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1 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
2 REGION IX
3 75 HAWTHORNE STREET
4 SAN FRANCISCO, CALIFORNIA 94105

2000 NOV -3 PM 4:09
REGIONAL HEARING CLERK

5 IN THE MATTER OF:)
6 Progressive Real Estate,) Docket No. TSCA-09-2009-0001
7 Inc. dba Pro Properties,) COMPLAINT AND NOTICE OF
8 Inc.,) OPPORTUNITY FOR HEARING
9 Respondent.)

10 PRELIMINARY STATEMENT

11 This is a civil administrative proceeding instituted
12 pursuant to Section 16(a) of the Toxic Substances Control Act
13 ("TSCA"), 15 U.S.C. § 2615(a). Section 16(a) of TSCA and Section
14 1018 of Title X of the Residential Lead-Based Paint Hazard
15 Reduction Act of 1992, 42 U.S.C. § 4852d (hereinafter "Section
16 1018"), authorize the Administrator of the United States
17 Environmental Protection Agency ("EPA") to issue a civil
18 complaint for each violation of Section 409 of TSCA, 15
19 U.S.C. § 2689.

20 Complainant is the Director of the Communities and
21 Ecosystems Division, EPA Region IX, who has been duly delegated
22 the authority to institute this action. Respondent is
23 Progressive Real Estate, Inc. dba Pro Properties, Inc., which
24 manages residential properties in Phoenix and Glendale, Arizona.

25 This Complaint and Notice of Opportunity for Hearing
26 ("Complaint") serves as notice that Complainant has reason to
27 believe that Respondent violated Section 409 of TSCA by failing
28 to comply with Section 1018 and its implementing regulations,

1 promulgated at 40 C.F.R. Part 745, Subpart F.

2 APPLICABLE STATUTORY AND REGULATORY SECTIONS

3 1. 40 C.F.R. Part 745, Subpart F implements the provisions
4 of Section 1018 that impose certain disclosure requirements
5 concerning lead-based paint and/or lead-based paint hazards upon
6 the sale or lease of target housing.

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

11 40 C.F.R. § 745.103.

12 3. "Lessor" means any entity that offers target housing for
13 lease, rent or sublease, including but not limited to
14 individuals, partnerships, corporations, trusts, government
15 agencies, housing agencies, Indian tribes, and nonprofit
16 organizations. 40 C.F.R. § 745.103.

17 4. "Lessee" means any entity that enters into an agreement
18 to lease, rent, or sublease target housing, including but not
19 limited to individuals, partnerships, corporations, trusts,
20 government agencies, housing agencies, Indian tribes, and
21 nonprofit organizations. 40 C.F.R. § 745.103.

22 5. Before a lessee is obligated under any contract to lease
23 target housing, the lessor shall provide the lessee with an EPA-
24 approved lead hazard information pamphlet. 40 C.F.R. §
25 745.107(a)(1).

26 6. Each contract to lease target housing shall include,
27 as an attachment or within the contract, a Lead Warning Statement
28 containing language provided in 40 C.F.R. § 745.113(b)(1). 40

1 C.F.R. § 745.113(b)(1).

2 7. Each contract to lease target housing shall include a
3 statement by the lessor disclosing the presence of known lead-
4 based paint and/or lead-based paint hazards in the target housing
5 being leased or indicating no knowledge of the presence of lead-
6 based paint and/or lead-based paint hazards. 40 C.F.R. §
7 745.113(b)(2).

8 8. Each contract to lease target housing shall include a
9 list of any records or reports available to the lessor pertaining
10 to lead-based paint and/or lead-based paint hazards in the target
11 housing that has been provided to the lessee or indicate that no
12 such records or reports are available. 40 C.F.R. §
13 745.113(b)(3).

14 9. Each contract to lease target housing shall include a
15 statement by the lessee affirming receipt of the information set
16 forth in 40 C.F.R. §§ 745.113(b)(2) and (3) and the lead hazard
17 information pamphlet required under 15 U.S.C. § 2696. 40 C.F.R.
18 § 745.113(b)(4).

19 10. Each contract to lease target housing shall include the
20 signatures of the lessors, agents, and lessees certifying to the
21 accuracy of their statements, to the best of their knowledge,
22 along with the dates of signature. 40 C.F.R. § 745.113(b)(6).

