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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION IX
REGIONAL HEARING CLERK

REGION IX

75 HAWTHORNE STREET

SAN FRANCISCO, CALIFORNIA 94105

IN THE MATTER OF:

Fine Custom Painting, Inc.,
Respondent.

)
) Docket No. TSCA-09-2007-0010
)
) COMPLAINT AND NOTICE OF
) OPPORTUNITY FOR HEARING
)
)
)

This is a civil administrative action instituted pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 et seq., for the assessment of a civil administrative penalty. Complainant is the Director of the Communities and Ecosystems Division, EPA Region IX, who has been duly delegated the authority to institute this action. Respondent is Fine Custom Painting, Inc., a California corporation located at 107 South Linden Avenue in South San Francisco, California. This Complaint and Notice of Opportunity for Hearing ("Complaint") serves as notice that Complainant has reason to believe that Respondent violated Section 409 of TSCA by failing to comply with Section 406 of TSCA and its implementing regulations at 40 C.F.R. Part 745, Subpart E.

APPLICABLE STATUTORY AND REGULATORY SECTIONS

1. Pursuant to Section 406 of TSCA, 15 U.S.C. § 2686, EPA

1 promulgated regulations requiring each person who performs a
2 renovation of target housing for compensation to provide a lead
3 hazard information pamphlet to the owner and occupant of such
4 housing prior to commencing the renovation at 40 C.F.R. Part 745,
5 Subpart E.

6 2. "Target housing" means any housing constructed prior to
7 1978, except housing for the elderly or persons with disabilities
8 (unless any child who is less than 6 years of age resides or is
9 expected to reside in such housing) or any 0-bedroom dwelling.
10 Section 401 of TSCA, 15 U.S.C. § 2681.

11 3. "Renovation" means the modification of any existing
12 structure, or portion thereof, that results in the disturbance of
13 painted surfaces, unless that activity is performed as part of an
14 "abatement," as defined by 40 C.F.R. §745.223. 40 C.F.R.
15 §745.83.

16 4. The term "renovation" includes (but is not limited to):
17 the removal or modification of painted surfaces or painted
18 components (e.g., modification of painted doors, surface
19 preparation activity (such as sanding, scraping, or other
20 activities that may generate paint dust); the removal of large
21 structures (e.g., walls, ceiling, large surface replastering,
22 major re-plumbing); and window replacement. 40 C.F.R. §745.83.

23 5. "Renovator" means any person who performs for
24 compensation a renovation. 40 C.F.R. §745.83.

25 6. "Pamphlet" means the EPA pamphlet developed under
26 Section 406(a) of TSCA for use in complying with 40 C.F.R. Part
27 745, Subpart E and other rulemakings under Title IV of TSCA and
28 the Residential Lead-Based Paint Hazard Reduction Act, or any

1 State or Tribal pamphlet approved by EPA pursuant to 40 C.F.R.
2 §745.326 that is developed for the same purpose. 40 C.F.R.
3 §745.83.

4 7. "Multi-family housing" means a housing property
5 consisting of more than four dwelling units. 40 C.F.R. §745.83.

6 8. No more than 60 days before beginning renovation
7 activities in common areas of multi-family housing, the renovator
8 shall provide the owner with the pamphlet and either obtain from
9 the owner a written acknowledgment that the owner received the
10 pamphlet or obtain a certificate of mailing at least 7 days prior
11 to renovation. 40 C.F.R. §745.85(b)(1).

12 9. No more than 60 days before beginning renovation
13 activities in common areas of multi-family housing, the renovator
14 shall notify in writing, or ensure written notification of, each
15 unit of the multi-family housing and make the pamphlet available
16 upon request prior to the start of renovation. 40 C.F.R.
17 §745.85(b)(2).

18 10. Such notification shall be accomplished by distributing
19 written notice to each affected unit and shall describe the
20 general nature and locations of the planned renovation
21 activities; the expected starting and ending dates; and a
22 statement of how the occupant can obtain the pamphlet from the
23 renovator at no charge. 40 C.F.R. §745.85(b)(2).

24 11. Section 409 of TSCA, 15 U.S.C. § 2689, provides that it
25 shall be unlawful for any person to fail or refuse to comply with
26 any provision of or any rule or order issued under Subchapter IV
27 of TSCA, which includes Section 406 of TSCA.

28 12. Failure or refusal to comply with any provision of 40

1 C.F.R. Part 745, Subpart E is a violation of TSCA Section 409, 15
2 U.S.C. § 2689. 40 C.F.R. §745.87.

3 **GENERAL ALLEGATIONS**

4 13. Paragraphs 1 through 12 are realleged and incorporated
5 herein by reference.

6 14. Respondent is a corporation and therefore a "person" as
7 that term is defined by 40 C.F.R. §745.83.

8 15. At all times relevant to this Complaint, Mark Ryser was
9 the owner of a building located at 129-131 Ord Street in San
10 Francisco, California (the "129-131 Ord Street Building").

