. Brumfield conduct biannual paint inspections and require tenants to inform her of paint damage when it occurs, to assure that the property remains lead safe. *Id.*

51. The letter states: "This record of lead-based paint hazards and abatement must be made available to purchasers and tenants under the federal Residential Lead-Based Paint Hazard Reduction Act." CX 7 at 105; RX 7.

52. The letter further states, in italicized print: "While the results indicate that your property is lead safe, this is a temporary state." CX 7 at 105; RX 7.

53. On April 15, 2008, Ms. Brumfield, doing business as Brumfield Properties LLC, entered into a written lease contract with Crystal Garrison to lease the dwelling at 2428 West Brown Street, Milwaukee, Wisconsin, from April 15, 2008, until April 15, 2009 (the "Garrison Lease") CX 7 at 95-103. The Garrison Lease stated that the agreed rent was $725 per month, and that the tenant agrees to make a deposit of $725. CX 7 at 95-96. Ms. Brumfield and "Crystal Garrison (Joyful Beginning)" signed the Garrison Lease. CX 7 at 102.

54. Ms. Garrison resided at 2428 West Brown Street from at least April 15, 2008 to April 15, 2009. CX 7 at 95, 103. Also occupying the premises with her were two children: one child who was seven years old and the other who was seven months old at the time Ms. Garrison submitted a "Residential Rental Application," which was undated, to Respondent. CX 7 at 104.

55. Ms. Garrison operated a daycare while she resided at 2428 West Brown Street. Tr. 204; CX 7 at 102. The Garrison Lease states: "The number of occupants is limited to, undetermined, if use as a day care [sic]." CX 7 at 96. The Garrison Lease describes the premises as a "dwelling" and a "one family house." CX 7 at 95.

56. The Garrison Lease does not include any written disclosure regarding lead-based paint or lead-based paint hazards. CX 7 at 95–105.

57. A Wisconsin Department of Revenue Rent Certificate prepared for tax year 2008 indicates that Crystal Garrison resided at 2428 West Brown Street from January 1, 2008 to December 31, 2008. CX 7 at 103. It also indicates that the rent was $495 for three months and $725 for nine months. *Id.* Ms. Brumfield signed the certificate on January 2, 2009, certifying to the truth, accuracy and completeness of the information thereon. *Id.*

G. 2230 North Teutonia Avenue (March 1, 2007), Milwaukee, Wisconsin

58. Ms. Brumfield rented to Denise Lindsey the premises at 2230 North Teutonia Avenue, and Ms. Lindsey resided there from March 1, 2007 to some time prior to May 15, 2008, March 1, 2007. CX 7 at 61-66; Court's Exhibit 1.

59. On Wisconsin Department of Revenue Rent Certificates for tax years 2007 and 2008 for 2230 North Teutonia Avenue, Ms. Brumfield stated that she rented the unit to Ms. Lindsey for 12 months during each of those years, but collected rent for only 10 months of 2007. CX 7 at 65-66. The Rent Certificate for 2007 indicates Denise Lindsey lived in the unit beginning on March 1, 2007. CX 7 at 65-66. Ms. Brumfield signed the certificates as landlord or authorized representative of Brumfield Properties, LLC, certifying to the truth, accuracy and completeness of the information thereon. *Id.* Her signature for the 2007 Rent Certificate is dated January 17, 2008. The Rent Certificates did not have any signature or signature line for the tenant or renter. *Id.*

60. Ms. Brumfield did not provide to the inspectors any documentation concerning rental or lease of 2230 North Teutonia Avenue to Ms. Lindsey other than the Rent Certificates. CX 7; Tr. 175-176. However, also in the record is a partial lead-based paint disclosure form, on which is a block of text entitled "Tenant's Acknowledgment," showing the initials "DL" next to the statements: "Tenant has received copies of all information listed above" and "Tenant has received the pamphlet Protect Your Family from Lead in Your Home." Court's Exhibit 1. Above that block is only a partial sentence, as follows: "and/or lead-based paint hazards in the housing." Also on the partial form is a block of text entitled "Certification of Accuracy" with a printed statement, "The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate," and a signature only of Denise Lindsey, dated March 1, 2007; the landlord's signature line is blank. *Id.*

H. 2230 North Teutonia Avenue (May 15, 2008), Milwaukee, Wisconsin

61. On May 15, 2008, Brumfield Properties, LLC, entered into a written lease contract with Frederick M. Goff to lease the premises at 2230 North Teutonia Avenue, Milwaukee, Wisconsin, from May 15, 2008, until May 15, 2009 ("Goff lease"). CX 7 at 61-64. The lease is signed by Frederick M. Goff and by Ms. Brumfield on behalf of Brumfield Properties, LLC. *Id.*

62. The Goff lease states that "[t]he [p]remises may not be occupied by more than three (3) persons(s), consisting of no more than one adult and two children . . . ." CX 7 at 62.

63. The Goff lease does not include any written disclosure regarding lead-based paint and lead-based paint hazards. CX 7 at 61–64.

I. 4908 North 40th Street #4908, Milwaukee, Wisconsin

64. Wisconsin Department of Revenue Rent Certificates prepared for tax years 2007 and 2008 indicate that Elsie Moore lived at 4908 North 40th Street from January 1, 2007 through December 31, 2008, and that a total rent of $5,940 was collected for 2007 and a total rent of $ 6,105 was collected for 2008. CX 7 at 89- 90.

65. The Wisconsin Department of Revenue Rent Certificates for 2007 and 2008 were signed by Ms. Brumfield, and did not have any signature or signature line for the tenant or renter. CX 7 at 89-90. Ms. Brumfield signed the Rent Certificate for 2007 on January 17, 2008, and the Rent Certificate for 2008 is undated.

66. Ms. Brumfield did not provide to the inspectors any documentation concerning rental or lease of 4908 North 40th Street other than the Rent Certificates. CX 7; Tr. 174-176.

J. 4908 North 40th Street #4908A, Milwaukee, Wisconsin

67. On January 1, 2009, Brumfield Properties, LLC, entered into a written lease contract with Ashley Thompson to lease the premises at 4908A North 40th Street, Milwaukee, Wisconsin, from January 1, 2009 until January 1, 2010 (the "Thompson Lease"). CX 7 at 83-88. The lease was signed by Ms. Brumfield on behalf of Brumfield Properties, LLC. CX 7 at 86. The lease

was also signed by Ms. Thompson, although the signature line marked "Tenant(s)" with Ashley Thompson's signature is on a separate page of the lease contract, which, as presented in Complainant's exhibit, follows a page entitled "Brumfield Properties LLC Rental Application" and filled out by Ashley Thompson. CX 7 at 87-88.

68. Ashley Thompson resided at the premises from January 1, 2009 until at least January 1, 2010 with her child who was two years old at the time she applied to rent 4908 North 40th Street Unit 4908A . CX 7 at 83-88.

69. The Thompson Lease did not include any disclosure regarding lead-based paint and lead-based paint hazards. CX 7 at 83–88; Tr. 94-95, 101-103.

K. General Findings of Fact

70. Ms. Brumfield first started leasing properties in 1979 or 1980. Tr. 208.

71. Ms. Brumfield manages her rental properties herself. Tr. 205-206. She makes repairs at the properties, does accounting, and collects rent. Tr. 214-215. The only persons who assist her are a handyman who makes plumbing and electrical repairs and a brother who maintains the yards. Tr. 215.

72. Ms. Brumfield typed the lease forms a few days before they were signed. Tr. 247. She downloaded lead-based paint disclosure forms from government websites. Tr. 220.

73. Ms. Brumfield signed lease contracts and allowed prospective tenants to take them and bring them back to her, to accommodate prospective tenants who were illiterate. Tr. 245-247. Ms. Brumfield usually told prospective tenants that if they change their mind about leasing the premises within seven days, she would release them from obligation under the lease. Tr. 247. She testified that she would treat prospective tenants "differently based on circumstances. *Id.*

74. Ms. Brumfield did not ensure that all documents were complete, accurate, consistent, signed, and organized. CX 7; Tr. 204-205, 210, 217. She testified, ". . . I did notice on some of my papers coming back, once I gave a tenant the lease and the [lead disclosure] form, that they overlooked something. . . . If I failed to, when I got it back, to have it – look and see if they actually did that, yes, I'm guilty of that." Tr. 217. She testified further, "I have not been thorough. . . . I have not been as thorough as I should have been." Tr. 218.

75. Ms. Brumfield rented residential units to family members on occasion, including during times when they were unemployed. Tr. 208, 249.

76. Property tax assessments for 2012 show that the estimated value of real property owned by Respondent is $ 697,300. CX 11 at 195-197, 211, 219, 229, 237, 245, 255, 263, 271, 279, 285, 293, 299, 307; Tr. 134, 144-145. However, the value of her properties is decreasing significantly, as the same properties were assessed at a total of $880,600 according to 2011 property tax assessments. *Id.*; Tr. 148-149. Maureen O'Neill, EPA's civil investigator who

investigated Respondent's financial information, found that there were no mortgages available in publicly available records, and Respondent did not provide any information about mortgages to EPA. Tr. 121, 124-125, 134, 147, 212.

77. Respondent purchased the property at 2428 West Brown Street for $8,000 in July 2003 as shown on a quitclaim deed for the property. CX 11 at 217. The real property at this address had an assessed value in 2012 of $ 26,300 for property tax purposes. CX 11 at 195, 211, 217.

78. In May 2008, Respondent satisfied a mortgage in the amount of $16,960, which was executed in November 2004 to purchase the property at 2228-2230 North Teutonia Avenue. CX 11 at 225, 227. The real property at this address had an assessed value in 2012 of $ 34,000 for property tax purposes. CX 7 at 61-66; CX 11 at 195, 203, 219, 225–27.

79. In January 2002, Respondent purchased the property at 3463 North 13th Street for approximately $18,000, calculated by the transfer tax of $54 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 235. The real property at this address had an assessed value in 2012 of $ 25,700 for property tax purposes. CX 11 at 195, 229, 235.

80. In December 2006, Respondent purchased the property at 3072 North 28th Street for approximately $25,000, calculated by the transfer tax of $75 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 243. The real property at this address as a whole had an assessed value in 2012 of $ 38,900 for property tax purposes. CX 11 at 195, 237, 243.

81. In May 2005, Respondent purchased the property at 3936 North 18th Street for approximately $67,000, calculated by the transfer tax of $201 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 251. The real property at this address had an assessed value in 2012 of $ 47,900 for property tax purposes. CX 11 at 195, 197, 245.

82. In May 1988, Respondent purchased the property at 4908 North 40th Street for approximately $42,000, calculated by the transfer tax of $126 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 261. The real property at this address had an assessed value in 2012 of $70,300 for property tax purposes. CX 11 at 195, 255-261.

83. In August 2000, Respondent purchased the property at 5327 West Center Street for approximately $75,000, calculated by the transfer tax of $ 225 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 269. It had an assessed value in 2012 of $165,000 for property tax purposes. CX 11 at 197, 265.

84. In February 2009, Respondent purchased the property at 4830 North 26th Street for approximately $9,000, calculated by the transfer tax of $27 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 275-277. The real property at this address had an assessed value in 2012 of $ 54,700 for property tax purposes. CX 11 at 195, 197, 271.

85. In March 2009, Respondent purchased the property at 3742 North 17th Street for approximately $25,300, calculated by the transfer tax of $75.90 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 283. The real property at this address had an assessed value in 2012 of $52,500 for property tax purposes. CX 11 at 195, 197, 279.

86. In March 2009, Respondent purchased the property at 3261 North 24th Place for approximately $11,000, calculated by the transfer tax of $33 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 289-291. The real property at this address had an assessed value in 2012 of $36,000 for property tax purposes. CX 11 at 195, 197, 285.

87. In February 2009, Respondent purchased the property at 2857 North 39th Street for less than $34,800, as the deed contained a prohibition from Respondent selling it for more than $34,800 within three months of purchase. Tr. 145; CX 11 at 297. The real property at this address had an assessed value in 2012 of $47,700 for property tax purposes. CX 11 at 195, 197, 293.

