**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **John P. Vidiksis** | ) | **Docket No. TSCA-03-2005-0266** |
| | ) | |
| **Respondent** | ) | |
| | ) | |
| | ) | |
| | ) | |



# Initial Decision

## I. Introduction and Procedural Background

This case involves the "Disclosure Rule" for lead-based paints, a rule which requires that renters and buyers of certain housing be provided with information regarding the presence of such paint. In an enforcement action based on that Rule, on August 5, 2005, the United States Environmental Protection Agency, Region III ("Complainant" or "EPA") filed an Administrative Complaint and Notice of Opportunity for Hearing against John P. Vidiksis and Kathleen E. Vidiksis, Respondents.[1] The Complaint alleges sixty-nine (69) violations of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA," or "Act" ), 42 U.S.C. § 4852d, and Section 409 of the Toxic Substances and Control Act ("TSCA") through non-compliance with the Disclosure Rule. 40 C.F.R. Part 745, Subpart F, Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property ("Disclosure Rule"). Sixty-eight (68) of the alleged violations arose out of thirty-four (34) lease transactions and one out of a sales transaction.[2] At the time the Complaint was filed, Respondent owned the

[1]This civil administrative proceeding arises under the authority of Section 16(a) of TSCA, 15 U.S.C. § 2615(a). This proceeding is governed by the Environmental Protection Agency's Consolidated Rules of Practice as set forth in 40 C.F.R. Part 22.

[2]The Court notes that these transactions were executed through an agent. Neither at the hearing nor in its post-hearing briefs did the Respondent assert that it had contracted away its responsibilities under the Disclosure Rule, and such an approach would have been without avail. This is because the Environmental Appeals Board ("EAB") has held that "[p]ermitting an owner to transfer its reporting obligations to an agent would largely defeat the purpose of the statute... thereby undermining the very purpose of the statute, and denying purchasers and lessees the very

residential properties described in the Complaint. These properties, located in York, Pennsylvania, were identified as "target housing"[3] as contemplated by the RLBPHRA. Complainant seeks a determination that Respondent is liable for all sixty-nine counts alleged in the Complaint and the assessment of a civil penalty totaling $97,545.00. A hearing in this matter was held in Harrisburg, Pennsylvania, commencing on September 25, 2006 and concluding on September 27, 2006.[4]

The core factual allegations of the Complaint are that the Respondent was the owner and lessor/seller of sixteen target housing units, for which he executed thirty-four lease transactions and one sales transaction. The transactions allegedly did not comply with the Disclosure Rule because Respondent failed to:

1. disclose to his "agent" the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased, as required by 40 C.F.R. § 745.107(a)(3);[5]

2. provide available records or reports pertaining to lead-based paint and/or lead-based paint hazards in target housing to the purchaser before the purchaser became obligated under any contract to purchase the target housing, as required by 40 C.F.R.§ 745.107(a)(4);[6]

---

protection that Congress intended the statute to provide." *In re Harpoon Partnership,* 12 E.A.D. ___ at 16-17, TSCA Appeal No. 0402 (EAB 2005). Therefore, the leasing and selling obligations under the regulations cited in the Complaint could not be pawned off to an agent.

[3]"Target housing" is defined as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling." 40 C.F.R. § 745.103.

[4] Ms. Vidiksis entered into a Consent Agreement and Final Order with Complainant on September 30, 2006, resolving her liability in this action. Therefore the Complaint refers only to John P. Vidiksis, as the remaining Respondent.

[5]This allegation applies to Count 68.

[6]This allegation applies to Count 69.

3. provide a lead-warning statement to the lessee(s) within the lease agreement, or as an attachment thereto, as required by 40 C.F.R. § 745.113(b)(1);[7]

4. provide within the lease agreement, or as an attachment thereto, a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing, or to indicate no knowledge of the presence of lead-based paint, as required by 40 C.F.R. § 745.113(b)(2);[8] and

5. include within the lease agreement signatures, including dates, of the lessor, agent, and lessee certifying to the accuracy of their statements, as required by 40 C.F.R. § 745.113(b)(6).[9]

In his defense, Respondent asserts that he did not violate section 113(b)(1) because all lease attachments included the required narrative statements. He also asserts there was no violation of 113(b)(2) because the disclosure of the potential presence of lead paint exceeded the minimum requirements and is superior to any required statement. Respondent concludes that a proper application of TSCA penalty factors shows that the Court should not impose any penalties. For the reasons which follow, the Court rejects Respondent's defense that it provided an adequate lead warning statement or proper disclosures and finds that with respect to these violations, Complainant has met its burden of proof for all 69 counts. The Court also finds that the established violations warrant the full penalty sought by EPA of **$97,545.00.**

## II. Statutory and Regulatory Background

Congress passed the RLBPHRA in 1992 as part of Title X of the Housing and Community Development Act. 42 U.S.C. § 4852d. The law was passed after Congress found that the public, and children in particular, were in danger of exposure to dangerous amounts of lead from deteriorating or abraded lead-based paint found in pre-1980 housing stock, i.e. "target housing." 42. U.S.C. § 4851. The purposes of RLBPHRA include "developing a national strategy...to eliminate lead-based paint hazards in all housing" and "educat[ing] the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards." 42 U.S.C. § 4851(a)(1), (7). To achieve these goals, Section 1018 of RLBPHRA required the Administrator of EPA and the Secretary of the Department of Housing

---

[7]This allegation applies to Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 61, 63, 65, and 66.

[8]This allegation applies to Counts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, and 59.

[9]This allegation applies to Counts 62, 64, and 67.

and Urban Development ("HUD") to promulgate regulations for the disclosure of lead-based paint hazards by a lessor or seller to the lessee or purchaser of target housing "before the purchaser or lessee is obligated under any contract to purchase or lease housing." 42 U.S.C. § 4852d(a).

As directed by the RLBPHRA, EPA and HUD promulgated the Disclosure Rule. The implementing regulations for this Rule appear separately in 24 C.F.R. Part 35, Subpart H, for HUD and in 40 C.F.R. Part 745, Subpart F, for EPA, but they are identical. For obvious reason, the references in this Initial Decision will be to the EPA regulations. The Disclosure Rule "requires that certain disclosure and acknowledgment language become part of the final sale or lease contract." Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9071 (March 6, 1996). The Rule places compliance requirements on sellers, lessors, and agents of target housing. 40 C.F.R. §§ 745.100, 745.107, 745.113, 745.115. Lessors and sellers have disclosure obligations under sections 745.107 and 745.113 while agents have separate responsibilities under section 745.115.[10]

Complainant has alleged violations of 40 C.F.R. §§ 745.107(a)(3), 107(a)(4), 113(b)(1), 113(b)(2), and 113(b)(6). Section 745.107 outlines what a lessor must disclose while 745.113 requires the disclosures to be in writing and attached to the lease. Section 745.113 further requires lessees to acknowledge the disclosure and that lessors, agents, and lessees certify the accuracy of their statements.

## III. Factual Overview

At the time the Complaint was filed, Respondent owned the sixteen residential properties in York, Pennsylvania identified in the Complaint.[11] Respondent's violations arise out of thirty-four separate lease transactions and one sales transaction related to these properties. CX1-26; CX28-35. Each of the transactions at issue took place after the Disclosure Rule went into

---

[10]Respondent does not argue that his agent has any liability in this matter.

[11]The residential units are located at 813 South Beaver Street; 333 East College Avenue; 934 Elm Street; 904 West Locust Street; 508 South Pershing Street; 443 East Prospect Street; 452 East Prospect Street; 105 South Richland Avenue; 625 Cleveland Avenue; 416 East College Avenue; 825 East Philadelphia Street; 217 South Queen Street; 545 South Queen Street; 519 Smith Street; 826 Wallace Street; and 138 South West Street. Through stipulation, the parties agreed that all of the addresses listed in the Complaint meet the statutory definition of "target housing," and that the Respondent was the owner of this target housing. Joint Stipulations 7 and 8. Joint Stipulation, September 25, 2006.

effect.[12] Respondent employed local real estate agents for all of the transactions. CX66 at EPA0771-0772; Tr.(Vol. I) at 19-22, 192; CX63-EE.

Approximately ninety-eight percent of the housing stock in the City of York, PA was constructed prior to 1978. Tr.(Vol. I) at 48. As a result, the city created an agency, the Childhood Lead Poisoning Prevention Program ("CLPPP") to address the issue. CLPPP determined that children with elevated blood levels of lead ("EBLs") resided at four of the sixteen target housing properties identified in this litigation. Tr.(Vol.I) at 47, 68, 69, 136, 137, 142, 146, 147. The discovery of the EBLs caused CLPPP to take action because children, especially those under the age of seven, are particularly susceptible to the effects of lead poisoning. Tr.(Vol. II) at 125. CLPPP inspected the four properties for lead-based paint concerns. These inspections led to Violation Letters, Inspection Reports, and other documents being sent to Respondent. These documents informed Respondent that children with EBLs were living in the units, that the lead inspection revealed potential hazards, and locations within the units where lead concentrations exceeded local limits. [13] Tr.(Vol.I) at 92, 141, 146; CX59, 61, 62-A, 63, 63-F.[14]

---

[12]The Disclosure The Disclosure Rule went into effect December 6, 1996 for owners of one to four properties and September 6, 1996 for owners of more than four properties. Tr.(Vol. II) at 92.

[13]The four target housing properties where CLPPP had determined that children with elevated blood levels of lead resided were at the following locations:

1. 813 S. Beaver St: Feb. 28, 1997 Violation Letter (CX59) and Feb. 26, 1997 Inspection Report (CX59A).

2. 333 East College Ave.: Oct. 20, 1995 Inspection Report (CX61B) and Oct. 31, 1995 Violation Letter (CX61).

3. 904 W. Locust St.: April 26, 1999 Inspection Report (CX62B); May 6, 1999 Violation Letter (CX62A); July 17, 1999 Reinspection Letter (CX62).

