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**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of)
) **Docket No. TSCA-05-2007-0002**
)
Frank J. Davis,) **Proceeding to Assess a Civil Penalty**
) **under Section 16(a) of the Toxic**
) **Substances Control Act**
Respondent)

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Complainant, Chief of the Chemicals Management Branch, Land and Chemicals Division, Region 5, U.S. EPA ("Complainant" or "U.S. EPA"), in accordance with the Order dated May 14, 2007 ("Prehearing Exchange Order") and Section 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. § 22.19(a), respectfully submits the following Initial Prehearing Exchange:

I. Desired or Required Location of the Hearing

The Consolidated Rules provide that the hearing shall be held in the county where the respondent resides or conducts the business which the hearing concerns; in the city in which the relevant EPA Regional Office is located; or in Washington DC, unless the Presiding Administrative Law Judge (the "Court") determines that there is good cause to hold it at another location or by telephone. 40 C.F.R. §§ 22.19(d) and 22.21(d). Respondent resides and conducts business in Marion County, Indiana. In light of the fact that Respondent is represented *pro se*, Complainant requests that the hearing be held in Marion County, Indiana.

II. Expected Witnesses

This section includes the names of witnesses Complainant intends to call, together with a brief narrative summary of each witness's anticipated testimony, as required by Paragraph 2 of the Prehearing Exchange Order and 40 C.F.R. § 22.19(a)(2)(i):

- (1) Estrella Calvo, *Environmental Protection Scientist, Land and Chemicals Division, U.S. EPA Region 5*. Ms. Calvo's duties include serving as an enforcement officer and case developer in the investigation of violations of the regulations promulgated by U.S. EPA at 40 C.F.R. Part 745, Subpart F, entitled "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (the "Disclosure Rule"). Ms. Calvo will testify about her review of the evidence compiled as a result of U.S. EPA's regulatory oversight of Respondent's rental business and property sales, and the factual basis for Complainant's determination that Respondent is in violation of the Disclosure Rule and, as a result, Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689. Ms. Calvo will testify regarding the manner in which she compiled the documentary evidence regarding Respondent's ownership of the subject properties. She will also testify about how Complainant calculated the penalty proposed in the complaint, applying the statutory penalty factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), as explained by U.S. EPA's Section 1018 - Disclosure Rule Enforcement Response Policy, dated February 2000, and as set forth in greater detail in Section VI, below.

If necessary, Ms. Calvo will testify regarding the delegation of authority pertaining to the Complainant in this matter.

If necessary, Ms. Calvo will provide testimony sufficient to authenticate certain exhibits contained in this prehearing exchange.

- (2) Edward Pilny, *Lead Inspector, Land and Chemicals Division, U.S. EPA Region 5.*

Mr. Pilny's duties include serving as an inspector in the investigation of lead disclosure violations under the Disclosure Rule. Mr. Pilny will testify regarding the joint initiative by U.S. EPA and the U.S. Department of Housing and Urban Development ("HUD") to enforce compliance with the requirements of Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851. As explained at greater length below in Complainant's response to Question #3, Mr. Pilny will testify regarding the conversation he had with Respondent on April 25, 2005 and his subsequent trip to Indianapolis, Indiana for the purpose of conducting an inspection of Respondent's lease and sale transaction records on April 29, 2005. Mr. Pilny will further testify regarding U.S. EPA's subsequent efforts to obtain lease and purchase information from Respondent.

- (3) William Messick, *Environmental Health Specialist, Indiana Licensed Lead Inspector and Risk Assessor, Health and Hospital Corporation of Marion County, Indiana.*

Mr. Messick's duties include performing lead inspections and risk assessments to determine potential lead paint, lead paint hazards and housing code violations in properties in Marion County, Indiana. Mr. Messick's other duties include serving as code enforcement officer and case developer in the investigation of properties with lead paint hazards and housing code violations. Mr. Messick will testify to the condition of the properties owned or formerly owned by Respondent at 4506 E. Washington Street, 2822 English Avenue, and 725 North Sherman Drive, Indianapolis, Indiana. Mr. Messick will also testify regarding lead paint hazards

that existed at these properties; violations at these properties of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana; and when and whether the violations were corrected.

- (4) Keeper of the records for the Center Township Assessor's Office for Marion County, Indiana. If necessary, this witness will testify as to the accuracy of CX-1 through CX-10, which support Complainant's allegations regarding Respondent's ownership of the properties at issue in this matter.
- (5) Dr. Chris Weis, *Senior Toxicologist, National Enforcement Investigations Center, United States Environmental Protection Agency*. Dr. Weis is a Senior Toxicologist at the National Enforcement Investigations Center in Denver, Colorado. He may be called as an expert witness to testify about the hazards to human health or the environment presented by lead-based paint, including the hazards associated with lead paint dust, paint chips or particles. Dr. Weis may testify about the various studies and other research that he has conducted with respect to the health effects associated with ingestion of or exposure to lead-based paint. He may offer expert opinion testimony about the specific hazards or potential hazards to human health or the environment posed by lead-based paint, including but not limited to the adverse health effects of lead poisoning, such as the effects on the development or functioning of the nervous system and internal organs. He may further testify as to how the violations alleged in the complaint may have increased the risks of exposure of humans to lead-based paint or lead-based paint dust or other fragments. Dr. Weis may also testify in Region 5's rebuttal case, in response to testimony and other evidence presented by Respondent. Dr. Weis' Personal Qualification Statement is attached as CX-49, and his Bibliography is attached as CX-50.

- (6) Mark Ewen, *Principal, Industrial Economics, Incorporated*. Mr. Ewen is a Principal of Industrial Economics, Incorporated, an economics and environmental consulting firm located at 2067 Massachusetts Avenue, Cambridge, Massachusetts 02140. Mr. Ewen will testify as an expert witness in the areas of forensic analysis of financial information and analyses of ability to pay. He will testify about the standard methodology used by professionals in his field to evaluate individuals' financial status and ability to pay, and he will provide his expert opinions and conclusions as to Respondent's financial status and ability to pay the penalty proposed in the Complaint. Mr. Ewen will testify about his review of Respondent's tax returns and other relevant financial information. He will testify about his assessment of the sufficiency or reliability of the financial information submitted by Respondent, and he may identify other categories of information or areas of inquiry that are relevant to an assessment of Respondent's ability to pay. Mr. Ewen will also testify about his review of public records obtained by Complainant, and about how the information contained in such records is relevant to the evaluation or assessment of Respondent's ability to pay. Mr. Ewen's Curriculum Vitae is attached as CX-51.
- (7) Respondent's Witnesses: Complainant reserves the right to call any of Respondent's witnesses in either its case in chief or in its rebuttal case.

Complainant reserves the right not to call any of the above-listed witnesses at hearing. In addition, Complainant reserves the right to expand, or otherwise modify the scope, extent, and areas of testimony of any of these witnesses where appropriate. Such changes may be occasioned by the discovery of new evidence or witnesses, the unavailability of one or more witnesses, prehearing stipulations of fact between the parties, rulings on motions, or any other legitimate purpose.

III. Exhibits to be Offered in Evidence

- CX-1: Township Assessor Records from Marion County, Indiana for the property at 1838 Brookside Avenue
- CX-2: Township Assessor Records from Marion County, Indiana for the property at 2822 English Avenue
- CX-3: Township Assessor Records from Marion County, Indiana for the property at 3780 North Parker Avenue
- CX-4: Township Assessor Records from Marion County, Indiana for the property at 2039 Roosevelt Avenue
- CX-5: Township Assessor Records from Marion County, Indiana for the property at 402 South Rural Street
- CX-6: Township Assessor Records from Marion County, Indiana for the property at 815 North Rural Street
- CX-7: Township Assessor Records from Marion County, Indiana for the property at 725 North Sherman Drive
- CX-8: Township Assessor Records from Marion County, Indiana for the property at 2518 North Temple Avenue
- CX-9: Township Assessor Records from Marion County, Indiana for the property at 4506 East Washington Street
- CX-10: Township Assessor Records from Marion County, Indiana for the property at 2140 East 34th Street
- CX-11: Telephone call log and notes of Edward R. Pilny, Region 5 U.S. EPA, documenting, among other things, Mr. Pilny's telephone conversation with Respondent regarding scheduling a 1018 lead-based paint disclosure inspection
- CX-12: U.S. EPA Notice of Inspection for Lead Paint
- CX-13: Certified Request for Information Letter issued to Respondent on May 3, 2005 by Complainant, asking Respondent, among other things to: "identify and produce copies of all documents relating to the leasing of each rental unit at the properties identified, above, in request #1, including but not limited to, leases, attachments and addendums" (CX-13, p. 49); and "provide copies of any sales contract documents and the 1018 lead-based paint disclosure documents that you provided to

the owner” (CX-13, p. 51). This exhibit also includes a copy of its Certified Mail receipt and a copy of the envelope in which it was sent.

