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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

IN THE MATTER OF:	)	
	)	Docket No. RCRA-08-2020-0007
New Prime, Inc.	)	
	)	
Respondent.	)	**RESPONDENT'S REPLY POST HEARING BRIEF**
	)	
_____	)	

Pursuant to the Presiding Officer's Order dated November 9, 2022, as amended on January 12, 2023, Respondent New Prime, Inc. (hereinafter "Prime" or "Respondent") submits this Reply Post Hearing Brief. Complainant has failed to show through its two post-hearing briefs that its $631,402 proposed penalty is justified. It should be rejected in favor of a more reasonable penalty based on the mitigating circumstances and facts including those adduced at hearing.

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SUMMARY OF REPLY ARGUMENT

The parties view the largely uncontested facts of this case through different lenses. Even though the Presiding Officer is not obliged to follow the RCRA Civil Penalty Policy (RCPP) or adopt Complainant's application of the RCPP to the conduct here, Complainant's two Post Hearing Briefs show that it sees the case only through the perspective of that unpublished guidance document and it argues that its interpretation of the RCPP is unassailable. Respondent, by contrast, sees the case through the focus of the statutory penalty factors and the facts adduced at hearing. Those facts demonstrated a low probability of exposure and that EPA's interpretation of the RCPP is premised on unrealistic and hypothetical exposure scenarios which did not occur and were unlikely to occur given the location and storage of the trailer.

Complainant argues without conviction that it met its burden of persuasion on the amount of the penalty. Respondent adduced significant evidence at hearing to show that Complainant failed to consider the facts surrounding the storage of the trailer, wrongly relied on false assumptions about the storage, made mistakes in its calculations and ultimately argued for a large penalty that is unsupported by the weight of the evidence -- even when applying EPA's self-serving RCPP.

And Respondent met its burden of showing that a smaller penalty is appropriate in this case. It offered uncontroverted evidence regarding the secure storage of the trailer outdoors within a fenced, gated facility with no public access and on an impermeable surface in a remote area rarely visited by employees. Contrary to Complainant's arguments, Respondent offered persuasive expert testimony from Dr. Elizabeth Walker regarding the low probability of exposure from the storage of the trailer on an asphalt pad, in the middle of a large industrial area, hundreds of feet from the closest workers and miles from the nearest homes. Complainant's

argument that Respondent did not provide credible evidence to support its case is without merit and belied by the evidence itself.

With regard to the central issue of potential for harm to human health or the environment, the parties each offered the testimony of a toxicologist and each presented competing views on the potential for harm. Of the two, Dr. Walker offered the more convincing explanation of what was happening on the ground based on the facts adduced at hearing. In comparison, the arguments of Dr. Keteles, a toxicologist employed by Complainant, were theoretical, based on unlikely scenarios, and devoid of any probability analysis. In short, the testimony presented by Complainant ignored the reality of the situation.

Prime has never contested that it inadvertently violated RCRA, or that it should pay a penalty as a result. Prime admitted liability from the outset and has only challenged the reasonableness of the proposed penalty. The question before the Presiding Officer is whether, in calculating the appropriate penalty, should she follow EPA's RCPP analysis or should she adhere to the RCRA statutory penalty factors set out by Congress, and in applying the RCPP or not, adopt a more realistic potential-for-harm assessment than that used by EPA.

Complainant's post-hearing arguments notwithstanding, its proposed penalty of $631,402 is neither justified by the statutory penalty factors or its own RCPP. As argued in our Post Hearing Brief, Respondent respectfully maintains that a penalty in the range of $50,000 to $150,000 is more appropriate under the facts adduced at hearing in this case.

