United States of America
Environmental Protection Agency

Before the Administrator

In the Matter of	**)**	
	)	
LEONARD G. GREAK	**)**	**Docket No. TSCA-3-2000-0016**
	)	
Respondent.	**)**	

ORDER GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

On November 1, 2000, the Associate Director for Enforcement of the Waste and Chemicals Management Division of the United States Environmental Protection Agency - Region III (Complainant) filed a Motion for Accelerated Decision as to Liability (Motion) in this proceeding, as well as a Brief in Support of the Motion. On November 22, 2000, Leonard G. Greak (Respondent) opposed the Motion by filing Respondent's Answer to Complainant's Motion for Accelerated Decision as to Liability (Answer to Motion). Complainant filed a Reply Brief on December 14, 2000. For the reasons set forth below, Complainant's Motion is hereby granted.[1]

Background

This proceeding was initiated by a complaint dated November 1, 2000, issued by Complainant pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), as amended, 15 U.S.C. § 2615(a). The complaint alleges that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, and Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (RLPHRA), 42 U.S.C. § 4852d, by failing to comply with the regulatory requirements of 40 CFR Part 745, Subpart F, pertaining to the disclosure of known lead-based paint and/or lead-based paint hazards upon sale or lease of residential property (the "Disclosure Rule").[2] The complaint alleges that Respondent violated the Disclosure Rule when, on or about May 13, 1998, he entered into an "Agreement of Sale" (Contract) to sell a residential dwelling and failed, prior to the Purchasers becoming obligated under the Contract, to provide disclosures and opportunities for inspection and obtain the Purchasers' attestations concerning lead-based paint as required by the Rule. Seven violations are alleged, for which Complainant proposes a total penalty of $22,000.00.

---

[1] Complainant's Motion for Accelerated Decision as to Penalty shall be the subject of a future order.

[2] The Disclosure Rule pertains to "target housing," which is defined as housing constructed prior to 1978, with some exceptions not here applicable.

Specifically, Complainant alleges the following seven counts of violations of the Disclosure Rule:

1) Respondent did not provide an EPA-approved lead hazard information pamphlet to Purchasers prior to their becoming obligated under the Contract, as required by 40 CFR § 745.107(a)(1);

2) Respondent did not include, as either an attachment to or within the Contract, a lead warning statement as required by 40 CFR § 745.113(a)(1);

3) Respondent did not include, as either an attachment to or within the Contract, a statement disclosing the presence of any known lead-based paint in the residence or indicating Respondent's lack of knowledge of such presence, as required by 40 CFR § 745.113(a)(1);

4) Respondent did not include, as either an attachment to or within the Contract, a list of any records or reports available to Respondent regarding lead-based paint in the subject property that were provided to the Purchasers or a statement that no such records were available, as required by 40 CFR § 745.113(a)(3);

5) Respondent violated 40 CFR § 745.113(a)(4) by not including, as either an attachment to or within the Contract, a statement by the Purchasers affirming receipt of the information set out in 40 CFR §§745.113(a)(2) and (a)(3) and the lead hazard information pamphlet required under 15 U.S.C. § 2686;

6) Respondent did not include, as either an attachment to or within the Contract, a statement by the Purchasers affirming that the Purchasers had either received the opportunity to conduct an evaluation[3] of the residence for the presence of lead-based paint and/or lead-based paint hazards in accordance with 40 CFR 745.110(a) or had waived the opportunity, as required by 40 CFR § 745.113(a)(5); and

7) Prior to the Purchasers becoming obligated under the Contract, Respondent did not provide the Purchasers a 10-day period to conduct an evaluation of the property for the presence

[3]Although 40 CFR § 745.113(a)(5) uses the term "risk assessment or inspection" and does not use the term "evaluation," 40 CFR § 745.103 states that: "*Evaluation* means a risk assessment and/or inspection." The terms "risk assessment" and "inspection" are themselves defined by 40 CFR § 745.103 (definitions quoted *infra*). This Order uses the term "evaluation" synonymously with "risk assessment and/or inspection," as defined by 40 CFR § 745.103.

of lead-based paint, nor did Respondent submit any evidence that the Purchasers waived this right in writing, as required by 40 CFR § 745.110.

Complainant asserts in its Motion that Respondent in its Answer to the Complaint admits each of the elements necessary to prove a violation in each of the seven counts cited in the complaint. Complainant has identified portions of the pleadings which it believes show the absence of any genuine issue of material fact as to Respondent's liability for the seven counts of the complaint. Complainant further argues that Respondent's Answer to Complainant's Motion fails to assert that any genuine issue of material fact exists, and that Complainant is therefore entitled to an accelerated decision as to liability as a matter of law. Respondent's principal[4] counter-argument is that the presence of two "as is" clauses in the Contract satisfies the cited statutory and regulatory requirements.

Discussion

I. Standards of Production and Persuasion

Summary judgment law under Federal Rule of Civil Procedure (FRCP) 56 is applicable to accelerated decisions under the Rules of Practice, 40 CFR § 22.20. *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *CWM Chemical Services, Inc.*, 6 E.A.D. 1 (EAB 1995). The party moving for summary judgment has an initial burden to show the absence of any genuine issue of material fact by "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2584, 91 L.Ed.2d 265 (1986), *quoting* FRCP 56(c). A "material" fact is one which, under the law governing the proceeding, might affect the outcome of the proceeding. *BWX Technologies, Inc.*, RCRA Appeal No. 97-5 (EAB, April 5, 2000); *Puerto Rico Aqueduct and Sewer Authority*, 35 F.3d 600. Upon such showing, the opponent of the motion "may not rest upon the mere allegations or denials of [its] pleading, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial," and if it "does not so respond, summary judgment, if appropriate, shall be entered against [it]." FRCP 56(e). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence.

