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U.S. EPA - Region IX

7
8 UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
9 REGION IX

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11 In the matter of:) Docket No. TSCA-09-2018- 0002
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13 Davis Kitchens,)
14 Respondent.)
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CONSENT AGREEMENT
AND FINAL ORDER
pursuant to 40 C.F.R. §§ 22.13(b),
22.18(b)(2), and 22.18(b)(3)

17 I. CONSENT AGREEMENT

18 The United States Environmental Protection Agency, Region IX (“EPA”), and Davis
19 Kitchens (the “Respondent”) agree to settle this matter and consent to the entry of this Consent
20 Agreement and Final Order (“CAFO”). This CAFO simultaneously initiates and concludes this
21 proceeding in accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b).

22 A. AUTHORITY AND PARTIES

23 1. This is a civil administrative penalty action brought against Respondent pursuant to
24 Section 16(a) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2615(a), for violation
25 of Section 409 of TSCA, 15 U.S.C. § 2615(a), by failing to comply with Sections 402 and 406
26 TSCA, 15 U.S.C. §§ 2682, and their implementing federal regulations promulgated at 40 C.F.R.
27 Part 745, Subpart E.
28

1 2. Complainant is the Chief of the Waste and Chemical Section in the Enforcement
2 Division, EPA Region IX, who has been duly delegated the authority to bring this action and to
3 sign a consent agreement settling this action.

4 3. Respondent, an Arizona corporation located in Tucson, Arizona, is a residential
5 kitchen cabinet manufacturer and installer.

6 B. STATUTORY AND REGULATORY BASIS

7 4. Pursuant to Section 406(b) of TSCA, 15 U.S.C. § 2686(b), 40 C.F.R. Part 745,
8 Subpart E requires a person who performs for compensation a renovation of target housing and
9 child-occupied facilities to provide a lead hazard information pamphlet to the owner and
10 occupant before beginning the renovation.

11 5. Pursuant to Sections 402(a) and (c) of TSCA, 15 U.S.C. §§ 2682(a) and (c), 40 C.F.R.
12 Part 745, Subpart E provides requirements for certification of individuals and firms engaged in
13 lead-based paint activities and work practice standards for renovation, repair, and painting
14 activities in target housing and child-occupied facilities.

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

19 7. “Person” means any natural or judicial person including any individual, corporation,
20 partnership, or association; any Indian Tribe, State, or political subdivision thereof; any interstate
21 body; and any department, agency, or instrumentality of the Federal Government. 40 C.F.R. §
22 745.83.

23 8. “Firm” means a company, partnership, corporation, sole proprietorship or individual
24 doing business, association, or other business entity; a Federal, State, Tribal, or local government
25 agency; or a nonprofit organization. 40 C.F.R. § 745.83.

26 9. “Renovation” means the modification of any existing structure, or portion thereof, that
27 results in the disturbance of painted surfaces, unless that activity is part of an abatement as
28 defined by 40 C.F.R. § 745.223. The term “renovation” includes (but is not limited to): the

1 removal, modification or repair of painted surfaces or painted components (*e.g.*, modification of
2 painted doors, surface restoration, window repair, surface preparation activity (such as sanding,
3 scraping, or other such activities that may generate paint dust); the removal of building
4 components (*e.g.*, walls, ceilings, plumbing windows); weatherization projects (*e.g.*, cutting
5 holes in painted surfaces to install blown-in insulation or to gain access to attics planning
6 thresholds to install weatherstripping), and interim controls that disturb painted surfaces

7 The term “renovation” does not include minor repair and maintenance activities. 40 C.F.R. §
8 745.83.

9 10. “Painted surface” means a component surface covered in whole or in part with paint
10 or other surface coatings. 40 C.F.R. § 745.83.

11 11. “Component or building component” means specific design or structural elements or
12 fixtures of a building or residential dwelling that are distinguished from each other by form,
13 function, and location. These include, but are not limited to interior components such as . . .
14 windows and trim (including sashes, window heads, jambs, sills or stools and troughs) . . . and
15 exterior components such as . . . windowsills or stools and troughs, casings, sashes and wells. 40
16 C.F.R. § 745.83.

17 12. “Renovator” means any individual who either performs or directs workers who
18 perform renovations. A certified renovator is a renovator who has successfully completed a
19 renovator course accredited by EPA or an EPA-authorized State or Tribal program. 40 C.F.R. §
20 745.83.

