

**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION**

IN THE MATTER OF:

**Davis-Frost, Inc.,

(Respondent).**

PHMSA CASE NUMBER

12-0178-SIBC-EA

COMPROMISE ORDER

By this Order I find that Davis-Frost, Inc. (Respondent) committed six (6) violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180. Accordingly, I assess Respondent a \$14,208 civil penalty for these violations.

I. Summary

Respondent: Davis-Frost, Inc.
P.O. Box 10578
3416 Candler's Mountain Road
Lynchburg, VA 24506-0578

No. of Violations: 6

Total Payment Due: \$11,248

II. Finding

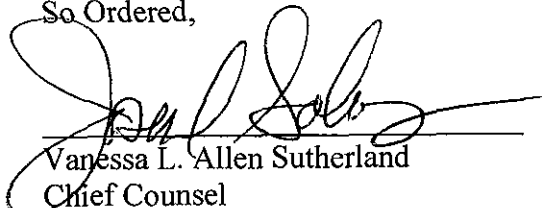
This matter comes before me after Respondent and the Pipeline and Hazardous Materials Safety Administration (PHMSA) agreed to a disposition of this civil enforcement action. I have reviewed the Compromise Agreement (Agreement) and I find that the terms as outlined therein are in the best interest of justice. I find Respondent committed the violations as described in the Agreement, which is attached as Addendum A to this Order, and I impose

a civil penalty of \$11,248. Respondent must pay the civil penalty in accordance with the instructions contained in Addendum B to this Order.

The Agreement, in its entirety, is incorporated in and attached to this Order. All of the terms and conditions of the Agreement shall be given the full force and effect of an Order issued pursuant to the Federal hazardous materials transportation law, 49 U.S.C. § 5101, et seq., or the Hazardous Materials Regulations, 49 C.F.R. Parts 171 – 180.

Dated: 6/19/2013

So Ordered,



Vanessa L. Allen Sutherland
Chief Counsel

for Pipeline and Hazardous
Materials Safety Administration

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of June, 2013, the undersigned served in the following manner the designated copies of this Order with attached Addendums to each party listed below:

Original Order with
Copy of Agreement
Certified Mail Return Receipt

Mr. Calvin C. Henning, CEO
Davis-Frost, Inc.
P.O. Box 10578
3416 Candler's Mountain Road
Lynchburg, VA 24506-0578

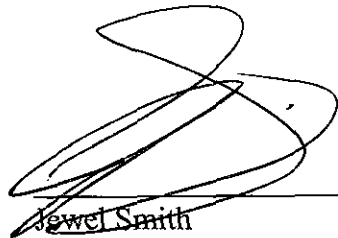
One Original
First Class Mail – Return Receipt

Mr. James Reynolds, Enforcement Officer (Acting)
Office of Hazardous Materials Enforcement
1200 New Jersey Avenue, S.E.
Washington, D.C. 02590-0001

One Copy (without enclosures)
Electronic Mail

Ms. Colleen Abbenhaus, Region Director
Hazardous Materials Safety Field Operations
Eastern Region, PHH-42
820 Bear Tavern Road, Suite 306
West Trenton, New Jersey 08628

One Copy (without enclosures)
Electronic Mail



Jewel Smith

ADDENDUM A

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**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION**

IN THE MATTER OF:

**Davis-Frost, Inc.
(Respondent)**

PHMSA CASE Number:

12-0178-SIBC-EA

COMPROMISE AGREEMENT

I. Parties

The Parties to this Compromise Agreement (Agreement) are:

Davis-Frost, Inc. ("Respondent"), a paint and coatings manufacturer, located in Lynchburg, VA

and

The Pipeline and Hazardous Materials Safety Administration ("PHMSA"), a modal Administration of the United States Department of Transportation.

II. Authority/Jurisdiction

A. The Parties enter into this Agreement under authority of 49 U.S.C. § 5123(e) and 49 C.F.R. § 107.327(a)(1).

B. For the Purposes of this Agreement, Respondent acknowledges:

(1) As paint and coatings manufacturer, it is a regulated entity subject to the Hazardous Materials Regulations (HMR) and to the jurisdiction of (a) the Secretary of Transportation, (b) the PHMSA's Associate Administrator for Hazardous Materials Safety, and (c) PHMSA's Office of the Chief Counsel (49 U.S.C. § 5103(b) and 49 C.F.R. § 107.301);

(2) PHMSA has sufficient proof to show by a preponderance of the evidence that Respondent violated the Federal regulations listed in Section V below; and

(3) That it received proper notice of PHMSA's action in this proceeding.

