UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

IN THE MATTER OF: JOHN C. JONES 102 Cedar Street Roxbury, Massachusetts 02119 Respondent.	Docket No. TSCA-01-2010-0035

COMPLAINANT'S MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT ORDER

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List of Exhibits

Exhibit 1	Complaint and Notice of Opportunity for Administrative Hearing, May 6, 2010
Exhibit 2	Proof of Service, indicating Respondent's receipt of Complaint on May 7, 2010
Exhibit 3	Notes of Telephone Calls between Respondent and Christine Foot, EPA Enforcement Counsel
Exhibit 4	Email message from Regional Hearing Clerk to Christine Foot, Feb. 17, 2010
Exhibit 5	EPA Inspection Report, Mar. 25, 2008, Rev'd Aug. 12, 2008
Exhibit 6	EPA Inspector's Meeting Notes, signed by Respondent, Mar. 25, 2008
Exhibit 7	Notes of Telephone Calls between Respondent and Catherine Smith, EPA Senior Enforcement Counsel
Exhibit 8	Subpoena under Section 1018 of Title X (the Real Estate Notification and Disclosure Rule) and Section 406(b) of TSCA (the Pre-Renovation Rule), Aug. 13, 2008
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Exhibit 10	Referral Regarding Petition to Enforce TSCA Subpoena against John C. Jones (Roxbury, Massachusetts), Mar. 30, 2009
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Exhibit 18	EPA Pamphlet: "Protect Your Family from Lead in Your Home"
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The Complainant, the United States Environmental Protection Agency ("EPA"), has moved for the issuance of an order:

(a) finding that Respondent, John C. Jones, is in default in this matter;

(b) finding that Respondent violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("the Act"), 42 U.S.C. §§ 4851 *et seq*., and the federal regulations promulgated thereunder, entitled "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property," set forth in 40 C.F.R. Part 745, Subpart F (the "Disclosure Rule"); and

(c) assessing a penalty of $84,600.

I. Respondent Should Be Found in Default for Failure to File a Timely Answer to the Complaint

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Part 22") provides that a party may be found to be in default after motion, upon failure to file a timely answer to the complaint. 40 C.F.R. § 22.17. See, e.g., In re Rocking BS Ranch, Inc., 2010 EPA App. LEXIS 11, at *6, *13, *21 (EAB 2010) (upholding Regional Judicial Officer's default order for failure to file an answer); In re Pan Am. Growers Supply, Inc., 2010 EPA ALJ LEXIS 26, at *8–9 (ALJ 2010) (finding a respondent in default where it failed to file a clarified answer and comply with other orders). "Default by respondent constitutes . . . an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a); see also Rocking BS Ranch, 2010 EPA App. LEXIS 11, at *5, *11 (noting that the amended complaint provided notice that failure to respond would constitute an

admission of all the alleged facts and citing 40 C.F.R. § 22.17(a)).

The Complaint in this action was filed with the Regional Hearing Clerk on May 6, 2010. (Ex. 1, Complaint.) In it, EPA alleged that Respondent violated federally enforceable provisions of TSCA Section 409, the Act, and the Disclosure Rule, and that Respondent is, therefore, subject to penalties under TSCA Section 16, 15 U.S.C. § 2615. The Complaint was sent to Respondent by first class certified mail on May 6, 2010, and Respondent signed a receipt for delivery on May 7, 2010. (See Ex. 2, Proof of Service[1]; see also Resp.'s Mot. for Extension of Time to File Answer, May 31, 2010 (". . . [T]he Respondent states that the Respondent received a copy of the Complaint on or before May 6, 2010."); Resp.'s Mot. for Extension of Time to File Answer, Jul. 15, 2010 (same).[2]) Accordingly, service was complete, on May 7, 2010, pursuant to 40 C.F.R. § 22.7(c).

In response to Respondent's request for an informal settlement conference, EPA and Respondent met at the EPA offices on May 26, 2010. During this meeting, Respondent was informed, among other things, of his option to request an "ability-to-pay" evaluation. Shortly thereafter, EPA assented to Respondent's motion for an extension of the time to file an answer to allow for the parties to make progress towards settlement and for Respondent to produce documentation needed to support a potential penalty reduction or approval of a Supplemental Environmental Project ("SEP"). Respondent filed the motion for an extension on May 31, 2010;

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[1] Although the Complaint was sent Certified Mail, Return Receipt Requested, a green card was not returned by the U.S. Postal Service. However, the Postal Service was able to provide this Proof of Service from its records, showing Respondent's signature for and receipt of the Complaint on May 7, 2010.

[2] In his Motions for Extensions of Time to File Answer, Respondent mistakenly referenced the date that the Complaint was filed and mailed (May 6, 2010), rather than the following day (May 7, 2010), which was the actual date of receipt.

the Regional Judicial Officer allowed it and extended the deadline for filing the Answer to July 15, 2010.

The day before the Answer was due, Respondent called EPA Counsel and requested another extension. He also spoke of financial stresses but declined EPA's repeated offer of an ability-to-pay evaluation. (Ex. 3, Call Notes, C. Foot.) Respondent requested, and EPA Counsel agreed to, a final thirty-day extension, upon Respondent's assurance that he now understood what documentation was needed and would be supplying it. The Regional Judicial Officer allowed his assented-to motion for a thirty-day extension, extending the deadline for filing the Answer to August 15, 2010. Upon not hearing from Respondent by July 26, 2010, EPA Counsel telephoned him. He stated that he expected to get the necessary documentation to EPA by July 30, 2010. (Id.) EPA never heard from Respondent again. When EPA had not received the materials nor a telephone call by August 5, 2010, EPA Counsel telephoned and left a voicemail message reminding him of the approaching Answer deadline. (Id.)

Respondent has not filed an Answer, and the deadline for filing an Answer (August 15, 2010) has lapsed. (Ex. 4, Email message, Reg'l Hr'g Clk. to C. Foot, Feb. 17, 2011). See 40 C.F.R. § 22.15(a). The fact that Respondent participated in some degree of settlement discussions does not offset his obligation to file a timely Answer. See Rocking BS Ranch, 2010 EPA App. LEXIS 11, at *16. Likewise, while proceeding *pro se* may afford Respondent more latitude than other litigants – and indeed EPA has provided Respondent with more guidance and leeway than it would a respondent represented by counsel, the Regional Judicial Officer "cannot excuse [his] abject failure to adhere to the requirements of [Part 22] by not providing a meaningful response to any of the pleadings . . . ." Id. at *16–17. Because Respondent has not

filed a timely answer to the Complaint, Respondent should be found in default. See 40 C.F.R. § 22.17(a). Such default constitutes an admission of all facts alleged in the Complaint and a waiver of any right to contest the factual allegations of the Complaint. 40 C.F.R. § 22.17(a); see Rocking BS Ranch, 2010 EPA App. LEXIS 11, at *5, *11, *21.

II. Respondent's Actions Violated TSCA, the Act, and the Disclosure Rule

The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), have not been contested and support a finding that Respondent violated TSCA Section 409, the Act, and the Disclosure Rule and support the penalty that EPA is seeking.

