

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103**

2010-07-12  
4:21 PM  
TSCA-03-2010-0325

In Re: )  
)  
Dobbins, Fisher & Pittman Associates, Inc. ) Motion for Default  
d/b/a Dobbins, Fisher & Pittman Realtors )  
339 3<sup>rd</sup> Avenue )  
South Charleston, WV 25303 ) Docket No. TSCA-03-2010-0325  
)  
**RESPONDENT** )  
)

**MOTION FOR DEFAULT**

On June 30, 2010 an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") was issued by the United States Environmental Protection Agency ("EPA" or "Complainant"), pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), the federal regulations set forth at 40 C.F.R. Part 745, Subpart F, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22. The respondent in this Complaint is Dobbins, Fisher & Pittman Associates, Inc., doing business as Dobbins, Fisher & Pittman Realtors ("Respondent"). A copy of the Complaint is attached as Exhibit A.

A copy of the Complaint was received by Respondent on July 1, 2010, as evidenced by the United Parcel Service "Proof of Delivery," a receipt enclosed with the Proof of Service filed by Complainant on July 7, 2010. *See* Exhibit B. The Complaint was accompanied by a cover letter addressed to Bradley Pittman, Respondent's President. *See* Exhibit C. Both the Complaint and the cover letter specifically informed Respondent

of the requirement, found in Section 22.15(a) of the Consolidated Rules, that an Answer to the Complaint be filed within 30 days after service of the Complaint. As of the date of this Motion, Respondent has not filed an Answer to the Complaint. Complainant therefore moves for an Order holding Respondent in default and imposing a penalty of \$26,510.

### **DISCUSSION**

Pursuant to 40 C.F.R. § 22.17(a), a party may be found to be in default, in relevant part, upon failing to file a timely answer to the complaint. Pursuant to 40 C.F.R. § 22.17(a), default by a respondent constitutes an admission of all facts alleged in the complaint. Pursuant to 40 C.F.R. § 22.17(b), a motion for default must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

#### **A. Violations Deemed Admitted as a Result of Default**

The law and facts with regard to Respondent's violations of TSCA are set forth in detail in the Complaint, and this recitation is incorporated herein by reference. As detailed in the Complaint, Respondent failed to comply with a number of regulatory requirements in each of two sales transactions and seven lease transactions. By virtue of Respondent's default, the factual allegations supporting these alleged violations are deemed to be admitted. These violations include the following:

#### **Margaret Street Property**

Count 1: Failure to include in or with contract for sale the Receipt of Information Statement required by 40 C.F.R. § 745.113(a)(4).

Count 2: Failure to include in or with contract for sale the Risk Assessment Statement required by 40 C.F.R. § 745.113(a)(5).

Marilynn Road Property

Count 3: Failure to include in or with contract for sale the Receipt of Information Statement required by 40 C.F.R. § 745.113(a)(4).

Count 4: Failure to include in or with contract for sale the Risk Assessment Statement required by 40 C.F.R. § 745.113(a)(5).

Dean Drive Property

Count 5: Failure to include in or with contract for lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 6: Failure to include in or with contract for lease the Disclosure Statement required by 40 C.F.R. § 745.113(b)(2).

Count 7: Failure to include in or with contract for lease the Disclosure List required by 40 C.F.R. § 745.113(b)(3).

Count 8: Failure to include in or with contract for lease the Receipt of Information Statement required by 40 C.F.R. § 745.113(b)(4).

Count 9: Failure to include in or with contract for lease the Agent Statement required by 40 C.F.R. § 745.113(b)(5).

Count 10: Failure to include in or with contract for lease the Certification of Accuracy required by 40 C.F.R. § 745.113(b)(6).

Washington Avenue Property

Count 11: Failure to include in or with contract for lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 12: Failure to include in or with contract for lease the Disclosure Statement required by 40 C.F.R. § 745.113(b)(2).

Count 13: Failure to include in or with contract for lease the Disclosure List required by 40 C.F.R. § 745.113(b)(3).

Count 14: Failure to include in or with contract for lease the Receipt of Information Statement required by 40 C.F.R. § 745.113(b)(4).

Count 15: Failure to include in or with contract for lease the Agent Statement required by 40 C.F.R. § 745.113(b)(5).

Count 16: Failure to include in or with contract for lease the Certification of Accuracy required by 40 C.F.R. § 745.113(b)(6).

#### Mountain Road Property

Count 17: Failure to include in or with contract for lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 18: Failure to include in or with contract for lease the Disclosure Statement required by 40 C.F.R. § 745.113(b)(2).

Count 19: Failure to include in or with contract for lease the Disclosure List required by 40 C.F.R. § 745.113(b)(3).