4. 138 South West St.: Feb. 24, 1995 Inspection Report, 1st Floor (CX63H); Mar. 2, 1995 Violation Letter, 1st floor (CX63F); Mar. 3, 1995 Exterior Work Extension, 1st floor (CX63I); Mar. 30, 1995 Notice of Reinspection, 1st floor (CX63K); July 8, 1999 Inspection Report, 2nd floor (CX63B); July 9, 1999 Violation Letter, 2nd floor (CX63); Aug. 14, 1995 Notice of Reinspection, 1st floor (CX63M).

[14]Complainant established proof of proper mailing and thus the Court may presume delivery and receipt. *Dunlop v. United States*, 165 U.S. 486 (1897); *Atherton v. Atherton*, 181 U.S. 155 (1901); *Hagner v. United States*, 285 U.S. 427 (1932). EPA Initial Brief at 10.

After receiving these documents and reports for each of the four EBL properties, Respondent entered into contracts with agents for the lease and/or sale of the sixteen housing units. CX111-A,B,C; CX63-EE. In each agreement, Respondent certified to each agent that he had no knowledge of the presence of lead-based paint or lead-based paint hazards. He also indicated that he did not have any records or reports pertaining to lead-based paint or lead-based paint hazards at any of the four properties that housed children with EBLs. Respondent also made the same representations to the purchaser of 138 South West Street. CX63-FF. Finally, in the lease agreements Respondent included a "Lead Paint Notice." It is the Respondent's language contained in its Lead Paint Notice which is the central issue in this decision. Simply stated, Respondent contends that its lead paint notice language met, and even exceeded, the required language, while EPA contends that the language Respondent employed did not track that of the "Lead Warning Statement," as set forth in 40 C.F.R. § 745.113(b)(1), and that in any event it was not an equivalent notice. As indicated *supra*, the Court does not agree with the Respondent's contention that it satisfied the lead warning requirements.

## IV. Respondent's liability under The Disclosure Rule

### 1. Liability under 40 C.F.R. § 745.113(b)(1) of the Lead Disclosure Rule: The Lead Warning Statement requirement

In odd numbered counts 1-59, Complainant alleges that Respondent violated 40 C.F.R. § 745.113(b)(1).[15] That provision requires each contract to lease target housing to include a Lead Warning Statement with the following language:

> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

There is no dispute that the Respondent did not include the exact language contained in the Lead Warning Statement at 40 C.F.R. § 745.113(b)(1) for any of the lease transactions associated with these counts. Tr.(Vol.II) at 113-114; CX1-CX31. Instead, the Respondent's lease contracts contained a "Lead Paint Notice," which read:

---

[15]These counts cover lease transactions involving all of the properties except 138 South West Street. CX1-31.

**LEAD PAINT NOTICE.** Tenant acknowledges that the leased premises may have been constructed before 1978, and may contain lead-based paint. Ingestion of paint particles containing lead may result in lead poisoning which can cause major health problems, especially in children under 7 years of age. In the event the Tenant or any family members or guests should develop lead poisoning, and it is determined that corrective measures are required to remedy the source of the lead poisoning, the cost of such remedy shall be at the sole expense of the Tenant. In the event that Tenant is either unwilling or unable to perform corrective measures, Tenant shall have the option at the discretion of the Landlord to terminate the lease with a written 30 day notice and providing Landlord with written verification of source of lead. CX1-CX31, at ¶44.

**a. Summary of relevant facts and arguments**

At hearing, EPA Lead Compliance Officer Daniel T. Gallo testified at length as to why Respondent's "Lead Paint Notice" was insufficient to meet the requirements of 40 C.F.R. § 745.113(b)(1). Tr.(Vol.II) at 118-129. Complainant essentially adopts the witness' testimony as its argument on this issue, contending that Respondent's statement is a "**rent at your own risk** statement" and that it is "totally opposite [to] the intended nature of [the promulgated] lead warning statement." Complainant's Post-Hearing Br. at 13 (bold text and second bracket in quotation).

Complainant develops its argument based on a sentence by sentence comparison between the two statements. To begin, EPA observes the first sentence of the Lead Warning Statement states a fact, while the first statement of Respondent's notice shifts the burden of determining whether there may be a lead-based paint hazard to the tenant. *Id.* at 13, 14. Complainant contends it is the owners's responsibility to know whether the property was constructed before 1978.

Complainant next notes that Respondent's notice does not warn of chipping or small particles of paint. In contrast, the second sentence in the prescribed Warning Statement not only does this, but the phrase "if not managed properly" implies that certain steps need to be taken in order manage hazards in pre-1978 properties. *Id.* at 16. The third sentence of the EPA statement warns of potential harm to pregnant women and young children. Complainant's witness Gallo asserted that this statement is superior to Respondent's notice, because the Respondent's notice, by highlighting children under seven years of age, might give a "full sense of security" to parents who have children over seven, despite the fact that lead exposure may still pose health risks to them. Tr.(Vol.II) at 125-126.

Respondent's notice also states that any corrective measures required to remedy the source of the lead poisoning "shall be at the sole expense of the Tenant." CX1-CX31, at ¶44. The Agency asserts this language is used to "warn and/or scare lessees." *Id.* at 16. Such language, according to Complainant, amounts to "a liability waiver on the part of Respondent."

Further, EPA's witness asserted that the language in Respondent's warning "encourages the tenant to do work themselves to correct the lead hazards," a scenario that raises the risk that tenants who attempt such corrections could create a worse problem. Tr.(Vol.II) at 128.

EPA also asserts that Respondent's notice does not inform lessees of the lessor's legal obligations. For example, Respondent's notice does not inform the lessees of the lessor's duty to disclose the presence of lead-based paint or lead-based paint hazards. In addition, it places the sole burden on the tenant to bear the cost of remedying the source of lead poisoning and if a tenant is unwilling or unable to perform such corrective measures, the tenant may only terminate the lease at the discretion of the landlord. EPA also notes that the Respondent's notice does not inform lessees of the lessor's obligation to provide a federally approved pamphlet on lead poisoning prevention. Complainant observes that the Respondent's notice avoids mention of this obligation entirely. Complainant's Post-Hearing Br. at 17, 18.

In its post-trial briefs, Respondent makes no similar line-by-line attempt to compare its Lead Paint Notice to the language employed in 40 C.F.R. § 113(b)(1). Rather, Respondent's central argument is that its notice accomplishes the same thing and that EPA's argument to the contrary amounts to nothing more than elevating form over substance. Respondent's Post Tr. Br. at 2. Respondent also asserts that EPA's own guidance states that providing, as Respondent has done, an approved pamphlet to each tenant is a sufficient warning and constitutes compliance with the regulation.[16] *Id.* at 3. The pamphlet referenced by the Respondent, the 1999 or 2003 version of an EPA/HUD pamphlet entitled *Protect Your Family From Lead in Your Home* ("EPA/HUD Pamphlet"), is identified in each of the leases as having been provided to each lessee. Respondent's Post Tr. Br. at 8; Tr.(Vol. III) at 40.[17]

EPA contends that the EPA/HUD pamphlet is not a substitute for the lead warning statement required under 40 C.F.R. §745.113(b)(1), that the Respondent misinterprets the guidance policy and that it confuses the *seller* requirements under 40 C.F.R. § 745.113(a)(1) with the *lessor* requirements of § 745.113(b)(1). Under the relevant regulations, Complainant concludes that lessors and sellers of target housing must provide both the lead warning statement

---

[16] Respondent cites the EPA/HUD *Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing,* dated August 20, 1996. ("EPA/HUD guidance document").

[17] Respondent highlights that he "elicited from Mr. Gallo the statement that both the 1999 and/or 2003 *Protect Your Family* pamphlets had been provided to all of Mr. Vidiksis' tenants." Respondent's Post Tr. Br. at 8. Tr.(Vol. III) at 43-44. At trial, Mr. Gallo stated his belief that tenants received the pamphlet and further admitted that EPA never alleged non-delivery of the pamphlet. Tr.(Vol. III) at 44, 46. As discussed *infra*, on this record, given the lease copies of record, the Court finds as a fact that the tenants who signed leases with Respondent received the EPA/HUD pamphlet.

*and* the federally approved pamphlet. Complainant's Reply to Respondent's Post Tr. Br. at 7-10.

**b. Analysis and Determination of Liability for Counts alleging violations of 40 C.F.R. § 745.113(b)(1), involving the required "Lead Warning" statement.**

Odd numbered Counts, (1-59), each assert violation of 40 C.F.R. § 745.113(b)(1), the provision requiring a Lead Warning Statement. Section 745.113(b), entitled "*Lessor requirements*," provides that "[*e*]*ach* contract to lease target housing *shall* include, as an attachment or within the contract, [certain identified] elements in the language of the contract (e.g. English, Spanish)." (emphasis added). The first element, constituting the § 745.113(b)*(1)* violations, speaks to the details for a "Lead Warning Statement." Reading the cited provision as a whole, it provides that a lessor must include with each contract to lease target housing a Lead Warning Statement with the following language:

> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

Accordingly, whether built into the language of the lease, or made as an attachment to it, the Section 745.113(b)(1) language quoted above *must* be part of the lease. It bears emphasis that the last sentence of this mandatory Lead Warning Statement language provides: "Lessees ***must also*** receive a federally approved pamphlet on lead poisoning prevention." (emphasis added).

The Respondent contends that it made the required lead paint disclosures on the basis that each tenant received the information through the attachment, with each lease, of the EPA/HUD lead paint pamphlet.[18] Because each tenant received this pamphlet, Respondent asserts that as

---

[18]Along with its post-trial reply brief, Respondent submitted the sworn affidavit of Leanna Beam, who identifies herself as the President of the Real Estate Agency, Beam Team, Inc. Ms. Beam's affidavit states that the EPA/HUD pamphlet was given to every tenant at the time of the execution of the lease agreements. Respondent states that it submitted this affidavit because of EPA's observation in its brief that the Respondent never called Ms. Beam as a witness. Respondent contends that, as Mr. Gallo conceded that all the leases reflected that tenants were given copies of the EPA Lead Paint Pamphlet, there was no longer any need to call that witness. In response, Complainant filed a Motion to Strike the affidavit, which motion essentially contended that the affidavit was nothing more than an attempt to supplement the

the Lead Warning Statement's information was conveyed through the issuance of the pamphlet to each tenant, EPA's Complaint amounts to a "disparagement of the format" for delivering the information, and thus elevates form over substance. R's Brief at 2. Although Respondent acknowledges that Section 113(b)(1) literally requires the "Warning Statement," set forth above, it contends that this requirement was satisfied by providing its tenants with a copy of the EPA/HUD pamphlet.