ARGUMENT

I. COMPLAINANT'S PROPOSED PENALTY IS UNREASONABLE.

Much of the first nine pages of Complainant's Reply Brief is devoted to the argument that "Respondent has not adduced meaningful evidence that the penalty proposed for any of the five violations is not appropriate." *See id.* at 3-9. Complainant's claim of lack of "meaningful evidence" is without merit. To the contrary, Respondent proffered extensive testimony and documentary evidence related to good faith efforts to comply and the seriousness of the violation, which are the two RCRA statutory penalty factors. *See* Resp.'s PHB at 24-34. Respondent also covered the significant gaps and problems with Complainant's own RCPP analysis as set out in CX04Cor and the testimony of its penalty witness. *See* Resp.'s PHB at 13-23. Importantly, Respondent proffered persuasive expert testimony from Dr. Walker regarding the low probability of exposure from the storage of the trailer. *See* Resp. PHB at 15-19.

In its Post Hearing Brief, Respondent pointed out a flaw in Complainant's penalty policy analysis related to its failure to consider the probability of exposure. *Id.* at 13-15. Complainant replies by denominating Respondent's argument regarding its failure to analyze probability as "mere word play." Compl.'s Reply Brief at 5. To the contrary, the RCPP instructs EPA to consider the "probability of exposure" when assessing risk. *See* Resp.'s PHB at 13-15. Dr. Keteles testified she did not consider the probability of exposure in her analysis. *Id.* Nor did EPA perform a probability analysis in CX04Cor. *Id.* If the probability of a worker coming into contact with the waste paint was low, the threat of harm was low, resulting in a much lower penalty. That is true whether one analyzes the facts of this case under the RCRA statutory penalty factors or the RCPP.

Dr. Walker, who works primarily with environmental groups and tribes and who focuses her work on supporting vulnerable populations, Tr. v.4 at 99:4-12, underscored the importance of probability of exposure and related points in her testimony:

- I determined that the risk of exposure was low. I determined that the probability of a fire occurring was also low. Tr. v.4 at 112:10-15.

- So, I went and gathered some nail polish remover, and WD-40, and a couple of paint products that I had used for home improvement projects, refinishing my daughter's stand recently. And I found that on this SDS there were a lot of the same signal kind of warnings as we find in this case, including that all of them were marked as highly flammable. All of them recommended storing them under locked condition. Tr. v.4 at 117:6-15.

- So, as I understand it, the paint was stored in a rather remote corner of an industrial facility, a large, open, flat yard in the middle of a very large, open, flat area in Salt Lake City that was full of industrial - - zoned industrial around the airport. It was open. . . the nearest neighborhood was 2 miles away, residential neighborhood. . . . [T]he facility if fenced, and that the location of where the trailer was stored in that yard was not a place where any workers spent any time. They didn't congregate there. They didn't walk by. It was not accessed on a routine basis for any period of time. Tr. v.4 at 120:2-19.

- I . . . estimated that the corner of the nearest building in Prime's facility was 200 to 250 feet, approximately to the nearest corner of where the trailer was stored. . . . So, we have people coming in and out 200 feet away. That's still a very long distance. . . . the paint on the SDS does state that it has a very slow evaporation rate. And so the potential for someone getting a significant enough exposure to cause any kind of toxicological harm is extremely low. Tr. v.4 at 121:8 – 122:14.

- So, the paint was characterized in the NEIC report as a semi-solid or sludge. It was alternatively characterized as viscous. And so what that says to me is that this paint is not going anywhere fast. . . The concrete is impermeable . . . And if it were to rain, the paint is water-insoluble, so the rain would not be expected to significantly accelerate the movement of that or the transport of chemicals into the environment or enter the soil. I also understand there were not any water ways nearby. Tr. v.4 at 123:16-124:19.

- But, again, that 112 degree closed cup flash point measurement is, is not necessarily the temperature, even if the paint reached that temperature, is not necessarily the temperature at which the paint would ignite, even if an ignition source was present. Tr. v.4 at 129:21-130:4.

- If something sparks, but it's 20 yards away, that's not likely to be something that's going to cause a fire. Tr. v.4 at 170:16-18.

- And the material is not listed as explosive. . . it's actually listed as stable . . . No, I wouldn't expect [the barrels] to explode. And, they had already been through a fire where they were exposed to upwards of potentially 1,000 degrees to 1,500 degrees . . . and they didn't explode. Tr. v.4 at 134:5-22.