- CX-14: Subpoena *Duces Tecum*, issued June 28, 2005, pursuant to Section 11 of the Toxic Substances Control Act, 15 U.S.C. § 2610, along with a transmittal letter dated June 29, 2007, from Mardi Klevs, Region 5 U.S. EPA, to Respondent, and a copy of its Certified Mail receipt. The subpoena required Respondent, among other things, to “[i]dentify and produce copies of all documents relating to the rental or lease of the Properties since June 1, 2002 to the present,” to provide copies of all documents “relating to the sale of any Properties since June 1, 2002 to the present”; and to provide copies of “[a]ll documents pertaining to the disclosure of lead-based paint and/or lead-based paint hazards” (CX-14, pp. 63-64.)
- CX-15: Petition for Enforcement of Subpoena filed by Shelese Woods, Assistant U.S. Attorney for the Southern District of Indiana (“AUSA”), on December 15, 2005
- CX-16: Motion for Voluntary Withdrawal of Petition for Subpoena filed by Shelese Woods, AUSA, along with transmittal letter from Shelese Woods, AUSA, to Edward Pilny, Region 5, U.S. EPA, dated January 20, 2006
- CX-17: Respondent’s response to the subpoena *duces tecum*, submitted to the U.S. Attorney for the Southern District of Indiana, in the form in which the originals were received by Complainant from the AUSA
- CX-18: Notice from the Marion County Health Department, dated August 12, 2003, regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana for the property at 4506 East Washington Street
- CX-19: Notice from the Marion County Health Department, dated February 6, 2004, regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana for the property at 2822 English Avenue
- CX-20: Notice from the Marion County Health Department, dated September 19, 2003, regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana for the property at 725 North Sherman Drive

- CX-21: Various facsimile transmittal memos and correspondence between Marion County Health Department officials and Edward Pilny, Region 5, U.S. EPA, regarding Marion County Health Department records
- CX-22: Memo from Jeff Beyer, Marion County Health Department to Jim O'Neil, Region 5 U.S. EPA, regarding 1018 Inspection Targets, dated March 29, 2005
- CX -23: Lease for the property at 1838 Brookside Avenue and other materials attached to the lease as submitted by Respondent in response to the subpoena *duces tecum*
- CX-24: Lease for the property at 2822 English Avenue and other materials attached to the lease as submitted by Respondent in response to the subpoena *duces tecum*
- CX-25: Lease for the property at 3780 North Parker Avenue and other materials attached to the lease as submitted by Respondent in response to the subpoena *duces tecum*
- CX-26: Lease for the property at 2039 Roosevelt Avenue and other materials attached to the lease as submitted by Respondent in response to the subpoena *duces tecum*
- CX-27: Lease for the property at 402 South Rural Street and other materials attached to the lease as submitted by Respondent in response to the subpoena *duces tecum*
- CX-28: Lease for the property at 815 North Rural Street and other materials attached to the lease as submitted by Respondent in response to the subpoena *duces tecum*
- CX-29: Lease for the property at 725 North Sherman Drive received by Complainant from HUD on September 19, 2006, and facsimile transmittal memorandum for the lease
- CX-30: Materials submitted by Respondent regarding a lease and/or sales agreement for the 725 North Sherman Drive property in response to the subpoena *duces tecum*, which include: (1) lead hazard information pamphlet; (2) Chain of Custody record for lead paint testing; (3) Certificate of Analysis for lead paint testing dated February 26, 2004; (4) Paint Chip Sample Collection record dated February 24, 2004; (5) invoice for project number 040084, with a due date of April 3, 2004; (6) Housing Choice Voucher Instructions; and (7) HUD Housing Assistance Payments Contract

- CX-31: Lease for the property at 2518 North Temple Avenue and other materials attached to the lease as submitted by Respondent in response to the subpoena *duces tecum*
- CX-32: Lease for the property at 4506 East Washington Street and other materials attached to the lease as submitted by Respondent in response to the subpoena *duces tecum*
- CX-33: Lease for the property at 2140 East 34th Street and other materials attached to the lease as submitted by Respondent in response to the subpoena *duces tecum*
- CX-34: Sales agreement for the property at 1838 Brookside Avenue, submitted by Respondent in response to the subpoena *duces tecum*
- CX-35: Sales agreement for the property at 725 North Sherman Drive, submitted by Respondent in response to the subpoena *duces tecum*
- CX-36: U.S. EPA Lead Based Paint Disclosure Form for lessors
- CX-37: U.S. EPA Lead Based Paint Disclosure Form for sellers
- CX-38: Notice of Intent to File Civil Administrative Action Against Frank J. Davis, Indianapolis, IN dated November 13, 2006
- CX-39: Penalty Calculation Memo prepared by Estrella Calvo, Region 5, U.S. EPA, proposing the penalty for Respondent's violations of the Disclosure Rule
- CX-40: Penalty calculation worksheet prepared by Estrella Calvo, Region 5, U.S. EPA, to calculate proposed penalty for Respondent's violations of the Disclosure Rule
- CX-41: U.S. EPA Section 1018 – Disclosure Rule Enforcement Response Policy
- CX-42: Guidelines for Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy
- CX-43: Financial information and facsimile transmittal memo submitted by Respondent to Complainant on March 9, 2007
- CX-44: E-mail message dated March 16, 2007 from Estrella Calvo, Region 5, U.S. EPA, to Respondent requesting that

- Respondent supplement the financial information previously submitted
- CX-45: Additional financial information submitted by Respondent to Complainant on or about April 3, 2007
- CX-46: Dun & Bradstreet Reports for corporate entities previously or currently owned and operated by Respondent, dated March 19, 2006
- CX-47: Information regarding corporate entities previously or currently owned and operated by Respondent, compiled by the Indiana Secretary of State
- CX-48: TSCA, FIFRA, and EPCRA Penalty Adjustment Memo, dated June 5, 2006, from Stephanie P. Brown, Acting Director, U.S. EPA Toxics and Pesticides Enforcement Division, to Regional Counsels and TSCA, FIFRA and EPCRA Division Directors
- CX-49: Personal Qualification Statement of Dr. Chris Weis, Senior Toxicologist, U.S. EPA
- CX-50: Bibliography of Dr. Chris Weis
- CX-51: Curriculum Vitae of Mark Ewen, Principal, Industrial Economics

Complainant respectfully reserves the right to supplement its prehearing exchange with additional exhibits prior to the adjudicatory hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to the Respondent and the Court.

IV. Judicial Notice

Complainant hereby requests that the Court take judicial notice of the following:

1. The Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, and its implementing regulations;
2. The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-56, including the legislative history, and its implementing regulations; and
3. 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, as amended.

V. Complainant's Responses to Prehearing Exchange Order

Question 1: State the factual basis for the allegation in paragraph 16 of the complaint that Frank J. Davis ("Respondent") owned the following residential rental properties located at the following addresses in Indianapolis, Indiana: 1838 Brookside Avenue, 2822 English Avenue, 3780 North Parker, 2039 Roosevelt Avenue, 402 South Rural, 815 North Rural, 725 North Sherman Drive, 2518 North Temple Avenue, 4506 E. Washington, and 2140 East 34th Street (referred individually as "Residential Rental Property" and collectively as the "Residential Rental Properties").

Complainant's Response to Question 1: CX-1 through CX-10, which are reports containing information from the Center Township Assessor's Office for Marion County, Indiana, collectively comprise the factual basis for Complainant's allegation in paragraph 16 of the complaint regarding Respondent's ownership of residential rental properties in Indianapolis, Indiana:

CX-1 shows that Respondent was the owner of the 1838 Brookside Ave property as of March 15, 2002.

CX-2 shows that Respondent was the owner of the 2822 English Avenue property as of January 8, 2003.

CX-3 shows that Respondent was the owner of the 3780 North Parker Avenue property as of June 10, 2002.

CX-4 shows that Respondent was the owner of the 2039 Roosevelt Avenue property as of April 20, 2001.

CX-5 shows that Respondent was the owner of the 402 South Rural Street property as of January 8, 2003.

CX-6 shows that Respondent was the owner of the 815 North Rural Street property as of January 16, 2003.

CX-7 shows that Respondent was the owner of the 725 North Sherman Drive property as of June 12, 2001.

CX-8 shows that Respondent was the owner of the 2518 North Temple Avenue property as of July 16, 2007.

CX-9 shows that Respondent was the owner of the 4506 East Washington Street property as of April 23, 2002.

CX-10 shows that Respondent was the owner of the 2140 East 34th Street property as of April 23, 2002.

Question 2: State the factual basis, including any information, for the assertions in paragraphs 17 and 18 of the complaint that each Residential Rental Property and each rental unit within such property was constructed prior to 1978 and is therefore, considered "target housing" as defined in 40 C.F.R. § 745.103.

Complainant's Response to Question 2: CX-1 through CX-10, which are reports containing information from the Center Township Assessor's Office for Marion County, Indiana, collectively comprise the factual basis for the assertions in paragraphs 17 and 18 of the complaint that each Residential Rental Property and each rental unit within such property was constructed before 1978:

CX-1 shows that 1838 Brookside Avenue was built in 1900.

CX-2 shows that 2822 English Avenue was built in 1922.

CX-3 shows that 3780 North Parker Avenue was built in 1922.

CX-4 shows that 2039 Roosevelt Avenue was built in 1925.

CX-5 shows that 402 South Rural Street was built in 1918.

CX-6 shows that 815 North Rural Avenue was built in 1901.

CX-7 shows that 725 North Sherman Drive was built in 1925.

CX-8 shows that 2518 North Temple Avenue was built in 1930.

CX-9 shows that 4506 East Washington Street was built in 1910.

CX-10 shows that 2140 East 34th Street was built in 1935.

Question 3: Provide a copy or state the factual basis for the assertion in paragraph 19 of the complaint that notice was given to Respondent for the April 29, 2005, scheduled inspection at Respondent's home office located at 623 Sunridge Court, Indianapolis, Indiana, with representatives from EPA and HUD, in order to monitor compliance with Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, found at 42 U.S.C. § 4851, and its implementing regulations found at 40 C.F.R. Part 745, Subpart F.

