IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO, *ex rel.* DAVE YOST OHIO ATTORNEY GENERAL,	:	**CASE NO. 23CV003566**
	:	**JUDGE HELD PHIPPS**
PLAINTIFF,	:	
	:	**MAGISTRATE HUNT**
v.	:	
	:	
PAXE LATITUDE LP, *et al.*,	:	
	:	
DEFENDANTS.	:	

MAGISTRATE'S DECISION ON CIVIL PENALTIES

I. INTRODUCTION

Asbestos is a known carcinogen that can cause cancer and other long-term debilitating health issues to those exposed. Because of the danger that asbestos presents, any owner or contractor doing demolition or renovation has a legal obligation to determine how much asbestos is present and to properly remove and handle regulated asbestos-containing materials before any renovation or demolition activity begins. Instead of complying with Ohio's asbestos regulations, Defendants Paxe Latitude LP, Boruch Drillman, and Aloft Management LLC failed to have the asbestos-containing material identified, failed to safely remove asbestos-containing materials using qualified individuals prior to beginning renovation work, and failed to provide employees with proper training and protective equipment. As a direct result of Defendants' actions, tenants' personal belongings were contaminated, and workers and members of the surrounding community were exposed to asbestos.

On May 18, 2023, the State filed its Complaint for civil penalties and injunctive relief against Defendants Paxe Latitude LP ("Paxe"), Mr. Drillman, and Aloft Management LLC

("Aloft"), as well as five other defendants. The State alleged that the various Defendants violated Ohio's air pollution control laws, particularly the asbestos rules, at the property at 521, 525, and 529 Sawyer Boulevard (now known as Latitude Five25 and previously known as Sawyer Towers).

This Court entered a default judgment against Defendants Paxe and Mr. Drillman as to liability on all counts and issued an injunction on July 25, 2023. The Court also entered a default judgment against Aloft as to liability on all counts and issued an injunction on September 8, 2023. After the Court rendered both judgments for liability, the State withdrew two counts from its Complaint. Counts Ten and Eleven alleged that certain work practices were not followed when temperatures were below freezing. The State has chosen not to pursue those claims and filed a notice to that effect. In addition, the Complaint contains a labelling error and does not contain Count Five. The State is, therefore, pursuing civil penalties from the Defendants listed above for Counts One through Four, Six through Nine, and Twelve.

On January 17, 2024, the Court held a hearing to assess civil penalties for the State's remaining claims. Plaintiff was represented by attorneys John McManus, Nora Baty, and Sarah Roveda. Plaintiffs presented the testimony of Jeffrey Gerdes, Dana Milligan, Aric Schmitter, and Richard Fowler. Exhibits 1 – 12, 21 – 30, and 35 were offered and admitted into evidence without objection. None of the Defendants appeared. The Court hereby enters the following Decision.

This Magistrate's Findings of Fact are based on the testimony of the witnesses and the exhibits introduced into evidence. This Magistrate reviewed all the exhibits and considered each as to its weight and credibility. The credibility of the witnesses was considered. The credibility of a witness is based upon the appearance of the witness upon the stand; his/her manner of testifying;

the reasonableness of the testimony; the opportunity he/she had to see, hear and know the things concerning which he/she testified; his/her accuracy of memory; frankness (or lack of it); intelligence, interest and bias (if any); together with common sense and all the facts and circumstances surrounding the testimony. Of importance in deciding the Findings of Facts, this Magistrate notes that she is free to believe all, some, or none of the testimony of each witness appearing before her. *State v. Ellis*, 8th Dist., Cuyahoga No. 98538, 2013-Ohio-1184.

It is the duty of the magistrate to consider the credibility or believability of the witnesses who testify and to determine the weight to be given to the evidence that is presented by the parties. It has been noted that persons such as judges, magistrates, jury members and other finders of fact are best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland*, 10 Ohio St. 3d 77 (1984). The undersigned found the testimony of all of Plaintiff's witnesses highly credible.

II. FINDINGS OF FACT

A. The Property, locally known as Sawyer Towers, is in a densely populated urban neighborhood.

1. Paxe Latitude LP ("Paxe") owns the property identified as both 521, 525, and 529 Sawyer Boulevard, Columbus, Franklin County, Ohio, and Parcel ID: 010-288512-00 ("the Property" or "Latitude Five25"). Exh. 26; 27; 30, p. 35. The Property is now known as Latitude Five25 and was previously known as Sawyer Towers. Exh. 30, p. 35.

2. Latitude Five25 is a residential apartment complex consisting of two towers connected by a one-story building and containing approximately 400 units of affordable residential housing. Exh. 27.

3. This residential complex is in an urban neighborhood amid the Mount Vernon and King-Lincoln Bronzeville district of the City of Columbus. Within an approximately 1.5-mile radius (using a Google Maps Earth mapping tool for convenience) are every type of public and private service and convenience. The complex's neighborhood is served by readily walkable public schools, public parks and recreation centers, civic and religious community centers, numerous places of worship, and hospitals (including Nationwide Children's Hospital and OSU East).

B. Paxe and Mr. Drillman purchased the property in August 2021 and hired Aloft to manage the Property.

4. Paxe purchased Latitude Five25 in August 2021 by obtaining a nearly $16M mortgage loan from Lument Structured Finance., LLC (f/k/a OREC Structured Finance Co., LLC). The first $12.75M of that loan went towards the purchase of Latitude Five25, and $3.136M was available as a line of credit for repairing and upgrading the buildings. Exh. 35, ¶ 7.

5. Boruch Drillman is the majority owner of Defendant Paxe and personally guaranteed the loan to Paxe. Exh. 30, p. 343-345; Exh. 35, ¶¶ 12-14.

6. According to Lument Commercial Mortgage Trust, the successor in interest to the original mortgage company, Mr. Drillman had considerable assets at his disposal at the time of purchase, including liquidity equal to at least 20% of the loan amount and net worth equal to at least 100% of the loan amount. Exh. 35, ¶ 16. Mr. Drillman also testified in another case in February 2023 that he was a partner or general partner or investor in over 25 commercial real estate investments. Exh. 30, p. 384-385.

7. According to his own testimony in another proceeding, Mr. Drillman was also "the managing member of Paxe Latitude" and "fully control[s] Paxe Latitude" with the ability to change management companies without consulting anyone. Exh. 30, p. 343-345; 389-390.

8. As discussed below, a receiver was appointed by Judge Holbrook in a separate action to manage the property. However, Paxe is still the titled owner of the Property, and all the evidence in this case indicates Mr. Drillman continues to control Paxe.

9. When Paxe purchased the Property in August 2021, Mr. Drillman hired Defendant Aloft Management LLC ("Aloft") to manage Latitude Five25. Exh. 30, p. 345, 349.

10. Aloft was responsible for the day-to-day management of Latitude Five25 starting when it was hired by Paxe and Mr. Drillman in August 2021. Exh. 30, p. 345-46.

11. Defendant Aloft continued to have representatives on site until at least sometime in May 2023. Testimony of City Code Enforcement Supervisor Aric Schmitter. As explained below, Aloft was involved in the management throughout the time that asbestos was spread throughout the building, creating the conditions that currently exist at the site.

C. The Property contained hundreds of thousands of square feet of asbestos-containing material.

12. Exhibit 1 contains a survey of asbestos-containing material at Latitude Fve25 performed by a licensed asbestos hazard abatement contractor.

13. The survey determined that the buildings contained hundreds of thousands of square feet of asbestos-containing material. Exh. 1, App. C. The asbestos-containing material was present in all three buildings. Exh. 1, App. C.

14. Asbestos was present in a variety of building materials, including but not limited to, drywall and joint compound, popcorn ceiling material, floor tile, and mastic. Exh. 1.

15. All of these asbestos-containing materials were found in large quantities on every floor of the two towers. Exh. 1, App. C.

16. Each floor contained approximately 24,000 square feet of asbestos-containing drywall and joint compound and thousands of square feet of asbestos-containing floor tile and mastic. Exh. 1, App. C.

D. Asbestos is a known carcinogen that, when breathed in, can cause lung cancer and other long-term debilitating health issues to those exposed.

17. Jeff Gerdes, the Asbestos Program Supervisor for the Ohio Environmental Protection Agency ("Ohio EPA"), testified in detail to the health impacts of asbestos and on the importance of its proper management.

18. Asbestos-containing materials can be friable or are easily made friable, meaning the materials are capable of being crumbled, pulverized, or reduced into dust or powder that can then become airborne.

19. Friable asbestos creates a fine dust when broken up. That dust can be breathed in, getting lodged deep in the lungs and over time damaging lung tissue.

20. It can also be embedded in cloth material, such as clothes, bedding, and furniture and later released, again causing exposure.

21. Asbestos is a known carcinogen that when breathed in can cause lung cancer and other long-term debilitating health issues to those exposed, such as asbestosis and mesothelioma.

