

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 2**

<p><b>IN THE MATTER OF:</b></p> <p><b>ALFAYA ESTATE, LLC and KARIMAR CONSTRUCTION, INC.</b></p> <p><b>DESARROLLO DE 9 VILLAS RESIDENTIAL PROJECT</b></p> <p><b>RESPONDENTS</b></p>	<p><b>DOCKET NUMBER CWA-02-2020-3452</b></p> <p><b>Proceeding pursuant to Section 309(g)(2)(B) of the Clean Water Act 33 U.S.C. §1319(g)(2)(B). to assess a Class II Civil Penalty</b></p>
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**ANSWER TO ADMINSTRATIVE COMPLAINT,  
AFFIRMATIVE DEFENSES AND REQUEST FOR HEARING**

**Respondent ALFAYA ESTATE LLC**, pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, hereby submits this Answer to the Complaint to the Regional Hearing Clerk for the Environmental Protection Agency, Region 2, and respectfully states, alleges and prays as follows (Paragraphs of answer correspond to paragraphs of Parts I through IX in the Complaint):

**I. STATUTORY AND REGULATORY AUTHORITIES**

1. Respondent ALFAYA ESTATE LLC, from now on ALFAYA, admit that the Environmental Protection Agency ("EPA") has issued an administrative complaint with a notice of proposed assessment of a civil penalty, but are without knowledge as to the truth of the allegations contained in Paragraph 1 of the Complaint on finding of violations and, therefore, DENY the same. Respondents specifically DENY that they have violated the Clean Water Act ("CWA") or that there is any factual or legal basis to impose a civil penalty on them.
2. ALFAYA ADMIT that ("EPA") proposes in the Complaint the assessment of a civil penalty against them for alleged violations of the CWA. Respondent is without knowledge as to the truth of the remaining allegations in Paragraph 2 of the Complaint and, therefore, DENY the same. ALFAYA is not obligated to have a NPDES because it does not discharge directly to any waters of the United States. ALFAYA obtained a Plan CEST prior to the construction permit. There is no linkage between ALFAYA and Karimar Construction, Inc.
3. Paragraph 3 of the Complaint recites provisions of the Clean Water Act, which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA.

4. Paragraph 4 of the Complaint recites provisions of the Clean Water Act, which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA.
5. Paragraph 5 of the Complaint recites provisions of the Clean Water Act, which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA.
6. Paragraph 6 of the Complaint recites provisions of the Clean Water Act, which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA.
7. Paragraph 7 of the Complaint recites provisions of the Clean Water Act, which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA.
8. Paragraph 8 of the Complaint addresses the Code of Federal Regulations and the NPDES program, which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA or the regulations promulgated under it or the NPDES program.
9. Paragraph 9 of the Complaint addresses the Code of Federal Regulations and the NPDES program, which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA or the regulations promulgated under it or the NPDES program.
10. Paragraph 10 of the Complaint addresses the Code of Federal Regulations and the NPDES program, which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA or the regulations promulgated under it or the NPDES program.
11. Paragraph 11 of the Complaint addresses the Code of Federal Regulations and the NPDES program, citing legal matters which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA or the regulations promulgated under it or the NPDES program.
12. Paragraph 12 of the Complaint addresses the Code of Federal Regulations and the NPDES program, citing legal definitions which require no answer. ALFAYA affirmatively allege that none of their actions constitute a violation of the CWA or the regulations promulgated under it or the NPDES program. In particular, for definition “I” “storm water discharge associated with small construction activities” does not apply to the ALFAYA activity because the area is less than 1 acre (a non-automatic designation).
13. Paragraph 13 of the Complaint recites provisions of the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA.
14. Paragraph 14 of the Complaint recites provisions pursuant to the Clean Water Act and regulation promulgated under the act and regulation promulgated under the act,

which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA.

15. Paragraph 15 of the Complaint recites provisions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA.

16. Paragraph 16 of the Complaint recites provisions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA.

17. Paragraph 17 of the Complaint recites provisions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA. EPA delegated to the Environmental Quality Board the development of point source discharge programs like the “plan CEST”, which is directed to prevent the erosion and runoff of sediments to bodies of waters in Puerto Rico.

18. Paragraph 18 of the Complaint recites provisions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA. Particularly, Respondent understand that the definition under 40 C.F.R. § 122.26(b)(15) does not apply to them.

19. Paragraph 19 of the Complaint recites provisions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA. Respondent respectfully understand that the definition under 40 C.F.R. § 122.26(b)(15) does not apply to them.