Complainant's Response to Question 3: Paragraph 19 of the complaint asserts that Respondent was not in attendance for the inspection to monitor compliance with Section 1018 and its implementing regulations at the scheduled time and location on April 29, 2005. U.S. EPA scheduled the inspection orally with Mr. Davis. The factual bases for the assertions in paragraph 19 are, collectively: (1) the personal knowledge of U.S. EPA inspector Edward R. Pilny; (2) CX-11, which includes Mr. Pilny's telephone call log and notes documenting his conversations with Respondent regarding the inspection; and (3) CX-12, which is an unsigned U.S. EPA Notice of Inspection for Lead Paint.

Mr. Pilny's log shows that on April 25, 2005 at 1:45 p.m., Mr. Pilny spoke with Respondent. Mr. Pilny advised Respondent at that time that U.S. EPA had selected his office for one of the inspections being conducted pursuant to a joint U.S. EPA/HUD initiative regarding compliance with the requirements of Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851. Mr. Pilny will testify that he and Respondent reached an agreement that the inspection would take place on Friday, April 29, 2005 at 10:00 a.m. Mr. Pilny will further testify that Respondent was not in attendance at the scheduled time and location, and that he had received no prior notice of Respondent's inability to attend the inspection at the pre-scheduled date and time. CX-12 is the U.S. EPA Notice of Inspection for Lead Paint that Mr. Pilny prepared for the inspection. Mr. Pilny will testify that he brought the notice with him on the scheduled date and time, but that it is not signed by Respondent because he was not in attendance.

Question 4: Provide a copy of the Certified Request for Information Letter issued to Respondent on May 3, 2005 by EPA, referred to in paragraph 20 of the complaint.

Complainant's Response to Question 4: CX-13 is a copy of the Certified Request for Information Letter sent by U.S. EPA to Respondent via certified mail on May 3, 2005.

Question 5: Provide a copy of the administrative subpoena *duces tecum* ("subpoena") issued on June 29, 2005, pursuant to Section 11 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2610 seeking copies of all agreements and lead-based disclosure documentation for the rental and sales transactions at all properties owned and/or managed by Respondent from June 1, 2002, to the date of the subpoena.

Complainant's Response to Question 5: The complaint mistakenly states that the administrative subpoena *duces tecum* was issued on June 29, 2005. The subpoena was issued the previous day, June 28, 2005; the cover letter sending the subpoena *duces tecum* to Respondent is dated the following day, June 29, 2005. (Complainant will seek leave to amend the complaint to correct this error.) CX-14 is a copy of the administrative subpoena *duces tecum*.

Question 6: Provide a copy of the Petition for Enforcement of Subpoena filed by the United States Attorney for the Southern District of Indiana, referred to in paragraph 22 of the complaint.

Complainant's Response to Question 6: CX-15 is a copy of the Petition for Enforcement of Subpoena filed by the U.S. Attorney for the Southern District of Indiana on December 15, 2005. CX-16 is a copy of the Motion to Withdraw the Petition for Enforcement of Subpoena filed by the U.S. Attorney on January 20, 2006 subsequent to Respondent's compliance with the subpoena.

Question 7: Provide a copy of Respondent's response to the subpoena received by EPA on January 6, 2006.

Complainant's Response to Question 7: CX-17 contains all materials submitted by Respondent in response to the subpoena, which were received by Complainant on January 6, 2006 from the Assistant U.S. Attorney for the Southern District of Indiana. CX-17 also includes the FedEx envelope in which Complainant received the materials from the Assistant U.S. Attorney.

Question 8: Provide a copy of the notices from the Marion County Health Department regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana for the 4506 East Washington Street, 2822 English Avenue, and 725 North Sherman Drive properties received by Respondent on August 12, 2003, September 19, 2003, and February 6, 2004, respectively, referred to in paragraph 24 of the complaint.

Complainant's Response to Question 8: CX-18 through CX-20 are the Marion County Health Department inspection reports identifying violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, and requiring Respondent to correct the violations:

CX-18 is the notice regarding the property at 4506 East Washington Street, dated August 12, 2003.

CX-19 is the notice regarding the property at 2822 English Avenue, dated February 6, 2004.

CX-20 is the notice regarding the property at 725 North Sherman Drive, dated September 19, 2003.

Question 9: State the factual basis for the allegation in paragraph 25 of the complaint that Respondent, as owner and lessor of the Residential Rental Properties, offered for lease the following properties under the following dates of lease and provide the factual basis that the term of occupancy covered greater than 100-days as asserted in paragraph 26 of the complaint.

Address	Date of Lease
1838 Brookside Avenue	11/14/2003
2822 English Avenue	03/30/2004
3780 North Parker	08/22/2002
2039 Roosevelt Avenue	06/01/2003
402 South Rural	04/11/2003
815 North Rural Avenue	04/24/2003
725 North Sherman Drive	09/16/2002
2518 North Temple Avenue	08/01/2003
4506 East Washington	06/01/2002
2140 East 34 th Street	07/10/2002

Complainant's Response to Question 9: The leases provided by Respondent in response to the subpoena *duces tecum*, CX-23 through CX-28 and CX-31 through CX-33; the HUD Housing Assistance Payments Contract for the property at 725 North Sherman Drive, also provided by Respondent in response to the subpoena *duces tecum*, included in CX-30; and the lease for the property at 725 North Sherman Drive provided to Complainant by HUD, CX-29; collectively comprise the factual basis for the allegations in paragraphs 25 and 26 of the complaint regarding: (1) Respondent's status as the lessor of the Residential Rental Properties; (2) Respondent's offer for lease of each Residential Rental Property; and (3) the term of each lease. As stated in Complainant's response to Question #1, *supra*, CX-1 through CX-10 collectively comprise the factual basis for Complainant's assertions regarding Respondent's ownership of the properties.

The table below summarizes Complainant's information regarding the date and term of each lease. The table is based on the exhibits identified and described more particularly below.

Address	Date of Lease	Term of Lease
1838 Brookside Avenue	11/14/2003	11/14/2003-11/14/2003[sic]
2822 English Avenue	03/30/2004	03/30/2004-03/30/2005
3780 North Parker Avenue	08/22/2002	08/22/2002-07/31/2003
2039 Roosevelt Avenue	06/01/2003	06/01/2003-05/31/2004
402 South Rural Street	04/11/2003	04/11/2003-03/31/2004
815 North Rural Avenue	04/24/2003	04/24/2003-03/24/2004
725 North Sherman Drive	08/01/2002	09/16/2002-08/31/2003
2518 North Temple Avenue	08/01/2003	08/01/2003-07/31/2004
4506 East Washington Street	06/01/2002	06/01/2002-06/01/2003
2140 East 34 th Street	07/10/2002	07/10/2002-07/10/2003

CX-23 is the lease for the property at 1838 Brookside Avenue, which states on page one that Respondent entered into the rental agreement on November 14, 2003 "for a term of one years commencing November 14, 2003 through and including November 14, 2003[sic]." Complainant believes that the end date of the lease, which is stated in the lease as 11/14/2003, is a typographical error.

CX-24 is the lease for the property at 2822 English Avenue, which states on page one that Respondent entered into the rental agreement on March 30, 2004 "for a term of one years commencing March 30, 2004 through and including March 30, 2005."

CX-25 is the lease for the property at 3780 North Parker Avenue, which states on page one that Respondent entered into the rental agreement on August 22, 2002 "for the period commencing on the 22 day of August, 2002, and thereafter until the 31 day of July, 2003."

CX-26 is the lease for the property at 2039 Roosevelt Avenue, which states on page one that Respondent entered into the rental agreement on June 1, 2003 "for a term of one years commencing June 1, 2003 through and including May 31, 2004."

CX-27 is the lease for the property at 402 South Rural Street, which states on page one that Respondent entered into the rental agreement on April 11, 2003 “for a term of one years commencing April 11, 2003 through and including March 31, 2004.”

CX-28 is the lease for the property at 815 North Rural Avenue, which states on page one that Respondent entered into the rental agreement on April 24, 2003 “for a term of one years commencing April 24, 2003 through and including March 24, 2004.”

CX-31 is the lease for the property at 2518 North Temple Avenue, which states on page one that Respondent entered into the rental agreement on August 1, 2003 “for a term of one years commencing August 1, 2003 through and including July 31, 2004.”

CX-32 is the lease for the property at 4506 East Washington Street, which states on page one that Respondent entered into the rental agreement on June 1, 2001 “for a term of 1 years commencing 06-01-2002 through and including 06-01-2003.”

CX-33 is the lease for the property at 2140 East 34th Street, which states on page one that Respondent entered into the rental agreement on July 10, 2002 “for the period commencing on the 10 day of July, 2002, and thereafter until the 10 day of July, 2003.”

CX-29 is the lease for the property at 725 North Sherman Drive, which states on page one that Respondent entered into the rental agreement on August 1, 2002 “for a term of 1 years commencing 9-16-02 through and including 8-31-03.” Complainant misidentified the date of this lease in the complaint as 9/16/02, which Complainant now believes is the beginning date of the term of the lease, but not the date of the lease agreement.

