BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In the Matter of:	:	
	:	
John P. Vidiksis	:	
225 DeVilla Court	:	
Fayetteville, GA 30214	:	**TSCA Appeal No. 07-02**
	:	
	:	
	:	
	:	

BRIEF ON BEHALF OF APPELLANT

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STATEMENT OF ISSUES PRESENTED

1. Does the Presiding Officer's failure to consider the content of the Respondent's Lease Attachments to be an integral portion of his 40 C.F.R. §745.113(b)(1) Lead Disclosure Statement constitute reversible error?

2. Does the Presiding Officer's failure to find the Respondent's lead non-knowledge affirmation superior to the Region's "Know Nothing" disclaimer, and therefore, in compliance with 40 C.F.R. §745.113 (b) (2) constitute reversible error?

3. Does the Presiding Officer's failure to apply the TSCA Section 16 penalty factor, i.e. Degree of Culpability, constitute reversible error?

4. Does the Presiding Officer's failure to apply to apply the TSCA Section 16 penalty factor, i.e. Compliance History, constitute reversible error?

5. Does the Presiding Officer's failure to apply the TSCA Section 16 penalty factor, i.e. Other Matters as Justice May Require, constitute reversible error?

STATEMENT OF THE CASE AND PERTINENT FACTS

In August 2005, Complainant, Region III, filed a TSCA Complaint naming John P. Vidiksis and his former wife, Kathleen Vidiksis as co-respondents. This sixty-nine count complaint alleged that these two co-owners of apartments in York, Pennsylvania failed to provide multiple lead paint disclosure notices and information to their tenants. Additional counts alleged identical Lead Paint Disclosure violations by Mr. Vidiksis alone for other dwelling units he owned separately. Accordingly, this TSCA penalty action was quintessentially a *document* only (leases and their attachments, as well as lead paint inspection reports) case.

From September 25, 2006 through September 27, 2006, the Presiding Officer, William Moran conducted a trial on both liability and penalties in this matter. During this plenary hearing, the majority of the Complainant's proofs related to the alleged liability of Respondent, Mr. John Vidiksis. Nonetheless, this liability phase of the two and one half day trial could have been obviated entirely, as both parties had filed motions for a pre-trial adjudication of liability inter alia on material facts both concurred were not in dispute.

For fifty-six of the counts (for which Mr. Vidiksis is appealing) in this highly repetitive Complaint, the issue of Mr. Vidiksis' liability turned exclusively on the language of the identical apartment leases and their EPA/HUD authorized attachments. After making its redundant liability proofs, Complainant then proffered fatally flawed, highly truncated testimony by a single witness, Mr. Gallo, on the issue of the proposed penalty assessment, as purportedly authorized by 15 U.S.C. § 2601 et seq.

The exercise of TSCA penalty authority entails two core determinations – how serious is a violation -- does it cause (or risk actual) injury to humans or harm to the environment? And secondly, to what *degree is the respondent culpable* for a proven violation, irrespective of whether it is serious

or merely a minor departure from the regulatory requirement? Monetary sanctions of a substantial amount, pursuant to the TSCA statutory scheme, are intended to punish and deter causal willful, intentional or neglectful misconduct TSCA Section 16. Clearly, deterrence of exclusively unknowing misconduct is not viable and harsh punishment of truly inadvertent and/or vicarious actions fails to address the causal or operative role of the actual wrong doer(s). Nonetheless, in this case, the Complainant (and then the Presiding Officer) answered the first core question incorrectly, and did not even present proofs to address the second core penalty facto–degree of culpability. These fatal trial errors are addressed in detail herein below, following a summary of the deficiencies in the Complainant's liability proofs.

COUNTS 1-29: Purported Violations of 40 C.F.R. § 745.113(b)(1)

Thirty of the Counts in the Complaint, Counts (1-29), allege identical violations of 40 C.F.R. § 745.113(b)(1) as follows:

> "Respondents did not include a Lead Warning Statement, containing the language set forth in and required by 40 C.F.R. § 745.113(b)(1), **as an attachment** to or within the July, 2002 South Beaver Street Lease Agreement"
> (Emphasis added; Complaint Count One, Paragraph 342)

Contrary to these thirty identical claims, however, Respondent's lease agreements (and their attachments) provided in their core elements compliant lead paint warnings:

> **LEAD PAINT NOTICE**
>
> Ingestion of paint particles containing lead may result in lead poisoning which can cause major health problems, especially in children under 7 years of age. (Form lease Agreement, page 12, paragraph 44; Copy attached as Respondent's Exhibit One)

Additionally, the Attachment to each of these 30 leases provided the tenants the following fully compliant warning as well:

> LEAD is also harmful to adults. Adults can suffer from:

- Difficulties during pregnancy
- Other reproductive problems (in both men and women) (Res. Exh. One and Two: EPA issued pamphlets; Protect Your Family from Lead in Your Home)

COUNTS 2-60,61,63,65 and 66: Purported Violations of 40 C.F.R. § 745.113(b)(2)

Thirty-four of the Counts in the Complaint (2-60, 61, 63, 65 and 66) allege violations of 40 C.F.R. § 745.113(b)(2). It is averred by the Region that Respondent did not inform his prospective clients of the presence of lead in his rental units (despite his having personal knowledge thereof, Counts 2,4,6 and 10), or having no knowledge of any lead, he failed to so inform these tenants of his personal unawareness of the actual apartment conditions. Prior to trial, Mr. Vidiksis acknowledged his personal knowledge of lead paint in these four apartment units. At trial, however, the Complainant's witnesses, including the York Lead Coordinator, Ms. Yingling, acknowledged that Mr. Vidiksis had the lead base paint conditions fully corrected in compliance with the local housing code.(Tr.Vol. I, p.155, line 21 - p. 156, line 3; p.160, lines 7 -10; p.162, lines 1 -18; p. 163, line 8 - p. 165 line 3). Additionally, neither Ms. Yingling, nor any other Region III witness, testified that they had discussed with Mr. Vidiksis or with his real estate managers the specifics of the EPA Lead Paint Disclosure Regulations, or the warnings specified therein for lease inclusion.

Accordingly, Respondent's exclusive obligation for even Counts (8-60)[1] was to inform his tenants that he did not know whether or not lead was present in the subject apartment. In its entirety, therefore, EPA's mandatory 40 C.F.R. § 745.113(b)(2) disclosure mandate required Respondent's property management firm to give the tenant this statement:

> "Lessor has *no knowledge of lead-based paint and/or lead-based pain hazards in the housing.*" (Hereinafter, sometimes referred to as the "Know Nothing" disclaimer)

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1 Excluding Counts 2,4,6 and 10.

Despite being obligated with giving only a "Know Nothing" disclaimer, Respondent's property management firms provided these tenants with the following far more protective information:

> "Tenant acknowledges that the leased premises may have been constructed before 1978, and may contain lead-based paint." (Lease Agreement, page 12, paragraph 44, Compl. Exh.1-26; 28-35).

ARGUMENT

POINT ONE

COMPLAINANT'S ALLEGATIONS THAT MR. VIDIKSIS' REALTORS PROVIDED ONLY PARTIAL LEAD-BASED PAINT WARNINGS IN VIOLATIONS OF 40 C.F.R. § 113(b)(1) ARE ERRONEOUS, BECAUSE ALL LEASES WITH ATTACHMENTS INCLUDED THE REQUIRED NARRATIVE STATEMENTS.

For odd Counts 1-59, the 40 C.F.R. § 113(b)(1) allegations, the best possible characterization of these 30 Counts is that the Region has literally elevated form over substance. The testimony of the Region's liability witness, Daniel T. Gallo, Esquire, establishes conclusively that the Respondent's tenants were provided all core elements of the mandated lead health risk information. In essence, then, the Region's 30 identical claims are nothing more than a non-meritorious disparagement of the format in which this information was conveyed to these tenants.

