UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Frank J. Davis,	)	**Docket No. TSCA-05-2007-0002**
	)	
Respondent	)	

DEFAULT ORDER[1]

Introduction

This proceeding arises under the authority of Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a) and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Rules of Practice"), 40 C.F.R. Part 22. On December 7, 2006, the United States Environmental Protection Agency Region 5 ("EPA" and "Complainant") initiated this proceeding by filing a Complaint against Frank J. Davis ("Respondent") alleging in 54 counts that Respondent had failed to comply with regulations implementing Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851 ("RLBPHRA"). The violations arose out of ten lease transactions and two sale transactions. Complainant sought the imposition of a civil administrative penalty in the amount of $52,724 against Respondent. Respondent, acting *pro se*, filed an Answer on January 29, 2007, alleging inter alia that all properties at time of purchase were completely renovated which completely eliminated all possibility of hazardous levels of lead-based paint. Respondent denied liability on all 54 counts and requested a hearing.

By an Order, dated May 14, 2007, the ALJ directed the parties to exchange prehearing information in accordance with Consolidated Rule 22.19 on or before June 15, 2007. The Order directed the parties to provide a list of prospective witnesses, a brief summary of their anticipated testimony and a copy of each document or exhibit to be proffered in evidence at the hearing. Based on claims made in Respondent's Answer, Respondent was directed to provide a copy of contracts for renovation work, invoices or similar documents to support the allegation that all properties at the time of purchase were completely renovated which eliminated all possibility of hazardous levels of lead-based paint. Additionally, Respondent was directed to provide a copy of information concerning lead-based paint obtained from the Indianapolis Housing Agency and to specify the form in which this information was provided to tenants. Respondent was ordered to identify individuals who could testify that this information was provided to all tenants and to provide a copy of the personal letter given to every tenant explaining the

[1] Under 40 C.F.R. § 22.17(c), this Default Order constitutes an Initial Decision.

possibility of lead paint being on the premises. Finally, Respondent was instructed to provide financial statements, copies of income tax returns, or other data if he wished to contend that the proposed penalty exceeded his ability to pay.

Respondent failed to submit any material on or before June 15, 2007 as required by the Prehearing Exchange Order. The ALJ therefore scheduled a teleconference. As a result of the discussion, the ALJ issued an Order dated June 25, 2007, which allowed Respondent until July 6, 2007 to provide the information originally requested in the May 14, 2007 order. During the teleconference, Respondent represented that he was in the process of changing his residence and would inform the ALJ of his new address to which mail could be sent in the future.

Respondent failed to submit any information on or before July 6, 2007 and failed to inform the ALJ of any new mailing address. Subsequently, Respondent failed to appear for the teleconference scheduled by the ALJ on July 19, 2007. To date, Respondent has failed to submit any information responsive to the Prehearing Exchange Order.

On October 12, 2007, Complainant filed a Motion to Withdraw Counts 1, 13, 23 and 33 of the Complaint and a Motion for an Order of Default or, in the Alternative, Accelerated Decision on the Issues of Respondent's Liability. Respondent has not filed a response.

For the reasons discussed below, Complainant's motions are granted. Counts 1, 13, 23 and 33 are dismissed. Respondent is found to be in default pursuant to Section 22.17 (a) of the Rules of Practice, 40 C.F.R. § 22.17(a).

Discussion

Motion to Withdraw Counts 1, 13, 23 and 33

Since filing the Complaint, the EPA has learned of the existence of the lead-based paint disclosure form executed in connection with the lease of Respondent's 1838 Brookside Avenue property. This information led to EPA's conclusion that Respondent satisfied the requirements of the Disclosure Rule in connection with this lease transaction. Accordingly, EPA moves to withdraw Counts 1, 13, 23 and 33.

EPA recalculated the penalty proposed in the Complaint to subtract those penalty amounts associated with Counts 1, 13, 23 and 33. The recalculated proposed penalty amount is $50,634.

Under the Consolidated Rules of Practice found at 40 C.F.R. Part 22, the Complainant may withdraw the complaint, or any count of the complaint, if the Administrative Law Judge grants such a motion. 40 C.F.R. §22.14(d).[2]

[2]According to 40 C.F.R. § 22.14(d), "[t]he complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer is filed. After one withdrawal before the filing of an answer,

Respondent has not filed a response to Complainant's Motion. Therefore, since Respondent does not oppose the Motion, the ALJ finds that granting the Motion will help to clarify the issues within the case. Accordingly, Complainant's Motion to Withdraw Counts 1, 13, 23 and 33 is granted and these counts are dismissed.

Motion for Default Order

Section 22.17(a) of the Rules of Practice governs when a party may be found to be in default. 40 C.F.R. § 22.17(a). The Rule provides that a default judgment may be entered against a party for "failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer." *Id.* Furthermore, Section 22.17(a) of the Rules of Practice provides that "[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. 22.17(a). When default occurs, the Presiding Officer:

> shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." Section 22.17(c).

