UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	**DOCKET NO. TSCA-05-2009-0004**
Kathryn Y. Lewis-Campbell	)	
Springfield, Ohio	)	
	)	
	)	
	)	
Respondent	)	
	)	

COMPLAINANT'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND APPROPRIATE PENALTY

CONFIDENTIALITY ASSERTED

The attachment cited by Complainant, in this "Complainant's Reply to Respondent's Brief in Opposition to Complainant's Motion for Accelerated Decision on Liability and Appropriate Penalty" ("the Reply"), and a portion of this Reply, consists of an analysis of financial information provided by Respondent to Complainant in this matter, or reference to that analysis. On July 30, 2009, Respondent's counsel in this matter a claim that Respondent's "submitted tax returns and her Statement of Financial Affairs must be kept confidential." Consequently, a complete copy of the Reply, and attachment, has been filed under seal with the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 5, and served on the Presiding Officer and Respondent. A second edition of the Reply, with the attachment and references in the Reply to information in the attachment redacted, has also been filed, to be made available for public viewing.

CONFIDENTIAL MATERIAL HAS BEEN REDACTED FROM THIS EDITION, TO MAKE IT AVAILABLE FOR PUBLIC VIEWING

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The Administrator's Delegated Complainant hereby submits this reply to Respondent's Brief in Opposition to Complainant's Motion for Accelerated Decision on Liability and Appropriate Penalty ("Respondent's Brief").

IS THERE A GENUINE ISSUE OF MATERIAL FACT?

In her Memorandum in Support of Complainant's Motion for Accelerated Decision on Liability and Penalty ("Complainant's Memorandum"), Complainant has carefully set out the law governing this proceeding, Complainant's Memorandum, at 4-13. More specifically, Complainant placed Respondent on notice of the law governing accelerated decision under the Administrator's Rules. Id., at 8-13. Among the governing principles of law cited by Complainant were those identified in the Administrator's published decision in In Re Green Thumb Nursery, Inc.: "a party waives its right to an adjudicatory hearing where it fails to dispute the material facts upon which the agency's decision rests[,]" and a "party must demonstrate that [a] dispute is 'genuine'

by referencing probative evidence in the record, or by producing such evidence." Complainant's Memorandum, at 8-9.

In presenting her case on Respondent's liability for the violations alleged in the Complaint, Complainant set out in support of the Motion for Accelerated Decision ("the Motion") 16 proposed Findings of Fact," citing reliable, probative and substantial evidence[1] to support each proposed Finding of Fact. Complainant's Memorandum, at 13-16.[2] A review of Respondent's Brief reveals that Respondent has failed to address those proposed findings of fact, or to challenge any evidence cited to support any of the 16 findings of fact proposed. Rather than challenge the entry of any of the 16 proposed findings of fact set out in support of Complainant's Motion, Respondent merely sets out her own "Statement of Facts," in a narrative prepared by her attorney, without reference to any evidence to support any statement she makes in her "Statement of Facts." Having ignored Complainant's proposed Findings of Fact, and submitted her own "Statement of Facts" without reference to reliable, probative and substantial evidence, as a matter of law, it is not possible for Respondent to raise any genuine issue of material fact so as to defeat Complainant's well-pled Motion.[3]

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[1]Section 556(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c), provides that an administrative sanction may not be imposed or rule or order issued unless "supported by and in accordance with the reliable, probative, and substantial evidence."

[2]Complainant would note that there is an error, or typo, in Finding of Fact No. 16. The attachment cited in this finding of fact is Attachment J. The correct citation should be to Attachment I. As Respondent has not challenged this finding of fact, this correction can now be made without any prejudice to Repsondent.

[3]Facts asserted by a party regarding a motion for summary disposition "must be established through on the vehicles designed to ensure reliability and veracity -- depositions, answers to interrogatories, admissions and affidavits." Martz v. Union Labor Life Ins. Co., 757 F.2d 135, at 138 (7th Cir. 1985). "[U]nsupported allegations or affidavits setting forth 'ultimate

Consequently, there is no genuine issue presented by Respondent on the 16 proposed Findings of Fact, and, as a matter of law, Complainant is entitled to each of the 16 proposed findings of fact being entered as findings of fact.[4]

AS A MATTER OF LAW, IS COMPLAINANT ENTITLED TO A FINDING THAT RESPONDENT IS LIABLE FOR THE VIOLATIONS ALLEGED IN THE COMPLAINT?

