UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION X

8/31/82

IN THE MATTER OF:	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	Docket X79-211-9
Complainant,	)	
	)	
vs.	)	
	)	
AIRPORT TAXI SERVICE,	)	
	)	
Respondent.	)	
	)	

INITIAL DECISION

Discussion

This matter arises from a complaint dated and filed 7 June 1979 by the Enforcement Division, EPA, Region X, against Eugene A. Sedille, Jr., Airport Taxi Service, Inc., and Sea-Tac Taxi, Inc. The complaint charged a violation of 40 CFR 80.22(a), (d), (e) and (f). The first count charged a violation of 80.22(f) on 18 May 79. This count has been admitted and is not an issue. The second count charged a violation of 80.22(a) in that during May, 1979, the respondents "caused or allowed the introduction of leaded gasoline into" five different taxi cabs. An amendment later added a sixth taxicab to this count. The third count charged a violation of 80.22(d) in that the respondents did not have the required notice posted at the pumps. This has been admitted by a stipulation. The respondents have admitted that the six taxicabs, which the regulation required to

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be fueled with unleaded gasoline only, were fueled with leaded gasoline. The factual issue raised is whether or not the respondents "caused and allowed" such introduction.

An amendment to the complaint filed 6 November 1979, deleted Eugene A. Sedille, Jr. and Sea-Tac Taxi, Inc. from the complaint and in effect dismissed them without prejudice. The complainant also dismissed its charge of a violation of 40 CFR 80.22(e). The prayer of the complaint was amended to demand a penalty of $12,500.00.

A prehearing conference was held on 29 October 1979 at Seattle, Washington. The Environmental Protection Agency, Region X, Enforcement Division (EPA), appeared by John Bookston. Ervin B. Pickell was substituted for Bookston on 30 November 1979. The respondents appeared by David Waldschmidt of Seattle, Washington. At the prehearing conference, an evidentiary hearing was set for the 14 January 1980 in Seattle, Washington. The issue to be determined was "whether Airport Taxi Service, Inc. during a several month period ending in May 1979 caused or allowed the introduction of leaded gasoline into each of the following described vehicles:

Airport Taxi # 123 (WA License R 6695)
Airport Taxi # 139 (WA License R 6694)
(WA License PT 7969)
(WA License R 7536)
(WA License XC 2941)
Airport Taxi # 133 (WA License R 6819)"

The evidentiary hearing was held as scheduled. W. Douglass Smith, Eugene Sedille, Jr., Keith Sedille, and Michael DeFilipps testified. A number of exhibits were received in evidence and have been considered. After the conclusion of the evidentiary

hearing, the parties filed briefs, memoranda of law, points and authorities, proposed findings of fact, conclusions of law and proposed orders. A final brief was received on 9 May 1980, and the matter was submitted for decision.

The factual issue to be determined in this decision was stated above. In addition to that fact it must be determined what penalty should be assessed on account of the violations stated in counts 1 and 3, and if a violation is found of count 2, what penalty should be assessed for that.

The evidence establishes very clearly that each of the taxi cabs described in the complaint as amended had been filled with leaded gasoline and each of them was placarded to require only unleaded gasoline. Each of them had the filler neck to the gas tank reamed out so as to admit a larger size nozzle enabling the tanks to be filled with leaded gasoline. The complaint does not charge the respondent Airport Taxi with having reamed out the filler necks. There is no evidence to show who may have done this. It is possible that the necks were reamed out before Airport Taxi received the cabs; it might have been done afterward; it might have been done by the drivers; and in any case, since that offense is not charged, it is not before me for decision. There is no question that the taxicabs' tanks were filled with leaded gasoline. The testimony of W. Douglass Smith is uncontradicted and persuasive. It is therefore quite clear that someone "caused or allowed the introduction of leaded gasoline" into these vehicles. The problem is who?