22. The human health effects of asbestos exposure only reveal themselves decades after the exposure, so those exposed may not realize the extent of exposure and the risks until far too late to protect themselves.

E. Renovation and demolition activities must be properly managed to prevent the spread of and exposure to asbestos-containing materials.

23. Ohio EPA and the United States Environmental Protection Agency regulations require what is known as "abatement" in advance of any other demolition or renovation activity occurring.

24. The first step of the process is having a state-certified asbestos hazard evaluation specialist conduct a survey of what asbestos-containing material is in the building. Exhibit 1 contains such a survey.

25. The purpose of the survey is to identify the regulated asbestos-containing material that will be impacted by the renovation or demolition activity, potentially releasing asbestos fibers into the air where they could be breathed by those exposed.

26. After completing the survey, certified workers employed by a state-licensed, asbestos hazard abatement contractor should then remove those regulated asbestos-containing materials, such as ceiling material, drywall and joint compound, floor tile, and/or mastic, that will be impacted by the renovation or demolition activity. This removal process is referred to as "abatement."

27. All abatement work must be performed under controlled conditions while using temporary containment systems with negative pressure to protect against the release of asbestos fibers into the environment.

28. Once containment is established, the work must be carried out by certified workers using personal protective equipment, such as protective suits and respirators, that prevents the inhalation of asbestos by those workers and prevents contamination of personal clothing.

29. To limit the spread of asbestos, the asbestos-containing building materials are wetted before and during work.

30. Care must be taken when removing and lowering asbestos-containing material and building components to avoid dropping the material so as to limit the extent to which asbestos-containing material is made friable.

31. Once removed, asbestos-containing material is placed in leak-tight, asbestos waste disposal bags. Additional wetting may occur if needed, and the bags are sealed. Bags are also labeled, so anyone handling the bags is aware of the contents.

32. Before leaving containment, both workers and the exterior of the bags are decontaminated to assure that asbestos is not inadvertently taken out of the contained area.

33. Once outside containment, the bags are placed in lined, roll-off boxes that are covered before being taken to a landfill permitted to allow the acceptance of asbestos-containing waste material.

34. If properly managed, workers are protected at every step, and the spread of asbestos is prevented, which protects the public, their personal belongings, and future occupants of the renovated buildings.

35. Each step described above is required by state and federal regulations.

36. The Defendants failed to take, and failed to assure their contractors took, these required steps for proper abatement of asbestos-containing material in advance of renovation work beginning at Latitude Five25.

F. Defendants' mismanagement combined with subzero temperatures caused pipes to burst, flooding much of the buildings and forcing an emergency evacuation.

37. At the time Paxe and Mr. Drillman purchased the Property, the buildings needed significant repair and maintenance.

38. Despite the need for significant renovation in the building, Paxe and Mr. Drillman never drew a single dollar from that $3.136M line of credit established under the mortgage loan, and the situation with the buildings deteriorated.

39. In the days before Christmas Day 2022, an extreme cold front came through the area causing overnight lows below zero. The buildings had open windows and doors in vacant apartments, and the freezing temperatures caused pipes to burst, flooding the buildings.

40. The City of Columbus emergently evacuated the approximately 160 occupied apartments that day. The tenants left with nothing more than what they could carry, leaving most of their belongings in the buildings.

41. The flood damage included burst pipes, water-soaked drywall and carpet, damaged floor tile, and falling ceiling tiles and textured ceiling material.

G. Site activities released asbestos, exposing unprotected workers for eight days and spreading asbestos outside the Property.

42. Defendants failed to have an asbestos survey completed for the work area at the Property prior to workers starting the renovation work.

43. Defendants also failed to provide Ohio EPA with the proper notification prior to allowing workers to begin renovation activities on January 4, 2023, that disturbed regulated asbestos-containing materials.

44. Aloft and Mr. Drillman quickly hired contractors to remove the water damaged building materials. In doing so, Paxe, Aloft, and Mr. Drillman ignored the moisture and water damage management plan on file in the Property's office that warned against doing water damage remediation without assessing for asbestos. Defendants also ignored the asbestos management plan in their files that described the steps needed to manage the asbestos in the buildings when doing renovation work.

45. Defendants hired All Dry 24/7 ("All Dry") to begin flood remediation activity. Exh. 30. All Dry in turn hired a subcontractor, Montiel General Construction, to perform or assist with the work.

46. City Code Enforcement Supervisor Aric Schmitter testified about his observation of conditions after the flood. He testified that workers, who were hired by All Dry and the subcontractor at the direction of Defendants, began renovation work on January 4, 2023. Exh. 9.

47. Mr. Schmitter testified that in the following days about thirty workers were on site. The workers were not provided with any protective equipment required for the safe removal of asbestos-containing material. No containment was established to limit the spread of asbestos, and materials were not kept wet to limit the spread of asbestos-containing material.

48. These renovation activities included removing drywall, tearing up floor tile and carpet, and removing ceiling tiles and popcorn ceiling material. Exh. 21-24.

49. These activities disturbed asbestos-containing drywall, joint compound, floor tile, mastic, and popcorn ceilings, spreading asbestos-containing dust and debris throughout the buildings, including all common areas and apartments, and exposing workers to asbestos.

50. Workers swept debris into piles. This debris contained asbestos-containing materials, and the sweeping caused dust to rise and contributed to the spread of dust in the buildings, further exposing workers to asbestos. Exh. 22; 24.

51. Workers carried this asbestos-containing debris through the buildings in open wheelbarrows, further exposing workers to asbestos. Exh. 21.

52. Photos admitted into evidence showed that debris was often dumped on the floor during the work, with no care taken to avoid dropping or limiting the spread of the asbestos-containing material. Exh. 21-24.

53. The renovation, sweeping, and hauling of materials spread asbestos-containing debris and dust throughout the three buildings. Anyone walking through the building walked through asbestos-containing material.

54. This same debris was then dumped into open-top dumpsters outside, again causing dust to rise, exposing workers and the surrounding communities to asbestos. Exh. 21; 23.

55. Workers also used fans during the renovation process. These fans spread dust from asbestos-containing materials throughout the buildings. Exh. 21.

56. Asbestos-containing dust and debris would have settled on workers' clothes, and those workers, because they were not provided with appropriate protective clothing and decontamination, would have taken those contaminated clothes home, risking exposure to those at home.

57. Prior to January 13, 2023, Defendants failed to ensure anyone on site was properly trained, certified, and licensed in the management of asbestos remediation.

58. The City of Columbus code enforcement inspectors, recognizing the risk that asbestos was present, contacted Ohio EPA. Ohio EPA's inspector, Richard Fowler, inspected the building on January 11, 2023, and also recognized the risk that asbestos was present.

59. In addition, Mr. Fowler determined that Defendants did not have an asbestos survey completed prior to the work and that Defendants had failed to notify Ohio EPA of the project.

60. On January 11, 2023, during his first inspection, Mr. Fowler recommended Defendants and their contractors to stop work. By that point, unprotected workers had been tearing into the asbestos-containing materials for eight days.

61. At trial, Mr. Fowler, who is trained in the identification of suspected asbestos-containing material, reviewed the photographs he and Mr. Schmitter took. During his review of the dozens of photos presented at trial, Mr. Fowler pointed out numerous examples of regulated asbestos-containing material identified in the asbestos survey in Exhibit 1. Both Mr. Fowler's and Mr. Schmitter's testimony and their photographs establish that regulated asbestos-containing material was improperly removed and spread throughout the building.

H. Defendants hired a licensed asbestos hazard abatement contractor who decontaminated much of the building, but then Defendants' contractors continued to do work that re-contaminated the Property, exposing workers and others.

62. Defendants soon hired an Ohio EPA-licensed asbestos hazard abatement contractor, and that asbestos hazard abatement contractor cleaned and decontaminated the common areas.

63. Some apartments were decontaminated while others were not. With rare exceptions, none of the tenants' belongings were decontaminated.

64. The asbestos hazard abatement contractor taped off doors so asbestos contamination would not be tracked into the areas that had been cleaned.

65. The asbestos hazard abatement contractor stopped working on the site on February 14, 2023. Exh. 3. That asbestos hazard abatement contractor did no more abatement work after that date.

66. After that work was done, the unprotected workers hired at the Defendants' direction tore through those barriers and performed more renovation work, tearing into more asbestos-containing material and respreading contamination to those areas cleaned by the asbestos hazard abatement contractor.

I. Defendants failed to properly secure the Property, thus allowing break-ins that further damaged asbestos-containing material and exposing others to asbestos.

67. Defendants did not provide adequate security that would prevent anyone other than a licensed asbestos hazard abatement contractor and certified employees from entering the buildings.

