UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
RONALD H. HUNT	)	**DOCKET No. TSCA-03-2003-0285**
PATRICIA L. HUNT	)	
DAVID E. HUNT	)	
J. EDWARD DUNIVAN	)	
GENESIS PROPERTIES, INC.,	)	
	)	
Respondents.	)	

ORDER ON EPA'S MOTION FOR ACCELERATED DECISION, MOTION TO WITHDRAW, AND MOTION TO RESCHEDULE HEARING

I. Background

On July 18, 2003, the United States Environmental Protection Agency, Region 3, Associate Director for Enforcement of the Waste and Chemicals Management Division (Complainant) issued an Administrative Complaint against the Respondents named above, pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA) (15 U.S.C. § 2615(a)). The Complaint alleges in 47 counts, that Respondents violated Section 409 of TSCA (15 U.S.C. § 2689), Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (RLBPHRA) (42 U.S.C. § 4852d), and federal regulations promulgated thereunder, set forth at 40 C.F.R. Part 745 Subpart F (the "Disclosure Rule"). The Complaint alleges that Respondents Ronald Hunt, Patricia Hunt, David Hunt and J. Edward Dunivan owned certain residential dwellings that were constructed prior to 1978, and, as "lessors," entered into a total of ten written leases through their agent, Genesis Properties Inc. (GPI). GPI is a Virginia corporation with an office at 11511 Allecingie Parkway, Richmond, Virginia. The Complaint alleges further that the dwellings contained lead-based paint, that Respondents knew at all relevant times that the dwellings contained lead paint and/or lead paint hazards, and that they failed to make disclosures concerning lead-based paint to prospective lessees.

The first 13 Counts pertain to two dwellings owned by Respondents Ronald Hunt and Patricia Hunt, involving two consecutive leases of one dwelling and three consecutive leases of the other. Specifically, in Counts 1-4, Ronald and Patricia Hunt are charged with failure to disclose to four of those lessees the known presence of lead-based paint and/or lead based paint hazards prior to entering into the leases, in violation of 40 C.F.R. § 745.107(a)(2). In Counts 5-8, Ronald and Patricia Hunt are charged with failure to include in or attached to those four leases a statement disclosing the presence of any known lead-based paint and/or lead-based paint hazards, or the lack of knowledge of such presence, in violation of 40 C.F.R. § 745.113(b)(2). In

Counts 9-12, Ronald and Patricia Hunt are charged with failing to provide those four lessees with any records or reports available to the Hunts pertaining to lead-based paint or lead-based paint hazards in the dwellings in violation of 40 C.F.R. § 745.107(a)(4). In Count 13, Ronald and Patricia Hunt are charged with failing to include, in another lease of one of the dwellings, a list of any records or reports available to the Hunts pertaining to lead-based paint or lead-based paint hazards in regard to that dwelling, or an indication in the lease that no such records or reports were available, in violation of 40 C.F.R. § 745.113(b)(3).

Counts 14 through 22 pertain to three consecutive leases of a dwelling owned by Respondents David Hunt and Patricia Hunt. In Counts 14 through 16, David Hunt and Patricia Hunt are charged with failing to disclose known presence of lead-based paint or lead-based paint hazards to the three lessees, in violation of 40 C.F.R. § 745.107(a)(2). In Counts 17 through 19, David and Patricia Hunt are charged with failing to include in or attached to those three leases a statement disclosing the presence of any known lead-based paint and/or lead-based paint hazards, or the lack of knowledge of such presence, in violation of 40 C.F.R. § 745.113(b)(2). In Counts 20 through 22, David and Patricia Hunt are charged with failing to provide those three lessees with any records or reports available to the Hunts pertaining to lead-based paint or lead-based paint hazards in the dwelling in violation of 40 C.F.R. § 745.107(a)(4).