The Prehearing Exchange Order issued by the ALJ on May 14, 2007 required the parties to make their initial prehearing exchanges under 40 C.F.R. § 22.19 by June 15, 2007. The Order directed both parties to provide a list of prospective witnesses, a brief summary of their anticipated testimony and a copy of each document or exhibit to be proffered in evidence. (P Ex Order at 1). Based on claims made in Respondent's Answer, the ALJ also directed Respondent to provide additional documents.[3]

The ALJ directed Respondent to provide some of the documents because, in his Answer, Respondent claimed that "[a]ll properties at time of purchase were completely renovated which eliminated all possibilities of hazardous levels of lead based paint."

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the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer."

[3] The documents listed in the Prehearing Exchange Order included a copy of contracts for renovation work, invoices or similar documents to support the allegation that all properties at the time of purchase were completely renovated which eliminated all possibility of hazardous levels of lead-based paint. Additionally, Respondent was directed to provide a copy of information concerning lead-based paint obtained from the Indianapolis Housing Agency, and to specify the form in which this information was provided to tenants and identify individuals who could testify that this information was provided to all tenants, and provide a copy of the personal letter given to every tenant explaining the possibility of lead paint being on the premises. Finally, Respondent was instructed to provide financial statements, copies of income tax returns or other data if he wished to contend that the proposed penalty exceeded his ability to pay. (P Ex Order at 5).

(Answer at 1). This claim may constitute an affirmative defensive to the allegations of violations of the Residential Lead-Based Paint Hazard Reduction Act. The ALJ gave Respondent a chance to support this affirmative defense by submitting documentation in response to the Prehearing Exchange Order. However, Respondent chose not to develop this defense by failing to comply with any of the requirements of the Prehearing Exchange Order.[4]

Respondent failed to submit any documents by May 14, 2007 as set forth in the Order. The ALJ scheduled a teleconference with all parties, to discuss Respondent's failure to comply with the Prehearing Exchange Order. The ALJ issued a new order, allowing the Respondent to submit the documents on or before July 6, 2007. Respondent failed to meet this second deadline. The ALJ again scheduled a teleconference, but Respondent failed to appear for the teleconference. To date, Respondent has failed to comply with the Prehearing Exchange Order, and has not submitted any information responsive to the Prehearing Exchange Order. Respondent has also failed to respond to Complainant's Motion for an Order of Default.[5]

Accordingly, due to Respondent's failure to comply with the Prehearing Exchange Orders issued on May 14, 2007 and June 25, 2007, his failure to timely file a prehearing exchange, and his failure to show good cause for these omissions, Respondent is hereby found to be in default. Pursuant to Section 22.17(a), default by Respondent constitutes an admission of the facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Therefore, the facts alleged in the Complaint establish Respondent's liability for nine counts of failure to include a lead warning statement in rental contracts in violation of 40 C.F.R. § 745.113(b)(1) and 40 C.F.R. § 745.100, two counts of failure to include a lead disclosure

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[4] Respondent's unsupported claim that all housing had been renovated, and was therefore lead-free, has been rebutted by Complainant, who submitted Marion County Health Department reports, dated August 12, 2003, September 19, 2003, and February 6, 2004, which state that Respondent's 4506 E. Washington St., 725 North Sherman Dr. and 2822 English Ave. properties were found to have deteriorated, peeling or scaling paint which contained hazardous levels of lead. (C's P Exs 18, 19 and 20).

[5] Complainant's Updated Status Report of September 24, 2007, informed the ALJ that an U.S. EPA civil investigator discovered that Respondent filed a Voluntary Petition for bankruptcy protection with the U.S. Bankruptcy Court for the Southern District of Indiana on August 31, 2007. On December 31, 2007, the ALJ received a copy of Respondent's Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors and Deadlines. Respondent's bankruptcy filings do not prevent this action from going forward or absolve Respondent of the necessity of following this ALJ's Prehearing Exchange Order. While Section 362(a) of the Bankruptcy Code generally stays the commencement or continuation of a proceeding against the debtor that could have been commenced prior to filing of the bankruptcy petition, excepted from stay is "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. §§ 362(a)(1), (b)(4). "It is well established that an administrative penalty proceeding seeking entry of a judgment for past violations of environmental regulations is within EPA's regulatory power to enforce environmental laws and is therefore *not stayed* by Respondent's filing of a bankruptcy petition." Keenhold Associates, et al., Order to Show Cause and Order Granting Motion for Extension, Docket No. TSCA-03-2007-0084, 2007 EPA ALJ LEXIS 28, 2 (ALJ October 16, 2007). (Emphasis in the original). Only the collection of the monetary judgment resulting from this proceeding is subject to the stay provisions of the bankruptcy code and will be dealt with by the bankruptcy court. *Id.*