21 13. “Pamphlet” means the EPA pamphlet titled, “Renovate Right: Important Lead
22 Hazard Information for Families, Child Care Providers and Schools,” developed under Section
23 406(a) of TSCA for use in complying with Section 406(b) of TSCA, or any State or Tribal
24 pamphlet approved by EPA pursuant to 40 C.F.R. § 745.326 that is developed for the same
25 purpose. 40 C.F.R. § 745.83.

26 14. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and the Civil Monetary Penalty
27 Inflation Adjustment Rule at 40 C.F.R. Part 19, which implements the Federal Civil Penalties
28 Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, authorize civil penalties not to

1 exceed \$37,500 per day for each violation of Section 409 of TSCA, 15 U.S.C. § 2689, that
2 occurred after January 12, 2009 but before November 2, 2015.

3 C. ALLEGED VIOLATIONS

4 15. Respondent is a “person,” as that term is defined at 40 C.F.R. § 745.83.

5 16. At all times relevant to this CAFO, Respondent was a “firm,” as that term is defined
6 at 40 C.F.R. § 745.83.

7 17. In or around July 2015, Respondent performed “renovation,” as that term is defined
8 at 40 C.F.R. § 745.83, for compensation at the residential property located at 5204 E. 8th Street in
9 Tucson, Arizona (the “Property”).

10 18. At all times relevant to this CAFO, the Property was “target housing,” as that term is
11 defined at 40 C.F.R. § 745.83.

12 19. Firms that perform renovations for compensation must apply to EPA for certification
13 to perform renovations. 40 C.F.R. § 745.89(a).

14 20. On or after April 22, 2010, no firm may perform a renovation without certification
15 from EPA under 40 C.F.R. § 745.89(a) in target housing unless the renovation is performed in
16 target housing that has been determined to be lead-free pursuant to 40 C.F.R. § 745.82(a). 40
17 C.F.R. § 745.81(a)(2)(ii).

18 21. At all times relevant to this CAFO, Respondent did not have a certification from
19 EPA to perform the renovation for compensation at the Property.

20 22. At all times relevant to this CAFO, the Property had not been determined to be lead-
21 free pursuant to 40 C.F.R. § 745.82(a) before the renovation for compensation occurred.

22 23. Respondent’s performance of renovation for compensation at the Property without
23 certification from EPA under 40 C.F.R. § 745.89(a) constitutes a violation of 40 C.F.R. §
24 745.81(a)(2)(ii) and Section 409 of TSCA, 15 U.S.C. § 2689.

25 24. No more than 60 days before beginning renovation activities in any residential
26 dwelling unit of target housing, the firm performing the renovation must provide the owner of the
27 unit with the “pamphlet,” as that term is defined at 40 C.F.R. § 748.83, and either obtain from the
28 owner a written acknowledgment that the owner has received the “pamphlet” or obtain a

1 certificate of mailing at least 7 days prior to the renovation. 40 C.F.R. § 745.84(a)(1).

2 25. Respondent did not provide the owners with the “pamphlet” before beginning
3 renovation activities at the Property.

4 26. Respondent’s failure to provide the owners with the “pamphlet” before beginning
5 renovation activities at the Property constitutes a violation of 40 C.F.R. § 745.84(a)(1) and
6 Section 409 of TSCA, 15 U.S.C. § 2689.

7 27. Firms performing renovations must comply with the work practice standards of §
8 745.85, including the posting of signs clearly defining the work area and warning occupants and
9 other persons not involved in renovation activities to remain outside of the work area. 40 C.F.R.
10 § 745.85(a)(1).

11 28. Respondent did not post signs clearly defining the work area and warning occupants
12 and other persons not involved in renovation activities to remain outside of the work area for the
13 renovation performed at the Property.

14 29. Respondent’s failure to post signs clearly defining the work area and warning
15 occupants and other persons not involved in renovation activities to remain outside of the work
16 area for the renovation performed at the Property constitutes a violation of 40 C.F.R. §
17 745.85(a)(1) and Section 409 of TSCA, 15 U.S.C. § 2689.

18 30. Firms performing renovations must comply with the work practice standards of §
19 745.85, including the closing of doors used as entrances to the work area by covering them with
20 plastic sheeting or other impermeable material in a manner that allows workers to pass through
21 while confining dust and debris to the work area. 40 C.F.R. § 745.85(a)(2)(i)(C).

