UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

IN THE MATTER OF: DOUGLAS PAULINO 9 Orange Street Hartford, Connecticut 06106 Respondent.	Docket No. TSCA 01-2009-0066

COMPLAINANT'S MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT ORDER

Table of Contents

Cited Authorities on Pages 32-33

The Complainant, the United States Environmental Protection Agency ("EPA"), has moved for the issuance of an order:

(a) finding that Respondent, Douglas Paulino, is in default in this matter;

(b) finding that Respondent violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("the Act"), 42 U.S.C. §§ 4851 *et seq.*, and the federal regulations promulgated thereunder, set forth in 40 C.F.R. Part 745, Subpart F ("Lead-Based Paint Disclosure Rule" or "Disclosure Rule"); and

(c) assessing a penalty of $159,063, unless in response to this motion Respondent provides financial documentation to substantiate a claim that Respondent cannot pay $159,063. As further described below, Complainant has previously requested, but not received such documentation. If Respondent timely supplies the requested financial documentation, EPA will review the information and move for the assessment of a revised default penalty, if appropriate.

I. Respondent Should Be Found In Default, Because No Timely Answer Has Been Filed to the Complaint.

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Part 22") provides that a party may be found to be in default after motion, upon failure to file a timely answer to the complaint. 40 C.F.R. § 22.17. According to 40 C.F.R. § 22.17, "[t]he relief proposed in the complaint or motion for default shall be ordered unless the requested relief is *clearly inconsistent* with the record of the proceeding or the Act." (Emphasis provided.)

The Complaint in this action was filed with the Acting Regional Hearing Clerk on September 28, 2009. In the Complaint, EPA alleged that Respondent violated federally enforceable provisions of TSCA Section 409, the Act, and the Lead-Based Paint Disclosure Rule, and that Respondent is therefore subject to penalties under TSCA Section 16, 15 U.S.C. § 2689. A copy of the Complaint is attached as Exhibit 1. The Complaint was served on Respondent by first class certified mail, and Respondent signed a receipt for delivery on October 6, 2009. (See Exhibit 2.) Accordingly, service was complete on October 6, 2009. See 40 C.F.R. § 22.7(c).

Respondent has not filed an answer, and the 30-day period for filing an answer has lapsed. See 40 C.F.R. § 22.15(a). See also November 10, 2009 e-mail from Acting Regional Hearing Clerk to Catherine Smith, Exhibit 3. Because Respondent has not filed a timely answer to the Complaint, Respondent should be found in default. Such default constitutes an admission of all facts alleged in the Complaint and a waiver of any right to contest the factual allegations of the Complaint. 40 C.F.R. § 22.17(a).

II. Respondent's Actions Violated TSCA, the Act and the Lead-Based Paint Disclosure Rule.

The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that the Complaint establishes a *prima facie* case that Respondent violated TSCA Section 409, the Act, and the Lead-Based Paint Disclosure Rule.

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("the Act"), 42 U.S.C. §§ 4851 *et seq.*, in response to findings that low-level lead poisoning is widespread among American children. In 1996, the United States Environmental Protection

Agency ("EPA") promulgated regulations to implement the Act. These regulations, collectively known as the Lead-Based Paint Disclosure Rule ("Disclosure Rule"), are set forth at 40 C.F.R. Part 745, Subpart F.

Pursuant to Section 1018(b)(5) of the Act, 42 U.S.C. § 4852d(b)(5), and 40 C.F.R. § 745.118(e), failure to comply with the Disclosure Rule is a violation of TSCA Section 409, 15 U.S.C. § 2689. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), provides that any person who violates a provision of TSCA Section 409, 15 U.S.C. § 2689, shall be liable to the United States for a civil penalty.

The Disclosure Rule requires sellers and lessors of "target housing" to, among other things:

> (a) provide to purchasers and lessees a lead hazard information pamphlet;
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> (b) disclose to purchasers and lessees, prior to their becoming obligated under any contract to purchase or lease target housing, the presence of any known lead-based paint and/or lead-based paint hazards;
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> (c) provide records or reports available to the lessor or seller pertaining to lead-based paint or lead-based paint hazards in the housing;
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> (d) ensure that the contract to lease or sell includes a Lead Warning Statement; and
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> (e) ensure that the contract to lease or sell includes a statement by the lessor or seller disclosing the presence of known lead-based paint or lead-based paint hazards, or indicating no knowledge thereof.

At all times relevant to the violations alleged in the Complaint, Respondent owned and offered for lease units of residential target housing in Hartford, Connecticut, including, among others, 9-11 Orange Street, Apartment Number 2, and 12-14 Orange Street, Apartment Numbers 1, 2, and 3. (Complaint at paragraphs 11-13; see also page 3 of Respondent's Response to Subpoena

Questions, Exhibit 4, and Property Research Information, Exhibit 5.)[1]

"Target housing," to which the Disclosure Rule applies, is defined as any housing constructed prior to 1978, except housing for the elderly and disabled, or any 0-bedroom dwelling. 40 C.F.R. § 745.103. All of the housing owned and leased by Respondent was constructed prior to 1978. (Complaint at paragraph 12; see also page 3 of Subpoena Response, Exhibit 4; and printouts from the Hartford Assessor's Office, Exhibit 5.) At the time of the violations and at the time of filing of the Complaint, none of the leased units qualified for any of the exemptions to the provisions of the Act or the Disclosure Rule. (Complaint at paragraph 12; see also page 1-3 of Subpoena Response, Exhibit 4, which indicates the presence of children; and Property Research, Exhibit 5, which indicates that none of the units is zero-bedroom.) Based on the above information, the Presiding Officer may conclude that the apartment units at 9-11 Orange Street and 12-14 Orange Street were, at the time of the violations, "target housing" as defined in 40 C.F.R. § 745.103, and that Respondent is a "lessor" of target housing as defined in 40 C.F.R. § 745.103.

On August 23, 2006, EPA Region 1 received a complaint from the City of Hartford Department of Health and Human Services, indicating that at least three children residing in Respondent's properties had confirmed elevated blood-lead levels and that Respondent failed to disclose information about lead-based paint to prospective tenants. (Complaint at paragraph 14; Exhibit 6.)