88. In December 2003, Respondent purchased the property at 2946 North Mother Simpson Way for approximately $10,000, calculated by the transfer tax of $30 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 303. This property had an assessed value in 2012 of $17,700 for purposes of property tax. CX 11 at 181, 197, 203, 299.

89. In April 2009, Respondent purchased the property at 2770-2772 North 40th Street for approximately $36,000, calculated by the transfer tax of $108 and the $3 transfer tax rate for each $1,000 for which a property is sold. Tr. 145; CX 11 at 311. The real property at this address had an assessed value in 2012 of $80,600 for property tax purposes. CX 11 at 195, 197, 307.

90. Respondent's yearly rental income is estimated at $240,000 according to a Dun & Bradstreet Market Identifiers Plus Report. CX 11 at 193, 201-203; Tr. 135.

91. As of June 2012, Respondent owed $8,222.27 in property taxes.

IV. Documents Submitted with Respondent's Post Hearing Brief

As pointed out by Complainant it its Reply Brief, Respondent's Post Hearing Brief includes documents which were not admitted into evidence. Complainant asserts that there are two categories of such documents that cannot be considered by this Tribunal.

One category consists of two lead-based paint disclosure forms, one with a signature of Ashley Thompson and the other with a signature of Deshonna Bennet, which were marked at the hearing as Respondent's Exhibits 12 and 14, and were enclosed with Respondent's Brief. R's Br. at 18-19. Neither of those documents will be considered, as the documentary evidence consists only of the exhibits admitted into evidence at the hearing.

However, to the extent that the ruling excluding the documents from evidence is not clear from the record, the reasons for excluding the two disclosure forms are provided here. The disclosure form with Deshonna Bennett's signature is not relevant as it was signed by a person who is not a lessee of any of the leases at issue in the Complaint, for a property at 2228 North Teutonia Road according Ms. Brumfield, which is not a subject of allegations of violation in the Complaint. Tr. 239-241. It is not probative as to Respondent's liability for the alleged violations or as to factors for assessing a penalty, which are based only on the leases alleged as bases of violations in the Complaint. The disclosure form marked as Respondent's Exhibit 12 signed by Ashley Thompson had "4908A" handwritten on it. A similar copy, which did not appear to have "4908A" written on it and which also was unaccompanied by any lease contract, was included as an attachment to the Answer. No disclosure form for 4980A North 40th Street was included with Mr. Pilny's inspection report, and the testimony and evidence does not show that Ms. Brumfield in fact did produce such a disclosure form for that property during the inspection. Findings of Fact 18, 69. Mr. Pilny's testimony that the lease documents in his inspection report were the documents provided by Ms. Brumfield during the inspection, and that he did not notice any documents missing from the documents she provided, is credible, especially considering the testimony of both inspectors as to their careful procedures during the inspection. Tr. 48, 87-95. Ms. Brumfield did not assert that the document marked as Respondent's Exhibit 12 was among the original documents she provided during the inspection. Ms. Brumfield asserts in defense that had she been given "the true reason" for the inspection, she "would have put more effort" into locating all necessary documents. Answer at 1. She testified that after the inspection she searched in her files and found one or two more disclosure forms, and mailed them to the inspectors. Tr. 204-205, 251-253. She testified further that she did not know until the inspection that the inspectors intended to review leases for lead-based paint disclosure, but this testimony is not credible in view of the undisputed evidence that before the inspection, she received the letters dated May 11 and May 13, 2009, referencing an inspection for compliance with the Lead Based Paint Disclosure Rule. Tr. 201-202, 205, 211-212; Findings of Fact 7-12. In any event, there was no date on the disclosure form marked as Respondent's Exhibit 12 and no indication that it was attached to a lease, and thus there is no basis to infer that it was included as part of the lease contract, or signed at or near the time the lease was executed. In addition, there is only a partial sentence expressing certification, without the object of what the signatories are certifying to, and the checked box on the form that "Landlord has no knowledge of lead based paint and/or lead-based paint hazards in the housing" is contradicted by the statement on the form, "Landlord's Disclosure: City of Milwaukee has set a date of 11/3/06 for cleaning the house of lead paint."

Therefore, the disclosure form with Ashley Thompson's signature, marked as Respondent's Exhibit 12, is not reliable and is of little or no probative value as to whether the Thompson Lease included the disclosures and certification required under 40 C.F.R. § 745.113(b).

The other category include EPA's "Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing," dated August 20, 1996 ("Interpretive Guidance Document") which Respondent apparently quoted in its entirety, and excerpts of guidance entitled "Section 1018: The Real Estate Notification and Disclosure Rule" available online at www.epa.gov/region1/enforcement/leadpaint/section1018, and a document which, Complainant asserts, appears to be a "U.S. Department of Housing and Urban Development Guidance on the Lead-Based Paint Disclosure Rule" ("HUD Guidance Document") R's Br. at 2-17. Complainant argues that this category of documents cannot be considered by this Tribunal because Respondent did not include them in her Prehearing Exchange or at the hearing, and they were not entered into the record at the hearing.

The undersigned appreciates Complainant's efforts in identifying the HUD Guidance Document. Official notice may be taken of publicly available EPA policy and guidance documents brought to this Tribunal's attention by a respondent in an enforcement action, and such official notice taken of EPA's own policy or guidance documents would not prejudice EPA. The facts that HUD and EPA developed the Disclosure Rule, that Complainant identified the HUD Guidance Document, and that it is publicly available, suggest that official notice may be taken of HUD's guidance document also.

Complainant also argues that the copies or excerpts of these guidance documents in Respondent's brief are "entirely unreliable" as they appeared "incomplete, disorganized, heavily edited, with multiple fonts, inconsistent italics and bold printing, and without any explanation." C's Reply at 2. It appears that Respondent has inserted into her Brief excerpts from electronic copies of EPA and HUD guidance documents. The variations in font help to delineate these excerpts from Respondent's arguments and the bold font and underlining helps to identify the portions of the guidance documents that Respondent intends to emphasize. Rather than quoting portions of the Interpretive Guidance Document, Respondent has chosen to include the entire document, which does not prejudice Complainant. Particularly where Respondent is not represented by counsel, some lack of clarity in excerpting from the other guidance documents does not warrant disregarding them. Reference can be made by this Tribunal as well as by Complainant to these guidance documents to verify the accuracy of the quotations therefrom, as would be done with quotations or references in any brief composed by an attorney. The argument to disregard Respondent's excerpts and quotations from the guidance documents must be rejected.

V. Discussion and Conclusions as to Liability

The Complaint charges Respondent with violations of 40 C.F.R. § 745.113(b) with respect to seven leases of six different housing units. Specifically, with respect to the Carter Lease for 3072 North 28th Street, Respondent is charged in Count 7 with failure to include in or

with the lease contract a statement disclosing presence of known lead-based paint and/or lead based paint hazards in the housing, or indicating no knowledge thereof, in violation of 40 C.F.R. § 745.113(b)(2). Also with respect to the Carter Lease, Respondent is charged in Count 26 with failing to include signatures of the lessor and lessees certifying to the accuracy of their statements regarding lead-based paint disclosure, along with the dates of signature, in violation of 40 C.F.R. § 745.113(b)(6). The remaining counts of violation charge Respondent with failure to include the requirements of 40 C.F.R. § 745.113(b)(1), (b)(2), (b)(3), (b)(4) and (b)(6) in the other six leases referenced in the Complaint.

With regard to each of the alleged violations, Complainant must establish the following elements of liability: (1) Respondent as lessor (2) entered into a contract to lease (3) "target housing," and (4) a statement, disclosure or certification required by 40 C.F.R. § 745.113(b)(1), (b)(2), (b)(3), (b)(4) or (b)(6) was not included either as an attachment or within the contract before the lessee was obligated to lease the housing. 40 C.F.R. §§ 745.100, 745.107, 745.113(b). Complainant has the burden of proving each alleged violation by a preponderance of the evidence. 40 C.F.R. § 22.24.

The third element of liability is established by a showing that the housing was constructed prior to 1978, and is not housing for the elderly or persons with disabilities unless a child under 6 years of age resides therein, and is not a dwelling in which the living area is not separated from the sleeping area. 40 C.F.R. § 745.103. Findings of Fact 20 through 24 establish that the six housing units were constructed prior to 1978, and had a living area separate from the sleeping area. Findings of Fact 19 and 25 establishes that the six housing units were not exempted from the definition of "target housing" as housing for the elderly or disabled.

Respondent argued that all of her properties had a lead-based paint certificate. R's Br. at 27-28. Respondent has not offered any such certificate into evidence. The only evidence regarding lead assessment on the properties at issue are the letter from the City of Milwaukee concerning the September 16, 2002 inspection of 3463 North 13th Street, and the letter dated October 24, 2006 informing Ms. Brumfield that the property at 2428 West Brown Street was "lead safe," which does not mean that it was lead *free*. Findings of Fact 40, 50, 52. During the inspection, Respondent did not present to the inspectors any other certificates or testing reports regarding lead-based paint despite being requested to do so in the letters dated May 11 and May 13, 2009. Findings of Fact 10, 12, 15, 18. The inspection report shows that she answered in the negative whether any of her properties were found to be lead-based paint free by a certified inspector. Finding of Fact 19. Respondent has not rebutted Complainant's evidence that the six housing units at issue were "target housing" as defined in the Disclosure Rule.

Complainant can establish the first element, that Respondent was a "lessor," where Respondent is "any entity" including an individual or a corporation, which "offers target housing for lease, rent, or sublease." 40 C.F.R. 745.103.

For the alleged violations regarding 3072 North 28th Street, Complainant has shown undisputed evidence that that Ms. Brumfield was a lessor, as she offered and entered into a contract to lease 3072 North 28th Street to Genevieve and Tiffany Carter for one year commencing on January 1, 2009. Findings of Fact 31, 32. Therefore, Complainant has

established the first and second elements of liability for the alleged violations concerning 3072 North 28th Street.

The evidence shows that on or before November 24, 2008, Ms. Brumfield showed the property and offered 3463 North 13th Street for rent to Leon Evans and April Rush, and that they moved in to that house at that address on or around that date. Findings of Fact 41, 42. Leon Evans and April Rush signed a lease contract for a one year lease of 3463 North 13th Street on or about December 1, 2008. Finding of Fact 41. Although Ms. Brumfield did not sign the lease contract, she did sign the Evans and Rush Disclosure Form on December 1, 2008. Findings of Fact 41, 49. The circumstances of Ms. Brumfield maintaining the lease contract in her records, presenting it for inspection, signing the Evans and Rush Disclosure Form, and allowing the tenants to stay in the unit indicate mutual assent to enter into a lease contract. Findings of Fact 15, 18, 41, 42, 49. The lease contract therefore was valid. "General principles of contract law provide that parties may become bound by the terms of an unsigned writing if they manifest assent to the terms of the contract through their conduct," which may include written or spoken words, acts or failure to act. *Tantillo v. Tidd, Lackey & Co.,* Civ. Nos. 88-2212-S, 2213-O, 1998 U.S. Dist. LEXIS 11210 (D. Kan. Sept. 26, 1988)(citing Restatement (Second) of Contracts § 19(1) (1981)). Complainant has therefore established the first and second elements of liability for the alleged violations concerning 3463 North 13th Street.

Complainant has presented undisputed evidence that Respondent offered and entered into a contract to lease 2428 West Brown Street for one year to Crystal Garrison commencing on April 15, 2008. Findings of Fact 53, 54, 57. Therefore, Complainant has established the first and second elements of liability as to alleged violations concerning 2428 West Brown Street.

The undisputed evidence shows that Respondent offered for rent and entered into a contract to lease 4908A North 40th Street to Ashley Thompson from January 1, 2009 to January 1, 2010. Finding of Fact 67. It is concluded that Complainant has established the first and second elements of liability for allegations of violation concerning 4908A North 40th Street.