---

[4]Respondent advances a number of other arguments in defense, including that Respondent is not in the business of selling real estate (Answer to Complaint, p. 9, ¶ 2); that Respondent is unable to pay the proposed penalty (*Id*. at p. 9, ¶ 3; p. 10, ¶ 5); that the proposed penalty exceeds the value of the residence (*Id*. at p. 9); that Respondent was not aware of the statutory and regulatory requirements (*Id*. at p. 9, ¶ 2; p. 10, ¶ 2); that Respondent was unaware of the presence of lead-based paint in the residence (*Id.* at p. 9, ¶ 2); that the Purchasers are currently in default on their house payments (*Id*. at p. 11, ¶ 6), and that Purchasers have no interest in prosecution of the Respondent (*Id*. at p. 11, ¶ 7). These arguments are without merit and/or pertain to penalty calculation rather than to liability. Respondent also argues that the Purchasers did conduct a general inspection of the residence and waived their right to conduct an "evaluation" for lead-based paint as defined by 40 CFR § 745.103. (*See, e.g.,* Respondent's Answer to Complaint, p.6, ¶ 42, pp.7-8, ¶ 46; p.9, ¶ 1; p.10, ¶ 3; p.11, ¶ 8; Respondent's Answer to Motion, p.1, ¶ 3). This argument is addressed *infra*. Respondent's principal asserted defense, however, lies in the "as is" clauses found in paragraphs 10 and 11 of the "Agreement of Sale."

Clarksburg Casket Company, EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999); *Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997). Federal courts are not obligated upon motion for summary judgment "to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 916, n.7 (5th Cir. 1992); *see also, L.S. Heath & Son, Inc., v, AT&T Information Systems, Inc.*, 9 F.3d 561, 567 (7th Cir. 1993). However, the record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

A. Complainant's Burden

Complainant has identified portions of the pleadings which do show the absence of any genuine issue of material fact as to liability by asserting that Respondent admits in its Answer to the Complaint each of the elements necessary to prove a violation in each of the seven counts cited in the complaint. Specifically, Respondent admits in its Answer to the Complaint that: the building located at 507 Chase Street in Kane, Pennsylvania (the "building") was constructed prior to 1978[5] and is a single family "residential dwelling" and "target housing," as defined by 40 CFR § 745.103 and within the meaning of the relevant statutes;[6] that at the time of the alleged violations, Respondent held legal title to the building and was the "owner" of the building as defined by 40 CFR § 745.103;[7] that on or about May 13, 1998, Respondent became the "seller" of the building, as defined by 40 CFR § 745.103;[8] that the Purchasers in this case are "purchasers," as defined by 40 CFR § 745.103;[9] that the "Agreement of Sale" in this case is a "contract for the purchase and sale of residential real property," as defined by 40 CFR § 745.103;[10] that Respondent did not provide to Purchasers an EPA-approved lead hazard information pamphlet before Purchasers became obligated under the Agreement of Sale (Count I);[11] that Respondent did not include the "Lead Warning Statement" set forth in 40 CFR

[5]Respondent's Answer to Complaint, ¶ 12.

[6]*Id.* at ¶ 13.

[7]*Id.* at ¶ 14.

[8]*Id.* at ¶ 15.

[9]*Id.* at ¶ 17.

[10]*Id.* at ¶ 18. This point is supported also by the "Agreement of Sale," which is attached to Respondent's Answer as "Respondent's Exhibit A" and is also attached to Complainant's Motion for Accelerated Decision as to Liability as "Complainant's Exhibit A" (*hereinafter* Agreement of Sale).

[11]Respondent's Answer to Complaint, ¶ 22. This point is supported also by the Affidavit of Purchasers, dated June 13, 1999, attached as "Complainant's Exhibit B" to Complainant's Motion (*hereinafter* Affidavit of Purchasers).

§ 745.113(a)(1) either as an attachment to or within the Agreement of Sale (Count II);[12] that Respondent did not include a statement disclosing the presence of any known lead-based paint in the target housing or indicating a lack of knowledge of such presence, either as an attachment to or within the Agreement of Sale (Count III);[13] that Respondent did not include a list of any records or reports available to the Respondent regarding lead-based paint in the building that were provided to Purchasers or a statement that no such records were available, either as an attachment to or within the Agreement of Sale (Count IV);[14] that Respondent did not include a statement by the Purchasers affirming their receipt of the information set forth in 40 CFR §§ 745.113(a)(2) and (a)(3) and the lead hazard information pamphlet required under 15 U.S.C. § 2686, either as an attachment to or within the Agreement of Sale (Count V);[15] that Respondent did not include, as either an attachment to or within the Contract, a statement by the Purchasers affirming that the Purchasers had either received the opportunity to conduct an evaluation of the residence for the presence of lead-based paint and/or lead-based paint hazards in accordance with 40 CFR 745.110(a) or had waived the opportunity, as required by 40 CFR § 745.113(a)(5) (Count VI);[16] and that prior to the Purchasers becoming obligated under the Contract, neither did Respondent provide the Purchasers a 10-day period to conduct an evaluation[17] of the Target Housing for the presence of lead-based paint, nor did the Purchasers waive this right in writing, as required by 40 CFR § 745.110 (Count VII).[18]

---

[12]Respondent's Answer to Complaint, ¶ 26. This point is supported also by the Agreement of Sale and the Affidavit of Purchasers.

