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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN THE MATTER OF:)	
)	Docket No. TSCA-05-2008-0010
Trust No. 98-123, Genghiskhan)	
Xiong, Hu Xiong, Chuhu Xiong,)	Proceeding to Assess a Civil Penalty
And Maivtshiab Xiong)	under Section 16(a) of the Toxic
)	Substances Control Act
Respondent.)	

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

The United States Environmental Protection Agency, Region 5 (U.S. EPA or Complainant), through its undersigned attorney, respectfully submits this initial prehearing exchange in accordance with the Presiding Officer's October 20, 2008, Prehearing Order and 40 C.F.R. § 22.19(a).

I. Witnesses for Complainant

This section includes the names of witnesses Complainant intends to call, together with a brief narrative summary of each witness' expected testimony as required by Paragraphs 1.a and b of the Presiding Officer's October 20, 2008, Prehearing Order and 40 C.F.R. § 22.19(a)(2)(i):

- A. Estrella Calvo, *Environmental Protection Specialist, Chemicals Management Branch, U.S. EPA Region 5*. Ms. Calvo's duties include serving as an enforcement officer and case developer in the investigation of lead disclosure violations under the Toxic Substances Control Act (TSCA). Ms. Calvo will testify about her review of the evidence compiled as a result of EPA's regulatory oversight of Respondents rental business, and the factual basis for her determination that Respondents are in violation of TSCA and its implementing regulations. She will also testify about how 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 EPA's Section 1018 - Disclosure Rule Enforcement Response Policy, dated February 2000, and as set forth in greater detail in Section IV, below.

Because Respondents admit that they owned the subject property at all times relevant to the Complaint, we do not anticipate requiring Ms. Calvo to testify about how Complainant established this information.

If necessary, Ms. Calvo will testify regarding the delegation of authority pertaining to the Complainant in this matter.

If necessary, Ms. Calvo will provide testimony sufficient to authenticate certain exhibits contained in this prehearing exchange.

- B. James G. O'Neil, *Environmental Protection Specialist, Chemicals Management Branch, U.S. EPA Region 5*. Mr. O'Neil's duties include serving as an inspector in the investigation of lead disclosure violations under the Toxic Substances Control Act (TSCA). Mr. O'Neil will testify about his collection of the evidence compiled as a result of EPA's regulatory oversight of Respondents' rental business.
- C. Financial Expert to be identified. This financial expert will opine on Respondents' ability to pay the proposed penalty in response to any financial information provided by Respondents. Respondents did not assert inability to pay in their response to EPA's prefiling letter; furthermore, Respondents have not provided sufficient information to support the assertion that they have an inability to pay the proposed penalty. Respondents did not respond to a series of correspondence from EPA asking them to provide specific information to support their claim that they would be unable to pay the proposed penalty. At the time of the alleged violations, Respondents personally owned at least two separate investment properties and a family business. As individual landowners and landlords, it is appropriate to consider the financial assets to which the Respondents have access in considering whether an adjustment for an alleged inability to pay is appropriate. However, unlike publicly traded companies, individual financial information is not generally publicly accessible. If Respondents provide sufficient probative documentation of their inability to pay, EPA will retain a financial expert to provide an expert opinion regarding such documentation.

Complainant reserves the right not to call any of the above-listed witnesses at hearing. In addition, Complainant 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. Documents to be Produced at Hearing

Complainant intends to introduce the following documents into evidence at hearing. Copies of these documents are attached to this prehearing exchange. Included with these documents are those required to be exchanged under Paragraph 1.c of the Presiding Officer's October 20, 2008, Prehearing Order and 40 C.F.R. § 22.19(a)(2)(ii).