In 1992, Congress passed the Act, 42 U.S.C. §§ 4851 *et seq.*, in response to findings that low-level lead poisoning is widespread among American children. In 1996, EPA promulgated the Disclosure Rule, set forth at 40 C.F.R. Part 745, Subpart F, to implement the Act. Pursuant to Section 1018(b)(5) of the Act, 42 U.S.C. § 4852d(b)(5), and 40 C.F.R. § 745.118(e), failure to comply with the Disclosure Rule is a violation of TSCA Section 409, 15 U.S.C. § 2689. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), provides that any person who violates a provision of TSCA Section 409, 15 U.S.C. § 2689, shall be liable to the United States for a civil penalty.

The Disclosure Rule contains requirements that sellers and lessors of "target housing" must perform. "Target housing" is defined as any housing constructed prior to 1978, except housing for the elderly or disabled and except any 0-bedroom dwelling. 40 C.F.R. § 745.103. With respect to target housing being leased, the Disclosure Rule requires lessors to, among other things:

(a) provide a lead hazard information pamphlet to lessees;

(b) provide records or reports available to the lessor pertaining to lead-based paint or lead-based paint hazards in the housing to lessees;

(c) ensure that the contract to lease includes a Lead Warning Statement;

(d) ensure that the contract to lease includes a statement by the lessor disclosing the presence of known lead-based paint or lead-based paint hazards in the housing, or indicating no knowledge thereof; and

(e) ensure that the contract to lease includes a list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the housing that have been provided to the lessee or an indication that no such records or reports are available.

See generally, 40 C.F.R. Part 745, Subpart F.

On March 25, 2008, EPA Region 1 inspectors met with Respondent to evaluate his compliance with the Disclosure Rule and another lead paint-related requirement, the Pre-Renovation Education Rule, found at 40 C.F.R. Part 745, Subpart E, in the leasing of residential properties that he owned and offered for rent. At this meeting, Respondent indicated that he had no knowledge of, and had not complied with, the Disclosure Rule and that he did not use disclosure forms. (Ex. 1, Compl. ¶ 19; Ex. 5, EPA Inspection Report at 2.) Because Respondent did not bring all of the relevant documents with him to the inspection, EPA requested that he, and he agreed to, send EPA copies of seven leases from the preceding two years and all records and reports pertaining to lead-based paint that he had in his possession by April 23, 2008. (See Ex. 6, EPA Inspector's Meeting Notes; Ex. 5, EPA Inspection Report at 3.)

Because Respondent failed to provide the requested documents after nearly five months and several attempts to contact him by telephone (see Ex. 7, Call Notes, C. Smith), on August 13, 2008, EPA served him with a subpoena, identified as TSCA Subpoena No. TSCA-SP-2008-077 ("the Subpoena"), pursuant to Section 11(c) of TSCA, 15 U.S.C. § 2610(c). (Ex. 8.) The Subpoena sought information necessary to assess Respondent's compliance with the Disclosure

Rule and the Pre-Renovation Education Rule. (Ex. 1, Compl. ¶ 16; Ex. 8, Subpoena.)

When Respondent failed to respond to the Subpoena, EPA sent a "Letter of Notice of Noncompliance and Potential for Further Enforcement" on October 24, 2008, informing him of the potential for enforcement of the Subpoena in federal court if EPA did not received a complete response. (Ex. 9.) When Respondent still failed to respond, on March 30, 2009, EPA referred the matter to the U.S. Attorney's Office for the District of Massachusetts, requesting assistance in compelling a response to the Subpoena. (Ex. 1, Compl. ¶ 18; Ex. 10, Referral.) After repeated attempts by the U.S. Attorney's Office and EPA to solicit a response, Respondent submitted some of the requested information on May 21, 2009. (Ex. 11, First Subpoena Resp.) When prompted again by the U.S. Attorney's Office, Respondent eventually supplemented his response on October 23, 2009, a year-and-a-half past the due date for the material. (Ex. 12, Second Subpoena Resp.)[3]

In his subpoena responses, Respondent provided written answers to questions concerning his properties, letters and certificates of compliance with Massachusetts lead inspection requirements for nine of his rental units, four leases, and portions of two housing assistance payments contracts. Respondent did not provide EPA with any documentation demonstrating compliance with the Disclosure Rule. (Ex. 1, Compl. ¶ 19; Exs. 12 & 13, First and Second Subpoena Responses.) During the course of its investigation in this matter, EPA supplemented the submitted information with research into Respondent's property holdings (Ex. 14, Property

[3] In each of his Subpoena responses, Respondent asserted a blanket claim of Confidential Business Information ("CBI") protection for the information contained therein. EPA maintained these records as CBI while it evaluated the merits of his claim. On March 9, 2010, EPA notified Respondent that, per 40 C.F.R. §§ 2.204 and 2.306(d), his materials were not entitled to CBI protection. (Ex. 13.) EPA ceased CBI management of the materials upon expiration of the thirty-day period for challenging this determination in federal court.

Deeds; Ex. 15, 2010 Tax Assessor Records) and the lead inspection histories of some of his properties (Ex. 16, Selected Entries from Massachusetts' Lead Safe Homes Website; Ex. 17, Fax Cover Sheet and 2005 Post-Compliance Assessment Determination Report concerning lead inspection of 23 and 25 Southwood Street from lead inspector Jack Kane (portions) ("2005 PCAD")).

At all times relevant to the violations alleged in the Complaint, Respondent owned and offered for lease units of residential target housing in Boston, Massachusetts (collectively referred to as "the Properties"), including, among others: 20 Woodville Street in Roxbury (a three-unit apartment building); a building with three entrances, addressed 48 Edgewood Street, 23 Southwood Street, and 25 Southwood Street in Roxbury (a three-unit apartment building); and 176-180 Quincy Street in Dorchester (a three-unit apartment building). (Ex. 1, Compl. ¶ 11; Ex. 8, Subpoena (presenting EPA's questions), at #1; Ex. 11, First Subpoena Resp. at Overview & #1; Ex. 12, Second Subpoena Resp. at #3 (explaining the building with three addresses); Ex. 14, Property Deeds (showing Respondent's acquisition of the Properties); Ex. 15, 2010 Tax Assessor Records (showing his on-going ownership of the Properties).)

All of the Properties were constructed prior to 1978. (Ex. 1, Compl. ¶ 12; Ex. 11, First Subpoena Resp. at #1 & #2; Ex. 15, 2010 Tax Assessor Records.) At the time of the violations and at the time the Complaint, none of the leased units qualified for any of the exemptions to the provisions of the Act or the Disclosure Rule. (Ex. 1, Compl. ¶ 12; Ex. 11, First Subpoena Resp. at #2.) Based on the above information, the Presiding Officer may conclude that the rental units at the Properties were, at the time of the violations, "target housing" as defined in 40 C.F.R. § 745.103, and that Respondent was a "lessor" of target housing as defined in 40 C.F.R.

§ 745.103.