11 16. At all times relevant to this Complaint, the 129-131
12 Ord Street Building was part of housing property that constituted
13 "multi-family housing" as that term is defined by 40 C.F.R.
14 §745.83.

15 17. The 129-131 Ord Street Building was constructed before
16 1978 and is therefore "target housing" as that term is defined by
17 Section 401 of TSCA, 15 U.S.C. § 2681.

18 18. On or about June 14, 2005, Mr. Ryser hired Respondent
19 to perform exterior paint work on the 129-131 Ord Street
20 Building.

21 19. This exterior paint work that Mr. Ryser hired
22 Respondent to perform included scraping and sanding all failing
23 paint on the woodwork, stucco, and plaster moldings and stripping
24 paint off certain areas around the Building.

25 20. The exterior paint work that Mr. Ryser hired Respondent
26 to perform was a "renovation" as that term is defined by 40
27 C.F.R. §745.83.

28 21. At all times relevant to this Complaint, Respondent was

1 a "renovator" as that term is defined by 40 C.F.R. §745.83.

2 22. On or around July 5, 2005, Respondent began exterior
3 paint work on the 129-131 Ord Street Building.

4 COUNT 1

5 23. Paragraphs 1 through 22 are realleged and incorporated
6 herein by reference.

7 24. Prior to the start of renovation, Respondent did not
8 provide the owner, Mark Ryser with a lead hazard pamphlet and
9 either obtain from Mr. Ryser a written acknowledgment that Mr.
10 Ryser received the pamphlet or obtain a certificate of mailing at
11 least 7 days prior to renovation.

12 25. Respondent's failure to provide the owner, Mark Ryser
13 with a lead hazard pamphlet before renovation began and either
14 obtain from Mr. Ryser a written acknowledgment that Mr. Ryser
15 received the pamphlet or obtain a certificate of mailing at least
16 7 days prior to renovation constitutes a violation of 40 C.F.R.
17 §745.85(b)(1) and therefore a violation of Section 409 of TSCA,
18 15 U.S.C. § 2689.

19 COUNT 2

20 26. Paragraphs 1 through 22 are realleged and incorporated
21 herein by reference.

22 27. Prior to the start of renovation, Respondent did not
23 provide written notice to the occupant(s) of 129 Ord Street
24 describing the general nature and locations of the planned
25 renovation activities; the expected starting and ending dates of
26 the renovation; and a statement of how the occupant(s) could
27 obtain a pamphlet from Respondent at no charge.

28 28. Respondent's failure to provide this written notice to

1 the occupant(s) of 129 Ord Street constitutes a violation of 40
2 C.F.R. §745.85(b)(2) and therefore a violation of Section 409 of
3 TSCA, 15 U.S.C. § 2689.

4 COUNT 3

5 29. Paragraphs 1 through 22 are realleged and incorporated
6 herein by reference.

7 30. Prior to the start of renovation, Respondent did not
8 provide written notice to the occupant(s) of 129A Ord Street
9 describing the general nature and locations of the planned
10 renovation activities; the expected starting and ending dates of
11 the renovation; and a statement of how the occupant(s) could
12 obtain a pamphlet from Respondent at no charge.

13 31. A child who was less than 6 years of age resided at
14 129A Ord Street.

15 32. Respondent's failure to provide this written notice to
16 the occupant(s) of 129A Ord Street constitutes a violation of 40
17 C.F.R. §745.85(b)(2) and therefore a violation of Section 409 of
18 TSCA, 15 U.S.C. § 2689.

19 COUNT 4

20 33. Paragraphs 1 through 22 are realleged and incorporated
21 herein by reference.

22 34. Prior to the start of renovation, Respondent did not
23 provide written notice to the occupant(s) of 129A Ord Street
24 describing the general nature and locations of the planned
25 renovation activities; the expected starting and ending dates of
26 the renovation; and a statement of how the occupant(s) could
27 obtain a pamphlet from Respondent at no charge.

28 35. Respondent's failure to provide this written notice to

1 the occupant(s) of 131 Ord Street constitutes a violation of 40
2 C.F.R. §745.85(b)(2) and therefore a violation of Section 409 of
3 TSCA, 15 U.S.C. § 2689.

4 PROPOSED CIVIL PENALTY

5 Section 16(a) of TSCA authorizes the Administrator of the
6 United States Environmental Protection Agency ("EPA") to issue a
7 civil complaint and assess a civil penalty not to exceed \$25,000
8 per day for each violation of Section 409 of TSCA, 15
9 U.S.C. § 2682. This statutory maximum civil penalty subsequently
10 has been raised to \$32,500 per day for each violation that
11 occurred on or after March 15, 2004 pursuant to the Federal Civil
12 Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as
13 amended, and its implementing regulation, the Civil Monetary
14 Penalty Inflation Adjustment Rule, codified at 40 C.F.R. Part 19.
15 In assessing any civil penalty, Section 16(a) of TSCA requires
16 that EPA take into account the nature, circumstances, extent, and
17 gravity of the violations; Respondent's history of such
18 violations of TSCA; the degree of culpability involved;
19 Respondent's ability to pay a penalty without jeopardizing its
20 ability to continue to do business and such other factors as
21 justice may require.