As to one of the vehicles, Taxi #139, there is no dispute but that Airport Taxi Service, Inc. allowed the introduction of leaded gasoline into the gas tank. This act occurred in the presence of witnesses from EPA at a time when responsible officials from respondent Airport Taxi were present. The evidence is uncontradicted and both parties have proposed a finding of fact to this effect. The factual issue remains as to who "caused or allowed" the introduction of leaded gasoline into the other five taxicabs? There is no direct evidence on this point, and if an affirmative finding is to be made it will have to be based on inferences. A discussion of the evidence that gives rise to inferences is warranted.

All of the taxicabs were purchased secondhand by Airport Taxi. A certain amount of rehabilitation was done by respondent after they were purchased. When they are damaged on the street, they are repaired in the respondent's own shop. This work involves both engine repair and body work.

The drivers are recruited by the company, given some instruction in the operation of the taxi business, assigned a vehicle and sent on the street with what the respondent Airport Taxi describes as a lease arrangement. This "lease arrangement" has been designed to avoid the payment of certain taxes that would be due if the drivers were employees. The lease itself is for an indefinite period. It is not clear how the lease would be terminated, but I presume that it would be at the will of either party. The drivers are responsible for buying their own gasoline

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and they may buy gasoline from any source they choose. Airport Taxi supplies gasoline to the drivers at a lower rate than they can buy it on the street. Since the drivers buy their own gasoline, they are both motivated and instructed to return at the end of a day's work with as little gasoline as possible in the tank. The "lease arrangement" does not give any driver exclusive use of a cab. Others may be assigned the use of that same cab during another working shift. During some of the period involved here--the early part of 1979--there was a shortage of gasoline in the Seattle area. Sometimes unleaded gas was not readily available and drivers were motivated to find and use other sources of gasoline. The prosperity of the taxicab business is such that it does not attract highly responsible applicants for work as taxi cab drivers. The Airport Taxi Service has found the level of responsibility of taxi drivers in the current labor market to be less than that which they might desire.

When the taxi drivers fill up with gasoline at the pumps maintained by respondent Airport Taxi they have available both leaded and unleaded gasoline. The pump for leaded gasoline can be "opened" for the drivers by turning an electric lock inside the shop area. The pump for the unleaded gasoline is padlocked most of the time and must be unlocked by a key obtained from the office. Keith Sedille, a responsible employee for respondent Airport Taxi, is the person who usually unlocks the gasoline pump. His testimony is to the effect that he does not pay any attention to what kind of gasoline the drivers are putting into which cab. He could easily do so if he wished to.

From the evidence summarized above, I am able to draw certain inferences. The drivers of the cabs receive some minimum amount of supervision from Airport Taxi and some degree of control. The amount of control is more than one would expect from a lessor/lessee relationship, but less than one would expect from an employer/employee relationship. The relationship between Airport Taxi and its drivers is not easily catalogued. For the purposes of this initial decision I shall call it a licensor/licensee relationship. The drivers are furnished with cabs, permitted to use them in the course of the day's work, they work during the day with some degree of independence, they are obliged to take assignments given to them by radio, but otherwise they are enabled to promote the taxi cab business for themselves in any way they see fit. The rides are metered and 50% of the metered fares are required to be turned into the company. From the other 50% the driver pays his expenses, including gasoline, and keeps whatever profit is left. The drivers are responsible for procuring and paying for their own fuel and for fueling the cabs during the time that they are operating them.

All of the foregoing leads to a consideration of the meaning of the word "allow" as that word is used in 40 CFR 80.22(a). There is no evidence in the record that Airport Taxi introduced leaded gasoline into the cabs, nor does the evidence support a finding that Airport Taxi caused the introduction of leaded gasoline into the taxi cabs. As to the cabs other than taxi #139, the issue then becomes: did Airport Taxi allow the introduction of leaded gasoline into the cabs?

The word "allow" has been variously defined by various courts, the definitions seem to depend upon the circumstances of the case before them. Dictionary definitions do not add much more to our understanding, but in every case the word has been held to mean a knowledge of conduct allowed and a decision evidenced by action or conscious inaction.