Moreover, the refusal by the Presiding Officer to acknowledge the compliant nature of Mr. Vidiksis' lead paint disclosures disregarded the EPA/HUD Guidance Document issued on August 20, 1996. EPA's own Lead Disclosure Rule's Guidance document, "*Interpretative Guidance for The Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing,*" issued August 20, 1996, in conjunction with the U.S. Department of Housing and Urban Development, explicitly authorizes use of this pamphlet as a lease attachment for disclosure compliance. See, Guidance document, page 11, Question 27:

> Q: Can the pamphlet be provided ... as an attachment to the sale or rental contract?
> A: **EPA has developed and made available an alternative format of the pamphlet ... to accommodate sellers or lessors who wish to provide the pamphlet as part of**

the contract. The attachment includes EPA and HUD's sample disclosure and acknowledgement forms. (Emphasis added.)

The subject lease documents demonstrate conclusively that the format Complainant prefers was not followed or adhered to by Respondent. Of course, the real test for compliance is not the shape or size of the lease paper (or the number of staples used to attached the requisite pamphlet), but the actual content of the notice and warnings provided. Moreover, the Presiding Officer's reliance upon extraneous (non-TSCA) lease language is of no moment.

The only germane question is: was the tenant provided with the lead hazard information as required. And, as the core or critical information was put before these tenants in their leases and attachments thereto, they were denied none of the substantive health protections afforded them by 40 C.F.R. § 745.113(b)(1). The Respondent's obligation is to fully inform his prospective tenants of lead paint health risks, not to prove he could copy a boilerplate statement from the rulebook into a dwelling lease. Indisputably, Mr. Vidiksis properly informed his tenants with a warning that was equivalent in its informational content, scope and candor to the EPA's preferred statement.

POINT TWO

THE PRESIDING OFFICER'S DETERMINATION OF VIOLATIONS OF 40 C.F.R. § 745. 113(b)(2) -- FOR THE 26 COUNTS IN WHICH MR. VIDIKSIS' ONLY COMPLIANCE OBLIGATION WAS TO DISCLOSE THAT HE HAD NO KNOWLEDGE OF LEAD-PAINT -- ARE ERRONEOUS BECAUSE HIS DISCLOSURE OF THE POTENTIAL PRESENCE OF LEAD PAINT EXCEEDED AND IS SUPERIOR TO THE NON-INFORMATIVE DISCLAIMER

For even Counts 8-60 (not including Counts 2,4,6 and 10), the Region's 40 C.F.R. 113(b)(2) claims should shock the conscience of this Court, as the Complainant is seeking to impose upon Mr. Vidiksis, and he alone, more than *fifty four thousand ($54,000.00) dollars* in penalties for his Real Estate Managers' issuance of a lead warning statement that is indisputably superior to Region III's demanded "Know Nothing" disclaimer:

> Lessor has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

In lieu of providing no useful information to his prospective tenants, Mr. Vidiksis, **Century 21** Realty and **Target** Real Estate (Count 55 Lease transaction), in their identical form leases, prudently and properly disclosed to these individuals that:

> Tenant acknowledges that the leased premises may have been constructed before 1978 and may contain lead-based paint.
>
> * * *
>
> By signing on the following line, I acknowledge that I have received notice and have been informed of the possibility of lead-based paint being on the premises. (Compl. Exhs. 1-26; 28-35)

Indisputably, Mr. Gallo's testimony that the "Know Nothing" disclaimer was more informative and, therefore, helped prospective tenants in making an informed judgment as to the potential for lead paint to be present in the subject dwelling strains credulity beyond the breaking point.

POINT THREE

ACCEPTING *ARGUENDO* ONLY, THAT MR. VIDIKSIS VIOLATED 40 C.F.R. § 745.113(b)(1), THE PRESIDING OFFICER'S IMPOSITION OF AN EGREGIOUSLY EXCESSIVE PENALTY IS ARBITRARY AND CAPRICIOUS, AND DOES NOT COMPORT WITH THE TSCA STANDARDS FOR THE ASSESSMENT OF MONETARY SANCTIONS.

In its assessment of a TSCA monetary penalty pursuant to the statute's civil enforcement provision, Section 16, the Agency (and therefore, the Presiding Officer in adjudicating a contested case) must make affirmative findings, supported by a preponderance of evidence that inter alia determine:

- The violator's degree of culpability;
- Any history of prior violations; and
- Such other matters as justice may require. (15 U.S.C. § 2615(a)(2)(B))

While the afore-cited three discrete penalty factors focus upon "individualized" accountability (or lack thereof by the violator), the Agency must also evaluate four inter-twined characteristics of the underlying violation itself. These "generic" penalty factors are:

- The nature circumstances, extent and gravity of the violation. 15 U.S.C. § 2615(a)(2)(B)

EPA has issued to its Regional Offices Guidelines for the assessment of monetary penalties "... in accordance with the requirements of TSCA Section 16." As Guidelines for Assessment of Civil Penalties Under Section 16 of TSCA, 45 F.R. 59770 (Sept. 10, 1980), as well as Enforcement Response Policy ("E.R.P.) for the Lead Paint Disclosure Rule in 1999. As these guidelines are not an Agency regulation, they are not binding upon the Presiding Officer and the final determination of a penalty assessment enforceability, depends exclusively upon the Presiding Officer's adherence to the TSCA statute's penalty standards set forth hereinabove.

In the instant matter before the Environmental Appeals Board, the Presiding Officer failed to comport his penalty assessment to these multiple discrete statutory mandates, such that no individualized or generic basis exists for upholding this Initial Decision. These fatal departures from the Agency's statutory penalty standards are separately addressed herein below.

A. Extent and Gravity of the Violation

In its relevant provisions, the 30 separate, but identical, 40 C.F.R. § 745.113(b)(1) violations entail the failure to include in the subject apartment leases the following Lead Warning Statement:

"Lead Exposure is especially harmful to the young, and pregnant women."

The form lease provided to Mr. Vidiksis for all 30 rentals by his real estate management company in its pertinent identical narrative reads as follows:

LEAD PAINT NOTICE

> Ingestion of paint particles containing lead may result in lead poisoning which can cause major health problems, especially in children under 7 years of age. (Compl. Exhs. 1-26; 28-35)

The EPA pamphlet attached to each of these form leases added the following compliant information to the requisite Warning Notice to each tenant:

> LEAD is also harmful to adults. Adults can suffer from:
>
> - Difficulties during pregnancy
> - Other reproductive problems (in both men and women)

A comparison of the Agency's mandated warning and these two warning statements illustrates the very close almost identical information conveyed to every tenant:

Rule	**Actual**
• "Lead exposure"	"Ingestion of paint particles containing lead ..."
• is especially harmful to the young	may result in lead poisoning which can cause major health problems in children under 7 years of age
• and pregnant women	difficulties during pregnancy

Any fair and reasonable word for word comparison of these two warnings demonstrates conclusively that, while some of the words used are different, they convey the exact same quality and extent of health risk information. Accordingly, the only statutorily compliant "generic" penalty assessment for this 40 C.F.R. § 745.113(b)(1) violations is that the Extent and Gravity are *indisputably* de minimis, and not major or moderate departures from the exact, word for word EPA mandated language.

B. Nature and Circumstances

In evaluating the Nature and Circumstances of the violation, the Agency's Disclosure Rule E.R.P. implicitly misplaces these penalty factors in the investigation phase, relevant only to selection of "... the appropriate respondent for the enforcement response." (E.R.P., p. 5). Therein, the Agency's enforcement office is directed to give due consideration "... to the person who has direct control over the practices for disclosure and who should be aware of the requirement of the Disclosure Rule." (Emphasis added, E.R.P., p. 5, para. 2)

Despite this directive, the Region named as violators in these 26 transactions and named as respondent's every person and entity involved in these lease transactions. Mr. John P. Vidiksis, his wife and co-owner of a majority of the apartments, and also in a separate case, it named the real estate company, Century 21. In each of the subject leases, Mr. Vidiksis retained the services of one of the leading real estate brokerage firms in the entire nation, Century 21. The leases executed by Mr. Vidiksis' real estate managers on his behalf were provided in each case by this real estate firm itself and not prepared by the Respondent. Not inappropriately, Mr. Vidiksis relied upon the professionals having the requisite knowledge and control over the drafting of apartment lease agreements.