- CX-1. Penalty Calculation Spreadsheet prepared by E. Calvo.
- CX-2. Notice of Intent to File Civil Administrative Action to Chuhu Xiong, February 8, 2008.
- CX-3. Form Residential Lease Lead Paint Disclosure.
- CX-4. Subpoena Duces Tecum issued pursuant to Section 11 of TSCA to Mr. Genghiskhan Xiong, September 19, 2005.
- CX-5. Affidavit Response to Subpoena, October 21, 2005.
- CX-6. City of Chicago Department of Public Health, Mitigation Notice Letter to uptown National Bank of Chicago TR# 98-123, February 4, 2005.
- CX-7. City of Chicago, Department of Public Health, Certificate of Compliance issued to Mr. Hu Xiong, August 30, 2005.
- CX-8. Chicago Residential Lease between Hu Xiong and Yolanda Damaso for premises located at 5682 N. Ridge Ave., 2nd Floor, Chicago, IL 60660 dated August 23, 2000.
- CX-9. Chicago Residential Lease between Genghiskhan Xiong and Chang Xiong for premises located at 5682 N. Ridge Ave., 1st Floor, Chicago, IL dated December 1, 2001.
- CX-10. Chicago Residential Lease between Genghiskhan Xiong and Hu Xiong for premises located at 5680 N. Ridge Ave., 1st Floor, Chicago, IL dated December 1, 2001.

- CX-11 Chicago Residential Lease between Hu Xiong and Ruth Montesdeoca for premises located at 5682 N. Ridge Ave., Apt. 2, Chicago, IL dated May 1, 2005.
- CX-12 Chicago Residential Lease between Hu Xiong and Bernadino Macedo for premises located at 5682 N. Ridge Ave., Apt. 3N , Chicago, IL dated July 1, 2005.
- CX-13 Chicago Residential Lease between Genghiskhan Xiong and Bernadino Macedo for premises located at 5682 N. Ridge Ave., 3rd Floor, Chicago, IL dated January 1, 2002.
- CX-14 Chicago Residential Lease between Genghiskhan Xiong and Paulina Ibanez for premises located at 5680 N. Ridge Ave., 3rd Floor, Chicago, IL dated January 1, 2001.
- CX-15 Apartment Rental Application completed by Miguel Guzman for premises located at 5680 N. Ridge Ave., 2nd Floor, Chicago, IL dated February 16, 2004
- CX-16 Chicago Residential Lease between Genghiskhan Xiong and Miguel Guzman for premises located at 5680 N. Ridge Ave., 2nd Floor, Chicago, IL dated March 1, 2004
- CX-17 Lexis Nexis Data Report for Hu Xiong, Genghiskhan Xiong and Hu Xiong.
- CX-18 Cook County Assessor's Office Real Estate Parcel Property Details for 5680 N. Ridge Ave., Chicago, Illinois.
- CX-19 Cook County Treasurer's Office, PIN # 14-05-331-004-0000, 5680 N. Ridge Ave., Chicago, IL 60660-3429.
- CX-20 Lexis Nexis Property Record for 5680 N. Ridge Ave., 2N, Chicago, IL 60660.
- CX-21 Correspondence: January 11, 2008 – August 8, 2005 between US EPA and Respondents
- CX-22 Correspondence: October 22, 2007 between Kert McAfee of Illinois Dept. of Public Health and US EPA.
- CX-23 Complete Subpoena response from Respondent

- CX-24 Telephone log for E. Calvo
- CX-25 U.S. EPA Individual Inability to Pay Financial Data Request Form
- CX-26 "Lead Safe Work Plan," Lead Poisoning Prevention Program, Chicago Department of Public Health.
- CX-27 United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Section 1018 – Disclosure Rule Enforcement Response Policy, February 2000.
- CX-28 "Protect Your Family from Lead in Your Home," United States Environmental Protection Agency, United States Consumer Product Safety Commission, United States Department of Housing and Urban Development, EPA747-K-99-001, April, 1999.
- CX-29 Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy," 45 Fed. Reg. 59770 (September 10, 1980) (TSCA Civil Penalty Guidelines).
- CX-30 Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule, US EPA, Office of Enforcement and Compliance Assurance, June 5, 2006.

III. Judicial Notice

Complainant requests the Presiding Officer to take judicial notice of the following:

- A. The Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.*, and its implementing regulations;
- B. 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
- C. 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.

