UNITED STATES ENVIRONMMENTAL PROTECTION AGENCY
REGION 4

In the Matter of:	)	
	)	
John Rice, LLC	)	Docket No. TSCA-4-2012-2646
	)	
Respondent.	)	
	)	

THIRD ORDER TO SUPPLEMENT THE RECORD

A Motion for Default Order filed by Complainant in the above-captioned matter on April 2, 2013, pursuant to Part 22 of the Consolidated Rules of Practice, 40 C.F.R. §22.17(a), sought an Order for default assessing a civil penalty of $84,920 against Respondent for violations of Section 409 of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2689. Thereafter, two Orders to supplement the record were issued and responded to by Complainant. The second of the aforementioned Orders issued on December 13, 2013, specifically requested copies of the leases listed in Paragraph 15 of the Complaint; the Inspection Report or other evidence relied upon for finding the violations alleged in the Complaint; and a statement clarifying the lack of correlation between the numbers for the Counts in the Complaint and those in the Motion for Default. On January 10, 2014, in addition to clarifying the inconsistently numbered counts, Complainant provided a) copies of three of the four leases and the first page of a fourth lease that were listed in the Complaint; and b) hand written forms pertaining to an inspection conducted on February 17, 2009 by W C Richardson, EPA Region 4 Pesticides and Toxics Substances Branch at the facility referred to as "John Rice Realtors" at 930 Avenue A, Opelika, Alabama. The "Receipt for Documents" page reflects that the leases were collected at the time of the inspection.

Upon my review of the record, particularly the leases submitted, it appeared that the information contained in the Declaration of Andrea Price-Lippitt, attached as Exhibit F to the Motion for Default, was, in very significant part, erroneous. Paragraph 5 of the Declaration, states, "The "extent" level I chose was significant" because the case file does not include any information on the ages of the residents." Exhibit F. However, upon closer examination, it became clear that statement was not supported by occupant age-related information in three of the four leases. Based upon this discrepancy, on July 8, 2014, the undersigned issued an Order to Withdraw Exhibits and Order to Show Cause.[1]

To clarify this discrepancy Counsel for Complainant filed a Response dated August 4, 2014, confirming that the extent level designation of 'significant" for violations relating to three leases was indeed in error, and clarifying that the extent level should have been "minor," based upon the ages indicated in the leases. In an effort to correct the record, Counsel for Complainant on

[1] In addition to discovering the error pertaining to tenant ages, it appeared that the submission by Complainant possibly contained personally identifiable information. Complainant was directed to withdraw the potentially problematic exhibits and resubmit them in accordance with procedures for Confidential Business Information provided for in the Consolidated Rules.

September 3, 2014, filed an "Amended Motion for Default," seeking a revised penalty in the amount of $38,660. The pleading summarized the proposed penalty for all counts in the Complaint to reflect the reduction resulting from the change in "extent level" going from "significant" to "minor;" and reaffirmed the original proposed penalties for the those violations within each of the Counts in the Complaint for which the extent levels were not changed. However, Complainant, evidently chose not to submit a corrected or new Declaration, leaving the unreliable version initially filed as the only evidence as to how the penalty was calculated.

The next error discovered was the actual dollar amounts culled from the penalty policy matrices in the Section 1018 Disclosure Rule Enforcement Response Policy (December 2007) ("ERP"). There are two matrices on page 30 of the ERP: one for violations occurring on or after March 15, 2004; the second for violations occurring on or before March 14, 2004. It appears Complainant jumped from one ERP Matrix to the other, with no explanation for doing so, notwithstanding that all four leases are dated after March 15, 2004. Therefore, it would appear that the first/top Matrix is applicable, and reflects different monetary amounts. The only dollar amounts taken from the relevant Matrix, are the revised amounts contained in the Amended Motion for Default. There is no explanation for reliance on the two different tables, nor attempt to correct this error.

While these particular errors are of concern with respect to the gravity bases of the penalty calculations, they also call into question the general reliability of the initial Declaration of Andrea Price-Lippitt to the extent she addresses, albeit briefly, the adjustment factors relied upon in calculating the proposed penalty: violator's ability to pay, and to continue in business, any history of prior such violations, the degree of culpability, and other matters as justice may require. TSCA§ 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

Complainant seeks a ruling on both liability and penalty. Should the Respondent be found to be in default and that a violation occurred, the undersigned could issue an Initial Decision, containing findings of fact and conclusions of law, and *if appropriate*, a civil penalty. A penalty different from the amount proposed by Complainant can be reached, but in the case of a default proceeding, as Presiding Officer I may not assess a penalty greater than that proposed in the Motion for default. 40 C.F.R. § 22.27(a) and (b). Most importantly, however, the amount of any civil penalty must be based on the *evidence in the record* and in accordance with any penalty criteria set forth in the Act.

It is also noted that while Complainant couches its last submission as an "Amended" Motion for Default, it appears more along the lines of an "Amendment To" the Motion for Default: The document does not stand-alone, but rather partially amends the Motion for Default that was previously filed. For this reason, I will consider the Motion for Default together with what I consider an amendment thereto.

IT IS ORDERED:

On or before **December 5, 2014,** Complainant is to resubmit a Declaration or Affidavit by Ms. Price-Lippitt or another agency representative, supporting the penalty proposed in the Motion for

Default. This new Declaration is to expand upon the information contained in the Declaration originally submitted by Ms. Price-Lippitt.

Date: November 13, 2014

Susan B. Schub
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Third Order to Supplement Record, in the Matter of John Rice, LLC, Docket No. TSCA-4-2012-2646, on the parties listed below in the manner indicated:

First Class Mail-Return Receipt Requested
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Date: 11-13-14

Patricia A. Bullock
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