Attached is a proposed default order. The penalty discussion is subject to revision if, in response to Complainant's Motion for Default Order, Respondent submits financial documentation to substantiate an inability-to-pay claim.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

IN THE MATTER OF:	Docket No. TSCA 01-2009-0066
DOUGLAS PAULINO 9 Orange Street Hartford, Connecticut 06106	
Respondent.	

PROPOSED DEFAULT ORDER

I. Introduction

Complainant, the United States Environmental Protection Agency, Region 1 ("EPA") commenced this proceeding on September 28, 2009, by filing a Complaint against Respondent, Douglas Paulino. The Complaint charged Respondent in four counts with nineteen (19) violations of Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689 (TSCA), for failure to comply with the Lead-Based Paint Disclosure Rule ("Disclosure Rule") requirements of 40 C.F.R. Part 745, Subpart F (40 C.F.R. §§ 745.100-745.119), a rule promulgated under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851, *et seq*. EPA's complaint proposed civil penalties of up to $11,000 per violation against Respondent for the 18 violations which occurred before January 13, 2009, and up to $16,000 for one violation that occurred on February 1, 2009.

For the reasons discussed below, Respondent is found to be in default pursuant to Section 22.17(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. § 22.17(a), and is assessed a penalty of $159,023.

II. Respondent Is In Default

1. EPA filed the Complaint on September 28, 2009, in accordance with Rule 22.5 of the Consolidated Rules of Practice, 40 C.F.R. § 22.5, and served it on Respondent by first class certified mail. Respondent signed a receipt for delivery on October 6, 2009. Rule 22.7(c) of the

Consolidated Rules of Practice, 40 C.F.R. § 22.7(c), states that service of a complaint is complete when the return receipt is signed. Therefore, service was complete on October 6, 2009.

2. In accordance with 40 C.F.R. § 22.17(a), the failure to file a timely Answer to the Complaint constitutes an admission of the facts alleged in the Complaint and grounds for the issuance of a Default Order and an assessment of the proposed penalty.

3. To date, Respondent has not filed an Answer or requested an extension. Forty C.F.R. § 22.15 provides a responding party 30 days from the date of service to file the answer to a complaint. Thus, the 30 day period for Respondent's Answer lapsed on November 5, 2009. See 40 C.F.R. § 22.7.

4. Forty C.F.R. § 22.17(c) of the Consolidated Rules of Practice provides that when the Presiding Officer finds that a party is in default, the Presiding Officer "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." 40 C.F.R. § 22.17(c).

5. Consequently, I find Respondent in default for failing to answer the Complaint in this matter.

III. Findings of Fact and Conclusions of Law

The following factual and legal grounds support the finding that the Complaint establishes a *prima facie* case of nineteen (19) violations of Section 409 of TSCA, 15 U.S.C. § 2689, and the Lead Disclosure Rule, 40 C.F.R. § 745.100 et seq:

1. Forty C.F.R. § 745.107(a)(1) requires a lessor of target housing to provide lessees an EPA-approved lead hazard information pamphlet entitled *Protect Your Family from Lead in Your Home*, or an equivalent pamphlet approved by EPA for use in the state, before the lessee becomes obligated under any contract to lease target housing.

2. Forty C.F.R. § 745.107(a)(2) requires a lessor to disclose to the lessee, *before* the lessee becomes obligated under any contract to lease target housing, the presence of any known lead-based paint and/or lead based paint hazards in the housing being leased. The lessor is also required to disclose to the lessee any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.

3. Forty C.F.R. § 745.107(a)(4) requires a lessor to provide to the lessee, *before* the lessee becomes obligated under any contract to lease target housing, any records or reports available to

the lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing being leased. This requirement includes common areas, defined in the Disclosure Rule as "portion[s] of a building generally accessible to all residents/users including, but not limited to, hallways, stairways, laundry and recreational rooms, playgrounds, community centers, and boundary fences." 40 C.F.R. § 745.107(a)(4); 40 C.F.R. § 745.103.

4. Forty C.F.R. § 745.113(b)(1) requires a lessor to include within, or as an attachment to the contract to lease target housing the "Lead Warning Statement."

5. Forty C.F.R. § 745.113(b)(2) requires a lessor to include within or as an attachment to the contract to lease target housing a statement by the lessor disclosing the presence of known lead-based paint and/or lead based paint hazards in the target housing being leased, or indicating no knowledge thereof.