Count 20: Failure to include in or with contract for lease the Receipt of Information Statement required by 40 C.F.R. § 745.113(b)(4).

Count 21: Failure to include in or with contract for lease the Agent Statement required by 40 C.F.R. § 745.113(b)(5).

Count 22: Failure to include in or with contract for lease the Certification of Accuracy required by 40 C.F.R. § 745.113(b)(6).

Fourth Avenue Property

Count 23: Failure to include in or with contract for lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 24: Failure to include in or with contract for lease the Disclosure Statement required by 40 C.F.R. § 745.113(b)(2).

Count 25: Failure to include in or with contract for lease the Disclosure List required by 40 C.F.R. § 745.113(b)(3).

Count 26: Failure to include in or with contract for lease the Receipt of Information Statement required by 40 C.F.R. § 745.113(b)(4).

Count 27: Failure to include in or with contract for lease the Agent Statement required by 40 C.F.R. § 745.113(b)(5).

Count 28: Failure to include in or with contract for lease the Certification of Accuracy required by 40 C.F.R. § 745.113(b)(6).

Gordon Drive Property

Count 29: Failure to include in or with contract for lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 30: Failure to include in or with contract for lease the Disclosure Statement required by 40 C.F.R. § 745.113(b)(2).

Count 31: Failure to include in or with contract for lease the Disclosure List required by 40 C.F.R. § 745.113(b)(3).

Count 32: Failure to include in or with contract for lease the Receipt of Information Statement required by 40 C.F.R. § 745.113(b)(4).

Count 33: Failure to include in or with contract for lease the Agent Statement required by 40 C.F.R. § 745.113(b)(5).

Count 34: Failure to include in or with contract for lease the Certification of Accuracy required by 40 C.F.R. § 745.113(b)(6).

Venable Avenue Property

Count 35: Failure to include in or with contract for lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 36: Failure to include in or with contract for lease the Disclosure Statement required by 40 C.F.R. § 745.113(b)(2).

Count 37: Failure to include in or with contract for lease the Disclosure List required by 40 C.F.R. § 745.113(b)(3).

Count 38: Failure to include in or with contract for lease the Receipt of Information Statement required by 40 C.F.R. § 745.113(b)(4).

Count 39: Failure to include in or with contract for lease the Agent Statement required by 40 C.F.R. § 745.113(b)(5).

Count 40: Failure to include in or with contract for lease the Certification of Accuracy required by 40 C.F.R. § 745.113(b)(6).

Jones Avenue Property

Count 41: Failure to include in or with contract for lease the Lead Warning Statement required by 40 C.F.R. § 745.113(b)(1).

Count 42: Failure to include in or with contract for lease the Disclosure Statement required by 40 C.F.R. § 745.113(b)(2).

Count 43: Failure to include in or with contract for lease the Disclosure List required by 40 C.F.R. § 745.113(b)(3).

Count 44: Failure to include in or with contract for lease the Receipt of Information Statement required by 40 C.F.R. § 745.113(b)(4).

Count 45: Failure to include in or with contract for lease the Agent Statement required by 40 C.F.R. § 745.113(b)(5).

Count 46: Failure to include in or with contract for lease the Certification of Accuracy required by 40 C.F.R. § 745.113(b)(6).

B. Civil Penalty

The authority for a civil penalty is found in Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, which authorizes the assessment of a civil penalty under Section 16 of TSCA, 15 U.S.C. § 2615, in the maximum amount of \$10,000 for each violation of Section 409 of TSCA, 15 U.S.C. § 2689. This amount has been adjusted under the *Civil Monetary Penalty Inflation Adjustment Rule*, 40 C.F.R. Part 19, and 40 C.F.R. § 745.118(f), which increase the maximum civil penalties which can be assessed by EPA under 42 U.S.C. § 4852d to \$11,000 for violations occurring on or after July 28, 1997. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant did not propose a specific penalty in the Complaint. However, pursuant to 40 C.F.R. § 22.14(a)(4)(ii), the Complaint contained an explanation of the number of and severity of violations.

For purposes of determining the amount of any civil penalty to be assessed, Section 16 of TSCA, 15 U.S.C. § 2615, requires EPA to take into account the nature, circumstances, extent, and gravity of the violation or violations alleged and, with respect

to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require ("statutory factors"). In developing the proposed penalty, Complainant has taken into account the particular facts and circumstances of this case with specific reference to the statutory factors set forth in Section 16 of TSCA and EPA's *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy ("ERP")*, dated December 2007. A copy of the ERP is attached as Exhibit D. The ERP provides a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to particular cases. Therefore, Complainant has followed the suggested calculations and methodology in the ERP to the maximum extent possible consistent with the statutory penalty factors and the specific circumstances of this case. Pursuant to the May 9, 1997 Memorandum from Assistant Administrator Steven A. Herman entitled "Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Rule," penalties for violations cited in the Complaint which occurred subsequent to January 30, 1997 have been adjusted upwards by 10 percent to reflect the increase in the statutory maximum penalty.