Counts 23 through 28 allege the same types of violation, but pertain to two consecutive leases of a dwelling owned by Respondent J. Edward Dunivan. Counts 23 and 24 allege that Mr. Dunivan failed to disclose the known presence of lead-based paint or lead-based paint hazards to the two lessees, in violation of 40 C.F.R. § 745.107(a)(2). Counts 25 and 26 allege that Mr. Dunivan failed to include in or attached to those two leases a statement disclosing the presence of any known lead-based paint and/or lead-based paint hazards, or the lack of knowledge of such presence, in violation of 40 C.F.R. § 745.113(b)(2). Count 27 and 28 allege that Mr. Dunivan failed to provide those two lessees with any records or reports available to him pertaining to lead-based paint or lead-based paint hazards in the dwelling in violation of 40 C.F.R. § 745.107(a)(4).

Count 29 through 46 allege that GPI failed to ensure that the lessors complied with, or failed to personally ensure compliance with, each of the three requirements referenced above (40 C.F.R. §§ 745.107(a)(2), 745.113(b)(2) and 745.107(a)(4)) in regard to six of the leases referenced above. Count 47 alleges that GPI failed to ensure that the lessors performed the requirement of 40 C.F.R. § 745.113(b)(3) for the lease referenced in Count 13, in violation of 40 C.F.R. § 745.115(a)(2).

Respondents collectively filed an Answer, denying liability. The parties engaged in an Alternative Dispute Resolution process, but were unsuccessful in settling the matter, so on February 11, 2004, the undersigned was designated to preside in this proceeding. The parties filed prehearing exchanges. In its Prehearing Exchange, Complainant proposed to assess Respondents Ronald and Patricia Hunt a joint and several penalty of $ 44,204, David and Patricia Hunt a joint and several penalty of $17,820, Edward Dunivan a penalty of $15,840 and GPI a penalty of $42,224. By Order dated May 10, 2004, a hearing in this matter was scheduled

to commence on July 27, 2004.

On May 24, 2004, Complainant filed a Motion for Accelerated Decision as to Liability, requesting accelerated decision as to the liability of Ronald Hunt and Patricia Hunt on Counts 5-13, as to liability of David and Patricia Hunt on Counts 17-22, as to liability of Edward Dunivan on Counts 25 through 28, and as to liability of GPI on Counts 35 through 47 of the Complaint.

Thereafter, on June 3, 2004, Complainant submitted a Motion to Re-Schedule Date of Hearing, on grounds, *inter alia*, of conflicts in witness' schedules. Respondents opposed this Motion, and Complainant filed a Reply on June 22, 2004.

Respondents submitted a Response to EPA's Motion for Accelerated Decision on June 7, 2004, conceding Respondents' liability, but stating that they are not waiving their "passive owner" defense of David Hunt and Edward Dunivan, withdrawing inability to pay as a defense, and requesting that this case proceed directly to the issue of penalty assessment. In response, on June 18, 2004, Complainant filed a Reply Brief.

On June 9, 2004, Complainant submitted an unopposed Motion to Withdraw the remaining counts alleged in the Complaint, all of which allege failure to disclose the known presence of lead-based paint or lead-based paint hazards, in violation of 40 C.F.R. § 745.107(a)(2): Counts 1-4, 14-16, 23, 24, and 29-34.

Two documents were submitted by Complainant on June 14, 2004: (1) a Motion for Issuance of Witness Subpoenas and (2) a Motion for Discovery and Motion in Limine. The next day, Respondents submitted an opposition to the Motion for Discovery, and on June 23, Complainant filed a Reply. These Motions will be addressed by separate order, in view of the postponement of the hearing, discussed below.

II. Motion to Withdraw

The Motion to Withdraw (Motion) seeks to withdraw from the Complaint Counts 1-4, 14-16, 23, 24 and 29-34, which charge Respondents with failing to disclose known presence of lead-based paint or lead-based paint hazards to lessees, in violation of 40 C.F.R. § 745.107(a)(2). Complainant states that although at the time of filing the Complaint it believed it had good cause to include those Counts in the Complaint, "after discussions with Respondents and after reviewing the facts in this case, Complainant has decided to exercise its prosecutorial discretion not to further pursue such alleged violations against Respondents in this matter." The Motion states further that Respondents' counsel agreed that Respondents do not oppose the Motion.