IV. Penalty

Under 40 C.F.R. § 22.19(a)(3), EPA must explain in its prehearing exchange how it calculated the proposed penalty in accordance with the criteria set forth in TSCA.

Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act (Section 1018), 42 U.S.C. § 4852d(b)(5), authorizes the imposition of a civil penalty of up to \$10,000 for each violation of a requirement of Section 1018 of that Act and its implementing regulations at 40 C.F.R. Part 745, Subpart F (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).

Complainant relied on the “Section 1018 - Disclosure Rule Enforcement Response Policy,” dated February 2000 (Penalty Policy) (CX-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), which are the nature, circumstances, extent, and gravity of the 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. The Penalty Policy was developed under the general framework established by the “Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy,” 45 Fed. Reg. 59770 (September 10, 1980) (TSCA Civil Penalty Guidelines). CX-29. The Penalty Policy was modified on June 5, 2006 to adjust for the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Parts 19 and

27. (See Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule, dated 6/5/06, CX - .) Due to the 2006 modification, all violations of the Disclosure Rule occurring after March 14, 2004 are subject to statutory penalties adjusted for inflation.

Under the Penalty Policy, EPA determines penalties in two stages: 1) the determination of a “gravity-based penalty,” and 2) adjustments to the gravity-based penalty. EPA calculates the gravity-based penalty by considering: 1) the nature of the violations; 2) the circumstances of the violations; and 3) the extent of harm that may result from the violations. CX-27 at 9.

The TSCA Civil Penalty Guidelines discuss the nature of the violation as the essential character of the violation and incorporate the concept of whether the violation is of a chemical control, control associated data gathering, or hazard assessment in nature. CX-29 at 59771. The Penalty Policy categorizes all Disclosure Rule violations as “hazard assessment” in nature, as the information is vital to purchasers and lessees in weighing the risks in purchasing or leasing target housing. 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. CX-27 at 9.

The “circumstances” reflect the probability of harm resulting from a particular type of violation. The Penalty Policy categorizes each possible violation of the Disclosure Rule in 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 10, B-1 through B-3. The “extent” factor considers the degree, range or scope of a 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 11-12. 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-4. Based on the date of the occurrence of the violation, the Penalty Policy requires that the circumstance and extent factors be applied to one of two gravity-based penalty matrices. Each matrix (Gravity-Based Penalty Matrix") lists varying penalty amounts in 18 cells, ranging in value from \$110 to \$11,000 for violations occurring prior to March 15, 2004, and from \$129 to \$11,000 for violations occurring on or after March 15, 2004. *Id.* at B-4 through B-4-A. The appropriate cell is determined according to the circumstance level, and extent category involved.

Once the gravity-based penalty is determined for a given violation, EPA applies upward or downward adjustments to the penalty in consideration of the following factors with respect to the violator: 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, which include: no known risk of exposure, the violator's attitude, consideration of supplemental environmental projects, audit policy, voluntary disclosure, size of business, adjustment for small independent owners and lessors, and the economic benefit of noncompliance. *Id.* at 14-18.

By letter dated January 29, 2007, EPA advised Respondents that it was planning to file a civil administrative complaint against Respondents for alleged violations of Section 1018 and that Section 1018 authorizes the assessment of a civil administrative penalty. The letter stated a civil penalty of \$44,489.00. EPA asked Respondent to identify any factors Respondents thought