statement in rental contracts in violation of 40 C.F.R. § 745.113(b)(2) and 40 C.F.R. § 745.100, nine counts of failure to include in rental contracts a list of records or statement that no such records exist in violation of 40 C.F.R. § 745.113(b)(3) and 40 C.F.R. § 745.100, nine counts of failure to include a statement of receipt of lead hazard information and pamphlet in rental contracts in violation of 40 C.F.R. § 745.113(b)(4) and 40 C.F.R. § 745.100, nine counts of failure to include certifying signatures in rental contracts in violation of 40 C.F.R. § 745.113(b)(6) and 40 C.F.R. § 745.100, and two counts of failure to include a lead warning statement in sale contracts in violation of 40 C.F.R. § 745.113(a)(1) and 40 C.F.R. § 745.100.

Findings of Fact

1. Complainant is the United States Environmental Protection Agency (EPA), Region 5 and is authorized to issue a complaint in accordance with 40 C.F.R. §§ 22.13 and 22.14 on behalf of the Agency to persons alleged to be in violation of the Act.

2. Respondent is Frank J. Davis, a private individual engaged in the business of selling and/or leasing housing, which meets the definition of "target housing" under 40 C.F.R. § 745.103.[6]

3. Between at least June 1, 2002 and March 30, 2004, Respondent owned the following nine properties ("Residential Rental Property"):
    a. 2822 English Avenue, a one family dwelling, built in 1922.
    b. 3780 North Parker, a one family dwelling, built in 1922.
    c. 2039 Roosevelt Avenue, a two family dwelling, built in 1925.
    d. 402 South Rural, a one family dwelling, built in 1918.
    e. 815 North Rural, a one family dwelling, built in 1901.
    f. 725 North Sherman Drive, a two family dwelling, built in 1925.
    g. 2518 North Temple Avenue, a one family dwelling, built in 1930.
    h. 4506 East Washington, a two family dwelling, built in 1910.
    i. 2140 East 34th Street, a one family dwelling, built in 1935.

4. Respondent is the "lessor", having offered the Residential Rental Property for lease.

5. Each of the nines leases was executed by an individual or individuals who are identified in the agreement as tenants.
    a. 2822 English Avenue was leased on March 30, 2004 by Charlie and Connie Dodson.
    b. 2039 Roosevelt Avenue was leased on August 22, 2002 by Annette Patterson.

[6] 40 C.F.R. § 745.103 defines "target housing" as any housing constructed prior to 1978, except for housing for the elderly or person 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 dwellings.

c. 2039 Roosevelt Avenue was leased on June 1, 2003 by Amos White and Carolyn Reeves.
d. 402 South Rural leased on April 11, 2003 by Gregory Caine.
e. 815 North Rural was leased on April 24, 2003 by Jametrial Robinson.
f. 725 North Sherman Drive was leased on August 1, 2002 by Tamara Smith.
g. 2518 North Temple Avenue was leased on August 1, 2003 by David and Myshellria Smith.
h. 4506 East Washington was leased on June 1, 2002, by Charmine Griffin.
i. 2140 East 34th Street was leased on July 10, 2002 by Shannon Page.

6. A child under the age of six lived in 3780 North Parker property at the time of the violations.

7. Two children, ages unknown, lived in the 2140 East 34th property at the time of the violations.

8. No children are known to have lived at 2822 English Avenue, 2039 Roosevelt Avenue, 402 South Rural, 815 North Rural, 725 North Sherman Drive, 2518 North Temple Avenue and 4506 East Washington.

9. No pregnant women are known to have lived at any of the properties.

10. On August 4, 2003, the Marion County Health Department made an inspection of Respondent's 4506 East Washington Street property and found, among other violations, that the exterior doors/door frames, exterior siding, exterior window frames, exterior window sills, exterior window wells, exterior wood trim, and soffits, all had deteriorated, peeling, or scaling paint which contained hazardous levels of lead. Respondent was ordered by the Health Department to properly dispose of the lead paint chips and repaint with a non-lead based paint.

11. On September 19, 2003, the Marion County Health Department made an inspection of Respondent's 725 North Sherman Drive property and found, among other violations, that the eaves, exterior siding, exterior window sashes, exterior window wells, exterior wood trim and porch roof supports all had deteriorated, peeling, or scaling paint which contained hazardous levels of lead. The Health Department also found paint chips containing hazardous levels of lead on the ground. Respondent was ordered by the Health Department to properly dispose of the lead paint chips and repaint with a non-lead based paint.

