

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

Keith Mirman,

Respondent.

Docket No.: TSCA-05-2011-0012

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Complainant, the Chief of the Chemicals Management Branch, Waste, Pesticides and Toxics Division, the United States Environmental Protection Agency, Region 5, Chicago, Illinois, through its undersigned attorney, respectfully submits this Prehearing Information Exchange in accordance with 40 C.F.R. § 22.19(a) and the Presiding Officer's order dated August 18, 2011 (the Prehearing Order).

I. Fact witnesses EPA may call at hearing, along with a narrative summary of their expected testimony.

Complainant may call any or all of the following individuals as fact witnesses in the hearing in this matter:

A. Christine Anderson, Environmental Scientist, Land and Chemicals Division, U.S. EPA Region 5

Ms. Anderson has detailed and extensive experience with the Toxic Substances Control Act (TSCA) statute and the regulations promulgated thereunder. Ms. Anderson's duties include serving as an enforcement officer and case developer in the investigation of violations of the regulations promulgated by U.S. EPA at 40 C.F.R. Part 745, Subpart F, entitled "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (the Disclosure Rule). Ms. Anderson will testify about her review of the evidence

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compiled as a result of EPA's regulatory oversight of Respondent's rental business, and the factual basis for Complainant's determination that Respondent is in violation of the Disclosure Rule and, as a result, Section 409 of TSCA, 15 U.S.C. § 2689. Ms. Anderson will testify regarding the manner in which she compiled the documentary evidence regarding Respondent's ownership of the subject properties. She will also testify about how Complainant calculated the penalty proposed in the Complaint, applying the statutory penalty factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), as explained by EPA's *Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy*, dated December 2007 (Penalty Policy) (Complainant's Exhibit 9). Ms. Anderson will also testify concerning the following lease transactions in connection with Respondent's properties:

- (1) Lease for 656 East Avenue, Akron, Ohio (September 19, 2006);
- (2) Lease for 656 East Avenue, Akron, Ohio (October 9, 2006);
- (3) Lease for 1063 Delia Avenue, Akron, Ohio (April 2, 2009);
- (4) Lease for 1139 Winton Avenue, Akron, Ohio (December 7, 2007);
- (5) Lease agreement for 911 Storer Avenue, Akron, Ohio (March 6, 2008); and
- (6) Lease agreement for 387 Grand Avenue, Akron, Ohio (April 24, 2009).

Ms. Anderson will testify that none of these lease agreements contained the following information:

- (i) A lead warning statement in compliance with 40 C.F.R. § 745.113(b)(1);
- (ii) A statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or a lack of knowledge of such presence;
- (iii) A list of any records or reports available to the lessor regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records

were available;

(iv) A statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (b)(3), and the lead hazard information pamphlet required under 15 U.S.C. § 2696; and

(v) Signatures of the lessor, the agent, and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of signature.

(CX-1 – CX-6). If necessary, Ms. Anderson will provide testimony sufficient to authenticate certain exhibits contained in this prehearing exchange.

As necessary, Ms. Anderson will testify regarding the delegation of authority pertaining to the Complaint. She may also describe how Complainant established that the subject properties were constructed prior to 1978 and why they are “target housing” as defined in 40 C.F.R. Section 745.103.

B. William Gomora, Inspector, Land and Chemicals Division, U.S. EPA Region 5

Mr. Gomora has detailed and extensive experience with enforcement of the TSCA statute and the regulations promulgated thereunder regarding the Disclosure Rule. Mr. Gomora inspected Respondent’s leasing office on June 23, 2009 and prepared an inspection report documenting the inspection. Mr. Gomora will provide testimony detailing the findings he made during the inspection and from the leases he obtained from Respondent’s representative. If necessary, Mr. Gomora will provide testimony sufficient to authenticate documents submitted for evidence at hearing.

C. Bruce Habor, Inspector, U.S. Department of Housing and Urban Development

Mr. Habor has detailed and extensive experience with enforcement of the TSCA statute and the regulations promulgated thereunder regarding the Disclosure Rule. Mr. Habor

accompanied Mr. Gomora on the inspection of Respondent's leasing office on June 23, 2009. If necessary, Mr. Habor will provide testimony detailing the findings he made during the inspection and from the leases he obtained from the Respondent's representative. He may also provide testimony to authenticate documents submitted for evidence at hearing.

D. Financial Investigation Witness

Respondent did not raise inability to pay as a defense in its Answer to the Complaint. If Respondent raises inability to pay issues in its prehearing exchange, Complainant will review Respondent's information supporting an inability to pay claim. EPA may call a financial investigation witness to testify as to Complainant's investigation of that claim.

