

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2007 APR -4 PM 3:23
REGIONAL HEARING
CLERK

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In the Matter of :

Nigito Realty Co., :

Respondent. :

Proceeding under Section 16(a) of
the Toxic Substances Control Act. :

**COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

Docket No.
TSCA-02-2007-9167

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COMPLAINT

This is a civil administrative action instituted pursuant to § 16(a), 15 U.S.C. § 2615(a), of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.* This Complaint serves notice of Complainant's preliminary determination 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, which were promulgated pursuant to § 1018 of the Residential Lead-based Paint Hazard Reduction Act of 1992, codified at 42 U.S.C. § 4851 *et seq.* (hereinafter "§ 1018").

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency ("EPA"), Region 2, has been duly delegated the authority to institute this action. Complainant, as and for her Complaint against Respondent, hereby alleges upon information and belief:

1. Respondent is Nigito Realty Co. (hereinafter "Respondent").
2. Respondent's primary place of business is located at 930 Kinderkamack Road, River Edge, NJ 07661.
3. Respondent is subject to the regulations and requirements pertaining to Lead-based Paint Disclosure promulgated pursuant to 42 U.S.C. § 4852d, and set forth at 40 C.F.R. Part 745, Subpart F.
4. On or about December 18, 2006, duly designated representatives of EPA conducted a consensual inspection of Lease Agreement files and Lead-based Paint Disclosure Forms at the office of Nigito Realty Co., 930 Kinderkamack Road, River Edge, NJ 07661 pursuant to § 11 of TSCA, 15 U.S.C. § 2610. Lease paperwork for Nigito Realty Co. - Marionette Twin Apartments, 265 Beech Street, Hackensack, NJ 07601, was reviewed for compliance with the EPA regulations and requirements pertaining to Lead-based Paint Disclosure, 40 C.F.R. Part 745, Subpart F. Additional information was requested by telephone and received from the Respondent. The activities described in this paragraph are hereinafter collectively referred to as the "inspection."

5. On or about January 26, 2007, EPA obtained information from the New Jersey Department of Health and Senior Services that a minor seven years of age would reside at 265 Beech Street, Apartment 22, Hackensack, NJ 07601.
6. Respondent is, and at all times relevant to this Complaint was, the “agent,” as that term is defined in 40 C.F.R. § 745.103, of the property located at 265 Beech Street, Hackensack, NJ 07601.
7. The property located at 265 Beech Street, Hackensack, NJ 07601 (hereinafter “265 Beech Street property”) is “residential real property” within the meaning of § 1004(24) of the Residential Lead-based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851b(24), that was constructed in 1935.
8. The 265 Beech Street property consists of approximately 39 “residential dwelling” units, within the meaning of § 1004(23) of the Residential Lead-based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851b(23), and 40 C.F.R. § 745.103.
9. The 265 Beech Street property is “target housing” within the meaning of § 1004(27) of the Residential Lead-based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851b(27), and 40 C.F.R. § 745.103.
10. Respondent acted as agent for the lease of target housing apartments to the following tenants on or about the dates cited below in paragraphs 11 through 14.
11. On or about June 1, 2003, Victoria Garcia entered into a contract to lease 265 Beech Street, Apartment 44, Hackensack, NJ 07601, from Respondent. Two minors under 18 years of age would reside in the apartment.
12. On or about May 26, 2006, Segundo Suqui Lema and Neli Suqui Lema entered into a renewal contract to lease 265 Beech Street, Apartment 22, Hackensack, NJ 07601, from Respondent. A minor under 18 years of age would reside in the apartment.
13. On or about July 1, 2005, Lori Anderson and Mark Fischer entered into a contract to lease 265 Beech Street, Apartment 37, Hackensack, NJ 07601, from Respondent.
14. On or about July 1, 2004, Robin McQueen entered into a contract to lease 265 Beech Street, Apartment 4, Hackensack, NJ 07601, from Respondent. A minor under 18 years of age would reside in the apartment.
15. Each of the persons leasing the target housing units described in paragraphs 11, 12, 13 and 14, above, is a “lessee” of target housing as that term is defined at 40 C.F.R. § 745.103.
16. None of the real estate transactions described in paragraph 15, above, constitutes an exempt transaction pursuant to 40 C.F.R. § 745.101.