III. Background

A. On June 26, 2012, an Inspector from PHMSA's Office of Hazardous Materials Safety Field Operations (OHMSFO) conducted a routine compliance inspection at Respondent's business pursuant to 49 U.S.C. § 5121 and 49 C.F.R. § 107.305. PHMSA's Inspector reported six (6) alleged violations of the HMR. At the conclusion of the compliance inspection, PHMSA's Inspector conducted an "exit briefing" during which the Inspector discussed the alleged violations and the required corrective actions with Respondent's representative.

B. Upon completion of the compliance inspection, the Inspector submitted a report to the Region Director of OHMSFO's Eastern Region, who reviewed the report for accuracy and sufficiency of evidence. Based on that review, the Region Director referred the matter to PHMSA's Office of Chief Counsel thereby recommending the initiation of a civil penalty action against Respondent pursuant to 49 C.F.R. § 107.311.

C. Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations, as set forth in the Inspector's report, on March 11, 2103, an attorney from PHMSA's Office of Chief Counsel issued a Notice of Probable Violation (Notice) alleging six (6) violations of the HMR and proposing a \$15,068 civil penalty.

IV. Basis of Agreement

A. Reply to Notice. On April 12, 2013, Respondent submitted a timely reply to the Notice.

B. Corrective Action. In a correspondence dated July 19, 2012, Respondent submitted evidence of corrective actions it had taken in response to the exit briefing. The following is a summary of all of Respondent's corrective actions.

Violation Number	Respondent's Corrective action
1	Respondent stated that it had received training for inspection and testing of IBCs and that it removed from service the subject IBC. Respondent also indicated that it had ordered a metal thickness tester and that it intends to use a separate compressor for pressure testing. Respondent submitted copies of training records, procedures, and training materials as proof of its corrective action for this violation.
2	Respondent stated that it had received training for inspection and testing of IBCs. Respondent also indicated that it had ordered a metal thickness tester and that it intends to use a separate compressor for pressure testing. Respondent submitted copies of training records, procedures, and training materials as proof of its corrective action for this violation.

3	Respondent stated that each IBC in service will have its own inspection sheet with the required information. Respondent submitted a sample of the inspection report as well as a recently completed one.
4	Respondent indicated that it trained its hazmat employees in certain areas and that it had contracted with a third party for hazmat training to address all the training requirements. Respondent included copies of recent training records and other documents to support its corrective action for this violation.
5	Respondent stated that it had purchased torque wrenches and created internal procedures for closing packagings IAW the manufacturer's closure instructions. Respondent also indicated that its hazmat employees had been trained in this area. Respondent included photographs of the wrenches, procedures, and training records.
6	Respondent stated that it had updated its bill of lading to indicate that the subject material was unregulated. Respondent submitted a copy of a recent bill of lading to support its corrective action for this violation.

C. Small Business Size. Evidence in the record also substantiates that Respondent is a small business.

V. Violations and Civil Penalty

In a subsequent Order, the Chief Counsel will find that Respondent committed the following violations and will assess the following civil penalty:

Viol. No.	HMR Violation	NOPV Penalty Amount	Compromise Penalty Amount
1	Offering for transportation, in commerce, a hazardous material (UN 1263, Paint, 3, PG II), in an out-of-test DOT-Specification 57 portable tank and therefore shipping in an unauthorized packaging in violation of 49 CFR §§ 171.2(a), (b), (i), 173.32(a)(2), and 173.242(c).	\$4,200	\$3,141
2	Failing to conduct the proper leakproofness test and failing to conduct a thickness test for intermediate bulk containers, in violation of 49 CFR §§ 171.2(a), (c), (g), and 180.352(b)(1) and (3)(ii).	\$5,120	\$3,831
3	Failing to create and maintain test records, or failing to create and maintain a test record with the required information, when testing intermediate bulk containers, in violation of 49 CFR §§ 171.2(a), (c), (g), and 180.352(g).	\$1,600	\$1,191
4	Allowing employees to perform a function subject to the requirements of the HMR, while failing to provide each hazmat employee training as specified in Sections 172.704(a)(1), (2), and (4), in violation of	\$1,188	\$882