Therefore, the only appropriate factual findings by the Presiding Officer would have been that the Nature and Circumstances of all 40 C.F.R. § 745.113(b)(1) violations were that the Company which drafted the leases had "... direct control over the ... disclosure." Likewise, Century 21 was the Respondent which was or should have been "...aware of the requirement of the Disclosure Rule." The complete and total absence of any consideration of the respective disparate knowledge, control and decision-making postures of the three separate violators in the penalty assessment of Mr. Vidiksis explicitly violates the Agency's statutory obligations in this regard.

C. **The Violator's Degree of Culpability**

At trial, the Complainant's sole penalty witness, Mr. Gallo, testified that pursuant to the Disclosure E.R.P., the Region had made no evaluation of a culpability reduction in the Gravity-based dollar amount, because this Guidance permits only an upward departure in the penalty assessment for violations of 40 C.F.R. § 745.113)(b)(1). (Tr. Vol. III; p. 47, lines 9-20).[2] This absence of any meaningful evaluation of the culpability factor is incontrovertibly demonstrated by the two separate Complaints filed by Region III, which addressed the identical Lead Warning Disclosure Rules for many of same rental transactions.

Significantly, however, Region III cited Century 21 for a number of apartments not owned by Mr. Vidiksis, thereby confirming that the "objectionable" form lease originated from Century 21 and not Mr. Vidiksis. In its action against Mr. John Vidiksis, Complainant also named his former wife, Mrs. Kathleen Vidiksis, as a respondent. In both the Complaint and Pre-Hearing Exchange Document, Complainant proposed an identical penalty assessment for Mr. Vidiksis and for Mrs. Vidiksis for those units they jointly owned. Indisputably, therefore, EPA viewed shared owner liability as a sufficient statutory basis for making no further evaluation of each persons degree of culpability or their individualized accountability for actually knowing of the rule's content, drafting the "objectionable" warnings and/or approving this lease language.

This absence of an individualized culpability evaluation is made even more egregious by the fact that the Region also filed a separate Lead Disclosure Complaint against Century 21 for the leases addressed in the Vidiksis case for which that real estate company handled these rentals, as well as others handled for non-Vidiksis properties. It is submitted that the Environmental Appeals Board can

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2 Tellingly, the Presiding Officer in his Initial Decision describes Mr. Gallo solely as "... EPA's key liability witness." (In. Dec.p. 30) Because of Mr. Gallo's focus on contested liability factors, and not individualized degree of culpability factors, Judge Moran apparently (and correctly) did not choose to characterize him as an actual penalty assessment witness.

take judicial notice of this Region III enforcement action, and that both the separate case against Century 21 and the claims against Mrs. Vidiksis were settled pre-trial on an ability to pay basis. (Copies of excerpts from these pleadings are attached at Tab A)

Nonetheless, as the Region pursued three separate Respondents for the same (as well as others) 40 C.F.R. § 745.113(b)(1) violations, any actual determination of individual culpability (*i.e.*, their degree of culpability) must entail presentation of trial evidence as to the respective lease writing roles and responsibilities of Mr. Vidiksis, Mrs. Vidiksis and Century 21. Despite naming in its Pre-Hearing Exchange Document both Mr. Vidiksis and Mrs. Vidiksis as trial witnesses, the Region did not call either individual to testify. Nor did the Region call even a single witness with personal knowledge of lease preparations or their manner of execution. Surely, any meaningful evaluation of individualized culpability would entail trial testimony from either or both property owners, the involved tenants or the involved real estate managers. The Region intentionally choose not to present any such testimony on individualized degree of culpability because, pursuant to its interpretation of the governing E.R.P., that statutory penalty factor was wholly irrelevant to the penalty assessment; indeed, it was deemed to be "not applicable" (Compl. Exh. 86).

Once selected as an alleged liable party, the Region's unalterable posture is that all so identified respondents are jointly and severally liable for the full penalty assessment. By taking this approach -- that shared liability equals full statutory culpability -- the Complainant has de facto repealed TSCA's express requirement in for an individualized, comparative evaluation of each Respondent's actual degree of culpability.

In recognition of the complete absence of any individualized evaluation of each Respondent's degree of culpability for these lead warning statements, the Presiding Officer, in his Initial Decision, endeavored to create inferences not based on any trial evidence to satisfy this statutory obligation.

Nonetheless, the Presiding Officer's findings of fact on this issue are wholly unsupported by the witness testimony, or more pertinently, by the complete absence of Complainant's proffer a single witness on degree of individual culpability.

The Presiding Officer made this blatantly erroneous factual finding:

> "Additionally, the leases **did** contain a lead paint notice, albeit a seriously inadequate one. The point is that even the use of a defective notice demonstrates awareness of the obligation to provide a notice. Therefore, Respondent cannot argue that he was unaware of regulations governing lead paint. (In. Dec. P. 33) (Emphasis in original)

It is noteworthy that, as only the Region has the statutory burden of proof as to Mr. Vidiksis' alleged degree of individual culpability; he had no need or obligation to prove his own lack of any culpability. This penalty proof burden on Complainant herein is not, in any way, contradicted or undercut by the two germane E.A.B. decisions: In re New Waterbury Ltd., 5 E.A.D. 529 (1994) and In re Ronald H. Hunt, et. al., 12 E.A.D. 774 (2006). As the Board stated in Waterbury, the burden of proof in going forward shifts to the respondent only after the Region has offered evidence "... to show that it, in fact, considered each factor identified in Section 16 and that its recommended penalty is supported by its analysis of theses factors." 5 E.A.D. at p.538. Because Region III's sole penalty witness offered no evidence whatsoever on Mr. Vidiksis' purported "degree of culpability", the conclusion compelled by both Waterbury and Hunt is that the Complainant did not consider each statutory penalty factor as mandated by TSCA.

Accordingly, the only rational inference from the lease inclusion of an "objectionable" lead warning statement, is that the Real Estate author(s) of these form leases decided for an unexplored (and therefore unknown) reason to provide this statement to its firm tenants.

The Presiding Officer's conclusion that -because a lead warning statement appears in a lease provided by Century 21 - Mr. Vidiksis either wrote (or even read) this form lead statement is insupportable, non-evidential speculation. It takes a second unsupported leap of speculative fancy to

conclude that the inclusion of what the Presiding Officer deemed to be an "inadequate" warning statement proves Mr. Vidiksis' actual knowledge of the EPA Warning Statement's word-for-word language and requirement for lease inclusion. The obvious question (not even considered or addressed by the Presiding Officer) is what conceivable motive would Mr. Vidiksis (or Century 21 for that matter) have for exposing himself to tens of thousands of dollars in civil penalties by deviating, however slightly, from a federally dictated word-for-word warning statement. Accordingly, the sole plausible factual inference, on the extant trial record, to be drawn from these Century 21 form lease warnings language is that someone in that firm did not know of or did not fully understand the federal rule's requirements.

Of course the Region had an unfettered opportunity to present trial testimony by Mr. Vidiksis, Mrs. Vidiksis and Century 21 employees. Because the Complainant intentionally chose not to present any testimony by any of the three Respondents as to their personal knowledge of or control of the lease language, is it impermissible for the Presiding Officer to base his Initial Decision on such non-evidence woven out of whole cloth.

Finally, in seeking to justify the finding of Mr. Vidiksis' purported culpability for these Lead Warning deficiencies, if any, the Presiding Officer determined without a scintilla of probative evidence that:

> "Further, as owner of the properties, Mr. Vidiksis certainly had the ability to act and correct identified hazards Ms. Yingling, the representative of CLIPPP, testified at length as to the records and reports her office provided and sent to Respondent" (Initial Decision, p. 33)

This bald assertion that local government reports of historic (all corrected) conditions at but four of his apartments informed Mr. Vidiksis, or his wife, of federally dictated mandatory lease language is a complete non-sequitor. Indeed, Ms. Yingling testified that only "currently" [circa 2006] does her Office provide owners with EPA lead disclosure informational requirements. (Tr. Vol. I,p.62,

line 23 - p.63, line 22).

