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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

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ENVIR. APPEALS BOARD

IN THE MATTER OF:)
)
ARMBRUST REALTY RENTALS)
OMAHA, NEBRASKA)
)
Respondent)

Docket No. TSCA-07-2008-0022

INITIAL DECISION AND DEFAULT ORDER

Background and Procedural Status

This proceeding was commenced by the Chief of the Toxics and Pesticides Branch, Water, Wetlands, and Pesticides Division, United States Environmental Protection Agency, Region 7 ("Complainant") by filing a Complaint and Notice of Opportunity for Hearing on August 1, 2008, against Respondent, Armbrust Realty Rentals, alleging two counts of violation section 409 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2689, for failure to comply with certain regulatory requirements in 40 C.F.R. Part 745, Subpart F (40 C.F.R. §§ 745.100-745.119 – sometimes referenced herein as the "Disclosure Rule") promulgated under section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §4852d. The complaint proposed a penalty, pursuant to section 16(a) of TSCA, 15 U.S.C. § 2615(a), of Twenty Two Thousand Dollars (\$22,000). The complaint was filed pursuant to the Consolidated Rules of Practice, 40 CFR Part 22.

On or about August 6, 2008, service of the complaint was made on the Respondent by delivery by certified mail, return receipt requested, to Respondent's authorized representative, Herbert Armbrust. See Return Receipt. The complaint stated that Respondent was required to file a written response to the complaint within thirty days of "receipt" of the complaint.¹ The complaint advised Respondent that failure to respond within thirty days could result in a finding of default against Respondent and assessment of the civil penalty proposed in the complaint. (Complaint, ¶ 33.) On March 25, 2009, Complainant filed a motion for default order, and supporting documents, requesting assessment of the penalty proposed in the complaint. Pursuant to an order to Complainant to supplement the record, Complainant filed a Supplemental Memorandum in Support of Motion for Default Order ("Supplemental Memorandum") on August 6, 2009.²

Finding of Default

Rule 22.17(a) of the Consolidated Rules of Practice³ provides, in relevant part, that a party may be found in default for failure to timely file an answer to a complaint.⁴

Rule 22.17(c) states:

When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding

¹ Rule 22.15(a) of the Consolidated Rules provides that an answer to a complaint must be filed within 30 days after service of the complaint. The answer in this proceeding was due within 30 days of August 6, 2008.

² A copy of the motion for default order was served by mailing it to Respondent's business address on March 27, 2009, by certified mail, return receipt requested, consistent with Rule 22.5(b)(2). (Exhibit 1 of Complainant's supplemental motion.) Although captioned "Ambrust" Realty Rentals, and returned as unclaimed, the record indicates that the motion was served on, and a copy of the motion was received through subsequent service by, Herbert Armbrust, as authorized representative on behalf of Armbrust Realty Rentals, the entity identified in the complaint as Respondent, on August 5, 2009. (Exhibit 4 of Complainant's supplemental motion.)

³ 40 C.F.R. § 22.17(a). For brevity, references herein to a specified "Rule" are to the corresponding provision in 40 C.F.R. Part 22, without specifying the C.F.R. citation in every instance.

⁴ Pursuant to Rule 22.4(b), the Regional Judicial Officer is the Presiding Officer, in proceedings brought under section 16(a) of TSCA, until the Respondent files an answer to the complaint.

unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice.

Rule 22.16(b) provides that a response to a motion filed in a proceeding must be filed within 15 after service of such motion, unless otherwise provided by the Presiding Officer or Environmental Appeals Board. Rule 22.16(b) also states as follows: "Any party who fails to respond within the designated period waives any objection to the granting of the motion."

To date, Respondent has not filed any response to the complaint or the motion for default order. Based on Respondent's failure to respond to the complaint, and the lack of any information in the record to the contrary, the Respondent is hereby found to be in default.

The following findings of fact and conclusions of law, and determination of civil penalty amount, are based on the complaint, the motion for default order, as supplemented, and other documents of record in this proceeding.

