UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

Mardaph II, LLC; Mardaph III, LLC; and Vinnie Wilson; Cincinnati, Ohio Respondents.	**Docket No. TSCA-05-2008-0019**

BRIEF IN SUPPORT OF MOTION FOR DEFAULT

Complainant United States Environmental Protection Agency (U.S. EPA) herein files this brief in support of its motion for a Default Judgment against Respondents Mardaph II, LLC and Mardaph III, LLC.

Summary

On July 31, 2008, U.S. EPA filed an administrative complaint against the Respondents, including Respondents Mardaph II, LLC (Mardaph II) and Mardaph III, LLC (Mardaph III), alleging 47 violations of the Toxic Substances Control Act (TSCA). The complaint alleged, inter alia, that Respondents Mardaph II and Mardaph III, as the owner of rental units, failed to provide its lessees with the required disclosures regarding the possible presence of lead paint. U.S. EPA sought a penalty against Respondent Mardaph II of $30,320 and against Respondent Mardaph III of $26,840. Though served with the complaint, Respondents have failed to file an answer within 30 days of service. U.S. EPA therefore moves for the entry of a default order against Respondent Mardaph II in the amount of $30,320 and against Respondent Mardaph III in the amount of $26,840.

Statutory and Regulatory Background

In promulgating Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, at 42 U.S.C. §4851 et seq., Congress found, among other things, that low-level lead poisoning is widespread among American children, afflicting as many as 3,000,000 children under the age of six. At low levels, lead poisoning in children causes intelligence deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems. The ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children. Key components of the national strategy to reduce and eliminate the threat of childhood lead poisoning are mandatory disclosure and notification requirements for residential rentals and sales. Section 1018, 42 U.S.C. §4852d requires the Administrator and the Secretary of the United States Department of Housing and Urban Development (HUD) to promulgate regulations for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease.

On March 6, 1996, pursuant to 42 U.S.C. §4852d, U.S. EPA and HUD promulgated regulations at 40 C.F.R. Part 745, Subpart F and 24 C.F.R. Part 35, Subpart A, known as, "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (Disclosure Rule). Pursuant to 40 C.F.R. §745.102(b), owners of one to four residential dwellings must comply with the Disclosure Rule by December 6, 1996. The Disclosure Rule implements the provisions of 42 U.S.C. §4852d, which impose certain requirements on the sale or lease of target housing. 40 C.F.R. §745.103 defines "target housing" as any housing constructed prior to 1978, except housing for the elderly or persons with

disabilities (unless any child who is less than six years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling. 40 C.F.R. §745.103 defines "owner" as any entity that has legal title to target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes and nonprofit organizations. 40 C.F.R. §745.103 defines "lessor" as any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes and nonprofit organizations. 40 C.F.R. §745.103 defines "lessee" as any entity that enters into an agreement to lease, rent, or sublease target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian Tribes and nonprofit organizations. 40 C.F.R. §745.103 defines "agent" as any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing.

40 C.F.R. §745.100 requires, among other things, that a seller or lessor of target housing complete the required disclosure activities before a purchaser or lessee is obligated under any contract to purchase or lease target housing. 40 C.F.R. §745.113(b) requires that each contract to lease target housing include, as an attachment or within the contract, a lead warning statement as set forth in the regulations (40 C.F.R. §745.113(b)(1)); a statement by the lessor disclosing the presence of any known lead-based paint and/or lead-based paint hazards or the lack of knowledge of such presence (40 C.F.R. §745.113(b)(2)); a list of any records or reports available to the lessor regarding lead-based paints and/or lead-based paint hazards in the target housing or a statement that no such records exist (40 C.F.R. §745.113(b)(3)); a statement by the

lessee affirming receipt of the information set out in 40 C.F.R. §745.113(b)(2) and (3) and the Lead Hazard Information Pamphlet required by 15 U.S.C. §2696 (40 C.F.R. §745.113(b)(4)); and signatures and dates of signatures of the lessor, agent, and lessee certifying the accuracy of their statements (40 C.F.R. §745.113(b)(6)). Under 42 U.S.C. §4852d(b)(5) and 40 C.F.R. §745.118(e), failing to comply with the Disclosure Rule violates Section 409 of TSCA, 15 U.S.C. §2689, which may subject the violator to administrative civil penalties under Section 16 of TSCA, 15 U.S.C. §2615(a), 40 C.F.R. §745.118(f), and 42 U.S.C. §4852d(b)(5). Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §4852d(b)(5), and 40 C.F.R. §745.118(f), authorize the Administrator of U.S. EPA to assess a civil penalty under Section 16(a) of TSCA of up to $10,000 for each violation of Section 409 of TSCA. U.S. EPA increased the maximum penalty to $11,000 for each violation occurring after July 28, 1997. 40 C.F.R. §745.118(f) and 40 C.F.R. Part 19.

