UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

(C-14J)

February 21, 2014

VIA HAND-DELIVERY

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, N.W.
WJC East Building, Room 3334
Washington, D.C. 20004

Re: Notice of Appeal and Brief; TSCA Appeal No. 13-(04);
In the Matter of: Ms. Dessie L. Brumfield d/b/a/ Brumfield Properties, LLC;
Docket No. TSCA-05-2010-0014

Dear Clerk of the Board:

Please find enclosed and served upon you for filing Appellant's Notice of Appeal and Brief, TSCA Appeal No. 13-(04).

Sincerely,

Morgan E. Kozy for

Jeffery M. Trevino
Associate Regional Counsel

Enclosure

cc: Dessie L. Brumfield
5067 North 37th Street
Milwaukee, WI 53290

LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency
77 West Jackson Boulevard (E-19J)
Chicago, IL 60604-3590

M. Lisa Buschmann
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Ms. Dessie L. Brumfield, d/b/a/ Brumfield Properties, LLC,	)	TSCA Appeal No. 13-(04)
Docket No. TSCA-05-2010-0014	)	

NOTICE OF APPEAL

Region 5 of the U.S. Environmental Protection Agency (Appellant) seeks review of an Initial Decision of Administrative Law Judge M. Lisa Buschmann, issued December 4, 2013, assessing a civil penalty of $45,904.00, for violations of the regulations found at 40 C.F.R. § 745.113(b), section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689, and section 4852d(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5). An appeal brief is attached.

Morgan E. Kog for

Jeffery M. Trevino
John P. Steketee
U.S. Environmental Protection Agency
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604-3590
Tel. No. (312) 886-6729
Fac. No. (312) 692-2987
trevino.jeffery@epa.gov

Attorneys for Appellant

Date: Feb. 21, 2014

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Ms. Dessie L. Brumfield, d/b/a/ Brumfield Properties, LLC	)	TSCA Appeal No. 13-(04)
Docket No. TSCA-05-2010-0014	)	

APPEAL BRIEF

TABLE OF CONTENTS

* * *

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

Region 5 of the U.S. Environmental Protection Agency (EPA or Appellant) appeals that part of the Initial Decision, dated December 4, 2013, of Administrative Law Judge (ALJ) M. Lisa Buschmann (Decision), which: 1) held as a matter of law that a "contract to lease" target housing within the meaning of the regulations at 40 C.F.R. § 745.113(b) must be in writing, since the contract must include, as an attachment or within the contract, various disclosures and certifications; 2) found Appellant failed to demonstrate by a preponderance of the evidence two written contracts to lease target housing pursuant to the regulations; and, 3) dismissed 10 Counts of the Complaint which alleged the two contracts to lease target housing failed to comply with the regulations. (Complaint Counts 5, 12, 18, 24, 31, and 3, 10, 16, 22, 29). The applicable laws in this matter are the Housing and Community Development Act of 1992, Title X, (Pub. L. No. 102-550), which may also be cited as the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851-4856 (2012) (the Act) [1], and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq.

The ALJ's *sua sponte* interpretation of longstanding and unchallenged joint EPA and HUD regulations is contrary to the clear intent and language of: the regulations promulgated pursuant to the Act and codified at both 40 C.F.R. Part 745, Subpart F, and 24 C.F.R. Part 35, Subtitle A (the Rule)[2]; EPA and HUD guidance; and applicable industry publications. The ALJ's interpretation of the Rule excludes oral contracts from its scope and would allow lessors

---

[1] These Acts will be referred to as "The Act" throughout this document.

[2] The Act directs both the Secretary of Housing and Urban Development (HUD) and the Administrator of the Environmental Protection Agency to promulgate implementing regulations. EPA and HUD promulgated joint (and identical) regulations. The regulations are, therefore, codified both in Title 24 and Title 40 of the Code of Federal Regulations. The relevant part of the applicable regulations in this proceeding, found at 40 C.F.R. Subpart F, is entitled "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property," and is also known as the "TSCA Lead Disclosure Rule."

to avoid liability and penalties under the Act for failing to disclose lead hazards by employing oral contracts to lease target housing, or by misplacing, losing or destroying contracts to lease target housing.

ISSUES PRESENTED FOR REVIEW

A. Whether the Rule Applies Only to Contracts to Lease Target Housing that are in Writing?

B. Whether Appellant Demonstrated that Appellee Entered Into the Two Additional Alleged Contracts to Lease Target Housing?

FACTUAL AND PROCEDURAL BACKGROUND

On July 8, 2010, the Appellant filed the Complaint for this civil administrative action pursuant to Section 16 of TSCA, 15 U.S.C. § 2615. The Complaint alleged in 32 Counts that Respondent, Ms. Dessie L. Brumfield, doing business as Brumfield Properties, LLC, (Appellee), entered into seven separate contracts to lease target housing, but failed to provide lessees with the specific lead hazard warnings, statements, lists of reports, and signatures and certifications, in violation of the Rule and Section 409 of TSCA, 15 U.S.C. § 2689, and Section 4852d(b)(5) of the Act, 42 U.S.C. § 4852d(b)(5). The Complaint proposed a civil penalty of $58,060. On or about June 2, 2011, Appellee filed its Answer to the Complaint. On December 28, 2011, Appellant timely filed its Prehearing Exchange. On March 5, 2012, Counsel for Appellee filed a Response to the ALJ's Order to Show Cause and its Prehearing Exchange. Appellee's Prehearing Exchange did not include any proposed exhibits and stated it would use Appellant's exhibits.

On July 27, 2012, the ALJ issued an Order which granted each party's motion to supplement its Prehearing Exchange, and struck Appellee's claim of inability-to-pay the proposed civil penalty. On July 26, 2012, Appellee notified the ALJ and Appellant that she was no longer represented by counsel, i.e., she was proceeding *pro se*, and she was requesting the

hearing be postponed for thirty days. On July 30, 2012, Appellee's counsel filed with the ALJ his Notice of Withdrawal. On August 2, 2012, the ALJ issued an Order which allowed Appellee's counsel to withdraw and denied Appellee's request to postpone the hearing.

On August 2, 2012, representatives of the ALJ held an informal prehearing conference with the parties. On August 7, 2012, the ALJ held the hearing for this action in Milwaukee, Wisconsin. Appellant presented the testimony of four witnesses and offered eight exhibits, all of which were admitted into evidence. Appellee, proceeding *pro se*, testified as the sole witness and offered eight exhibits, six of which were admitted into evidence. One document was admitted into evidence as an exhibit of the ALJ. The parties submitted post-hearing briefs. Appellant filed a reply brief. On December 10, 2012, the ALJ closed the record.

On December 4, 2013, the ALJ issued her Decision. Generally, she found Respondent entered into five written contracts to lease target housing, but failed to comply with the Rule, in violation of the subject regulations, Section 409 of TSCA, 15 U.S.C. § 2689, and Section 4852d(b)(5) of the Act, 42 U.S.C. § 4852d(b)(5), and assessed a civil penalty of $45,904. However, she also held, *sua sponte*, that the Rule applied only to a contract to lease target housing that was in writing; found Appellant failed to demonstrate two written contracts to lease target housing; and, dismissed their associated Counts of the Complaint, Count Nos. 5, 12, 18, 24, 31, and 3, 10, 16, 22, 29. Appellant found the ALJ's holding to be an issue of first impression before EPA's Environmental Appeals Board (EAB or Board). On December 18, 2013, Appellant filed with the Board a Motion for a 30-Day Extension of Time to File its Notice of Appeal and Brief. On December 20, 2013, the EAB granted Appellant until Friday, February 7, 2014, to file its Notice of Appeal and Brief. On February 5, 2014, Appellant filed with the Board a Motion for a 14-Day Extension of Time to File its Notice of Appeal and Brief. On

February 6, 2014, the EAB granted Appellant until Friday, February 21, 2014, to file its Notice of Appeal and Brief.