In support of this argument, Respondent relies upon the jointly issued "Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing," issued August 20, 1996 by HUD and EPA. ("Interpretive Guidance"). It points to Question 27 from that Interpretive Guidance document to support its contention that providing the pamphlet satisfies the Section 745.113(b)(1) Lead Warning Statement requirement. Respondent adds that EPA witness Gallo[19] stated that the pamphlet, either in a 1999 or 2003 version, had been provided to all of the Respondent's tenants. Accordingly, Respondent contends that as the pamphlet includes all the required Section 113(b)(1) information and that the EPA/HUD "Interpretive Guidance" informs the regulated community that attaching the pamphlet satisfies the requirement,[20] EPA's Lead Warning," Counts must fail. As Respondent expresses it, "[t]he only appropriate question [to pose for a Section 113(b)(1) claim] is [whether] the tenant [was] provided with the lead hazard information as required." R's Brief at 3.

In its Reply Brief EPA contends, with regard to the 69 Counts alleging Disclosure Rule violations, that the Respondent offered nothing of its own to support its claim that a lead hazard

---

record long after the hearing had concluded. Admission of such affidavits, EPA notes, are disfavored for a number of reasons, including that such evidence avoids the scrutiny afforded by cross-examination. Respondent submitted a letter in response to EPA's Motion, stating that the affidavit was not submitted for the purpose of augmenting the evidentiary record, but rather to contradict the claim in EPA's in its post-hearing brief that it had avoided presenting Ms. Beam's testimony. As the Court has determined that, on this record, it was established that the EPA Pamphlet on lead poisoning prevention was provided to each tenant, the skirmish surrounding the Beam affidavit is now moot.

[19]Paradoxically, while Respondent asserts that the Court *should* accept Mr. Gallo's asserted statement that the pamphlet had been provided to all tenants it simultaneously argues in the same brief that Mr. Gallo was not a credible witness and that "his entire testimony should be disregarded." R's Brief at 5.

[20]Respondent dismisses Mr. Gallo's testimony that the Respondent's leases, whether through the Respondent's own warning language or through the alleged pamphlet attachment, was not the equivalent of the Section 113(b)(1) Lead Warning Statement because it provided the "authorized pamphlet lease attachment language." R's Brief at 10.

information pamphlet had been attached to any of the 34 leases in issue. It notes that Respondent John Vidiksis did not testify that the pamphlets had been provided, nor did any real estate agent from Dale or Target Realty, the realty companies associated with the leases, so testify. EPA argues that a tenant's acknowledgment of receipt of the EPA Pamphlet is not evidence of compliance with the lessor certification and acknowledgment of disclosure requirements under 40 C.F.R. § 745.113(b)(1)[21], EPA Reply at 2.

In particular, as to the assertion that the pamphlet was attached to each lease, EPA contends that the record does not support that claim and that, in any event, the pamphlet has never been deemed to be a substitute for the lead warning required in every lease or sale of target housing. EPA points to the testimony of its lead enforcement coordinator, Mr. Gallo, who stated that he requested copies of all attachments to the leases from the Respondent. While Galllo acknowledged receiving attachments from the Respondent, he never stated that copies of the pamphlet were among those attachments.[22] EPA argues that the Respondent stipulated to the completeness in the record of the lease transactions and attachments and thus that, by the absence of copies of the pamphlet, such absences demonstrate that the pamphlets were not in fact among the attachments. The Court notes that counsel for the Respondent did in fact stipulate that, for EPA Exhibits 1 through 26 and 28 through 35, those were complete and accurate "copies of the lease agreements." Tr. Vol. II at 90.

Having considered these arguments, the Court does not agree with EPA's characterization that "There Is No Evidence in the Record That the EPA Pamphlet Was Ever Attached to Any of the 34 Lease Transactions at Issue," and that "neither the 4-corners of the trial transcript nor the 4-corners of the lease agreement . . . support the contention that the EPA Pamphlet was attached to any of the 34 Lease Transactions at issue." EPA Reply at 3, 5. The Court's conclusion is based on the fact that the leases themselves reflect that the tenants *did* receive the EPA Pamphlet. A few examples demonstrate this. EPA Exhibit 3, the lease for 333 E. College Avenue, provides an "Addendum to Pennsylvania Plain Language Lease," that the tenant acknowledged receiving a copy "of the EPA booklet titled "PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME." EPA Bates Stamp 0041. Similarly, although in a slightly different form, EPA Exhibit 5 provides at paragraph 49 of the lease for 904 W. Locust Street, that the tenant

---

[21]EPA also contends that a tenant's acknowledgment of the possibility of lead-based paint in the premises does not constitute evidence of compliance with 40 C.F.R. § 745.113(b)(2). EPA Reply at 2. This contention will be addressed in the discussion of the alleged § 745.113(b)(2) violations, *infra*.

[22]Mr. Gallo did acknowledge receiving some attachments. He noted that for leases 32 through 35 a disclosure form was attached, as did lease transaction 29, but that no such forms were provided for lease transactions 1 through 28, nor for 30 or 31. EPA Reply at 3, quoting transcript at Vol. II, pages 90-91. The attachments that were provided are part of the exhibits of record.

acknowledges receiving the EPA booklet titled "PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME." EPA Bates Stamp 0070. The same acknowledgment appears for each of the leases.[23]

Thus, the leases themselves do reflect that the pamphlet was received by each tenant and that is certainly evidence that the pamphlets were provided. Nor does the Respondent's stipulation undo that evidence. This is because the Respondent's stipulation that the record reflects complete and accurate copies of the lease agreements is entirely consistent with the claim that the pamphlet was provided to each tenant. Whether included as an addendum or, as in the case of EPA Exhibit 5, where the acknowledgment was part of a clause in the lease proper, the acknowledgment of the delivery of the EPA booklet was part of the lease. Such statements in the leases themselves constitute the evidence that the Pamphlet was received and it is not necessary that a physical copy of the Pamphlet itself had to be attached to prove this. In short, the acknowledgment in the lease itself proves the claim that the Pamphlet was provided. Thus, the Court concludes that the record shows that the pamphlets were actually provided to the tenants for these leases.

However, EPA also argues that, even if it is determined that the Pamphlets were provided, pamphlets do not operate as a substitute for the Lead Warning Statement requirement of 40 C.F.R. § 745.113(b)(1) and that the Respondent misconstrues EPA's "Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing. Placed in context, EPA asserts that Question 27 from that Interpretive Guidance only serves to allow a seller or lessor the option of providing the Pamphlet in an 8 ½ x 14 inch format, or in the 5 ½ x 8 ½ inch version. Thus, EPA contends that the response for Question 27 offers an additional *size format* for the Pamphlet, but it does not eliminate the separate requirement for the Lead Warning Statement.

The Court notes that the Interpretive Guidance question in issue, Question 27, is under the topic "PAMPHLET ISSUES," and the subheading "**Reproduction**" applies to this question. The question posed for this item is very limited, asking only if the pamphlet can "be provided in an 8-½ x 14 inch format as an attachment to the sale or rental contract?" As pertinent here, EPA's response *to that question* is that the legal size format is an acceptable alternative to the 5 ½ x 8 ½ inch version, as long as the appropriate regional and state contacts are added in the space provided.[24] Accordingly, the Court agrees with EPA that the answer is limited to acceptable size

---

[23]See, as additional examples, EPA Exhibit 7, Bates Stamp 0092, pertaining to the lease for 508 S. Pershing Ave, 2nd Fl, EPA Exhibit 15, Bates Stamp 0205, pertaining to the lease for 452 Prospect St 2nd Fl, and EPA Exhibit 20, Bates Stamp 0275, pertaining to the lease 625 Cleveland Av.

[24]The response to Question 27 also adds that "[t]he public may also revise the included sample disclosure and acknowledgment forms provided that the forms contain *all* the elements

formats for the pamphlet and that EPA's response to Question 27 does not suggest that providing a tenant with the Pamphlet supplants the requirements of § 745.113(b)(1). Beyond this, the regulation makes clear that the federally approved pamphlet is an additional, not an alternative requirement by providing that "Lessees must also receive a federally approved pamphlet on lead poisoning prevention."[25]

---

set out in the content requirements in 24 CFR 35.92 and 40 CFR 745.113." This does not aid the Respondent's argument as the inclusion of this language also demonstrates that the disclosure and acknowledgment forms constitute separate requirements from providing the Pamphlet.

[25]The RLBPHRA requires the lessors and sellers of target housing to provide a copy of an EPA-approved lead safety pamphlet to purchasers and lessees before they become obligated under the sales or lease contract. 42 U.S.C. § 4852d. Pursuant to this, 40 C.F.R. § 745.107(a)(1) requires the seller or lessor to "provide the purchaser or lessee with an EPA-approved lead hazard information pamphlet." The Preamble to the Lead Disclosure Rule provides further guidance. In explaining Section 1018 of the RLBPHRA, it states:

> (1)Sellers or lessors to provide the purchaser or lessee of target housing with a lead information pamphlet to be developed under section 406(a) of TSCA; (2) sellers and lessors of target housing to disclose any known lead-based paint or lead-based paint hazard in such housing; (3) sellers of target housing to permit purchasers a 10-day opportunity to conduct a risk assessment or inspection for the presence of lead-based paint hazards; and (4) attachment of a lead warning statement to each contract for purchase and sale of target housing.