- I think there's a low probability of harm occurring. Again, you know, just thinking about the actual exposure scenario that we have whereby anything vaporizing or coming off of this paint is going to readily dissipate into the surrounding environment. Tr. v.4 at 1238:1-6.

Regarding Dr. Keteles' opinion that the pathways for exposure were complete, Dr. Walker testified:

- So you'll see here in red Dr. Keteles has several different ways that a responder, worker or visitor, that there's evidence of or strong probability of these receptors coming into contact with the waste, and that's where I disagree that we have a complete pathway here. Tr. v.4 at 146:17-22.

- So we've already discussed that the Prime site was not open to visitors, so it's highly unlikely that there are going to be visitors that are exposed to this waste. With regards to workers, the workers are rarely in the area of this paint waste either. And then with regards to responders, presumably this refers to emergency responders who would come and be summoned in the case of fire, they would be wearing personal protective equipment, and so it's unlikely that they would also have a significant inhalation exposure to the paint waste. Tr. v.4 at 148:5-16.

Complainant argues that "the unfettered access to the drums of hazardous waste created a strong likelihood that someone or something may have been exposed," Compl.'s Reply Br. at 7. The Dr. Walker testimony cited above and the testimony from Mr. Singleton regarding the remote and secure location of the stored trailer contradict any claim of "unfettered access" to the drums. *See* Resp.'s PHB at 16. Complainant's arguments are simply not supported by the facts.

Complainant argues that "a very large number of facts that Respondent presents as undisputed in its Brief are clearly contradicted by evidence and testimony in the record." Compl. Reply Br. at 6. Complainant confuses arguments for facts. The arguments it makes in note 8 of its brief are either based on Dr. Keteles' hypothetical scenarios (a spark from a passing truck) for which there was no evidence, *see* Tr. v.4 at 241:13-22, or are inconclusive, such as the alleged

lack of fencing around the construction site. The only photo showing the temporary removal of fencing between the trailer storing the waste paint and the construction was taken during the EPA inspection, and it's very possible that the fence was moved at the direction of EPA to move the drums by forklift off of the trailer and stage them for sampling. *See* Tr. v.4 at 42:19-43:2; 4516-46:4; 84:16-86:13. Mr. Singleton also was clear that the greater Prime terminal was fenced off and not open to the public. Tr. v.4 at 26:13-27:7.

Finally, Complainant argues that Respondent failed to address the element of its RCPP that deals with "harm to the RCRA program." Compl.'s Reply Br. at 4, citing page 23 of its PHB. "Harm to the RCRA regulatory program," according to the RCPP, results where "some requirements of the RCRA program which, if violated, may not appear to give rise as directly or immediately to a significant risk of contamination as other requirements of the program. *Noncompliance with these requirements, however, directly increases the threat of harm to human health and the environment*." *Id.* at 14 (emphasis added).

Respondent addressed this issue head on in its PHB. As noted in detail above and in Respondent's PHB at 13-24, the storage of the trailer in Salt Lake City posed a low probability of exposure. In other words, failure to comply with the RCRA requirements did not "directly increase[] the threat of harm to human health or the environment." To the extent that the RCPP attempts to bootstrap another penalty increase where no real threat of substantial harm exists, it is another reason to deviate from the RCPP.

Also, with respect to the "harm to the program argument" that Complainant raises at page 4 of its Reply brief, it cites to pages 23-24 of its PHB, which in turn addresses Count 1. That count relates to failure to conduct a hazardous waste determination. That the burned paint drums contain hazardous waste has never been contested, nor has there ever been any question that the

burned, intact drums on the stored trailer in Salt Lake City are the same drums that Prime picked up from PPG to haul to Oregon. *See* Resp.'s Answer to the Complaint, admitting paragraphs 45 and 46 of the Complaint. The drums Prime picked up from PPG contained paint and primer that were listed as hazardous materials. Those drums stayed on the trailer after it burned and were returned to Salt Lake City. As noted in our PHB at 23-24, Complainant could not show an economic benefit to Prime because Complainant concluded that "the SDS and other documents . . . *would serve as a reasonable basis* for determining the drums contain hazardous waste." CX04Cor at 9 (emphasis added). No hazardous waste determination was needed to know that the burned barrels of paint were regulated hazardous waste.