[13]Respondent's Answer to Complaint, ¶ 30. This point is supported also by the Agreement of Sale and the Affidavit of Purchasers.

[14]Respondent's Answer to Complaint, ¶ 34. This point is supported also by the Agreement of Sale and the Affidavit of Purchasers.

[15]Respondent's Answer to Complaint, ¶ 38. This point is supported also by the Agreement of Sale and the Affidavit of Purchasers.

[16]Respondent's Answer to Complaint, ¶ 42. This point is supported also by the Agreement of Sale.

[17]"Evaluation" meaning a "risk assessment and/or inspection" as those terms are defined in 40 CFR § 745.103.

[18]As discussed *infra* regarding Count VII, although Respondent vacillates to some degree as to whether the requisite inspection took place or was waived, Respondent's statements considered together indicate that Respondent admits that the Purchasers waived their right to "evaluate" the property for lead-based paint and that the "Agreement of Sale" does not contain any written waiver of that right. However, Respondent argues that the Purchasers were afforded an opportunity to conduct a general inspection and did conduct a general inspection of some sort, that the general inspection alleged to have occurred satisfies the statutory requirement of an opportunity for a lead-based paint "evaluation," and/or that the "as is" clauses satisfy the statutory requirement of a written waiver of the right to conduct a lead-based paint evaluation. *See* Respondent's Answer to Complaint, p.6, ¶ 42; pp.7-8, ¶ 46; p.9, ¶ 1; p.10, ¶ 3; p.11, ¶ 8; Respondent's Answer to Motion, p.1, ¶ 3. The absence of any specific waiver of a right to "evaluate" the building for lead-based paint is supported also by the Agreement of Sale.

Complainant has thus carried its initial burden to show the absence of any genuine issue of material fact.

B. Respondent's Burden

The burden then shifts to the Respondent to demonstrate that a genuine issue of material fact exists by setting forth specific facts and referencing probative evidence in the record or producing such evidence.[19] Although Respondent "may not rest upon the mere allegations or denials of [its] pleading,"[20] the record must be viewed in a light most favorable to the Respondent, indulging all reasonable inferences in Respondent's favor.[21]

Respondent, in it's Answer to the Motion for Accelerated Decision, states in pertinent part that:

> . . . (A) material issue of genuine fact exists due to the fact that the [Purchasers] understood the risks and hazards of lead paint and had the right and opportunity to inspect the house and declined to inspect the house . . .
>
> . . . Complainant is not entitled to judgement on all seven (7) counts of the complaint as violations were not committed . . .
>
> It is also noteworthy that [the Purchasers], the buyers and initial Complainants, do not wish to pursue this claim or any other claim against Respondent, Leonard G. Greak.

Respondent's Answer to Motion for Accelerated Decision as to Liability, pp. 1-2.

The third quoted paragraph is irrelevant and immaterial to any issue presented in this case and therefore does not help to demonstrate that a genuine issue of material fact exists.[22] The second quoted paragraph states a bare legal conclusion without pointing to any evidence at all and therefore does not help to demonstrate that a genuine issue of material fact exists.

---

[19]*Clarksburg Casket Company*, EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999); *Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997).

[20]FRCP 56(e).

[21]*Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

[22]This quoted paragraph is also factually inaccurate, as the "initial Complainant" in this case is the Associate Director for Enforcement of the Waste and Chemicals Management Division of the United States Environmental Protection Agency - Region III, and not the Purchasers.

Regarding the first quoted paragraph, whether the Purchasers "understood the risks and hazards of lead paint" is immaterial to any issue presented in this case.[23] Although the question of whether the Purchasers "had the right and opportunity to inspect the house and declined to inspect the house" is relevant to count VII of the complaint if such "inspection" waiver is taken to mean an inspection for lead-based paint as defined by 40 CFR § 745.103,[24] Respondent's Answer to the Motion rests upon the mere allegations or denials of its pleading and does not set forth specific facts. Respondent's Answer to the Motion therefore does not demonstrate that the "waiver of opportunity to inspect" issue is "genuine" by referencing probative evidence in the record or by producing such evidence. Further, although the Purchasers' waiver of "inspection" would be relevant, it is immaterial to a determination of liability under count VII because such waiver must be in writing, and Respondent admits that no such *written* waiver exists.[25]

Therefore, Respondent has failed to carry its burden of demonstrating that a genuine issue of material fact exists.

II. The "as is" Clauses

Nevertheless, Respondent's Answer to the Complaint asserts, in essence, that two "as is" clauses in the Agreement of Sale satisfy the requirements of the RLPHRA and its implementing regulations. That question must be resolved before ruling on Complainant's Motion for Accelerated Decision as to Liability. For the following reasons, the "as is" clauses do not satisfy any relevant requirement of the TSCA, the RLPHRA, or their implementing regulations.