12. On February 3, 2004, the Marion County Health Department made an inspection of Respondent's 2822 English Ave property and found, among other violations, that the interior doors/door frames had deteriorated, with peeling or scaling paint, which contained hazardous levels of lead. The front door frame and casing was found to contain hazardous levels of lead as well. Respondent was ordered by the

Health Department to properly dispose of the lead paint chips and repaint with a non-lead based paint.

13. None of the nine leases contained the Lead Warning Statement as detailed in 40 C.F.R. § 745.113(b)(1).

14. Respondent failed to include, within or as an attachment to the contract, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in the target housing, or lack of knowledge of such presence, before the lessee at 725 North Sherman Drive and the lessee at 2822 English Avenue, was obligated under contract to lease target housing.

15. Respondent failed to include, within or as an attachment to the contract, a list of any records or reports available to him regarding lead-based paint and/or lead-based paint hazards in the target housing, or statement that no such records existed before the lesses at 2822 English Avenue, 3780 North Parker, 2039 Roosevelt Avenue, 402 South Rural, 815 North Rural, 725 North Sherman Drive, 2518 North Temple Avenue, 4506 East Washington, and 2140 East 34th Street, were obligated under the contract to lease the target housing.

16. Respondent failed to include, within or as an attachment to the contract, a statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (b)(3), and the lead hazard information pamphlet before the lessees at 2822 English Avenue, 3780 North Parker, 2039 Roosevelt Avenue, 402 South Rural, 815 North Rural, 725 North Sherman Drive, 2518 North Temple Avenue, 4506 East Washington, and 2140 East 34th Street, were obligated under the contract to lease the target housing.

17. Respondent failed to include, within or as an attachment to the contract, the signatures of the lessor and lessee certifying to the accuracy of their statements along with the dates of such signature before the lesses at 2822 English Avenue, 3780 North Parker, 2039 Roosevelt Avenue, 402 South Rural, 815 North Rural, 725 North Sherman Drive, 2518 North Temple Avenue, 4506 East Washington, and 2140 East 34th Street, were obligated under the contract to lease the target housing.

18. Respondent failed to include, within or as an attachment to the sales contract, a Lead Warning Statement[7] before the purchasers of 1838 Brookside Avenue and

[7] The Lead Warning Statement consists of the following language:
Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known

725 North Sherman Drive, were obligated under the sales contract to buy target housing.

19. Respondent failed to include, within or as an attachment to the sale contract, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in the target housing, or a lack of knowledge of such presence, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing.

20. Respondent failed to include, within or as an attachment to the sale contract, a list of any records or reports available to him regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records existed, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing.

21. Respondent failed to include, within or as an attachment to the sale contract, a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. § 745.113(a)(2) and (a)(3), and the lead hazard information pamphlet, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing.

22. Respondent failed to include, within or as an attachment to the sale contract, a statement by the purchaser that he/she has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing.

23. Respondent failed to include, within or as an attachment to the sale contract, the signatures of the sellers, agent, and purchasers certifying to the accuracy of their statements, along with the dates of such signature, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing.

24. On December 6, 2006 the Chief of the Pesticides and Toxics Branch, Waste, Pesticides and Toxics Division, U.S. EPA, Region 5 issued a 54 count Complaint under Section 16(a) of the Toxic Substances Control Act against Respondent, Frank J. Davis.

25. On January 29, 2007, Respondent filed an Answer which denied the allegations in the Complaint and requested a hearing.

26. On May 14, 2007, the ALJ issued a Prehearing Exchange Order requiring the parties to file their initial prehearing exchanges under 40 C.F.R. § 22.19 by June

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lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

15, 2007. Complainant filed its prehearing exchange on June 15, 2007, but no prehearing exchange was received from Respondent by that date.

27. By an Order dated June 25, 2007, the ALJ granted Respondent until July 6, 2007, in which to submit information requested in the ALJ's Prehearing Exchange Order. No information was received from Respondent by that date.

28. On July 19, 2007, Respondent failed to appear for the teleconference scheduled by the ALJ.

29. On October 12, 2007, Complainant filed a Motion for Default, which sought a default judgment against Respondent for the violations alleged in the Complaint based on Respondent's failure to comply with the Prehearing Order and failure to file a prehearing exchange.

30. Respondent did not file a response to Complainant's Motion to Amend or Motion for Default.

Conclusions

1. EPA has jurisdiction over this matter pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a).

2. The leased properties are target housing as defined under 40 C.F.R. § 745.103.

3. At the time of each lease transaction, Respondent was a lessor.

4. At the time of each lease transaction, the person who rented target housing was a lessee.

5. Before the lesse was obligated under the contract to lease the target housing, Respondent did not satisfy one or more requirements of the Disclosure Rule.

