

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS**

FILED
2010 JUL 28 PM 3:24
REGIONAL HEARING CLERK
EPA REGION VI

IN THE MATTER OF:	§	Docket No. TSCA-06-2010-6119
	§	
ERVAY RESIDENTIAL	§	COMPLAINT AND
LIMITED PARTNERSHIP,	§	CONSENT AGREEMENT AND
	§	FINAL ORDER
RESPONDENT.	§	
	§	

I. STATEMENT OF AUTHORITY

1. This proceeding for the assessment of civil penalties is initiated by the United States Environmental Protection Agency (EPA) pursuant to Section 16 of the Toxic Substances Control Act, as amended (TSCA), 15 U.S.C. § 2615, against Ervay Residential Limited Partnership, Dallas, Texas (hereinafter Respondent). Section 16 of TSCA authorizes the Administrator of EPA to issue a Complaint whenever the Administrator has information that any person has violated or is violating any requirement of Section 15 of TSCA.

2. The Complainant in this action is the Director, Compliance Assurance and Enforcement Division, EPA Region 6, the person to whom authority has been delegated to issue such Complaints in the states of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. The Respondent and Complainant are sometimes referred to herein as the Parties.

II. PRELIMINARY STATEMENT

3. Complainant and Respondent agree that settlement of this matter is in the public interest, and that entry of this Complaint and Consent Agreement and Final Order (Complaint and CAFO) without further litigation is the most appropriate means of resolving this matter.

4. For the purposes of this proceeding, Respondent admits the jurisdictional allegations of this Complaint and CAFO; however, Respondent neither admits nor denies the specific factual allegations and conclusions of law contained in this Complaint and CAFO. The Complaint states a claim upon which relief can be granted.

5. As part of this settlement, Respondent explicitly waives its right to a judicial or administrative hearing or appeal on any issue of law or fact set forth herein.

6. Respondent consents to the issuance of this Complaint and CAFO and to the assessment and payment of the stated civil penalty in the amount and by the method set forth in this Complaint and CAFO.

7. Compliance with all the terms and conditions of this Complaint and CAFO shall only resolve Respondent's liability for the violations and facts alleged in this Complaint and CAFO.

8. Each party to this action shall bear its own costs and attorney fees.

9. Nothing in this Complaint and CAFO shall be construed to prevent or limit EPA's civil and criminal authorities with respect to matters other than the violations and facts alleged in this Complaint and CAFO, or that of other Federal, State, or local agencies or departments to obtain penalties or injunctive relief under other Federal, State, or local laws or regulations.

10. Pursuant to 40 C.F.R. § 745.101(b), Respondent and the Site (as hereinafter defined) are no longer subject to the TSCA Lead-Based Paint Disclosure Rule (Disclosure Rule) because the Site has been certified to be free of lead-based paint hazards by an inspector certified under a federally-accredited State certification program (the "Lead-Free Certification").

11. Each undersigned representative of the Parties to this agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this agreement and to execute and legally bind that party to it.

III. STATEMENT OF FACTS

12. Respondent is Ervay Residential Limited Partnership, having an address of 2650 Cedar Springs Road, Suite 800, Dallas, Texas, 75201.

13. The Respondent owns and/or manages a portion of the building at 350 North Ervay Street, Dallas, Texas 75201-3501 (the "Site").

14. On or about September 19, 2008, EPA conducted an inspection of the Site to determine compliance with the Disclosure Rule.

15. On or about September 19, 2008, EPA Inspector Marie Stucky presented her EPA Inspector credentials to Kimberly Waller, representative of Respondent.

16. On or about September 19, 2008, Ms. Waller signed EPA Form 7740-3 for 1018, Notice of Inspection, thereby certifying voluntary consent for EPA to review and make copies of real estate notification and disclosure forms and any other documents relating to EPA's ability to determine compliance with the Disclosure Rule.

17. Pursuant to 40 C.F.R. § 745.103, housing constructed prior to 1978 is defined as target housing.

18. The Site was originally constructed prior to 1978, and is therefore "target housing" as defined in 40 C.F.R. § 745.103.

19. Respondent is an entity that offers target housing for lease, rent, or sublease and is therefore a "lessor" as defined in 40 C.F.R. § 745.103.

20. Respondent, as lessor, entered into contracts to lease target housing at the Site ("Contracts to Lease") with various tenants (the "Lessees").

21. As part of her inspection, EPA Inspector Stucky reviewed six randomly selected Contracts to Lease: (a) a Contract to Lease dated on or about February 23, 2007, for 350 North Ervay Street #1801, Dallas Texas; (b) a Contract to Lease dated on or about August 24, 2007, for 350 North Ervay Street #1705, Dallas Texas; (c) a Contract to Lease dated on or about September 30, 2007, for 350 North Ervay Street #3104, Dallas Texas; (d) a Contract to Lease dated on or about April 16, 2008, for 350 North Ervay Street #1905, Dallas Texas; (e) a Contract to Lease dated on or about April 16, 2008, for 350 North Ervay Street #1706, Dallas Texas; and (f) a Contract to Lease dated on or about April 16, 2008, for 350 North Ervay Street #3308, Dallas Texas. These randomly selected Contracts to Lease did not show receipt of the lead hazard information pamphlet and information required by 40 CFR §745.113(b)(2) and (b)(3).