Paragraphs 10 and 11 of the "Agreement of Sale" state as follows:

> 10. Buyers, prior to the execution of this Agreement, have inspected the premises and agree to accept the real estate and the structure located thereon, in their "as is" condition, as of the date of execution of this Agreement.

[23]Respondent admits that the Purchasers are "purchasers" of target housing within the meaning of 40 CFR § 745.103. The Disclosure Rule does not distinguish between "purchasers" who do or do not "understand the risks and hazards of lead paint."

[24]The record must be viewed in a light most favorable to the Respondent, indulging all reasonable inferences in the Respondent's favor. However, even if the Purchasers were provided a 10-day period to conduct a risk assessment or inspection for the presence of lead-based paint and waived their right of inspection, Respondent is still in violation of 40 CFR § 745.110 unless the Purchasers have indicated their waiver in writing.

[25]Respondent's arguments regarding count VII are more fully addressed, *infra*.

> 11. No warranties herein are made by the Seller to the Buyers with respect to the condition of said real estate and structure thereon; and, Buyers, having inspected the same, agree to accept the real estate and said structure in their "as is" condition at the time of execution of this Agreement.[26]

Respondent asserts that these two "as is" warranty disclaimer paragraphs satisfy the lead-based paint opportunity for inspection, disclosure, and purchaser attestation requirements of Section 409 of TSCA, 15 U.S.C. § 2689, Section 1018 of the RLPHRA, 42 U.S.C. § 4852d, and 40 CFR Part 745, Subpart F (the Disclosure Rule), such that Paragraphs 10 and 11 of the Agreement of Sale exonerate Respondent from counts 2-7 of the complaint[27] (Respondent does not assert this or any other defense to count 1 of the complaint[28]). For example, in response to count III of the complaint, Respondent argues:

> . . . It is admitted that no statement was included disclosing the presence of any known lead-based paint in the target housing or indicating lack of knowledge with regard specifically to lead-based paint, either as an attachment to or within the Agreement of Sale for the Target Housing. However, it is denied that any *warranties or guarantees* were made with respect to the condition or substances within the premises. Specifically, Paragraph 11 of the Sales Agreements (sic) provides that "no warranties are made by the Seller to the Buyers with respect to the condition of said real estate and structure thereon; and, Buyers, having inspecting (sic) the same, agree to accept the real estate and said structure in their "as is" condition at the time of execution of this Agreement." This language specifically provided Buyers an opportunity to inspect and in fact indicates they had conducted all inspections necessary *which would include inspection for lead paint*.[29]

This response to count III of the complaint is representative of Respondent's responses to counts 2-7.[30] Since all of Respondent's responses rely upon paragraphs 10 and 11 of the Agreement of Sale, the legal analysis of the "as is" clause will apply to all counts, and therefore all six of Respondent's "as is" arguments need not be addressed individually.

A. The "as is" Clauses Do Not Satisfy Requirement of "Strict Compliance" with the

---

[26]Agreement of Sale, pp. 6-7, ¶¶ 10-11.

[27]*See* Respondent's Answer to Complaint, ¶¶ 26, 30, 34, 38, 42, and 46.

[28]*Id.* at ¶¶ 22 and 23.

[29]*Id.* at ¶ 30 (emphasis added).

[30]*See, e.g.*, Respondent's Answer to Complaint, ¶¶ 26, 34, 38, 42, and 46.

RLPHRA

The United States District Court in Connecticut considered an argument very similar to Respondent's "as is" argument in *Smith v. Coldwell Banker Real Estate Services, Inc.*, 122 F.Supp.2d 267 (2000, D.Conn.).[31] In *Smith*, purchasers of Target Housing sought to impose civil liability upon sellers for failure to provide purchasers with a copy of a lead paint report prior to the closing of the sale when the purchasers "became obligated under [the] contract," in violation of the RLPHRA § 1018, 42 U.S.C.A. §§ 4852d, and the Disclosure Rule at 40 CFR § 745.113. In response to the purchasers' motion for summary judgment, the sellers advanced two arguments. First, the sellers argued that the contract contained a clause voiding the contract for failure to comply with the Disclosure Rule,[32] and that the contract for sale was therefore invalid and the purchasers never became "obligated under the contract." Second, the sellers argued that they did, in fact, comply with the Disclosure Rule by alerting the purchasers, prior to the closing, of the existence of a lead paint report, and by then producing the lead paint report at the closing.

Strictly construing the mandates of the RLPHRA and the requirements of the Disclosure Rule, the court rejected both of these arguments. Regarding the "contract invalidation clause" argument, the court held:

> . . . (T)he Court rejects defendants' circular argument that they can avoid liability because the contract was voidable by their failure to comply with the Act's lead paint disclosure requirements. Such contract language, if inserted by all sellers and their agents and held enforceable by the courts, would frustrate the purpose of the statute and lead to an evasion of the statute.
>
> Given the absence of dispute that the purchasers never received a copy of the lead paint report before the parties signed the contract of sale, *there is no material dispute that defendants violated the disclosure requirement* by not providing a copy of the lead paint reports before the contract was ratified.[33]

---

[31]*Smith v. Coldwell Banker* is closely on point and appears to be the only judicial guidance available. The court noted: ". . . (T)his case interpreting the standard for imposing civil liability on a seller and his or her agent for failure to comply with the disclosure requirements under § 4852d is a matter of first impression." 122 F.Supp.2d at 271 (citation omitted). The case has not been cited by any other authority.

