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April 11, 2005

Via UPS

Clerk of the Board
Environmental Appeals Board
United States Environmental Protection Agency
1341 G Street, N.W. - Suite 600
Washington, D.C. 20005

Re: ***In re. Ronald H. Hunt, et. al.***
TSCA-03-2003-0285

Dear Sir:

Enclosed please find an original and copy of a Notice of Appeal and the Respondent's Appeal brief.

Thank you for your kind attention to this matter. Please do not hesitate to call with any questions or concerns that you may have.

Sincerely,

Christopher G. Hill

CGH/nf
cc: Assistant Regional Counsel (3RC30)
Chief Administrative Law Judge
Regional Hearing Clerk
Ron Hunt (for himself & Genesis)
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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In the Matter of:

Ron Hunt, et al.

Respondents.

U. S. EPA Docket Number:
TSCA-03-2003-0285

CERTIFICATE OF SERVICE

A copy of the foregoing was sent to the following on April 11, 2005:

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RESPONDENT'S BRIEF

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RESPONDENTS' NOTICE OF APPEAL

Summary of Initial Decision

After hearing, the Presiding Officer made findings of fact and conclusions of law regarding the appropriateness of the Environmental Protection Agency ("EPA") proposed penalty of $120,088.00. The Presiding Officer reduced the proposed penalty to $84,224.80, an amount more than twice any fine previously levied after a full hearing. Because of some flaws in the Presiding Officer's application of the facts and law, the respondents hereby note their appeal.

Appealed portions of the Initial Decision:

1. The Presiding Officer's harm analysis found in Section IV (A) of her Initial Decision properly granted a 30% reduction in penalty for lead abatement activities at three of the four leased properties. However, the Presiding Officer improperly failed to allow such a reduction for the property found at Barton Avenue. The Presiding Officer improperly found that insufficient evidence of encapsulation activities was presented at the hearing on this matter and improperly rejected testimony based upon absence of documentation of such activities.

2. The Presiding Officer should have granted a further reduction, beyond the additional 10% granted in Section IV (B) of the Initial Decision for the cooperation shown by the respondents throughout this process.

3. In Section IV (C) the Presiding Officer erred in failing to allow any reduction for the lack of culpability despite the testimony of all the witnesses regarding this issue.

4. In Section IV (D) the Presiding Officer erred in ratifying the EPA's unwarranted multiplication of charges, ignoring the fact that in the Harpoon Partnership case, this type of multiplication was not allowed.

5. In Section IV (E) the Presiding Officer refused to consider the previously decided cases, and their corresponding range of penalties. As such, the Presiding Officer erred in her analysis of the precedents.

6. The Presiding Officer incorrectly concluded that $84,224.80 was a proper fine to be levied for the violations cited by the EPA in its complaint.

RONALD H. HUNT, ET. AL.

By: _____
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Issues on Appeal/Assignments of Error

1. The Presiding Officer erred when she refused to consider the published case precedents under TSCA, and their corresponding range of penalties, so as to assure that the penalties assessed against respondents were proportionate in view of the gravity of their violations and the available precedents.[1]

2. The Presiding Officer erred in ratifying the EPA's unwarranted multiplication of charges, which resulted in excessive penalties against the respondents.[2]

3. The Presiding Officer erred in failing to allow any reduction for lack of culpability, despite ample and uncontradicted evidence regarding this issue.[3]

4. The Presiding Officer erred in her failure to allow a further reduction, beyond the additional 10% granted in Section IV (B) of the Initial Decision, for the cooperation shown by the respondents throughout this process.[4]

5. The Presiding Officer erred in her failure to grant a larger reduction in penalty for the respondents' mitigation activities at the target properties. The Presiding Officer's harm analysis (found in Section IV (A) of her Initial Decision) properly granted a substantial reduction in penalty for lead abatement activities at three of the four leased properties. However, the Presiding Officer improperly failed to allow such a reduction for the property found at Barton Avenue. The Presiding Officer improperly found that insufficient evidence of encapsulation activities was presented at the hearing on this matter and improperly rejected testimony confirming those activities.[5]

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[1] Initial Decision (Init. Dec.) § IV(E), pp. 38 through 40.
[2] Init. Dec. § IV(D), pp. 37 and 38.
[3] Init. Dec. § IV(C), pp. 35 through 37.
[4] Init. Dec § IV(B), pp. 34 and 35.
[5] Init. Dec.§ IV(A), pp. 26 through 34.