68. Individuals broke into the Property and stole fixtures and tenants' property. Exh. 9. When individuals walked through those buildings, they tracked asbestos-containing materials throughout the buildings, unknowingly exposing themselves to asbestos.

69. Wiring and piping were stolen, exacerbating problems with the buildings and causing more destruction to the elements of the building that contained asbestos.

70. Residents' apartments were broken into.

71. Some residents returned to get belongings even though the apartments had not been checked for asbestos or decontaminated.

72. Vagrants moved into the buildings and lived there for undetermined periods of time.

73. Renovation debris, such as drywall and joint compound, popcorn ceiling, floor tile, and mastic, was also left in piles in apartments with open windows. Exh. 24. Mr. Fowler identified this debris as containing regulated asbestos-containing materials.

J. Tenants cannot return to their homes. Their belongings are contaminated with asbestos, and most of their belongings cannot be decontaminated and must be disposed of at a landfill permitted to take asbestos-containing waste material.

74. Defendants' failure to limit the spread of asbestos ensured that none of the over 160 tenants in Latitude Five25 could return to their homes.

75. Furthermore, Defendants' failure to limit the spread of asbestos resulted in contamination of tenants' belongings.

76. As noted above, cloth and porous material cannot be decontaminated and therefore must be disposed of properly. As a result, most of the tenants' property, clothes, mattresses and box springs, linens, cloth furniture, and other items cannot be decontaminated and must be sent to a landfill permitted to take asbestos-containing waste materials. Exh. 21; 24.

77. As a direct result of Defendants' failure to limit the spread of asbestos, over 160 tenants must now rebuild their lives in a new location with new clothes, furniture, and other possessions.

K. In September 2023, Judge Holbrook, in a separate action, appointed a receiver who, at great expense, has secured the Property and is returning limited amounts of property to the tenants.

78. In September 2023, in a separate foreclosure case filed by the mortgage bank, Judge Holbrook appointed a receiver, Dana Milligan, who took over management of the Property.

79. Ms. Milligan testified that she immediately addressed security by fencing the property, hiring security guards, and taking other steps to improve security.

80. Ms. Milligan also testified to the steps she is taking to return personal property to the tenants. She explained that most of that property is fabric or porous, and those materials will continue to pose a threat if used, so much of the tenants' property cannot be returned.

81. Ms. Milligan also explained that before being returned, those few items that have hard surfaces must be properly decontaminated by a state-licensed asbestos hazard abatement contractor.

82. The Receiver hired a different, licensed asbestos hazard abatement contractor than hired by the Defendants. That asbestos hazard abatement contractor must retrieve and clean each item before it is returned, an expensive and time-consuming process that tenants cannot

accomplish on their own. The work is further complicated because the elevators do not work, so any items must be carried down the stairs.

83. The cost of the Receiver's work, including the work cleaning or disposing of the tenants' property, is being covered by $750,000 in funds provided by the local land bank. These funds may not be enough to allow the Receiver to complete her work.

84. Ms. Milligan testified that the asbestos contamination added significant additional cost to the receivership and required her to hire a state-licensed asbestos hazard abatement contractor to assess the contamination, develop plans to limit exposure to workers, and to clean or dispose of tenant property.

85. As of January 17, 2024, when this Court held the civil penalty hearing, the Property had not been properly decontaminated. Regulated asbestos-containing materials are still onsite, still incorrectly packaged, and still threatening anyone in the building and the surrounding community with asbestos exposure.

86. At no point during the activities described above did Defendants or All Dry and its subcontractor hold an asbestos hazard abatement contractor license.

L. Extraordinary Enforcement

87. Ohio EPA Supervisor Jeff Gerdes testified that in 27 years working with asbestos abatement projects, the issues at Latitude Five25 required more enforcement efforts than any other case he has ever been on.

88. Typically, Ohio EPA's involvement with asbestos abatement projects extends to receiving and reviewing notifications related to demolition, renovation, or abatement work; auditing asbestos trainings; licensing contractors; and certifying individuals who are properly trained to work asbestos abatement projects.

89. Defendants' actions required Ohio EPA to investigate Latitude Five25 approximately ten times between January 11, 2023, and August 10, 2023.

90. Additionally, few cases ever rise to the level of an Ohio EPA referral to the Office of the Ohio Attorney General. However, Defendants' actions threatened the health and safety of workers and the surrounding communities to the extent that this case was referred for the State to prosecute.

91. Finally, the State has spent countless hours preparing witnesses and materials for trial—all enforcement efforts that are atypical and extend beyond the usual level of involvement with violators.

III. CONCLUSIONS OF LAW

92. This case is brought under R.C. Chapters 3704 and 3710 and rules promulgated thereunder.

93. Ohio's air pollution control laws serve "[t]o protect and enhance the quality of the state's air resources so as to promote the public health, welfare, economic vitality, and productive capacity of the people of the state." R.C. 3704.02(A)(1).

94. Ohio's asbestos abatement laws under R.C. Chapter 3710 promote the same purpose, and both chapters work in concert to protect the public. *See* R.C. 3710.16 ("The provisions of this chapter shall not limit the administration and enforcement of the provisions set forth in Chapter 3704. of the Revised Code."). *See also* R.C. 3745.011(B) and (F).

95. This case demonstrates the vital role those chapters, and the rule promulgated thereunder, play in protecting the public health, welfare, economic vitality, and productive capacity of the people of this state.

A. The State seeks civil penalties for each day of each violation of R.C. Chapters 3704 and 3710.

96. The State of Ohio, having already received a judgment as to liability, seeks penalties under a total of nine counts. Eight of those counts are brought under R.C. Chapter 3704 and rules promulgated thereunder. One count, Count Three, is brought pursuant to R.C. Chapter 3710 and rules promulgated thereunder.

97. Violations of R.C. Chapter 3704 and rules promulgated thereunder are subject to a penalty of up to $25,000 per day per violation. R.C. 3704.06(C). Violations of R.C. Chapter 3710 and rules promulgated thereunder are subject to a penalty of up to $5,000 per day per violation. R.C. 3710.14(C) and (D).

98. The State's claims can be categorized into three groups. One group consists of the initial, one-time, pre-project actions that Defendants were required to take but failed to do. *See* Counts One (failure to conduct an asbestos inspection) and Two (failure to notify Ohio EPA). Those violations occurred once for each of those two counts.

99. The second group involves Defendants' actions that were prohibited by the State's asbestos regulations contained in Ohio Adm.Code Chapters 3745-20 and 3745-22. Those violations occurred on each day those prohibited actions took place. *See* Counts Three (unlicensed abatement project), Four (no authorized representative onsite), Six (improperly removing asbestos-containing material), Seven (inadequately wetting asbestos-containing material), and Eight (improperly lowering asbestos-containing material to the ground).

100. The third group consists of conditions at the Property that are themselves violations of the law. Those violations continue day-to-day until the condition has been corrected and the Property returns to a state of compliance. *See* Counts Nine (failure to limit the spread of asbestos) and Twelve (failure to properly handle and package asbestos-containing material).

B. Ohio's air pollution control laws impose mandatory civil penalties with the penalty amount, up to the maximum, within the Court's discretion.

101. Revised Code 3704.06(C) states that "[a] person who violates section 3704.05 or 3704.16 of the Revised Code **shall pay a civil penalty** of not more than twenty-five thousand dollars for each day of each violation." Emphasis added. "Person" includes an individual as well as a corporation, partnership, or other entity. R.C. 3704.01.

102. Revised Code 3710.14(C) states that "[u]pon a finding of a violation, **the court shall assess a civil penalty** of not more than five thousand dollars against the person." Emphasis added.

103. The phrases "shall pay a civil penalty" and "shall assess" mandate the imposition of a penalty: "Because of the mandatory language of R.C. 6111.09(A), a trial court has no discretion regarding about whether to impose a civil penalty." *State v. Tri-State Group, Inc*., (7th App. Dist.) 2004-Ohio-4441, ¶103. However, a trial court does have broad discretion in determining the penalty amount. *Id*.

104. Ohio's air pollution control and asbestos abatement laws count every day that a person violates the law as a separate offense. R.C. 3704.06(C); R.C. 3710.14(D). Thus, each day of each violation is counted when determining the total days of violation. *See, e.g.*, *State ex rel. DeWine v. C&D Disposal Techs, LLC*, 2016-Ohio-5573, 69 N.E.3d 1163, ¶¶ 39-45 (7th Dist.) (affirming trial court's determination of 14,000 days of violation); *State ex rel. Petro v. Maurer Mobile Home court, Inc*., 6th Dist. Wood No. WD-06-053, 2007-Ohio-2262, ¶¶ 63-69 (affirming trial court's calculation of days of violation).