22 31. Respondent did not close doors used as entrances to the work area by covering them
23 with plastic sheeting or other impermeable material in a manner that allows workers to pass
24 through while confining dust and debris to the work area for the renovation performed at the
25 Property.

26 32. Respondent’s failure to close doors used as entrances to the work area by covering
27 them with plastic sheeting or other impermeable material in a manner that allows workers to pass
28 through while confining dust and debris to the work area for the renovation performed at the

1 Property constitutes a violation of 40 C.F.R. § 745.85(a)(2)(i)(C) and Section 409 of TSCA, 15
2 U.S.C. § 2689.

3 33. Firms performing renovations must retain documentation of compliance with the
4 requirements of § 745.85, including documentation that: a certified renovator was assigned to
5 the project; a certified renovator provided on-the-job training for workers used on the project; a
6 certified renovator performed or directed workers who performed all of the work practice tasks
7 described in § 745.85(a); a certified renovator performed the post-renovation cleaning
8 verification described in § 745.85(b); includes a copy of the certified renovator's training
9 certificate; and includes a detailed certification by the certified renovator. 40 C.F.R. §
10 745.86(b)(6).

11 34. Respondent did not retain documentation for the renovation performed at the
12 Property that: a certified renovator was assigned to the project; a certified renovator provided
13 on-the-job training for workers used on the project; a certified renovator performed or directed
14 workers who performed all of the work practice tasks described in § 745.85(a); a certified
15 renovator performed the post-renovation cleaning verification described in § 745.85(b); included
16 a copy of the certified renovator's training certificate; and included a detailed certification by the
17 certified renovator.

18 35. Respondent's failures to retain documentation for the renovation performed at the
19 Property that: a certified renovator was assigned to the project; a certified renovator provided on-
20 the-job training for workers used on the project; a certified renovator performed or directed
21 workers who performed all of the work practice tasks described in § 745.85(a); a certified
22 renovator performed the post-renovation cleaning verification described in § 745.85(b); included
23 a copy of the certified renovator's training certificate; and included a detailed certification by the
24 certified renovator constitute six violations of 40 C.F.R. § 745.86(b)(6) and Section 409 of
25 TSCA, 15 U.S.C. § 2689.

26 36. Firms performing renovations must ensure that a certified renovator is assigned to
27 each renovation performed by the firm and discharges all of the certified renovator
28 responsibilities identified in § 745.90. 40 C.F.R. § 745.89(d)(2).

1 37. Respondent did not ensure that a certified renovator discharged all of the certified
2 renovator responsibilities identified in § 745.90 for the renovation performed at the Property.

3 38. Respondent's failure to ensure that a certified renovator discharged all of the certified
4 renovator responsibilities identified in § 745.90 for the renovation performed at the Property
5 constitutes a violation of 40 C.F.R. § 745.89(d)(2) and Section 409 of TSCA, 15 U.S.C. § 2689.

6 D. RESPONDENT'S ADMISSIONS

7 39. In accordance with 40 C.F.R. § 22.18(b)(2) and for the purpose of this proceeding,
8 Respondent: (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over
9 Respondent; (ii) neither admits nor denies the specific factual allegations contained in Section
10 I.C of this CAFO; (iii) consents to any and all conditions specified in this CAFO and to the
11 assessment of the civil administrative penalty under Section I.E of this CAFO; (iv) waives any
12 right to contest the allegations contained in this CAFO; and (v) waives the right to appeal the
13 proposed Final Order contained in this CAFO.

14 E. CIVIL ADMINISTRATIVE PENALTY

15 40. In settlement of the violations specifically alleged in Section I.C of this CAFO,
16 Respondent shall pay a civil administrative penalty of TWENTY-FOUR THOUSAND AND
17 NINETY-ONE DOLLARS (\$24,091). Respondent shall pay this civil penalty within thirty (30)
18 days of the effective date of this CAFO. The civil penalty shall be paid by remitting a certified or
19 cashier's check, including the name and docket number of this case, for the amount, payable to
20 "Treasurer, United States of America," (or be paid by one of the other methods listed below) and
21 sent as follows:

22 Regular Mail:

23 U.S. Environmental Protection Agency
24 Fines and Penalties
25 Cincinnati Finance Center
26 PO Box 979077
27 St. Louis, MO 63197-9000

28 Wire Transfers:

Wire transfers must be sent directly to the Federal Reserve Bank in New
York City with the following information:
Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727

1 SWIFT address = FRNYUS33
33 Liberty Street
2 New York, NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727
3 Environmental Protection Agency"

