ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

CHURCHILL COMMUNITY DEVELOPMENT, LP; RAMESH JAIN; VIKAS JAIN; PARADIGM CONSULTANTS, LLC,	:	In Re: 1310 Beulah Road/ Churchill Community Development
	:	Docket no. ACHD-17-006
Appellants,	:	Copies Sent To:
	:	*Counsel for Appellants:*
v.	:	Maurice A. Nernberg, Esq.
	:	MAURICE A. NERNBERG &
ALLEGHENY COUNTY HEALTH DEPARTMENT,	:	ASSOCIATES
	:	301 Smithfield Street
	:	Pittsburgh, PA 15222
Appellee.	:	
	:	*Counsel for Appellee:*
	:	Jason K. Willis, Esq.
	:	ALLEGHENY COUNTY HEALTH
	:	DEPARTMENT
	:	301 39th Street, Building 7
	:	Pittsburgh, PA 15201

DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH DEPARTMENT HEARING OFFICER

I. INTRODUCTION

This case concerns the allegedly illegal removal and disposal of asbestos at the former Westinghouse headquarters in Churchill. On June 2, 2017, the Allegheny County Health Department ("ACHD" or the "Department") levied a civil penalty of $1,471,675 against Appellants Churchill Community Development, LP, Vikas Jain, Ramesh Jain, and Paradigm Consultants, LLC (collectively "Appellants"). The civil penalty was for violations of ACHD Rules and Regulations, Article XXI (Air Pollution Control) ("Article XXI") concerning improper removal and

disposal of asbestos-containing material ("ACM") at Buildings # 401 and 501 at 1310 Beulah Road, in Churchill, PA (the "Subject Property").

The Department argues that the $1,091,675 civil penalty[1] is appropriate because of Appellants' callous disregard for the law concerning improper removal and disposal of ACM, and endangerment of the public health of the community. To justify the penalty, the Department goes through a factor-by-factor analysis of how it calculated the civil penalty and decided to levy the largest fine it had ever imposed against a polluter.

Appellants retort that the Department failed to follow its own policies when assessing the civil penalty. Appellants also argue that the amount of the civil penalty is grossly disproportionate to any conduct by Appellants regarding the removal and disposal of ACM in this matter. In support of this argument, Appellants assert that the Department lacked evidence for their claims and that much of the Department's testimony during the Hearing on the Merits ("Merits Hearing") was supposedly hearsay.

Based on the briefs submitted by the parties, the evidence and testimony presented, as well as the relevant regulations, statutes, and case law, this tribunal finds that the ACHD met its burden of proving by a preponderance of the evidence that the $1,091,675 civil penalty it issued against Appellants is justified. Appellants are hereby **ORDERED** to pay $1,091,675 to the Allegheny County Health Department Clean Air Fund.

[1] The Department dropped $380,000 economic benefit portion of the civil penalty.

II. EVIDENCE[2]

The following exhibits were introduced by Appellants, and admitted into evidence:

A1: Notice to Attend, Issued to Shannon Sandberg
A2: Notice to Attend, Issued to Dr. Debra Bogen
A3: Notice to Attend, Issued to ACHD Representative
A4: RJ Lee Receipt

The following exhibits were introduced by the ACHD, and admitted into evidence:

D1: Photographs of the Subject Property Taken by the ACHD
D2: Emergency Order, Dated March 2, 2017
D3: Enforcement Order, Dated March 7, 2017
D4: Asbestos Removal Investigation
D5: Asbestos Sampling Report
D6: Enforcement Order, Dated June 2, 2017
D7: Penalty Calculation Form
D8: Permit Application, Dated February 26, 2015
D9: Permit Application, Dated February 15, 2015
D10: Laboratory Results for Building 401
D11: Laboratory Results for Building 501
D12: Guilty Plea for Vikas Jain

III. FINDINGS OF FACT

1) The property at issue is 1310 Beulah Road, Churchill, PA 15235, buildings #401 and #501 (the "Subject Property"). (*Appellants' Brief* at 9-10).

2) Churchill Community Development, LP purchased the Subject Property in 2012. (Ability to Pay Hearing Transcript ("ABT") at 90-94).

3) Churchill Community Development, LP was the Owner of the Subject Property at the time the penalty was issued. (ABT at 90-94).

4) Paradigm Consultants, LLC was the General Partner of the Owner at the time the penalty was issued. (ABT at 90-94)

[2] This tribunal also has admitted the transcript from the Ability to Pay Hearing and all exhibits from the Ability to Pay Hearing into evidence in this matter. (Hearing on the Merits Transcript ("HMT") at 478-80).

5) Ramesh Jain ("RJ") and his son, Vikas Jain ("VJ") (collectively the "Jains") were Limited Partners in Churchill and Members of Paradigm. (ABT at 90-94, 98-100).

6) Paradigm is the General Partner and Operator. (Hearing on the Merits Transcript ("HMT") at 17-18).

7) On or about February 28, 2017, the Allegheny County Health Department (the "Department" or "ACHD") received a notification from Shawn Jacob ("Mr. Jacob"), a building inspector for Churchill Borough, that people were allegedly removing suspected asbestos-containing material ("ACM") from the Subject property. (HMT at 11-15).

8) In response, two Department air quality engineers, Shannon Sandberg ("Ms. Sandberg") and Joseph Yakubisin ("Mr. Yakubisin") met with Mr. Jacob and a fire marshal, and inspected Building #501. (HMT at 11-22).

9) Starting on or about March 1, 2017, Ms. Sandberg and Mr. Yakubisin conducted additional inspections of Buildings #401 and #501 at the Subject Property. (HMT at 20, 48).

10) As a result of inspections, on March 2, 2017, ACHD issued to Appellants Churchill Community Development, LP ("Churchill"), Paradigm Consultants, LLC ("Paradigm"), Ramesh Jain ("RJ"), and Vikas Jain ("VJ") an Emergency/Enforcement Order regarding Building #501 at the Subject Property. (Ex. D2).

11) On March 7, 2017, the Department issued to Appellants an Emergency/Enforcement Order regarding Building #401 at the Subject Property. (Ex. D-3).

