UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Ric Temple and	)	**Docket No. TSCA-5-99-015**
Paul Nay & Associates	)	
	)	
Respondent	)	

ORDER DENYING MOTION FOR DISCOVERY

One of the Respondents in this matter, Ric Temple[1], has filed a motion for leave to take depositions of two witnesses of the Complainant, the Region 5 Office of the United States Environmental Protection Agency (also referred to as the "Region"). The Respondents also seek discovery of certain medical records and documents. The Region has filed a response in opposition to the motion.

The Complaint in this proceeding alleges that the Respondents, real estate agents in North Vernon, Indiana, failed to comply with the disclosure requirements of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §4851 *et seq*, and its implementing regulations at 40 CFR Part 745, Subpart F (the "Disclosure Rule"). More specifically, the Complaint alleges that the Respondents were agents in the sale of a home in North Vernon, Indiana, to Kevin P. Morris and Courtenay C. Morris in October 1997. The home is alleged to have been built before 1978, and is thus characterized as "target housing" under the Act.

The Complaint states seven counts of violations, all stemming from the alleged failure of the Respondents to fulfill their duty to ensure that the sellers comply, or that the agents themselves comply, with the Disclosure Rule. These include the failure to provide the buyers with a lead hazard information pamphlet, the failure to allow them to inspect the house for lead-based paint, the failure to include a lead warning statement with the contract of sale, and the failure to obtain attestations by the purchasers concerning the disclosure of lead-based paint hazards.

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[1] The motion was filed by one of the Respondents, Ric Temple. It appears that the co-Respondent, Paul Nay & Associates, has filed a bankruptcy petition and may not be actively appearing in this proceeding at this point. However, both Mr. Temple and Mr. Nay are listed as witnesses in the Respondents' prehearing exchange, and their interests are allied in this matter. For convenience, the motion may be referred to as made by both Respondents.

In their Answer, the Respondents denied liability for these alleged violations. The Respondents assert that they lack knowledge of whether the subject home was "target housing" as defined in the Act, and that they are without knowledge as to what the sellers may have disclosed to the buyers of the home concerning possible lead-based paint hazards.

The parties have already filed their prehearing exchanges of evidence. The hearing in this matter is scheduled to take place June 20-21, 2000, in Columbus, Indiana. In order to obtain additional discovery beyond the prehearing exchange, a party must demonstrate that the proposed discovery satisfies the requirements of the EPA's Consolidated Rules of Practice, 40 CFR §22.19(e). The additional discovery must not unreasonably delay the proceeding or unduly burden the opposing party; must seek information within the control of the non-moving party that it has not provided voluntarily; and must seek information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. 40 CFR §22.19(e)(1). In order for the judge to order depositions upon oral questions, the moving party must also show that the information sought cannot reasonably be obtained by other means, or that the evidence may otherwise not be preserved for presentation by a witness at the hearing.

The Respondents seek to take the depositions of Mr. and Mrs. Morris, the buyers of the house for which the Respondents allegedly failed to disclose the lead-based paint hazard. Mr. Temple also seeks medical records of the Morris family, and wishes to "reserve the right" to take the deposition of the Morris' children's pediatrician, Dr. Bruce Davison. The Region opposes granting the Respondent the right to take the depositions of the Morrises. In its prehearing exchange, the Region did submit two lead blood tests for one of the Morris' children, their 2-year old daughter, Caitlin. The Region asserts that this satisfies the Respondent's request, since those are the only medical records it intends to introduce into the record of this hearing. The Region also opposes the possible deposition of Dr. Davison as speculative.

The Respondent's motion raises the issue of the extent to which medical evidence of blood lead levels in the family of the buyers of alleged target housing, and evidence on the possible causes of such levels, should be received in a proceeding charging real estate agents with failure to disclose lead-based paint hazards under the Act. The Complainant here, in its prehearing exchange, has listed the Morrises and Dr. Davison as intended witnesses. Caitlin's blood tests offered into evidence show elevated levels of lead at the time of her residence in the subject

house. Dr. Davison is expected to testify as to his "medical diagnosis" as to the exposure pathways causing the elevated blood levels," and also as to his recommendation that the Morrises move out of the North Vernon house.

In order to find liability for failure to comply with the Disclosure Rule, it is not necessary to show that any actual lead-based paint hazard exists at all in the "target housing," let alone that the buyers' family has elevated blood lead levels. The agent or seller of target housing is required to provide a pamphlet, allow an inspection, attach a warning to the contract, and comply with the additional disclosure requirements regardless of whether the subject house actually has any lead-based paint in it at all. See 42 U.S.C. §4852d. The failure of a seller or real estate agent to follow any of these requirements subjects them to liability for civil penalties of up to $10,000 per violation. 42 U.S.C. §4852d(b)(5). The statute provides for separate additional civil liability, and for treble damages, in civil actions brought by purchasers damaged by a seller's or agent's knowing violations of the Act. See 42 U.S.C. §4852d(b)(1,3,4).

However, if a house sold in violation of the Act's disclosure requirements turns out to have a significant lead-based paint hazard, and the buyer's family includes young children, these facts may be relevant to the seriousness of the violation and the appropriate amount of the civil penalty. The Act explicitly recognizes the problem of low-level lead poisoning in children. One of its chief purposes is to reduce that threat. See 42 U.S.C. §§4851 and 4851a.

These circumstances are recognized in the Interim Enforcement Response Policy for the Residential Lead-Based Paint Hazard Reduction Act, dated January 1998 (the "Enforcement Response Policy" or "ERP"). The Region used the ERP to calculate the proposed civil penalty in this case. One of the chief factors to be used in determining the seriousness of the alleged violation, and the resulting "extent category," is the age of children in the purchasers' family. (ERP, p. 12-13). The Morris' daughter, Caitlin, was two years old at the time of the transaction. In addition, the Region asserts that Courtenay Morris was pregnant at the time of the sale. Further, the house was tested and found to have high levels of lead-based paint in poor condition. Under the ERP, these circumstances all result in rendering these "major extent category" violations, and "egregious" violations, for the purposes of calculating penalties.

The Respondents do not appear to dispute these facts. They may dispute their culpability with respect to disclosure of

possible lead-based paint hazards in the house to the purchasers.[2] In any event, the Respondents have not sufficiently supported their request to take the depositions of the Morrises.

The Respondents' motion is vague. Respondents only specifically mention the purported intention of the Region to show that the Respondents' failure to comply with the Disclosure Rule caused elevated blood lead levels in the Morrises. It is not at all clear that the Region intends to prove that proposition in this proceeding. Evidence on this issue will be sharply limited. The cause or causes of the family's blood lead levels is at best a tangential issue in this proceeding. That could well be the main issue in civil action for damages, which has apparently been commenced by the Morrises against the Respondents.[3] But it is not a material issue in this proceeding for civil penalties for alleged violations of the Disclosure Rule.

In this proceeding, the Respondents' could be found liable for violating the Disclosure Rule even if the Morrises had no lead found in their blood tests. The gravity of any violations, and the amount of any penalties, will depend on the risk created to the purchasers by the sale of targeted housing without following the Disclosure Rule. The facts concerning the age of the purchasers' children, the pregnancy of the mother, the lead tests in the house, and the blood tests, could all be relevant to the calculation of any civil penalty. The facts as alleged by the Region, if proven, would indicate a high risk of lead poisoning that the Act is designed to prevent. But it would not be productive in this proceeding to explore to any significant extent beyond those facts to the underlying specific medical issues. That is more appropriate in another forum. Thus, if the purpose of the discovery sought is to probe the causes of the purchasers' blood lead levels, that is not seeking information that has significant probative value on a disputed issue of material fact relevant to liability or relief sought, as required by 40 CFR §22.19(e)(1)(iii).

In addition, the Respondents have not demonstrated any real need to depose the Morrises or Dr. Davison. They have not pointed

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[2] The Complainant has filed a motion for partial accelerated decision as to the Respondents' liability for the alleged violations. Although the Respondents have not yet responded, in their Answer and prehearing exchange they indicated that there may have been some disclosure to the purchasers concerning lead-based paint and the Act by the sellers or agents.

[3] Such an action is referred to by the Region in its response to the Respondents' motion for discovery.

out any information sought that is not already available through the prehearing exchanges. They have not indicated any specific factual dispute with the material submitted with the Region's prehearing exchange. The Complainant has disclosed the medical records of Caitlin's blood tests, and stated that those are the only medical records it intends to offer into evidence. The Morrises and Dr. Davison will be fully available at the hearing to testify in response to questions by both parties. Hence, the Respondents have not met the requirements for allowing additional discovery pursuant to 40 CFR §22.19(e)(3). Their motion for discovery will be denied.

Order

The Respondents' motion for leave to conduct discovery is denied.

Andrew S. Pearlstein
Administrative Law Judge

Dated: April 27, 2000
Washington, D.C.