

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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In the Matter of: )  
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Mardaph II, LLC, Mardaph III, LLC, )  
and Vinnie Wilson, )  
 )  
Respondents. )  
\_\_\_\_\_ )

Docket No. TSCA-05-2008-0019

**COMPLAINANT'S PREHEARING EXCHANGE**

The United States Environmental Protection Agency, Region 5 ("Complainant" or "U.S. EPA"), in accordance with the Order dated October 8, 2009 ("Prehearing Order") and Section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. § 22.19, respectfully submits this prehearing exchange.

**I. WITNESSES**

U.S. EPA plans to call the following individuals to testify as follows:

**A. Estrella Calvo**

Ms. Calvo is an Environmental Scientist with the Lands and Chemicals Division of U.S. EPA in Region 5. Ms. Calvo's duties include serving as an enforcement officer and case developer in the investigation of violations of the regulations promulgated by U.S. EPA at 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 (the "Disclosure Rule") pursuant to Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, at 42 U.S.C. §4851 et seq. Ms.

Calvo is expected to testify about her review of the evidence compiled as a result of U.S. EPA's investigation of Respondents' rental properties, including the March 14, 2007 inspection and documents provided by Respondent Vinnie Wilson. Based on her review, Ms. Calvo will testify as to the factual basis for U.S. EPA's determination that Respondents failed to comply with the Disclosure Rule requirements and are in violation of the Toxic Substances Control Act (TSCA) and its implementing regulations, specifically the Disclosure Rule. She will also testify about how U.S. EPA calculated the penalty proposed in the complaint, applying the statutory penalty factors set forth in Section 16(a) (2) (B) of TSCA, 15 U.S.C. § 2615(a) (2) (B), as explained by U.S. EPA's Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy, dated December 2007, and as set forth in greater detail in Section IV, below. If necessary, Ms. Calvo will testify regarding the delegation of authority pertaining to the Complainant in this matter.

B. William Gomora

Mr. Gomora is a Lead Inspector with the Lands and Chemicals Division of U.S. EPA in Region 5. Mr. Gomora's duties include serving as an inspector in the investigation of lead disclosure violations under the Disclosure Rule. Mr. Gomora is expected to testify regarding the joint initiative by U.S. EPA and the U.S. Department of Housing and Urban Development ("HUD") to enforce compliance with the requirements of Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851. Mr. Gomora is expected to testify as to the results and observations of his inspection on March 14, 2007, regarding target housing offered for rent by the Respondents, including his conversations with Respondent Vinnie Wilson

regarding the Respondents' compliance with the Disclosure Rule and his review of any documents provided by Respondents.

C. Cynthia Mack-Smeltzer

Ms. Smelter is an Accountant with U.S. EPA in Region 5. Ms. Smelter may testify as to her review of documents provided by Respondent Vinnie Wilson, including tax returns, financial statements and other relevant financial information as to the financial status of Respondent Wilson. Ms. Mack-Smeltzer may testify about her assessment of the sufficiency or reliability of the financial information submitted by Respondent and her efforts to analyze the financial status and ability to pay of the Respondents in this case. She may testify about the standard methodology used by professionals in her field to evaluate the financial status and ability to pay of individuals/corporations/partnerships. She may testify about the need in any ability to pay analysis to identify potential sources of funds by conducting an analysis of the annual cash flow that the party is generating and the need to fully and accurately identify the party's expenses and assess whether or not all such expenses are reasonable. Ms. Mack-Smeltzer may testify that analyzing ability to pay also necessarily involves an analysis of the net worth of the individual or party, which entails an accurate and complete identification of all assets and liabilities. She may testify about the need for a comprehensive financial statement that accurately identifies all of the person's assets and liabilities. She may testify about her assessment of the sufficiency or reliability of the financial information submitted by Respondent in her effort to make an ability to pay analysis, identifying any shortfalls in the information provided. Ms. Mack-Smeltzer may also provide her expert opinions and conclusions as to Respondent's financial status and ability

to pay the penalty proposed in the Complaint. Ms. Mack-Smeltzer may also testify in U.S. EPA's rebuttal case in response to testimony and other evidence presented by Respondents. As of the date of this pre-hearing exchange, this review of Respondent Vinnie Wilson's ability to pay is not complete pending the receipt of additional documents from the Respondent. U.S. EPA may supplement Ms. Mack's testimony and its exhibit list in its rebuttal prehearing exchange to address and include any additional documents provided by Respondents. A curriculum vitae or resume will be submitted for Ms. Mack-Smeltzer as soon as it is prepared.