[32]The clause stated: ". . . the parties agree that a precondition to the validity of this agreement is that each party has received, signed and annexed hereto a completed Disclosure and Acknowledgment Form re: Lead Paint as required by Federal EPA/HUD disclosure regulations." *Smith*, 122 F.Supp.2d at 272, *quoting* Mem. In Opp'n at 3 (citation omitted).

[33]*Smith*, 122 F.Supp. 267, 272 (emphasis added) (citation omitted).

Regarding the sellers' second argument that they did, in fact, satisfy the purposes of the Disclosure Rule, the court explained:

> Defendants seek to excuse their failure to provide the buyers a copy of the report on the grounds that they complied by disclosing the fact that lead paint was present and alerted the purchasers that the lead paint report existed. The Court is unwilling to recognize such a defense *absent any language in the statute or its regulations supporting a defense of "substantial compliance"* with the purpose of the statute.[34]

Although *Smith* addresses the requirements of the Disclosure Rule in the context of civil liability, the legal analysis of the duty imposed by the Rule upon sellers of Target Housing is equally applicable in the context of the present administrative penalty assessment. The RLPHRA and the Disclosure Rule require strict compliance, and "substantial compliance" will not suffice.

Indeed, the sellers in *Smith* complied with the Rule far more substantially than did Respondent in the case at bar. The *Smith* court observed:

> *Since it is clear that simply putting the plaintiffs on notice of the lead paint report's existence does not satisfy the statutory requirement that the report be provided to the purchaser*, the issue is whether production of the lead paint report at the closing satisfies the statutory requirement that disclosure "must occur before the purchaser . . . is obligated under any contract to purchase . . . housing." See 42 U.S.C. § 4852d.[35]

Finding that the statute required strict compliance, the court answered this question in the negative. In the case at bar, however, the "substantial compliance" question is not even presented. Respondent never took any steps to comply with the requirements of the Disclosure Rule. Under *Smith*, it is clear that this conduct does not satisfy the strict requirements of the Disclosure Rule.

Respondent's argument that the two "as is" clauses in the Agreement of Sale absolve Respondent of responsibility to adhere to the specific lead-based paint disclosure requirements is closely akin to the "voidable contract" argument advanced by the sellers in *Smith*. Like the court

---

[34] *Id.* at 272-273 (emphasis added).

[35] *Id.* at 271-272 (emphasis added).

in *Smith,* the undersigned observes that "(s)uch contract language, if inserted by all sellers . . . and held enforceable . . . would frustrate the purpose of the statute and lead to evasion of the statute,"[36] and like the court in *Smith,* the undersigned rejects this argument.[37]

B. Warranty Disclaimers Do Not Excuse Affirmative Obligations Imposed by Federal Law

Further, Respondent misunderstands the difference between warranties, express or implied, made by the Seller of real property, and affirmative obligations imposed by federal statute. As noted *supra*, Respondent argues:

> . . . It is admitted that no statement was included disclosing the presence of any known lead-based paint . . . or indicating lack of knowledge with regard specifically to lead-based paint . . . However, it is denied that any *warranties or guarantees* were made with respect to the condition or substances within the premises. Specifically, Paragraph 11 of the Sales Agreements (sic) provides that "no *warranties* are made by the Seller to the Buyers with respect to the condition of said real estate and structure thereon; and, Buyers, having inspecting (sic) the same, agree to accept the real estate and said structure in their "as is" condition . . . [38]

However, the federal courts have consistently and specifically held that "as is" provisions in sales agreements in the context of hazardous material liability under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.

---

[36] *Id.* at 272.

[37] The fundamental purpose of the RLPHRA is to ". . . ensure that families receive both specific information on the housing's lead history and general information on lead exposure prevention [so that] (w)ith this information, consumers can make more informed decisions concerning home purchase, lease, and maintenance to protect their families from lead hazard exposure." 61 Fed. Reg. 9064 (March 6, 1996).

These purposes reflect the grave importance of lead-based paint hazard disclosure, recognizing that: "Lead affects virtually every system of the body. While it is harmful to individuals of all ages, lead exposure can be especially damaging to children, fetuses, and women of childbearing age . . . Lead poisoning has been called 'the silent disease' because its effects may occur gradually and imperceptibly, often showing no obvious symptoms. Blood-lead levels as low as 10 mg/dL have been associated with learning disabilities, growth impairment, permanent hearing and visual impairment, and other damage to the brain and nervous system. In large doses, lead exposure can cause brain damage, convulsions, and even death. Lead exposure before or during pregnancy can also alter fetal development and cause miscarriages. In 1991, the Secretary of (Health and Human Services) characterized lead poisoning as the 'number one environmental threat to the health of children in the United States.'" 61 Fed. Reg. 9064, 9065 (March 6, 1996) (citations omitted).

To allow Respondent in this case to avoid the carefully crafted lead-based paint disclosure requirements of the RLPHRA by simply including an "as is" clause in the Agreement of Sale would be to completely undermine the important public health and safety purposes of the Act and render the legislation meaningless.

[38] Respondent's Answer to Complaint, ¶ 30 (emphasis added).