(Complainant will seek to leave to amend the complaint subsequent to the filing of this Initial Prehearing Exchange to correct this error.) For purposes of this Initial Prehearing Exchange, Complainant has used 8/1/2002 as the date of the 725 North Sherman Drive lease. Additionally, the end date of the term of the lease for the 725 North Sherman Drive

property cannot be ascertained with certainty from Complainant's copy of the lease. See CX-29. Complainant received this exhibit via facsimile from HUD, and the year in which the lease term would expire is indecipherable on the fax copy. Complainant believes the end date of the lease for the 725 North Sherman Drive property was 8/31/03. The factual bases for Complainant's belief are: (1) the text of the lease; and (2) the HUD Housing Assistance Payments Contract for the 725 North Sherman Drive lease (included in CX-30), which states clearly that the term of the lease was September 16, 2002 to August 31, 2003. See CX-30, p. 431.

Question 10: Provide the factual basis for the assertion in paragraph 29 of the complaint that Respondent, as owner of the target housing, transferred legal title to two of the Residential Rental Properties located at 1838 Brookside Avenue and 725 North Sherman Drive by entering into written sales agreements ("sales contracts") with individuals on 04/15/2005 and 05/17/2005, respectively.

Complainant's Response to Question 10: CX-34 and CX-35 comprise the factual basis for Complainant's allegation in paragraph 29. More specifically:

CX-34 includes the sales agreement for the property at 1838 Brookside Avenue, which states on page one that Respondent transferred legal title to the property on April 15, 2005.

CX-35 includes the sales agreement for the property at 725 North Sherman Drive, which states on page one that Respondent transferred legal title to the property on May 17, 2005.

Question 11: Provide a copy of the letter, dated November 13, 2006, wherein Respondent was informed that EPA was planning on filing a civil administrative complaint.

Complainant's Response to Question 11: CX-38 is a copy of the letter, dated November 13, 2006, that was sent to Respondent to inform him of Complainant's intention to file a civil administrative

action alleging violations of Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, at 42 U.S.C. § 4851.

Question 12: State the factual basis for the allegations in paragraphs 37 through 46 (Counts 1 through 10) of the complaint that for each of the Residential Rental Properties, Respondent failed to include, within or as an attachment to the contract, a Lead Warning Statement prior to the time the lessees became obligated under the dated contracts to lease the properties, supra paragraph 9, in violation of 40 C.F.R. § 745.113(b)(1); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 12*: 40 C.F.R. § 745.113(b)(1) and 40 C.F.R. § 745.100

require, before a lessee is obligated under the contract to lease target housing, that the lessor include, within or as an attachment to each contract to lease target housing, 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.

CX-23 through CX-33 collectively comprise the factual basis for the allegations in paragraphs 37 through 46 (Counts 1 through 10) of the complaint that, for each of the Residential Rental Properties, Respondent failed to include the required Lead Warning Statement prior to the time the lessees became obligated under the contract. CX-23 through CX-33 are the leases for the Residential Rental Properties, and all attachments thereto received by Complainant from Respondent and/or HUD. None of these leases or the attachments contains the required Lead Warning Statement. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with the Disclosure Rule violates Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689.

* Where Complainant believes it may be helpful to the Court and the parties, Complainant has stated the regulatory requirement at issue at the beginning of its response.

Question 13: Provide the factual basis for the allegations in paragraphs 50 and 51 (Counts 11 and 12) of the complaint that Respondent failed to include, within or as an attachment to the contract, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in the target housing, or a lack of knowledge of such presence, to the lessee at 725 North Sherman Drive, Indianapolis, Indiana under the contract, dated September 16, 2002, and to the lessee at 2822 English Avenue, Indianapolis, Indiana under the contract, dated March 30, 2004, prior to the time the lessees became obligated under the mentioned contracts in violation of 40 C.F.R. § 745.113(b)(2); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 13: 40 C.F.R. § 745.113(b)(2) and 40 C.F.R. § 745.100

require a lessor to include, within or as an attachment to each contract to lease target housing, a statement disclosing the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or a lack of knowledge of such presence, before a lessee is obligated under the contract to lease target housing. Additionally, 40 C.F.R. § 745.113(b)(2) and 40 C.F.R. § 745.100 require that, before a lessee is obligated under a contract to lease target housing, a lessor must disclose any additional information available concerning known lead-based paint and/or lead-based paint hazards. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with the Disclosure Rule violates Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689.

As explained at more length below, CX-19, CX-24 and CX-29 collectively form the factual basis for the allegations in paragraphs 50 and 51 (Counts 11 and 12) of the complaint:

2822 English Avenue property

CX-19 is a notice from the Marion County Health Department dated February 6, 2004 regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana. The notice advised Mr. Davis, as owner of the 2822 English Avenue property, that interior doors or door frames and the front door frame and casing contained paint with hazardous levels of lead. CX-19 shows that Respondent had knowledge of the presence of lead-based paint and lead-based paint hazards at the 2822 English Avenue property on or about

February 6, 2004.

CX-24 is the lease for the property at 2822 English Avenue, which states on page one that Respondent entered into the rental agreement on March 30, 2004. Respondent was informed by the notice from the Marion County Health Department that the property contained lead-based paint almost two months before he entered into the rental agreement. The lease is silent with regard to the presence of known lead-based paint and/or lead-based paint hazards at the 2822 English Avenue property.

725 North Sherman Drive Property

CX-30 is the lease for the property at 725 North Sherman Drive, which states that Respondent entered into the rental agreement on August 1, 2002. *See* CX-30, p. 411. Neither the lease nor any attachment includes a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards or a lack of knowledge of such presence.

Question 14: State the factual basis for the allegations in paragraphs 55 through 64 (Counts 13 through 22) of the complaint that Respondent failed to include, within or as an attachment to the contracts, a list of any records or reports available to him regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records existed, to the lessees prior to the time the lessees at the referenced locations became obligated under dated contracts, *supra* paragraph 9, in violation of 40 C.F.R. § 745.113(b)(3); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 14: 40 C.F.R. § 745.113(b)(3) and 40 C.F.R. § 745.100 require the lessor to include, within or as an attachment to each contract to lease target housing, 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, or a statement that no such records exist, before a lessee is obligated under a contract to lease target housing. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with the Disclosure Rule violates Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689.

CX-23 through CX-33, and CX-19 collectively comprise the factual basis for the allegations in paragraphs 55 through 64 (Counts 13 through 22) of the Complaint. CX-23 through CX-33 are the leases for the Residential Rental Properties and all attachments thereto submitted by Respondent to Complainant or received by Complainant from HUD. CX-19 is a notice from the Marion County Health Department dated September 19, 2003 regarding violations of Chapter 10 of the Code of Health and Hospital Corporation of Marion County, Indiana at the 2822 English Avenue property. None of these leases or attachments contains a list of records or reports available to the lessor (*i.e.* Respondent) regarding lead-based paint and/or lead based paint hazards at the property, or a statement that no such records exist.

Question 15: Provide the factual basis for the allegations in paragraphs 68 through 77 (Counts 23 through 32) of the complaint that Respondent failed to include, within 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 (b)(3), and the lead hazard information pamphlet to the lessees at the locations, supra paragraph 9, prior to the time the lessees became obligated under the referenced dated contracts, in violation of 40 C.F.R. § 745.113(b)(4); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 15: 40 C.F.R. § 745.113(b)(4) and 40 C.F.R. § 745.100 require the lessor to include, within 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 (b)(3), and the lead hazard information pamphlet before the lessee is obligated under a contract to lease target housing.

CX-23 through CX-33 collectively comprise the factual basis for the allegations in paragraphs 68-77 (Counts 23 through 32) of the complaint. These exhibits are the leases for the Residential Rental Properties and all attachments thereto received by Complainant from Respondent and/or HUD. None of these leases or their attachments contains a statement by any lessee affirming receipt of the required information and/or the lead hazard information pamphlet.

Question 16: State the factual basis for the allegations in paragraphs 81 through 90 (Counts 33 through 42) of the complaint that Respondent did not include, within or as an attachment to the contracts, the signatures of the lessor and the lessees certifying to the accuracy of their statements along with the dates of such signature to the lessees at the locations, supra paragraph 1, prior to the times the lessees became obligated under dated contracts, supra paragraph 9, in violation of 40 C.F.R. § 745.113(b)(6); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 16: 40 C.F.R. § 745.113(b)(6) and 40 C.F.R. § 745.100

require the lessor to include, within or as an attachment to the contract, the signatures of the lessor and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of signature before the lessee is obligated under a contract to lease target housing.

CX-23 through CX-33 collectively comprise the factual basis for the allegations in paragraphs 81 through 90 (Counts 33 through 42) of the complaint. These exhibits are the leases for the Residential Rental Properties and all attachments thereto received by Complainant from Respondent and/or HUD. None of the leases or their attachments includes the signatures of the lessor (*i.e.* Respondent) or the lessee certifying to the accuracy of their statements.

Question 17: State the factual basis for the allegations in paragraphs 94 and 95 (Counts 43 and 44) of the complaint that Respondent failed to include, within or as an attachment to the sales contracts, a Lead Warning Statement to the purchasers, as listed in paragraph 10, prior to the time the purchasers became obligated under the contracts in violation of 40 C.F.R. § 745.113(a)(1); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 17: 40 C.F.R. § 745.113(a)(1) and 40 C.F.R. § 745.100

require that, before a purchaser is obligated under a contract to purchase target housing, the seller must include, as an attachment to the contract, a Lead Warning Statement consisting of the following language:

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to

pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

CX-34 and CX-35 jointly comprise the factual basis for the allegations in paragraphs 94 and 95 (Counts 43 and 44) of the complaint. These exhibits are the sales agreements for the properties at 1838 Brookside Avenue and 725 North Sherman Drive, respectively. Respondent submitted no attachments to either sales agreement in response to the subpoena *duces tecum*. Neither sales agreement contains the required Lead Warning Statement. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with the Disclosure Rule violates Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689.