20. Paragraph 20 of the Complaint recites provisions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA.

21. Paragraph 21 of the Complaint recites provisions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA, therefore the paragraph is denied.

22. Paragraph 22 of the Complaint recites provisions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA, therefore the paragraph is denied.

23. Paragraph 23 of the Complaint recites provisions and/or definitions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA, therefore the paragraph is denied.

24. Paragraph 24 of the Complaint recites provisions and/or definitions pursuant to the Clean Water Act and regulation promulgated under the act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA, therefore the paragraph is denied.

25. Paragraph 25 of the Complaint recites provisions pursuant to the Clean Water Act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA, therefore the paragraph is denied.

26. Paragraph 26 of the Complaint recites provisions pursuant to the Clean Water Act, which require no answer. Respondents affirmatively allege that none of their actions constitute a violation of the CWA, therefore the paragraph is denied.

## **II. JURISDICTIONAL STATEMENTS**

27. Respondent ADMIT paragraph 27 of the Complaint.

28. Respondent ADMIT paragraph 28 of the Complaint.

29. Respondent ADMIT paragraph 29 of the Complaint.

30. Respondent DENIES paragraph 30 of the Complaint because it is not an owner of a small construction activity for which an NPDES permit is required.

31. Respondent DENIES paragraph 31 of the Complaint because it does not apply the facility definition of a small construction activity for which an NPDES permit is required.

32. Respondent ALFAYA does not ADMIT or DENY paragraph 32 of the Complaint, because is not in reference to them.

33. Respondent ALFAYA does not ADMIT or DENY paragraph 33 of the Complaint, because is not in reference to them.

34. Respondent DENIES paragraph 34 of the Complaint because the agreement between ALFAYA and Karimar was not executed.

35. Respondent DENIES paragraph 35 of the Complaint due to the way the alleged statement is written. Respondents allege that the local agency, OGPe, granted a permit for vegetation clearing, but no construction causing major earth disturbing occurred at the beginning. No activities were performed during 2018. Respondents specifically DENY that any of their activities have resulted in "discharges of pollutants via stormwater to the unnamed creek.

36. Respondent ADMIT paragraph 36 of the Complaint.

37. Respondent DENIES paragraph 37 of the Complaint. Alfaya does not have information on how EPA measured the area of Desarrollo de 9 villas Residential Project. The area of the project is less.

38. Respondent DENIES paragraph 38 of the Complaint because definition under 33 U.S.C. § 1362(14) does not describe the activity of interest and the activity does not discharge any pollutants.

39. Respondent ADMIT paragraph 39 of the Complaint.

40. Respondent ADMIT paragraph 40 of the Complaint. However, we reserve the right to amend this answer if after the discovery, the term day-to-day operational control over construction activities as stated by EPA are indeed defined or related to a legal meaning of “construction activities” under the Puerto Rico laws allowed under constructions permits.

41. Respondent ADMIT paragraph 41 of the Complaint.

42. Respondent DENIES paragraph 42 of the Complaint as the alleged statement is structured or written. Respondent denies that Karimar was an operator.

43. Respondent DENIES paragraph 43 of the Complaint as the alleged statement is structured or written. Respondent does not discharge storm water directly to an unnamed creek. Respondents DENY they propose to discharge (or have discharged) pollutants via stormwater to a surface water body constituting waters of the United States including, but not limited to the unnamed creek.

44. In relation to paragraph 44 of the Complaint, the definition under Section 502(7) does not include directly the unnamed intermittent creek. However we accept that EPA and the United States Army Corps of Engineers has included intermittent creeks as waters of the United States by regulation.

45. Respondent ADMIT paragraph 45 of the Complaint.

46. Respondent DENIES paragraph 46 of the Complaint. The area of the 9 Villas is less than an acre.

47. Respondent ADMIT that EPA required them to apply and obtain an NPDES permit coverage for the project, however, Respondent understand that the definition under 40 C.F.R. § 122.26(b)(15) does not apply to them.

### **III. FINDINGS OF VIOLATIONS**

48. Respondent maintains answers 1 – 47 in reference to the statement of Paragraph 48 of the Complaint.

49. In relation to paragraph 49 of the Complaint, Respondent was notified by letter that an inspection was performed, however deny any outcome of the inspection until discovery within the administrative process.

50. Respondent is without knowledge or lack information to form a belief as to the truth of the allegations contained in Paragraph 50 of the Complaint, and the allegations are therefore denied.

51. Respondent is without knowledge or lack information to form a belief as to the truth of the allegations contained in Paragraph 51 of the Complaint, and the allegations are therefore denied.