The Consolidated Rules of Practice (Rules of Practice) provide that ". . . the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(d). There is no reason to deny the Motion, as Respondents do not oppose it. Accordingly, Counts 1-4, 14-16, 23, 24 and 29-34 are withdrawn

without prejudice.

III. Motion for Accelerated Decision

A. Standards for Accelerated Decision

The Rules of Practice provide at 40 C.F.R. § 22.20(a) that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgement as a matter of law.

Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12, TSCA Appeal No. 93-1 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 780-82, 1993 EPA App. LEXIS 32 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148.

First it must be determined whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)).

If the initial burden of the movant is met, then it must be determined whether the party responding to a motion for summary judgment has met its obligation to designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. *Id.* at 324. The motion for summary judgment places the nonmovant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164 (S.D. Ind. 1992). To avoid the summary judgment motion being granted, the nonmovant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is not sufficient if the nonmoving party's evidence is "merely colorable" or "not significantly probative." *Id.* at 249-250. Summary disposition may not be avoided merely by alleging that a factual dispute may exist, or that future proceedings may turn something up. *Green Thumb Nursery, Inc.*, 6 E.A.D. 782 n. 23, 1997 EPA App. LEXIS 4 (EAB 1997).

B. Applicable Lead Based Paint Regulations

Complainant asserts that no genuine issue of material fact exists as to the liability of each of the Respondents as charged in the Complaint. Complainant has cited to the admissions in the Answer and to documents filed in the Prehearing Exchange to support a *prima facie* case of liability for the violations alleged in the Complaint. The Disclosure Rule provides, in pertinent part:

> **§ 745.107 Disclosure Requirements for sellers and lessors**.
> (a) The following activities shall be completed before the . . . lessee is obligated under any contract to . . . lease target housing . . . .
> * * *
> (4) The . . . lessor shall provide the . . . lessee with 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.
> * * *
> **§ 745.113 Certification and acknowledgment of disclosure**
> * * *
> (b) *Lessor requirements.* Each contract to lease target housing shall include, as an attachment or within the contract, the following elements . . . :
> * * *
> (2) A statement by the lessor disclosing the presence of known lead-based paint and/or lead based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead based paint or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint or lead-based paint hazards . . . .
> * * *
> (3) 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. If no such records or reports are available, the lessor shall so indicate.
>
> **§ 745.115 Agent Responsibilities**
> (a) Each agent shall ensure compliance with all requirements of this subpart. To ensure compliance, the agent shall:
> (1) Inform the seller or lessor of his/her obligations under §§ 745.107, 745.110, and 745.113.
> (2) Ensure that the seller or lessor has performed all activities required under §§ 745.107, 745.110, and 745.113, or personally ensure compliance with the requirements of §§ 745.107, 745.110, and 745.113.
> (b) If the agent has complied with paragraph (a)(1) of this section, the agent shall not be liable for the failure to disclose to a purchaser or lessee the presence of lead-based paint and/or lead-based paint hazards known by a seller or lessor but not disclosed to the agent.

The term "target housing" is defined as "any housing constructed prior to 1978, except

housing for the elderly or persons with disabilities . . . or any 0-bedroom dwelling." 40 C.F.R. § 745.103. "Lead-based paint" is defined a paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight. *Id.* "Lead based paint hazard" is defined as "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate Federal agency. *Id.*

C. Undisputed Facts as to Individual Respondents (Counts 5-13, 17-22, 25-28)

The case file shows the following facts as to liability under the relevant provisions of the Disclosure Rule.

Respondents admitted in their Answer that the properties at issue were constructed prior to 1978, and that they were not "0-bedroom" dwellings or used to house elderly or disabled persons. Answer ¶¶ 10, 11, 14, 15, 18, 19, 22, 23. Thus there is no dispute that the properties are "target housing" as defined by Section 1004(27) of the RLBPHRA, Section 401(17) of TSCA, and 40 C.F.R. § 745.103, and are therefore subject to the Disclosure Rules.