EPA should consider before issuing the complaint. EPA also asked that if Respondents believed there were financial factors that bore on Respondents' ability to pay a civil penalty, Respondents submit specific financial documents. CX-2. Instead of claiming any inability to pay the penalty specified in the notice letter, counsel for Respondents sent a letter response to EPA on March 21, 2007, which alleged that they had not "knowingly violated" TSCA, and that they had complied with the requirements of Section 1018. Respondents provided no facts or information to support their claims. CX-21, March 21, 2007. As a result, EPA sent Respondent a second letter, dated April 4, 2007, explaining the specific reasons why Respondents' assertions were false, and confirming that Respondents had not asserted or submitted financial documents for purposes of substantiating any claimed inability to pay despite EPA's allowance of extended time for their response. CX-21, April 4, 2007. Specifically, EPA reiterated that, at a minimum, it required the Respondents' complete individual inability to pay financial data request form to consider any inability to pay claim. CX- 25. The form was never submitted to EPA. On May 7, 2007 Respondents conferred with EPA about the possibility of settlement and resolution of the case prior to the filing of a complaint (including the completion of a potential Supplemental Environmental Project). Respondents were given precise direction on what types of programs qualify, and referred to the US EPA website on SEPs, but Respondents failed to provide the necessary information despite numerous requests documented in correspondence ranging from July 13, 2007 through November 17, 2008. CX-21, July 13, 2007, November 17, 2008. During that time, Respondents falsely represented to the US EPA that they were certified and qualified to

complete a window replacement SEP. CX-21, October 23, 2007 and CX-22. On November 8, 2007, counsel for Respondents resigned from the case. CX-21, November 8, 2007.

A. Gravity-Based Penalty

1. Extent

a. Counts 1, 3-6, 8-11, 13-16, and 18-20. In accordance with the Extent Category Matrix, 16 violations fell into the significant category because either children were identified on the lease and the ages of the children were identified using the corresponding application which identified children 6 years of age or older but less than 18 as tenants under the lease or no corresponding application was available, in which case EPA conservatively assumed the children identified on the lease were older than six. *See* CX-27 and CX-23.

b. Counts 2, 7, 12, and 17. In accordance with the Extent Category Matrix, four violations fell into the minor category because there were no children under 18 years of age residing in the properties at the time of violations. CX-27 and CX-23.

2. Circumstances and Gravity-Based Penalty: Counts 1-5 (Failure to Include Statement Disclosing Presence or Lack of Knowledge of Lead-Based Paint)

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, a statement disclosing either the presence of any known lead-based paints and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(2) and 40 C.F.R. § 745.100 is a Level 3 violation. CX-27 at B-1. Respondents failed to include, within or as an attachment to each contract to lease target housing, a statement disclosing either the presence of any known lead-based paints and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the lessee became obligated under the contract in five leasing transactions: 5680 North Ridge Avenue, 2nd Floor,

Chicago, Illinois, March 1, 2004 (Count 1); 5680 North Ridge Avenue, 3rd Floor, Chicago, Illinois, January 1, 2005 (Count 2); and 5682 North Ridge Avenue, 2nd Floor, Chicago, Illinois, March 31, 2004 (Count 3); 5682 North Ridge Avenue, 2, Chicago, Illinois, May 1, 2005 (Count 4); and 5682 North Ridge Avenue, 3N, Chicago, Illinois, July 1, 2005 (Count 5).

Under the Gravity-Based Penalty Matrix, *Id.* at B-4, Level 3 circumstance violations that occurred prior to March 15, 2004 incur a penalty of \$6,600 (major extent); \$4,400 (significant extent); and \$660 (minor extent). Level 3 circumstance violation that occurred on or after March 15, 2004 incur a penalty of \$7,737 (major extent); \$5,158 (significant extent); and \$774 (minor extent). See Gravity-Based Penalty Matrix, *id.* at B-4-A. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed penalty gravity-based penalty for counts 1-5 of \$20,648. See CX-1 for the worksheet prepared by U.S. EPA to calculate the penalty for these counts.

