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March 12, 2008

FED EX OVERNIGHT DELIVERY
Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Suite 600
1341 G Street, NW
Washington D.C. 20005

Re: In the Matter of John P. Vidiksis
Appeal No.: TSCA 07-02

Dear Ms. Durr:

Enclosed for filing please find the original (signed in blue ink) along with five (5) copies (marked as such) of Appellee's Response Brief. The Certificate of Service is attached at the end of Appellee's Brief.

Sincerely,

Donzetta W. Thomas
Senior Assistant Regional Counsel

cc: Keith Onsdorff

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

In the Matter of:	:	
	:	
JOHN P. VIDIKSIS	:	
	:	Appeal No.: TSCA 07-02
Docket No.: TSCA-03-2005-0266.	:	
	:	

Appeal by Respondent John P. Vidiksis
from an Initial Decision by Administrative Law Judge
William B. Moran, Dated October 10, 2007

APPELLEE'S RESPONSE BRIEF

March 12, 2008

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APPELLEE'S RESPONSE BRIEF

I. AUTHORITY

The United States Environmental Protection Agency ("EPA" or "Complainant") submits this Appellee's Response Brief ("Response Brief") in response to the Respondent's Notice of Appeal and Motions ("Notice of Appeal"), filed on November 13, 2007 and subsequent Brief on Behalf of Appellant ("Appellant Brief"), filed on January 4, 2008. This Response Brief is submitted pursuant to Section 22.30(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules" or "Part 22")*, 40 C.F.R. § 22.30(a).

II. STATEMENT OF THE ISSUES ON APPEAL

John P. Vidiksis ("Appellant" or "Respondent") has appealed the liability determination and the penalty assessment set forth in the October 10, 2007 Initial Decision issued by the Honorable William B. Moran ("Presiding Officer"). *See In the Matter of John P. Vidiksis,* TSCA-03-2005-0266 (ALJ, October 10, 2007) ("Initial Decision"). In his Notice of Appeal, Respondent raised the following 3 issues:

1. For even Counts 8 - 60 of the Complaint (other than Count 10), the determination that Respondent's lease content violated 40 C.F.R. § 113(b)(2);
2. For odd Counts 1 - 59 of the Complaint, the determination that Respondent's lease form content violated 40 C.F.R. § 113(b)(1); and

3. Were any violations established by a preponderance of the evidence, the proper application of the TSCA Statutory penalty provision mandates a di minimus [sic] penalty only.

Notice of Appeal, unnumbered p. 1.[1]

III. SYNOPSIS OF APPELLEE'S RESPONSE

The Presiding Officer's Initial Decision, including his Findings of Facts, Conclusions of Law, and Penalty Order, should be sustained in its entirety. The Initial Decision is based on a thorough and careful review of the evidentiary record in this matter. In finding the Respondent liable for all 69 violations under 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* (also known as the "Lead Disclosure Rule"), the Presiding Officer correctly analyzed each lease and/or sale transaction, along with applicable attachments, against the requirements of 40 C.F.R. § 745.107(a)(3) and (4), and 745.113(b)(1), (2), and (6). Further, in calculating the appropriate penalty, the Presiding Officer relied on EPA's February 23, 2000, *Section 1018 Disclosure Rule*

[1]Subsequently, on page 2 of the Appellant Brief under the section "Statement of Issues Presented", the Respondent lists the following 5 issues:

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

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

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

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

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

Enforcement Response Policy ("ERP") which takes into account the statutory penalty factors set forth in Section 16 of the Toxic Substances Control Act, 15 U.S.C. § 2615. (CX113)

Respondent admits and the Presiding Officer correctly found that none of the lease transactions at issue contained the federally prescribed language set forth in 40 C.F.R. § 113(b)(1) and (2). Yet, Respondent asserts in his Appellant Brief that he should not be assessed a penalty for any of the 69 counts alleged in the Complaint. Through this Response Brief, Complainant will show that the evidence, hearing testimony, and the Initial Decision fully support the finding that Respondent is liable for all 69 violations named in the Complaint and that the assessed penalty was warranted, reasonable and appropriate. More specifically, Complainant will show:

1. The Presiding Officer Considered the Contents of the Respondent's Leases and Lease Attachments and Correctly Found that 30 of Respondent's Leases Were Not in Compliance with the Lessor Requirements found at 40 C.F.R. § 745.113(b)(1).

2. The Presiding Officer Considered the Language Contained in 34 of Respondent's Lease Transactions and Correctly Determined that Said Language Was Not in Compliance With the Lessor Requirements found at 40 C.F.R. § 745.113(b)(2).

3. The Penalty Assessed by the Presiding Officer Against the Respondent is Reasonable and Appropriate Considering the Facts and Circumstances of this Case and Should be Affirmed.

IV. FACTUAL AND PROCEDURAL BACKGROUND

On August 5, 2005, Complainant filed a Complaint against John P. Vidiksis and Kathleen E. Vidiksis[2], individuals who, at the time of the violations alleged in the Complaint, owned certain

[2]Ms. Vidiksis entered into a Consent Agreement and Final Order with Complainant on September 20, 2006 thus resolving her liability for the first thirty-four (34) counts of the Complaint. Accordingly, she was not a party at the administrative hearing for this matter.

residential rental properties in York, Pennsylvania. Complainant alleged that the Respondent violated the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d (the "RLBPHRA"), and Section 409 of the Toxic Substances and Control Act ("TSCA") through his failure to comply with 40 C.F.R. Part 745, Subpart F. Specifically, Complainant alleged that the Respondent was the owner and lessor of sixteen (16) *target housing* units and that he failed to comply with the 40 C.F.R. Part 745, Subpart F regulations in the execution of thirty-four (34) lease transactions and one sales transaction involving said *target housing* which resulted in sixty-nine (69) separate violations.[3]

The Honorable William B. Moran presided over an administrative hearing from September 25 - 27, 2007 in Harrisburg, Pennsylvania to determine the Respondent's liability and assess an appropriate penalty. During the hearing, Complainant presented the oral testimony of the following five witnesses: (1) EPA Region III Lead Coordinator, Daniel Gallo; (2) EPA Region III Toxicologist, Dr. Samuel Rotenberg; (3) Director of the City of York Childhood Lead Poisoning Prevention Program ("CLPPP"), Marilou Yingling; (4) Respondent's Former Agent, Michael Fabie, Target Investment Realty; and (5) Respondent's Former Power of Attorney, Teresa McKeown. In addition, seventy-six ("76") of Complainant's Exhibits (CX-1 -35; 59[4], 59A-B; 61;

[3] The alleged violations included the Respondent's failure 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); [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); [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); [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); 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).

[4] See Tr.(Vol.I) at 145.

61A-B; 62, 62A-C; 63, 63A-B, F-N, U, EE[5] and FF; 64-H[6]; 65; 66[7]; 86[8]; 87; 94 107; 111 A - C; 113, 116A and B[9]; 118[10]; 121; 122; and 123), were admitted into the record at the hearing along with 1 Joint Stipulation (Joint Exhibit 1). (See Trial Transcript (Volume III) at 84 - 86).

Although the Respondent did not submit the oral testimony of any witness, the Respondent did offer one exhibit which was also admitted into evidence (RX-1).

On October 10, 2007, the Presiding Officer issued his Initial Decision. The Respondent was found liable for all 69 violations alleged in the Complaint and assessed a civil penalty in the amount of $97,545.00.[11]

On November 13, 2007, the Environmental Appeals Board ("EAB" or "Board") received the Notice of Appeal in which the Respondent requested an extension of time to file his appeal brief, challenged the liability determination for approximately 54 of the 69 counts, and challenged the overall penalty assessed in this matter for all 69 counts. Subsequently, on November 29, 2007, Respondent was granted until January 4, 2008 to file his appeal brief. By motion dated January 15, 2008, Complainant filed for an extension of time to file its response. By Order dated January 17, 2008, the EAB granted Complainant until March 13, 2008 to file its response.

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[5] Only Bates numbers 0593-0601.

[6] Only Bates numbers 0689-0691.

[7] Only Bates numbers 0771, 0772, 0773, 0781, 0782, and 0783.

[8] Only redacted version admitted.

[9] CX 116B only redacted version admitted.

[10] Only Bates numbers 2445 and 2446.

[11] Initial Decision, slip op. at 3 and 33.

V. STANDARD OF REVIEW

Administrative enforcement actions taken by EPA are governed by the Consolidated Rules. 40 C.F.R. Part 22. Pursuant to the Consolidated Rules, any party may appeal an adverse ruling by the Presiding Officer provided that the party files a notice of appeal to the EAB within thirty (30) days of issuance of the initial decision. 40 C.F.R. § 22.30(a). In considering the merits of an appeal "[t]he Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretions contained in the [initial] decision or order being reviewed." 40 C.F.R. § 22.30(f). Although the Board has the authority to review an administrative law judge's factual and legal conclusions on a *de novo* basis, the Board will typically grant deference to an administrative law judge's determinations regarding witness credibility and the judge's factual findings based on such credibility determinations. *In re Donald Cutler*, 11 E.A.D. 622, 630 (EAB 2004); *In re Billy Yee*, 10 E.A.D. 1, 11 (EAB 2001).

In the case at bar, the Respondent has challenged the Presiding Officer's liability determinations for a majority of the counts alleged in the Complaint. In reviewing the Respondent's challenge to the Presiding Officer's liability determinations, this Board should apply the preponderance of the evidence standard established in 40 C.F.R. § 22.24(b), which "means that fact finder should believe that his factual conclusion is more likely than not." *In re The Bullen Companies, Inc.*, 9 E.A.D. 620, 632 (EAB 2001) (citing *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

As with liability determinations, Part 22 "grants the Board *de novo* review over an ALJ's penalty decisions". *In re Environmental Protection Services, Inc.*, TSCA Appeal No. 06-01, slip op. at 115 (EAB February 15, 2008), 13 E.A.D. __; *In re Martex Farms, S.E.*, FIFRA Appeal No.

07-01, slip op. at 40 (EAB February 14, 2008), 13 E.A.D. __. However, in cases such as the case at bar, where the penalty assessed by the Presiding Officer "falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the ALJ has committed an abuse of discretion or clear error in assessing the penalty." *Id* at 116, citing *In re City of Wilkes-Barre*, CAA Appeal No. 06-03, slip op. at 20 (EAB July 11, 2007), 13 E.A.D. __; *In re Morton L. Friedman and Schmitt Construction Company*, 11 E.A.D. 302, 341 (EAB 2004) (quoting *In re Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994), *aff'd* No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005), *aff'd*, No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007).

VI. RESPONSE TO APPELLANT'S ARGUMENTS ON APPEAL

A. The Presiding Officer Considered the Contents of the Respondent's Leases and Lease Attachments and Correctly Found that 30 of Respondent's Lease Transactions Were Not in Compliance with the Lessor Requirements Found at 40 C.F.R. § 745.113(b)(1).

Respondent argues that for odd Counts 1 - 59, each of these "leases with attachments included the required narrative statements." Appellant Brief, at 6. Respondent's arguments are erroneous as: (1) witness testimony and the evidence revealed that the lead warning statement required by 40 C.F.R. § 745.113(b)(1) (hereinafter, "Lessor Lead Warning Statement") was not included in any of these leases; (2) providing lessees with a copy of the federally approved pamphlet, *Protect Your Family From Lead in Your Home*[12], is not a substitute for compliance with the Lessor Lead Warning Statement requirement; and (3) compliance may only be shown by a verbatim recitation of the Lessor Lead Warning Statement. Accordingly, the Presiding Officer's

[12] Respondent was required pursuant to 40 C.F.R. § 745.107(a)(1) to provide each lessees with a copy of this document before the lessee became obligated under the lease. This requirement is not in issue in this case.

finding that Respondent's lease language "was not an equivalency and did not otherwise satisfy the required contents of the [40 C.F.R. § 745.113(b)(1)] statement" should be upheld. Initial Decision, slip op. at 16.