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1 In the leases submitted by Respondent, the addresses do not reference "9-11 Orange Street" or "12-14 Orange Street" but rather "11 Orange Street," "12 Orange Street," or "14 Orange Street." Nine and 11 Orange Street refer to the same 3-unit apartment building; likewise 12 and 14 Orange Street are in the same building. (See page 2 of

On August 9, 2007, after several unsuccessful attempts to arrange a consensual inspection of Respondent's records, EPA Region 1 served Respondent a subpoena ("Subpoena"), pursuant to Section 11(c) of TSCA, 15 U.S.C. § 2610(c), to assess Respondent's compliance with the Disclosure Rule (Complaint at paragraph 15; Exhibit 7.)

Respondent failed to respond to EPA's subpoena and a follow-up letter, dated and hand-delivered on November 2, 2007, notifying Respondent that his non-compliance with the subpoena would likely result in enforcement to compel a response. (Complaint at paragraph 16; Exhibit 7.) Accordingly, on May 19, 2008, the United States filed an enforcement action in the United States District Court, District of Connecticut ("2008 Petition to Enforce TSCA Subpoena"). (Complaint at paragraph 17; Exhibit 8.)

On August 25, 2008, representatives from EPA Region 1 met with Respondent at the United States Attorney's Office in Hartford, Connecticut to receive Respondent's subpoena response in person (Complaint at paragraph 18; Subpoena Response, Exhibit 4; and meeting notes, Exhibit 9.) In his response to the subpoena ("Subpoena Response"), Respondent did not provide EPA with any documentation demonstrating compliance with the Disclosure Rule, and he attested at the meeting that he had not complied with the Disclosure Rule (Complaint at paragraph 18; See leases attached to Subpoena Response, Exhibit 4; EPA inspector Ronnie Levin's notes from the August 25, 2008 meeting, which were signed by Respondent, and an e-mail from Ms. Levin, dated August 28, 2009, stating that during her discussions with Respondent he repeatedly stated that he had never heard of the Disclosue Rule or the lead information pamphlet, Exhibit 9.)

Subpoena Response, Exhibit 4, and inspection report, Exhibit 10).

During the course of its investigation in this matter, EPA obtained a copy of a letter from the Lead Action for Medicaid Primary Prevention Project, Connecticut Children's Medicaid Center, dated December 9, 2004 ("2004 LAMPP Letter"), notifying Respondent that a child who resided at 11 Orange Street, 2nd Floor, had been found to have an elevated blood-lead level and that lead-based paint hazards were found to exist in the rental unit. (Complaint at paragraph 19; Exhibit 11.) The letter enclosed a report prepared by TRC Environmental Corporation in December of 2004, entitled *Visual Risk Assesment and Scope of Services to Reduce Potential Lead Hazards*, indicating that lead-based paint hazards existed in 11 Orange Street 2nd and 3rd Floors ("2004 TRC Report"). (Exhibit 11.) Finally, the letter informed Respondent that the report should be disclosed to purchasers and tenants pursuant to the Disclosure Rule. (Exhibit 11 at page 1.) Additionally, EPA obtained a State of Connecticut Department of Public Health Lead Inspection Report Form, dated August 20, 2008 ("2008 Lead Inspection Form"), and a lead-based paint abatement order issued by the City of Hartford on August 21, 2008, requiring Respondent to abate and manage lead-based paint at 11 Orange Street 2nd and 3rd Floors ("2008 Hartford Abatement Order"). (Complaint at paragraph 19; Exhibit 12.) The 2008 Hartford Abatement Order also notifed Respondent of the requirements of the Disclosure Rule. (Complaint at paragraph 19; Exhibit 12.)

On April 6, 2009, representatives from EPA Region 1, the City of Hartford Health and Human Services Department, and Connecticut Department of Public Health met with Respondent to conduct a follow-up inspection of his leases and lead paint-related records and to determine whether any of his tenants' children were currently at risk from lead-based paint hazards. During the course of this inspection, EPA gathered two more leases. (Complaint at

paragrah 20; Exhibit 13.)

The allegations in the complaint concern one or more of the following lease transactions between Respondent and his tenants, as more fully described in the discussion of each Count below:

(a) Lease with Gladys Melendez, who became obligated to rent 11 Orange Street, 2nd Floor, on or about September 1, 2007.[2] (See lease included in Subpoena Response, Exhibit 4);

(b) Lease with Felix Colon, who became obligated to rent 12 Orange Street, 1st Floor, on or about October 1, 2007[3] (Exhibit 4);

(c) Lease with Marylin Cotto Rivera, who became obligated to rent 14 Orange Street, #3, on or about June 1, 2008[4] (Exhibit 4);

(d) Natalie Delgado, who became obligated to rent 12 Orange Street, 1st Floor, on or about August 1, 2006[5] (Exhibit 4);

(e) Yaris Sanz, who became obligated to rent 14 Orange Street, 2nd Floor, on or about October 1, 2006[6] (Exhibit 4);

(f) Madelin Regas, who became obligated to rent 14 Orange Street, 3rd Floor, on

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2 Although Ms. Melendez's lease indicates that no children under the age of 18 would occupy the rental unit, the 2008 Hartford Abatement Order indicates that a child under the age of 6 was living in the rental unit when it was inspected by the City on August 20, 2008, less than one year after the date that Ms. Melendez entered into the lease. (Exhibit 4, Melendez lease p. 2 and Exhibit 12, p. 1.)

3 The lease indicates that Mr. Colon planned to occupy his apartment with two children, ages 7 and 9, at the time of the lease transaction. (Exhibit 4, Colon lease p.1).

4 The lease indicates that Ms. Rivera planned to occupy her apartment with one child under the age of 18 at the time of the lease transaction. (Exhibit 4, Rivera lease p. 2).

5 The lease indicates that Ms. Delgado planned to occupy her apartment with two children, ages 6 and 8, at the time of the lease transaction. (Exhibit 4, Delgado lease p. 1).

6 The lease indicates that Ms. Sanz planned to occupy her apartment with three children under the age of 18 at the time of the lease transaction (Exhibit 4, Sanz lease, p.1).

or about October 1, 2006[7] (Exhibit 4);

(g) Blanca Maldonado, who became obligated to rent 11 Orange Street, 2nd Floor, on or about February 1, 2009[8] (Exhibit 12).