6. The Presiding Officer incorrectly concluded that $84,224.80 was a proper fine to be levied for the violations cited by the EPA in its complaint.[6]

Standard of Review

The standard of review on this appeal of the Initial Decision is one of *de novo* review. 40 C.F.R. §22.30(f); In re Billy Yee, TSCA Appeal no. 00-2 (EAB, May 29, 2001). In the present instance, all of the above assigned errors are errors of law and therefore the Environmental Appeals Board need not show deference for the Initial Decision

Statement of the Nature of the Case and Relevant Facts

The matter presently before the Environmental Appeals Board ("EAB" or "Board") has been an exercise in bureaucratic excess, beginning with the Environmental Protection Agency's ("EPA" or "agency") initial demand of $390,000.00, and continuing with the 83-page brief filed by the agency below, and continuing further with the 44 page Initial Decision of the Presiding Officer.

The respondents have never tried to avoid responsibility for the technical violations of the Toxic Substances Control Act ("TSCA" or "Act") at any point in this process. However, the respondents do ask this Board to bring a sense of justice and proportionality to the treatment of the respondents.

The agency brought this action under the Act. The respondents include Genesis Properties, Inc. ("Genesis"), the sole leasing agent for the four target properties, and the four individuals who hold ownership interests in the four target properties. The Complaint filed by the EPA alleged that the five respondents failed to make proper disclosures to several of

[6] Init. Dec. pp. 40 through 43.

their tenants of potential lead paint hazards at the target properties.[7] A hearing on this matter was held before the Presiding Officer on September 14, 2004.

Though EPA's allegations concern only 4 target properties, the initial Complaint set forth 46 separate counts of supposed violations of the Act. EPA later acknowledged that its initial filing was duplicative, but agreed to drop only 14 of the original counts. Thus, the Presiding Officer was, and now the Board remains, faced with 32 separate counts raised by EPA, notwithstanding that only 4 properties and 10 leases are in fact all that are involved.

Prior to the hearing on this matter, EPA reduced its demand for fines to $120,088.00. The agency arrived at this number by initially doubling several of the proposed fines then halving them again to come to exactly the same unreasonable fine level as would have been originally proposed.[8]

The Presiding Officer sustained several of the respondents' arguments at hearing, but incorrectly rejecting several others.[9] Specifically, the Presiding Officer erred in rejecting any discount for the work performed to encapsulate the Barton Avenue property; in failing to grant a further discount for the cooperation of the respondents throughout the ordeal of investigation and trial; in failing to allow for a discount because of the lack of culpability of the respondents; in ratifying the EPA's unwarranted multiplication of charges; in refusing to consider the previously decided cases, and their corresponding range of penalties; and in her final conclusion that the fine of $84,224.80 was reasonable for the violations at issue.[10]

This appeal follows.

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[7] Initial Complaint
[8] Transcript ("Tr") pp 36-148.
[9] Init. Dec. pp. 40 through 42.
[10] Id at footnotes 1 through 6.

Argument

For their part, the respondents do not dispute that technical violations of the Act occurred. Respondents also do not quarrel with this Board's having discretion to administer fines in appropriate amounts under the Act. The sole issue that remained after the hearing of September 14, 2004 was the proper level of fine.

The EPA bears the burden in this matter of demonstrating that the $120,088.00 penalty it proposed was reasonable given past precedent and the gravity of the infractions. In re New Waterbury, Ltd., TSCA Appeal no. 93-2. While the Presiding Officer did not simply rubber stamp the penalty calculations of the EPA, she nonetheless erred by beginning her analysis from the agency's figures, instead of conducting her own, independent, review. In re Harpoon Partnership, TSCA-05-2002-0004. This Board should correct this error by reviewing and determining the reasonableness of the proposed penalty *de novo*, and reducing the amount of the fine to a reasonable level in proportion to the nature of the infractions cited by the EPA.

I. The fines imposed by the Presiding Officer in this case are totally out of proportion with the infractions committed.

A. The Presiding Officer erroneously refused to consider the precedents and their range of penalties when analyzing the proportionality of the fine imposed.