STANDARD OF REVIEW

The appeal of an initial decision to the EAB is governed by 40 C.F.R. § 22.30 (2014). The scope of the review is set forth at 40 C.F.R. § 22.30(c) and is limited to those issues: raised during the course of the proceeding, raised by the initial decision and/or concerning subject matter jurisdiction. *See In re Billy Yee*, 10 E.A.D. 1, 10 (EAB 2001). As with other enforcement proceedings, "[t]he [Board] shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed." 40 C.F.R. § 22.30(f); *see also Administrative Procedure Act*, 5 U.S.C. § 557(b) (2012) ("On appeal from or review of [an] initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). The Board also may assess a civil penalty that is higher or lower than the amount recommended by the Presiding Officer's decision. 40 C.F.R. § 22.30(f). The EAB conducts its review of initial decisions under a *de novo* standard. *In re Friedman*, 11 E.A.D. 302, 314 (EAB 2004) (explaining that the EAB reviews "the [presiding officer's] factual and legal conclusions on a *de novo* basis"), *aff'd*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005), *aff'd*, 220 Fed. App'x 678 (9th Cir. 2007). In conducting a *de novo* review, the Board applies the "preponderance of the evidence" standard required by 40 C.F.R. § 22.24(b). *In re Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001) (defining standard). The complainant bears the burden of demonstrating that the alleged violation occurred per 40 C.F.R. § 22.24(a), *i.e.*, the complainant must prove, by a preponderance of the evidence, that the facts exist for finding a violation of the applicable requirements. *Id.* (defining standard); *see In re Bricks, Inc.*, 11 E.A.D. 224, 233 (EAB 2003) (rejecting an administrative law

judge's findings of fact because the Agency had failed to demonstrate that the facts were supported by a preponderance of the evidence); *see also In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 (EAB 2004) (explaining the subject standard); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). A factual determination meets the preponderance of the evidence standard if the fact finder concludes that it is more likely true than not. *See In re Julie's Limousine*, 11 E.A.D. at 507 n. 20; *In re Lyon Cnty. Landfill*, 10 E.A.D. 416, 427 n. 10 (EAB 2002), *aff'd*, No. Civ-02-907 (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005); *Bullen*, 9 E.A.D. 632.

ARGUMENT

A. The ALJ Erred When She Held the Rule Applied Only to a Written Contract to Lease Target Housing.

1. The Lead Disclosure Requirement of the Act and the Rule Applies to Any or Each Contract to Lease Target Housing Including an Oral Contract

a. The Lead Disclosure Requirement of the Act Applies to Any Contract to Lease Target Housing Including an Oral Contract

The Act states:

> The regulations shall require that, before the purchaser or lessee is obligated under **any contract** to purchase or lease the housing, the seller or lessor shall — (A) provide the purchaser or lessee with a lead hazard information pamphlet, as prescribed by the Administrator of the Environmental Protection Agency under section 406 of the Toxic Substances Control Act; (B) disclose to the purchaser or lessee the presence of any known lead-based paint, or any known lead-based paint hazards, in such housing and provide to the purchaser or lessee any lead hazard evaluation report available to the seller or lessor.

42 U.S.C § 4852d(a)(1) (2012) (emphasis added).

The Act clearly specifies this subsection applies to "**any** contract to purchase or lease the housing..." *Id.* (emphasis added). It does not limit this subsection to any particular type of contract. It demonstrates that Congress clearly places upon sellers and lessors of target housing the legal duty to provide all purchasers and lessees with specific lead-based paint hazard

information before they become obligated under any contract to purchase or lease target housing. Thus, the plain language of the statute applies to any contract to purchase or lease housing. The ALJ's holding renders the Agency's Rule contrary to the clear language and requirement of the Act.

b. The Lead Disclosure Requirement of the Rule Applies to Each Contract to Lease Target Housing Including an Oral Contract

On March 6, 1996, EPA and HUD promulgated jointly the federal regulations entitled "Lead-Based Paint Poisoning Prevention In Certain Residential Structures." 61 Fed. Reg. 9064 (1996). The "Purpose" section of the regulatory text is clear and states:

> This subpart implements the provisions of 42 U.S.C. § 4852d, which impose certain requirements on the sale or lease of target housing. Under this subpart, a seller or lessor of target housing shall disclose to the purchaser or lessee the presence of any known lead-based paint and/or lead-based paint hazards; provide available records and reports; provide the purchaser or lessee with a lead hazard information pamphlet; give purchasers a 10-day opportunity to conduct a risk assessment or inspection and attach specific disclosure and warning language to the sales or leasing contract before the purchaser or lessee is obligated under a contract to purchase or lease target housing.

40 C.F.R. § 745.100 (2013) (emphasis added); 24 C.F.R. § 35.80. *See also* 61 Fed. Reg. at 9082 and 9085.

Similarly, the "Scope and Applicability" of the Rule specifies that it "Applies to **all** transactions to sell or lease target housing, including subleases . . . ." 40 C.F.R. § 745.101 (emphasis added); 24 C.F.R. § 35.82. The Scope and Applicability of the Rule does provide four exceptions: (a) Sales of target housing at foreclosure; (b) Leases of target housing found to be lead-based paint free; (c) Short-term leases of 100 days or less; and, (d) Renewals of existing leases in target housing. 40 C.F.R. § 745.101(a) – (d); 24 C.F.R. § 35.82(a) – (d). Notably, nothing in this subsection of the Rule limits its application to written contracts.

The "Certification and Acknowledgement of Disclosure" requirement of the Rule also specifically states that "**[e]ach** contract to lease target housing shall include, as an attachment, or within the contract, the following elements, in the language of the contract (e.g. English, Spanish)." 40 C.F.R. § 745.113(b) (emphasis added); 24 C.F.R. § 35.92(b).

EPA's and HUD's Rule, applies to "a contract to purchase or lease target housing," and "all transactions to lease target housing," and "each contract to lease target housing," including an oral contract. 40 C.F.R. §§ 745.100, 745.101, and 745.113(b); 24 C.F.R. §§ 35.80, 35.82 and 35.92(b). This continuous emphasis throughout the Rule demonstrates the legal duty EPA and HUD, like Congress, place upon sellers and lessors of target housing to provide all purchasers and lessees with specific lead-based paint hazard information before they become obligated under any contract to purchase or lease target housing, including an oral contract.

c. EPA and HUD Specifically Determined Each and Any Contract to Lease Target Housing Included an Oral Contract

After EPA and HUD published proposed regulations and received written comments, EPA and HUD specifically rejected the idea of excluding oral leases from the scope of the Rule. *See* 61 Fed. Reg. at 9068. EPA and HUD originally proposed limiting the scope of the Rule to written leases. Specifically, on November 2, 1994, EPA and HUD jointly proposed a rule for public comment. *See* 59 Fed. Reg. 54,984 (1994). Both EPA and HUD proposed that the Rule would apply only to written contracts. As originally drafted, the proposed rule would apply "to virtually all transactions involving a **written** contract to sell or lease target housing." *See* 59 Fed. Reg. at 54,986 (emphasis added). The joint proposal specifically excluded informal rental agreements from lead disclosure requirements:

B. Informal Rental Agreements

> Because this proposed rulemaking only applies to transactions to lease housing which involve a **written**

> contract, EPA and HUD have concluded that it should not apply to informal rental agreements which do not involve a lease. Such arrangements, by virtue of their informality, make the administration and enforcement of these requirements extremely difficult. To the extent practicable, however, EPA and HUD encourage individuals engaging in such informal arrangements to obtain available information on lead-based paint before occupying target housing.

