

U. S. ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

In the Matter of )

) Docket No. TSCA-07-2011-0009

Theiss Family Limited Partnership )  
Omaha, Nebraska 68106 )

Respondent )

**CONSENT AGREEMENT AND FINAL ORDER**

The U.S. Environmental Protection Agency (EPA), Region 7 and Theiss Family Limited Partnership (Respondent) have agreed to a settlement of this action before filing of a Complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Renovation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

**Section I**

**Jurisdiction**

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a).
2. This Consent Agreement and Final Order (CAFO) serves as notice that the EPA has reason to believe that Respondent has violated Section 409 of TSCA, 15 U.S.C. § 2689, by

failing to comply with the regulatory requirements of 40 C.F.R. Part 745, Subpart F, *Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property*, promulgated pursuant to Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d.

## **Section II**

### **Parties**

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region 7, is the Chief, Toxics and Pesticides Branch, EPA, Region 7.

4. The Respondent is Theiss Family Limited Partnership (Theiss).

## **Section III**

### **Statutory and Regulatory Background**

5. Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the Act), 42 U.S.C. §§ 4851 to 4856, to address the need to control exposure to lead-based paint hazards. The Act amended TSCA by adding Sections 401 to 412, 15 U.S.C. §§ 2681 to 2692. Section 1018 of the Act required the EPA and the Department of Housing and Urban Development (HUD) to jointly issue regulations requiring the disclosure of known lead-based paint and/or lead-based paint hazards by persons selling or leasing housing constructed before the phaseout of residential lead-based paint use in 1978. The regulations, issued March 6, 1996, and codified at 40 C.F.R. Part 745 Subpart F, require that sellers and lessors of most residential housing built before 1978: (a) disclose the presence of known lead-based paint and/or lead-based paint hazards in the target housing; (b) provide purchasers and lessees with any available

records or reports pertaining to the presence of lead-based paint and/or lead-based paint hazards;  
(c) provide purchasers and lessees with a federally approved lead hazard information pamphlet;  
(d) provide purchasers with a 10-day opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards before the purchaser is obligated under any purchase contract; and (e) include certain disclosure and acknowledgment language in the sales or leasing contract. The failure or refusal to comply with the regulations is a violation of Section 1018 of the Act and Section 409 of TSCA.

#### **Section IV**

##### **General Factual Allegations**

6. Respondent is, and at all times referred to herein was, a “person” within the meaning of TSCA.

7. Respondent is the “lessor” as defined by 40 C.F.R. § 745.103, for the lease of 2516 Fort Street, Omaha, Nebraska 68111 and 5134 North 37<sup>th</sup> Street, Omaha, Nebraska 68111 (Properties).

8. The Properties were constructed before 1978.

9. The Properties are “target housing” as defined by 40 C.F.R. § 745.103.

##### **Violations**

10. The Complainant hereby states and alleges that Respondent has violated TSCA and federal regulations promulgated thereunder, as follows:

##### **Count 1**

11. The facts stated in Paragraphs 1 through 9 above are herein incorporated.

12. Respondent entered into a contract to lease the target housing unit located at 2516 Fort Street, Omaha, Nebraska 68111 on or about October 30, 2009 and 5134 North 37<sup>th</sup> Street,

Omaha, Nebraska 68111 on or about January 16, 2009.

13. Respondent failed to provide the lessees of the properties with an EPA-approved lead hazard information pamphlet or to perform any other lead-based paint disclosure activities before lessees were obligated under contract to lease the target housing unit.

14. Respondent's failure to perform the acts indicated in paragraph 13 above are violations of 40 C.F.R. §§ 745.107, 745.113, and in accordance with 40 C.F.R. § 745.118(e), violations of Section 1018 of the Act, 42 U.S.C. § 4852d, and Section 409 of TSCA, 15 U.S.C. § 2689, and thus Respondent is subject to civil penalties under Section 16 of TSCA, 15 U.S.C. § 2615.

## Section V

### Consent Agreement

15. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above.

16. Respondent neither admits nor denies the factual allegations set forth above.

17. Respondent waives their right to contest any issue of fact or law set forth above and their right to appeal the Final Order accompanying this Consent Agreement.

