UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Frank J. Davis	)	
	)	**Docket No. TSCA-05-2007-0002**
	)	
Respondent	)	
	)	

NOTICE OF FILING

You are hereby notified that a Motion: (1) Withdraw Counts 1, 13, 23 and 33 of the Complaint; and (2) for an Order of Default or, in the Alternative, Accelerated Decision on the issues of Respondent's Liability for the Remaining Violations Alleged in the Complaint and that attached Memorandum in Support of Complaint's Motion to: (1) Withdraw Counts 1, 13, 23 and 33 of the Complaint; and (2) for an Order of Default or, in the Alternative, Accelerated Decision on the Issue of Respondent's Liability were filed with the Regional Hearing Clerk on October 12, 2007.

Respectfully submitted,

Eileen L. Furey
Associate Regional Counsel
Region 5, U.S. EPA
312-886-7950

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COMPLAINANT'S MOTION: (1) TO WITHDRAW COUNTS 1, 13, 23 AND 33 OF THE COMPLAINT; AND (2) FOR AN ORDER OF DEFAULT OR, IN THE ALTERNATIVE, FOR ACCELERATED DECISION ON THE ISSUE OF RESPONDENT'S LIABILITY FOR THE REMAINING VIOLATIONS ALLEGED IN THE COMPLAINT

Complainant, Director of the Chemicals Management Branch, Land and Chemicals Division, Region 5, U.S. EPA ("Complainant" or "U.S. EPA"), through its undersigned attorney, hereby moves to withdraw Counts 1, 13, 23 and 33 of the Complaint. Additionally, Complainant moves the Court for an Order of Default pursuant to Section 22.17(a) 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. §§ 22.17(a) or, in the alternative, for an accelerated decision pursuant to Section 22.20 of the Consolidated Rules, on the issue of Respondent's liability under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851 *et seq*. In support of this motion, Complainant submits the attached Memorandum in Support of Complainant's Motion: (1) to Withdraw Counts 1, 13, 23 and 33 of the Complaint,

and (2) for an Order of Default or, in the Alternative, for Accelerated Decision on the Issue of Respondent's Liability.

Respectfully submitted,

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Chicago, IL 60604

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MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION: (1) TO WITHDRAW COUNTS 1, 13, 23 AND 33; AND (2) FOR DEFAULT OR, IN THE ALTERNATIVE, FOR AN ACCELERATED DECISION ON THE ISSUE OF LIABILITY

Complainant, Director of the Chemicals Management Branch, Land and Chemicals Division, Region 5, U.S. EPA ("Complainant" or "U.S. EPA"), through its undersigned attorney, hereby submits this memorandum in support of its Motion to: (1) Withdraw Counts 1, 13, 23 and 33 of the Complaint; and (2) for an Order of Default or, in the Alternative, Accelerated Decision on the issue of Respondent's Liability for the Remaining Violations Alleged in the Complaint.

I. BACKGROUND OF THE CASE

On December 7, 2006, U.S. EPA filed the Complaint in this matter, and instituted this civil administrative action pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a) and Sections 22.1(a)(5) and 22.13 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, 40 C.F.R. §§ 22.1(a)(5) and 22.13 ("Consolidated Rules"). The Complaint alleged in 54 counts that

Respondent had failed to comply with the regulations implementing Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851 ("RLBPHRA"). The regulations, codified at 40 C.F.R. Part 745, subpart F (the "Disclosure Rule"), require owners and lessors of most housing constructed prior to 1978 to disclose to, respectively, purchasers and lessees the presence of lead-based paint and/or lead-based paint hazards. The Complaint alleged that between June 1, 2002 and May 17, 2005, Respondent violated the RLBPHRA by leasing ten properties and selling two properties without following various requirements of the Disclosure Rule. Complainant proposed a total penalty of $52,724.

Respondent filed his *pro se* Answer on January 29, 2007, which denied all 54 counts in the Complaint, and requested a hearing. The parties agreed to try to resolve this matter through alternative dispute resolution proceedings, which were ultimately unsuccessful. In an Order dated May 14, 2007, the Court directed the parties to exchange prehearing information in accordance with Rule 22.19 of the Consolidated Rules (the "Prehearing Exchange Order"). Complainant submitted its Initial Prehearing Exchange on June 15, 2007. Respondent failed to submit any information in response to the Court's Prehearing Exchange Order. By Order dated June 25, 2007, the Court provided Respondent until July 6, 2007 in which to submit information requested in the Court's Prehearing Exchange Order. Respondent failed to submit any materials on or before July 6, 2007, and subsequently failed to appear for the teleconference scheduled by the Court on Thursday, July 19, 2007. To date, Respondent has failed to submit any information responsive to the Prehearing Exchange Order.

II. STATUTORY AND REGULATORY BACKGROUND

In passing the RLBPHRA, Congress determined that a key component of the national strategy to reduce and eliminate the threat of childhood lead poisoning would be an education program designed to inform "the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards." 42 U.S.C. § 4851(a)(1), (7), cited in *In re Harpoon Partnership*, TSCA Appeal No. 04-02 (EAB, May 19, 2005). To implement this education program, Congress required the Administrator of U.S. EPA and the Secretary of the United States Department of Housing and Urban Development ("HUD") to promulgate regulations for the disclosure of lead-based paint hazards in "target housing" offered for sale or lease. 42 U.S.C. § 4852d(a)

On March 6, 1996, U.S. EPA and HUD jointly promulgated the Disclosure Rule. The Disclosure Rule imposes certain requirements on sellers, lessors, and agents of "target housing." "Target housing" means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling. 40 C.F.R. § 745.103. With very limited exceptions, the requirements of the Disclosure Rule apply to all transactions to sell or lease target housing. The required disclosure activities must be completed before a lessee or purchaser is obligated under any contract to lease or purchase target housing. 40 C.F.R. § 745.100.

Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with the Disclosure Rule violates Section 409 of TSCA, 15 U.S.C. § 2689, which may subject the violator to U.S. EPA administrative civil penalties under Section 16 of TSCA, 15 U.S.C. § 2615(a), 40 C.F.R. § 745.118(f), and 42 U.S.C. § 4852d(b)(5).

III. WITHDRAWAL OF COUNTS 1, 13, 23 AND 33

Complainant has moved, pursuant to Section 22.14(d) of the Consolidated Rules for withdrawal of Counts 1, 13, 23 and 33 of the Complaint. These four counts concern the adequacy of Respondent's disclosures in connection with a lease dated November 14, 2003 for the target housing located at 1838 Brookside Avenue in Indianapolis, Indiana.