Factual Background

The U.S. Department of Housing and Urban Development (HUD) and the U.S. EPA, Region 5, conducted a joint investigation in the Cincinnati, Ohio metropolitan area to determine compliance with the Section 1018 Real Estate Notification and Disclosure Rule. One of the subjects of this investigation was Respondent Vinnie Wilson who is also d/b/a Mardaph, Inc.; Mardaph I, LLC; Respondent Mardaph II, LLC and Respondent Mardaph III, LLC. In March of 2007, U.S. EPA conducted an inspection of Respondent Wilson's records. See Exhibit 1. However, not all required records were available for review during the inspection. Therefore, U.S. EPA requested that Respondent Wilson submit copies of requested documents via U.S.

Mail. See Exhibit 2. U.S. EPA did not receive the information requested or any correspondence from Ms. Wilson.

Based on information obtained from the inspection, the City of Cincinnati Department of Health, HUD and public records, on April 14, 2008, U.S. EPA issued a notice of intent to file a civil administrative action to Vinnie Wilson, Mardaph II, LLC and Mardaph III, LLC. See Exhibit 3. The letter informed the recipients that U.S. EPA would allege violations of Section 1018, 42 U.S.C. § 4852d, for lease transactions. Id. The violations included a failure to provide the lessee (either within the lease contract or as an attachment to the lease contract) a lead warning statement, an accurate lead disclosure statement, a list of any records or reports available to the lessor, and certain required statements affirming compliance with 42 U.S.C. §4852d. Id. The proposed gravity–based civil penalty was $91,090 for these violations. Id. The letter encouraged the recipients to contact U.S. EPA. Id. Respondents Mardaph II and Mardaph III are both corporations authorized to do business in Ohio with an address of 105 East Fourth Street, Cincinnati, Ohio and a registered agent listed as Jeffrey Greenberger. See Exhibit 1-Attachment C.

On May 7, 2008, Respondent Wilson wrote to U.S. EPA, enclosing some documents. See Exhibit 4. However, these documents did not address any of the alleged violations. The returned address for Respondent Wilson was 7923 Rambler Place. Id. Despite two letters from U.S. EPA trying to set up a phone conference with Respondent Wilson, U.S. EPA had no further contact with Respondent Wilson. See Exhibits 5, letter dated May 13, 2008 (which was returned to sender) and Exhibit 6, letter dated June 5, 2008.

As a result, on July 31, 2008, U.S. EPA filed an administrative complaint against Vinnie Wilson, Mardaph II and Mardaph III. See Exhibit 7. The complaint alleged that: Respondent Mardaph II owned residential rental property located at 711 Marion Road and 8750 Venus Drive, Cincinnati, Ohio and Respondent Mardaph III owned residential rental property located at 2605 Fenton Avenue, 2637 Fenton Avenue, 2639 Fenton Avenue, and 3341 McHenry Avenue, Cincinnati, Ohio. Id. at ¶ 17 & 18. The complaint had further allegations regarding Respondent Wilson. All of the residential rental properties referenced above were constructed prior to 1978 and thus were "target housing" as defined in 40 C.F.R. § 745.103. Id. at ¶¶ 21 & 22. The complaint further alleged that Respondents Mardaph II and Mardaph III each offered and entered into leases for rental units in apartment buildings or single-family dwellings it owned. Id. at ¶¶ 25 to 26 and 29 to 30.

