

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

In the Matter of: )  
)  
John Rice, LLC )  
930 Avenue A )  
Opelika, Alabama 36801 )  
)  
Respondent )  
\_\_\_\_\_ )

Docket No. TSCA-4-2012-2646

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MOTION FOR DEFAULT

COMES NOW THE Complainant, Director of the Air, Pesticides, and Toxics Management Division of the United States Environmental Protection Agency (EPA) Region 4, and moves for a finding of default and issuance of a default order against Respondent, pursuant to 40 C.F.R. §§ 22.17(a), (b) and (c). Through this Motion, Complainant seeks resolution of all of the proceeding and requests that the Respondent be assessed a penalty of \$84,920.

According to 40 C.F.R. § 22.17(a), “[a] party may be found to be in default . . . after motion, upon failure to file a timely answer to the complaint . . . “ 40 C.F.R. § 22.15 requires that an answer be filed with the Regional Hearing Clerk within thirty (30) days after service of the complaint. In this case, the Respondent has not timely filed an answer to the complaint, which was filed on May 25, 2012 and served on Respondent on May 29, 2012. In support of this Motion for Default, Complainant attaches the following exhibits: Exhibit A, a copy of the complaint; Exhibit B, Amended Proof of Service of complaint, with attachment; and Exhibit C, Declaration of Patricia A. Bullock, Regional Hearing Clerk, stating that an answer to the complaint has not been filed.

Pursuant to 40 C.F.R. § 22.17(b), Complainant seeks resolution of the entire proceeding and asks the Presiding Officer to order the Respondent to pay a penalty of \$84,920 to the United States.

According to 40 C.F.R. § 22.17(c), “[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the

Act.” In this case, the relief proposed in this motion for default is assessment of a penalty of \$84,920, and this relief is not clearly inconsistent with the record of this proceeding and the underlying Act. Consequently, the Presiding Officer should issue a Default Order against Respondent which requires payment of a \$84,920 penalty.

As further support, the Complainant states the following legal and factual grounds for the relief requested, as required by 40 C.F.R. § 22.17(b).

1. Because Respondent is in default, all of the factual allegations in the complaint are deemed admitted by the Respondent. 40 C.F.R. § 22.17(a).
2. Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a) and Section 1018 of Title X of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d (hereinafter “Section 1018”) authorize EPA to assess penalties for violations of Section 409 of TSCA, 15 U.S.C. § 2689 and regulations at 40 C.F.R. Part 745, Subpart F.
3. Violations of 40 C.F.R. Part 745, Subpart F are violations of Section 409 of TSCA, 15 U.S.C. § 2689, pursuant to Section 1018.
4. The statutory maximum penalty assessable for a violation of Section 409 of TSCA, 15 U.S.C. § 2689 occurring after March 15, 2004 and through January 12, 2009 is \$11,000. Section 1018 and 40 C.F.R. § 19.4.
5. Respondent was the lessor of residential properties located at 215-B Samford Avenue, Opelika, Alabama; 1827 1<sup>st</sup> Avenue, Opelika, Alabama; 104 14<sup>th</sup> Street, Opelika, Alabama; and 4006 US Highway N, Opelika, Alabama. Complaint, paragraph 12. These residential properties were constructed prior to 1978, and at all times relevant to this matter, were “target housing” as that term is defined at 40 C.F.R. § 745.108. Complaint, paragraphs 12 and 13. Respondent entered into four leases of these residential properties on or around the dates listed below, as follows:

<u>Address</u>	<u>Date of Lease</u>
215-B Samford Avenue, Opelika, Alabama	January 2, 2008
1827 1 <sup>st</sup> Avenue, Opelika, Alabama	April 1, 2008
104 14 <sup>th</sup> Street, Opelika, Alabama	June 1, 2007
4006 US Highway 29 N, Opelika, Alabama	June 1, 2008

Complaint, paragraph 15.

**Counts 1-4**

6. At the time that Respondent entered into the four leases listed above, Respondent did not provide the lessees with an EPA-approved lead hazard information pamphlet, as required by 40 C.F.R. § 745.107(a)(1). Complaint, paragraph 17. Respondent's failures to provide the lessees with an EPA-approved lead hazard pamphlet, as required by 40 C.F.R. § 745.107(a)(1) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

**Counts 5-8**

7. At the time that Respondent entered into the four leases listed above, Respondent did not include, as an attachment to the leases or within the leases, a Lead Warning Statement containing language provided in 40 C.F.R. § 745.113(b)(1), as required by 40 C.F.R. § 745.113(b)(1). Complaint, paragraph 20. Respondent's failures to include, as an attachment to the leases or within the leases, a Lead Warning Statement containing the language provided in 40 C.F.R. § 745.113(b)(1), as required by 40 C.F.R. § 745.113(b)(1) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

**Counts 9-12**

8. At the times that Respondent entered into the four leases listed above, Respondent failed to include in the leases a statement by Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the units being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards, as required by 40 C.F.R.