In June of 2007, U.S. EPA contacted the Indianapolis Housing Authority ("IHA") to request copies of "all leases, including any lead-based paint disclosures made either within the lease or as an attachment, submitted to IHA by Frank J. Davis as a participating owner." (A copy of U.S. EPA's request to IHA is attached as Attachment B to the Declaration of Estrella Calvo in Support of Complainant's Motion: (1) to Withdraw Counts 1, 13, 23 and 33 of the Complaint; and (2) for Default or, in the Alternative, for an Accelerated Decision on the Issue of Liability ("Calvo Declaration"), attached to this memorandum as Attachment 1.) In response to the Agency's request, IHA provided copies of two leases, one for the 1838 Brookside Avenue property, and another dated August 1, 2002 for the 725 North Sherman Drive property (also at issue in this case). IHA's copy of the 1838 Brookside Avenue lease included, as an attachment to the lease, a lead-based paint disclosure form executed by Respondent and the tenant. A complete copy of the 1838 Brookside Avenue lease dated August 1, 2002 as provided to U.S. EPA by IHA is attached as Attachment D to the Calvo Declaration. (Strangely, however, the copy of the 1838 Brookside Avenue lease provided to U.S. EPA by IHA did not contain a copy of the "personal letter" which, according to Respondent's Answer, he provided to each tenant, and which was included with the copy of this lease provided by Respondent to Complainant. *Compare* CX-23, p. 328 of Complainant's Initial Prehearing Exchange *with* Attachment D to

Calvo Declaration.)[1]

Prior to receipt of this information from IHA, U.S. EPA had no knowledge of the existence of the lead-based paint disclosure form executed in connection with the lease of the 1838 Brookside Avenue property. The copy of this lease provided by Respondent to U.S. EPA in response to a subpoena *duces tecum* issued on June 28, 2005 did not contain this disclosure form. (*See* CX-17 to Complainant's Initial Prehearing Exchange, which is a complete copy of the information submitted by Respondent in compliance with the subpoena *duces tecum*.) The information provided by IHA supports the conclusion that Respondent satisfied the requirements of the Disclosure Rule in connection with this lease transaction. Accordingly, U.S. EPA asks leave pursuant to Section 22.14(d) of the Consolidated Rules to withdraw Counts 1, 13, 23 and 33.

U.S. EPA has recalculated the penalty proposed in the Complaint to subtract those penalty amounts associated with Counts 1, 13, 23 and 33. The recalculated penalty amount is $50,634. Attachment E to the Calvo Declaration is a Penalty Calculation Memo with revised penalty figures.

IV. MOTION FOR ORDER OF DEFAULT

A. Factual Background

Complainant moves the Court for an Order of Default with regard to all remaining counts of the Complaint. As noted above, on May 14, 2007, the Court ordered the parties to exchange prehearing information in accordance with Rule 22.19 of the Consolidated Rules. U.S. EPA

[1] To avoid wasteful duplication, when an exhibit to this memorandum is also an exhibit to Complainant's Initial Prehearing Exchange, Complainant has referred to the exhibit by its prehearing exchange exhibit number, and has not attached it separately here.

submitted its prehearing exchange on June 15, 2007 in accordance with the Court's Order. When Respondent failed to submit any prehearing exchange information, the Court convened a teleconference on June 25, 2007. During the teleconference, Respondent represented that he was in the process of changing his residence, and would notify the court shortly of his new address or a post office box to which mail could be sent. As a result of the teleconference, the Court allowed Respondent until July 6, 2007 in which to provide the information requested in the May 14, 2007 Order. The Court faxed a copy of the Order granting the extension to Respondent at the fax number provided by him to the Court.

Respondent failed to submit any responsive information on or before July 6, 2007 and also failed to inform the Court of any new mailing address. The Court convened a teleconference on Thursday, July 19, 2007. Respondent failed to appear during this teleconference. To date, Respondent has not notified the Court of any new mailing address. U.S. EPA believes that Respondent's only contact with the Court since the June 25, 2007 teleconference was during a telephone call with the Court's Legal Staff Assistant, Mary Angeles, on Wednesday, July 18, 2007, when Respondent represented that he might make himself available for a teleconference on Thursday, July 19, 2007. As noted above, Respondent failed to appear.

As noted in Complainant's Updated Status Report dated September 24, 2007, a U.S. EPA civil investigator recently discovered that on August 31, 2007, Respondent filed a Voluntary Petition for bankruptcy protection with the U.S. Bankruptcy Court for the Southern District of Indiana. Respondent's bankruptcy filings are silent with regard to U.S. EPA's claims in this matter.

B. Argument

Section 22.17(a) of the Consolidated Rules provides that:

> A party may be found to be in default: after motion... upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of respondent's right to contest such factual allegations. . . .

Section 22.17(c) provides that:

> When the Presiding Office finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. ...

Respondent failed to comply with the information exchange requirements of this Court's Orders of May 14, 2007 and June 25, 2007. Respondent disregarded a teleconference convened by the Court, and has failed to notify the Court of his change of address. Respondent has submitted no factual information whatsoever to support the denials in his Answer. Complainant's motion for default is clearly consistent with the record of proceedings in this matter.

U.S. EPA seeks imposition of a penalty of $50,634 as part of the Court's default order. The Consolidated Rules provide that "[w]here the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested." 40 C.F.R. § 22.17(b). Complainant's explanation of the legal and factual grounds for the penalty proposed in the Complaint was included as Section VI, pp. 31-48, of Complainant's Initial Prehearing

Exchange. *See also* CX-39 through CX-48 (exhibits supporting Complainant's initial proposed penalty in this matter). Since Complainant filed its Initial Prehearing Exchange, it has received no additional information from Respondent regarding his ability to pay. This Court's Order of May 14, 2007 required Respondent to submit financial information if he contended that the proposed penalty exceeded his ability to pay. (May 14, 2006 Order, p. 5, ¶ 6.)

As explained above, Complainant proposes to reduce the penalty to account for the withdrawal of Counts 1, 13, 23 and 33. The Calvo Declaration attached as Exhibit 1 to this memorandum , and the revised penalty calculation attached thereto as Attachment E, support Complainant's request that the default order include the imposition of the revised proposed penalty.

Accordingly, Complainant moves the Court to issue an Order of Default, resolving all remaining counts of the Complaint in favor of U.S. EPA, and imposing a penalty of $50,634.

V. MOTION FOR ACCLERATED DECISION

A. Standard for Accelerated Decision

Section 22.20(a) of the Consolidated Rules authorizes the Presiding Officer "at any time [to] render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 56. *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *BMX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000).