52. In relation to paragraph 52 of the Complaint, Respondent ADMIT a delivery of an Inspection Report annexed with a letter dated October 10, 2018. However any

information on the findings of the inspections are subject to discovery because at this time Respondent information is insufficient, therefore in part is denied.

53. Respondent ADMIT Paragraph 53 of the Complaint.

54. Respondent ADMIT Paragraph 54 of the Complaint in relation to the issuance of an Administrative Compliance Order, but does not possess enough information on the EPA observation and investigation methods so that part is denied.

55. Respondent ADMIT Paragraph 55 of the Complaint confirming that EPA notified them to comply with an enumerated list of requirements, however ALFAYA respectfully believes that none of their actions constitute a violation of the CWA. However any information on the findings of the inspections are subject to discovery because at this time Respondent information is insufficient, therefore in part is denied.

56. Respondent ALFAYA does not ADMIT or DENY paragraph 56 of the Complaint, because is not in reference to them.

57. Respondent ADMIT Paragraph 57 of the Complaint. However, ALFAYA also submitted an eNOI on October 23, 2018 and another on February 21, 2019.

58. Respondent ALFAYA does not ADMIT or DENY paragraph 58 of the Complaint, because is not in reference to them.

59. Respondent ADMIT Paragraph 59 of the Complaint.

60. Respondent is without knowledge or lack information to form a belief as to the truth of the allegations contained in Paragraph 60 of the Complaint, and the allegations are therefore denied.

61. Respondent is without knowledge or lack information to form a belief as to the truth of the allegations contained in Paragraph 61 of the Complaint, and the allegations are therefore denied.

62. Respondent ADMIT paragraph 62 of the Complaint.

63. Respondent ALFAYA does not ADMIT or DENY paragraph 62 of the Complaint, because is not in reference to them.

64. Respondent DENIES paragraph 64 of the Complaint.

**a. Claim 1 (Failure to Apply for a Permit)**

Respondent re-allege its responses to Paragraphs 1 through 64 of the Complaint, which responses are incorporated by reference.

1) Respondent DENY the allegations of Paragraph 64(a)(1) of the Complaint. Respondent ADMIT it did not have an NPDES permit until May 22, 2019. Respondent affirmatively allege that they were not required to obtain an individual NPDES permit or seek coverage under the industrial stormwater general permit as the result of their activities conducted on the site. Respondent affirmatively allege that they promptly applied for and secured an individual NPDES permit when so advised by EPA.

Respondents affirmatively allege that they have continually invested in voluntary upgrades to the facility over each of the preceding 3 to 4 years to minimize any impacts of the activities conducted on site in a total amount of approximately \$50,000, which is beyond what is standard in such a small site.

2) Respondent is without knowledge or lack information to form a belief as to the truth of the allegations contained in Paragraph 64(a)(2) of the Complaint, and the allegations are therefore denied.

3) Respondent is without knowledge or lack information to form a belief as to the truth of the allegations contained in Paragraph 64(a)(3) of the Complaint, and the allegations are therefore denied.

#### **b. Count 2 (Discharge Without a Permit)**

Respondent re-allege its responses to Paragraphs 1 through 64 of the Complaint, which responses are incorporated by reference.

1) Respondent DENY the allegations to Paragraph 64(b)(1) of the Complaint. Respondent does not have sufficient information on the storm events alleged by EPA. The January 26, 2017 event of 0.36 inches that EPA indicates in the Complaint was a sole or one event during a dry season. EPA did not acknowledge to have visited the site on that specific date. The storm water does not flow directly to the unnamed creek or the sea. The storm water flows to a MS4 drainage. Soils on the site have a relatively high infiltration capacity. The R factor of the soil runoff was not measured by EPA. The definition under 40 C.F.R. § 122.26(b)(15) does not apply to ALFAYA. The EPA estimated area of the project is incorrect. The remnant of the lots is not part of the project. Storm runoff from adjacent parcels closer to the unnamed creeks than the Respondent, are the real discharging sources.

2) Respondent DENY the allegations contained in Paragraph 64(b)(2) of the Complaint. Respondent specifically DENY that any surface stormwater discharges have reached the unnamed creek as a direct path or to any other water of the United States from their activities. Respondent operated under the reasonable assumption that it was a small activity, thus negates the requirement to attain NPDES coverage. Respondent affirmatively DENY any "pollutants" were released in stormwater emanating from their property or were discharged into the unnamed creek as a result of its activities.