In Complainant's Memorandum, Complainant identified each objection and defense to the Complaint raised by Respondent, both in her Amended Answer and in her Pre-Hearing Exchange, and demonstrated that each objection and defense was either immaterial to a finding that she is liable for the violations alleged in the Complaint, or to a finding on the appropriateness of the penalty amount proposed. Complainant's Memorandum, at 17-23.

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or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." Galindo v. Precision American Corp., 754 F.2d 1212, at1216 (5th Cir. 1985). "The opposing party cannot defeat summary judgment by mere allegations but must bring 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties differing versions of the truth at trial[,]'" and the "burden is on both parties to file necessary materials with the court to support their claims for and against summary judgment." General Office Products v. A.M. Capen's Sons, Inc., 780 F.2d 1077, at 1078 (1st Cir. 1986). Finally, "[l]egal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid summary judgment." Estrella v. Brandt, 682 F.2d 814, at 819-20 (9th Cir. 1982).

[4]Respondent does argue that "[w]hether the property was not a residential property at the time its was sold to Mr. Freeman, and was therefore exempt from the EPA's Disclosure Requirement, is a genuine issue of material fact, and, therefore, the Motion must be denied." Respondent's Brief, at 7. However, this is not an issue of fact. There is no dispute over the condition of the house. Complainant cited the Notice of Violation and Order to Repair or Demolish, issued on October 10, 2006, to Kathryn L. Lewis, by the City of Springfield, Ohio, which directed that the house be repaired or demolished, in Complainant's Memorandum, as Attachment H. The only issue is whether that house fell within the statutory definition of "target housing," as defined in the Residential Lead-Based Paint Hazard Reduction Act of 1992, and the resolution of that issue involves an interpretation of law, which is a matter or legal argument, not the presentation of witness testimony.

In response to the Motion and Complainant's Memorandum, Respondent pursues only one matter in her defense. Respondent's counsel states that the "subject property was not a residential property at the time it was sold to Mr. Freeman[,]" as, in Respondent's opinion, the house on that property was "uninhabitable[,]" and she understood from her purchaser, Donald Freeman, Jr., that he would not immediately be occupying the property on his purchase of it. Respondent's Brief, at 5-6. Respondent's counsel states that Mr. Freeman told Respondent that " he wanted to buy and rehab the property, and eventually move into the property." Id., at 3. Respondent's counsel further states that "[b]ecause of the uninhabitable condition of the property, and [Mr. Freeman's] desire to rehab it, the Respondent sold the property to Mr. Freeman for a huge discounted price of Seven Thousand Five Hundred Dollars ($7,500)." Id. Respondent cites the statutory definition of "residential real property" as "real property on which there is situated 1 or more residential dwellings used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of 1 or more persons." 42 U.S. C. § 4851b(24). Respondent argues that the property was not occupied and was "uninhabitable," and she never intended that the property be immediately used or occupied by Mr. Freeman as a residence.

While Complainant has already demonstrated that Respondent cannot defeat the Motion with no more than statements in a memorandum, unsupported by actual evidence, see fn.3, even if these statements are considered, they cannot prevent a finding being entered that Respondent is liable for the violations alleged in the Complaint.

First, the Real Estate Purchase Agreement, Complainant's Memorandum, Attachment C, clearly:

(1) allows for immediate occupancy by Mr. Freeman "once the first payment is received, and this agreement signed," Attachment C, Paragraph 9;

(2) states that the "Buyer and Seller agree that Buyer shall pay $5,000 at the time of the signing of this purchase agreement[,]" Id., Paragraph 14; and

(3) states that "[t]here are no agreements, promises, or understandings between the parties except as specifically set forth in this contract." Id., at 12(a).