23 11. Failure to comply with 40 C.F.R. §§ 745.107 or 745.113
24 is a violation of Section 409 of TSCA, 15 U.S.C. § 2689, and the
25 penalty for each such violation shall not be more than \$11,000
26 for violations occurring after July 28, 1997. 40 C.F.R. §§
27 745.118(e) and (f).

28 GENERAL ALLEGATIONS

1 12. EPA has jurisdiction over this matter pursuant to
2 Section 1018.

3 13. At all times relevant to this matter, Respondent was
4 the "lessor" of residential properties located at 4902 East
5 Thomas Road; 2738 West Augusta Avenue; 7232 North 27th Avenue;
6 3520 West Dunlap Avenue; 3524 West Dunlap Avenue; 3421 West
7 Dunlap Avenue; 3001 North Black Canyon Highway; 3040 North 35th
8 Avenue; 4901 West Thomas Road; and 4235 North 35th Avenue in
9 Phoenix, Arizona and at 5902 West Royal Palm Road and 6604 West
10 Montebello Avenue in Glendale, Arizona, as that term is defined
11 at 40 C.F.R. § 745.103.

12 14. At all times relevant to this matter, the residential
13 properties located at 4902 East Thomas Road; 2738 West Augusta
14 Avenue; 7232 North 27th Avenue; 3520 West Dunlap Avenue; 3524
15 West Dunlap Avenue; 3421 West Dunlap Avenue; 3001 North Black
16 Canyon Highway; 3040 North 35th Avenue; 4901 West Thomas Road;
17 and 4235 North 35th Avenue in Phoenix, Arizona and at 5902 West
18 Royal Palm Road and 6604 West Montebello Avenue in Glendale,
19 Arizona were "target housing," as that term is defined at 40
20 C.F.R. § 745.103.

21 15. Respondent entered into 21 leases of the residential
22 properties referenced in Paragraphs 16 and 17 for occupancies
23 greater than 100 days on or around the dates listed below, as
24 follows:

<u>Address</u>	<u>Date of Lease</u>
4902 East Thomas Road #104	11/04/2003
4902 East Thomas Road #120	10/23/2003
2738 West Augusta Avenue #A5	11/21/2003

1	7232 North 27 th Avenue #131	12/09/2003
2	7232 North 27 th Avenue #212	12/01/2003
3	3520 West Dunlap Avenue #102	11/29/2003
4	3524 West Dunlap Avenue #125	12/11/2003
5	3421 West Dunlap Avenue #125	11/01/2003
6	3421 West Dunlap Avenue #201	01/01/2004
7	3421 West Dunlap Avenue #225	10/10/2003
8	3001 North Black Canyon Road #A24	11/12/2003
9	3001 North Black Canyon Road #A66	10/04/2003
10	3040 North 35 th Avenue #259	10/31/2003
11	4901 West Thomas Road #118	12/01/2003
12	4901 West Thomas Road #125	10/20/2003
13	4235 North 35 th Avenue #13	11/29/2003
14	4235 North 35 th Avenue #17	11/29/2003
15	4235 North 35 th Avenue #31	11/28/2003
16	5902 West Royal Palm Road #1	12/01/2003
17	5902 West Royal Palm Road #15	12/10/2003
18	6604 West Montebello Avenue #4A	11/05/2003

19 SPECIFIC ALLEGATIONS

20 COUNTS 1-21:FAILURE TO PROVIDE LESSEES WITH EPA-APPROVED LEAD

21 HAZARD INFORMATION PAMPHLET

22 16. Paragraphs 1 through 15 are realleged and incorporated
23 herein by reference.

24 17. At the times that Respondent entered into the 21 leases
25 listed in Paragraph 15, Respondent failed to provide the lessees
26 with an EPA-approved lead hazard information pamphlet, as
27 required by 40 C.F.R. § 745.107(a)(1).

28 18. Respondent's failures to provide the lessees with an

1 EPA-approved lead hazard information pamphlet, as required by 40
2 C.F.R. § 745.107(a)(1) constitute 21 violations of Section 409 of
3 TSCA, 15 U.S.C. § 2689.