A. Count I: Failure to provide lessees with an EPA-approved lead hazard information pamphlet

As noted above, EPA has offered factual and legal support for its assertion that Respondent is a lessor of target housing, that the units in 9-11 Orange Street and 12-14 Orange are target housing subject to the Disclosure Rule, and that Respondent entered into contracts to lease such target housing. The Disclosure Rule requires that lessors of target housing provide lessees with an EPA-approved lead hazard information pamphlet entitled *Protect Your Family From Lead In Your Home* (or an equivalent pamphlet approved by EPA for use in that state) before entering into a contract to lease target housing. 40 C.F.R. § 745.107(a)(1).

As alleged in paragraphs 22-26 of the Complaint, Respondent failed to provide an EPA-approved lead hazard information pamphlet to all of the above-listed tenants except Blanca Maldonado. The leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, and Madelin Regas contained no lead disclosure forms and no reference to the EPA-approved lead hazard information pamphlet. (See leases in Exhibits 4 and 13.) In addition, Respondent admitted that he did not comply with the Disclosure Rule requirements during his meeting with representatives from EPA Region 1 on August 25, 2008. (Complaint at

7 The lease indicates that Ms. Regas planned to occupy her apartment with two children under the age of 18 at the time of the lease transaction (Exhibit 4, Regas lease, p. 1).
8 The lease indicates that Ms. Maldonado planned to occupy her apartment with four children under the age of 18 at the time of the lease transaction (Exhibit 13, Maldonado lease, p. 2).

paragraph 18, and see EPA inspectors' notes, which were signed by Respondent, and inspector's e-mail message, Exhibit 9.)

Based on the absence of any reference to the EPA-approved hazard information pamphlet in or as an attachment to any lease and Respondent's admission that he did not comply with the Disclosure Rule requirements, the Presiding Officer may reasonably conclude that Respondent did not meet the requirement of 40 C.F.R. § 745.107(a)(1) to provide a lead hazard information pamphlet to the tenants listed above before entering into contracts to lease target housing. Respondent's failure to provide the lead hazard information pamphlet to Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, and Madelin Regas constitutes six (6) violations of 40 C.F.R. § 745.107(a)(1), 40 C.F.R. § 745.118(e), and TSCA Section 409, 15 U.S.C. § 2689.

B. Count II: Failure to disclose to lessees the presence of any known lead-based paint or lead-based paint hazards in target housing and/or provide available records of such

The Disclosure Rule requires a lessor to disclose to the lessee the presence of any known lead-based paint and/or lead-based paint hazards in the target housing before the lessee becomes obligated under the lease contract. 40 C.F.R. § 745.107(a)(2). Under 40 C.F.R. § 745.107(a)(2), a lessor also is required to disclose any additional information available concerning 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. Under 40 C.F.R. § 745.107(a)(4), the lessor also is required to provide to the lessee, before the lessee becomes

obligated under a lease contract, any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing being leased. This requirement includes records or reports regarding common areas. "Available" records include records in the lessor's possession or records that are reasonably obtainable by the lessor at the time of the disclosure. See 40 C.F.R. § 745.103.

EPA has provided a sufficient factual and legal basis (see above) for the Presiding Officer to conclude that Respondent entered into a lease with Gladys Melendez for 11 Orange Street, 2nd Floor, on or about September 1, 2007, and Blanca Maldonado for 11 Orange Street, 2nd Floor, on or about February 1, 2009, and that both lease transactions were subject to the Disclosure Rule.

At the time Respondent leased 11 Orange Street, 2nd Floor, to Ms. Melendez, Respondent had the following information pertaining to lead-based paint and/or lead-based paint hazards in the rental unit: the 2004 LAMPP Letter, stating that a child who resided in the rental unit had an elevated blood lead level and that lead-based paint hazards were found to exist in the rental unit, and the 2004 TRC Report, which contained a visual risk assessment of the unit. (Complaint at paragraph 31; Exhibit 11.) The 2004 LAMPP Letter also informed Respondent that the 2004 TRC Report should be disclosed to purchasers and tenants pursuant to the Disclosure Rule. (2004 LAMPP Letter at page 1, Exhibit 11.)

At the time Respondent leased 11 Orange Street, 2nd Floor, to Ms. Maldonado, Respondent had the following information pertaining to lead-based paint and/or lead-based paint hazards in the rental unit: the 2004 LAMPP Letter; the 2004 TRC Report; the 2008 Hartford Abatement Order, which required Respondent to abate and manage lead-based paint and notified Respondent of the requirements of the Disclosure Rule; and the 2008 Lead Inspection Form that

accompanied the abatement order. (Complaint at paragraph 32; and Exhibits 11 and 12.)

Based on the above-described records, the Presiding Officer may reasonably conclude that the lead-based paint and/or lead-based paint hazards in 11 Orange Street, 2nd Floor, were known to Respondent at the time of the Melendez lease and the Maldonado lease, and further, that Respondent knew of the specific locations of the lead-based paint and/or hazards and the condition of the painted surfaces prior to entering into the above leases. The Presiding Officer may also conclude that the 2004 LAMPP Letter and the 2004 TRC Report constitute "records or reports pertaining to lead-based paint or lead-based paint hazards" within the meaning of 40 C.F.R. § 745.107(a)(4), and that such records were "available to" Respondent within the meaning of 40 C.F.R. § 745.107(a)(4) and 40 C.F.R. § 745.103, as of approximately December 9, 2004 (prior to the leases with Ms. Melendez and Ms. Maldonado). (Complaint at paragraphs 30-33.) The Presiding Officer may also conclude that the 2008 Hartford Abatement Order and the 2008 Lead Inspection Form each constitutes "a record or report pertaining to lead-based paint or lead-based paint hazards" within the meaning of 40 C.F.R. § 745.107(a)(4), and that those documents were "available to" Respondent within the meaning of 40 C.F.R. § 745.107(a)(4) and 40 C.F.R. § 745.103, as of approximately August 21, 2008 (prior to the lease with Ms. Maldonado). (Complaint at paragraph 32.)