With regard to the other residential unit on that property, Unit 4908, Complainant has presented only Wisconsin Department of Revenue Rent Certificates to establish the alleged violations. Finding of Fact 66. They are not signed by the tenant Ms. Moore, but only by Ms. Brumfield, who signed it *after* the annual period of tenancy, and indicate the period of time the tenant lived on the premises and the amount of rent received for the preceding year. Finding of Fact 65. There is no agreement, manifestation of mutual assent, or terms of a contract in the Rent Certificates. They do not constitute a "contract to lease" within the meaning of 40 C.F.R. § 745.113(b). The Rent Certificates also do not constitute sufficient evidence of any contract to lease. A "contract to lease" within the meaning of the Disclosure Rule must be in writing, as the contract must "include, as an attachment or within the contract" the various disclosures and certifications. 40 C.F.R. § 745.113(b). Although the Rent Certificates show that Ms. Brumfield had rented the property to Ms. Moore in 2007 and 2008, they do not indicate whether any written lease contract existed for rental of the premises. Ms. Brumfield had tenants renting properties on a month-to-month basis after the lease term expired, and there is no evidence in the record of when Ms. Moore began renting the unit, so she may have entered into a lease with Ms. Brumfield before 2007. Finding of Fact 16. There is no evidence in the record of a "contract to

lease" 4908 North 40th Street to Ms. Moore. Therefore, Complainant has not made a prima facie case on the second element of liability with respect to rental of 4908 North 40th Street to Ms. Moore. Accordingly, Counts 5, 12, 18, 24 and 31 of the Complaint, which allege violations of 40 C.F.R. § 745.113(b)(1), (b)(2), (b)(3), (b)(4), and (b)(6) respectively concerning this property, must be dismissed.

Similarly, for the alleged rental of 2230 North Teutonia Avenue to Denise Lindsey, Complainant has presented only Wisconsin Department of Revenue Rent Certificates to establish the alleged violations. Finding of Fact 59, 60. They do not constitute a "contract to lease" or evidence of a "contract to lease" for the same reasons as those stated above regarding the rental to Ms. Moore. Considering the Rent Certificates together with the last page of a "Disclosure of Information on Lead-Based-Paint and/or Lead-Based Hazards" form, signed by Ms. Lindsey on the same date as that on the Rent Certificate indicating the time she began living at that address, suggest that a written lease contract may have existed for a period commencing on that date. Finding of Fact 59, 60. Yet Ms. Brumfield certified on the Rent Certificate that Ms. Lindsey resided there for all 12 months of 2007. Finding of Fact 59. The evidence is insufficient to prove existence of a written "contract to lease" the premises to Denise Lindsey. Complainant has failed to make a prima facie case on the second element of liability with respect to rental of 2230 North Teutonia Avenue to Denise Lindsey. Accordingly, Counts 3, 10, 16, 22 and 29 of the Complaint, which allege violations of 40 C.F.R. § 745.113(b)(1), (b)(2), (b)(3), (b)(4), and (b)(6) respectively concerning rental of this property to Ms. Lindsey, must be dismissed.

It is noted that, as referenced in Ms. Grace's testimony, Complainant contemplated charging Ms. Brumfield with failure to retain for three years copies of lease contracts for the rental of some of her properties under 40 C.F.R. § 745.113(c). Tr. 199. However, Complainant has not sought to amend the Complaint to allege violations of Section 745.113(c). Complainant has not established that the commencement of rental of the properties to Ms. Moore or Ms. Lindsey occurred within three years of the inspection. There is no basis to amend to conform to any proof at hearing the allegations in Counts 3, 5, 10, 12, 16, 18, 22, 24, 29 and 31 of the Complaint.

For the later rental of 2230 North Teutonia Avenue to Frederick Goff, Complainant produced the Goff Lease showing that Respondent offered for rent and entered into a contract to lease that dwelling to Mr. Goff from May 15, 2008 to May 15, 2009. Finding of Fact 61. It is concluded that Complainant has established the first and second elements of liability for allegations of violation concerning a lease of 2230 North Teutonia Avenue to Frederick Goff.

The next issues to address are whether Complainant has shown by a preponderance of the evidence that Respondent failed to comply with 40 C.F.R. § 745.113(b)(1), (b)(2), (b)(3), (b)(4), and (b)(6) with respect to the Carter Lease, the Evans and Rush Lease, the Garrison Lease, the Goff lease, and the Thompson Lease.

A. *3072 North 28th Street (January 1, 2009)*

1. Count 7

The Complaint alleges in Count 7 that Respondent failed to include in the Carter Lease or as an attachment thereto, a statement disclosing the presence of any known lead-based paint and/or lead-based paint hazards or a statement of lack of knowledge of such presence, in violation of 40 C.F.R. § 745.113(b)(2). Complaint ¶ 59. On one hand, the Carter Disclosure Form shows an attempt to comply with that requirement by printed "X" mark next to a statement that the lessor has no knowledge of lead based paint or its hazards in the housing. Finding of Fact 37. However, contradicting that statement is the bold underlined "Landlord's Disclosure" stating that the City of Milwaukee has set a date of November 3, 2006 "for cleaning the house of lead paint." Finding of Fact 36. The latter statement implies that there was a lead-based paint hazard in the house at least prior to November 2006. It is inferred from the fact that Ms. Brumfield prepared the lease document and Carter Disclosure Form with the "Landlord's Disclosure," that she had knowledge that there was lead-based paint in the house at least prior to that time. Finding of Fact 36, 72. This inference is supported by her testimony, "as soon as I made more money, that was going to be the next house that I called the City to do." Finding of Fact 36. The dwelling was not been found to be free of lead-based paint. Finding of Fact 19. Respondent's statement of having no knowledge of lead paint or lead paint hazards in the housing was incorrect and fails to comply with the requirement of 40 C.F.R. § 745.113(b)(2). Complainant has thus proven the allegations in Count 7 of the Complaint by a preponderance of the evidence.

2. Count 26

The Complaint alleges in Count 26 that the Carter Lease "failed to include, either within the contract or as an attachment to the contract, . . . the signatures of the lessor and lessee certifying to the accuracy of their statements and the dates of such signatures." Complaint ¶ 135. The Complaint alleges that such failure constitutes a violation of 40 C.F.R. § 745.113(b)(6), which requires every contract to lease target housing to include "[t]he signatures of the lessors . . . and lessees, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature." 40 C.F.R. § 745.113(b)(6). The Carter Disclosure Form accompanying the Carter Lease is signed by Tiffany Carter and Ms. Brumfield but there is no date on it. Finding of Fact 39. Furthermore, the certification statement is not complete, and does not indicate what the parties to the lease are certifying. *Id.* The evidence does not show that the required disclosures were made prior to the lessees being obligated under the lease contract. Therefore, Complainant has shown that Respondent is liable for a violation of Section 745.113(b)(6), referenced in Count 26 of the Complaint.

B. *3463 North 13th Street (December 1, 2008)*

Complainant argued, based on testimony of case developer and enforcement officer Pamela Grace, that the violations concerning the Evans and Rush Lease, Counts 1, 8, 14, 20 and 27 of the Complaint, are based on the signature of the lessee on the Evans and Rush Disclosure Form being dated after the date of the lease, indicating that the lessee did not obtain any information regarding lead based paint or its hazards or other disclosures prior to the obligation to lease the property. Tr. 152, 171; C's Br. at 14-15, 18, 23, 27, 32, 43-46.

Ms. Brumfield signed the Evans and Rush Disclosure Form on December 1, 2008, and April Rush signed on December 2, 2008, certifying "to the best of their knowledge that the information that they have provided is true and accurate." Finding of Fact 49. This suggests that Ms. Rush may have signed after she was obligated under the contract to lease the housing, based on the statement in the Evans and Rush Lease contract that the tenants agree to lease the dwelling from December 1, 2008. Finding of Fact 41. However, the signatures on the lease contract are not dated. *Id.* Ms. Brumfield allowed some prospective tenants to review lease contracts and bring them back before signing them, and in this instance, the tenants moved into the dwelling before the lease documents were prepared. Finding of Fact 42, 73. The evidence is unclear as to when the tenants became obligated under the lease. Therefore, Complainant has not proven by a preponderance of the evidence any violations of 40 C.F.R. § 745.113(b) based on a failure to make disclosure prior to the obligation to lease the property at 3463 North 13th Street to Mr. Evans and Ms. Rush. Other bases for violations concerning this lease are discussed below.

1. Count 1

The Complaint alleges in Count 1 that "Respondent failed to include, either within the [Evans and Rush Lease] contract or as an attachment to the contract . . . a Lead Warning Statement." Complaint ¶ 35. Count 1 alleges that the failure to include the warning statement constitutes a violation of 40 C.F.R § 745.113(b)(1). Complaint ¶ 36.

The Evans and Rush Disclosure Form bears a "Lead Warning Statement" that is almost, but not quite, identical to, the statement required by § 745.113(b)(1), the last two lines of which are: "Before renting pre-1978 housing, *lessors* must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. *Lessees* must also receive a federally approved pamphlet on *lead* poisoning prevention." 40 C.F.R. § 745.113(b)(1) (emphasis added). The last two lines of the Evans and Rush Disclosure Form read as follows: "Before renting pre-1978 housing, *landlords* must disclose the presence of *known* lead-based paint and/or lead-based paint hazards in the dwelling. *Tenants* must also receive a federally approved pamphlet on poisoning prevention." CX 7 at 81 (emphasis added). That is, the words "lessor" and "lessees" are substituted with the words "landlords" and "tenants," and the word "lead" is omitted from the phrase "on lead poisoning prevention" in the Evans and Rush Disclosure Form.

The Environmental Appeals Board ("EAB") has set forth an unyielding rule that the Lead Warning Statement in or attached to a lease contract must be *exactly* identical to the text of the Lead Warning Statement in the regulations. The EAB held that "the test for compliance with 40 C.F.R. § 745.113(b)(1) is whether the contract to lease . .. includes . . . a Lead Warning Statement with the language (i.e. a verbatim recitation of the precise words) set forth in the regulation. *John P. Vidiksis*, 14 E.A.D._, 2009 EPA App. LEXIS 8 *20-22 (EAB, April 22, 2009) (Final Decision and Order) (footnote omitted), *aff'd*, 612 F.3d 1150, 1156–57 (11th Cir. 2010). The EAB stated that "lessors must use the exact language set forth in the regulation," that it "does not provide lessors discretion to satisfy the lessor's obligation with substitute or alternative language," and that it does not provide for any defense to liability based on

"substantial compliance." 2009 EPA App. LEXIS 8 *14. The EAB's holding is based on a plain reading of the regulatory requirement of Section 745.113(b)(1), that the lease "shall include . . . the following elements" including a "Lead Warning Statement *with the following language*," the nearly identical directive of Section 745.113(a)(1) for purchase transactions mandating language set forth by Congress for the Lead Warning Statement, and the preamble to the regulation reflecting the careful attention of EPA and the U.S. Department of Housing and Urban Development in simplifying the words and syntax of Congress' Lead Warning Statement for lease transactions. 2009 EPA App. LEXIS 8 at *16-17. The EAB reasoned that allowing language containing the core elements but not the exact wording of the regulation's Lead Warning Statement would render superfluous such careful attention, would undermine the clarity of the warning, and would result in "a time consuming analysis" and unnecessary litigation in enforcement cases of whether the lease contained such core elements. *Id.* n. 8.

The Lead Warning Statement in the Evans and Rush Disclosure Form is so close to the warning required in the regulation that some of the EAB's rationale is not as persuasive here as in the *Vidiksis* case, which concerned a warning substantially inferior to the regulatory language. Nevertheless, under the EAB's test for compliance, where the Evans and Rush Disclosure Form is not quite a verbatim recitation of the Lead Warning Statement language required by 40 C.F.R. § 745.113(b)(1), Complainant has proven the violation alleged in Count 1.