6. At all times relevant to the Complaint, the Respondent, Douglas Paulino, was a "lessor," within the meaning of 40 C.F.R. § 745.103, of three (3) rental units located at 9-11 Orange Street, Hartford, Connecticut ("9-11 Orange Street") and three (3) rental units located at 12-14 Orange Street, Hartford, Connecticut ("12-14 Orange Street"). (Complaint, paragraph 11.) Respondent's apartment units were constructed prior to 1978 and fall within the definition of "target housing" in 40 C.F.R. § 745.103. (Complaint, paragraph 12.)

7. On or about December 9, 2004, the Lead Action for Medicaid Primary Prevention Project ("LAMPP"), Connecticut Children's Medical Center, issued a letter notifying Respondent that a child who resided 11 Orange Street, 2nd Floor, had an elevated blood lead level and that lead-based paint hazards were found to exist in the rental unit ("2004 LAMPP Letter"). The letter also transmitted a report entitled *Visual Risk Assessment and Scope of Services to Reduce Potential Lead Hazards* for the rental unit prepared by TRC Environmental Corporation in December 2004 ("2004 TRC Report") (Complaint, paragraph 31.) The 2004 LAMPP Letter also informed Respondent that the 2004 TRC Report should be disclosed to purchasers and tenants pursuant to the Disclosure Rule (See Exhibit 11 to Complainant's Memorandum in Support of Motion for Default Order ("Complainant's Memorandum")).

8. The 2004 LAMPP Letter and 2004 TRC Report state that a risk assessment for lead-based paint hazards was conducted at 11 Orange Street, 2nd Floor, on November 24, 2004. The 2004 TRC Report describes the visual paint assessment, visual soil assessment and dust wipe sampling protocols used during the risk assessment. The 2004 TRC Report states that all paint observed during the risk assessment was assumed to be lead-based in accordance with LAMPP risk assessment protocols. The 2004 TRC Report states that all bare soil observed during the risk assessment was assumed to be contaminated with lead in accordance with LAMPP risk assessment protocols. The 2004 TRC Report identifies area of defective paint, paint on friction surfaces and/or paint on impact surfaces that posed a potential lead-based paint exposure hazard.

I find that the 2004 TRC Report identified "lead-based paint hazards" in the bedrooms, hall, kitchen and living room of the rental unit known as 11 Orange Street, 2nd Floor. See 40 C.F.R. § 745.103. I find that the 2004 TRC Report identified "lead-based paint hazards" in locations described as "Front Entry Foyer," "Stair/Front Entry Hall," "Back Porch," "Exterior Apartment Building," and "Garage" at 11 Orange Street and that these locations are common areas "generally accessible to all residents/users" within the meaning of the Disclosure Rule. See 40 C.F.R. § 745.103. I find that the 2004 TRC Report identified areas of bare soil at 11 Orange Street and that these are common areas "generally accessible to all residents/users" within the meaning of the Disclosure Rule. See 40 C.F.R. § 745.103.

9. I find that the 2004 LAMPP Letter and 2004 TRC Report support Complainant's allegations that lead-based paint hazards were present in 11 Orange St., 2nd Floor, and associated common areas, at the time of the lease transaction described in paragraphs 30 and 31 of the Complaint.

10. Complainant has attached copies of the 2004 LAMPP Project letter and the 2004 TRC Report as Exhibit 11 to Complainant's Memorandum. I conclude that the 2004 LAMPP Letter and 2004 TRC Report constitute "records or reports pertaining to lead-based paint or lead-based paint hazards" within the meaning of 40 C.F.R. §§ 745.107(a)(4) and were "available" to Respondent prior to September 1, 2007. (See Complaint, paragraphs 30-31 and 32-33.)

11. On or about August 21, 2008, the City of Hartford, Connecticut, issued a lead-based paint abatement order regarding 11 Orange Street, 2nd and 3rd Floors ("2008 Hartford Abatement Order"), which required Respondent to abate and manage lead-based paint and notified Respondent of the requirements of the Disclosure Rule. Attached to this order was a lead inspection form that specifically identified where lead-based paint and/or lead-based paint hazards were found ("2008 Lead Inspection Form") (See Exhibit 12 to Complainant's Memorandum.)