§ 9601 *et seq.*, operate only as a shield to breach of warranty claims and do *not* relieve sellers of affirmative obligations imposed by federal statute. Like the *Smith* court in the RLPHRA context, the CERCLA cases hold that "as is" clauses cannot be allowed to undermine the purposes of the Act.

In *Channel Master Satellite Sys. v. JFD Electronics*, 702 F.Supp. 1229 (E.D.N.C. 1988), the owner of a site found to contain hazardous groundwater and soil contamination sought contribution from the seller for clean-up costs under CERCLA. The seller moved for summary judgment, arguing that an "as is" clause[39] in the contract for sale disclaimed any warranties and therefore released the seller from responsibility under CERCLA. The court disagreed, explaining:

> The non-existence of express warranties, etc., on the part of the Seller has no bearing upon the obligations of the parties, *inter se*, imposed by federal statute. Such obligations are not dependent upon the contract, and Section 4.3 [of the contract] does not affect the same.[40]

The court therefore held:

> . . . *(T)he "as is" clause does not shift affirmative obligations of the parties imposed by statute independent of the contract*. It is applicable only to rights arising by the dealings of the parties *inter se*, and hence is no bar to Channel Master's claim predicated upon § 107(a)(2) of CERCLA.[41]

Under similar facts, the court reached the same conclusion in *Wiegmann & Rose Intern. Corp. v. NL Industries*, 735 F.Supp. 957 (N.D.Cal. 1990). There, noting that:

> First, . . . the purchasers of the contaminated property had no knowledge . . . of the presence of hazardous waste . . . [and] (s)econd, . . . the "as is" clause in this case, *was standard, boiler-plate language* routinely included in every contract and deed for the transfer of property owned by NL Industries,"[42]

The court found that,

---

[39]The "as is" clause stated, in part: "Buyer represents that it has inspected, examined and investigated the Property and the uses thereof to its satisfaction, that it has independently investigated, analyzed, and appraised the value and the profitability thereof and that, except as expressly provided in this contract, it is purchasing the Property 'as is' at the date of this contract and at the Closing." *Channel Master*, 702 F.Supp. at 1230.

[40]*Id.* at 1231.

[41]*Id.* at 1232 (emphasis added).

[42]*Wiegmann & Rose*, 735 F.Supp. at 961 (emphasis added).

> . . . (T)he ["as is"] clause protected NL from claims for breach of warranty. The clause was not, and could not have been at that time, intended to release NL from *statutory* causes of action arising out of its contamination of the property.[43]

The court therefore held:

> In view of these provisions, and the intent of Congress in enacting the CERCLA statute, the Court holds that allowing an otherwise "responsible party" to avoid liability . . . based on an "as is" clause in the deed conveying the property, would *clearly circumvent both the intent and the language* of the statute . . .
>
> This holding is in accordance with decisions of other district courts which have held that an "as is" clause precludes only claims for breach of warranty, and does not operate to release strict liability arising under a statutory cause of action created by CERCLA.[44]

Just as the *Smith v. Coldwell Banker* court would not allow the "voidable contract" language in that case to frustrate the purposes of the RLPHRA, the courts have uniformly held that "as is" boiler-plate cannot circumvent the Congressional intent of CERCLA to hold liable former owners of property contaminated with hazardous material. "As is" clauses operate only as disclaimers of warranties and cannot relieve a seller of real property of affirmative obligations imposed by federal statute. The requirements of the RLPHRA and the Disclosure Rule are just such affirmative obligations, and the "as is" provisions of paragraphs 10 and 11 of the Agreement of Sale in the present case do not relieve Respondent of the duty to strictly comply with those requirements.[45]

III. Count VII

Finally, as noted *supra*, Respondent is somewhat equivocal regarding count VII of the complaint.[46] That is, Respondent vacillates to some degree as to whether the "risk assessment or inspection" for lead-based paint was waived or was actually conducted by the Purchasers. In its Answer to the Complaint, Respondent states:

---

[43] *Id.* (emphasis added).

[44] *Id.* at 962 (emphasis added) (citations omitted).

[45] This Order expresses no opinion as to whether the "as is" provisions at issue in the present case would or would not shield Respondent from any breach of warranty claim.

[46] Count VII of the complaint states, in part: "Upon information and belief, Respondent did not provide the Purchasers a 10-day period to conduct a risk assessment or inspection for the presence of lead-based paint in the Target Housing, nor did the Purchasers waive this right in writing . . . as required by 40 CFR § 745.110 . . ." Complaint, p.11, ¶¶ 46-47.

> Admitted in part, Denied in part. It is admitted that language is not contained in the Agreement that says a 10-day period is provided to conduct risk assessment or inspection for the presence of lead-based paint; however, on the contrary it is denied that the Buyers did not have an opportunity to do this. Paragraphs 10 and 11 of the Sales Agreement specifically provides (sic) as follows: [quoting paragraphs 10 and 11].
>
> By signing this Agreement, Buyers *either did inspect or waived their right to inspection or risk of assessment*. Further, the Agreement was signed on May 13, 1998, but it was understood by all parties that the commencement date would not be until June 1, 1998, and that during this time, they had the right to inspect the premises and prior to that, *did inspect the premises and did waived (sic) any further right of inspection*.[47]