D. Respondents' Witnesses

U.S. EPA reserves the right to call any of Respondents' witnesses in either its case in chief or in its rebuttal case

U.S. EPA reserves the right not to call any of the above-listed witnesses at hearing, particularly Ms. Mack if Respondent fails to provide the additional requested documents. In addition, U.S. EPA reserves the right to expand, or otherwise modify the scope, extent, and areas of testimony of any of these witnesses where appropriate. Such changes may be occasioned by the discovery of new evidence or witnesses, the unavailability of one or more witnesses, prehearing stipulations of fact between the parties, rulings on motions, or any other legitimate purpose.

**II. LIST OF EXHIBITS TO BE INTRODUCED INTO EVIDENCE**

Complainant's Exhibit 1 - March 14, 2007 Inspection report, including Attachments A to H  
Complainant's Exhibit 2 - March 29, 2007 letter to Respondent Vinnie Wilson  
Complainant's Exhibit 3 - April 14, 2008 U.S. EPA Notice of Intent to File Civil Administrative Action letter  
Complainant's Exhibit 4 - May 7, 2008 letter from Respondent Vinnie Wilson to U.S. EPA and

enclosed documents

- Complainant's Exhibit 5 - May 13, 2008 letter from U.S. EPA to Vinnie Wilson
- Complainant's Exhibit 6 - June 5, 2008 letter from U.S. EPA to Vinnie Wilson
- Complainant's Exhibit 7 - Administrative Complaint against Respondent Vinnie Wilson
- Complainant's Exhibit 8 - Hamilton County Auditor Property Report for 2636 Fenton Avenue
- Complainant's Exhibit 9 - Lease for 2636 Fenton Avenue
- Complainant's Exhibit 10 - Hamilton County Auditor Property Report for 1815 Clarion Avenue
- Complainant's Exhibit 11 - Lease for 1815 Clarion Avenue
- Complainant's Exhibit 12 - Hamilton County Auditor Property Report for 4537 Lucerne Avenue
- Complainant's Exhibit 13 - Lease for 4537 Lucerne Avenue
- Complainant's Exhibit 14 - Hamilton County Auditor Property Report for 1530 Kinney Avenue
- Complainant's Exhibit 15 - Lease for 1530 Kinney Avenue
- Complainant's Exhibit 16 - Hamilton County Auditor Property Report for 8750 Venus Lane
- Complainant's Exhibit 17 - Lease for 8750 Venus Lane
- Complainant's Exhibit 18 - Hamilton County Auditor Property Report for 711 Marion Road
- Complainant's Exhibit 19 - Lease for 711 Marion Road
- Complainant's Exhibit 20 - Hamilton County Auditor Property Report for 2605 Fenton Avenue
- Complainant's Exhibit 21 - Lease for 2605 Fenton Avenue
- Complainant's Exhibit 22 - Lease for 2637 Fenton Avenue
- Complainant's Exhibit 23 - Hamilton County Auditor Property Report for 2639 Fenton Avenue
- Complainant's Exhibit 24 - Lease for 2639 Fenton Avenue
- Complainant's Exhibit 25 - Hamilton County Auditor Property Report for 3341 McHenry Avenue
- Complainant's Exhibit 26 - Lease for 3341 McHenry Avenue
- Complainant's Exhibit 27 - Section 1018- Disclosure Rule Enforcement Response and Penalty Policy- December 2007
- Complainant's Exhibit 28 - Penalty Calculation Memo
- Complainant's Exhibit 29 - April 30, 2007 Order by the City of Cincinnati (Attachment E to March 14, 2007 inspection report)
- Complainant's Exhibit 30 - June 23, 2009 letter to Respondent Vinnie Wilson
- Complainant's Exhibit 31 - July 24, 2009 letter to Respondent Vinnie Wilson
- Complainant's Exhibit 32 - October 13, 2009 letter to Respondent Vinnie Wilson
- Complainant's Exhibit 33 - November 3, 2009 letter to Respondent Vinnie Wilson
- Complainant's Exhibit 34 - August 20, 2008 letter from Jeffrey Greenberger, former registered agent for Mardaph II and III to Vinnie Wilson
- Complainant's Exhibit 35 - October 22, 2008 Certificate of Service
- Complainant's Exhibit 36 - Affidavit of Christopher Mizek
- Complainant's Exhibit 37 - Respondent Vinnie Wilson's Tax Returns for 2006, 2007 and 2008. Though the Respondent did not assert a claim of confidentiality, U.S. EPA considers the documents to be Business Confidentiality Asserted (BCA) – Personal Privacy Information.
- Complainant's Exhibit 38 - Respondent Vinnie Wilson's Financial Statement for Individuals. Though the Respondent did not assert a claim of confidentiality, U.S. EPA considers the document to be Business Confidentiality Asserted (BCA) – Personal Privacy

Information.

At this time, Exhibits 37 and 38 are not included with the pre-hearing exchange documents since, as will be noted in more detail in Section IV, U.S. EPA is still awaiting additional information from Respondent to make a determination as to Respondent Vinnie Wilson's ability to pay.