However, predicting that its "bright-line rule may produce a harsh result on the particular facts of a specific case," the EAB conceded that "an adjustment may be taken into account when setting the appropriate penalty. 2009 EPA App. LEXIS 8 n. 8. Therefore, to reflect the *de minimus* nature of the violation, and because Complainant did not even argue that the Lead Warning Statement in the Evans and Rush Disclosure Form was deficient, no penalty will be assessed for Count 1.

2. Count 8

In Count 8, the Complaint alleges that "Respondent failed to include either within the [Evans and Rush Lease] contract or as an attachment to the contract . . . a statement disclosing either the presence of any known lead-based paint and/or any lead-based paint hazards in the target housing or a lack of knowledge of such presence," and that such failure is a violation of 40 C.F.R. § 745.113(b)(2). Complaint ¶¶ 63, 64. The Evans and Rush Disclosure Form, like the Carter Disclosure Form, shows an attempt to comply with that requirement by a printed "X" mark next to a statement that the lessor has no knowledge of lead based paint or its hazards in the housing. Finding of Fact 47. However, contradicting that statement is the bold underlined text stating "Landlord's Disclosure" that the City of Milwaukee has set a date of November 3, 2006 "for cleaning the house of lead paint." Finding of Fact 46.

Ms. Brumfield argues that she typed an "X" in the box on her form to draw the tenant's attention to the disclosure statement next to it, because they were overlooking that area. R's Br. at 2-3.

The Order to Correct Condition of Premises dated September 16, 2002 states that there were lead-based paint and lead based-paint hazards in the house since at least 2002. Finding of

Fact 40. However, there is no evidence in the record that Ms. Brumfield received the Order, as discussed below regarding Count 14. *Id.* Moreover, the statement in the Order that "[f]ailure to correct these conditions within 30 days will result in the City hiring a contractor . . ." suggests that the City intended to have the abatement completed several years prior to the time the Evans and Rush Lease was executed. *Id.*

Nevertheless, it is inferred from the fact that Ms. Brumfield was the lessor and prepared the lease documents, including the Disclosure Form stating a date of November 3, 2006 for "cleaning the house of lead paint," that she knew that there was lead-based paint in the house at least prior to that time. Finding of Fact 72. The dwelling has not been found to be free of lead-based paint. Findings of Fact 19.

Placing an "X" on the line next to the statement of having no knowledge of lead-based paint or lead-based paint hazards in the housing does not merely draw the tenant's attention to the statement; it asserts that the statement is true when the "Landlord's Disclosure" indicates it is not. Reading a statement that the landlord has no knowledge of lead-based paint in the house, together with a statement of a date set two years prior for cleaning the house of lead-based paint, likely would lead a tenant to believe that the house is free of lead-based paint. The statement is incorrect and misleading, and therefore does not comply with the requirement of 40 C.F.R. § 745.113(b)(2). Complainant has thus proven by a preponderance of the evidence the violation alleged in Count 8.

3. Count 14

Count 14 of the Complaint alleges that "Respondent failed to include either within the [Evans and Rush Lease] contract or as an attachment to the contract . . . a list of any records or reports available to the lessor regarding lead-based paint and/or lead-based paint hazards in the target housing that have been provided to the lessee or a statement that no such records are available," in violation of 40 C.F.R. § 745.113(b)(3). Complaint ¶¶ 87, 88. To establish this violation, Complainant must show either: (1) records or reports regarding lead-based paint and/or lead based paint hazards in the housing were available to Respondent, and a list of such records or reports was not included in or attached to the lease contract, or (2) a statement that no such records or reports are available was not included in or attached to the lease contract.

The Evans and Rush Disclosure Form shows Respondent's compliance with the second of the two alternatives, in that there is a printed "X" mark next to a statement that the lessor has no reports or records available to the lessor pertaining to lead-based paint or lead-based paint hazards in the housing. Finding of Fact 47. Complainant, however, argues that Respondent made such statement "notwithstanding this clear Order," namely the Order to Correct Condition of Premises which the City of Milwaukee Health Department issued to Respondent on or about September 16, 2002 for 3463 North 13th Street. C's Br. at 22. The question is whether Complainant has shown that this Order, or any other records or reports regarding lead-based paint or its hazards concerning 3463 North 13th Street, was available to Respondent.

The Order to Correct Condition of Premises, dated September 16, 2002, was addressed to Ms. Brumfield at 2466 N. 60th Street, Milwaukee, Wisconsin 53210. Finding of Fact 40. There

is no evidence in the record that she owned that property, resided at that address, or received mail at that address. See, Findings of Fact 10-24, 26-28. The only evidence of that Order is a copy with a blank proof of service, and there is no evidence in the record that the Order was served on Ms. Brumfield or that she received it. Finding of Fact 40. Complainant has not presented any other evidence of records or reports as to lead based paint or its hazards at this property that was available to Ms. Brumfield. The "Landlord's Disclosure" concerning the City setting a date for "cleaning the house of lead paint" merely suggests that Ms. Brumfield knew about lead-based paint in the dwelling but does not establish that she in fact had available to her any records or reports in that regard. It is concluded that Complainant has not shown by a preponderance of the evidence that Respondent failed to comply with 40 C.F.R. § 745.113(b)(3).

4. Count 20

The Complaint alleges in Count 20 that "Respondent failed to include either within the [Evans and Rush Lease] contract or as an attachment to the contract . . .a statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (3) and the Lead Hazard Information Pamphlet required under 15 U.S.C. § 2696," in violation of 40 C.F.R. § 745.113(b)(4). Complaint ¶¶ 111, 112.

The Evans and Rush Disclosure Form has no initials or other marks on the blank lines or near the statements "Tenant has received copies of all information listed above," and "Tenant has received the pamphlet Protect Your Family from Lead in Your Home." Finding of Fact 48.

Respondent argues that there is no requirement that a lessee write his initials by the disclosure information in addition to signing a disclosure form, and that landlords have flexibility in drafting disclosure documents. R's Br. at 2-3, 17, 24-26. Respondent quotes the following text from the EPA website entitled, "Section 1018: The Real Estate Notification and Disclosure Rule" in support of her argument:

> Section 1018: The Real Estate Notification and Disclosure Rule
> ***
> What is required? Before signing of a contract for a housing sale or lease:
> - Sellers and landlords must disclose known lead-based paint and lead-based paint hazards and provide available written reports to buyers or renters.
> - Sellers and landlords must give buyers and renters the pamphlet, developed by EPA, HUD, and the Consumer Product Safety Commission (CSPC), titled "Protect Your Family from Lead in Your Home."
> - Home buyers will get a 10-day period to conduct a lead-based paint inspection or risk assessment at their own expense. The rule gives the two parties flexibility to negotiate key terms of the evaluation.
> - Notification and disclosure language for the existence of lead paint hazards must be included in sales contracts and leasing agreements.

R's Br. at 2, 24, 25 (www.epa.gov/region1/enforcement/leadpaint/section1018). She also provides the following text from Question and Answer 28 in the Interpretive Guidance Document:

> . . . the rule does not require the use of a Federal disclosure form as an attachment to sales and leasing contracts. States, sellers, landlords, and agents have flexibility to draft disclosure and acknowledgement attachments to fit their needs, provided that the attachments address the content requirements laid out in 24 CFR 35.92 and 40 CFR 745.113.

R's Brief at 12, 25, 26.

The EPA website guidance quoted above provides only a very broad overview, and the general requirement that "[n]otification and disclosure language . . . must be included . . ." does not indicate that deviation from the regulatory requirements is allowed. The excerpt above from the Interpretive Guidance Document acknowledges that lessors have some flexibility in drafting the disclosure attachment, but clearly requires compliance with Section 745.113.

Turning to the regulatory requirements, Respondent is correct that Section 745.113 does not specify that the lessee must initial the disclosure form. Section 745.113 requires "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." 40 C.F.R. § 745.113(b)(4). Respondent could have required her lessees to write out such a statement on the disclosure form to document compliance. Having lessees instead write their initials next to a pre-printed statement affirming receipt of the information also meets the requirement. But a statement pre-printed by the *lessor* affirming a lessee's receipt of the information, with a blank line next to it, is not in any way a "statement by the lessee affirming receipt of the information," and thus does not meet the requirement of Section 745.113(b)(4). The lessee's signature at the bottom of the page also does not meet the requirement of Section 745.113(b)(4). When the lessor and lessee sign, "certifying to the accuracy of their statements" (40 C.F.R. § 745.113(b)(6)) or certifying "that the information they have provided is true and accurate" (Finding of Fact 49), the lessee is certifying to the accuracy of his own statements. A line left blank next to a statement pre-printed by the lessor is not a "statement" by the lessee. In fact, it suggests that the lessee has read the pre-printed statement and has chosen not to initial it because he does not agree with it. Because the lessees did not mark the appropriate statements in the Evans and Rush Disclosure Form, and the Evans and Rush Lease does not otherwise contain the statements required by § 745.113(b)(4), Complainant has proven the violation alleged in Count 20.

5. Count 27

In Count 27, the Complaint alleges that "Respondent failed to include either within the [Evans and Rush Lease] contract or as an attachment to the contract . . .the signatures of the lessor and the lessee certifying to the accuracy of their statements and the dates of such

signatures." Complaint ¶ 139. The Complaint alleges further that such failure constitutes a violation of 40 C.F.R. § 745.113(b)(6). Complaint ¶ 140.

Complainant argues that the lease contract violates § 745.113(b)(6) only on the basis that Ms. Rush signed the form on December 2, 2008, but the lease is dated December 1, 2008. C's Br. at 32. As concluded above, the evidence does not establish that Respondent failed to provide disclosures before the obligation to lease the property. Accordingly, Respondent is not liable for the violation alleged in Count 27.

C. *2428 West Brown Street (April 15, 2008)*

The Complaint alleges that "Respondent failed to include, either within the contract or as an attachment to the contract dated April 15, 2008 for 2428 West Brown Street" the following items in the Garrison Lease:

a. a Lead Warning Statement, alleged in Count 2;
b. a statement disclosing either the presence of any known lead-based paint and/or lead based paint hazards, or a lack of knowledge, alleged in Count 9;
c. a list of any records or reports available to the lessor regarding lead-based paint and/or lead-based paint hazards that have been provided to the lessee, or a statement that no such records are available, alleged in Count 15;
d. a statement affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (3) and the Lead hazard Information Pamphlet required under 15 U.S.C, § 2696 , alleged in Count 21; and
e. the signatures of the lessor and the lessee certifying to the accuracy of their statements and the dates of such signatures, alleged in Count 28.

The Complaint alleges that such failures constitute violations of 40 C.F.R § 745.113(b)(1), (2), (3), (4), and (6), respectively.

Ms. Brumfield testified at the hearing that Ms. Browley, the sister of Ms. Garrison, opened a daycare at the West Brown Street premises, but Ms. Browley decided not to stay there and brought in Ms. Garrison, who stayed as a tenant and continued the daycare. Tr. 204, 244-245. Ms. Brumfield argues in her Post Hearing Brief that she provided a "lease with a certificate from the City of Milwaukee stating the property was lead free" and offered the booklet concerning lead-based paint. R's Brief at 24-25. In her Answer she asserted that the tenant took over the existing business of a family member, and that a "checklist, lead paint disclosure and booklet . . . has always been in place," and "Respondent provided the business with an updated lead inspection certificate." Answer at 5.

As concluded above, there is no evidence in the record that this property was lead free. Finding of Fact 19. As to the daycare, it is undisputed that Ms. Garrison operated a daycare on the premises, but this does not exempt the lease transaction from the Disclosure Rule requirements. Finding of Fact 55. The Interpretive Guidance Document, Question 9, quoted by Respondent, points out that the Disclosure Rule applies to daycare centers "where such facilities

are part of a residential dwelling." Interpretive Guidance Document (available at www2.epa.gov/lead/interpretive-real- estate- community-requirements-disclosure-information-concerning-le-0). A "residential dwelling" is defined in the regulations at 40 C.F.R. § 745.103 as a "single-family dwelling" or a "single family dwelling unit in a structure that contains more than one separate residential dwelling unit, and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the residence of one of more persons." The evidence shows that Ms. Garrison occupied 2428 West Brown Street as her residence, and that it was a single family house. Findings of Fact 54, 55, 57.