59 Fed. Reg. at 54,986 (emphasis added). Accordingly, in the Scope and Applicability section of the proposed regulatory text, EPA and HUD's 1994 proposed rule stated:

> Scope and Applicability.
>
> This subpart does not apply to the sale of properties at foreclosure and informal rental agreements not involving a lease. Renewals of existing leases would be covered by the requirements of this subpart only if the lessor:
> (a) Did not previously provide the lessee with the lead-based paint hazard information required under Sec. 745.107; or,
> (b) If the lessor becomes aware of additional information concerning lead-based paint hazards during the term of the lease, in which case he or she is required to disclose this information prior to renewal of the lease.

59 Fed. Reg. at 54,997 and 55,001. However, after reviewing the public comments for their proposed rule, EPA and HUD rejected the proposal limiting the scope of the Rule to written contracts to lease. *See* 61 Fed. Reg. at 9064. EPA and HUD explained:

> 7. *Informal rental agreements.* In the proposed rule, EPA and HUD proposed excluding "informal rental agreements which do not involve a lease" (a phrase meant to capture oral leases) because "such arrangements, by virtue of their informality, make the administration and enforcement of these requirements extremely difficult." EPA and HUD have removed any implied exclusion for oral leases. In deciding not to exclude such leases, EPA and HUD drew heavily upon the public comments. Many of these comments suggested that the absence of a written lease may not have bearing on the "formality" of the housing arrangement. Commenters noted that oral leases make up a significant portion of the housing arrangements in certain areas, especially those that lack rental

> housing codes. Further, although the absence of a written lease provides challenges for certain Federal Enforcement and compliance monitoring approaches, EPA and HUD now believe that enforcement is possible. **Other evidence may exist, for example, to demonstrate that a leasing agreement exists between two parties.** Congress also provided lessees with opportunities for redress under its civil penalty provisions at section 1018(b)(3). These safeguards are not dependent upon Agency actions and therefore should not be constrained by EPA and HUD limitations. EPA and HUD have also considered policy reasons for not excluding oral leases. First, EPA and HUD are sympathetic to commenter concerns that an explicit exclusion for oral leasing transactions could create incentives for lessors to avoid written leases. If the rule's exclusion were to indirectly discourage the use of written leases, lessees would lose both their right to information on lead-based paint poisoning prevention and the many other protections afforded by written leases. Commenters also noted that a disproportionate number of oral transactions occur in low-income, disadvantaged communities. These communities are already at greater risk of exposure to lead-based paint hazards. Nevertheless, while the final rule does not provide an explicit exclusion for oral leasing arrangements, EPA and HUD expect that many oral lease transactions may be excluded for other reasons (length of arrangements, rental of 0-bedroom dwelling, etc.).

61 Fed. Reg. at 9068 (emphasis added).

EPA's and HUD's explicit consideration, and ultimate rejection, of a proposal limiting the scope of the Rule to written contracts, demonstrates their deliberation of the issue and conclusion to provide the broad protection afforded by the Act through the Rule.

d. EPA and HUD Official Guidance States the Rule Applies to Each Contract to Lease Target Housing Including an Oral Contract

EPA and HUD followed their final Rule with official guidance and other statements to reiterate its application to both written and unwritten contracts to lease target housing.[3] Each guidance document anticipated that some rental leases would be oral and nonetheless subject to

[3] EPA's original Interpretive Guidance for these regulations, entitled "Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing," August 20, 1996, remains at http://www2.epa.gov/sites/production/files/documents/1018fin.pdf and HUD's substantively identical guidance, entitled "Guidance on the Lead-Based Paint Disclosure Rule," August 21, 1996, remains at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_12348.pdf. February 7, 2014.

written lead disclosure requirements. Each guidance document includes Q & A No. 16 which states:

> The rule excludes from its requirements short-term leases of 100 days or less, where no lease renewal or extension can occur. If both parties wish to extend a previously exempted short-term lease beyond the 100-day limit, all provisions of this rule must be satisfied in full before any such "extension" occurs. In an "open-ended" month-to-month lease arrangement (i.e., an arrangement with no specified termination date), **whether written or unwritten**, the rule applies at the time of the initial lease agreement, since the parties have not limited the lease term to 100 days or less. (emphasis added). [4]

Each guidance document also includes Q & A No. 5 regarding the Rule and lease renewals:

> Thus, the date upon which a renewal lease is offered is not particularly relevant under the rule. **It is the date that the offer is accepted, if such acceptance constitutes an obligation to rent, that determines whether or not the rules apply. For written leases,** this would mean that regardless of when the renewal leases are offered to the tenant, the rule would apply to all renewal leases signed by the tenant (and any contingencies have been removed) on or after the effective date.

(emphasis added). HUD's 2012 Guidelines further reiterated the Act applied to written and unwritten leases.[5] Those Guidelines, **at Appendix 6, page 6-2,**[6] specifically state:

> At a minimum, Title X requires the offeror to provide the potential buyer or tenant the following information **before signing a written agreement or making an oral agreement:**
>
> 1) an EPA (or EPA-approved State) brochure on lead hazards for residential properties built before 1978;

---

[4] U.S. Dep't of Hous. and Urban Dev., Guidance on the Lead-Based Paint Disclosure Rule, 1, 7 (1996), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/healthy_homes/lbp/hudguidelines. February 7, 2014.

[5] *Id.*

[6] *See* U.S. Dep't of Hous. and Urban Dev., 1995 Guidelines, app. 6-2, June,1995, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&ved=0CD4QFjAC&url=http%3A%2F%2Fportal.hud.gov%2Fhudportal%2Fdocuments%2Fhuddoc%3Fid%3Dlbph-28.pdf&ei=ZEinUqmTN6HJsQTL-oDYBA&usg=AFQjCNEwdQ61sUggfigBAdJURM36Soxjhg&sig2=Tc7MIiJP1GkJVYHdLJk_6Q&bvm=bv.57799294,d.cWc. February 7, 2014.

2) information regarding the presence of lead-based paint and/or lead-based paint hazards, as well as any other available information, including records and reports on the subject; and,
3) a certification that all the parties sign and date. The certification must indicate that seller or landlord provided:
   a) the required Lead Warning Statement;
   b) disclosure of the information in item 2, above; and.
   c) a list of available records or reports (or a statement that no such documents are available).

(emphasis added). These HUD Guidelines provide explicit guidance on what it means to comply with the Rule's requirement in the context of an oral lease, specifying that each contract to lease "must include, as an attachment or within the contract, various disclosures and certifications." 40 C.F.R. 745.113(b). It must also be noted the regulated community was aware that the Rule applied to both written and unwritten contracts.[7]

Appellant argues that the statute and the Rule on their faces apply to any and each contract to lease target housing, including an oral contract. However, the ALJ held that "[A] 'contract to lease' within the meaning of the Rule must be in writing, as the contract must 'include, as an attachment or within the contract' the various disclosures and certifications." *In the Matter of Dessie L. Brumfield, d/b/a/ Brumfield Properties, LLC,* Docket No. TSCA-05-2010-0014, Slip Op. at 21, (December 4, 2013).