18. Respondent and the EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

19. Respondent certifies by the signing of this CAFO that it is presently in compliance with all requirements of 40 C.F.R. Part 745, Subpart F.

20. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in the Final Order.

21. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of Section 409 of TSCA, 15 U.S.C. 2689 and 40 C.F.R. Subpart F alleged in this document.

22. In settlement of this matter, Respondent agrees to complete the following Supplemental Environmental Project (SEP), which the parties agree is intended to secure significant environmental and/or public health benefits: Respondent has paid for a certified inspector to perform a lead based paint inspection at 2862 Ellison in Omaha, Nebraska. The lead based paint inspection included sampling results which identified areas of the inspected property that contained lead based paint and/or lead based paint hazards. Respondent will hire a certified abatement contractor to perform an abatement window replacement SEP and other abatement SEP activities in order to address the lead based paint and/or lead based paint hazards identified during the lead based paint inspections. The abatement SEP activities will reduce lead based paint hazards in said properties.

23. SEP abatement activities will consist of the following:

At 2862 Ellison the certified abatement contractor will perform the following abatement activities:

- a. Living/dining room-overlay ceiling with drywall
- b. Northeast bedroom-remove existing drywall overlay and install drywall for East/North/West walls
- c. Bathroom-remove and replace drywall overlay for north wall
- d. Bathroom window-remove and replace window sash unit
- e. Bathroom door-remove and replace door jamb
- f. Southwest bedroom closet-remove and replace door casing

- g. Southwest bedroom baseboard-remove and replace baseboard
- h. Replace window sashes at 24 window locations

At 4233 Emmet the certified abatement contractor will perform the following abatement activities:

- a. Replace window sashes at 10 window locations

24. Within thirty (30) days of the effective date of the Final Order, Respondent will provide EPA with a copy of the letter sent to the Nebraska Department of Health and Human Services informing the state of Respondent's intent to perform a SEP and requesting procedural information pertaining to performance of the SEP.

25. The total expenditure for the SEP shall be not less than \$14,305.00 and the SEP shall be completed no later than one (1) year from effective date of the final order. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations.

26. Respondent agrees that the abatement work on the SEP project referenced in Paragraphs 22 and 23 above will be performed by entities licensed and/or certified by the state of Nebraska to perform lead-based paint abatement activities. Respondent is responsible for ensuring that the entity or entities performing the SEP project described in Paragraphs 22 and 23 above receive a copy of this CAFO and all attachments pertaining to the SEP project.

Respondent is responsible for any failure to complete the SEP in accordance with all applicable terms of this agreement.

27. Within six (6) months of the effective date of this Order, Respondent shall submit an Interim SEP Report to EPA. The Interim SEP Report shall contain the following:

- a. A copy of the most current certification for the abatement contractor

performing the SEP abatement activities.

The Interim SEP Report shall be directed to the following:

Cassie Mance  
WWPD/TOPE  
U.S. Environmental Protection Agency  
Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101.

28. Within thirty (30) days of completion of the abatement SEP described in Paragraphs 22 and 23 above, Respondent will have a certified inspector, other than the certified abatement contractor performing the abatement SEP, conduct clearance sampling on the abatement work described in Paragraphs 22 and 23 above. The Respondent agrees to correct any lead-based paint hazards indicated by the clearance sampling results. The clearance sampling and any necessary corrections shall be performed per HUD guidelines.

29. Upon receipt of the clearance sampling results, Respondent shall submit the clearance sampling results to:

As to EPA:

Cassie Mance  
WWPD/TOPE  
U.S. Environmental Protection Agency  
Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101.

As to the state:

Nebraska Department of Health and Human Services  
Office of Environmental Health Hazards & Indoor Air  
Lead Based Paint Program  
PO Box 95026  
301 Centennial Mall South – 3<sup>rd</sup> Floor  
Lincoln, Nebraska 68509-5026.

30. Within thirty (30) days of completion of the clearance sampling described in Paragraph 28 above, Respondent shall submit a SEP Completion Report to EPA, with a copy to the state agency identified below. The SEP Completion Report shall contain the following:

- a. A detailed description of the SEP as implemented;
- b. Itemized costs, documented by copies of purchase orders, receipts or canceled checks;
- c. The final abatement report, as required by state law; and
- d. The following certification signed by Respondent or, if Respondent is a corporation, an officer of the corporation:

**I certify under penalty of law** that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

The SEP Completion Report shall be directed to the following:

As to EPA:

Cassie Mance  
WWPD/TOPE  
U.S. Environmental Protection Agency  
Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101.