#### **IV. PROPOSED PENALTY**

The EPA has not applied a hydrologic model to predict when a significant runoff from the site has allegedly occurred. Respondent DENY that it have violated any section of the Clean Water Act or that there is any factual or legal basis upon which a final order can or should be issued to Respondent assessing administrative penalties in any amount, including an amount not to exceed \$118,865.

Respondents allege that EPA has selectively investigated Respondent, obviating other properties closer to the unnamed creek. The basis for the nature, circumstances, and gravity of violations are inflated. Respondent were not familiar with the full policies of the NPDES Permitting Program, actually, the local agency did not make any indication of the

need for an NPDES permit. EPA did not collect samples of storm water runoff from the site to detect pollutants. There is no evidence stormwater from the subject site reached a water of the United States, nor are pollutants that even if discharged from the site to municipal receiver drainage, would be harmful to human health and aquatic species. Respondents specifically DENY the "potential for environmental harm". Respondents affirmatively allege that they have operated at all times in good faith and that the facility was not required to have an NPDES permit, but they promptly applied for and secured an NPDES permit when so advised by EPA, even though the site area is smaller than the required by regulation for an NPDES permit to apply. Respondents have continually invested in voluntary upgrades to the facility over each of the preceding four years, in a total amount of approximately \$50,000, beyond what is standard in the industry, to minimize any impacts of the activities conducted on site.

Respondent ALFAYA case should be separated from Karimar Construction, Inc. because their potential construction agreement was not executed after EPA intervention at the site (prior to execution of the activities). The control over the vegetative clearing activities was solely done by ALFAYA.

Due to the non-applicability of an NPDES program (less than 1 acre) and no previous history of violations by ALFAYA, EPA should not enter a penalty. Respondent deny culpability. Respondent has no ability to pay such a high, an arbitrary proposed amount for penalty. The penalty amount is similar to a taking of the property. Respondent respectfully DENY it has violated the CWA or that there is any factual or legal basis to impose civil penalties. Without waiving that position, if any quasi-judicial officer, after due process, imposes civil penalties, Respondent do not have the ability to pay them. Subject to confidentiality of their sensitive proprietary information and private financial worth, Respondent is willing and able to present information supporting the allegation that they do not have the ability to pay a substantial civil penalty, if any. The proposed penalty is 1/3 the original cost of the site of the project. If any civil penalties are imposed (which should not be the case) Respondents request that their fees and costs, including attorney fees and expert engineering consulting fees responding to EPA's complaint, plus the amounts set out in the Notice of Proposed Order Assessing a Civil Penalty (Part IV of the Complaint) be credited towards the penalty.

Respondent followed EPA's recommendations and spent a high sum of money to implement best technology practices to mitigate storm water runoff but never expected any civil penalties because it complied in good faith.

## **V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION**

1. Respondent acknowledges that a copy of the CROP was provided with the Complaint.
2. Respondent requests a hearing.

## **VI. INFORMAL SETTLEMENT CONFERENCE**

Aside from the formal hearing request, it is convenient to have commence with an informal settlement conference. Settlement discussions will give the opportunity to Respondent to present information relevant to the disposition of the administrative process. For example,



the actions Respondent took following EPA recommendations; the reduction or elimination of the penalty; the negative effect of the penalty to the business; and that no harm was caused to the environment or the human health.

## **VII. RESOLUTION WITHOUT HEARING OR CONFERENCE**

Respondent is formally requesting a hearing and also to enter into informal settlement conferences.

## **VIII. FILLING OF DOCUMENTS**

Proper filing of documents will be followed by Respondent. Particularly. The filling will be done by electronic means, but the original answer will be delivered by certified mail to the Regional Hearing Clerk.

## **IX. FUTHER LEAVE TO AMEND ANSWER**

Much of the information related to the EPA's enforcement action taken in this matter is solely in the possession of that agency. As allowed by the Rules, Rule 22.19(c), Respondent will request leave to engage in discovery. Once Respondent receives more information from the EPA, it will give notice that it may further amend this Answer to provide more defenses than set-out herein.