2. EPA's and HUD's Interpretation of Their Rule

As explained above, this holding is contrary to the longstanding interpretations of both HUD and EPA who jointly administer the Act and the Rule. Nevertheless, should the Board find the Rule's application to any and each contract to lease target housing ambiguous, Appellant

[7] *See* Nat'l Ass'n of Realtors, Lead Based Paint – A Guide to Complying with the EPA/HUD Disclosure Regulations, 5, 10 (2004), available at http://www.dfwrealestate.com/sites/default/files/file/leadbasedpaintreferenceguide.pdf. February 7, 2014.

argues that the longstanding interpretation of EPA and HUD of their own Rule should be entitled to deference.

a. The Board Should Look to the Doctrine of Administrative Deference as a Guide

Typically, parties before the Board do not raise the doctrine of administrative deference. *In re Mobil Oil Corp.*, 5 E.A.D. 490, 509 n.30 (EAB 1994). However, in *In re Lazarus, Inc.*, 7 E.A.D. 318, 349-59 (EAB 1997), the Board recognized that in situations where a statutory and regulatory program is delegated to another federal agency, an administrative deference analysis serves as a useful guide in the Board's review. *Id.* at 351 n.55. While the Board noted that the *Chevron*[8] deference analysis it conducted in *Lazarus* was not "directly applicable to an agency's review of another agency's interpretation" because the doctrine of administrative deference is predicated upon the Constitutional principle of separation of powers, the Board, nevertheless used a deference type analysis to assist its decision-making in the matter. *Id.*, at 350-51 n.54. Moreover, the Board noted that "an agency's interpretation of its own regulation is typically entitled to more deference than an interpretation of a statute." *Id.* at 318.

The Board addressed the doctrine of administrative deference as it applies to the interpretation of a statute in *Lazarus*, and also discussed the doctrine as it applies to the interpretation of a regulation. The Board stated:

> The rule of deference also applies to agency interpretations of regulations. In fact, an agency's interpretation of its own regulation is typically entitled to more deference than an interpretation of a statute. *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"); *Martin v. Occupational Safety and Health Review Comm.*, 499 U.S. 144, 151 (1991) ("the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation of a regulation

[8] *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

> must be accorded "substantial deference" and "controlling weight" unless "plainly erroneous or inconsistent with the regulation"). The heightened deference accorded to interpretations of regulations is especially appropriate where an agency's special expertise is required to administer a technical regulatory program. *Thomas Jefferson Univ.*, 512 U.S. at 512; *Martin*, 499 U.S. at 151; *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (Federal Reserve Board's administrative expertise in implementing the Truth in Lending Act was basis for according deference to its interpretation of regulations); *Beazer East, Inc. v. EPA*, 963 F.2d 603, 607 (3d Cir. 1992) ("complex nature of environmental statutes and regulations and the specialized knowledge necessary to construe them" was reason for according deference to EPA).

In re Lazarus, Inc., 7 E.A.D. 318, 351 (EAB 1997).

Indeed, the Board noted – as is the case here – that interpretations published via notice-and-comment rulemaking are typically entitled to a higher degree of deference. Additionally, the Board addressed less formal sources of interpretations and held that such deference is essentially applied on a sliding scale. *Id.* at 352-53. The Board stated that "the degree of deference accorded to such an interpretation 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it the power to persuade, if lacking power to control'" and then listed four factors which courts typically use in assessing less formal sources of agency interpretations. *Id.* (citing *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944)).

This is in accord with the standard for deference to an agency's interpretation of its own regulations as established by the Supreme Court in *Auer v. Robbins,* 519 U.S. 452, 457 (1997). In *Auer*, the Court upheld an interpretation by the U.S. Department of Labor of one of its own regulations, explaining that "because the salary basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461 (citations omitted). The Court also concluded that DOL's interpretation was worthy of deference even though it had been

set forth in a legal brief, as opposed to a regulation, because it was not a *post hoc* rationalization; there was no reason to suspect that it did not reflect the Department's fair and considered judgment; and a ruling requiring the Department to narrowly construe its own regulations made little sense as long as the Department's interpretation fit within the limits imposed by the statute. *Id.* at 462-63.[9]

Similar to the situation in *Lazarus*, where the Board considered another agency's interpretation of its own regulations, here the issue involves a statutory and regulatory scheme that is jointly administered by EPA and HUD, another federal agency. Just as principles of deference informed the Board's analysis in *Lazarus*, so too should *Auer* inform the Board's analysis in this matter. Appellant argues that EPA's and HUD's reasonable, permissible and consistent interpretation of their Rule, promulgated pursuant to the Agency and Department's congressionally delegated authorities after notice-and-comment rulemaking, is entitled to deference under an *Auer* type analysis.

The Board should apply an *Auer* type analysis in this appeal because the Rule and interpretation were developed through notice-and-comment rulemaking and administered jointly by EPA and HUD, they fall squarely within EPA's and HUD's areas of expertise, and there is no inter-agency conflict to resolve. The Rule and the agencies' interpretation of such were also not made beyond their purview, as opposed to an interpretation of a statute or regulation of general

[9] While the Supreme Court has recently limited *Auer*, it still provides the applicable standard for reviewing an agency's interpretation of its own regulations and directs courts to give controlling weight to an agency interpretation of its own regulation as long as it is not plainly erroneous or inconsistent with the regulation. *See Christopher v. SmithKline Beecham Corp.*, 2012 BL 150189, 80 U.S.L.W. 4463 (2012) (limiting *Auer* in circumstances where *Auer* deference to DOL's interpretation would result in retroactive liability and unfair surprise to the regulated entity); and *Decker v. Nw. Envtl. Defense Ctr.*, 133 S. Ct. at 1326 (2013) (three justices concurred with *Auer* deference to EPA's interpretation of an agency regulation but questioned the broad test established by Auer).

applicability not administered by any particular agency or department or administered by multiple agencies none of which has particular expertise in the subject of the statute, *e.g.*, APA, FOIA, etc. *See Individual Reference Servs. Grp. v. Federal Trade Commission*, 145 F. Supp. 2d 6 (D.D.C. 2001), at 23-24. Rather, EPA and HUD were entrusted by Congress to administer the Rule and their Rule was the result of a "statutorily coordinated effort" between EPA and HUD to promulgate the Rule as required by the Act. *Individual Reference Servs. Grp.* at 23-24. Lastly, EPA and HUD's jointly shared interpretation was compelled by the statutory text; is longstanding and has been consistently applied.

b. EPA's and HUD's Interpretation of the Rule is not Plainly Erroneous or Inconsistent with the Regulation

EPA's and HUD's interpretation of their Rule is controlling unless "plainly erroneous or inconsistent with the regulation," pursuant to an *Auer*-type analysis. *Auer*, 519 U.S. at 461. The ALJ held, *sua sponte*, that "[A] 'contract to lease' within the meaning of the Rule must be in writing, as the contract must 'include, as an attachment or within the contract' the various disclosures and certifications." *In the Matter of Dessie L. Brumfield, d/b/a/ Brumfield Properties, LLC,* Docket No. TSCA-05-2010-0014, Slip Op. at 21, (December 4, 2013). Although the ALJ apparently conceived of only one method for a lessor of target housing to comply with the Rule, i.e., written contract to lease target housing with attached written TSCA Lead Disclosure Form, the substantive provisions of the Rule do not require this particular method. Surely the ALJ's highlighting one method of compliance with the Rule does not preclude other methods. Neither does the ALJ's holding make the Rule itself ambiguous or provide a basis for limiting the Rule—contrary to its explicit language—to written contracts.