	49 CFR §§ 171.2(a), (c), (g), and 172.702(a).		
5	Offering for transportation, in commerce, a hazardous material (UN 1263, Paint, 3, PG II), while failing to close UN-standard packagings as prescribed in the manufacturer's closure instructions, in violation of 49 CFR §§ 171.2(a), (b), (c), (f), (i), 173.22(a)(4), and 173.202(a).	\$2,000	\$1,491
6	Representing material as Division 4.3 by marking and labeling the package and providing a shipping paper to indicate the materials was hazardous, when the material was not hazardous, in violation of 49 CFR §§ 171.2(a) and (k), 172.202(e), 172.303(a), and 172.401(a)(1).	\$960	\$712
TOTAL	-----	\$15,068	\$11,248

VI. Factors Considered in Determining the Civil Penalty

In determining the amount of a civil penalty, PHMSA considered the following statutory criteria (49 U.S.C. § 5123(c)):

- (1) The nature, circumstances, extent, and gravity of the violations;
- (2) The degree of culpability and history of prior violations;
- (3) Respondent's size;
- (4) Respondent's ability to pay the penalty and its ability to continue to do business; and
- (5) Other matters as justice may require.

Documentation of Respondent's corrective actions for these violations and the fact that Respondent is a small business, justify assessing a civil penalty of \$11,248 payable in four (4) monthly installments of \$2,812.

VII. Terms and Conditions

A. Respondent agrees to pay the sum of \$11,248, as full satisfaction of civil penalty proposed in the Notice in four (4) monthly payments of \$2,812 each.

- (1) Respondent must pay the first \$2,812 of the payment plan within thirty days of the date of the Compromise Order.
- (2) Respondent must pay an additional \$2,812 each thirty days after that until the entire amount is paid.

B. By entering into this Agreement, Respondent waives:

- (1) Any right to present further written or oral explanations, information, and arguments in this matter;

(2) Any right to Administrative appeal; and

(3) Any right to seek judicial review or otherwise contest or challenge the validity of this Agreement or the Notice associated with this case.

C. This Agreement resolves only the violations noted in PHMSA Ref. No. 12-0178-SIBC-EA as referenced in Section V of this Agreement. In the event Respondent commits any future violations of the Federal hazardous material transportation law, 49 U.S.C. § 5101 *et seq.*, the HMR, or any exemption, or order issued thereunder these violations shall constitute a prior violation under 49 U.S.C. § 5123.

D. After Respondent returns this signed Agreement, PHMSA's representative will present the Agreement to the Chief Counsel requesting that the Chief Counsel adopt the terms of this Agreement by issuing a Compromise Order (49 C.F.R. § 107.327(a)(1)). The terms of this Agreement constitute an offer of compromise until accepted by the Chief Counsel.

E. After issuance of the Compromise Order, Respondent must pay the civil penalty in accordance with the terms of this Agreement. Upon receipt of Respondent's final payment, the Chief Counsel will close this case with prejudice to the Respondent (49 C.F.R. § 107.327(a)(1)(ii)).

VIII. Miscellaneous Provisions

A. By signing this Agreement, Respondent or its representative warrants to have read the Agreement and understood its terms and conditions.

B. The individuals signing on behalf of the Respondent and PHMSA represent that they are authorized to sign and have authority to enter into this Agreement.


C. Respondent's failure to sign and return this Agreement within thirty (30) days from its receipt will result in the withdrawal of this Agreement and the Chief Counsel will issue an Order pursuant to 49 C.F.R. §§ 107.317(d), for the full amount of the penalty proposed in the Notice.

D. Respondent must return the signed Agreement to:

Vincent Lopez
United States Department of Transportation
Pipeline and Hazardous
Materials Safety Administration
1200 New Jersey Avenue, S.E.,
PHC-10, Room E26-328
Washington, D.C. 20590-0001

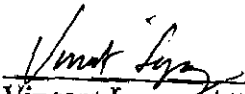
Respondent

Federal Tax ID #: 41-026786-1

By: 
Name, Capacity or position
Calvin C. Henning
President

Date: 6/10/2013

**Pipeline and Hazardous
Materials Safety Administration**

By: 
Vincent Lopez, Attorney-Advisor

Date: 6.17.13

¹ The Taxpayer Identifying Number is required by 31 U.S.C. § 7701(c)(3). PHMSA will use this number for purposes of collecting and reporting on any delinquent amounts arising out of this agreement.

ADDENDUM B

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Payment Information

Respondent must pay a total civil penalty of \$11,248 in accordance with the following:

Due date

Respondent must pay the first \$2,812 of the payment plan within 30 days of the date of this Order. Respondent must pay an additional \$2,812 each 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first installment is due.

Payment Method

Respondent must pay the civil penalty by one of the following: (1) wire transfer, (2) certified check or money order, or (3) credit card via the Internet.

(1) Wire Transfer.