The allegations in the Complaint concern one or more of the following lease transactions for rental units within the Properties between Respondent and his tenants, as more fully described in the discussion of each Count below:

a) A lease with a tenant who became obligated to rent 20 Woodville Street #3 in Roxbury on or about December 1, 2007 (Ex. 12, Second Subpoena Resp. (lease);

b) A lease with a tenant who became obligated to rent 48 Edgewood Street #2 in Roxbury on or about April 1, 2007 (Ex. 12, Second Subpoena Resp. (lease);

c) A lease with a tenant who became obligated to rent 25 Southwood Street #1 in Roxbury on or about July 1, 2008 (Ex. 12, Second Subpoena Resp. (lease));

d) A lease with a tenant who became obligated to rent 176-180 Quincy Street #2 in Dorchester on or about January 1, 2009 (Ex. 12, Second Subpoena Resp. (lease)).

In his First Response to the Subpoena, Respondent indicated that all units are occupied by children, although he did not specify their ages. (Ex. 11, First Subpoena Resp. at #5.)

A. Count I: Failure to provide an EPA-approved lead hazard information pamphlet

As noted above, EPA has offered factual and legal support for its assertion that Respondent is a lessor of target housing, that each of the Properties are target housing subject to the Disclosure Rule, and that Respondent entered into contracts to lease such target housing. The Disclosure Rule requires lessors of target housing to provide lessees with an EPA-approved lead hazard information pamphlet entitled "Protect Your Family From Lead In Your Home" (Ex. 18) (or an equivalent pamphlet approved by EPA for use in that state) before entering into a contract to lease target housing. 40 C.F.R. § 745.107(a)(1).

As alleged in paragraphs 21–25 of the Complaint, Respondent failed to provide an EPA-approved lead hazard information pamphlet to all four of the above-listed tenants. The leases listed above did not contain any reference to the EPA-approved lead hazard information

pamphlet and did not include any attachments indicating that a pamphlet had been given to the tenants. (See Exs. 12 & 13, First and Second Subpoena Resps.) In addition, Respondent indicated that he did not comply with the Disclosure Rule requirements during his meeting with EPA representatives on March 25, 2008. (Ex. 1, Compl. ¶ 19; Ex. 5, EPA Inspection Report at 2.)

Based on the lack of any reference to the EPA-approved hazard information pamphlet in, or as an attachment to any lease, Respondent's failure to produce one in his subpoena responses (for which he was directed to provide all lead-based paint documents in his possession), and his indication that he did not comply with the Disclosure Rule, the Presiding Officer may reasonably conclude that Respondent did not fulfill the requirement of 40 C.F.R. § 745.107(a)(1) of providing a lead hazard information pamphlet to the tenants listed above before entering into contracts with them to lease target housing. Respondent's failure to provide the lead hazard information pamphlet to the tenants of the Properties listed above constitutes four (4) violations of 40 C.F.R. § 745.107(a)(1) and TSCA Section 409, 15 U.S.C. § 2689.

B. Count II: Failure to provide available records pertaining to lead-based paint or lead-based paint hazards in target housing

EPA has provided a sufficient factual and legal basis (see above) for the Presiding Officer to conclude that Respondent entered into the leases referenced above with the tenant at 48 Edgewood Street #2, on or about April 1, 2007, and the tenant at 25 Southwood Street #1, on or about July 1, 2008, and that both lease transactions were subject to the Disclosure Rule.

Under 40 C.F.R. § 745.107(a)(4), the Disclosure Rule requires a lessor also to provide to a lessee any information available concerning known lead-based paint and/or lead-based paint hazards in the target housing before the lessee becomes obligated under the lease contract. This

requirement includes records or reports regarding common areas. The term "available records" includes records in the lessor's possession or records that are reasonably obtainable by the lessor at the time disclosure is required to be made. 40 C.F.R. § 745.103.

At the time Respondent leased 48 Edgewood Street # 2 to the tenant referenced above, at least the following information pertaining to lead-based paint and/or lead-based paint hazards in that rental unit was available to Respondent: notice that violations were found during a lead-based paint Comprehensive Initial Inspection conducted on December 14, 1991 ("1991 CII"). (Ex. 1, Compl. ¶ 29; see Ex. 16, Lead Safe Homes website entry.) Property records indicate that Respondent acquired this property in 1983 and, thus, he owned this unit at the time of this inspection. (Ex. 14, 48 Edgewood Street Deed.)

At the time Respondent leased 25 Southwood Street #1 to the lessee referenced above, at least the following information pertaining to lead-based paint and/or lead-based paint hazards in that rental unit was available to Respondent: (a) notice that violations were found during a lead-based paint Comprehensive Initial Inspection conducted on March 11, 2005 ("2005 CII"); and (b) violations found during a Post-Compliance Assessment Determination conducted on September 1, 2005 ("2005 PCAD"). (Ex. 1, Compl. ¶ 31; Ex. 16, Lead Safe Homes website entries; Ex. 17, 2005 PCAD (portions).[4]) The 2005 PCAD was conducted by lead inspector Jack Kane on 23 Southwood #3 and 25 Southwood #1. While it revealed no lead-based paint hazards *inside* the apartment of 25 Southwood #1, it did reveal lead-based paint hazards in the *common areas* of the building. On the 25 Southwood #1 portion of the 2005 PCAD (Ex. 17), the "Lead

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[4] The lead inspector examined 23 Southwood Street #3 in Roxbury, another unit in the building, on the same visit and noted violations in areas common to both units, so portions of both inspection documents are included here.

Hazards?" box is filled with a "Y" (p.1), the box under the PCAD "Inspection Activity" is filled with an "F," which the key defines as "Fail" (p.2), and the Comments section on page 2 reads: "No lead hazards identified in Unit 25-1, but exterior violations found." Additionally, the inspector explained the lead inspection history of the building in the Fax Cover Sheet and noted finding "exterior/common area hazards" in his inspection of 23 Southwood Street #3, which he referenced in the report for 25 Southwood Street #1. (Ex. 17, Fax Cover Sheet and 2005 PCAD.) Property records indicate that Respondent acquired this property in 1983 and so he owned this unit at the time of this inspection. (Ex. 14, 48 Edgewood Street Deed.)

Based on the above-described records, the Presiding Officer may reasonably conclude that the 1991 CII for 48 Edgewood Street #2 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), and that this record was "available" to Respondent within the meaning of 40 C.F.R. § 745.107(a)(4) and 40 C.F.R. § 745.103, as of approximately March 31, 2007 (prior to the lease for 48 Edgewood Street #2 listed above). (Ex. 1, Compl. ¶¶ 26–29.) The Presiding Officer may also conclude that the 2005 CII and the 2005 PCAD for 25 Southwood Street #1 both 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 that those documents were "available" to Respondent within the meaning of 40 C.F.R. § 745.107(a)(4) and 40 C.F.R. § 745.103, as of approximately July 31, 2007 (prior to the lease for 25 Southwood Street #1 listed above). (Ex. 1, Compl. ¶¶ 26–31.)