6. Respondent's failure to include, within or as an attachment to each contract, a Lead Warning Statement, before the lessees were obligated under the contracts for each of the leasing transactions for 2822 English Avenue, 3780 North Parker, 2039 Roosevelt Avenue, 402 South Rural, 815 North Rural, 725 North Sherman Drive, 2518 North Temple Avenue, 4506 East Washington, and 2140 East 34th Street, constitutes nine violations of 40 C.F.R. § 745.113(b)(1), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

7. Respondent's failure to include, within or as an attachment to the contract, a statement disclosing either the presence of any know lead-based paint and/or lead-based paint hazards in the target housing, or lack of knowledge of such presence, before the lessee at 725 North Sherman Drive and the lessee at 2822 English Avenue,

was obligated under contract to lease target housing constitutes two violations of 40 C.F.R. § 745.113(b)(2), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

8. Respondent's failure to include, within or as an attachment to the contract, a list of any records or reports available to him regarding lead-based paint and/or lead-based paint hazards in the target housing, or statement that no such records existed before the lesses at 2822 English Avenue, 3780 North Parker, 2039 Roosevelt Avenue, 402 South Rural, 815 North Rural, 725 North Sherman Drive, 2518 North Temple Avenue, 4506 East Washington, and 2140 East 34th Street, were obligated under the contract to lease the target housing constitutes nine violations of 40 C.F.R. § 745.113(b)(3), 40 C.F.R. § 745. 100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

9. Respondent's failure to include, within or as an attachment to the contract, a statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (b)(3), and the lead hazard information pamphlet before the lessees at 2822 English Avenue, 3780 North Parker, 2039 Roosevelt Avenue, 402 South Rural, 815 North Rural, 725 North Sherman Drive, 2518 North Temple Avenue, 4506 East Washington, and 2140 East 34th Street, were obligated under the contract to lease the target housing constitutes nine violations of 40 C.F.R. § 745.113(b)(4), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

10. Respondent's failure to include, within or as an attachment to the contract, the signatures of the lessor and lessee certifying to the accuracy of their statements along with the dates of such signature before the lesses at 2822 English Avenue, 3780 North Parker, 2039 Roosevelt Avenue, 402 South Rural, 815 North Rural, 725 North Sherman Drive, 2518 North Temple Avenue, 4506 East Washington, and 2140 East 34th Street, were obligated under the contract to lease the target housing constitutes nine violations of 40 C.F.R. § 745.113(b)(6), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

11. Respondent's failure to include, within or as an attachment to the sales contract, a Lead Warning Statement before the purchaser of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing constitutes two violations of 40 C.F.R. § 745.113(a)(1), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

12. Respondent's failure to include, within or as an attachment to the sale contract, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in the target housing, or a lack of knowledge of such presence, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing constitutes two violations of 40 C.F.R. § 745.113(a)(2), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

13. Respondent failed to include, within or as an attachment to the sale contract, a list of any records or reports available to him regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records existed, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing constitutes two violations of 40 C.F.R. § 745.113(a)(3), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

14. Respondent's failure to include, within or as an attachment to the sale contract, a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. § 745.113(a)(2) and (a)(3), and the lead hazard information pamphlet, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing constitutes two violations of 40 C.F.R. § 745.113(a)(4), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

15. Respondent's failure to include, within or as an attachment to the sale contract, a statement by the purchaser that he/she has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing constitutes two violations of 40 C.F.R. § 745.113(a)(5), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

16. Respondent's failure to include, within or as an attachment to the sale contract, the signatures of the sellers, agent, and purchasers certifying to the accuracy of their statements, along with the dates of such signature, before the purchasers of 1838 Brookside Avenue and 725 North Sherman Drive, were obligated under the sales contract to buy target housing constitutes two violations of 40 C.F.R. § 745.113(a)(7), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

17. Pursuant to 40 C.F.R. § 22.17(a), Respondent is found to be in default for failing to comply with the prehearing exchange requirements in 40 C.F.R. § 22.19(a) and the Prehearing Exchange Order issued by the ALJ. Default by Respondent constitutes, for purposes of this proceeding, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations.

18. Respondent has failed to show good cause why a default order should not be issued.

Penalty Assessment

The ALJ, having found that Complainant has established Respondent's liability for all 50 counts in the Complaint, must now determine an appropriate penalty for these violations. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of

1992, 42 U.S.C. § 4852d, and 40 C.F.R. Part 745, Subpart D, authorizes the assessment of a civil penalty under section 16 of TSCA, 15 U.S.C. § 2615, of up to $11,000 for each violation, as adjusted by the Civil Monetary Penalty Inflation Adjustment Rule. Pursuant to the Rules, the ALJ is required to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The ALJ must also "consider any civil penalty guidelines issued under the Act." (*Id.*) Therefore, the ALJ must consider TSCA statutory factors and EPA's *Section 1018-Disclosure Enforcement Response Policy* ("ERP").