Respondent was required under 40 C.F.R. §§ 745.107(a)(2) and 745.107(a)(4) to disclose to Ms. Melendez and Ms. Maldonado, before entering into contracts to lease 11 Orange Street, 2nd Floor, the known lead-based paint or lead-based paint hazards in the unit and records or reports pertaining to lead-based paint, including the 2004 LAMPP Letter, the 2004 TRC Report, and (for Ms. Maldonado) the 2008 Hartford Abatement Order and the 2008 Lead Inspection

Form. Respondent's lease contracts with Ms. Melendez and Ms. Maldonado, did not contain, either in the body of the leases or as an attachment, any statement disclosing known lead-based paint or lead-based paint hazards in 11 Orange Street, 2nd Floor, or indicating the lessor's lack of knowledge thereof. (Complaint at paragraphs 27-35; Exhibit 4, Melendez lease; Exhibit 13, Maldonado lease.) The leases did not contain in the body of the leases or as an attachment any reference to records or reports pertaining to lead-based paint or lead-based paint hazards in 11 Orange Street, 2nd Floor. Id. In addition, Respondent admitted that he did not comply with the Disclosure Rule requirements during his meeting with representatives from EPA Region 1 on August 25, 2008. (Complaint at paragraph 18; and see EPA inspector's notes and e-mail, Exhibit 9.)

Based on the legal and factual assertions above, the Presiding Officer may reasonably find that Respondent failed to disclose the presence of, and/or provide records or reports pertaining to, known lead-based paint or lead-based paint hazards before Ms. Melendez and Ms. Moldonado became obligated under contracts to lease target housing on the dates set forth above. Respondent's failure to disclose the presence of and the available records pertaining to known lead-based paint and lead-based paint hazards to Gladys Melendez and Blanca Maldonado constitutes two (2) violations of 40 C.F.R. § 745.107(a)(2) and/or 40 C.F.R. § 745.107(a)(4), 40 C.F.R. § 745.118(e), and TSCA Section 409, 15 U.S.C. § 2689.

C. Count III: Failure to include the Lead Warning Statement as an attachment to, or within, the contract to lease target housing

EPA has provided a sufficient factual and legal basis (above) for the Presiding Officer to conclude that Respondent entered into leases with Gladys Melendez, Felix Colon, Natalie

Delgado, Yaris Sanz, and Madelin Regas, and that these lease transactions were subject to the Disclosure Rule. Section 113(b)(1) of the Disclosure Rule requires a lessor to include within, or as an attachment to the contract to lease target housing the "Lead Warning Statement." 40 C.F.R. § 745.113(b)(1).

The contracts between Respondent and Gladys Melendez, Felix Colon, Natalie Delgado, Yaris Sanz, and Madelin Regas did not include a Lead Warning Statement,[9] either in the body of the lease or as an attachment. (Complaint at paragraphs 36-40; leases at Exhibit 4.) In addition, Respondent admitted that he did not comply with the Disclosure Rule requirements during his meeting with representatives from EPA Region 1 on August 25, 2008. (Complaint at paragraph 18; and see EPA inspector's notes and e-mail, Exhibit 9.) Therefore, the Presiding Officer may reasonably conclude that Respondent failed to include the Lead Warning Statement within the contracts to lease target housing discussed above or as an attachment to such contracts. Respondent's failure to include the Lead Warning Statement as an attachment, or within five contracts to lease target housing constitutes five (5) violations of 40 C.F.R. § 745.113(b)(1), 40 C.F.R. § 745.118(e), and TSCA Section 409, 15 U.S.C. § 2689.

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9 The lead warning statement reads as follows:

> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not taken care of properly. 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 lead-based paint hazards in the dwelling. Tenants

D. Count IV: Failure to include as an attachment to or within the lease contract, a statement by the lessor disclosing the presence of known lead-based paint or lead-based paint hazards, or lack of knowledge thereof

The Disclosure Rule requires that each contract to lease target housing include a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing or indicating no knowledge thereof. 40 C.F.R. § 745.113(b)(2). The lessor is also required to disclose any additional information concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that such paint or hazards exist, their location, and the condition of the painted surfaces. Id.

EPA has provided a sufficient factual and legal basis (above) for the Presiding Officer to conclude that: (1) Respondent entered into leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz and Madelin Regas; (2) these lease transactions were subject to the Disclosure Rule; and (3) at the time Respondent entered into a lease with Gladys Melendez, information was available to him concerning known lead-based paint and lead-based paint hazards at 11 Orange Street, 2nd Floor, including the basis for determining that such paint or hazards existed, their location, and the condition of the painted surfaces. See Count II, above.

Respondent's leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz and Madelin Regas did not include a statement by Respondent disclosing the presence of known lead-based paint or lead-based paint hazards in Respondent's rental units, or lack of knowledge thereof, either in the body of the lease or as an attachment. (Complaint at paragraphs 41-45; leases at Exhibit 4.) In addition, Respondent admitted that he did not comply

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must also receive a federally approved pamphlet on lead poisoning prevention.

with the Disclosure Rule requirements during his meeting with representatives from EPA Region 1 on August 25, 2008 (Complaint at paragraph 18; and see EPA inspectors' notes, Exhibit 9.) Based on these factual assertions, the Presiding Officer may reasonably conclude that Respondent failed to include in lease contracts with Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz and Madelin Regas, or as an attachment thereto, a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or lack of knowledge thereof. This failure constitutes six (6) violations of 40 C.F.R. § 745.113(b)(2), 40 C.F.R. § 745.118(e), and TSCA Section 409, 15 U.S.C. § 2689.

In summary, the factual allegations of the Complaint, which are deemed admitted by means of Respondent's failure to timely answer the Complaint, establish a *prima facie* case that Respondent violated the provisions of TSCA, the Act and the Lead Disclosure Rule.

III. A Penalty Of Up To $159,063 Should Be Assessed, Based On the Penalty Assessment Criteria Of TSCA and the ERPP As Applied to the Circumstances of This Case

EPA's complaint proposed civil penalties of up to $11,000 per violation against Respondent for the 18 violations described above which occurred before January 13, 2009, and up to $16,000 for one violation described above that occurred on February 1, 2009. (Complaint at paragraphs 46-49.) EPA's complaint did not propose a specific penalty. At this time, and as further explained below, Complainant recommends the imposition of a $159,063 civil penalty. If, in response to this motion, Respondent timely supplies financial documentation to substantiate an inability to pay the proposed penalty, EPA will review such information and move for the

assessment of a revised default penalty, if appropriate. The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that the proposed $159,063 penalty amount is appropriate.