E. Keith Mirman

Mr. Mirman is an owner of the subject properties. He provided documents and other information to EPA on behalf of Respondent. If necessary, Mr. Mirman will provide testimony sufficient to authenticate documents submitted for evidence at hearing and any admissions made in his correspondence with EPA.

II. Expert witnesses EPA may call at hearing, along with a narrative summary of their expected testimony.

A. Financial Expert Witness

Respondent did not raise inability to pay as a defense in its Answer to the Complaint. If Respondent raises inability to pay issues, Complainant may call a financial expert to provide an opinion concerning Respondent's ability to pay. Upon amendment of its prehearing exchange to list such expert, Complainant will submit a resume and documents relied upon to reach the expert's opinion.

B. Harm Witness

Complainant reserves the right to call an expert witness to testify as to the health effects associated with ingestion of or exposure to lead-based paint. This witness may offer expert opinion testimony about the specific hazards or potential hazards to human health or the environment posed by lead-based paint, including but not limited to the adverse health effects of lead poisoning, such as the effects on the development or functioning of the nervous system and internal organs. The witness may further offer opinion testimony as to how the violations alleged in the Complaint may have increased the risks of human exposure to lead-based paint or lead-based paint dust or other fragments. Upon amendment of its prehearing exchange to list such expert, Complainant will submit a resume and documents relied upon to reach the expert's opinion.

III. Documents EPA may introduce at hearing.

Pursuant to the Prehearing Order, Complainant intends to introduce the documents identified and set forth in Attachment 1. Copies of these documents are attached to this prehearing exchange.

Complainant respectfully reserves the right to elect to not introduce at the hearing any of its exhibits listed in Attachment 1, and/or, in accordance with the Prehearing Order, to supplement its prehearing exchange with additional exhibits not listed above, and will provide reasonable notice to the Presiding Officer and Respondent concerning any modifications to the above exhibit list.

IV. View as to location of hearing.

As required by the Prehearing Order, Complainant provides its statement as to the appropriate place for a hearing. Respondent conducts business in Akron, Ohio, and his counsel

is based in Akron. Therefore, it is appropriate to hold the hearing in Akron, Ohio. As an alternative, Complainant requests that the hearing take place in Chicago, Illinois, where Complainant's staff is located.

V. An estimate of time needed to submit case.

Complainant anticipates needing approximately one to two days to present its direct case.

VI. A narrative statement explaining in detail the penalty calculation.

40 C.F.R. § 22.19(a)(3) and the Presiding Officer's Order require that EPA explain in its prehearing exchange how it calculated the proposed penalty in accordance with the criteria set forth in TSCA.

A. Legal Background

Failing to comply with the Disclosure Rule violates Section 409 of TSCA, 15 U.S.C. § 2689, which may subject the violator to administrative civil penalties under Section 16(a) of TSCA, 15 U.S.C. § 2615(a), 42 U.S.C. § 4852d(b)(5) (Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act), and 40 C.F.R. § 745.118(f). To facilitate the calculation and assessment of TSCA penalties, EPA developed its Penalty Policy (CX-9). The Penalty Policy is based on the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), which are the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. The Penalty Policy was developed under the general framework established by the *Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy*, 45 Fed. Reg. 59770 (September 10, 1980) (TSCA Civil Penalty Guidelines) (CX-11).

Section 1018 authorizes the imposition of a civil penalty of up to \$10,000 for each violation of a requirement of Section 1018 and its implementing regulations at 40 C.F.R. Part 745, Subpart F (*i.e.*, the Disclosure Rule), under Section 16 of TSCA, 15 U.S.C. § 2615. EPA modified the Penalty Policy on Dec. 11, 2008 to adjust for the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Parts 19 and 27, by increasing the maximum penalty amount to \$16,000 for each violation of Section 409 that occurred after January 12, 2009. See 73 Fed. Reg. 75,340 (Dec. 11, 2008) (CX- 11), and *Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)* (CX-27). Due to the 2008 modification, all violations of the Disclosure Rule occurring on or after January 12, 2009 are subject to statutory penalties adjusted for inflation.

EPA determines penalties under the Penalty Policy in two stages: (1) the determination of a “gravity-based penalty,” and (2) adjustments to the gravity-based penalty. EPA calculates the gravity-based penalty by considering: (1) the nature of the violation; (2) the circumstances of the violation; and (3) the extent of harm that may result from the violation.