§ 745.113(b)(2). Complaint, paragraph 23. Respondent's failures to include in the leases a statement by Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the units being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards, as required by 40 C.F.R. § 745.113(b)(2) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

**Counts 13-16**

9. At the times that Respondent entered into the four leases listed above, Respondent failed to include in the leases a list of any records or reports available to Respondent pertaining to lead-based paint and/or lead-based paint hazards in the units that had been provided to the lessees or indicate that no such records or reports are available, as required by 40 C.F.R.

§ 745.113(b)(3). Complaint, paragraph 26. Respondent's failures to include in the leases a list of any records or reports available to Respondent pertaining to lead-based paint and/or lead-based paint hazards in the units that had been provided to the lessees or indicate that no such records are available, as required by 40 C.F.R. § 745.113(b)(3) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

**Counts 17-20**

10. At the times that Respondent entered into the four leases listed above, Respondent failed to include in the leases a statement by the lessees affirming receipt of the information set forth in 40 C.F.R. § 745.113(b)(2) and (3) and the lead hazard information pamphlet required under 15 U.S.C. § 2696, as required by 40 C.F.R. § 745.113(b)(4). Complaint, paragraph 29.

Respondent's failures to include in the leases a statement by the lessees affirming receipt of the information set forth in 40 C.F.R. §§ 745.113(b)(2) and (3) and the lead hazard information

required under 15 U.S.C. § 2696, as required by 40 C.F.R. § 745.113(b)(4) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

**Counts 21-24**

11. At the times that Respondent entered into the four leases listed above, Respondent did not include the signatures of Respondent and the lessees certifying to the accuracy of their statements to the best of their knowledge, along with the dates of signature, as required by 40 C.F.R. § 745.113(b)(6). Complaint, paragraph 32. Respondent's failures to include the signatures of Respondent and the lessees certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature, as required by 40 C.F.R. § 745.113(b)(6) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

**Penalty**

12. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), states that the following criteria must be considered in penalty assessment: the nature, circumstances, extent, and gravity of the violations; Respondent's history of such violations of TSCA; the degree of culpability involved; Respondent's ability to pay a penalty without jeopardizing its ability to continue to do business; and, such other factors as justice may require.
13. In addition to consideration of the criteria listed in TSCA § 16(a), EPA also uses enforcement response policies in calculating penalties. In this case, EPA used the Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy (December 2007), hereinafter referred to as the “ERPP” and attached hereto as Exhibit D. The ERPP explains penalty calculation in chapters 5, 6, and 7. ERPP at 3. The ERPP references the EPA's Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act: PCB Penalty Policy, 45 Fed. Reg. 59771 (1980) (TSCA Civil Penalty Guidelines); a copy is attached hereto as Exhibit E.

14. According to the ERPP, a gravity-based penalty is calculated for a violation with consideration of the following factors: “the ‘nature’ of the violation,” “the ‘circumstances’ of the violation,” and “the ‘extent’ of harm that may result from a given violation.” ERPP at 11. “These factors are incorporated into a penalty matrix that specifies the appropriate gravity-based penalty. See Appendix B.” ERPP at 11. Upward and downward adjustments may be made to a gravity-based penalty, in consideration of the other factors, including “the violator’s ability to pay/ability to continue in business;” “the violator’s history of prior violations;” “the violator’s degree of culpability;” “voluntary disclosure of violations by the violator;” and “such other factors as justice may require.” ERPP at 11.
15. The “nature” of a violation is discussed on pages 11 and 12 of the ERPP and in the TSCA Civil Penalty Guidelines at 48 Fed. Reg. 59771. The “nature” of a violation is “the essential character of the violation,” and a violation can be “of a chemical control, control-associated data gathering, or hazard assessment nature.” ERPP at 11. The nature of all violations of 40 C.F.R. Part 745, Subpart F is “hazard assessment.” ERPP at 11-12.
16. “The ‘circumstances’ reflect the probability of harm resulting from a particular type of violation.” ERPP at 11-12. For violations of 40 C.F.R. Part 745, Subpart F, “the harm is associated with the failure to disclose information on lead-based paint and/or lead-based paint hazards.” ERPP at 11-12.

Therefore, the primary circumstance to be considered is the purchaser’s or lessee’s ability to properly assess and weigh the factors associated with human health risk when purchasing or leasing target housing. The greater the deviation from the regulations (such as no disclosure), the greater the likelihood that the purchaser or lessee will be uninformed about the hazards associated with lead-based paint and, consequently, the greater the likelihood of harm due to exposure to lead-based paint and/or lead-based paint hazards.