Detailed instructions for sending a wire transfer through the Federal Reserve Communications System (Fedwire) to the account of the U.S. Treasury are contained in the enclosure to this Order. Please direct questions concerning wire transfers to:

Financial Operations Division
Attn: Robin Cecil
Federal Aviation Administration
Mike Monroney Aeronautical Center
AMZ-341
P.O. Box 269039
Oklahoma City, OK 73125
Telephone (405) 954-8845.

(2) Check or Money Order.

Make check or money order payable to "U.S. Department of Transportation" (include the Ref. No. of this case on the check or money order) and send to:

Chief, Financial Operations Division
Attn: Robin Cecil
Federal Aviation Administration
Mike Monroney Aeronautical Center

AMZ-341
P.O. Box 269039
Oklahoma City, OK 73125.

(3) Credit Card.

To pay electronically using a credit card, visit the following website address and follow the instructions:

<https://www.pay.gov/paygov/>

Interest and Administrative Charges

If Respondent pays the civil penalty by the due date, no interest will be charged. If Respondent does not pay by that date, the FAA's Financial Operations Division will start collection activities and may assess interest, a late-payment penalty, and administrative charges under 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 49 C.F.R. § 89.23.

The rate of interest is determined under the above authorities. Interest accrues from the date of this Order. A late-payment penalty of six percent (6%) per year applies to any portion of the debt that is more than 90 days past due. The late-payment penalty is calculated from the date Respondent receives the Order.

Treasury Department Collection

FAA's Financial Operations Division may also refer this debt and associated charges to the U.S. Department of Treasury for collection. The Department of the Treasury may offset these amounts against any payment due Respondent (31 C.F.R. § 901.3).

Under the Debt Collection Act (see 31 U.S.C. § 3716(a)), a debtor has certain procedural rights prior to an offset. You, as the debtor, have the right to be notified of: (1) the nature and amount of the debt; (2) the agency's intention to collect the debt by offset; (3) the right to inspect and copy the agency records pertaining to the debt; (4) the right to request a review within the agency of the indebtedness and (5) the right to enter into a written agreement with the agency to repay the debt. This Order constitutes written notification of these procedural rights.

**INSTRUCTIONS FOR ELECTRONIC FUNDS TRANSFER TO
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,
U.S. DEPARTMENT OF TRANSPORTATION**

1. <u>RECEIVER'S ABA NO.</u> 021030004	2. <u>TYPE SUBTYPE</u> (provided by sending bank)
3. <u>SENDING BANK ARB NO.</u> (provided by sending bank)	4. <u>SENDING BANK REF NO.</u> (provided by sending bank)
5. <u>AMOUNT</u>	6. <u>SENDING BANK NAME</u> (provided by sending bank)
7. <u>RECEIVER NAME:</u> TREAS NYC	8. <u>PRODUCT CODE</u> (Normally CTR, or sending bank)
9. <u>BENEFICIAL (BNF)- AGENCY LOCATION CODE</u> BNF=/AC-69140001	10. <u>REASONS FOR PAYMENT</u> <i>Example: PHMSA Payment for Case #/Ticket</i>

INSTRUCTIONS: You, as sender of the wire transfer, must provide the sending bank with the information for Block (1), (5), (7), (9), and (10). The information provided in blocks (1), (7), and (9) are constant and remain the same for all wire transfers to the Pipeline and Hazardous Materials Safety Administration, Department of Transportation

Block #1 - RECEIVER ABA NO. - "021030004". Ensure the sending bank enters this nine digit identification number; it represents the routing symbol for the U.S. Treasury at the Federal Reserve Bank in New York.

Block #5 - AMOUNT - You as the sender provide the amount of the transfer. Please be sure the transfer amount is punctuated with commas and a decimal point. **EXAMPLE:** **\$10,000.00**

Block #7 - RECEIVER NAME- "TREAS NYC." Ensure the sending bank enters this abbreviation, which must be used for all wire transfer to the Treasury Department.

Block #9 - BENEFICIAL - AGENCY LOCATION CODE - "BNF=/AC-69140001"
Ensure the sending bank enters this information. This is the Agency Location Code for Pipeline and Hazardous Materials Safety Administration, Department of Transportation

Block #10 - REASON FOR PAYMENT – "AC-Payment for PHMSA Case#" To ensure your wire transfer is credited properly, enter the case number/ticket number or Pipeline Assessment number."

Note: - A wire transfer must comply with the format and instructions or the Department cannot accept the wire transfer. You, as the sender, can assist this process by notifying, at the time you send the wire transfer, the General Accounting Division at (405) 954-8893.