Ms. Brumfield's assertion that Ms. Browley left and her sister stayed as a tenant suggests the possibility that the lease transaction with Ms. Garrison was not subject to the Disclosure Rule on the basis of the exception at 40 C.F.R. § 745.101(d) for "[r]enewals of existing leases," where the "lessor has previously disclosed all information required under § 745.107. . . ." It is undisputed that Ms. Brumfield and Ms. Garrison entered into a written contract to lease the property. Finding of Fact 53. It appears that Ms. Garrison rented the premises for $495 per month for three months prior to commencement of the Garrison Lease. Finding of Fact 57. However, there is no evidence that it was a renewal of an existing lease. Indeed, Ms. Garrison's rental application, and the Garrison Lease, requiring a deposit of $725, suggest that it was not. Finding of Fact 53, 54; CX 7 at 96, 103. Ms. Brumfield's mere assertions in her Answer that a "checklist" and "lead paint disclosure" have "always been in place" lack support in her testimony, are vague and do not indicate what disclosures were made, and when or to whom they were provided. There is no evidence that Ms. Brumfield previously made the required disclosures to Ms. Browley or Ms. Garrison under any existing lease. Respondent has thus not shown that the exception of Section 745.101(d) applies.

The evidence shows that the Garrison Lease did not include any lead-based paint disclosure form or any other written disclosure regarding lead-based paint or hazards thereof. Finding of Fact 56. The only evidence in the record of a lead assessment of the property is the letter from the City of Milwaukee dated October 24, 2006. Ms. Brumfield merely asserted in her Brief, but did not testify, that she offered the "certificate" and "booklet." Nevertheless, even if Ms. Brumfield in fact provided Ms. Garrison with that letter and the pamphlet required under Section 745.107(a)(1) and 15 U.S.C. § 2696, she did not comply with the requirements of 40 C.F.R. §§ 745.113(b)(1), (2), (3), (4) or (6). The Garrison Lease does not include a Disclosure Form or otherwise contain language satisfying the requirements of § 745.113(b). Accordingly, Complainant has shown by a preponderance of the evidence that the lease contract does not comply with those requirements, as alleged in Counts 2, 9, 15, 21 and 28.

D. *2230 North Teutonia Avenue (May 15, 2008)*

In Counts 4, 11, 17, 23 and 30, the Complaint charges Respondent with failure "to include, either within the contract or as an attachment to the contract dated May 15, 2008 for 2230 North Teutonia Road" the same items in the Goff Lease as for the Garrison Lease, in violation of 40 C.F.R. §§ 745.113(b)(1), (2), (3), (4) and (6).

Respondent in her Answer noted that the Complaint misidentifies the property as 2230 North Teutonia Road, rather than North Teutonia Avenue, and denied owning such property. Complaint at 4–5, 9, 14, 19, 24, 29–30; Answer at 3-4. The evidence of record clearly identifies the relevant property as 2230 North Teutonia Avenue, and allowing the Complaint to conform to the evidence will not cause Respondent undue prejudice. Therefore, the allegations in Counts 4, 11, 17, 23, and 30 of the Complaint are found to relate to 2230 North Teutonia Avenue, rather than 2230 North Teutonia Road. *See H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 449–50 (EAB 1999) (ALJ has discretion to find pleadings implicitly amended to conform to evidence presented at hearing).

The evidence shows that the Goff Lease did not include any lead-based paint disclosure form or any other written disclosure regarding lead-based paint or hazards thereof. Finding of Fact 63.

Respondent argues in her Brief that tenants often cannot produce the deposit after they sign a lease, and that "[e]very lease that is dated and signed does not mean that the tenant took possession . . . [s]uch as Mr. Golf [sic]. . . ." R's Br. at 27. However, she did not testify or present any evidence that Mr. Goff did not actually lease the property. Complainant has therefore proven the violations alleged in Counts 4, 11, 17, 23, and 30.

E. *4908 North 40th Street #4908A (January 1, 2009)*

The Complaint alleges that "Respondent failed to include, either within the contract or as an attachment to the contract dated January 1, 2009 for 4908 North 40th Street, Unit 4908A" the same items as in the Goff and Garrison Leases, namely the warning statement required by § 745.113(b)(1) (Count 6); the disclosure statement required by § 745.113(b)(2) (Count 13); the list of known records required by § 745.113(b)(3) (Count 19); the lessee affirmation required by § 745.113(b)(4) (Count 25); and the dated certification signatures required by § 745.113(b)(6) (Count 32).

The evidence shows that the Thompson Lease did not include any lead-based paint disclosure form or any other written disclosure regarding lead-based paint or hazards thereof. Finding of Fact 69.

Respondent argues that the tenant was at the property for "maybe four months," and that she was a "young girl/adult coming from an abusive home, kids taken away" and that Respondent processed the lease and gave the "lead paint info," and that the "Mother held on to info." R's Br. at 25. These arguments are not supported by testimony or evidence in the record and in any event, do not show that the Thompson Lease was exempt from Disclosure Rule requirements as a short term lease of 100 days or less under 40 C.F.R. § 745.101(c). Moreover, Respondent's argument suggests that any disclosure information was retained by the lessee's mother rather than signed and included in the Garrison Lease.

Complainant has therefore proven that the Thompson Lease does not comply with § 745.113(b), and that Respondent violated Section 745.113(b)(1), (b)(2), (b)(3), (b)(4) and (b)(6) as alleged in Counts 6, 13, 19, 25, and 32 of the Complaint.

VI. Respondent's Defenses to Liability

Respondent raised some affirmative defenses in her Answer and her Post-Hearing Brief. Respondent has the burden to prove any affirmative defenses by a preponderance of the evidence. 40 C.F.R. § 22.24.

A. *Selective Enforcement*

Respondent argues that she was unfairly singled out for inspection with a "sinister motive and abusive of power." R's Br. at 17. She suspected that officials from the City of Milwaukee as a "vengeful act" influenced EPA to conduct an inspection of her leases, and did not believe the inspector's testimony about how they selected her for an inspection. Answer at 2-3; R's Br. at 27.

Respondent appears to argue that Complainant unfairly targeted Respondent for selective enforcement. To successfully raise a defense of selective enforcement, Respondent must prove that she has "'(1) been singled out while other similarly situated violators were left untouched, and (2) that the government selected [Respondent] for prosecution invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.'" *Newell Recycling Co., Inc.*, 8 E.A.D. 598, 1999 EPA App. LEXIS 28 (EAB 1999) (quoting *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 985 (E.D. Va. 1997)) (internal quotation marks omitted). One who claims this defense "faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *B & R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998).

Respondent has not alleged that she was targeted for enforcement due to impermissible considerations such as race, religion or to prevent her exercise of constitutional rights. There is no evidence that the inspectors' selection of Respondent for inspection was based on any improper motive or bad faith. Testimony at hearing showed that Mr. O'Neil selected Respondent for inspection from a list of properties that had been inspected, based on the open abatement order and inventory of pre-1978 housing, and that Respondent was one of six property owners selected for inspection. Findings of Fact 4, 5, 6. There is no evidence that other similarly situated property owners received different treatment. Respondent has therefore not established a defense on the basis of selective enforcement or improper motive.

B. *Fourth Amendment*

Respondent argues that her civil rights under the Fourth Amendment to the United States Constitution have been violated. R's Br. at 28. Respondent argues in her Answer and in other filings that the inspectors provided false statements or information, asserting that she was randomly selected for inspection, but that according to their testimony, EPA received her name on a list from the City of Milwaukee Health Department and did not check to see whether her property was actually a hazard. She also argues that they were impersonating federal agents, and appeared to be police officers. Answer at 1; R's Br. at 17, 24, 27-28; RX 3. At the hearing, she testified that when she talked to the inspector by phone, he told her that her name was "pulled at random," and that he never mentioned lead-based paint, but asked to see her past leases and whether she would set up an appointment for him to come out, and she agreed, thinking she was going through a training session. Tr. 201. She testified that when they conducted the inspection they were in blue uniforms with badges, and that she felt "a little bit uncomfortable." Tr. 201-202.

The question is whether the inspection conducted on May 21, 2009, involved an illegal search and seizure in violation of the Fourth Amendment. The Fourth Amendment to the United States Constitution states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the words of the Supreme Court, "the touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). "[A]dministrative inspections of private commercial property conducted for the purpose of enforcing regulatory statutes are subject to the Fourth Amendment's prohibition of unreasonable searches and seizures." *Norman C. Mayes*, 12 E.A.D. 54, 74 (EAB 2005). The expectation of privacy in an individual's home is greater than in a commercial property. *New York v. Burger,* 482 U.S. 691, 700 (1987). Here, while the inspectors did not have a warrant, and conducted the inspection in a house owned by Respondent, they only inspected her business papers and not her house.

An exception to the requirement of a warrant is a search conducted pursuant to voluntary consent. *Schneckloth v. Bustamante*, 412 U.S. 218, 219 (1973); *Mayes* 12 E.A.D. at 76. Respondent appears to raise issues as to whether her consent was voluntary and the scope of her consent.

As to the scope, "courts have held that the scope of a search is generally defined by its expressed object" and the scope of consent to search "is measured by a standard of 'objective reasonableness,' i.e. what the typical reasonable person would have understood by the communication between the government agents and the suspect." *Mayes* 12 E.A.D. at 76. "A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent." *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990)(federal agent posed as assisting a state licensing inspector). The Fourth Amendment is violated where the agent entered the premises

due to "affirmative or deliberate misrepresentation of the nature of the government's investigation." *Id.* (quoting *United States v. Little,* 753 F.2d 1420, 1438 (9th Cir. 1984)).

"[W]hether a consent to search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined by the totality of circumstances." *United States v. Garcia,* 997 F.2d 1273, 1281-82 (9th Cir. 1993); *Schneckloth,* 412 U.S. at 223. "[T]he state of a defendant's knowledge is only one factor to be taken into account in assessing the voluntariness of a consent." *Schneckloth,* 412 U.S. at 223. The government is not required to demonstrate the defendant's knowledge of the right to refuse as a prerequisite to a finding of consent. *Id.* at 235-246.

Not only must a "subjective belief of coercion" be shown, but also "some objectively improper action on the part of the police . . . to invalidate consent." *United States v. Elkins,* 300 F.3d 638, 648 (6th Cir. 2002). Consent has been held invalid where it is given after officers say that they already have the authority to conduct the search. *Bumper v. North Carolina,* 391 U.S. 543 (1968)(no consent where resident allowed law enforcement officers in her home when they falsely stated they had a search warrant); *Donovan v. A.A. Biero Construction Co.,* 746 F.2d 894, 901 (D.C. Cir. 1984)(contractor did not freely and voluntarily consent where it acquiesced in allowing OSHA compliance officers to conduct inspection of construction site based on their claimed authority from consent of government site owner). Consent was also held invalid where officers without a warrant arrived unannounced and obtained consent to enter a private residence by implied coercion, stating that they are revenue officers who had come to search the premises for violations of revenue law, and proceeded to search the home and seize private property. *Amos v. United States,* 255 U.S. 313 (1921).

The evidence in this matter establishes that several days prior to the inspection, Respondent was informed of the specific and accurate purpose and scope of the inspection -- to determine compliance with the lead-based paint disclosure rule -- and that the inspection would include lease documents and lease document files. Findings of Fact 8, 10, 12. In the telephone discussion on May 13, 2009 with Mr. O'Neil, Ms. Brumfield consented to the inspection of her past leases. Findings of Fact 11, 12. On the day of the inspection, she invited the inspectors into the house, and during the inspection, she answered in the affirmative when Mr. Pilny asked her whether she understood the purpose of the inspection. Finding of Fact 14. She signed the Notice of Inspection which specifically referred to review of "copies of Title X Section 1018 Disclosure Rule documents for . . . lease transactions. Finding of Fact 14. There is no evidence that she objected to the inspection or that she did not consent to the scope of the inspection.