Having found that Respondent violated TSCA, the ALJ has determined that $50,634, the penalty proposed in the Motion to Withdraw Counts 1, 13, 23 and 33 of the Complaint and a Motion for an Order of Default or, in the Alternative, Accelerated Decision on the Issues of Respondent's Liability, is not the appropriate civil penalty to be assessed against Respondent. Since the Complaint was filed, Respondent has filed for bankruptcy. This new financial information requires a closer look at Respondent's ability to pay the proposed penalty. It is the ALJ's finding that the proposed penalty should be reduced due to Respondent's inability to pay.

Under the Penalty Policy, the penalty is determined in two stages: (1) the determination of a "gravity-based penalty" and (2) adjustments to the gravity-based penalty. The gravity-based penalty is calculated by considering: (1) the nature of the violation; (2) the circumstances of the violation; and (3) the extent of harm that may result from the violation. (ERP at 9). Once the gravity-based penalty is determined, upward or downward adjustments to the penalty are made in consideration of the following factors: (1) ability to pay/continue in business; (2) history of prior violations; (3) degree of culpability; and (4) such other factors as justice may require, which include, no known risk of exposure, the violator's attitude, consideration of supplemental environmental projects, audit policy, voluntary disclosure, size of business, adjustment for small independent owners and lessors, and the economic benefit of noncompliance. (ERP at 14-15).

Nature

The "nature" factor includes the "essential character of the violation, and incorporates the concept of whether the violation is of a chemical control, control-associated data gathering, or hazard assessment nature." (ERP at 9). The Penalty Policy categorizes all Disclosure Rule violations as "hazard assessment" in nature, since the information is considered vital to purchasers/lessees in assessing the risks in purchasing/leasing target housing. This information is especially important to purchasers/lessees who are pregnant or have small children, who are at especial risk in target housing. (*Id.*).

Circumstances

The "circumstances" level factor deals with the probability of harm. In this case, the circumstances level pertains to the likelihood that a violation will result in an

uninformed tenant or purchaser and the likelihood that a child will be exposed to lead-based paint hazards. The ERP divides violations into six levels based on the probability of harm from each type of violation with Level 1 designating the most serious category and Level 6 designating the least serious category. (ERP at 10).

Counts 2-10, the failure to include, within or as an attachment to each to lease target housing, the Lead Warning Statement before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(1) and 40 C.F.R. § 745.100, is a Level 2 violation. (ERP at B-1).

Counts 11-12, the failure to include, within or as an attachment to each contract to lease target housing, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(2) and 40 C.F.R. § 745.100, is a Level 3 violation. (ERP at B-1).

Counts 14-22, the failure to include, within or as an attachment to each contract to lease target housing, a list of any records or reports available to the lessor regarding lead-based paint and/or lead based paint hazards in the target housing or a statement that no such records exist before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(3) and 40 C.F.R. § 745.100, is a Level 5 violation. (ERP at B-2).

Counts 24-32, the failure to include, within or as an attachment to the contract, a statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (b)(3), and the lead hazard information pamphlet before the lessees are obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(4), 40 C.F.R. § 745.100, is a Level 4 violation. (ERP at B-2).

Counts 34-42, the failure to include, within or as an attachment to the contract, the signatures of the lessor and lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of such signature before the lesse is obligated under a contract to lease target housing as required by 40 C.F.R. § 745.113(b)(6), 40 C.F.R. § 745.100, is a Level 6 violation. (ERP at B-3).

Counts 43-44, the failure to include, as an attachment to each contract to sell target housing, the Lead Warning Statement before a purchaser is obligated under the contract to purchase target housing, as required by 40 C.F.R. § 745.113(a)(1) and 40 C.F.R. § 745.100, is a Level 2 violation. (ERP at B-1).

Counts 45-46, the failure to include, as an attachment to each contract to sell target housing, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the purchaser is obligated under the contract to purchase target housing as required

by 40 C.F.R. § 745.113(a)(2) and 40 C.F.R. § 745.100 is a Level 3 violation (ERP at B-1).

Counts 47-48, the failure to include, as an attachment to each contract to sell target housing, a list of any records or reports available to the seller regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records exist, before a purchaser is obligated under a contract to purchase target housing as required by 40 C.F.R. § 745.113(a)(3) and 40 C.F.R. § 745.100 is a Level 5 violation. (ERP at B-2).

Counts 49-50, the failure to include, as an attachment to each contract to sell target housing, a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. §§ 745.113(a)(2) and (a)(3), and the lead hazard information pamphlet before the purchaser is obligated under a contract to purchase target housing as required by 40 C.F.R. § 745.113(a)(4) and 40 C.F.R. § 745.100 is a Level 4 violation. (ERP at B-2).