12) At the time, Appellants owned several buildings located at 1310 Beulah Road, Churchill, PA 15235, which comprised the former Westinghouse headquarters. (Exs. D2, D3).

13) The Enforcement Orders alleged that asbestos had been improperly removed from Buildings #501 and #401, respectively, and directed Appellants to take the following actions:

> 1. Cease any demolition work on Buildings #401 and #501;
> 2. Not allow any one into either Buildings #401 and #501 without prior authorization from the Department;
> 3. Make available all equipment used in Buildings #401 and #501 for Departmental inspection;

4. Retain the equipment in the condition as they existed at the time of their removal;
5. Provide information as to who removed the asbestos containing material, how it was done and the waste manifest reflecting where the asbestos containing material was taken; and
6. Provide the Department with an asbestos abatement permit for the abatement already performed. (Exs. D2, D3).

14) On March 13, 2017, Appellants filed two separate appeals, one for each of the Enforcement Orders issued by the Department. (Notice of Appeal 205546757.3 (March 13, 2017); Notice of Appeal 205561057 (March 13, 2017)).

15) Appellants made general allegations of deficiency regarding the Enforcement Orders. (Notice of Appeal 205546757.3; Notice of Appeal 205561057).

16) Each Notice of Appeal affirmed that (1) Churchill owned the subject property (Buildings 501 and 401, respectively), (2) "Paradigm is a general partner of Churchill," and (3) "[t]he Jains are principals of Paradigm." (Notice of Appeal 205546757.3; Notice of Appeal 205561057).

17) By Enforcement Order dated June 2, 2017, the ACHD imposed the following penalties:

1. $4,168.00 for violating ACHD Article XXI (Air Pollution Control) ("Article XXI"), § 2101.11.a.;
2. $4,168.00 for violating Article XXI, § 2105.60;
3. $4,168.00 for violating Article XXI, §2105.62.h.l.;
4. $4,168.00 for violating Article XXI, §2105.62.h.2.;
5. $4,168.00 for violating Article XXI, § 2105.62.k.;
6. $4,168.00 for violating Article XXI, § 2105.63.b.l.;
7. $4,168.00 for violating Article XXI, § 2105.63.b.2.;
8. $4,168.00 for violating Article XXI, § 2105.63.d.4.;
9. $4,168.00 for violating Article XXI, § 2105.63.d.5.;
10. $4,168.00 for violating Article XXI, § 2105.63.e.;
11. $29,170.00 for violating Article XXI, § 2105.63.f.1 – 7.; and
12. $41,668.00 for violating Article XXI, § 2105.63.l.1 – 10. (and, by incorporation, 40 CFR §61. 150(a)(l)(iv) and (v);

For a total of $104,175.002 per day, which, when multiplied by ten days of violations, equaled a total of $1,041,675.00; plus $50,000.00 for violation the March 2, 2017 and March 7, 2017 Enforcement Orders; and.

$380,000.00[3] as the economic benefit that Appellants received by not following Article XXI; For a grand total of $1,471,675.00. (Exs. D6, D7).

18) On June 2, 2017, the Department issued a similar Enforcement Order against Pintura Construction, LLC, ("Pintura") and Ramon Perez. The Department later discovered that the person identified by Appellants to the Department as "Ramon Perez" and owner of Pintura was actually Raymond Sida ("Mr. Sida"), one of Appellants' employees. (N.T. Sida Hearing (September 26, 2017) at 10).

19) On June 12, 2017, Appellants appealed the Department's June 2, 2017 Enforcement Order. (Notice of Appeal 215869262 (June 2, 2017)).

20). The Notice of Appeal affirmed that (1) Churchill owned the subject property, (2) "Paradigm is a general partner of Churchill," and (3) "[t]he Jains are principals of Paradigm." (*Id.*). The Notice of Appeal alleged that Appellants could not prepay the Civil Penalty or post the bond and requested a hearing on that issue. (*Id.*).

21) On August 7 and 29, 2017, this tribunal conducted administrative hearings concerning the sole issue of whether Appellants could prepay the $1,471,675.00 civil penalty or post a bond prior to an adjudication on the merits of its appeal. (*See Generally* Ability to Pay Hearing ("ABT")).

22) The Hearing Officer found that the Appellants had the ability to prepay the penalty/bond. *Hearing Officer Prepayment Decision and Order (December 20, 2017)* at 4[4]. However, that finding was later overturned on appeal. *Churchill Community Development, LP v. Allegheny County Health Dept.*, 225 A.3d 596 (Pa. Cmwlth. Ct. 2019).

23) On September 26, 2017, and October 19, 2017, this tribunal conducted a hearing on the appeal of Mr. Sida.

24) Prior to that hearing, on August 17, 2017, ACHD's counsel notified Appellants' counsel of Mr. Sida's appeal via email. In that notice, ACHD's counsel specifically stated that they had included Appellants' counsel on the notice because Appellants may have an interest in that appeal and may want to attend and participate in the hearing. Despite receiving such notice of a public hearing, neither Appellants nor their counsel attended or participated in Mr. Sida's appeal hearing. (*See* N.T. Sida Hearing at 82).

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[3] The Department agreed to waive this economic benefit penalty.

[4] Available at Churchill-Inability-to-Pay-Administrative-Decision.pdf (alleghenycounty.us).

25) Based on the testimony and evidence at Mr. Sida's appeal hearing and legal argument and a motion from Mr. Sida's counsel, on or about October 24, 2017, the Hearing Officer entered an Order dismissing the Enforcement Order against Mr. Sida.

26) On October 10, 2019, five days before the merits hearing in this case was supposed to begin, Appellant VJ pled guilty in federal court regarding the conduct underlying the civil penalty at issue in this case. (HMT at 7).

27) On March 18, 2020, Judge Joy Flowers Conti of the United States District Court of the Western District of Pennsylvania entered a judgment accepting the Guilty Plea. *See* Judgment in Case Number 2:19-cr-00305-JFC-1 (March 18, 2020).