22. Respondent subsequently provided the Lessees in the Contracts to Lease listed in Paragraph 21 and other Lessees with a lead hazard information pamphlet as specified by Section 406(a) of TSCA and obtained signatures of such Lessees affirming receipt of the lead hazard information pamphlet and information required by 40 C.F.R. §745.113(b)(2) and (b)(3).

23. On or about February 19, 2010, Ray Medrano of TLI & Environmental Service, Inc., an inspector certified to conduct lead-based paint inspections by the State of Texas, issued the Lead Free Certification for the Site.

IV. ALLEGATIONS

24. Pursuant to 40 C.F.R. § 745.107(a)(1), before the lessee is obligated under an agreement to lease target housing, the lessor must provide the lessee with a lead hazard information pamphlet, as specified by Section 406(a) of TSCA. Complainant alleges that, prior to obtaining the Lead Free Certification, Respondent failed to provide the Lessees in the Contracts to Lease listed in Paragraph 21 and certain other Lessees with a lead hazard information pamphlet before those Lessees were obligated under the Contracts to Lease the target housing, which is a violation of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R. § 745.107(a)(1).

25. Pursuant to 40 C.F.R. § 745.113(b)(1), the lessor of target housing is required to include as an attachment to the contract to lease target housing, a Lead Warning Statement. Complainant alleges that, prior to obtaining the Lead Free Certification, Respondent failed to attach or include such a statement in the Contracts to Lease listed in Paragraph 21 and certain other Contracts to Lease target housing, which is a violation of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R. § 745.113(b)(1).

26. Pursuant to 40 C.F.R. § 745.113(b)(2), the lessor of target housing is required to include as an attachment to the contract to lease target housing, a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. Complainant alleges that,

prior to obtaining the Lead Free Certification, Respondent failed to include such an attachment to the Contracts to Lease listed in Paragraph 21 and certain other Contracts to Lease, which is a violation of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R. § 745.113(b)(2).

27. Pursuant to 40 C.F.R. § 745.113(b)(3), the lessor of target housing is required to include as an attachment to the contract to lease target housing, a list of any records or reports available to the lessor regarding lead-based paint and/or lead-based paint hazards in the target housing being leased, or a statement that no such records exist. Complainant alleges that, prior to obtaining the Lead Free Certification, Respondent failed to include such an attachment to the Contracts to Lease listed in Paragraph 21 and certain other Contracts to Lease, which is a violation of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R. § 745.113(b)(3).

28. Pursuant to 40 C.F.R. § 745.113(b)(4), the lessor is required to include in the contract to lease target housing or to attach to the contract a statement by the lessee affirming receipt of the information required by 40 C.F.R. § 745.113(b)(2) and (b)(3) and the lead hazard information pamphlet required under 15 U.S.C. § 2696. Complainant alleges that, prior to obtaining the Lead Free Certification, Respondent failed to attach or include such a statement in the Contracts to Lease listed in Paragraph 21 and certain other Contracts to Lease, which is a violation of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R. § 745.113(b)(4).

29. Pursuant to 40 C.F.R. § 745.113(b)(6), the lessor of target housing is required to include as an attachment to the contract to lease target housing, the signatures of the lessor and lessee certifying to the accuracy of their statements, along with dates of signatures. Complainant alleges that, prior to obtaining the Lead Free Certification, Respondent failed to include such an

attachment to the Contracts to Lease listed in Paragraph 21 and certain other Contracts to Lease, which is a violation of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R. § 745.113(b)(6).

30. The allegations in each of the foregoing Paragraphs 24 through 29 are also referred to as causes of action.

V. TERMS OF SETTLEMENT

31. Complainant acknowledges that the Lead Free Certification demonstrates that there is and has been no known risk of exposure at the Site, and mitigates the violations alleged above to paper violations.

32. To resolve these alleged violations, Respondent shall pay a civil penalty in the amount of \$1,220.00 in full settlement of the allegations in this Complaint and CAFO.

33. Payment shall be made by one of the following methods within 30 days after the effective date of this Complaint and CAFO:

a. By mailing a bank check, a cashier's check, or certified check, payable to "Treasurer of the United States," to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

b. By wire transfers to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

c. By overnight mail (Express, FedEx, DIIL, etc.) to:

U.S. Bank
1005 Convention Plaza
SL-MO-C2GL
St. Louis, MO 63101
Contact: 314-418-4087

d. By credit card payments to: <https://www.pay.gov>

Enter sfo 1.1 in the search public forms field

The case name and docket number (*In the Matter of Ervay Residential Limited Partnership*,
Docket No. TSCA-06-2010-6119) shall be clearly marked on the check or other method of
payment to ensure credit for payment.