The specific language of the Rule is clear. "[E]ach contract to lease target housing shall include as an attachment or within the contract . . ." various lead warnings, statements, lists of

reports, and signatures and certifications. 40 C.F.R. § 745.113(b). It applies to "each" contract to lease target housing. 40 C.F.R. § 745.113(b). It does not require one particular type of contract to lease target housing. It does not require one specific method for a lessor to attach to a contract, or place within the language of the contract, the required lead warnings, statements, lists of reports, and signatures and certifications of the Rule. It leaves those responsibilities and decisions to the lessor. An oral contract between lessor and lessee to lease target housing accompanied with a completed TSCA Lead Disclosure Rule Form, or accompanied with other solid evidence the lessor provided lessee with the required lead warnings, statements, lists of reports, and signatures and certifications, e.g., a signed affidavit, would comply with the Rule. Indeed, the 2012 HUD Guidelines explain how a lessor can employ an oral contract to lease target housing and how a lessor can attach documents and disclosures to comply with the Rule. *See* U.S. Dep't of Hous. and Urban Dev., 1995 Guidelines, app. 6-2, June,1995. However, the fact that the Rule does not dictate the form that a contract to lease must take does not allow the lessor to evade its legal duty to provide a lessee the lead warnings, statements, lists of reports, and signatures and certifications required by the Rule.

EPA's and HUD's interpretation that any and each contract to lease target housing includes an oral contract to lease is reasonable and has been consistently applied. EPA and HUD specifically addressed oral contracts or "informal rental agreements which do not involve a lease" in Part III (Summary of Proposed Rule and Public Comments) of the preamble to the Rule. 62 Fed. Reg. at 9068. In the preamble to the final rule, EPA and HUD explain that they specifically decided not to exclude oral contracts to lease from the Rule's scope, due, in large part to the fact that oral contracts make up a significant portion of housing arrangements in certain communities already disproportionately at risk for exposure to lead hazards. The

preamble to the final Rule explicitly stated that the regulation did not "provide an explicit exclusion for oral leasing arrangements...." EPA and HUD reasoned that other evidence may exist to prove oral lease agreements so enforcement was possible despite the lack of a written lease. The agencies concluded that an exclusion of oral contracts would circumvent the authority Congress provided all lessees under Section 1018(b)(3) of the Act to seek redress under the Act's civil penalty provisions. *See* 61 Fed. Reg. 9064, 9068 (1996).

Since 1996, EPA and HUD have consistently interpreted the Rule to apply to any contract to lease target housing, including oral contracts. Further, as discussed earlier, official EPA and HUD guidance documents specifically addressed this issue and the regulated community is well aware that the Act and the Rule apply to each contract to lease target housing, including oral contracts. The regulated community also generally complies (for both written and oral contracts) with the specific lead hazard warnings, statements, lists of reports, and signatures and certifications required by the Rule. The longstanding knowledge and practice of the regulated community demonstrates that they have complied with the Rule consistently to all contracts to lease target housing, including oral contracts. It cannot be ignored that no member of the regulated community or its counsel has ever argued that the Rule excludes an oral contract to lease target housing from lead disclosure requirements.

The ALJ's *sua sponte* interpretation is contrary to the clear and consistent language of both the Act and the Rule, and compromises the legal duty the Rule places upon sellers and lessors of target housing to provide all purchasers and lessees with specific lead hazard warnings, statements, lists of reports, and signatures and certifications, before they become obligated under any contract. It excludes many lessors and lessees with oral contracts to lease target housing, or with misplaced, lost, or destroyed contracts to lease target housing, from the requirements and

protections of the language of the Act and the Rule, due entirely to the choices and actions of the lessor. It will have a disproportionate impact among lessees of target housing in disadvantaged, low-income communities, who are already at a greater risk of exposure to lead-based paint hazards.

Therefore, the Board should defer to the longstanding and unchallenged EPA and HUD Rule and interpretation that any and each contract to lease target housing, including an oral contract, shall provide the lessee with critical lead-based paint warnings, statements, lists of records, and signatures and certifications as required by the Rule, because the Rule and interpretation is completely consistent with, indeed compelled by, the language of the Act.

B. The ALJ Erred When She Found Appellant Failed to Demonstrate Two Alleged Appellee Contracts to Lease Target Housing to Support the Factual Allegations and Legal Conclusions of Counts 5, 12, 18, 24, 31, and, 3, 10, 16, 22, 29 of the Complaint

1. Appellant Demonstrated Alleged Appellee Contract to Lease, dated January 1, 2008, for 4908 N. 40th Street, Milwaukee, Wisconsin (Complaint Count Nos. 5, 12, 18, 24, 31)

Appellant's Complaint alleged that on or about January 1, 2008, Appellee entered into a contract to lease target housing located at 4908 N. 40th Street, Milwaukee, but failed to comply with the five regulatory provisions of the Rule at 40 C.F.R. 745.113(b)(1), (2), (3), (4), and (6). The ALJ held Appellant's evidence, a Wisconsin Department of Revenue Rent Certificate (Rent Certificate), failed to demonstrate a written lease contract existed for rental of the premises, as required by the Rule. *In the Matter of Dessie L. Brumfield, d/b/a/ Brumfield Properties, LLC,* Docket No. TSCA-05-2010-0014, Slip Op. at 21, (December 4, 2013). Specifically, the ALJ found that the:

> " . . . Wisconsin Department of Revenue Rent Certificates . . . are not signed by the tenant Ms. Moore, but only by Ms. Brumfield, who signed it *after* the annual period of tenancy, and indicated the period of time the tenant lived on

> the premises and the amount of rent received for the preceding year. Finding of Fact 65. There is no agreement, manifestation of mutual assent, or terms of a contract in the Rent Certificates. They do not constitute a "contract to lease" within the meaning of 40 C.F.R. § 745.113(b).

Id. at 21. The ALJ then continued:

> The Rent Certificates also do not constitute sufficient evidence of any contract to lease. A "contract to lease" within the meaning of the Disclosure Rule must be in writing, as the contract must "include, as an attachment or within the contract" the various disclosures and certifications. 40 C.F.R. § 745.113(b). Although the Rent Certificates show that Ms. Brumfield had rented the property to Ms. Moore in 2007 and 2008, they do not indicate whether any written lease contract existed for rental of the premises.

Id. at 21. The ALJ then dismissed Counts 5, 12, 18, 24, and 31 of the Complaint which corresponded to that alleged contract to lease.

However, the ALJ erred when she held the Rule required a written contract to demonstrate a contract to lease target housing, as argued above. The 2008 Rent Certificate alone, completed by Appellee after the alleged contract to lease, is Appellee's written admission of the alleged contract to lease, which more than exceeds Appellant's burden of proof for this allegation. These written admissions by lessors, like commonly employed rent rolls or rent ledgers, are often the best evidence of contracts to lease target housing involving an oral lease, or a misplaced, lost, or destroyed written contract to lease target housing. *See In re Billy Yee*, 10 E.A.D. 1, 7 (EAB 2001) (finding oral lease based on landlords written admissions in response to subpoena).