## **X. AFFIRMATIVE DEFENSES**

Having fully answered the Complaint, the Respondents assert the following:

1. Violation of the constitutional due process of law.
2. The Complaint fails to state a claim upon which relief can be granted because civil penalties cannot be imposed unless there is a material violation of the CWA, and as set out herein, Respondents have not violated the CWA. *United States v. Bay-Houston Towing Co., Inc.*, 197 F.Supp.2d 788 (E.D. Mich. 2002).
3. The record does not support a penalty for ALFAYA vegetation clearing in the absence of an NPDES permit. As soon as ALFAYA was notified by EPA, it filed for, and diligently pursued, a permit. At no time did runoff water with pollutants drainage into the unnamed creek and did not cause any substantive harm to the environment.
4. ALFAYA has no record or history of non-compliance with the CWA.
5. For the type of such a small activity as the one operated by Respondent, the EPA delegated authority to implement state storm water controls to the Environmental Quality Board state agency, now by the Department of Natural Recourses and the Environment. During the application of local permits for vegetation clearing, the local agencies did not require Respondent to obtain an individual NPDES permit; the EPA waived any and all claims related to Respondents' alleged failure to obtain a permit prior to their intervention.
6. ALFAYA desisted to complete the 9 Villas project and decided to stabilize the site in compliance with EPA recommendations and submitted a notice of termination to reorganize the project, although it has already a federal permit. At present, ALFAYA presented a new project that consists of 6 lots and has obtained all local and federal permits.

7. Respondent always worked under a state sediment erosion and pollutant developed plan, known as "Plan CES", which is similar in effectiveness and prevention of contamination as the EPA NPDES, therefore there were no contaminants reaching the waters of the United States at any time. This permit takes into consideration the prevention of fugitive dust, storm water runoff pollutants and sediments. The plan procures to maintain run off water nested on hale packs and fabric netting, at all times preventing any pollutants to reach the drainage inlet which actually receives rainwater runoff from the project and adjacent properties.
8. After Hurricane Irma and Maria, ALFAYA immediately helped neighbors removing the debris, clean the project area from all accumulated sediments and replaced de hale stacks and netting fabric, in order avoid any contaminant to reach to waters of the United States.
9. The run water inlet collects all water from the project area and adjacent properties. The inlet is counted within the MS4 the municipality of Rincon filed with EPA. Therefor the catch basin is counted within the municipality MS4.
10. The Clean Water Rule of 2015 has been suspended by the US Government.
11. The President has emitted Orders for EPA to suspend penalties and CWA monitoring processes during the Pandemic of Covid 19.
12. Local agencies in charge of the water resources should had inform Respondent if there was a need for an NPDES permit for his activity.
13. Respondent activity has not resulted (and did not result) in the discharge of pollutants to "waters of the United States."
14. The EPA cannot establish that Respondent was the source of any of the pollutants allegedly found in surrounding waters.
15. The existence of any storm water discharges in the vicinity of Respondent operation has been caused solely by acts of God and/or the acts or omissions of a third party. Respondents affirmatively allege that properties closer to the unnamed creek are sites with direct discharge to the creek.
16. To the extent that Respondent's acts or omissions may, without either so admitting or denying, be in noncompliance with the Clean Water Act, those acts or omissions are de minimis in nature, have created no danger to health and public safety or human welfare, or a danger to the environment. See *United States v. Bay-Houston Towing Co., Inc.*, 197 F.Supp.2d 788 (E.D. Mich. 2002).
17. The allegations in the Complaint are barred by laches, statutes of limitation and/or waiver.
18. The EPA lacks authority to assess a penalty under 33 U.S.C. § 1319(g) because it cannot establish any violation of the Clean Water Act as a result of Respondent actions or omissions. See *United States v. Bay-Houston Towing Co., Inc.*, 197 F.Supp.2d 788 (E.D. Mich. 2002).
19. Any and all actions or omissions concerning compliance with the Clean Water Act have not resulted in any economic benefit to Respondent ALFAYA. See *United States v. Bay Houston Towing Co., Inc.*, 197 F.Supp.2d 788 (E.D. Mich. 2002).
20. Respondent ALFAYA at all times acted in good faith. See *United States v. Bay-Houston Towing Co., Inc.*, 197 F.Supp.2d 788 (E.D. Mich. 2002).

21. Karimar did not have control of the operations in ALFAYA's property. The potential business agreed was not executed after EPA intervention on the site. Karimar has nothing to do with the clearing and grading that ALFAYA conducted on the site.
22. EPA fails to meet its burden of proof. Respondents reserve the right to further amend these pleadings and to add such further affirmative defenses as discovery and development of the case may disclose.

**WHEREFORE**, Respondent ALFAYA respectfully request that the Complaint in the instant case be dismissed in its entirety and that no civil penalties be imposed on them.

DATED this 4<sup>th</sup> day of November, 2020.

**/S/GERARDO GONZALEZ ROMAN**  
**USDC-PR 209314**  
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#### **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify to have notified a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

**Karen Maples**

Regional Hearing Clerk

U.S. Environmental Protection Agency, Region 2

290 Broadway – 16<sup>th</sup> Floor

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