UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
HARPOON PARTNERSHIP,	)	Docket No. TSCA-05-2002-0004
RESPONDENT	)	

INITIAL DECISION

Pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), Harpoon Partnership is assessed a civil penalty of $37,037 for violations of Section 409 of TSCA, 15 U.S.C. § 2689, and its implementing regulations for disclosure of known lead-based paint or lead-based paint hazards upon sale or lease of residential property found in 40 C.F.R. Subpart F.

Issued: May 27, 2004

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

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I. Procedural History

This civil administrative penalty proceeding arises under the authority of Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On March 19, 2002, the United States Environmental Protection Agency, Region V ("Complainant" or the "EPA") filed a Complaint against Harpoon Partnership ("Respondent"), alleging violations of TSCA and its implementing regulations for the disclosure of lead-based paint and lead-based paint hazards found in 40 C.F.R. Part 745, Subpart F ("Lead Disclosure Rule"). Complainant seeks a civil administrative penalty of $56,980 for these alleged violations in regard to nine units in an apartment building constructed before 1978, owned by Respondent, located at 5134-5136 S. Harper, Chicago, Illinois. Complainant filed an Amended Complaint on April 10, 2002 and a Second Amended Complaint ("Complaint") on April 16, 2003.[1]

Specifically, Counts 1 through 9[2] in the Complaint allege that Respondent failed to include, either within the contract to lease or as an attachment to the contract, a Lead Warning Statement before the lessees of Apartments 2B, 1B, 4A, 2A, 2E, 4C, 1C, 3B, and 4B of 5134-5136 S. Harper, Chicago, Illinois ("target apartments") were obligated under each contract in violation of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R.

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[1] Complainant's Motion to File the Second Amended Complaint was granted on April 9, 2003, which sought to add, *inter alia*, financial information regarding individual partners that comprise Harpoon Partnership and Respondent's ability to pay, and greater specificity about the Complainant's calculation of the proposed penalty. *See* In the Matter of Harpoon Partnership, Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 24, at *2, *8 (April 9, 2003) (Order Granting Complainant's Motion to File the Second Amended Complaint).

[2] Complainant had, for the sake of clarity, grouped the violations by each type of violation of the Lead Disclosure Rule.

§§ 745.113(b)(1) and 745.100. Counts 10 through 18 allege that Respondent failed to include, either within each contract or as an attachment to each contract, a statement disclosing either the presence of any known lead-based paints and/or lead-based paint hazards in the target housing, or a lack of knowledge of such presence before the lessees in the target apartments were obligated under each contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100. Counts 19 through 27 allege that Respondent failed to include, either within the contract or as an attachment to the contract, 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 before the lessee in each target apartment was obligated under each contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100.

Counts 28 through 36 allege that Respondent failed to include, either within each contract or as an attachment to each contract, 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 before the lessees were obligated under each target apartment contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100. Counts 37 through 45 allege that Respondent failed to include, either within the contract or as an attachment to the contract, the signatures of the lessor and the lessee certifying to the accuracy of their statements or the dates of such signature before the lessee in each target apartment was obligated under the leasing contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100.

For these alleged violations, Complainant considered the statutory penalty factors in Section 16(a)(2)(B) of TSCA, and calculated the proposed penalty by applying the methodology of the EPA's Section 1018 Disclosure Rule Enforcement Response Policy, dated February 2000.

Respondent filed its Answer and Affirmative Defenses to Amended Complaint on May 20, 2002, clarified its first affirmative defense in Respondent's Motion to Supplement First Affirmative Defense to the Amended Complaint on January 24, 2003, and answered the Second Amended Complaint on May 6, 2003, denying many of the factual allegations made in the Complaint and raising several defenses. Respondent's first defense raises two issues. First, Respondent contends that it is not the "lessor" as defined by the regulations because it did not offer the target property for lease or have any contact with the lessees of the target

housing.[3] Second, Respondent contends that the language of 40 C.F.R. Part 745 is vague and ambiguous so as to not provide adequate notice that Respondent was a lessor and responsible for disclosure of the presence of lead-based paint or lead-based paint hazards.[4]

On May 19, 2003, Complainant moved to strike Respondent's first defense in its Response to Respondent's First Affirmative Defense. In turn, on June 3, 2003, Respondent replied to the Complainant's motion to strike in its Response to Complainant's Response to Respondent's First Affirmative Defense, claiming that defendant mischaracterized the nature of Respondent's defense.[5]

Subsequently, during a telephonic conference with Respondent and Complainant on June 6, 2003, the hearing date set for June 23, 2003 through June 27, 2003 was postponed and a schedule was established for the submission of briefs addressing the legal questions of whether the statutory and regulatory meaning of the term "lessor" includes the owner of the target housing, whether a lessor's responsibilities may be contracted away to a third party, and whether the regulations afforded Respondent "fair notice."

In the Order Granting Complainant's Request for Partial Accelerated Decision and Denying Respondent's Request for Partial Accelerated Decision, entered on August 4, 2003 ("Order on Accelerated Decisions"), Complainant's Request for Partial Accelerated Decision was granted and Respondent's Request for Partial Accelerated Decision was denied. The Order on Accelerated Decisions included the following determinations:

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[3] Respondent states that it was merely the owner and that its management company, Hyde Park Realty, Inc., transacted with the lessees and therefore was the lessor with regard to the leased units listed in the Complaint.

[4] Respondent added the issue of fair notice in Respondent's Motion to Supplement First Affirmative Defense to the Amended Complaint. Respondent's motion was granted on January 27, 2003.

[5] Complainant contends that Respondent's arguments are first, that Respondent contracted away its responsibility as an "owner" under Subpart F, and second, that Respondent had no fair notice that it could not contract away its disclosure requirements to a management company to act as a lessor. *See* Complainant's Response to Respondent's First Affirmative Defense.

there were no genuine issues of material fact; there was no uncertainty as to how the regulations were to be applied to the facts in this case and the Lead Disclosure Rule provided fair notice to the regulated community; the owner of target housing, Respondent, was the "lessor" under the Lead Disclosure Rule when it contracted with an "agent," Hyde Park Realty, Inc. ("Hyde Park"), for the purpose of leasing its property; and Respondent was ultimately responsible for any failure to comply with the lead Disclosure Rule and could not contract away its responsibilities for compliance.[6] The Order on Accelerated Decisions, attached hereto, is incorporated by reference in this Initial Decision.

Respondent's second affirmative defense contended that its operations and management were unrelated to any other properties in which Gerald M. Fisch ("Gerald Fisch") may have an interest and Respondent requested that any allegation pertaining to Acres Real Estate, Ltd. be stricken from the Complaint. Respondent's Motion to Strike any Allegations Pertaining to Acres Real Estate, Ltd. was denied in an Order issued on August 12, 2002. *See* Order Denying Respondent's Motion to Strike Any Allegation Pertaining to Acres Real Estate, Ltd. from the Complaint.