4 COUNTS 22-42:FAILURE TO INCLUDE LEAD WARNING STATEMENT AS AN
5 ATTACHMENT TO OR WITHIN LEASE

6 19. Paragraphs 1 through 15 are realleged and incorporated
7 herein by reference.

8 20. At the times that Respondent entered into 21 leases
9 listed in Paragraph 15, Respondent failed to include, as an
10 attachment to the leases or within the leases, a Lead Warning
11 Statement containing language provided in 40 C.F.R. §
12 745.113(b)(1), as required by 40 C.F.R. § 745.113(b)(1).

13 21. Respondent's failures to include, as an attachment to
14 the leases or within the leases, a Lead Warning Statement
15 containing language provided in 40 C.F.R. § 745.113(b)(1), as
16 required by 40 C.F.R. § 745.113(b)(1) constitute 21 violations of
17 Section 409 of TSCA, 15 U.S.C. § 2689.

18 COUNTS 43-63:FAILURE TO INCLUDE STATEMENT DISCLOSING PRESENCE OF
19 LEAD-BASED PAINT AND/OR HAZARD OR INDICATING NO KNOWLEDGE

20 22. Paragraphs 1 through 15 are realleged and incorporated
21 herein by reference.

22 23. At the times that Respondent entered into the 21 leases
23 listed in Paragraph 15, Respondent failed to include in the
24 leases a statement by Respondent disclosing the presence of known
25 lead-based paint and/or lead-based paint hazards in the units
26 being leased or indicating no knowledge of the presence of lead-
27 based paint and/or lead-based paint hazards, as required by 40
28 C.F.R. § 745.113(b)(2).

1 24. Respondent's failures to include in the leases a
2 statement by Respondent disclosing the presence of known lead-
3 based paint and/or lead-based paint hazards in the units being
4 leased or indicating no knowledge of the presence of lead-based
5 paint and/or lead-based paint hazards, as required by 40 C.F.R. §
6 745.113(b) (2) constitute 21 violations of Section 409 of TSCA, 15
7 U.S.C. § 2689.

8 COUNTS 64-84:FAILURE TO INCLUDE LIST OF LEAD-BASED PAINT AND/OR
9 HAZARD RECORDS OR INDICATE NO RECORDS AVAILABLE

10 25. Paragraphs 1 through 15 are realleged and incorporated
11 herein by reference.

12 26. At the times that Respondent entered into the 21 leases
13 listed in Paragraph 15, Respondent failed to include in the
14 leases a list of any records or reports available to Respondent
15 pertaining to lead-based paint and/or lead-based paint hazards in
16 the units that had been provided to the lessees or indicate that
17 no such records or reports are available, as required by 40
18 C.F.R. § 745.113(b) (3).

19 27. Respondent's failures to include in the leases a list
20 of any records or reports available to Respondent pertaining to
21 lead-based paint and/or lead-based paint hazards in the units
22 that had been provided to the lessees or indicate that no such
23 records or reports are available, as required by 40 C.F.R. §
24 745.113(b) (3) constitute 21 violations of Section 409 of TSCA, 15
25 U.S.C. § 2689.

26 COUNTS 85-105:FAILURE TO INCLUDE STATEMENT AFFIRMING RECEIPT OF
27 INFORMATION IN 40 C.F.R. §§ 745.113(b) (2) AND (3) AND LEAD HAZARD
28 INFORMATION PAMPHLET

1 28. Paragraphs 1 through 15 are realleged and incorporated
2 herein by reference.

3 29. At the times that Respondent entered into the 21 leases
4 listed in Paragraph 15, Respondent failed to include in the
5 leases a statement by the lessees affirming receipt of the
6 information set forth in 40 C.F.R. §§ 745.113(b)(2) and (3) and
7 the lead hazard information pamphlet required under 15 U.S.C. §
8 2696, as required by 40 C.F.R. § 745.113(b)(4).

9 30. Respondent's failures to include in the leases a
10 statement by the lessees affirming receipt of the information set
11 forth in 40 C.F.R. §§ 745.113(b)(2) and (3) and the lead hazard
12 information pamphlet required under 15 U.S.C. § 2696, as required
13 by 40 C.F.R. § 745.113(b)(4) constitute 21 violations of Section
14 409 of TSCA, 15 U.S.C. § 2689.

