

IN THE MATTER OF:)

EAST 23rd AVENUE BATTERY)
SUPERFUND SITE)
TAMPA, FLORIDA)

SETTLEMENT AGREEMENT

U.S. EPA Region 4

Docket No.

CERCLA-04-2010-3754

Utility Battery Company, Inc.,)
d/b/a/ Utility Battery Company,)
SETTLING PARTY)

PROCEEDING UNDER

SECTION 122(h)(1) OF

CERCLA, 42 U.S.C. § 9622(h)(1)

I. JURISDICTION

1. This Settlement Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated in Region 4 to the Director of the Superfund Division, then to the Deputy Director of the Superfund Division, and finally to the Superfund Enforcement and Information Management Branch Chief.

2. This Settlement Agreement is made and entered into by EPA and Utility Battery Company, Inc., d/b/a Utility Battery Company ("Settling Party"). Settling Party consents to and will not contest EPA's authority to enter into this Settlement Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Settlement Agreement concerns the East 23rd Avenue Battery Superfund Site located in Tampa, Florida. EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of lead, a hazardous substance, at or from the Site, EPA undertook the following response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604: EPA conducted a Fund-lead time-critical removal action at the Site consisting of soil removal activities beginning August 20, 2005. EPA's contractors removed debris and approximately 109 cubic yards of battery casings and lead-contaminated soil from the following three contiguous residential properties: 903 East 23rd Avenue, 905 East 23rd Avenue, and 3005 North Nebraska Avenue, in Tampa, Florida. EPA also remediated steps at 903 East



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23rd Avenue which had been painted with lead-based paint and exhibited high lead concentrations. After excavations were complete, the excavated areas were backfilled with clean fill and the soils compacted. Afterwards, the properties were restored to their previous condition. Restoration activities included laying sod, rebuilding walkways and driveways, and repairing or replacing fences. No further removal or remedial action, evaluation, or assessment is planned at the Site.

5. In performing the response actions, EPA has incurred response costs at or in connection with the Site.

6. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred or to be incurred at or in connection with the Site based on the following: Settling Party is a business that sells batteries and battery parts. Settling Party is liable as a generator/arranger under Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), since a prior employee and owner of the company, Mr. William Howard Jr., (now deceased), brought empty battery cases from the Settling Party during his course of employment and used them as driveway pavers at his then residence, located at 903 E. 23rd Avenue, Tampa, Florida in the mid to late 1960s.

7. EPA has determined that the total past and projected response costs of the United States at or in connection with the Site will not exceed \$500,000.00, excluding interest.

8. EPA and Settling Party recognize that this Settlement Agreement has been negotiated in good faith and that this Settlement Agreement is entered into without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

9. This Settlement Agreement shall be binding upon EPA and upon Settling Party and its successors and assigns. Any change in ownership or corporate or other legal status of Settling Party, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Party's responsibilities under this Settlement Agreement. Each signatory to this Settlement Agreement certifies that he or she is authorized to enter into the terms and conditions of this Settlement Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Settlement Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

- b. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- c. "Effective Date" shall mean the effective date of this Settlement Agreement as provided by Section XV.
- d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- e. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.
- f. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral or a lower case letter.
- g. "Parties" shall mean EPA and Settling Party.
- h. "Past Response Costs" shall mean all costs, including but not limited to, direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through August 13, 2009, plus accrued Interest on all such costs through such date.
- i. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.
- j. "Settlement Agreement" shall mean this Settlement Agreement.
- k. "Settling Party" shall mean Utility Battery Company, Inc., d/b/a Utility Battery Company.
- l. "Site" shall mean the East 23rd Avenue Battery Superfund Site located at the intersection of East 23rd Avenue and North Nebraska Avenue within the city limits of Tampa, Hillsborough County, Florida. The Site consists of three adjacent residential properties, 903 East 23rd Avenue, 905 East 23rd Avenue, and 3005 North Nebraska Avenue. The geographic coordinates of the Site are 29,01'55.4" North Latitude by 82,40'38.4" West Longitude.
- m. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

11. Settling Party shall pay to the EPA Hazardous Substance Superfund the principal sum of Ten Thousand (\$10,000.00) Dollars, plus an additional sum for Interest, as defined in Paragraph 10 e. above, and as explained below. Payment shall be made in two (2) installments. Both installments shall include the principal amount due plus an additional sum for accrued Interest. The first payment of Five Thousand (\$5,000.00) Dollars plus Interest shall be due within six (6) months of the Effective Date of this Settlement Agreement. The final payment of Five Thousand (\$5,000.00) Dollars plus Interest shall be due within twelve (12) months of the Effective Date of this Settlement Agreement. Settling Party may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

12. Payments made by certified or cashier's check shall be made payable to "EPA Hazardous Substance Superfund." Each certified or cashier's check, or a letter accompanying each check, shall identify the name and address of the party making payment, the Site name (East 23rd Avenue Battery Superfund Site), the EPA Region (4), Site/Spill ID Number (A4JL), and the EPA docket number for this action. Settling Party shall send the checks to:

US Environmental Protection Agency
Superfund Payments – Region 4
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

13. Payments sent by wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727
Environmental Protection Agency"

14. Payments made by Overnight Mail shall be sent to:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

15. At the time of payment, Settling Party shall also send notice that payment has been made to:

U.S. Environmental Protection Agency
Region 4
Ms. Paula V. Painter
11th Floor/Superfund Division
61 Forsyth Street, SW
Atlanta, Georgia 30303

Such notice shall reference the site name (East 23rd Avenue Battery Superfund Site), the EPA Region (4), Site/Spill ID Number (A4JL), and the EPA docket number for this action.