Unless and until U.S. EPA receives such information, U.S. EPA would not rely on these exhibits.

If the additional information is provided in Respondent's pre-hearing exchange, or otherwise sent to U.S. EPA, U.S. EPA will include copies of Exhibits 37 and 38 in its rebuttal pre-hearing exchange.

The Prehearing Order also required that U.S. EPA include documents that supported the allegations of paragraphs 17 to 21, 24 to 31, 33, 42 to 56, 64 to 79, 87 to 102, 110 to 124, 132 to 146 of the Complaint. The supportive documents are as follows:

- Paragraph 17 - Complainant's Exhibits 1, 16 and 18
- Paragraph 18 - Complainant's Exhibits 1, 20, 23 and 25
- Paragraph 19 - Complainant's Exhibits 1, 8, 10, 12 and 14
- Paragraph 20 - Complainant's Exhibits 1, 9, 11, 13, 15, 17, 19, 21, 22, 24 and 26
- Paragraph 21 - Complainant's Exhibits 1, 8, 10, 12, 14, 16, 18, 20, 23 and 25
- Paragraph 24 - Complainant's Exhibit 29
- Paragraph 25 - Complainant's Exhibits 1, 17 and 19
- Paragraph 26 - Complainant's Exhibits 1, 21, 22, 24 and 26
- Paragraph 27 - Complainant's Exhibits 1, 9, 11, 13 and 15
- Paragraph 28 - Complainant's Exhibits 1, 9, 11, 13, 15, 17, 19, 21, 22, 24 and 26
- Paragraph 29 - Complainant's Exhibits 1, 17 and 19
- Paragraph 30 - Complainant's Exhibits 1, 21, 22, 24 and 26
- Paragraph 31 - Complainant's Exhibits 1, 9, 11, 13 and 15
- Paragraph 33 - Complainant's Exhibits 1, 17, 19, 21, 22, 24 and 26
- Paragraph 42 - Complainant's Exhibits 1 and 19
- Paragraph 43 - Complainant's Exhibits 1 and 19
- Paragraph 44 - Complainant's Exhibits 1 and 17
- Paragraph 45 - Complainant's Exhibits 1 and 17
- Paragraph 46 - Complainant's Exhibits 1 and 21
- Paragraph 47 - Complainant's Exhibits 1 and 21

Paragraph 48 - Complainant's Exhibits1 and 22  
Paragraph 49 - Complainant's Exhibits1 and 22  
Paragraph 50 - Complainant's Exhibits1 and 24  
Paragraph 51 - Complainant's Exhibits1 and 24  
Paragraph 52 - Complainant's Exhibits1 and 26  
Paragraph 53 - Complainant's Exhibits1 and 26  
Paragraph 54 - Complainant's Exhibits1 and 11  
Paragraph 55 - Complainant's Exhibits1 and 13  
Paragraph 56 - Complainant's Exhibits1 and 15  
Paragraph 64 - Complainant's Exhibits1 and 19  
Paragraph 65 - Complainant's Exhibits1 and 19  
Paragraph 66 - Complainant's Exhibits1 and 17  
Paragraph 67 - Complainant's Exhibits1 and 17  
Paragraph 68 - Complainant's Exhibits1 and 21  
Paragraph 69 - Complainant's Exhibits1 and 21  
Paragraph 70 - Complainant's Exhibits1 and 22  
Paragraph 71 - Complainant's Exhibits1 and 22  
Paragraph 72 - Complainant's Exhibits1 and 24  
Paragraph 73 - Complainant's Exhibits1 and 24  
Paragraph 74 - Complainant's Exhibits1 and 26  
Paragraph 75 - Complainant's Exhibits1 and 26  
Paragraph 76 - Complainant's Exhibits1 and 11  
Paragraph 77 - Complainant's Exhibits1 and 9  
Paragraph 78 - Complainant's Exhibits1 and 13  
Paragraph 79 - Complainant's Exhibits1 and 15  
Paragraph 87 - Complainant's Exhibits1 and 19  
Paragraph 88 - Complainant's Exhibits1 and 19  
Paragraph 89 - Complainant's Exhibits1 and 17  
Paragraph 90 - Complainant's Exhibits1 and 17  
Paragraph 91 - Complainant's Exhibits1 and 21  
Paragraph 92 - Complainant's Exhibits1 and 21  
Paragraph 93 - Complainant's Exhibits1 and 22  
Paragraph 94 - Complainant's Exhibits1 and 22  
Paragraph 95 - Complainant's Exhibits1 and 24  
Paragraph 96 - Complainant's Exhibits1 and 24  
Paragraph 97 - Complainant's Exhibits1 and 26  
Paragraph 98 - Complainant's Exhibits1 and 26  
Paragraph 99 - Complainant's Exhibits1 and 11  
Paragraph 100 - Complainant's Exhibits1 and 9  
Paragraph 101 - Complainant's Exhibits1 and 13  
Paragraph 102 - Complainant's Exhibits1 and 15  
Paragraph 110 - Complainant's Exhibits1 and 19  
Paragraph 111 - Complainant's Exhibits1 and 19  
Paragraph 112 - Complainant's Exhibits1 and 17