4. Circumstances and Gravity-Based Penalty: Counts 6-10 (Failure to List Records or Reports)

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, a list of any records or reports available to the lessor regarding lead-based paint and/or lead based paint hazards in the target housing or a statement that no such records exist before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(3) and 40 C.F.R. § 745.100 is a Level 5 violation. *Id.* at B-2. Respondents failed to include, within or as an attachment to each contract to lease target housing, a list of any records or reports available to Respondents regarding lead-based paint and/or lead based paint hazards in the target housing or a statement that no such records exist before the lessee was obligated under the contract in five leasing transactions: 5680 North Ridge Avenue, 2nd Floor, Chicago, Illinois, March 1, 2004 (Count 6); 5680 North Ridge Avenue, 3rd

Floor, Chicago, Illinois, January 1, 2005 (Count 7); and 5682 North Ridge Avenue, 2nd Floor, Chicago, Illinois, March 31, 2004 (Count 8); 5682 North Ridge Avenue, 2, Chicago, Illinois, May 1, 2005 (Count 9); and 5682 North Ridge Avenue, 3N, Chicago, Illinois, July 1, 2005 (Count 10).

Under the Gravity-Based Penalty Matrix, *Id.* at B-4, Level 5 circumstance violations that occurred prior to March 15, 2004 incur a penalty of \$2,200 (major extent); \$1,430 (significant extent); and \$220 (minor extent). Level 5 circumstance violation that occurred on or after March 15, 2004 incur a penalty of \$2,579 (major extent); \$1,676 (significant extent); and \$258 (minor extent). See Gravity-Based Penalty Matrix, *Id.* at B-4-A. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed penalty gravity-based penalty for counts 6-10 of \$6,716. See CX-1 for the worksheet prepared by U.S. EPA to calculate the penalty for these counts.

5. Circumstances and Gravity-Based Penalty: Counts 11-15 (Failure to Include Lessee’s Affirmation of Receipt)

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract, a statement by the lessee affirming receipt of the information set forth in 40 C.F.R. § 745.113(b)(2) and (b)(3) and the lead hazard information pamphlet before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.114(b)(4) and 40 C.F.R. § 745.100 is a Level 4 violation. *Id.* at B-2. Respondents failed to include, either within or as an attachment to each contract, a statement by the lessee affirming receipt of the information set forth in 40 C.F.R. § 745.113(b)(2) and (b)(3) and the lead hazard information pamphlet before the lessee was obligated under the contract in five leasing transactions: 5680 North Ridge Avenue, 2nd Floor, Chicago, Illinois, March 1, 2004 (Count 11); 5680 North Ridge Avenue, 3rd Floor, Chicago, Illinois, January 1, 2005 (Count 12); and 5682 North Ridge Avenue,

2nd Floor, Chicago, Illinois, March 31, 2004 (Count 13); 5682 North Ridge Avenue, 2, Chicago, Illinois, May 1, 2005 (Count 14); and 5682 North Ridge Avenue, 3N, Chicago, Illinois, July 1, 2005 (Count 15).

Under the Gravity-Based Penalty Matrix, *Id.* at B-4, Level 4 circumstance violations that occurred prior to March 15, 2004 incur a penalty of \$4,400 (major extent); \$2,750 (significant extent); and \$440 (minor extent). Level 4 circumstance violation that occurred on or after March 15, 2004 incur a penalty of \$5,158 (major extent); \$3,224 (significant extent); and \$516 (minor extent). *See Gravity-Based Penalty Matrix, Id.* at B-4-A. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed penalty gravity-based penalty for counts 11-15 of \$12,938. *See CX-1* for the worksheet prepared by U.S. EPA to calculate the penalty for these counts.

6. Circumstances and Gravity-Based Penalty: Counts 16-20 (Failure to Include Certifying Signatures)

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, the signatures of the lessors, agents, and lessees certifying to the accuracy of their statements to the best of their knowledge along with the dates of signature before the lessee is obligated under a contract to lease target housing as required by 40 C.F.R. § 745.113(b)(6) and 40 C.F.R. § 745.100 is a Level 6 violation. *CX-27* at B-3. Respondents failed to include, within or as an attachment to each contract to lease target housing, the signatures of Respondents, agents, and the lessees certifying to the accuracy of their statements to the best of their knowledge along with the dates of signature before the lessees were obligated under the contract in five leasing transactions: 5680 North Ridge Avenue, 2nd Floor, Chicago, Illinois, March 1, 2004 (Count 16); 5680 North Ridge Avenue, 3rd Floor, Chicago, Illinois, January 1, 2005 (Count 17); and 5682 North Ridge Avenue, 2nd Floor, Chicago,

Illinois, March 31, 2004 (Count 18); 5682 North Ridge Avenue, 2, Chicago, Illinois, May 1, 2005 (Count 19); and 5682 North Ridge Avenue, 3N, Chicago, Illinois, July 1, 2005 (Count 20).