105. The rules contained in Ohio Adm.Code Chapter 3745-20 were promulgated pursuant to R.C. 3704.03(E).

106. Revised Code 3704.05(G) prohibits anyone from violating administrative rules adopted by the Director of Ohio EPA under R.C. Chapter 3704, including Ohio's asbestos rules found in Ohio Adm.Code Chapter 3745-20. Specifically, R.C. 3704.05(G) states "[n]o person shall violate any order, rule, or determination of the director issued, adopted, or made under this chapter." Consequently, a violation of Ohio Adm.Code Chapter 3745-20 constitutes a violation of R.C. 3704.05(G) that is subject to a penalty under R.C. 3704.06(C).

107. The rules contained in Ohio Adm.Code Chapter 3745-22 were promulgated pursuant to R.C. 3710.02.

108. Under R.C. 3710.14(A), "any person who has violated, is violating, or is threatening to violate this chapter, any rule adopted under this chapter, or any license or certificate issued under this chapter" is subject to civil action by the attorney general. This provision includes Ohio's asbestos rules found in Ohio Adm.Code Chapter 3745-22. Consequently, a violation of Ohio Adm.Code Chapter 3745-22 constitutes a violation of R.C. 3710.14(A) that is subject to a penalty under R.C. 3710.14(C).

C. As "owners and operators" under Ohio Adm.Code 3745-20-01, Defendants Paxe, Mr. Drillman, and Aloft are each responsible for compliance with Ohio's Asbestos Rules that impose a duty or prohibition on "owners and operators."

109. Ohio's asbestos rules in Ohio Adm.Code Chapter 3745-20 apply to any activity that might disturb asbestos in any regulated building, from planning renovation or demolition activity through execution and final disposal of regulated asbestos-containing material.

110. As applicable to Ohio Adm.Code 3745-20-02 to 3745-20-05, "owner or operator" means "any person who **owns**, leases, **operates**, **controls, or supervises** the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation, or both." Ohio Adm.Code 3745-20-01.

111. Paxe, as the titled owner of the Property, has since August 2021 been subject to those regulations in Ohio Adm.Code Chapter 3745-20 that are applicable to an "owner or operator."

112. Mr. Drillman, by his own admission under oath, acknowledged that he controls Paxe and has the authority to hire and fire managers of the Property, so he too is subject to those regulations in Ohio Adm.Code Chapter 3745-20 that are applicable to an "owner or operator."

113. As property manager, Aloft, in conjunction with Mr. Drillman, operated, controlled, or supervised the Property and is, therefore, also subject to those regulations in Ohio Adm.Code Chapter 3745-20 that are applicable to an "owner or operator."

D. As owners and operators, Defendants are subject to regulations requiring the proper management of regulated asbestos-containing material during renovation.

114. The regulations in Ohio Adm.Code Chapter 3745-20 that are at issue in this case apply to the identification and removal of regulated asbestos-containing material.

115. The asbestos survey contained in Exhibit 1 was performed by a state-certified asbestos hazard evaluation specialist. The purpose of the asbestos survey contained in Exhibit 1 was to identify the regulated asbestos-containing material that, if disturbed through renovation, would be subject to the requirements of Ohio Adm.Code Chapter 3745-20.

116. Consistent with the findings of that survey, the drywall and joint compound, popcorn ceiling, tile, and mastic listed in Exhibit 1, when disturbed, constitute as a matter of law regulated asbestos-containing material.

117. Ohio Adm.Code 3745-20-03, 3745-20-04, and 3745-20-05 apply to each owner or operator of a demolition or renovation operation when the combined amount of regulated

asbestos-containing material affected by the activity equals at least one hundred sixty square feet on other facility components. Ohio Adm.Code 3745-20-02(A) and (B)(1).

118. At Latitude Five25, Defendants disturbed thousands of square feet of regulated asbestos-containing material, easily meeting the threshold for Ohio Adm.Code 3745-20-02(B)(1).

119. Under the definitions in Ohio Adm.Code 3745-20-01, "demolition" means "the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility," while "renovation" means "altering a facility or one or more facility components in any way, including the stripping or removal of regulated asbestos-containing material from a facility component. Operations in which load-supporting structural members are wrecked or taken out are demolitions."

120. The activities at issue in this case constitute a "renovation" for purposes of Ohio Adm.Code Chapter 3745-20.

E. The transfer of the Property does not stay or otherwise negate the continuing violations caused by Defendants, and absent evidence that Defendants have been barred from access to the Property, the transfer does not mitigate their failure to correct the continuing violations.

121. The fact that a receiver has been appointed does not alter Defendants' obligation to comply with the law. *See*, *State ex rel. Yost v. Osborne Co., Ltd*., 2020-Ohio-3090 (11th Dist.), ¶51. In that case, the Defendant argued that he should be excused from a cleanup order because he did not own and, therefore, did not have access to the property subject to that cleanup order. The Eleventh Appellate District held that even where another person owns property subject to a cleanup order, the defendant's lack of ownership does not provide an excuse for ignoring legal obligations.

122. Environmental laws impose strict liability. *State v. Gross*, 4th Dist. Highland Nos. 783 and 784, 1992 Ohio App. LEXIS 4312, at *3-4 (Aug. 12, 1992), citing *State v. Cheraso*, 43 Ohio App.3d 221, 540 N.E.2d 326 (8th Dist. 1988) ("[U]se of the language 'no person shall * * *,' absent any reference to the requisite culpable mental state, [is] plainly indicative of a legislative intent to impose strict liability."). Consequently, the transfer of control to the Receiver does not relieve Defendants of the obligation to address an ongoing violation. If control by another provided an excuse, then polluters could avoid liability for offsite cleanups. That result would defeat the goal of public protection enshrined in Ohio's environmental laws. *See* R.C. 3704.02 and R.C. 3745.011.

123. A lack of cooperation on the part of the Receiver could possibly be a mitigating factor with respect to the civil penalty if Defendants had exhausted all avenues of gaining access. However, as Defendants failed to appear despite having been properly served, they have presented no evidence of this or any other possible mitigating consideration. There is no basis for this Court to believe that Defendants lack the ability to correct the conditions that exist in violation of the law and continued to the day of the civil penalty hearing.

124. Therefore, every day of violation identified below may be assessed a penalty, regardless of whether the violation occurred before or after the appointment of the Receiver.

F. Defendants' actions at issue in this case constitute at least 792 days of violation of Ohio Adm.Code Chapter 3745-20, for which each Defendants are subject to a maximum penalty of up to $19,800,000.

i. The State established that Defendants violated Ohio Adm.Code 3745-20-02(A) – failure to have an asbestos inspection performed prior to demolition or renovation – for which Defendants are subject to a maximum penalty of $25,000.

125. Count One alleges a violation of Ohio Adm.Code 3745-20-02(A), which provides that "each owner or operator of any demolition or renovation operation shall have the affected

facility where a demolition or renovation operation will occur thoroughly inspected by a certified asbestos hazard evaluation specialist." *See* State's Complaint, Count One.

126. Mr. Fowler testified that Defendants failed to produce or subsequently supply an asbestos survey performed in advance of the renovation of the Property. The asbestos survey contained in Exhibit 1 was obtained not by Defendants but by the Receiver, and it was not issued until August 11, 2023.

127. By failing to have a thorough inspection by a certified asbestos hazard evaluation specialist in advance of starting the renovation on January 4, 2023, all three Defendants violated Ohio Adm.Code 3745-20-02(A) and R.C. 3704.05(G) and, therefore, are subject to a maximum penalty of $25,000 pursuant to R.C. 3704.06(C).

ii. The State established that Defendants violated Ohio Adm.Code 3745-20-03(A)(1) – failure to notify Ohio EPA of intent to demolish and/or renovate – for which Defendants are subject to a maximum penalty of $25,000.

128. Count Two alleges a violation of Ohio Adm.Code 3745-20-03(A)(1), which provides that each owner or operator shall notify the Director of Ohio EPA of the intention to demolish or renovate in a manner prescribed by the Director. *See* State's Complaint, Count Two.

129. Mr. Fowler testified that Defendants failed to notify Ohio EPA in advance of the renovation starting on January 4, 2023. The notification was that was admitted as Exhibit 2 was not submitted until January 18, 2023. *See* Exh. 2.

130. That lack of notification prevented Ohio EPA from properly overseeing the work at the sight for eight critical days. During those eight days, approximately thirty workers were exposed daily to asbestos-containing dust and debris, and tenants' property became contaminated, rendering most of it unrecoverable.

131. By failing to provide the required notice in advance of starting the renovation on January 4, 2023, all three Defendants violated Ohio Adm.Code 3745-20-03(A)(1) and R.C. 3704.05(G) and, therefore, are subject to a maximum penalty of $25,000 pursuant to R.C. 3704.06(C).

iii. The State established that Defendants violated Ohio Adm.Code 3745-20-04(B)(1) – failure to have an authorized representative onsite during demolition or renovation – on at least eight days, for which Defendants are subject to a maximum penalty of $200,000.