Paragraph 113 - Complainant's Exhibits 1 and 17  
Paragraph 114 - Complainant's Exhibits 1 and 21  
Paragraph 115 - Complainant's Exhibits 1 and 21  
Paragraph 116 - Complainant's Exhibits 1 and 22  
Paragraph 117 - Complainant's Exhibits 1 and 22  
Paragraph 118 - Complainant's Exhibits 1 and 24  
Paragraph 119 - Complainant's Exhibits 1 and 24  
Paragraph 120 - Complainant's Exhibits 1 and 26  
Paragraph 121 - Complainant's Exhibits 1 and 26  
Paragraph 122 - Complainant's Exhibits 1 and 11  
Paragraph 123 - Complainant's Exhibits 1 and 13  
Paragraph 124 - Complainant's Exhibits 1 and 15  
Paragraph 132 - Complainant's Exhibits 1 and 19  
Paragraph 133 - Complainant's Exhibits 1 and 19  
Paragraph 134 - Complainant's Exhibits 1 and 17  
Paragraph 135 - Complainant's Exhibits 1 and 17  
Paragraph 136 - Complainant's Exhibits 1 and 21  
Paragraph 137 - Complainant's Exhibits 1 and 21  
Paragraph 138 - Complainant's Exhibits 1 and 22  
Paragraph 139 - Complainant's Exhibits 1 and 22  
Paragraph 140 - Complainant's Exhibits 1 and 24  
Paragraph 141 - Complainant's Exhibits 1 and 24  
Paragraph 142 - Complainant's Exhibits 1 and 26  
Paragraph 143 - Complainant's Exhibits 1 and 26  
Paragraph 144 - Complainant's Exhibits 1 and 11  
Paragraph 145 - Complainant's Exhibits 1 and 13  
Paragraph 146 - Complainant's Exhibits 1 and 15

#### Judicial Notice

U.S. EPA hereby requests that the Presiding Officer take judicial notice of the following:

1. The Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.*, and its implementing regulations;
2. The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-56, including the legislative history, and its implementing regulations; and
3. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, as amended.



### **III. PLACE AND DURATION OF HEARING**

The Consolidated Rules provide that the hearing shall be held in the county where the respondent resides or conducts the business which the hearing concerns; in the city in which the relevant EPA Regional Office is located; or in Washington DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone. 40 C.F.R. §§ 22.19(d) and 22.21(d). On information and belief, Respondent Vinnie Wilson resides in the Cincinnati area, which is also the location of the target housing that is the subject of this action. In light of the above facts, U.S. EPA believes that Cincinnati, Ohio would be the appropriate place for the hearing and estimates that it would need one day to present its direct case.

### **IV. CALCULATION OF PENALTY**

#### **A. Statutory and Policy Requirements**

In calculating the penalty for Respondent Vinnie Wilson<sup>1</sup>, U.S. EPA looked to Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d(b)(5) (“Section 1018”), which authorizes the imposition of a civil penalty of up to \$10,000 for each violation of a requirement of Section 1018 and its implementing regulations at 40 C.F.R. Part 745, Subpart F (*i.e.*, the Disclosure Rule), under Section 16 of TSCA, 15 U.S.C. § 2615. The Civil Monetary Penalty Inflation Adjustment Act and its implementing regulations increased this maximum penalty amount to \$11,000 per violation for violations that occur after January 30, 1997. 31 U.S.C. § 3701 and 40 C.F.R. Part 19 (2004). U.S. EPA relied on the “Section 1018 -

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<sup>1</sup> Though U.S. EPA calculated a penalty for each Respondent, the total penalty for this matter is \$91,090. Respondent Vinnie Wilson is the president and agent for Respondents Mardaph II and III, and U.S. EPA has no information that these entities have any resources other

Disclosure Rule Enforcement Response Policy,” dated December 2007 (“Penalty Policy”) (Complainant’s Exhibit-27), in its calculation of the proposed penalty in this matter. The Penalty Policy is based on the statutory factors set forth in Section 16(a) (2) (B) of TSCA, 15 U.S.C. § 2615(a) (2) (B).