Respondent's Answer to the Complaint contains other statements regarding "inspection" and/or "waiver" as well. *See, e.g.*, page 6, ¶ 42 (". . . it is averred that this item was *waived* and the Purchasers did have an opportunity to inspect and conduct risk assessment and specifically *waived* that by this specific language of Paragraphs 10 and 11 . . ."") (emphasis added); page 9, ¶ 1 (". . . the Agreement of Sale did contain *waivers* by the Buyers/Purchasers of inspection, further, the Purchasers specifically *did inspect* the premises and had knowledge of the *age and condition* of the residence.") (emphasis added); page 10, ¶ 3 ("The Respondent provided many opportunities for the Purchasers to inspect the premises and in fact, the Purchasers *did inspect* the premises and are well aware of the *structure and conditions* of the premises.") (emphasis added); page 11, ¶ 8 ("Purchasers acknowledge that they had a right to inspect the premises and ***did not wish to have a lead pain (sic) inspection.***") (emphasis and bold type added).[48]

Respondent's last word on "inspection or risk assessment" is found in Respondent's Answer to the Motion, page 1, ¶ 3, which states in part: ". . . (A) material issue of genuine fact exists due to the fact that the [Purchasers] . . . had the right and opportunity to inspect the house and *declined to inspect the house*." (Emphasis added).

Respondent's statements, considered together, indicate that Respondent asserts that the Purchasers waived their right to conduct an "inspection" or "risk assessment" for lead-based paint, as those terms are defined by 40 CFR § 745.103, and that the "Agreement of Sale" does not contain any written waiver of that right. However, Respondent argues that the Purchasers were afforded an opportunity to conduct a general inspection (*e.g.*, regarding the "structure, age, and condition" of the house) and did conduct a general inspection of some sort, that the general inspection alleged to have occurred satisfies the statutory requirement of an opportunity for a

---

[47]Respondent's Answer to Complaint, pp. 7-8, ¶ 46 (emphasis added).

[48]This is Respondent's only statement explicitly addressing a "lead paint inspection," as opposed to an "inspection" in general terms.

lead-based paint "evaluation," and/or that the "as is" clauses satisfy the statutory requirement of a written waiver of the right to conduct a lead-based paint evaluation.

Respondent's argument in this regard fails to state a genuine issue of material fact. This is so for the following reasons.

First, a "general" inspection cannot substitute for a "risk assessment and/or inspection" as defined by the Disclosure Rule. "Inspection" is defined as follows:

> *Inspection* means:
> (1) A surface-by-surface investigation to determine the presence of lead-based paint as provided in section 302(c) of the Lead-Based Point Poisoning and Prevention Act [42 U.S.C. 4822], and
>
> (2) *The provision of a report explaining the results of the investigation*.[49]

The statute referenced in the definition, 42 U.S.C. §4822(c), states in pertinent part:

> The Secretary shall require the inspection of all intact and nonintact interior and exterior painted surfaces of housing subject to this section for lead-based paint using an approved x-ray fluorescence analyzer, atomic absorption spectroscopy, or comparable approved sampling or testing technique. A *certified inspector or laboratory shall certify in writing* the precise results of the inspection.

(Emphasis added). The Disclosure Rule defines "risk assessment" as follows:

> *Risk assessment* means an on-site investigation to determine *and report* the existence, nature, severity, and location of lead-based paint hazards in residential dwellings, including:
>
> (1) Information gathering regarding the age and history of the housing and occupancy by children under age 6;
>
> (2) Visual inspection;
>
> (3) Limited wipe sampling or other environmental sampling techniques;
>
> (4) Other activity as may be appropriate; and

[49] 40 CFR § 745.103 (emphasis added).

(5) *Provision of a report explaining the results of the investigation*.[50]

The lead-based paint risk assessment and/or inspection contemplated by this rule is far more detailed and precise than a general inspection conducted for "structure, age, and condition." The inspection is conducted by a specially trained and certified inspector and results in a written report. To the extent that the Purchasers may have conducted a "general" inspection of the house, such inspection does not satisfy the strict requirements of an "inspection" as defined by the Disclosure Rule. Respondent has merely asserted that an inspection of some sort took place but has pointed to no evidence of such inspection. In particular, Respondent has not offered to produce the written report of such "inspection," which report is required by the Disclosure Rule. Further, Purchasers' Affidavit supports the position that Purchasers were unaware of lead-based paint hazards and would not have thought to "inspect" for them. The theoretical "opportunity" to conduct a lead-based paint "inspection" is meaningless without the knowledge of such hazards afforded by the disclosures required by the RLPHRA and implementing regulations. Therefore, Respondent's argument that the Purchasers were afforded an opportunity to conduct an inspection and did conduct some sort of inspection fails to articulate a genuine issue of material fact.

Second, if Purchasers indeed "waived" their right of inspection, such waiver must be in writing. Such provisions of the Disclosure Rule require strict compliance.[51] The Agreement of Sale contains no such waiver, as Respondent admits,[52] and Respondent points to no written waiver (besides the "as is" clauses, discussed in the next paragraph). Rather, Respondent relies solely upon the unsupported statement that the Purchasers "had the right and opportunity to inspect the house and declined to inspect the house."[53] Respondent, as the opponent of the Motion for Accelerated Decision, "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for [hearing]."[54] Respondent has failed to meet this burden regarding Purchasers' alleged "waiver." Therefore, Respondent's argument that the Purchasers "waived" their right of inspection fails to state a genuine issue of material fact.