The TSCA Civil Penalty Guidelines describe the “nature” of the violation as the essential character of the violation and distinguish the concepts of whether the violation is in the nature of a chemical control, data gathering associated with chemical control, or hazard assessment. (CX-9). The Penalty Policy categorizes all Disclosure Rule violations as “hazard assessment” in nature, because the information is vital to purchasers and lessees in weighing the risks in purchasing or leasing target housing. This information is particularly vital to purchasers or lessees who are pregnant or have young children, who may be put at risk when residing in target housing.

The “circumstances” reflect the probability of harm resulting from a particular type of violation. The Penalty Policy categorizes each possible violation of the Disclosure Rule in one of six circumstance levels, primarily based on the purchaser’s or lessee’s ability to properly assess and weigh the factors associated with human health risk, and reflects the probability of harm from each violation. The levels range from Level 1, the most serious, to Level 6, the least serious.

The “extent” factor considers the degree, range or scope of a violation. When assessing penalties for violations of the Disclosure Rule, the extent factor is based on two measurable facts: (1) the age of any children living in the target housing; and (2) whether a pregnant woman lives in the target housing. The Penalty Policy categorizes the extent of a violation as major, significant or minor, through the use of an “Extent Category Matrix.”

Based on the date of the occurrence of the violation, the Penalty Policy requires that the circumstance and extent factors be applied to one of two gravity-based penalty matrices. (CX-9). Each matrix (Gravity-Based Penalty Matrix) lists varying penalty amounts in 18 cells, ranging in value from \$200 to \$16,000 for violations occurring after January 12, 2009. For violations that occurred on or after March 15, 2004, but before January 12, 2009, the penalty amounts range in value from \$130 to \$11,000. In this instance, the alleged violations associated with the Delia Avenue and Grand Avenue leases occurred after January 12, 2009 (maximum penalty \$16,000). The four other lease agreements occurred between March 15, 2004, and January 12, 2009 (maximum penalty \$11,000). EPA determined the appropriate cell according to the circumstance level and extent category involved.

Once the gravity-based penalty is determined for a given violation, EPA applies upward or downward adjustments to the penalty in consideration of the following factors with respect to

the violator: (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: no known risk of exposure, the violator's attitude, consideration of supplemental environmental projects, audit policy, voluntary disclosure, size of business, adjustment for small independent owners and lessors, and the economic benefit of noncompliance.

B. Calculation of Mirman Penalty

By letter dated April 7, 2010, EPA advised Respondent that it was planning to file a civil administrative complaint against Respondent for alleged violations of Section 1018, and that Section 1018 authorizes the assessment of a civil administrative penalty. (CX-7). EPA asked Respondent to identify any factors Respondent thought EPA should consider before issuing the Complaint. EPA also asked that, if Respondent believed there were financial factors that bore on Respondent's ability to pay a civil penalty, Respondent submit specific financial documents.

On June 2, 2010, Respondent provided a narrative response to the alleged violations. Respondent did not claim an inability to pay the proposed, approximate civil penalty of \$92,675 and did not provide facts or other information concerning his ability to pay the proposed, approximate civil penalty. In letters dated June 8, 2010, and August 4, 2010, Respondent provided additional information to EPA concerning the conditions within the subject properties. Complainant considered all of the information provided by Respondent in assessing the alleged violations and proposed penalty. On June 27, 2011, EPA filed a Complaint in this action against Mirman for violations of Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5); Section 409 of TSCA, 15 U.S.C. § 2689; and 40 C.F.R. § 745.113(b)(1), 745.113(b)(2), 745.113(b)(3), 745.113(b)(4), and 745.113(b)(6), in connection with six contracts to lease target housing. Supra at 2.

1. Gravity-Based Penalty
 - a. Extent
 - i. Counts 1-5

In accordance with the Extent Category Matrix, the following lease agreements fell into the minor category because there were no children under 18 years of age residing in these residences: East Avenue Unit A, East Avenue Unit B, Storer Avenue and Grand Avenue. The Delia and Winton Avenue lease violations fell into the significant category because children between the ages of 6 and 18 years of age resided either full-time or part-time in the residences. The Grand Avenue lease violations fell into the major extent category because a child under the age of six lived in the residence.

- b. Circumstances
 - i. Count 1-Failure to Include Lead Warning Statement

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, the Lead Warning Statement before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(1) and 40 C.F.R. § 745.100 is a Level 2 violation. Respondent failed to include, within or as an attachment to the subject leases, the Lead Warning Statement before the lessee was obligated under the contract.