Counts 51-52, the failure to include, as an attachment to the contract, a statement by the purchaser that he/she has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity before a purchaser is obligated under a contract to buy target housing as required by 40 C.F.R. § 745.113(a)(5) and 40 C.F.R. § 745.110(a) is a Level 4 violation. (ERP at B-2).

Counts 53-53, the failure to include, as an attachment to the contract, the signatures of the sellers, agents, and purchasers certifying to the accuracy of their statements to the best of their knowledge, along with the dates of signature, before the purchaser is obligated under a contract to purchase target housing as required by 40 C.F.R. § 745.113(a)(7) and 40 C.F.R. § 745.100 is a Level 6 violation. (ERP at B-3).

Extent

The "extent" factor measures the amount of harm that could result from a violation. The harm will be categorized as "major," "significant," or "minor" through an "Extent Category Matrix." The relevant facts under this factor are the age of any children and the presence of pregnant women in the target housing. (ERP at 10-11). Violations involving tenants who are children under the age of 6 or pregnant women are considered major. Violations involving children between the ages of 6 and 17 are considered significant. Violations involving tenants over 18 are considered minor. (ERP at 11).

Counts 3, 15, 25, and 35 fell into the major category because, according to the lease agreement for the 3780 North Parker Avenue property, there was a child under the age of six living in the property at the time of the violations. (C's PH Ex 25 and ERP at B-4).

Counts 10, 22, 32, and 42 fell into the significant category. Children are identified in the lease for the 2140 East 34th property.[8] (C's PH Ex 33 and ERP at B-4).

Counts 2, 4-9, 11-12, 14, 24, 26-31, 34, 36-41 and 43-54 all fell into the minor category because there were no children under the age of 18 years living in the properties at the time of the violations.

Ability to Pay

Respondent's ability to pay the proposed penalty must be considered as a factor in determining the appropriateness of the penalty. The ERP suggests that the ALJ consider Dun & Bradstreet Reports or look at the number of dwellings owned or leased by the Respondent. (ERP at 14). On March 9, 2007, Respondent provided EPA with unexecuted U.S. Individual Income Tax Returns from tax years 2003, 2004, and 2005. (*See* C's PH Ex 43). On April 3, 2007, Respondent sent additional financial information to EPA, including signed copies of the 2003-2005 income tax returns (*See* C's PH Ex 45). Complainant's Exhibit 46 comprises of Dun & Bradstreet Reports for corporate entities previously or currently owned and operated by Respondent, from November 1, 1996 to March 19, 2007. Complainant's Prehearing Exchange Exhibit 47 is information regarding corporate entities previously or currently owned and operated by Respondent, compiled by the Indiana Secretary of State. Based on these documents, Complainant contends that Respondent owns substantial assets in the form of rental property and has received additional assets from the sale of former rental properties. Accordingly, Complainant did not adjust the initial gravity-based penalty based on Respondent's ability to pay.

Since the filing of the Complaint, the ALJ has received information that Respondent has declared bankruptcy and filed in the United States Bankruptcy Court for the Southern District of Indiana on August 31, 2007. The ALJ received on February 29, 2008, a notice of Discharge of Debtors from the Bankruptcy Court. Despite this, Complainant's case against Respondent may proceed through the automatic stay exception under 11 U.S.C. § 362(b)(4)[9] and the civil penalty assessed is excepted from discharge under 11. U.S.C. § 523(a)(7).[10]

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[8] Since the lease does not state the children's ages, the EPA conservatively assumed the children were older than six.

[9] The filing of a bankruptcy petition does not automatically stay "the commencement of continuation of an action or proceeding by a governmental unit...to enforce such governmental unit's...police and regulatory power." 11 U.S.C. § 362(b)(4). Enforcement of environmental regulations falls within the regulatory. powers described in § 362(b)(4). As the Bankruptcy Court explains, "state and federal enforcement of environmental protection laws and regulations against debtors has been allowed to proceed under § 362(b)(4) because the primary purpose of such laws is to promote public safety and welfare." *State of Nebraska v. Strong (In re Strong)*, 2002 Bankr. LEXIS 1783, at 9 (Neb 2002).

[10] Section 523(a)(7) provides in relevant part that a debt is excepted from discharge "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty..." 11 U.S.C. § 523(a)(7). Civil penalties arising from violations of environmental regulations are therefore excepted from discharge. *Ricketson v. State of Florida Department of Environmental Protection (In re Ricketson)*, 190 B.R. 684, 686-688 (M.D. Fla 1995).

However, the combination of the record and the bankruptcy filing reveals that Respondent does not have the ability to pay the proposed penalty. The Dun & Bradstreet Reports submitted by Complainant do not show the Respondent has received any gross income for his various business entities. Instead, the reports show the presence of liens against Respondent, for failure to pay various federal and state taxes. (C's PH Ex 46). The federal income tax returns from 2003-2005 also reveal that Respondent's gross income from those years is insufficient to pay the proposed penalty. (C's PH Ex 45).