12. I find that the 2008 Hartford Abatement Order and the 2008 Lead Inspection Form support Complainant's allegations that lead-based paint and/or lead-based paint hazards were present in 11 Orange St., 2nd Floor, and associated common areas, at the time of the lease transaction described in paragraphs 32 and 33 of the Complaint.

13. Complainant has attached a copy of the 2008 Hartford Abatement Order and 2008 Lead Inspection Form as Exhibit 12 to Complainant's Memorandum. I conclude that each document constitutes a "record or report pertaining to lead-based paint or lead-based paint hazards" within the meaning of 40 C.F.R. §§ 745.107(a)(4) that was "available" to Respondent, meaning in the possession of or reasonably obtainable by Respondent, prior to February 1, 2009. (See Complaint, paragraphs 32-33.)

14. On or about September 1, 2007, Respondent entered into a lease contract with Gladys Melendez, a person who occupied her apartment with one child under the age of six years, to lease 11 Orange Street, 2nd Floor (Complainant's Memorandum, page 9.)

15. On or about October 1, 2007, Respondent entered into a lease contract with Felix Colon, a person with two children, aged seven years and nine years, to lease 12 Orange Street, 1st Floor (Complainant's Memorandum, page 9.)

16. On or about June 1, 2008, Respondent entered into a lease contract with Marilyn Cotto Rivera, a person with one child under the age of eighteen years, to lease 14 Orange Street, #3 (Complainant's Memorandum, page 9.)

17. On or about August 1, 2006, Respondent entered into a lease contract with Natalie Delgado, a person with two children, aged six years and eight years, to lease 12 Orange Street, 1st Floor (Complainant's Memorandum, page 9.)

18. On or about October 1, 2006, Respondent entered into a lease contract with Yaris Sanz, a person with three children under the age of eighteen years, to lease 14 Orange Street, 2nd Floor (Complainant's Memorandum, page 9.)

19. On or about October 1, 2006, Respondent entered into a lease contract with Madelin Regas, a person with two children under the age of eighteen years, to lease 14 Orange Street, 3rd Floor (Complainant's Memorandum, page 9.)

20. On or about February 1, 2009, Respondent entered into a lease contract with Blanca Maldonado, a person with four children under the age of eighteen years, to lease 11 Orange Street, 2nd Floor (Complainant's Memorandum, page 10.)

21. Respondent did not provide a copy of the EPA-approved lead hazard pamphlet, *Protect Your Family from Lead in Your Home*, or an EPA-approved equivalent pamphlet, to Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz or Madelin Regas before these lessees became obligated under contracts to lease target housing from the Respondent, as required by 40 C.F.R. § 745.107(a)(1). (Complaint, paragraph 24.)

22. Accordingly, I conclude that Respondent's failure to provide an EPA-approved lead hazard information pamphlet to Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, and Madelin Regas constitutes six (6) violations of 40 C.F.R. § 745.107(a)(1) and Section 409 of TSCA, 15 U.S.C. § 2689.

23. Respondent did not disclose the presence of known lead-based paint or lead-based paint hazards in the target housing leased to Gladys Melendez or Blanca Maldonado before these

lessees became obligated under contracts to lease target housing from the Respondent, as required by 40 C.F.R. § 745.107(a)(2). (Complaint, paragraphs 30-34.)

24. Accordingly, I conclude that Respondent's failure to disclose the presence of known lead-based paint or lead-based paint hazards to Gladys Melendez and Blanca Maldonado constitutes two (2) violations of 40 C.F.R. §§ 745.107(a)(2) and Section 409 of TSCA, 15 U.S.C. § 2689.

25. Respondent did not provide available records or reports pertaining to the presence of lead-based paint or lead based paint hazards in the target housing (including common areas) to Gladys Melendez or Blanca Maldonado before these lessees became obligated under contracts to lease target housing from the Respondent, as required by 40 C.F.R. § 745.107(a)(4). (Complaint, paragraphs 30-33.)

26. Accordingly, I conclude that Respondent's failure to provide available records or reports pertaining to the presence of lead-based paint or lead-based paint hazards in common areas to Gladys Melendez and Blanca Maldonado constitutes two (2) violations of 40 C.F.R. § 745.107(a)(4) and Section 409 of TSCA, 15 U.S.C. § 2689.