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To avoid summary judgment, the opposing party must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment is proper against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In considering motions for accelerated decisions, the evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The moving party has an initial burden to show the absence of any genuine issue of material fact by "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, *quoting* Fed. R. Civ. P 56(c). "A 'material' fact is one that may affect the outcome of the case." *Puerto Rico Aqueduct*, 35 F.3d at 605. Upon such a showing, the party opposing the motion "may not rest upon the mere allegations or denials of [its] pleading, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial," and if it "does not so respond, summary judgment, if appropriate, shall be entered against [it]." Fed. R. Civ. P. 56(e). The opponent of the motion "must demonstrate that this dispute is 'genuine' by referencing probative evidence in the record, or by producing such evidence. *In re Green Thumb Nursery,*

Inc., 6 E.A.D. 782, 793 (EAB 1997). Summary disposition may not be avoided by merely alleging that a factual dispute may exist or that future proceedings may turn something up. *Id.* Thus, Respondent cannot defeat a factual allegation well supported in the record by merely alleging a lack of information as to its accuracy. *Rhee Bros., Inc.*, FIFRA Appeal No. 06-02 (EAB 2007).

B. Argument

1. The Lease Transactions[2]

To demonstrate that Respondent violated Section 1018 of the RLBPHRA, 42 U.S.C. §§ 4851 *et seq.*, Complainant must establish the following *prima facie* elements:

(1) The leased properties are "target housing";

(2) At the time of each lease transaction, Respondent was a "lessor";

(3) At the time of each lease transaction, the person who rented target housing was a "lessee"; and

(4) Before the lessee was obligated under the contract to lease the target housing, Respondent did not satisfy one or more requirements of the Disclosure Rule.

See, e.g., Order Granting Complainant's Motion for Partial Accelerated Decision, *In re Billy Yee*, Docket No. TSCA-7-99-0009 (J. Biro, 1999), attached as Exhibit 2.

U.S. EPA's Complaint alleges that Respondent failed to satisfy certain requirements of the Disclosure Rule with regard to the following nine lease transactions:

[2] For purposes of this argument, Complainant has assumed that the Court has granted its Motion to Withdraw Counts 1, 13, 23 and 33, and that only nine lease transactions remain at issue in this matter.

Address	Date of Lease
2822 English Avenue	03/30/2004
3780 North Parker	08/22/2002
2039 Roosevelt Avenue	06/01/2003
402 South Rural	04/11/2003
815 North Rural	04/24/2003
725 North Sherman Drive	09/16/2002
2518 North Temple Avenue	08/01/2003
4506 East Washington	06/01/2002
2140 East 34th Street	07/10/2002

a. The Leased Properties Are Target Housing.

40 C.F.R. § 745.103 defines "target housing" as any housing constructed prior to 1978, except for housing for the elderly or persons with disabilities (unless children under 6 are residing there) or any 0-bedroom dwellings. Township Assessor records from Marion County, Indiana, submitted by Complainant in its Prehearing Exchange, conclusively establish that all nine properties leased by Respondent were constructed before 1978 and are not 0-bedroom dwellings. The chart below identifies, for each leased property at issue in this matter, the type of dwelling; the date on which each leased property was constructed; and the exhibit in Complainant's Initial Prehearing Exchange that demonstrates the type of dwelling and date of construction:

Address	Type of Dwelling	Date of Construction	Prehearing Exchange Exhibit
2822 English Avenue	One family	1922	CX-2
3780 North Parker	One family	1922	CX-3
2039 Roosevelt Avenue	Two family	1925	CX-4
402 South Rural	One family	1918	CX-5
815 North Rural	One family	1901	CX-6
725 North Sherman Drive	Two family	1925	CX-7
2518 North Temple Avenue	One family	1930	CX-8
4506 East Washington	Two family	1910	CX-9
2140 East 34th Street	One family	1935	CX-10

There is no genuine issue of material fact with regard to whether the leased properties were "target housing" under 40 C.F.R. § 745.103.

b. Respondent is a Lessor.

40 C.F.R. § 745.103 defines "lessor" as:

> any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.

Respondent fits squarely within the definition of lessor: he is an individual who offered nine target housing properties for lease.

Each of the nine leases at issue identifies Respondent as the lessor of the property. Each lease was executed by Respondent, and most of Respondent's signatures are followed by the identifier "Landlord." The chart below identifies each lease by its exhibit number in Complainant's Prehearing Exchange; the page number of the exhibit on which Respondent is identified as the lessor, and quotes the language of the lease regarding Respondent's status:

Address	Complainant's Prehearing Exchange Exhibit Number	Page Number on which Respondent is identified as lessor	Language of the lease identifying Respondent as the lessor
2822 English Avenue	CX-24	338	"THIS LEASE made...between Frank J. Davis (the "Landlord")..." "The Landlord hereby leases to the Tenant..."
3780 North Parker	CX-25	360	"THIS LEASE AGREEMENT is made and entered into... by and between FRANK J.

			DAVIS "Landlord" and ...." "Landlord leases to Tenant..."
2039 Roosevelt Ave.	CX-26	377	"THIS LEASE made...between Frank J. Davis (the "landlord")..." "The Landlord hereby leases to the Tenant..."
402 South Rural	CX-27	392	"THIS LEASE made ... between Frank J. Davis (the "Landlord")..." "The Landlord hereby leases to the Tenant..."
815 North Rural	CS-28	406	"THIS LEASE made ... between Frank J. Davis (the "Landlord")..." "The Landlord hereby leases to the Tenant..."
725 North Sherman Drive	CX-29	411	"THIS LEASE made ...between Frank J. Davis (the "Landlord")..." "The Landlord hereby leases to the Tenant..."
2518 North Temple Avenue	CX-31	455	"THIS LEASE made ... between Frank J. Davis (the "Landlord")..." "The Landlord hereby leases to the

			Tenant..."
4506 East Washington	CX-32	477	"THIS LEASE made ... between Frank J. Davis (the "Landlord")..." "The Landlord hereby leases to the Tenant..."
2140 East 34th Street	CX-33	491	"THIS LEASE AGREEMENT is made ... by and between FRANK J DAVIS, hereinafter referred to as "Landlord" ..." "Landlord leases to Tenant..."

These leases demonstrate conclusively that Respondent was a lessor under 42 U.S.C. § 745.103, and offered for lease the target housing at issue in this case.

c. <u>Each Individual Who Rented Target Housing is a Lessee</u>.

40 C.F.R. § 745.103 defines "lessee" as:

> any entity that enters into an agreement to lease, rent, or sublease target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.

