



A copy of the Complaint was received by Respondent on January 19, 2012, as evidenced by the attached copy of the certified mail return receipt "green card", which was filed in connection with Complainant's Proof of Service on January 26, 2012. *See* Exhibit B. The Complaint was accompanied by a cover letter addressed to David Crespo, Respondent's President *See* Exhibit C. Both the Complaint and the cover letter specifically informed Respondent of the requirement, found in Section 22.15(a) of the Consolidated Rules, that an Answer to the Complaint be filed within 30 days after service of the Complaint. As of the date of this Motion, Respondent has not filed an Answer to the Complaint. Complainant, therefore, moves for an Order holding Respondent in default and imposing a penalty of \$40,010.

## **II. DISCUSSION**

Pursuant to 40 C.F.R. § 22.17(a), a party may be found to be in default, in relevant part, upon failing to file a timely answer to the complaint. Pursuant to 40 C.F.R. § 22.17(a), default by a respondent constitutes an admission of all facts alleged in the complaint. Pursuant to 40 C.F.R. § 22.17(b), a motion for default must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

### **A. Violations Deemed Admitted as a Result of Default**

The law and facts with regard to Respondent's violations of TSCA are set forth in detail in the Complaint, and this recitation is incorporated herein by reference. As detailed in the Complaint, Respondent failed to comply with a number of regulatory requirements in each of five (5) lease transactions. By virtue of Respondent's default, the

factual allegations supporting these alleged violations are deemed to be admitted. These violations include the following:

**945 Elm Street, 2nd Floor (Front) Lease Transaction**

Count 1: Failure to include either as an attachment to, or within, the lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 6: Failure to include either as an attachment to, or within, the lease the disclosure statement required by 40 C.F.R. § 745.113(b)(2).

Count 11: Failure to include either as an attachment to, or within, the lease a list of records/reports or an indication that no such records/reports are available as required by 40 C.F.R. § 745.113(b)(3).

Count 16: Failure to include either as an attachment to, or within, the lease the receipt of information statement required by 40 C.F.R. § 745.113(b)(4).

Count 21: Failure to include either as an attachment to, or within, the lease signatures certifying to the accuracy of statements required by 40 C.F.R. § 745.113(b)(6).

**945 Elm Street, 1<sup>st</sup> Floor (Front) Lease Transaction**

Count 2: Failure to include either as an attachment to, or within, the lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 7: Failure to include either as an attachment to, or within, the lease the disclosure statement required by 40 C.F.R. § 745.113(b)(2).

Count 12: Failure to include either as an attachment to, or within, the lease a list of records/reports or an indication that no such records/reports are available as required by 40 C.F.R. § 745.113(b)(3).

Count 17: Failure to include either as an attachment to, or within, the lease the receipt of information statement required by 40 C.F.R. § 745.113(b)(4).

Count 22: Failure to include either as an attachment to, or within, the lease signatures certifying to the accuracy of statements required by 40 C.F.R. § 745.113(b)(6).

**533 Franklin Street, 1<sup>st</sup> Floor (Rear) Lease Transaction**

Count 3: Failure to include either as an attachment to, or within, the lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 8: Failure to include either as an attachment to, or within, the lease the disclosure statement required by 40 C.F.R. § 745.113(b)(2).

Count 13: Failure to include either as an attachment to, or within, the lease a list of records/reports or an indication that no such records/reports are available as required by 40 C.F.R. § 745.113(b)(3).

Count 18: Failure to include either as an attachment to, or within, the lease the receipt of information statement required by 40 C.F.R. § 745.113(b)(4).

Count 23: Failure to include either as an attachment to, or within, the lease signatures certifying to the accuracy of statements required by 40 C.F.R. § 745.113(b)(6).

**425 N. 10<sup>th</sup> Street, 2<sup>nd</sup> Floor Lease Transaction**

Count 4: Failure to include either as an attachment to, or within, the lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 9: Failure to include either as an attachment to, or within, the lease the disclosure statement required by 40 C.F.R. § 745.113(b)(2).

Count 14: Failure to include either as an attachment to, or within, the lease a list of records/reports or an indication that no such records/reports are available as required by 40 C.F.R. § 745.113(b)(3).

Count 19: Failure to include either as an attachment to, or within, the lease the receipt of information statement required by 40 C.F.R. § 745.113(b)(4).

Count 24: Failure to include either as an attachment to, or within, the lease signatures certifying to the accuracy of statements required by 40 C.F.R. § 745.113(b)(6).

**609 N. 10<sup>th</sup> Street, 1<sup>st</sup> Floor (Rear) Lease Transaction**

Count 5: Failure to include either as an attachment to, or within, the lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 10: Failure to include either as an attachment to, or within, the lease the disclosure statement required by 40 C.F.R. § 745.113(b)(2).