132. Count Four alleges a violation of Ohio Adm.Code 3745-20-04(B)(1), which provides in part, that "no regulated asbestos-containing material shall be stripped, removed, or otherwise handled or disturbed at a facility" unless at least one authorized representative, trained under R.C. 3704, is "present at the location of operations." *See* State's Complaint, Count Four.

133. The presence of trained personnel is required both to ensure regulations are followed and, more importantly, to ensure that workers are properly protected.

134. The photographs from Mr. Schmitter and Mr. Fowler, along with Mr. Fowler's testimony about the contents of those photographs, demonstrate that much of what was removed by the untrained and unprotected workers, particularly the drywall and joint compound, tile, mastic, and popcorn ceiling, was ultimately identified in Exhibit 1 as regulated asbestos-containing material. That work began on January 4, 2023, and continued until at least January 11, 2023.

135. From January 4, 2023, through at least January 11, 2023, as testified to by Mr. Fowler and Mr. Schmitter, workers employed on behalf of Defendants stripped, removed, or otherwise handled or disturbed regulated asbestos-containing material at the Property without an authorized representative trained under R.C. Chapter 3704 present at the Property.

136. The only time when Defendants had trained personnel on site was during the period when the asbestos contractor was on site, which ran from January 13, 2023, to February 14, 2024. In addition, while specific dates were not established, subsequent inspections by Mr. Schmitter and Mr. Fowler showed that the stripping and removing of regulated asbestos-containing material by untrained workers continued after February 14, 2023.

137. By failing to have at least one authorized representative trained under R.C. 3704 present at the Property during renovations, all three Defendants violated Ohio Adm.Code 3745-20-04(B)(1) and R.C. 3704.05(G) and, therefore, are subject to a maximum penalty of $25,000 per day for this violation pursuant to R.C. 3704.06(C).

138. Because these activities continued for at least eight days, from January 4, 2023, through at least January 11, 2023, Defendants are subject to a maximum civil penalty of at least $200,000 under Count Four.

iv. The State established that Defendants violated Ohio Adm.Code 3745-20-04(A)(1) – failure to properly remove asbestos-containing materials before demolition or renovation – on at least eight days, for which Defendants are subject to a maximum penalty of $200,000.

139. Count Six alleges a violation of Ohio Adm.Code 3745-20-04(A)(1), which provides in part that each owner or operator of any demolition or renovation operation shall "[r]emove all regulated asbestos-containing material from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the materials or preclude access to the materials for subsequent removal." *See* State's Complaint, Count Six.

140. As Mr. Gerdes explained, the regulated asbestos-containing material must be removed prior to renovation activities to allow other aspects of renovation to proceed safely.

141. From January 4, 2023, through at least January 11, 2023, as indicated in the testimony and photographs from Mr. Schmitter and Mr. Fowler, Defendants failed to remove the regulated asbestos-containing material being renovated from the Property before beginning activity that would break up, dislodge, or similarly disturb the materials. That failure caused at least thirty workers to be exposed to asbestos-containing dust daily during that period.

142. In addition, while specific dates were not established, subsequent inspections by Mr. Schmitter and Mr. Fowler showed that the breaking up, dislodging and disturbing of regulated asbestos-containing material by untrained workers continued after January 11, 2023.

143. By failing to remove regulated asbestos-containing material before beginning activity that would break up, dislodge, or similarly disturb the materials, all three Defendants violated Ohio Adm.Code 3745-20-04(A)(1) and R.C. 3704.05(G) and, therefore, are subject to a maximum penalty of $25,000 per day for this violation pursuant to R.C. 3704.06(C).

144. Because these activities continued for at least eight days, from January 4, 2023, through at least January 11, 2023, Defendants are subject to a maximum civil penalty of at least $200,000 under Count Six.

v. The State established that Defendants violated Ohio Adm.Code 3745-20-04(A)(6)(a) – failure to adequately wet all regulated asbestos-containing material – on at least 379 days, for which Defendants are subject to a maximum penalty of $9,475,000.

145. Count Seven alleges a violation of Ohio Adm.Code 3745-20-04(A)(6)(a), which provides in part, that for all regulated asbestos-containing material, the owner or operator shall "adequately wet the materials and ensure that the materials remain adequately wet until collected and contained or treated in preparation for disposal." *See* State's Complaint, Count Seven.

146. The purpose of wetting is to prevent asbestos-containing particles from becoming airborne and, therefore, capable of being breathed into the lungs.

147. As indicated in the testimony and photographs from Mr. Schmitter and Mr. Fowler, the regulated asbestos-containing material strewn round the building was not adequately wet. Nor did Defendants at any time, except during the brief operations of the asbestos abatement contractor, ensure that the materials remained adequately wet until collected and contained or treated in preparation for disposal.

148. That violation began on January 4, 2023, and at no time was the violation fully corrected. Even during the operations of the asbestos hazard abatement contractor, parts of the buildings continued to have regulated asbestos-containing material that was not wet and was never collected by that contractor. In addition, even after the asbestos hazard abatement contractor began working on the site, unprotected workers hired by All Dry and its subcontractor continued to tear into walls, ceilings, and flooring without those material being wetted. As the Receiver testified at the hearing, asbestos-containing material remains at the Property.

149. By failing to keep regulated asbestos-containing material adequately wet, all three Defendants violated Ohio Adm.Code 3745-20-04(A)(6)(a) and R.C. 3704.05(G) and, therefore, are subject to a maximum penalty of $25,000 per day for this violation pursuant to R.C. 3704.06(C).

150. Because regulated asbestos-containing material continues to be strewn throughout the building and is not adequately wet, this violation continues from January 4, 2023, through the date of the hearing, January 17, 2024. This violation has existed for 379 days.

151. As explained above, the existence of the receivership does not absolve Defendants of liability for these violations, so Defendants are subject to a maximum penalty of $25,000 for each of these 379 days, for a total maximum penalty of $9,475,000 under Count Seven.

vi. The State established that Defendants violated Ohio Adm.Code 3745-20-04(A)(6)(b) – failure to properly lower asbestos containing

material to the floor or ground level – on at least eight days, for which Defendants are subject to a maximum penalty of $200,000.

152. Count Eight alleges a violation of Ohio Adm.Code 3745-20-04(A)(6)(b), which provides in part that, for all regulated asbestos-containing material, the owner or operator shall "carefully lower the materials to the ground or floor not dropping, throwing, sliding or otherwise damaging or disturbing the material." *See* State's Complaint, Count Eight.

153. Count Eight also alleges a violation of Ohio Adm.Code 3745-20-04(A)(6)(c) provides, in part, that for all regulated asbestos-containing material, the owner or operator shall "transport the materials to the ground via leak-tight chutes, HEPA equipped vacuum transport system, or in leak-tight containers" when the regulated asbestos-containing material has been either removed or stripped at a height above fifty feet from the ground "and were not removed as units or in sections." *See* State's Complaint, Count Eight.

154. The practices required by these rules ensure that damage to regulated asbestos-containing material is minimized, thereby limiting the release of asbestos into the air.

155. From January 4, 2023, through at least January 11, 2023, as indicated in the testimony and photographs from Mr. Schmitter and Mr. Fowler, the regulated asbestos-containing material strewn round the building was not carefully lowered to the ground or floor but instead had been dropped and broken up. In addition, the regulated asbestos-containing material from the upper levels of the building, all of which were more than fifty feet above the ground, was not moved via leak-tight chutes, HEPA equipped vacuum transport system, or in leak-tight containers. Instead, the regulated asbestos-containing material was transported using open wheelbarrows and dumped into open roll-off boxes. Even when bags were used, Mr. Schmitter's photographs showed that those bags were left open. In addition, while specific dates were not established, subsequent inspections by Mr. Schmitter and Mr. Fowler showed that the

uncontrolled dropping and breaking and hauling of regulated asbestos-containing material by untrained workers continued after January 11, 2023.

156. These actions caused the unnecessary release of asbestos-containing material, exposing workers to vast quantities of asbestos-containing dust and contributing to the spread of asbestos throughout the building, including into the belongings of the tenants who were evacuated during the flooding.

157. By failing to properly lower and transport the regulated asbestos-containing material, all three Defendants violated Ohio Adm.Code 3745-20-04(A)(6)(b), Ohio Adm.Code 3745-20-04(A)(6)(c) and R.C. 3704.05(G) and, therefore, are subject to a maximum penalty of $25,000 per day for this violation pursuant to R.C. 3704.06(C).

158. Because these activities continued for at least eight days, from January 4, 2023, through at least January 11, 2023, Defendants are subject to a maximum civil penalty of at least $200,000 under Count Eight.

vii. The State established that Defendants violated Ohio Adm.Code 3745-20-04(A)(4) – failure to limit the spread of asbestos after removal – on at least eight days, for which Defendants are subject to a maximum penalty of $200,000.