Respondent does not challenge that she, or her agent, provided the written contract for Mr. Freeman's signature. Complainant's Memorandum, at 16. Nowhere in this Real Estate Purchase Agreement that Respondent provided to Mr. Freeman for signature is it stated that, notwithstanding the actual written terms of the contract, Mr. Freeman was not to occupy the house until he performed extensive repairs on the house.[5] Consequently, by the terms of her own purchase agreement Respondent is precluded from invoking her understanding of what might or might not happen, on Mr. Freeman's signing the purchase agreement, as controlling on Mr. Freeman's opportunity to occupy the house under the purchase agreement.

Moreover, as a matter of law, Respondent's defense theory fails. Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5), provides that "[i]t shall be a prohibited act under section 409 of the Toxic Substances Control Act for any person to fail or refuse to comply with a provision of his section or with any rule or order issued

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[5]Respondent's counsel asserts that Respondent sold the property to Mr. Freeman "at a steep discount, for the express purpose of either demolishing it or rehabbing it" and that "had Respondent known about Mr. Freeman's actual plan, she would not have sold him the property." Respondent's Brief, at 6. However, there is nothing stated in the Real Estate Purchase Agreement regarding any such "purpose" or understanding of Respondent, or any restriction on Mr. Freeman's use of the house. The purchase agreement by its own terms clearly provides that, with regard to "occupancy," Respondent was "to deliver possession to Buyer once the first payment is received, and this agreement signed." Complainant's Memorandum, Attachment C, Paragraph 9.

under this section." By rule, the Administrator provides that the requirements of 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, applies to the "sellor or lessor of target housing[.]" 40 C.F.R. § 745.100. In the Complaint, Complainant alleges that Respondent violated several provisions of 40 C.F.R. Part 745, Subpart F.

The Administrator defines "target housing" to be, with exceptions not here applicable -- or cited by Respondent in opposition to the Motion -- "any housing constructed prior to 1978[.]" 40 C.F.R. § 745.103. The term "target housing" is likewise defined by Congress at 42 U.S.C. § 4851b(27), as "any housing constructed prior to 1978," with exceptions not herein applicable. In Complainant's Memorandum, Complainant has demonstrated that the house sold by Respondent to Mr. Freeman was built "prior to 1978." Complainant's Memorandum, at 4 (Proposed Finding of Fact 4). Respondent does not challenge that proposed finding of fact in Respondent's Brief.

Neither the Congress nor the Administrator exclude from the definition of "target housing" houses which are dilapidated and sorely in need of repair, nor do either make the definition turn on the intent of any party regarding a house being sold or leased. The definition turns simply on the age of the house. Complainant set out relevant legislative history in Complainant's Memorandum, at 21-24. Respondent neither challenges that recitation of legislative history, nor does Respondent cite any other legislative history to support its contention that a house can be excluded from the definition of "target housing" based upon the intent of the parties to the sale or lease of the house, or based upon the physical condition of the house. Instead, Respondent cites the definition of "residential real property" under 42 U.S. C. § 4851b(24), without any explanation

regarding how it is that this defined term is relevant to a finding of liability against Respondent in this matter, for violations of 40 C.F.R. Part 745, Subpart F.

Consequently, Respondent cannot prevail on the defense to liability that she raises in opposition to the Motion. To the contrary, based upon the argument made by Complainant both here, and in Complainant's Memorandum, Complainant is entitled to a finding that Respondent violated the provisions of 40 C.F.R. Part 745, Subpart F, as alleged in the Complaint.

IS THERE A GENUINE ISSUE OF MATERIAL FACT ON PENALTY, AND IS THE PENALTY AMOUNT APPROPRIATE?

Complainant has re-evaluated her determination of an appropriate penalty to propose for the violations alleged in the Complaint, and, as a consequence, there should be no issue of law or fact regarding the penalty amount proposed in this matter.