1. Mr. Gallo's Testimony Establishes Conclusively that 30 of Respondent's Lease Agreements Did Not Include the Required 40 C.F.R. § 745.113(b)(1) Lead Warning Statement.

Contrary to the misstatement on page 6 of the Appellant Brief, EPA Lead Compliance Officer Dan Gallo's testimony does not support Respondent's contention "that the Respondent's tenants were provided all core elements of the mandated lead health risk information." In fact, Mr. Gallo testified that although each of Respondent's leases contained a "Lead Paint Notice" the content of such did not meet the requirements of 40 C.F.R. § 745.113(b)(1). (Tr.(Vol.II) at 118-129). Mr. Gallo's testimony went on further to characterize Respondent's Lead Paint Notice as "irresponsible". (Tr.(Vol.II) at 128). Therefore, based upon the evidence entered into the record and as explained in more specific detail below, thirty (30) of Respondent's Lease Agreements failed to meet the requirements of 40 C.F.R. § 745.113(b)(1).

EPA and HUD, after notice and comment, published very specific language to be used in every lease transaction for target housing.[13] This language commonly known as the Lessor Lead Warning Statement is promulgated at 40 C.F.R. §745.113(b)(1). The Lessor Lead Warning Statement was designed to: (1) disclose to prospective tenants that pre-1978 residential properties

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[13] The *Preamble to the Final Disclosure Rule,* states:

> EPA and HUD received a considerable amount of comment regarding the language of the Lead Warning Statement used in the **leasing** disclosure attachment. . . and . . . have developed a modified lead warning statement for leasing transactions that **uses simpler words and syntax than the purchase warning statement required by Title X**.
>
> 61 Fed. Reg. at 9073 (extra emphasis supplied).

may contain lead-based paint, (2) identify the specific exposure pathways for lead-based paint, (3) alert tenants that lead-based paint exposure can be harmful to pregnant women and young children, and (4) provide a summary of the lessor's obligations to the tenant before any obligation to lease pre-1978 housing was finalized. Specifically, the lessor requirements found at 40 C.F.R. § 745.113(b)(1) requires that each contract to lease target housing shall include within the contract or as attachment thereto:

> (1) 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. (Emphasis added.)

(Tr.(Vol.II) at 112 - 113, CX94).

The Presiding Officer held that "whether built into the language of the lease, or made as an attachment to it, the [40 C.F.R.] Section 745.113(b)(1) language quoted above *must* be part of the lease." Initial Decision, slip op. at 9 (emphasis in original). However, as adduced at trial and further admitted by the Respondent, the Respondent failed to include the EPA promulgated Lessor Lead Warning Statement in Lease Transactions #1 - #31. (*Id.*, p.6; Appellant Brief, at 7; Tr.(Vol.II) at 113-114; CX1 - CX31). On the contrary, each of Respondent's leases for Lease Transactions #1 - #31, include the following inferior and substantially different statement:

> **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 **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.**

(CX 1 - 31, see ¶44) (Emphasis added). The plain language of Respondent's "Lead Paint Notice" clearly reveals that such is not the Lessor Lead Warning Statement language that is **required** pursuant to 40 C.F.R. § 745.113(b)(1). Rather, Respondent's Lead Paint Notice Statement "appears to be a **rent at your own risk** statement, [and] totally opposite the intended nature of [the Lessor] [L]ead [W]arning [S]tatement." (Emphasis added). (Tr.(Vol.II) at 129).

In finding that Respondent's Lead Paint Notice did not meet the requirements of 40 C.F.R. § 745.113(b)(1), the Presiding Officer found the Complainant's sentence by sentence comparison of the Lessor Lead Warning Statement with the Respondent's Lead Paint Notice persuasive. Such a comparison fully supports a finding that each of Respondent's leases (Lease Transactions #1 - #31) included a substantially inferior non-compliant Lead Paint Notice statement which fails to disclose: (1) the specific exposure pathways to children from lead-based paint such as paint, paint dust, and paint chips, (2) that lead is especially harmful to young children and pregnant women, (3) the lessor's obligation to disclose lead-based paint and/or lead-based paint hazards to the lessee, and (4) the lessor's obligation to provide lessees with a federally approved pamphlet on lead poisoning prevention. This sentence by sentence comparison shows both language and content differences that shift the burden of disclosure and production from the Respondent as lessor to the lessee, contrary to the fundamental intent of the regulation.

a] Contents of First Sentence of Lessor Lead Warning Statement Absent From Respondent's Lead Paint Notice Statement

The first sentence of the required Lessor Lead Warning Statement states that, "**Housing built before 1978 may contain lead-based paint.**" (CX94). In contrast, the first sentence of the

Respondent's Lead Paint Notice only provides that, "Tenant acknowledges that the leased premises may have been constructed before 1978, and may contain lead-based paint." (Tr.(Vol.II) (Emphasis added.) at 121; CX1-31). Mr. Gallo explained that "there were problems with that statement because it's putting the burden of the disclosure of making the statement on the tenant. . . [w]hen the tenant has no way of knowing before entering into a lease the lead history of the property. (Tr.(Vol.II) at 121-122). Such statements are the responsibility of the owner based upon his first hand knowledge of the property. (Tr.(Vol.II) at 122). The Lessor Lead Warning Statement imposes an affirmative duty on the lessor to make certain disclosures of fact to lessees, *i.e.* that pre-1978 housing may contain lead-based paint. It is not sufficient for the lessor to make the tenant acknowledge possibilities, *i.e.,* the Lead Paint Notice statement that the "leased premises may have been constructed before 1978" and that "the lease premises . . . may contain lead-based paint." Furthermore, unlike the required Lessor Lead Warning Statement, Respondent's Lead Paint Notice does not link the pre-1978 construction date of housing with the possible presence of lead-based paint. After reading the Respondent's Lead Paint Notice, a lessor may not realize that the risk of lead-based paint is greater in pre-1978 housing than in post-1978 housing, and that the construction date of the housing to be leased is important for that reason.

Accordingly, the Presiding Officer properly found that "Respondent's language is not an equivalency because . . . the Respondent's language speaks in terms of the tenant's Acknowledgment, not the lessor's expression." Initial Decision, slip op. at 14.

b] **Contents of Second Sentence of Lessor Lead Warning Statement Absent From Respondent's Lead Paint Notice Statement**

The second sentence of the required Lessor Lead Warning Statement, includes a disclosure to the lessee that, "**[l]ead from paint, paint chips, and dust can pose health hazards if not managed properly.**" (CX94). Again, Mr. Gallo was unable to find this specific statement within Respondent's Lead Paint Notice. (Tr.(Vol.II) at 122). Rather, the Respondent's leases include a modified, and less comprehensive and/or specific, statement that "[i]ngestion of paint particles containing lead may result in lead poisoning which can cause major health problems, especially in children under 7 years of age." (Tr.(Vol.II) at 122-123; CX1 - CX31). Respondent's Lead Paint Notice does **not** contain the essential wording, **"lead from paint, paint chips, and dust"** as is required by 40 C.F.R. § 745.113(b)(1). (CX1 - CX31). Respondent's lease statements are "too general, it's not specific enough", testified Mr. Gallo. (Tr.(Vol.II) at 123). Specifically, Respondent's statement to the tenant "does not indicate to the tenant that there could be special harm from either lead dust . . . lead paint chips or from lead paint." (Tr.(Vol.II) at 124). This type of information is essential and crucial for parents to have in order to better protect themselves and their children. During the trial, Ms. Yingling explained that:

> Sometimes children will pick at the flaking paint, they'll eat it, and also when it's deteriorated and breaking down just from age the dust that is generated from friction surface like window sashes up and down will mix with the general household normal dust, and a child standing at a window with their hands and then sucking their thumb or toys laying under a window with dust and they might chew on a toy, you know, children ingest the lead paint that way.

(Tr.(Vol.I) at 65). In fact, in enacting the RLBPHRA, Congress found that "the ingestion of household **dust containing lead** from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children" and "the health and development of children living

in as many as 3,800,000 American homes is endangered by **chipping or peeling lead paint**, or excessive amounts of **lead-contaminated dust** in their homes" (emphasis added). 42 U.S.C. § 4851(4) and (5).

Further, Respondent's Lead Paint Notice does not inform the lessee that the health hazards posed by lead can occur if **"not managed properly."** (Tr.(Vol.II) at 124). This wording, Mr. Gallo noted "was specifically made a requirement of the [lessor] lead warning statement because [sic] want to put the tenants on notice that there are certain things that need to be done in order to properly manage these pre-1978 properties, especially when they're real old as in this case." (Tr.(Vol.II) at 124-125). Since "lead dust could be created from friction surfaces and it's important that . . . it managed . . . in terms of maintenance, cleaning, keeping children away from certain areas. " (Id. at 124). In fact the Preamble to the Disclosure Rule warns that:

> Dust caused during normal lead-based paint wear (especially around windows and doors) can create a hard-to-see film over surfaces in a house. In some cases **cleaning and renovation** activities **can increase the threat of lead-based paint exposure** by dispersing fine lead dust particles in the air over accessible household surfaces. **If managed improperly**, both adults and children can receive hazardous exposures by inhaling the fine dust or by ingesting paint dust during hand to mouth activities.

61 Fed. Reg. 9066 (CX-94 at EPA1655) (emphasis added). Accordingly, the Presiding Officer held that the "EPA Warning is more explicit . . . [and] For these reasons the second part of the Respondent's Notice is not an equivalency of the [40 C.F.R. § 745.113(b)(2)] regulations language." Initial Decision, slip op. at 15.

c] **Contents of Third Sentence of Lessor Lead Warning Statement Absent From Respondent's Lead Paint Notice Statement**

The third sentence within the required Lessor Lead Warning Statement includes a warning to the lessee that "**Lead exposure is especially harmful to young children and pregnant women.**" (CX94). These two population groups are the same groups targeted by Congress in promulgating a separate lead warning statement for sales transactions. (Tr.(Vol.III) at 70); see also 42 U.S.C. § 4852d(3). Notwithstanding, Respondent's Lead Paint Notice does not mention these targeted population groups. (CX1 -CX31).

In contrast, the third sentence of Respondent's Lead Paint Notice takes this opportunity to warn and/or scare the lessees 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 Tenant." (CX1 - CX31). Such a statement has the potential of placing the "tenant in danger". (Tr.(Vol.II) at 128). "In a lot of instances," Mr. Gallo noted, " it encourages the tenant to do work themselves to correct the lead hazards. They could create a worse problem." (Tr.(Vol.II) at 128). As, the majority of "people . . . not aware of how to correctly handle . . . lead paint, and they could . . . either do dry sanding or scraping, and they could create a real lead hazard in the property if they were [to] follow the instructions in here." (Tr.(Vol.II) at 128). The Presiding Officer found that, "[c]ontrary to the thrust and intent of the EPA Lead Warning Statement, there is no safety-type warning conveyed through this [third] sentence by the Lessor, except to warn a tenant that any lead poisoning they may develop is *their problem*, not the Lessor's." Initial Decision, slip op. at 15 (emphasis in original).

d] Contents of Fourth Sentence of Lessor Lead Warning Statement Absent From Respondent's Lead Paint Notice Statement

The fourth sentence within the required Lessor Lead Warning Statement includes a notification to the lessee that, "**Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling.**" (CX94). However, Respondent's Lead Paint Notice "does not advise a lessee of the lessor's *duty to disclose*. *Id.* See also: (Tr.(Vol.II) at 127; CX1 - CX31). Rather, Respondent's Lead Paint Notice states that "[i]n 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). The Presiding Officer found that "[s]uch an allocation upon the tenant, not the landlord, is clearly not the intent of the [lessor] lead warning statement and by no stretch can such language be characterized as an equivalency." *Id.* At 16.

e] Contents of Fifth Sentence of Lessor Lead Warning Statement Absent From Respondent's Lead Paint Notice Statement

The fifth and final sentence of the required Lessor Lead Warning Statement, includes a notification to the lessee of information that must be provided to him/her, namely that, "**Lessees must also receive a federally approved pamphlet on lead poisoning prevention.**" (CX94). No comparable statement is found within Respondent's Lead Paint Notice. (CX1 - CX31). (Tr.(Vol.II) at 127). Mr. Gallo testified that, "if you look at the lead paint notice in the lease, the tenant would have no way of knowing they're supposed to be receiving this pamphlet." (Tr.(Vol.II) at 127). As such, the Presiding Officer determined that "Respondent's warning does

not advise a lessee . . . of the lessee's *right to receive* the federally approved pamphlet." Initial Decision, slip op. at 15.