It should be noted that Complainant has not taken into consideration Respondent's ability to pay the proposed penalty other than to note that Respondent is an ongoing business and that there is no reason to believe that Respondent cannot pay the full penalty. While Complainant has the ultimate burden of persuasion regarding ability to pay, information regarding a respondent's ability to pay is normally within the control of that respondent, and therefore "where a respondent does not raise its ability to pay as an issue in its answer . . . [Complainant] may properly argue and the presiding officer may

conclude that any objection to the penalty based upon ability to pay has been waived." *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (E.A.B. 1994). In this case Respondent, by defaulting, has failed to raise its ability to pay as an issue or introduce any evidence whatsoever to support its burden of production regarding ability to pay. Therefore, no further consideration of the issue is warranted.

The penalty calculation under the ERP relies primarily on two factors. The "circumstance" level looks at the relative risk that the violation would impair ability of the purchaser or lessee to evaluate the risks of lead exposure at the property. These levels range from Level 1 to Level 6, with Level 1 being most serious. The "extent" level looks at the nature of the persons potentially exposed to lead paint hazards, with the highest levels being assigned where the most vulnerable persons -- young children and/or pregnant women -- will occupy the premises.

At the present time Complainant has yet to obtain information as to whether or not children or pregnant women were living in any of the properties at issue. Respondent's default makes it impossible for Complainant to engage in discovery on this issue. It might be justified under these circumstances to draw adverse inferences from Respondent's lack of cooperation. However, Complaint is instead giving Respondent the benefit of the doubt and assuming that no children or pregnant women were living in any of the properties. Complainant has thus assessed the extent level of all of the violations as "minor."

As set forth in the Complaint, the assessed circumstance level varies with the type of violation. The following circumstance levels are proposed in this case:

- A. Violations of 40 C.F.R. § 745.113(a)(4): Violations of the requirements set forth at 40 C.F.R. § 745.113(a)(4) are deemed to represent a “medium” probability of impairing a purchaser's ability to assess the information required to be disclosed and are characterized as Circumstance Level 4 violations in the ERP. The failure to obtain a statement confirming that the purchaser received the disclosure of known lead hazards (or statement that the owner has no knowledge of the presence of such hazards) prevents both EPA and the Respondent from being able to accurately determine if the required disclosures occurred and thus creates a moderate risk that the purchaser was not adequately informed of the hazards. As a result, each of the violations alleged in Counts 1 and 3 have been assessed as Circumstance Level 4 violations. Under the ERP a Level 4 violation with a minor extent level is assessed a \$520 penalty.
- B. Violations of 40 C.F.R. § 745.113(a)(5): Violations of the requirements set forth at 40 C.F.R. § 745.113(a)(5) are deemed to represent a “medium” probability of impairing a purchaser's ability to assess the information required to be disclosed and are characterized as Circumstance Level 4 violations in the ERP. The failure to obtain a statement verifying that the purchaser received or waived the opportunity to conduct a risk assessment prevents an accurate determination as to whether the purchaser understood that such an opportunity was offered, and creates a moderate risk that the purchaser was not adequately aware of the hazards. As a result, each of the violations alleged in Counts 2 and 4 have been assessed as

Circumstance Level 4 violations. Under the ERP a Level 4 violation with a minor extent level is assessed a \$520 penalty.

- C. Violations of 40 C.F.R. § 745.113(b)(1): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(1) are deemed to represent a “high” probability of impairing a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 2 violations in the ERP. The failure to provide the required Lead Warning Statement deprived each of the tenants, before they became obligated under the lease, of information they could have used to assess whether to enter in to the lease and to better protect themselves and their families, including warnings that exposure to lead-based paint can be particularly harmful to pregnant woman and young children, warnings as to the specific exposure pathways from lead-based paint (i.e. paint, paint chips, and paint dust). The violation leads to a high probability of impairing the ability of the tenant to make an informed decision. As a result, each of the violations alleged in Counts 5, 11, 17, 23, 29, 35 and 41 have been assessed as Circumstance Level 2 violations. Under the ERP a Level 2 violation with a minor extent level is assessed a \$1,550 penalty.
- D. Violations of 40 C.F.R. § 745.113(b)(2): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(2) are deemed to represent a “medium” probability of impairing a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 3 violations in the ERP. The failure to inform the

tenants of known lead hazards or to state that the owner has no knowledge of the presence of such hazards deprived each of the tenants, before they became obligated under the lease, of information they could have used to assess whether to enter in to the lease and to better protect themselves and their families. As a result, each of the violations alleged in Counts 6, 12, 18, 24, 30, 36 and 42 of this Complaint have been assessed as Circumstance Level 3 violations. Under the ERP a Level 3 violation with a minor extent level is assessed a \$770 penalty.