Each of the nine leases at issue in this case was executed by an individual or individuals who are identified in the agreement as tenants. As noted in the chart above, each agreement is identified as a "lease" or "lease agreement." The chart below identifies, for each lease, the prehearing exchange exhibit number; the page number of the prehearing exchange on which an individual (or individuals) are identified as tenants; the page number on which the tenant's (or tenants') signature appears; and the name of the tenant:

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Respectfully submitted,

Eileen L. Furey
Associate Regional Counsel
Region 5, U.S. EPA
312-886-7950

Address	Complainant's Prehearing Exchange Exhibit Number	Page Numbers on which an Individual or Individuals are identified as lessees, and lessees' signature pages	Name of Lessee(s)
2822 English Avenue	CX-24	338; 341	Charlie Dodson and Connie Dodson
3780 North Parker	CX-25	360; 364	Annette Patterson
2039 Roosevelt Avenue	CX-26	377; 380	Amos White and Carolyn Reeves
402 South Rural	CX-27	392; 395	Gregory Caine
815 North Rural	CX-28	406; 409	Jametrice Robinson
725 North Sherman Drive	CX-29	411; 414	Tamara Smith
2518 North Temple Avenue	CX-31	455; 458	David and Myshellria Smith
4506 East Washington	CX-32	477; 480	Charmine and Carolyn Griffin
2140 East 34th Street	CX-33	491; 495	Shannon Page

No genuine issue of fact exists with regard to whether the individuals who leased target housing from Respondent were "lessees" as that term is defined in 40 C.F.R. § 745.103.

d. Counts 2 through 10: There is no genuine issue of material fact as to whether Respondent included a Lead Warning Statement within or as an attachment to each contract to lease target housing, as required by 40 C.F.R. § 745.113(b)(1).

40 C.F.R. § 745.113(b)(1) and 40 C.F.R. § 745.100 require, before a lessee is obligated under a contract to lease target housing, that the lessor include, within or as an attachment to that lease:

> a Lead Warning Statement with the following language:
>
> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention *(emphasis added)*.

The purpose of this federal requirement is to advise prospective lessees of target housing of the possibility of lead-based paint hazards in the dwelling, and to apprise those tenants of the lessor's disclosure obligations under the law. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with this requirement of the Disclosure Rule violates Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689.

None of the leases at issue contain the Lead Warning Statement. Instead, eight of the nine leases provided by Respondent contain, as an attachment, a "personal letter" by the Respondent concerning lead-based paint in the residential dwelling.[3] Answer, ¶ 3. *See* CX-24, p. 342; CX-25, p. 367; CX-26, p. 382; CX-27, p. 396; CX-28, p. 410; CX-31, p. 459; CX-32, p. 481; and CX33- p. 497. Respondent's personal letter provides:

> We believe that this house has no hazardous levels of lead based paint. This house has recently been painted inside and out. However, this house was built before 1978 when lead based painted was widely used. If you feel there is any danger, please notify Frank Davis, the Landlord. The house will be tested and corrected.

Each of Respondent's personal letters is executed by him, but not by any lessee.

The Disclosure Rule specifically mandates that the Lead Warning Statement contain the exact language of § 745.113(b)(1). *Cf. In re Leonard G. Greak*, TSCA-3-2000-0016(C. Bullock, 2001), attached as Exhibit 3 at n. 37 ("To allow Respondent in this case to avoid the carefully crafted lead-based paint disclosure requirements of the RLPHRA by simply including an "as is" clause in the Agreement of Sale would be to completely undermine the important public health and safety purposes of the Act and render the legislation meaningless"). The reasons for the required specificity become apparent when the differences between the required language and

Respondent's language are examined. Instead of notifying prospective lessees about the potential presence of lead-based paint and the specific hazards to pregnant women and young children, Respondent's version assured his prospective tenants that he did not believe there were any hazardous levels of lead paint, and that he had recently painted the house. The personal letter is silent with regard to the particular risks associated with lead-based paint to young children and pregnant women. Instead of informing his prospective tenants about his own obligations under the law, Respondent attempted to shift the burden to his prospective tenant to let him know if he or she believed there was any danger.

Tweaking the required language of § 745.113(b)(1) to serve one's own purposes is simply not permitted under the Lead Disclosure Rule. In sum, there is no genuine issue of material fact with regard to whether the nine leases at issue in this matter contained the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1). Complainant therefore is entitled to accelerated decision on Counts 2 through 10 of the Complaint.

e. Counts 11 and 12: 40 C.F.R. § 745.113(b)(2) Violations.

40 C.F.R. § 745.113(b)(2) and 40 C.F.R. § 745.100 require a lessor to include a statement disclosing the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or a lack of knowledge of such presence, before a lessee is obligated under the contract to lease target housing. Additionally, 40 C.F.R. § 745.113(b)(2) and 40 C.F.R. § 745.100 require that, before a lessee is obligated under a contract to lease target housing, a lessor must disclose any additional information available concerning known lead-based paint and/or lead-based paint hazards. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e),

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[3] As explained below, the lease for the 725 North Sherman Drive property did not

failing to comply with this requirement of Disclosure Rule violates Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689.

With regard to seven of the nine leases at issue in this matter, U.S. EPA has accepted Respondent's personal letter as the required statement indicating lack of knowledge about the presence of lead-based paint and/or lead-based paint hazards. With regard to two leases however – the lease for the 2822 English property and the lease for the 725 North Sherman Drive property -- Respondent failed to satisfy the requirements of 40 C.F.R. § 745.113(b)(2).

2822 English Avenue property

CX -19 is a notice from the Marion County Health Department dated February 6, 2004 regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana. The notice advised Respondent, as owner of the 2822 English Avenue property, that interior doors or door frames and the front door frame and casing contained paint with hazardous levels of lead. CX-19 demonstrates that Respondent had knowledge of the presence of lead-based paint and lead-based paint hazards at the 2822 English Avenue property on or about February 6, 2004.

CX -24 is the lease for the property at 2822 English Avenue, which states on page 1 that Respondent entered into the rental agreement on March 30, 2004. Respondent was informed by the notice from the Marion County Health Department that the property contained lead-based paint almost two months before he entered into the rental agreement. The lease is silent with regard to the presence of known lead-based paint and/or lead-based paint hazards at the 2822 English Avenue property. Respondent's failure to disclose the presence of known lead-

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contain even the Respondent's version of a lead warning statement.

based paint or lead-based paint hazards violated the requirement of 40 C.F.R. § 745.113(b)(2).

725 N. Sherman Drive Property

CX-30 is the lease for the property at 725 North Sherman Drive, which states that Respondent entered into the rental agreement on August 1, 2002. Respondent's personal letter is not attached to this lease. *See* CX-30, p. 411. Neither the lease nor any attachment includes a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards or a lack of knowledge of such presence, in violation of 40 C.F.R. § 745.113(b)(2).

In sum, no genuine issue of material fact exists with regard to whether Respondent violated 40 C.F.R. § 745.113(b)(2) in connection with the lease transactions for the 2822 English Avenue and 725 North Sherman properties. Complainant, therefore, is entitled to an accelerated decision on Counts 11 and 12.

f. Counts 14-22: 40 C.F.R. § 745.113(b)(3) Violations.