After considering the contents of Respondent's Lead Paint Notice and making a sentence by sentence comparison between Respondent's language to the required Lessor Lead Warning Statement, the Presiding Officer held that "Respondent's [Lead Paint] 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." Initial Decision, slip op. at 16. The Presiding Officer went on further to find that such "provisions turn the intent of the [Lessor] Lead Warning Statement on its head and operate to egregiously mislead a tenant about the respective duties between the landlord and the tenant. *Id.*

2. Respondent's Duty to Provide Each Tenant a Copy of the EPA Pamphlet is Not A Substitute for Compliance with 40 C.F.R. §745.113(b)(1).

Respondent argues that he met the requirements promulgated at 40 C.F.R. § 745.113(b)(1) because the EPA lead hazard information pamphlet, *Protect Your Family From Lead in Your Home* (hereinafter "EPA Pamphlet"), was provided to each tenant. (Appellant Brief, at 6). Respondent's argument is without merit as the EPA Pamphlet has never been authorized, by statute, regulation or policy, as a substitute for the requirement to include the regulatory Lessor or Seller Lead Warning Statement in every sale and lease transaction for target housing. In fact, neither EPA nor HUD has ever approved the use of the EPA Pamphlet as a substitute for the Lead Warning Statement requirements of 40 C.F.R. § 745.113(a)(1) or (b)(1).

Respondent misinterprets the context and applicability of the #27 Question and Answer dialogue in 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 ("Interpretive Guidance, Part I"). He argues that both the EPA/HUD response allows the Respondent to substitute the EPA Pamphlet for the Lessor Lead Warning Statement requirement in 40 C.F.R. § 745.113(b)(1). To the contrary, the only purpose of the #27 Q&A is to expand upon the manner in which the owner of target housing may comply with both the seller and lessor requirement to "provide the purchaser or lessee with an EPA approved lead hazard information pamphlet . . . *Protect Your Family From Lead in Your Home* . . ." under 40 C.F.R. § 745.107(a)(1). In Part I of the Interpretive Guidance, under the section "PAMPHLET ISSUES" and the Heading **"Reproduction"** the following complete question and answer is provided:

> 27.Q: Can the pamphlet be provided in an 8 ½ x 14 format as an attachment to the sale or rental contract?
>
> A: EPA has developed and made available an alternative format of the pamphlet on a 8 ½ x 14 inch legal paper to accommodate sellers or lessors who wish to provide the pamphlet as part of the contract. The attachment includes EPA's and HUD's sample disclosure and acknowledge forms [e.g. Lead Disclosure Form]. Provided that the seller or lessor adds the appropriate regional and state contacts in the space provided, **the legal size format may be used as an alternative to the 5 ½ x 8 ½ inch version of the pamphlet**. The public may also revise the included sample disclosure and acknowledgment forms provided that the forms contain all the elements set out in the content requirement in 24 C.F.R. 35.92 and 40 C.F.R. 745.113. These materials may be obtained from the NLIC [National Lead Information Clearinghouse]." (Emphasis added.)

Thus, the question being asked is not whether the EPA Pamphlet, required under 40 C.F.R.

§ 745.113(a)(1),[14] may be used as a substitute for the Lead Warning Statement requirements in both 40 C.F.R. § 745.113(a)(1) and (b)(1), but rather whether the regulated community may attach an 8 ½ x 14 photocopied version of the EPA Pamphlet to the lease/sales contract in lieu of handing out the standard EPA Pamphlet, a 5 ½ x 8 ½ inch blue booklet ("blue booklet"), and still be in compliance with 40 C.F.R. § 745.107(a)(1).[15] EPA/HUD's answer is yes; however, EPA/HUD rather than allowing the regulated community to simply photocopy or reproduce the blue booklet, EPA/HUD created and made available an 8 ½ x 14 inch legal paper version of the pamphlet ("alternative pamphlet") for attachment to each sales/lease contract in lieu of the requirement to provide the actual blue booklet. Further, EPA/HUD's answer goes on to state that the alternative pamphlet will also include EPA/HUD's Lead Disclosure Forms[16], which includes either the 40 C.F.R. § 745.113(a)(1) or (b)(1) Lead Waning Statement. Nowhere in the aforementioned #27 Q&A does EPA or HUD state that a lessor's act of attaching the blue booklet, in which the dissemination of such to lessees is a requirement of both 40 C.F.R. § 745.107(a)(1) and Section 1018 of the RLBPHRA, negates or substitutes the separate and distinct requirements of providing a Lead Warning Statement mandated by 40 C.F.R. § 745.113(a)(1) and (b)(1). The Presiding Officer agreed "that the answer is limited to acceptable size formats for the

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[14] Under both the *Residential Lead-Based Paint Hazard Reduction Act of 1992*, 42 U.S.C. § 4852d, (the "RLBPHRA") and the Disclosure Rule, owners of target housing are obligated to "provide" (*i.e.*, give or hand out) a copy of the EPA Pamphlet (13 page blue booklet measuring 5 ½ x 8 ½) to each lessee and/or purchaser before they become obligated under the sales or lease contract.

[15] Having the ability to attach a photocopied version of the EPA Pamphlet to each document versus handing out the actual blue booklet allows the regulated community to save on purchasing and storage cost that would otherwise be incurred from ordering individual copies of the EPA Pamphlet. In addition, the ability to attach a photocopied version of the EPA Pamphlet to each sales/lease contract would provide a record of compliance with the owner's obligation to provide a copy of the pamphlet, as the photocopied version of the EPA Pamphlet would remain in their records attached to each sales and lease contract.

[16] See CX94 at EPA 1663 - 1664 for copy of sample Lead Disclosure Form.

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)." Initial Decision, slip op., at 12-13.

As explained in the Preamble to the Disclosure Rule, Section 1018 of the RLBPHRA requires:

> (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. Violation of section 1018 may result in civil and criminal penalties and potential triple damages in a private civil suit.

61 Fed.Reg. 9064 (CX94 at EPA 1653) (Emphasis added). As shown above, the plain language of the statute, the RLBPHRA, distinctly requires that the seller provide both the EPA Pamphlet AND a separate Seller Lead Warning Statement to each purchaser of target housing before said purchaser is obligated under any contract to purchase the target housing. Congress clearly intended for these to be two (2) separate seller requirements in which compliance with one does not provide compliance with the other.[17] Accordingly, pursuant to Section 1018 of the RLBPHRA, EPA promulgated these two (2) separate statutory requirements into regulations found at 40 C.F.R. § 745.107(a)(1) (seller must provide copy of EPA Pamphlet to purchaser) and 40 C.F.R. § 745.113(a)(1) (seller must attach Seller Lead Warning Statement). (see 61 Fed.Reg. 9064 at CX94 at EPA1653).

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[17] Mr. Gallo explained that, "the [Lessor] [L]ead [W]arning [S]tatement 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. It was supposed to be short and concise and with a greater probability being read at the time on or before the lease signing or before entering a sale transaction." (Tr.(Vol.III) at 71). As opposed to the EPA Pamphlet whose purpose, Mr. Gallo explained, "was consumer education and it was intended to be taken at the time of the transaction to be taken home by the purchaser or the tenant to be read and referred to. The pamphlet was not intended to be read at the time of the lease or sale transaction." Id.

Likewise, within the RLBPHRA Congress mandated that lessors provide the EPA Pamphlet to each lessee of target housing; however, Congress did not within RLBPHRA include a lead warning statement for lease transactions. Nevertheless, EPA and HUD developed one pursuant to the authority given to them by Congress in Section 1018 of the RLBPHRA. EPA and HUD determined that lessees should be afforded the benefits of a lead warning statement just as purchasers had been given by Congress. EPA promulgated these statutory requirements into the regulations found at 40 C.F.R. § 745.107(a)(1) (lessor must provide a copy of EPA Pamphlet to lessees) and 40 C.F.R. §745.113(b)(1) (lessors must attach Lessor Lead Warning Statement).

In explaining this additional regulatory requirement for lessors, EPA and HUD stated that "[a]lthough not specifically required by section 1018, EPA and HUD believe that this [40 C.F.R. § 745.113(b)(1)] statement provides a useful context for information disclosed to lessees, just as for purchasers, concerning the hazards of lead-based paint." 59 Fed. Reg. 54984. Thus, the Lessor Lead Warning Statement (40 C.F.R. § 745.113(b)(1)), just like the Seller Lead Warning Statement (40 C.F.R. § 745.113(a)(1)), is a separate and distinct requirement from the 40 C.F.R. § 745.107(a)(1) obligation to provide the EPA Pamphlet.

By way of further evidence that providing the EPA Pamphlet to a lessee is not a substitute for including the Lessor Lead Warning Statement either within or as an attachment to the lease, the last sentence of the Lessor Lead Warning Statement states "Lessees must also receive a federally approved pamphlet on lead poisoning prevention." 40 C.F.R. § 745.113(b)(1). Clearly, the Lessor Lead Warning Statement itself directs the lessor to provide a copy of the EPA Pamphlet to the lessee. In addition, Section 113(b) of the Disclosure Rule states under Lessor requirements that:

> each contract to lease target housing shall include, as an attachment or within the contract, the following elements:
> (1) **A Lead Warning Statement** . . .;
> * * * *
> (4) **A statement** by the lessee **affirming receipt** of . . . **the lead hazard information pamphlet** required under 15 U.S.C. 2696.
> * * * *

40 C.F.R. § 745.113(b) (emphasis added). Clearly, EPA contemplated in drafting Section 113(b) of the Disclosure Rule that the EPA Pamphlet would be a separate and distinct regulatory requirement from the Lessor Lead Warning Statement requirement. The Presiding Officer found this argument persuasive and held that "the regulation makes clear that the federally approved pamphlet is an additional, not an alternative requirement." Initial Decision, slip op. at 13. Accordingly, Respondent's consistent failure to include the federally promulgated 40 C.F.R. § 745.113(b)(1) Lessor Lead Warning Statement for Lessors in each of his 34 lease agreements amounts to 34 separate violations of the Lead Disclosure Rule for which penalties may be assessed.

3. Compliance With 40 C.F.R. § 745.113(b)(1) Requires Inclusion of the "Verbatim" Lessor Lead Warning Statement Either Within or Attached to the Lease Agreement.