The evidence in this case, especially the testimony of Keith Sedille, who is a responsible managing employee of the company, can raise an inference that Airport Taxi knew that the cab drivers were filling cabs with leaded gasoline when unleaded gasoline was required. The evidence, however, is equally susceptible to an inference that Airport Taxi simply never addressed the subject of leaded vs. unleaded gasoline and that neither the corporation nor any of its officers paid any attention to what was going on. The witnesses specifically denied any knowledge of wrongdoing and expressly stated that if that was going on it was being done by the cab drivers.

In order to hold the corporation liable, I would have to make one of three findings:

1. The responsible managing officers or employees of the corporation knew what was going on and either expressly or tacitly concurred in it;
2. The cab drivers were employees of the corporation and the activity of refueling the cabs was being done in the course and scope of their employment; or

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3. The regulation imposes upon the corporation and its managing and responsible officers and employees a duty to know what is going on and to take action to correct illegal activity, which duty was not performed.

The inference that the corporation knew that the drivers were using leaded gasoline in cars requiring unleaded gasoline is not strong and is specifically contradicted. I do not believe it rises to the level of carrying the burden of persuasion by a preponderance of the evidence. The single act of refueling taxi-cab #139 does indeed support the inference, but standing alone is not sufficiently significant to meet the burden of proof. I do not think that a single act establishes a course of conduct. In order to support the inference leading to knowledge on the part of the corporation, the complaint must establish a course of conduct.

Airport Taxi has gone to some trouble to establish the fact that the relationship between itself and the cab drivers is that of independent contractor. This may be the case for the purpose of state taxes, unemployment compensation, or other purposes. I am not sure that it is the case for all purposes at law; however, for the purposes of this matter it is unnecessary to determine it. I do find that they are not employees. The corporation has some control over their activities and conduct, but it is not on a direct hour-to-hour basis. The drivers are required to accept and carry out radio dispatched calls, but are otherwise free to "hustle" business as they themselves see fit. Their compensation

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is derived from the profitability of their activities--not on the basis of time spent, miles driven, number of calls answered or other time or piecework basis. Whatever their relationship is, it is not such that their conduct may be imputed to the corporation for the purposes of liability in this proceeding.

I do not think that the Regulation imposes a duty on Airport Taxi to know what gasoline its drivers are using and take action to assure that unleaded gasoline is used where required, except at its own refueling station. However, my opinion that there is no affirmative duty to control the conduct of the drivers is subject to review by the Administrator. I will therefore address this factual issue so that if a reviewer disagrees with my interpretation of the regulation an order can follow without the necessity of a rehearing of the facts.

Keith Sedille is a machinist for the company. His duties are to make sure that the cars are running, to attend to gas receipts, change tires and to do "whatever is necessary to keep them on the road." He keeps records about the gasoline that is pumped into the cabs at the base station, but testifies that he pays no attention to which cab is getting which kind of gasoline. He could easily be informed on this subject by merely looking out the window. Most of the cabs in the fleet use leaded gasoline because they are of a pre-1975 model. There is some confusion in the testimony as to how many of the post-1975 models are

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incorporated in the fleet, but there are at least three; #122, #139 and #132. By being alert and paying some attention when cabs are being refueled, Keith Sedille could have known that some of the cabs that require unleaded fuel were being refueled with leaded gasoline. The evidence does not show, however, that he actually knew and assented to that conduct.

The regulation at 40 CFR 80.22(a) provides "no wholesale purchaser-consumer or his employee or agent shall introduce, or cause or allow the introduction of leaded gasoline into any motor vehicle which is labeled 'unleaded gasoline only,' or which is equipped with a gasoline tank filler inlet which is designed for the introduction of unleaded gasoline." This language does not create strict liability. Some action or conscious inaction is required to be established in order to show a violation. The evidence is not sufficient to show that Airport Taxi either acted to "allow" the forbidden use of leaded gasoline or that it had actual knowledge of the use and consciously refrained from acting. If there was an affirmative duty for it to know of the illegal use and to take action, then I find that responsible managing employees of the company had access to facts that should have put them on notice. If there was no affirmative duty on the part of the respondent, then I find that the burden of proof to establish actual knowledge of the practice of the cab drivers in fueling improperly with leaded gasoline has not been met.