Respondents admitted in their Answer that Ronald and Patricia Hunt owned the residential dwellings at 1124 North 28th Street and 1813 North 29th Street, David and Patricia Hunt owned the residential dwelling at 3015 Barton Street, that Edward Dunivan owned the residential dwelling at 2405 Third Street, and that the dwellings were offered for lease. Answer ¶¶ 26-29, 31-34. Respondents admitted that Ronald, Patricia and David Hunt and Edward Dunivan contracted with GPI to lease the properties at issue. Answer ¶ 36. Respondents state that Ronald Hunt is the sole shareholder of GPI. *Id.*

Complainant points to copies of the leases in both its own and in Respondents' Prehearing Exchanges. There are leases dated January 28, 2000 and December 4, 2000, for the property at 1124 North 28th Street (Complainant's Prehearing Exchange Exhibit ("CX") 1, 2; Respondents' Prehearing Exchange ("RX") 7, 8); leases dated January 8, 1999, April 11, 2000 and July 2, 2001, for the property at 1813 North 29th Street (CX 3, 4, 5; RX 9, 10, 11); leases dated August 11, 1999, December 7, 2000 and June 13, 2001, for the property at 3015 Barton Avenue (CX 6, 7, 8; RX 12, 13, 14), and leases dated December 1, 1999 and January 16, 2001 for the property at 2405 Third Avenue (CX 9, 10; RX 15, 16). The leases identify GPI as the "landlord," and do not identify or otherwise refer to the Respondent property owners.

In their Answer, Respondents denied that the dwellings contained lead based paint as defined in 40 C.F.R § 745.103, and asserted that all of the alleged lead-based paint was encapsulated to the satisfaction of the City of Richmond. Answer ¶¶ 39, 45, 48, 49, 53, 56, 59, 60, 65, 68, 71, 72, 77, 80. However, Respondents admitted in the Answer that the Department of Health for the City of Richmond sent Ronald and Patricia Hunt a Notice of Violation, citing municipal lead-based paint violations, and including sample analyses of lead levels, for the 1124

North 28th Street and 1813 North 29th Street properties, in 1997 and 1996, respectively, and in 1997 sent such a Notice of Violation and sample analyses to David and Patricia Hunt in regard to the 3015 Barton Avenue property. Answer ¶¶ 39, 49, 60. Respondents admitted that in 1998 the Department sent Edward Dunivan, a Notice of Non-Hazardous Lead Based Paint stating that the 2405 Third Avenue dwelling contained lead paint. Answer ¶ 72. Further, Respondents admitted with respect to the 1124 North 28th Street property that in 1998, the City of Richmond sent Ronald and Patricia Hunt a report of the inspection underlying the Notice of Violation. Answer ¶ 40. In addition, Respondents admitted that GPI received copies of such Notices[1] prior to the lessees entering into the leases at issue with respect to the 1124 North 28th Street, 3015 Barton Avenue, and 2405 Third Avenue properties. Answer ¶¶ 41, 61, 73.

Complainant included in its Prehearing Exchange copies of the Notices of Violation, which state that the properties at issue were found to be in violation of the standard for lead based paint which prohibits painted surfaces in excess of 0.5 percent lead by weight, sample analyses, and the Notice of Non-Hazardous Lead-Based Paint, which states that the 2405 Third Avenue property was found to be positive for lead-based paint. CX 21-26. This standard cited in the Notices is the same as that defining "lead-based paint" in the Disclosure Rule, 40 C.F.R. § 745.103. It is concluded that the properties at issue contained lead-based paint as defined in the Rule.