EPA's witness, Mr. Gallo, testified that in determining compliance, he looks for "a lead warning statement that's verbatim" to the 40 C.F.R. § 745.113(b)(1) Lessor Lead Warning Statement either within or as an attachment to the lease transaction. (Tr.(Vol.II) at 114). Similarly, In re: Harpoon Partnership, TSCA-05-2002-0004, slip op. at 15, (ALJ, May 27, 2004) (Initial Decision); *upheld*, In re Harpoon, 12 E.A.D. 183 (EAB 2005), the Presiding Officer determined that "[t]he most effective and only realistic method of ensuring disclosure is to **incorporate the language of the lessor requirements** in the leasing contract or as an attachment

thereto before the lessee is obligated under the contract." (Emphasis added.) Notwithstanding, in his brief, Respondent argues that his "obligation [was] . . . not to prove he could copy a boilerplate statement [40 C.F.R. § 745.113(b)(1)] from the rule book into a dwelling lease. . . . [and therefore] [i]ndisputably, [he] properly informed his tenants with a warning that was equivalent in its informational content, scope, and candor to the EPA's preferred statement." Appellant Brief, at 7. Respondent is mistaken.

In Section 1018 of the RLBPHRA Congress has expressly required that all sellers of target housing must copy its verbatim "boilerplate statement" and include such as an attachment to each sales contract. See 42 U.S.C. § 4852d.(a)(3). In fact, EPA noted in the preamble to the Disclosure Rule that "while several commenters recommended providing simpler language, EPA and HUD are constrained by the mandate [of Congress] and have retained the [42 U.S.C. § 4852d(a)(3)] statement as proposed [in 40 C.F.R. § 745.113(a)(1)]." 61 Fed.Reg. 9073. Therefore, it is clear that after EPA promulgated 40 C.F.R. § 745.113(a)(1), the Respondent could not successfully argue that he was in compliance with the Disclosure Rule if he failed to provide the verbatim Seller Lead Warning Statement. Under similar principles, it is also clear that after EPA promulgated similar lessor requirements at 40 C.F.R. § 745.113(b)(1), Respondent cannot successfully argue that he was in compliance with the Disclosure Rule when he failed to provide the verbatim Lessor Lead Warning Statement.[18]

[18] In the preamble to the Final Disclosure Rule, it notes that "EPA and HUD received a considerable amount of comments regarding the language of the Lead Warning Statement used in the leasing disclosure attachment. EPA and HUD have developed a modified Lead Warning Statement for leasing transactions that uses simpler words and syntax than the purchase warning statement required by Title X. " 61 Fed. Reg. 9073. (See CX94 at EPA1662.)

Undeniably, the Respondent when acting as a seller is constrained by the statutory mandate to both provide the EPA Pamphlet as well as to include the boilerplate 40 C.F.R. § 745.113(a)(1) language, i.e. Seller Lead Warning Statement, as an attachment to every sales agreement. Likewise, the Respondent while acting as the lessor is likewise constrained by the regulatory mandate to both provide a copy of the EPA Pamphlet and to include the boilerplate 40 C.F.R. § 745.113(b)(1) language, i.e. Lessor Lead Warning Statement, either within or attached to every lease agreement. Thus, the "RLBPHRA and the Disclosure Rule require strict compliance, and 'substantial compliance' will not suffice." In the Matter of Leonard G. Greak, TSCA-03-2000-0016, slip op. at 10 (ALJ, April 6, 2001).

B. The Presiding Officer Considered the Language Contained in 34 of Respondent's Lease Transactions and Correctly Determined that Said Language Was Not in Compliance With the Lessor Requirements Found at 40 C.F.R. § 745.113(b)(2).

1. Each of Respondent's Lease Transactions Failed to Include a Lessor Statement Regarding the Extent of the Respondent's Knowledge of Lead-Based Paint and/or Lead-Based Paint Hazards as Required by 40 C.F.R. § 745.113(b)(2).

None of the lease transactions at issue, Lease Transactions #1- #35,[19] include, either as an attachment thereto or within the lease itself, a lessor statement disclosing whether the Respondent possessed knowledge, lacked knowledge, or additional information available regarding the presence of lead-based paint and/or lead-based paint hazards at any of the 16 Target Housing Properties, as required by 40 C.F.R. § 745.113(b)(2). (Tr.(Vol.II) at 141). Section 745.113(b)(2) of the Disclosure Rule requires that each contract to lease target housing, "shall include, as an attachment or within the contract," the following:

[19] Note, there is no Lease Transaction #27.

> 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 surface**.

40 C.F.R. § 745.113(b)(2) (emphasis added). "[T]his 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." Initial Decision, slip op. at 17. Mr. Gallo testified that these two (2) possible options include "the lessor [having] to indicate knowledge of lead-based paint or indicate no knowledge of lead-based paint." (Tr.(Vol.II) at 141).

Therefore, in order to comply with 40 C.F.R. § 745.113(b)(2), the Respondent was required to include a written lessor statement within or attached to each applicable lease transaction either affirmatively stating that he had personal knowledge of the presence of lead-based paint or lead-based paint hazards or alternatively affirmatively stating that he did not have personal knowledge of the presence of lead-based paint or lead-based paint hazards. Yet, each of Respondent's Lease Transactions #1 through #26 and #28 through #35 failed to include any statement or declaration by the Respondent about the extent of his knowledge. As Mr. Gallo testified,

> "[s]aying nothing is not sufficient because we have no way of knowing then whether there is or is not lead paint in the property according to the landlord's [Respondent's] knowledge. . . . If there's silence on the issue there's an **absence of information to the tenant**, the tenant has no way of knowing whether there is a lead paint history for the property or not. And there could also be – there could be private lead inspections reports, there could have been private tests done by the landlord [Respondent] that would indicate knowledge and that information

> would not be provided to the tenant, in addition to the type of CLPPP information that we discussed for these other [EBL] properties."

(Tr.(Vol.II) at 167-168) (emphasis added).

During the hearing, EPA presented evidence and testimony demonstrating that the Respondent did in fact have knowledge of the presence of lead-based paint and lead-based paint hazards at four of the 16 Target Housing Properties – yet each of these applicable lease transaction included neither a statement by the Respondent affirming his knowledge of lead-based paint and lead-based paint hazards nor any additional information available concerning the known lead-based paint and lead-based paint hazards.[20] There is no evidence in the record as to whether the Respondent had knowledge or lacked knowledge of the presence of known lead-based paint and/or lead-based paint hazards for the remaining 12 Target Housing Properties. The mere fact that EPA was unable to discover any official records or reports documenting the presence of lead-based paint or lead-based paint hazards at these remaining properties does nothing to shed light on the extent of Respondent's personal knowledge concerning these properties. To the contrary, "**Congress recognized** . . . the fact 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**." (emphasis added). 61 Fed. Reg. 9064, 9076.

Respondent's lease transactions includes language that upon the tenant's personal discovery of lead hazards in the housing then the tenant is required "to provide written verification of source lead." (CX1-27, CX 28-35). Arguably, some prior tenants may have in fact provided the Respondent with records or reports regarding the presence of lead-based paint or

[20] As stated supra, Respondent is no longer challenging his liability for these egregious violations which are included in Counts 2, 4, 6, and 10; however, Respondent does contest the assessment of any penalty for these counts.

lead-based paint hazards, thus giving the Respondent knowledge. However, since none of the lease transactions include the requisite lessor statement by the Respondent, neither the tenants, EPA, the Presiding Officer, nor the Board have any way of knowing what if anything the Respondent knew about these properties.

In order to show his compliance with 40 C.F.R. § 745.113(b)(1) for Lease Transactions #1, #2, #3, #5 and #32 - #35, the Disclosure Rule required the Respondent, based on the uncontroverted evidence admitted in CX59, CX59A, CX61, CX61B, CX62, CX62B, CX62B, CX63, CX63B, CX63F, CX63H, CX63I, CX63K, and CX63M to include a lessor statement confirming his personal knowledge of the **"presence of known lead-based paint and lead-based paint hazards"** at each of these target housing properties. In addition, based on this actual knowledge, the Respondent was required to include additional information to each tenant such as the source of his knowledge, location of lead-based paint and/or hazards, and condition of the painted surfaces. None of this additional information was included in any of the lease transactions.

Conversely, if the Respondent did not have personal knowledge of the known presence of lead-based paint or lead-based hazards in the target housing associated with Lease Transaction #4, or Lease Transactions #6 through #31, then the Respondent should have included a statement affirming that he had "**no knowledge of the presence of lead-based paint and/or lead-based paint hazards.**" 40 C.F.R. § 745.113(b)(2). Making one of these two (2) affirmative statements regarding the extent of his knowledge of lead-based paint and/or lead-based paint hazards is "important so that the tenant can make an informed decision about whether to enter into the lease transaction for the property." (Tr.(Vol.II) at 167).

Respondent's failure to include any lessor statement in any of his lease transactions regarding his personal knowledge or lack of knowledge regarding the presence of lead-based paint and/or lead-based paint hazards in such target housing violates the clear requirements of 40 C.F.R. § 745.113(b)(2). Complainant has demonstrated by a preponderance of the evidence that Respondent violated Section 113(b)(2) in connection with all 34 Lease Transactions and is therefore liable for a civil penalty as alleged in even Counts 2 - 60 and Counts 61, 63, 65, and 66.

2. Tenant Acknowledgment Language, Included in Each Lease Transaction, is Insufficient to Show Compliance with the Lessor Requirements Found at 40 C.F.R. § 745.113(b)(2).

As explained *supra*, none of Respondent's lease transactions included the required lessor statement promulgated at 40 C.F.R. § 745.113(b)(2). Nonetheless, Respondent argues that he was in compliance with the lessor requirements because each of his 34 lease transactions included 2 separate tenant acknowledgments.[21] "The Respondent's contentions are without any merit." Initial Decision, slip op. at 18. Simply put, tenant acknowledgments are insufficient to prove that the Respondent complied with his affirmative obligation, as a lessor of target housing, to include a written statement within each lease transaction regarding the extent of his knowledge of known lead-based paint or lead-based paint hazards at his properties.

First, the primary purpose of Section 113(b)(2) is to document in writing that which the lessor knows about his target housing. Yet, the Respondent argues that each boilerplate tenant acknowledgment is "indisputably superior" to the promulgated language found at 40 C.F.R. §

[21] Each lease includes the following tenant statement, "*I [tenant] acknowledge* that I have received notice and been informed of the *possibility of lead based paint* being on the premises located at [property address listed]." In addition, each lease includes the following statement, "By signing on the following line, *I [tenant] acknowledge* that I have received notice and have been informed of the *possibility of lead-based paint* being on the premises." (Emphasis added). (CX1-CX26, CX28-CX31).

745.113(b)(2). Appellant Brief, at 7. The Presiding Officer found that 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." Initial Decision, slip op. at 18. None of the 34 lease transactions at issue in this case include any statement putting the Respondent on record as to the extent of his knowledge regarding lead-based paint and/or lead-based paint hazards at any of the 16 Target Housing Properties. As stated *supra*, the boilerplate Tenant Acknowledgment included in Lease Transactions #1, #2, #3, #5, #32, #33, #34, and #35 did not include any disclosure to those tenants regarding the fact that the Respondent did possess actual, specific, and very detailed knowledge about the presence of known lead-based paint as well as lead-based paint hazards at those properties. Therefore these tenant acknowledgments about the "possibility of lead based paint being on the premises" directly contradict the actual knowledge by the Respondent of the known presence of lead-based paint and/or lead-based paint hazards at these properties. As a result, each of these tenant acknowledgments are inaccurate generic statements drafted into the lease agreement by Respondent's agent – who coincidently, the Respondent supplied with incorrect information. (CX111-A, CX111-B, CX111-C). Therefore, each tenant acknowledgment is an unreliable source of documentation for proving the Respondent's compliance with 40 C.F.R.. § 745.113(b)(2) in regards to any of his 16 Target Housing Properties. (See CX1 -26 and CX28-35).