I must now consider the amount of the penalty to be assessed on account of the violations. Both the complainant and the respondent have suggested that I start from the published guidelines (40 Fed Reg 39973, 29 August 1975). While I am not bound to do so, I see no reason to depart from that guidance and will follow it. The parties agree that category II should be used and differ from each other only in the amount of mitigation to be allowed. The respondent urges that the taxi business in King County has fallen upon hard times and therefore urges a 90% mitigation. The complainant urges that mitigation be no more than 40%. The guidance in these cases provides that mitigation for this cause must be based on the "respondent's inability to continue in business" if a heavier penalty is levied. The "burden of persuasion rests with respondent, and any such showing must include a statement of the respondent's current financial status." This has not been done, the burden has not been met. I shall allow a 40% mitigation as suggested by the complainant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By reason of all of the foregoing I make the following Findings of Fact and Conclusions of Law:

(Findings of Fact 23 through 36 are not relevant to my "initial decision", they are included because they would be relevant if a reviewer holds that there is an affirmative duty on the part of the respondent as discussed above.)

FINDINGS OF FACT

1. On 18 May 1979 a gasoline pump dispensing leaded gasoline located at 4850 Beacon Avenue So., Seattle, Washington, was equipped with a nozzle spout with an outside diameter of less than .840 inch at the terminal end.

2. Said pump was connected to a 6,000 gallon underground tank containing gasoline with a lead content of 1.102 gram of lead per gallon. Said tank and pump were regularly used for dispensing leaded gasoline.

3. Said tank and pump were leased to Airport Taxi Service, Inc. at all times relevant hereto and operated by an employee of said respondent (although said employee does not pump the gasoline).

4. Respondent promptly replaced the undersized nozzle with the appropriate leaded gasoline nozzle after the 18 May 1979 inspection.

5. On 18 May 1979 the following required notice was not posted on or around the gasoline pumps at 4850 Beacon Avenue So.:

> "Federal law prohibits the introduction of any gasoline containing lead or phosphorus intc any motor vehicle labeled "UNLEADED GASOLINE ONLY."

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6. Said notice was so posted promptly after the 18 May 1979 inspection.

7. Each of the following six vehicles were owned by respondent Airport Taxi Service, Inc., on 18 May 1979:

Airport Taxi #123 (WA License R 6695)
Airport Taxi #139 (WA License R 6694)
WA License PT 7969
WA License R 7536
WA license XC 2941
Airport Taxi #133 (WA License R 6819)

8. Each of said vehicles were labeled "unleaded gasoline only" on the dashboard.

9. Leaded gasoline was introduced into Airport Taxi #139 on 18 May 1979 at the Beacon Avenue So. location in the presence of employees of Airport Taxi Service, Inc.

10. The lead content of the gasoline in the tanks of the several vehicles sampled by EPA were as follows:

Date	Wash. Lic. No.	grams of lead/gallon
May 9, 1979	R 6819	1.214
	R 6695	.852
May 18, 1979	R6695	.940
	PT7969	.418
	XN5567	.014
	(unlicensed vehicle)	.012
May 23, 1979	R6695	.103
	XC2941	1.365
	R7536	1.476
	R6697	.028
	XL1539	.003
	R7541	.027
	XF8557	.002
	R6819	.030

11. Airport Taxi Service, Inc. is a Washington corporation.

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12. Mr. Eugene Sedille, Jr. at all times relevant hereto was president of Airport Taxi Service, Inc..

13. Airport Taxi at all times relevant hereto operated a fueling and maintenance facility at 4850 Beacon Avenue South, Seattle, Washington.

14. Mr. Keith Sedille at all times relevant hereto was in charge of said fueling facility and maintenance of vehicles.

15. Airport Taxi taxicab #139 was owned by Airport Taxi and in operation as a taxicab at all times relevant hereto.

16. Eleven gallons of leaded gasoline was introduced into Airport Taxi taxicab #139 on 18 May 1979 in the presence of Airport Taxi President Eugene Sedille, Jr. who did nothing to prevent such introduction of leaded gasoline.