Question 18: State the factual basis for the allegations in paragraphs 99 and 100 (Counts 45 and 46) of the complaint that Respondent failed to include, within or as an attachment to the sales contracts, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in the target housing, or a lack of knowledge of such presence, to the purchasers, as listed in paragraph 10, prior to the time the purchasers became obligated under the contracts in violation of 40 C.F.R. § 745.113(a)(2); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 18: 40 C.F.R. § 745.113(a)(2) and 40 C.F.R. § 745.100 require a seller to include, as an attachment to each contract to sell target housing, a statement disclosing the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or a lack of knowledge of such presence, before a purchaser is obligated under the contract to purchase target housing. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with the Disclosure Rule violates Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689.

As explained at more length below, CX-34, CX-20 and CX-35 collectively comprise the factual basis for the allegations contained in paragraphs 99 and 100 (Counts 45 and 46) of the complaint.

1838 Brookside Avenue property

CX-34 is the sales agreement for the 1838 Brookside Avenue property. No attachments to this sales agreement were submitted by Respondent in response to the subpoena *duces tecum*. The sales contract does not contain either a statement disclosing the presence of any known lead-based paint and/or lead-based paint hazards, or a statement indicating lack of knowledge about the presence of such lead-based paint or lead-based paint hazards.

725 North Sherman Drive property

CX-20 is a notice from the Marion County Health Department dated September 19, 2003 regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana. The notice, which concerns the property at 725 North Sherman Drive, states on page one that “Eaves have peeling paint which contains hazardous levels of lead.” Page 2 states that “Exterior siding . . . Exterior window sashes . . . Exterior window wells . . . [and] Exterior wood trim [have] deteriorated paint which contains hazardous levels of lead,” and “Paint chips containing hazardous levels of lead found on the ground.” Finally, page 3 states that the “Porch roof supports have deteriorated paint which contains hazardous levels of lead,” and that “Window casing contains hazardous levels of lead based paint.” This exhibit shows that Respondent had knowledge of the presence of lead-based paint and lead-based paint hazards at the property on or about September 19, 2003.

CX-35 is the sales agreement submitted by Respondent regarding the sale of the 725 North Sherman Drive property. Respondent submitted no attachments to this sales agreement in response to the subpoena *duces tecum*. CX-35 states on page one that Respondent transferred legal title to the property on May 17, 2005, approximately 21 months after Respondent’s receipt of the notice from the Marion County Health Department that the property contained lead-based paint at hazardous levels. The sales agreement does not contain any

statement disclosing the presence of known lead-based paint and/or lead-based paint hazards at the 725 North Sherman Drive property, or a statement that Respondent had no knowledge of such presence.

Question 19: State the factual basis for the allegations in paragraphs 104 and 105 (Counts 47 and 48) of the complaint that Respondent failed to include, within or as an attachment to the sales contracts, a list of any records or reports available to him regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records existed, to the purchasers, as listed in paragraph 10, prior to the time the purchasers became obligated under the contracts in violation of 40 C.F.R. § 745.113(a)(3); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 19: 40 C.F.R. § 745.113(a)(3) and 40 C.F.R. § 745.100 require the seller to include, as an attachment to each contract to sell target housing, a list of any records or reports available to the seller regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records exist, before a purchaser is obligated under a contract to purchase target housing. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with the Disclosure Rule violates Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689.

As explained at more length below, CX-34, CX-20 and CX-35 collectively comprise the factual basis for the allegations in paragraphs 104 and 105 (Counts 47 and 48) of the complaint.

1838 Brookside Avenue property

CX-34 is the sales agreement received by Complainant from Respondent concerning the sale of the property at 1838 Brookside Avenue. No attachments to the sales agreement were submitted by Respondent. The sales agreement does not contain either a list of any records or reports available to the seller (*i.e.* Respondent) regarding lead-based paint and/or lead-based paint hazards, or a statement that no such records exist.

725 North Sherman property

CX-20 is a notice from the Marion County Health Department dated September 19, 2003

regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana. The notice concerns the property at 725 North Sherman Drive, and states on page one that “Eaves have peeling paint which contains hazardous levels of lead.” Page 2 states that “Exterior siding . . . Exterior window sashes . . . Exterior window wells . . . [and] Exterior wood trim [have] deteriorated paint which contains hazardous levels of lead,” and “Paint chips containing hazardous levels of lead found on the ground.” Finally, page 3 states that the “Porch roof supports have deteriorated paint which contains hazardous levels of lead,” and that “Window casing contains hazardous levels of lead based paint.” This exhibit shows that Respondent had knowledge of the presence of lead-based paint and lead-based paint hazards on the property on or about September 19, 2003.

CX-35 is the sales agreement for the property at 725 North Sherman Drive, which states on page one that Respondent transferred legal title to the property on May 17, 2005, approximately 21 months after Respondent’s receipt of the notice from the Marion County Health Department that the property contained lead-based paint at hazardous levels. Respondent submitted no attachments to this sales agreement in response to the subpoena *duces tecum*. The sales agreement does not contain a list identifying the Marion County Health Department records regarding the presence of lead-based paint, which were available to Respondent as of approximately September 19, 2003.

Question 20: State the factual basis for the allegations in paragraphs 109 and 110 (Counts 49 and 50) of the complaint that Respondent failed to include, within or as an attachment to the sales contracts, a statement by the purchasers affirming receipt of the information set out in 40 C.F.R. §§ 745.113(a)(2) and (a)(3), and the lead hazard information pamphlet to the purchasers, as listed in paragraph 10, prior to the time the purchasers became obligated under the contracts in violation of 40 C.F.R. § 745.113(a)(4); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant’s Response to Question 20: 40 C.F.R. § 745.113(a)(4) and 40 C.F.R. § 745.100 require the seller to include, as an attachment to the contract, a statement by the purchaser

affirming receipt of the information set out in 40 C.F.R. §§ 745.113(a)(2) and (a)(3), and the lead hazard information pamphlet before the purchaser is obligated under a contract to purchase target housing.

CX-34 and CX-35 jointly comprise the factual basis for the allegations in paragraphs 109 and 110 (Counts 49 and 50) of the complaint. These exhibits are the sales agreements for the properties at 1838 Brookside Avenue and 725 North Sherman Drive, respectively. Respondent submitted no attachments to either sales agreement in response to the subpoena *duces tecum*. The sales agreements do not include a statement by the purchaser affirming receipt of any information about the presence of lead-based paint or the lead hazard information pamphlet.

Question 21: State the factual basis for the allegations in paragraphs 114 and 115 (Counts 51 and 52) of the complaint that Respondent failed to include, within or as an attachment to the sales contracts, a statement by the purchasers that he/she has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity to conduct such inspection, as listed in paragraph 10, prior to becoming obligated under such contracts in violation of 40 C.F.R. § 745.113(a)(5); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 21: 40 C.F.R. § 745.113(a)(5) and 40 C.F.R. § 745.100 require that the seller must include, as an attachment to the contract, a statement by the purchaser that he/she has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity before a purchaser is obligated under a contract to buy target housing.

CX-34 and CX-35 jointly comprise the factual basis for the allegations in paragraphs 114 and 115 (Counts 51 and 52) of the complaint. These exhibits are the sales agreements for the properties at 1838 Brookside Avenue and 725 North Sherman Drive, respectively. Respondent submitted no attachments to either sales agreement in response to the subpoena *duces tecum*. The sales agreements do not include the required statement or waiver by the purchaser.

Question 22: State the factual basis for the allegations in paragraphs 119 and 120 (Counts 53 and 54) of the complaint that Respondent failed to include, within or as an attachment to the sales contracts, the signatures of the sellers, agent, and purchasers certifying to the accuracy of their statements, along with the dates of such signatures, to the purchasers, as listed in paragraph 10, prior to the time the purchasers became obligated under the contracts in violation of 40 C.F.R. § 745.113(a)(7); 40 C.F.R. § 745.100; 42 U.S.C. § 4852d(b)(5); and Section 409 of TSCA, 15 U.S.C. § 2689.

Complainant's Response to Question 22: 40 C.F.R. § 745.113(a)(7) and 40 C.F.R. § 745.100

require that the seller must include, within or as an attachment to the contract, the signatures of the sellers, agents, and purchasers certifying the accuracy of their statements to the best of their knowledge, along with the dates of signature, before the purchaser is obligated under a contract to purchase target housing.

CX-34 and CX-35 comprise the factual basis for the allegations in paragraphs 119 and 120 (Counts 53 and 54) of the complaint. These exhibits are the sales agreements for the properties at 1838 Brookside Avenue and 725 North Sherman Drive, respectively. Respondent submitted no attachments to either sales agreement in response to the subpoena *duces tecum*. The sales agreements do not include the required signatures of the seller (*i.e.* Respondent), agents, and purchasers, certifying to the accuracy of their statements.

Question 23: Provide a copy of any worksheets used in computing the proposed penalty and a copy of any documents such as a D & B report used in determining Respondent's ability to pay the proposed penalty.

Complainant's Response to Question 23: CX-39 through CX-42 and CX-48, are the materials used by Complainant to compute the proposed penalty:

CX-39 is the Penalty Calculation Memo prepared by Estrella Calvo proposing the penalty for Respondent's violations of the Disclosure Rule.

CX-40 is the penalty calculation worksheet prepared by Estrella Calvo to calculate the proposed penalty for Respondent's violations of the Disclosure Rule.