27. Respondent did not include the Lead Warning Statement as an attachment to, or within contracts to lease target housing to Gladys Melendez, Felix Colon, Natalie Delgado, Yaris Sanz, and Madelin Regas, as required by 40 C.F.R. § 745.113(b)(1). (Complaint, paragraphs 38-39.)

28. Accordingly, I conclude that Respondent's failure to include the Lead Warning Statement within or as an attachment to the contracts to lease target housing to Gladys Melendez, Felix Colon, Natalie Delgado, Yaris Sanz, and Madelin Regas constitutes five (5) violations of 40 C.F.R. § 745.113(b)(1) and TSCA Section 409, 15 U.S.C. § 2689.

29. Respondent did not include within or as an attachment to the contracts to lease target housing to Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz or Madelin Regas a statement by Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased, or indicating no knowledge thereof, as required by 40 C.F.R. § 745.113(b)(2). (Complaint, paragraphs 43-44.)

30. Accordingly, I conclude that Respondent's failure to include as an attachment to, or within the contracts to lease target housing to Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz and Madelin Regas a statement by Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased, or indicating no knowledge thereof constitutes six (6) violations of 40 C.F.R. § 745.113(b)(2) and TSCA Section 409, 15 U.S.C. § 2689.

IV. Determination of Civil Penalty Amount

31. Section 22.17(c) of the Consolidated Rules of Practice provides in pertinent part that upon issuing a default order, "[t]he relief proposed in the complaint ... shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or [the statute authorizing the proceeding.]" 40 C.F.R. § 22.17(c).

32. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and 40 C.F.R. Part 745, Subpart F, authorizes the assessment of a civil penalty under Section 16 of TSCA, 15 U.S.C. § 2615, of up to $11,000 for each violation of the Disclosure Rule, as adjusted by the Debt Collection and Improvement Act of 1996, found at 31 U.S.C. § 3701, and 40 C.F.R. Part 19. Effective January 13, 2009, the maximum penalty per violation is $16,000.

33. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires that the following factors be considered in determining the amount of any penalty assessed under Section 16: the nature, circumstances, extent, and gravity of the violation or violations 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 other such matters as justice may require.

34. EPA has issued guidelines for penalties under TSCA titled *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy* ("ERPP"), dated December 2007 and updated by 73 Fed. Reg. 75340 (December 11, 2008). (See Exhibit 14 to Complainant's Memorandum.)

35. I have considered the statutory criteria at 15 U.S.C. § 2615(a)(2)(B) and the guidance of the ERPP, in light of the facts of this case, and have found that the proposed penalty of $159,063 is not inconsistent with TSCA, the Residential Lead-Based Paint Hazard Reduction Act, the Lead-Based Paint Disclosure Rule, or the ERPP.

36. Under the ERPP, penalties are determined in two stages against responsible parties: (1) determination of a "gravity-based penalty"; and (2) adjustments to the gravity-based penalty. The gravity refers to the overall seriousness of the violation, and the gravity-based penalty is determined by considering the nature and circumstances of the violation, and the extent of harm that may result from the violation. The ERPP assigns a "circumstance level" to each type of violation, and an "extent" to each type of violation, and the combination of circumstance level and extent determines the gravity-based penalty for each violation of the Disclosure Rule. (See Exhibit 14 to Complainant's Memorandum, at 11-14 and 27.)

37. The "circumstance level" of the violation reflects the probability that a buyer or lessee of the property will suffer harm based on the particular violation. The harm under the ERPP is the degree to which the buyer or lessee is denied the ability to properly assess and weigh the

potential for human health risk from exposure to lead-based paint when entering into a transaction to buy or lease target housing. Circumstance levels range from 1 to 6, "Level 1 or 2" having the highest potential for impairing a tenant's ability to assess information required to be disclosed; "Level 3 or 4" having a medium potential for impairing a tenant's ability to assess information required to be disclosed; and "Level 5 or 6" having the lowest potential for impairing a tenant's ability to assess information required to be disclosed. (See Exhibit 14 to Complainant's Memorandum, at 12 and 27.)