Under the Penalty Policy, the penalty is determined in two stages: (1) the determination of a “gravity-based penalty” and (2) adjustments to the gravity-based penalty. The gravity-based penalty is calculated by considering: (1) the nature of the violation; (2) the circumstance of the violation; and (3) the extent of harm that may result from the violation. Once the gravity-based penalty has been determined, upward or downward adjustments may be made to the penalty amount by considering other factors, including: (1) ability to pay/continue in business; (2) history of prior violations; (3) degree of culpability; (4) supplemental environmental projects; (5) voluntary disclosure of violations before an inspection, investigation, or tip/complaint; and (6) other factors, which may include, potential for harm due to risk of exposure, litigation risk, and violator’s attitude. See also *In the Matter of Frank J. Davis*, Docket No. TSCA-05-2007-0002, 2008 EPA ALJ Lexis 12 (March 31, 2008).

The Penalty Policy categorizes all Disclosure Rule violations as “hazard assessment” in nature, since the information is vital to purchasers and lessees in weighing the risks in purchasing or leasing target housing. Exhibit 27 at page 11 to 12. This information is particularly vital to purchasers or lessees who are pregnant or have young children, who may be put at risk when residing in target housing.

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than the assets of Respondent Vinnie Wilson.

The “circumstances” of a violation reflect the probability of harm resulting from a particular type of violation. The Penalty Policy categorizes each possible violation of the Disclosure Rule into one of six circumstance levels, based on the nature and circumstances surrounding each type of violation, and reflecting the probability of harm from each. The levels range from Level 1, the most serious, to Level 6, the least serious. *Id.* at 12 and Appendix B at 27 to 29.

The next step in calculating the penalty is the extent of the level of violation. When assessing penalties for violations of the Disclosure Rule, the extent factor is based on 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. *Id.* at 12-13. The Penalty Policy categorizes the extent of a violation as major, significant or minor, through the use of an “Extent Category Matrix.” *Id.* at B at 29. A major violation occurs if there is a child under the age of six or a pregnant woman living at the target housing. *Id.* A significant violation occurs if there is a child between the ages of 6 and 18 years old living at the target housing. *Id.* A minor violation occurs if everyone at the target housing is over 18 years of age. *Id.*

Based on these factors, the Penalty Policy uses a gravity-based penalty matrix to determine the penalty for each violation. *Id.* at 30. The appropriate cell is determined according to the circumstance level and extent category involved.

**B. Application of Statute and Policy to the Facts of this Case**

In applying the penalty policy to this case for the circumstances of the violation, the Penalty Policy established a ranking system for potential violations using six levels. A level 1 or 2 circumstance is for violations that have a high probability of impairing the purchaser’s or

lessee's ability to consider the information required to be disclosed. *Id.* at 12. A level 3 or 4 circumstance is considered to have a medium probability of impairing the purchaser's or lessee's ability. *Id.* A level 5 or 6 circumstance is considered to have a low probability of impairing the purchaser's or lessee's ability. *Id.* Pursuant to Appendix B of the Penalty Policy, a failure to include, as an attachment or within the contract to lease, the required warning statement pursuant to 40 C.F.R. § 745.113(b) (1) is a level 2 circumstance violation. *Id.* at 27. The failure to include a statement by the lessor of the presence of known lead-based paint, or a statement indicating no such knowledge pursuant to 40 C.F.R. § 745.113(b) (2) is a level 3 violation. *Id.* The failure to provide a list of records or reports on the presence of any known lead-based paint or indicate that no such records are available pursuant to 40 C.F.R. Part § 745.113(b)(3) is a level 5 violation. *Id.* at 28. The failure to include a statement by lessee affirming receipt of the lead hazard pamphlet and the information from (b) (2) and (3) pursuant to 40 C.F.R. Part § 745.113(b)(4) is a level 4 violation. *Id.* And lastly, the failure to have the signature of the lessor, agent and lessee certifying the accuracy of the statements pursuant to 40 C.F.R. Part § 745.113(b) (6) is a level 6 violation. *Id.* at 29.

In determining the extent of the violations, according to the lease or rental application, at two properties, 2636 Fenton Avenue and 8750 Venus Drive, there were children under the age of six living in the rental units. See Exhibits 9 and 17. At the Venus Drive address, there was a 1 year old child, a 4 year old child, and a 13 year old child living in the rental unit. See Exhibit 17. At the Fenton Avenue address, there were children ages 3, 8, 13 and 15 years old living in the rental unit. See Exhibit 9. At two properties, 1815 Clarion Avenue and 3341 McHenry Avenue, there were children between the ages of 6 and 18 years old living in the rental unit. See Exhibits

11 and 26. At the Clarion Avenue address, there was a 14 year old child living in the rental unit. See Exhibit 11. At the McHenry Avenue address, there were 2 children living in the rental unit, ages 15 and 16 years old. See Exhibit 26. The remaining properties did not identify any individual under the age of 18 living in the rental unit. See Exhibits 13, 15, 19, 21, 22 and 24. Thus, there were two major, two significant and six minor extent of violations. Using the level and extent of violation and the gravity-based penalty matrix, U.S EPA calculated the following penalty for each count:

For Counts 1 to 9 for *Failure to Provide a Lead Warning Statement as an attachment or within the lease/contract* which is a Circumstance Level 2 Violation, the penalty was as follows:

Count 2

Extent – Major  
Penalty - \$10,320

Counts 6 and 7

Extent – Significant  
Penalty - \$6,450 each  
Total Penalty = \$12,900

Counts 1, 3, 4, 5, 8 and 9

Extent – Minor  
Penalty - \$1,550 each  
Total Penalty - \$9,300

Total Penalty for Counts 1 to 9 is \$32,520.

In calculating this penalty, U.S. EPA did not include the lease for 2636 Fenton Avenue as the attachment to the lease for this unit did have a lead warning statement.

For Counts 10 to 19 for *Failure to Include a Statement by the Lessor as an attachment or within the lease/contract*, which is Circumstance Level 3 violation, the penalty was as follows:

Counts 11 and 17

Extent – Major  
Penalty - \$7,740 each  
Total Penalty- \$15,480

Counts 15 and 16  
Extent – Significant  
Penalty - \$5,160 each  
Total Penalty - \$10,320

Counts 10, 12, 13, 14, 18 and 19  
Extent – Minor  
Penalty - \$770 each  
Total Penalty- \$4,620

Total Penalty for Counts 10 to 19 is \$30,420.

For Counts 20 to 29 for *Failure to Include a List of Records or Reports as an attachment or within the lease/contract*, which is a Circumstance Level 5 violation, the penalty is as follows:

Counts 21 and 27  
Extent – Significant  
Extent – Major  
Penalty - \$2,580 each  
Total Penalty -\$5,160

Counts 25 and 26  
Extent – Significant  
Penalty - \$1,680 each  
Total Penalty - \$3,360

Counts 20, 22, 23, 24, 28 and 29  
Extent – Minor  
Penalty - \$260 each  
Total Penalty- \$1,560

Total Penalty for Counts 20 to 29 is \$10,080.

For Counts 30 to 38 for *Failure to Include an Affirmation Statement by Lessee as an attachment or within the lease/contract*, which is a Circumstance Level 4 violation, the penalty is as follows:

Count 31  
Extent – Major

Penalty - \$5,160

Counts 35 and 36

Extent – Significant

Penalty - \$3,220 each

Total Penalty - \$6,440

Counts 30, 32, 33, 34, 37 and 38

Extent – Minor

Penalty - \$520 each

Total Penalty - \$3,120

Total Penalty for Counts 30 to 38 is \$14,720

In calculating this penalty, U.S. EPA did not include the lease for 2636 Fenton Avenue as the attachment to the lease did include an affirmation statement by lessee for this unit.

For Counts 39 to 47 for *Failure to Include Signatures of the Lessor, Agent, and Lessee as an attachment or within the lease/contract*, which is a Circumstance Level 6 violation, the penalty is as follows:

Count 40

Extent – Major

Penalty - \$1,290

Counts 44 and 45

Extent – Significant

Penalty - \$640 each

Total Penalty- \$1,280

Counts 39, 41, 42, 43, 46 and 47

Extent – Minor

Penalty - \$130 each

Total Penalty - \$780

Total Penalty for Counts 39 to 47 is \$3,350.

In calculating this penalty, U.S. EPA did not include the lease for 2636 Fenton Avenue as the attachment to the lease did include signatures of the lessor, agent, and lessee for this unit.

The total gravity based proposed penalty is \$91,090. See Exhibit 28- Penalty Calculation Memo.

### **C. Adjustments**

After calculating the gravity based penalty U.S. EPA considered the statutory adjustment factors to determine if any modifications to the proposed penalty should be made.

#### **1. Ability to Pay/Continue in Business**

On April 14, 2008, U.S. EPA issued a prefiling notice letter to Respondents informing Respondents that U.S. EPA was prepared to file a civil administrative penalty complaint for alleged violations of the Section 1018 requirements. Complainant's Exhibit 3. The prefiling notice letter also extended an opportunity to Respondents to advise U.S. EPA of any factors that she believed U.S. EPA should consider before filing a complaint. *Id.* The prefiling notice letter specifically asked Respondent to provide financial information if Respondent believed she would have an inability to pay a penalty. *Id.* U.S. EPA received a response on May 7, 2008 from Respondent Vinnie Wilson that did not address an inability to pay. Complainant's Exhibit 4. U.S. EPA received no response to subsequent letters to Respondent. Complainant's Exhibits 5 and 6.