- E. Violations of 40 C.F.R. § 745.113(b)(3): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(3) are deemed to represent a “low” probability of impairing a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 5 violations in the ERP. The failure to obtain a statement confirming that the lessee received the disclosure of known lead hazards (or statement that the owner has no knowledge of the presence of such hazards) prevents both EPA and the Respondent from being able to accurately determine if the required disclosures occurred and thus creates a significant but relatively low risk that the purchaser was not adequately informed of the hazards. As a result, each of the violations alleged in Counts 7, 13, 19, 25, 31, 37 and 43 of this Complaint have been assessed as Circumstance Level 5. Under the ERP a Level 5 violation with a minor extent level is assessed a \$260 penalty.

- F. Violations of 40 C.F.R. § 745.113(b)(4): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(4) are deemed to represent a “medium” probability of impairing a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 4 violations in the ERP. The failure to obtain a statement confirming that the lessee received lead hazard pamphlet and the the disclosure of known lead hazards (or statement that the owner has no knowledge of the presence of such hazards) prevents both EPA and the Respondent from being able to accurately determine if the required disclosures occurred and thus creates a significant but risk that the lessee was not adequately informed of the hazards. As a result, each of the violations alleged in Counts 8, 14, 20, 26, 32, 38 and 44 of this Complaint have been assessed s Circumstance Level 4 violations. Under the ERP a Level 4 violation with a minor extent level is assessed a \$520 penalty.
- G. Violations of 40 C.F.R. § 745.113(b)(5): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(5) are deemed to represent a “low” probability of impairing a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 5 violations in the ERP. The failure of an agent to document that it informed the lessor of its obligations prevents an accurate determination as to whether the lessor was made aware of those obligations, thus creates a significant but relatively low risk that the lessor did not adequately inform the tenants of the hazards. As a result, each of the violations alleged in

Counts 9, 15, 21, 27, 33, 39 and 45 of this Complaint have been assessed as Circumstance Level 5. Under the ERP a Level 5 violation with a minor extent level is assessed a \$260 penalty.

- H. Violations of 40 C.F.R. § 745.113(b)(6): Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(6) are deemed to represent a “low” probability of impairing a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 6 violations in the ERP. The failure to obtain signatures from all of the relevant parties makes it difficult to assess whether the other disclosure requirements were complied with, and thus creates a significant but relatively low risk that the lessees were not adequately informed of the hazards. As a result, each of the violations alleged in Counts 10, 16, 22, 28, 34, 40 and 46 of this Complaint have been assessed as Circumstance Level 6. Under the ERP a Level 6 violation with a minor extent level is assessed a \$130 penalty.

Complainant does not propose to make any adjustments to the penalty under the adjustment factors set forth in the ERP. Complainant is not aware of any past violations of the lead regulations, and is not aware of any circumstances from which to conclude that Respondent’s level of culpability was either greater or lesser than the normal.

Complainant is unaware of any extraordinary factors, either aggravating or mitigating.

The total proposed penalty for the violations set forth in the Complaint is \$26,510.

A summary of the penalties for each of the properties is set forth in Exhibit E.

**CONCLUSION**

For the forgoing reasons the Regional Judicial Officer should issue a Default Order against Respondent ordering Respondent to pay a civil penalty of \$26,510.

Respectfully submitted,



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Benjamin D. Fields  
Senior Assistant Regional Counsel

11/10/10  
Date

**CERTIFICATE OF SERVICE**

I hereby certify that on the date below I hand-delivered the original and one copy of the attached Motion for Default to the Regional Hearing Clerk, and caused true and correct copies to be sent as follows:

Via UPS Overnight to:

Bradley Pittman, President  
Dobbins, Fisher & Pittman Associates, Inc.  
d/b/a Dobbins, Fisher & Pittman Realtors  
339 3<sup>rd</sup> Avenue  
South Charleston, WV 25303

Via hand delivery to:

Renée Sarajian  
Regional Judicial Officer (3RC00)  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103

11/10/10  
Date



Benjamin D. Fields  
Senior Assistant Regional Counsel