28) On February 8, 2022, ACHD filed a Motion requesting that the Hearing Officer accept the Guilty Plea and its incorporated facts as preclusive admissions in this case. (*ACHD Motion to Admit Prior Admissions* ¶¶ 9 – 10).

29) Appellants challenged ACHD's Motion. (*See Appellants' Response to Motion to Admit Admissions*).

30) On March 22, 2022, this tribunal ordered that (1) the Guilty Plea was admitted into the evidentiary record; (2) the Guilty Plea would not be considered as a preclusive judicial admission; and (3) at the evidentiary hearing, Appellants could "present evidence and testimony concerning the matters raised in the Guilty Plea."

31) The evidentiary hearing on the merits of the appeal ("Merits Hearing") occurred on May 24, 2022, May 25, 2022, July 22, 2022, July 25, 2022, and July 27, 2022.

32) During the hearing, ACHD presented two witnesses from the Department who testified to the details of the Department's enforcement actions and one witness from RJ Lee Group, Inc.[5] ("RJ Lee"), the consulting firm that provides asbestos testing services to the Department.

33) The employee of RJ Lee, Monica McGrath-Koerner ("Ms. McGrath-Koerner"), testified to the results and procedures regarding the tests of samples of suspected ACM taken from the subject property.

[5] To this tribunal's knowledge, the "RJ" in RJ Lee Group is of no relation to Appellant Ramesh Jain, who is referred to as "RJ" in this matter.

34) Appellants' counsel made no opening statement, called no witnesses of their own, and presented no case in chief at the Merits Hearing.

IV. DISCUSSION

Before delving into Appellants' alleged violations of Article XXI and the dispute among the parties about how the Department calculated the civil penalty, there are five threshold matters to dispose of: (1) the burden of proof; (2) the admissibility of Vikas Jain's guilty plea agreement in federal court; (3) the admissibility of the transcript in the hearing concerning Raymond Sida; (4) individual and/or corporate liability concerning the businesses at issue; and (5) Vikas Jain's double jeopardy claim.

a. Burden of Proof

Under the Allegheny County Health Department's Rules and Regulations Article XI (Hearings and Appeals) ("Article XI"), which govern administrative appeals, when assessing a civil penalty, the Department bears the burden of proof by a preponderance of the evidence. Article XI § 1105.C.7.

The preponderance of evidence standard "is tantamount to a 'more likely than not' standard." *Agostino v. Twp. of Collier*, 968 A.2d 258, 269 (Pa. Cmwlth. Ct. 2009) (citing *Commonwealth v. McJett*, 811 A.2d 104, 110 (Pa. Cmwlth. Ct. 2002)).

b. Admissibility of Vikas Jain's Plea Agreement

The parties disagree over the admissibility and authoritativeness of Appellant Vikas Jain's ("VJ") guilty plea in federal court. The ACHD argues that this tribunal should take official notice of the guilty plea because Pennsylvania law indicates that a voluntarily entered guilty plea precludes a party from denying or

contesting any fact contained therein, and that VJ voluntarily admitted to the same conduct that is at issue in this case. (*ACHD Brief* at 8-11).

Appellants respond that the guilty plea cannot be used by the Department to prove facts because its contents "do not constitute facts contained in reports and records of the agency's field and those facts contained in reports and records of the agency's files." (*Appellants' Brief* at 6-7). Appellants further argue, "The Western District of Pennsylvania is not the ACHD, and the plea agreement does not contain facts." (*Id.* at 7-8).

This tribunal finds that the Department has the better argument here. Appellants are incorrect when they contend that the plea agreement "does not contain facts." (*Appellants' Brief* at 8). Pennsylvania law is clear that "a guilty plea constitutes an admission to all of the facts averred in the indictment" and "a criminal conviction may be used to establish the operative facts in a subsequent civil case based on those same facts." *Commonwealth Dept. of Transp. v. Mitchell*, 535 A.2d 581, 585 (Pa. 1987) (internal citations omitted).

Here, VJ entered a guilty plea in federal court, and that plea was based on the same operative facts that are at issue in this matter. Furthermore, this tribunal expressly gave Appellants the opportunity to challenge the facts contained in the guilty plea, and Appellants chose not to do so. (*See Hearing Officer's March 22, 2022 Order*).

Appellants argue that they did not contest the contents of the guilty plea at the Merits Hearing because "the ACHD should have, on the record averred the facts

from the plea, during its case in chief, that it sought to enter and rely upon." (*Appellants' Brief* at 8). But this argument falls flat. Appellants had ample notice in advance of the Merits Hearing (1) that the Department sought to use the guilty plea, (2) that the guilty plea would be admitted into the evidentiary record, and (3) that they would have the opportunity at the hearing to challenge the contents of the guilty plea. Appellants made a choice to not contest the guilty plea at the Hearing. This tribunal will therefore take judicial notice of VJ's guilty plea.

c. Admissibility of the Transcript in the Raymond Sida Hearing

The parties also disagree over the admissibility of the transcript from the Raymond Sida hearing, which was conducted on September 26 and October 19, 2017. The Department contends that the Raymond Sida hearing transcript should be part of the record because Appellants' counsel were notified that they could participate in the hearing if they so wished, and that Appellants failed to appear at the hearing, failed to intervene, and failed to call Mr. Sida as a witness in this matter. *(ACHD Brief* at 5).

Appellants argue that the Raymond Sida hearing transcript should not be part of the record in this case because Appellants were not parties or witnesses to that proceeding. (*Appellants' Brief* at 4-5). And while Appellants did use the transcript from the Raymond Sida hearing in their appeal, its sole purpose was for the issue regarding why Hearing OfficerMax Slater should recuse. (*Id.*).