40 C.F.R. § 745.113(b)(3) and 40 C.F.R. § 745.100 require the lessor 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 a contract to lease target housing. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with this requirement of the Disclosure Rule violates Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689.

None of the leases (and their attachments) at issue contains a list of records or reports available to Respondent regarding lead-based paint and/or lead-based paint hazards at those properties, or a statement that no such records exist. In fact, records regarding the presence of

lead-based paint did exist for the 2822 English Avenue property. CX-19 is a notice from the Marion County Health Department dated September 19, 2003 regarding violations of Chapter 10 of the Code of Health and Hospital Corporation of Marion County, Indiana. This notice advised Respondent that the "FRONT DOOR FRAME AND CASING CONTAIN HAZARDOUS LEVELS OF LEAD. RESURFACE WITH A NON-LEAD BASED PAINT." *See* CX-19, p. 298. Pursuant to 40 C.F.R. § 745.113(b)(3) and 40 C.F.R. § 745.100, the Marion County notice should have been identified in the lease, or in an attachment to the lease, dated March 3, 2004 for the 2822 English Avenue property. Instead, the lease is silent with regard to the existence of these records.

No genuine issue of material fact exists with regard to whether Respondent included within each lease for target housing, or within its attachments, a list of records or reports available to him regarding lead-based paint and/or lead-based paint hazards at the property, or a statement that no such records exist. Respondent's failure to do so represents a violation of 40 C.F.R. § 745.113(b)(3), and Complainant is entitled to an accelerated decision on Counts 14 through 22 of the Complaint.

g. Counts 23-32: 40 C.F.R. § 745.113(b)(4) Violations.

40 C.F.R. § 745.113(b)(4) and 40 C.F.R. § 745.100 require the lessor to include, within or as an attachment to the lease contract, a statement by the lessee affirming receipt of the information set out in 40 C.F.R. 745.113(b)(2) and (b)(3), and the lead hazard information pamphlet, before the lessee is obligated under a contract to lease target housing.

None of the leases at issue in this matter included, within or as an attachment to the lease contract, a statement by the lessee affirming receipt of information about lead hazards and the

lead hazard information pamphlet. *See* CX- 24 through CX-33. No genuine issue of material fact exists as to whether Respondent violated 40 C.F.R. § 745.113(b)(4) by failing to include the lessees' affirming statements in the lease contracts or their attachments. Accordingly, Complainant is entitled to an accelerated decision on Counts 23 through 32.

h. Counts 34 through 42: 40 C.F.R. § 745.113(b)(6) Violations.

40 C.F.R. § 745.113(b)(6) and 40 C.F.R. § 745.100 require the lessor to include, within or as an attachment to the contract, the signatures of the lessor and the lessee 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.

None of the leases at issue in this matter, or their attachments, included the signatures of the lessor (*i.e.* Respondent) and lessee certifying the accuracy of their statements, or the dates on which such certifications were made. *See* CX- 24 through CX-33. No genuine issue of material fact exists as to whether Respondent violated 40 C.F.R. § 745.113(b)(6) by failing to include such signatures and dates in the lease contracts or their attachments. Accordingly, Complainant is entitled to an accelerated decision on Counts 34 through 42.

2. The Sales Transactions

The Disclosure Rule pertains to both the sale and lease of target housing. 40 C.F.R. § 745.101. U.S. EPA's Complaint alleges that Respondent violated the Disclosure Rule in connection with the sale of two properties owned by Respondent. The *prima facie* elements for establishing a violation of the Disclosure Rule in connection with sale of target housing are similar to the *prima facie* requirements outlined above for lease violations. With regard to each property sale transaction, U.S. EPA must establish the following elements:

(1) The property sold is "target housing";

(2) At the time of the sale, Respondent was an "owner" of the target housing;

(3) At the time of the transaction, each entity who purchased target housing was a "purchaser"; and

(4) Respondent did not satisfy one or more requirements of the Disclosure Rule before the purchaser was obligated under the sales contract.

a. <u>The Properties Sold by Respondent are Target Housing.</u>

As noted above, "target housing" is defined as any housing constructed prior to 1978, except for housing for the elderly or persons with disabilities (unless children under 6 are residing there) or any 0-bedroom dwellings. Township Assessor records from Marion County, Indiana establish that the properties sold by Respondent were constructed before 1978 and are not 0-bedroom dwellings. The chart below identifies, for both properties at issue, the type of dwelling; the date on which each sold property was constructed; and the exhibit in Complainant's Initial Prehearing Exchange that demonstrates the type of dwelling and date of construction:

Address	**Type of Dwelling**	**Date of Construction**	**Prehearing Exchange Exhibit**
1838 Brookside Ave.	Two Family	1900	CX-1
725 North Sherman Dr.	Two Family	1925	CX-7

No genuine issue of material fact exists with regard to whether the properties at 1838 Brookside Avenue and 725 North Sherman Drive are "target housing."

b. <u>At the Time of the Sale, Respondent was the Owner of the Target Housing</u>.

The Disclosure Rule defines "owner" as:

> any entity that has legal title to target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations, except where a mortgagee holds legal title to property serving as collateral for a mortgage loan, in which case the owner would be the mortgagor.

There is no genuine issue of material fact as to whether Respondent was the owner of the 1838 Brookside Avenue and 725 North Sherman Drive properties at the time of the sale transactions at issue in this matter. The HUD Settlement Statement prepared in connection with the two sale transactions identify Respondent as the seller.[4] See CX-34 and CX-35. Center Township Assessor's Office records confirm that Respondent held title to the 1838 Brookside Avenue property between March 15, 2002 and April 15, 2005, on which date he transferred title to Leonard Taylor, III. See CX-1, p. 3. Center Township Assessor's Office records also confirm that Respondent held title to the 725 North Sherman Avenue property between June 12, 2001 and May 17, 2005, at which time title was transferred to Robert and Susan Hairston. CX-7, p. 23.

In sum, there is no genuine issue of material fact with regard to whether Respondent was the owner of the 1838 Brookside Avenue property at the time of its sale on April 15, 2005, or as to whether Respondent was the owner of the 725 North Sherman property at the time of its sale

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[4] Complainant mistakenly identified these two documents as "sales agreements" in its Initial Prehearing Exchange. U.S. EPA does not possess copies of the actual sales contracts or any attachments thereto. As explained below, the Disclosure Rule required Respondent to maintain copies of the lead-based paint disclosures made in connection with the sales for three years. The subpoena duces tecum issued to Respondent by U.S. EPA on June 28, 2005 required Respondent to "[i]dentify and produce all documents relating to the sale of any Properties" owned by Respondent since June 1, 2002. CX-14, p. 64. Respondent never produced the sales contracts, their attachments, or any other document concerning disclosures of lead-based paint hazards. Instead, Respondent produced only the HUD Settlement Statements.

on May 17, 2005.

c. Each Person who Purchased the Target Housing is a "Purchaser."