Under the Gravity-Based Penalty Matrix, Level 2 circumstance violations that occur after March 15, 2004, but before January 12, 2009, incur a penalty of \$10,320 (major extent), \$6,450 (significant extent), or \$1,550 (minor extent). Under the Gravity-Based Penalty Matrix, Level 2 circumstance violations that occur after January 12, 2009, incur a penalty of \$15,000 (major extent), \$9,675 (significant extent), or \$2,325 (minor extent). The “extent” determinations made by EPA for these counts are explained above. After the correct matrix cell was applied for each of these counts, EPA calculated a proposed gravity-based penalty for Count 1 as follows: (1)

\$1,550 for the September 19, 2006, lease for 656 East Avenue, Akron, Ohio; (2) \$1,550 for the October 9, 2006, lease for 656 East Avenue, Akron, Ohio; (3) \$9,675 for the April 2, 2009, lease for 1063 Delia Avenue, Akron, Ohio; (4) \$6,450 for the December 7, 2007, lease for 1139 Winton Avenue, Akron, Ohio; (5) \$1,550 for the March 6, 2008, lease agreement for 911 Storer Avenue, Akron, Ohio; and (6) \$15,000 for the April 24, 2009, lease agreement for 387 Grand Avenue, Akron, Ohio. (See CX-10 for the worksheet prepared by EPA to calculate the penalty for these counts).

ii. Count 2-Failure to Include Statement Disclosing Presence or Lack of Knowledge of Lead-Based Paint

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(2) and 40 C.F.R. § 745.100 is a Level 3 violation. As explained at length above, Respondent failed to include, within or as an attachment to the subject leases, a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the lessee became obligated under the contract.

Under the Gravity-Based Penalty Matrix, Level 3 circumstance violations that occur after March 15, 2004, but before January 12, 2009, incur a penalty of \$7,740 (major extent), \$5,160 (significant extent), or \$770 (minor extent). Under the Gravity-Based Penalty Matrix, Level 3 circumstance violations that occur after January 12, 2009, incur a penalty of \$11,600 (major extent), \$7,740 (significant extent), or \$1,155 (minor extent). The “extent” determinations made by EPA for these counts are explained above. After the correct matrix cell was applied for each

of these counts, EPA calculated a proposed gravity-based penalty for Count 2 as follows: (1) \$770 for the September 19, 2006, lease for 656 East Avenue, Akron, Ohio; (2) \$770 for the October 9, 2006, lease for 656 East Avenue, Akron, Ohio; (3) \$7,740 for the April 2, 2009, lease for 1063 Delia Avenue, Akron, Ohio; (4) \$5,160 for the December 7, 2007, lease for 1139 Winton Avenue, Akron, Ohio; (5) \$770 for the March 6, 2008, lease agreement for 911 Storer Avenue, Akron, Ohio; and (6) \$11,600 for the April 24, 2009, lease agreement for 387 Grand Avenue, Akron, Ohio.

iii. Count 3-Failure to List Records or Reports

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, a list of any records or reports available to the lessor regarding lead-based paint and/or lead based paint hazards in the target housing or a statement that no such records were available to the lessor before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.113(b)(3) and 40 C.F.R. § 745.100 is a Level 5 violation. As explained at length above, Respondent failed to include, within or as an attachment to the subject leases, a list of any records or reports available to Respondent regarding lead-based paint and/or lead based paint hazards in the target housing or a statement that no such records were available to Respondent before the lessee was obligated under the contract.

Under the Gravity-Based Penalty Matrix, Level 5 circumstance violations that occur after March 15, 2004, but before January 12, 2009, incur a penalty of \$2,580 (major extent), \$1,680 (significant extent), or \$260 (minor extent). Under the Gravity-Based Penalty Matrix, Level 5 circumstance violations that occur after January 12, 2009, incur a penalty of \$3,870 (major extent), \$2,520 (significant extent), or \$390 (minor extent). The “extent” determinations made

by EPA for these counts are explained above. After the correct matrix cell was applied for each of this count, EPA calculated a proposed gravity-based penalty for Count 3 as follows: (1) \$260 for the September 19, 2006, lease for 656 East Avenue, Akron, Ohio; (2) \$260 for the October 9, 2006, lease for 656 East Avenue, Akron, Ohio; (3) \$2,520 for the April 2, 2009, lease for 1063 Delia Avenue, Akron, Ohio; (4) \$1,680 for the December 7, 2007, lease for 1139 Winton Avenue, Akron, Ohio; (5) \$260 for the March 6, 2008, lease agreement for 911 Storer Avenue, Akron, Ohio; and (6) \$3,870 for the April 24, 2009, lease agreement for 387 Grand Avenue, Akron, Ohio.

iv. Count 4-Failure to Include Lessee's Affirmation of Receipt

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract, a statement by the lessee affirming receipt of the information set forth in 40 C.F.R. § 745.113(b)(2) and (b)(3) and the lead hazard information pamphlet before a lessee is obligated under the contract to lease target housing as required by 40 C.F.R. § 745.114(b)(4) and 40 C.F.R. § 745.100 is a Level 4 violation. As explained at length above, Respondent failed to include, within or as an attachment to the subject leases, a statement by the lessee affirming receipt of the information set forth in 40 C.F.R. § 745.113(b)(2) and (b)(3) and the lead hazard information pamphlet before the lessee was obligated under the contract.