Under the Gravity-Based Penalty Matrix, *Id.* at B-4, Level 6 circumstance violations that occurred prior to March 15, 2004 incur a penalty of \$1,100 (major extent); \$550 (significant extent); and \$110 (minor extent). Level 6 circumstance violation that occurred on or after March 15, 2004 incur a penalty of \$1,290 (major extent); \$645 (significant extent); and \$129 (minor extent). See Gravity-Based Penalty Matrix, *Id.* at B-4-A. The “extent” determinations made by U.S. EPA for these counts are explained in Section VI.A.1 above. After the correct matrix cell was applied for each of these counts, U.S. EPA calculated a proposed penalty gravity-based penalty for counts 16-20 of \$2,614. See CX-2 for the worksheet prepared by U.S. EPA to calculate the penalty for these counts.

8. Total Initial Gravity-Based Penalty

EPA calculated the total initial gravity-based penalty adding together the four subtotal gravity-based penalties for the 20 counts (\$20,648 + \$6,716 + \$12,938 + \$2,614). The initial gravity-based penalty is \$42,916.

B. Statutory Adjustment Factors

1. Ability to Pay/Continue in Business

As noted above, on February 8, 2008, EPA issued a prefiling notice letter to Respondents informing Respondents that EPA was prepared to file a civil administrative penalty complaint against them for alleged violations of the Section 1018 requirements. The prefiling notice letter also extended an opportunity to Respondents to advise EPA of any factors that they believed EPA should consider before filing a complaint. The prefiling notice letter specifically asked Respondents to provide financial information if Respondents believed they would have an

inability to pay a penalty. CX-14. Instead of claiming any inability to pay the penalty specified in the notice letter, counsel for Respondents sent a letter response to EPA on March 21, 2007, which alleged that they had not “knowingly violated” TSCA, and that they had complied with the requirements of Section 1018. Respondents provided no facts or information to support their claims. CX-21, March 21, 2007. As a result, EPA sent Respondents a second letter, dated April 4, 2007, explaining the specific reasons why Respondents’ assertions were false, and confirming that Respondents had not asserted or submitted financial documents for purposes of substantiating any claimed inability to pay, despite EPA’s allowance of extended time for their response. CX-21, April 4, 2007. Specifically, EPA reiterated that, at a minimum, it required the Respondents’ complete individual inability to pay financial data request form to consider any inability to pay claim. CX- 25. The form was never submitted to EPA. Accordingly, Complainant did not adjust the initial gravity-based penalty based on Respondent’s ability to pay.

2. History of Prior Such Violations

EPA does not believe Respondents have a history of prior violations of Section 1018. 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. CX-27 at 15. EPA has no information that Respondents’ violations were intentional or that Respondents had previously received a NON. EPA has not increased the initial gravity-based penalty for culpability.

4. Other Factors as Justice May Require

a. No Known Risk of Exposure

Under the Penalty Policy, EPA will adjust a proposed penalty down 80 percent if the Respondents provide EPA with appropriate documentation that the target housing is certified to be lead-based paint free by a certified inspector. CX-27. at 16. Respondents have not provided any documentation to certify that the properties at issue in this matter are certified lead-based paint free. EPA did not adjust the penalty downward based on no known risk of exposure.

b. Attitude

Under the Penalty Policy, EPA may reduce the proposed penalty by up to 30 percent based on a Respondents' cooperation, immediate good faith efforts to comply, and timely efforts to settle the case. *Id.* EPA does not believe a reduction of the proposed penalty is appropriate based on Respondents' attitude and, therefore, has not adjusted the initial gravity-based penalty downward.