Findings of Fact and Conclusions of Law as to Liability

1. The Complainant is the United States Environmental Protection Agency, Region 7. Complaint, ¶ 3.
2. The Respondent is Armbrust Realty Rentals, Omaha, Nebraska. Complaint, ¶ 4.

The South 82nd Street Lease

3. On or about April 1, 2006, Respondent entered into a contract to lease apartment 3 at 3454 S. 82nd Street, Omaha, Nebraska. Complaint, ¶ 13.

4. During the term of the lease, two children, ages 4 and 6, resided at the property. Complaint, ¶ 14.

5. The property described above was constructed before 1978 and is “target housing” as that term is defined at 40 C.F.R. § 745.103. Complaint, ¶ 10.

6. At the time relevant to this proceeding (on or about April 1, 2006), Respondent was a “lessor” of apartment 3 at 3454 S. 82nd Street, Omaha, Nebraska, as the term “lessor” is defined at 40 C.F.R. § 745.103. Complaint, ¶ 9.

The Marcy Street Lease

7. On or about October 27, 2006, Respondent entered into a contract to lease apartment 4 at 3208 Marcy Street, Omaha, Nebraska. Complaint, ¶ 20.

8. During the term of the lease, one child, age 4, resided at the property. Complaint, ¶ 21.

9. The property described above was constructed before 1978 and is “target housing” as that term is defined at 40 C.F.R. § 745.103. Complaint, ¶ 10.

10. At the time relevant to this proceeding (on or about October 27, 2006), Respondent was the “lessor” of apartment 4 at 3208 Marcy Street, as the term “lessor” is defined at 40 C.F.R. § 745.103. Complaint, ¶ 9.

The Violations

11. 40 C.F.R. § 745.107(a)(1) provides, in relevant part, that, before a lessee is obligated under a contract to lease target housing, the lessor must provide the lessee “with an EPA-approved lead hazard information pamphlet”.

12. 40 C.F.R. § 745.118(e) provides, in relevant part, that failure or refusal to comply with 40 C.F.R. § 745.107 is a violation of section 1018 of the Residential Lead-

Based Paint Hazard Reduction Act (42 U.S.C. § 4852d) and section 409 of TSCA (15 U.S.C. § 2689).

13. With respect to the South 82nd Street property described above, Respondent failed to provide the lessee with an EPA-approved lead hazard information pamphlet before the lessee was obligated under a contract for lease of the property entered into on or about April 1, 2006. Complaint, ¶ 15.

14. With respect to the Marcy Street property described above, Respondent failed to provide the lessee with an EPA-approved lead hazard information pamphlet before the lessee was obligated under a contract for lease of the property entered into on or about October 27, 2006. Complaint, ¶ 22.

15. Respondent's failures to provide EPA-approved lead hazard information pamphlets are violations of section 1018 of the Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. § 4852d) and section 409 of TSCA (15 U.S.C. § 2689).

16. Section 16 of TSCA, 15 U.S.C. § 2615, provides, in relevant part, that a person who violates section 409 of TSCA is liable for civil penalties as provided in section 16.

17. Respondent is liable for civil penalties in accordance with section 16 of TSCA.

Determination of Civil Penalty Amount

Having found that Respondent is liable for civil penalties for two counts of violation of TSCA, as set forth above, I have determined the appropriate civil penalty to be assessed based on the following:

Rule 22.17(c), Consolidated Rules of Practice, 40 C.F.R. § 22.17(c), provides in relevant part that upon issuing a default order, “the relief proposed in the complaint ... shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act”. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and 40 C.F.R. Part 745, subpart F authorize the assessment of a civil penalty under section 16 of TSCA, 15 U.S.C. § 2615, of up to \$11,000 for each violation as adjusted by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. § 19.4, Table 1.⁵ Pursuant to section 16(a)(2)(B) of TSCA, 42 U.S.C. § 2615(a)(2)(B), the following factors must be considered in determining the amount of any penalty assessed under section 16: “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 other such matters as justice may require”. EPA has issued nonbinding guidance for the assessment of penalties for violations of section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, entitled “Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy”, dated December 2007 (the “Penalty Guidance”).⁶ The Penalty Guidance sets forth EPA’s analysis of the statutory factors in TSCA for the assessment of civil penalties, particularly as they apply to violations of the Disclosure Rule. After application of the statutory factors set forth in section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B) to the record in this proceeding, as described in more detail below, and having considered the applicable EPA penalty