D. History of Prior Violations

In its Pre-Hearing Exchange, and in Mr. Gallo's trial testimony, Complainant acknowledged that, prior to the filing of this Complaint, Mr. Vidiksis had no prior lead warning violations. Nonetheless, despite the absence of any non-compliance history, neither the Region nor the Presiding Officer considered this mandatory TSCA penalty assessment factor as a basis to reduce the Gravity-based penalty calculation. (Tr. Vol.III, p. 47, lines 9 - 20). *Indisputably*, this Region III posture that prior successful lead enforcement actions constitutes an appropriate factor to increase an violator's final penalty assessment, but the opposite does not warrant a penalty reduction, again de facto repeals a portion of the TSCA statutory penalty provision

POINT FOUR

ACCEPTING *ARGUENDO* ONLY THAT MR. VIDIKSIS VIOLATED 40 C.F.R. § 745.113(b)(2), THE PRESIDING OFFICER'S IMPOSITION OF AN EGREGIOUSLY EXCESSIVE PENALTY IS ARBITRARY, CAPRICIOUS AND DOES NOT COMPORT WITH THE TSCA STANDARDS FROM THE ASSESSMENT OF MONETARY SANCTIONS.

The Complainant's disingenuous trial testimony regarding the Respondent's compliance with 40 C.F.R. § 745.113(b)(2) was indeed egregious. On direct examination, Mr. Gallo explicitly testified that by providing the "Know Nothing" disclaimer: "Lessor has no knowledge of the presence of lead-based paint ...," the landlord informed the tenant of the probable absence of lead hazards and consequent safety of renting the dwelling. (Tr. Vol. II; p. 167, lines 3 - 25). That assertion is blatantly untrue.

Because the EPA/HUD Lead Disclosure Rule contains no affirmative mandate for a landlord to acquire knowledge of the paint's composition in pre-1978 housing, his issuance of the "Know

Nothing" disclaimer, by definition, provides no basis for a prospective tenant to infer that the apartment is lead free. Nonetheless, Mr. Gallo testified as follows:

> Q. Okay. And why is it important for a tenant to know what the landlord knows regarding lead-based paint?
>
> A. Well that's important so that the tenant can make an informed decision about whether to enter into the lease transaction for the property and if it's an – **If there's an indication that there's no lead-based paint on the property then the tenant can have some reassurance that entering into the lease transaction at the property won't endanger the tenant or the tenant's family.** If there's an indication that there is lead-based paint, then the tenant can take proper precautions or make a decision not to rent the property. (Emphasis added.)
>
> Q. Now why isn't saying nothing regarding if you have no knowledge of lead-based paint, why isn't saying nothing in your lease sufficient.
>
> A. Saying nothing is not sufficient because we have no way of knowing then whether there is or is not lead paint in the property according to the landlord's knowledge. The landlord does not go on record as indicating whether or not he has knowledge or not.
> ...
>
> (Tr. Vol. II, p.167, lines 3-25)

Mr. Gallo's testimony that Mr. Vidiksis violated 40 C.F.R. § 745.113(b)(2) because he did not affirm his absence of lead paint knowledge is irrational for the very TSCA policy reason stated by this witness: "If there's an indication that there is lead based paint, then the tenant can take the proper precautions or make a decision not to rent the property. " (Tr. Vol. II, p. 167, lines 13-16.) This direct testimony by Gallo, condemning Mr. Vidiksis' purported failure to give an indication of the potential presence of lead, is completely false, because he absolutely did so. Instead, in a fashion mirroring George Orwell's novel *"1984"* (e.g., *War is Peace)* -- Mr. Gallo proclaimed the Vidiksis lease statement -- "Tenant acknowledges that the leased premises may have been constructed before 1978 and may contain lead-based paint." -- gave the prospective tenant no indication of the potential presence of lead hazards in the dwelling. Indisputably, Mr. Gallo's absurd testimony, and not

Mr. Vidiksis' protective lease warning endangers public health.

In an obvious ploy, seeking to rectify its untenable trial testimony that, saying -- "I have no knowledge of the presence or absence of lead paint or lead paint hazards" informed the tenant of the probable absence of such a health hazard -- for the first-time in its post trail brief, Complainant took the factual posture that Mr. Vidiksis might well have known of lead paint in one or more of these apartments.

This non-evidential, hypothetical theory entails believing that his two real estate managers both prepared identical form lease statements which allowed him not to dissemble through averring: "landowner has no knowledge ..." No conceivable motivation exists for two real estate companies to enter into such a fantastical and elaborate conspiracy to no possible good end. Had Mr. Vidiksis indeed known of lead paint in the subject apartment units, and had he been inclined to falsify his affirmative knowledge, it would have been a far more plausible scenario for him to have used the "Know Nothing" disclaimer. That ruse would have attracted no regulatory scrutiny, as it was on its face complaint. To know of lead paint being present and then stating that the potential for the presence of lead paint existing clearly invites EPA to question this owner's actual knowledge of apartment conditions. Again, however, the Region proffered no trial testimony to establish that Mr. Vidiksis had knowledge of lead in any of these subject apartments.

The Region alleged Mr. Vidiksis had knowledge of lead paint at four apartments, leaving 26 such units where it alleged that his only violation was not including in each of these 26 leases that statement: "landlord has no knowledge ..." Now, with that allegation shown to be meritless (at least as to the imposition of any monetary penalty), the Region seeks to salvage its demand for $54,000 in penalties by claiming that possibly Mr. Vidiksis could conceivably have known of the presence of lead

paint in one or more of these 26 dwelling units, but then lied about it. Had the Region sought to prove that proposition, it had three-day trial to do so by calling Mr. Vidiksis, Mrs. Vidiksis, the several involved real estate managers or any other witnesses it located who could offer admissible evidence to support such a (baseless) allegation. Having not proffered at trial a scintilla of evidence that Mr. Vidiksis knew of lead paint in these 26 "Know Nothing" Counts, the Complainant can not post-trial rely upon that non-evidence to impose tens of thousands of penalties on this Respondent. Accordingly, as the Presiding Officer's Initial Decision, as well as his proposed egregiously excessive penalty of $54,000.00 is premised exclusively upon this non-evidence of the hypothetical notion that Respondent might have known of the lead paint in the subject apartments, no factual basis in this trial record supports that erroneous determination.

POINT FIVE

COMPLAINANT'S LITIGATION ABUSES ARE AN APPROPRIATE STATUTORY FACTOR TO BE EVALUATED BY THE ENVIRONMENTAL APPEALS BOARD TO ACHIEVE JUSTICE IN THIS CASE

Based not only upon the afore cited exculpatory evidence, but also as a direct result of the manner in which Complainant conducted this litigation, this full record should compel the Environmental Appeals Board's full remedial application of the TSCA Section 16 statutory factor: "circumstances as justice may warrant". Complainant's litigious abuses include filing a *Motion for Discovery (and/or in Limine)* on the Respondent's inability to pay defenses which he had already waived. That frivolous motion required Mr. Vidiksis to undertake substantial legal fee expenditures to obtain denial of that harassing and vexatious motion. Moreover, the erroneous statement in the Initial Decision that the Respondent had not waived this defense prior to trial contradicts the trial court's own

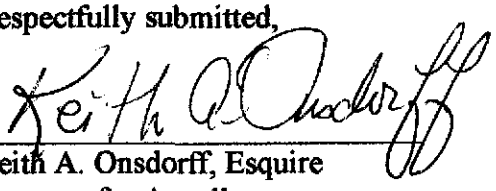
prior determination on this matter. (Tr. Vol. I, p. 28, line 14 - p. 29 line 11).