In Appendix A to their pre-hearing brief, respondents provided the Presiding Officer with copies of ***each and every published court precedent*** that they and the EPA have been able to identify as having been decided under the Act involving lead paint disclosures. These cases – several of which involved circumstances much more egregious than those now before this Board – assessed fines as low as $4,070.00, but never higher than

$37,037.00[11]. The Presiding Officer erred by summarily dismissing these precedents as non-controlling and even unpersuasive, despite their close factual relationship to the issues in the matter before the Board. Respondents respectfully submit that these precedents carry the force of law and thus, they set the boundaries for what this Board should consider as the appropriate amount of fine to be assessed against them in this case.

Briefly, these cases are as follows:

1. **In re Bellflower Realty** **Number of violations: 10** **Assessed Penalty: $4,070.00**
   TSCA –06-2002-0712

The respondent in this action was charged with failure to provide a lead disclosure form with the sale contract, failure to allow the purchaser to inspect, and failure to properly disclose the possible existence of lead paint in a home built prior to 1978. After an initial answer, the respondent failed to file a pre-hearing exchange or show cause as to why it did not respond. Upon holding the Respondent in default, the court held that the proposed $4,070.00 penalty was reasonable.

2. **In re Mark Brown** **Number of violations: 1** **Assessed Penalty: $10,000.00**
   TSCA-7-2001-0001

In another case of default, the respondent failed to contest either the reasonableness of the penalty or the factual allegations at its root. Even though the tenant in the target housing was at the end of her term of pregnancy, thus increasing the risk of harm from non-disclosure of lead paint, the EPA sought only $10,000.00. Without having a response from Mr. Brown, the court found in favor of the EPA and granted the $10,000.00 proposed penalty.

[11] While the EPA has gone to great pains to point out that the agency has requested higher fines than this in the past (EPA Post Hearing Brief p. 46), the Presiding Officer explicitly, and correctly, rejected such argument at the September 14, 2004 hearing. See Tr. pp. 252-253. The rulings of the courts- not the agency's positions- establish the law that governs this case.

3. **In re Turner** **Number of violations: 1** **Assessed penalty: $11,000.00**
TSCA-07-2001-0044

The respondent was alleged to have purposely failed to provide any lead disclosure information with the lease to the tenant. The EPA only proposed a fine of $11,000.00 for this blatant disregard for the Act's requirements. Because of a default by the respondent, the court never inquired into the reasonableness of the EPA's proposed $11,000.00 penalty in granting that amount of fine.

4. **In re Greak** **Number of violations: 7** **Proposed Penalty: $22,000.00**
TSCA-3-2000-0016

As of this writing, this case has not concluded. However, the EPA has only proposed a $22,000.00 penalty for the absolute failure to provide the required information regarding lead and its hazards in the sale of real estate. Such a proposal shows that the EPA itself sees such a penalty as more in keeping with reasonableness than the penalty in the case of inadvertent partial disclosure presently before this Board.

5. **In re Minor Ridge, L.P.** **Number of Violations: 5** **Proposed Penalty: $24,200.00**
TSCA-07-2003-0019

Again, this case has not yet been adjudicated. But again, this Board may note well the EPA's having demanded only $24,200.00 in a case seemingly comparable to our own. However, no finding has yet been made as to the culpability level and intent of the respondent in the non-disclosure.

6. **In re Temple** **Number of violations: 7** **Assessed Penalty: $29,700.00**
TSCA-5-99-015

Once again, the Respondent never responded to the Complaint and therefore was held in default. Therefore, the court never made a reasonableness inquiry. Temple involved a real estate agent and his real estate broker (with whom he had a required affiliation) who violated the lead disclosure rules through their failure to provide the required pamphlets and disclosures in the course of a real estate sale. This case involved a pregnant woman and evidence of elevated lead levels in the blood of a young child. Despite the lack of a reasonableness inquiry by the court, the penalty imposed by the court in this case *in which actual harm was alleged* was a mere $29,700.00.

7. **In re Yee** **Number of violations: 7** **Assessed penalty:** **$29,700.00**
TSCA-7-99-0009, TSCA Appeal No. 00-2

Yee involves lack of disclosure of the type involved in our case. However, the facts at the hearing on the case showed that children, in fact, had lead poisoning. Additionally, the leased home was strewn with peeling paint and that paint was never encapsulated. Even with actual lead poisoning being diagnosed, the EPA requested and received only a $29,700 penalty.