In her May 26, 2009 answer, Respondent Vinnie Wilson included a copy of her 2007 tax return. On June 23, 2009, U.S. EPA wrote to Ms. Wilson and stated that if she wished to raise an inability to pay, U.S. EPA would need her tax returns for three years, 2006, 2007 and 2008, as well as have her complete an enclosed Individual Ability to Pay Claim form. Exhibit 30. In response to a default motion by U.S. EPA, on July 21, 2009, Respondent Vinnie Wilson provided U.S. EPA with her last three tax returns. Exhibit 37. In reviewing this information, U.S. EPA had additional questions and sent Ms. Wilson letters on July 24, 2009 (Exhibit 31), and October 13, 2009 (Exhibit 32) requesting additional information. On October 21, 2009,



Respondent Wilson faxed U.S. EPA her tax returns and a completed Ability to Pay Form for Individuals. Exhibits 37 and 38. Upon reviewing this information, U.S. EPA had additional questions and on November 3, 2009, sent Respondent Wilson a letter, by Federal Express, requesting the additional information. Exhibit 33. To date, U.S. EPA has not received this information and so has not completed its review of Respondent's ability to pay. Thus, at this time, U.S. EPA has not made an adjustment to the penalty based on the Respondent's ability to pay. If the additional information is received, U.S. EPA may revisit this issue.

## **2. History of Prior Such Violations**

U.S. EPA does not believe Respondents have a history of prior violations of Section 1018. U.S. EPA did not increase the initial gravity-based penalty for a history of prior such violations.

## **3. Degree of Culpability**

The Penalty Policy provides for a 25 percent increase in penalty for an intentional violation of Section 1018, or a violation where the violator has previously received a Notice of Noncompliance (NON) for Section 1018 or Disclosure Rule violations. U.S. EPA has no information that Respondents' violations were intentional or that Respondent had previously received a NON. Thus, U.S. EPA has not increased the initial gravity-based penalty for culpability.

In her answer, Respondent Vinnie Wilson raised the argument of contributory negligence of the Cincinnati Metropolitan Housing Authority. However, other than this conclusory statement, the Respondent provided no facts or documents to back this statement. Further, liability under TSCA is strict liability and as the landlord/manager of the leased housing, it was

the Respondent's responsibility to comply with applicable statutory requirements. Thus, no adjustment was made for this factor at this time.

**4. Supplemental Environmental Projects**

Respondents have not agreed to perform a Supplemental Environmental Project. Thus, no adjustment was made for this factor.

**5. Voluntary Disclosure of Violations before an Inspection, Investigation, or Tip/Complaint**

**a. Audit Policy**

Respondents did not disclose its violations of Section 1018 under U.S. EPA's Audit Policy, "Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations," 60 Fed. Reg. 66706 (December 22, 1995). Therefore, U.S. EPA made no adjustment to the initial gravity-based penalty based on this factor.

**b. Small Business Policy**

A violator may request assistance under the U.S. EPA's *Policy on Compliance Incentives for Small Businesses* (Small Business Policy). The Small Business Policy provides for the elimination of penalties if a small business meets its four qualifying criteria and agrees to participate in the compliance assistance program or conducts a voluntary self-audit.

Respondents have not sought assistance under the Small Business Policy. Therefore, U.S. EPA made no adjustment to the proposed penalty based on this factor.

**c. Voluntary Disclosure**

The Penalty Policy provides that a violator, who self-discloses a violation of Section 1018, but not under the Audit Policy, may still receive a reduction in penalty for such a voluntary

disclosure. Respondents did not disclose its violations of Section 1018. Therefore, U.S. EPA made no adjustment to the initial gravity-based penalty based on this factor.

**6. Other Factors**

**a. Potential for Harm Due to Risk of Exposure**

**(1) No Known Risk of Exposure**

Under the Penalty Policy, U.S. EPA may adjust a proposed penalty downward by up to 95 percent if the Respondent provides U.S. EPA with appropriate documentation that demonstrates that the target housing is certified to be lead-based paint free by a certified inspector at the time of the alleged violations. Respondent has not provided any documentation that the properties at issue in this matter were certified to have been lead-based paint free at the time of the alleged violations. Thus, U.S. EPA did not adjust the penalty downward based on no known risk of exposure.

**(2) Reduced Risk of Exposure**

Under the Penalty Policy, in the absence of lead-based paint hazards, including soil and/or dust lead hazards, U.S. EPA may adjust a proposed penalty downward by up to 50 percent if the violator provides appropriate documentation of a reduced risk of exposure. Respondent has not provided any documentation to demonstrate that the properties at issue in this matter were (1) properties with interior lead-based paint free at the time of the alleged violations; (2) properties that had a significant potential source of lead-based paint hazards removed prior to the alleged violations; or (3) properties that were free of lead-based paint hazards at the time the alleged violations occurred. Thus, U.S. EPA did not adjust the penalty downward based on reduced risk of exposure.