II. IT IS NOT ABSURD TO EXPECT THE GOVERNMENT TO WARN OF KNOWN DANGERS.

Respondent argues in its Post Hearing Brief that the EPA's actions in failing to warn anyone -- Prime, Prime employees helping the EPA inspectors, local first responders or the neighboring community, to name a few -- of the supposed inherent dangers of the trailer stored at the Prime Salt Lake City terminal showed that the drums were not as dangerous as EPA now makes them out to be. Resp.'s PHB at 19-21. EPA CID knew what was in the drums. It had the SDS and the bills of lading for the shipment. Complainant dismisses this argument as "patently absurd." Compl.'s Reply Brief at 8.

Complainant argues that it is standard procedure in criminal investigations to order the preservation of evidence. *Id.* Respondent agrees. But it stands to reason that if the paint posed such an "imminent and substantial endangerment" as Complainant *now* argues that EPA surely would have warned Prime in the preservation letter, CX11 at 2, to avoid contact with the trailer and to take other necessary precautions during the six weeks it remained under the preservation order. After all, the letter was written during August,

the hottest month of the year, and EPA now maintains that there was a serious risk of fire, and the preservation letter did not allow Prime to move or alter the trailer in any way.

It is also reasonable to expect that the government would warn the Prime workers who assisted EPA in moving the drums during the two inspections, to wear personal protective equipment, or take other precautionary measures when moving the barrels if those barrels were in fact as dangerous as Dr. Keteles attempted to portray them in her testimony. And it would have been quite simple. The EPA inspectors could have simply given a verbal warning. But they did no such thing. *See* citations at pages 20-21 of Resp.'s PHB.

To be clear, Respondent does not assert that EPA's actions or inactions in 2016 regarding the supposed danger the stored barrels posed was inappropriate. Instead, Respondent asks that Complainant's current advocacy for a significant penalty premised on what it now claims was a highly dangerous situation be considered in the context of EPA's behavior at the time.

Finally, Complainant hints that maybe CID did warn local law enforcement and first responders about the danger, offering no evidence to support that argument. "If Respondent has knowledge that CID did not communicate with other agencies in Utah . . . it has not placed that information into the record." Compl.'s Reply Br. at 8-9. The record is clear that EPA did not warn Prime about the dangers supposedly posed by the burned paint barrels and Ms. McNeal testified that she was unaware of any warnings to any Utah agencies. *See* citations at pages 20-21 of Resp.'s PHB. EPA could have easily called Marc Callaghan, its CID witness, as a rebuttal witness to testify to the efforts the

EPA criminal investigators took to warn local agencies, but it did not. Almost certainly because EPA made no such effort and Prime was not required to prove a negative.

III. THE PRESIDING OFFICER HAS BROAD AUTHORITY TO DEVIATE FROM THE RCPP.

Complainant argues the RCPP "should not be discarded lightly," citing *In re Chem-Solv, Inc.*, 2014 WL 2593697 at *103 (EAB 2014). Compl.'s Reply Br. at 10-11. But the EAB has made clear that the Presiding Officer may deviate from the policy so long as she explains why. "[A]n ALJ need not strictly follow the relevant penalty policy and may depart from it as long as he or she adequately explains the reasons for doing so." *In re Andrew B. Chase*, 2014 WL 3890099 (EAB 2014) at *15. Importantly, the EAB has set no standard for when she can or cannot deviate. It is entirely up to the Presiding Officer's discretion "as long as he or she adequately explains the reasons for doing so." As explained in our Post Hearing Brief, there are ample reasons to deviate. *See* Resp.'s PHB at 3-12.