As to the state:

Nebraska Department of Health and Human Services  
Office of Environmental Health Hazards & Indoor Air



Lead Based Paint Program  
PO Box 95026  
301 Centennial Mall South – 3<sup>rd</sup> Floor  
Lincoln, Nebraska 68509-5026.

31. If the SEP referenced in Paragraphs 22 and 23 above is not timely completed to the satisfaction of the EPA in accordance with the terms of this Final Order, Respondent shall pay a stipulated penalty in the amount of 100% of the projected costs of the SEP minus any documented expenditures determined by the EPA to be acceptable for the SEP. This stipulated penalty is consistent with the EPA SEP Policy, effective May 1, 1998. For the SEP, the following instances constitute a failure to complete the project in accordance with the terms of this Final Order:

- i. Failure to expend the funds in a manner acceptable to the EPA or otherwise to complete the project pursuant to the terms of this consent agreement.
- ii. Failure to ensure, through good faith and timely efforts, that the SEP project is completed by the anticipated completion date of within one (1) year of the effective date of the Final Order. In the event of circumstances beyond its control rendering the anticipated completion date unfeasible, Respondent may demonstrate good faith by promptly notifying the EPA Region 7 contact identified in Paragraph 26(iv) above of the change in circumstances and proposing a new completion date acceptable to the EPA for the SEP.
- iii. Any stipulated penalties for which Respondent is liable under this agreement shall be due and payable within ten (10) days of

Respondent's receipt of a written demand from Complainant.

32. Respondent certifies that it is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant or as injunctive relief in this or any other case or to comply with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

33. Respondent certifies that it is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP. Respondent further certifies that, to the best of its knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to the EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purposes of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not yet expired.

34. For federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

35. Any public statement, oral or written, in print, film or other media, made by Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency."

36. Respondent understands that its failure to timely pay any portion of the civil

penalty described in Paragraph 1 of the Final Order below or any portion of a stipulated penalty as stated in Paragraph 31 above may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charge for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

#### **Section VI**

#### **Final Order**

Pursuant to the provisions of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692, and based upon the information set forth in the Consent Agreement accompanying this Final Order, **IT IS HEREBY ORDERED THAT:**

1. Respondent shall pay a civil penalty of Eight Thousand Ninety-five Dollars (\$8,095.00) within thirty (30) days of the effective date of this Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

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

2. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101; and

Jennifer Trotter, Attorney  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101.

3. Respondent shall complete the Supplemental Environmental Project in accordance with the provisions set forth in the Consent Agreement and shall be liable for any stipulated penalty for failure to complete such project as specified in the Consent Agreement.

4. Respondent and Complainant shall each bear their own costs and attorneys' fees incurred as a result of this matter.

**RESPONDENT:  
THEISS FAMILY LIMITED PARTNERSHIP**


Date: 6-22-11

By: Darlene Theiss


DARLENE THEISS Gen. Partner  
Print Name Title

**COMPLAINANT:  
U. S. ENVIRONMENTAL PROTECTION AGENCY**

Date: 7/5/11

  
\_\_\_\_\_  
Jamie Green  
Chief  
Toxics and Pesticides Branch  
Water, Wetlands and Pesticides Division

Date: 7-6-11

  
\_\_\_\_\_  
Jennifer Trotter  
Attorney  
Office of Regional Counsel

**IT IS SO ORDERED.** This Order shall become effective immediately.

Date:

July 25, 2011



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ROBERT L. PATRICK  
Regional Judicial Officer

IN THE MATTER OF Theiss Family Limited Partnership, Respondent  
Docket No. TSCA-07-2011-0009

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:


Copy hand delivered to  
Attorney for Complainant:

Jennifer Trotter  
Assistant Regional Counsel  
Region 7  
United States Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Darlene Theiss  
The Theiss Family Limited Partnership  
536 N. 74<sup>th</sup> Avenue  
Omaha, Nebraska 68106

Dated: 7/25/11

  
Kathy Robinson  
Hearing Clerk, Region 7