38. The record in this case supports a finding that Respondent's violations of 40 C.F.R. § 745.107(a)(1), failing to provide the lead hazard information pamphlet, resulted in a high probability of impairing his tenants' ability to assess the potential for exposure to lead-based paint, and therefore, that it is appropriate to categorize such a violation as Circumstance Level 1 for purposes of calculating the penalty. Because Respondent failed to provide the pamphlet to Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, and Madelin Regas, these tenants were denied the opportunity to become aware of potential health hazards from lead-based paint in pre-1978 housing. In the Complainant's Memorandum and attached exhibits, Complainant alleges that Respondents' failure to provide a lead hazard information pamphlet to Gladys Melendez was especially significant because a childhood lead poisoning or significantly elevated blood lead levels had already been reported in the very apartment that Respondent leased to Ms. Melendez (See Exhibit 11 to Complainant's Memorandum.)

39. The record in this case supports a finding that Respondent's violations of 40 C.F.R. §§ 745.107(a)(2) and/or 745.107(a)(4), failing to disclose the presence of any known lead-based paint or lead-based paint hazards and/or provide records pertaining to the presence of lead-based paint or lead based paint hazards in the target housing, resulted in a high probability of impairing the ability of Gladys Melendez and Blanca Maldonado to assess the potential for exposure to lead-based paint, and therefore, that it is appropriate to categorize such violations as Circumstance Level 1 for purposes of calculating the penalty.

40. The record in this case supports a finding that Respondent's violations of 40 C.F.R. § 745.113(b)(1), failing to include within, or as an attachment to contracts to lease target housing the "Lead Warning Statement," resulted in a high probability of impairing the ability of Gladys Melendez, Felix Colon, Natalie Delgado, Yaris Sanz, and Madelin Regas to properly assess the risks associated with exposure to lead-based paint and to weigh this information with regard to leasing the target housing from the Respondent. As a result, under the Disclosure Rule ERPP, a violation of 40 C.F.R. § 745.113(b)(1) is a Circumstance Level 2 violation for purposes of calculating the penalty.

41. The record in this case supports a finding that Respondent's violations of 40 C.F.R. § 745.113(b)(2), failing to include a statement of knowledge of lead-based paint and/or lead-based paint hazards as an attachment, or within the contract to lease target housing, resulted in a

medium probability of impairing the ability of Gladys Melendez, Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, and Madelin Regas to properly assess the risks associated with exposure to lead-based paint and/or lead-based paint hazards and to weigh this information with regard to leasing the target housing from Respondent. As a result, under the Disclosure Rule ERPP, a violation of 40 C.F.R. § 745.113(b)(2) is a Circumstance Level 3 violation for purposes of calculating the penalty.

42. Under the ERPP, the "extent" of harm is determined to be major, significant, or minor, depending on whether the risk factors are high for childhood lead poisoning to occur as the result of the violation. "Extent" is determined by two facts: the age of any children living in the target housing at the time of the lease, and whether a pregnant woman lives in the target housing. (See Exhibit 14 to Complainant's Memorandum at 12-13.)

43. Under the ERPP, any violation involving a unit where a pregnant woman or children under the age of six resides is considered a "Major" extent level because such violation has the potential to cause serious damage to human health. The rationale for the "Major" classification is that children under the age of six are most likely to be adversely affected by the presence of lead-based paint and lead-based paint hazards because they are in the early stages of physical development. (See Exhibit 14 to Complainant's Memorandum at 13.)

44. Under the ERPP, any violation involving a unit where children aged six to eighteen years old resides is considered a "Significant" extent level because such violation has the potential to cause significant damage to human health. The ERPP provides that where the age of the youngest individual residing in target housing is not known that EPA may use the significant extent factor for purposes of calculating its penalty. Id.

45. The record in this case supports a finding that Respondent's violations associated with the lease of Gladys Melendez are considered "major" extent under the ERPP because she occupied her apartment with a baby. (See 2008 Lead Inspection Form, Exhibit 12 to Complainant's Memorandum.) The record further supports a finding that Respondent's violation associated with the leases of Felix Colon, Marylin Cotto Rivera, Natalie Delgado, Yaris Sanz, Madelin Regas and Blanca Maldonado are considered "significant" extent under the ERPP because these tenants occupied their apartments with children between the ages of six and eighteen, or the ages of their children are not known to EPA at this time. (See leases in Exhibits 4 and 13 to Complainant's Memorandum.)