This tribunal finds that Appellants have the better argument here. The Department did not introduce the transcript from the Raymond Sida hearing into

evidence. Appellants were not parties or witnesses in that hearing. Additionally, Appellants' absence at the Raymond Sida hearing does not bear on the admissibility of the transcript from that hearing. Therefore, the transcript from the Raymond Sida hearing will not be considered as part of the evidentiary record in this matter.

d. Ownership of the Businesses at Issue

The parties differ on exactly who should be held liable for the civil penalty. The Department contends that all appellants—RJ, VJ, Churchill Community Development, LP ("Churchill") and Paradigm Consultants, LLC ("Paradigm")—should be held individually liable for the civil penalty. First, the Department points to language in Article XXI which imposes liability on those who have engaged in unlawful conduct or allowed such conduct to occur on property they own. (*ACHD Brief* at 17 (citing Art. XXI §§ 2101.11.b.1, 20101.11.c)). Second, the Department cites to testimony from the Ability to Pay Hearing showing that VJ and RJ are part owners of both Churchill and Paradigm, ran their businesses together, and that VJ was responsible for any demolition and renovation.[6] (*ACHD Brief* at 18 (citing ABT at 40, 49-50, 90; Ex. D12)).

Appellants argue that the penalty should be dismissed as to VJ and RJ, because the Department cannot prove that their conduct as individuals was the basis for the civil penalty. (*Appellants' Brief* at 18-23). For support, Appellants cite to case law holding, "[I]f individual liability is to be imposed on petitioner, it must be by analogizing the tort law 'participation' theory of liability and is predicated on

[6] The Department also cites to the transcript from the Raymond Sida hearing to bolster its argument. For the reasons discussed in Section IV(c) of this administrative decision, that transcript is not a part of the record here.

the corporate officer's own actions and participation in the corporation's wrongful conduct." *B&R Res., LLC v. Dept. of Envtl. Prot.*, 180 A.3d 812, 817-18 (Pa. Cmwlth. Ct. 2018) (internal citations omitted). Here, Appellants argue that the ACHD failed to produce any evidence showing that VJ or RJ individually participated in the corporate entities' allegedly wrongful conduct. (*Appellants' Brief* at 23).

This tribunal holds that the Department has the better argument here. VJ's guilty plea established that VJ owned and operated the Subject Property, and that he was responsible for any "demolition or renovation therein." (Ex. D12). There is thus clear evidence that VJ individually participated in the wrongful conduct at issue. Furthermore, Article XXI is clear that any *person* who operates or allows to be operated, any unlawful air pollution can be held liable. (Art. XXI §§ 2101.11.b.1, 20101.11.c) (emphasis added).

The record is also clear that both VJ and RJ have substantial ownership and control over Churchill and Paradigm, and that RJ controls all the businesses' finances. (ABT at 40, 139, 148). Based on these facts and the regulatory language at issue, this tribunal holds that Churchill, Paradigm, VJ, and RJ may all be held individually liable for the civil penalty at issue.

e. Double Jeopardy

Additionally, Appellants argue that VJ cannot be held liable in this matter due to double jeopardy. (*Appellants' Brief* at 23-30). Specifically, Appellants assert that because VJ pleaded guilty to the underlying conduct in federal court, he cannot be held civilly liable here. (*Id.* at 23). In support of their claim, Appellants cite to the

Commonwealth Court's decision in *Sweeny v. State Bd. of Funeral Directors*, 666 A.2d 1137 (Pa. Cmwlth. Ct. 1995). (*Appellants' Brief* at 25). In *Sweeny*, the Commonwealth Court considered whether a civil penalty imposed by an administrative agency against a funeral director who pled guilty to similar underlying conduct was subject to double jeopardy. 666 A.2d at 1139-40. The *Sweeny* court held, "If the civil sanction can be characterized only as a deterrent or as punishment for the conduct in question, then double jeopardy would prevent the imposition of that sanction." *Id.* at 1139.

This tribunal rejects Appellants' double jeopardy claim. Unlike *Sweeny*, this case is not about professional licensure. This case is about public health. More fundamentally, the Allegheny County Health Department is a public health agency. It cannot convict, parole, incarcerate, otherwise impose any criminal penalty against a person or entity. The purpose behind the civil penalty, as with any other enforcement action the ACHD takes, is to protect public health, not to punish criminally. Appellants' double jeopardy argument fails.

f. Specific Violations of Article XXI

Appellants did not address the individual violations of Article XXI levied against them either in their brief or at the Merits Hearing. Still, the Department must prove all twelve of these violations, as well as violations of the enforcement orders, by a preponderance of the evidence. (Art. XI § 1105.C.7).

1. Unlawful removal of ACM (Art. XXI § 2101.11)

Article XXI § 2101.11 prohibits anyone from

> "[. . .] willfully, negligently, or through the failure to provide and operate necessary control equipment or to take necessary precautions, operat[ing] any source of air contaminants in such manner that emissions from such source:
> 1. Exceed the amounts permitted by this Article or by any order or permit issued pursuant to this Article;
> 2. Cause an exceedance of the ambient air quality standards established by §2101.10 of this Article; or
> 3. May reasonably be anticipated to endanger the public health, safety, or welfare."

Additionally, Article XXI imposes liability on those who have actively engaged in the unlawful conduct and on those who have allowed such conduct to occur on property that they own. Article XXI §§ 2101.11.b.1., 2101.11.c.

Here, the ACHD provided evidence that Appellants owned and controlled the Subject Property and the companies involved, directed their workers to improperly abate ACM, and exposed the public to asbestos. (*ACHD Brief* at 17-21; *see also* Section IV(d), above). The Department therefore proved by a preponderance of the evidence that Appellants unlawfully removed ACM.

2. Unlicensed persons removing ACM (Art. XXI § 2105.60)

Article XXI § 2105.60 prohibits the removal of ACM by anyone other than a person licensed by the ACHD to conduct such removal or remediation. At the hearing, Ms. Sandberg testified that prior to and at the time of the assessment of the civil penalty, no one involved with removing suspected ACM from the subject properties had a license to perform the removal. (HMT at 135-36). Furthermore, by the time of the hearing, the Appellants had failed to identify any employee who had such a license. (HMT at 137). Based on this uncontradicted testimony presented at

the Merits Hearing, this tribunal finds that the Department proved by a preponderance of the evidence that Appellants unlawfully had unlicensed persons remove ACM from the Subject Property.