Nevertheless, Respondents denied in their Answer that they knew at relevant times that the properties contained lead-based paint and/or lead-based paint hazards. Answer ¶¶ 42, 50, 62, 74. Complainant, however, points to EPA's Subpoena No. 412, asking the question, "State whether you are aware of the presence of any lead-based paint in the property. State the date of and the circumstances under which you or any agent of yours became aware of such presence, along with copies of any document(s) informing of such presence, " and points to Ronald Hunt's Response, dated October 9, 2001, answering the question affirmatively ("yes" or "I became aware . . ."), with respect to the 1124 28th Street, 3015 Barton Street and 2405 Third Avenue properties, and citing the dates of the Notices. CX 29, 30. The response to that question as to the 1813 North 29th Street property was "Inspected by City of Richmond. 5/11/98. Compliance completed." *Id.* Although that response does not directly state whether or not Ronald Hunt was aware of the presence of lead-based paint, the date provided in the Response represents the date that he or any agent of his became aware of the presence of lead-based paint, and clearly indicates that he or his agent were in fact aware of such presence on that date. Considering also the admission that the Notice of Violation as to the 1813 North 29th Street property was received by Ronald Hunt, and that he was the sole shareholder of GPI, GPI is deemed to have had notice of the lead based paint in that property. Respondents have made no indication to the contrary. Therefore, Complainant has carried its burden of pointing to documents in the case file showing that Respondents received notice and knew of lead based paint and/or lead based paint hazards in the dwellings they respectively owned and/or leased prior to the dates of the leases at issue.

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[1] For sake of brevity, the term "Notices" shall refer to the Notices of Violation, Notice of Nonhazardous Lead Paint, and inspection report from the City of Richmond, described above.

Complainant has also shown that Respondents failed to make disclosures concerning lead-based paint to prospective lessees, as alleged in the Complaint. In their Answer, as to Counts 5-13, 17-22, and 25-28, Respondents stated generally that "Respondents admit that they did not disclose any alleged lead paint and/or lead paint hazards in the described leases." Answer ¶¶ 88, 92, 97, 100, 103, 106, 109, 112, 115. Respondents also stated in their Response to the Motion for Accelerated Decision (at ¶ 1) that they "concede liability in this matter as to the inadvertent failure to properly complete the lead disclosure forms required by both Federal law and EPA regulations." Documents in the case file show specifically the failure to comply with each of the disclosure requirements at issue in regard to each lessee, as alleged in Counts 5-13, 17-22 and 25 through 28.

As to Counts 5 through 8, and 17 through 19, 25 and 26, Respondents were required under 40 C.F.R. § 745.113(b)(2) to include a statement disclosing the presence of known lead-based paint and/or lead based paint hazards, or a statement indicating no knowledge of such presence. The leases at issue state, "Lessor has no knowledge of lead-based paint and/or lead-based paint hazards in the housing." CX 1, 3, 4, 5, 6, 7, 8, 9, 10; RX 7, 9, 10, 11, 12, 13, 14, 15, 16. As concluded above, Respondents had received the Notices and knew of lead-based paint in the property prior to the execution of the leases.

As to Counts 9 through 12, 20 through 22, 27 and 28, the Lead Based Paint Forms attached to the leases at issue state "Lessor has no reports or records pertaining to lead-based paint and/or lead based paint hazards in the housing." *Id.* In the October 9, 2001 Response to EPA's TSCA Subpoena 412, Paragraph 9, requesting all documents concerning lead based paint that were provided to lessees, as to the lease referenced in Count 9, Respondent stated that information regarding inspection from city was given to the lessees at issue *on the date the terms of the lease commenced*. CX 29, 30. As to Counts 10 through 12, 22, 27, 28, Respondents stated that they provided the pamphlet entitled "Protect Your Family from Lead in Your Home," and did not state that they provided any other documents. *Id.* In regard to Counts 20 and 21, Respondents stated that the pamphlet and "documents in file" were given to the lessees at issue *on the date the terms of the lease commenced*. As concluded above, Respondents had received the Notices prior to the time the lessors became obligated under the leases. Under 40 C.F.R. § 745.107(a)(4), lessors were required to provide such records or reports *before the lessee was obligated under the lease*.

As to Count 13, the lessors were required to include in or with the lease a list of any reports or records available to the lessor pertaining to lead based paint, that is, the Notice of Violation and inspection report for the property at 1124 28th Street. The lease at issue states "Lessor has provided the lessee with all available records and reports pertaining to lead based paint and/or lead based paint hazards in the housing (list documents below)," but neither the lease nor attachments list any documents. CX 2; RX 8.