The ALJ also erred when she found the documentary evidence, together with the testimonial evidence of the record, failed to demonstrate the Appellee entered into the alleged contract to lease target housing. Although it is true that the Rent Certificates are not actually "written lease contracts," Appellant did not contend that the Rent Certificate itself was the alleged contract to lease. Rather, Appellant contended that the entire trial record of testimonial

and documentary evidence, including the Rent Certificate, demonstrated the alleged oral contract to lease, and the alleged failure to comply with the five regulatory provisions of the Rule at 40 C.F.R. 745.113(b)(1), (2), (3), (4), and (6). Indeed, the ALJ's Findings of Fact demonstrated this alleged contract to lease.

> 12. Before the inspection occurred, Ms. Brumfield received a letter dated May 13, 2009 from Mr. O'Neill ("May 13, 2009 Letter"). Tr. 227-228. The letter stated "Confirming our phone conversation today, May 13, 2009, in which you agreed to an on site inspection for compliance with the Lead Based Paint Disclosure Rule." CX 2 at 19; Tr. 43-45. The Letter requested access to the "tenant leases for the past three years." CX 2 at 19. The letter further stated: "We ask you have available copies of any lead abatement orders, mitigation notices, notices of violations, certificates of compliance and any lead based paint safe certificates [and] . . . any reports of testing for lead based paint or lead based paint hazards.

In the Matter of Dessie L. Brumfield, d/b/a/ Brumfield Properties, LLC, Docket No. TSCA-05-2010-0014, Slip Op. at 7, (December 4, 2013).

> 15. During the inspection, Mr. Pilny asked Ms. Brumfield to produce all the leases and lead paint disclosure forms that she had pertaining to buildings she owned that were built before 1978. Tr. 48, 89-93, 111-114. She brought the lease documents to Mr. Pilny and he reviewed them. Tr. 48, 50, 114. Ms. Brumfield confirmed that all the leases for the pre-1978 buildings were at the location of the inspection, and that the lease documents he reviewed were all the leases for the pre-1978 properties that she had. Tr. 87, 90, 92, 94, 110-111, 113-114. During the inspection Ms. Brumfield made copies of the documents Mr. Pilny reviewed, upon his request. Tr. 48, 95. She made copies of 11 lease documents from her files. CX 7 at 45-46, 50; Tr. 95. Ms. Brumfield was provided with a receipt for the documents copied, which she signed. Tr. 47-49; CX 7 at 47, 59. Mr. Brumfield retained the original documents. Tr. 95-96.

Id. at 7.

> 18. The 11 lease documents copied during the inspection included the following addresses, move-in dates and tenants:
>
> d. 2230 North Teutonia Avenue, March 1, 2007, tenant: Densie Lindsey;
> h. 4908 North 40th Street, unite 4908, January 1, 2008, tenant: Elise Moore;
>
> CX 7 at 45-46, 59, 61-115. The copies made during the inspection were attached to Mr. Pilny's inspection report, and were presented at the hearing

as Complainant's Exhibit 7 at pages 61 through 131. Tr. 94-95, 101- 103.

Id. at 8.

> 64. Wisconsin Department of Revenue Rent Certificates prepared for tax years 2007 and 2008 indicate the Elise Moore lived at 4908 North 40th Street from January 1, 2007 through December 31, 2008, and that a total rent of $5,940 was collected for 2007 and a total rent of $6,105 was collected for 2008. CX 7 at 89-90.

Id. at 14.

> 65. The Wisconsin Department of Revenue Rent Certificates for 2007 and 2008 were signed by Ms. Brumfield, and did not have any signature or signature line for the tenant or renter. CX 7 at 89-90. Ms. Brumfield signed the Rent Certificate for 2007 on January 17, 2008, and the Rent Certificate for 2008 is undated.

Id. at 14.

The ALJ's Findings of Fact demonstrated that on or about January 1, 2008, Appellee entered into a contract to lease target housing located at 4908 N. 40th Street, Milwaukee. The record demonstrated Appellant requested Appellee provide tenant leases and Appellee provided lease documents, including Rent Certificates, as evidence of her leases. The Rent Certificate was a formal Wisconsin Department of Revenue Rent Certificate. The Rent Certificate included 1) the name of the lessor and lessee; 2) the address of the rental property; 3) the months and years of the rental; 4) the rental dollar amount; 5) the actual rental dollar amount collected each year; and 6) Appellee's signature which certified the Rent Certificate was true, correct, and complete. The Rent Certificate is Appellee's admission of its offer to contract to lease target housing, lessee's acceptance, their mutual assent, their consideration, and their performance. Indeed, the ALJ stated, ". . . the Rent Certificates show that Ms. Brumfield had rented the property to Ms. Moore in 2007 and 2008 . . ." *Id.* at 21. It is true the Rent Certificate does not include the signature of the lessee. However, the Rent Certificate did not require, request or

provide a signature line for a lessor and the State of Wisconsin's rent certificate forms specifically instruct lessees not to sign these forms.[10]

Therefore, the entire trial record of testimonial and documentary evidence, including the Rent Certificate, demonstrated that on or about January 1, 2008, Appellee entered into a contract to lease target housing located at 4908 N. 40th Street, Milwaukee.

2. Appellant Demonstrated Alleged Appellee Contract to Lease, Dated March 1, 2007, for 2230 North Teutonia, Milwaukee, Wisconsin (Complaint Count Nos. 3, 10, 16, 22, 29).

Appellant's Complaint also alleged that on or about March 1, 2007, Appellee entered into a contract to lease target housing located at 2230 North Teutonia, but failed to comply with the five regulatory provisions of the Rule at 40 C.F.R. 745.113(b)(1), (2), (3), (4), and (6). The ALJ held Appellant's evidence, a Rent Certificate, failed to demonstrate a written lease contract existed for rental of the premises, as required by the Rule.

Id. at 22. Specifically, the ALJ found the:

> They do not constitute a "contract to lease" or evidence of a contract to lease for the same reasons as those stated above regarding the rental to Ms. Moore. Considering the Rent Certificates together with the last page of a "Disclosure of Information on Lead-Based–Paint and/or Lead Based Hazards" form, signed by Ms. Lindsey on the same date as that on the Rent Certificate indicating the time she began living at the address, suggest that a written lease contract may have existed for a period commencing on the date. Finding of Fact 59, 60 Yet, Ms. Brumfield certified on the Rent Certificate that Ms. Lindsey resided there for all 12 months of 2007. Finding of Fact 59. The evidence is insufficient to prove existence of a written "contract to lease" the premises to Denise Lindsey.

Id. at 22. The ALJ then dismissed Counts 3, 10, 16, 22, and 29 of the Complaint which corresponded to that alleged contract to lease.

However, again, the ALJ erred when she held the Rule required a written contract to demonstrate a contract to lease target housing, as argued above. The 2007 Rent Certificate

[10] http://www.revenue.wi.gov/forms/2013/RentCertificate.pdf

alone, completed by Appellee after the alleged contract to lease, is Appellee's written admission of the alleged contract to lease, which more than exceeds Appellant's burden of proof for this allegation. These written admissions by lessors, like commonly employed rent rolls or rent ledgers, are often the best evidence of contracts to lease target housing involving an oral lease, or a misplaced, lost, or destroyed written contract to lease target housing. *See In re Billy Yee*, 10 E.A.D. 1, 7 (EAB 2001) (finding oral lease based on landlords written admissions in response to subpoena).