Respondent was required under 40 C.F.R. § 745.107(a)(4) to disclose to the lessees, before entering into contracts to lease 48 Edgewood Street #2 and 25 Southwood Street #1, the

records or reports pertaining to lead-based paint, including the 1991 CII (to the lessee of 48 Edgewood Street #2) and the 2005 CII and 2005 PCAD (to the lessee of 25 Southwood Street #1). The leases did not contain either within their body, or as attachments thereto, any reference to these or other records or reports pertaining to lead-based paint or lead-based paint hazards in 48 Edgewood Street #2 or 25 Southwood Street #1. (Ex. 1, Compl. ¶¶ 28, 31; Exs. 12 & 13, First and Second Subpoena Resps.) In addition, Respondent indicated that he did not comply with the Disclosure Rule requirements during his meeting with EPA representatives on March 25, 2008. (Ex. 1, Compl. ¶ 19; Ex. 5, EPA Inspection Report at 2.)

Based on the legal and factual assertions above, the Presiding Officer may reasonably find that Respondent failed to provide records or reports pertaining to known lead-based paint or lead-based paint hazards before the lessees of 48 Edgewood Street #2 and 25 Southwood Street #1 became obligated under contracts to lease target housing on the dates set forth above. Respondent's failure to disclose the presence of, and the available records pertaining to, known lead-based paint and lead-based paint hazards to these lessees constitutes two (2) violations of 40 C.F.R. § 745.107(a)(4) and TSCA Section 409, 15 U.S.C. § 2689.

C. Count III: Failure to include the Lead Warning Statement within, or as an attachment to, the contract to lease target housing

EPA has provided a sufficient factual and legal basis (above) for the Presiding Officer to conclude that Respondent entered into leases with the tenants of 20 Woodville Street #3, 48 Edgewood Street #2, and 25 Southwood Street #1, and that these lease transactions were subject to the Disclosure Rule. Section 113(b)(1) of the Disclosure Rule requires a lessor to include within, or as an attachment to, the contract to lease target housing, the "Lead Warning

Statement."[5] 40 C.F.R. § 745.113(b)(1).

The contracts between Respondent and the tenants of the three units listed above did not include a Lead Warning Statement, either within the body of the lease or as an attachment. (Ex. 1, Compl. ¶¶ 34–38; Exs. 12 & 13, First and Second Subpoena Resps.) In addition, Respondent indicated that he did not comply with the Disclosure Rule requirements during his meeting with EPA representatives on March 25, 2008. (Ex. 1, Compl. ¶ 19; Ex. 5, EPA Inspection Report at 2.)

Therefore, the Presiding Officer may reasonably conclude that Respondent failed to include the Lead Warning Statement within the contracts to lease target housing discussed above or as an attachment to such contracts. Respondent's failure to include the Lead Warning Statement within, or as an attachment to, three contracts to lease target housing constitutes three (3) violations of 40 C.F.R. § 745.113(b)(1) and TSCA Section 409, 15 U.S.C. § 2689.

D. Count IV: Failure to include within the lease contract, or as an attachment thereto, a statement by the lessor disclosing the presence of known lead-based paint or lead-based paint hazards, or lack of knowledge thereof

EPA has provided a sufficient factual and legal basis (above) for the Presiding Officer to conclude that: (1) Respondent entered into leases with the tenants of 20 Woodville Street #3, 48 Edgewood Street #2, and #25 Southwood #1; (2) these lease transactions were subject to the Disclosure Rule; and (3) at the time Respondent entered into these leases, information was

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[5] The lead warning statement reads as follows:

> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not taken care of properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, landlords must disclose the presence of known lead-based paint and lead-based paint hazards in the dwelling. Tenants must also receive a federally approved pamphlet on lead poisoning prevention.

available to him concerning known lead-based paint and lead-based paint hazards at 28 Edgewood Street #2 (1991 CII) and 25 Southwood Street #1 (2005 CII and 2005 PCAD), including the basis for determining that such paint or hazards existed, their location, and the condition of the painted surfaces (see Count II, above).

The Disclosure Rule requires that each contract to lease target housing include a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing or indicating no knowledge thereof. 40 C.F.R. § 745.113(b)(2). The lessor is also required to disclose any additional information concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that such paint or hazards exist, their location, and the condition of the painted surfaces. Id.

Respondent's leases with the tenants of 48 Edgewood Street #2 and 25 Southwood Street #1 did not include a statement by him disclosing the presence of known lead-based paint or lead-based paint hazards in the rental units, either in the body of the lease or as an attachment thereto. (Ex. 1, Compl. ¶¶ 39–43; Exs. 12 & 13, First and Second Subpoena Resps.) Likewise, Respondent's lease with the tenant of 20 Woodville Street #3 did not either disclose the presence of known lead-based paint or lead-based paint hazards in the unit or indicate a lack of knowledge thereof, either in the body of the lease or as an attachment thereto. (Ex. 1, Compl. ¶¶ 41–43; Exs. 12 & 13, First and Second Subpoena Resps.) Further, Respondent admitted that he had no disclosure forms (Ex. 6, Inspector's Meeting Notes (signed by Respondent and noting that he "has no dfs" (lead disclosure forms) for his properties)), and he indicated that he did not comply with the Disclosure Rule requirements during his meeting with EPA representatives on March

25, 2008. (Ex. 1, Compl. ¶ 19; Ex. 5, EPA Inspection Report at 2.)

Based on these factual assertions, the Presiding Officer may reasonably conclude that Respondent failed to include, either in the lease contracts with the lessees of 20 Woodville Street #3, 48 Edgewood Street #2, and 25 Southwood #1, or as an attachment thereto, a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating a lack of knowledge thereof. This failure constitutes three (3) violations of 40 C.F.R. § 745.113(b)(2) and TSCA Section 409, 15 U.S.C. § 2689.

E. Count V: Failure to include within the lease contract, or as an attachment thereto, a list of records pertaining to lead-based paint and/or lead-based paint hazards in the target housing or to indicate that no such list exists

EPA has provided a sufficient factual and legal basis (above) for the Presiding Officer to conclude that Respondent entered into leases with the tenants of 20 Woodville Street #3 and 176-180 Quincy Street #2, and that these lease transactions were subject to the Disclosure Rule. Section 113(b)(3) of the Disclosure Rule requires a lessor to include within, or as an attachment to, the contract to lease target housing, a list of 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 that have been provided to the lessee or an indication that no such records or reports are available.

The contracts between Respondent and the tenants of the two units listed above did not include a list of records or reports available to the Respondent pertaining to lead-based paint and/or lead-based paint hazards. (Ex. 1, Compl. ¶¶ 44–48; Exs. 12 & 13, First and Second Subpoena Resps.) In addition, Respondent indicated that he did not comply with the Disclosure Rule requirements during his meeting with EPA representatives on March 25, 2008. (Ex. 1, Compl. ¶ 19; Ex. 5, EPA Inspection Report at 2.)

Therefore, the Presiding Officer may reasonably conclude that Respondent failed to include a list of the records or reports available to him pertaining to lead-based paint and/or lead-based paint hazards or to indicate no knowledge of the same in, or attached to, two lease contracts to lease target housing. Respondent's failure to include this list of records constitutes two (2) violations of 40 C.F.R. § 745.113(b)(3) and TSCA Section 409, 15 U.S.C. § 2689.