3. Removal of ACM without a permit (Art. XXI § 2105.62.h.1)

Article XXI, Section 2105.62.h.1. prohibits the following removal of ACM without receipt of and compliance with an approved permit from ACHD:

> i. ACM on 260 linear feet or more of pipe or a total of 160 square feet or more of ACM at any facility; or
> ii. Any ACM at any facility without a current Operating & Maintenance (O&M) Plan approved by the Department under this Subpart if the Department has determined that a permit is required as a result of recent multiple prior related projects, each involving the removal, encasement, or encapsulation of ACM on less than 260 linear feet of pipe and a total of less than 160 square feet of ACM at the same facility as the current project.

Here, Ms. Sandberg made measurements and estimates in Building #401 and Building #501. (HMT at 302). Regarding the size of the facility and severity of the violation, Ms. Sandberg calculated that "more than 160,000 square feet of asbestos-containing floor tile" and that "10,000 linear feet of amosite" had been removed from the subject properties. (HMT at 441). Given the amount of removed ACM and suspected ACM, the Appellants were required to get a permit. 2105.62.h.1.i.

However, although Appellant VJ had obtained permits in 2015 for asbestos abatement in Buildings #401 and #501, neither of those permits covered the ACM removal and disposal that is the subject of this case, and no permit existed for said removal. (HMT at 137, 588-94); Exs. D8, D9).

Based on this, this tribunal finds the ACHD proved by a preponderance of the evidence that Appellants are liable for the removal of ACM without the proper permit.

4. Not following the permit posting requirement (Art. XXI § 2105.62.h.2)

Article XXI, Section 2105.62.h.2. prohibits the removal of asbestos without prior and continuous posting of a properly issued permit in a "conspicuous location immediately adjacent to the work area." Article XXI § 2105.62.h.2. The posting must remain in place "until the Department has accepted the results of all required Final Clearance Inspections." (*Id.*).

During her inspections of Buildings #401 and #501, Ms. Sandberg did not observe any evidence of the safety equipment, materials, postings, practices, and procedures required by Article XXI for asbestos removal and disposal. (HMT at 134-55). Additionally, the fact that Appellants did not obtain the proper permit for asbestos abatement at issue in this case corroborates that they failed to post a properly issued permit during abatement. (HMT at 137, 588-94). This tribunal finds that the ACHD proved by a preponderance of the evidence that Appellants failed to properly post a permit.

5. Not properly setting up the worksite, not maintaining negative air pressure, and not giving prior notice to the ACHD (Art. XXI § 2105.62.k)

Article XXI, Section 2105.62.k. prohibits the removal of ACM prior to (1) proper "set-up and preparation of the" worksite; (2) "maintenance of negative air pressure in the" worksite; (3) and notice to the Department that "include[s] the

asbestos permit number, the names of the permit applicant and the licensed contractor, the street address and municipality of the project site, the name and phone number of the person submitting the notice, and" the planned start date of the work. Article XXI § 2105.62.k.

Here, Appellant VJ admitted to directing and causing multiple people to remove ACM from Buildings #401 and #501, including with the use of rented grinders and carbide cutters, and without training, following proper removal techniques, wearing proper protective gear (e.g., clothing and respirators), air testing, or air monitoring. (*ACHD Motion to Admit Prior Admissions* at Exhibit A). Based on this evidence, this tribunal finds that the ACHD proved by a preponderance of the evidence that Appellants failed to properly set up the worksite, maintain negative air pressure, and give prior notice to the ACHD.

6. Not posting warning signs (Art. XXI § 2105.63.b.1)

Article XXI, Section 2105.63.b.1. prohibits the removal of ACM unless:

> 1. Clearly identifiable signs with, and only with, the following specific warning, word for word, are posted at the facility, at eye level in a conspicuous location easily read by passers-by, at all potential approaches to the work area, a sufficient distance from the work area to permit a person to read the sign and take the necessary protective measures to avoid potential exposure, from the commencement of preparation for the project until acceptance by the Department of all final clearance inspections for the work area:
> "- DANGER - ASBESTOS - CANCER AND LUNG DISEASE HAZARD - AUTHORIZED PERSONNEL ONLY - RESPIRATORS AND PROTECTIVE CLOTHING ARE REQUIRED IN THIS AREA - . . . ."

Here, Ms. Sandberg observed no evidence of the safety equipment, materials, practices, and procedures required by Article XXI for asbestos removal or disposal. (HMT at 134-44, 152-55). Also, Ms. Sandberg and Mr. Yakubisin observed improperly bagged tile with no asbestos removal warnings posted in the vicinity. (*Id.* at 65; Ex. D1 at IMG_094). This tribunal thus finds that the ACHD proved by a preponderance of the evidence that Appellants failed to post warning signs.

7. Not maintaining air exchange and preventing contamination of the area outside of the worksite (Art. XXI § 2105.63.b.2)

Article XXI § 2105.63.b.2. prohibits the removal of ACM

> "[. . .] unless:
>
> [...]
>
> 2. Negative air pressure is maintained in the work area, the air outside the work area remains uncontaminated by asbestos fibers, and negative air pressure equipment is utilized to provide, at a minimum, one (1) air change in the work area every 15 minutes, at all times, 24 hours per day, from the commencement of preparation for asbestos removal, encasement, or encapsulation until all requirements of this Part have been met."

Proper removal of tile depends on its condition and requires things like negative air pressure, "critical barriers" for containment, and covering surfaces and things in "6 mil poly." (HMT at 56).

During her inspections of the Subject Property, Ms. Sandberg observed and photographed evidence of attempts to remove mastic with a grinder. (HMT at 56, 568-69; Ex. D1 at IMG_027). But inspectors observed no evidence of the safety equipment, materials, practices, and procedures required by Article XXI for asbestos removal or disposal. (HMT at 134-44, 148-55). Based on this testimony and

evidence, this tribunal finds that the Department proved by a preponderance of the evidence that Appellants violated Article XXI § 2105.63.b.2.