c. Supplemental Environmental Projects (SEPs)

Respondents have not agreed to perform a SEP, nor cooperated with EPA toward the identification and/or discussion of potential SEPs that may be approvable in this matter.

d. Audit Policy

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

e. 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. CX-23 at 17. Respondents did not disclose its violations of Section 1018; therefore, EPA made no adjustment to the initial gravity-based penalty based on this factor.

f. Size of Business

A violator may request assistance under the 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, EPA made no adjustment to the proposed penalty based on this factor.

g. Adjustment for Small Independent Owners and Lessors

Under the Penalty Policy, EPA will adjust a penalty down by 50 percent for individuals who own one target housing unit for lease or one target housing unit that is "for sale by owner." CX-23 at 18. Respondents are the owners of multiple rental properties in Milwaukee, Wisconsin and Chicago, Illinois, and is cited in the complaint for violations involving five separate target housing units. Accordingly, EPA made no adjustment to the initial gravity-based penalty based on this factor.

h. Economic Benefit of Noncompliance

EPA believes the proposed penalty captures any economic benefit to Respondents from their noncompliance with section 1018.

C. Total Proposed Penalty

In summary, EPA did not increase or decrease the initial gravity-based penalty based on any of the statutory adjustment factors. EPA proposed a \$42,916 penalty in the Complaint.

V. Estimate of Time Needed to Present Case

As required by Paragraph 1.c of the of the Presiding Officer's October 20, 2008, Prehearing Order, Complainant estimates that it will need approximately one day to present its case-in-chief.

VI. Location of Hearing

As required by Paragraph 1.c of the of the Presiding Officer's October 20, 2008, Prehearing Order, Complainant suggests that any hearing in this matter be held in Chicago, Illinois, the location of the alleged violations.

VII. Rights Reserved

Complainant respectfully reserves the right, upon proper notice to the Presiding Officer and Respondents, to amend and/or supplement its list of witnesses, documents and exhibits to be produced at hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Luis A. Oviedo', written over a horizontal line.

Luis A. Oviedo
Associate Regional Counsel
U.S. EPA Region 5

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

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- CX-5. Affidavit Response to Subpoena, October 21, 2005.
- CX-6. City of Chicago Department of Public Health, Mitigation Notice Letter to uptown National Bank of Chicago TR# 98-123, February 4, 2005.
- CX-7. City of Chicago, Department of Public Health, Certificate of Compliance issued to Mr. Hu Xiong, August 30, 2005.
- CX-8. Chicago Residential Lease between Hu Xiong and Yolanda Damaso for premises located at 5682 N. Ridge Ave., 2nd Floor, Chicago, IL 60660 dated August 23, 2000.
- CX-9. Chicago Residential Lease between Genghiskhan Xiong and Chang Xiong for premises located at 5682 N. Ridge Ave., 1st Floor, Chicago, IL dated December 1, 2001.
- CX-10. Chicago Residential Lease between Genghiskhan Xiong and Hu Xiong for premises located at 5680 N. Ridge Ave., 1st Floor, Chicago, IL dated December 1, 2001.