**b. Litigation Risk**

Under the Penalty Policy, U.S. EPA may adjust a proposed penalty downward for settlement purposes depending on the Complainant's assessment of litigation considerations. U.S. EPA did not adjust the penalty downward based on litigation risk.

**c. Attitude**

Under the Penalty Policy, U.S. EPA may reduce the proposed penalty by up to 30 percent based on a Respondent's cooperation, immediate steps taken to comply, and timely efforts to settle the case. U.S. EPA does not believe a reduction of the proposed penalty is appropriate at this time and, therefore, has not adjusted the initial gravity-based penalty downward.

Thus, U.S. EPA did not adjust the penalty either upward or downward. The statutory maximum penalty for these violations is \$517,000<sup>2</sup>. By using the statutory requirements and the penalty policy, U.S. EPA has calculated a fair and reasonable penalty of \$91,090 for these violations. Since the Respondent has provided no information regarding the penalty, U.S. EPA's determination should be accepted.

With regard to Respondents Mardaph II and III, in calculating the penalty, U.S. EPA used the same factors as outlined above. For Mardaph II, the penalty for Counts 1, 2, 10, 11, 20, 21, 30, 31, 39 and 40 is \$30,320. For Mardaph III, the penalty for Counts 3, 4, 5, 6, 12, 13, 14, 15, 22, 23, 24, 25, 32, 33, 34, 35, 41, 42, 43, and 44 is \$26,840. The statutory maximum for the

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<sup>2</sup> The maximum penalty is calculated by multiplying the number of counts/violations in

violations for Respondent Mardaph II is \$110,000 and for Respondent Mardaph III, it is \$220,000<sup>3</sup>. By using the statutory requirements and the penalty policy, U.S. EPA has calculated a fair and reasonable penalty of \$30,320 for Respondent Mardaph II and \$26,840 for Respondent Mardaph III. Since the Respondents have provided no information regarding the penalty, U.S. EPA's determination should be accepted.

## **V. PAPERWORK REDUCTION ACT**

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. §§ 3501 et seq., applies to this proceeding. The Office of Management and Budget (OMB) control number for The Residential Lead-Based Paint Hazard Disclosure Requirements (Renewal), 40 C.F.R., Subpart F, §§745.100 to 745.119 is 2070-0151. 40 C.F.R. §9.1. The current expiration date for this Information Collection Request (ICR) is March 31, 2011. The ICR was properly approved for provisions 40 C.F.R., Subpart F, §§745.100 to 745.119 during the specified time period for the alleged violations, August 2005 to January 1, 2007. OMB approved this ICR on 7/3/2001 with an expiration date of 7/31/2004 with notice in the Federal Register on 09/28/2001 at 66 FR 2004. Since EPA sent its renewal package to OMB on July 26, 2004 for review prior to the expiration date by OMB regulation (5 CFR 1320.10(e) (2)), it cannot expire until OMB takes action. Therefore, OMB automatically extended the expiration date from 04/31/2004 to 11/30/2004 so there were no lapses in approval. OMB took action by approving the renewal on 11/05/2004 with a new expiration date of 11/30/2007 with notice in the Federal Register on

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the complaint (47) by the statutory maximum of \$11,000 for each violation.

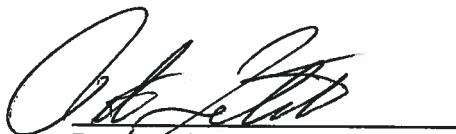
<sup>3</sup> The maximum penalty is calculated by multiplying the number of counts/violations in the complaint by the statutory maximum of \$11,000 for each violation.

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11/30/2004 at 69FR 69598. Therefore the provisions of Section 3512 of the PRA are not applicable in this case.

Submitted this 20th day of November 2009.



Peter Felitti  
Assistant Regional Counsel  
U.S. Environmental Protection Agency

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CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, U.S. EPA Region 5, and that true and correct copy was served on the Administrative Law Judge by first class mail on November 20, 2009 and Respondents Vinnie Wilson, Mardaph II, LLC and Mardaph III, LLC with delivery by first class mail on November 20, 2009 to:

The Honorable Susan L. Biro, Chief Administrative Law Judge  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Avenue, NW.  
Washington, D.C. 20460-2001

Mardaph II, LLC and Mardaph III, LLC  
c/o Vinnie Wilson  
7923 Rambler Place  
Cincinnati, Ohio 45231

Vinnie Wilson  
7923 Rambler Place  
Cincinnati, Ohio 45231

Vinnie Wilson  
P.O. Box 317639  
Cincinnati, Ohio 45231

Dated this 20th day of November 2009.



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Peter Felitti  
Assistant Regional Counsel  
U.S. EPA, Region 5