ERPP at 11-12. The ERPP designates six “circumstance” levels, with level 1 representing the greatest probability of harm and level 6 representing the lowest probability of harm. ERPP at 11-12.

17. The “extent” of a violation relates to the degree or scope of the potential harm associated with the violation. ERPP at 11-12. The extent level is “major” when the youngest individual at the residence is under six years; the extent level is “significant” when the age of the youngest individual is not known or the youngest individual is between six and eighteen; and the extent level is “minor” when the age of the youngest individual is at least eighteen years. ERPP at 13.

#### **Gravity-Based Penalty of Violations**

18. The total gravity-based penalty of the violations is \$84,920. This penalty is the sum of the penalties calculated below.

(1) Counts 1- 4: EPA alleges in these counts that Respondent did not provide lessees with EPA-approved lead-hazard information pamphlets, in violation of 40 C.F.R. § 745.107(a)(1). Under the ERPP, the nature of all violations of 40 C.F.R. Part 745 is hazard assessment. See ERPP at 11-12, and paragraph 15 of this Motion for Default. The ERPP designates the circumstance level for each of these violations (failure to provide lessees with EPA-approved lead-hazard information pamphlet, violation of 40 C.F.R. § 745.107(a)(1)) as level 1. See ERPP at 27, and paragraph 16 of this Motion for Default. According to the ERPP, the extent level for each of these violations is significant because the age of the youngest individual at each residence is not known by EPA. See ERPP at 13 and Exhibit F, Declaration of Andrea Price-Lippitt. The penalty for each of these violations is \$6,600. See ERPP at 30. The penalty for counts 1-4 is \$26,400 (4 x \$6,600).

(2) Counts 5-8: EPA alleges in these counts that Respondent did not include a lead warning statement as an attachment to or within the lease, in violation of 40 C.F.R. § 745.113(b)(1). According to the ERPP, the nature of these violations is hazard assessment because the nature of all violations of 40 C.F.R. Part 745 is hazard assessment. See ERPP at 11-12. The ERPP designates the circumstance level for each of these violations (failure to include lead warning statement as an attachment to or within lease, violation of 40 C.F.R. § 745.113(b)(1)) as 2. See ERPP at 27. The extent level is significant because EPA does not know the age of the youngest individual at each residence. The penalty for each of these violations is \$5,500. See ERPP at 30. The penalty for counts 5-8 is \$22,000 (4 x \$5,500).

(3) Counts 9-12: EPA alleges in these counts that Respondent did not include in the leases a statement disclosing the presence of lead-based paint and/or lead-based paint hazards or indicating no knowledge of the presence of lead-based paint or lead-based paint hazards, in violation of 40 C.F.R. § 745.113(b)(2). Under the ERPP, the nature of these violations is hazard assessment because the nature of all violations of 40 C.F.R. Part 745 is hazard assessment. See ERPP at 11-12. The ERPP designates the circumstance level for each of these violations as 3. See ERPP at 27. The extent level is significant because EPA does not know the age of the youngest individual at each residence. The penalty for each of these violations is \$4,400. See ERPP at 30. The penalty for counts 9-12 is \$17,600 (4 x \$4,400).

(4) Counts 13-16: EPA alleges in these counts that Respondent did not include in four leases a list of any records or reports available to Respondent pertaining to lead-based paint and/or lead-based paint hazards in the units that had been provided to the lessees or indicate that no such records or reports are available, in violation of 40 C.F.R. § 745.113(b)(3). Under the ERPP, the nature of these violations is hazard assessment because the nature of all violations of 40



C.F.R. Part 745 is hazard assessment. See ERPP at 11-12. The ERPP designates the circumstance level for each of these violations as 5. See ERPP at 28. The extent level is significant because EPA does not know the age of the youngest individual at each residence. The penalty for each of these violations is \$1,430. See ERPP at 30. The penalty for counts 13-16 is \$5,720 (4 x \$1,430).

(5) Counts 17-20: EPA alleges in these counts that Respondent did not include in four leases a statement by the lessees affirming receipt of the information set forth in 40 C.F.R.

§ 745.113(b)(2) and (3) and the lead information pamphlet required under 15 U.S.C. § 2696, in violation of 40 C.F.R. § 745.113(b)(4). Under the ERPP, the nature of these violations is hazard assessment because the nature of all violations of 40 C.F.R. Part 745 is hazard assessment. See ERPP at 11-12. The ERPP designates the circumstance level for each of these violations as 4. See ERPP at 28. The extent level is significant because EPA does not know the age of the youngest individual at each residence. The penalty for each of these violations is \$2,750. See ERPP at 30. The penalty for counts 17-20 is \$11,000 (4 x \$2,750).