In summary, the factual allegations of the Complaint, which are deemed to be admitted by means of Respondent's failure to timely answer the Complaint, establish a *prima facie* case that Respondent violated the provisions of TSCA, the Act, and the Disclosure Rule.

III. A Penalty of up to $84,600 Should Be Assessed, Based on the Penalty Assessment Criteria of TSCA and EPA's Penalty Policy as Applied to the Circumstances of This Case

EPA bears the burden of showing that the proposed penalty is appropriate in light of all of the statutory penalty factors. In re New Waterbury, Ltd., 5 E.A.D. 529, 536–38 (EAB 1994); see 15 U.S.C. 2615(a)(2)(B) (listing TSCA penalty factors). However, according to 40 C.F.R. § 22.17(c), "[t]he 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." (emphasis added).

EPA's complaint proposed civil penalties of $84,600 against Respondent for the fourteen violations described above. At this time, and as further explained below, EPA recommends the imposition of the full $84,600 civil penalty. The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that the proposed $84,600 penalty amount is appropriate and that it is consistent with both the record and TSCA. Cf. In re Rocking BS Ranch, Inc., 2010 EPA App. LEXIS 11, *21 (EAB 2010) (upholding Regional Judicial Officer's

finding that while the proposed penalty was consistent with the *record*, it need to be reduced to be consistent with the Clean Water Act). If, in response to this motion, Respondent timely supplies financial documentation to substantiate an inability to pay the proposed penalty, EPA will review such information and move for the assessment of a revised default penalty, if appropriate.

Pursuant to Section 1018(b)(5) of the Act, 42 U.S.C. § 4852d(b)(5), and 40 C.F.R. § 745.118(e), failure to comply with the disclosure requirements in 40 C.F.R. Part 745, Subpart F is a violation of TSCA Section 409, 15 U.S.C. § 2689. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), provides that any person who violates a provision of TSCA Section 409, 15 U.S.C. § 2689, shall be liable to the United States for a civil penalty. Sections 1018(b)(5) of the Act and 40 C.F.R. § 745.118(f) provide that, for purposes of enforcing the Disclosure Rule under TSCA, the penalty for each violation applicable under Section 16 shall be no more than $10,000. Pursuant to 40 C.F.R. § 745.118(f), the Debt Collection and Improvement Act of 1996, found at 31 U.S.C. § 3701, and 40 C.F.R. Part 19, penalties of up to $11,000 per violation may be assessed for violations occurring from July 28, 1997 through January 12, 2009.[6]

The proposed civil penalty has been determined in accordance with TSCA Section 16, 15 U.S.C. § 2615, and the provisions of 40 C.F.R. § 745.118(f). To develop the proposed penalty, EPA has taken into account the particular facts and circumstances of this case with specific reference to EPA's December 2007 "Section 1018 Disclosure Rule Enforcement Response and Penalty Policy" ("ERPP"). (Ex. 19.) The ERPP establishes a framework for calculating

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[6] Effective January 13, 2009, the maximum penalty per violation is $16,000. 40 C.F.R. Part 19. However, all of the violations alleged in the Complaint occurred after July 28, 1997 but before January 13, 2009.

penalties in Disclosure Rule enforcement cases, incorporating the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B). The statutory factors include 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, history of any prior such violations, the degree of culpability, and such other matters as justice may require.

Pursuant to the ERPP, penalties are determined in two stages: (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. (Ex. 19, ERPP at 11.) 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. Id. The ERPP assigns a "circumstance level" and an "extent" to each type of violation, and the combination of circumstance level and extent (on a penalty matrix) determines the gravity-based penalty for each violation of the Disclosure Rule. Id. at 11–13.

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 by the seller or lessor. Id. at 12. 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. Id. Circumstance levels range from 1 to 6, "Level 1 or 2" having a high probability of impairing a tenant's ability to assess the information required to be disclosed; "Level 3 or 4" having a medium probability of impairing a tenant's ability to assess the information required to be disclosed; and "Level 5 or 6" having a low probability of impairing a tenant's ability to assess the information required to be disclosed.

Id.

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. Id. at 13. "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. Id. Under the ERPP, a violation involving a unit where a pregnant woman or children under the age of 6 resides is considered a "Major" extent level because the violation has the potential to cause serious damage to human health. Id. A violation involving tenants whose youngest children are ages 6 through 17 is considered a "Significant" extent level because the violation has the potential to cause significant damage to human health. Id. A violation involving tenants who are all at least 18 years old or older is considered a "Minor" extent level because the violation has the potential to cause a lesser amount of damage to human health. Id. The ERPP provides that EPA may use a "Significant" extent factor when the age of the youngest individual is not known. Id. A violator may mitigate the extent factor by offering evidence that no children or pregnant women were present in the housing at the time of the violation. Id.

The rationale for the "Major" classification is that children under the age of 6 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, and thus vulnerable, stages of physical development and because they have a propensity to come into contact with lead-based paint through play, putting things in their mouths, and eating items they put in their mouths. See id. The effects of lead exposure on children under 6 years old include intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavior problems. Id.

at 1. Lead exposure before or during pregnancy can alter fetal development and cause miscarriages. Id. at 13. Exposure to lead-based paint and lead-based paint hazards also poses dangers to children of ages 6 through 17 because of vulnerabilities due to their on-going physical development. Id. The ERPP takes this fact into account in the "Significant" classification. Id.

The "Gravity-Based Penalty Matrix" incorporates these factors into a chart, in order to determine the gravity-based penalty amount. Id. at 30. The appropriate cell of the matrix is determined according to the circumstance level and extent categories identified for the violation. Id. Each requirement of the Disclosure Rule is separate and distinct from the others. Id. at 15. Each lease is considered a "stand alone" transaction. Id. at 16. Penalties for each violation found in each individual lease transaction are to be assessed separately. Id.

After calculating the gravity-based penalty, EPA may adjust the penalty upward or downward based on the following factors: (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. These other factors can include downward adjustments for: supplemental environmental projects, voluntary disclosure, potential for harm due to risk of exposure, litigation risk, the violator's attitude, and size of business. Id. at 14–23. The penalty may also be adjusted upwards 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. Id. at 14. A chart summarizing the recommended penalty for Counts I-V is included at Exhibit 21.

A. Proposed Penalty for Count I: Failure to provide an EPA-approved lead hazard information pamphlet

The purpose of requiring the lessor to provide an EPA-approved lead hazard information pamphlet is to ensure that a tenant is aware of the potential harm associated with exposure to

lead-based paint or lead-based paint hazards and is aware of measures he or she can take to minimize a child's contact with lead-based paint or lead-based paint hazards in target housing. The lead hazard information pamphlet entitled "Protect Your Family From Lead in Your Home" contains numerous important pieces of information, including: (1) a brief explanation of the Disclosure Rule; (2) the potential health effects of exposure to lead-based paint; (3) an explanation about how lead gets into the body; (4) a discussion of where lead-based paint is found; (5) an explanation of how to have your family checked for lead exposure; (6) an explanation of how to identify lead hazards in housing; (7) an explanation of how to test your home for lead; (8) steps you can take to protect your family from lead exposure; and (9) steps you can take to reduce lead hazards in the home. (Ex. 18, Pamphlet.) If a tenant does not receive the pamphlet, the tenant may be denied critical information about the risks of exposure to lead-based paint or lead-based paint hazards and the steps that he or she can take to minimize his or her family's exposure to lead-based paint and/or lead-based paint hazards.