The ALJ also erred when she found the documentary evidence, together with the testimonial evidence of the record, failed to demonstrate the Appellee entered into the alleged contract to lease target housing. Although it is true that the Rent Certificates are not actually "written lease contracts," Appellant did not contend that the Rent Certificate itself was the alleged contract to lease. Rather, Appellant contended that the entire trial record of testimonial and documentary evidence, including the Rent Certificate, demonstrated the alleged oral contract to lease, and the alleged failure to comply with the five regulatory provisions of the Rule at 40 C.F.R. 745.113(b)(1), (2), (3), (4), and (6).

Indeed, again the ALJ's Findings of Fact demonstrated this alleged contract to lease. Appellant sought "tenant leases for the past three years." *In the Matter of Dessie L. Brumfield, d/b/a/ Brumfield Properties, LLC,* Docket No. TSCA-05-2010-0014, Slip Op. at 7, (December 4, 2013). Mr. Pilny asked Ms. Brumfield to produce all the leases and lead paint disclosure forms that she had pertaining to buildings she owned . " *Id.* at 7. "She brought the lease documents to Mr. Pilny and he reviewed them." *Id.* at 7. "Ms. Brumfield confirmed that all the leases for the pre-1978 buildings were at the location of the inspection, and that the lease documents he reviewed were all the leases for the pre-1978 properties that she had." *Id.* at 7. "During the

inspection Ms. Brumfield made copies of the documents Mr. Pilny reviewed, upon his request." *Id.* at 7. She made copies of 11 lease documents from her files." *Id. at 7.* "The 11 lease documents copied during the inspection included the following addresses, move-in dates and tenants: d. 2230 North Teutonia Avenue, March 1, 2007, tenant: Densie Lindsey." *Id.* at 8. "The copies made during the inspection were attached to Mr. Pilny's inspection report, and were presented at the hearing as Complainant's Exhibit 7 at pages 61 through 131. Tr. 94-95, 101-103." *Id.* at 8. More specifically for this contract to lease, the ALJ's Findings of Fact found the following.

> 58. Ms. Brumfield rented to Denise Lindsey the premises at 2230 North Teutonia Avenue, and Ms. Lindsey resided there from March 1, 2007, to some time prior to May 15, 2008, March 1, 2007 (sic). CX 7 at 61-66; Court's Exhibit 1.

Id. at 13.

> 59. On the Wisconsin Department of Revenue Rent Certificates for tax years 2007 and 2008, Ms. Brumfield stated that she rented the unit to Ms. Lindsey for 12 months during each of those years, but collected rent for only 10 months of 2007. CX 7 at 65-66. Ms. Brumfield signed the certificates as landlord or authorized representative of Brumfield Properties, LLC, certifying to the truth, accuracy and completeness of the information thereon. *Id.* Her signature for the 2007 Rent Certificate is dated January 17, 2008. The Rent Certificates did not have any signature or signature line for the tenant or renter. *Id.*

Id. at 13.

The ALJ's Findings of Fact demonstrate that on or about March 1, 2007, Appellee entered into a contract to lease target housing located at 2230 North Teutonia, Milwaukee, Wisconsin.

The record demonstrated Appellant requested Appellee provide tenant leases, and Appellee provided lease documents, including the Rent Certificates, as evidence of her leases. The Rent Certificate was a formal Wisconsin Department of Revenue Rent Certificate. The Rent

Certificate included 1) the name of the lessor and lessee; 2) the address of the rental property; 3) the months and years of the rental; 4) the rental dollar amount; 5) the actual rental dollar amount collected each year; 6) Appellee's signature which certified the Rent Certificate was true, correct, and complete; and, 7) the date of signature, January 17, 2008. The Rent Certificate is Appellee's admission of its offer to contract to lease target housing, leesee's acceptance, their mutual assent, their consideration, and their performance. Indeed, the ALJ found "Ms. Brumfield rented to Denise Lindsey the premises at 2230 North Teutonia Avenue, and Ms. Lindsey resided there from March 1, 2007, to some time prior to May 15, 2008, March 1, 2007 (sic)." *Id.* at 13. It is true the Rent Certificate does not include the signature of the lessor. However, the Rent Certificate did not require, request, or provide a signature line for a lessor.

Therefore, Appellant demonstrated that the entire trial record of testimonial and documentary evidence, including the Rent Certificate, demonstrated that on or about March 1, 2007, Appellee entered into a contract to lease target housing located at 2230 North Teutonia, Milwaukee, Wisconsin.

3. Appellee Entered into a Contract to Lease Target Housing, Dated January 1, 2008, for 4908 N. 40th Street, Milwaukee, Wisconsin, but Failed to Comply with the Rule, as Alleged in Counts 5, 12, 18, 24, and 31 of the Complaint, and the Proposed Civil Penalties are Appropriate

Since the ALJ erred and did not find Appellee entered into a contract to lease target housing, dated January, 1, 2008, for 4908 N. 40th Street, Milwaukee, Wisconsin, the ALJ's Decision made no formal findings of fact or conclusions of law for the allegations Appellee failed to comply with the Rule, as alleged in Counts 5, 12, 18, 24, and 31 of the Complaint. The ALJ also made no findings of fact or conclusions of law as to the appropriateness of the corresponding proposed civil penalties.

Therefore, Appellant requests the Board review the following pages of Appellant's Post-Hearing Brief,[11] dated October 15, 2012, ("PHB"), and find Appellee failed to comply with the Rule, as alleged in Counts 5, 12, 18, 24, and 31 of the Complaint, and the corresponding proposed civil penalties are appropriate pursuant to the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), and Appellant's "EPA Section 1018 – Disclosure Rule Enforcement Response Policy," dated December 2007, (the Penalty Policy).

a. Count 5
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(1), PHB p. 16.
b. Count 12
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(2), PHB p. 20
c. Count 18
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(3), PHB p. 24
d. Count 24
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(4), PHB p. 29
e. Count 31
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(6), PHB p. 33
f. Counts 5, 12, 18, 24, 31
   Appropriateness of Proposed Civil Penalties, PHB pp. 50 – 54.

4. Appellee Entered Into a Contract to Lease Target Housing, Dated March 1, 2007, for 2230 North Teutonia, Milwaukee, Wisconsin, but Failed to Comply with the Rule, as Alleged in Counts 3, 10, 16, 18, 22, and 29 of the Complaint, and the Proposed Civil Penalties Are Appropriate.

Since the ALJ erred and did not find Appellee entered into a contract to lease target housing, dated March 1, 20017, for 2230 N. Teutonia, Milwaukee, Wisconsin, the ALJ made no formal findings of fact or conclusions of law for the allegations Appellee failed to comply with the Rule, as alleged in Counts 3, 10, 16, 22, and 29, of the Complaint. The ALJ also made no findings of fact or conclusions of law as to the appropriateness of the corresponding proposed civil penalties.

---

[11] *See* Appellant's Post-Hearing Brief (2012), available at http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/Filings/C8E64BDD0F2138B285257A9A001B7CDD/$File/TSCA-05-2010-0014%20CPHB%2010-15-2012.PDF

Therefore, Appellant again requests the Board review the following pages of Appellant's PHB and find Appellee failed to comply with the Rule, as alleged in Counts 3, 10, 16, 22, and 29, of the Complaint, and the corresponding proposed civil penalties are appropriate pursuant to the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), and the Penalty Policy.

g. Count 3
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(1), PHB p. 15.
h. Count 10
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(2), PHB p. 20
i. Count 16
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(3), PHB p. 23
j. Count 22
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(4), PHB p. 28
k. Count 29
   Evidence of Violation of 40 C.F.R. §§ 745.113(b)(6), PHB p. 33
l. Counts 3, 10, 16, 22, 29
   Appropriateness of Proposed Civil Penalties, PHB pp. 54 – 58.