As to whether her consent was voluntary, Ms. Brumfield testified that during the inspection she "felt a little bit uncomfortable" being by herself and inviting "these two strangers" in her house with uniforms and flashing their badges, to the extent that she left her back door open during the inspection. Tr. 202. She did not assert, however, that the inspectors were aggressive or intimidating in their words or actions, or that they misled her in any way during the inspection. Mr. O'Neil denied that he and Mr. Pilny were in uniform or had badges other than EPA credentials, and Mr. Pilny testified that he is not required to wear a uniform when appearing for an inspection. Tr. 53, 63. The inspectors' testimony is credible, and her testimony as to the inspectors wearing uniforms and appearing as police officers is not credible, particularly where

she admitted to fears of government intrusion and harassment. She testified, "I really personally felt the way they came after me in a sneaky way, that I feel that this was a scam. I was afraid to give them my . . . three year mortgage, . . . bank statement. I'm thinking they try to steal my life. So there was a fear there. And no one at the EPA office could dispel that fear . . . . But based on what I was going through, through things I'm not allowed to mention, I felt that that was a part of it." Tr. 211-212. In her Answer, she stated that she viewed the inspection as "a vengeful act on the part of a city official or officials" and that her family has been threatened, locked up, harassed, intimidated, received late night calls, had garbage collection stopped , and that building inspectors were sent out. She stated that "every problem I have is . . . viewed to be associated with this issue. In some case it may or may not be." RX 3. There is no evidence that the inspectors gave any indication that they already had authority to conduct the inspection regardless of her consent. Whether or not they told her that she was selected randomly for inspection has no bearing on the scope of the inspection, which was clearly communicated to her, or on the seriousness of the inspection, as the potential for finding a violation would be no greater in a random inspection of her lease documents than in a targeted inspection. There is no evidence of any improper action on the part of the inspectors.

The evidence does not show that Ms. Brumfield's consent to the inspection was the product of duress or coercion, express or implied. Respondent's claim that her Fourth Amendment rights were violated is not justified by the objective evidence of record, and is therefore rejected.

C. *Laches*

Respondent complains about the two year time span between the violation and the Complaint. R's Br. at 1, 27. This argument was not raised until the Post-Hearing Brief, and could be deemed waived on the basis of being untimely. *See J. Phillip Adams*, 13 E.A.D. 310, 325–26 (EAB 2007) (citing *Lazarus, Inc.*, 7 E.A.D. 318, 333–34 (EAB 1997)) (untimely defenses may be deemed waived after consideration of delay and prejudice). However, on the merits the defense fails. "As a general rule[,] laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest . . . ." *Nevada v. United States*, 463 U.S. 110, 141 (1983) (quoting *Utah Power and Light Co. v. United States*, 243 U.S. 389, 409 (1917). Respondent has not presented any basis for departing from this general rule.

VII. Penalty

A. Applicable Statutes, Regulations, Policies, and Burdens of Proof

When enacting the RLPHRA, Congress recognized the significant health threat posed by exposure to lead-based paint, finding that "at low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems." 42 U.S.C. § 4851.

When promulgating the Disclosure Rule, EPA described the serious adverse health consequences of low-level lead poisoning, observing that "lead exposure can be especially

damaging to children, fetuses, and women of childbearing age." Lead; Requirements For Disclosure of Known Lead-based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9064, 9065 (Final Rule, March 6, 1996). EPA found that "lead levels as low as 10 μg/dL have been associated with learning disabilities, growth impairment, permanent hearing and visual impairment, and other damage to the brain and nervous system," and that '[l]ead exposure before or during pregnancy can also alter fetal development and cause miscarriages." *Id.* EPA noted that "[f]rom the turn of the century through the 1940's paint manufacturers used lead as a primary ingredient in many oil-based interior and exterior house paints." 61 Fed. Reg. at 9065-66.

In determining sanctions under the RLPHRA, Congress provided that "[i]t shall be a prohibited act under Section 409 of [TSCA] (15 U.S.C. § 2689) for any person to fail or refuse to comply with a provision of this section or any rule . . . issued under [section 4852d(b)]," and that "the penalty for each violation applicable under Section 16 of [TSCA] shall not be more than $10,000." 42 U.S.C. § 4852d(b)(5). The maximum penalty was adjusted upward to $11,000 for violations occurring after January 30, 1997, through January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended, and the implementing regulations at 40 C.F.R. part 19. On December 11, 2008, the regulations were amended to raise the maximum penalty to $16,000 for each violation occurring after January 12, 2009. Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75,340 (Dec. 11, 2008).

The applicable procedural regulations provide that the amount of a civil penalty must be determined based on the evidence in the record and in accordance with any penalty criteria set forth the statute. 40 C.F.R. § 22.27(b). Section 16(a)(2)(B) of TSCA requires the penalty to "take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." 15 U.S.C. § 2615(a)(2)(B).

The judge must consider "any civil penalty guidelines issued under the" statute. 40 C.F.R. § 22.27(b). Such guidelines are not binding upon this Tribunal, but "should be applied whenever possible because such policies 'assure that statutory factors are taken into account are designed to assure that penalties are assessed in a fair and consistent manner.'" *Carroll Oil Co.*, 10 E.A.D. 635, 655–56 (EAB 2002) (quoting *M.A. Bruder & Sons*, 10 E.A.D. 598, 613 (EAB 2002)).

EPA prepared civil penalty guidelines for violations of the Disclosure Rule, entitled "Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy" ("Penalty Policy), establishing a two-step procedure for calculating a penalty. CX 8 at 147. The first step is to calculate a gravity-based penalty, and the second step is to evaluate whether that penalty should be adjusted upwards or downwards for case-specific factors. *Id.* To determine the number of violations for which to assess separate penalties, the Penalty Policy states that "each lessor must comply with each of the Disclosure Rule requirements of 40 C.F.R. §§ . . . 745.113(b) and 745.113(c) . . . ," that "failure to comply with any requirement is a violation," and that "the

penalty for each violation found in each individual transaction should be assessed separately." CX 8 at 151-152.

The gravity-based penalty for each violation is derived from the nature and an assessment of circumstances of the violation, and an assessment of the extent of harm that may result from a given violation. CX 8 at 147. As to the nature of the violations, EPA describes the provisions of the Disclosure Rule as "hazard assessment" in nature, designed to provide potential lessees of target housing with information that will permit them to weigh and assess the risks, and make an informed decision before deciding to reside in that housing. CX 8 at 148.

"The 'circumstances' reflect the probability of harm resulting from a particular violation." CX 8 at 148. Each violation of the Disclosure Rule has been assigned a circumstance level from 1 through 6, depending on the nature of the Disclosure Rule provision violated. CX 8 at 147–48, 165–66. Violations assessed at Level 1 or 2 have "a high probability of impairing the . . . lessee's ability to assess the information required to be disclosed," whereas those assessed at Levels 5 or 6 have "a low probability of impairing the . . . lessee's ability to assess the information required to be disclosed." CX 8 at 148. Appendix B of the Penalty Policy lists various violations of the Disclosure Rule and assigns each a circumstance level. CX 8 at 165-167. Of the violations of Section 745.113(b), failure to include the Lead Warning Statement is the most severe violation (Level 2), followed in descending order by the lessor's failure to include a statement disclosing presence of known lead-paint hazards or indicating no knowledge (§ 745.113(b)(2)) (Level 3), failure to obtain the lessee's affirmation of receipt of information and pamphlet (§ 745.113(b)(4)) (Level 4), failure to provide a list of available records or statement that no such records are available (§ 745.113(b)(3)) (Level 5), and failure to obtain the dated signatures of all lessors and lessees (§ 745.113(b)(6)) (Level 6). CX 8 at 165–67.

"The term 'extent' is used to consider the degree, range, or scope of the violation's potential for harm" in terms of the overall intent of the rule: to prevent childhood lead poisoning. CX 8 at 148. Violations are assessed as a "major," "significant," or "minor" extent according to the ages of any children who live in the dwelling and whether a pregnant woman lives in the dwelling. CX 8 at 149. Violations involving tenants who are children under the age of 6 or pregnant women are considered "major," those involving children between ages 6 and 17 are deemed "significant," and those involving occupants over 18 are classified as "minor." CX 8 at 149.

After assessing the circumstance level and extent of a violation, the gravity-based penalty is determined by applying those two factors to a matrix contained in the Penalty Policy. CX 8 at 168. The circumstance level forms the y-axis of the matrix, and the extent category forms the x-axis. CX 8 at 168. A violation's prescribed gravity-based penalty is provided where its circumstance level and extent intersect in the matrix. CX 8 at 168. While a gravity-based penalty may be increased to recapture any economic benefit the violator realized through noncompliance, the Penalty Policy recognizes that the costs of complying with the Disclosure Rule are generally low, and the penalty is not usually increased due to this factor. CX 8 at 150.

In regard to the requirement of Section 16(a)(2)(B) of TSCA to consider the violator's ability to pay or continue in business, history of prior violations, degree of culpability, and such

other unique factors as justice may require, the Penalty Policy directs the gravity-based penalty to be adjusted on the basis of these four criteria. CX 8 at 153–59.

As to ability to pay or continue in business, the Penalty Policy states, "[a]bsent proof to the contrary, EPA can establish a respondent's ability to pay with circumstantial evidence relating to a company's size and sales" and that when financial information is not publically available, facts such as the lease amount of the dwelling, "or the number of dwellings owned or leased by the violator, may offer insight regarding the violator's ability to pay the penalty." CX 8 at 153.

The Penalty Policy sets gravity-based penalty amounts based on an assumptions that there is no history of prior violations and that the violator has a minimal degree of culpability. Therefore, the Penalty Policy directs that the gravity-based penalty only be increased to account for these factors, by a maximum of 25% for each of the factors. CX 8 at 154-155. A penalty may be increased for degree of culpability based on: the degree of control the violator had over the events constituting the violation, any actual knowledge of the presence of lead-based paint or its hazards in the housing being leased, the level of sophistication of the violator in dealing with compliance issues, and the extent to which the violator knew of the legal requirement that was violated, such as an abatement order received by the violator stating a requirement to disclose information regarding lead-based paint. CX 8 at 155.

In addition, the Penalty Policy allows for reduction or elimination of a penalty in a negotiated settlement of the case, for voluntary disclosure of violations before an inspection or investigation. The Penalty Policy also allows the penalty to be decreased "in settlement for other factors that may arise on a case-by-case basis," and lists the following factors: "potential for harm due to risk of exposure," "litigation risk" and "attitude," the latter two of which are emphasized as only applicable in context of settlement. CX 8 at 157-159. The penalty may be decreased for "potential for harm due to risk of exposure" if the violator provides documentation that the housing was lead-based paint free at the time of the alleged violation or that "a significant potential source of lead-based paint hazards in the target housing was removed prior to the alleged violations." CX 8 at 157.

Complainant "bears the burden of proof as . . . to the appropriateness of the penalty taking all factors into account." *New Waterbury, Ltd.*, 5 E.A D. 529, 538 (EAB 1994) (emphasis omitted). Complainant must show that it considered each statutory penalty factor "and that its recommended penalty is supported by its analysis of those factors." *New Waterbury, Ltd.*, 5 E.A.D. at 538. "There is no "specific burden of proof with respect to any individual factor; rather the burden of proof goes to [Complainant's] consideration of all of the factors." *Id.* at 539.

In an action under section 16 of TSCA, EPA "must as part of its prima facie case produce some evidence regarding the respondent's general financial status from which it can be inferred that the respondent's ability to pay should not affect the penalty amount." *New Waterbury, Ltd.*, 5 E.A.D. at 541 (emphasis omitted). If EPA meets this burden, then "a respondent's ability to pay may be presumed until it is put at issue by a respondent." *Id.* A respondent wishing raise its ability to pay as a mitigating factor must raise the issue in its answer or prehearing exchange, and must give the EPA access to its financial records in advance of hearing. *Id.* at 542. The

respondent must then produce "*specific* evidence" at hearing to show that it cannot pay the proposed penalty despite evidence implying the contrary. *Id.* at 542–43. A respondent that "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" may be deemed to have waived the issue. *Id.* at 542.