61 Fed. Reg. 9064.

Although the RLBPHRA does not specifically mandate this dual requirement, EPA and HUD promulgated section 40 C.F.R. 745.107(a)(1) pursuant to the regulatory authority granted by the statute. 42 U.S.C. § 4852d. The agencies explained this additional requirement by stating that "[a]lthough not specifically required by section 1018, EPA and HUD believe that [the Lead Warning Statement] provides a useful context for information disclosed to lessees, just as for purchasers, concerning the hazards of lead-based paint." Proposed Lead Disclosure Rule, 59 Fed. Reg. 54984 (November 2, 1994). This dual requirement is echoed in the last sentence of the Lead Warning Statement itself. 40 C.F.R. § 745.113(b)(1). EPA's witness, Mr. Gallo, echoed this sentiment in his testimony at trial, stating that "the lead warning statement was intended to be read on or before the lease signing. It was supposed to be an up-front statement, it was almost like a product warning label before you used it." Tr.(Vol. III) at 71. Yet another indication that lessor must meet both requirements is found in 40 C.F.R. § 745.113(b)(4), which requires that each lease contract include, as an attachment or within the contract, "[a] statement by the lessee affirming receipt of...the lead hazard information pamphlet." If the rule did not

This determination does not end the matter because Respondent makes the additional contention that the lead paint notice it provided in its leases not only is the equivalent of the Lead Warning Statement language of Section 745.113(b)(1), it exceeds EPA's required warning language. Respondent describes its lead warning as "far more informative" than the EPA-prescribed warning. R's Brief at 15. EPA contends that the Respondent's notice is not an equivalent.

For the sake of argument, it will be assumed by the Court that a lessor could satisfy the Lead Warning statement through equivalent language. Working on that assumption, the Court now proceeds to examine and compare the Respondent's warning statement with the prescribed language.

The Respondent's leases begin with the bold print phrase "**LEAD PAINT NOTICE,**" which phrase is then immediately followed by these words: "Tenant acknowledges that the leased premises may have been constructed before 1978, and may contain lead-based paint." By comparison, the EPA language provides that "Housing built before 1978 may contain lead-based paint." Respondent's language is not an equivalency because, while the EPA language alerts a tenant that housing built before 1978 may contain lead-based paint, the Respondent's language speaks in terms of the *tenant's acknowledgment*, not the lessor's expression, and offers two gray areas for the tenant: that the property *may* have been constructed before 1978 and that it *may* contain lead-based paint. The EPA language, while itself presenting an necessary degree of indefiniteness, still focuses a tenant's attention on the fact that it is housing constructed before 1978 that presents concerns for the presence of lead-based paint.

Continuing with this comparison, the second sentence of the Respondent's notice provides that: "Ingestion of paint particles containing lead may result in lead poisoning which can cause major health problems, especially in children under 7 years of age." By comparison, the EPA Warning provides that: "Lead from paint, paint chips, and dust can pose health hazards if not managed properly.[26] Lead exposure is especially harmful to young children and pregnant women." [27]

---

require both elements, then 113(b)(4) would be extraneous.

[26]Respondent's statement also omits the phrase, "if not managed properly." As the Preamble to the Disclosure rule notes, this language was included because, "cleaning and renovation activities can increase the threat of lead-bast paint exposure." It goes on to note that "[i]f not managed properly, both adults and children can receive hazardous exposures." 61 Fed. Reg. 9066 (March 6, 1995).

[27]Congress contemplated these sources of lead exposure specifically and recognized them as hazards when drafting the RLBPHRA. The statute states that "the ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead

Although the distinctions between the two provisions in the first sentences of the two notices could be viewed as somewhat marginal, the differences between the versions for the second sentences are stark. This is because the Respondent's language speaks only to "[i]ngestion of paint particles," while the EPA warning is more explicit, identifying "paint, paint chips and dust" as health hazards. Also, the EPA warning speaks to the health hazards for pregnant women, as well as young children.[28] The Respondent's version makes no mention of hazards to pregnant women. For these reasons the second part of the Respondent's Notice is not an equivalency of the regulation's language.

The third sentence of the Respondent's notice states that: "[i]n the event the Tenant or any family members or guests should develop lead poisoning, and it is determined that corrective measures are required to remedy the source of the lead poisoning, the cost of such remedy shall be at the sole expense of the Tenant." Contrary to the thrust and intent of the EPA Lead Warning statement, there is no safety-type warning conveyed through this sentence by the Lessor, except to warn a tenant that any lead poisoning they may develop is *their problem*, not the Lessor's.

Similarly, while the EPA Warning advises tenants that "[b]efore renting pre-1978 housing, *lessors* must disclose the presence of lead-based paint and/or lead-based paint hazards in [the subject] dwelling [and that] [l]essees must also receive a federally approved pamphlet on lead poisoning prevention," the Respondent's warning does not advise a lessee of the lessor's *duty to disclose*, nor of the lessee's *right to receive* the federally approved pamphlet. Instead, the Respondent's language continues its overarching tone of placing the burdens associated with lead paint on the tenant, as reflected again by the language that "[i]n the event that Tenant is either

---

poisoning in children [and adds that] the health and development of children...is endangered by chipping or peeling lead paint, or excessive amounts of lead-contaminated dust in their homes." 42 U.S.C. § 4851(4) and (5)

[28]Congress expressed its intent to protect these two population groups in particular when drafting its Lead Warning Statements, by providing that the Lead Warning Statement shall contain the following text printed in large type on a separate sheet of paper attached to the contract: "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 lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase." 42 U.S.C. § 4852d(3)(emphasis added).

unwilling or unable to perform corrective measures, Tenant shall have the option at the discretion of the Landlord to terminate the lease with a written 30 day notice and providing Landlord with written verification of source of lead." Such an allocation upon the tenant, not the landlord, is clearly not the intent of the lead warning statement and by no stretch can such language be characterized as an equivalency.

Accordingly, even on the assumption that equivalent language could operate to satisfy the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1), the Respondent's Lead Paint Notice was not an equivalency and did not otherwise satisfy the required contents of the statement under the regulation. In fact, the Court views the Respondent's Notice as worse, in some respects, than if no notice had been provided at all.[29] This is because the Respondent's Notice serves to mislead a tenant, speaks in terms of the *tenant's* responsibilities, not the *landlord's*, places the burden of correcting lead-based paint problems on the tenant, and even suggests that if the tenant were to provide verification of a lead paint problem, it would still be at the discretion of the landlord whether it would agree to terminate the lease. Such provisions turn the intent of the Lead Warning Statement on its head and operate to egregiously mislead a tenant about the respective duties between the landlord and the tenant.[30] For these reasons, the Court concludes that each of the odd numbered counts, (i.e. odd numbered Counts 1-59), have been established as violations. Last, it is worth noting that the Respondent certainly did know of the correct, and required, language to be employed. As reflected in the Agreements of Lease reproduced in Exhibits CX 32 through CX 35, the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1) appears for each lease. These leases, all relating to Respondent's 138 South West Street property span a number of years, from October 2000 through September 2002.

---

[29]This observation is for the purpose of emphasizing the harm that an erroneous notice can create but it should not be construed as suggesting that no notice is required.

[30]The Court also notes that the RLBPHRA is designed, in part, to "educate the public concerning the hazards and sources of lead-based paint poisoning." 42 U.S.C. § 4851a(7). Respondent's notice does not inform of the specific lead exposure pathways through paint dust and chips and does not specify that lead is especially harmful to pregnant women and young children. It also fails to inform the lessee of the lessor's obligations. Under Respondent's warning statement, the lessee has no way of knowing that a lessor must disclose the existence of lead-based paint or lead-based paint hazards and also provide the lessee with a federally approved pamphlet. Thus, Respondent's version, in comparison to the EPA Lead Warning Statement, is inconsistent with the law's object and policy. *See Nat'l Bank of Oregon v. Indep. Ins. Agents. Of Am., Inc.*, 508 U.S. 439, 455 (1993)(quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)). The language employed by the Respondent is inconsistent with the Act's object and policy by shifting the statement burdens to the lessee. The Environmental Appeals Board has stated that "[t]he Disclosure Rule imposes certain requirements on the sale or lease of target housing, and places compliance responsibility on *sellers, lessors, and agents*." (emphasis added) *In re Harpoon Partnership*, TSCA Appeal No. 04-02, 12 E.A.D. ___ at 4 (EAB 2005).

By virtue of the use in those leases of the required Lead Warning Statement regulatory language, Respondent has effectively conceded that he knew of the required language and, when he chose to, applied it in his leases.

**2. Liability under 40 C.F.R. §745.113(b)(2), the "Lessor Disclosure Statement."**

The even numbered Counts allege violations of 40 C.F.R. § 745.113(b)(2). This subsection requires:

> a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.

As with the Section 745.113(b)***(1)*** *lead warning* statement, the requirement of Section 745.113(b)***(2)***, which the Court will describe in shorthand fashion as the landlord/lessor's statement of "*knowledge, or no knowledge*" as to presence of lead-based paint, must be a part of each lease contract for target housing, either within the contract itself or as an attachment to it. Specifically, this provision of the regulation requires that the landlord/lessor make a statement about the extent of his/her knowledge. This mandatory statement requires the landlord/lessor first to affirmatively make a declaration, choosing *only* from one of two possible options. While there are two options to choose from, they are not freely electable, as they have a sequence, or order, to them. The first step, if applicable, is to acknowledge the presence of known lead-based paint and/or a lead-based paint hazard in the target housing being leased.[31]

Having determined the applicability or non-applicability of the first statement, under the regulation, the second option only becomes active when a landlord/lessor *does not know*, that is, the landlord/lessor *has no knowledge* of the presence of lead-based paint and/or lead-based paint hazards.

The polemics from the parties' briefs aside, the Court's role is to focus on the charges in the Complaint, assess the evidence adduced relating to those charges, and determine whether, applying the appropriate burden of proof, violations were established. It now proceeds to do

---

[31]Should this be the case, that is, that the landlord/lessor knows of, and therefore acknowledges, the presence of known lead-based paint and/or a lead-based paint hazard, the regulation then goes on to name additional disclosures the landlord/lessor must make.

that. Addressing even Counts 8-60, the charge for each, derived from the language of 40 C.F.R. § 745.113(b)(2), is that the Respondent did not provide a statement "disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards."