22 Based upon the facts alleged in this Complaint and upon the
23 statutory factors enumerated above, Complainant requests that the
24 Administrator assess against the Respondent a civil
25 administrative penalty of up to \$32,500 for each violation of
26 TSCA.

27 NOTICE OF OPPORTUNITY TO REQUEST A HEARING

28 As provided in Section 16(a) of TSCA, 15 U.S.C. § 2615(a),

1 Respondent has the right to request a formal hearing to contest
2 any material fact set forth in this Complaint or to contest the
3 appropriateness of the proposed penalty. Any hearing requested
4 will be conducted in accordance with the Administrative Procedure
5 Act, 5 U.S.C. § 551 et seq., and the Consolidated Rules of
6 Practice Governing the Administrative Assessment of Civil
7 Penalties and the Revocation/Termination or Suspension of Permits
8 ("Consolidated Rules of Practice"), 40 C.F.R. Part 22. A copy of
9 the Consolidated Rules of Practice is enclosed with this
10 Complaint.

11 You must file a written Answer within thirty (30) days of
12 receiving this Complaint to avoid being found in default, which
13 constitutes an admission of all facts alleged in the Complaint
14 and a waiver of the right to a hearing, and to avoid having the
15 above penalty assessed without further proceedings. If you
16 choose to file an Answer, you are required by the Consolidated
17 Rules of Practice to clearly and directly admit, deny, or explain
18 each of the factual allegations contained in this Complaint to
19 which you have any knowledge. If you have no knowledge of a
20 particular fact and so state, the allegation is considered
21 denied. Failure to deny any of the allegations in this Complaint
22 will constitute an admission of the undenied allegation.

23 The Answer shall also state the circumstances and arguments,
24 if any, which are alleged to constitute the grounds of defense,
25 and shall specifically request an administrative hearing, if
26 desired. If you deny any material fact or raise any affirmative
27 defense, you will be considered to have requested a hearing.

28 The Answer must be filed with:

1 Regional Hearing Clerk
2 USEPA, Region IX
3 75 Hawthorne Street
4 San Francisco, CA 94105

5 In addition, please send a copy of the Answer and all other
6 documents that you file in this action to:

7 Carol Bussey
8 Assistant Regional Counsel
9 Office of Regional Counsel (ORC-2)
10 USEPA, Region IX
11 75 Hawthorne Street
12 San Francisco, CA 94105

13 Ms. Bussey is the attorney assigned to represent EPA in this
14 matter. Her telephone number is (415)972-3950.

15 You are further informed that the Consolidated Rules of
16 Practice prohibit any ex parte (unilateral) discussion of the
17 merits of any action with the Regional Administrator, Regional
18 Judicial Officer, Administrative Law Judge, or any person likely
19 to advise these officials in the decision of the case, after the
20 Complaint is issued.

21 **INFORMAL SETTLEMENT CONFERENCE**

22 EPA encourages all parties against whom a civil penalty is
23 proposed to pursue the possibility of settlement through informal
24 conferences. Therefore, whether or not you request a hearing,
25 you may confer informally with EPA through Carol Bussey, the EPA
26 attorney assigned to this case, regarding the facts of this case,
27 the amount of the proposed penalty, and the possibility of
28 settlement. An informal settlement conference does not, however,
affect your obligation to file an Answer to this Complaint.

29 **ALTERNATIVE DISPUTE RESOLUTION**

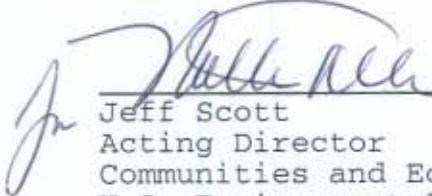
30 The parties also may engage in any process within the scope
31 of the Alternative Dispute Resolution Act, 5 U.S.C. § 581 et

1 seg., which may facilitate voluntary settlement efforts. Dispute
2 resolution using alternative means of dispute resolution does not
3 divest the Presiding Officer of jurisdiction nor does it
4 automatically stay the proceeding.

5 **CONSENT AGREEMENT AND FINAL ORDER**

6 EPA has the authority, where appropriate, to modify the
7 amount of the proposed penalty to reflect any settlement reached
8 with you in an informal conference or through alternative dispute
9 resolution. The terms of such an agreement would be embodied in
10 a Consent Agreement and Final Order. A Consent Agreement signed
11 by both parties would be binding as to all terms and conditions
12 specified therein when the Regional Judicial Officer signs the
13 Final Order.

14
15 DATE: 9-28-2007


16 Jeff Scott
17 Acting Director
18 Communities and Ecosystems Division
19 U.S. Environmental Protection Agency,
20 Region IX
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