46. After determining the "circumstance" and "extent," one determines the gravity-based penalty amount by locating the appropriate cell of a "Gravity-Based Penalty Matrix" in the ERPP. (See Exhibit 14 to Complainant's Memorandum, at 30B.) The appropriate cell of the matrix is determined according to the circumstance level and extent category of the violation. Complainant's proposed penalty was calculated according to this chart. Each requirement of the

Disclosure Rule is separate and distinct from the other requirements, and each lease is considered a "stand alone" transaction. (See Exhibit 14 to Complainant's Memorandum, at 16.) Penalties for each violation found in each individual lease transaction must be assessed separately. Id.

47. Under the ERPP the "nature" of violations of the Lead-Based Paint Disclosure Rule is a factor incorporated into the consideration of the "circumstances" and "extent" of the violations. In this case, the record indicates that the nature of the violation is "hazard assessment," in that Respondent's failure to provide information concerning lead-based paint and/or lead-based paint hazards in the target housing prevented tenants from assessing the potential health consequences of exposure to such lead-based paint and/or lead-based paint hazards. (See Exhibit 14 to Complainant's Memorandum, at 11-12.)

48. After calculating the gravity-based penalty, the ERPP provides for consideration of additional factors, consistent with TSCA, such as: (1) ability to pay/ability to continue in business; (2) history of prior violations; (3) degree of culpability; and (4) such other factors as justice may require, which include: the violator's attitude, supplemental environmental projects, voluntary disclosure, potential for harm due to risk of exposure, litigation risk, and size of business. The penalty also may be adjusted upward to recoup the economic benefit of noncompliance, although generally the economic benefit of noncompliance is low in Disclosure Rule cases and is therefore not included in the penalty calculation. (See Exhibit 14 to Complainant's Memorandum, at 14-23.)

49. With respect to culpability, I have reviewed the record and find that an upward adjustment of gravity-based penalties associated with the leases of Gladys Melendez, Felix Colon, Marylin Cotto Rivera and Blanca Maldonado is appropriate. The record indicates that EPA's Subpoena, served upon Respondent on August 9, 2007, provided clear notice to Respondent of the Disclosure Rule requirements. (See EPA's Subpoena, Exhibit 7 to Complainant's Memorandum.) Nevertheless, Respondent failed to comply with the Disclosure Rule when he entered into leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera and Blanca Maldonado after August 9, 2007. Likewise, the record reflects that EPA hand-delivered a Subpoena Notice of Noncompliance with another copy of the subpoena on November 2, 2007, providing notice once again of the Disclosure Rule requirements. (See Subpoena Notice of Noncompliance, Exhibit 7 to Complainant's Memorandum). As referenced above, the 2004 LAMPP Letter and the 2008 Hartford Abatement Order also informed Respondent about the requirements of the Disclosure Rule. (See Exhibits 10 and 12 to Complainant's Memorandum.) In addition, Respondent entered into his lease with Blanca Maldonado *after* EPA served Respondent with the detailed Petition to Enforce TSCA Subpoena on June 24, 2008 and met with Respondent on August 25, 2008. (See Maldonado lease, Exhibit 13 to Complainant's Memorandum; Petition and Certificate of Service, Exhibit 8; 2008 Lead Inspection Form and Harford Abatement Order, Exhibit 12; and meeting notes, Exhibit 9). At that August 25, 2008 meeting, the record reflects that EPA provided a Spanish interpreter and another compliance

assistance packet. (See Exhibit 9 to Complainant's Memorandum). The appropriate upward adjustment to the gravity-based penalties associated with Respondent's leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera and Blanca Maldonado is twenty-five (25) percent, the maximum allowable increase for this factor. A 25% upward adjustment of gravity-based penalties associated with the leases of these tenants is appropriate because Respondent had control over the events constituting the violation; had actual knowledge of lead-based paint and/or lead-based paint hazards in the target housing leased to Gladys Melendez and Blanca Maldonado; and Respondent had written notice of Disclosure Rule requirements when he entered into leases with Gladys Melendez, Felix Colon, Marylin Cotto Rivera, and Blanco Maldonado. Respondent's culpability was particulary severe in the case of Blanco Maldonado because he entered into his lease with Blanca Maldonado (failing to provide her a copy of the 2004 LAMPP Letter, the 2004 TRC Report, the 2008 Hartford Abatement Order and the 2008 Lead Inspection Form), after EPA both had served Respondent with a detailed Petition to Enforce the Subpoena on June 24, 2008 and met with Respondent on August 25, 2008.