Pursuant to Section 1018(b)(5) of the Act, 42 U.S.C. § 4852d(b)(5), and 40 C.F.R. § 745.118(e), failure to comply with the disclosure requirements in 40 C.F.R. Part 745, Subpart F, is a violation of TSCA Section 409, 15 U.S.C. § 2689. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), provides that any person who violates a provision of TSCA Section 409, 15 U.S.C. § 2689, shall be liable to the United States for a civil penalty. Sections 1018(b)(5) of the Act and 40 C.F.R. § 745.118(f) provide that, for purposes of enforcing the Lead Disclosure Rule under TSCA, the penalty for each violation applicable under Section 16 shall be no more than $10,000. Penalties of up to $11,000 per violation may be assessed for violations occurring between July 28, 1997 and January 12, 2009, pursuant to 40 C.F.R. § 745.118(f), the Debt Collection Improvement Act of 1996, found at 31 U.S.C. § 3701, and 40 C.F.R. Part 19. Effective January 13, 2009, the maximum penalty per violation is $16,000. 40 C.F.R. Part 19.

The proposed civil penalty has been determined in accordance with TSCA Section 16, 15 U.S.C. § 2615, and the provisions of 40 C.F.R. § 745.118(f). To develop the proposed penalty, Complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's December 2007 *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy* "ERPP" (See ERPP, Exhibit 14.) The ERPP establishes a framework for calculating penalties in Disclosure Rule enforcement cases, incorporating the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B). Such statutory factors include 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.

Pursuant to the ERPP, penalties are determined in two stages against responsible parties: (1) determination of a "gravity-based penalty"; and (2) adjustments to the gravity-based penalty. The gravity refers to the overall seriousness of the violation. (Exhibit 14, ERPP at 11.) The gravity-based penalty is determined by considering the nature and circumstances of the violation and the extent of harm that may result from the violation. Id. The ERPP assigns a "circumstance level" to each type of violation, and an "extent" to each type of violation, and the combination of circumstance level and extent (on a penalty matrix) determines the gravity-based penalty for each violation of the Disclosure Rule. Id.

The "circumstance level" of the violation reflects the probability that a buyer or lessee of the property will suffer harm based on the particular violation by the seller or lessor. Id. at 12. The harm under the ERPP is the degree to which the buyer or lessee is denied the ability to properly assess and weigh the potential for human health risk from exposure to lead-based paint when entering into a transaction to buy or lease target housing. Id. at 12. Circumstance levels range from 1 to 6, "Level 1 or 2" having the highest probability of impairing a tenant's ability to assess information required to be disclosed; "Level 3 or 4" having a medium probability of impairing a tenant's ability to assess information required to be disclosed; and "Level 5 or 6" having the lowest probability of impairing a tenant's ability to assess information required to be disclosed. Id.

The "extent" of harm is determined to be major, significant, or minor, depending on whether the risk factors are high for childhood lead poisoning to occur as the result of the

violation. (Exhibit 14, ERPP at 13.) "Extent" is determined by two facts: the age of any children living in the target housing at the time of the lease, and whether a pregnant woman lives in the target housing. Id. The ERPP provides that the agency may use a significant extent factor when the age of the youngest individual is not known. (Exhibit 14, ERPP at 13.) A violator may mitigate the extent factor by offering evidence that no children or pregnant women were present in the housing at the time of the violation. Id.

Under the ERPP, a violation involving a unit where a pregnant woman or children under the age of 6 resides is considered a "Major" extent level because such violation has the potential to cause serious damage to human health. (Exhibit 14, ERPP at 13.) A violation involving tenants whose youngest children are between the ages of 6 and 17 is considered a "Significant" extent level because such violation has the potential to cause significant damage to human health. Id. A violation involving tenants who are all at least 18 years or older is considered a "Minor" extent level because such violation has the potential to cause a lesser amount of damage to human health. Id.

The rationale for the "Major" classification is that children under the age of six are most likely to be adversely affected by the presence of lead-based paint and lead-based paint hazards because they are in the early stages of physical development and because they have a propensity to come into contact with lead-based paint through play, putting things in their mouths and eating items they put in their mouths. See Id. The effects of lead exposure on children under six years old include intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavior problems. (Exhibit 14, ERPP at 1.) Lead exposure before or during pregnancy can alter fetal development and cause miscarriages.

(Exhibit 14, ERPP at 13.) Exposure to lead-based paint and lead-based paint hazards also poses dangers to children between the ages of 6 and 18. Id. The ERPP takes this fact into account in the "significant" classification. Id.

After applying these factors, one turns to the "Gravity-Based Penalty Matrix," which incorporates the factors into a chart, in order to determine the gravity-based penalty amount. (Exhibit 14, ERPP at 30-B.) The appropriate cell of the matrix is determined according to the circumstance level and extent category of the violation. Id. Each requirement of the Disclosure Rule is separate and distinct from the other requirements. (Exhibit 14, ERPP at 15.) Each lease is considered a "stand alone" transaction. (Exhibit 14, ERPP, at 16.) Penalties for each violation found in each individual lease transaction must be assessed separately. Id.

After calculating the gravity-based penalty, EPA may adjust the penalty upward or downward based on the following factors: (1) ability to pay/ability to continue in business; (2) history of prior violations; (3) degree of culpability; and (4) such other factors as justice may require, which include downward adjustments for: supplemental environmental projects, voluntary disclosure, potential for harm due to risk of exposure, litigation risk, the violator's attitude, and size of business. (Exhibit 14, ERPP at 14-23.) The penalty may also be adjusted upwards to recoup the economic benefit of noncompliance, although generally the economic benefit of noncompliance is low in Disclosure Rule cases and therefore not included in the penalty. (Exhibit 14, ERPP at 14.) A chart summarizing the recommended penalty for Counts I-IV is included in Exhibit 20.

A. Count I: Failure to provide lessees with an EPA-approved lead hazard information pamphlet.

Failure to provide an EPA-approved lead hazard information pamphlet to a purchaser or lessee pursuant to 40 C.F.R. § 745.107(a)(1) results in a *high* probability of impairing the lessee's ability to properly assess the risks associated with exposure to lead-based paint and to weigh this information with regard to leasing the target housing in question. As a result, under the ERPP, a violation of 40 C.F.R. § 745.107(a)(1) is a *Level 1* violation, the highest circumstance level. (Exhibit 14, ERPP at 27.)