Because Respondent did not provide a pamphlet to the lessees of 20 Woodville Street #1, 48 Edgewood Street #2, 25 Southwood Street #1, or 176-180 Quincy Street #2, these tenants were denied the opportunity to become aware that lead-based paint could be present in the housing based on its age and to weigh the potential risk to their families *before* they entered into the lease. Further, they were denied the information in the pamphlet about specific measures they could take to prevent their children from being lead-poisoned *if they did choose* to enter into the lease and live in Respondent's rental units for any period of time. (See Ex. 18, Pamphlet.)

Failure to provide an EPA-approved lead hazard information pamphlet to a purchaser or lessee pursuant to 40 C.F.R. § 745.107(a)(1) results in a *high* probability of impairing the

lessee's ability to properly assess the risks associated with exposure to lead-based paint and to weigh this information with regard to leasing the target housing in question. As a result, under the ERPP, a violation of 40 C.F.R. § 745.107(a)(1) is a "Level 1" violation, the highest circumstance level. (Ex. 19, ERPP at 27.) The ERPP also takes into consideration the extent of harm by accounting for the risk factors for exposure to lead-based paint and lead-based paint hazards. The Respondent indicated that children live in each of the rental units addressed by the Complaint, but did not specify their ages. (Ex. 11, First Subpoena Resp. at #5.) In the absence of more specific information regarding the ages of the children, EPA assumes only that they are under the age of eighteen, warranting a "Significant" extent factor.

Therefore, the appropriate penalty for the violations of 40 C.F.R. § 745.107(a)(1) associated with the leases listed above is $7,740 for each lease transaction because these tenants had children whose ages were unknown or undocumented at the time they became obligated to rent Respondent's rental units. Thus, a total penalty of $30,960 is appropriate for these four violations. (See Ex. 20, Penalty Chart.)

B. Proposed Penalty for Count II: Failure to provide available records or reports pertaining to lead-based paint and/or lead-based paint hazards in target housing

The purpose of requiring an owner of target housing to provide to lessees any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in target housing is to ensure that tenants have all the information that is available concerning the possible presence of lead-based paint and/or lead-based paint hazards in the rental unit and can incorporate this information into their decision regarding whether to move into the housing. If they choose to move into the housing, the information in these records or reports enables them to take steps to prevent exposure to lead-based paint. By failing to provide to lessees these records

or reports concerning the presence of known lead-based paint and/or lead-based paint hazards, the landlord denies tenants the right to make an informed decision as to whether or not to lease the housing. The potential harm is that tenants may unwittingly expose themselves and their families to lead-based paint and/or lead-based paint hazards, and thereby suffer the negative health effects associated with such exposure. (See Ex. 19, ERPP at 12.)

Respondent placed two families, including children, at risk of exposure to lead-based paint by failing to provide to them records available to him regarding the presence of lead-based paint in their rental units before entering into their leases. As discussed above, records were available to Respondent at the time he entered into two leases, including the 1991 CII (for 48 Edgewood Street #2) and the 2005 CII and the 2005 PCAD (for 25 Southwood Street #1). (Ex. 1, Compl. ¶ 28–33; Exs. 12 & 13, First and Second Subpoena Resps.)

Failure to provide lessees with records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing pursuant to 40 C.F.R. § 745.107(a)(4), results in a *high* probability of impairing a lessee's ability to properly assess and weigh the factors associated with human health risk when leasing target housing and greatly increases the likelihood of exposure to lead. Consequently, under the ERPP, a violation of 40 C.F.R. § 745.107(a)(4) is a "Level 1" violation, the highest circumstance level. (Id. at 12 and 27.) The ERPP also takes into consideration the extent of harm by accounting for the risk factors for exposure to lead-based paint and lead-based paint hazards. The Respondent indicated that children live in each of the apartments addressed by the Complaint, but did not specify their ages. (Ex. 11, First Subpoena Resp. at #5.) In the absence of more specific information regarding the ages of the children, EPA assumes only that they are under the age of eighteen,

warranting a "Significant" extent factor.

Therefore, the appropriate penalty for the violations of 40 C.F.R. § 745.107(a)(4) associated with the leases of the 48 Edgewood Street #2 and 25 Southwood Street #1 is $7,740 for each lease transaction because these tenants had children whose ages were unknown or undocumented at the time they became obligated to rent Respondent's rental units. Thus, a total penalty of $15,480 is appropriate for these two violations. (See Ex. 20, Penalty Chart.)

C. Proposed Penalty for Count III: Failure to include the Lead Warning Statement within,or as an attachment to, the contract to lease target housing.

The purpose of requiring an owner of target housing to include the Lead Warning Statement in the language of a lease contract, or as an attachment thereto, is to ensure that tenants are warned of the dangers of lead-based paint and its health risks to children and pregnant women. Tenants whose leases lack the Lead Warning Statement are denied information alerting them that (a) they are entitled to receive information about the presence of known lead-based paint and lead-based paint hazards in the housing, and that (b) a federally-approved lead poisoning prevention pamphlet is available and is required to be provided to them before entering into the lease.

In this case, Respondent failed to include the Lead Warning Statement in leases with the tenants of 20 Woodville Street #3, 48 Edgewood Street #2, and 25 Southwood Street #1. (Ex. 1, Compl. ¶¶ 34–38.) These tenants were denied information alerting them that pre-1978 housing may contain lead-based paint and/or lead-based paint hazards because of its age, and that such paint/hazards pose particular health risks to young children and pregnant women. See 40 C.F.R. § 745.113(b)(1). Had they been provided with the Lead Warning Statement before entering into the lease, these tenants could have taken the opportunity to inquire as to the age of the apartment

building, could have requested additional information from Respondent about lead-based paint in their rental units, and could have factored the possibility that their apartment contained lead-based paint into their decision as to whether or not to enter into the lease.

Failure to include the Lead Warning Statement in the language of the lease contract, or as an attachment thereto, pursuant to 40 C.F.R. § 745.113(b)(1), results in a *high* probability of impairing a lessee's ability to properly assess the risks associated with exposure to lead-based paint and to weigh this information with regard to leasing the target housing in question. As a result, under the ERPP, a violation of 40 C.F.R. § 745.113(b)(1) is a "Level 2" violation. (Ex. 19, ERPP at 12 and 27.) The ERPP also takes into consideration the extent of harm by accounting for the risk factors for exposure to lead-based paint and lead-based paint hazards. The Respondent indicated that children live in each of the apartments addressed by the Complaint, but did not specify their ages. (Ex. 11, First Subpoena Resp. at #5.) In the absence of more specific information regarding the ages of the children, EPA assumes only that they are under the age of eighteen, warranting a "Significant" extent factor.