The Respondents did not admit, however, that the individual Respondents each were "lessors" of the respective properties at issue. Respondents assert that all of the individual Respondents except Ronald Hunt were merely passive owners with no knowledge of the day-to-

day leasing of the dwellings at issue. Answer ¶¶ 88, 92, 97, 103, 106, 112, 115 141E. To determine whether this assertion raises an issue of fact which is material to liability, the question is whether a passive owner may be liable as a "lessor" under the applicable statutes and regulations.

D. Respondents' Passive Owner Defense

In their Response to the Motion for Accelerated Decision, Respondents stated that they do not waive their "passive owner" defense as to the Respondents, specifically David Hunt and Edward Dunivan, that are mere owners of the properties with no hand in their management or even in their selection for purchase, and who have no control over the actions of GPI.

First, it is noted that TSCA is deemed to be a strict liability statute. *Leonard Strandley*, 3 E.A.D. 718, 722 (CJO 1991). A person may be liable under TSCA without any showing of fault, intent to violate the legal requirement, or guilty knowledge. That is, a finding of liability does not require a showing of the respondent's knowledge of either the legal requirement or the facts constituting the act or omission alleged to violate the requirement. *See, Staples v. United States*, 511 U.S. 600, 618 (1994)(under statutes defining public welfare offenses, there is no requirement for plaintiff to show defendant knew the facts that make his conduct fit the definition of the offense); *United States v. Morgan*, 311 F.3d 611, 615 (5th Cir. 2002)(with true strict liability, plaintiff need not show defendant knew he was dealing with a dangerous item).

Second, an examination of the plain text of the Disclosure Rule shows that an owner of housing who engages an agent to lease the property is nevertheless a "lessor" of the property. The Rule defines "lessor" as "any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations ...." 40 C.F.R. § 745.103. The Rule defines "owner" as "any entity that has legal title to target housing, including but limited to individuals, partnerships, corporations ..., except where a mortgagee holds legal title to property serving as collateral for a mortgage loan, in which case the owner would be the mortgagor." 40 C.F.R. § 745.103. The term "agent" is defined 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. § 745.103.

The clause stating that the agent "enters into a contract with a seller or *lessor*" to sell or lease housing, and the fact that the "agent" has separate responsibilities from the "lessor" in 40 C.F.R. § 745.115, shows that agents are distinct from lessors. An agent generally enters into such a contract with a property owner, such as a landlord seeking to lease property or homeowner seeking to sell property. Thus, such owners must be the "lessors" or "sellers" under the Disclosure Rule. The Rule clearly indicates that the owner of target housing is a "lessor" even when he enters into a contract with an agent for the purpose of authorizing the agent to be involved exclusively in the lease transaction with the lessee.

The respondent in *Harpoon Partnership*, EPA Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52 (Order Granting Complainant's Request for Partial Accelerated Decision and Denying Respondent's Request for Partial Accelerated Decision, Aug. 4, 2003)(attached to Initial Decision, May 27, 2004) claimed, as do Respondents here, that it was merely the passive owner, and that its management company entered into the transaction with the lessee, and was therefore the lessor, rather than the respondent. The parties in that case briefed the issue, and my Honorable colleague, Judge Barbara Gunning, discussed it at length in her ruling, holding that the respondent owner was subject to the requirements of the Disclosure Rule as a lessor. Judge Gunning noted that the regulatory definitions of "lessor" and "agent" are not mutually exclusive, and that the regulations do not suggest that when the owner enters into a contract with an agent, the application of the term "lessor" transfers from the owner to the agent. She also held that the owner cannot contract away its disclosure obligations under the Disclosure Rule, and that the regulatory language and preamble to the Disclosure Rule provided proper notice that the owner could be deemed a lessor.

Therefore, it is concluded that Respondents' defense that individual Respondents were merely passive owners would not affect a finding of liability, and thus does not raise an issue of fact that is material to liability.