With respect to Respondent's due process argument, Resp's PHB at 4, Complainant argues against itself. It notes at page 10 of its reply brief that the RCPP "should be applied whenever possible," then at page 11 argues that there can be no due process concerns because penalty policies such as the RCPP "are used as guides in administrative proceedings; they are not 'applicable,'" and "presiding officers are not required to strictly apply penalty policies." Complainant cannot have it both ways. Either the unpublished RCPP applies "whenever possible," thus creating due process problems, or it is merely guidance that the ALJ can disregard so long that she explains why.

Respondent agrees with the latter interpretation. As we noted in our PHB at 4, the RCPP is at most an interpretive rule, which was not subject to the notice and comment process and does not have the force of law. *See United States v. Presbyterian Camp & Conf. Centers, Inc.*, 2020

WL 6193639 (C.D. Cal. May 19, 2020) at *3 (citing *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) ("Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process.") (internal quotation omitted).)

As set out in greater detail in Respondent's PHB, there is ample reason to deviate from the RCPP in the present case. *See* Resp. PHB at 4-10. EPA wrote the RCPP for companies that work under the RCRA regulatory environment, not trucking companies that specialize in hauling food and pharmaceuticals. Tr. v.3 at 300:2-9; 301:2-11. Prime is in this case because of its inexperience with RCRA that resulted in it inadvertently violating the statute. In over 50 years of operation, Prime has no history of other RCRA violations.

The examples EPA uses to explain its penalty rationale in the RCPP show how different the present case is from the typical case EPA brings under RCRA. *See e.g.*, RCPP at 30 (failure to install groundwater monitoring equipment; failure to develop a waste analysis plan), A-9 (company that generates and stores hazardous wastes), A-27 (company failed to restrict entry of persons onto active portion of its surface impoundment facility) and A-40 (operator of several commercial hazardous waste treatment facilities). The Presiding Officer should deviate from the RCPP because it is inapt under the circumstance of this case.

IV. ALJ'S SELDOM ADOPT EPA'S PROPOSED RCRA PENALTIES.

In its Post Hearing Brief, Respondent argued that the relevant administrative case law shows that EPA has largely failed to convince ALJs to either find liability or to adopt its proposed penalties in RCRA cases. Respondent's Brief at 8-10. Complainant makes two arguments in response: (1) the cases Respondent cites are distinguishable and (2) the EAB has

advised against comparing cases. *See* Compl.'s Reply Brief at 11-12. Both arguments miss the point.

EPA attempts to distinguish the cited RCRA penalty cases as inapplicable based on the facts. But the facts don't matter. What matters is in each case EPA argued for a high penalty *applying the RCPP* and in almost every case, the ALJ rejected EPA's RCPP analysis and assessed a much smaller penalty. If we were to employ a sports analogy, EPA is batting less than .100 in court with its RCPP. The cited cases show that when EPA takes its RCRA cases to hearing, arguing for penalties based on the same RCPP it employs in this case, the ALJs have mostly rejected the analysis, regardless of the facts, and assessed much smaller penalties in the cases that have gone to hearing. *See* list at page 9 of Resp.'s PHB.

Significantly, Complainant cites no other RCRA cases that have gone to hearing where the ALJ accepted EPA's proposed penalty.[1] Complainant describes the cited cases as "irrelevant," Compl. Reply Br. at 11, which is an interesting adjective to describe the complete body of RCRA penalty cases handed down by EPA ALJs. Respondent does not offer these cases to compare the penalties assessed in them to this case, as Complainant argues. Respondent offers these cases to show that the RCPP has a very poor track record when EPA is forced to substantiate its interpretation of its own policy to a neutral ALJ.