The record is supplemented by the Notice of Chapter 7 Bankruptcy filed by Respondent in the Southern District of Indiana. Although Complainant contends that Respondent owns substantial assets in the form of rental property and has received additional funds from the sale of former rental properties, the bankruptcy notice reveals that Respondent's properties, namely, 3780 N. Parker, 2140 E. #4th Street, 725 N. Sherman Drive, 402 South Rural Avenue, 815 N. Rural Avenue, 441 South Rural Avenue, and 2822 English Avenue are all in foreclosure. This makes it unlikely that Respondent will be able to raise much, if any, income from the sale of property. Finally, the Notice of Bankruptcy lists $342,599.43 in creditor claims against Respondent.[11]

The ALJ believes that the violations committed by Respondent, while serious, were not so egregious as to warrant forcing Respondent further into bankruptcy. Therefore, the ALJ finds it appropriate to reduce the proposed penalty by 25%.

History of Prior Such Violations

U.S. EPA has no information regarding prior violations of TSCA by Respondent. The initial gravity-based penalty was not increased.

Degree of Culpability

The Penalty Policy provides for 25% increase in penalty for an intentional violation. Complainant states that it has no information that Respondent's violations were intentional. Therefore, the gravity-based penalty will not be increased for culpability.

Other Factors as Justice May Require

The ALJ has looked at all other factors as justice may require, and sees no reason to either increase or decrease the initial gravity-based penalty in this matter.

Conclusion

In assessing this civil penalty, the ALJ considered the rationale for the calculation of the assessed penalty set forth in Complaint's Exhibit 39 and 40 in Complainant's Initial Prehearing Exchange filed in this proceeding. The ALJ has also considered the facts alleged in the Answer to the Complaint, filed *pro se* by Respondent in this matter. Furthermore, the Prehearing Order explicitly requested that Respondent indicate if he is

[11] Complainant's original proposed penalty of $52,724 is included in the list of claims against Respondent in the bankruptcy notice.

claiming an inability to pay the proposed penalty. As indicated above, Respondent chose not to the respond in any way to the Prehearing Order. However, the fact that Respondent is in bankruptcy and combined with the fact that the Dun and Bradstreet Reports show no gross income from 1996 to 2007, warrants a reduction based on ability to pay. A civil penalty of $37,975.50 is hereby assessed against Respondent. The question of how the penalty is to be treated is now before the Bankruptcy Court.

On February 29, 2008, the ALJ received notice that the Bankruptcy Court has ordered a discharge of debtors in Respondent's bankruptcy case. It remains necessary for the ALJ to issue this order for several reasons. First, the final assessment of a civil penalty reduces the penalty to a fixed amount against Respondent for the purpose of determining its treatment in the distribution of assets. Currently, Respondent has listed a penalty of $52,724 in his Amended Schedule F Bankruptcy filing. This Order reduces that amount. Second, EPA is entitled to a resolution of the merits of its charges. Third, this proceeding may become relevant in the event that Respondent is cited again for violation of the Residential Lead-Based Paint Hazard Reduction Act, as a history of prior violations can increase the proposed penalty.

Order

For failing to comply with the Prehearing Order, Respondent is found to be in default, and accordingly, is found to have violated the Residential Lead-Based Paint Hazard Reduction Act of 1992 requirements codified in 40 C.F.R. Part 745, subpart F. A civil penalty in the amount of $37,975.50 is assessed against Respondent, Frank J. Davis. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $37,975.50, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

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

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

This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. § 22.27(c), an Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to re-open the hearing with 20 days after service of the Initial

Decision pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken from it by a party to this decision within 30 days after the Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review the Initial Decision pursuant to 40 C.F.R. § 22.30(b).

Dated this 31st day of March, 2008.

Spencer T. Nissen
United States Administrative Law Judge

In the ADR Matter of *Frank J. Davis*, Respondent.
Docket No. TSCA-05-2007-0002

CERTIFICATE OF SERVICE

I certify that the foregoing **Default Order,** dated March 31, 2008, was sent this day in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Sonja Brooks-Woodard
Regional Hearing Clerk
U.S. EPA, Region V, MC-13J
77 West Jackson Blvd., 13th Floor
Chicago, IL 60604-3590

One Copy by Certified Pouch Mail to:

Eileen L. Furey, Esq.
Estrella Calvo, Esq.
Associate Regional Counsel
U.S. EPA, Reg. V
77 West Jackson Blvd., 13th
Chicago, IL 60604-3590

One Copy by Certified and Regular Mail to:

Frank J. Davis
623 Sunridge Court
Indianapolis, IN 46239

Frank J. Davis
1618 Touchstone Drive
Indianapolis, IN 46239-8865

Dated: March 31, 2008
Washington, D.C.