8. **In re CAS Equity** **Number of Violations: 2** **Assessed Penalty: $30,800.00**
TSCA-3-2000-019

In another case of default by the respondent, the EPA was granted a fine of $30,800.00 for complete non-disclosure of the presence of lead paint in the target housing. No facts aside from those in the actual Complaint are cited in the opinion, so no analysis was performed by the court regarding the reasonableness of the proposed fine.

9. **In re Beuscher** **Number of violations: 4** **Assessed Penalty: $33,000.00**
TSCA-3-2000-019

Again, the court was left without the ability to assess the reasonableness of the EPA proposed penalty because of a default by the respondent. Another difference from the present case is the judge found two children were afflicted with lead poisoning and the presence of lead-based paint that was peeling from the walls. Despite the actual harm to children because of the non-disclosure, the EPA requested a fine of less than a third of that proposed in our case.

10. **In re Harpoon Partnership** **Number of violations: 45 Assessed penalty: $37, 037.00**
TSCA-05-2002-0004

A case in which the court cut the original proposed penalty by the EPA for 45 counts of nondisclosure by the owner from an original proposed penalty of $56,980.00. The facts as concluded by the court in Harpoon Partnership involved the inadvertent omission of lead disclosures on nine different units within an apartment building, and multiplied in the same manner as in the present case. The facts showed that the owners delegated everything to a management company for the purposes of leasing the premises, as was done in our case. The court in Harpoon Partnership concluded that the owners' delegation of responsibility and lack of active participation in the non-disclosure were mitigating factors.

The violations at issue in our case should fall at the low end of the above referenced range detailed above. Given the fact that this case boils down to ten leases, four houses, and truly, four clerical mistakes at the least, the EPA and the Presiding Officer have far exceeded the established precedents in assessing such exorbitant fines to the respondents.

The fines imposed in the above-cited precedents are serious and punitive. Those fines, many of which reach in to the tens of thousands of dollars, are quite high enough to deter a landlord like the respondents. The fines are well above those that the City of Richmond imposes for violations of its similar lead-safe regulations[12].

Recently, the EPA has admitted that the fines imposed by the Presiding Officer in her initial decision are out of kilter with <u>any</u> previously imposed fine. Shortly after the Initial Decision, the agency issued a media advisory describing the result as ". . . the largest penalty ever assessed in the country in an EPA administrative hearing for lead disclosure violations, *more than doubling* the previous high penalty"(emphasis added).[13]

Clearly the fines imposed in this matter by the Presiding Officer are beyond the pale for minor infractions such as those involved here. The Board should therefore use its authority to follow established precedent and common sense in imposing a more reasonable fine than that suggested by the Presiding Officer.

B. <u>The agency and now the Presiding Officer have multiplied the fines in this matter without the use of discretion or common sense.</u>

The Presiding Officer accepted the EPA's division and analysis of the counts in this matter, and therefore began her analysis on the wrong path. Their breakdown of the issues magnifies the respondents' minor clerical errors by reviewing each of the 32 counts of the

[12] The EPA has argued that deterrence and punishment are legitimate reasons for the massive fines imposed, however, such massive fines go well beyond the level necessary for such deterrence.
[13] <u>See</u> Exhibit A to the Appellants Brief , "EPA Environmental News" from March 23, 2005.

Complaint individually. A more enlightening analysis can be undertaken by looking at the facts in groupings by property, a more objective approach than simply adopting the agency's 32-count framework. Such an analysis follows[14]:

1. 1124 N. 28th Street; Respondents to Counts: Ron and Patricia Hunt, and Genesis
(Counts 5, 9, 13, 35, 41, 47)
Total fine for property- $17,128.00

   a). Lease 1 (Total fine for lease- $15,840.00) – the agency charged Ron Hunt, Patricia Hunt, and Genesis $2,970.00 each for a single failure to disclose know lead-based paint ("LBP"). Essentially, the method used by the EPA was to double the penalty prior to halving it again through joint and several liabilities. This charge resulted in $5,940.00 in total fines for this lease. The agency then piled on with an additional charge against the same three parties, going through the same doubling and halving exercise again, resulting in an additional $9,900.00.

   b) Lease 2 (Total fine for lease- $1,288.00)- After the same exercise of doubling and halving, the agency imposed a $1,288.00 fine for the failure to check the correct box on the lead disclosure form.