Count 8 is representative of the even numbered counts alleging violations of 40 C.F.R. § 745.113(b)(2). As with the other even numbered counts, Count 8 alleges, (with particular reference in that Count to the February 2002 Elm Street Lease Agreement), that the Respondent failed to include either a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards at that lease location, or a statement indicating that Respondent had no knowledge of the presence of lead-based paint and/or lead-based paint hazards at that location, either as an attachment to or within that lease agreement, as required by 40 C.F.R. § 113(b)(2). The Complaint goes on to assert that this alleged failure is, pursuant to 40 C.F.R. § 745.118(e), a violation of 42 U.S.C. § 4852d(b)(5) and 15 U.S.C. § 2689.

The Respondent's contention as to these, even-numbered, alleged violations of 40 C.F.R. § 745.113(b)(2), regarding its statement of *"knowledge, or no knowledge"* as to presence of lead-based paint may be easily stated. As with its contention for the odd-numbered Counts, involving the 40 C.F.R. § 745.113(b)(1) charges, Respondent asserts that its statement, which is the same statement raised for its defense of the section 745.113(b)(1) charges, is better than that required by 745.113(b)(2). This contention is based on the Respondent's theory that the statement in its lease is "too informative and prudently protective" regarding its prospective tenants, whereas the cited regulation is satisfied by telling prospective tenants "**absolutely nothing**." R's Br. at 10 (emphasis in brief). The Respondent forcefully proclaims that EPA's "Know Nothing disclaimer" requirement is at odds with "the protection of public health goals of TSCA's lead paint notice requirements," and that, in contrast, its notice is "indisputably superior and far more protective." R's Br. 11.

The Respondent's contentions are without any merit. The Respondent's **LEAD PAINT NOTICE**, which purports to operate with duality, simultaneously satisfying the requirements of 40 C.F.R. § § 745.113(b)(1) and 745.113(b)(2), completely sidesteps the purpose of subsection 745.113(b)(2) of disclosing *the lessor/landlord's state of knowledge* about the presence of lead-based paint. Respondent's "NOTICE" speaks only in terms of the *lessee/tenant's acknowledgment* of when the premises *may* have been constructed and the *lessee/tenant's acknowledgment* that the premises *may* contain lead-based paint. The Respondent's "NOTICE" ignores that a lessee/ tenant has no independent knowledge of either the date of the leased premise's construction nor the presence of lead-based paint, apart from what the lessor/landlord discloses.

The Respondent's position also ignores an underlying purpose of the lessor disclosure statement of 40 C.F.R. § 745.113(b)(2), namely that it puts the lessor/landlord *on record* as to the state of its knowledge regarding the presence of lead-based paint and/or lead-based paint hazards. In contrast, the Respondent's version avoids the lessor/landlord's duty to faithfully disclose its

actual state of knowledge on these questions. That the lessor/landlord's version is inferior can be demonstrated by facts in this case. As will be discussed in more detail later, for some of the alleged violations EPA demonstrated that the Respondent in fact *did* have knowledge of the presence of lead-based paint and/or lead-based paint hazards. These pertained to leases for properties identified in the Complaint which involved lead paint notices and violation letters that were sent to the Respondent by the City of York's Childhood Lead Poisoning Prevention Program, (previously identified in this decision as "CLPPP.") For each of these cases involving CLPPP notification to the Respondent about these problems, while the Respondent did in fact have knowledge of them, its purportedly superior statement disclosed nothing to the lessee/tenant about that state of knowledge. Indeed, if the Court were to adopt the Respondent's claim that its disclosure was superior, and exceeded the regulation's requirement, on its terms there is no duty for the lessor/landlord to reveal what it knows, whether through CLPPP or for that matter, from any other source of knowledge concerning lead-paint issues. Accordingly, the Court completely rejects the Respondent's claims regarding the Counts based on 40 C.F.R. § 745.113(b)(2) violations and finds that violations have been established for each of those Counts.

While each of the Counts alleging violations of 40 C.F.R. §§ 745.113(b)(1) and 745.113(b)(2) have been established, some represent more flagrant transgressions of these requirements because, as just alluded to, the evidence shows that the Respondent knew of the presence of lead-based paint and/or lead-based paint hazards for some of its target housing properties. These may be identifed according to those properties that housed children with elevated blood levels of lead ("EBL properties") and those where there was no such evidence ("non-EBL properties"). The four EBL properties are 813 South Beaver Street, 333 East College Avenue, 904 West Locust Street, and 138 South West Street.[32]

---

[32]At trial, EPA witness Gallo testified that a disclosure form to a lease must not only indicate the state of knowledge of lead-based paint in the premises, but must also indicate the source of that knowledge and of the relevant documents. Tr. (Vol. II) at 159. As already noted, the language of 40 C.F.R. § 745.113(b)(2) expressly supports this obligation. The EAB has reached the same conclusion, holding that the Disclosure Rule imposes these two separate obligations on a lessor and it "stress[ed] the importance of providing documentary evidence apart from simple notice." *In re Ronald H. Hunt et al.*, 12 E.A.D. ___ at 36, TSCA Appeal No. 05-01 (EAB 2006)(citing the preamble to the Disclosure Rule at 61 Fed. Reg. 9064, 9076). That court went on to conclude that "this language stressed that carrying out these two obligations is necessary to provide the intended protection to tenants, thus indicating that one obligation cannot be subsumed within the other." *Id.*

**a. The EBL property at 813 South Beaver Street**

Respondent leased the 813 South Beaver Street property on July 13, 2002 and November 20, 2003.[33] In 1997, well before these transactions took place, CLPPP sent Respondent a Violation Letter and Inspection Report detailing the presence of lead-based paint and lead-based paint hazards at the property. CX59, CX59-A, CX59-B. The documents notified the owners that a child with lead poisoning lived in or frequented the property. Tr.(Vol. I) at 146. The letter also specified the locations of the lead-based paint hazards within the property as well as recommendations for remediation. CX59-A; Tr.(Vol. I) at 143-144.

As such, the letter and report triggered certain disclosure obligations but the 2002 and 2003 leases contained no such information. On March 7, 2000, Respondent entered into a Property Management Agreement ("PMA") authorizing an agent to lease 813 South Beaver Street. CX111B. The agreement included a Lead Paint Clause, which is essentially a disclosure clause, as well as a clause stating that the owner (i.e., Respondent) alone is responsible for the accuracy of the information presented therein. CX111-B. In the same agreement, Respondent indicated that he had *no* knowledge of lead-based paint or lead-based paint hazards in the property and also indicated that he had no records of any lead-based paint or lead-based paint hazards. *Id*; Tr.(Vol.II) at 148-149. Thus, Respondent's claim of "no knowledge" is directly at odds with his actual state of knowledge by virtue of the letter and report from CLPPP.

These lease transactions also violated Section 745.113(b)(2) because neither transaction contained a statement disclosing the details required where there is a known presence of lead-based paint. Respondent accepted responsibility for any omission in the PMA and was therefore responsible for any omission in the resulting lease transactions. The leases made no reference to the Violation Letter or Inspection Report nor did they provide the specific locations of lead-based paint hazards within the property. Accordingly, on these additional grounds, the Court concludes that Respondent violated section 113(b)(2) and is liable as alleged in Counts 2 and 4.

---

[33] The 2003 lease was a rental rate adjustment that EPA considered a separate lease transaction. EPA adopted the reasoning of the Preamble to the Disclosure Rule , which states, "many residential lease transactions and leasing arrangements switch to month-to-month 'at will' arrangements after an initial period of occupancy. In such cases, the leasing arrangement may continue indefinitely without any 'renewal process.' Under such circumstances, EPA and HUD interpret renewal to occur at the point when the parties agree to a significant written change in the terms of the lease, such as a rental rate adjustment." 61 Fed. Reg. 9068; Tr.(Vol. II) at 138-139. This reasoning applies with respect a similar transaction involving the property at 416 East College Avenue. Tr.(Vol.II) at 140.

**b. The EBL Property at 333 East College Avenue**

Respondent, through his agent, leased this property on May 23, 2001. CX3 and CX111-A. In 1995, prior to entering into this agreement, Respondent received a Violation Letter, dated October 31, from CLPPP informing him that an inspection revealed lead hazards and also informed him that a child with elevated blood levels of lead was residing at the address. Tr.(Vol.I) at 141; CX61; CX61-A. The Violation Letter included an Inspection Report that specified the locations of the lead hazards as well as corrective measures to be taken. CX61-B.

The letter and report triggered the disclosure obligations described, *supra*, but no such information was included in the lease contract. Tr.(Vol.II) at 153. Additionally, The PMA between Respondent and his agent, dated March 7, 2000, contains the same admonitions and representations as those discussed above. CX111-A; Tr.(Vol.II) at 151-152. Respondent once again indicated that he had no knowledge of lead-based paint or lead-based paint hazards in the property and also indicated that he had no records of any lead-based paint or lead-based paint hazards, an assertion at odds with the facts.

Accordingly, on these additional grounds, the Court concludes that Respondent violated section 745.113(b)(2) as alleged in Count 6 because neither transaction contains an accurate statement of Respondent's knowledge of lead-based paint or lead-based paint hazards at the property. The contracts made no reference to the Violation Letter or Inspection Report nor did they provide the specific locations of lead-based paint hazards within the property.

**c. The EBL Property at 904 West Locust Street**

Respondent, through his agent, leased this property on February 27, 2002. CX5 and CX111-C. On April 26, 1999, CLPPP conducted a lead inspection of the property and prepared an accompanying inspection report. CX62-B. On May 6, 1999, CLPPP sent Respondent a Violation Letter notifying the presence of a child at the address with elevated blood levels of lead. CX62-A. The letter also gave Respondent 30 days to eliminate the hazard. *Id.* On July 17, 1999, CLPPP sent Respondent a Reinspection Letter stating that the hazard had been cured.

On March 7, 2000, Respondent executed a PMA authorizing his agent to offer the property for lease. CX111-C. As with the other PMAs, this one included a clause whereby Respondent indicated that he had no knowledge of any lead-based hazards or records pertaining thereto. *Id*; Tr.(Vol. I) at 157-158. The contracts made no reference to any correspondence with CLPPP nor did they provide the specific locations of lead-based paint hazards within the property. Regardless of the Respondent's remedial action, the disclosure obligations under Section 75.113(b)(2) were still triggered and unmet by the Respondent.