Count 15: Failure to include either as an attachment to, or within, the lease a list of records/reports or an indication that no such records/reports are available as required by 40 C.F.R. § 745.113(b)(3).

Count 20: Failure to include either as an attachment to, or within, the lease the receipt of information statement required by 40 C.F.R. § 745.113(b)(4).

Count 25: Failure to include either as an attachment to, or within, the lease signatures certifying to the accuracy of statements required by 40 C.F.R. § 745.113(b)(6).

B. Civil Penalty

The authority for a civil penalty is found in Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, which authorizes the

assessment of a civil penalty under Section 16 of TSCA, 15 U.S.C. § 2615, in the maximum amount of \$10,000 for each violation of Section 409 of TSCA, 15 U.S.C. § 2689. This maximum amount was adjusted to \$11,000 for violations occurring after March 15, 2004 and on or before January 12, 2009, and to \$16,000 for violations occurring after January 12, 2009, pursuant to the *Civil Monetary Penalty Inflation Adjustment Rule*, 40 C.F.R. Part 19. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant did not propose a specific penalty in the Complaint. However, pursuant to 40 C.F.R. § 22.14(a)(4)(ii), the Complaint contained an explanation of the number of and severity of violations.

For purposes of determining the amount of any civil penalty to be assessed, Section 16 of TSCA, 15 U.S.C. § 2615, requires EPA to take into account the nature, circumstances, extent, and gravity of the violation or violations alleged 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 ("statutory factors"). In developing the proposed penalty, Complainant has taken into account the particular facts and circumstances of this case with specific reference to the statutory factors set forth in Section 16 of TSCA and EPA's *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy ("ERP")*, dated December 2007. A copy of the ERP is attached as Exhibit D. The ERP provides a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to particular cases. Therefore, Complainant has followed the suggested calculations and methodology in the ERP to the maximum extent possible consistent with the statutory penalty factors and the specific circumstances of this case. Pursuant to the December 29,

2008 *Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)*, penalties for violations cited in the Complaint, all of which occurred prior to January 12, 2009, need not be adjusted for inflation.

It should be noted that Complainant has not taken into consideration Respondent's ability to pay the proposed penalty other than to note that there is no current information to support a belief that Respondent cannot pay the full penalty. While Complainant has the ultimate burden of persuasion regarding ability to pay, information regarding a respondent's ability to pay is normally within the control of that respondent, and therefore "where a respondent does not raise its ability to pay as an issue in its answer . . . [Complainant] may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived." *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (E.A.B. 1994). In this case Respondent, by defaulting, has failed to raise its ability to pay as an issue or introduce any evidence whatsoever to support its burden of production regarding ability to pay. Therefore, no further consideration of the issue is warranted.

The penalty calculation under the ERP relies primarily on two factors. The "Circumstance" level looks at the relative risk that the violation would impair ability of the purchaser or lessee to evaluate the risks of lead exposure at the property. These levels range from Level 1 to Level 6, with Level 1 being most serious. *See* Exhibit D, page 12. The "Extent" level looks at the nature of the persons potentially exposed to lead paint hazards, with the highest levels being assigned where the most vulnerable persons --

children under the age of six (6) and/or pregnant women -- will occupy the premises. *See* Exhibit D, pages 12-13.

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

As set forth in the Complaint, the assessed circumstance level varies with the type of violation. The following circumstance levels are proposed in this case:

A. Violations of 40 C.F.R. §§ 745.113(b)(1): Violations of the disclosure requirements set forth at 40 C.F.R. § 745.113(b)(1) are deemed to represent a “high” level of impairment to a lessee’s ability to assess the information required to be disclosed and have been characterized as Circumstance Level 2 violations in the ERP. *See* Exhibit D, Appendix B, pages 27 and 30. The failure to provide the required Lead Warning Statement deprived each of the tenants, before they became obligated under the lease, of information they could have used to assess whether to enter in to the lease and to better protect themselves and their families, including warnings that exposure to lead-based paint can be particularly harmful to pregnant woman and young children, warnings as to the specific exposure pathways from lead-based paint (i.e. paint, paint chips, and paint dust). These violations lead to a high probability of impairing the ability of tenants to make informed decisions. As a result, each of the violations alleged in Counts 1 through 5 of the Complaint have been assessed as Circumstance Level 2 violations. Under the ERP a Level 2 violation with a Major Extent level is assessed a \$10,320 penalty (Count 1), and a Level 2 violation with a Minor Extent level is assessed a \$1,550 penalty (Counts 2, 3, 4 and 5). *See* Exhibit D, Appendix B, page 30.