⁵ Table 1, as relates to violations of section 1018, authorizes a maximum penalty of \$11,000 per violation for the relevant time frame in this proceeding - after March 15, 2004 through January 12, 2009. The violations found herein occurred in 2006.

⁶ This guidance superseded an earlier guidance dated February 2000. See, Exhibit 5 of Complainant’s Supplemental Memorandum.

guidelines, as required by Rule 22.27(b), I have determined that \$22,000, the penalty proposed in the complaint, is the appropriate civil penalty to be assessed against Respondent in that it is neither clearly inconsistent with the record in this proceeding nor clearly inconsistent with TSCA.

Nature of the Violations

The purpose of the Disclosure Rule, as relates to this proceeding, is to require an owner or lessor of target housing to provide a prospective buyer or lessee with information relating to lead-based paint or lead-based paint hazards before a prospective buyer or lessee is obligated under a contract or lease of the housing, 40 C.F.R. § 745.100, which in turn allows the prospective buyer or lessee to assess the actual or potential presence of such paints or hazards in order to make an informed decision whether to reside in the target housing. Penalty Guidance (Exhibit 5 of Complainant's Supplemental Memorandum) at p. 12. The EPA-approved lead hazard information pamphlet (which, as found in paragraphs 13 and 14 above, Respondent failed to provide in the instances relevant to this proceeding) is critical to the assessment of the potential lead-based paint hazards associated with target housing.⁷

Circumstances

The EPA Penalty Guidance describes the statutory factor relating to circumstances with respect to the violation as the "probability of harm" as relates to the

⁷ The analysis of the appropriate penalty set forth in this Initial Decision considers only the two violations of the requirements of 40 C.F.R. § 745.107(a)(1), discussed above, which are the only violations specifically addressed in the complaint (see, Complaint, ¶ 16 and ¶ 23). Moreover, although Complainant alludes to other infractions by Respondent relating to certain Disclosure Rule prohibitions specified in 40 C.F.R. § 745.113 (Complainant's Supplemental Memorandum at pp. 6-7), and the complaint alludes to violations of 40 C.F.R. § 745.115, relating to obligations of agents (obligations not otherwise addressed in the record), Complainant states that it calculated its proposed penalty based on violations of section 745.107(a) with respect to each of the two properties addressed in the complaint (Complainant's Supplemental Motion at p. 7).

particular type of violation. (Exhibit 5 of Complainant's Supplemental Memorandum at p. 12.) With respect to violations of the Disclosure Rule, the harm results from the impairment of the purchaser's or lessee's ability to assess the hazards regarding health risk when deciding whether to purchase or lease target housing, and the probability of harm increases as the degree of deviation from the regulations increases. Id. In this proceeding, the record shows that Respondent failed to provide EPA-approved lead hazard information pamphlets, and there is no evidence that Respondent provided either of the prospective lessees with any information regarding potential lead-based paint hazards at the target housing. Because of this failure by Respondent, in each transaction, to provide the required pamphlets, the record supports a conclusion that there was a high degree of probability of harm due to impairment of the ability of the lessees to assess the lead-based paint hazards before entering into the leases at the two properties.

Extent of Violation

The Penalty Guidance describes the statutory factor relating to extent in terms of the "degree, range, or scope" of the potential for harm resulting from the violation in light of the Disclosure Rule's purpose, to prevent harm to children as a result of lead poisoning. Id. The Penalty Guidance explains that the key indicators with respect to this factor are the ages of children living in the target housing, and whether a pregnant woman resides in the target housing. Id. at 13. Because of the nature of the harm attributable to lead exposure, that children under the age of six and pregnant women are likely to be adversely affected, the guidance provides that if specific violations of the Disclosure Rule involve individuals in either of these categories, the extent of the violation may be considered as major. In this proceeding, as found in the Findings of Fact above, a child

under the age of six resided at each of the properties where the violations occurred.