---

[50]*Id.* (emphasis added).

[51]*Smith v. Coldwell Banker Real Estate Services, Inc.*, 122 F.Supp.2d 267 (D.Conn. 2000).

[52]Respondent's Answer to Complaint, p.7, ¶ 46.

[53]Respondent's Answer to Motion, p. 1, ¶ 3.

[54]FRCP 56(e). Summary Judgment law under FRCP 56 is applicable to accelerated decisions under the Rules of Practice, 40 CFR § 22.20. *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994).

Third, the "as is" clauses do not constitute valid "waivers" of the right to conduct a lead-based paint inspection as defined by the Disclosure Rule. The "as is" clauses are merely warranty disclaimers and do not affect Respondent's affirmative obligations under the RLPHRA. The "as is" clauses do not constitute strict compliance with the Act or the implementing regulations under the analysis mandated by *Smith v. Coldwell Banker*. Further, to construe the "as is" boiler-plate to constitute a valid waiver of the Purchasers' "inspection" right under the Act would eviscerate the purposes of the Act to:

> . . . (E)nsure that families receive both specific information on the housing's lead history and general information on lead exposure prevention [so that] (w)ith this information, consumers can make more informed decisions concerning home purchase, lease, and maintenance to protect their families from lead hazard exposure.[55]

Such a construction of the "as is" clauses is not proper and runs counter to the great weight of authority.[56] Therefore, Respondent's argument that the "as is" clauses in paragraphs 10 and 11 of the Agreement of Sale constitute a "waiver" of Purchasers' right of inspection fails to state a genuine issue of material fact.

Fourth, Respondent's argument that Purchasers were afforded an opportunity to inspect the Target Housing after having signed the Agreement of Sale is without merit. Respondent maintains:

> . . . (T)he Agreement was signed on May 13, 1998, but it was understood by all parties that the commencement date would not be until June 1, 1998, and that during this time, they had the right to inspect the premises and prior to that, did inspect the premises and did waived (sic) any further right of inspection.[57]

40 CFR § 745.110, however, requires the 10-day inspection period or waiver to occur "(b)efore a purchaser is obligated under any contract to purchase target housing." Under *Smith v. Coldwell Banker*, this provision requires strict compliance. The 10-day inspection period or waiver, in order to satisfy the Rule, must have been completed before the Agreement of Sale was signed on May 13, 1998. Therefore, Respondent's argument that Purchasers had an opportunity to inspect between May 13, 1998 and June 1, 1998, fails to state a genuine issue of material fact.

Fifth, assuming *arguendo* that Respondent may be suggesting that Purchasers did, in fact,

---

[55]61 Fed. Reg. 9064 (March 6, 1996). *See also* note 37, *supra*, regarding "purposes of the Act."

[56]*See, e.g., Smith v. Coldwell Banker*, 122 F.Supp.2d 267 (D.Conn. 2000); *Channel Master Satellite Sys. v. JFD Electronics*, 702 F.Supp. 1229 (E.D.N.C. 1988); *Wiegmann v. Rose Intern. Corp. v. NL Industries*, 735 F.Supp. 957 (N.D.Cal. 1990), *and cases cited therein* at 962.

[57]Respondent's Answer to Complaint, p. 8, ¶ 46.

conduct an "inspection" as defined by the Disclosure Rule, Respondent points to no evidence in support of such a position. In particular, the record contains no written report "explaining the results of the investigation," as required by the Disclosure Rule. Respondent, in opposing the Motion for Accelerated Decision, must demonstrate that an issue is "genuine" either by referencing probative evidence in the record or by producing such evidence.[58] Respondent has failed to do so. Further, nothing in the Purchasers' Affidavit suggests that Purchasers were aware of the possibility of lead-based paint hazards prior to signing the Agreement of Sale. Therefore, to the extent that Respondent may be suggesting that an "inspection" was performed in accordance with the RLPHRA, such suggestion fails to state a genuine issue of material fact.

In summary: 1) whether Purchasers were afforded an opportunity to conduct a general inspection of some sort and did in fact conduct such an inspection for "structure, age, and condition" is immaterial because such an inspection cannot substitute for the "inspection and/or risk assessment" mandated by the RLPHRA and the Disclosure Rule; 2) a true "waiver" of the right of inspection must be in writing, and Respondent has failed to point to any evidence of such a waiver; 3) the "as is" clauses cannot, as a legal matter, constitute a "waiver" under the RLPHRA; 4) the "opportunity to inspect" after signing the Agreement of Sale on May 13, 1998, is immaterial because the opportunity must occur before the Purchasers become obligated on the contract; and 5) assuming *arguendo* that Respondent is suggesting that Purchasers did conduct a "risk assessment and/or inspection" in accordance with the RLPHRA, Respondent has failed to point to any evidence of such an inspection.

Therefore, Respondent has failed to state a genuine issue of material fact regarding count VII of the complaint.

Ruling and Order on Motion for Accelerated Decision

It is concluded that there are no genuine issues of material fact as to Respondent's liability on any of the seven counts of the complaint. Accordingly, Complainant's Motion for Accelerated Decision as to Liability on all seven counts of the complaint is granted.

_____

Charles E. Bullock
Administrative Law Judge

Dated: April 6, 2001
Washington, D.C.

[58] *Clarksburg Casket Company*, EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999).