Second, the fact that each Tenant Acknowledgment implies that there might be some lead-based paint and/or lead-based paint hazards on the premises is problematic for showing the Respondent's compliance with 40 C.F.R. § 745.113(b)(2). As a matter of policy, the Disclosure

Rule does not allow the lessor to speculate, guess, or give unsubstantiated generalizations regarding his property's lead-based paint history. Instead, the purpose of the Disclosure Rule is to require simply that the lessor, Respondent, share his personally acquired information regarding the known lead-based paint history of his target housing to each prospective tenant so that he/she can make an informed decision regarding any potential health-risks before entering into the lease transaction.

Under the rules, if the Respondent did not possess knowledge of the presence of known lead-based paint and/or lead-based paint hazards then he only needed to make such a statement and his disclosure would be complete. However, if the Respondent has actual knowledge – arguably, the declaration of the "possibility of lead-based paint" constitutes some form of knowledge – then the rules required the Respondent to make a lessor statement confirming that knowledge and providing additional information. Under the regulations, the additional information the Respondent was required to provide included: (1) the basis for the determination of the "possibility of lead based paint being on the premises;" (2) the location of this possible lead-based paint; and (3) the condition of the possible lead-based paint surfaces. None of the lease transactions or Tenant Acknowledgments included this additional information as required by 40 C.F.R. § 745.113(b)(2). Therefore any disclosure of the "possibility" of the presence of lead-based paint and/or lead-based paint hazards is insufficient to show compliance with 40 C.F.R. § 745.113(b)(2).

As explained above, each of Respondents Lease Transactions #1 - #26, and Lease Transactions #28 - #35 failed to include the required lessor statement promulgated at 40 C.F.R.

§ 745.113(b)(2). Further, the Tenant Acknowledgment Statement included in those lease transactions are insufficient indicators of the extent of Respondent's knowledge of the presence of lead-based paint and/or lead-based paint hazards at any of his 16 Target Housing Properties. Accordingly, the Complainant has shown by a preponderance of the evidence that Respondent violated 40 C.F.R. § 745.113(b)(2) as alleged in the Complaint and further the Presiding Officer was correct in finding that violations had been established for even numbered Counts 2 - 60 and Counts 61, 63, 65, and 66.

C. The Penalty Assessed by the Presiding Officer Against the Respondent is Reasonable and Appropriate Considering the Facts and Circumstances of this Case and Should be Affirmed.

1. The Penalty was Calculated in Accordance with the ERP and the TSCA Statutory Factors.

Section 22.27(b) of the *Consolidated Rules* provides in pertinent part: ". . . the Presiding Officer shall 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 Presiding Officer shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). Accordingly, the Presiding Officer must consider the TSCA statutory factors as well as the Section 1018 - Disclosure Rule Enforcement Response Policy which is the applicable EPA penalty policy for this matter. Based on the evidence entered in the record and trial testimony from credible witnesses, the Presiding Officer assessed the following penalties against the Respondent:

Section 113(b)(1)	$	36,263.70
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

Combined, these penalties total $97,545, including adjustments as explained below in Section c.ii.

a. Statutory Criteria

Section 1018(b)(5) of the RLBPHRA, 42 U.S.C. § 4852d(b)(5), authorizes the imposition of a civil penalty and makes violations of the Disclosure Rule enforceable under Section 409 of TSCA. Although Section 1018(b)(5) of the RLBPHRA, 42 U.S.C. § 4852d(b)(5), limits the penalty for each discrete Disclosure Rule violation to $10,000, the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410; 101 Stat. 890), as amended by the Debt Collection Act of 1996, (31 U.S.C. § 3701 note; Pub. L. 104-134; 110 Stat. 1321), increases this limit to $11,000 for any violation that occurs after July 28, 1997. 62 Fed. Reg. 35037 (June 27, 1997), 40 C.F.R. Part 19.

In determining the amount of a civil penalty to be assessed for violations of Section 409 of TSCA, "the Administrator shall take into account 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, any history of prior such violations, the degree of culpability, and such other matters as justice may require." 15 U.S.C. § 2615(a)(2)(B). These factors are known as the "TSCA statutory factors."

b. Section 1018 - Disclosure Rule Enforcement Response Policy

The ERP [22] was designed to incorporate the TSCA statutory factors when addressing violations of the Disclosure Rule and to provide procedures to determine the appropriate enforcement response to such violations. (CX113 at EPA2364; Tr.(Vol.II) at 182). "While . . .

[22] Please note, in calculating the assessed penalty, the Presiding Officer relied on the February 2000 version of the ERP; however, the ERP was revised on December 2007. The revised ERP was not used in calculating the assessed penalty.

there is clearly no legal obligation to follow an Agency penalty policy, we [this Board] think there are good reasons to apply a penalty policy whenever possible." *In re M.A. Bruder & Sons*, 10 E.A.D. 598, 613 (EAB 2002). In fact, this Board 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." *Id.*

Pursuant to the ERP, penalties are determined in two stages: 1) determination of a "gravity-based penalty"; and 2) adjustments to the gravity-based penalty.

In determining the gravity-based penalty, EPA must consider the following factors: nature and circumstance of the violation along with the extent of harm that may result from the violation. The "nature" of the violation 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." (CX113 at EPA2364).

The "circumstance" level reflects the probability of harm resulting from a specific type of violation. For example, the more likely the violation is to leave the purchaser or tenant uninformed about the hazards associated with lead-based paint, the greater the likelihood of a child being exposed to lead-based paint hazards. (Tr.(Vol.II) at 186-187, CX113 at EPA2365). Each possible violation of 40 C.F.R. Part 745, Subpart F, is categorized by the ERP as being within one of six circumstance levels, based on the nature and circumstances surrounding the specific type of violation, and reflecting the probability of harm from each type of violation. These levels range from Level 1 to Level 6, with Level 1 being most serious.

The "extent" factor measures the potential for harm that could result from the Disclosure Rule violation. (Tr.(Vol.II) at 188, CX113 at EPA2365). The ERP categorizes the extent of the violation as either major, significant, or minor, through the use of an "Extent Category Matrix." (Tr.(Vol.II) at 189-190, CX113 at EPA2386). The Extent Category Matrix determines the extent level based on the following two measurable facts: 1) the age of any children living in the target housing; and 2) whether a pregnant woman lives in the target housing. (Tr.(Vol.II) at 189-190, CX113 at EPA2366). Violation factors concerning purchasers or tenants with pregnant women or children under the age of 6 are considered "Major" extent violations under the ERP. However, violations involving purchases or leases with children between ages 6 and 17 are classified as "Significant" extent violations while violations concerning occupants who are all at least 18 or older are considered "Minor" extent violations.(Tr.(Vol.II) at 190, CX113 at EPA 2386).

After the circumstance and extent factors are determined they are applied to the "Gravity-Based Penalty Matrix," to determine the gravity-based penalty amount. (Tr.(Vol.II) at 190-191, CX113 at EPA2386). Once the gravity-based penalty has been determined, the ERP allows for adjustments to be made either upwards or downwards based on four specific categories of adjustments factors. Any applicable adjustments are applied to the gravity-based penalty resulting in a proposed penalty which incorporates all of the TSCA statutory factors.

c. Calculation of Proposed Penalty

"[T]he Region has the burden of proof . . . with regard to the *appropriateness* of a penalty and thus, it must show that it has taken into account each of the factors identified in TSCA § 16 in assessing a proposed penalty and that it's proposed penalty is supported by its analysis. . . [T]his does not mean that there is any specific burden of proof with respect to any individual factor;

rather the burden of proof goes to the Region's consideration of all the factors." *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538-539 (EAB 1994). As shown in more detail below, the Presiding Officer "independently reviewed the application of the facts to the ERP and concluded that none of the EPA's allocations represent excesses." Initial Decision, slip op. at 30, n.36.

i] Gravity-Based Penalty

The Presiding Officer determined the "gravity" of the 69 violations at issue by considering the nature and circumstances of each violation along with the extent of harm that could have resulted from the violation. (Tr.(Vol.II) at 185-186, CX113 at EPA2364). The Presiding Officer characterized the "nature" of the 69 violations at issue as being one of hazard assessment. (Tr.(Vol.II) at 186, CX113 at EPA2364). "Major" extent levels were assigned to all counts associated with Lease Transactions #10, #12, #16, #19, and #26 because each of these lease transactions involved children under the age of six residing in the target housing. (CX86, CX123, Tr.(Vol.II) at 212 and 215). "Significant" extent levels were assigned to all counts associated with Lease Transactions #4, #5, and #22 because each of these lease transactions involved children between the ages of 6 and 17 as residing in these target housing units. (CX86, CX123, Tr.(Vol.II) at 208 and 211). "Minor" extent levels were assigned to all counts associated with Lease Transactions #1 - #3, #6 - #9, #11, #13 - #15, #17, #18, #20, #21, #23, - #25, #28 - #35, and the 138 South West Street Sales Transaction because there was no indication that any children resided in those target housing units. (CX86, CX123, Tr.(Vol.II) at 202). The Presiding Officer found that "this was a logical and fair allocation of the 'extent of violation' category." Initial Decision, slip op. at 27.

The specific "circumstance" levels for each of the 69 violations along with each calculated gravity-based penalty are as follows:

[A] Section 113(b)(1) Counts

Respondent's failure to provide the promulgated Lessor Lead Warning Statement to the tenants in Lease Transactions #1 - #31 deprived each of these tenants of information they could have used to better protect themselves and their families. Specifically, the tenants were not warned of the fact that exposure to lead-based paint can be harmful to pregnant woman and young children. Tenants were not informed as to the specific exposure pathways from lead-based paint (i.e. paint, paint chips, and paint dust). In addition, the tenants were not provided a summary of the Respondent's obligations to them before they became obligated under the lease. Accordingly, Respondent's failure to comply with Section 113(b)(1) resulted in each violation being assigned a "Level 2" circumstance violation under the Enforcement Response Policy. Mr. Gallo explained that this designation indicates that the violation "has a high probability of impairing the ability of the tenant to make an informed decision about the information." (Tr.(Vol.II) at 199, see also CX113 at EPA2365 and EPA2383). Based on this Level 2 classification, EPA calculated a gravity-based penalty of $44,000 for all major extent violations alleged in Counts 19, 23, 31, 37, and 51 (or $8,800 per count); $16,500 for all significant extent violations alleged in Counts 7, 9, and 43 (or $5,500 per count); and $29,040 for all minor extent violations alleged in Counts 1, 3, 5, 11, 13, 15, 17, 21, 25, 27, 29, 33, 35, 39, 41, 45, 47, 49, 53, 55, 57, and 59 (or $1,320 per count). (CX86, CX123). In sum, the total gravity-based penalty for all Section 113(b)(1) violations equals $89,540. In subscribing to the above analysis, the Presiding Officer held that "this was

also a logical and fair allocation of the 'circumstance of the violation' category." Initial Decision, slip op. at 28.

[B] Section 113(b)(2) Counts

Respondent's failure to provide an affirmative statement regarding the specific knowledge he had or did not have regarding the presence of lead-based paint and/or lead-based paint hazards at the 16 Target Housing Properties, as well as his failure to provide the required "additional information" for those properties where he had actual knowledge, deprived each tenant in Lease Transactions #1 - #35 of information that they could have used to better protect themselves and their families. [23] This deprivation of information resulted in the exact harm that the Congress was trying to prevent, the **uninformed occupancy** of lead-contaminated housing. Accordingly, Respondent's failure to comply with Section 113(b)(2) results in each violation being assigned a "Level 3" circumstance violation under the Enforcement Response Policy. Mr. Gallo explained that this designation indicates that these violations "have a medium impact on the ability of the lessee to make an informed decision about whether to enter into a lease or not." (Tr.(Vol.II) at 218, see also CX113 at EPA 2365 and EPA2383).

