UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
PROVISION REALTY AND	)	**DOCKET No. TSCA-07-2007-0023**
PROPERTY MGMT LLC,	)	
	)	
Respondent	)	

DEFAULT ORDER AND INITIAL DECISION

This proceeding was commenced on March 15, 2007 with the filing of a Complaint by the Complainant, the United States Environmental Protection Agency, Region 7 (EPA), against Respondent, Provision Realty and Property Management, LLC. The Complaint charges the Respondent in one count with one violation of Section 409 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2689, by failing to comply with the regulatory requirements contained in 40 C.F.R. Part 745, Subpart F (40 C.F.R. §§ 745.100-745.119) known as the "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property," Regulations, promulgated under section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851 *et seq.* The Complaint proposed a total penalty of $11,000.

On or about May 31, 2007, service was made on the Respondent company pursuant to 40 C.F.R. § 22.5(b) by the Sheriff delivering a copy of the Complaint to John W. North, whom the Complaint alleges is the Registered Agent for the company as shown on the records of the Secretary of the State of Missouri. *See*, Sheriff's Return. On or about July 9, 2007, Respondent, *pro se,* filed a Response to the Complaint.[1] In its Response, Respondent failed to admit or deny the factual allegations regarding the violation asserted in the Complaint. Instead, the Response explicated the events that allegedly immediately preceded the purchase of the Respondent company by John and Heather North and the financial and legal difficulties said owners incurred thereafter as a result. No

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[1] It is unclear who exactly prepared the Response to the Complaint filed on Respondent's behalf as the statement is not signed nor is it on letterhead and is written in the third person. However, the Response references the matter to which it is responding as "John North Provision Property Management," the body of the letter detailing the business' history, refers to "John and Heather North" as having "control of the business," and the envelope in which the response was sent identifies the sender/return address as that of "John North." Furthermore, while the record does not evidence any extensions of time for answering having been granted by the Regional Judicial Officer, Complainant's failure to raise the issue indicates that the Complainant consented to the Respondent's delay in responding.

specific request for hearing was made. Nevertheless, on or about July 10, 2007, the Regional Hearing Clerk referred the case to the Office of Administrative Law Judges (OALJ) for the purposes of assigning a presiding judge for hearing.

Thereafter, the parties were offered an opportunity to participate in OALJ's Alternative Dispute Resolution process. Complainant accepted the offer on July 25, 2007, however Respondent failed to respond. As a result, the matter was not sent for ADR but rather on August 1, 2007, the undersigned was designated to preside over the hearing of this matter.

On August 6, 2007, the undersigned issued a Prehearing Order directing the parties to engage in a settlement conference and for Complainant to file a Status Report in regard thereto on or before August 31, 2007. In addition, the Prehearing Order directed the Complainant to file its Initial Prehearing Exchange on or before September 21, 2007; Respondent to file its Initial Prehearing Exchange on or before October 12, 2007; and permitting Complainant to file a rebuttal prehearing exchange on or before October 24, 2007. The Prehearing Order further stated:

> If the Respondents intend to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondents shall serve a statement to that effect on or before the date for filing its prehearing exchange. **The Respondents are hereby notified that their failure to either comply with the prehearing exchange requirements set forth herein or to state that they are electing only to conduct cross-examination of the Complainant's witnesses can result in the entry of a default judgment against them.**

See, Prehearing Order at 5 (underlineation and bold in original).

In response to the Prehearing Order, Complainant submitted a Status Report on August 31, 2007 indicating that the parties had engaged by telephone and mail in settlement discussions, but no agreement had been reached. Subsequently, on September 27, 2007, Complainant submitted its Initial Prehearing Exchange, identifying two witnesses and six exhibits as well as providing other information responsive to the Prehearing Order. Respondent did not file its Initial Prehearing Exchange or otherwise respond to the Prehearing Order.

As a result, on October 17, 2007, the undersigned issued an Order to Show Cause, requiring that on or before October 31, 2007, Respondent show good cause why it failed to submit its Prehearing Exchange in a timely manner and "why a default should not be entered against it [in] accordance with 40 C.F.R. § 22.17(a)."

To date, Respondent has not responded to the Show Cause Order nor the Prehearing Order issued by this tribunal.

Section 22.17(a) of the Consolidated Rules of Practice provides that:

> A party may be found to be in default: . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of respondent's right to contest such factual allegations. . . .

Section 22.17(c) of the Consolidated Rules of Practice provides that:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. . . .

The Prehearing Order required Respondent to respond to it on or before October 12, 2007 or suffer default. The Order to Show Cause required a response to it by October 31, 2007 if Respondent wished to avoid default. To date, Respondent has not responded to either of those Orders. Thus, the Respondent is hereby found to be in default. In accordance with Rule 22.17(a), this constitutes an admission of the facts alleged in the Complaint and grounds for assessment of the penalty of $11,000 proposed therein.

The following Findings of Fact and Conclusions of Law are based upon the Complaint, Respondent's Response thereto, Complainant's Prehearing Exchange, and other documents of record in the case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Complainant is the United States Environmental Protection Agency (EPA), Region 7.

2. The Respondent is Provision Realty and Property Management LLC, a company doing business in Joplin, Missouri engaged in the business of acting as an agent (within the meaning of 40 C.F.R. § 745.103) for others selling and/or leasing housing, including housing constructed prior to 1978, which is defined as "target housing" under 40 C.F.R. § 745.103.