159. Count Nine alleges a violation of Ohio Adm.Code 3745-20-04(A)(4), which provides in part that after facility components with regulated asbestos-containing material are removed from the facility, the owner or operator shall do one of the following options: "adequately wet the regulated asbestos-containing material during stripping"; "use a local exhaust ventilation and collection system" to capture particulate (dust) produced during stripping; or "encase the regulated asbestos-containing material on the [facility] component with a suitable leak-tight container" per Ohio Adm.Code 3745-20-05. *See* State's Complaint, Count Nine.

160. As with previous violations, the steps required by this rule limit the spread of asbestos-containing material.

161. From January 4, 2023, through at least January 11, 2023, as indicated in the testimony and photographs from Mr. Schmitter and Mr. Fowler, facility components with regulated asbestos-containing material were removed without taking the safety precautions prescribed by Ohio Adm.Code 3745-20-04(A)(4).

162. In addition, while specific dates were not established, subsequent inspections by Mr. Schmitter and Mr. Fowler showed that the stripping and removing of regulated asbestos-containing material by untrained and unprotected workers continued after January 11, 2023, and the protective steps required by Ohio Adm.Code 3745-20-04(A)(4) were still not taken.

163. By failing to ensure proper transport of the regulated asbestos-containing material, all three Defendants violated Ohio Adm.Code 3745-20-04(A)(4) and R.C. 3704.05(G) and, therefore, are subject to a maximum penalty of $25,000 per day for this violation pursuant to R.C. 3704.06(C).

164. Because these activities continued for at least eight days, from January 4, 2023, through at least January 11, 2023, Defendants are subject to a maximum civil penalty of at least $200,000 under Count Nine.

viii. The State established that Defendants violated Ohio Adm.Code 3745-20-05(B) – failure to properly handle and package asbestos-containing materials – on at least 379 days, for which Defendants are subject to a maximum penalty of $9,475,000.

165. Count Twelve alleges a violation of Ohio Adm.Code 3745-20-05(B), which provides in part that each owner and operator of a demolition and/or renovation operation "shall discharge no visible emissions to the outside air during the collection, . . . packaging,

transporting, or deposition of any asbestos-containing waste materials." *See* State's Complaint, Count Twelve.

166. Ohio Adm.Code 3745-20-05(B)(1)(c) also requires each owner and operator to adequately wet the asbestos-containing waste material and seal all the asbestos-containing waste material "in durable leak-tight containers or wrapping," after wetting and while materials remain wet. Ohio Adm.Code 3745-20-05(B)(1)(c). *See* State's Complaint, Count Twelve.

167. Ohio Adm.Code 3745-20-01 defines "asbestos-containing waste material" pertaining to renovation operations as "regulated asbestos-containing material waste, regulated asbestos contaminated debris, and materials contaminated with asbestos including disposable equipment and clothing."

168. Ohio Adm.Code 3745-20-01 defines "asbestos-contaminated debris" pertaining to renovation operations as "construction and demolition debris that has become mingled with regulated asbestos-containing material."

169. During the period between January 4, 2023, and January 11, 2023, Defendants failed to ensure that no part of the renovation process discharged visible emissions.

170. Instead, asbestos-containing waste materials were carted in open wheelbarrows through the building and dumped into open-top dumpsters outside the buildings. These dumpsters remained open to outside air.

171. Starting on or before January 4, 2023, and continuing to the present, Defendants also failed to ensure that the asbestos-containing waste materials from the Property were properly wetted and sealed in durable leak-tight containers or wrapping.

172. Instead of being wetted and sealed in durable leak-tight containers or wrapping, the asbestos-containing waste materials remain strewn throughout the building.

173. Because asbestos-containing waste material continues to be strewn throughout the building and is not adequately wet and sealed in durable leak-tight containers or wrapping, this violation continues from January 4, 2023, through the date of the hearing, January 17, 2024. Therefore, this violation has existed for 379 days.

174. As explained above, the existence of the receivership does not absolve Defendants of liability for these violations, so Defendants are subject to a maximum penalty of $25,000 for each of these 379 days, for a total maximum penalty of $9,475,000 under Count Twelve.

G. Defendants' actions at issue in this case constitute at least eight days of violations of R.C. 3710.05(A) and 3745-22-02(A) – performing an asbestos hazard abatement project without a license – for which Defendants are liable for a maximum penalty of up to $40,000.

175. Ohio R.C. 3710.01 and Ohio Adm.Code 3745-22-01 define "asbestos hazard abatement activity" as "any activity involving the removal, renovation, enclosure, repair, encapsulation or operation and maintenance of reasonably related friable asbestos-containing materials in an amount greater than three linear feet or three square feet." *See* State's Complaint, Count Three.

176. As noted above, there is no doubt that the activity at Latitude Five25 involved thousands of square feet of friable asbestos-containing material. The State also already established that Defendants engaged in activity involving removal and renovation directly related to that asbestos-containing material. As a result, Defendants engaged in "asbestos hazard abatement activity."

177. Ohio R.C. 3710.01 and Ohio Adm.Code 3745-22-01 define "asbestos hazard abatement project" as a project in which "one or more asbestos hazard abatement activities the sum total of which is greater than fifty linear feet or fifty square feet of friable asbestos-

containing materials and is conducted by one asbestos hazard abatement contractor." *See* State's Complaint, Count Three.

178. Again, thousands of square feet of friable asbestos-containing materials were impacted, so the work at the Property also constitutes a "asbestos hazard abatement project."

179. Based on the exhibits and testimony presented at the hearing, Defendants engaged in "asbestos hazard abatement activity" or an "asbestos hazard abatement project" as defined in R.C. 3710.01 and Ohio Adm.Code 3745-22-01.

180. Ohio R.C. 3710.05(A) provides that "[e]xcept as otherwise provided in this chapter, no person shall engage in any asbestos hazard abatement activities in this state unless licensed or certified pursuant to this chapter." *See* State's Complaint, Count Three.

181. Ohio Adm.Code 3745-22-02(A) indicates that "[n]o business entity or public entity shall perform, directly or indirectly, any asbestos hazard abatement project as defined in paragraph (C) of rule 3745-22-01 of the Administrative Code without a valid license from the [D]irector [of Ohio EPA]." *See* State's Complaint, Count Three.

182. Ohio Adm.Code 3745-22-02(B) states that "no person shall coordinate, or supervise, an asbestos hazard abatement activity unless he or she is certified as an asbestos hazard abatement specialist by the director pursuant to the requirements of Chapter 3710 of the Revised Code and the rules of this chapter."

183. Under the definitions in R.C. 3710.01 and Ohio Adm.Code 3745-22-01, Defendants are each "persons" and "business entities" and are thus subject to R.C. Chapter 3710 and rules promulgated thereunder.

184. Ohio R.C. 3710.14(A) provides that "the attorney general may commence a civil action for civil penalties and injunctions, in a court of common pleas, against any person **who**

has violated … **this chapter, [or] any rule adopted under this chapter**." *See* State's Complaint, Count Three.

185. Ohio's asbestos rules in Ohio Adm.Code Chapter 3745-22 are promulgated under R.C. Chapter 3710.

186. From January 4, 2023, through at least January 11, 2023, Defendants continued to engage in "asbestos hazard abatement activity" or "asbestos hazard abatement projects" without being licensed or certified and have therefore violated R.C. 3710.05(A) and Ohio Adm.Code 3745-22-02(A) or Ohio Adm.Code 3745-22-02(B).

187. By violating R.C. 3710.05(A) and Ohio Adm.Code 3745-22-02(A) or Ohio Adm.Code 3745-22-02(B), all three Defendants are subject to a maximum penalty of $5,000 per day pursuant to R.C. 3710.14(C) and (D).

188. Because these activities and projects continued for at least eight days, from January 4, 2023, through at least January 11, 2023, Defendants are subject to a maximum civil penalty of at least $40,000 under Count Three.

H. Defendants have at least 800 days of violation for which they can be assessed a maximum of $19,840,000 in penalties.

189. The total days of violation of Ohio Adm.Code Chapter 3745-20 and R.C. 3704.05(G) identified above equals at least 792 days, each of which may be assessed at a statutory maximum of $25,000 in accordance with R.C. 3704.06(C), for a total maximum penalty for Counts One, Two, Four, Six, Seven, Eight, Nine, and Twelve of $19,800,000.

190. The total days of violation of Ohio Adm.Code Chapter 3745-22 and R.C. Chapter 3710 identified above equals at least eight days, each of which may be assessed at a statutory maximum of $5,000 in accordance with R.C. 3710.14(C) and (D), for a total maximum penalty for Count Three of $40,000, and a total under all counts of $19,840,000.