B. Complainant's Proposed Penalty Calculation

Through the testimony of environmental protection specialist Pamela Grace, Complainant demonstrated that it calculated the proposed penalty by utilizing the Penalty Policy. Tr. 152–53, 162–64, 170–73, 177–84. The circumstance levels were assessed based on the listings in Appendix B of the Penalty Policy. Tr. 177. Violations relating to the Carter Lease, the Evans and Rush Lease, and the Goff Lease were considered to be of "minor" extent because there was no evidence that children or pregnant women lived at the target properties. Tr. 170, 177-78. Violations relating to the Garrison Lease were assessed as being of "significant" extent because evidence indicated that "an occupant between the ages of 7 and 18 lived there." Tr. 182; *see* CX 7 at 95, 104; CX 8 at 149. Ms. Grace testified that the violations arising from the Garrison Lease should have been treated as "major" extent because the evidence indicated that a child under the age of six lived there. Tr. 182, 198. However, because Ms. Grace did not realize that an oversight had been made until after the penalty had been calculated, a decision was made to retain the classification of "significant." Tr. 198. Violations arising from the Thompson Lease were deemed to be of "major" extent because evidence indicated that a child under the age of 6 lived in the target housing. Tr. 180; *see* CX 7 at 83, 87; CX 8 at 149. The proposed penalties were simply the matrix values based on the assessed circumstance and extent levels, as Ms. Grace explained that no increase or decrease was made to account for the adjustment factors because she did not have any information concerning these factors that would lead her to adjust the penalty. Tr. 182–83.

Through the testimony of civil investigator Maureen O'Neill, Complainant offered evidence of Respondent's financial condition and demonstrated that it considered Respondent's ability to pay and continue in business when calculating the proposed penalty. Tr. 116, 127–31, 134–39. Between May and June of 2012, Ms. O'Neill investigated publicly available records concerning Respondent's real property holdings, property tax history, earnings reports, licenses, vehicle registrations, other assets, judgments, liens, and other liabilities. Tr. 116, 121–23, 127–29, 134–39. Ms. O'Neill compiled the results of her investigation in a report dated July 1, 2012, entered into evidence as Complainant's Exhibit 11. Tr. 130–31, 140–41. The record also shows that Complainant asked Respondent to provide information concerning her financial condition, but that she did not do so. Tr. 124–25, 147, 211–12; CX 10 at 174. Based on the information available to her, Ms. O'Neill concluded that Respondent had income and assets which would enable her to pay the proposed penalty. Tr. 135; CX 11 at 193.

Ms. O'Neill testified that she also considered financial information provided by Respondent in her motion to supplement its prehearing exchange, filed on July 20, 2012. Tr. 142–43. This information was contained in two bank statements for the months of April and May, 2012, and one page showing bank deposit slips displaying handwritten figures. Tr. 142–

43. Ms. O'Neill testified that the information was "incomplete," and noted that there appeared to be "a commingling of personal funds" and business funds in the bank account statements. Tr. 142–43; *see* Tr. 224–26. Ms. O'Neill determined that the additional information provided by Respondent did not alter her conclusion that Respondent had the ability to pay the proposed penalty. Tr. 142–43.

Complainant's proposed penalties for Counts 2, 4, 6-9, 11, 13, 15, 17, 19-21, 23 25, 26, 28, 30 and 32 combined together total $49,660. Complaint at 32-35.

C. Civil Penalty Analysis

1. *Nature, Circumstances, Extent, & Gravity of Violation*

All of the written lease contracts at issue in this matter took effect after January 30, 1997, but before January 12, 2009, so under the statute, the maximum penalty for each violation is $11,000. In general, three of the leases, the Garrison, Goff and Thompson Leases, lacked all of the elements required by § 745.113, and the other two contained disclosures and certifications that were incomplete and contradictory. These violations were serious because they deprived Respondent's lessees of the information needed to assess the risks posed by lead-based paint at the property before agreeing to lease it, and likely contained significant amounts of lead-based paint as the properties at issue were built long before 1940. Findings of Fact 20-24; see 61 Fed. Reg. at 9065-66.

a. Counts 2, 4, 6

The lease documents in evidence for the Garrison, Goff and Thompson Leases show that there was no Lead Warning Statement provided to the tenants. The Penalty Policy provides that a failure of a lessor to include as an attachment or within the lease contract the Lead Warning Statement is assigned Circumstance Level 2. Circumstance Level 2 is appropriate to assess for Counts 2, 4 and 6.

The Penalty Policy provides a very specific measure of the extent levels, based on the ages of the individuals living in the housing. The evidence shows Ms. Garrison leased 2428 West Brown Street and occupied the premises with two children, ages seven months and seven years at around the beginning of the lease period, and that she operated a daycare at the premises. Findings of Fact 54, 55. The evidence does not show whether the two children were her own children and that she had additional children in the dwelling for daycare, or whether she was providing daycare for the two children listed. However, this issue does not affect the extent level. The Penalty Policy states that for determining the extent level, "[t]he age factor will be determined by the age of the youngest individual residing in the target housing at the time the violation occurred or the youngest individual in the family that is . . . leasing the target housing." CX 8 at 149. Therefore only one child under six is sufficient to assess a "major" extent level. While a child in daycare does not technically "reside" at the dwelling, there is no reason to assess a lower extent level to reflect a child staying in the dwelling for regular daycare than for a child who lives with the parent at the dwelling. The risk factor for exposure to lead-based paint

stemming from the violation is virtually the same for a child in daycare as for a child living with the parent. Therefore, the evidence would support an assessment of "major" extent for the violations arising from the Garrison Lease. Nevertheless, the penalty should reflect the fact that lead hazard reduction work was carried out at the property and the premises were deemed "lead safe" 18 months prior to execution of the Garrison Lease. Finding of Fact 50. Complainant assessed the extent level as "significant," resulting in a penalty of $6,450, rather than as "major," which would result in a penalty of $10,320 under the Penalty Policy Appendix B matrix, although the record is not clear as to Complainant's rationale for that assessment. Tr. 198; CX 8 at 168. Under the "reduced risk of exposure" factor in the Penalty Policy, a penalty may be reduced by up to 40% where documentation clearly demonstrates that a significant source of lead based paint hazards has been removed. CX 8 at 157. A 40% reduction of a penalty of $10,320 would be $6,192. The latter penalty better reflects the extent and circumstances of the violation in Count 2. Accordingly, the gravity based penalty for Count 2 is $6,192.

As to Count 4, the evidence shows that Frederick Goff was the named renter of 2230 North Teutonia Avenue, and that the Goff Lease stated that up to two children were allowed to reside at the premises, but there is no evidence that any children or any pregnant woman resided at the premises. Complainant assessed a "minor" extent level for the violations arising from the Goff Lease, which is consistent with the evidence. Therefore, applying the matrix in Appendix B of the Penalty Policy, the gravity based penalty is $1,550 for Count 4.

As to Count 6, the undisputed evidence shows that Ashley Thompson resided with her two year old child at 4908A North 40th Street during the term of the Thompson Lease. Finding of Fact 68. Respondent did not present any testimony or evidence showing that Ms. Thompson in fact received information about lead-based paint and its hazards prior to being obligated under the lease. Considering the young age of the child, the appropriate extent level for the failure to provide the Lead Warning Statement with the Thompson Lease is "major," which results in a penalty of $10,320 under the Penalty Policy. CX 8 at 168. However, the maximum penalty under the statute is $11,000, and the violation in Count 6 is not close to the same magnitude as the most egregious violation in a civil administrative complaint under the Disclosure Rule, i.e. a violation that is not knowing or willful but has the greatest probability of harm and potential for serious damage to human health in terms of degree, range or scope. Considering the evidence as a whole, the appropriate penalty for Count 6 is $9,000.

b. Counts 7-9, 11, 13

The Penalty Policy Appendix B assigns Circumstance Level 3 for violations of 40 C.F.R. § 745.113(b)(2), failure to include a statement disclosing the presence of known lead-based paint or its hazards, or a statement indicating no such knowledge. The Garrison, Goff and Thompson Leases, at issue in Counts 9, 11 and 13, did not include any lead based paint disclosures, and thus Circumstance Level 3 is an appropriate assessment.

Regarding Count 7, the Carter Disclosure Statement, Respondent indicated she had no knowledge of the presence of known lead-based paint or its hazards, yet there is conflicting information in the statement on the form that the City of Milwaukee had a date set two years

prior for cleaning the house of lead paint. Findings of Fact 36, 37. A person reading this Disclosure Form would not have a significantly greater probability of being impaired in assessing the risks of lead paint hazards in the housing than if the Disclosure Form did not include the statement about cleaning the house of lead paint. Therefore, the Circumstance Level should be reduced to Level 6 for Count 7. As to the extent level, the Carter Lease stated that it allowed no more than one adult and two children to occupy the premises, but there was no evidence that children resided at the premises. Finding of Fact 33. Complainant assessed an extent level of "minor" for violations stemming from the Carter Lease, and there is no reason to depart from that assessment. The gravity based penalty for Count 7 under the matrix is $130.

For Count 8, regarding the Evans and Rush Disclosure Form, as with the Carter Disclosure Form, Respondent indicated she had no such knowledge, yet there is conflicting information in the statement on the form that the City of Milwaukee had a date set two years prior for cleaning the house of lead paint. Findings of Fact 46, 47. As with Count 7, a person reading this Disclosure Form would not have a significantly greater probability of being impaired in assessing the risks of lead paint hazards in the housing than if the Disclosure Form did not include the statement about cleaning the house of lead paint. Therefore, the Circumstance Level should be reduced to Level 6 for Count 8. As to the extent level for the Evans and Rush Lease, Respondent testified that the couple who leased the premises had "moved their family" into the house, but there is no evidence that the family included very young children or a pregnant woman. Tr. 203. The Evans and Rush Lease stated that it allowed "three children" to reside there, but there is no indication in the record as to their ages or whether they in fact resided there. Finding of Fact 43. Therefore, the extent level of "minor" assessed by Complainant for Count 8 is appropriate. With Circumstance Level 6 and "minor" extent, the gravity based penalty under the matrix is $130.

Regarding Count 9, an appropriate extent of violation for the violation stemming from the Garrison Lease is "major" which would result in a matrix value of $ 7,740 under Appendix B of the Penalty Policy. However, as with Count 2, a 40% decrease from the penalty matrix value is appropriate to reflect the gravity of the violation. Accordingly, the penalty for Count 9 is $4,644.

As to Count 11, Complainant assessed a "minor" extent level for the violations arising from the Goff Lease, which is consistent with the evidence. Applying the matrix in Appendix B of the Penalty Policy, the gravity based penalty is $770 for Count 11.

Considering the young age of the child residing at 4908A North 40th Street, the appropriate extent level for Count 13 regarding the Thompson Lease is "major," which results in a penalty of $ 7,740 under the Penalty Policy. CX 8 at 168. This penalty adequately reflects the circumstances and extent of the violation in Count 13.

c. Counts 15, 17, 19

The Penalty Policy Appendix B assigns Circumstance Level 5 for violations of 40 C.F.R. § 745.113((b)(3), failure to include a list of records or to indicate no such records or reports are available. The Garrison, Goff and Thompson Leases, at issue in Counts 15, 17 and 19 did not

include any lead based paint disclosures, and thus Circumstance Level 5 is an appropriate assessment.

Regarding Count 15, an appropriate extent of violation for the violation stemming from the Garrison Lease is "major" which would result in a matrix value of $ 2,580 under Appendix B of the Penalty Policy. However, as with Counts 2 and 9, a 40% decrease from the penalty matrix value is appropriate to reflect the gravity of the violation. Accordingly, the penalty for Count 15 is $ 1,548.