The Disclosure Rule defines "purchaser" as:

> an entity that enters into an agreement to purchase an interest in target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.

40 C.F.R. § 745.103. The Settlement Statement prepared in connection with the sale of the 1838 Brookside Avenue property establishes that the purchaser was Leonard Taylor, III, an individual, who entered into an agreement to purchase an interest in the target housing. (CX-34.) The Center Township Assessor's record (CX-1) establishes that the transfer of title from Respondent to Leonard Taylor, III occurred as reflected in the Settlement Statement. (CX-1.)

Similarly, the Settlement Statement prepared in connection with the sale of the 725 North Sherman Drive property establishes that the purchasers were Robert Hairston and Susan Hairston, two individuals who entered into an agreement to purchase an interest in target housing. Center Township Assessor's records (CX-7) establish that the transfer of title from Respondent to Robert and Susan Hairston occurred as reflected in the Settlement Statement. (CX-2.)

In sum, there is no genuine issue of material fact as to whether the individual who purchased the 1838 Brookside Avenue property or the individuals who purchased the 725 North Sherman Drive property were "purchasers" for purposes of the Disclosure Rule.

d. Respondent Failed to Satisfy the Disclosure Rule in Connection with the Sale of 1838 Brookside Avenue and 725 Sherman Drive Properties.

The Complaint alleges that Respondent failed to comply with the following requirements of the Disclosure Rule before the purchaser was obligated under a sales contract to purchase the residential dwelling unit at 1838 Brookside Avenue in Indianapolis, Indiana on April 15, 2005, and before the purchaser was obligated under a sales contract to purchase the residential dwelling unit at 725 North Sherman Avenue in Indianapolis, Indiana on May 17, 2005:

- 40 C.F.R. § 745.113(a)(1)'s requirement that the seller include a Lead Warning Statement as an attachment to each contract to sell target housing (Counts 43-44);

- 40 C.F.R. § 745.113(a)(2)'s requirement that the seller include a statement disclosing the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or a lack of knowledge of such presence as an attachment to each contract to sell target housing, and the requirement to disclose additional available information concerning known lead-based paint and/or lead-based paint hazards (Counts 45-46);

- 40 C.F.R. § 745.113(a)(3)'s requirement that the seller include a list of records regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no records exist, as an attachment to the contract to sell target housing (Counts 47-48);

- 40 C.F.R. § 745.113(a)(4)'s requirement that the seller include, as an attachment to the sales contract, a statement by the purchaser affirming receipt of the information required by 40 C.F.R. § 745.113(a)(2) and (a)(3), and the lead hazard information pamphlet (Counts 49-50);

- 40 C.F.R. § 745.113(a)(5)'s requirement that the seller include, as an attachment to the sales contract, a statement by the purchaser that he/she has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity (Counts 51-52) and

- 40 C.F.R. § 745.113(a)(7)'s requirement that the seller include, as an attachment to the sales contract, the signatures of the sellers, agents, and purchasers certifying as to the accuracy of their statements to the best of their knowledge, along with the dates of signature (Counts 53-54).

Complainant's motion for accelerated decision is based on the lack of any evidence suggesting that Respondent satisfied any of these Disclosure Rule requirements in connection with the sale of the 1838 Brookside Avenue and 725 North Sherman Drive properties.

e. Document Retention Obligations and Evidentiary Issues.

Respondent was obligated to maintain evidence of the disclosures made in connection with the sales of the two target housing properties and provide it in response to U.S. EPA's subpoena *duces tecum.*

The Disclosure Rule requires that sellers of target housing maintain copies of the attachment to the sales contract on which all required disclosures should be made for three years after the sale. 40 C.F.R. § 745.113(c)(1) provides:

> The seller, and any agent, shall retain a copy of the completed attachment required under paragraph (a) of this section for no less than 3 years from the completion date of the sale.

Respondent has had ample time to provide documentary evidence that he complied with the requirements of the Disclosure Rule when he sold the 1838 Brookside Avenue and 725 North Sherman Drive properties. On May 3, 2005 (*i.e.* after the sale of the 1838 Brookside Avenue property but before the sale of the 725 North Sherman property), Complainant issued a Certified Request for Information Letter to Respondent requesting, *inter alia,* copies of "any sales contract documents and the 1018 lead-based paint disclosure documents that you provided to the new owner." CX-13, p. 51. After Respondent failed to respond to the Request for Information, U.S. EPA issued an administrative subpoena d*uces tecum.* Paragraph 3 of the subpoena, issued on June 28, 2005 (*i.e.* after the sale of both properties) required Respondent to:

Identify and produce copies of all documents relating to the sale of any Properties since June 1, 2002 to the present. For each Property, provide the following documents:

a. All sales contracts or sales agreements, including all attachments;

b. Any buyer's offer to purchaser any Properties;

c. All documents pertaining to the disclosure of lead-based paint and/or lead-based paint hazards;

d. Any other documents that may have information regarding the name(s) and/or age(s) of buyers and/or persons living with buyers.

CX-15, p. 82. U.S. EPA received a green card confirming receipt of the subpoena *duces tecum* by Lorie Davis on July 12, 2005. *See* Exhibit B to *Petition for Enforcement of Subpoena*, CX-15, p. 86 of Complainant's Initial Prehearing Exchange. After Respondent failed to produce the requested records within 30 days of his receipt of the subpoena *duces tecum*, the U.S. Attorney for the Southern District of Indiana filed a *Petition for Enforcement of Subpoena* on December 15, 2005. CX-15.

On December 28, 2005 and December 29, 2005 – exactly six months from the dates the subpoena was issued and mailed -- Respondent complied. *See* Motion for Voluntary Withdrawal of Petition, CX-16, and date stamps that appear on the back sides of pp. 90 and 91 of CX-17. All of the materials submitted by Respondent to comply with the subpoena are contained in CX-17 in the exact form in which they were received. *See* Calvo Declaration, attached as Exhibit 1.

The only materials submitted by Respondent relating to the sale of any property were the two HUD Settlement Statements, one for the 1838 Brookside Avenue property (*see* CX-17, pp. 250-251), and the other for the 725 North Sherman Avenue property (see CX-17, pp. 290-291). U.S. EPA was able to obtain Marion County and Center Township information regarding the sale

of these two properties by Respondent from available databases. These records indicate that Respondent sold the 1838 Brookside Avenue property on April 14, 2005, approximately eleven weeks prior to the issuance of U.S. EPA's subpoena. The records further indicate that Respondent sold the 725 North Sherman Drive property on May 17, 2005, six weeks prior to the issuance of U.S. EPA's subpoena.