8. Not sealing off openings at the worksite (Art. XXI § 2105.63.d.4)

Article XXI, Section 2105.63.d.4. prohibits the removal of ACM "unless . . . [a]ll openings, including but not limited to windows, corridors, doorways, skylights, ducts, and grilles are sealed off with minimum six mil plastic sheeting sealed with tape."

Here, Ms. Sandberg observed no evidence of the safety equipment, materials, practices, and procedures required by Article XXI for asbestos removal or disposal. (HMT at 134-44, 148-55). Additionally, inspectors observed water on a floor in part of Building 501—indicating a leaking roof and an unsealed worksite—in proximity to evidence that a circular grinder had been used to remove mastic. (HMT at 57-58; Ex. D1 at IMG_071). There were also several open ceiling hatches, and the depicted area was not "the only area that was exposed to the elements." (HMT at 57-58). Inspectors also observed an area where some of the removed tile had slid under a door. (*Id.* at 42; Ex. D1 at IMG_013). Finally, in an unsealed area, inspectors observed residual, suspected asbestos-containing insulation that was left over from attempts to remove it. (N.T. at 76-78). The Department proved by a preponderance of the evidence that Appellants failed to seal off openings at the worksite.

9. Not covering the floors and walls with six mil plastic (Art. XXI § 2105.63.d.5)

Article XXI, Section 2105.63.d.5. prohibits the removal of ACM unless all floors and walls "are covered with minimum six mil plastic sheeting sealed with

tape, all floors with a minimum of two layers of six mil plastic, so that plastic on floors overlaps the plastic on walls by a minimum of 12 inches."

At the Merits Hearing, Ms. Sandberg observed no evidence of the safety equipment, materials, practices, and procedures required by Article XXI for asbestos removal or disposal. (HMT at 134-44, 148-55). Additionally, the inspectors observed and photographed rooms, furniture, and material that did not have anything covering it and, therefore, was "potentially contaminated" with ACM fibers. (HMT at 45-48, 76-78, 562-65; Ex. D1 at IMG_024, IMG_097). This tribunal finds that the ACHD proved by a preponderance of the evidence that Appellants violated Article XXI § 2105.63.d.5.

10. Not using enclosure systems at the worksite (Art. XXI § 2105.63.e)

Article XXI, Section 2105.63.e. prohibits the removal of ACM without the installation, maintenance, and proper use of enclosure systems everywhere people "or equipment enter or exit the" worksite.

Here, Ms. Sandberg observed no evidence of the safety equipment, materials, practices, and procedures required by Article XXI for asbestos removal or disposal and found a mask that appeared to have been used, but was inadequate for asbestos removal. (HMT at 65, 134-44, 148-55; Ex. D1 at IMG_108). Additionally, in an unenclosed area, inspectors observed residual, suspected asbestos-containing insulation that was left over from attempts to remove it. (HMT at 76-78, 564-65; Ex. D1 at IMG_197). This tribunal finds that the Department proved by a preponderance of the evidence that Appellants violated Article XXI § 2105.63.e).

11. Not following proper removal and cleaning procedures (Art. XXI § 2105.63.f)

Unless ACHD has approved "the glovebag technique . . . as an alternative procedure," ACM removal must be done as follows:

> "1. All ACM to be removed, being removed, and having been removed, has been wetted and saturated to the substrate with an amended water solution, using low pressure equipment capable of providing a fine spray mist, and is kept wet and saturated until it can be containerized for disposal, except where an alternative procedure has been approved by the Department in advance due to special circumstances (e.g. live electrical equipment, materials previously coated with an encapsulant) which prohibit the adequate use of such wetting methods.
> 2. All ACM to be removed, being removed, and having been removed, is handled in such a manner so as to prevent the release of any fibers from such ACM during such removal and disposal.
> 3. All ACM is removed in manageable sections capable of containerization in six mil polyethylene bags and drums, and is so containerized at least once per eight (8) hour work shift.
> 4. All ACM is removed as intact sections or components and carefully lowered to the floor or containerized at elevated levels (e.g. on scaffolds) and carefully lowered to the ground, and no ACM removed from facility structures or components is dropped or thrown to the floor at any time.
> 5. Except where equivalent alternative procedures have been approved by the Department in advance, all ACM removed and asbestos-containing waste material is double-bagged in two (2) six-mil polyethylene bags which are securely sealed to prevent accidental opening and leakage, not overfilled, and placed in drums for transportation to an authorized landfill; all bags and drums are sealed prior to removal from the work area and labeled in accordance with the requirements of 40 CFR §61.150(a)(l)(iv) and (v).
> 6. All oversize components containing or covered with ACM, which are removed intact but do not fit into drums,

> are wrapped in at least two layers of six-mil polyethylene sheeting and securely sealed for transport to the landfill.
> 7. After completion of the removal of ACM, all surfaces from which the ACM has been removed are wet cleaned to remove all visible residue."

Here, Ms. Sandberg and Ms. Yakubisin observed that certain material at the Subject Property did not have anything covering it and, therefore, was "potentially contaminated" with ACM fibers. (HMT at 48; Ex. D1 at IMG_024). Similarly, the inspectors also observed a laboratory with "residual mastic" that had circular marks indicative of removal via a grinder and furniture not covered by plastic to prevent contamination from airborne material during removal. (HMT at 44-45). The inspectors also noted instances where carpet and scattered pieces of potentially asbestos-containing tile on the ground, indicating the removal of ACM without proper bagging. (HMT at 52-53). Finally, in an unsealed area, inspectors observed residual, suspected asbestos-containing insulation that was left over from attempts to remove it without following proper removal and cleaning techniques. (HMT at 76-78, 564-65; Ex. D1 at IMG_197).

Moreover, Mr. Yakubisin found and sampled from a wet-dry vacuum material that appeared to be "similar to the material found near the boiler and pipe insulation." (HMT at 78; Ex. D1 at IMG_218). That vacuum was not appropriate for ACM removal because it lacked the proper filtration and would have caused asbestos fibers to spread throughout the air. (HMT at 79). Based on this evidence and testimony, this tribunal finds that the ACHD proved by a preponderance of the evidence that Appellants violated Article XXI §2105.63.e.