2. 1813 N. 29th Street; Respondents to counts: Ron Hunt and Patricia Hunt
(Counts 6, 7, 8, 10, 11, and 12)
Total fine for property- $35,640.00

   a) Lease 3 (Total fine for lease- $9,900.00)- Because the agency did not try to assess the same error against both the owners and Genesis, no double counting and halving occurred. However the result was the

[14] The information found in this table is based upon the agency's demonstrative exhibits A and B.

same as if this exercise had been performed, resulting in a fine for the failure to mark the proper box on the form of $3,960.00. Additionally, the agency assessed fines of $5,940.00 against the owners because, due to their having checked the wrong box, they also failed to give tenants related documentation.

b) Lease 4 (Total fine for lease- $15,840.00)- In this instance, the same two "violations" as in Lease #3 occurred. Again, the EPA imposed a large fine for non-disclosure and lack of collateral documentation. The total fines in this case were higher because of the relatively lower ages of the children (5 and 14 years old) housed at the property during the lease. However, since neither child was harmed, the children's ages were never shown to have any relevance.

c) Lease 5 (Total fine for lease- $9,900.00)- Again, the agency multiplied a simple paperwork error into an overly large fine. The EPA fined the owners, without reference to Genesis, a total of $9,900.00 for the two violations.

3. 3015 Barton Avenue; Respondents to counts: David Hunt, Patricia Hunt and Genesis
(Counts 17,18,19,36,37 and 38)
Total fine for property- $35,640.00

a) Lease 6 (Total fine for lease- $15,840.00)- Yet again, the agency doubled the fines for the same offense before using its "prosecutorial discretion[15]" to halve it back to the level of fines originally imposed. As with the other incidents, the agency double-fined the respondents

[15] This term was repeatedly used in the closing argument of the EPA. As opposed to the discretion alleged by the agency, this Board should use true discretion to temper the fines in this case.

for (i) mis-marking the lead disclosure form, and (ii) omitting backup paperwork.

b) Lease 7 (Total fine for lease- $9,900.00)- In a repeat of its pattern throughout this case, the agency doubled the fines for the same offense before using its "prosecutorial discretion" to halve it back to the level of fines originally imposed. As with the other incidents, the agency also double-fined the respondents for both mis-marking the lead disclosure form and failing to provide backup documentation.

c) Lease 8 (Total fine for lease- $9,900.00)- The agency doubled the fines for the same offense before again using its "prosecutorial discretion" to halve it back to the level of fines originally imposed. As with the other incidents, the agency double-fined the respondents for both mis-marking the lead disclosure form and the failing to provide backup documentation.

4. 2405 Third Avenue: Respondents to counts: David Hunt, Patricia Hunt and Genesis
(Counts 25, 26, 27, 28, 39, 40, 45, 46)
Total fine for property- $31,680.00

a) Lease 9 (Total fine for lease- $15,840.00)- Yet again, the agency doubled the fines for the same offense before using its "prosecutorial discretion" to halve it back to the level of fines originally imposed. As with the other incidents, the agency double-fined the respondents for (i) mis-marking the lead disclosure form, and (ii) omitting backup paperwork.

b) Lease 10 (Total fine for lease- $15,840.00)- In a repeat of its pattern throughout this case, the agency doubled the fines for the same offense before using its "prosecutorial discretion" to halve it back to the level of fines originally imposed. As with the other incidents, the agency also double-fined the respondents for both mis-marking the lead disclosure form and failing to provide backup documentation.

As is clearly shown in the above outline, the EPA took four minor paperwork errors on four properties[16] and multiplied those offenses in an effort to justify $120,088.00 in fines. The Presiding Officer incorrectly began her analysis at the point reached through the EPA's inflated analysis and worked backwards from there, thereby failing to begin her review with a fresh look at the EPA analysis as required by New Waterbury, supra.

Such an approach is shown by the Presiding Officer's addition of a "second 10% reduction" to the EPA baseline when discussing the cooperative attitude of the Respondents.[17] This approach is backwards as the Presiding Officer was not required to accept the EPA fine proposal as a baseline and, in fact, should have used her discretion to choose the appropriate fine from the beginning or at the very least reduced the proposed penalty even further.

II. The Presiding Officer should have granted a larger discount for the remediation performed by the respondents at the properties and the lack of harm to any of the tenants.