Under the Gravity-Based Penalty Matrix, Level 4 circumstance violations that occur after March 15, 2004, but before January 12, 2009, incur a penalty of \$5,160 (major extent), \$3,220 (significant extent), or \$520 (minor extent). Under the Gravity-Based Penalty Matrix, Level 4 circumstance violations that occur after January 12, 2009, incur a penalty of \$7,700 (major extent), \$4,830 (significant extent), or \$780 (minor extent). The "extent" determinations made by EPA for these counts are explained above. After the correct matrix cell was applied for this

count, EPA calculated a proposed gravity-based penalty for Count 4 as follows: (1) \$520 for the September 19, 2006, lease for 656 East Avenue, Akron, Ohio; (2) \$520 for the October 9, 2006, lease for 656 East Avenue, Akron, Ohio; (3) \$4,830 for the April 2, 2009, lease for 1063 Delia Avenue, Akron, Ohio; (4) \$3,220 for the December 7, 2007, lease for 1139 Winton Avenue, Akron, Ohio; (5) \$520 for the March 6, 2008, lease agreement for 911 Storer Avenue, Akron, Ohio; and (6) \$7,700 for the April 24, 2009, lease agreement for 387 Grand Avenue, Akron, Ohio.

v. Count 5-Failure to Include Certifying Signatures

Under Appendix B of the Penalty Policy, the failure to include, within or as an attachment to each contract to lease target housing, the signatures of the lessor and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of signature before the lessee is obligated under a contract to lease target housing as required by 40 C.F.R. § 745.113(b)(6) and 40 C.F.R. § 745.100 is a Level 6 violation. As explained at length above, Respondent failed to include, within or as an attachment to the subject leases, the signatures of Respondent and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of such signature before the lessee was obligated under the contract.

Under the Gravity-Based Penalty Matrix, Level 6 circumstance violations that occur after March 15, 2004, but before January 12, 2009, incur a penalty of \$1,290 (major extent), \$640 (significant extent), or \$130 (minor extent). Under the Gravity-Based Penalty Matrix, Level 6 circumstance violations that occur after January 12, 2009, incur a penalty of \$1,940 (major extent), \$960 (significant extent), or \$200 (minor extent). The “extent” determinations made by EPA for these counts are explained above. After the correct matrix cell was applied for each this

count, EPA calculated a proposed gravity-based penalty for Count 5 as follows: (1) \$130 for the September 19, 2006, lease for 656 East Avenue, Akron, Ohio; (2) \$130 for the October 9, 2006, lease for 656 East Avenue, Akron, Ohio; (3) \$960 for the April 2, 2009, lease for 1063 Delia Avenue, Akron, Ohio; (4) \$640 for the December 7, 2007, lease for 1139 Winton Avenue, Akron, Ohio; (5) \$130 for the March 6, 2008, lease agreement for 911 Storer Avenue, Akron, Ohio; and (6) \$1,940 for the April 24, 2009, lease agreement for 387 Grand Avenue, Akron, Ohio.

2. Total Initial Gravity-Based Penalty

EPA calculated the total initial gravity-based penalty by adding together the five subtotal gravity-based penalties for the five counts ($\$35,775 + \$26,810 + \$8,850 + \$17,310 + \$3,930$). The initial gravity-based penalty is \$92,675.

3. Statutory Adjustment Factors

a. Ability to Pay/Continue in Business

As noted above, on April 7, 2010, EPA issued a prefiling notice letter to Respondent informing Respondent that EPA was prepared to file a civil administrative penalty complaint against him for alleged violations of the Section 1018 requirements. The prefiling notice letter also extended an opportunity to Respondent to advise EPA of any factors that he believed EPA should consider before filing a complaint. The prefiling notice letter specifically asked Respondent to provide financial information if Respondent believed he would have an inability to pay a penalty, and advised Respondent to submit such information within ten days of his receipt of the notice, and enclosed a "Financial Statement for Individual Form" for Respondent to complete if he claimed an inability to pay. The prefiling notice letter also asked Respondent to fill out a "Request for Transcript of Tax Return Form (IRS Form 4506-T)" and return it to EPA.