Accordingly, on these additional grounds, as neither transaction contained a statement of Respondent's true knowledge of lead-based paint or lead-based paint hazards at the property, the Court concludes that Respondent violated section 745.113(b)(2) as alleged in Count 10.

**d. The EBL Property at 138 South West Street**

Respondent, through his agent, executed four lease transactions for this property between October 2000 and September 2002. CX32, 33, 34, 35. On February 24, 1995, CLPPP conducted a lead inspection of the property and prepared an accompanying inspection report which it sent to Respondent, along with a Violation Letter dated March 2, 1995. CX63-H, 63-F; Tr.(Vol. I) at 92. The letter informed Respondent that a child at the address was found to have elevated blood levels of lead. CLPPP sent another letter on March 30, 1995 stating that a reinspection of the property found that the lead hazards were still present and a failure to remedy the hazard could result in court proceedings. Tr.(Vol.I) at 99; CX63-K, 63-L. CLPPP sent a 10-day notice on or about August 14, 1995 informing that an August inspection found that the necessary work had not been done. CX63-M, 63-N. There was an additional exchange between Respondent and CLPPP with respect to the second floor of the property. A July 9, 1999 Inspection Report listed lead hazards and it was mailed to Respondent along with a Violation Letter dated July 9, 1999. Tr.(Vol.I) at 118, 121; CX63-A, 63-B. The July 9th letter also informed Respondent of state and federal compliance requirements.

As with the transactions described above, this correspondence triggered 113(b)(2) obligations. Respondent included a lead disclosure form with each of these lease transactions wherein he indicated no knowledge of lead-based hazards and also indicated that all pertinent records had been provided to lessee. The Court agrees that the Respondent's disclosure did not meet the requirements of 40 C.F.R. § 745.113(b)(2) because the disclosures were not dated, there was no evidence that any of the documents were given to the lessees, and the relevant documents were not listed in the disclosure. Tr. (Vol.II) at 160-165; CX-32, 33, 34, 35.

Accordingly, the Court concludes that, on these additional grounds, these transactions constituted violations of section 745.113(b)(2) and the Respondent is liable as alleged in Counts 61, 63, 65, and 66. Respondent's lead disclosure form made no reference to any correspondence with CLPPP nor did they provide the specific locations of lead-based paint hazards within the property.

**3. Liability under 40 C.F.R. § 745.113(b)(6) of the Lead Disclosure Rule: the requirement that lessors, agents, and lessees certify the accuracy of their statements, along with dates of signature**

The Complaint asserts for Counts 62, 64, and 67 that while the Respondent attached Lead Disclosure Forms, with the language required by the regulation, to three lease transactions associated with its 138 South West Street property, those transactions violated 40 C.F.R.§

113(b)(6). That section requires that each contract to lease target housing include, as an attachment or within the contract, "[t]he signatures of the lessors, agents, and lessees, certifying to the accuracy of their statements, to the best of their knowledge, along with the *dates of signature*." (emphasis added). Although the required signatures were present, there were no dates associated with the signatures of the lessee and agent involved with the transactions. Respondent did not address these allegations in its post-hearing briefs.

40 C.F.R. § 745.113(b)(6) The Preamble to the Disclosure Rule states this requirement is necessary because "the process of completing and signing these sections ensures that all parties are aware of their rights and obligations and are able to confirm that the appropriate actions have already occurred [and also because] this disclosure language provides a clear record of compliance." 61 Fed. Reg. At 9071. In short, the requirement for a date of signature is needed to show proof of a timely certification of the statements by lessors, agents and lessees.

EPA witness Gallo testified at trial that three lease transactions associated with this property from October 2000, April 2001, and September 2002 contained signatures under both "Lessee" and "Agent" but did not contain dates of signature for any of them. The record corroborates this testimony. CX 32, 33, and 35. The regulation and record on this issue is unambiguous and the leases should have contained dates corresponding to the signatures. This is a clear violation of the rule and the Court finds that the Respondent did not comply with 40 C.F.R. § 745.113(b)(6) as it pertains to Counts 62, 64, and 67, and that these failures constituted a violation of 42 U.S.C. § 4852d(b)(5), and 15 U.S.C. § 2689.

**4. Liability under 40 C.F.R. § 745.107(a)(3) of the Lead Disclosure Rule: The requirement that sellers and lessors disclose to their agents the presence of lead-based paint and lead-based paint hazards**

Count 68 stems from a sales transaction involving Respondent's property at138 South West Street. EPA asserts that Respondent, as the seller of that property, violated 745.107(a)(3) by failing to disclose to its agent, Target Realty, any knowledge of, or records pertaining to, the presence of lead-based paint or lead-based hazards at the property. As Respondent did not address this allegation in its post-hearing briefs, liability rests on whether Complainant met its burden of proof.

Section 745.107(a)(3) of the Disclosure Rule, whose obligation must be completed before the purchaser or lessee is obligated under any contract, reads:

> The seller or lessor shall disclose to each agent the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased and the existence of any available records or reports pertaining to lead-based paint and/or lead-based paint hazards. The seller or lessor shall also disclose

> any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.

EPA has provided guidance to the rule that illustrates the extent of this regulation. The disclosure requirement applies even if the seller or lessor is unable to locate original reports or data, as Congress recognized that "the seller or lessor might have actual knowledge of lead-based paint and/or lead-based paint hazards above and beyond that present in available reports." 61 Fed. Reg. at 9076. Accordingly, the rule extends to the disclosure of information where the documentation no longer exists and to information that shows that lead-based hazards have been corrected. *EPA Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing*, Part II at 6-7 (December 5, 1996).

As described, *supra*, CLPPP sent Respondent multiple notices between 1995 and 1999 informing him of both lead-based paint and lead-based paint hazards at 138 South West Street. This information should have been disclosed to the agent with whom Respondent contracted. At trial, the agent for Target Investment Realty who listed the property for sale, Mr. Fabie, testified that his listing agreement informed Respondent of his duty to disclose any lead-based paint documentation and that he did not receive any such documents. Tr.(Vol I.) at 198; CX-63 EE. He further testified that Respondent completed and returned a Seller's Disclosure form upon which Respondent certified that he had no knowledge of nor any reports pertaining to lead-based paint or lead-based paint hazards on the property. Tr.(Vol. I) at 204; CX63-FF. Compounding the Respondent's failures, Mr. Fabie also testified that once he learned of the inaccuracies of the Seller's Disclosure Form, he requested that Respondent correct the errors, but that Respondent never did so. Tr.(Vol. I) at 206, 220.

The record clearly establishes, and the Court finds, that the Respondent violated the requirements of 40 C.F.R. § 745.107(a)(3) as it pertains to Count 68.

**5. Liability under 40 C.F.R. § 745.107(a)(4) of the Lead Disclosure Rule: The requirement that sellers and lessors disclose to their purchasers the presence of lead-based paint and lead-based paint hazards**

As set forth in Count 69, this alleged violation also stems from the sales transaction pertaining to the 138 South West Street property, the same property identified in Count 68. Complainant asserts that Respondent violated 745.107(a)(4) by failing to disclose to its purchaser any knowledge of or records pertaining to the presence of lead-based paint or lead-based hazards in the property. Again, Respondent did not offer any counter arguments to EPA's allegations and therefore Respondent's liability rests on whether Complainant has met its burden of proof.

Section 745.107(a)(4) of the Disclosure Rule, which be completed before the purchaser or lessee is obligated under any contract, reads:

> The seller or lessor shall provide the purchaser or lessee with any records or reports available to the seller or lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing being sold or leased. This requirement includes records or reports regarding common areas. This requirement also includes records or reports regarding other residential dwellings in multifamily target housing, provided that such information is part of an evaluation or reduction of lead-based paint and/or lead-based paint hazards in the target housing as a whole.

Essentially, this disclosure requirement is a companion regulation to Section 745.107(a)(3), with the distinction that Section 745.107(a)(4) applies the seller or lessor's disclosure obligation to the purchaser or lessee.

As has already been described, Respondent received numerous documents from CLPPP indicating the presence of lead-based paint or lead-based paint hazards on the property. On November 16, 2004, Respondent entered into an Agreement of Sale with intention of transferring title of the property. CX 63-EE. The Seller's Disclosure form, described previously, should have indicated Respondent's knowledge of these defects and any CLPPP documents should have been provided to prospective purchasers prior to entering into the sales contract. Instead, contrary to the undisputed evidence of record, the Seller's Disclosure form indicated that Respondent had *no* knowledge of lead-based paint or lead-based paint hazards on the property and further indicated that Respondent had *no* records of such hazards. CX 63-FF. Respondent never introduced any evidence into the record to indicate that he did provide applicable records and information prior to the purchaser becoming obligated under contract.

Accordingly, the record clearly establishes, and the Court finds, that the Respondent violated 40 C.F.R. § 745.107(a)(4) as it pertains to Count 69.

## V. The Court's Penalty Assessment

### 1. Statutory and regulatory framework for penalty calculations

The Disclosure Rule is enforceable under Section 409 of TSCA and Section 1018(b)(5) of the RLBPHRA allows for civil penalties for violations. 15 U.S.C. § 2689; 42 U.S.C. § 4852d(b)(5). The statutory factors that TSCA requires this Court to consider are "the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, and history of prior such violations, the degree of culpability, and such other matters as justice may require." 15 U.S.C. § 2614(a)(2)(B). The Court, having found that EPA has established Respondent's liability for all counts in the

Complaint, must now determine an appropriate penalty for these violations. Pursuant to 40 C.F.R. § 22.27(b), the Court 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." The Court must also "consider any civil penalty guidelines issued under the Act." *Id.* Accordingly, the Court must consider TSCA statutory factors and EPA's *Section 1018-Disclosure Enforcement Response Policy* (December 1999)(hereinafter referred to as "ERP").[34]

EPA carries the burden of proof with respect to the appropriateness of the penalty. It must demonstrate "that it has taken into account each of the factors identified in TSCA § 16 in assessing a proposed penalty and that its proposed penalty is supported by its analysis." *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538-539 (EAB 1994). While there is no "specific burden of proof with respect to any individual factor,... the burden of proof goes to [EPA's] consideration of all the factors. *Id.*

The ERP establishes a two-step approach to calculating an appropriate penalty. The first step involves determining a "gravity-based penalty" and the second provides a method for adjusting the gravity based penalty. ERP at 9. The gravity based penalty is determined using the nature of the violation, the circumstances of the violation and the extent of harm that may result from the violation. The "nature" 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."[35] *Id.*

The circumstance level pertains to the probability of harm and in this case it addresses 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. Tr.(Vol.II) at 186-87; ERP at 10. The ERP categorizes 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 the least serious. ERP at 10.