B. Violations of 40 C.F.R. § 745.113(b)(2): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(2) are deemed to represent a “medium” level of impairment to a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 3 violations in the ERP. *See* Exhibit D, Appendix B, pages 27 and 30. The failure to inform

the tenants of known lead hazards or to state that the owner has no knowledge of the presence of such hazards deprived each of the tenants, before they became obligated under the lease, of information they could have used to assess whether to enter in to the lease and to better protect themselves and their families. As a result, each of the violations alleged in Counts 6 through 10 of the Complaint have been assessed as Circumstance Level 3 violations. Under the ERP a Level 3 violation with a Major Extent level is assessed a \$7,740 penalty (Count 6), and a Level 3 violation with a Minor Extent level is assessed a \$770 penalty (Counts 7, 8, 9 and 10). *See* Exhibit D, Appendix B, page 30

- C. Violations of 40 C.F.R. § 745.113(b)(3): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(3) are deemed to represent a “low” probability of impairing lessees’ ability to assess the information required to be disclosed and are characterized as Circumstance Level 5 violations in the ERP. *See* Exhibit D, Appendix B, pages 28 and 30. The failure to obtain a statement confirming that lessees received the disclosure of known lead hazards (or statement that the owner has no knowledge of the presence of such hazards) prevents both EPA and the Respondent from being able to accurately determine if the required disclosures occurred and thus creates a significant but relatively low risk that the lessees were not adequately informed of the hazards. As a result, each of the violations alleged in Counts 11 through 15 of the Complaint have been assessed as Circumstance Level 5. Under the ERP a Level 5 violation with a “Major Extent” level is assess a \$2,580 penalty (Count 11) and a Level 5

violation with a “Minor Extent” level is assessed a \$260 penalty (Counts 12, 13, 14, and 15). *See* Exhibit D, Appendix B, page 30.

D. Violations of 40 C.F.R. § 745.113(b)(4): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(4) are deemed to represent a “medium” probability of impairing a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 4 violations in the ERP. *See* Exhibit D, Appendix B, pages 28 and 30. The failure to obtain a statement confirming that the lessees received the lead hazard pamphlet and the disclosure of known lead hazards (or statement that the owner has no knowledge of the presence of such hazards) prevents both EPA and the Respondent from being able to accurately determine if the required disclosures occurred and thus creates a significant but medium risk that the lessees were not adequately informed of the hazards. As a result, each of the violations alleged in Counts 16 through 20 of Complaint have been assessed as Circumstance Level 4 violations. Under the ERP a Level 4 violation with a “Major Extent” level is assessed a \$5,160 penalty (Count 16) and a Level 4 violation with a “Minor Extent” level is assessed a \$520 penalty (Counts 17, 18, 19 and 20). *See* Exhibit D, Appendix B, page 30.

E. Violations of 40 C.F.R. § 745.113(b)(6): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(6) are deemed to represent a “low” probability of impairing a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 6 violations in the ERP. *See* Exhibit D, Appendix B, pages 29 and 30. The failure to obtain signatures

from all of the relevant parties makes it difficult to assess whether the other disclosure requirements were complied with, and thus creates a significant but relatively low risk that the lessees were not adequately informed of the hazards. As a result, each of the violations alleged in Counts 20 through 25 of the Complaint have been assessed as Circumstance Level 6. Under the ERP a Level 6 violation with a "Major Extent" level is assessed a \$1,290 penalty (Count 21) and a Level 6 violation with a "Minor Extent" level is assessed a \$130 penalty (Counts 22, 23, 24 and 25). *See Exhibit D, Appendix B, page 30.*

Complainant does not propose to make any adjustments to the penalty under the adjustment factors set forth in the ERP. Complainant is not aware of any past violations of the lead regulations, and is not aware of any circumstances from which to conclude that Respondent's level of culpability was either greater or lesser than the normal. Complainant is unaware of any extraordinary factors, either aggravating or mitigating.

The total proposed penalty for the violations set forth in the Complaint is \$40,010. A summary of the penalties for each of the properties is set forth in Exhibit F.

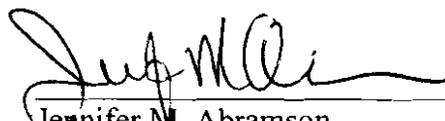
### III. CONCLUSION

For the forgoing reasons the Regional Judicial Officer should issue a Default Order against Respondent ordering Respondent to pay a civil penalty of \$40,010.

Respectfully submitted,

APR 20 2012

\_\_\_\_\_  
Date



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Jennifer M. Abramson  
Senior Assistant Regional Counsel



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