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U.S. EPA, REGION IX
REGIONAL HEARING CLERK

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7 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
8 **REGION IX**
9 **75 HAWTHORNE STREET**
10 **SAN FRANCISCO, CALIFORNIA 94105**

11 IN THE MATTER OF:)
12) Docket No. TSCA-09-2009-0001
13 Progressive Real Estate, Inc., dba Pro)
14 Properties, Inc.,) **RESPONSE TO COMPLAINT**
15) **AND REQUEST FOR**
16 Respondent.) **HEARING**
17)

18 **PRELIMINARY STATEMENT AND LEGAL AUTHORITY**

19 Progressive Real Estate, Inc., dba Pro Properties does not dispute the
20 complaint's language relating to the applicable statutory and regulatory sections set
21 forth in paragraphs 1-11, but reserves the right to provide additional statutory and
22 regulatory sections that may be applicable to the action.

23 **GENERAL ALLEGATIONS**

- 24 1. Admit that Section 1018 provides jurisdiction to the EPA as alleged in
25 paragraph 12.
26 2. In response to the allegations contained in paragraph 13, Respondent has
27 not been informed of the "times relevant" and therefore must deny the
28 allegations contained in paragraph 13. Respondent admits that it was
the "Lessor" of all residential properties located at the addresses
provided in paragraph 13 at some point in time.

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3. In response to the allegations contained in paragraph 14, Respondent is unable to determine what “times relevant” to the matter are and therefore denies the allegation. Further, Respondent all of the properties alleged en mass in paragraph 14, do not constitute “target housing” as that term is defined at 4 C.F.R. Chapter 1, Part 745, Subpart F, or is otherwise exempt. Respondent demands strict proof of that allegation as to each property address.

4. As to the allegations contained in paragraph 15, the Respondent confirms that it managed the property, entered into leases on each of those properties, but is without sufficient information to form a belief as to the truth of falsity of the actual date of the lease, but believes them to be true.

SPECIFIC ALLEGATIONS

5. In response to the allegations contained in paragraph 16, Respondent incorporates its statements and answers as set forth above in paragraphs 1-4 as though fully set forth herein.

6. In response to the allegations contained in paragraph 17, admit that Respondent failed to provide any of the lessees on the 21 leases listed in paragraph 15, the EPA approved Lead Hazard Information Pamphlet.

7. In response to the allegations contained in paragraph 18, Respondent denies the allegations contained therein.

8. In response to the allegations contained in paragraph 19, Respondent incorporates its statements and answers in paragraphs 1-4, as if fully set forth herein.

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9. As to the allegations contained in paragraph 20, admit those allegations.

10. In response to the allegations contained in paragraph 21, Respondent denies that allegation.

11. In response to the allegations contained in paragraph 22, Respondent incorporates its statements and answers set forth in paragraphs 1-4 as though fully set forth herein.

12. In response to the allegations contained in paragraph 23, admit those allegations.

13. In response to the allegations contained in paragraph 24, deny the allegations contained therein.

14. In response to the allegations contained in paragraph 25, Respondent incorporates its statement and answers set forth in paragraphs 1-4 as though fully set forth herein.

15. Admit the allegations contained in paragraph 26.

16. In response to the allegations contained paragraph 27, Respondent denies those allegations.

17. In response to the allegations contained in paragraph 28, Respondent incorporates its statements and answers as set in paragraphs 1-4 above as though fully set forth herein.

18. In response to the allegations contained in paragraph 29, admit those allegations.

19. In response to the allegations contained in paragraph 30, Respondent denies those allegations.

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20. In response to the allegations contained in paragraph 31, Respondent realleges its statement and answers as set forth in paragraphs 1-4 as though fully set forth herein.

21. In response to the allegations contained in paragraph 32, Respondent admits those allegations.

22. In response to the allegations contained in paragraph 33, deny those allegations.

RESPONSE TO PROPOSED CIVIL PENALTY

The facts alleged in the complaint breakdown those matters set forth in 40 C.F.R. Section 745.113 (b) to Subsections (1), (2), (3), (4) and (6) all dealing with a failure to provide notice, obtain signatures, disclose (as well as providing a pamphlet) required by 40 C.F.R. Section 745.107(a)(1), also a violation at 40 C.F.R. Section 745.113(b)(1). The complaint doubles down as the allegations contained in paragraphs 16, 17 and 18, seeking to make a second violation that is exactly the same violation as is set forth in paragraphs 19, 20 and 21. This unseemly attempt to create 21 violations for each subsection of a Rule for the admitted failure to comply with rules and duplicating two rules in order to create 126 violations, for which the EPA is seeking \$11,000 for each violation is appalling. It creates \$1,386,000.00 civil penalty—ridiculous and hardly civil.

The complaint fails to allege how many days the EPA believes that violation run, which could bring the penalties to literally hundreds of millions of dollars.

The proposed draconia penalty does not take into account any degree of culpability or Respondent’s ability to pay penalties without jeopardizing its ability to continue to do business as the Complainant admits it should.