Based on this Level 3 circumstance classifications, EPA calculated a gravity-based penalty of $33,000 for all major extent violations alleged in Counts 20, 24, 32, 38, and 52 (or $6,600 per count); $13,200 for all significant extent violations as alleged in Counts 8,10, and 44 (or $4,400

[23] Note, the Respondent is no longer contesting his liability under 40 C.F.R. § 745.113(b)(2) for lease transactions at 813 South Beaver Street, 333 East College Ave., 904 West Locust Street, and 138 South West Street. EPA's witness, CLPPP Director, Marilou Yingling, testified that each of the aforementioned properties were targeted for lead-based paint inspections which resulted in Violation Letters, Inspection Reports, and associated correspondence being sent to the Respondent (Tr.(Vol.I) at 50, see also CX59, CX59A, CX61, CX61B, CX62, CX62B, CX62B, CX63, CX63B, CX63F, CX63H, CX63I, CX63K, and CX63M). See also, Initial Decision, slip op. at 5-6.

per count); and $17,160 for all minor extent violations as alleged in 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 (or $660 per count). Therefore, the total gravity-based penalty for all Section 113(b)(2) violations equals $63,360. Again, the Presiding Officer "considered this application of the policy and considered it to be a logical and fair allocation of the 'circumstance of the violation' category." Initial Decision, slip op. at 28.

[C] Section 113(b)(6) Counts

Complainant notes that the Respondent is not contesting his liability under 40 C.F.R. § 745.113(b)(6) regarding his failure to ensure that each Lead Disclosure Form attached to Lease Transactions #32, #33, and #35 included the dates of signatures, along with the signatures of the lessor, lessee and agent, certifying to the accuracy of their statements. Respondent's violation of Section 113(b)(6) results in each violation being assigned a "Level 6" circumstance violation under the Enforcement Response Policy. Mr. Gallo explained that this designation indicates these violations "have a small impact on the ability to access the information that's required to be disclosed." (Tr.(Vol.II) at 226, see also CX113 at EPA 2365 and EPA2385). Based on this Level 6 circumstance classifications, EPA calculated a gravity-based penalty of $330 for all minor extent violations alleged in Counts 62, 64, and 67 (or $110 per count). After considering EPA's application of the ERP to these violations, the Presiding Officer opined that "[o]ne can hardly take issue with the reasonableness of these assessments." Initial Decision, slip op. at 28.

[D] Section 107(a)(3) Count

Complainant notes for the record that the Respondent is no longer contesting his liability under 40 C.F.R. § 745.107(a)(3) for untrue statements he made to his agent[24] prior to the listing and sale of 138 South West Street. Respondent's failure to disclose his actual knowledge of lead-based paint and lead-based paint hazards along with the existence of available records and reports such as CX63, CX63B, CX63F, CX63H, CX63I, CX63K, CX63M and CX63FF which pertain to lead-based paint and lead-based paint hazards, deprived his agent of his ability to provide complete, timely, and accurate information to all prospective purchasers interested in the 138 South West Street target housing –described more fully in Count 68 of the Complaint. Respondent's actions put the agent at risk of presenting false information to prospective purchasers and was not only wilful and negligent, but resulted in a complete disregard for the mandate of Congress and EPA. Accordingly, Respondent's failure to comply with Section 107(a)(3) results in a "Level 1" circumstance violation under the Enforcement Response Policy. The Enforcement Response Policy explains that this type of violation "has a high probability of impairing the ability to assess the information required to be disclosed." (CX113 at EPA 2365 and EPA2383). Based on this Level 1 circumstance and major extent classification, EPA

[24]Subsequent to the issuance and receipt of Notice and Violation letters and Lead-based Paint Inspection Reports for 138 South West Street, the Respondent entered into a listing agreement with Target Realty for its sale. (CX63-EE). In this listing agreement, the Respondent incorrectly certified to his agent that he had no knowledge of the presence of lead-based paint or lead-based paint hazards and that he did not have any records or reports pertaining to lead-based paint or lead-based paint hazards at the 138 South West Street property. (CX63FF). Evidence admitted at trial and testified to by Ms. Yingling showed that her office had sent and that Respondent had received at least 7 correspondences between 1995 - 1999 regarding the presence of lead-based paint and lead-based paint hazards at this property as well as notice that children with elevated blood levels had been residing at this property (CX63, CX63B, CX63F, CX63H, CX63I, CX63K, and CX63M).

calculated a gravity-based penalty of $2,200 as alleged in Count 68. The Presiding Officer agreed with "these penalty allocations." Initial Decision, slip op. at 28.

[E] Section 107(a)(4) Count

Complainant notes for the record that the Respondent is no longer contesting his liability under 40 C.F.R. § 745.107(a)(4) for untrue statements he submitted to the purchaser[25] of 138 South West Street regarding that property's lead-based paint history. Respondent failed to provide the purchaser of 138 South West Street with available records and reports (i.e. CX63, CX63B, CX63F, CX63H, CX63I, CX63K, and CX63M) regarding lead-based paint and lead-based paint hazards in the property being sold – described more fully in Count 69 of Complaint. Further, Respondent's presentation of false and inaccurate information in the Seller's Disclosure Statement (CX63FF) regarding the lead-based paint history of 138 South West Street deprived the purchaser of access to and knowledge of specific lead-based paint and lead-based paint hazard information with which she could have used to make an informed decision before making an offer on the property. In addition, Respondent's presentation of false and inaccurate information to the purchaser deprived the purchaser of the opportunity to amend or lower her offer, based on the lead-based paint information, before she became obligated under the sales contract. Accordingly, Respondent's failure to comply with Section 107(a)(4) results in a "Level 1" circumstance violation under the Enforcement Response Policy. The ERP explains that this type of violation "has a high probability of impairing the ability to assess the information required to be disclosed." (CX113 at EPA 2365 and EPA2383). Based on this Level 1 circumstance and major extent

[25] Likewise, in his Seller's Disclosure Statement, the Respondent wrongly and inaccurately certified to the purchaser of 138 South West Street that he had no knowledge of the presence of lead-based paint or lead-based paint hazards nor any records or reports pertaining to lead-based paint or lead-based paint hazards (CX63-FF).

classification, EPA calculated a gravity-based penalty of $2,200 for the violation alleged in Count 69. Again, after considering the individualized facts of this case, the Presiding Officer agreed with "these penalty allocations." Initial Decision, slip op. at 28.

In his Initial Decision, the Presiding Officer stated that "the Court finds no reason to depart from the ERP with regard to its gravity-based penalty calculation methodology." *Id.* at p. 38. Rather, "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." *Id.* Accordingly, the Presiding Officer found that "for the 69 counts, the gravity-based penalty calculation of $157,630 was appropriate." *Id.*

ii] Adjustment Factors

Once the gravity-based penalty is calculated, the ERP requires EPA to consider whether any upward or downward adjustments are appropriate. The adjustment factors that EPA is required to consider include: 1) ability to pay/ability to continue in business; 2) history of prior violations; 3) degree of culpability; and 4) such other factors as justice may require. (CX113, Tr.(Vol.II) at 192). Mr. Gallo testified that he considered each of the factors which respect to the Respondent and determined as follows:

[A] <u>Ability-to Pay/Continue in Business</u>

Although Mr. Gallo was prepared to testify that EPA considered the ability-to-pay/continue in business factor, Counsel for Respondent stipulated that EPA considered this factor. (Tr.(Vol.II) at 192); see also Initial Decision, slip op. at 27. Accordingly, there was no issue concerning the Respondent's ability to pay the proposed penalty or continue in business if the Presiding Officer were to assess the full penalty proposed by EPA.

[B] History of Prior Such Violations

Under this factor, Respondents with a history of prior Disclosure Rule violations are subject to a 25% penalty increase. Mr. Gallo testified that although four of the Respondent's properties have a history of lead-based paint notices from the CLPPP regarding violation of city ordinances, the Respondent did not have a history of prior enforcement action by EPA and therefore no upwards adjustments were made. (Tr.(Vol.II) at 193-194). The Presiding Officer agreed with this assessment. Initial Decision, slip op. at 27.

[C] Degree of Culpability

Under this factor, EPA may adjust the gravity-based penalty up to 25% depending on whether the violator had prior knowledge of the Disclosure Rule and the violator's degree of control over the violative condition. Mr. Gallo testified, "[b]ased on the information that we had in our possession the Respondent had knowledge of the disclosure rule at the time of the violations in the complaint. So based on that . . . we could have made an upward adjustment of 25 percent to the calculated penalty."[26] (Tr.(Vol.II) at 194). However, Mr. Gallo noted that, "EPA did consider adjusting the penalty upwards, but we felt the penalty amount that [was] calculated was appropriate without making the adjustment." (Id.). Mr. Gallo fully explained on cross-examination, that under the adjustment factor for "culpability" his notation of "Not applicable" in CX86 did not mean that the Respondent was not culpable, but rather "meant that we did not

[26] As discussed previously, Respondent received notices from CLPPP regarding lead-based paint hazards at four of his properties. In at least 2 of these notices, dating back to 1999, the CLPPP notified the Respondent of his duty to comply with the Disclosure Rule and disclose lead-based paint records and reports to purchasers and tenants. (CX62A, CX63).

apply the upward adjustment. . ., so we say 'not applicable'." (Tr.(Vol.III) at 52).[27] Based on the facts of this case and applying such to this factor, the Presiding Officer noted that "[t]hough the Court could justify an increase [allowable under the ERP], it will not disturb this determination" by EPA not to apply the 25% increase. Initial Decision, slip op. at 29.

[D] Other Factors as Justice May Require

This factor includes 8-subcategories which must also be considered before assessing a final penalty. These sub-categories include: (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, (8) economic benefit of noncompliance. Mr. Gallo testified that although each of these factors were considered in calculating the proposed penalty he determined that only one of these adjustment factors was relevant to the proposed penalty. (Tr.(Vol.) at 195; see also CX86). Mr. Gallo testified, "the attitude factor was the only factor that was applicable to the complaint." (Tr.(Vol.II) at 195). The "attitude factor" consists of 3 components: cooperation, immediate steps to come into compliance, and early settlement. (CX113 at EPA 2371). Mr. Gallo explained that under this factor, "EPA gave a 10 percent reduction in the penalty due to the cooperation of the Respondent." (Tr.(Vol.II) at 196; CX86). However, the remaining components did not apply and no further reductions were applied. (Id.). "In the Court's view, EPA could have taken a less

[27] This same notation, "not applicable" is provided under each of the four adjustment factors in which Mr. Gallo determined that no adjustment to the gravity-based penalty should be made. (CX86 at EPA 1070-1071). In fact, the only instance in which Mr. Gallo does not use the "not applicable" notation in CX 86 is under the category for "other factors as justice may require - attitude - cooperation of Respondent." Id. In that instance, Mr. Gallo proposed a 10% reduction to the gravity-based penalty. Id.

generous view of the Respondent's cooperation, but nevertheless, it accepts EPA's calculation in this regard." Initial Decision, slip op. at 29.

Additionally, using its enforcement discretion, EPA reduced the gravity-based penalty for all Section 113(b)(1) counts by $49,247. Mr. Gallo testified that, "[b]ased on the information provided in the lease transactions, the majority of the lease transactions that had the so-called lead paint notice, EPA looked at the language in there and determined that there was some attempt to provide lead based paint information to the tenants in those transactions. So based on that we made a 55 percent reduction in the 113-B-1 penalty." (Tr.(Vol.II) at 233). Upon considering the facts of this case and the egregious violations by the Respondent, the "Court could easily have taken a dimmer view of this very significant downward adjustment, [however] it elects to leave this determination unchanged." Initial Decision, slip op. at 30.