Similarly, Respondent failed to provide any documents regarding these two sales transactions -- or any other documents whatsoever -- in response to the Court's Order of May 14, 2007 requiring the prehearing exchange of information. Although the Court's Order did not specifically request that Respondent produce records relating to the two sales transactions at issue, the Order did require Respondent to "summarize any facts supporting denial of the violations alleged in the complaint." Order dated May 14, 2007, p. 5. The Court's Order requested copies of documents supporting the assertion in Respondent's Answer that the properties at issue had been completely renovated, and that all possibilities of hazardous levels of lead-based paint had been eliminated. Again, Respondent failed to produce any documents in support of this assertion.

Complainant is in the position of having to prove a negative (*i.e.* that the requirements of the Disclosure Rule were not met in connection with the two sales transactions) based upon a record controlled entirely by Respondent. Complainant believes that it is entitled to the inference, based on (1) the document retention requirements of 40 C.F.R. § 745.113(c)(1); (2) Respondent's response to the subpoena *duces tecum;* and (3) Respondent's failure to respond to the Court's May 14, 2007 Order, that Respondent failed to make the disclosures and obtain the certifications and signatures required by the Disclosure Rule in connection with the two sales

transactions. Section 22.19(g)(1) of the Consolidated Rules, 40 C.F.R. § 22.19(g)(1), provides as follows:

> Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion: (1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issue a default order under § 22.17(c).

Cf. International Union (UAW) v. N.L.R.B., 459 F.2d 1329, 1336 (D.C. Cir. 1972) (the adverse inference rule "provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him")

Complainant believes that, under the circumstances of this case, the Court's exercise of such discretion is entirely warranted. The Court should conclude that neither of the contracts for sale of target housing at issue in this matter contained an attachment that contained the disclosures, certifications and signatures required by the Disclosure Rule. Complainant believes there is no genuine issue of material fact with regard to Respondent's violations of 40 C.F.R. §§ 745.113(a)(1); 745.113(a)(2); 745.113(a)(3); 745.113(a)(4); 745.113(a)(5) and 745.113(a)(7), as alleged in Counts 43 through 54 of the Complaint. Accordingly, Complainant moves for an accelerated decision with regard to Respondent's liability on Counts 43 through 54.

VI. RESPONDENT'S DEFENSES

Respondent's Answer offers four "Circumstances" which, Complainant assumes, represent Respondent's defenses to the allegations of the Complaint. Respondent's "Circumstances" appear in the Answer immediately following his summary denial of all counts in the Complaint, and state, in their entirety, as follows:

> 1. All properties at time of purchase were completely renovated which eliminated all possibilities of hazardous Levels [sic] of lead based paint.

2. Information about lead based paint was obtained from Indianapolis Housing Agency and given to all tenants.

3. A personal letter was given to every tenant explaining The [sic] possibilities of lead paint because the house was built before 1978.

4. I am therefore requesting a formal hearing to better explain all of my procedures.

None of the defenses presented by Respondent in his Answer raises a genuine issue of material fact sufficient to withstand Complainant's motion for an accelerated decision on the issue of liability.

A. Renovation

Respondent's Answer asserts that "at time of purchase," all of the properties were renovated to eliminate any possibility of lead based paint. While Respondent's Answer is unclear as to whether it refers to the time at which he purchased all the target housing, or the time at which the two properties at 1838 Brookside Avenue and 725 North Sherman Drive were sold by him to purchasers, the ambiguity makes no material difference to his defense.

Complainant assumes the Respondent intended to invoke the exception to the Disclosure Rule provided by 40 C.F.R. § 745.101(b). This provision of the Disclosure Rule excludes from the rule's requirements lease transactions of target housing that "have been found to be lead-based paint free by an inspector certified under the Federal certification program or under a federally accredited State or tribal certification program."

Nothing in the evidentiary record of this case supports the conclusion that any property leased by Respondent has been found to be lead-based paint free by a certified inspector.[5] In

[5] The exemption of 40 C.F.R. § 745.101(b) applies to only lease transactions, and therefore not to the two sale transactions at issue in this matter.

fact, the evidence is to the contrary.

Notices issued to Respondent by the Marion County Health Department show that at least three of the properties at issue contained lead-based paint before Respondent leased them. CX-20 is a notice from the Marion County Health Department to Respondent dated September 19, 2003 regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana at 725 North Sherman Drive. The notice states on page 1 that "Eaves have peeling paint which contains hazardous levels of lead." Page 2 states that "Exterior siding . . . Exterior window sashes . . .Exterior window wells . . . [and] Exterior wood trim [have] deteriorated paint which contains hazardous levels of lead," and "Paint chips containing hazardous levels of lead found on the ground." Finally, page 3 states that the "Porch roof supports have deteriorated paint which contains hazardous levels of lead," and that "Window casing contains hazardous levels of lead based paint." CX-19 is a notice from the Marion County Health Department dated February 6, 2004 regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana at the 2822 English Avenue property. The notice advised Respondent that interior doors or door frames and the front door frame and casing contained paint with hazardous levels of lead. Finally, CX-18 is a notice from the Marion County Health Department, dated August 12, 2003, regarding violations of Chapter 10 of the Code of the Health and Hospital Corporation of Marion County, Indiana for the property at 4506 East Washington Street. The notice states on pages 2-4 that hazardous levels of lead paint had been found on exterior doors or door frames, exterior siding, exterior window frames, exterior window sills, exterior window wells, exterior wood trim, the soffits and throughout the property.

Evidence in the record supports the conclusion that Respondent may have conducted some activity to address the lead orders issued to Respondent by the Marion County Health Department. *See* CX-22, p. 310 (indicating that two of the three orders issued by the County Health Department had been "Finalized"). Additionally, the records support the conclusion that Respondent conducted limited sampling of the paint in the middle right bedroom of the target housing at 725 North Sherman Avenue. *See* CX-30, pp. 425-428. Nothing in the record, however, supports the conclusion that Respondent conducted sufficient renovation activities at the target housing leased (or sold) by him to be considered lead-based paint free, or that an inspection by a certified inspector had determined that the properties leased (or sold) by Respondent were free of lead-based paint. In the absence of such a certification, Respondent has no basis for a defense based on alleged renovation.

B. Indianapolis Housing Agency Information

Respondent's second assertion in his Answer is that "Information about lead based paint was obtained from Indianapolis Housing Agency and given to all tenants."