The extent factor measures the harm that could result from a violation. The harm is categorized as "major," "significant," or "minor" through an "Extent Category Matrix." *Id.* The relevant facts under this factor are the age of any children and the presence of pregnant women in the target housing. *Id.* at 11. Violations involving tenants who are children under the age of 6 or pregnant women are considered major, while those involving children between ages 6 and 17 are

---

[34]The policy is not binding on this Court, however it does warrant deference. The EAB has "emphasized that the Agency's penalty policies should be applied whenever possible because such policies assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *In re M.A. Bruder & Sons,* 10 E.A.D. 598, 613 (EAB 2002).

[35]Generally, violations of the Lead Disclosure Rule are considered "hazard assessment" violations. ERP at 9. Therefore, as far as penalty calculations are concerned, the determining factors are the extent and circumstance classifications applied to the given violation.

deemed significant and last, those violations involving occupants over 18 are classified as minor. *Id.*; Tr.(Vol. II) at 190.

Once all of these factors are determined, they are then applied to the "Gravity-Based Penalty Matrix" to determine the gravity-based penalty amount. The amount so derived then can be adjusted upwards or downwards based on four adjustment factors. The factors are ability to pay (or continue to do business), history of prior violations, degree of culpability, and such other factors as justice may require. Respondent stipulated at trial that there was no issue regarding its ability to pay and although Respondent has a history of notices from CLPPP, EPA never brought a prior enforcement action and therefore there is no history of violations. Tr.(Vol.II) at 192-94.

The Court agrees with this assessment of the adjustment factors and so only the remaining two adjustment factors – degree of culpability, and such other factors as justice may require, are at issue. Under the degree of culpability factor, EPA may adjust the gravity-based penalty up to 25%, based on Respondent's prior knowledge of the Disclosure Rule and the degree of control over the violative condition. ERP at 15. There are eight sub-factors that can be used to adjust the gravity-based penalty under the "as justice may require" factor. These are: (1) no known risks of exposure, (2) attitude, (3) supplemental environmental projects, (4) audit policy, (5) voluntary disclosure, (6) size of business, (7) adjustments for small independent owners and lessors, and (8) the economic benefit of noncompliance. ERP at 16-18.

**2. EPA's penalty calculation**

**a. Extent of the violation**

EPA determined whether the violations associated with specific counts fell into the "major," "significant," or "minor" categories based on a hazard assessment of available facts with respect to the residents of the target property in question. Tr.(Vol.II) at 186. Applying this, it assigned "major" extent levels to Counts 19, 20, 23, 24, 31, 32, 37, 38, 51, and 52 because each lease transaction associated with these counts involved children, under the age of six, as residents. CX86, CX123; Tr.(Vol.II) at 212-215. For Counts 7, 8, 9, 10, 43, and 44, it assigned "significant" extent levels because the lease transactions associated with these counts involved children between the ages of 6 and 17. CX86, CX123; Tr.(Vol.II) at 208-211. Finally, for Counts 1-6, 11-18, 21, 22, 25-30, 33-36, 39-42, 45-50, and 53-69, EPA assigned the "minor" extent category level because there was no indication that children lived at those housing units. CX86, CX123; Tr.(Vol.II at 202). This was a logical and fair allocation of the "extent of violation" category and the Court subscribes to these determinations.

**b. Circumstance of the violation and penalty matrix calculation**

**i. 113(b)(1): Failure to provide an adequate Lead Warning Statement**

EPA classified each 113(b)(1) violation as a "Level 2" circumstance violation, which the ERP defines as "[v]iolations having a high probability of impairing the ability to assess the information required to be disclosed." ERP at 10. Using this level 2 classification, the ERP gravity-based penalty matrix provides for a standard penalty of $8,800 per count for major extent violations, $5,500 for significant extent violations, and $1,320 for minor extent violations. ERP at B-4. Therefore, the total gravity based penalty calculation for the major extent violations, Counts 19, 23, 31, 37, and 51, is $44,000. The calculation for the significant extent violations, Counts 7, 9, and 43, is $16,500. The calculation for the minor extent violations, Counts 1, 3, 5, 11, 13, 15, 17, 21, 25, 27, 29, 33, 35, 39, 41, 45, 47, 49, 53, 55, 57, and 59, is $29,040. Thus, the total gravity-based penalty calculation for all 113(b)(1) violations is $89,540. This was also a logical and fair allocation of the "circumstance of the violation" category and the Court subscribes to these determinations as well.

**ii. 113(b)(2): Failure to provide an affirmative statement regarding the specific knowledge of the presence of lead-based paint hazards**

EPA classified each 113(b)(2) violation as a "Level 3" circumstance violation, which the ERP defines as "[v]iolations having a medium impact of impairing the ability to assess the information." ERP at 10. Using this level 2 classification, the ERP gravity-based penalty matrix provides for a standard penalty of $6,600 per count for major extent violations, $4,400 for significant extent violations, and $660 for minor extent violations. ERP at B-4. Therefore, the total gravity based penalty calculation for the major extent violations, Counts 20, 24, 32, 38, and 52, is $33,000. The calculation for the significant extent violations, Counts 8, 10, and 44, is $13,200. The calculation for the minor extent violations, Counts 2, 4, 6, 12, 14, 16, 18, 22, 26, 28, 30, 34, 36, 40, 42, 46, 48, 50, 54, 56, 58, 60, 61, 63, 65, and 66, is $17,160. Thus, the total gravity-based penalty calculation for all 113(b)(2) violations is $63,360. The Court has considered this application of the policy and also considers it to be a logical and fair allocation of the "circumstance of the violation" category.

**iii. 113(b)(6): Failure to verify dates along with signatures**

EPA classified each 113(b)(6) violation as a "Level 6" "circumstance of violation," which the ERP defines as "[v]iolations having only a low impact on the ability to assess the information required to be disclosed." ERP at 10. Using this "Level 6" classification, the ERP gravity-based penalty matrix provides for a standard penalty of $110 per count for minor violations. Counts 62, 64, and 67 were all minor extent violations and thus the total gravity-based penalty calculation for all 113(b)(6) violations is $330. One could hardly take issue with the reasonableness of these assessments.

**iv. 107(a)(3) and (a)(4): Failure to provide lead-based paint documents and/or an updated Seller's Disclosure Form; False and inaccurate information in the Seller's Disclosure form**

EPA classified the 107(a)(3) and (a)(4) violations as "Level 1" circumstance violations, which the ERP defines as "[v]iolations having a high probability of impairing the ability to assess the information required to be disclosed." ERP at 10. Using this "Level 1" classification, the ERP gravity-based penalty matrix provides for a standard penalty of $2,200 for minor extent violations and this is the total gravity based penalty for the single 107(a)(3) count, Count 68. Likewise, the penalty for the single 107(a)(4) violation, Count 69, is also $2,200 ERP at B-4. Again, the Court agrees with these penalty allocations.

Thus, the total calculated gravity-based penalty for all 69 violations was $157,630.

**c. Downward adjustments to the gravity-based penalty**

As stated, the only two relevant adjustment factors are Respondent's "degree of culpability" and the "other factors that justice may require." The degree of culpability factor allows EPA to adjust the gravity-based calculation up to 25%, based on the violator's prior knowledge of the Disclosure Rule and its degree of control over the violative condition. ERP at 15. EPA considered an increase because Respondent had knowledge of the rule at the time the violations were committed. In the end, EPA declined to do so because if felt that its calculated penalty was appropriate. Tr.(Vol.II) at 194. Though the Court could justify an increase, it will not disturb this determination either.

There are eight sub-categories that fall within the "other factors" as justice may require. EPA determined that only one of these factors was relevant in this case and that is the "attitude" factor. The "attitude" factor potentially provides for a reduction in the penalty of up to 30%, upon consideration of three elements within that factor. Those elements within "attitude" are: cooperation, immediate steps to come into compliance, and early settlement. Separately, each of those elements can reduce the penalty by a maximum of 10%. Thus, only if all three were fully applied in a given case would they total to reach the 30% maximum available reduction. In this instance, upon evaluating the Respondent's "cooperation," EPA reduced the gravity-based penalty by 10%, thereby applying the maximum reduction available for the Respondent's cooperation, but it also determined that the other two factors did not apply in this case. Tr.(Vol. II) at 196; CX86. In the Court's view, EPA could well have taken a less generous view of the Respondent's cooperation, but nevertheless, it accepts EPA's calculation in this regard.

In addition to these adjustment factors, as delineated in the ERP, EPA used its enforcement discretion and reduced the gravity-based penalty for all the 113(b)(1) violations by 55% ($49,247). EPA made this reduction because it "determined that there was some attempt to provide lead-based paint information to the tenants." Tr.(Vol. II) at 233. Thus, as the discussion *supra* demonstrates, deficient and misleading as the Respondent's lead paint notice was, EPA still elected to make a

substantial reduction, apparently on the view that, warts and all, there was still a lead paint notice, and that was an improvement over a lease which had no such notice at all. Here again, while the Court could easily have taken a dimmer view of this very significant downward adjustment, it elects to leave this determination unchanged.

To summarize, after applying the statutory factors, guidance, adjustment factors, and other adjustments, EPA seeks the following penalties:

Section 113(b)(1) – $36,264.00
Section 113(b)(2) – $57,024.00
Section 113(b)(6) – $ 297.00
Section 107(a)(3) – $ 1,980.00
Section 107(a)(4) – $ 1,980.00

**TOTAL –** $97,545.00

### 3. Respondent's arguments concerning Complainant's penalty calculation

Respondent contends that the Court should disregard Complainant's penalty calculation entirely and impose no civil penalty at all, on the assertion that EPA's key liability witness, Mr. Gallo, lacked any credibility. Respondent argues that Mr. Gallo's testimony under direct examination contradicted his testimony under cross examination and that this demonstrates an utter lack of credibility warranting a complete disregard of his testimony.