During each of these thirty-four lease transaction for which penalties have been assessed families, including those with children, were uninformed of potential lead-based paint hazards in the "target housing" being leased. In addition, Respondent's failure to provide documents regarding the known presence of lead-based paint and lead-based paint hazards to his agents, tenants, and purchaser "evinces a 'negligent, if not willful disregard' of TSCA requirements." See *Ronald H. Hunt et al.*, 12 E.A.D. __ (EAB August 17, 2006), slip op. at 46. (Under similar facts, the EAB upheld the ALJ's determination that failure to make the proper disclosures of known lead-based paint contamination evinces a "negligent, if not willful disregard" of TSCA requirements.). Accordingly, based on the evidence admitted into the record and in accordance with the TSCA statutory factors the Presiding Officer assessed a $97,545 penalty against the

Respondent, noting that "EPA could well have made stricter, fully supportable, determinations." *Id.*

2. The Presiding Officer Considered the TSCA Section 16 Penalty Factor Involving Degree of Culpability and Correctly Determined That a Downward Penalty Adjustment Was Not Warranted.

Respondent argues that the penalty should be mitigated due to the "absence of any meaningful evaluation of the culpability factor." Appellant Brief, at 12. According to the ERP, "the two principal criteria for assessing culpability are: (a) the violator's knowledge of the Disclosure Rule, and (b) the degree of the violator's control over the violative condition." [28] *ERP*, at 15. The Presiding Officer held that "[g]iven these two criteria and the facts that apply to them, the Court cannot accept Respondent's claim that the penalty should be reduced on an absence of culpability." Initial Decision, slip op. at 33. The argument below will show that the Respondent's actions and/or inaction qualifies him as a culpable party based on his failure to ensure that each of his lease transactions, as well as the one sales transaction, complied with the Disclosure Rule.

First, in determining the Respondent's personal culpability, the Presiding Officer considered whether the Respondent had knowledge of his obligations under the Disclosure Rule. In making this determination, the Presiding Officer considered the effective date of the Disclosure Rule, 1996, along with disclosure language included in lead notices the Respondent had received from CLPPP. Ms. Yingling testified that on July 9, 1999 the Respondent was sent, via certified mail, a Violation Letter explaining that a lead-poisoned child resided at one of the Respondent's

[28] As explained *supra,* at Section E.3.b.iii, Complainant considered this factor and used its enforcement discretion not to apply the 25% upward adjustment recommended by the ERP.

properties. (Tr(Vol I) at 118- 122). Included within this Violation Letter was the following admonition/warning:

> "The federal Residential Lead-Based Paint Hazard reduction Act, 42 U.S.C. 4852d, requires sellers and landlords of most residential housing built before 1978 to disclose all available records and reports concerning lead-based paint and/or lead-based paint hazards, including the test results contained in this notice, to purchasers and tenants at the time of sale or lease or upon lease renewal. This disclosure must occur even if hazard reduction or abatement has been completed. Failure to disclose these test results is a violation of the U.S. Department of Housing and Urban Development and the U.S. Environmental Protection Agency regulations at 24 CFR Part 35 and 40 CFR Part 745 and can result in a fine of $11,000 per violation. To find out more information about your obligations under federal lead-based paint requirements, call 1-800-424-LEAD."

CX63 (emphasis in original). As evinced by the above statement, the Respondent had actual knowledge of the applicable regulations as early as 1999. Further evidence of the Respondent's knowledge of the Disclosure Rule requirements can be shown by property managements agreements the Respondent executed with his agents. Each of these agreements included a "Lead Paint Clause" in which the Respondent was required to provide his initials and signature attesting to the lead-based paint history of that particular property. These agreements were signed in 2000. (CX111A-C). Notably, each of the 34 leases for which a penalty was assessed pertain to leases and/or sales contracts for the years 2001 through 2005, two (2) years or more after Respondent's documented receipt of notice of the federal requirements. As a result, under the first prong of the culpability analysis, the Presiding Officer correctly determined that the Respondent "cannot argue that he was unaware of regulations governing lead-based paint." Initial Decision, slip op. at 33.

Secondly, in determining the Respondent's personal culpability, the Presiding Officer considered the degree of control that Respondent exercised over the violative condition. Respondent argues that he should not be found culpable because his agent, "had direct control

over the . . . disclosure." Appellant's Brief, at 11. The mere fact that the Respondent contracted with real estate agents in each sale and lease transaction does not automatically negate his liability and/or culpability for Disclosure Rule violations. At best, such actions merely place the Respondent in the category of "passive owner."[29] The EAB has explained that:

> Permitting an owner to transfer its reporting obligations to an agent would largely defeat the purpose of the statute. Because the statute requires disclosure of known hazards, [see 42 U.S.C. §4851b(a)(1)(B)] allowing a knowledgeable owner to transfer its responsibilities to a less knowledgeable agent could allow informed owners to avoid disclosure altogether, thereby undermining the purpose of the statute, and denying purchasers and lessees the very protection that Congress intended the statute to provide.

In re Harpoon Partnership, 12 E.A.D. 182, 194-195 (EAB 2005).

In the case at bar, the Respondent avoided his disclosure obligations over a period of at least thirty-four leases, five of which related to housing occupied by children between the ages of 1 and 5 and three of which related to housing occupied by children between the ages of 6 and 16, by his failure to provide lead-based paint information to agents acting on his behalf. The Presiding Officer was correct in not granting any penalty reduction to Respondent simply because Respondent purported to delegate his statutory responsibilities to an agent – especially one whom he repeatedly provided with incorrect information regarding his level of knowledge of lead-based paint and lead-based paint hazards records and reports. (CX 111-A, 111-B, 111-C). Conversely,

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[29] . The "passive owner" defense was specifically disavowed in the landmark disclosure rule case, *In the Matter of: Harpoon Partnership*, 2003 EPA ALJ Lexis 52 (August 4, 2003). In *Harpoon*, the Respondent owner argued that he was not liable for the alleged disclosure rule violations because he had contracted away his obligations to a realty management company and therefore, was not a lessor under the Disclosure Rule. The ALJ rejected this argument, holding instead that "[a]lthough the [Lead Disclosure] regulations do not explicitly preclude a lessor from contracting away his/her lead disclosure requirements, doing so is not authorized by and is inconsistent with the Lead-Based Paint Act and its regulations." *Harpoon Partnership*, 2003 EPA ALJ Lexis at *38.

substantial penalties are needed to discourage passive owners such as the Respondent from attempting to delegate their responsibilities and obligations under the Disclosure Rule to others without any obligation to provide truthful and accurate information.[30]

The uncontroverted evidence shows that the Respondent took no steps to ensure that his agents were aware of the presence of lead-based paint or lead-based paint hazards at any of his properties. On the contrary, evidence in record, such as property management agreements and seller's disclosure statements, show Respondent's disclosure of erroneous information to his agent and potential purchasers. (CX111-A, CX111-B, CX111-C, and CX63-FF). "In a situation where the landlord is actually aware that the premises contain lead-based paint, the failure to warn of that specific danger appears to be a much more egregious violation . . ." *In re Billy Yee*, 10 E.A.D. 1 (EAB 2001). Allowing this Respondent to mitigate the proposed penalty because he purported to delegate or contract away his responsibilities under the Disclosure Rule provides no assurance that accurate disclosures will be made, if made at all. In the case at bar, the evidence clearly shows that inaccurate disclosures were made.[31] In fact, allowing penalty mitigation could encourage more lessors to hide behind the cloak of passive ownership knowing that they would receive a

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[30] In contrast, the ALJ in *Harpoon*, decided to depart from the penalty policy and apply a penalty reduction under the culpability factor. The facts of this case, however, are VASTLY distinguishable from those in *Harpoon*. Most importantly, the ALJ noted that her decision to depart from the policy was based on her finding credible the owner's testimony that he took the following steps to ensure compliance with the Disclosure Rule: (1) that he provided lead-based paint information to his agents, (2) that he periodically inquired whether the disclosures were being made, and (3) that his agent assured him, albeit incorrectly, that the appropriate disclosures were being made. *Harpoon*, Initial Decision, slip op. at 27 - 28. Clearly, such is not the case at bar.

[31] During the 2½ day hearing, the Respondent had the opportunity to take the stand and offer testimony to repair his credibility, including, but not limited to explaining why he failed to provide accurate information to his agents, why he incorrectly certified that he had no knowledge of the presence of known lead-based paint as well as lead-based paint hazards in certain target housing, why he failed to provide the required records and reports to his agents, and to explain the extent of his personal knowledge of lead-based paint and/or lead-based paint hazards at any of the target housing. Respondent did not take the stand. Respondent also had the opportunity to call witnesses on his behalf to rebut any of the Complainant's evidence and witness testimony. Again, Respondent did not do so.

"discount" or "reduction" for Disclosure Rule violations. The Presiding Officer determined that the "Respondent certainly had the ability to act and correct identified hazards." Initial Decision, slip op. at 33. In sum, the Complainant and the Presiding Officer considered the Respondent's personal culpability and determined that he had both the requisite knowledge as well as the ability to control the dissemination of the disclosure. Accordingly, the Respondent is not entitled to, nor deserving of, penalty mitigation when he is clearly culpable despite attempting to delegate his responsibilities to his agent.

3. The Presiding Officer Considered the TSCA Section 16 Penalty Factor Involving Compliance History and Correctly Determined That a Downward Penalty Adjustment Was Not Warranted.

Under the ERP, "when a violator has a history of prior such violations of the Disclosure Rule, the penalty should be adjusted upward in accordance with the TSCA penalty policy by a maximum of 25%." *Id.* at 15. As Mr. Gallo explained on direct examination, under this factor EPA would "look to see whether there was any prior penalty, any enforcement action with a penalty that was issued against this Respondent . . . – we'd be looking for a complaint with a penalty in the past." (Tr.(Vol.II) at 193). Since no prior enforcement action had been brought by EPA against this Respondent no upwards adjustment was made to the penalty. The Presiding Officer agreed with this assessment by EPA. Initial Decision, slip op. at 27.

The Respondent should not be rewarded, via penalty mitigation, for his long-standing disregard for the requirements of the Disclosure Rule, just because EPA had failed to take any prior enforcement action against him. The mere fact that EPA had not initiated any prior enforcement action against the Respondent does not mean that the Respondent had a prior history of compliance with the Disclosure Rule. On the contrary, the evidence adduced at trial revealed

that the Respondent has a history of not complying with the Disclosure Rule. Despite the fact that the Respondent received lead-based paint records as far back as 1995, Ms. McKeown testified that during her period of management, 1997 - 2000, she was never provided with any lead-based paint documents by the Respondent.[32] (Tr.(Vol.I) at 171 -172). Further, the evidence showed that Respondent failed to provide lead-based paint documents and reports to a licensed realtor with whom he contracted to sell and/or lease his properties from 2000 to the date of the Complaint. Clearly, the Respondent is not a first-time offender. Rather, the evidence shows a pattern of everyday practice by the Respondent of noncompliance with the Disclosure Rule by intentionally failing to provide lead disclosure information to those acting on his behalf (agents, power of attorney) and those imminently affected by his actions (tenants and purchasers). Accordingly, Respondent should not receive penalty mitigation simply because EPA was slow to discover and act on his years of noncompliance with the Disclosure Rule.

4. The Presiding Officer Considered the TSCA Section 16 Penalty Factor Involving Other Matters as Justice May Require and Correctly Determined That a Downward Penalty Adjustment Was Not Warranted.