- CX-11 Chicago Residential Lease between Hu Xiong and Ruth Montesdeoca for premises located at 5682 N. Ridge Ave., Apt. 2, Chicago, IL dated May 1, 2005.
- CX-12 Chicago Residential Lease between Hu Xiong and Bernadino Macedo for premises located at 5682 N. Ridge Ave., Apt. 3N , Chicago, IL dated July 1, 2005.
- CX-13 Chicago Residential Lease between Genghiskhan Xiong and Bernadino Macedo for premises located at 5682 N. Ridge Ave., 3rd Floor, Chicago, IL dated January 1, 2002.
- CX-14 Chicago Residential Lease between Genghiskhan Xiong and Paulina Ibanez for premises located at 5680 N. Ridge Ave., 3rd Floor, Chicago, IL dated January 1, 2001.
- CX-15 Apartment Rental Application completed by Miguel Guzman for premises located at 5680 N. Ridge Ave., 2nd Floor, Chicago, IL dated February 16, 2004
- CX-16 Chicago Residential Lease between Genghiskhan Xiong and Miguel Guzman for premises located at 5680 N. Ridge Ave., 2nd Floor, Chicago, IL dated March 1, 2004
- CX-17 Lexis Nexis Data Report for Hu Xiong, Genghiskhan Xiong and Hu Xiong.
- CX-18 Cook County Assessor's Office Real Estate Parcel Property Details for 5680 N. Ridge Ave., Chicago, Illinois.
- CX-19 Cook County Treasurer's Office, PIN # 14-05-331-004-0000, 5680 N. Ridge Ave., Chicago, IL 60660-3429.
- CX-20 Lexis Nexis Property Record for 5680 N. Ridge Ave., 2N, Chicago, IL 60660.
- CX-21 Correspondence: January 11, 2008 – August 8, 2005 between US EPA and Respondents
- CX-22 Correspondence: October 22, 2007 between Kert McAfee of Illinois Dept. of Public Health and US EPA.
- CX-23 Complete Subpoena response from Respondent
- CX-24 Telephone log for E. Calvo

- CX-25 U.S. EPA Individual Inability to Pay Financial Data Request Form
- CX-26 "Lead Safe Work Plan," Lead Poisoning Prevention Program, Chicago Department of Public Health.
- CX-27 United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Section 1018 – Disclosure Rule Enforcement Response Policy, February 2000.
- CX-28 "Protect Your Family from Lead in Your Home," United States Environmental Protection Agency, United States Consumer Product Safety Commission, United States Department of Housing and Urban Development, EPA747-K-99-001, April, 1999.
- CX-29 Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy," 45 Fed. Reg. 59770 (September 10, 1980) (TSCA Civil Penalty Guidelines).
- CX-30 Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule, US EPA, Office of Enforcement and Compliance Assurance, June 5, 2006.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

RECEIVED
DEC 17 2008

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN THE MATTER OF:)
)
Trust No. 98-123, Genghiskhan) Docket No. TSCA-05-2008-0010
Xiong, Hu Xiong, Chuhu Xiong,)
And Maivtshiab Xiong,) Proceeding to Assess a Civil Penalty
) under Section 16(a) of the Toxic
) Substances Control Act
Respondents.)

NOTICE OF FILING

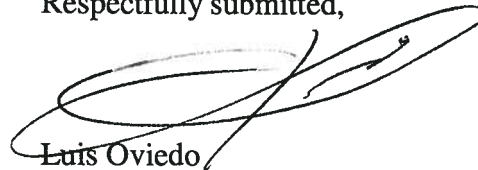
To: Honorable Barbara A. Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L/Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dennis J. Kellogg, Esq.
Sheats & Kellogg
105 West Madison, Suite 1300
Chicago, IL 60602

PLEASE TAKE NOTICE that the Complainant has today filed with the Regional Hearing Clerk an Initial Prehearing Exchange, a copy of which is attached and hereby served upon you.

Dated: December 17, 2008

Respectfully submitted,



Luis Oviedo
Associate Regional Counsel
U.S. EPA Region 5 (C-14J)
77 West Jackson Boulevard
Chicago, Illinois 60604-3590
Ph: (312) 353-9538
FAX: (312) 886-0747

In the Matter of: Trust No. 98-123, et al.
Docket No.: TSCA-05-2008-0010

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original and one copy of COMPLAINANT'S INITIAL PREHEARING EXCHANGE and NOTICE OF FILING with the Regional Hearing Clerk (E-13J), U.S. Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590


I then promptly sent by pouch mail a true and accurate copy to:

Honorable Barbara A. Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L/Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

I also mailed a true and accurate copy, by certified mail, return receipt-requested, to:

Dennis J. Kellogg, Esq.
Sheats & Kellogg
105 West Madison, Suite 1300
Chicago, IL 60602

dated: December 17, 2008



Donald E. Ayres,
Paralegal Specialist, MM2-4
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(312) 353-6719