Additionally, Complainant intentionally included confidential and privileged settlement negotiation exchanges in its Exhibit 86. Despite three separate written communications to the Region's attorneys by counsel for the Respondent, Complainant refused to redact or delete the privileged (and false) SEP misrepresentation from its trial exhibit. Accordingly, Respondent was compelled to file a *Motion in Limine* to prevent Complainant from offering into evidence privileged and confidential settlement communications. Again, Complainant's intentional litigation tactics required Mr. Vidiksis to incur substantial transaction costs on an issue for which Complainant had no good faith arguments. Nonetheless, Complainant offered its Exhibit 86 with the offending narrative un-redacted, apparently intent upon having the Presiding Officer consider this false SEP representation, and thereby prejudice the record. Only a timely trial objection by Respondent prevented Complainant from including in this record material it knew had already been ruled to be inadmissible. (Tr- Vol. II, p.176, line 4 - p. 179, line 12).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Environmental Appeals Board should adjudge Mr. Vidiksis ***not liable*** for the allegations set forth in Counts 1-64, other than Counts 2,4,6 and 10. Alternatively, Mr. Vidiksis should ***not*** be assessed monetary penalties for his violations, if any, for these same Counts.

Respectfully submitted,



Keith A. Onsdorff, Esquire
Attorney for Appellant

TAB
A

ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	:	
	:	
BEAM TEAM INC. T/A Century 21 Dale Realty Company Property Management	:	
360 Loucks Road	:	
York, Pennsylvania 17404	:	**U.S. EPA Docket No. TSCA-03-2006-0058**
	:	
	:	
Respondent.	:	
	:	
813 South Beaver Street, York, PA	:	
3209 Cape Horn Road, Red Lion, PA	:	
621 Chestnut Street, York, PA	:	**AMENDED**
625 Cleveland Avenue, York, PA	:	**ADMINISTRATIVE COMPLAINT AND**
333 East College Avenue, York, PA	:	**NOTICE OF OPPORTUNITY FOR A**
416 East College Avenue, York, PA	:	**HEARING ISSUED PURSUANT TO**
934 Elm Street, York, PA	:	**SECTION 16(a) OF THE TOXIC**
2112 Fishing Creek Road, Wrightsville, PA	:	**SUBSTANCES CONTROL ACT**
93 Fox Run Road, York, PA	:	**("TSCA"), 15 U.S.C. § 2615(a)**
1650 J. Devers Road, York, PA	:	
904 West Locust Street, York, PA	:	
508 South Pershing Street, York, PA	:	
825 East Philadelphia Street, York, PA	:	
139 North Pine Street, York, PA	:	
1024 West Poplar Street, York, PA	:	
1108 West Poplar Street, York, PA	:	
443 East Prospect Street, York, PA	:	
452 East Prospect Street, York, PA	:	
217 South Queen Street, York, PA	:	
105 South Richland Avenue, York, PA	:	
519 Smith Street, York, PA	:	
826 Wallace Street, York, PA	:	
220 South West Street, York, PA	:	
	:	
Target Housing.	:	

This Amended Administrative Complaint and Notice of Opportunity for a Hearing

("Amended Complaint") is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA" or the "Agency") by Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), the federal regulations set forth at 40 C.F.R. Part 745, Subpart F, and 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 ("Consolidated Rules of Practice"). The Administrator has delegated this authority, under TSCA, to the Regional Administrators, and this authority has been further delegated in U.S. EPA Region III to, *inter alia*, the Associate Director for Enforcement of the Waste and Chemicals Management Division ("Complainant"), pursuant to EPA Region III Delegation No. 12-2-A, dated August 26, 2002.

The Respondent in this action is Beam Team Inc. T/A Century 21 Dale Realty Company Property Management. By issuing this Amended Complaint, Complainant alleges violations by Respondent of Section 409 of TSCA, 15 U.S.C. § 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA"), 42 U.S.C. §§ 4851 *et seq.*, and the federal regulations promulgated thereunder, set forth in 40 C.F.R. Part 745, Subpart F (also known as the "Disclosure Rule"), in relation to forty-seven (47) written lease agreements associated with twenty-three (23) different target housing units, described more fully in Paragraph 14 of this Amended Complaint.

Failure to comply with RLBPHRA Section 1018, 42 U.S.C. § 4852d, or with any rule or regulation issued thereunder, including, but not limited to, 40 C.F.R. Part 745, Subpart F, constitutes a violation of TSCA Section 409, 15 U.S.C. § 2689. Pursuant to TSCA Section 16, 15 U.S.C. § 2615, violations of TSCA Section 409, 15 U.S.C. § 2689, are subject to the assessment of civil and/or criminal penalties.

In support of its Amended Complaint, Complainant alleges the following:

I. JURISDICTION

1. EPA and the Office of Administrative Law Judges have jurisdiction over the above-captioned matter pursuant to Sections 16 and 409 of TSCA, 15 U.S.C. §§ 2615 and 2689; Section 1018 of RLBPHRA, 42 U.S.C. §4852d; 40 C.F.R. Part 745, Subpart F; and 40 C.F.R. §§ 22.1(a)(5) and 22.4.

II. DEFINITIONS AND REGULATORY REQUIREMENTS

2. Pursuant to 40 C.F.R. § 745.103, the term "agent" means, in pertinent part, "any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing."

3. Pursuant to 40 C.F.R. § 745.103, the term "lead-based paint" means, "paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter [mg/cm^2] or 0.5 percent by weight."

4. Pursuant to 40 C.F.R. § 745.103, the term "lead-based paint hazard" means "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate Federal agency."

5. Pursuant to 40 C.F.R. § 745.103, the term "Lessee" means "any entity that enters into an agreement to lease, rent, or sublease target housing, including, but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations."

6. Pursuant to RLBPHRA Section 1004(23), 42 U.S.C. § 4851b(23), TSCA Section 401(14), 15 U.S.C. § 2681(14), and 40 C.F.R. § 745.103, the term "residential dwelling" means: "(1) A single-family dwelling, including attached structures such as porches and stoops; or (2) A single-family dwelling unit in a structure that contains more than one separate residential dwelling unit, and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the residence of one or more persons."

7. Pursuant to RLBPHRA Section 1004(24), 42 U.S.C. § 4851b(24), and TSCA Section 401(15), 15 U.S.C. § 2681(15), the term "residential real property" means "real property on which there is situated 1 or more residential dwellings used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of 1 or more persons."

8. Pursuant to RLBPHRA Section 1004(27), 42 U.S.C. § 4851b(27), TSCA Section 401(17), 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103, the term "target housing" means "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling."

9. 40 C.F.R. § 745.115(a) provides, in pertinent part, that: "[e]ach agent shall ensure compliance with all requirements of this subpart. To ensure compliance, the agent shall: . . . (2) Ensure that the seller or lessor has performed all activities required under §§ 745.107, 745.110, and 745.113 or personally ensure compliance with the requirements of §§ 745.107, 745.110, and 745.113."

10. 40 C.F.R. § 745.113(b)(1) provides that each contract to lease target housing shall include, as an attachment or within the contract, "[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."

11. 40 C.F.R. § 745.113(b)(2) provides, in relevant part, that each contract to lease target housing shall include, as an attachment or within the contract, "[a] statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards and the condition of the painted surfaces"

12. 40 C.F.R. § 745.113(b)(5) provides, in relevant part, that each contract to lease target housing shall include, as an attachment or within the contract, "[w]hen one or more agents are involved in the transaction to lease target housing on behalf of the lessor, a statement [hereinafter the "Agent's Statement"] that:

    i. The agent has informed the lessor of the lessor['s] . . . obligations under 42 U.S.C. 4852d; and
    ii. The agent is aware of his/her duty to ensure compliance with the requirements of this subpart."

13. Enforcement, 40 C.F.R. § 745.118 provides, in pertinent part, that

    (e) Failure or refusal to comply with . . . § 745.115 (agent responsibilities) is a violation of 42 U.S.C. 4852d(b)(5) and of TSCA Section 409 (15 U.S.C. 2689).