Complainant received limited financial information from Respondent before filing the Complaint. The information pertained only to business income associated with the six properties identified in the Complaint. Respondent did not provide information pertaining to other business income, personal income, business assets or personal assets. Respondent did not fill out either of the required forms prior to EPA's filing of the Complaint on June 27, 2011. Thus, EPA was unable to rebut the conclusion that Respondent owns substantial assets in the form of residential rental property. Accordingly, Complainant did not adjust the initial gravity-based penalty based on Respondent's ability to pay.

b. History of Prior Such Violations

EPA has no information regarding prior violations of Section 1018 by Respondent. Accordingly, EPA did not increase the initial gravity-based penalty for a history of prior such violations.

c. Degree of Culpability

The Penalty Policy provides for up to a 25 percent increase in penalty for an intentional violation of Section 1018, or a violation where the violator has previously received a Notice of Noncompliance (NON) for Section 1018 or Disclosure Rule violations. EPA has no information that Respondent's violations were intentional or that Respondent had previously received a NON. EPA has not increased the initial gravity-based penalty for culpability.

d. Other Factors as Justice May Require

i. No Known Risk of Exposure

Under the Penalty Policy, EPA may adjust the proposed penalty downward by up to 40 percent if the violator provides documentation that clearly demonstrates that a significant potential source of lead-based paint hazards in the target housing was removed prior to the alleged violations (e.g., windows including window frames were replaced, thereby eliminating

lead-based paint on a friction surface). In the course of settlement negotiations, Respondent provided EPA with information that suggests he has replaced window frames and doors at the following residences: East Avenue Unit A, East Avenue Unit B, Storer Avenue and Delia Avenue. Sampling in 2011, suggests that lead persisted in the window troughs at the residence on Delia Avenue. EPA is considering a downward adjustment of 40 percent for the following residence: East Avenue Unit A, East Avenue Unit B, Storer Avenue. It is still evaluating whether the window and door replacements at the residence on Delia Avenue merit a penalty reduction.

Following the filing of the complaint, Respondent provided EPA with information that suggests that actions taken by and forms required by the Akron Area Housing Authority may have satisfied the lead-disclosure requirements for the residences on Grand Avenue and Winton Avenue. EPA continues to evaluate this information. Such information may support a 100 percent reduction in the civil penalty for these residences; or, equivalently, EPA may drop the relevant counts for these residences.

ii. Attitude

Under the Penalty Policy, EPA may reduce the proposed penalty by up to 30 percent based on a Respondent's cooperation, immediate good faith efforts to comply, and timely efforts to settle the case. If the matter proceeds to hearing, EPA will argue that a reduction of the proposed penalty in consideration of these factors is not warranted. For settlement purposes, it is willing to consider downward adjustments for these factors.

iii. Supplemental Environmental Projects (SEPs)

Respondent has not agreed to perform a SEP.

iv. Audit Policy

Respondent did not disclose its violations of Section 1018 under EPA's Audit Policy, "Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations," 60 Fed. Reg. 66706 (December 22, 1995). Therefore, EPA made no adjustment to the initial gravity-based penalty based on this factor.

v. Voluntary Disclosure

The Penalty Policy provides that a violator who self-discloses a violation of Section 1018, but not under the Audit Policy, may still receive a reduction in penalty for such a voluntary disclosure. Respondent did not disclose its violations of Section 1018. Therefore, EPA made no adjustment to the initial gravity-based penalty based on this factor.

vi. Size of Business

A violator may request assistance under EPA's *Policy on Compliance Incentives for Small Businesses* (Small Business Policy). The Small Business Policy provides for the elimination of penalties if a small business meets its four qualifying criteria and agrees to participate in the compliance assistance program or conducts a voluntary self-audit. Respondent has not sought assistance under the Small Business Policy. Therefore, EPA made no adjustment to the proposed penalty based on this factor.

vii. Adjustment for Small Independent Owners and Lessors

Under the Penalty Policy, EPA will adjust a penalty down by 50 percent for individuals who own one target housing unit for lease or one target housing unit that is "for sale by owner." Respondent is the owner of multiple residential rental properties in Akron, Ohio. Accordingly, EPA made no adjustment to the initial gravity-based penalty based on this factor.

viii. Economic Benefit of Noncompliance

EPA believes the proposed penalty captures any economic benefit to Respondent from its noncompliance with Section 1018. Accordingly, EPA made no upward adjustment to the initial gravity-based penalty based on this factor.