17. Mr. Keith Sedille witnessed the nozzle from the leaded pump introduced into taxicab #139 but did nothing to prevent misfueling.

18. Said introduction into taxicab #139 occurred at the Airport Taxi fueling facility at 4850 Beacon Avenue South, Seattle, Washington.

19. The introduction of leaded gasoline into taxicab #139 was performed by the driver of the taxicab.

20. In addition to the label "unleaded gasoline only" on the dashboard, taxicab #139 was equipped with a gasoline tank filler inlet designed for the introduction of leaded gasoline.

21. Said filler inlet of taxicab #139 was enlarged so that it could accept a leaded gasoline nozzle.

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22. The gasoline tank filler inlet of taxicab #139 (as well as the catalytic converter) were repaired by early June 1979, after the EPA inspections.

23. Washington license No. R 6819 (R 6819) Fleet #133 was an operating taxicab at all times relevant hereto.

24. R 6819 was equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, which was enlarged so that it could accept a leaded gasoline nozzle.

25. R 6819 has been parked since 9 May 1979.

26. Washington license No. R 6695 (R 6695) was an operating taxicab at all times relevant hereto.

27. R 6695 was equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline which was enlarged so that it could accept a leaded gasoline nozzle.

28. Washington license No. PT 7969 is owned by Airport Taxi and has been in the custody of the company president, Eugene Sedille, Jr.

29. PT 7969 was purchased by Airport Taxi 28 November, 1976.

30. PT 7969 was equipped with a gasoline filler inlet designed for the introduction of leaded gasoline, which was enlarged so that it could accept a leaded gasoline nozzle.

31. Washington license No. R 7536 was not incorporated into the Airport Taxi fleet as an operating taxicab but was owned by Airport Taxi.

32. R 7536 has been driven two hundred seventy miles since its purchase by Airport Taxi until the time of hearing.

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33. R 7536 was equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, which was enlarged so that it could accept a leaded gasoline nozzle.

34. Washington license No. XC-2941 was not incorporated into the Airport Taxi fleet as on operating taxicab but was owned by Airport Taxi.

35. XC 2941, at the time of hearing had been driven 197 miles since the time of purchase by Airport Taxi.

36. XC 2941 was equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, which was enlarged so that it could accept a leaded gasoline nozzle.

37. Airport Taxi performs all maintenance on its vehicles.

38. Airport Taxi owns the taxicabs that are furnished to the drivers.

39. The taxicabs can be used by the drivers only for official business.

40. Airport Taxi employs a dispatcher.

41. The drivers are required to accept the fares provided them by the dispatcher.

42. The drivers operate the cabs under the name of Airport Taxi Service, Inc.

43. Only assigned drivers could operate the taxicabs.

44. The taxi drivers are not highly skilled specialists.

45. The taxi drivers work as part of the regular, ongoing business of Airport Taxi.

46. The taxi drivers work under contract for an indeterminate period of time.

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47. The drivers perform the actual fueling of the taxicabs they drive.

48. The taxi drivers are paid on a fifty percent of income basis, less the cost of gasoline.

49. The relationship between Airport Taxi and the drivers is that of licensee/licensor.

50. The Airport Taxi fueling facility at 4850 Beacon Avenue South, Seattle was operated by an employee of Airport Taxi although that employee, Keith Sedille, does not fuel the cars himself.

51. Mr. Keith Sedille's responsibilities were to "make sure that the cars are running, to make out gas receipts, change tires, whatever is necessary to keep them on the road."

52. Mr. Keith Sedille stated that drivers must ask for a key to a padlock to use the unleaded gasoline pump at Airport Taxi but that for the leaded pumps Keith Sedille turns a key in the office that allows the pump to be operated. He also stated that he can see the leaded pump island from his work area. Mr. Keith Sedille testified that he did not take any precautions to see that leaded gasoline is not introduced into unleaded vehicles. He testified that when drivers ask to have the pumps turned on he makes "no reference as to whether it was leaded or unleaded gas."