An evidentiary hearing was held from August 27 through 29, 2003 in Chicago, Illinois.[7] Both parties have since filed post-hearing briefs and post-hearing reply briefs. For the reasons discussed below, having fully considered the record in the case, the arguments of counsel, and being fully advised, I find Respondent to be in violation of TSCA as alleged in Counts 1-45 of the Complaint. For these violations, Respondent is liable for a civil administrative penalty in the amount of $37,037.

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[6] In the Order on Accelerated Decisions, dated August 4, 2003, I found that the EPA has provided the requisite fair notice, through the text of the regulations and the discussion in the preamble concerning its provisions and the rulemaking process, that this was the EPA's interpretation. *See* Order on Accelerated Decisions, p. 20.

[7] At the hearing, Complainant presented leases and application forms for the apartments at issue that contained confidential information. C's Ex. 4. These documents have been treated as confidential, and no confidential information is contained in this decision.

II. Findings of Fact

1. Harpoon Partnership, the owner and lessor of the target housing at 5134-5136 S. Harper Avenue, Chicago, Illinois, failed to include, either within or as an attachment to the leasing contracts for Apartments 2B, 1B 4A, 2A, 2E, 4C, 1C, 3B, and 4B before the lessees were obligated under each lease: (1) a Lead Warning Statement; (2) a disclosure statement where the lessor either provides actual information about lead-based paint hazards in the building or states he has no knowledge of this; (3) a list of any records or reports of lead-based paint or a statement that no such records are available; (4) a statement by each tenant affirming receipt of the aforementioned information; (5) and certifying signatures and dates from each tenant, lessor and any agent.

2. For Counts 1, 10, 19, 28, and 37, where there was a child under the age of 6, a penalty of $15,015 is reasonable and appropriate.

3. For Counts 9, 18, 27, 36, and 45, where there was a child between the ages of 6 and 18, a penalty of $9,509.50 is reasonable and appropriate.

4. For the remaining counts, where there were no children under the age of 18 and no pregnant women, a penalty of $12,512.50 is reasonable and appropriate.

III. Liability

A. Counts 1-45

The Complaint alleges that Respondent failed to include, either within the leasing contract or as an attachment to the contract: (1) a Lead Warning Statement; (2) a statement disclosing either the presence of any known lead-based paints and/or lead-based paint hazards in the target housing or a lack of knowledge of such presence; (3) 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; (4) 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; and (5) the signatures of the lessor and the lessee certifying to the accuracy of their statements or the dates of

such signature, before the lessees of Apartments 2B[8], 1B[9], 4A[10], 2A[11], 2E[12], 4C[13], 1C[14], 3B[15], and 4B[16] of 5134-5136 S. Harper, Chicago, Illinois, were obligated under each contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100.

B. Lessor Requirements Under the Lead Disclosure Rule

Section 745.113(b) provides that:

> [e]ach contract to lease target housing shall include, as an attachment or within the contract, the following elements, in the language of the contract (e.g., English, Spanish):
> (1) a Lead Warning Statement with the following language:
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> > Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly.

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[8] The leasing contract at issue for apartment 2B is dated February 15, 1999.

[9] The leasing contract at issue for apartment 1B is dated December 22, 1997.

[10] The leasing contract at issue for apartment 4A is dated July 1, 1998.

[11] The leasing contract at issue for apartment 2A is dated February 15, 1998.

[12] The leasing contract at issue for apartment 2E is dated June 1, 1998.

[13] The leasing contract at issue for apartment 4C is dated June 15, 1998.

[14] The leasing contract at issue for apartment 1C is dated April 17, 1998.

[15] The leasing contract at issue for apartment 3B is dated August 1, 1998.

[16] The leasing contract at issue for apartment 4B is dated September 1, 1998.

> Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.
>
> (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 and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or the lead-based paint hazards, and the condition of the painted surfaces.
>
> (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.
>
> (4) A statement by the lessee affirming receipt of the information set out in paragraphs (b)(2) and (b)(3) of this section and the lead hazard information pamphlet required under 15 U.S.C. 2696....
>
> (6) The signatures of the lessors, agents, and lessees, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature.

40 C.F.R. §§ 745.113(b).

Further, 40 C.F.R. § 745.100 directs that all the information enumerated above must be attached to the leasing contract "before the purchaser or lessee is obligated under a contract to purchase or lease target housing." The information required under 40 C.F.R. § 745.113(b) for purposes of this decision will be referred to as the "lessor requirements."

C. Complainant's Prima Facie Case

In demonstrating Respondent's liability as charged, Complainant must establish a number of prima facie elements: (1) Respondent's apartment building is "target housing;"(2)

Respondent is a "lessor" and Hyde Park is Respondent's "agent;" (3) that each individual target apartment renter is a "lessee;" and (4) that Respondent did not include the lessor requirements in each target apartment's contract to lease or as an attachment thereto before the lessee was obligated to lease the target housing.

Target housing is defined in the regulations as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling. *See* 40 C.F.R. § 745.103. Respondent admits that its apartment building at 5134-5136 S. Harper, Chicago, Illinois was constructed prior to 1978[17] and that the building is "target housing" pursuant to the regulations. *See* Answer, p. 4, ¶¶ 18,19; *see also* Proposed Conclusions of Law, ¶ 6.

Under the Disclosure Rule, the term "lessor" means 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. *See* 40 C.F.R. § 745.103. As indicated in the Order on Accelerated Decisions, I have determined that Respondent is the lessor for the transactions alleged in the Complaint for the purposes of liability. *See* Order on Accelerated Decisions.

Pursuant to 40 C.F.R. § 745.103, an "agent" is any party who enters into a contract with a seller or a 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. In the Order on Accelerated Decisions, I found that Hyde Park was the agent for these leasing transactions. *See* Order on Accelerated Decisions, August 4, 2003.

The Disclosure Rule defines a "lessee" as any entity that enters into an arrangement to lease, rent, or sublease target

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[17] EPA Investigator Reginald Arkell's report indicates that based on publicly available information, the apartment building in question was constructed in circa 1912. *See* Tr. at 52. Respondent's attempts to impeach the reliability of the public records for the property at issue based on several inaccuracies in the Cook County land records is rejected. Respondent demonstrated no significant inaccuracies that affect the EPA's jurisdiction over this matter or the outcome of this case.

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. Respondent concedes that the individuals in the target apartments to whom the agent leased units are "lessees" as that term is defined by regulation. *See* Respondent Harpoon Partnership's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof ("Respondent's Post-Hearing Brief"), November 24, 2003, Conclusions of Law, ¶ 4.