In support of this claim, Respondent asserts that Mr. Gallo's testimony reflects a lack of understanding of the ERP adjustment factors. Respondent points to Mr. Gallo's direct examination testimony in which he contended that the penalty adjustment factors can lead to either downward or upward modifications. Respondent's Post Hr. Br. at 5. Respondent asserts that Mr. Gallo misrepresented the penalty policy because under cross-examination he later conceded that there is no allowance under the policy for any downward adjustment under either the "history of prior violations" or the "culpability" factors. *Id.* at 6. Respondent also challenges Mr. Gallo's credibility on the basis that he cited only one factor under culpability when the ERP provides for two factors. *Id.* Last, Respondent points to Mr. Gallo's testimony that EPA considers both criteria under the degree of culpability, while Complainant's Exhibit 86 reflects that the culpability factor was marked as "not applicable." *Id.* at 7.

On these grounds, Respondent requests that the Court exercise its discretion and give no deference to Complainant's penalty calculations.[36] Respondent also asserts that EPA's penalty policy does not comport with the TSCA statutory factors because neither that policy nor its

---

[36]As the Court has discussed, it independently reviewed the application of the facts to the ERP and concluded that none of EPA's allocations represent excesses. As noted, EPA could well have made stricter, fully supportable, determinations.

application here considered the Respondent's "first offender" status nor his absence of culpability, in the sense that those considerations can only move the penalty calculation in an upward direction. *Id.* at 12.[37] EPA's response to these assertions is that Mr. Gallo's testimony was credible and that his alleged "contradictory" statements were consistent. Complainant attempts to clarify Gallo's use of correct and acceptable terminology that supports Complainant's position. Complainant's Reply to Respondent's Post Tr. Br. at 12. Complainant goes on to argue that any issue of veracity and credibility is on the Respondent because of its submitting incorrect property management agreements and failure to disclose information regarding lead-based paint and lead-based paint hazards. *Id.* at 13, 14. Finally, Complainant attacks Respondent by asserting that it was Respondent who acted disingenuously during the pre-trial process when it failed to withdraw its inability to pay defense or stipulate its financial ability to pay the proposed penalty, thereby forcing Complainant to investigate the issue. *Id.* at 15.

**4. The Court's concluding remarks regarding the assessed civil penalty.**

At the outset of this discussion it should be noted that while the Court, upon giving deference to the application of a particular EPA penalty policy, may discard the policy in its entirety, or in part, upon providing a rational basis for that decision. If that occurs, whether the Court applies the statutory criteria exclusively or applies parts of the statutory criteria and the penalty policy selectively, a different penalty amount is thereby derived. However it is often overlooked that this process is a two-way street. Although commonly the result is that the new assessment produces a lower penalty, there is nothing that stands in the way of either the Court (or the EAB) from articulating reasons supporting the imposition of a penalty that is greater than that advocated by EPA, as long as the assessment does not exceed statutory maximums.

**a. Respondent's request for the Court to disregard Complainant's penalty calculation**

The Court must reject Respondent's call to strike Mr. Gallo's testimony. Mr. Gallo's expertise was established at trial and Respondent offers no substantial reason to disregard the witness' testimony. The Court finds that, while not perfect in his testimony, overall Mr. Gallo was an articulate and credible witness. Regarding Mr. Gallo's use of the phrase "Not Applicable" in Complainant's Exhibit 86 in relation to the ERP adjustment factor of "Degree of Culpability," he explained that the use of that phrase did not signal that the Respondent literally was not culpable, but that EPA, in its discretion, elected not to apply an upward adjustment to the penalty. Tr.(Vol. III) at 52. So too, the Court does not buy into the Respondent's claim regarding its view of Mr. Gallo's testimony as to downward and upward adjustments to the penalty calculation. The Court finds that on direct examination Mr. Gallo was speaking to adjustment factors as a whole, while his testimony on cross-examination was addressing the

---

[37]Respondent also objects to the manner in which Complainant conducted the litigation, arguing that Complainant did not act in good faith when it offered un-redacted exhibits that included settlement exchanges and filed a Motion for Discovery on Respondent's inability to pay defense. *Id.* at 12-13.

specific adjustment factors raised by Respondent's Counsel. Beyond that, there is a marked difference between mispeaking and lying. At most, the Court views any errors made by Mr. Gallo during his testimony as falling into the former category, not the latter.

**b. Analysis of Complainant's gravity-based penalty calculation**

**i. Extent assessment**

The penalty policy is clear as to the criteria used to classify the "extent" and "circumstance" of a Disclosure Rule violation. The extent levels were assigned based on available facts as to whether or not children were present on the target housing in questions during the periods of the lease transactions in issue. Complainant has introduced adequate evidence in the record regarding the presence or absence of children on the properties and Respondent did not introduce any evidence to contradict these facts. Therefore, as noted, the Court finds that Complainant properly assessed the extent levels of all 69 counts.

**ii. Circumstance assessment**

As explained *supra*, the Court has found that the Respondent's failure to provide adequate Lead Warning Statements did not meet the regulatory requirements and that the failure deprived tenants of important public health and safety information. Respondent's statement did not set forth the Respondent's obligations to the tenant under the lease. Therefore, as noted, the Court finds that, with respect to the Section 745.113(b)(1) violations, the Agency acted appropriately in assigning a "Level 2" circumstance designation.

For some of the Counts, as described earlier in this Initial Decision, the Respondent's failure to provide a statement regarding Respondent's specific knowledge of the presence of lead-based paint or lead-based paint hazards resulted in uninformed occupancy of lead-contaminated housing. As noted, Complainant appropriately assigned a "Level 3" circumstance designation with respect to those Section 745.113(b)(2) violations.

The absence of dates on Lead Disclosure forms failed to comply with the cited regulation. As noted, the Court finds that EPA appropriately assigned the "Level 6" circumstance designation with respect to the Section 745.113(b)(6) violations.

Respondent's failure to provide lead-based paint documents and/or a proper Seller's Disclosure Form, as well as its presenting that form with false and inaccurate information, also constitutes a serious violation because it deprived the purchaser of the 138 South West Street property with access to specific knowledge of lead-based paint and lead-based paint hazards. As noted, the Court finds that Complainant acted appropriately assigned a "Level 1" circumstance designation with respect to the Section 107(a)(3) and Section 107(a)(4) violations.

Accordingly, as noted, on this record, the Court finds no reason to depart from the ERP with regard to its gravity-based penalty calculation methodology. Indeed, the Court, acting independently, upon application of the record and the findings of violation here, reaches the same conclusions as EPA with regard to the various penalty policy categories selected. For these reasons, the Court finds that, for the 69 counts, the gravity-based penalty calculation of $157,630 is appropriate.

**c. Analysis of the adjustment factors**

The only two adjustment factors that are potentially applicable are the culpability factor and other factors as justice may require. Respondent argues that Complainant "did not consider Mr. Vidiksis' 'first offender' status as a mitigating factor, nor did the Region consider Mr. Vidiksis' absence of culpability for even a single alleged violation." Respondent's Post Hr. Br. at 12.

As for Respondent's "absence of culpability for even a single alleged violation," the two factors involved in the culpability analysis are (a) the violator's knowledge of the Disclosure Rule, and (b) the degree of the violator's control over the violative condition. The Disclosure Rule went into effect in early 1996 and Respondent received lead notices as early as 1995. Additionally, the leases *did* contain a lead paint notice, albeit a seriously inadequate one. The point is that even the use of a defective notice demonstrates awareness of the obligation to provide a notice. Therefore Respondent cannot argue that he was unaware of regulations governing lead-based paint. Further, as owner of the properties, Respondent certainly had the ability to act and correct identified hazards. Ms. Yingling, the representative of CLPPP, testified at length as to the records and reports her office produced and sent to Respondent. Complainant further introduced uncontradicted evidence into the record to show that these records were delivered in a proper manner. Given these two criteria and the facts that apply to them, the Court cannot accept Respondent's claim that the penalty should be reduced based on an absence of culpability.

The Court also recognizes that EPA already significantly reduced the penalty amount. The 113(b)(1) penalty was reduced by 55%, a generous reduction in light of the Respondent's seriously flawed lead warning statement. Additionally, the overall gravity-based penalty calculation was reduced by 10% because of Respondent's "cooperation," which represents another generous view of the Respondent's conduct in this case. All of this leads the Court to conclude that there is no basis to reduce the penalty sought by EPA and that its application of the penalty policy to the facts is supportable and justified.

For the reasons set forth in this Initial Decision, the Court finds Respondent liable for each of the 69 Counts in the Complaint pertaining to violations of the Lead Disclosure Rule and orders Respondent to pay a civil penalty of **$97,545.00**.

## ORDER

A civil penalty in the amount of **$97,545.00** (Ninety-seven thousand five hundred forty-five dollars) is assessed against the Respondent, **John P. Vidiksis.** Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c).

Payment shall be submitted by a certified check or cashier's check made payable to the Treasurer, United States of America and mailed to:

United States Environmental Protection Agency, Region III
Fines and Penalties
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

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

**So Ordered.**

William B. Moran

William B. Moran
United States Administrative Law Judge

Washington, D.C.
Dated: October 10, 2007

In the Matter of *John P. Vidiksis*, Respondents
Docket No. TSCA 03-2005-0266

## CERTIFICATE OF SERVICE

I certify that a true copy of the **Initial Decision,** dated, October 10, 2007 was sent this day in the following manner to the addressees listed below:

Original and one copy by Pouch Mail to:

Lydia Guy
Regional Hearing Clerk
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103

Copy sent by Pouch Mail to:

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

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

Copy sent by Regular Mail to:

Keith A. Onsdorff, Esq.
Reed Smith, LLP
136 Main Street, Suite 250
Princeton, NJ 08540

Knolyn Jones
Legal Staff Assistant

Dated: October 10 , 2007