ALTERNATIVE FINDINGS OF FACT

Appellant proposes to the Board the following alternative findings of fact for Appellee contract to lease target housing, dated January 1, 2008, for 4908 N. 40th Street, Milwaukee, Wisconsin.

1. On or about January 1, 2008, Appellee entered into a contract to lease to an individual target housing located at 4908 N. 40th Street, Milwaukee, Wisconsin.
2. Appellee failed to provide that individual with a Lead Warning Statement. (Complaint Count No. 5).
3. Appellee failed to provide that individual with a statement by lessor disclosing the presence of 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. (Complaint Count No. 12).

4. Appellee failed to provide that individual a list of any records or reports available to the lessor regarding lead-based paints and/or lead-based paint hazards in the target housing or a statement that no such records exist. (Complaint Count No. 18).
5. Appellee failed to provide that individual a statement by the lessee affirming receipt of the lessor's disclosure statement, a list of any records or reports available to the lessor regarding lead-based paints and/or lead-based paint hazards in the target housing or a statement that no such records exist, and a Lead Hazard Information Pamphlet. (Complaint Count No. 24).
6. Appellee failed to provide that individual lessor and lessee signatures certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature for the above statements. (Complaint Count No. 31).

Appellant proposes to the Board the following alternative findings of fact for Appellee contract to lease, dated March 1, 2007, for its target housing located at 2230 N. Teutonia, Milwaukee, Wisconsin.

1. On or about March 1, 2007, Appellee entered into a contract to lease to an individual target housing located at 2230 N. Teutonia, Milwaukee, Wisconsin.
2. Appellee failed to provide that individual with a Lead Warning Statement. (Complaint Count No. 3).
3. Appellee failed to provide that individual with a statement by lessor disclosing the presence of 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. (Complaint Count No. 10).

4. Appellee failed to provide that individual a list of any records or reports available to the lessor regarding lead-based paints and/or lead-based paint hazards in the target housing or a statement that no such records exist. (Complaint Count No. 16).
5. Appellee failed to provide that individual a statement by the lessee affirming receipt of the lessor's disclosure statement, a list of any records or reports available to the lessor regarding lead-based paints and/or lead-based paint hazards in the target housing or a statement that no such records exist, and a Lead Hazard Information Pamphlet. (Complaint Count No. 22).
6. Appellee failed to provide that individual lessor and lessee signatures certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature for the above statements. (Complaint Count No. 29).

ALTERNATIVE CONCLUSIONS OF LAW

Appellant proposes to the Board the following alternative conclusions of law.

1. Each contract to lease target housing includes oral contracts to lease target housing, pursuant to the regulation at 40 C.F.R. § 745.113(b).
2. On or about January 1, 2008, Appellee entered into a contract to lease to an individual target housing located at 4908 N. 40th Street, Milwaukee, Wisconsin, and was therefore a "lessor," as that term is defined at 40 C.F.R. § 745.103.
3. On or about January 1, 2008, Appellee entered into a contract to lease to an individual target housing located at 4908 N. 40th Street, Milwaukee, Wisconsin, but failed to comply with the regulations at 40 C.F.R. §§ 745.113(b)(1), (2), (3), (4), and (6), in violation of those regulations, 15 U.S.C. § 2689, and 42 U.S.C. § 4852d.
4. The appropriate civil penalties for Appellee's contract to lease, dated January 1, 2008, to an individual target housing located at 4908 N. 40th Street, Milwaukee, Wisconsin, which

violated 40 C.F.R. §§ 745.113(b)(1), (2), (3), (4), and (6), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d, are $1,550, $770, $260, $520, and $130.00, respectively.

5. On or about March 1, 2007, Appellee entered into a contract to lease to an individual target housing located at 2230 N. Teutonia, Milwaukee, Wisconsin, and was therefore a "lessor," as that term is defined at 40 C.F.R. § 745.103.
6. On or about March 1, 2007, Appellee entered into a contract to lease to an individual target housing located at 2230 N. Teutonia, Milwaukee, Wisconsin, but failed to comply with the regulations at 40 C.F.R. §§ 745.113(b)(1), (2), (3), (4), and (6), in violation of those regulations, 15 U.S.C. § 2689, and 42 U.S.C. § 4852d.
7. The appropriate civil penalties for Appellee's contract to lease, dated March 1, 2007, to an individual target housing located at 2230 Teutonia Milwaukee, Wisconsin, which violated 40 C.F.R. §§ 745.113(b)(1), (2), (3), (4), and (6), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d, are $1,550, $770, $260, $520, and $130.00, respectively.

CONCLUSION

Therefore, Appellant respectfully requests the Board find and adopt Appellant's alternative findings of fact and conclusions of law as proposed above.

Respectfully submitted,

Morgan E. Rog 4/07

Jeffery M. Trevino
John P. Steketee
U.S. Environmental Protection Agency
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604-3590
Tel. No. (312) 886-6729
Fac. No. (312) 692-2987
trevino.jeffery@epa.gov

Attorneys for Appellant

Of Counsel: MORGAN E. ROG
Office of Civil Enforcement

ANDREW J. SIMONS
Office of General Counsel

Date: 2.21.2014

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Ms. Dessie L. Brumfield, d/b/a/ Brumfield Properties, LLC,	)	TSCA Appeal No. 13-(04)
Docket No. TSCA-05-2010-0014	)	

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of the attached **NOTICE OF APPEAL AND APPELLATE BRIEF** in the matter **MS. DESSIE L. BRUMFIELD D/B/A BRUMFIELD PROPERTIES, LLC; DOCKET NO. TSCA-05-2010-0014, _____EAB Appeal No. 13-(04),** was hand-delivered to the Board at the following address:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, Room 3334
Washington, DC 20004

Further, I hereby certify that one copy of the attached **NOTICE OF APPEAL AND APPELLATE BRIEF** in the matter **MS. DESSIE L. BRUMFIELD D/B/A BRUMFIELD PROPERTIES, LLC; DOCKET NO. TSCA-05-2010-0014, _____EAB Appeal No. 13-(04)**, was sent to the Respondent via Express Mail to the following address:

Ms. Dessie L. Brumfield
5067 North 37th Street
Milwaukee, WI 53290

Further, I hereby certify that one copy of the attached **NOTICE OF APPEAL AND APPELLATE BRIEF** in the matter **MS. DESSIE L. BRUMFIELD D/B/A BRUMFIELD PROPERTIES, LLC; DOCKET NO. TSCA-05-2010-0014, _____EAB Appeal No. 13-(04)**, was hand-delivered to the Regional Hearing Clerk at the following address:

U.S. EPA, Region 5
Regional Hearing Clerk
Office of Regional Hearing Clerk
Attention: La Dawn Whitehead
77 W. Jackson Blvd., 19th Floor
Chicago, IL 60604-3590

Further, I hereby certify that one copy of the attached **NOTICE OF APPEAL AND APPELLATE BRIEF** in the matter **MS. DESSIE L. BRUMFIELD D/B/A BRUMFIELD PROPERTIES, LLC; DOCKET NO. TSCA-05-2010-0014, _____EAB Appeal No.13-(04)**, was sent to the ALJ via Express Mail to the following address:

M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Morgan E. Rog
Morgan E. Rog

2.21.2014
Date