53. The president of Airport Taxi stated in his affidavit of 23 May 1979 that Airport Taxi keeps no records of type or amount of fuel used by vehicles. Mr. Keith Sedille testified that Airport Taxi does keep fuel records in the form of receipts which include the number of gallons introduced into each vehicle.

54. During May 1979, gasoline was available at the Airport Taxi facility at 4850 Beacon Avenue South, Seattle, Washington.

55. During May 1979, gasoline could be procured more cheaply by the taxi drivers at Airport Taxi than at independent service stations.

56. An unleaded nozzle was on one of the leaded pumps at the 4850 Beacon Avenue South facility on 18 May 1979.

57. Gross revenues, after payment of drivers, from January to July 31 was about $33,000 per month. Gross revenues were about $12,500 per month August through December. Thus, gross revenues for the year were about $293,500.

CONCLUSIONS OF LAW

1. Respondent, Airport Taxi Service, Inc. (Airport Taxi) was at all times relevant hereto a wholesale purchaser-consumer as defined by 40 CFR §80.2(o).

2. Respondent violated 40 CFR §80.22(f)(1) in that a pump from which leaded gasoline was introduced into motor vehicles was equipped with a nozzle spout having a terminal end with an outside diameter of less than 0.930 inch (2.363 cm) on 18 May, 1979, at respondent's facility.

3. Respondent violated 40 CFR §80.22(d) in that the notice required by that section was not displayed.

4. The Airport Taxi drivers are licensees of Airport Taxi.

5. With regard to Airport Taxi vehicle #139, respondent, at its facility on 18 May 1979 introduced or caused or allowed the introduction of leaded fuel into vehicle 139 which was labeled "unleaded gasoline only" and which was equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, in violation of 40 CFR §80.22(a).

6. Respondent does not have an affirmative duty to prevent the drivers from introducing leaded gasoline into those taxicabs restricted to fueling by unleaded gasoline only.

7. Respondent's business size is category II (see 40 FR 39973 et. seq).

8. Respondent has no history of past violations.

9. Respondent has taken steps to remedy the violations.

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10. Appropriate penalties are as follows:

undersized nozzle	=	$1,000.00	x .60	= $ 600
failure to display notice	=	$ 500.00	x .60	= $ 300
introduction vehicle No. 139	=	$2,000.00	x .60	= $1200

Total penalty is $3,500 x .60 = $2,100.00.

By reason of the foregoing findings of fact and conclusions of law, I make the following Proposed Final Order Assessing a Civil Penalty which shall become the final order of the Administrator forty five days after transmission thereof by the Regional Hearing Clerk to the Hearing Clerk for forwarding to the Administrator and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to these proceedings, or (2) the Administrator elects, sua sponte, to reverse the initial decision.

Dated: 21 AUG 1980

Matthew S. Walker
Presiding Officer

PROPOSED FINAL ORDER ASSESSING A CIVIL PENALTY

Airport Taxi Service, Inc., Respondent, a wholesale purchaser-consumer, Docket No. X79-211-9, is found to have violated 40 CFR §80.22(d) & (f), and to be liable for one violation of 40 CFR §80.22(a). A penalty of Two Thousand One Hundred Dollars ($2,100) is hereby assessed against respondent. Payment of the full amount of the penalty assessed shall be made within sixty days of service upon it of the FINAL ORDER. Such payment shall be made by forwarding to the Regional Hearing Clerk a cashier's check or certified check in the full amount of the penalty assessed in the FINAL ORDER. Such check shall be payable to the United States of America.

Failure to remit such payment in full compliance with the FINAL ORDER may result in referral of this matter to the United States Attorney General for collection pursuant to section 211(d) of the Clean Air Act, 42 USC §7545(d). The respondent is further notified that Treasury Notice 80-08 requires the remittance of late charges on overdue accounts at the rate of 14.72%/ann. or 1.23%/mo.

Dated: _____

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Administrator