4. Total Proposed Penalty

In summary, EPA has not yet increased or decreased the initial gravity-based penalty based on any of the statutory adjustment factors. EPA proposed a \$92,675 penalty in the Complaint.

VII. Copies of Penalty Policies or Guidelines

A copy of the relevant penalty policy is included in the Prehearing Exchange as Complainant's Exhibit 9.

VIII. Application of the Paperwork Reduction Act

The Presiding Officer requested Complainant's position regarding the applicability of the Paperwork Reduction Act (PRA), 44 U.S.C. Section 3501 *et seq.*, to this proceeding, including whether there is a current Office of Management and Budget (OMB) control number involved and whether the provisions of Section 3512 of the PRA may apply to this case.

The PRA does apply to the information collection requirements of the lead-paint disclosure rule at 40 C.F.R. Part 745, Subpart F. EPA obtained OMB approval of the information collection requirements, and the OMB control number assigned to the information collection requirements in the rule is 2070-0151. According to the preamble to the final rule, the rule contains the following information collection requirements: (1) disclosure of known lead-based paint and/or lead-based paint hazards; (2) provision of any available records and reports pertaining to lead-based paint in the housing; (3) provision of a federally-approved lead hazard

information pamphlet; (4) completion and subsequent retention of disclosure and acknowledgement for 3 years; and (5) provision of a 10-day evaluation opportunity to purchasers before obligation under purchase contracts. See 61 Fed.Reg. 9081 (March 6, 1996).

On May 31, 1996, EPA issued a notice in the Federal Register (61 Fed. Reg. 27438) to announce that on April 22, 1996, OMB had approved the information collection requirements contained in 40 C.F.R. Sections 745.107, 745.110, 745.113, and 745.115. This notice stated that OMB control number 2070-0151 had been assigned to these collection activities, and was valid through April 30, 1999. On July 1, 1996, (61 Fed.Reg. 33851), EPA amended the table in 40 C.F.R. Part 9 to add this OMB control number to the listing of OMB control numbers for EPA's regulations that appear in Section 9/1. See 64 Fed.Reg. 39418, July 22, 1999. The OMB extended the April 30, 1999 expiration date to October 31, 1999 on April 14, 1999. See 64 Fed.Reg. 25878, May 13, 1999. On April 22, 1999 (64 Fed.Reg. 19772), EPA and HUD issued a notice and request for comment on the submission of the information collection request to OMB for renewal. The OMB subsequently approved that renewal, repeatedly extended expiration deadlines, and approved all subsequent renewals. See, e.g., 64 Fed.Reg. 61870, November 15, 1999; 65 Fed.Reg. 19751, April 12, 2000; 65 Fed.Reg. 45600, July 24, 2000; 65 Fed. Reg. 54263, September 7, 2000; 69 Fed.Reg. 1740, January 12, 2004; 69 Fed.Reg. 46534, August 3, 2004; 69 Fed.Reg. 69598 November 30, 2004; 72 Fed.Reg. 11354, March 13, 2007; 72 Fed.Reg. 65018, November 19, 2007; 75 Fed.Reg. 66087, October 27, 2010; and 76 Fed.Reg. 11451, March 2, 2011.

The transactions alleged in the Complaint occurred between September 19, 2006, and April 24, 2009. Complainant states that there were no lapses in this OMB control number during the period of noncompliance cited in the Complaint. Notably, under 5 CFR 1320.12(b)(2), the

EPA may continue to conduct or sponsor the collection of information while an information collection request submission for renewal is pending at OMB. Thus, Complainant has fully complied with the PRA with respect to the counts at issue in this proceeding.

IX. Judicial Notice

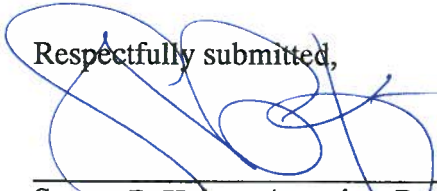
Complainant hereby requests the Presiding Officer to take judicial notice of the following:

1. The Toxic Substances Control Act (TSCA), 15 U.S.C. Section 2601 et seq., and the regulations promulgated thereunder;
2. The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. Section 4851-56, including the legislative history, and the regulations promulgated thereunder;
3. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, as amended, including 61 Fed.Reg. 9064, March 6, 1996;
4. Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009);
5. EPA's Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act: PCB Penalty Policy, 45 Fed. Reg. 59770 (1980); and
6. Federal Register notices pertaining to OMB information collection requirements.