The Presiding Officer erred in her failure to grant a higher discount to the respondents for the remediation work performed at the Barton Avenue property. Neither the

[16] These four initial errors admittedly and understandably resulted in 10 errors due to replication in later leases.
[17] Init. Dec. at p. 35.

testimony nor the voluminous documentary evidence produced at trial by the agency showed that any harm befell any of the tenants who occupied the four houses in question. The Presiding Officer properly determined that no harm befell any of the tenants and properly granted a 10%[18] discount for each of the three of the four properties at issue, excluding the Barton Avenue property.[19]

At their own expense, the respondents encapsulated the lead paint at the properties at issue. This work was performed initially because of the Notices of Violation issued by the City of Richmond. In contrast to scraping the paint from the walls, encapsulation reduces the lead paint risk to zero on first application. The encapsulation work has been repeated on a regular basis in order for it to remain effective, at an expense of between $5,000.00 and $7,000.00 per application.[20]

Ron Hunt specifically testified that the respondents paid to have lead based paint encapsulated at the properties.[21] The EPA offered no evidence to rebut the respondents' testimony that remediation also occurred at the Barton Avenue property. The EPA called Lonnie Sims, from the City of Richmond lead inspection office, in an effort to rebut Mr. Hunt's testimony. But instead, Mr. Sims corroborated Mr. Hunt by confirming that no fines for non-compliance with city directives to perform such encapsulation had ever been assessed. Mr. Sims also testified that the City of Richmond is quite diligent in its enforcement of the lead paint regulations, acting swiftly in the case of harm to tenants. In

[18] The respondents further question whether 10% per property is in fact the limit of possible discount, and ask this Board to consider a greater discount.
[19] Init. Dec. at p. 34.
[20] Tr. 210-215.
[21] Tr. pp. 205-213.

this matter, not only did they not act, no further action has been taken on any of the Notices of Violation issued to the respondents.[22]

Mr. Sims also testified that such encapsulation is unfortunately extremely rare. Yet, the respondents have performed such encapsulation work on all four properties.[23] The inference from this testimony is that the respondents not only acted to satisfy Mr. Sims' office, but acted in an exemplary manner in doing so.[24]

Mr. Hunt's testimony regarding the Barton Avenue property, testimony corroborated by Mr. Sims, was erroneously rejected out of hand by the Presiding Officer because the City of Richmond failed to send out a compliance letter.[25] The Presiding Officer has essentially allowed the EPA to prove a lack of remediation through the *absence* of evidence. Such an analysis flies in the face of the EPA's clear burden to prove its case against the respondents. As such, the Presiding Officer erred in her failure to significantly reduce the fine imposed upon the respondents' for the abatement activities clearly performed at the Barton Avenue property.

Unlike the facts of the cases cited above in which the larger fines were imposed[26], no harm occurred to any of the tenants of properties owned or managed by the respondents[27], and the respondents encapsulated the lead paint at their properties. As such, the respondents' case is truly one of harmless error and therefore should be considered at the lower end of the range of penalties imposed in lead paint disclosure cases.

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[22] At Tr. pp. 179-181.
[23] See generally at Tr. pp. 189-198.
[24] An inference made necessary by Mr. Sims lack of certainty regarding any action taken by the City of Richmond.
[25] See supra at fn.5 for page citations.
[26] See Section I. A. of this Brief.
[27] Init. Dec. pp. 27 and 28.

III. The Presiding Officer gave too small a discount to the respondents for their cooperation

Given the Presiding Officer's conclusion that the respondents were "exceptionally honest, direct and cooperative"[28] in their actions relating to the investigation and hearing of this matter, the Presiding Officer's conclusion that the respondents remediated three of the four properties, and the clear failure to show a lack of remediation at the Barton Avenue property by the EPA, the mere addition of another 10% discount[29] is clearly insufficient.

Not only did the respondents cooperate in this case, they performed voluntary remedial actions that, according to the EPA's own witness, Mr. Sims, are rarely if ever done. Because of this additional action, the fines in this matter should be reduced substantially to show the proportional nature of the violations of the respondents and the highly cooperative manner in which they handled themselves once made aware of these violations.

IV. The Presiding Officer erred in her failure to consider the respondents' lack of culpability

The Presiding Officer also concluded that no consideration would be given for the respondents' lack of culpability and the unintentional nature of the violations. In doing so, she erred through her failure to distinguish the respondents from those parties who, in past cases actively and knowingly tried to conceal the presence of lead paint at their properties. In re. Greak, supra, and In re Yee, supra.