12. Improper disposal of ACM (Art. XXI § 2105.63.l)

Article XXI, Section 2105.63.l. imposes the following requirements for ACM disposal:

> "1. All asbestos-containing materials, asbestos-containing waste materials, asbestos contaminated materials including, but not limited to, sealing tape and plastic, disposable clothing, respirator filters, mop heads, sponges, and rags, shall, at least once per eight (8) hour work shift and prior to removal from the work area, be placed in leaktight containers and properly sealed and labeled, for transportation to and disposal at approved landfills.
> 2. All such leaktight containers shall be labeled in accordance with the requirements of 40 CFR §61.150(a)(l)(iv) and (v).
> 3. Alternative forms of containerization may only be approved under the alternative procedures provisions of this Part and upon a satisfactory demonstration that they are equivalent in terms of asbestos containment.
> 4. Double-bagged material may be carefully removed from drums at the landfill site for disposal and the drums cleaned for re-use, provided the bags are intact.
> 5. Asbestos-containing waste materials with sharp-edged components (e.g. nails, screws, metal lath, tin sheeting) which may tear the double six mil polyethylene bags and sheeting, shall be placed into drums for disposal together with the drum.
> 6. Asbestos-containing waste materials which cannot be placed in leaktight containers, shall be adequately wetted, wrapped in two (2) layers of six mil polyethylene, securely sealed, and transported from the work site to the disposal site in an enclosed truck.
> 7. Asbestos-containing waste materials shall be placed on the ground at the disposal site, not pushed or thrown out of trucks.
> 8. All asbestos-containing waste materials shall be transported directly to the approved landfill. Temporary storage at any location outside the project work area for more than eight (8) hours is prohibited.
> 9. All disposal receipts, trip tickets, transportation manifests and/or other documentation of transportation and disposal of the asbestos-containing waste materials

> shall be maintained and shall be made available to the Department, upon request, for inspection and copying.
> 10. All asbestos waste transportation vehicles shall be licensed in accordance with Department Rules and Regulations, Article VIII, Solid Waste and Recycling Management, and shall comply with all applicable PA Dept. of Transportation regulations."

Here, Appellant VJ admitted to directing and causing people to dispose of ACM from Buildings #401 and #501 by placing it in black trash bags, putting the bags in pickup trucks, and then driving and disposing of the bags in Appellant VJ's residential dumpsters. (*ACHD's Motion to Admit Prior Admissions* Exhibit A).

Ms. Sandberg also observed someone enter the boiler room with "a broom and a dustpan" and "no protective gear." (HMT at 288). She tried to talk to him, but he did not speak English. (*Id.*). Additionally, the inspectors observed and photographed drains with suspected ACM in the boiler room of Building 501, indicating that ACM had been improperly put down the drain. (*Id.* at 65-66).

Furthermore, in an unsealed area, inspectors observed residual, suspected asbestos-containing insulation that was left over from attempts to remove it without following proper removal, cleaning, and disposal techniques and procedures. (*Id.* at 76-78). Finally, the Department did not receive from Appellants any manifest relating to the removal of ACM at the subject property. (*Id.* at 55). This tribunal finds that the Department proved by a preponderance of the evidence that Appellants violated Article XXI § 2105.63.1.

13. Violating the March 2, 2017 and March 7, 2017 Enforcement Orders

On March 2, 2017, and March 7, 2017, the ACHD issued Emergency/Enforcement Orders notifying Appellants of (1) what they had to do to comply, (2) the consequences of noncompliance, and (3) the possibility of monetary penalty. Despite this notice, all the evidence presented at the Ability to Pay Hearing and the Merits Hearing indicates that Appellants failed to comply with these Orders. (HMT at 98-102, 596; Exs. D2, D3).

Furthermore, Appellant VJ specifically admitted that, on or about February 28, 2017, after his workers in Building #501 were once again told to stop their unlawful abatement, he defied ACHD directives and (1) had floor grinders removed from Building 501; (2) tried to have two of the grinders returned to the rental company; (3) had two grinders cleaned before providing them to ACHD for testing and "concealed" that they were used to remove ACM; (4) had two other grinders cleaned and returned to the rental company without providing them to ACHD for testing; and (5) without telling ACHD, attempted to have the two returned grinders re-rented and specifically rented two different grinders and provided them to ACHD for testing. *(ACHD Motion to Admit Prior Admissions)*.

The testimony of and photographs taken by Ms. Sandberg further established and corroborated that Appellants' intentionally switched, concealed, and cleaned off equipment before providing it to ACHD for inspection and testing. (HMT at 59, 573-77; Ex. D1 at IMG_083, IMG_086, IMG_087, IMG_089). Based on this evidence, this

tribunal finds that the Department proved by a preponderance of the evidence that Appellants violated the March 2, 2017 and March 7, 2017 Enforcement Orders.

g. Factors in Calculating the Civil Penalty

Appellants devote the bulk of their brief to challenging how the ACHD calculated the civil penalty against them. Appellants argue that the manner in which the Department levied the civil penalty against Appellants was grossly disproportionate to Appellants' conduct at the Subject Property. The Department counters that it carefully applied its precise penalty calculation framework when assessing the amount of the civil penalty.

When the Department assesses a civil penalty under Article XXI, it considers ten factors: (1) The health effect of the pollutants; (2) the impact on the public; (3) the size of the appellant's business(es); (4) prior enforcement actions against appellant(s); (5) the severity of the violations; (6) the duration of the violations; (7) the willfulness of the violations; (8) any economic benefit gained by appellant(s) by skirting regulations; (9) the degree of appellant(s)' non-cooperation; and (10) the deterrence of future violations.

1. Health Effects of Pollutants

The first factor that the ACHD considers when assessing a civil penalty is the health effects of the pollutants at issue. Here, the Department's Penalty Calculation Guidance specifies that all hazardous air pollutants ("HAPS") are automatically ranked "2," which indicates the highest level of severity. (Ex. D7). The United States Environmental Protection Agency ("EPA") has designated asbestos as a

hazardous air pollutant, which the Department has incorporated into Article XXI. *See* 40 CFR § 61.01(a); Art. XXI § 2101.20.