It may be that Respondent obtained a copy or copies of the U.S. EPA-approved pamphlet entitled "Protect Your Family from Lead in Your Home" from IHA, and distributed copies of the pamphlet to all tenants. 40 C.F.R. § 745.107(a)(1) requires that a seller or lessor of target housing provide the purchaser or lessee with a copy of the pamphlet before the purchaser or lessor is obligated to purchase or lease target housing. The documents provided by Respondent in response to the subpoena *duces tecum* included, with each lease, a copy of the required pamphlet. U.S. EPA's Complaint does not allege, however, any violation of 40 C.F.R. § 745.107(a)(1).

Except as explained above in connection with Complainant's motion to withdraw certain counts of the Complaint, nothing in the evidentiary record supports the conclusion that Respondent obtained any information from IHA that would have satisfied his obligations under the Disclosure Rule.[6] In fact, IHA appears not to have been involved in many of the lease transactions at issue in this matter.

Respondent's Answer alone does not create a genuine issue of material fact sufficient to withstand Complainant's motion for an accelerated decision. No information exists to support the conclusion that information provided by IHA was included within the nine lease transactions or two sale transactions at issue in this case in satisfaction of the Disclosure Rule.

C. Personal Letter

Respondent's third and final assertion in his Answer is that "A personal letter was given to every tenant explaining the possibilities of lead paint because the house was built before 1978."

Complainant assumes for the sake of this argument only that: (1) the Answer refers to the typewritten notice attached to most, but not all, of the leases at issue; and (2) that the notice was, in fact, included with the materials Respondent originally provided to lessees at the time of the lease transactions.[7] As discussed above in section V.B.1.d. of this memorandum, the

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[6] As noted above, U.S. EPA contacted IHA to determine, *inter alia*, what information may have been provided to Respondent's tenants by IHA. U.S. EPA's request to IHA is attached as Attachment B to the Calvo Declaration. In response, IHA submitted the materials attached to the Calvo Declaration as Attachments C and D, which led to U.S. EPA's determination that the Disclosure Rule had been satisfied with respect to 11/14/04 lease for the target housing at 1838 Brookside Avenue.

[7] On June 4, 2007, U.S. EPA was able to contact Shannon Page, one of the tenants whose lease is at issue in this matter. Ms. Page entered into a lease agreement with Respondent

notice stated:

> We believe that this house has no hazardous levels of lead based paint. This house has recently been painted inside and out. However, this house was built before 1978 when lead based paint was widely used. If you feel there is any danger, please notify Frank Davis, the Landlord. The house will be tested and corrected. *See, e.g.* CX-25, p. 367.

For the reasons discussed in section V.B.1.d., Respondent's provision of this "personal letter" to his tenants does not create a genuine issue of material fact. 40 C.F.R. § 745.113(b)(1) requires that a Lead Warning Statement "consisting of the following language" be provided to each tenant of target housing. The required language is provided by regulation. Respondent's self-serving variation of the Lead Warning Statement, even if it was provided to his tenants as he asserts, did not satisfy 40 C.F.R. § 745.113(b)(1). Moreover, Respondent's personal letter did not advise prospective tenants of the 2822 English Avenue property of information known to him regarding lead-based paint hazards at that property, also a violation of 40 C.F.R. § 745.113(b)(2).

In summary, the assertions contained in Respondent's Answer are simply irrelevant and immaterial to the allegations of the Complaint.

VII. CONCLUSION

There is no genuine issue of material fact with respect to Respondent's violation of Section 1018 of RLBPHRA. Even when viewed in the light most favorable to Respondent, the

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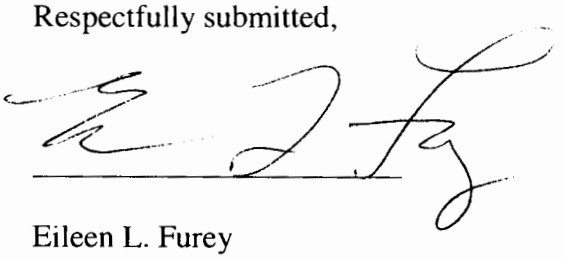
for the 2140 E. 34th Street property on July 10, 2002 (*see* CX-33). Ms. Page informed U.S. EPA that she has never seen the "personal letter" attached to the copy of this lease provided by Respondent to U.S. EPA, and that this personal letter was not provided to her before, during or after the lease transaction was completed. U.S. EPA has not been able to locate any other tenants whose leases are at issue in this matter. *See* Declaration of Scott Cooper, attached to this memorandum as Exhibit 4. Complainant notes that the "personal letter" is not signed by any of the tenants, and neither the copy of the 1838 Brookside Avenue lease provided by IHA, nor the lease for the 725 North Sherman Drive property contains a copy of the personal letter.

evidence demonstrates that Respondent failed to fulfill various requirements of the Disclosure Rule in connection with the lease and sale of target properties. Respondent is not entitled to rest on the mere denials of his Answer, but now bears the burden of coming forward with specific facts demonstrating there is an issue for trial. If such facts exist, Respondent was obligated to identify and produce them in response to U.S. EPA's subpoena *duces tecum* and this Court's Order of May 14, 2007. Respondent failed to do so. Accordingly, Complainant respectfully moves the Court to grant this Motion for Accelerated Decision as to Respondent's Liability on Counts 2-12, 14-22, 24-32, and 34 through 54 of the Complaint.

Respectfully submitted,



Eileen L. Furey
Associate Regional Counsel
U.S. EPA, Region 5 (C-14J)
77 W. Jackson Blvd.
Chicago, IL 60604

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2007, the original and copy of the foregoing Motion to: (1) Withdraw Counts 1, 13, 23 and 33 of the Complaint; and (2) for an Order of Default or, in the Alternative, Accelerated Decision on the issue of Respondent's Liability for the Remaining Violations Alleged in the Complaint and the attached Memorandum in Support of Complainant's Motion to: (1) Withdraw Counts 1, 13, 23 and 33 of the Complaint; and (2) for an Order of Default or, in the Alternative, Accelerated Decision on the issue of Respondent's Liability for the Remaining Violations Alleged in the Complaint, with attachments, along with a Notice of Filing, were hand delivered to the Regional Hearing Clerk, Region 5, U.S. EPA, and that a correct copy was mailed certified mail, return receipt requested, to the Respondent by placing such copy in the custody of the United States Postal Service addressed as follows:

Frank J. Davis
1618 Touchstone Drive
Indianapolis, IN 46239-8865

Certified Mail # 7001 0320 0006 1558

On this same date, a true and correct copy was also delivered to the Presiding Officer, Administrative Law Judge Nissen, via Pouch Mail from Region 5, U.S. EPA, to U.S. EPA Headquarters, addressed as follows:

Honorable Spencer T. Nissen
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

Yesenia Ortiz
Legal Technician
U.S. EPA, Region 5