E. Undisputed Facts as to Corporate Respondent (Counts 35-47)

Respondents admitted in their Answer that GPI was under contract with the other Respondents to lease the dwellings at issue and was an "agent" within the meaning of the Disclosure Rule, 40 C.F.R. § 745.103. Answer ¶ 36. The Rule requires that "Each agent shall ensure compliance with all requirements of this subpart." 40 C.F.R. § 745.115(a). Counts 35 through 40 alleged that GPI failed to ensure compliance with 40 C.F.R. § 745.113(b)(2), Counts 41 through 46 alleged that GPI failed to ensure compliance with 40 C.F.R. § 745.107(a)(4), and Count 47 alleged that GPI failed to ensure compliance with 40 C.F.R. § 745.113(b)(3), with respect to certain leases referenced in the Complaint. As discussed above, the requirements of 40 C.F.R. § 745.113(b)(2) and (3), and 745.107(a)(4) were not complied with, for those leases. Respondents have not challenged GPI's liability or raised any genuine issue of material fact as to GPI's liability.

F. Respondents' Other Defenses

In Paragraph 141 of Respondents' Answer the following "defenses" were listed: ability to pay, cooperation, the duplicative and borderline criminal nature of the Complaint, the nature of the ownership of GPI, and multiplication of a few quickly corrected omissions into 18 counts in a clear attempt to put Ronald Hunt and GPI out of business. Ability to pay was withdrawn in Respondents' Response to the Motion for Accelerated Decision, and moreover, like the "defense" of cooperation, may only be relevant to the assessment of a penalty and has no relevance to liability. Respondent has not supported the other "defenses" to liability by

designating specific facts showing that there is a genuine issue for hearing or by presenting or pointing out any supporting documentation in the case file.

G. Conclusion on Motion for Accelerated Decision

It is concluded that Complainant has demonstrated that there is no genuine issue of fact material to the liability of Respondents for the violations alleged in Counts 5 through13, 17 through 22, 25 through 28, and 35 through 47 of the Complaint. Complainant is entitled to judgment as a matter of law on all of those Counts. The issues that remain in dispute are only relevant to the penalty to assess against Respondents. Those issues are reserved for hearing.

IV. Motion to Reschedule Hearing

Shortly after the Order scheduling the hearing in this matter, Complainant's counsel alerted Respondents' counsel and the undersigned's office to conflicts that some of Complainant's witnesses have with the hearing schedule. The Motion to Reschedule Hearing (Motion) states that four witnesses have arranged for leave during the time of the hearing, including Complainant's financial witness, the Lead Compliance Officer assigned to this case, the Regional Lead Enforcement Coordinator, and the Region's Toxicologist. The Motion states further that their vacation plans pre-date the Order scheduling the hearing, and if the hearing proceeds, would severely prejudice the Complainant, because their testimony is critical to Complainant's case.

The financial witness would testify to the financial impact of the penalty on Respondents, addressing the statutory penalty determination factors of ability to pay and ability to continue in business, and would rebut Respondents' proposed penalty mitigation arguments. Complainant asserts that Respondents have "offered" to withdraw the ability to pay arguments, but have not filed a motion to withdraw. Complainant also points out that it filed a Motion for Discovery to obtain further information concerning financial exhibits Respondents included in their Prehearing Exchange, and that this information may provide additional basis for her testimony.

The Lead Compliance Officer would testify about the alleged violations and proposed penalty. The Regional Lead Enforcement Coordinator would testify on an overview of the Lead Disclosure regulatory program, and environmental threats it is designed to address. The Toxicologist, who would be available on July 27 but not available to prepare for hearing on July 10 through 24, would testify as to risks to human health posed by lead based paint.

Complainant also asserts that the hearing date of July 27 would not allow sufficient time for a ruling on a Motion for Discovery and if granted, submission of a response to the discovery requests, review, and follow up. Complainant requests that the hearing be rescheduled to commence on September 28 or October 5, 2004.

In their Response, Respondents state that they "strongly object to any delay in the hearing date, as it will prejudice them both financially and personally." Respondents assert that the Complaint has been pending for over two years, that they suffer financial difficulty in maintenance of their affairs based upon the pending Complaint, and that each day that this matter continues pending is another day they have to explain to lenders, lessees, and other possible business associates that EPA has an outstanding Complaint. Respondents state that the defense of ability to pay was withdrawn and liability was conceded, so some witnesses are not necessary, discovery on financial issues is not needed, and further delay is not warranted. Additionally, Respondents assert that another EPA toxicologist could be substituted.