4 Overnight Mail:
U.S. Bank
5 1005 Convention Plaza
Mail Station SL-MO-C2GL
6 ATTN Box 979077
St. Louis, MO 63101

7 ACH (also known as REX or remittance express):
Automated Clearinghouse (ACH) for receiving U.S. currency
8 PNC Bank
9 808 17th Street, NW ABA = 051036706
Washington, DC 20074
10 Transaction Code 22 – checking
Environmental Protection Agency
11 Account 31006
CTX Format

12 On Line Payment:
13 This payment option can be accessed from the information below:
www.pay.gov
14 Enter "sfo1.1" in the search field
Open form and complete required fields

15 If clarification regarding a particular method of payment remittance is
16 needed, contact the EPA's Cincinnati Finance Center at (513) 487-2091.

17 A copy of each check, or notification that the payment has been made by one of the other
18 methods listed above, including proof of the date payment was made, shall be sent with a
19 transmittal letter, indicating Respondent's name, the case title, and docket number, to the
20 following addresses:

21
22 Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
23 U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
24 San Francisco, CA 94105

25 Max Weintraub
Waste and Chemical Section
26 Enforcement Division (ENF-2-2)
U.S. Environmental Protection Agency, Region IX
27 75 Hawthorne Street
San Francisco, CA 94105
28

1 41. Respondent shall not use payment of any penalty under this CAFO as a tax deduction
2 from Respondent's federal, state, or local taxes, nor shall Respondent allow any other person to
3 use such payment as a tax deduction.

4 42. If Respondent fails to pay the assessed civil administrative penalty of TWENTY-
5 FOUR THOUSAND AND NINETY-ONE DOLLARS (\$24,091), as identified in Paragraph 40,
6 by the deadline specified in that Paragraph, then Respondent shall pay a stipulated penalty to
7 EPA of \$500 per day in addition to the assessed penalty. Stipulated penalties shall accrue until
8 such time as the assessed penalty and all accrued stipulated penalties are paid and shall become
9 due and payable upon EPA's written request. Failure to pay the civil administrative penalty
10 specified in Paragraph 40 by the deadline specified in that Paragraph may also lead to any or all
11 of the following actions:

12 (1) EPA may refer the debt to a credit reporting agency, a collection
13 agency, or to the Department of Justice for filing of a collection action in the appropriate United
14 States District Court. 40 C.F.R. §§ 13.13, 13.14 and 13.33. The validity, amount, and
15 appropriateness of the assessed penalty or of this CAFO is not subject to review in any such
16 collection proceeding.

17 (2) The U.S. Government may collect the debt by administrative offset
18 (*i.e.*, the withholding of money payable by the United States to, or held by the United States for, a
19 person to satisfy the debt the person owes the U.S. Government), which includes, but is not
20 limited to, referral to the Internal Revenue Service for offset against income tax refunds. 40
21 C.F.R. §§ 13(C) and 13(H).

22 (3) Pursuant to 40 C.F.R. § 13.17, EPA may either: (i) suspend or revoke
23 Respondent's licenses or other privileges, or (ii) suspend or disqualify Respondent from doing
24 business with EPA or engaging in programs EPA sponsors or funds.

25 (4) Pursuant to 31 U.S.C. § 3701 *et seq.* and 40 C.F.R. Part 13, the U.S.
26 Government may assess interest, administrative handling charges, and nonpayment penalties
27 against the outstanding amount that Respondent owes to EPA for Respondent's failure to pay the
28 civil administrative penalty specified in Paragraph 40 by the deadline specified in that Paragraph.

1 (a) Interest. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R.
2 §13.11(a)(1), any unpaid portion of the assessed penalty shall bear interest at the rate established
3 according to 26 U.S.C. § 6621(a)(2) from the effective date of this CAFO, provided, however,
4 that no interest shall be payable on any portion of the assessed penalty that is paid within thirty
5 (30) days of the effective date of this CAFO.

6 (b) Administrative Handling Charges. Pursuant to 31 U.S.C.
7 Section 3717(e)(1) and 40 C.F.R. § 13.11(b), Respondent shall pay a monthly handling charge,
8 based on either actual or average cost incurred (including both direct and indirect costs), for
9 every month in which any portion of the assessed penalty is more than thirty (30) days past due.