D. Respondent's Arguments

With regard to the final element of Complainant's prima facie case, the inclusion of the lessor requirements in each target apartment's contract to lease or as an attachment thereto, Respondent argues that, as early as January 3, 1998, it complied with the regulatory requirements, through its agent Hyde Park, and attached to every lease a Disclosure Form[18] containing the information required under 40 C.F.R. § 745.113(b)(1)-(4) and distributed to every lessee an EPA pamphlet containing information about lead-based paint and the hazards involved therein prior to the dates of obligation of the leases. *See* Tr. at 380-84, 386, 387, 448-49, 486-87; R's Ex. 11; Respondent's Post-Hearing Brief, Section II, ¶ 18. Respondent argues that the Disclosure Form specifically contained the Lead Warning Statement, a statement disclosing the presence of lead-based paint and paint hazards, an indication whether records concerning lead-based paint are available, and an affirmation by the lessee that the lessee received the US E.P.A. pamphlet, disclosure statement, and any available reports. *See id.*

Respondent also explains that its agent periodically reviewed its files for signed and dated Disclosure Forms for each lease. *See* Tr. at 384-86. When Hyde Park identified that the signed Disclosure Form was not "returned" to them, they would send out a reminder letter. *See id.*

In support of these arguments, Respondent notes that included in the documents submitted by Hyde Park in response to the EPA's administrative subpoenas were photocopies of letters

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[18] This form has been described variously by the witnesses at the hearing as the "Disclosure Form," "Section 1018 Form," and the "Disclosure checklist." For the purposes of this decision, this form will be referred to as the Disclosure Form.

dated February 10, 1999, and March 19, 1999, reminding the tenants to return their completed Disclosure Forms. Respondent contends that these reminder letters show that the Disclosure Forms were given to the tenants when they received their leases and that disclosure of the lessor requirements was made in a timely manner. Respondent also notes that the record includes Disclosure Forms signed by the tenants of units 2A (dated February 15, 1999) and 1B (dated January 3, 1998 and March 31, 1999), as well as two additional reminder letters dated September 3, 1999.

In further support of its arguments, Respondent points to the testimony of Gerald Fisch, the managing partner of Harpoon Partnership, Joseph Zugalj, the president of Hyde Park, and Michael Ahmed, the tenant of unit 1B since 1998. Respondent submits that Mr. Fisch testified that he supplied Carl Collina, the president of Hyde Park, now deceased, with the Disclosure Form in 1997 and recommended that Hyde Park distribute these forms as required, that Mr. Zugalj testified that he did attach the Disclosure Forms to the leases as a standard practice, and that Mr. Ahmed testified that he received a Disclosure Form at the time he signed his lease for unit 1B in December 1997.

E. Analysis of Respondent's Arguments and Evidence

The record before me discloses that on December 10, 1998, the EPA conducted an inspection of Hyde Park, a management company for many apartment units for several different owners in the Chicago area, which included Harpoon Partnership. On April 27, 1999, the EPA sent Hyde Park an administrative subpoena to produce all leasing records since September 1996. *See* C's Ex. 2. Hyde Park, in response to the April 27, 1999 EPA administrative subpoena, submitted copies of all available leases and attachments for the apartments, including the nine units in question owned by Harpoon Partnership. *See* C's Exs. 3 and 4. Later in response to a subsequent subpoena in March 2000, Respondent verified that all available records had been produced in its earlier response. *See* C's Ex. 6.

A review of the leases and attachments produced by Hyde Park in June 1999 in response to the EPA's first subpoena discloses that none of the contracts to lease the target housing identified in the Complaint were in compliance with the requirements of 40 C.F.R. § 745.113(b). Each contract to lease did not include as an attachment, or within the contract, the lessor requirements set forth at 40 C.F.R. § 745.113(b). C's Ex. 4. The only two Disclosure Forms produced by Hyde Park pursuant to the EPA subpoenas were dated by the tenants February 15, 1999 and March

31, 1999, for units 2A and 1B, respectively, and were attached to leases not at issue in this matter.[19]

Respondent's argument that the "reminder letters" establish that the Disclosure Forms were given to each tenant at the time of leasing and, thus, there was no violation of the Lead Disclosure Rule is unavailing. The Lead Disclosure Rule specifically directs that *prior to* the lessee becoming obligated, the lessor must certify and the lessee must acknowledge that the lessor requirements were met and such were included in the leasing contract or as an attachment to it. *See* 40 C.F.R. §§ 745.100 and 745.113(b)(Emphasis added). Respondent is charged with failing to include the Certification and Acknowledgment information in the lease or as an attachment to the lease.

Here, the required regulatory language for the certification and acknowledgment of the lessor requirements was not contained in or attached to any of the leases and the existence of reminder letters is not sufficiently probative to show that the Disclosure Forms with Respondent's certifications were provided to the lessees before they were obligated under their leases. Rather, the six "reminder letters" in evidence sent by Respondent's agent to each lessee, which were all dated February 10, 1999 or later, indicate that the required certifications and acknowledgments were not made before or at the time of the execution of the leases, and confirm that completed Disclosure Forms for these target apartments were not retained by Hyde Park. I note that each of the reminder letters was sent between one to eight months after the lessee became obligated under the leasing contract. See C's Ex. 4, Attachments 1, 5-9; R's Ex. 1. I further note that Bruce Adelmann, the author of the "reminder letters," did not testify. See Tr. at 365-66.

The record indicates that the EPA investigation in December 1998 may have prompted Hyde Park to review its records and send out reminder letters to lessees to furnish completed Disclosure Forms. Such action, however, does not negate the fact that the leases at issue do not meet the regulatory requirements of 40 C.F.R. § 745.113(b) for certification and acknowledgment of the disclosure information.

I now turn to the testimony of Respondent's witnesses. Mr. Fisch testified that he attended a training session given by the Chicago Association of Realtors regarding the lead disclosure

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[19] The Disclosure Forms were signed by Joseph Zugalj of Hyde Park but were not dated by him.

rules in late 1996. Tr. at 357. Mr. Fisch credibly testified that he relayed his knowledge of the Lead Disclosure Rule to Carl Collina and Joe Zugalj at Hyde Park, provided Mr. Collina a copy of the Disclosure Form, and requested them to send the Disclosure Forms to the tenants. Tr. at 344.