V. COMPLAINANT'S REJECTION OF MITIGATING FACTORS MAKE SENSE ONLY IF THE RCPP IS STRICTLY APPLIED.

Respondent at hearing and in its Post Hearing Brief articulated several reasons why Complainant's proposed penalty is unreasonable, including the failure of EPA to consider mitigating factors. *See* Resp. PHB at 24-36. Complainant argues against the ALJ considering any

[1] The quote Complainant ascribes in n. 15 of its Reply Brief to *In re M.A. Bruder and Sons, Inc.*, 2001 WL 1659339 (ALJ 2001) at *11 is not to be found in that opinion.

of the mitigating factors in this case because EPA's RCPP doesn't allow it. Compl. Reply Brief at 13-14. Yet nothing in the statute compels that result.

Complainant's argument boils down to this: EPA wrote an unpublished internal guidance document that allows EPA to unilaterally interpret it in a way that assesses most penalty issues in favor of higher penalties, and to dismiss almost all mitigating factors. But the RCPP is not law, and as set out elsewhere in this Reply Brief and in Respondent's PHB, the RCPP's rationale for significant sanctions and its disallowance for consideration of mitigating factors such as good faith efforts to comply and lack of pre- or post-violation history of violations, are inapt in the present case. A policy that allows for reduction in penalty for a knowing violator who takes partial efforts to return to compliance but allows no reduction for an otherwise law-abiding violator that is unaware of its violation and who promptly complies when notified is an inherently unfair and poorly-reasoned policy as applied. *See* Tr. v.2 at 290:21-292:1.[2]

The RCPP as applied in this case is a heads-I-win-tails-you-lose policy unsupported by the bare-boned statutory penalty factors. *See* 42 U.S.C. § 6928(a)(3) ("In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."). If one narrowly construes the RCPP in the manner argued by EPA, the mitigating factors established by Respondent may be ignored, and the Presiding Officer may focus only on the mistakes Respondent made. Surely that is not what the operative statute contemplates. That result would be both inequitable under the facts of this case and wrong.

[2] If EPA were to ever publish its RCPP and subject it to public scrutiny, it certainly would receive valid criticism of the needless complexity, one-sided treatment of respondents and lack of statutory authority, among many other complaints.

In reality, the Presiding Officer may deviate at her discretion from the RCPP and consider the following important facts: (1) Prime is a company that specializes in hauling refrigerated food and pharmaceuticals, not hazardous materials (and never hazardous waste); (2) Complainant acknowledges Prime's "commendable" good corporate citizenship and identifies no other RCRA violations by Prime in over fifty years of operation; (3) Prime has been violation free in the seven years since the underlying violation despite its trucks traveling millions of miles during that time period; (4) Prime gained no economic benefit from the violation; (5) Prime had no real history of working with this type of accident and cleanup before (or since); (6) Prime immediately came into compliance when alerted by EPA, and (7) Prime has embraced the mistakes it made here, and corrected its internal policies to ensure such a violation never happens again. Prime is indisputably a good corporate citizen and it prides itself on its safety and regulatory compliance record notwithstanding the unintentional mistakes made here. These are all valid equitable factors that a neutral Presiding Officer should consider in assessing a penalty in this case.

VI. THE CONFUSION ON THE NIGHT OF THE FIRE IS RELEVANT.

Finally, Complainant focuses on the reasons Prime should have known it made a mistake. Compl.'s Reply Brief at 15-19. As Prime has admitted from the start of this litigation, internal miscommunication resulted in the company inadvertently violating RCRA, and it concedes that a reasonable penalty for those violations is in order. The company has never tried to avoid responsibility for what it did.

Complainant's argument, however, focuses on the mistakes Respondent made -- which Respondent concedes -- and avoids any consideration of the context in which those mistakes were made. The confusion on the night of the fire led Prime to initially misread the situation and

the subsequent transport and storage of the burned trailer was the result of corporate internal miscommunication. The Safety Department was handling the Idaho cleanup while the Road Assist Department took responsibility for hauling the burned trailer to Salt Lake City, and the two weren't communicating as they should. Tr. v.3, 342:10 – 343:1. Respondent ended up mistakenly storing the wrecked trailer in its Salt Lake City yard for 10 months without knowing it was violating the law. How that came to be matters when it comes to assessing a penalty.