3. Section 745.113(a)(2), 40 C.F.R. requires a seller or the agent for the seller to include as an attachment to the sales contract, a statement by the seller disclosing either the presence of any known lead-based paint and/or lead based paint hazards in the target housing, or indicating no knowledge of the presence of lead based paint and/or lead-based paint hazards.

4. Section 745.113(a)(4), 40 C.F.R. requires a seller or the agent for the seller to include as an attachment to the sales contract a statement by the purchaser affirming receipt of the information required by 40 C.F.R. §§ 745.113(a)(2) (disclosing known paint hazards) and (a)(3) (disclosing records available of paint hazards) and the lead hazard information pamphlet required under 15 U.S.C. § 2696.

5. On or about January 23, 2006, Respondent was the agent for the lease of target housing at 627 Byers, Apartment #1, in Joplin, Missouri (the Property).

6. During the term of the lease, a child under the age of six resided at the Property.

7. Respondent failed to provide the lessee with an EPA-approved lead hazard information pamphlet or otherwise conduct Lead-Based Paint disclosure activities before the lessee was obligated under a contract for lease of the Property entered into on or about January 23, 2006.

8. Respondent's failure to provide an EPA-approved lead hazard information pamphlet or otherwise conduct Lead-Based Paint disclosure activities is a violation of 40 C.F.R. §§ 745.107(a) and 745.115 and, in accordance with 40 C.F.R. § 745.118(e), a violation of Section 1018 of the Act, 42 U.S.C. § 4852d, and of Section 409 of TSCA, 15 U.S.C. §2689.

DETERMINATION OF CIVIL PENALTY AMOUNT

9. Section 22.17(c) of the Consolidated Rules of Practice provides in pertinent part that upon issuing a default "[t]he relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R.§ 22.17(c).

10. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and 40 C.F.R. Part 745, Subpart F, authorizes the assessment of a civil penalty under section 16 of TSCA, 15 U.S.C. § 2615, of up to $11,000 for each violation as adjusted by the Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69360 (Dec. 31, 1996).

11. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires that the following factors be considered in determining the amount of any penalty assessed under Section 16: the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any

history of prior such violations, the degree of culpability, and other such matters as justice may require.

12. EPA has issued guidelines for penalties under TSCA titled "Section 1018 - Disclosure Rule Enforcement Response Policy," dated December 1999. *See*, Exhibit 4 to Complainant's Initial Prehearing Exchange.

13. Having found that Respondent violated TSCA, I have determined that $11,000, the penalty proposed in the Complaint, is the appropriate civil penalty to be assessed against Respondent in that it is neither clearly inconsistent with the record of the proceeding nor clearly inconsistent with the Act.

14. In doing so, I have taken into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to Respondent, the ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as justice may require, which are all of the factors identified by Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2). I have also considered the above referenced guidelines.

15. In assessing this penalty, I find persuasive the rationale for the calculation of the assessed penalty set forth in the Complaint and in Complainant's Initial Prehearing Exchange filed in this proceeding and incorporate such rationale by reference into this Order.

16. Further, I have considered the facts alleged in the Response to the Complaint filed by Respondent in this matter but find such allegations do not warrant a reduction in the penalty in that the Response is unsigned, unsworn, and unsupported by any documentary or other evidence. In addition, I note that section 3 of the Prehearing Order explicitly requested Respondent to identify any affirmative defenses it wished to raise to this action, indicate if it is claiming an inability to pay the proposed penalty, and to identify any other bases it was relying upon if it was taking the position that the proposed penalty should be reduced or eliminated. As indicated above, Respondent chose not to respond in any way to the Prehearing Order or the Show Cause Order issued thereafter and has not otherwise contacted this Tribunal with regard to this matter.

ORDER

1. For failing to comply with the Prehearing Order and Order to Show Cause of the Presiding Officer, as indicated above, Respondent is hereby found in **DEFAULT.**

2. Respondent Provision Realty & Property Mgmt, LLC is hereby assessed a civil administrative penalty in the amount of $ 11,000.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $11,000, payable to "Treasurer, United States of America," and mailed to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 6
P.O. Box 360582M
Pittsburgh, PA 15251

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

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

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

Susan L. Biro
Chief Administrative Law Judge

Dated: November 13, 2007
Washington, D.C.

In the Matter of *Provision Realty and Property Mgmt, LLC,* Docket No. TSCA-07-2007-0023

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Default Order and Initial Decision**, dated November 13, 2007, was sent in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Kathy Robinson
Regional Hearing Clerk
U.S. EPA / Region VII
901 North 5th Street
Kansas City, KS 66101

Copy by Certified Pouch Mail

Chris R. Dudding, Esq.
Assistant Regional Counsel
U.S. EPA / Region VII
901 North 5th Street
Kansas City, KS 66101

Copy by Certified and Regular Mail

John W. North
216 E. 12th Street
Picher, OK 74360

John W. North
110 Concord
Carl Junction, MO 64834

John W. North
1210 Bobwhite Lane
Carl Junction, MO 64834

Heather W. North
c/o Complete Me Salon
1427 Missouri Ave.
Joplin, MO 64801

John W. North
101 North Windwood
Carl Junction, MO 64834

Dated: November 13, 2007
Washington, DC

IN THE MATTER OF Provision Realty and Property MGMT LLC, Respondent
Docket No. TSCA-07-2007-0023

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Default Order and Initial Decision was sent this day in the following manner to the addressees:

Copy by Pouch Mail to:

U. S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
(MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

and

Assistant Administrator
Office of Enforcement and Compliance Assurance
Mail Code 2201A
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dated: 11/14/07

Kathy Robinson
Hearing Clerk, Region 7