CX-41 is the U.S. EPA Section 1018 Disclosure Rule Enforcement Response Policy.

CX-42 are the Guidelines for Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy

CX-48 is the TSCA, FIFRA, and EPCRA Penalty Adjustment Memo from Stephanie P. Brown on June 5, 2006.

CX-43 through CX-47 are all of the financial materials submitted by Respondent to Complainant through the date of this Prehearing Exchange, and all other materials used by Complainant to determine Respondent's ability to pay the proposed penalty:

CX-43 is the financial information submitted by Respondent to Complainant on March 9, 2007.

CX-44 is the e-mail message, dated March 16, 2007, from Estrella Calvo to Respondent asking him to supplement the financial information previously submitted.

CX-45 is the financial information submitted by Respondent to Complainant subsequent to Ms. Calvo's requests to submit additional financial information.

CX-46 comprise Dun & Bradstreet Reports for corporate entities previously or currently owned and operated by Respondent, dated March 19, 2006.

CX-47 is information regarding corporate entities previously or currently owned and operated by Respondent, compiled by the Indiana Secretary of State.

VI. Explanation of Proposed Penalty

Under 40 C.F.R. § 22.19(a)(3), U.S. EPA must explain in its prehearing exchange how it calculated the proposed penalty in accordance with the criteria set forth in TSCA.

Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d(b)(5) ("Section 1018"), authorizes the imposition of a civil penalty of up to \$10,000 for each violation of a requirement of Section 1018 and its implementing regulations at 40 C.F.R. Part 745, Subpart F (*i.e.*, the Disclosure Rule), under Section 16 of TSCA, 15 U.S.C. § 2615. The Civil

Monetary Penalty Inflation Adjustment Act and its implementing regulations increased this maximum penalty amount to \$11,000 per violation for violations that occur after January 30, 1997. 31 U.S.C. § 3701 and 40 C.F.R. Part 19 (2004).

Complainant relied on the “Section 1018 - Disclosure Rule Enforcement Response Policy,” dated February 2000 (“Penalty Policy”) (CX-41), in its calculation of the proposed penalty in this matter. The Penalty Policy is based on the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), which are the nature, circumstances, extent, and gravity of the violation, 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. The Penalty Policy was developed under the general framework established by the “Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy,” 45 Fed. Reg. 59770 (September 10, 1980) (TSCA Civil Penalty Guidelines) (CX-42). The Penalty Policy was modified on June 5, 2006 to adjust for the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Parts 19 and 27. (*See* TSCA, FIFRA, and EPCRA Penalty Adjustment Memo, dated 6/5/06, CX-48.) Due to the 2006 modification, all violations of the Disclosure Rule occurring on or after March 15, 2004 are subject to statutory penalties adjusted for inflation.

Under the Penalty Policy, U.S. EPA determines penalties in two stages: 1) the determination of a “gravity-based penalty,” and 2) adjustments to the gravity-based penalty. U.S. EPA calculates the gravity-based penalty by considering: 1) the nature of the violation; 2) the circumstances of the violation; and 3) the extent of harm that may result from the violation. CX-41 at 9.

The TSCA Civil Penalty Guidelines discuss the nature of the violation as the essential character of the violation and incorporate the concept of whether the violation is in the nature of a chemical control, control associated data gathering, or hazard assessment. CX-42 at 59771. The Penalty Policy categorizes all Disclosure Rule violations as “hazard assessment” in nature, since the

information is vital to purchasers and lessees in weighing the risks in purchasing or leasing target housing. This information is particularly vital to purchasers or lessees who are pregnant or have young children, who may be put at risk when residing in target housing. CX-41 at 9.

The “circumstances” reflect the probability of harm resulting from a particular type of violation. The Penalty Policy categorizes each possible violation of the Disclosure Rule in one of six circumstance levels, based on the nature and circumstances surrounding each type of violation, and reflecting the probability of harm from each. The levels range from Level 1, the most serious, to Level 6, the least serious. *Id.* at 10, B-1 through B-3.

The “extent” factor considers the degree, range or scope of a violation. When assessing penalties for violations of the Disclosure Rule, the extent factor is based on two measurable facts: 1) the age of any children living in the target housing; and 2) whether a pregnant woman lives in the target housing. *Id.* at 10-11. The Penalty Policy categorizes the extent of a violation as major, significant or minor, through the use of an “Extent Category Matrix.” *Id.* at B-4 through B-4-A.

Based on the date of the occurrence of the violation, the Penalty Policy requires that the circumstance and extent factors be applied to one of two gravity-based penalty matrices. Each matrix (“Gravity-Based Penalty Matrix”) lists varying penalty amounts in 18 cells, ranging in value from \$110 to \$11,000 for violations occurring prior to March 15, 2004, and from \$129 to \$11,000 for violations occurring on or after March 15, 2004. *Id.* at B-4 through B-4-A. The appropriate cell is determined according to the circumstance level, and extent category involved.

Once the gravity-based penalty is determined for a given violation, U.S. EPA applies upward or downward adjustments to the penalty in consideration of the following factors with respect to the violator: 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: no known risk of exposure, the violator’s attitude, consideration of supplemental environmental projects, audit policy,

voluntary disclosure, size of business, adjustment for small independent owners and lessors, and the economic benefit of noncompliance. *Id.* at 14-18.

By letter dated November 13, 2006, U.S. EPA advised Respondent that it was planning to file a civil administrative complaint against Respondent for alleged violations of Section 1018, and that Section 1018 authorizes the assessment of a civil administrative penalty. CX-38. U.S. EPA asked Respondent to identify any factors Respondent thought U.S. EPA should consider before issuing the complaint. U.S. EPA also asked that, if Respondent believed there were financial factors that bore on Respondent's ability to pay a civil penalty, Respondent submit specific financial documents. CX-38. On March 9, 2007, Respondent provided U.S. EPA with unexecuted U.S. Individual Income Tax Returns for tax years 2003, 2004, and 2005. CX-43. On or about April 3, 2007, Respondent sent additional financial information to Complainant, including signed copies of the 2003-2005 income tax returns. CX-45.

A. Gravity-Based Penalty

1. Extent

a. Counts 3, 15, 25, and 35. In accordance with the Extent Category Matrix, four violations fell into the major category because, according to the lease agreement for the 3780 North Parker Avenue property, there was a child under the age of six residing in the property at the time of the violations. *See* CX 25 and CX-41 at B-4.

b. Counts 10, 22, 32, and 42. In accordance with the Extent Category Matrix, four violations fell into the significant category because, although children are identified as tenants under the lease at issue (for the 2140 East 34th Street property), the lease does not state the children's ages. *See* CX-33 and CX-41 at B-4. U.S. EPA conservatively assumed the children were older than six.

c. Counts 1, 2, 4-9, 11-14, 16-21, 23-24, 26-31, 33-34, 36-41 and 43-54.

In accordance with the Extent Category Matrix, 46 violations fell into the minor category because there were no children under 18 years of age residing in the properties at the time of the violations. *See* CX-23 through CX-24, CX-26 through CX-29, CX-31 through CX-32, and B-4 through B-4-A.

2. Circumstances

a. Counts 1-10 (Failure to Include Lead Warning Statement).

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, the Lead Warning Statement before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(1) and 40 C.F.R. § 745.100 is a Level 2 violation. *Id.* at B-1. As explained at length above, Respondent failed to include, within or as an attachment to each contract to lease target housing, the Lead Warning Statement before the lessee was obligated under the contract in ten leasing transactions: 1838 Brookside Avenue, November 14, 2003 (Count 1); 2822 English Avenue, March 30, 2004 (Count 2); 3780 North Parker Avenue, August 22, 2002 (Count 3); 2039 Roosevelt Avenue, June 1, 2003 (Count 4); 402 South Rural Street, April 11, 2003 (Count 5); 815 North Rural Avenue, April 24, 2003 (Count 6); 725 North Sherman Drive, August 1, 2002 (Count 7); 2518 North Temple Avenue, August 1, 2003 (Count 8); 4506 East Washington Street, June 1, 2002 (Count 9); and 2140 East 34th Street, July 10, 2002 (Count 10).

Under the Gravity-Based Penalty Matrix, *id.* at B-4, Level 2 circumstance violations that occurred prior to March 15, 2004 incur a penalty of \$8,800 (major extent); \$5,500 (significant extent); or \$1,320 (minor extent). Level 2 circumstance violations that occurred on or after March 15, 2004 incur a penalty of \$10,316 (major extent), \$5,448 (significant extent), or \$1,547 (minor extent). *See* Gravity-Based Penalty Matrix, *id.* at B-4-A. The “extent” determinations made by U.S. EPA for

these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 1-10 of \$25,087. See CX-40 for the worksheet prepared by U.S. EPA to calculate the penalty for these counts.

b. Counts 11-12 (Failure to Include Statement Disclosing Presence or Lack of Knowledge of Lead-Based Paint)

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(2) and 40 C.F.R. § 745.100 is a Level 3 violation. *Id.* at B-1. As explained at length above, Respondent failed to include, within or as an attachment to each contract to lease target housing, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the lessee became obligated under the contract in one leasing transaction at 725 North Sherman Drive, August 1, 2002 (Count 11). Respondent failed to disclose additional information concerning known lead-based paint hazards before the lessee became obligated under the contract in one leasing transaction at 2822 English Avenue, March 30, 2004 (Count 12).