191. The remaining question for this Court is how much of that $19,840,000 to assess against Defendants.

I. Defendants' asbestos violations in this case exposed dozens of workers to asbestos and caused over 160 people to be displaced and lose most of their belongings; those violations, therefore, warrant the maximum penalty for each day of each violation.

192. One purpose of Ohio's environmental civil penalty laws is aimed at industry to strongly disincentivize polluting activity in the first place. *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St.3d 151, 157, 438 N.E.2d 120 (1982), affirming *State ex rel. Brown v. Dayton Malleable*, 2d Dist. Montgomery No. 6722, 1981 Ohio App. LEXIS 12103 (Apr. 21, 1981). Civil penalties are "a tool to implement a regulatory program." *State ex rel. Brown v. Howard*, 3 Ohio App.3d 189, 191, 444 N.E.2d 469 (10th Dist. 1981) (internal citations omitted).

193. The other purpose is to ensure a particular violator does not reengage in that activity. *Dayton Malleable*, 1 Ohio St.3d at 157; *see also United States v. ITT Continental Banking Co.*, 420 U.S. 223, 231-32, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975) (civil penalty provisions assessed on a per day basis are intended to provide a "meaningful deterrence whose effect is continuing" and not a "minor tax upon a violation which could reap large financial benefits to the perpetrator"); *State ex rel. Brown v. Howard*, 3 Ohio App.3d 189, 191, 444 N.E.2d 469 (10th Dist.1981) for the proposition that an effective deterrent means a civil penalty "large enough to hurt the offender."

194. When the General Assembly imposed civil penalties of $25,000 for each day of each violation of R.C. Chapter 3704, it did so "to protect and enhance the quality of the state's air resources so as to promote the public health, welfare, economic vitality, and productive capacity of the people of the state." R.C. 3704.02(A)(1). Similarly, when the General Assembly imposed civil penalties of $5,000 for each day of each violation of R.C. Chapter 3710, it did so

reinforce the Director of Ohio EPA's power to "prohibit and prevent improper asbestos hazard abatement procedures." R.C. 3710.02(B)(5).

195. As noted above, the phrase "shall pay a civil penalty" mandates the imposition of a penalty. *State v. Tri-State Group, Inc*., 2004-Ohio-4441, ¶103. Similarly, R.C. 3710.14(C) states "[u]pon a finding of a violation, the court **shall assess a civil penalty** of not more than five thousand dollars against the person." However, a trial court does have broad discretion in determining the penalty amount. *Tri-State Group, Inc*., 2004-Ohio-4441, ¶103.

196. *Dayton Malleable* lays out the factors traditionally assessed in determining the amount of civil penalty. These are:

(1) Actual harm or the risk of harm to the environment or human health;

(2) Recalcitrance, defiance, or indifference to the law shown by the Defendants;

(3) Economic benefit accruing to the defendants as a result of violating the law or to be gained as a result of delayed compliance with the law; and

(4) Unusual or extraordinary enforcement costs thrust upon the public.

State of Ohio v. Dayton Malleable, 2nd Dist. Montgomery No. 7622, 1981 Ohio App. LEXIS 12103 (April 21, 1981) (aff'd in part, rev'd in part, in *State of Ohio v. Dayton Malleable, Inc*., 1 Ohio St. 3d 151, 438 N.E.2d 120 (1982)); *see also*, *State of Ohio ex rel. Cordray v. Tri-State Group*, 7th Dist. Belmont, No. 07-BE-38, 2011-Ohio-2719, ¶¶ 104-115 (applying the *Dayton Malleable* factors using the civil penalty as an economic sanction in a case where the violator unsuccessfully pointed its finger at Ohio EPA).

197. In addition, because of the severe economic impact of these violations to the tenants, the damage to the area's affordable housing stock, and the substantial cost to the local land bank due to the appointment of the Receiver, these impacts, which go to the welfare and

economic vitality of the community, should also be considered in setting the penalty. *See* R.C. 3704.02(A)(1) ("The purposes of [R.C. Chapter 3704, Air Pollution Control] are * * * [t]o protect and enhance the quality of the state's air resources so as *to promote the public health, welfare, economic vitality, and productive capacity* of the people of the state." Emphasis added.).

i. Defendants' asbestos violations in this case exposed dozens of workers and the community to asbestos, creating a substantial risk of harm to human health that on its own warrants imposition of the maximum penalty.

198. The *Dayton Malleable* analysis does not require proof of actual harm, only risk of harm. *State ex rel. Celebrezze v. Thermal-Tron, Inc.*, 71 Ohio App.3d 11, 20, 592 N.E.2d 912 (8th Dist. 1992). This makes sense, given that "oftentimes * * * the actual damage cannot be precisely ascertained or is incapable of measurement." *Dayton Malleable*, 1981 Ohio App. LEXIS 12103, at 13-14. "When an environmental violation is committed, the fact that the state was injured is a concept built into the statutory framework and regulatory scheme; the violation of the law presupposes an injury to the state." *Evergreen Land Dev., Ltd*., *supra*, 2016-Ohio-7038, at ¶ 39, citing *Ackerman v. TriCity Geriatric & Health Care, Inc*., 55 Ohio St.2d 51, 378 N.E.2d 145 (1978); *State v. Mercomp, Inc*., 167 Ohio App.3d 64, 2006-Ohio-2729, 853 N.E.2d 1193 (8th Dist.). Under this strict liability civil enforcement regime, merely threatening environmental health is an actionable offense, and actual injury need not be shown. *State ex rel. DeWine v. Deer Lake Mobile Park*, 2015-Ohio-1060, 29 N.E.3d 35, ¶ 44 (11th Dist.), citing *Mercomp* at ¶ 32.

199. Here, there is no direct evidence of harm to human health or the environment. That is primarily due to the nature of asbestos. The harm to human health from asbestos exposure does not manifest for decades after that exposure. However, here the risk of harm is substantial. Mr. Gerdes identified the long-term debilitating and deadly illnesses that can develop

because of asbestos exposure. He also testified that he had never seen a situation as bad as the one created by these Defendants. Mr. Schmitter testified to his own personal concerns regarding his exposure in the days before Mr. Fowler recommended Defendants stop working, but he expressed an even greater concern for the approximately thirty workers who tore into regulated asbestos-containing material for eight days—hard, dusty work that would have caused them to breathe in asbestos hour after hour.

200. In addition, asbestos escaped in the surrounding area. The exact consequence of that release cannot be known, but Mr. Gerdes and Mr. Fowler both recognized the potential exposure to neighbors in this residential community.

ii. Defendants' disregard of its own water damage plan and asbestos management plan, their sending and then resending unprotected workers into the complex and their complete disregard of this Court's injunction demonstrate recalcitrance warranting the maximum penalty.

201. The second civil penalty factor measures a violator's recalcitrance, defiance, or indifference to the law. *Dayton Malleable*, 1 Ohio St.3d at 157; *State ex rel. Cordray v. Morrow Sanitary Co*., 5th Dist. Morrow No. 10-CA-10, 2011-Ohio-2690, ¶ 15 (noting "significant recalcitrance by failing to discover and remedy violations before Ohio EPA sent any notice of violation, and by being relatively unresponsive even after Ohio EPA notified [violators] of their legal obligations * * * and [while] the violations remained[ed] unresolved.").

202. Here, the evidence of recalcitrance is overwhelming. Defendants demonstrated their indifference by ignoring the plans they had in their possession for managing the flood damage and assuring the proper management of asbestos. Had the plans been followed, the asbestos violations would not have occurred. Rather than follow these plans, Defendants chose expedience over safety and compliance with the law. These operational decisions at Latitude

Five25 were entirely within the Defendants' control. Indifference to consequences is a strong consideration in supporting a civil penalty. *State v. Tri-State Group, Inc.*, 7th Dist. Belmont No. 03 BE 61, 2004-Ohio-4441, ¶ 115.

203. Defendants' actions rose thereafter to outright defiance, sending workers back into the buildings after contractors were recommended to stop work onsite. That defiance continued when Defendants ignored this Court's order to properly address the conditions at the Property by establishing site security, returning tenant property to the extent possible, safely disposing of the remaining property, and cleaning up the asbestos contamination in the building.

iii. Defendants avoided millions of dollars of expenses relating to building maintenance and responding to the calamity they created, thereby creating an economic benefit warranting a substantial penalty.

204. The third factor is the level of economic benefit gained through the violations. Economic benefit is not narrowly limited to the cost of avoided or delayed compliance. It can be measured by how the defendant profited as a result of violating the applicable environmental statute. For example, in *State ex rel. DeWine v. C&D Disposal Techs, LLC*, the trial court assessed, and the appellate court affirmed, a civil penalty of $4 million that equated to the amount of gross receipts the defendant received after they began to violate the law by overfilling a landfill. *State ex rel. DeWine v. C&D Disposal Techs, LLC*, 2016-Ohio-5573 (7th Dist.) ¶¶ 12, 27. Courts may presume economic benefit from environmental violations because it can be impossible for the finder of fact to calculate the precise amount of economic benefit an offender gained from the violation. *Tri-State Group, Inc.*, 2004-Ohio-4441, ¶ 113-114.