    (f) Violators may be subject to civil and criminal sanctions pursuant to TSCA section 16 (15 U.S.C. 2615) for each violation. For purposes of enforcing this subpart, the penalty for each violation applicable under 15 U.S.C. 2615 shall not be more than $11,000 for all violations occurring after July 28, 1997; all violations occuring on or prior to that date are subject to a penalty not more than $10,000."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

14. The following twenty-three (23) properties are and, at all times relevant to the violations alleged herein, were "target housing" as defined at RLBPHRA Section 1004(27), TSCA Section 401(17) and 40 C.F.R. § 745.103: 813 South Beaver Street, York, PA; 3209 Cape Horn Road, Red Lion, PA; 621 Chestnut Street, York, PA; 625 Cleveland Avenue, York, PA; 333 East College Avenue, York, PA; 416 East College Avenue, York, PA; 934 Elm Street, York, PA; 2112 Fishing Creek Road, Wrightsville, PA; 93 Fox Run Road, York, PA; 1650 J. Devers Road, York, PA; 904 West Locust Street, York, PA; 508 South Pershing Street, York, PA; 825 East Philadelphia Street, York, PA; 139 North Pine Street, York, PA; 1024 West Poplar Street, York, PA; 1108 West Poplar Street, York, PA; 443 East Prospect Street, York, PA; 452 East Prospect Street, York, PA; 217 South Queen Street, York, PA; 105 South Richland Avenue, York, PA; 519 Smith Street, York, PA; 826 Wallace Street, York, PA; 220 South West Street, York, PA, as outlined below:

Counts	Lease Transaction #	Address of Target Housing	Lease Date
1, 48, 95	1	813 S. Beaver St.	7/21/2000
2, 49, 96	2	813 S. Beaver St.	7/13/2002
3, 50, 97	3	813 S. Beaver St.	11/20/2003
4, 51, 98	4	3209 Cape Horn Rd.	4/4/2003
5, 52, 99	5	621 Chestnut St.	5/31/2000
6, 53, 100	6	621 Chestnut St.	3/22/2002
7, 54, 101	7	621 Chestnut St.	6/3/2002
8, 55, 102	8	621 Chestnut St.	5/5/2003
9, 56, 103	9	625 Cleveland Ave.	10/12/2000
10, 57, 104	10	625 Cleveland Ave.	3/8/2002
11, 58, 105	11	625 Cleveland Ave.	2/13/2003
12, 59, 106	12	333 E. College Ave.	5/23/2001
13, 60, 107	13	416 E. College Ave.	7/31/2002
14, 61, 108	14	416 E. College Ave.	1/27/2003
15, 62, 109	15	416 E. College Ave.	11/20/2003
16, 63, 110	16	934 Elm St.	2/26/2002
17, 64, 111	17	2112 Fishing Creek Rd.	8/8/2002
18, 65, 112	18	93 Fox Run Rd.	1/22/2002
19, 66, 113	19	1650 J. Devers Rd.	4/24/2000
20, 67, 114	20	1650 J. Devers Rd.	9/22/2000
21, 68, 115	21	1650 J. Devers Rd.	4/28/2001
22, 69, 116	22	904 W. Locust St.	2/27/2002
23, 70, 117	23	508 S. Pershing St.	5/18/2000
24, 71, 118	24	508 S. Pershing St.	9/12/2000

25, 72, 119	25	508 S. Pershing St.	10/8/2001
26, 73, 120	26	508 S. Pershing St.	7/20/2002
27, 74, 121	27	508 S. Pershing Ave.	9/26/2003
28, 75, 122	28	825 E. Philadelphia St.	11/10/2000
29, 76, 123	29	825 E. Philadelphia St.	11/13/2001
30, 77, 124	30	825 E. Philadelphia St.	3/6/2003
31, 78, 125	31	139 N. Pine St.	9/12/2000
32, 79, 126	32	1024 W. Poplar St.	12/7/2000
33, 80, 127	33	1108 W. Poplar St.	9/1/2000
34, 81, 128	34	443 E. Prospect St.	4/26/2000
35, 82, 129	35	443 E. Prospect St.	1/21/2002
36, 83, 130	36	443 E. Prospect St.	5/22/2002
37, 84, 131	37	443 E. Prospect St.	12/12/2003
38, 85, 132	38	452 E. Prospect St.	8/8/2000
39, 86, 133	39	452 E. Prospect St.	4/2/2001
40, 87, 134	40	452 E. Prospect St.	8/1/2001
41, 88, 135	41	217 S. Queen St.	7/31/2000
42, 89, 136	42	217 S. Queen St.	12/4/2001
43, 90, 137	43	105 S. Richland Ave.	9/28/2002
44, 91,138	44	105 S. Richland Ave.	9/26/2003
45, 92, 139	45	519 Smith St.	12/16/2003
46, 93, 140	46	826 Wallace St.	11/1/2001
47, 94, 141	47	220 S. West St.	3/7/2003

A. The 813 South Beaver Street Target Housing (Lease Transactions #1–#3)

15. At all times relevant to the violations alleged herein, the property located at 813 South Beaver Street, York, Pennsylvania, consisted of real property on which there was situated one building used as the home or residence for one or more persons.

16. At all times relevant to the violations alleged herein, the building situated on the real property located at 813 South Beaver Street, York, Pennsylvania was housing constructed prior to 1978.

17. At all times relevant to the violations alleged herein, the building situated on the real property located at 813 South Beaver Street, York, Pennsylvania, consisted of housing and was not housing for the elderly or persons with disabilities and was not a 0-bedroom dwelling as provided in 40 C.F.R. § 745.103.

§ 745.107 has come into the possession of the lessor," as provided at 40 C.F.R. § 745.101(d).

IV. VIOLATIONS

Counts 1 - 47
(Violation of 40 C.F.R. § 745.113(b)(1) In Relation To Lease Transactions #1 - #47)

246. The allegations contained in Paragraphs 1 through 245, above, of this Amended Complaint are incorporated by reference herein as though fully set forth at length.

247. Respondent did not ensure that a "Lead Warning Statement" containing the language set forth in, and required by, 40 C.F.R. § 745.113(b)(1) was included as an attachment to, or within, Lease Transactions #1 - #47, as required by 40 C.F.R. §§ 745.115(a)(2) and 745.113(b)(1).

248. Pursuant to 40 C.F.R. § 745.118(e), Respondent's failure to ensure that a "Lead Warning Statement" containing the language set forth in 40 C.F.R. § 745.113(b)(1) was included either within, or as an attachment to, Lease Transactions #1 - #47, constitutes 47 separate violations of the RLBPHRA Section 1018(b)(5), 42 U.S.C. § 4852d(b)(5), and TSCA Section 409, 15 U.S.C. § 2689.

249. Pursuant to RLBPHRA Section 1018(b)(5), 42 U.S.C. § 4852d(b)(5), Respondent's failure to ensure that a "Lead Warning Statement" containing the language set forth in 40 C.F.R. § 745.113(b)(1) was included either within, or as an attachment to, Lease Transaction #1 - #47, constitutes 47 separate prohibited acts under TSCA Section 409, 15 U.S.C. § 2689.

Counts 48 - 94
(Violation of 40 C.F.R. § 745.113(b)(2) In Relation To Lease Transactions #1 - #47)

250. The allegations contained in Paragraphs 1 through 249, above, of this Amended Complaint are incorporated by reference herein as though fully set forth at length.

251. Respondent failed to ensure that a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing identified above in Paragraph 14, or a statement indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards, was included either as an attachment to, or within, Lease Transactions #1 - #47, as required by 40 C.F.R. §§ 745.115(a)(2) and 745.113(b)(2).

252. Pursuant to 40 C.F.R. § 745.118(e), Respondent's failure to ensure that a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing identified above in Paragraph 14, or a statement indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards, in such housing, was included either as an attachment to, or within, Lease Transactions #1 - #47, constitutes 47 separate violations of RLBPHRA Section 1018(b)(5), 42 U.S.C. § 4852d(b)(5), and TSCA Section 409, 15 U.S.C. § 2689.

253. Pursuant to RLBPHRA Section 1018(b)(5), 42 U.S.C. § 4852d(b)(5), Respondent's failure to ensure that a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing identified above in Paragraph 14, or a statement indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards, in such housing, was included either as an attachment to, or within, Lease Transaction #1 - #47, constitutes 47 separate prohibited acts under TSCA Section 409, 15 U.S.C. § 2689.

Counts 95 - 141
(Violation of 40 C.F.R. § 745.113(b)(5) In Relation to Lease Transactions #1 - #47

254. The allegations contained in Paragraphs 1 through 253, above, of this Amended Complaint are incorporated by reference herein as though fully set forth at length.