Although Mr. Fisch's testimony that he relayed the requirements of the Lead Disclosure Rule to Hyde Park is credible, the testimony of Mr. Zugalj is not sufficiently credible or persuasive to show that Hyde Park actually gave a Disclosure Form to each tenant before or contemporaneously with the execution of the leasing contract. First, I observe that there are no documents corroborating Mr. Zugalj's alleged practice. Again, I note that the only Disclosure Forms presented and the reminder letters postdated the leases at issue. I also note that none of the Lead Disclosure Forms signed by Mr. Zugalj are dated by him. *See* R's Ex. 11. Second, Mr. Zugalj's testimony was vague because he did not have personal knowledge of the leasing transactions, and he was unable to recall and verify many of the dates and information at issue. *See* Tr. at 395-97. Mr. Zugalj's testimony was not corroborated by the testimony or affidavit of his partner, Bruce Adelmann. Finally, I note that Mr. Zugalj's testimony concerning has compliance with the Lead Disclosure Rule was self-serving and is not considered credible or probative, particularly in light of his 1993 conviction under the Federal Frauds and Swindles Statute. *See* C's Ex. 24; Tr. at 400.

Michael Ahmed, tenant of unit 1B, the only one of the nine target apartment lessees to testify or submit a statement, testified that he received a Lead Disclosure Form when he received the lease for 1B in December 1997. *See* Tr. at 449. Mr. Ahmed further testified that he signed the lease and paid Hyde Park a security deposit on December 22, 1997 which was non-refundable, that he moved into the unit on January 1, 1998, that he signed a Disclosure Form on January 3, 1998,[20] and that he signed another disclosure form in March of 1999. *See* C's Ex. 4, Attachment 2. At the hearing, Respondent proffered a faxed copy of a completed Disclosure Form dated January 3, 1997 by Mr. Ahmed. *See* R's Ex. 11. Mr. Ahmed explained that the correct date must have been January 3, 1998. This form was not included

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[20] The Disclosure Form executed by Mr. Ahmed on January 3, 1998 indicates that there was no information about lead-based paint or lead-based paint hazards in his unit or any common areas of the building at 5134-5136 S. Harper Avenue. *See* Tr. at 449, R's Ex. 11.

in the documents submitted by Hyde Park in response to the EPA's subpoenas, and again, this form is not dated by Mr. Zugalj. The *misdated* Lead Disclosure Form for Mr. Ahmed apparently had remained in his possession until a week before the hearing.[21]

Although Mr. Ahmed's testimony appeared to be somewhat credible, such does not show that Respondent complied with the certification and acknowledgment of the lessor requirements at 40 C.F.R. § 745.113(b). The lease in question was dated December 22, 1997 and the Disclosure Form was dated January 3, 1998. *See* R's Ex. 11. Mr. Ahmed testified that he signed the Disclosure Form on January 3, 1998. Mr. Ahmed signed the Lead Disclosure Form two weeks after becoming obligated under the apartment lease. Thus, the record does not demonstrate that the lessor requirements were certified and acknowledged before the lessee was obligated under the contract to lease. 40 C.F.R. § 745.113(b).

Respondent argues in the alternative that even if it cannot produce the records for the certification and acknowledgment of the lessor requirements because of the sloppy record keeping practices of its agent, it has shown that timely disclosure of the lessor requirements was made to the lessees. Thus, Respondent asserts that it should not be penalized for Hyde Park's minor "paperwork" violation. Respondent's argument is rejected.

Again, I point out that the Complaint does not charge Respondent for failure to notify each lessee of the lessor requirements, but for the failure to include the required information in each lease and which is evidenced by the lessor's certification and the lessee's acknowledgment pursuant to § 745.113(b). These violations are not the mere "paperwork" violations or ministerial acts as argued by Respondent. In this regard, I observe that the purpose of the Lead Disclosure Rule "is to ensure that families are aware of: (1) [t]he existence of lead-based paint or lead-based paint hazards in target housing, (2) the hazards of exposure to lead-based paint, and (3) ways to avoid such exposure before they become obligated to purchase or lease housing that may contain lead-based paint." Proposed Rules, 59 Fed. Reg. 54984 (Nov. 2, 1994).

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[21] Mr. Ahmed's testimony also indicated that lead testing was performed at his apartment and that he has never been given the results of any lead-based paint testing performed at 5134-5136 S. Harper Avenue. *See* Tr. at 454. I note that any action pertaining thereto is not cited in the Complaint before me.

Documentation of the lessor's and agent's compliance with the lessor requirements set forth at § 745.113(b) through certification and acknowledgment is the prescribed method of ensuring disclosure, which is the sole purpose of the Lead Disclosure Rule. The most effective and only realistic method of ensuring disclosure is to incorporate the language of the lessor requirements in the leasing contract or as an attachment thereto before the lessee is obligated under the contract. Otherwise, proof of disclosure would be reduced to a "he said, she said" controversy. The purpose of the Lead Disclosure Rule would be defeated without these "record keeping" requirements.

I note Respondent's argument that it should not be held accountable for the tenants' refusal to sign and return the Disclosure Forms in a timely manner. New leases should not have been executed without the required certification and acknowledgment of the lessor requirements, and such was enforceable by not providing the tenant with the lease and keys to the apartment until the Disclosure Form was completed. *See* Tr. at 407. Respondent could have addressed the question of renewals of existing leases by incorporating the lessor requirements in the language of the lease. In this case, however, there is no probative or credible evidence in the record showing refusal to sign by tenants.[22]

F. Retention of Certification and Acknowledgment Information

In its defense, Respondent also argues that it was not required to maintain documentation for more than three years from the commencement of the leasing period. *See* 40 C.F.R. § 745.113(c)(1). Respondent contends that Complainant cannot prove that violations occurred between 1997 and 1999 in a case filed in March 2002 because there is no regulatory requirement to keep records after three years. *See* Respondent's Post-Hearing Brief.

The regulatory requirement at 40 C.F.R. § 745.113(c)(1) provides that in leasing situations, the lessor and any agent must retain a copy of each completed attachment or contract containing the required information in § 745.113(b) for no less than three years from commencement of each lease. The purpose of the record keeping requirements in the Lead Disclosure Rule is to maintain copies of the information provided to demonstrate the lessor's compliance with the Lead Disclosure Rule, documenting

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[22] The testimony of Patrick T. Connor is immaterial and did not include reference to the apartments at issue in this matter. *See* 466-76.

the completion of all disclosure activities by the responsible parties and providing a record of compliance for use by EPA enforcement officials. *See* 61 Fed. Reg. 9081.

In this case, the administrative subpoenas issued to Hyde Park in April 1999 and March 2000 put Respondent on notice of a possible enforcement action. During early 2000, Respondent participated in discussions with the EPA concerning the EPA's enforcement action against Hyde Park. *See* Tr. at 313-14. In December 2000, the EPA sent Respondent a Pre-Filing Notice letter advising Respondent of its potential liability in this matter. *See* C's Ex. 10. Moreover, on July 19, 2001, Complainant sent Respondent's bank and titleholder of the trust, American National Bank, a letter notifying them of potential violations of federal lead-based paint disclosure laws by Respondent. *See* C's Ex. 9. At no time from the EPA's investigation in December 1998 through the hearing has Respondent indicated that it had any exculpatory documents concerning the leasing contracts for the nine units at issue other than the January 3, 1998 Disclosure Form faxed by Mr. Ahmed to Respondent one week before the hearing. The evidence produced by Respondent's agent, Hyde Park, in response to Complainant's administrative subpoenas is deemed adequate to sustain the charges against Respondent. Further, such evidence is sufficient to meet the preponderance of the evidence standard for Complainant's burdens of presentation and persuasion that the violations occurred as set forth in the Complaint. See 40 C.F.R. § 22.24.

G. Conclusion

In view of the foregoing, I find Respondent liable for failing to include, either within the contract or as an attachment to the contract, the lessor requirements before the lessees of Apartments 2B, 1B, 4A, 2A, 2E, 4C, 1C, 3B, and 4B of 5134-5136 S. Harper, Chicago, Illinois, were obligated under each contract cited in the Complaint pursuant to 40 C.F.R. §§ 745.113(b) and 745.100. In making this finding, I have considered the documentary and testimonial evidence presented by Respondent individually and collectively. There is no direct evidence that there was compliance with the certification and acknowledgment of the lessor requirements under § 745.113(b), and the circumstantial evidence presented is not sufficiently probative or credible to establish compliance.[23]

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[23] I note that Respondent has not introduced evidence to support its earlier assertion that several documents related to the leasing transactions were lost or destroyed in a flood at

IV. Penalty

The Consolidated Rules of Practice govern the assessment of civil administrative penalties in this proceeding. Section 22.27(b) of the Consolidated Rules of Practice provides in pertinent part:

> [i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.... If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b)(64 Fed. Reg. 40186 (July 23, 1999)).

The Board has recently interpreted this rule in *US Army, Ft. Wainwright Central Heating and Power Plant*, CAA Appeal No. 02-04, slip op. at 61-62 (EAB, June 5, 2003) and determined that a proposed penalty based upon the CAA Penalty Policy may be completely disregarded as long as the ALJ "adequately explains" her reasons for departure. The Board stated: "[t]he Part 22 regulations and the Board's decisions, however, make clear that the ALJ has significant discretion to assess a penalty other than that calculated pursuant to a particular penalty policy." *Id.* at 61 (citing 40 C.F.R. § 22.27(b); *In re Allegheny Power Serv. Corp. & Choice Insulation, Inc.*, 9 E.A.D. 636 (EAB 2001), appeal docketed, No. 6:01-CV-241 (S.D. W. Va. Mar. 16, 2001); *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997).

The ALJ's decisions must contain a reasoned analysis of the basis for the penalty assessment, but the ALJ is free to depart from the penalty policy as long as she adequately explains her rational. *Id.* at 61 (citing *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 535 (EAB 1998). *See also In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758-9 (EAB 1997) (The ALJ's penalty

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Hyde Park's offices in 1998. *See* Respondent's Answer, Fourth Affirmative Defense.

assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide 'specific reasons' for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e., that the choice of sanction not be an 'abuse of discretion' or otherwise arbitrary and capricious) (*quoted in US Army, Ft. Wainwright Central Heating and Power Plant*, CAA Appeal No. 02-04, slip op. at 61-62 (EAB, June 5, 2003)).

In another decision, issued the same day as *Ft. Wainwright*, the Board stated that:

> ALJ's are not compelled to use penalty policies in setting penalties. Instead an ALJ, 'having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand.' If the ALJ chooses not to apply the penalty policy, the ALJ must explain his reasons for forgoing the penalty policy. If the Board determines these reasons to be persuasive or convincing...the Board will defer to the ALJ's penalty analysis.

In re CDT Landfill, CAA Appeal No. 02-02, slip op. at 42 (June 5, 2003) (citations omitted) (quoting *In re Capozzi*, RCRA Appeal No. 02-01, slip op. at 30 (EAB March 25, 2003)).

As described above, Respondent has been found to have violated Section 409 of TSCA and its implementing regulations at 40 C.F.R. § 745.113(b) for certification and acknowledgment of disclosure.

Pursuant to the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) and the regulations promulgated thereunder[24], for violations occurring on and after January 31, 1997, the statutory maximum penalty for each violation shall be $11,000. Pursuant to the Rules of Practice, the EPA bears the burden of proof to show that any penalty sought

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[24] *See* Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69360 (December 31, 1996), codified at 40 C.F.R. Part 19 (March 15, 2004).

is appropriate.[25] *See In re John A. Capozzi*, RCRA (3008) Appeal No. 02-01, slip op. at 28, 11 E.A.D. __ (EAB, Mar. 25, 2003).

Section 16 of TSCA provides that:

> [i]n determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, gravity of the violation or any history of such prior violations, the degree of culpability, and such other matters as justice may require.

15 U.S.C. § 2615(a)(2)(B). In proposing a penalty of $56,980, the EPA employed the Section 1018 - Disclosure Rule Enforcement Response Policy[26] dated February 2000 ("ERP" or "Disclosure Guidance Document"), which was designed by the Agency to guide its calculation of civil penalties against sellers, lessors, and agents who fail to comply with certain requirements when selling or leasing target housing. *See* Section 1018 - Disclosure Rule Enforcement Response Policy, February, 2000, C's Ex. 11. This policy, with minor exceptions, follows the penalty factors set forth in the statute. The purpose of the Lead Disclosure Rule is to ensure that individuals and families receive the information necessary to protect themselves and their families from lead-based paint and/or lead-based paint hazards. *Id.* at 2. This information "will help families and individuals make informed housing decisions to reduce their risk of exposure to lead hazards." *Id.*

While the ERP is not binding on Administrative Law Judges, the EAB has emphasized that the Agency's penalty policies should be applied whenever possible because such policies "assume that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *In re M.A. Bruder & Sons*, RCRA (3008) Appeal No. 01-04, slip op. at 21, 10 E.A.D. __ (EAB, July 10, 2002); *In re Carroll Oil Co.*, 2002 WL 1773052 EPA, July 31, 2002.

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[25] "The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a).

[26] The ERP was developed under the general framework established by the *Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy*, 45 Fed. Reg. 59770 (1980)(TSCA Civil Penalty Guidelines).

A. Disclosure Penalty Policy Methodology

In lieu of a civil administrative complaint, the EPA may issue a notice of noncompliance ("NON") as determined on a case-by-case basis when justice would best be served. *See* ERP, at 6. In this case, Complainant determined that an NON would not be sufficient to address the violations involving apartments with children of various ages. This is a matter of prosecutorial discretion.

Where a violation warranting a penalty has occurred, the Disclosure Penalty Policy utilizes a two stage process for determining an appropriate penalty amount. *See* Disclosure Guidance Document, p. 9. The first step is the determination of a "gravity-based penalty" taking into account the nature of the violation, the circumstances of the violation, and the extent of harm that may result from a given violation. *See id.* These factors are incorporated into a penalty matrix (the Gravity-Based Penalty Matrix) which specifies the appropriate gravity-based penalty. *See id.* The second stage involves the upward or downward adjustment of the gravity-based penalty in consideration of the violator's ability to pay/continue in business, history of prior violations, degree of culpability, and "such other factors as justice may require," such as attitude, supplemental environmental projects, voluntary disclosure, size of business, single unit owners, and/or economic benefit of non-compliance. *See id.*

The Disclosure Penalty Policy characterizes as "major" violations those where there is potential for "serious" damage to human health, such as in cases where children under six reside on the premises and/or the housing was built prior to 1960, *i.e.*, prior to the time when lead levels in paint were reduced. It characterizes the nature/circumstances of egregious violations at various levels. Those violations which have a *high* probability of impairing the ability to access the information required to be disclosed are classified as "level 1 violations;" violations having a *medium* impact of impairing the ability to access the information are "level 2 or 3 violations;" and violations having a *low* impact on the ability to access the information required to be disclosed are "level 4, 5, or 6 violations."

B. Gravity-Based Penalty

The first stage, determining the gravity-based penalty for the violations, consists of determining the nature, circumstances and gravity of the violations that provides a penalty amount from the Gravity-Based Penalty Matrix.

1. The Nature, Circumstances, Extent and Gravity of the Violations

The TSCA Civil Penalty Guidelines discuss the "nature" of the violation as the essential character of the violation, and incorporate the concept of whether the violation is of a chemical control, control-associated data gathering, or hazard assessment nature. *See* ERP, at p. 9. The "circumstances" reflect the probability of harm resulting from a particular type of violation. *Id.* at 10. The primary circumstance to be considered is the lessee's ability to properly assess and weigh the factors associated with human health risk when leasing target housing. *See id.* Thus, the greater the deviation from the regulations (such as no disclosure), the greater the likelihood that the lessee will be uninformed about the hazards associated with lead-based paint, and, consequently, the greater the likelihood of a child being exposed to lead-based paint hazards. *See id.* And lastly, extent is used to consider the degree, range, or scope of the violation. *See id.*

The ERP explicitly provides that "[t]he harmful effects that lead can have on children under the age of six warrant a major extent factor." *Id.* at 11. Complainant appropriately placed each of the violations for Apartment 4B which are Counts 1, 10, 19, 28, and 37 in the "major" extent category because there was one child three years of age residing in the target apartment. *See* C's Ex. 4, Attachment 9. The ERP further provides that "[c]hildren age of six or above can also be harmed by exposure to lead-based paint and lead-based paint hazards; therefore, the extent factor takes this fact into consideration as well." *Id.* Complainant placed each of the violations for Apartment 3B which are Counts 9, 18, 27, 36, and 45 in the "significant" extent category because there was one child eleven years of age residing in the target apartment. *See* C's Ex. 4, Attachment 8. The remaining seven target apartments and the thirty-five related violations fall into the "minor" extent category as there were no other children under 18 years of age known to be residing in the property and there were no pregnant women known to be living in the target housing.

Next, for Counts 1 through 9, Complainant assigned each count a Level 2 "circumstance" value because the ERP designates the failure to include the Lead Warning Statement as a "circumstance" Level 2 indicating that each of these violations has a high probability of impairing the ability to assess the information required to be disclosed. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $8,800 for Count 1, $5,500 for Count 9, and $9,240 for Counts 2 through 8 (or $1,320 per count).

For Counts 10 through 18, Complainant assigned each count a Level 3 "circumstance" value because the ERP specifically designates this violation as a Level 3 indicating that each of these violations has a medium impact of impairing the ability to assess the information, as the lessor's disclosure statement is intended to provide a description of what the landlord knows about the historical presence of lead-based paint or the related hazards. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $6,600 for Count 10, $4,400 for Count 18, and $4,620 for Counts 11 through 17 (or $660 per count).

For Counts 19 through 27, Complainant assigned each count a Level 5 "circumstance" value because the ERP designates the failure to include a list of records or reports that are available to the lessor which pertain to lead-based paint or related hazards to be at Level 5, indicating that each of these violations has a low impact on the ability to assess the information required to be disclosed. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $2,200 for Count 19, $1,430 for Count 27, and $1,540 for Counts 20 through 26 (or $220 per count).

For Counts 28 through 36, Complainant assigned each count a Level 4 "circumstance" value because the ERP designates the failure to include a statement by the lessee affirming receipt of the required information to be at Level 5, indicating that each of these violations has a medium impact on the ability to assess the information required to be disclosed. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $4,400 for Count 28, $2,750 for Count 36, and $3,080 for Counts 29 through 35 (or $440 per count).

For Counts 37 through 45, Complainant assigned each count a Level 6 "circumstance" value because the ERP designates the

failure to include 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 to be at Level 6, indicating that each of these violations has a low impact on the ability to assess the information required to be disclosed. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $1,100 for Count 37, $550 for Count 45, and $770[27] for Counts 38 through 44 (or $110 per count).

The sum gravity-based penalty for all 45 counts is $56,980. Respondent has not challenged the calculation of the penalty or the characterizations of the circumstance or extent classifications assigned by the EPA in calculating the penalty. Rather, Respondent argues that the proposed penalty is excessive for paperwork violations and that the five counts for each leased unit is cumulative in nature. In other words, when a Respondent cannot produce the Disclosure Form, there are five separate violations rather than one violation.

As discussed above in the liability determination section, Respondent's violations are not merely "paperwork" violations.[28] When the Disclosure Form is absent, the ERP provides that each lessor requirement constitutes a violation, i.e., the failure to provide a Lead Warning Statement. *See* 40 C.F.R. § 745.113(b)(1). However, the proposed penalty for each leasing unit does not exceed the amount of penalty allowed by Section 16 of TSCA for the violation. The EPA's method allows for apportionment of the penalty when only certain elements of the certification and acknowledgment requirements are not met.

Respondent contends that the penalty in this case should be examined in the light of the $20,000 settlement made in the EPA's enforcement action against Hyde Park. *See* Tr. at 389. I

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[27] Complainant apparently made an arithmetic error where it had indicated $660 as the sum of seven violations at $110 each. The correct amount is indicated above. However, the total proposed penalty was correctly calculated to be $56,980.

[28] The regulatory requirement that the lessor, and any agent, shall retain a copy of the completed attachment or lease contract containing the certification and acknowledgment information for no less than three years from the commencement of the leasing period set forth at 40 C.F.R. § 745.115(c)(1) is characterized as a "record keeping requirement" but such does not diminish the requirement's importance to the regulatory scheme.

emphasize to Respondent that such settlement is not dispositive because the lessor, as a party named in the statute and regulations as obligated by their requirements, is ultimately responsible and liable for failure to comply with the certification and acknowledgment of disclosure requirements. I note that TSCA is a strict liability statute that holds that where there is more than one party, each is held to be jointly and severally liable. *See* discussion *infra* p. 26 (discussing TSCA's strict liability).

C. Adjustments to the Gravity-Based Penalty

1. Ability to Pay

In Respondent's Answer to EPA's Amended Complaint, dated May 20, 2002, Respondent raised its ability to pay the $56,980 proposed penalty[29] and did not alter its position in its Motion to Supplement its First Affirmative Defense to the Amended Complaint, dated January 24, 2003. In Respondent's Answer and Prehearing Exchange, Respondent failed to provide facts or information which would indicate that the proposed penalty should be adjusted due to Respondent's ability to pay the proposed penalty. Although Respondent contends that they place a majority of their profits directly back into their partnership, there is no claim that an assessment of the proposed penalty would affect their ability to continue in business or that they would not be able to pay the complete penalty amount.

Subsequently, Respondent withdrew its inability to pay claim in Respondent Harpoon Partnership's Response to Complainant's Motion to File second Amended Complaint filed on March 24, 2003. At hearing, Respondent stipulated to its ability to pay the proposed penalty. *See* Tr. at 339. Therefore, Complainant correctly did not apply a downward adjustment for Respondent's ability to pay.

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[29] In its Second Affirmative Defense, Respondent argues that "Harpoon is without sufficient funds to [pay] the civil penalty required by the U.S. EPA." *See* Respondent Harpoon Partnership's Answers and Supplemental Affirmative Defenses to the Amended Complaint, January 24, 2003, at p. 20. Specifically, Harpoon requests that EPA take into account "Harpoon's financial situation, without regard to any alleged connection between Gerald M. Fisch and other properties in which he may or may not have an interest, when requesting penalties." *Id.*

2. History of Prior Violations

When a violator has a history of having previously violated the Lead Disclosure Rule, the gravity-based penalty should be adjusted upward by a maximum of 25%. *See* ERP, at 15. In the instant case, Respondent had no history of prior violations and Complainant correctly did not make an upward adjustment to increase the gravity-based penalty.

3. Degree of Culpability

The ERP provides two principal criteria for assessing culpability: (a) the violator's knowledge of the Lead Disclosure Rule; and (b) the degree of the violator's control over the violative condition. *See* ERP, p. 15. When the violator intentionally commits an act which he knew would be a violation of the Lead Disclosure Rule or hazardous to health, the proposed penalty may be increased by up to 25%. *See id.*

In this case, Complainant did not increase the initial gravity-based penalty due to culpability. In reviewing the provision of the ERP which provides an increase in the penalty for culpability, Complainant states that it "has no information that the violations were intentional or that Respondent had previously received a NON." Complainant's Post-Hearing Brief, at 78. Complainant did not consider a downward adjustment of the proposed penalty on the basis of culpability because Complainant determined that the ERP does not provide for such a reduction. *See id.* at 78; Tr. at 184, 254.

Respondent points out that pursuant to the TSCA Guidelines, the gravity-based penalty may be decreased for the "innocent landowner" on the basis of degree of control. *See id.* Respondent argues that a significant reduction of the proposed penalty is warranted on the basis of its lack of culpability in this case, particularly as its agent was responsible for compliance with the Lead Disclosure Rule.

As indicated above, the ERP is based on the statutory factors set forth in Section 16(a)(2)(B) of TSCA and was developed under the general framework established by the Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59770 (1980) ("TSCA Guidelines"), C's Ex. 12, ERP at p. 9. The TSCA Guidelines provide a reduction of a gravity-based penalty by up to 25% for the adjustment factor of culpability. *See* TSCA Guidelines, at 59733. In providing that a reduction may be warranted, the TSCA Guidelines recognize that "another company

may have had some role in creating the violative conditions and thus must also share in the legal responsibility for the resulting consequences." TSCA Guidelines, at 59733.

TSCA is a strict liability statute that holds each party jointly and severally liable for violations of the statutory provisions. *See* In the Matter of *Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 EPA ALJ; In the Matter of *Leonard Strandley*, TSCA Appeal No. 89-4, 3 E.A.D. 718, 722 (CJO, Nov. 25, 1991). Nevertheless, culpability is a statutory factor that must be addressed when calculating the penalty amount. Although the ERP only specifies that an upward adjustment may be made for culpability, it does not explicitly exclude a downward adjustment for this factor. *See* ERP, p. 15.

Respondent's argument concerning a reduction for the mitigating factor of culpability is persuasive. An adjustment for culpability was clearly contemplated by the enabling statute. The TSCA Guidelines provide a reduction of the gravity-based penalty for the adjustment factor of culpability. To find that the ERP does not allow for a downward adjustment for culpability when the TSCA Guidelines do would be an inconsistent interpretation of the same penalty factor by the two TSCA penalty policies. Complainant's reason for not recognizing a reduction because the ERP does not provide explicitly for such is not compelling.

Additionally, failure to recognize a reduction of a penalty for the adjustment factor of culpability in situations where an owner of target housing employs an agent to lease the property does not address the possible question of the respondent's control or the agent's sharing in the legal responsibility. The text of the regulations, as well as the ERP, indicates that primary responsibility for compliance with the Lead Disclosure Rule lies with the management company that serves as the lessor's agent. Indeed, the regulations direct the agent to ensure compliance. 40 C.F.R. §§ 745.113(b)(5), 745.113(a).

The ERP recognizes that a "Property Management Firm" normally is empowered to perform certain duties on behalf of the lessor, including "showing the target housing to prospective Purchasers or Lessees and ensuring that all sales and leases are *properly executed* by the parties." (Emphasis added.) ERP, at A-1. In many instances, the Property Management Firm has primary responsibility for lease matters and this should be taken into consideration when analyzing the culpability factor. This does not mean, however, that an owner's use of a management company automatically warrants a reduction of a penalty for the owner

based on the culpability factor. Rather, the facts of each case must be examined to determine the owner's degree of culpability. Interestingly, I note that the ERP does not discuss responsibility apportionment and other relationship intricacies between the owner and the agent, one of the most common leasing scenarios in the business.

In view of the foregoing, I find that the EPA incorrectly determined that a downward adjustment of a gravity-based penalty in consideration of the violator's degree of culpability is not allowed under the ERP. *See* 15 U.S.C. § 2615(a)(2)(B).

I now turn to an examination of the facts in this case to determine Respondent's degree of culpability. There is no dispute that Mr. Fisch, the managing partner for Respondent, knew of the Lead Disclosure Rule and its requirements. As described in the liability section, Mr. Fisch testified that he attended a training session given by the Chicago Association of Realtors regarding the lead disclosure rules in late 1996. Tr. at 357. The testimony, however, indicates that only one of the partners in the partnership who owns the target housing, Mr. Fisch, had knowledge of the Lead Disclosure Rule.

Mr. Fisch testified on behalf of the Respondent that Hyde Park was purposely employed by the owner to take care of such leasing matters.[30] Moreover, Mr. Fisch credibly testified that he conveyed his knowledge of the lessor requirements and that he told Carl Collina, and later Mr. Zugalj, to give the Disclosure Form to the tenants. Tr. at 344. Mr. Fisch provided Hyde Park with a copy of the Disclosure Form. *See id.* According to Mr. Fisch's testimony, he was assured by Mr. Collina and Mr. Zugalj that Hyde Park was complying with the Lead Disclosure Rule. *See id.* Thus, the degree of control by the owner in the instant case appears to be minimal.

In view of this testimony by Mr. Fisch, the full reduction of 25% based on culpability is warranted. Further, I find that under the particular facts and circumstances of this case, the culpability factor deserves an additional 10% adjustment. A 35% reduction of the gravity-based penalty amount is more reasonable

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[30] The target housing's tax documentation is sent to Mr. Fisch's office at Acres Real Estate, not to the agent's office. Tr. at 328. However, Mr. Fisch testified that Hyde Park paid the taxes and mortgage, procured an insurance policy, and paid the bills on behalf of the Respondent. *See* Tr. at 302-3, 340, and 343-44.

and appropriate based on the facts here. The primary reason for the departure from the penalty policy is that Mr. Fisch took steps to ensure that the Lead Disclosure Rule was followed by relaying the information he received to his agent and inquiring whether the Lead Disclosure Rule was being followed. He was assured by Hyde Park that the requirements of the Lead Disclosure Rule were being met. As such, justice and fairness dictate that in this particular case, the culpability factor should have a greater reduction than that suggested in the ERP. I attach significance to the fact that the EPA, when seeking information concerning compliance with the Lead Disclosure Rule, subpoenaed Hyde Park and not Respondent.

Application of the 35% downward adjustment to the gravity-based penalty for the culpability factor results in a total penalty of $37,037. The penalty for Counts 1, 10, 19, 28, and 37, pertaining to apartment 4B where there was a child under the age of 6, is $15,015. The penalty for Counts 9, 18, 27, 36, and 45, pertaining to apartment 3B where there was a child between the ages of 6 and 18, is $9,509.50, and the penalty for the remaining counts, where there were no children under the age of 18 and no pregnant women, is $12,512.50.

Finally, I observe that the total penalty amount should not reflect that the Lead Disclosure Program is an abatement program.[31] *See* 40 C.F.R. § 745.107(a). The testimony of Mr. Cooper indicated that the EPA was seeking abatement of the lead paint hazards as part of its enforcement action. *See* Tr. at 217, 220. Although abatement of lead-based paint hazards may be an excellent Supplemental Environmental Project ("SEP") used to offset part of a monetary penalty, assessment of penalties should not be used as a means to convert the Lead Disclosure Program into an abatement program. The Lead Disclosure program is an informational program. The regulation explicitly states that "[n]othing in this section implies a positive obligation on the seller or lessor to conduct any evaluation or reduction activities." 40 C.F.R. § 745.107(a).

Furthermore, even if it were found that a downward adjustment for culpability could not be made as an adjustment to the gravity-based penalty, I note that a downward adjustment would then be warranted for other factors as justice may require.

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[31] Mr. Fisch testified that the EPA ultimately was seeking abatement. *See* Tr. at 314.

4. Other Factors as Justice May Require

a. No Known Risk of Exposure

Complainant may also make a downward adjustment of 80% when the responsible party provides documentation that the target housing is certified lead-based paint free. *See id.* In this case, Respondent has not provided any documentation that the property is lead-based paint free. Thus, Complainant appropriately did not make the downward adjustment of 80% for the documentation that the target housing is certified to be lead-based paint free.

b. Other Factors

Pursuant to the ERP, Complainant may also reduce the proposed civil penalty for other enumerated factors: a 30% adjustment for attitude; an adjustment of the value of a SEP; a potential 100% reduction for the audit policy outlined in the *Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66706 (Dec. 22, 1995); a reduction of up to 50% for voluntary disclosure; a discretionary reduction for the size of business pursuant to *EPA's Policy on Compliance Incentives for Small Business* (June 10, 1996); an adjustment of 50% for small independent owners and lessors where there is no agent involvement; or an adjustment for the economic benefit of noncompliance. *See* ERP at 16-18.

Complainant did not adjust the gravity-based penalty for any of the other factors as justice may require because none of the factors were applicable to Respondent's situation. *See* Complainant's Post-Hearing Brief, at 80-82. Therefore, the adjusted gravity-based penalty amount is $37,037.

Accordingly, Respondent is hereby assessed a civil penalty of $37,037. This amount is appropriate for the gravity of the violations committed and the nature of Respondent's operations. Specifically, I find this penalty amount to be reasonable when taking into account the seriousness of the violations and the culpability of Respondent pursuant to the Lead Disclosure Rule. Furthermore, the penalty amount is meaningful and sufficient to serve as a deterrent.

V. Conclusions of Law

1. The term "lessor", as used in the Lead Disclosure Rule, includes an "owner" of target housing. 40 C.F.R. § 745.103.

2. Complainant has sustained its burden of proof and has shown by a preponderance of the evidence that Respondent, as owner and lessor, failed to provide, pursuant to 40 C.F.R. § 745.113(b)(1)-(4), either within or as an attachment to the leasing contracts for apartments 2B, 1B 4A, 2A, 2E, 4C, 1C, 3B, and 4B: (1) a Lead Warning Statement; (2) a disclosure statement where the lessor either provides actual information about lead-based paint hazards in the building or states he has no knowledge of this; (3) a list of any records or reports of lead-based paint or a statement that no such records are available; (4) a statement by each tenant affirming receipt of the aforementioned information; (5) and certifying signatures and dates from each lessee, lessor and any agent before each lessee was obligated to lease the target housing. 40 C.F.R. §§ 745.113 and 745.100.

3. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and the ERP, as well as fairness and justice, require that Respondent is assessed a penalty of $37,037.

VI. Order

1. Respondent Harpoon Partnership, Inc. is assessed a civil administrative penalty in the amount of $37,037.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after the effective date of the Final Order by submitting a cashier's check or certified check in the amount of $37,037, payable to the "Treasurer, United States of America," and mailed to:

EPA Region 5
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

3. A transmittal letter identifying the subject case title and EPA docket number (TSCA-05-2002-0004), as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. § 901.9.

Appeal Rights

Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Barbara A. Gunning
Administrative Law Judge

Dated: May 27, 2004
Washington, DC