As explained supra, the penalty may be further reduced because of "other factors as justice may require," provided the Respondent qualifies for a reduction under one of the 8-subcategories. The Presiding Officer considered each of these subcategories and gave deference to EPA's determination that only the "attitude factor" was applicable in this case. Initial Decision, slip op. at 29. Under this factor, the Presiding Officer applied the 10% reduction to the penalty proposed by EPA noting, however, that "[i]n the Court's view, EPA could well have taken a less generous

[32] Ms. Teresa McKeown testified that she and her husband were granted a limited power of attorney from early 1997 to early 2000 to manage Respondent's target housing properties. (CX66 at EPA0782-0783).

view of the Respondent's cooperation, but nevertheless, it accepts EPA's calculation in this regard." *Id.*

Respondent argues that the penalty should be reduced because the "Complainant intentionally included confidential and privileged settlement negotiation exchanges in its Exhibit 86." Appellant Brief at 20. Respondent's contention of litigation abuses are misplaced. Within the "other matters as justice may require" adjustment factor, Complainant is required to consider the subcategory, supplemental environmental projects ("SEPs"). This subcategory is included on Complainant's penalty calculation worksheet found at CX86. Under this subcategory, EPA's witness included a statement explaining the Respondent's response to the option of performing a SEP. Respondent argues that such a statement should not have been included in the record, as it was made in the course of settlement, and by inclusion of such he is entitled to a reduction in the penalty. As already established, step 2 of calculating any penalty under the Disclosure Rule requires the Complainant to consider whether the Respondent is willing to perform a SEP as an adjustment factor. In consideration of this factor, Complainant made the necessary inquiries to the Respondent regarding his option of performing a SEP and included such findings in its penalty calculation worksheet as proof of consideration under this category. The Presiding Officer, based on Respondent's objection, allowed this notation to be redacted. However, no prejudice was committed against the Respondent by inclusion of this statement. The only way that the Presiding Officer or EPA could grant a penalty reduction under the SEP factor would be for the Respondent to voluntarily agree to perform such. Since the Respondent made no representations during the trial that he was willing and able to perform a SEP the Presiding Officer was correct in not allowing any penalty reduction under this category.

Although not an adjustment factor mentioned in the ERP, the Presiding Officer gave consideration to EPA's 55% partial compliance reduction for all 40 C.F.R. § 745.113(b)(1) counts. This reduction was premised on the fact that some attempt had been made by Respondent to provide a lead warning statement, albeit a deficient one. The 55% partial compliance adjustment reduced the gravity-based penalty by $49,247.00. The Presiding Officer appeared surprise that as "deficient and misleading as the Respondent's lead paint notice was, EPA still elected to make a substantial reduction." *Id.* at pp. 29 - 30. Notwithstanding his own apparent reservations, the Presiding Officer opined that "while the Court could easily have taken a dimmer view of this very significant downward adjustment, it elects to leave this determination unchanged." *Id.*

Again, although not a specific adjustment factor under the ERP, Respondent has argued that the penalty should be reduced on the theory that EPA committed litigation abuses by filing the pre-hearing motion, Motion for Discovery for Respondent John P. Vidiksis or in the alternative, Motion in Limine. The Presiding Officer, after considering the evidence, rejected this claim by the Respondent – as should the Board. A review of the pleadings and other filed pre-hearing documents demonstrate that the Respondent affirmatively placed his inability to pay at issue in this proceeding. The Respondent proclaimed: that his " **ability to pay is limited**, and **must be considered** in assessing a penalty,"[33] that "his business is **financially unable** to remit the Agency's penalty demand **without discontinuing its business operations**"[34]; that he

[33] *Answer of John P. Vidiksis and Kathleen E. Vidiksis*, filed on September 7, 2005.

[34] *Amended Answer of John P. VIDIKSIS*, dated February 17, 2006, at 5th Defense.

"individually is **financially unable** to remit the Agency's penalty demand,"[35] and that he had "**very meager net worth** . . . ."[36] Based on these numerous proclamations in the record, the Complainant spent considerable resources attempting to investigate and substantiate the Respondent's claimed inability-to-pay, including filing the aforementioned motion. The Presiding Officer noted that this issue could have been resolved "by simply filing a stipulation with the Court advising that the ability-to-pay defense had been waived" – no such stipulation was ever filed by the Respondent.

VII. CONCLUSION

It is well established that the Disclosure Rule is not an abatement program. Therefore, it is imperative, if not essential, that each owner of target housing disclose and provide all known information regarding the presence of lead-based paint and/or lead-based paint hazards so that tenants and purchasers can take the appropriate steps to protect themselves and their loved ones from unnecessary exposure to both lead-based paint and lead-based paint hazards. Only by the owner providing full disclosure of his personal level of knowledge regarding the presence of known lead-based paint and lead-based paint hazards in his target housing units can tenants and purchasers make conscientious and informed decision for themselves about whether residing in such housing presents an acceptable level of risk for them and their children. Had the Respondent properly complied with disclosure requirements found at 40 C.F.R. Part 745, the tenants and/or purchaser would have been better equipped to make informed decisions regarding the potential health risks posed by residing in those properties. Although some of these lessees or purchaser

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[35] Id. at 6th Defense.

[36] Id. at Counterclaim and Demand for Judgment of Liability Against EPA #2.

may have considered this an acceptable level of risk, based on economics or other factors, other lessors and/or purchasers may have decided that the risk was too great and chosen to find alternative housing or attempted to negotiate a lower rent or purchase price. In the end, Respondent's failure to comply with the Disclosure Rule deprived each of these 34 tenants and the purchaser of 138 South West Street of the right to choose what levels of lead-based paint and lead-based paint hazards they were willing to live with and thereby expose their children, family, and friends to.

During the Administrative Hearing, the Respondent's credibility and veracity were called into issue. Respondent's own Sales Agent, a 6-year licensed Realtor, testified that not only did the Respondent fail to notify him of the known presence of lead-based paint and lead-based paint hazards at 138 South West Street and fail to provide him with records and reports documenting such knowledge, but also that the Respondent submitted to him a certified Seller's Disclosure Form proclaiming that he had no knowledge of the presence of known lead-based paint and/or lead-based paint hazards. (Tr.(Vol.I) at 204; CX63-FF). Respondent was well aware that the agent would be providing the inaccurate Seller's Disclosure Form to each interested purchaser of 138 South West Street. Interestingly, the Respondent's agent testified that despite the agent's request, the Respondent never submitted a corrected Seller's Disclosure Form disclosing his knowledge of the presence of known lead-based paint and/or hazards at 138 South West Street. (Tr.(Vol.I) at 206 and 220). The Respondent's actions cannot help but be categorized as a willful disregard of the tenant's right to know as well as 40 C.F.R. § 745.107(a)(3) and (4).

Respondent's credibility was further called into issue when EPA's first witness, a 16 ½ year veteran with the City of York - Childhood Lead Poisoning Prevention Program ("CLPPP")

and current director, testified that her office sent the Respondent, via both regular mail and certified mail, return-receipt requested, copies of numerous records and reports regarding the presence of known lead-based paint and the presence of known lead-based paint hazards at four of his target housing properties as well as notice of his continuing obligation to comply with local ordinances and federal disclosure laws in regards to those records and reports. (Tr.(Vol.I) at 86-87, 139-140, 1440146, and 148-149; see also: CX59, CX59-A, CX61, CX61-B. CX62,CX62-A, CX62-B, CX63, CX63-B, CX63-F, CX63-H, CX63-I, CX63-K, CX63-M). Respondent did not present any evidence or witness testimony disputing his receipt of any of the aforementioned certified mailings.[37] Therefore, despite having notice as early as 1999 regarding his obligation to disclose to tenants the required lead-based paint and lead-based paint hazards information, including records and reports, the Respondent failed to make such disclosures.

Notwithstanding, having first-hand knowledge of the presence of known lead-based paint and the availability of actual records and reports documenting such, the Respondent failed to provide any lead-based paint records/reports to his agent whom he contracted with to lease his target housing properties. Further, Respondent wrongly certified in executed property management agreements with his agent that he had no knowledge or any records or reports regarding the presence of lead-based paint and/or lead-based paint hazards at his target housing properties. (CX111-A, CX111-B, CX111-C). Thus, Respondent's history of submitting incorrect and inaccurate information to his agents regarding his personal knowledge of known lead-based

[37] See, Federal Deposit Ins. Corp. v. Schaffer, 731 F.2d 1134 (4th Cir. 1984), where service of process was delivered certified mail return-receipt requested to the Defendant's personal residence. The certified mailing was signed by Defendant's mother-in-law, who was residing with the Defendant. Defendant was unsuccessful in trying to overcome the presumption of service by simply saying that his mother-in-law never gave the letter to him. The Fourth Circuit held that the simple denial of receipt, absent at least an affidavit from someone in the household as to what happened to the certified mailing, is insufficient to overcome the presumption..

paint and lead-based paint hazards makes it impossible to infer whether he did or did not have knowledge at the remaining target housing properties. Therefore, it was crucial for each individual lease transaction not to include a generic tenant acknowledgment, but one of the two affirmative statements provided in 40 C.F.R. § 745.113(b)(2).

Rather than include within, or attach to, each lease transaction the Lessor Lead Warning Statement promulgated at 40 C.F.R. § 745.113(b)(1), the Respondent substituted a much inferior Lead Paint Notice in each of Lease Transactions 1-26 and 28-35. Respondent's Lead Paint Notice is not equivalent to the Lessor Lead Warning Statement and the contents of Respondent's Notice undermines the purposes and goals of RLBPHRA and the Disclosure Rule. Allowing the Respondent to substitute his self-serving Lead Paint Notice for the Lessor Lead Warning Statement would possibly open the floodgates of needless litigation as every owner of target housing would argue that statements in his lease were superior to those promulgated by EPA and HUD. One of the purposes of enacting RLBPHRA was to delegate responsibility for the "develop[ment of] a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing . . ."[38] to both EPA and HUD not to give Respondents a license to develop their own set of rules.

In sum, in 1992 Congress enacted a law giving EPA and HUD joint authority to promulgate regulations for the disclosure and dissemination of lead-based paint hazard information to tenants and purchasers of target housing. In 1996, under this express Congressional directive, EPA promulgated regulations at 40 C.F.R. Part 745, explaining the specific disclosure requirements for all sellers and lessors of target housing to follow in regards to

[38] 42 U.S.C. § 4851a.(1).

the lease or sale of target housing property.[39] Pursuant to these regulations, on August 5, 2005, Complainant filed a Complaint alleging that the Respondent had committed 69 violations under the Lead Disclosure Rule. Evidence admitted during the course of the September 25-27, 2006 Administrative Hearing along with witness testimony – which the Presiding Officer found to be credible – proved by a preponderance of the evidence that the Respondent had failed to comply with the 40 C.F.R. Part 745 regulations in at least 69 instances. As a result, on October 10, 2007 the Presiding Officer issued a decision finding the Respondent liable for all 69 counts alleged in the Complaint and assessed a penalty of $97,545. Although the Respondent appealed the Initial Decision, nothing in his brief supports any conclusion that the Presiding Officer committed an abuse of discretion or clear error in assessing or calculating the penalty. In fact, the assessed penalty falls well with the range of penalties allowed under the ERP and is considerably lower than the statutory maximum for each violation. Therefore, we ask this Board to uphold the Presiding Officer's decision on liability for all 69 counts and that a civil penalty of at least $97,545.00 be affirmed.[40]

Date: 3/12/08

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[39] HUD's identical regulations are promulgated at 24 C.F.R. Part 35.

[40] "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." Initial Decision, slip op. at 31.

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

In the Matter of:	:	
	:	
JOHN P. VIDIKSIS	:	
	:	**Appeal No.: TSCA 07-02**
Docket No.: TSCA-03-2005-0266	:	
	:	

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the date provided below, I served the Environmental Protection Agency, Region III's Appellee Response Brief in the above-captioned matter on the following persons in the manner set forth below:

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