The purpose of requiring the lessor to provide an EPA-approved lead hazard information pamphlet is to ensure that a tenant is aware of the potential harm associated with exposure to lead-based paint or lead-based paint hazards and is aware of measures he or she can take to minimize a child's contact with lead-based paint or lead-based paint hazards in target housing. The lead hazard information pamphlet entitled *Protect Your Family From Lead in Your Home* contains numerous important pieces of information, including: (1) a brief explanation of the Disclosure Rule; (2) the potential health effects of exposure to lead-based paint; (2) an explanation about how lead gets into the body; (3) a discussion of where lead-based paint is found; (3) an explanation of how to have your family checked for lead exposure; (4) an explanation of how to identify lead hazards in housing; (5) an explanation of how to test your home for lead; (6) steps you can take to protect your family from lead exposure; and (7) steps you can take to reduce lead hazards in the home. (See Exhibit 15.) If a tenant does not receive the pamphlet, the tenant may be denied critical information about the risks of exposure to lead-based paint or lead-based paint hazards and the steps that he or she can take to minimize his or her family's exposure to lead-based paint or lead-based paint hazards.

Because Respondent did not provide a pamphlet to Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, and Madelin Regas, these tenants were denied the opportunity to become aware that lead-based paint could be present in the housing based on its age and to weigh the potential risk to their families *before* they entered into the lease. Further, they were denied the information in the pamphlet about specific measures they could take to prevent their children from being lead-poisoned *if they did choose* to enter into the lease and live in Respondent's rental units for any period of time. (See Exhibit 15.) In this case, Respondent's failure to provide a lead hazard information pamphlet to Gladys Melendez was especially significant because elevated blood lead levels had already been reported in the very apartment that Respondent leased to Ms. Melendez (Complaint at paragraph 48(a); and see Exhibit 11.)

The appropriate penalty for the violation of 40 C.F.R. § 745.107(a)(1) associated with the lease of Gladys Melendez is the maximum allowable penalty, or $11,000, because a child under the age of six lived in her apartment during her lease term; the extent of harm is, therefore, considered "major." The appropriate penalty for the violations of 40 C.F.R. § 745.107(a)(1) associated with the leases of Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, and Madelin Regas is $7,740 for each lease transaction because these tenants had children whose ages were unknown or undocumented at the time they became obligated to rent Respondent's rental units. For these five leases, the extent of harm is considered "significant." Thus, a total penalty of $49,700 is appropriate for the six violations of this provision.

B. Count II: Failure to disclose to lessees the presence of any known lead-based paint or lead-based paint hazards in target housing and/or provide available records of such.

The purpose of requiring an owner of target housing to disclose to lessees the presence of known lead-based paint and/or lead-based paint hazards in target housing is to ensure that tenants are aware of the presence of lead-based paint and/or lead-based paint hazards and can incorporate this fact into their decision as to whether to move into the housing. If they choose to move into the housing, such disclosure enables them to take steps to prevent exposure to lead-based paint. By failing to disclose to lessees the presence of known lead-based paint and/or lead-based paint hazards, the landlord denies tenants the right to make an informed decision as to whether or not to lease the housing. The potential harm is that tenants may unwittingly expose themselves and their families to lead-based paint and/or lead-based paint hazards, and thereby suffer the negative health effects associated with such exposure. (See Exhibit 14, ERPP at 12.)

In the instant case, Respondent placed two families, including one baby and four children of unknown age, at serious risk of exposure to lead-based paint by failing to disclose to them the presence of lead-based paint and specific, known lead-based paint hazards in 11 Orange St., 2nd Floor, before entering into a lease for that unit. As discussed above, such information was contained in documents that were available to Respondent at the time it entered into leases, including the 2004 LAMPP Letter, the 2004 TRC Report, and (for Ms. Maldonado) the 2008 Hartford Abatement Order and Lead Inspection Form. (Complaint at paragraph 48(b); and see Exhibits 11 and 12.)

Failure to disclose the presence of any known lead-based paint and/or lead-based paint hazards represents the greatest deviation from the Section 1018 regulations. A failure to disclose

such information and/or provide records or reports regarding the presence of lead-based paint and/or lead-based paint hazards has a *high* probability of impairing a lessee's ability to properly assess and weigh the factors associated with human health risk when leasing target housing and greatly increases the likelihood of exposure to lead. Consequently, under the Disclosure Rule ERPP, a violation of 40 C.F.R. § 745.107(a)(2) and/or a violation of 40 C.F.R. § 745.107(a)(4) is a *Level 1* violation, the highest circumstance level. (See Exhibit 14, ERPP at 12 and 27.)

Respondent violated this provision when he entered into two leases. Although the September 1, 2007 lease with Gladys Melendez for 11 Orange Street, 2nd Floor, does not list any children, the August 20, 2008 Lead Inspection Form attached to the 2008 Hartford Abatement Order indicates that there was a baby living in the apartment during the lease term. (Complaint at paragraph 48(b) and see Exhibit 12.) Because Gladys Melendez occupied 11 Orange Street, 2nd Floor, with a child under the age of six, the extent of harm is considered "major," warranting a penalty of $11,000. Because Blanca Maldonado became obligated to lease 11 Orange Street, 2nd Floor, after January 12, 2009, and because she occupied the rental unit with four children of unknown ages, the extent of harm is considered "significant," warranting a penalty of $8,500. Thus, a penalty of $19,500 is appropriate for two violations of this provision.

C. Count III: Failure to include the Lead Warning Statement as an attachment to, or within, the contract to lease target housing.

Failure to include the Lead Warning Statement in the language of the lease contract or an attachment thereto, pursuant to 40 C.F.R. § 745.113(b)(1), results in a *high* probability of impairing a lessee's ability to properly assess the risks associated with exposure to lead-based

paint and to weigh this information with regard to leasing the target housing in question. As a result, under the Disclosure Rule ERPP, a violation of 40 C.F.R. § 745.113(b)(1) is a *Level 2* violation. (Exhibit 14, ERPP at 12 and 27.)