255. Respondent failed to ensure that the "Agent's Statement" was included either as an attachment to, or within, Lease Transactions #1 - #47, as required by 40 C.F.R. § 745.113(b)(5).

256. Pursuant to 40 C.F.R. § 745.118(e), Respondent's failure to ensure that the "Agent's Statement" was included either as an attachment to, or within, Lease Transactions #1 - #47, constitutes 47 separate violations of RLBPHRA Section 1018(b)(5), 42 U.S.C. § 4852d(b)(5), and TSCA Section 409, 15 U.S.C. § 2689.

257. Pursuant to RLBPHRA Section 1018(b)(5), 42 U.S.C. § 4852d(b)(5), Respondent's failure to ensure that the "Agent's Statement" was included either as an attachment to, or within, Lease Transactions #1 - #47 constitutes 47 separate prohibited acts under TSCA Section 409, 15 U.S.C. § 2689.

IV. CIVIL PENALTY

Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and 40 C.F.R. § 745.118(f) authorize 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 amount has been adjusted to $11,000 per violation under the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, which increases the civil penalties which can be assessed by EPA under TSCA by 10% for violations occurring on or after July 28, 1997 and before March 15, 2004.

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 a proposed penalty, Complainant will take 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 Final Enforcement Response Policy ("Final ERP")*, dated February 2000. The ERP provides a rational, consistent, and equitable calculation methodology for applying the statutory factors enumerated above to particular cases.

Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant is not proposing a specific penalty at this time, but will do so at a later date after an exchange of information has occurred. See 40 C.F.R. § 22.19(a)(4). As a basis for calculating a specific penalty pursuant to 40 C.F.R. § 22.19(a)(4), Complainant will consider, among other factors, facts and circumstances unknown to Complainant at the time of issuance of the Amended Complaint that become known after the Amended Complaint is issued.

The penalty to be proposed does not constitute a "demand" as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412. Given the facts alleged in this Amended Complaint and the statutory factors enumerated above, as known to Complainant at this time, Complainant proposes the assessment of a civil penalty of up to $11,000 against the Respondent for each violation alleged in this Amended Complaint. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), an explanation of the number and severity of violations is as follows:

A. Penalty Calculation Explanation

1. Circumstance Levels:

a) 40 C.F.R. § 745.113(b)(1) violations: 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. As a result, each of the violations alleged in Counts 1 - 47 of this Amended Complaint may be characterized as Circumstance Level 2 violations for purposes of

calculating an appropriate penalty.

b) 40 C.F.R. § 745.113(b)(2) violations: 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. As a result, each of the violations alleged in Counts 48 - 94 of this Amended Complaint may be characterized as Circumstance Level 3 violations for purposes of calculating an appropriate penalty.

c) 40 C.F.R. § 745.113(b)(5) violations: Violations of the requirements set forth at 40 C.F.R. § 745.113(b)(5) are deemed to represent a "low" level of impairment to a lessee's ability to assess the information required to be disclosed and are characterized as Circumstance Level 5. As a result, each of the violations alleged in Counts 95 - 141 of this Amended Complaint may be characterized as Circumstance Level 5 violations for purposes of calculating an appropriate penalty.

2. Extent Levels:

a) Major Extent Violations: Defined as "[p]otential for 'serious' damage to human health or major damage to the environment." Failure to provide lead-based paint disclosures to lessees with children under age six (6) is considered a "Major Extent" violation under the ERP. The ERP states, " [t]he age factor will be determined by the age of the youngest child at the time the violation occurred." Respondent failed to provide disclosures and/or certifications in seven (7) different lease agreements (Lease Transactions 4, 7, 10, 30, 35, 37, and 43) to lessees with children under the age of six. Accordingly, the three (3) violations associated with each of these seven (7) transactions, for a total of twenty-one (21) violations (alleged in Counts 4, 7, 10, 30, 35, 37, 43, 51, 54, 57, 77, 82, 84, 90, 98, 101, 104, 124, 129, 131, and 137) are "Major Extent Violations."

b) Significant Violations: Defined as "[p]otential for 'significant' amount of damage to human health or the environment." Failure to provide lead-based paint disclosures to lessees with children between the ages of six (6) and eighteen (18) is considered a "Significant Extent" violation under the ERP. Respondent failed to provide disclosures and/or certifications in five (5) different lease agreements (Lease Transactions 8, 15, 16, 22, and 47) to lessees with children between the ages of six (6) and eighteen (18). Accordingly, the three (3) violations associated with each of these five (5) transactions, for a total of fifteen (15) violations (alleged in Counts 8, 14, 16, 22, 47, 55, 61, 63, 69, 94, 102, 108, 110, 116, and 141) are 'Significant Extent" violations.

c) Minor Violations: Defined as "[p]otential for a 'lesser' amount of damage to human health or the environment." Failure to provide lead-based paint disclosures and/or certifications to lessees where no children or pregnant women live in the target housing is considered a "Minor Extent" violation under the ERP. Respondent failed to provide disclosures and/or certifications in thirty-five (35) different lease agreements (Lease Transactions 1-3, 5-6, 9, 11-13, 15, 17-21, 23-29, 31-34, 36, 38-42, and 44-46) to lessees where no children or pregnant women were present. Accordingly, the three (3) violations associated with each of these thirty-five (35) transactions, for a total of one hundred five (105) violations (alleged in Counts 1-3, 5-6, 9, 11-13, 15, 17-21, 23-29, 31-34, 36, 38-42, 44-46, 48-50, 52-53, 56, 58-60, 62, 64-68, 70-76, 78-81, 83, 85-89,91-93, 95-97, 99-100, 103, 105-107, 109, 111-115, 117-123, 125-128, 130, 132-136, and 138-140) are "Minor Extent" violations.

In addition, EPA will consider, among other factors, Respondent's ability to pay to adjust the proposed civil penalty assessed in this Amended Complaint. With respect to Respondent's ability to pay the proposed penalty, it is each Respondent's responsibility to provide to Complainant financial information to support and establish any claim by Respondent of an inability to pay the proposed penalty. To the extent that facts or circumstances, including, but not limited to, additional information concerning Respondent's ability to pay the proposed penalty that were unknown to Complainant at the time of the issuance of the Amended Complaint become known to Complainant after issuance of the Amended Complaint, such facts and circumstances may be considered as a basis for adjusting the civil penalty proposed in this Amended Complaint.

QUICK RESOLUTION

In accordance with the Consolidated Rules of Practice at 40 C.F.R. § 22.14(a)(4)(ii), EPA has not demanded a specific penalty in this Amended Complaint. Complainant will file in this proceeding a document specifying a proposed penalty within fifteen (15) days after Respondent files its prehearing information exchange as provided in the Consolidated Rules of Practice at 40 C.F.R. § 22.19(a)(4). Thereafter, in accordance with the Consolidated Rules of Practice, 40 C.F.R. §22.18(A), Respondent may resolve this proceeding at any time by paying the specific penalty which will be proposed in Complainant's prehearing exchange, in full, as specified below and filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. Payment of the full penalty in accordance with this paragraph shall be made by mailing a certified or cashier's check or by electronic funds transfer ("EFT"), payable to the **"Treasurer, United States of America,"** to the address shown below:

U.S. Environmental Protection Agency
P.O. Box 371099M

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	:	
	:	
BEAM TEAM INC. T/A Century 21 Dale	:	
Realty Company Property Management	:	**U.S. EPA Docket No. TSCA-03-2006-0058**
	:	
	:	
Respondent.	:	

CONSENT AGREEMENT

This Consent Agreement is entered into by the Associate Director for Enforcement, Waste and Chemicals Management Division, U.S. Environmental Protection Agency, Region III ("Complainant") and Beam Team Inc. T/A Century 21 Dale Realty Company Property Management ("Respondent") pursuant to Sections 409 and 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2689 and 2615(a), and 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 (the "Consolidated Rules of Practice").