15 COUNTS 106-126:FAILURE TO INCLUDE LESSOR AND LESSEE SIGNATURES
16 CERTIFYING ACCURACY OF STATEMENTS AND DATES OF SIGNATURES

17 31. Paragraphs 1 through 15 are realleged and incorporated
18 herein by reference.

19 32. At the times that Respondent entered into the 21 leases
20 listed in Paragraph 15, Respondent failed to include the
21 signatures of Respondent and the lessees certifying to the
22 accuracy of their statements, to the best of their knowledge,
23 along with the dates of signature, as required by 40 C.F.R. §
24 745.113(b)(6).

25 33. Respondent's failures to include the signatures of
26 Respondent and the lessees certifying to the accuracy of their
27 statements, to the best of their knowledge, along with the dates
28 of signature, as required by 40 C.F.R. § 745.113(b)(6) constitute

1 21 violations of Section 409 of TSCA, 15 U.S.C. § 2689.

2 **PROPOSED CIVIL PENALTY**

3 Section 16(a) of TSCA and Section 1018 authorize the
4 Administrator of the United States Environmental Protection
5 Agency ("EPA") to assess a civil penalty not to exceed \$10,000
6 per day for each violation of Section 409 of TSCA, 15
7 U.S.C. § 2689. That statutory maximum civil penalty has
8 subsequently been raised to \$11,000 per day for each violation
9 that occurred after January 30, 1997 but prior to March 15, 2004
10 pursuant to the Federal Civil Penalties Inflation Adjustment Act
11 of 1990, Pub. L. 101-410, as amended, and its implementing
12 regulation, the Civil Monetary Penalty Inflation Adjustment Rule,
13 codified at 40 C.F.R. Part 19.

14 In assessing any civil penalty, Section 16(a) of TSCA
15 requires that EPA take into account the nature, circumstances,
16 extent, and gravity of the violations; Respondent's history of
17 such violations of TSCA; the degree of culpability involved;
18 Respondent's ability to pay a penalty without jeopardizing its
19 ability to continue to do business and such other factors as
20 justice may require.

21 Based upon the facts alleged in this Complaint and upon the
22 statutory factors enumerated above, Complainant requests that the
23 Administrator assess against the Respondent a civil
24 administrative penalty of up to \$11,000 for each violation of
25 Section 409 of TSCA.

26 **NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

27 As provided in Section 16(a) of TSCA, 15 U.S.C. § 2615(a),
28 Respondent has the right to request a formal hearing to contest

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

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

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

27 The Answer must be filed with:

28 **Regional Hearing Clerk**

1 USEPA, Region IX
2 75 Hawthorne Street
3 San Francisco, CA 94105

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

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

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

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

20 **INFORMAL SETTLEMENT CONFERENCE**

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

ALTERNATIVE DISPUTE RESOLUTION


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

1 seq., 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 a 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: 11/3/08

16 
ENRIQUE MANZANILLA
17 Director, Communities and Ecosystems
Division
U.S. Environmental Protection Agency,
18 Region IX

CERTIFICATE OF SERVICE

I certify that the original fully executed Civil Complaint ("CC"), Docket Number **TSCA-09-2009-0001**, was filed this day with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, California 94105, and that a true and correct copy of this CC was sent to the Respondent at the following address, certified mail, return receipt requested:

Ed Klugman, President
Progressive Real Estate, Inc., dba Pro Properties, Inc.
2723 W. Northern Avenue
Phoenix, AZ 85051
Certified Mail Number: 7007 3020 0000 9807 0982.

An identical copy of the civil complaint packet was sent this same day to David Postal (attorney for Mr. Klugman) at the following address, certified mail, return receipt requested:

Ed Klugman (Pro Properties, Inc.)
c/o David Postal, Attorney
6520 N. 7th Street #100
Phoenix, AZ 85014
Certified Mail Number: 7007 3020 0000 9807 0999

A copy of EPA's current Section 1018 Enforcement Response Policy and a copy of Part 22 - Consolidated Rules of Practice was provided in the packets for Mr. Klugman and Mr. Postal.

David R. Tomsovic

David R. Tomsovic
Program and Enforcement Officer
Toxics Office, US EPA, Region IX

Nov. 3 - 2008

Date