Under the Gravity-Based Penalty Matrix, *id.* at B-4, Level 3 circumstance/minor extent violations that occurred prior to March 15, 2004 incur a penalty of \$660. Level 3 circumstance/minor extent violations that occurred on or after March 15, 2004 incur a penalty of \$774. See Gravity-Based Penalty Matrix, *id.* at B-4-A. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts

11-12 of \$1,434. *See* CX-40 for the worksheet prepared by U.S. EPA to calculate the penalty for these counts.

c. Counts 13-22 (Failure to List Records or Reports)

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, 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 or a statement that no such records exist before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(3) and 40 C.F.R. § 745.100 is a Level 5 violation. *Id.* at B-2. As explained at length above, Respondent failed to include, within or as an attachment to each contract to lease target housing, a list of any records or reports available to Respondent regarding lead-based paint and/or lead based paint hazards in the target housing or a statement that no such records existed before the lessee was obligated under the contract in ten leasing transactions: 1838 Brookside Avenue, November 14, 2003 (Count 13); 2822 English Avenue, March 30, 2004 (Count 14); 3780 North Parker Avenue, August 22, 2002 (Count 15); 2039 Roosevelt Avenue, June 1, 2003 (Count 16); 402 South Rural Street, April 11, 2003 (Count 17); 815 North Rural Avenue, April 24, 2003 (Count 18); 725 North Sherman Drive, August 1, 2002 (Count 19); 2518 North Temple Avenue, August 1, 2003 (Count 20); 4506 East Washington Street, June 1, 2002 (Count 21); and 2140 East 34th Street, July 10, 2002 (Count 22).

Under the Gravity-Based Penalty Matrix, *id.* at B-4, Level 5 circumstance violations that occurred prior to March 15, 2004 incur a penalty of \$2,200 (major extent); \$1,430 (significant extent); or \$220 (minor extent). Level 5 circumstance violations that occurred on or after March 15, 2004 incur a penalty of \$2,579 (major extent); \$1,676 (significant extent); or \$258 (minor extent). *See* Gravity-Based Penalty Matrix, *id.* at B-4-A. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied

for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 13-22 of \$5,428. See CX-40 for the worksheet prepared by U.S. EPA to calculate the penalty for these counts.

d. Counts 23-32 (Failure to Include Lessee's Affirmation of Receipt)

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract, a statement by the lessee affirming receipt of the information set forth in 40 C.F.R. § 745.113(b)(2) and (b)(3) and the lead hazard information pamphlet before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.114(b)(4) and 40 C.F.R. § 745.100 is a Level 4 violation. *Id.* at B-2. As explained at length above, Respondent failed to include, within or as an attachment to each contract, a statement by the lessee affirming receipt of the information set forth in 40 C.F.R. § 745.113(b)(2) and (b)(3) and the lead hazard information pamphlet before the lessee was obligated under the contract in ten leasing transactions: 1838 Brookside Avenue, November 14, 2003 (Count 23); 2822 English Avenue, March 30, 2004 (Count 24); 3780 North Parker Avenue, August 22, 2002 (Count 25); 2039 Roosevelt Avenue, June 1, 2003 (Count 26); 402 South Rural Street, April 11, 2003 (Count 27); 815 North Rural Avenue, April 24, 2003 (Count 28); 725 North Sherman Drive, August 1, 2002 (Count 29); 2518 North Temple Avenue, August 1, 2003 (Count 30); 4506 East Washington Street, June 1, 2002 (Count 31); and 2140 East 34th Street, July 10, 2002 (Count 32).

Under the Gravity-Based Penalty Matrix, *id.* at B-4, Level 4 circumstance violations that occurred prior to March 15, 2004 incur a penalty of \$4,400 (major extent); \$2,750 (significant extent); or \$440 (minor extent). Level 4 circumstance violations that occurred on or after March 15, 2004 incur a penalty of \$5,158 (major extent); \$3,224 (significant extent); or \$516 (minor extent). See Gravity-Based Penalty Matrix, *id.* at B-4-A. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for

each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 23-32 of \$10,746. *See* CX-40 for the worksheet prepared by U.S. EPA to calculate the penalty for these counts.

e. Counts 33-42 (Failure to Include Certifying Signatures)

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, the signatures of the lessor and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of signature before the lessee is obligated under a contract to lease target housing as required by 40 C.F.R.

§ 745.113(b)(6) and 40 C.F.R. § 745.100 is a Level 6 violation. *Id.* at B-3. As explained at length above, Respondent failed to include, within or as an attachment to each contract to lease target housing, the signatures of Respondent and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of such signature before the lessee was obligated under the contract in ten leasing transactions: 1838 Brookside Avenue, November 14, 2003 (Count 33); 2822 English Avenue, March 30, 2004 (Count 34); 3780 North Parker Avenue, August 22, 2002 (Count 35); 2039 Roosevelt Avenue, June 1, 2003 (Count 36); 402 South Rural Street, April 11, 2003 (Count 37); 815 North Rural Avenue, April 24, 2003 (Count 38); 725 North Sherman Drive, August 1, 2002 (Count 39); 2518 North Temple Avenue, August 1, 2003 (Count 40); 4506 East Washington Street, June 1, 2002 (Count 41); and 2140 East 34th Street, July 10, 2002 (Count 42).

Under the Gravity-Based Penalty Matrix, *id.* at B-4, Level 6 circumstance violations that occurred prior to March 15, 2004 incur a penalty of \$1,100 (major extent); \$550 (significant extent); or \$110 (minor extent). Level 6 circumstance violations that occurred on or after March 15, 2004 incur a penalty of \$1,290 (major extent); \$645 (significant extent); or \$129 (minor extent). *See* Gravity-Based Penalty Matrix, *id.* at B-4-A. The “extent” determinations made by U.S. EPA for

these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 33-42 of \$2,549. *See* CX-40 for the worksheet prepared by U.S. EPA to calculate the penalty for these counts.

f. Counts 43-44 (Failure to Include a Lead Warning Statement in Sales Contracts)

Under Appendix B of the Penalty Policy, the failure to include, as an attachment to each contract to sell target housing, the Lead Warning Statement before a purchaser is obligated under the contract to purchase target housing as required by 40 C.F.R. § 745.113(a)(1) and 40 C.F.R. § 745.100 is a Level 2 violation. *Id.* at B-1. As explained at length above, Respondent failed to include, as an attachment to each contract to purchase target housing, the Lead Warning Statement before the purchaser was obligated under the contract in two leasing transactions: 1838 Brookside Avenue, April 15, 2005 (Count 43) and 725 North Sherman Drive, May 17, 2005 (Count 44).

Under the Gravity-Based Penalty Matrix, Level 2 circumstance/minor extent violations that occurred on or after March 15, 2004 incur a penalty of \$1,547. *Id.* at B-4-A. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 43-44 of \$3,094.

g. Counts 45-46 (Failure to Include a Lead Disclosure Statement in Sales Contracts)

Under Appendix B of the Penalty Policy, the failure to include, as an attachment to each contract to sell target housing, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the purchaser is obligated under the contract to purchase target housing as required by 40 C.F.R. § 745.113(a)(2) and 40 C.F.R. § 745.100 is a Level 3 violation. *Id.* at B-1. Additionally,

under Appendix B of the Penalty Policy, the failure to include, as an attachment to each contract to sell target housing, any available additional information concerning known lead-based paint and/or lead-based paint hazards, as required by 40 C.F.R. § 745.113(a)(2) and 40 C.F.R. § 745.100 is a Level 3 violation. As explained at length above, Respondent failed to include, as an attachment to the sale contract, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the purchaser became obligated under the contract in one sales transaction for the property at 1838 Brookside Avenue, April 15, 2005 (Count 45). Respondent failed to disclose information concerning known lead-based paint hazards before the purchaser became obligated under the contract in another sale transaction for the property at 725 North Sherman Drive, May 17, 2005 (Count 46).

Under the Gravity-Based Penalty Matrix, *id.* at B-4-A, Level 3 circumstance/minor extent violations that occurred on or after March 15, 2004 incur a penalty of \$774. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 45-46 of \$1,548.

h. Counts 47-48 (Failure to Include a List of Records or Statement that No Records Exist in Sales Contracts)

Under Appendix B of the Penalty Policy, the failure to include, as an attachment to each contract to sell target housing, a list of any records or reports available to the seller regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records exist, before a purchaser is obligated under a contract to purchase target housing as required by 40 C.F.R. § 745.113(a)(3) and 40 C.F.R. § 745.100 is a Level 5 violation. *Id.* at B-2. As explained at length above, Respondent failed to include, as an attachment to each contract to sell

target housing, a list of any records or reports available to the seller regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records exist, before the purchasers were obligated under the contract to purchase target housing in two sales transactions: 1838 Brookside Avenue, April 15, 2005 (Count 47) and 725 North Sherman Drive, May 17, 2005 (Count 48).

Under the Gravity-Based Penalty Matrix, *id. at B-4-A*, Level 5 circumstance/minor extent violations that occurred on or after March 15, 2004 incur a penalty of \$258. The “extent” determinations made by U.S. EPA for these counts is explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 47-48 of \$516. *See CX-40* for the worksheet prepared by U.S. EPA to calculate the penalties for these counts.

i. Counts 49-50 (Failure to Include Statement of Receipt of Lead Hazard Information and Pamphlet in Sales Contracts)

Under Appendix B of the Penalty Policy, the failure to include, as an attachment to each contract to sell target housing, a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. §§ 745.113(a)(2) and (a)(3), and the lead hazard information pamphlet before the purchaser is obligated under a contract to purchase target housing as required by 40 C.F.R. § 745.113(a)(4) and 40 C.F.R. § 745.100 is a Level 4 violation. *Id. at B-2*. As explained at length above, Respondent failed to include, as an attachment to each contract to sell target housing, a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. §§ 745.113(a)(2) and (a)(3), and the lead hazard information pamphlet before the purchasers were obligated under the contract to purchase target housing in two sales transactions: 1838 Brookside Avenue, April 15, 2005 (Count 49) and 725 North Sherman Drive, May 17, 2005 (Count 50).