16. The total amount to be paid by Settling Party pursuant to Section shall be deposited by EPA in the EPA Hazardous Substance Superfund.

VI. FAILURE TO COMPLY WITH SETTLEMENT AGREEMENT

17. If Settling Party fails to make any payment required by Section V by the required due date, all payments and accrued Interest shall become due immediately upon such failure. Interest shall continue to accrue on the any unpaid amounts until the total amount due has been received.

18. Stipulated Penalty.

a. If any amounts due to EPA under Section V are not paid by the required date, Settling Party shall be in violation of this Settlement Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 17, \$500.00 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made in accordance with the procedures set forth in Section V.

19. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

20. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Party's failure to comply with the requirements of this Settlement Agreement, if Settling Party fails or refuses to comply with the requirements of this Settlement Agreement, Settling Party shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf

of EPA, brings an action to enforce this Settlement Agreement, Settling Party shall reimburse the United States for all costs of such action, including, but not limited to, costs of attorney time.

21. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Settlement Agreement. Payment of stipulated penalties shall not excuse Settling Party from payment as required by Section V or from performance of any other requirements of this Settlement Agreement.

VII. COVENANT NOT TO SUE BY EPA

22. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Settling Party pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), for failure to fully respond to EPA's Supplemental Information Request, or pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Settlement Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Settlement Agreement. This covenant not to sue extends only to Settling Party and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

23. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Settling Party with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Section VII. Notwithstanding any other provision of this Settlement Agreement, EPA reserves all rights against Settling Party with respect to:

- a. liability for failure of Settling Party to meet a requirement of this Settlement Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

24. Nothing in this Settlement Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or

judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Settlement Agreement.

IX. COVENANT NOT TO SUE BY SETTLING PARTY

25. Settling Party covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Settlement Agreement, including but not limited to:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the State of Florida, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

26. Nothing in this Settlement Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

27. Nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement Agreement. Settling Party expressly reserves any and all rights, including, but not limited to, any right to contribution pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613, defenses, claims, demands, and causes of action which Settling Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. 9613 §§ (f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

28. EPA and Settling Party agree that the actions undertaken by Settling Party in accordance with this Settlement Agreement do not constitute an admission of any liability by Settling Party. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the facts or allegations contained in Section II of this Settlement Agreement.

29. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) and 122(h)(4) of CERCLA; 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and that Settling Party is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law, for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are Past Response Costs. The Parties further agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Settling Party has as of the Effective Date, resolved its liability to the United States for Past Response Costs.

30. Settling Party shall, with respect to any suit or claim brought by it for matters related to this Settlement Agreement, notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Settling Party also shall, with respect to any suit or claim brought against it for matters related to this Settlement Agreement, notify EPA in writing within ten (10) days of service of the complaint or claim upon it. In addition, Settling Party shall notify EPA within ten (10) days of service or receipt of any Motion for Summary Judgment and within ten (10) days of receipt of any order from a court setting a case for trial, for matters related to this Settlement Agreement.

31. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Section VII.

XI. RETENTION OF RECORDS

32. Until five (5) years after the Effective Date, Settling Party shall preserve and retain all records, reports, or information ("records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

33. After the conclusion of the 5-year document retention period in the preceding paragraph, Settling Party shall notify EPA at least 90 days prior to the destruction of any such records and, upon request by EPA, Settling Party shall deliver any such records to EPA. Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege, it shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. Settling Party shall retain all records that they claim

to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

34. Settling Party hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. NOTICES AND SUBMISSIONS

35. Whenever, under the terms of this Settlement Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Settlement Agreement with respect to EPA and Settling Party.

As to EPA:

Brenita Richardson
Enforcement Project Manager
US EPA Region 4
Superfund Enforcement and Information
Management Branch
San Nunn Federal Center
61 Forsyth Street
Atlanta, GA 30303

As to Settling Party:

John A. Dwyer, Esq.
506 North Alexander Street
Plant City, Florida 33563
or:
Post Office Box 848
Plant City, Florida 33564-0848

Utility Battery Company, Inc., d/b/a Utility Battery Company
c/o Herbert C. Hoover, Jr.,
5621 Alamo Drive
Tampa, Florida 33619

XIII. INTEGRATION/APPENDIX

36. This Settlement Agreement constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement Agreement.

XIV. PUBLIC COMMENT

37. This Settlement Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Settlement Agreement if comments received disclose facts or considerations which indicate that this Settlement Agreement is inappropriate, improper or inadequate.

XV. EFFECTIVE DATE

38. The effective date of this Settlement Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 37 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Settlement Agreement.

East 23rd Avenue Battery Superfund Site Settlement Agreement

THE UNDERSIGNED SETTLING PARTY enters into this Settlement Agreement in the matter of U.S. EPA Docket Number _____ relating to East 23rd Avenue Battery Superfund Site located in Tampa, Florida

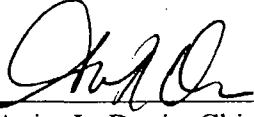
FOR SETTLING PARTY: Wendell C. Hooney, Jr.
Utility Battery Company, Inc., d/b/a Utility Battery Company
5621 Adams Dr.
Address
Tampa, FL 33619
Address

By: Wendell C. Hooney, Jr. 10-19-09
Name Date

East 23rd Avenue Battery Superfund Site Settlement Agreement

IT IS SO AGREED:

U.S. Environmental Protection Agency

By: 
Anita L. Davis, Chief
Superfund Enforcement and Information
Management Branch
Superfund Division

12/7/09
Date