The complaint alleged a total 47 violations of TSCA at ten residential rental units. There were five separate violations of TSCA: a failure to provide a lead warning statement, 40 CFR §745.113(b)(1); a failure to provide 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, 40 CFR §745.113(b)(2); a failure to provide 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 existed, 40 CFR §745.113(b)(3); a failure to provide 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, 40 CFR §745.113(b)(4); and a failure to have the signatures of the lessor, agent and the lessee certifying the accuracy of their statements to the best of their knowledge and the dates of

such signatures before the lessee is obligated under the contract for the leasing transaction, 40 CFR §745.113(b)(6). The complaint alleged that Respondent Mardaph II committed these violations for the rental units at 711 Marion Road and 8750 Venus Drive, Cincinnati, Ohio and Respondent Mardaph III committed these violations for the rental units at 2605 Fenton Avenue, 2637 Fenton Avenue, 2639 Fenton Avenue, and 3341 McHenry Avenue, Cincinnati, Ohio. Id. at ¶¶ 42, 44, 46, 48, 50, 52, 64, 66, 68, 70, 72, 74, 87, 89, 91, 93, 95, 97, 110, 112, 114, 116, 118, 120, 132, 134, 136, 138, 140 and 142. These failures are violations of 40 C.F.R. §745.113(b), 40 C.F.R. §745.100, 42 U.S.C. §4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. §2689.

Service of the complaint was made by Federal Express mail to the listed registered agent for Respondents Mardaph II and Mardaph III. See Exhibit 8. On August 22, 2008, U.S. EPA received a copy of two letters and attachments from the registered agent Jeffrey Greenberger. See Exhibit 9 and 10. The first letter was to U.S. EPA and was dated April 18, 2008. However, from the context of the letter this appears to be a typographical error and it is most likely that the letter should have been dated August 18, 2008. Exhibit 9. In this letter, Mr. Greenberger stated that he received U.S. EPA's August 4, 2008 letter (which was the date of the cover letter to the complaint), though he doesn't state on what day he received it. Id. Mr. Greenberger went on to state that he had resigned as the Statutory Agent and that until a new agent was appointed, U.S. EPA could reach Vinnie Wilson at 7923 Rambler Place, Cincinnati, Ohio 45231 as Ms. Wilson was the shareholder for the two Respondents. Id. In the second enclosed letter, which was dated August 20, 2008 and addressed to Vinnie Wilson at the Rambler Place address, Mr. Greenberger forwarded to Ms. Wilson a copy of the notices he had received from U.S. EPA. Exhibit 10. Thus, it would appear that Mr. Greenberger provided Ms. Wilson, the shareholder for

Respondents Mardaph II and Mardaph III, with a copy of the complaint. The address that he used to write to Respondent Wilson was the same as the address that U.S. EPA used for the administrative complaint. Id. Further, the notice of resignation listed Respondent Wilson as the contact for Respondents Mardaph II and Mardaph III and listed her Rambler Place address. Id.

As a result of U.S. EPA continuing difficulty in serving Respondent Wilson, U.S. EPA chose to try personal service of the complaint and enlisted the services of the Ohio Department of Health (ODH). Christopher Mizek, Sanitarian Program Specialist at ODH, achieved service of the complaint on Respondent Wilson on behalf of Complainant on October 22, 2008. See Exhibit 11, Certificate of Service and Exhibit 12, Affidavit of Christopher Mizek. At the time of the service of the complaint, no new statutory agent had been named for Respondents Mardaph II or Mardaph III.

Following service of the complaint, the Respondents had 30 days to file an answer. 40 C.F.R. §22.15(a). No answer has been received by U.S. EPA or filed with the Regional Hearing Clerk. On January 22, 2009, U.S. EPA moved for default judgment against Respondent Wilson. After a response by Respondent Wilson to the motion, the motion was denied and Respondent Wilson was ordered to answer the complaint. No answer was filed for Respondents Mardaph II or Mardaph III.

Argument

Pursuant to 40 C.F.R. §22.17(a), a party may be found to be in default "upon failure to file a timely answer to the complaint." It is clear that Respondents Mardaph II and Mardaph III were served in August 2008 by the complaint being served on the statutory agent for the

Respondents. See Exhibits 8 to 10. Though the statutory agent resigned on August 11, 2008, no new agent had been named for these entities, so the statutory agent fulfilled his responsibility and forwarded the complaint onto Respondent Wilson, the shareholder for these Respondents. Further, even if the August 2008 service was deemed insufficient because the statutory agent had resigned, the Respondents were properly served with the complaint when Respondent Wilson was served by personal service on October 22, 2008. See Exhibits 11 and 12. As noted in the April (sic) 18, 2008 letter from Mr. Greenberger, service for the Mardaph entities could be made on Respondent Wilson until a new statutory agent was selected as she was the shareholder for these entities. As no new statutory agent for the Respondents has been selected to date, service on the shareholder, Respondent Wilson, is service for these entities. To not allow this, would be to create a circumstance where service on these two Respondents is impossible. Since, the Respondents have failed to file an answer to the complaint, Respondents Mardaph II and Mardaph III are in default. Pursuant to 40 C.F.R. §22.17(a), a default by the Respondents constitutes an admission of the facts alleged in the complaint. See also, In the Matter of Frank J. Davis, Docket No. TSCA-05-2007-0002, 2008 EPA ALJ Lexis 12 (March 31, 2008); In the Matter of Bar Development Water User's Association, et al, 2006 EPA RJO Lexis 545, (January 10, 2006).