34. Respondent shall send simultaneous notices of payments, including copies of the
check or other proofs of payment, to each of the following:

- a. Ms. Lorena Vaughn
Regional Hearing Clerk (6RC-D)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733
- b. Ms. Pat Weatherly (6EN-IIM)
TSCA Enforcement Officer
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733
- c. Mr. Jeffrey Page (6RC-ER)
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Adherence to this request will ensure proper credit is given when payments are received.

35. Respondent agrees not to claim nor attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

36. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this Complaint and CAFO will begin to accrue 30 days after the effective date of the Complaint and CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of EPA's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. *See* 40 C.F.R. § 13.11(b).

37. If EPA does not receive payment within 30 days of the due date, EPA will also impose a late payment handling charge of \$15.00 for each subsequent 30-day period. Finally, EPA will apply a six percent per annum penalty on any principal amount not paid within 90 days of the due date. Other penalties for failure to make a payment may also apply.

VI. PARTIES BOUND

38. The provisions of this Complaint and CAFO shall apply to and be binding upon the Parties to this action, their officers, directors, agents, employees, successors, and assigns.

VII. MODIFICATIONS

39. The terms, conditions, and compliance requirements of this Complaint and CAFO may not be modified or amended except as otherwise specified in this Complaint and CAFO, or upon the written agreement of EPA and Respondent, and such modification or amendment being filed with the Regional Hearing Clerk.

VIII. RETENTION OF ENFORCEMENT RIGHTS

40. EPA does not waive any rights or remedies available to EPA for any other violations by Respondent of Federal or State laws, regulations, or permitting conditions unrelated to matters addressed in this Complaint and CAFO.

IX. RECORD PRESERVATION

41. Respondent shall preserve, during the pendency of this Complaint and CAFO, all records and documents in its possession or in the possession of its divisions, employees, agents, contractors, or successors which in any way relate to this Complaint and CAFO regardless of any document retention policy to the contrary.

X. COSTS

42. Each party agrees to bear its own costs and attorneys' fees in this matter, except to the extent that Respondent may be responsible for reasonable costs and expenses of enforcement and collection proceedings for failure to comply with the terms of this Complaint and CAFO.

Furthermore, Respondent specifically waives its right to seek reimbursement of its costs and

attorneys' fees under the Equal Access to Justice Act, 5 U.S.C. § 504, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 *et seq.*, and any regulations promulgated pursuant to those Acts.

XI. TERMINATION

43. Upon payment of the civil penalty specified herein in accordance with the provisions set forth in this Complaint and CAFO, this Complaint and CAFO shall be thereby satisfied and terminated without further proceedings.

XII. EFFECTIVE DATE

44. This Complaint and CAFO, and any subsequent modifications, become effective upon filing with the Regional Hearing Clerk.

**THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS CONSENT
AGREEMENT AND FINAL ORDER**

FOR RESPONDENT:

Thomas B. Bakewell

7-9-2010
Date

ERVAY RESIDENTIAL LIMITED PARTNERSHIP,
a Texas limited partnership

By: Gables Republic, Inc.,
a Georgia corporation,
General Partner

By: Thomas B. Bakewell
Name: Thomas B. Bakewell
Its: Vice President

FOR COMPLAINANT:

John Blevins

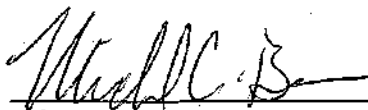
7-23-10
Date

John Blevins
Director
Compliance Assurance and
Enforcement Division

FINAL ORDER

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Complaint and Consent Agreement is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged in the Complaint. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. The Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Complaint and Consent Agreement. This Final Order shall become effective upon filing with the Regional Hearing Clerk as stated in 40 C.F.R. § 22.31(b).

Issuance Date: July 27, 2010



Michael C. Barra
Regional Judicial Officer
EPA, Region 6

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2010, the original and a copy of the foregoing Complaint and Consent Agreement and Final Order (CACAF0) concerning Ervay Residential Limited Partnership, Docket No. TSCA-06-2010-6119, were hand-delivered to the Regional Hearing Clerk, U.S. EPA, Region 6 (6RC-D), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and that a true and correct copy of the CACAF0 was delivered to the following by the method indicated:

U.S. POSTAL SERVICE CERTIFIED MAIL:

Ms. Susan M. Rainey
Locke Lord Bissell & Liddell
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-2748

U.S. POSTAL SERVICE FIRST-CLASS MAIL:

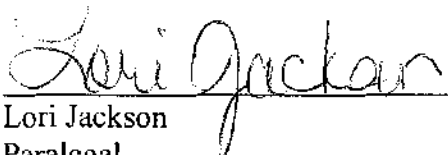
U.S. EPA
Cincinnati Finance Center MS 002
Attention: Michelle Angel
26 West MLK Dr.
Cincinnati, Ohio 45268-0001

HAND-DELIVERED:

Mr. Jeffrey Page (6RC-ER)
Office of Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Ms. Pat Weatherly (6EN-HM)
TSCA Enforcement Officer
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Mr. Larry Permenter (6EN-HM)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733


Lori Jackson
Paralegal