As noted in detail in Respondent's Post Hearing Brief at 26-30, it was more than Chief Janousek's ill-founded statement that the fire aftermath "went from a haz-mat scene to a clean-up scene," RX05 at 3, that led to the confusion in the early morning hours of September 27, 2015. For example, the Idaho Transportation representative, Carl Vaughn stated that there was confusion at the scene. RX11 at 7-8. The Idaho State Patrol, in consultation with the Idaho Department of Environmental Quality, allowed B&W Wrecking to clean up the site even though B&W was not qualified to do hazmat work. Tr. V.3, 67:5 – 68:6; *see, also* RX03 at 3. Thus, a clean-up company unfamiliar with the procedures and protocols associated with cleaning up hazardous waste was put in charge of the clean-up and was not advising Prime of what actions needed to be taken. All the while, the decision-makers at Prime were thousands of miles away relying on communications on scene by state and local government representatives on what to do which namely amounted to B&W handling the clean-up from the aftermath of the fire.

It was following this that Prime's then compartmentalization allowed it to deviate from its commitment to regulatory compliance. While Prime's Safety Department immediately dealt with the fire and ensuring a contractor was hired to handle the subsequent cleanup, s*ee* Resp.'s PHB at 29-30, Prime's Roadside Assist Department stepped in to handle the transportation of the burned trailer to Prime's Salt Lake City yard for further investigation. A "legal hold" was placed

on the trailer to allow for an investigation into the source of the fire while the trailer was stored in the corner of the Salt Lake City terminal yard. Regrettably, the individual with Roadside Assist coordinating the transportation and storage of the trailer and its remaining contents failed to determine the trailer contained hazardous waste. This was clearly a mistake, and clearly a violation of RCRA. But it was not the result of an effort to save money, malicious disregard for the law or for the safety of those who could have been exposed to the remaining paint barrels.

Prior to this incident, Prime's experience with hazardous waste spills was largely associated with truck diesel fuel leaks and truck radiator discharges resulting from deer strikes. Tr. v.3 at 332:10-20. This incident was unique in the company's history and valuable lessons were learned. When hazardous materials are now involved, Prime will no longer rely on different Departments to manage such situations and it will not hesitate to immediately involve a qualified RCRA contractor to oversee any clean-up. In fact, Prime Safety Department employees carry mobile phones with that contractor's phone number saved in the contacts list and the refrigerator in their offices is plastered with that contractor's magnets. Tr. v.3 at 400:11-15. This mistake will most assuredly not happen again at Prime.

CONCLUSION

This proceeding arises out of a trailer fire that occurred in September 2015. Notwithstanding the billions of miles traveled by Prime trucks before and in the seven years since this incident, Complainant can point to no other incidents which would call into question Respondent's commitment to adherence with the law. Respondent accepts responsibility for the unintentional mistakes which occurred following this roadside fire and it is committed to never repeat those mistakes. Complainant in its Reply PHB fails to persuasively counter Respondent's arguments that a more reasonable penalty should be assessed in this case. For that and the

reasons set forth above and in Respondent's Post Hearing Brief, Respondent respectfully submits that a penalty in the range of of $50,000 to $150,000 is appropriate. Prime stands ready to pay a penalty in this range and to finally bring closure to an isolated event that does not reflect its company philosophy or its record of compliance.

RESPECTFULLY SUBMITTED this 3rd day of March 2023.

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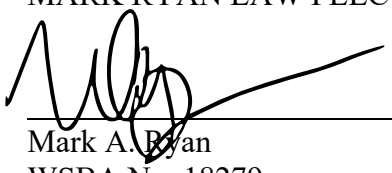

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March 2023, I filed Respondent's Post Hearing Brief via the OALJ E-filing system and via email to:

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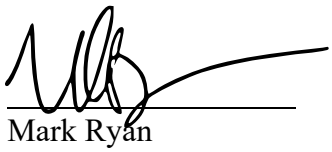

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