As with Counts 4 and 11, Complainant assessed a "minor" extent level for Count 17 regarding the Goff Lease, which is consistent with the evidence. Applying the matrix in Appendix B of the Penalty Policy, the gravity based penalty is $260 for Count 17.

As to Count 19, considering the young age of the child residing at 4908A North 40th Street, the appropriate extent level regarding the Thompson Lease is "major," which results in a penalty of $ 2,580 under the Penalty Policy. CX 8 at 168. This penalty adequately reflects the circumstances and extent of the violation in Count 19.

d. Counts 20, 21, 23, 25

The Penalty Policy Appendix B assigns Circumstance Level 4 for violations of 40 C.F.R. § 745.113((b)(4), failure to include a statement affirming receipt of information required by Section 745.113(b)(2) and (b)(3) and the required lead paint pamphlet. Where the leases at issue did not include any lead based paint disclosures, namely the Garrison, Goff and Thompson Leases, at issue in Counts 21, 23 and 25, Circumstance Level 4 is an appropriate assessment.

For Count 20, the Evans and Rush Disclosure Form shows blank spaces next to the statement acknowledging receipt of the pamphlet and statement acknowledging that "tenant has received copies of all information listed above." Finding of Fact 48. However the Disclosure Form does not indicate that there are any such copies to be received. Finding of Fact 47. The Disclosure Form suggests only that the tenants did not receive the pamphlet, which is a lesser circumstance level than if records or reports regarding lead-based paint that existed that Respondent failed to provide. Therefore, the appropriate Circumstance Level for Count 20 is 5. As to the extent level, Complainant appropriately assessed it as "minor," consistent with the lack of evidence in the record as to the ages of any children or whether they in fact any children resided there. Finding of Fact 43. With Circumstance Level 5 and "minor" extent, the gravity based penalty under the matrix is $ 260.

As to Count 21, an appropriate extent of violation for the violation stemming from the Garrison Lease is "major" which would result in a matrix value of $ 5,160 under Appendix B of the Penalty Policy. However, as with Counts 2, 9 and 15, a 40% decrease from the penalty matrix value is appropriate to reflect the gravity of the violation. Accordingly, the penalty for Count 21 is $ 3,096.

As to the violations concerning the Goff Lease, Complainant assessed a "minor" extent level for Count 23, which is consistent with the evidence. Applying the matrix in Appendix B of the Penalty Policy, the gravity based penalty is $520 for Count 23.

With regard to Count 25, considering the young age of the child residing at 4908A North 40th Street, the appropriate extent level is "major," resulting in a penalty of $ 5,160 under the Penalty Policy. CX 8 at 168. This penalty adequately reflects the circumstances and extent of the violation in Count 25.

e. Counts 26, 28, 30, 32

The Penalty Policy Appendix B assigns Circumstance Level 6 for violations of 40 C.F.R. § 745.113(b)(6), failure to include dated signatures of lessor and lessees, certifying to accuracy of their statements. As the lowest circumstance level on the matrix, it is appropriate and consistent with the evidence for Counts 26, 28, 30 and 32.

In regard to the Count 26, the Carter Disclosure Form does not include dates with the signatures, and does not include a complete statement certifying as to accuracy of the statements within the form. Finding of Fact 39. Therefore, the evidence does not establish that it was signed before the lessee became obligated under the lease. The Complainant's assessment of "minor" extent and the $130 gravity based penalty under the matrix is deemed appropriate.

For Count 28, an appropriate extent of violation for the violation stemming from the Garrison Lease is "major" which would result in a matrix value of $ 1,290 under Appendix B of the Penalty Policy. However, as with the other violations stemming from the Garrison Lease, a 40% decrease from the penalty matrix value is appropriate to reflect the gravity of the violation. Accordingly, the penalty for Count 28 is $ 774.

For Count 30, Complainant assessed a "minor" extent level regarding the Goff Lease, which is consistent with the evidence. Applying the matrix in Appendix B of the Penalty Policy, the gravity based penalty is $130 for Count 30.

Considering the young age of the child residing at 4908A North 40th Street, the appropriate extent level for Count 32 is "major," yielding a penalty of $ 1,290 under the Penalty Policy. CX 8 at 168. This penalty adequately reflects the circumstances and extent of the violation in Count 32.

f. Total Gravity Based Penalty

Adding the gravity based penalties for each of Counts 2, 4, 6-9, 11, 13, 15, 17, 19-21, 23, 25, 26, 28, 30 and 32, plus the penalty of zero for Count 1, the aggregate gravity based penalty is $ 45,904.

2. *Ability to Pay, Continue in Business*

In December 2009, before the Complaint was filed, Complainant requested Respondent to provide information as to her finances, but she did not do so. CX 10 at 174; Answer at 2. In her Answer, she did not refer to an inability to pay a penalty or financial hardship, but referred to a "struggle to pay my mortgage." Answer at 3. The Prehearing Order directed Respondent as follows: "If Ms. Brumfield intends to argue that the proposed penalty should be reduced or eliminated for any reason, such as an inability to pay the penalty, she should include a statement explaining why the penalty should be reduced or eliminated" and the statement "should be accompanied by a copy of any and all documents supporting Ms. Brumfield's argument." The Prehearing Exchange, prepared by Respondent's counsel, did not mention financial hardship, or inability to pay or continue in business, and did not include any documents in support of Respondent's case. Approximately a month before the hearing, Complainant filed a motion to supplement its Prehearing Exchange to add Ms. O'Neill as a witness and to include her Report of Investigation of financial information concerning Respondent. A few days later, Respondent, through counsel, submitted a motion to supplement her Prehearing Exchange with copies of bank statements for two months and five deposit slips to show she is unable to pay the proposed penalty. Complainant opposed the motion and requested that the claim of inability to pay be stricken. By Order dated July 27, 2012, Respondent's assertion of inability to pay was stricken but both motions to supplement the prehearing exchanges were granted.

Based on the evidence of record, Complainant has shown prima facie evidence that Respondent has the ability to pay the penalty assessed herein. Findings of Fact 76-90. The evidence shows that Ms. Brumfield has sufficient assets in the form of real properties, that she could pay the penalty from the sale of one or more of the properties. The evidence also shows that she receives significant rental income from the properties, but does not indicate whether any part of that rental income is used to pay any mortgages or for repair, renovation and/or maintenance of the properties. Finding of Fact 90. Furthermore, to the extent that she allows family members to stay in her houses at times, her gross rental income may be less than the $240,000 reported. Finding of Fact 75, 90.

Ms. Brumfield testified vaguely that "all five houses [she has] are underwater" in that she owes more on them than they are worth, that she is "struggling to keep up" and doesn't have the finances, that she is supporting family members including her mother, that she provided a vehicle to her sister, and that she could not afford to pay an attorney. Tr. 209, 249, 256, 262. She also testified that in 2008 she prepared flyers to sell one or more of her houses, but the market failed and they did not sell. Tr. 250. These statements are self-serving, lack specific detail, and are unsupported by documentary evidence, and thus are not given significant weight. *See F&K Plating Co.*, 2 E.A.D. 443, 449 (CJO 1987) ("[U]nsupported self-serving testimony is generally entitled to little weight . . . ."). The evidence does show that she owes over $8,000 in property taxes, but this alone does not establish any financial hardship. Finding of Fact 91. During the course of this proceeding Respondent has not presented any documents reflecting her financial condition except for the bank statements for two months and the deposit slips, and she did not offer these into evidence at the hearing. Even if she had offered the bank statement and deposit slips, they only reflect a bank account balance for a very brief period of time, do not provide a reliable overview of her financial condition, and would not rebut Complainant's prima facie showing of her ability to pay the penalty. Ms. O'Neill testified at the hearing that they were

incomplete and failed to provide a complete picture of Respondent's financial condition. Tr. 142–143. Based on the totality of the evidence, it is concluded that Respondent has the ability to pay the penalty assessed herein and continue her business of leasing residential properties.

3. *History of Prior Violations*

Respondent does not have a history of prior violations, so this factor does not warrant an adjustment to the penalty.

4. *Degree of Culpability*

Respondent's actions are best characterized as negligent. Finding of Fact 74. Respondent was aware of the Disclosure Rule's requirements and made some pro forma attempts to comply with its provisions. Findings of Fact 72; *See* Tr. 200–01, 209–11, 215–21, 246–48, 259–61. In general, Respondent did not exercise sufficient care to ensure that Respondent's leases did in fact provide the information required by the Disclosure Rule for the lessees' protection.

As to specific factors of culpability, on one hand, she had been leasing residential properties for more than 20 years, so she should have known about the Disclosure Rule and the seriousness of complying with it at the time she leased the properties at issue. Finding of Fact 70. She also was solely responsible for the content, accuracy, completeness, organization and maintenance of the leases and lead-based paint disclosure documents. Finding of Fact 71. On the other hand, some of her lessees were illiterate and/or needed to take the lease forms and then bring them back, which may explain missing pages and incomplete forms. Finding of Fact 73. Nevertheless, Respondent was obligated under the law to ensure that lead-based paint disclosure documents were completed and returned to her. 40 C.F.R. § 745.113(b) and (c). There are sound reasons to increase the penalty for Respondent's culpability. Considering the degree of control Respondent had over the events constituting the violation, her actual knowledge of the presence of lead-based paint or its hazards in the housing being leased, her level of sophistication in dealing with compliance issues, and the extent to which she knew of the legal requirement that was violated, on balance, and considering the evidence relevant to culpability as a whole, the gravity based penalty will not be increased for the factor of culpability.

5. *Other Factors as Justice May Require*

Respondent raised a number of arguments at hearing and in its post-hearing brief to support the reduction or elimination of the penalties. These arguments are based, *inter alia*, on the length of the proceeding, the competence, lack of honesty and lack of cooperation of Complainant's counsel and witnesses, and the sufficiency of the evidence. *See, e.g.,* Tr. 205, 208–213, 217–221; R's Br. at 1–2, 27–28. These arguments, and any other arguments not specifically addressed herein, are unsupported by the record and are therefore rejected. There are no additional factors that warrant further adjustment to the penalties for any of the violations.

It is concluded that the total penalty for the violations found herein is $ 45,904.

ORDER

1. Respondent Ms. Dessie L. Brumfield, d/b/a Brumfield Properties, LLC, is held to have violated section 409 of the Toxic Substances Control Act and 40 C.F.R. § 745.113(b), as alleged in Counts 1, 2, 4, 6, 7, 8, 9, 11, 13, 15, 17, 19, 20, 21, 23, 25, 26, 28, 30, and 32 of the Complaint. For these violations, a civil penalty of $ 45,904 is assessed against Respondent. 15 U.S.C. § 2615.

2. Respondent shall pay the full amount of this civil penalty within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by one of the following methods:

a) Submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

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

b) Submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed by overnight mail to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines & Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

c) Wire transfer to the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
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) Through Automated Clearinghouse (ACH):

U.S. Treasury REX / Cashlink Receiver
ABA: 051036706

Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - checking

e) Debit card or credit card online payment:

https://www.pay.gov/paygov
Enter SFO 1.1 in the search field
Open form and complete required fields.

3. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondent's name and address, must accompany the check;

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11;

5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

M. Lisa Buschmann
Administrative Law Judge

In the Matter of *Ms. Dessie L. Brumfield,* Respondent.
Docket No. TSCA-05-2010-0014

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Initial Decision**, dated December 4, 2013, was sent this day in the following manner to the addressees listed below.

Knolyn R. Jones
Staff Assistant

Original and One Copy by Regular Mail to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region V, MC-E-19J
77 West Jackson Blvd.,
Chicago, IL 60604-3590

One Copy by Regular Mail to:

Jeffrey M. Trevino, Esq.
Associate Regional Counsel
ORC, U.S. EPA, Region V
77 West Jackson Blvd.
Chicago, IL 60604-3590

One Copy by Regular Mail to:

Ms. Dessie L. Brumfield
5067 N. 37th Street
Milwaukee, WI 53290

Dated: December 4, 2013
Washington, D.C.