1 The EPA admits it is to take into account the “nature, circumstance, extent and
2 gravity of the violations.” They fail to show any where how these are taken into
3 account. Nor are any activities of the Respondent regarding taking remedial actions to
4 correct their error and compliance after the October 2003 notification mentioned. The
5 Respondent was unaware of the requirement at the time of being contacted by the EPA,
6 and immediately took steps to disclose to all tenants (past and, of course, future)
7 pursuant to the EPA requirements.
8

9 The EPA has been supplied with prior years taxes and the current financials of
10 Respondent, which for the year 2008 shows losses in the hundreds of thousands of
11 dollars. A detailed explanation by the President of the Corporation explaining the
12 economic circumstances in the State of Arizona and how it has impacted the
13 Respondent’s business was provided to the EPA. Obviously that has not been taken
14 into account.
15

16 The Respondent is already significantly in debt. Should a penalty of any
17 significance be imposed, Respondent will have little alternative but to close the doors as
18 a business and put its approximately 100 employees out of work.
19

20 **BAD FAITH AND LATCHES**

21 The EPA is guilty of latches and their requests for civil penalties should be
22 denied as they failed to take timely action to enforce these matters against Respondent,
23 and the EPA has failed to act in good faith.

24 The EPA made its initial request for information from Respondent in October
25 2003. The basis for the inquiry was purported to be building code violations on
26 properties managed by Pro Properties. Pro Properties has never had a building code
27 violation noted at any property it managed in 19 years of its existence. The violations
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1 suggested as the basis for investigating the Respondent were of neighborhood
2 enforcement Statutes and Rules having to do with the proper trimming of landscaping,
3 refuse not being properly contained, etc. The initial basis for the investigation of Pro
4 Properties was without a valid basis, and was built upon a dispute between Pro
5 Properties and the City of Phoenix. This entire action started based on the bad faith
6 actions of the City of Phoenix or a misunderstanding by the EPA of the City's
7 standards.
8

9 When informed by EPA there existed a requirement for lead disclosure,
10 acknowledgment, signing and distribution of EPA pamphlets in leases with potential
11 tenants in pre-1978 built buildings, Pro Properties personnel informed the EPA
12 personnel that they were unaware of the requirement. Pro Properties admitted that it
13 had not performed those requirements at properties that it managed and provided leases
14 as requested by the EPA.
15

16 The EPA personnel said they found it "refreshing" that the party accepted
17 responsibility and took immediate and appropriate remedial action without trying to
18 "cover up the failure or dummy up records." The required action, including signed
19 disclosure, providing the pamphlet and acknowledgement by the tenant were
20 implemented for all pre-1978 build buildings being managed by Pro Properties as Pro
21 Properties acknowledged it would, including giving existing tenants a right to leave if
22 they wished, and compliance with the disclosure requirements with future tenants.
23

24 Once the October 2003 investigation and activities were complete, it was not
25 until November of 2006 that the EPA further contacted the Respondent. In November
26 2006, the EPA sent a Subpoena Duces Tecum to Respondent out of the blue. A
27 response was made by Pro Properties and nothing further was heard from the EPA until
28

1 September 2008, when the threat of a civil penalty was made, just before a 5 year
2 statute of limitations would run out.

3 Pro Properties had operated for these nearly 5 years in compliance with the
4 EPA's statutes and rules. It relied upon the EPA's requirement that it comply to avoid
5 civil penalties.
6

7 Pro Properties did not take actions it could have with regard to properties that it
8 had control of in 2003 to determine if there were mitigating factors, such as no lead
9 based paint or properly encapsuled lead based paint on properties subject to this
10 complaint, because it was never given any notice that the EPA would seek civil
11 penalties after remedial actions were taken and compliance was established.
12

13 Now, 5 years later, many of the complexes from which the units, the subject of
14 this complaint, are no longer under the control of Respondent, and Respondent, even if
15 it had the finances to do investigations to demonstrate a lack of gravity because of the
16 limited or non-existence of exposure to lead due to the lack of lead or proper
17 encapsulation of lead paint that could mitigate the \$11,000.00 per day violation being
18 sought by complainant cannot be done.
19

20 The inexplicable actions of the EPA in failing to notify Respondent of their
21 intent to enforce civil penalties after remedial action and compliance, has resulted in an
22 unfair advantage that should be resolved by dismissing the complaint.

23 The complaint was brought about by the bad faith actions of the City of Phoenix
24 even if brought about by misconstrued notions of the EPA in reviewing the City of
25 Phoenix "violations." That combined with the failure of the EPA to timely advise
26 Respondent of its intent to seek civil penalties after the Respondent took remedial steps
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and fully complied with the law and rules it did not know existed, constitutes a basis for denying the civil penalties sought by the EPA.

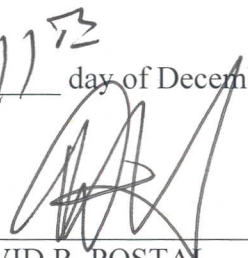
REQUEST FOR HEARING

Respondent, following informal settlement attempts, requests a formal hearing to contest the material facts at issue in this complaint and to contest the appropriateness of the "Proposed Civil Penalty."

INFORMAL SETTLEMENT

Respondent has been informed by the Assistant Regional Counsel, Carol Bussey, that a settlement offer is being formulated. Once an offer is provided, it will be given due attention by Respondent.

RESPECTFULLY SUBMITTED this 11th day of December 2008.



DAVID R. POSTAL
Attorney for Respondent, Progressive
Real Estate, Inc. dba Pro Properties

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Original of the foregoing
mailed via Fed Ex on the
14th day of December 2008, to:

Regional Hearing Clerk
U.S. EPA, Region IX
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San Francisco, CA 94105

Copy to:

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BY *Sawola*