I. PRELIMINARY STATEMENT AND STIPULATIONS

1. Complainant initiated this proceeding on December 30, 2005 with the filing of an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") against Respondent and against Dale and Wade Elfner, d.b.a Century 21 Dale Realty Company, seeking the assessment of a civil penalty pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and the Consolidated Rules of Practice, for violations of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851 *et seq.* ("RLBPHRA"), and the regulations promulgated thereunder, as set forth in 40 C.F.R. Part 745, Subpart F (the "Disclosure Rule"), which statutory and regulatory provisions are enforceable pursuant to Section 409 of TSCA, 15 U.S.C. § 2689.

2. Pursuant to the Honorable Susan L. Biro's May 25, 2006 *Order Granting Motion to Amend Administrative Complaint*, Complainant intends to file on or before June 5, 2006, an Amended Complaint withdrawing Dale and Wade Elfner, d.b.a Century 21 Dale Realty Company, as a party to this Proceeding.

3. The violations cited in the Amended Complaint pertain to the Respondent's alleged failure to comply with requirements of the RLBPHRA and the Disclosure Rule with respect to forty-seven (47) written lease agreements for "target housing", as that term is

defined at 40 C.F.R. § 745.103, at the addresses and on the transaction dates identified immediately below:

Counts	Lease Transaction #	Address of Target Housing	Lease Date
1, 48, 95	1	813 S. Beaver St.	7/21/2000
2, 49, 96	2	813 S. Beaver St.	7/13/2002
3, 50, 97	3	813 S. Beaver St.	11/20/2003
4, 51, 98	4	3209 Cape Horn Rd.	4/4/2003
5, 52, 99	5	621 Chestnut St.	5/31/2000
6, 53, 100	6	621 Chestnut St.	3/22/2002
7, 54, 101	7	621 Chestnut St.	6/3/2002
8, 55, 102	8	621 Chestnut St.	5/5/2003
9, 56, 103	9	625 Cleveland Ave.	10/12/2000
10, 57, 104	10	625 Cleveland Ave.	3/8/2002
11, 58, 105	11	625 Cleveland Ave.	2/13/2003
12, 59, 106	12	333 E. College Ave.	5/23/2001
13, 60, 107	13	416 E. College Ave.	7/31/2002
14, 61, 108	14	416 E. College Ave.	1/27/2003
15, 62, 109	15	416 E. College Ave.	11/20/2003
16, 63, 110	16	934 Elm St.	2/26/2002
17, 64, 111	17	2112 Fishing Creek Rd.	8/8/2002
18, 65, 112	18	93 Fox Run Rd.	1/22/2002
19, 66, 113	19	1650 J. Devers Rd.	4/24/2000
20, 67, 114	20	1650 J. Devers Rd.	9/22/2000
21, 68, 115	21	1650 J. Devers Rd.	4/28/2001
22, 69, 116	22	904 W. Locust St.	2/27/2002
23, 70, 117	23	508 S. Pershing St.	5/18/2000
24, 71, 118	24	508 S. Pershing St.	9/12/2000
25, 72, 119	25	508 S. Pershing St.	10/8/2001
26, 73, 120	26	508 S. Pershing St.	7/20/2002
27, 74, 121	27	508 S. Pershing Ave.	9/26/2003
28, 75, 122	28	825 E. Philadelphia St.	11/10/2000
29, 76, 123	29	825 E. Philadelphia St.	11/13/2001
30, 77, 124	30	825 E. Philadelphia St.	3/6/2003
31, 78, 125	31	139 N. Pine St.	9/12/2000
32, 79, 126	32	1024 W. Poplar St.	12/7/2000
33, 80, 127	33	1108 W. Poplar St.	9/1/2000
34, 81, 128	34	443 E. Prospect St.	4/26/2000

35, 82, 129	35	443 E. Prospect St.	1/21/2002
36, 83, 130	36	443 E. Prospect St.	5/22/2002
37, 84, 131	37	443 E. Prospect St.	12/12/2003
38, 85, 132	38	452 E. Prospect St.	8/8/2000
39, 86, 133	39	452 E. Prospect St.	4/2/2001
40, 87, 134	40	452 E. Prospect St.	8/1/2001
41, 88, 135	41	217 S. Queen St.	7/31/2000
42, 89, 136	42	217 S. Queen St.	12/4/2001
43, 90, 137	43	105 S. Richland Ave.	9/28/2002
44, 91,138	44	105 S. Richland Ave.	9/26/2003
45, 92, 139	45	519 Smith St.	12/16/2003
46, 93, 140	46	826 Wallace St.	11/1/2001
47, 94, 141	47	220 S. West St.	3/7/2003

II. GENERAL PROVISIONS

4. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth in the Amended Complaint.

5. Except as provided in Paragraph 4, above, the Respondent neither admits nor denies the specific factual allegations and legal conclusions contained in the Amended Complaint or in this Consent Agreement.

6. Respondent agrees not to contest the jurisdiction of the U.S. Environmental Protection Agency ("EPA") with respect to the execution of this Consent Agreement, the issuance of the attached Final Order (collectively, "CAFO"), or the enforcement of this CAFO.

7. For purposes of this proceeding only, Respondent hereby expressly waives any right to contest any issue of law or fact set forth in this Consent Agreement and any right to appeal the accompanying Final Order.

8. Respondent consents to the issuance of this CAFO and agrees to comply with its terms and conditions.

9. Each Party to this Consent Agreement shall bear its own costs and attorney's fees in connection with this proceeding.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

10. Subject to Paragraphs 4 and 5, above, EPA incorporates by reference, as if fully set forth herein, the factual allegations and conclusions of law contained in the Amended Complaint as the Findings of Fact and Conclusions of Law of this Consent Agreement.

11. Based upon EPA's Findings of Fact and Conclusions of Law, EPA concludes that Respondent violated provisions of TSCA, the RLBPHRA and the Disclosure Rule, in regards to forty-seven (47) written lease transactions listed in the Amended Complaint and in Paragraph 3 of this Consent Agreement.

12. As a result of EPA's conclusion that Respondent violated TSCA, the RLBPHRA, and the Disclosure Rule, EPA has determined that Respondent is liable for a civil penalty.

IV. CIVIL PENALTY

13. Respondent agrees to pay a civil penalty in the amount of **Five Thousand Dollars** ($5,000.00) in settlement and satisfaction of all civil claims which Complainant may have against Respondent under Section 16(a) of TSCA, 15 U.S.C. § 2615(a), for the specific violations alleged in the Amended Complaint. Such civil penalty amount shall become due and payable immediately upon Respondent's receipt of a true and correct copy of this CAFO. In order to avoid the assessment of interest in connection with such civil penalty, as described in this CAFO, Respondent must pay the civil penalty no later than **thirty (30) calendar days** after the effective date of the accompanying Final Order. The settlement amount of this Consent Agreement was based upon Complainant's consideration of a number of factors, including the penalty criteria set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), *i.e.*, the nature, circumstances, extent and gravity of the violations, and the Respondent's ability to pay, effect on ability to continue to do business, prior history of such violations, degree of culpability, and such other matters as justice may require. These factors were applied to the particular facts and circumstances of this case with specific reference to EPA's *Real Estate Notification and Disclosure Rule: Final Enforcement Response Policy* (February 2000).

14. Payment of the civil penalty amount shall be made by either cashier's check, certified check or electronic funds transfer, in the following manner:

    a. All payments by Respondent shall reference Respondent's name and address and the Docket Number of this action (TSCA-03-2006-0058).

    b. All checks shall be made payable to "**Treasurer, United States of America**".

CERTIFICATE OF SERVICE

Appellant's counsel hereby certifies that the original (and five copies) of this Appellate Brief on behalf of Appellant has been filed with the Clerk of the Environmental Appeals Board as follows:

Clerk of the Environmental Appeals Board
Suite 600
1341 G Street, N.W.
Washington, D.C. 20005
(Original and 5 copies via UPS overnight delivery)

Copies of this Brief have been served upon the counsel for the Complainant, (and the Regional Hearing Clerk) as follows:

Donzetta W. Thomas, Esq.
Assistant Regional Counsel
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103

Russell S. Swan, Esq.
Assistant Regional Counsel
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103

(All Region III recipients served via UPS overnight delivery service.)

Dated: January 3, 2008

By: 

Keith A. Onsdorff, Esq.