In this case, because Respondent failed to include the Lead Warning Statement in leases with Gladys Melendez, Felix Colon, Natalie Delgado, Yaris Sanz, and Madelin Regas, these tenants were denied information alerting them that pre-1978 housing may contain lead-based paint or lead-based paint hazards because of its age, and that such paint/hazards pose particular health risks to young children and pregnant women. See 40 C.F.R. 745.113(b)(1). Further, these tenants were denied information in the Lead Warning Statement alerting them that (a) they were entitled to receive information about the presence of known lead-based paint and lead-based paint hazards in the housing and that (b) a federally-approved lead poisoning prevention pamphlet was available and that Respondent was required to provide such pamphlet to them before entering into the lease. Id. Had they been provided with the Lead Warning Statement before entering into the lease, these tenants could have taken the opportunity to inquire as to the age of the apartment building, could have requested additional information from Respondent about lead-based paint in their rental units, and could have factored into their decision as to whether or not to enter into the lease the possibility that their apartment contained lead-based paint. Respondent's failure to include the Lead Warning Statement was especially significant with respect to Gladys Melendez, Felix Colon, Natalie Delgado, Yaris Sanz, and Madelin Regas, because no other form of disclosure was provided to them.

The appropriate penalty for the violation of 40 C.F.R. § 745.113(b)(1) associated with the lease of Gladys Melendez is $10,320 because a child under the age of six lived in her apartment

during her lease term; the extent of harm is, therefore, considered "major." The appropriate penalty for the violations of 40 C.F.R. § 745.113(b)(1) associated with the leases of Felix Colon, Natalie Delgado, Yaris Sanz, and Madelin Regas is $6,450 for each lease transaction because these tenants had children whose ages were unknown or undocumented at the time they became obligated to rent Respondent's rental units. The extent of harm for these four lease transactions is, therefore, considered "significant." A total penalty of $36,120 is appropriate for the five violations of 40 C.F.R. §745.113(b)(1).

D. Count IV: Failure to include as an attachment to or within the lease contract, a statement by the lessor disclosing the presence of known lead-based paint or lead-based paint hazards, or lack of knowledge thereof.

Failing to include the statement of knowledge of lead-based paint and/or lead-based paint hazards as an attachment or within the contract to lease target housing results in a *medium* probability of impairing the lessee's ability to properly assess the risks associated with exposure to lead-based paint and/or lead-based paint hazards and to weigh this information with regard to leasing the target housing in question. Because the intent of this provision is to put potential lessees on notice of specific information relating to the presence of lead in the housing, violation of this provision deprives lessees of their right to make decisions based upon risk. As a result, under the Disclosure Rule ERPP, a violation of 40 C.F.R. § 745.113(b)(2) is a *Level 3* violation. (See Exhibit 14, ERPP at 12 and 27.) In this case, Respondent failed to provide the statement of knowledge in leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, and Madelin Regas.

The appropriate penalty for the violation of 40 C.F.R. § 745.113(b)(2) associated with the lease of Gladys Melendez is $7,740 because a child under the age of six lived in her apartment during her lease term; the extent of harm for this violation is, therefore, considered "major." The appropriate penalty for the violations of 40 C.F.R. § 745.113(b)(1) associated with the leases of Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, and Madelin Regas is $5,160 for each lease transaction because these tenants had children whose ages were unknown or undocumented at the time they became obligated to rent Respondent's rental units. The extent of harm for these five violations is, therefore, considered "signficant." A total penalty of $33,540 is appropriate for the six violations of 40 C.F.R. § 745.113(b)(2).

Penalty Adjustment Factors

In accordance with TSCA Section 16, 15 U.S.C. § 2615, 40 C.F.R. § 745.118(f), and the ERPP, EPA also has taken into account the following with respect to the Respondent: 1) Respondent's degree of culpability; 2) Respondent's history of prior such violations; 3) Respondent's ability to pay the proposed penalty; 4) the effect on Respondent's ability to do business; and 5) such other matters as justice may require.

E. Upward adjustment of gravity-based penalty for degree of culpability.

As discussed above, after calculating the gravity-based penalty, EPA may adjust the penalty upward for degree of culpability. EPA is instructed to consider the following points in assessing the degree of culpability: 1) the degree of control the violator had over the events constituting the violation; 2) any actual knowledge of the presence of lead-based paint and/or

lead-based paint hazards in the target housing being sold or leased; 3) the level of sophistication of the violator in dealing with compliance issues; and 4) the extent to which the violator knew of the legal requirement that was violated (for example, whether the requirement to disclose information pertaining to lead-based paint and/or lead-based paint hazards is mentioned in an abatement order received by the violator). (Exhibit 14, ERPP at 19.)

In this case, Respondent was informed of both the legal requirement to disclose information and the actual presence of lead-based paint hazards before entering into several of the leases involved in this case. On August 9, 2007, EPA Region 1 served a subpoena upon the Respondent, pursuant to Section 11(c) of TSCA, 15 U.S.C. § 2610(c), to assess Respondent's compliance with the Lead Disclosure Rule (Exhibit 7.) The Subpoena provided clear notice to Respondent of the Disclosure Rule requirements and enclosed a compliance assistance package (See Exhibit 7.) EPA hand-delivered a Subpoena Notice of Noncompliance with another copy of the Subpoena on November 2, 2007. (Exhibit 7.) Nevertheless, Respondent failed to comply with the Disclosure Rule when he entered into leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera and Blanca Maldonado after August 9, 2007. As referenced above, the 2004 LAMPP Letter and the 2008 Hartford Abatement Order also informed Respondent about the requirements of the Disclosure Rule. (Exhibits 10 and 12.) In addition, Respondent entered into his lease with Blanca Maldonado (failing to provide her a copy of the 2004 LAMPP Letter, the 2004 TRC Report, the 2008 Hartford Abatement Order, and the 2008 Lead Inspection Report) *after* EPA served Respondent with the detailed Petition to Enforce TSCA Subpoena on June 24, 2008 and met with Respondent on August 25, 2008. (See Maldonado lease, Exhibit 13; Petition and Certificate of Service, Exhibit 8; 2008 Lead Inspection Form and Hartford

Abatement Order, Exhibit 12; and meeting notes, Exhibit 9.) At that August 25, 2008 meeting, EPA provided a Spanish interpreter and another compliance assistance packet. (See Exhibit 9.)

