

U. S. ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 N. 5th STREET

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

In the Matter of

**FIVESTAR REALTY, INC.
Saint Louis, Missouri**

Respondent

Docket No. TSCA-07-2009-0011

**COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

COMPLAINT

Jurisdiction

1. This Complaint and Notice of Opportunity for Hearing (Complaint) serves as notice that the United States Environmental Protection Agency (EPA), Region 7 has reason to believe that Respondent has violated Section 409 of the Toxic Substances Control Act (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.

2. This administrative action for the assessment of civil penalties is instituted pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and in accordance with the EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, (Consolidated Rules) a copy of which is enclosed along with this Complaint.

Parties

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

4. The Respondent is Fivestar Realty, Inc., a residential leasing corporation, located at 9024 Firewood Trail, Saint Louis, Missouri, 63126

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 EPA and the Department of Housing and Urban Development 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.

Violations

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

Count 1

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

8. Respondent is the “lessor” as defined by 40 C.F.R. § 745.103, of ten rental property units located at 3115 Cherokee, 4236 Virginia, and 4250 Virginia, St. Louis, Missouri (the Properties).

9. The Properties were constructed before 1978.

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

11. EPA has conducted an evaluation of Respondent’s compliance with the lead-based paint disclosure requirements of TSCA and 40 C.F.R. Part 745, Subpart F, and has collected records and information from Respondent as part of that evaluation.

12. Information collected during the evaluation showed that Respondent entered into contracts to lease the Properties between December 2005 and March 2008.

13. Information collected during the evaluation showed that Respondent failed to disclose to the lessees of each of the abovementioned properties the presence of any known lead-based paint and/or lead-based paint hazards before the lessees were obligated under a contract for lease of the Properties.

14. Respondent's failure to disclose the presence of any known lead-based paint and/or lead-based paint hazards is a violation of 40 C.F.R. § 745.107(a)(2) and, in accordance with 40 C.F.R. § 745.118(e), a violation of Section 1018 of the Act and of Section 409 of TSCA.

15. Respondent is subject to a civil penalty pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, for violations of Section 1018 of the Act and Section 409 of TSCA.

16. Pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, and based upon the facts set forth above, it is proposed that a civil administrative penalty in the amount of \$34,211 be assessed against Respondent.

Relief

17. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), provides that any person who violates Section 409 of TSCA, 15 U.S.C. § 2689, shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. This maximum penalty amount is limited by Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5), which limits penalties assessed for violations of Section 409 of TSCA to not more than \$10,000 per violation. The Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, authorizes penalties of up to \$11,000 for violations that occur after July 28, 1997.

18. The proposed penalty of \$34,211 is based upon the facts alleged in this Complaint and upon the factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), including the nature, circumstances, extent and gravity of the violations, and with respect to the Respondent: a) its ability to pay, b) the effect on its ability to continue to do business, c) any history of prior violations, d) the degree of culpability, and e) such other matters as justice may require. The proposed penalty is in accordance with EPA's Section 1018 - Disclosure Rule Enforcement Response Policy, dated February 2000, a copy of which is enclosed along with this Complaint.

19. The proposed penalty is based on the best information available to EPA at the time the Complaint is issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty. An explanation of the proposed penalty is contained in the Civil Penalty Assessment Worksheets attached and incorporated herein by reference.

Payment of Proposed Penalty in Full

20. A Respondent may resolve this proceeding at any time by paying the full penalty proposed in the Complaint and filing a copy of the check or other instrument of payment with the Regional Hearing Clerk. Payment of the total penalty, \$34,211, may be made by Certified or Cashier's Check payable to the "United States Treasury," and remitted to:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 97977
St. Louis, MO 63197-9000

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York
ABA = 021030004
Account = 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"

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

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 7
901 N. 5th Street
Kansas City, Kansas 66101; and

Chris Muehlberger, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
901 N. 5th Street
Kansas City, Kansas 66101.

Checks should reference the name and Docket Number of this Complaint.

Payment of Proposed Penalty in Lieu of an Answer

21. A Respondent who wishes to resolve a proceeding by paying the proposed penalty in

full instead of filing an answer to the Complaint may do so within thirty (30) days of receipt of the Complaint, in accordance with the procedures set forth above. A Respondent who wishes to resolve a proceeding by paying the proposed penalty in full instead of filing an answer but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within thirty (30) days of receipt of the Complaint, in accordance with Rule 22.18(a)(1) of the Consolidated Rules. The written statement shall state that Respondent agrees to pay the proposed penalty in full within sixty (60) days of receipt of the Complaint. The written statement need not contain any response to, or admission of, the allegations in the Complaint. A Respondent must then pay the full amount of the proposed penalty within sixty (60) days of receipt of the Complaint. Failure to pay the full penalty within sixty (60) days of receipt of the Complaint may subject a Respondent to default, as set forth below.

NOTICE OF OPPORTUNITY FOR HEARING

Answer and Request for Hearing

22. A Respondent must file a written answer within thirty (30) days of receipt of this Complaint if Respondent: a) contests any material fact upon which this Complaint is based; b) contends that the penalty proposed in this Complaint is inappropriate; or c) contends that it is entitled to judgment as a matter of law. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which a Respondent has any knowledge. Where a Respondent has no knowledge of a particular factual allegation, the answer shall so state. Failure to admit, deny or explain any of the factual allegations in the Complaint constitutes an admission of the allegation. The answer shall also state: a) the circumstances or arguments which are alleged to constitute the grounds of any defense; b) the facts that a Respondent disputes; c) the basis for opposing the proposed penalty; and d) whether a hearing is requested.

23. The original and one copy of the answer shall be filed with the following, in accordance with Section 22.15 of the Consolidated Rules:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 7
901 N. 5th Street
Kansas City, Kansas 66101.

A copy of the answer shall be sent to:

Chris Muehlberger, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
901 N. 5th Street
Kansas City, Kansas 66101.

Default

24. If, within thirty (30) days of receipt of a Complaint, a Respondent fails to: a) submit full payment of the proposed penalty; b) submit a written statement to the Regional Hearing Clerk that Respondent agrees to pay the penalty within sixty (60) days of receipt of the Complaint; or c) file a written answer to the Complaint; a Respondent may be found in default. Default by a Respondent constitutes, for the purposes of this proceeding, an admission of all facts alleged in the Complaint and a waiver of a Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalty proposed in the Complaint shall be assessed unless the Presiding Officer finds that the proposed penalty is clearly inconsistent with the record of the proceeding or TSCA.

Informal Settlement Conference

25. The EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of TSCA and the regulations upon which this action is based. Regardless of whether a Respondent requests a hearing, a Respondent may request an informal settlement conference to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request an informal settlement conference, please contact:

Chris Muehlberger, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
901 N. 5th Street
Kansas City, Kansas 66101 Telephone (913) 551-7623.

26. Any settlement which may be reached as a result of such a conference shall be recorded in a written consent agreement signed by all parties or their representatives and shall conform with the provisions of Section 22.18(b)(2) of the Consolidated Rules. No settlement or consent agreement shall dispose of this proceeding without a final order from the Regional Judicial Officer or the Regional Administrator.

27. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer must be filed.

Date: 2/27/09

By: Jamie Green
Jamie Green, Chief
Toxics and Pesticides Branch
Water, Wetlands and Pesticides Division

Date: 2.26.09

By: Chris Muehlberger
Chris Muehlberger, Attorney
Office of Regional Counsel

Attachment