Under the Gravity-Based Penalty Matrix, *id.* at B-4-A, Level 4 circumstance/minor extent violations that occurred on or after March 15, 2004 incur a penalty of \$516. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 47-48 of \$1,032.

j. Counts 51-52 (Failure to Include Statement Concerning Opportunity for Risk Assessment and/or Inspection in Sales Contracts)

Under Appendix B of the Penalty Policy, the failure to include, as an attachment to the contract, a statement by the purchaser that he/she has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity before a purchaser is obligated under a contract to buy target housing as required by 40 C.F.R. § 745.113(a)(5) and 40 C.F.R. § 745.100 is a Level 4 violation. As explained at length above, Respondent failed to include, as an attachment to each contract, a statement by the purchaser that he/she had either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity before the purchaser was obligated under the contract in two sales transactions: 1838 Brookside Avenue, April 15, 2005 (Count 51) and 725 North Sherman Drive, May 17, 2005 (Count 52).

Under the Gravity-Based Penalty Matrix, *id.* at B-4-A, Level 4 circumstance/minor extent violations that occurred on or after March 15, 2004 incur a penalty of \$516. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 47-48 of \$1,032. *See* CX-40 for the worksheet prepared by U.S. EPA for these counts.

k. Counts 53-54 (Failure to Include Certifying Signatures in Sales Contracts)

Under Appendix B of the Penalty Policy, the failure to include, as an attachment to the contract, the signatures of the sellers, agents, and purchasers certifying to the accuracy of their statements to the best of their knowledge, along with the dates of signature, before the purchaser is obligated under a contract to purchase target housing as required by 40 C.F.R. § 745.113(a)(7) and 40 C.F.R. § 745.100 is a Level 6 violation. *Id.* at B-3. As explained at length above, Respondent failed to include, as an attachment to each contract, the signatures of the seller (*i.e.* Respondent), agents, and purchasers certifying to the accuracy of their statements to the best of their knowledge, along with the dates of such signature, before the purchasers were obligated under the contract in two sales transactions: 1838 Brookside Avenue, April 15, 2005 (Count 53) and 725 North Sherman Drive, May 17, 2005 (Count 54).

Under the Gravity-Based Penalty Matrix, *id.* at B-4-A, Level 6 circumstance/minor extent violation that occurred on or after March 15, 2004 incur a penalty of \$129. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed gravity-based penalty for Counts 53-54 of \$258.

3. Total Initial Gravity-Based Penalty

U.S. EPA calculated the total initial gravity-based penalty adding together the eleven subtotal gravity-based penalties for the 54 counts (\$25,087 + \$1,434 + \$5,428 + \$10,746 + \$2,549 + \$3,094 + \$1,548 + \$516 + \$1,032 + \$1,032 + \$258). The initial gravity-based penalty is \$52,724.

B. Statutory Adjustment Factors

1. Ability to Pay/Continue in Business

As noted above, on November 13, 2006, U.S. EPA issued a prefiling notice letter to Respondent informing Respondent that U.S. EPA was prepared to file a civil administrative penalty complaint against him for alleged violations of the Section 1018 requirements. The prefiling notice letter also extended an opportunity to Respondent to advise U.S. EPA of any factors that he believed U.S. EPA should consider before filing a complaint. The prefiling notice letter specifically asked Respondent to provide financial information if Respondent believed he would have an inability to pay a penalty, and advised Respondent to submit such information within ten days of his receipt of the notice. CX-38. Complainant did not receive any financial information from Respondent before filing the complaint on December 7, 2006. On March 9, 2007, and on or about April 3, 2007, Respondent provided U.S. EPA with U.S. Individual Income Tax Returns for tax years 2003, 2004, and 2005 and certain state tax filings. CX-43 and CX-45. U.S. EPA has compiled additional information regarding Respondent's ability to pay the proposed penalty. *See* CX-46 and CX-47. These exhibits support the conclusion that Respondent owns substantial assets in the form of rental property and has received considerable additional assets from the sale of former rental properties. Accordingly, Complainant did not adjust the initial gravity-based penalty based on Respondent's ability to pay.

2. History of Prior Such Violations

U.S. EPA has no information regarding prior violations of Section 1018 by Respondent. Accordingly, U.S. EPA did not increase the initial gravity-based penalty for a history of prior such violations.

3. Degree of Culpability

The Penalty Policy provides for a 25 percent increase in penalty for an intentional violation of Section 1018, or a violation where the violator has previously received a Notice of Noncompliance (NON) for Section 1018 or Disclosure Rule violations. CX-41 at 15. U.S. EPA has no information that Respondent's violations were intentional or that Respondent had previously received a NON. U.S. EPA has not increased the initial gravity-based penalty for culpability.

4. Other Factors as Justice May Require

a. No Known Risk of Exposure

Under the Penalty Policy, U.S. EPA will adjust a proposed penalty down 80 percent if the Respondent provides U.S. EPA with appropriate documentation that the target housing is certified to be lead-based paint free by a certified inspector. *Id.* at 16. Respondent has not provided any documentation to certify that the properties at issue in this matter are certified lead-based paint free. U.S. EPA did not adjust the penalty downward based on no known risk of exposure.

b. Attitude

Under the Penalty Policy, U.S. EPA may reduce the proposed penalty by up to 30 percent based on a Respondent's cooperation, immediate good faith efforts to comply, and timely efforts to settle the case. *Id.* U.S. EPA does not believe a reduction of the proposed penalty is appropriate based on these factors and, therefore, has not adjusted the initial gravity-based penalty downward.

c. Supplemental Environmental Projects (SEPs)

Respondent has not agreed to perform a SEP.

d. Audit Policy

Respondent did not disclose his violations of Section 1018 under U.S. EPA's Audit Policy, "Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations," 60 Fed. Reg.

66706 (December 22, 1995); therefore, U.S. EPA made no adjustment to the initial gravity-based penalty based on this factor.

e. Voluntary Disclosure

The Penalty Policy provides that a violator who self-discloses a violation of Section 1018, but not under the Audit Policy, may still receive a reduction in penalty for such a voluntary disclosure. CX-41 at 17. Respondent did not disclose his violations of Section 1018; therefore, U.S. EPA made no adjustment to the initial gravity-based penalty based on this factor.

f. Size of Business

A violator may request assistance under the U.S. EPA's *Policy on Compliance Incentives for Small Businesses* (Small Business Policy). The Small Business Policy provides for the elimination of penalties if a small business meets its four qualifying criteria and agrees to participate in the compliance assistance program or conducts a voluntary self-audit. Respondent has not sought assistance under the Small Business Policy. Therefore, U.S. EPA made no adjustment to the proposed penalty based on this factor.

g. Adjustment for Small Independent Owners and Lessors

Under the Penalty Policy, U.S. EPA will adjust a penalty down by 50 percent for individuals who own one target housing unit for lease or one target housing unit that is "for sale by owner." CX-41 at 18. Respondent is the owner of multiple residential rental properties in Indianapolis, Indiana, and is cited in the complaint for violations involving ten separate target housing units. Accordingly, U.S. EPA made no adjustment to the initial gravity-based penalty based on this factor.

h. Economic Benefit of Noncompliance

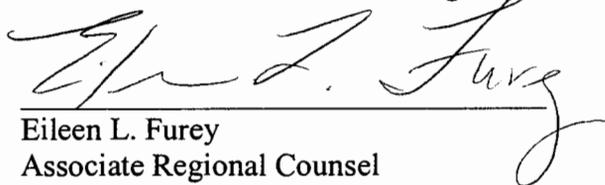
U.S. EPA believes the proposed penalty captures any economic benefit to Respondent from his noncompliance with Section 1018.

C. Total Proposed Penalty

In summary, U.S. EPA did not increase or decrease the initial gravity-based penalty based on any of the statutory adjustment factors. U.S. EPA proposed a \$52,724 penalty in the Complaint.

Respectfully submitted,

U.S. Environmental Protection Agency,

A handwritten signature in cursive script, appearing to read "Eileen L. Furey", written over a horizontal line.

Eileen L. Furey
Associate Regional Counsel
U.S. EPA Region 5
77 W. Jackson Blvd. (C-14J)
Chicago, IL 60604

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In the Matter of: Frank J. Davis
Docket No.: TSCA-05-2007-0002

CERTIFICATE OF SERVICE

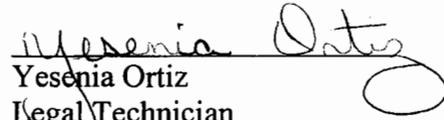
I, Yesenia Ortiz, certify that I filed the original and one copy of the above Complainant's Initial Prehearing Exchange with U.S. EPA Region 5's Regional Hearing Clerk on June 15, 2007. In addition, I delivered, by pouch mail, a true and accurate copy to:

Honorable Spencer T. Nissen
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L/Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

I also mailed a true and accurate copy, by Federal Express, to:

Frank J. Davis
623 Sunridge Court
Indianapolis, Indiana 46239

dated: June 15, 2007


Yesenia Ortiz
Legal Technician