The appropriate upward adjustment to the gravity-based penalties associated with Respondent's leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera and Blanca Maldonado is twenty-five (25) percent, the maximum allowable increase for this factor. A 25% upward adjustment of gravity-based penalties associated with the leases of these tenants is appropriate because Respondent had control over the events constituting the violation; had actual knowledge of lead-based paint and/or lead-based paint hazards in the target housing leased to Gladys Melendez and Blanca Maldonado; and Respondent was provided written notice at least three times (through EPA Region 1's Subpoena, the Subpoena Notice of Noncompliance and the 2004 LAMPP Letter) of the Disclosure Rule requirements that were violated when he entered into leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera, and Blanco Maldonado.

The total proposed penalty, after applying a 25% upward adjustment for culpability for the Gladys Melendez, Felix Colon, Marylin Cotto Rivera, and Blanco Maldonado leases, is $159,063. (See penalty chart, Exhibit 19.)

F. Adjustment for history of violations

EPA made no upward adjustment for history of violations because Respondent had no previous order, consent agreement, default judgment, or conviction for Disclosure Rule violations. (See Disclosure Rule ERPP, Exhibit 14, at 18.)

G. Adjustment for such other factors as justice may require

EPA made no adjustments for such other factors as justice may require because none of the considerations in the ERPP for that factor were applicable (EPA may provide downward adjustments for documented lack of risk, supplemental environmental projects, voluntary disclosure of violations, litigation risk, or cooperative behavior). (See Disclosure Rule ERPP, Exhibit 14, at 19-23.) Although the ERPP does not provide for an *upward* adjustment for Respondent's lack of cooperation, Respondent's lack of cooperation has been noteworthy, including (a) refusal to allow a consensual inspection in 2007, as described in the Subpoena; (b) failure to respond to both the Subpoena and the Subpoena Notice of Noncompliance; (c) failure to accept certified mail service of the Subpoena and the Subpoena Notice of Noncompliance, resulting in a need for an EPA employee to travel to Connecticut from Boston to hand-serve those two documents; (d) failure of Respondent to supply requested financial documentation so that EPA could assess Respondent's ability to pay; and (e) failure to answer the Complaint. (See Subpoena and Subpoena Notice of Non-compliance and certificates of hand delivery, Exhibit 7.)

H. No adjustment of gravity-based penalty for ability-to-pay or ability to do business

EPA made no downward adjustment for ability-to-pay or ability to do business. Prior to filing the Complaint, EPA learned that Respondent had filed and withdrawn a bankruptcy petition in 2008 (see Exhibit 17), so EPA was uncertain as to whether Respondent could pay a significant penalty. Accordingly, when EPA filed the Complaint, EPA provided Respondent with a list of documents needed to substantiate any inability-to-pay claim (see Exhibit 16) and had several conversations with Respondent and/or his wife about the need to submit such

documentation in order to substantiate an inability-to-pay claim. Respondent did not submit such documentation or answer the Complaint.

Although EPA must make a *prima facie* case that the proposed penalty is appropriate considering all of the statutory penalty factors, EPA may *presume* that a respondent has an ability to pay until the respondent makes a claim to the contrary "because the Agency's ability to gather the necessary financial information about a respondent is limited and the respondent is in the best position to obtain the relevant financial records about its own financial condition." *In re Spitzer Great Lakes*, 9 E.A.D. 302, at 321 (EAB 2000) (quoting *In re New Waterbury*, 5 E.A.D. 529, 541 (EAB 1994)); *In re CDT Landfill Corp.*, 11 E.A.D. 88,122 (EAB 2003); and *In re. Donald Cutler*, 11 E.A.D. 622, 632 (EAB 2004). Accordingly, if a respondent fails to properly notify EPA that it plans to assert an inability-to-pay claim or fails to produce supporting financial information, then the Presiding Officer has the *discretion* to waive consideration of the ability to pay factor. See *Spitzer Great Lakes* at 321 (in which the EAB upheld a presiding officer's decision to exclude consideration of ability to pay in a TSCA case when the respondent failed to raise ability to pay in its answer and then failed to comply with a subsequent order to produce financial documentation); see also *CDT Landfill Corp.* at 123 (where the EAB reiterated the same standard, but found that EPA did not meet its burden of proof after the presiding officer chose *not* to waive consideration of ability to pay after Respondent produced a late financial balance sheet). The discretion of a presiding officer to disregard ability-to-pay claims after a respondent fails to provide sufficient supporting documentation is consistent with 40 C.F.R. § 22.19(g) (governing prehearing exchanges), which provides that "[w]here a party fails to provide information within its control as required pursuant to this section, the Presiding Officer

may, in his discretion: (1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issue a default order under § 22.17(a)." See *New Waterbury* at 542, footnote 24 (discussing the previous version of this regulation).

Without more information about Respondent's sources of income, current assets, and debts, EPA is unable to further consider Respondent's ability to pay or continue to do business.[10] If, in response to this motion, Respondent provides financial information that would substantiate a lower penalty, EPA will propose an adjusted amount. If Respondent fails to do so, EPA proposes that the Regional Judicial Officer find that EPA made satisfactory efforts to consider ability-to-pay; that Respondent failed to cooperate; that any inability-to-pay claim is waived; that consideration of the other statutory factors in and of themselves justifies the penalty; and that a penalty of $159,063 is therefore merited.

As summarized in Sections III(A) - (F) above, absent further information about Respondent's ability to pay, the total proposed penalty of $159,063 is reasonable.

IV. Conclusion

The Complainant requests that the Presiding Officer issue an order: (1) finding that Respondent is in default; (2) finding that Respondent violated the federally enforceable

10 Even a review of Respondent's current property holdings does not yield sufficient information for EPA to determine whether Respondent can pay the penalty. Respondent currently owns two of the six buildings that he owned at the beginning of EPA's investigation. (See updated property research, Exhibit 19.) EPA does not know whether Respondent has other sources of income besides rental income.

provisions of Section 409 of TSCA, 15 U.S.C. § 2689, and the Disclosure Rule, 40 C.F.R. Part 745, Subpart F; and (3) assessing an appropriate penalty in the amount of $159,063.

Respectfully submitted,

Catherine Smith
Senior Enforcement Counsel
U.S. Environmental Protection Agency,
Region 1
5 Post Office Square, mail code OES04-4
Boston, MA 02109-3912
(617) 918-1777
smith.catherine@epa.gov

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