X. Reservation of Rights.

Complainant respectfully reserves the right to call all witnesses called by the Respondent, to recall any of its witnesses in rebuttal, and to modify or supplement the names of witnesses and exhibits prior to the Adjudicatory Hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to the Respondent and Presiding Officer.

Respectfully submitted,



Steven P. Kaiser, Associate Regional Counsel
U.S. Environmental Protection Agency
Region 5 (C-14J)
77 West Jackson Blvd.
Chicago, IL 60604
Telephone: (312) 353-3804
Facsimile: (312) 385-5466

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

Keith Mirman,

Respondent.

Docket No.: TSCA-05-2011-0012

2011 OCT 12 PM 2:23
U.S. EPA REGION 5

Complainant's Documents and Exhibits

- Complainant's Exhibit 1: Lease for 656 East Avenue, Akron, Ohio (September 19, 2006).
- Complainant's Exhibit 2: Lease for 656 East Avenue, Akron, Ohio (October 9, 2006).
- Complainant's Exhibit 3: Lease for 1063 Delia Avenue, Akron, Ohio (April 2, 2009).
- Complainant's Exhibit 4: Lease for 1139 Winton Avenue, Akron, Ohio (December 7, 2007).
- Complainant's Exhibit 5: Lease for 911 Storer Avenue, Akron, Ohio (March 6, 2008).
- Complainant's Exhibit 6: Lease for 387 Grand Avenue, Akron, Ohio (April 24, 2009).
- Complainant's Exhibit 7: Letter from EPA to Keith Mirman (April 7, 2010).
- Complainant's Exhibit 8: EPA Report of Inspection including Attachments A - G (June 23, 2009).
- Complainant's Exhibit 9: EPA's Section 1018 – Disclosure Rule Enforcement Response Policy, dated February 2000 (Penalty Policy).
- Complainant's Exhibit 10: EPA Spreadsheet Showing Penalty Calculation.
- Complainant's Exhibit 11: Extent Category Matrix for Violations after January 12, 2009.
- Complainant's Exhibit 12: Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009).
- Complainant's Exhibit 13: EPA's Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act: PCB Penalty Policy, 45 Fed. Reg. 59770 (1980).

- Complainant's Exhibit 14: Interpretative Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing, dated August 20, 1996, Part II dated December 5, 1996, and Part III dated January 2, 2000.
- Complainant's Exhibit 15: Letter from EPA to William Caplan (June 27, 2011).
- Complainant's Exhibit 16: Akron Metropolitan Housing Authority Form, Lead Paint Disclosure Form (Blank).
- Complainant's Exhibit 17: Summit County Health District, Certificate of Clearance (1063 Delia Avenue).
- Complainant's Exhibit 18: Summit County Health District, Certificate of Clearance (387 Grand Avenue).
- Complainant's Exhibit 19: Summit County Health District, Certificate of Clearance (911 Storer Avenue).
- Complainant's Exhibit 20: Summit County Health District, Certificate of Clearance (1139 Winton Avenue).
- Complainant's Exhibit 21: Summit County Health District, Certificate of Clearance (656 East Avenue, Apt #2).
- Complainant's Exhibit 22: Letter from William Caplan to Christine Anderson with enclosures (June 2, 2010).
- Complainant's Exhibit 23: Letter from William Caplan to Christine Anderson with enclosures (June 8, 2010).
- Complainant's Exhibit 24: Mirman Development, LLC, Articles of Organization.
- Complainant's Exhibit 25: Basic Information For Parcel 0900805, County of Summit, Record.
- Complainant's Exhibit 26: Akron Metropolitan Housing Authority, Lead Paint Disclosure, 869 Fried Street (November 5, 2003).
- Complainant's Exhibit 27: EPA/HUD Fact Sheet (March 1996, revised 12/96).

In re Keith Mirman

Docket No. TSCA-05-2011-0012

CERTIFICATE OF SERVICE

I, Elizabeth Rosado certify that I filed the original of Complainant's Initial Prehearing Exchange and attachments with EPA Region 5's Regional Hearing Clerk on October 12, 2011. I also delivered a true and accurate copy on that date, in the following manner to the addresses listed below:

Pouch mail and Fax (without attachments): The Honorable Barbara A. Gunning
Administrative Law Judge
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code: 1900 L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Copy by Certified Mail: David W. Hilkert, Esquire
Buckingham, Doolittle & Burroughs, LLP
3800 Embassy Parkway
Akron, Ohio 44333

2011 OCT 12 PM 2:28
U.S. EPA REGION 5
REGIONAL HEARING CLERK

10-12-11
Date

Elizabeth Rosado
Elizabeth Rosado