COUNT 1

Statement by the Lessor Disclosing Known Lead-based Paint

17. Paragraphs 1 through 16 are realleged and incorporated as if fully set forth herein.

18. Under 40 C.F.R. § 745.113(b)(2), the lessor shall include in each contract to lease target housing, as an attachment or within the contract, a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of such presence.
19. Pursuant to 40 C.F.R. § 745.115, each agent is required to ensure that the lessor has performed all activities required under 40 C.F.R. § 745.113, or to personally ensure compliance with the requirements of 40 C.F.R. § 745.113.
20. Upon information and belief, Respondent acted as the agent for lease of the target housing apartments listed in paragraphs 11, 12, 13, and 14, above.
21. For each real estate transaction for the rental of the apartments described in paragraph 20, above, a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of such presence was not included within, nor attached to, the contract to lease.
22. Failure to include or attach a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of such presence to the contract to lease is a violation of 40 C.F.R. § 745.113(b)(2).
23. Respondent's failures to ensure that the lessor has performed all activities required under 40 C.F.R. § 745.113(b)(2), or to personally ensure compliance with 40 C.F.R. § 745.113(b)(2), constitute failures or refusals to comply with 40 C.F.R. § 745.115(a)(2), which are violations of 42 U.S.C. § 4852d(b)(5) and of § 409 of TSCA, 15 U.S.C.

COUNT 2

List of Records or Reports Pertaining to Lead-based Paint

24. Paragraphs 1 through 16 are realleged and incorporated as if fully set forth herein.
25. Under 40 C.F.R. § 745.113(b)(3), the lessor shall include in each contract to lease target housing, as an attachment or within the contract, a list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards that have been provided to the lessee, or an indication that no such records or reports are available.
26. Pursuant to 40 C.F.R. § 745.115, each agent is required to ensure that the lessor has performed all activities required under 40 C.F.R. § 745.113, or to personally ensure compliance with the requirements of 40 C.F.R. § 745.113.
27. Upon information and belief, Respondent acted as the agent for lease of the target housing apartment listed in paragraph 12, above.
28. For the real estate transaction for the rental of the apartment described in paragraph 27, above, a list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards that have been provided to the lessee, or an indication that no such records or reports are available, was not included within, nor attached to, the contract to lease.
29. Failure to include or attach to the contract to lease a list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards that

have been provided to the lessee, or to indicate that no such records or reports are available, is a violation of 40 C.F.R. § 745.113(b)(3).

30. Respondent's failure to ensure that the lessor has performed all activities required under 40 C.F.R. § 745.113(b)(3), or to personally ensure compliance with 40 C.F.R. § 745.113(b)(3), constitutes a failure or refusal to comply with 40 C.F.R. § 745.115(a)(2), which is a violation of 42 U.S.C. § 4852d(b)(5) and of § 409 of TSCA, 15 U.S.C. § 2689.

PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with § 1018 and 40 C.F.R. § 745.118(f), which authorize the assessment of a civil penalty under TSCA § 16 in the maximum amount of \$10,000 for each violation of TSCA § 409. This maximum amount has been adjusted to \$11,000 per violation under the Civil Monetary Penalty Inflation Adjustment Rule. 61 Fed. Reg. 69361 (1996) for violations occurring after January 30, 1997. See 62 Fed. Reg. 35038 (1997). Penalties for violations occurring after March 15, 2004 were further adjusted for inflation by the Agency effective October 1, 2004.

For purposes of determining the amount of any penalty to be assessed, § 16 requires EPA to take into account the nature, circumstances, extent and gravity of the violation or violations alleged. As to the violator, § 16 requires EPA to take into account its ability to pay, the effect of the penalty on its ability to continue to do business, its history of prior such violations, its degree of culpability, as well as such other matters as justice may require.

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case, to the extent known at the time, with specific reference to EPA's "Guidelines for Assessment of Civil Penalties Under § 16 of the Toxic Substances Control Act," which was published on September 10, 1980 in the Federal Register (45 Fed. Reg. 59,770), and EPA's February, 2000 "§ 1018 Disclosure Rule Enforcement Response Policy." These policies provide rational, consistent and equitable calculation methodologies for applying the statutory penalty factors enumerated above to particular cases. Copies of these documents are available on request, or can be found on the web at <http://cfpub.epa.gov/compliance/resources/policies/civil/tsca/>

Given the facts alleged in this Complaint and the statutory factors enumerated above, as known to Complainant at this time, Complainant proposes, subject to receipt and evaluation of further relevant information, that Respondent be assessed the following civil penalties for the violations alleged in the Complaint:

COUNT 1: Statement by Lessor Disclosing Known Lead-based Paint, or No Knowledge
Circumstance Level: 3
Total number of violations: 4
Extent Category: Significant (child between 6 and 18 years)
Minor (occupants over 18 years)
Penalty per Violation: Significant (violation prior to March 15, 2004) = \$ 4,400
Significant (violation on or after March 15, 2004) = \$ 5,158
Minor (violation on or after March 15, 2004) = \$ 774

1 Significant violation x \$ 4,400 = \$ 4,400
2 Significant violations x \$ 5,158 = \$ 10,316
1 Minor violation x \$ 774 = \$ 774

Total Proposed Assessment for this Count: \$ 15,490

COUNT 2: List of Records or Reports Pertaining to Lead-based Paint

Circumstance Level: 5

Total number of violations: 1

Extent Category: Significant (child between 6 and 18 years)

Penalty per Violation: Significant (violation on or after March 15, 2004) = \$ 1,676

1 Significant violation x \$ 1,676 = \$ 1,676

Total Proposed Assessment for this Count: \$ 1,676

TOTAL PROPOSED PENALTY \$ 17,166

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, "Consolidated Rules of Practice Governing the Administrative Assessments of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," and are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this "Complaint and Notice of Opportunity for Hearing" (hereinafter referred to as the "Complaint").

A. Answering the Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within 30 days after service of the Complaint. 40 C.F.R. § 22.15(a). The address of the Regional Hearing Clerk of EPA, Region 2, is:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus

intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity to Request a Hearing

If requested by Respondent in its Answer, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). See generally Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c).

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22. See Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A), which states, in part: "A civil penalty for a violation of section 2614...of this title [15 U.S.C. § 2614] shall be assessed by the Administrator by an order made on the record after opportunity...for a hearing in accordance with section 554 of Title 5 [5 U.S.C. § 554]."

If Respondent fails to request a hearing, such failure may operate to preclude Respondent from obtaining judicial review of an adverse EPA order. See 15 U.S.C. § 2615(a)(3), which states, in part: "Any person who requested in accordance with paragraph (2)(A) [15 U.S.C. § 2615(a)(2)(A)] a hearing respecting the assessment of a civil penalty and who is aggrieved by an order assessing a civil penalty may file a petition for judicial review with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business."

C. Failure to Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for failure to timely file an Answer to the Complaint, any order issued therefor shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court.

D. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

In order to appeal an initial decision to the Agency's Environmental Appeals Board [EAB; see 40 C.F.R. § 1.25(e)], Respondent must do so "within thirty (30) days after the initial decision is served." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "5 days shall be added to the time allowed by these [rules] for the filing of a responsive document." Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that Respondent believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent or any relevant information previously not known to Complainant, or to dismiss any or all of the charges if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to:

Lisa Kim
U.S. Environmental Protection Agency, Region 2
2890 Woodbridge Avenue
Lead Team, MS-225
Edison, NJ 08837
(732) 906-6993
kim.lisa@epa.gov

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does

not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's entering into a settlement through the signing of such Consent Agreement and Respondent's complying with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the New York address noted above), a copy of the check or other instrument of payment. 40 C.F.R. § 22.18(a). Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America," in the full amount of the penalty assessed in this Complaint to the following addressee:

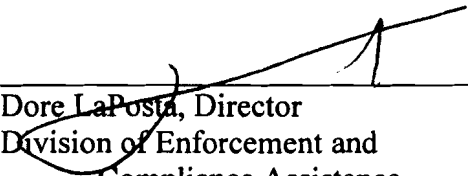
Regional Hearing Clerk
U. S. Environmental Protection Agency, Region 2
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document. A copy of the check or other instrument of payment should be provided to Lisa Kim as identified in the previous section.

Pursuant to 40 C.F.R. § 22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within 30 days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a final order. Issuance of this final order terminates this

administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 C.F.R. § 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said final order to federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

Dated: MARCH 27, 2007


Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance
U.S. Environmental Protection
Agency - Region 2

TO: Mr. Paul Nigito, Owner
Nigito Realty Co.
930 Kinderkamack Road
River Edge, NJ 07661

Enclosures

In the Matter of Nigito Realty Co.
Docket No. TSCA-02-2007-9167


CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed a copy of the foregoing Complaint, bearing docket number TSCA-02-2007-9167, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22, by certified mail, return receipt requested, to:

Mr. Paul Nigito, Owner
Nigito Realty Co.
930 Kinderkamack Road
River Edge, NJ 07661

I transmitted the original and a copy of the foregoing Complaint via interoffice mail to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: March 30, 2007
Edison, New Jersey


Lisa S. Kim