Therefore, the appropriate penalty for the violations of 40 C.F.R. § 745.113(b)(1) associated with the leases of 20 Woodville Street #3, 48 Edgewood Street #2, and 25 Southwood Street #1 is $6,450 for each lease transaction because these tenants had children whose ages were unknown or undocumented at the time they became obligated to rent Respondent's rental units. (Ex. 11, First Subpoena Resp. at #5.) Thus, a total penalty of $19,350 is appropriate for the three violations of 40 C.F.R. § 745.113(b)(1). (See Ex. 20, Penalty Chart.)

D. Proposed Penalty for Count IV: Failure to include within the lease contract, or as an attachment thereto, a statement by the lessor disclosing the presence of known lead-based paint or lead-based paint hazards, or lack of knowledge thereof

The purpose of requiring an owner of target housing 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 is to put potential lessees on notice of specific information relating to the presence of lead in the housing. Violation of this provision deprives lessees of their right to make decisions based upon risk.

In this case, Respondent failed to provide the statement of knowledge in leases with the lessees of 20 Woodville Street #3, 48 Edgewood Street #2, and 25 Southwood Street #1. (Ex. 1, Compl. ¶¶ 39–43.) This deprived the tenants of notice regarding the presence of lead in their units and deprived them of the ability to consider this information in their decision of whether to lease the unit.

Failure to provide this statement results in a *medium* probability of impairing the lessee's ability 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 in question. As a result, under the ERPP, a violation of 40 C.F.R. § 745.113(b)(2) is a "Level 3" violation. (Ex. 19, ERPP at 12 and 27.) The ERPP also takes into consideration the extent of harm by accounting for the risk factors for exposure to lead-based paint and lead-based paint hazards. The Respondent indicated that children live in each of the apartments addressed by the Complaint, but did not specify their ages. (Ex. 11, First Subpoena Resp. at #5.) In the absence of more specific information regarding the ages of the children, EPA assumes only that they are under the age of eighteen, warranting a "Significant" extent factor.

Therefore, the appropriate penalty for the violations of 40 C.F.R. § 745.113(b)(2) associated with the three leases is $5,160 for each lease transaction because these tenants had children whose ages were unknown or undocumented at the time they became obligated to rent

Respondent's rental units. (Ex. 11, First Subpoena Resp. at #5.) Thus, a total penalty of $15,480 is appropriate for these three violations. (See Ex. 20, Penalty Chart.)

E. Proposed Penalty for Count V: Failure to include within the lease contract, or as an attachment thereto, a list of records pertaining to lead-based paint and/or lead-based paint hazards in the target housing or to indicate that no such list exists

The purpose of requiring an owner of target housing to include a list of any records pertaining to lead hazards or to indicate that no such records exist within the contract to lease target housing, or as an attachment thereto, is to put potential lessees on notice of specific information relating to the presence of lead in the housing. Violation of this provision deprives lessees of their right to make decisions based upon risk.

In this case, Respondent failed to provide the statement of knowledge in leases with the lessees of 20 Woodville Street #3 and 176-180 Quincy Street #2. This failure deprived these tenants of information regarding the presence of lead-based paint in the rental units and deprived them of their right to consider this information in deciding whether to rent the unit.

The failure to provide this information results in a *low* probability of impairing the lessee's ability to properly assess information regarding 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 in question. As a result, under the ERPP, a violation of 40 C.F.R. § 745.113(b)(3) is a "Level 5" violation. (See Ex. 19, ERPP at 12 and 28.) The ERPP also takes into consideration the extent of harm by accounting for the risk factors for exposure to lead-based paint and lead-based paint hazards. The Respondent indicated that children live in each of the apartments addressed by the Complaint, but did not specify their ages. (Ex. 11, First Subpoena Resp. at #5.) In the absence of more specific information regarding the ages of the children, EPA assumes only that they are under the age of eighteen, warranting a "Significant"

extent factor.

Therefore, the appropriate penalty for the violations of 40 C.F.R. § 745.113(b)(3) associated with the two leases is $1,680 for each lease transaction because these tenants had children whose ages were unknown or undocumented at the time they became obligated to rent Respondent's rental units. (Ex. 11, First Subpoena Resp. at #5.) Thus, a total penalty of $3,360 is appropriate for these two violations. (See Ex. 20, Penalty Chart.)

Penalty Adjustment Factors

In accordance with TSCA Section 16, 15 U.S.C. § 2615, 40 C.F.R. § 745.118(f), and the ERPP, EPA also has taken into account the following factors with respect to the Respondent: (1) Respondent's history of prior such violations; (2) Respondent's degree of culpability; (3) Respondent's ability to pay the proposed penalty; (4) the effect on Respondent's ability to do business; and (5) such other matters as justice may require.

F. No upward adjustment for history of violations

EPA made no upward adjustment for history of violations because EPA is not aware of Respondent having any previous order, consent agreement, default judgment, or conviction concerning violations related to the Disclosure Rule. (See Ex. 19, ERPP at 18.)

G. No upward adjustment the penalty for degree of culpability.

As discussed above, after calculating the gravity-based penalty, EPA may adjust the penalty upward for degree of culpability. EPA is instructed to consider the following points in assessing the degree of culpability: (1) the degree of control the violator had over the events constituting the violation; (2) any actual knowledge of the presence of lead-based paint and/or lead-based paint hazards in the target housing being sold or leased; (3) the level of sophistication of the violator in dealing with compliance issues; and (4) the extent to which the violator knew

of the legal requirement that was violated (for example, whether the requirement to disclose information pertaining to lead-based paint and/or lead-based paint hazards is mentioned in an abatement order received by the violator). (Id. at 19.)

In this case, the evidence indicates that Respondent was on notice that at least two of his rental units had lead-based paint hazards. (See Count II, above.) Additionally, Respondent was informed of the legal requirements of the Disclosure before entering into one of the leases involved in this case. On March 25, 2008, EPA met with Respondent and inspected some of his records to assess Respondent's compliance with the Disclosure Rule. At this meeting, EPA inspectors provided clear notice to Respondent of the Disclosure Rule requirements and provided a compliance assistance package. (Ex. 5, EPA Inspection Report at 2, 3.) Nonetheless, Respondent failed to fully comply with the Disclosure Rule when he entered into a lease with the lessee of 176-180 Quincy Street #2 on January 1, 2009. However, EPA did not apply an upward adjustment to the gravity-based penalties associated with this lease.

H. No downward adjustment of the penalty for ability-to-pay or ability to do business

EPA made no downward adjustment for ability-to-pay or ability to do business. At the time of filing the complaint, EPA is entitled to presume a respondent has the ability to pay a penalty, assuming there is no evidence to the contrary, "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." In re CDT Landfill Corp., 11 E.A.D. 88, 122 (EAB 2003), citing In re Spitzer Great Lakes, 9 E.A.D. 302, 321 (EAB 2000); see In re Cutler, 11 E.A.D. 622, 632 (EAB 2004). Then, it is the respondent's responsibility to raise any claim of inability to pay and support it, if requested, by providing the relevant evidence. See Spitzer Great Lakes, 9 E.A.D. at 321. Failure to raise and support an

ability-to-pay claim constitutes waiver of the issue by a respondent. See In re Chempace Corp., 9 E.A.D. 119, 133 n.20 (EAB 2000); New Waterbury, 5 E.A.D. at 542 ("[W]here a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived . . . .").[7] See, e.g., In re JHNY, Inc., 12 E.A.D. 372, 383 (EAB 2005) (upholding Presiding Officer's determination that respondent's proffered "generalized picture of financial difficulty" was insufficient to rebut the region's conclusion of an ability to pay); In re Pan Am. Growers Supply, Inc., 2010 EPA ALJ LEXIS 26, *8 (ALJ 2010) (finding that respondent had waived any ability-to-pay objection where it failed to provide any documentation to support its general claim).