(6) Counts 21-24: EPA alleges in these counts that Respondent did not include signatures of Respondent and the lessees certifying to the accuracy of their statements to the best of their knowledge, along with the dates of signature, in violation of 40 C.F.R. § 745.113(b)(6). Under the ERPP, the nature of these violations is hazard assessment because the nature of all violations of 40 C.F.R. Part 745 is hazard assessment. See ERPP at 11-12. The ERPP designates the circumstance level for each of these violations as 6. See ERPP at 29. The extent level is significant because EPA does not know the age of the youngest individual at each residence. The penalty for each of these violations is \$550. See ERPP at 30. The penalty for counts 21-24 is \$2,200 (4 x \$550).

### **Consideration of Adjustment Factors**

19. Ability to Pay/Continue in Business. Respondent has not filed an answer raising ability to pay as an issue. Respondent has not provided any financial documents for consideration of an ability to pay claim in this case. Exhibit F, Declaration of Andrea Price-Lippitt. If a respondent “does not raise ability to pay as an issue in its answer . . . the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived . . . and thus this factor does not warrant a reduction of the proposed penalty.” In Re New Waterbury, Ltd., TSCA Appeal No. 93-2, 5 EAD 529, 542 (EAB 1994). No penalty reduction is required under this factor because Respondent has not raised this issue in its answer, nor has Respondent provided any financial documents for EPA review in consideration of this factor.
20. History of Prior Violations. Respondent does not have a history of prior violations. See Exhibit F, Declaration of Andrea Price-Lippitt. Therefore, under the ERPP, no upward penalty adjustments should be made in consideration of this factor. See ERPP at 18.
21. Degree of Culpability. According to the ERPP at page 19, the penalty should be raised in consideration of this factor if a violator willfully or knowingly commits a violation. In this case, EPA does not have any evidence which would show that a willful or knowing violation occurred. Therefore, in consideration of this factor, Complainant does not propose an upward penalty adjustment.
22. Self-Disclosure. Under the ERPP, a penalty may be reduced if a violator self-discloses a violation. See ERPP at 20. In this case, the Respondent did not self-disclose the violations. See Exhibit F, Declaration of Andrea Price-Lippitt. Therefore, no penalty adjustments were made in consideration of this factor.

23. Other Unique Factors. The ERPP at pages 20 through 23 discuss other factors which may be considered to reduce a penalty. Complainant did not reduce the penalty in consideration of these factors. See Exhibit F, Declaration of Andrea Price-Lippitt. Complainant has not been provided with information from Respondent which indicates that there is no known risk or exposure or reduced risk of exposure. Complainant does not believe it is appropriate to reduce the penalty on the basis of litigation risk. Respondent has not been responsive to EPA's settlement efforts. Respondent has not provided Complainant with information regarding the extent of Respondent's efforts to comply with the requirements of 40 C.F.R. Part 745, Subpart F. Exhibit F, Declaration of Andrea Price-Lippitt.

**Proposed Penalty**

24. Below is a penalty summary table.

Penalty Summary Table

<b>Counts</b>	<b>Circumstances Level of each count</b>	<b>Extent Level of each count</b>	<b>Penalty for each count</b>	<b>Penalty for group of counts</b>
Counts 1-4	1	Significant	\$6,600	\$26,400
Counts 5-8	2	Significant	\$5,500	\$22,000
Counts 9-12	3	Significant	\$4,400	\$17,600
Counts 13-16	5	Significant	\$1,430	\$ 5,720
Counts 17-20	4	Significant	\$2,750	\$11,000
Counts 21-24	6	Significant	\$550	\$ 2,200

TOTAL PENALTY: \$84,920



25. Complainant proposes that a penalty of \$84,920 be assessed against Respondent. This penalty amount is not inconsistent with the record.

WHEREFORE, Complainant requests issuance of a Default Order against Respondent to resolve the entire proceeding with a penalty assessment of \$84,920.

Respectfully submitted,



Michiko Kono  
Attorney for Complainant

Date: April 2, 2013

Attachments: Exhibits A - F

CERTIFICATE OF SERVICE

I certify that the original Motion for Default in the John Rice, LLC matter., Docket Number TSCA-04-2012-2646, with exhibits, and a copy were filed with the Regional Hearing Clerk, and a copy of the Motion for Default with exhibits was mailed to the addressees listed below on this 2nd day of April, 2013.

Addressees:

John W. Rice  
John Rice, LLC  
930 Avenue A  
Opelika, Alabama 36801

(First class mail)

Susan Schub  
Regional Judicial Officer  
U.S. EPA Region 4  
61 Forsyth Street  
Atlanta, Georgia 30303

(Internal EPA mail)

4/2/2013  
Date

Michiko Kono  
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