The admission of the facts set forth in the complaint establishes a prima facie case of liability against the Respondents. To state a prima facie case here, U.S. EPA needs to show that the rental units in question are target housing, that the Respondents are the owner for each of the rental units in question, and that the requirements of the Disclosure Rule were not met at each rental unit. As set forth in the complaint and above, the Respondent Mardaph II is alleged to

have committed 10 violations of TSCA and Respondent Mardaph III is alleged to have committed 20 violations. According to reports from the Hamilton County Auditor, each of the rental units owned by these two Respondents was constructed prior to 1978 and thus all are considered to be target housing and subject to the Disclosure Rule. See Exhibits 13 to 18. Respondent Mardaph II is listed as the owner of two rental units, 8750 Venus Drive and 711 Marion Road. See Exhibits 13 to 14. Respondent Mardaph III is listed as the owner of four rental units, 2605 Fenton Avenue, 2637 Fenton Avenue, 2639 Fenton Avenue[1] and 3341 McHenery Avenue. See Exhibits 15 to 18.

During the March 2007 inspection, none of the above listed rental units had any of the required documents or disclosures and none were later provided by the Respondents. See Exhibits 13 to 18. At each of these rental units, the owner Respondent therefore failed: to provide a lead warning statement, 40 CFR §745.113(b)(1); to provide 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, 40 CFR §745.113(b)(2); to provide 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 existed, 40 CFR §745.113(b)(3); to provide 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, 40 CFR §745.113(b)(4); and to have the signatures of the lessor, agent and the lessee certifying to the accuracy of their statements to the best of their knowledge and the dates

[1] The rental unit at 2639 Fenton Avenue is a duplex and has multiple addresses, which includes 2637 Fenton Avenue. There is no separate listing for 2637 Fenton Avenue in the Hamilton County database.

of such signatures before the lessees were obligated under the contract for each of the leasing transactions, 40 CFR §745.113(b)(6). Thus, there were five violations of the Disclosure Rule at each rental unit for a total of 10 violations for the two properties owned by Respondent Mardaph II and 20 violations for the four properties owned by Respondent Mardaph III. Thus, U.S. EPA has shown a prima facie case that Respondents Mardaph II and Mardaph III are the owners of rental units that were constructed prior to 1978 and that each Respondent failed to make the required disclosures under the Disclosure Rule.

Upon a motion for default, a party can "request the assessment of a penalty . . . against the defaulting party" and if done, "the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested." 40 C.F.R. §22.17(b). U.S. EPA requests that an order for default be entered for a penalty of $30,320 against Respondent Mardaph II and a penalty of $26,840 against Respondent Mardaph III. In accessing the appropriate penalty, it is required that "the amount of the recommended civil penalty [be] based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" and one must also "consider any civil penalty guidelines issued under the Act." 40 C.F.R. §22.27(b) and In the Matter of Frank J. Davis, Docket No. TSCA-05-2007-0002, 2008 EPA ALJ Lexis 12 (March 31, 2008).

In calculating the penalty, U.S. EPA looked to the existing guidance -Section 1018 Disclosure Rule Enforcement Response Policy - December 2007 (Penalty Policy). See Exhibit 19. Under the Penalty Policy, the penalty is determined in two stages: (1) the determination of a "gravity-based penalty" and (2) adjustments to the gravity-based penalty. The gravity-based penalty is calculated by considering: (1) the nature of the violation; (2) the circumstance of the

violation; and (3) the extent of harm that may result from the violation. Once the gravity-based penalty has been determined, upward or downward adjustments may be made to the penalty amount by considering other factors, including: (1) ability to pay/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. See also *In the Matter of Frank J. Davis*, Docket No. TSCA-05-2007-0002, 2008 EPA ALJ Lexis 12 (March 31, 2008).