Attached to this reply is a declaration provided by Gail B. Coad, Principal, Industrial Economics, Inc., on September __, 2009, setting forth her credentials as an expert in the area of financial analysis. She has been retained by U.S. EPA to provide a financial capability analysis of Kathryn Lewis-Campbell, Declaration of Gail B. Coad, Paragraph 4, and her declaration recites her analysis of Respondent's financial circumstances. In that analysis, Ms. Coad concludes that, based upon the information provided by Respondent, Respondent cannot pay a penalty of more than $500.00. Id., at Paragraph 19. Essentially, that opinion is based upon Respondent's submissions revealing that her **[CONFIDENTIAL INFORMATION DELETED .....]** Id., at Paragraph 16. However, **[CONFIDENTIAL INFORMATION DELETED .....**

.....

.....] Id., Paragraph 19. And, it appears that Respondent has "underreported her living expenses[.]" Id.

While a sound analysis would ordinarily require additional information to "verify some of the data that [Respondent] has provided[,]" and Complainant, at the request of Industrial Economics, has sought that additional information in discovery, at the same time, Ms. Coad believes that " it is unlikely that the requested documentation will change my opinion regarding [Respondent's] ability to pay." Id., Paragraph 20. This is, of necessity, a judgment call -- especially so, as some information regarding Respondent is supported by nothing other than statements of her counsel -- but a judgment call which, in this particular case, Complainant finds is not unwarranted.

Complainant acknowledges that the verification sought in Complainant's Second Motion for Production of Information is generally necessary for a sound determination of a party's financial circumstances. However, under the circumstances in this particular case -- those being: (1) the amount of penalty involved being less than $500; (2) Ms. Coad's opinion that it is unlikely that additional documentation would change her opinion regarding Respondent's "ability to pay," (3) and the limited time available for further discovery prior to the date set for hearing -- Complainant exercises her discretion to reduce the penalty amount proposed so as to adequately incorporated a consideration of Respondent's "ability to pay" consistent with Ms. Coad's declaration.

On her Motion for Accelerated Decision on Liability and Penalty, Complainant proposes that, for the reasons stated herein, a penalty amount of $0 be found appropriate for the violations alleged in the Complainant, should Respondent be found liable for those violations.

Complainant will propose the same penalty amount should this proceeding continue beyond a decision on the Motion. Given Respondent's limited financial resources and the information Complainant has been provided concerning her health and her obligations to her grandchildren, the imposition of any penalty would be onerous for her, especially so when weighed against the little deterrent effect some penalty amount less than $500 would likely serve.

CONCLUSION

For the reasons stated in the Motion, Complainant's Memorandum, and this reply, Complainant asks that an order be entered finding Respondent liable for all violations alleged in the Complaint, and that no penalty be assessed. Complainant would note that the Administrator, by rule, provides that: "[if] an accelerated decision . . . is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted'," and "[t]he partial accelerated decision . . . shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed." 40 C.F.R. § 22.20(b)(2).

Respectfully submitted,

Richard R. Wagner
Senior Attorney and Counsel for
the Administrator's Delegated Complainant

Maria Gonzalez
Associate Regional Counsel and Co-Counsel for
the Administrator's Delegated Complainant

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DECLARATION OF GAIL B. COAD

THIS DECLARATION IS AN ANALYSIS OF FINANCIAL INFORMATION SUBMITTED BY RESPONDENT WITH REGARD TO THIS MATTER. AS RESPONDENT, BY COUNSEL, HAS CLAIMED HER FINANCIAL INFORMATION TO BE CONFIDENTIAL, THIS DECLARATION HAS BEEN REDACTED FROM PUBLIC VIEWING. THE COMPLETE DECLARATION HAS BEEN FILED UNDER SEAL TO THE HEARING CLERK OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 5, AND COPY OF THE DECLARATION SERVED ON THE PRESIDING OFFICER AND RESPONDENT.

In Re Kathryn Y. Lewis-Campbell
No. TSCA-05-2009-0004

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of the **Complainant's Reply to Respondent's Brief in Oppostion to Complainant's Motion for Accelerated Decision on Liability and Appropriate Penalty** (Redacted Public Edition) in the office of the Regional Hearing Clerk (E-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604, with this Certificate of Service.

I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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September 30, 2009

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