When EPA met with Respondent in its offices on May 27, 2010, EPA provided him with a list of documents needed to substantiate an inability-to-pay claim. (See Ex. 21.) Additionally, despite EPA's repeated expression of willingness to perform an ability-to-pay evaluation, Respondent chose not to provide the documentation to support such a claim. Because, Respondent neither submitted such documentation nor answered the Complaint, at which time he could have raised the issue, Respondent has waived the opportunity to raise an ability-to-pay argument. See New Waterbury, 5 E.A.D. at 542; see, e.g., In re Rocking BS Ranch, Inc., 2010

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[7] The Presiding Officer having discretion to disregard ability-to-pay claims after a respondent fails to provide sufficient supporting documentation is consistent with 40 C.F.R. § 22.19(g) (governing prehearing exchanges), which provides: "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)." See New Waterbury at 542 n.24 (referencing the previous version of this regulation).

EPA App. LEXIS 11, *20–21 (EAB 2010) (upholding Regional Judicial Officer's default order despite belated claim of inability to pay where record reflected the region's repeated unanswered attempts to obtain necessary documentation from respondent to assess its financial status); Spitzer Great Lakes, 9 E.A.D. at 321 (upholding Presiding Officer's conclusion that respondent had waived a inability to pay claim in a TSCA case where it had made a general statement that it could not afford the penalty in its prehearing exchange but had failed to substantiate this claim when asked by the Region and directed by the Presiding Officer); cf. CDT Landfill, 11 E.A.D. at 123 (upholding the Presiding Officer's finding of no waiver of an ability-to-pay claim where Respondent produced a late financial balance sheet and that consequently, the region had not met its burden of proof regarding the respondent's ability to pay by producing general financial evidence that indicated an ability to pay).

For a Default Order entering EPA's proposed penalty to issue, EPA must make a *prima facie* showing that the proposed penalty is appropriate in consideration of all of the statutory penalty factors. See Spitzer Great Lakes, 9 E.A.D. at 320; New Waterbury, 5 E.A.D. at 538. However, unless put at issue by the respondent, EPA may *presume* that a respondent has the ability to pay the proposed penalty. See Cutler, 11 E.A.D. at 631; Spitzer Great Lakes, 9 E.A.D. at 320; New Waterbury, 5 E.A.D. at 538–39. Accordingly, where, as here, a respondent has waived his opportunity to raise the issue, and EPA has otherwise shown the appropriateness of the proposed penalty, the Presiding Officer may find that EPA has made the required *prima facie* showing. See Spitzer Great Lakes, 9 E.A.D. at 321; see, e.g., JHNY, 12 E.A.D. at 399 (finding that not only had respondent waived any ability-to-pay claim by not complying pre-hearing exchange requirements to provide supporting evidence, it similarly failed to rebut the Region's

prima facie case with specific evidence).

Even where a respondent does place ability to pay at issue, EPA need only "rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced." CDT Landfill, 11 E.A.D. at 122, quoting New Waterbury, 5 E.A.D. at 542–43. At that point, "the burden of production shifts to the respondent to rebut the complainant's evidence with specific information of its own" that it lacks the ability to pay the penalty. Cutler, 11 E.A.D. at 632; see New Waterbury, 5 E.A.D. at 543. If the respondent does not produce evidence sufficient to support an inability-to-pay assertion, the Presiding Officer "may decide that the penalty is appropriate, at least with respect to the ability to pay issue." CDT Landfill, 11 E.A.D. at 122, citing In Re Lin, 5 E.A.D. 595, 599 (EAB 1994). If he does so, the burden shifts back to the complainant to rebut this evidence through additional evidence or cross-examination. See Cutler, 11 E.A.D. at 632, citing Chempace, 9 E.A.D. at 133.

In response to Respondent's generalized protestations of an inability to pay the proposed penalty, EPA has repeatedly requested but not received information from Respondent that would allow it to conduct an ability-to-pay evaluation. (See, e.g., Ex. 3, Call Notes, C. Foot.) Even so, EPA has considered the limited information available to it regarding Respondent's financial status. Respondent indicated that he is the owner of eight residential buildings, with a combined total of twenty living units. (Ex. 11, First Subpoena Resp. at #1). Assuming that the single family home at 102 Cedar Street in Roxbury, Massachusetts is owner-occupied (Ex. 11, First Subpoena Resp. at #3), Respondent appears to have nineteen rental properties. Indeed, a search of Massachusetts recent property tax assessment records reveals a similar although not identical

list of properties, showing land and buildings comprising seventeen living units, and thus sixteen rental units, with a 2010 total assessed value of $2,423,200. (Ex. 11, 2010 Tax Assessor Records). While EPA cannot be certain of the exact extent of Respondent's property holdings, his equity in them, his annual rental income, or whether he has other sources of income, its inquiry into this general financial evidence readily supports an inference that Respondent has the ability to pay the penalty. See In re Britton Constr. Co., 8 E.A.D. 261, 291 (EAB 1999) (noting that the respondents' "considerable assets in the form of investment real estate" indicated an ability to pay the penalty imposed by the Presiding Officer). Therefore, EPA has made no downward adjustment for this factor.

I. No adjustment for such other factors as justice may require

EPA may provide downward adjustments for documented lack of risk, supplemental environmental projects, voluntary disclosure of violations, litigation risk, or cooperative behavior. (See Ex. 19, ERPP at 19–23.) However, EPA made no adjustments for such other factors as justice may require because none of the considerations in the ERPP for this factor were applicable.

EPA moves that the Regional Judicial Officer find: that EPA's consideration of the statutory factors justifies the penalty; that EPA made satisfactory efforts to consider ability-to-pay; that Respondent failed to cooperate; that any inability-to-pay claim is waived; and that a penalty of $84,600 is therefore consistent with the record and with TSCA. See 40 C.F.R. § 22.17(c). EPA proposes that Regional Judicial Officer makes this finding contingent on Respondent's continued failure to provide specific financial information that would substantiate a lower penalty, and that EPA have the opportunity to rebut that evidence or propose an adjusted

amount should Respondent provide the necessary ability-to-pay documentation within thirty (30) days of the Default Order.

IV. Conclusion

The Complainant requests that the Presiding Officer issue an order: (1) finding that Respondent is in default; (2) finding that Respondent violated the federally enforceable provisions of Section 409 of TSCA, 15 U.S.C. § 2689, and the Disclosure Rule, 40 C.F.R. Part 745, Subpart F; and (3) assessing an appropriate penalty in the amount of $84,600.

Date:

July 15, 2011

Respectfully submitted,

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