205. Here, an exact amount of economic benefit would be challenging to calculate, but a significant benefit occurred. Defendants received an economic benefit that is obvious in at least three respects.

a. First, Defendants avoided the cost of maintaining the building in a way that would have avoided the need for the asbestos removal resulting from the flood. Defendants had over $3 million available to them in the form of a line of credit from the mortgage lender specifically for the maintenance and upgrade of the Property but chose not to spend that money.

b. Second, Defendants have also avoided the costs associated with addressing the aftermath of the violations, a $750,000 cost picked up by the local land bank as a result of the appointment of the Receiver.

c. Third, Defendants have, thus far, avoided the cost of addressing the losses of the tenants to their property. To the extent that those losses have been covered, the losses have, in essence, been covered by the mortgage bank. That bank, Lument Commercial Mortgage Trust, had a right to the insurance proceeds under its loan agreement with Paxe and Mr. Drillman. The bank agreed to allow the tenants to receive the first $1.5 million of that mortgage settlement. *See* Exh. 29.

iv. Defendants' asbestos violations are unprecedented and their inaction in response to the contamination forced the state to take extraordinary enforcement warranting a substantial penalty.

206. The final civil penalty factor under *Dayton Malleable* is the "extraordinary costs incurred in enforcement." *Tri-State Group, Inc.*, 2004-Ohio-4441, ¶ 104. With Ohio's regulatory structure designed to depend on the cooperation of industry and avoid reaching litigation, extraordinary enforcement costs are one consequence of conduct that frustrates the self-regulating nature of Ohio's environmental laws. *State ex rel. DeWine v. Deer Lake Mobile Park*, 2015-Ohio-1060, 29 N.E.3d 35, ¶ 48 (11th Dist.).

207. When industry actors—such as Defendants—do not self-regulate and self-correct, the General Assembly intends the civil penalty to be severe. *See*, *Deer Lake*, at ¶ 48 ("[T]he statutory scheme governing enforcement of Ohio's environmental laws is designed to be self-regulating. It depends on cooperation of the regulated industry through its self-monitoring, self-reporting, and self-concern. It is designed to avoid reaching litigation.").

208. In other words, because the regulatory system is designed around upfront compliance, thereby protecting Ohio's environmental resources and its citizens, any civil enforcement litigation is extraordinary. Litigation is not the norm but a last resort; it is extraordinary on its face.

v. Defendants' asbestos violations displaced over 160 people who lost most of their belongings, damaged 400 units of affordable housing, and caused other harm to the welfare, economic vitality, and productive capacity of the State, warranting the maximum penalty for each day of each violation.

209. As to those factors identified in R.C. 3704.02 that are not referenced in *Dayton Malleable*—welfare, economic vitality, and productive capacity, Defendants' conduct has been egregious. These towers should, right now, be providing affordable housing to the City of Columbus. Defendants, through their actions, have prevented that from happening. Instead, the buildings sit empty at a time when affordable housing is sorely needed. Had the renovation work in January 2023 been managed properly, the buildings could have moved toward rehabilitation instead of necessitating the Receiver carry out a damage assessment in the hope of finding a buyer and slowly identifying, cleaning, and returning the few recoverable items from the apartments.

210. The Receiver's work, while urgent and necessary, tied up three quarters of a million dollars that could have been used by the land bank for other purposes, such as creating new benefits for the community instead of working to bring these towers back into use.

211. Most importantly, the lives of over 160 tenants have been disrupted, not just by the flooding but by the loss of almost all that they owned due to the spread of asbestos contamination and the loss of any hope of returning to their home. The spread of contamination throughout the building caused people, who had lived in the towers for years, to be scattered throughout the city and to be forced to rebuild their lives in a new location with new clothes, furniture, and other possessions.

J. Defendants provided no evidence in mitigation.

212. Civil penalty determinations must begin at the statutory maximum, and any downward adjustments should be made based upon the evidence introduced at trial. *United States v. Midwest Suspension and Brake*, 824 Supp. 713, 735, (E.D. Mich. 1993) (citing federal water pollution and air pollution statutes to "calculate the civil penalties to be imposed on defendant by starting with the statutory maximum * * * and examining the requisite penalty assessment criteria to determine if any downward departure is required"), affirmed at 49 F.3d 1197 (6th Cir. 1995); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc*., 897 F.2d 1128, 1137 (11th Cir.1990) ("In deciding upon the penalty to be assessed against a defendant who has violated its NPDES permit, the point of departure for the district court should be the maximum fines for such violations permitted by the Clean Water Act."). The top-down approach hews to the statute's strict language, reinforcing the multiple policy goals the civil penalty regime is designed to achieve. When trial courts weigh the *Dayton Malleable* civil penalty factors, those factors are used to justify a departure from the statutory maximum.

213. It is the State's right to ask for the maximum civil penalty here. *State ex rel. Ohio, AG v. LG Dev. Corp.*, 187 Ohio App.3d 211, 2010-Ohio-1676, 931 N.E.2d 642 (6th Dist.). *See e.g.*, *State ex rel. DeWine v. ARCO Recycling, Inc*., 2022-Ohio-1758 (8th Dist.) (upholding the trial court's imposition of the statutory maximum civil penalty).

214. While this Court can consider facts that mitigate against the imposition of the maximum penalty, Defendants, not the State, bear the burden of producing any evidence that would mitigate against a high civil penalty. *LG Dev. Corp*., at 220. A party who has violated environmental laws bears the burden of showing a civil penalty would be ruinous or otherwise disabling. *State ex rel. Dann v. Meadowlake Corp*., 5th Dist. Stark No. 2006 CA 00252, 2007-Ohio-6798, ¶ 66 ($300,000 civil penalty against a small drinking water system upheld where the defendant failed to meet its burden that the penalty would be ruinous). Here, Defendants failed to appear and have put on no mitigating evidence. The level of disruption to the tenants of these apartments caused by these Defendants, including the forced relocation and loss of almost all belongings resulting from the spreading contamination, warrants the most severe penalty allowed by law, as does the exposure of over thirty workers to asbestos over a period of eight or more days. Defendants' level of indifference to these impacts demonstrates a level of recalcitrance that reinforces that conclusion.

215. A violator's financial status is also relevant to determine whether the civil penalty is sufficient to deter future illegal conduct. *Dayton Malleable*, 1 Ohio St.3d at 156-157 (the civil penalty should take into consideration the "size of the enterprise" and whether it would be a mere "slap on the wrist," which would frustrate the civil penalty regime's deterrent effect).

216. Here, Boruch Drillman is a wealthy man. As the principal investor in the purchase, Mr. Drillman personally guaranteed a $16 million loan. The bank making that loan

was assured that Mr. Drillman had enough assets to cover the loan should Paxe default. Lument, that mortgage bank, received documentation that purported to show that Mr. Drillman had liquidity equal to at least 20% of the $16 million loan amount and net worth equal to at least 100% of that loan. Exh. 35. Mr. Drillman (or a broker on his behalf) provided information stating that Mr. Drillman and the entities that he owned had a net worth in excess of the loan. *Id*. Mr. Drillman also testified in another case in February of 2023 that he was a partner or general partner or investor in over 25 commercial real estate investments, a substantial enterprise that went far beyond just this apartment complex. Exh. 30, p. 384-385.

217. Mr. Drillman and Paxe, the company he controlled, both had the means to avoid these violations but chose not to comply with the law. Given the severity of the violations and the consequences of those violations, the facts of this case warrant the maximum penalty allowed by law.

DECISION

Based upon the foregoing reasons, this Magistrate recommends that this Court find that that Defendants Paxe Latitude LP, Boruch Drillman, and Aloft Management LLC are jointly and severally liable to pay a civil penalty at the statutory maximum—a total of **$19,840,000**.

Counsel for Plaintiff is hereby **ORDERED** to prepare and e-file a proposed judgment entry to Judge Held Phipps pursuant to Local Rule 25.01 within 14 days of this decision.

IT IS SO ORDERED.

A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION, WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIV.R. 53(D)(3)(a)(ii), UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FACTUAL FINDING OR LEGAL CONCLUSION AS REQUIRED BY CIV.R. 53(D)(3)(b).

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Franklin County Court of Common Pleas

Date:	05-02-2024
Case Title:	STATE OF OHIO -VS- PAXE LATITUDE LP ET AL
Case Number:	23CV003566
Type:	MAGISTRATE DECISION

So Ordered

/s/ Magistrate Jennifer D. Hunt