10 (c) Nonpayment Penalties. Pursuant to 31 U.S.C. § 3717(e)(2)
11 and 40 C.F.R. § 13.11(c), a monthly penalty charge, not to exceed six percent (6%) annually,
12 may be assessed on all debts more than ninety (90) days delinquent.

13 F. CERTIFICATION OF COMPLIANCE

14 43. In executing this CAFO, Respondent certifies that it is now fully in compliance with
15 the federal regulations promulgated at 40 C.F.R. Part 745, Subpart E.

16 G. RETENTION OF RIGHTS

17 44. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's
18 liabilities for federal civil penalties for the violation and facts specifically alleged in Section I.C
19 of this CAFO. Nothing in this CAFO is intended to or shall be construed to resolve: (i) any civil
20 liability for violations of any provision of any federal, state, or local law, statute, regulation, rule,
21 ordinance, or permit not specifically alleged in Section I.C of this CAFO; or (ii) any criminal
22 liability. EPA specifically reserves any and all authorities, rights, and remedies available to it
23 (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to address
24 any violation of this CAFO or any violation not specifically alleged in Section I.C of this CAFO.

25 45. This CAFO does not exempt, relieve, modify, or affect in any way Respondent's
26 duties to comply with all applicable federal, state, and local laws, regulations, rules, ordinances,
27 and permits.
28

1 H. ATTORNEYS' FEES AND COSTS

2 46. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in
3 this proceeding.

4 I. EFFECTIVE DATE

5 47. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CAFO shall be
6 effective on the date that the Final Order contained in this CAFO, having been approved and
7 issued by either the Regional Judicial Officer or Regional Administrator, is filed.

8 J. BINDING EFFECT

9 48. The undersigned representative of Complainant and the undersigned representative of
10 Respondent each certifies that he or she is fully authorized to enter into the terms and conditions
11 of this CAFO and to bind the party he or she represents to this CAFO.

12 49. The provisions of this CAFO shall apply to and be binding upon Respondent and its
13 officers, directors, employees, agents, trustees, servants, authorized representatives, successors,
14 and assigns.


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16
17 FOR RESPONDENT DAVIS KITCHENS:

18
19 4/3/2018
DATE

20 
MIKE MULCAHY
President & CEO
Davis Kitchens

21
22 FOR COMPLAINANT EPA:

23
24 4/27/18
DATE

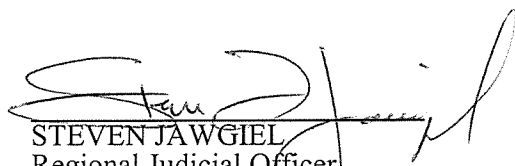
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DOUGLAS K. MCDANIEL
Chief, Waste and Chemical Section
Enforcement Division
U.S. Environmental Protection Agency, Region IX

1 II. FINAL ORDER

2 EPA and Davis Kitchens having entered into the foregoing Consent Agreement,

3 IT IS HEREBY ORDERED that this CAFO (Docket No. TSCA-09-2018-0002) be
4 entered, and Respondent shall pay a civil administrative penalty in the amount of TWENTY-
5 FOUR THOUSAND AND NINETY-ONE DOLLARS (\$24,091), and comply with the terms and
6 conditions set forth in the Consent Agreement.

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9 04/30/18
10 DATE

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STEVEN JAWGIEL
Regional Judicial Officer
U.S. Environmental Protection Agency, Region IX

CERTIFICATE OF SERVICE

I hereby certify the attached Consent Agreement and Final Order in the matter of Davis Kitchens [Docket Number: TSCA-09-2018-0002] has been filed by the Regional Hearing Clerk, and was served on the following parties as indicated below:

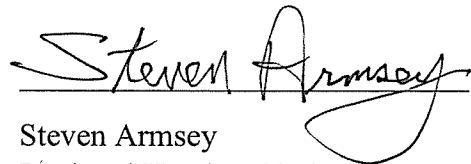
Certified Mail

Respondent(s): Mark D. Lammers
Rusing Lopez & Lizardi, PLLC
6363 North Swan Road, Suite 151
Tucson, Arizona 85718

Mail Box

Complainant: Edgar Paul Coral
Assistant Regional Counsel
U.S. EPA Region IX (ORC-2)
75 Hawthorne Street
San Francisco, CA 94105

Dated at San Francisco, California, this 1st of May ~~of April~~, 2018



Steven Armsey
Regional Hearing Clerk
U.S. EPA, Region IX
75 Hawthorne Street, 12th Floor (ORC)
San Francisco, CA 94105