Therefore, the record supports a conclusion that the potential for harm/extent is high with respect to these violations.

Gravity of the Violations

The Penalty Guidance analyzes the gravity component of the statutory penalty factors as the “overall seriousness” of the violation taking into account the factors previously discussed, the nature, circumstances, and extent of the violation. The Penalty Guidance contains matrices for calculation of the gravity-based component of the penalty. Penalty Guidance, App. B. In calculating the penalty proposed in the complaint in this proceeding, Complainant utilized the applicable matrix in Appendix B to calculate the gravity component. Supplemental Memorandum at 9. In reference to the gravity based penalty matrix, Complainant calculated the “circumstance” component as “level 1” (high probability of impairment of lessees’ ability to assess risks) and the “extent” component as “major” (based on potential for serious damage to human health due to ages of children in residence), for each violation, which yielded a gravity-based penalty of \$11,000 for each of the two violations, and a total gravity-based penalty of \$22,000. I find that the use of the applicable matrix in in the Penalty Guidance, Appendix B, is appropriate to calculate the gravity-based penalty in this proceeding. I also find that Complainant’s calculation is appropriate, and represents the appropriate gravity-based penalty to be assessed based on the statutory factors regarding the nature, circumstances, extent and gravity of the violations addressed in this proceeding.

Adjustments to Gravity-Based Penalty

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B) provides that, with respect to the violator, the ability to pay, the effect on ability to continue in business, the violator's history of prior such violations, the degree of culpability, and such other matters as justice may require, must be considered in assessing the amount of civil penalty. Complainant addressed each of these factors in its explanation of the calculation of the penalty proposed in the complaint in this proceeding, and did not make any adjustments to the gravity-based penalty based on consideration of these factors.

Supplemental Memorandum at 9-10. I have reviewed the record as it relates to these factors and find that an adjustment to the \$22,000 penalty, based on the statutory factors relating to the violator, is not warranted in this proceeding.

Based on the foregoing, I have determined that the appropriate civil administrative penalty to be assessed in this matter is \$22,000.

ORDER

1. Pursuant to Rule 22.17(a), 40 C.F.R. § 22.17(a), for failure to file an answer to the complaint, as enumerated above, Respondent is hereby found in default.
2. Respondent is hereby found liable for two violations of section 409 of TSCA, 15 U.S.C. § 2689, section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and EPA regulations promulgated thereunder, codified at 40 C.F.R. Part 745, subpart F, and is assessed a civil administrative penalty in the amount of \$22,000.
3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as

set forth below. Payment shall be made by submitting a certified or cashier's check in the amount of the penalties assessed, payable to:

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

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

5. If Respondent fails to pay the penalty within the prescribed period after this order becomes final, as set forth below, interest and penalties may be assessed. See, 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

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

SO ORDERED, this 3rd day of January, 2012.



ROBERT L. PATRICK
Regional Judicial Officer
Region 7

IN THE MATTER OF Armbrust Realty Rentals, Respondent
Docket No. TSCA-07-2008-0022

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Demetra Salisbury
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Mr. Herbert J. Ambrust
Armbrust Realty Rentals
3163 Leavenworth Street
Omaha, Nebraska 68105

Mr. Herbert J. Ambrust
3728 Paddock Road
Omaha, Nebraska 68124

First Class Mail to:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

U.S. Environmental Protection Agency
Assistant Administrator
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Avenue
Washington, DC 20460

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Omaha, Nebraska 68105

Mr. Herbert J. Ambrust
3728 Paddock Road
Omaha, Nebraska 68124

Dated: 1/3/12



Kathy Robinson
Hearing Clerk, Region 7