In its Reply, Complainant asserts that substitution of another toxicologist would be very inconvenient given the amount of time needed to prepare for and testify at a hearing within a few weeks. Complainant counters any allegations that this proceeding has been unnecessarily delayed already, pointing out that the Complaint was only filed on July 18, 2003, and the Answer was not filed until September 30, 2003. Complainant suggests that the statement in Respondents' Response to the Motion for Accelerated Decision that they "hereby withdraw inability to pay as a defense in this matter" may not constitute a proper withdrawal as an argument in mitigation of the penalty.

However, based on Respondents' broad use of the word "defense" in this matter, and their assertions in the Response to the Motion that "the finances of Respondents are no longer at issue" (at ¶ 6) and that financial information "is rendered unnecessary by the lack of a financial defense in this matter" (at ¶ 11), it is concluded that Respondents have withdrawn inability to pay as an argument in mitigation of the penalty. Complainant has indicated in its Reply that if Respondents are admitting that they can each afford to pay the proposed penalty, then it will withdraw its Motion for Discovery. Such a withdrawal of an inability to pay argument, and withdrawal of the Motion for Discovery, do not defeat Complainant's request to reschedule the hearing date, however.

The Respondents' statements that they have withdrawn an argument of inability to pay the penalty and that their finances are no longer in issue does not necessarily mean that any testimony on the issue of ability to pay and ability to continue in business is unnecessary or irrelevant. Complainant has the initial burden at hearing to show that the relief requested, the proposed penalty, is appropriate. 40 C.F.R. § 22.24(a). This requires presentation of evidence and/or testimony as to each applicable statutory penalty determination factor, including ability to pay and to continue in business. *CDT Landfill Corp.*, 2003 EPA App. LEXIS 5, CAA App. No. 02-02 (EAB, June 5, 2003)("for a Region to make its prima facie case with regard to a proposed penalty, 'the Region must come forward with evidence to show that it, in fact, considered each factor identified in' the relevant act")(quoting *New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994)). The witnesses who are unavailable the week of July 27 would be testifying also as to the other statutory factors, *viz.*, nature, circumstances, extent and gravity of the violations, any history of prior violations, degree of culpability, and other factors as justice may require. TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). Therefore, to proceed with the hearing during the week of July 27 would prejudice Complainant's case. The allegations of prejudice to

Respondents, on the other hand, are not supported with any specific facts and are unpersuasive.

Accordingly, the hearing is postponed, and will commence on September 14, 2004.

ORDER

1. Complainant's Motion to Withdraw from the Complaint Counts 1-4, 14-16, 23, 24 and 29-34 is **GRANTED.** These Counts are withdrawn without prejudice.

2. Complainant's Motion for Accelerated Decision as to Liability for Counts 5-13, 17-22, 25-28 and 35-47 is **GRANTED.** Accordingly, Respondents Ronald H. Hunt an Patricia L. Hunt are liable for the violations alleged in Counts 5 through 13 of the Complaint; Respondents David E. Hunt and Patricia L. Hunt are liable for the violations alleged in Counts 17 through 22 of the Complaint; Respondent J. Edward Dunivan is liable for the violations alleged in Counts 25 through 28 of the Complaint, and Respondent Genesis Properties, Inc., is liable for the violations alleged in Counts 35 through 47 of the Complaint. The only issues remaining in this matter are as to the amount of any penalty to assess for the violations found herein.

3. Complainant's Motion to Reschedule Hearing is **GRANTED.** The hearing in this matter shall begin promptly at 9:30 a.m. on Tuesday, **September 14, 2004** in Richmond, Virginia, continuing if necessary on September 15-17, 2001. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

4. In light of the new hearing date, the deadline for filing prehearing briefs is moved to **August 27, 2004.**

5. The parties shall continue in good faith to attempt to settle this matter. Complainant shall file status reports as to the progress of settlement efforts on **July 30, 2004 and August 27, 2004.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: July 2, 2004
Washington, D.C.