Importantly, EPA has never contended that any of the non-disclosures were intentional. To the contrary, the uncontradicted testimony at trial was that the non-

[28] Init. Dec. at p. 35.
[29] Init. Dec. at p 35.

disclosures were unintentional paperwork snafus, and rare ones at that.[30] The respondents should not be held to a high level of fine reserved for those who intentionally violate the Act. This Board should therefore significantly reduce the penalty because of the lack of culpability as demonstrated by the record.

Conclusion

Given the facts and the precedents summarized above, the Presiding Officer's proposed fine of $84,224.80 is excessive in the extreme. Respondents understand that, even in cases of unintentional and harmless violations like theirs, some amount of fine may be deemed appropriate given the preventive policy of the Act. Nonetheless, respondents respectfully contend that the Presiding Officer's imposed fine – more than twice the largest fine ever assessed after a full hearing[31] – cannot be maintained. Respondents ask only that this Board compare the facts of their case with the facts involved in the published precedents, give this case the fresh look required by the *de novo* standard of review in this matter, and assess the fine in this case at an appropriate point on the spectrum between $4,070.00 and $37,037.00.

RONALD H. HUNT
PATRICIA HUNT
DAVID HUNT
J. EDWARD DUNIVAN
GENESIS PROPERTIES

By: _____
Counsel

[30] See the testimony of Ronald Hunt and Michael Hunt at Tr. pp. 203 through 231.
[31] See Exhibit A to this brief, the EPA's press release concerning this case.

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1650 Arch Street
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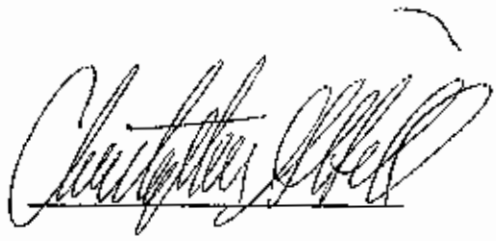

EXHIBIT

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III- OFFICE OF COMMUNICATIONS AND GOVERNMENT RELATIONS
1650 Arch Street Philadelphia, Pennsylvania 19103-2029
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EPA Environmental News

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March 23, 2005

Richmond Property Management Co. and Owners to Pay $84,224 in Penalties for Lead Disclosure Violations

PHILADELPHIA – The owners and the management company of four residential apartment buildings in Richmond, Va. have been found guilty of violating a federal law requiring disclosure of lead-based paint hazards to residential tenants.

Chief Administrative Law Judge Susan L. Biro issued an initial decision that assessed penalties for the five respondents totaling $84,224. This is the largest penalty ever assessed in the country in an EPA administrative hearing for lead disclosure violations, more than doubling the previous high penalty.

Ronald H. and Patricia L. Hunt own the residential rental properties at 1124 North 28th Street and 1813 North 29th St. Patricia L. Hunt and David E. Hunt own the residential rental property at 3015 Barton Ave. J. Edward Dunivan owns the residential rental property at 2405 Third Ave. Genesis Properties, Inc., manages these properties.

The lead disclosure rule requires that owners, landlords, and agents renting or selling residential property built prior to 1978 must disclose to tenants or purchasers information pertaining to lead-based paint. All of the above properties were built prior to 1978.

Correspondence was sent to the owners and property management firm from the City of Richmond Department of Health citing lead-paint conditions and/or hazards in the rental properties. The information was not disclosed to 10 groups of tenants over a three-year period before they leased the properties. This information could have enabled the renters to take proper precautions to avoid their children's exposure to lead-based paint present in their apartments.

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"Lead poisoning can be prevented. If parents are concerned that their children may have been exposed to lead-based paint, they can get their homes and children tested, and learn preventative steps that can be taken to avoid lead poisoning," said Donald S. Welsh, EPA regional administrator mid-Atlantic region.

Renters for five of the 10 apartments had children under the age of six when they entered into the lease. The other five renters had children ranging from seven to 15 years old at the time they entered into the lease. Children under age six are especially vulnerable to the dangerous effects of lead poisoning which can impair their neurological development.

To find out more about Richmond's lead poisoning prevention program see its website at www/richmondgov.com/department/hsis/health/programs/lead.asp or call the Lead Safe Richmond Program at 804-646-3300.

Check out www.epa.gov/reg3wcmd/leadisc.htm for additional information on the lead disclosure rule.

The parties have the right to appeal the penalty decision to the Environmental Advisory Board.

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