50. With respect to Respondent's ability to pay and ability to continue to do business, I deem that Respondent has waived any claim that he cannot afford to pay the penalty. The record reflects that Complainant was concerned about whether Respondent would be able to pay the penalty and provided Respondent with several opportunities to substantiate a financial inability-to-pay claim, both after filing the Complaint (when EPA supplied Respondent with a list of requested financial documentation) and again after filing its Motion for Default. Respondent has not provided the requested financial documentation. Although Complainant has the duty to make a *prima facie* case that the penalty is appropriate based on a consideration of all of the statutory factors, including Respondent's ability to pay, Complainant may *presume* that Respondent has an ability to pay the penalty until Respondent claims that it cannot afford the penalty. *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (EAB 1994); *In re Spitzer Great Lakes*, 9 E.A.D. 320, 321 (EAB 2000) (quoting *In re New Waterbury*, 5 E.A.D. at 541); *In re CDT Landfill Corp.*, 11 E.A.D. 88, 122 (EAB 2003); and *In re. Donald Cutler*, 11 E.A.D. 622, 632 (EAB 2004). This is "because the Agency's ability to gather the necessary financial information about a respondent is limited, and the respondent is in the best position to obtain the relevant financial records about its own financial condition." *Spitzer Great Lakes*, 9 E.A.D. at 321 (quoting *New Waterbury*, 5 E.A.D. at 540). If a respondent fails to properly notify EPA that it plans to assert an inability-to-pay claim or fails to produce supporting financial information, then the Presiding Officer has the discretion to waive consideration of the ability to pay factor. See *Spitzer Great Lakes* at 321. There is no rational way for me to assess Respondent's ability to pay unless he submits financial documentation, which he has not done. Thus, I exercise my discretion to exclude the "ability to pay" and "continue to do business" penalty factors from further consideration. The exercise of this discretion also is consistent with 40 C.F.R. § 22.19(g) (governing prehearing exchanges), which provides that "[w]here 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(a)." See *New Waterbury* at 542, footnote 24 (discussing the previous version of this regulation).

51. I have considered the record in this case in light of the remaining statutory penalty factors, including history of prior violations and other such matters as justice may require, and have found that no further adjustments to the gravity-based penalty are warranted.

52. Having found that Respondent violated TSCA in nineteen (19) instances, and having considered the statutory penalty assessment criteria and the ERPP, I have determined that $159,063, the proposed penalty, is the appropriate civil penalty to be assessed against Respondent because it is neither clearly inconsistent with the record of the proceeding nor clearly inconsistent with the Residential Lead-Based Paint Hazard Reduction Act of 1992, TSCA, or the Disclosure Rule. In doing so, I have considered the nature, circumstances, extent, and gravity of the violation or violations and, with respect to Respondent, the ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as justice may require, which are all the factors identified by TSCA Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

53. In assessing this penalty, I find persuasive the rationale for the calculation of the assessed penalty set forth in the Complaint and in the Complainant's Memorandum filed in this proceeding and incorporate such rationale by reference into this Order.

IV. Order

1. I find that Respondent is in default for failing to answer the Complaint in this matter, and that Respondent violated Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689 (TSCA), and the Disclosure Rule, 40 C.F.R. Part 745, Subpart F (40 C.F.R. §§ 745.100-745.119). Accordingly, I hereby order that a civil administrative penalty be assessed in the amount of $159,063 against Respondent, Douglas Paulino.

2. This Default Order constitutes an initial decision under 40 C.F.R. §§ 22.17(c) and 22.27(c), and shall become a final order 45 days after its service upon the parties unless: (1) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; (2) a party moves to set aside this Order, pursuant to 40 C.F.R. § 22.27(c)(3); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

3. Respondent shall make payment of the full amount of this civil penalty within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $159,063, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines & Penalties
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

4. A transmittal letter identifying the subject case and EPA docket number (TSCA-01-2009-0066) as well as Respondent's name and address, must accompany the check.

5. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed pursuant to 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 40 C.F.R. § 13.11.

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Jill T. Metcalf
Regional Judicial Officer

Dated: