UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**
	)
BELLEFLOWER REALTY,	**) DOCKET No. TSCA-06-2002-0712**
	)
Respondent.	**)**

DEFAULT ORDER AND INITIAL DECISION

This proceeding was commenced on March 5, 2002 with the filing of a Complaint by the Complainant, the United States Environmental Protection Agency, Region 6 (EPA), against Respondent, Belleflower Realty. The Complaint charges the Respondent in six counts with ten violations of Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689, by failing to comply with the Real Estate Notification and Disclosure Rule requirements of 40 C.F.R. Part 745, Subpart F (40 C.F.R. §§ 745.100-745.119), a rule promulgated under section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851 *et seq.* The Complaint proposed a total penalty of $4,070.

On or about July 22, 2003, Respondent, *pro se,* filed a Response to the Complaint.[1] In its Response, Respondent admitted that certain administrative errors were made on certain lead-based paint disclosure forms and that such errors had been corrected and, in light thereof, requested a settlement. No specific request for hearing was made. Nevertheless, on or about January 20, 2004, the Regional Hearing Clerk referred the case to the Office of Administrative Law Judges (OALJ) for the purposes of assigning a presiding judge for hearing.

Thereafter, the parties were offered, and accepted, an opportunity to participate in OALJ's Alternative Dispute Resolution (ADR) process. The parties participated in ADR from February 4, 2004 until April 14, 2004, when the Neutral Judge reported that settlement efforts had been unsuccessful. Thereafter, my esteemed colleague, the Honorable Barbara A. Gunning was designated to preside over this matter.

On April 16, 2004, Judge Gunning issued a Prehearing Order requiring the Complainant to

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[1] The Response to the Complaint filed on Respondent's behalf was prepared and signed by Jack Burkett, who is the corporate Respondent's "owner/broker," according to its letterhead. While the record before me does not evidence any extensions of time for answering having been granted by the Regional Judicial Officer, the Response indicates that the Complainant consented to the Respondent's delay in responding based upon Mr. Burkett's personal family crisis.

file its Initial Prehearing Exchange on or before June 2, 2004; Respondent to file its Initial Prehearing Exchange on or before July 2, 2004; and permitting Complainant to file a rebuttal prehearing exchange on or before July 16, 2004. The Prehearing Order further stated:

> Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. See Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

In accordance with the Prehearing Order, on June 2, 2004, Complaint filed its Initial Prehearing Exchange, identifying three witnesses and 5 exhibits as well as providing other information responsive to the Prehearing Order.

On June 8, 2004, Judge Gunning filed a Recusal Order in this matter and the undersigned was subsequently redesignated to preside over the case.

On July 15, 2004, Complainant filed its "Rebuttal Prehearing Exchanged," in which it noted that to date Respondent had not filed its Prehearing Exchange in accordance with the Prehearing Order.

In response to Respondent's failure to file its prehearing exchange, or otherwise respond to the Prehearing Order, on July 13, 2004, the undersigned issued an Order to Show Cause, requiring that on or before July 23, 2003, Respondent show good cause why it failed to submit its Prehearing Exchange in a timely manner and "why a default should not be entered against it [in] accordance with 40 C.F.R. § 22.17(a)."

To date, Respondent has not responded to the Show Cause Order nor the Prehearing Exchange Order issued by this tribunal.

Section 22.17(a) of the Consolidated Rules of Practice provides that:

> A party may be found to be in default: . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of respondent's right to contest such factual allegations. . . .

Section 22.17(c) of the Consolidated Rules of Practice provides that:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default

> order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. . . .

The Prehearing Order required Respondent to respond to it on or before July 2, 2004 or suffer default. The Order to Show Cause required a response to it by July 23, 2004 if Respondent wished to avoid default. To date, Respondent has not responded to either of those Orders. Thus, the Respondent is hereby found to be in default. In accordance with Rule 22.17(a), this constitutes an admission of the facts alleged in the Complaint and grounds for assessment of the penalty of $4,070 proposed therein.

The following Findings of Fact and Conclusions of Law are based upon the Complaint, Respondent's Response thereto, Complainant's Prehearing Exchange, and other documents of record in the case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Complainant is the United States Environmental Protection Agency (EPA), Region 6.

2. The Respondent is Belleflower Realty, a corporation doing business in Albuquerque, New Mexico, engaged in the business of acting as an agent (within the meaning of 40 C.F.R. § 745.103) for others selling and/or leasing housing, including housing constructed prior to 1978, which is defined as "target housing" under 40 C.F.R. § 745.103.

3. Section 745.113(a)(2), 40 C.F.R. requires a seller or the agent for the seller to include as an attachment to the sales contract, a statement by the seller disclosing either the presence of any known lead-based paint and/or lead based paint hazards in the target housing, or indicating no knowledge of the presence of lead based paint and/or lead-based paint hazards.

4. Section 745.110(a), 40 C.F.R. requires a seller or the agent for the seller to permit the purchaser a ten-day period to conduct a risk assessment or inspection of the target housing for the presence of lead-based paint before the purchaser becomes obligated under a purchase contract.

5. Section 745.113(a)(5), 40 C.F.R. requires a seller or the agent for the seller to include as an attachment to the sales contract a statement by the purchaser, indicating that the purchaser has either received the opportunity to conduct a risk assessment or inspection or has waived such opportunity.

6. Section 745.113(a)(4), 40 C.F.R. requires a seller or the agent for the seller to include as an attachment to the sales contract a statement by the purchaser affirming receipt of the information required by 40 C.F.R. §§ 745.113(a)(2) (disclosing known paint hazards) and (a)(3) (disclosing records available of paint hazards) and the lead hazard information pamphlet required under 15 U.S.C. § 2696.

7. Section 745.113(a)(3), 40 C.F.R. requires a seller or the agent for the seller to include as an attachment to the sales contract a list of any records or reports available to the seller regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records exist.

8. Section 745.113(a)(7), 40 C.F.R. requires a seller or the agent for the seller to include as an attachment to the sales contract the signatures of the sellers, agents and purchasers certifying to the accuracy of their statements made therein as well as dates of signatures.

9. On or about July 13, 1999, Respondent represented the seller and was the agent for the sale of target housing at 11005 Haines, NE, Albuquerque, New Mexico.

10. On or about July 28, 1999, Respondent represented the seller and was the agent for the sale of target housing at 1909 Sanchez Road, SW, Albuquerque, New Mexico.

11. On or about February 5, 2000, Respondent represented the seller and was the agent for the sale of target housing at 812 Valencia NE, Albuquerque, New Mexico.

12. On or about February 19, 2000, Respondent represented the seller and was the agent for the sale of target housing at 11005 Haines, NE, Albuquerque, New Mexico.

13. Respondent failed to attach to the sales contract a statement by the seller disclosing either the presence of any known lead-based paint and/or lead based paint hazards in the target housing, or indicating no knowledge of the presence of lead based paint and/or lead-based paint hazards as required by 40 C.F.R. § 745.113(a)(2) to the purchase agreement for the sale of the target housing at 11005 Haines, NE, Albuquerque, New Mexico as alleged in Count 1 of the Complaint.[2]

14. Respondent's failure to attach the statement required by 40 C.F.R. § 745.113(a)(2) the purchase agreement for the sale of the target housing at 11005 Haines, NE, Albuquerque, New Mexico constitutes a violation of Section 409 of TSCA, 15 U.S.C. §2689.

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[2] The Lead-Based Paint Disclosure Before Sale Form for the 11005 Haines NE property reflects that the term "n/a" is placed where the disclosure required by 40 C.F.R. § 745.113(a)(2) is to be made and boxes available to be marked to indicate such disclosures by the seller are left empty or blank. *See*, Exhibit 1 to Respondent's Response Part II (a).

15. Respondent did not permit the purchasers of 11005 Haines NE and 1909 Sanchez Road SW a ten day opportunity, as required by 40 C.F.R. § 745.110(a), to conduct a risk assessment or inspection of the target housing to determine the presence of lead-based paint before the purchasers began obligated under a contract to purchase the target housing as alleged in Count II of the Complaint.[3]

16. Respondent's failure to permit the purchasers of 11005 Haines NE and 1909 Sanchez Road SW the opportunity to conduct a risk assessment or inspection of the target housing within a ten day period to determine the presence of lead-based paint before the purchasers began obligated under a contract to purchase the target housing, as required by 40 C.F.R. § 745.110(a), constitutes two violations of Section 409 of TSCA, 15 U.S.C. §2689.

17. Respondent failed to attach to the sales contract a statement required by 40 C.F.R. § 745.113(a)(5) from the purchasers of the target housing at 10015 Haines NE and 1909 Sanchez Road SW, indicating that the purchasers had either received the opportunity to conduct a risk assessment or waived such opportunity as alleged in Count III of the Complaint.[4]

18. Respondent's failure to attach a statement required by 40 C.F.R. § 745.113(a)(5) from the purchaser of the target housing at 10015 Haines NE and 1909 Sanchez Road SW constitutes two violations of Section 409 of TSCA, 15 U.S.C. §2689.

19. Respondent failed to include as an attachment to the contract with the purchaser of 11005 Haines NE the statement of the purchaser required by 40 C.F.R. § 745.113(a)(4) regarding affirming receipt of the information required by 40 C.F.R. 745.113(a)(2) (disclosing known paint hazards) and (a)(3) (disclosing records of paint hazards) and the lead information pamphlet required under 15 U.S.C. 2696 as specified in 40 C.F.R. § 745.113(a)(4) as alleged in Count IV of the Complaint.[5]

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[3] While Respondent denied in his Response to the Complaint the assertion that the purchasers of the 11005 Haines NE and 1909 Sanchez Road SW were not permitted a ten day period to conduct risk assessments as required by 40 C.F.R. § 745.110(a), the Lead-Based Paint Disclosure Before Sale Forms for the 11005 Haines NE and 1909 Sanchez Road SW properties reflects no markings to indicate that the buyers acknowledged having receiving such opportunities and/or waiving the same as required by 40 C.F.R. § 745.110 and there are no other documents in the file otherwise supporting the Respondent's denial in this regard. *See*, Exhibits 1 and 2 to Respondent's Response Part III (c).

[4] *See*, Footnote 3 above.

[5] The Lead-Based Paint Disclosure Before Sale Form for the 11005 Haines NE property reflects that the boxes where the buyer would mark to affirm receipt of such information and pamphlet are empty or left blank. *See*, Exhibit 1 to Respondent's Response Part III (a) and (b).

20. Respondent's failure include as an attachment to the contract with the purchaser of 11005 Haines NE the statement of the purchaser required by 40 C.F.R.§ 745.113(a)(4) as to affirming receipt of the information required by 40 C.F.R. § 745.113(a)(2) and (a)(3), and the lead information pamphlet required under 15 U.S.C. 2696 as specified in 40 C.F.R. § 745.113(a)(4), constitutes a violation of Section 409 of TSCA, 15 U.S.C. §2689.

21. Respondent failed to attach to the purchase contact for the sale of 11005 Haines NE, 1909 Sanchez Road SW, and 8316 Portales NE, a list of any records or reports available or a statement required by 40 C.F.R.§ 745.113(a)(3) that no such records exist as, as alleged in Count V of the Complaint.[6]

22. Respondent's failure to attach to the purchase contact for the sale of 11005 Haines NE, 1909 Sanchez Road SW, and 8316 Portales NE a list of any records or reports available, or a statement that no such records exist as required by 40 C.F.R. § 745.113(a)(3), constitutes three violations of Section 409 of TSCA, 15 U.S.C. §2689.

23. Respondent failed to include in the contract for 812 Valencia NE the signatures certifying as to the accuracy of statements as well as dates of signatures as alleged in Count VI of the Complaint.

24. Respondent's failure to include in the contract for 812 Valencia NE the signatures certifying as to the accuracy of statements as well as dates constitutes a violation of Section 409 of TSCA, 15 U.S.C. §2689.[7]

DETERMINATION OF CIVIL PENALTY AMOUNT

25. Section 22.17(c) of the Consolidated Rules of Practice provides in pertinent part that upon issuing a default "[t]he relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R.§ 22.17(c).

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[6] The Lead-Based Paint Disclosure Before Sale Form for the properties at 11005 Haines NE property, 1909 Sanchez Road SW, and 8316 Portales NE, reflects that the term "n/a" is placed where the seller's disclosure of the provision of available records as required by 40 C.F.R. § 745.113(a)(3) is to be made and/or the boxes confirming such provisions are left blank . *See*, Exhibits 1, and 3 to Respondent's Response Part II(b).

[7] The Lead-Based Paint Disclosure Before Sale Form for the 812 Valencia NE property dated February 19, 2000 is neither signed nor dated by the buyer. See, Exhibit 4 to Respondent's Response and Respondent's Response to Complaint acknowledging the same.

26. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4852d, and 40 C.F.R. Part 745, Subpart F, authorizes the assessment of a civil penalty under 16 of TSCA, 15 U.S.C. § 2615, of up to $11,000 for each violation as adjusted by the Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69360 (Dec. 31, 1996).

27. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires that the following factors be considered in determining the amount of any penalty assessed under Section 16: the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as justice may require.

28. EPA has issued guidelines for penalties under TSCA titled "Section 1018 - Disclosure Rule Enforcement Response Policy," dated December 1999. *See*, Exhibit 4 to Complainant's Initial Prehearing Exchange.

29. Having found that Respondent violated TSCA in ten instances, I have determined that $4,070, the penalty proposed in the Complaint, is the appropriate civil penalty to be assessed against Respondent in that it is neither clearly inconsistent with the record of the proceeding nor clearly inconsistent with the Act.

30. In doing so, I have taken into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to Respondent, the ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as justice may require, which are all of the factors identified by Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2). I have also considered the above referenced guidelines.[8]

31. In assessing this penalty, I find persuasive the rationale for the calculation of the assessed penalty set forth in the Complaint and in Complainant's Initial Prehearing Exchange filed in this proceeding and incorporate such rationale by reference into this Order.

ORDER

1. For failing to comply with the Prehearing Order and Order to Show Cause of the Presiding Officers, as enumerated above, Respondent is hereby found in **DEFAULT.**

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[8] The Prehearing Order issued in this case gave Respondent the opportunity to submit a statement explaining why the proposed penalty should be reduced or eliminated, and particularly to submit any documentation which would evidence inability to pay the proposed penalty. See, Prehearing Order dated April 16, 2004. As indicated above, to date Respondent has chosen not to respond to that Order.

2. Respondent Belleflower Realty a/k/a Belleflower Realty Corporation is assessed a civil administrative penalty in the amount of $ 4,070.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $4,070, payable to "Treasurer, United States of America," and mailed to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 6
P.O. Box 360582M
Pittsburgh, PA 15251

4. A transmittal letter identifying the subject case and EPA docket number as well as Respondent's name and address, must accompany the check.

5. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See*, 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

6. Pursuant to 40 C.F.R. §22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

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Susan L. Biro
Chief Administrative Law Judge

Dated: July 27, 2004
Washington, D.C.