With regard to the nature of the violations, violations of the Disclosure Rule are considered hazard assessment in nature since the information is important to allow lessees to make informed decisions. Exhibit 19 at page 9.

The next step in calculating the penalty is the extent of the level of violation. A major violation occurs if there is a child under the age of six in the target housing. Id. - Appendix B at page 29. A significant violation occurs if there is a child between the ages of 6 and 18 years old living at the target housing. Id. A minor violation occurs if everyone at the target housing is over 18 years of age. Id. According to the lease or rental application, at 8750 Venus Drive, there were children under the age of six living in the rental units. See Exhibit 13. At the Venus Drive address, there was a 1 year old child, a 4 year old child, and a 13 year old child living in the rental unit. Id. At 3341 McHenry Avenue, there were children between the ages of 6 and 18 years old living in the rental unit. See Exhibit 18. At the McHenry Avenue address, there were 2 children living in the rental unit, ages 15 and 16 years old. See Exhibit 18. The remaining

addresses did not identify any individual under the age of 18. See Exhibits 14 to 17. Thus, there were one major, one significant and four minor violations.

Next to be determined is the circumstance of the violation. "Circumstances reflect the probability of harm resulting from a particular type of violation." Exhibit 19 at page 12. The Penalty Policy established a ranking system for potential violations using six levels. A level 1 or 2 circumstance is for violations that have a high probability of impairing the lessee's ability to consider the information required to be disclosed. A level 3 or 4 circumstance is considered to have a medium probability of impairing the lessees while a level five or six circumstance have a low probability of impairing the lessee's ability. Pursuant to Appendix B of the Penalty Policy, a failure to include the warning statement is a level 2 circumstance violation. See Exhibit 19. The failure to include a statement by the lessor of the presence of known lead-based paint, or a statement indicating no such knowledge, is a level 3 violation. Id. The failure to provide a list of records or reports on the presence of any known lead-based paint or indicate that no such records are available is a level 5 violation. Id. The failure to include a statement by lessee affirming receipt of the lead hazard pamphlet and the information from (b) (2) and (3) is a level 4 violation. Id. And lastly, the failure to have the signature of the lessor, agent and lessee certifying the accuracy of the statements is a level 6 violation. Id. Using the level of violation and extent, U.S. EPA was able to calculate a penalty for each count. See Exhibits 7 and 20- Penalty Calculation Memo.

U. S EPA did not receive any information from the Respondents as to their ability to pay, history of prior violations, degree of culpability, voluntary disclosure of violations or any other information that may have a bearing on the penalty. Thus, U.S. EPA did not adjust the penalty

either upward or downward. The statutory maximum penalty for these violations for Respondent Mardaph II is $110,000 and for Respondent Mardaph III, it is $220,000[2]. By using the statutory requirements and the penalty policy, U.S. EPA has calculated a fair and reasonable penalty of $30,320 for Respondent Mardaph II and $26,840 for Respondent Mardaph III. Since the Respondent has provided no information regarding the penalty, U.S. EPA's determination should be accepted.

Conclusion

Since Respondents Mardaph II and Mardaph III were properly served with an Administrative Compliant and have failed to file an answer or otherwise respond, the entry of a default judgment against each Respondent is proper. Further, the entry of a default judgment in the amount listed in the complaint of $30,320 for Respondent Mardaph II and $26,840 for Respondent Mardaph III is proper. U.S. EPA therefore requests that the Regional Hearing Officer enter an order of a default judgment in the amount of $30,320 against Respondent Mardaph II and $26,840 against Respondent Mardaph III.

Submitted this 10th day of June 2009.

Peter Felitti
Assistant Regional Counsel
U.S. Environmental Protection Agency

[2] The maximum penalty is calculated by multiplying the number of counts/violations in the complaint by the statutory maximum of $11,000 for each violation.

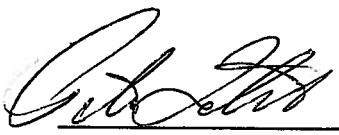
CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, U.S. EPA Region 5, and that true and correct copies were served on the Regional Hearing Officer and Respondent Mardaph II, LLC and Respondent Mardaph III, LLC with delivery by first class mail on June 10, 2009 to:

Mardaph II, LLC
c/o Vinnie Wilson
7923 Rambler Place
Cincinnati, Ohio 45231

Mardaph III, LLC
c/o Vinnie Wilson
7923 Rambler Place
Cincinnati, Ohio 45231

Dated this 10th day of June 2009.



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