The Department also justifies its penalty calculation here with guidance that "[a]sbestos is a known carcinogen" (Ex. D7) and testimony from Ms. Sandberg, an experienced asbestos abatement specialist, that asbestos exposure in humans can be fatal, causing such diseases as asbestosis and mesothelioma. (*ACHD Brief* at 39-40) (citing HMT at 67-69).

Appellants counter that the ACHD failed to justify the penalty because no one at the Merits Hearing testified as to the impact on the public or explanation of "Hap's [sic]; emissions point subject to NESHAP's [sic] or MACT standards; toxic substances[.]" (*Appellants' Brief* at 38). Appellants also argue that Ms. Sandberg's testimony should be discounted because she was not tendered as an expert. (*Id.*).

This tribunal finds that the ACHD justified its penalty calculation of "2" regarding the health effects of the asbestos at issue. Even though Ms. Sandberg was not tendered as an expert, her extensive training and experience as an air pollution control engineer who frequently dealt with asbestos issues carries significant weight. Additionally, the law is clear that both the EPA and the ACHD classify asbestos as a hazardous air pollutant. The ACHD has met its burden of proof.

2. Impact on the Public

The next factor the Department considered was public impact. In making the penalty calculation, Ms. Sandberg evaluated the following: (1) people working in a nearby building; (2) "people working in the same building where asbestos had been

disturbed;" and (3) that Appellants did not provide documentation regarding the disposal of the ACM, indicating that anyone at the dumpsite and anyone along the travel way to the dumpsite would have been exposed. (HMT at 445-47). Based on this, Ms. Sandberg calculated a penalty factor of "2" across all 29 violations included in the penalty calculation. (Ex. D7).

The Department also based its public impact penalty calculation here on Appellants' failure to post mandatory signs including ACM or ACM potential, and that Appellants actively sought more tenants for the Subject Property during abatement, thus risking further public exposure. (*ACHD Brief* at 18-21, 40-41).

Appellants retort that the ACHD failed to produce any testimony that many members of the public, and that the Subject Property "is isolated and far from the public." (*Appellants' Brief* at 39 (citing HMT at 633-36).

This tribunal holds that the ACHD has the better argument here. Asbestos is a known carcinogen and a Hazardous Air Pollutant under both EPA and ACHD regulations. (*See* Section IV(g)(1), above). And Appellants' failure to post proper signage concerning asbestos, along with numerous other violations of Article XXI, underscore the serious public health risk here. (*See* Section IV(f), above). The ACHD has met its burden of proof.

3. Size of the Appellant(s)

In calculating the size of Appellants' businesses and their number of employees, Ms. Sandburg considered the ownership of four companies (a window company, a hotel, Churchill, and Paradigm); (b) counting four employees at the

hotel; and (c) talking to people who said that they and others worked for the Jains, surmising that they had between 11-50 employees. (HMT at 161, 467). Consequently, Ms. Sandberg included a penalty factor of "2" across all twenty-nine violations included in the penalty calculation. (Ex. D7).

Appellants argue that a factor of "1" rather than "2" should be applied because the ACHD failed to "prove participation to even factor employees of VJ or RJ into their calculation. (*Appellants' Brief* at 51). Additionally, Appellants contend, "There is no evidence of any employees of Churchill, VJ, RJ or Paradigm, or for that matter, even the other alleged businesses." (*Id.*).

This tribunal finds that the Department has the better argument here. First, it was established at the Ability to Pay Hearing that VJ and RJ have ownership interests in Churchill, Paradigm, a hotel, and a window business. (ABT at 40, 49-50, 90). Second, Appellants' participation theory argument, which they used to explain why RJ and VJ should not be held individually liable, has no connection to the size of Appellants' businesses. That argument falls flat. The ACHD has met its burden of proof.

4. Prior Enforcement Actions

Both parties agree that there have been no prior enforcement actions against Appellants.

5. Severity of Violations

The "Severity of Violations" factor is determined by the extent to which a given limit is exceeded (HMT at 157; Ex. D7). The ACHD Penalty Policy specifically

details that an exceedance of over "50% of the mass standard" will result in a maximum penalty factor being applied, which in this case is "2." (Ex.D7). The triggering amount of ACM removed or disturbed under Article XXI is 160 square feet. Art. XXI §§ 2105.62(f)-(h).

Regarding the amount of ACM, Ms. Sandberg calculated that "more than 160,000 square feet of asbestos-containing floor tile" and that "10,000 linear feet of amosite" had been removed from the Subject Property. (HMT at 441; Ex. D7). The ACHD concludes, "Because that number greatly exceeded the 50% of 160 sq. ft. threshold, the maximum penalty factor of two was correctly applied." (*ACHD Brief* at 41-42).

Appellants argue that Ms. Sandberg should have assigned a "0" rather than a "2" because "[l]inear and square footage has no relation to a mass standard." (*Appellants' Brief* at 41-42). Additionally, Appellants argue that "there was no evidence that any Appellant removed asbestos." (*Id.*).

This tribunal finds that the Department has the better argument here. Ms. Sandberg employed a sound, by-the-book methodology when calculating the penalty here. She calculated the square footage and the ACM to assess the appropriate severity under the ACHD Penalty Policy. The ACHD has met its burden of proof.

6. Duration of Violations

The "Duration of Violation" factor in the ACHD's penalty calculation considers how far the conduct had advanced by the time it was stopped, essentially accounting for the reversibility of any damage done. (Ex. D7). Ms. Sandberg

considered how far Appellants had progressed in the process of removing ACM as well as the fact that the time to apply for a permit had long since passed. (HMT at 157-58).

The Department explains that in making this determination, Ms. Sandberg considered the "conservative" ten-day estimate she applied to the "number of violations" row. (*ACHD Brief* at 42). In the penalty calculation guidance, she elaborated that her decision was "[b]ased on the quantity of material observed to be disturbed and/or removed by Churchill, and the lack of permit application or asbestos survey submission to ACHD[.]" (Ex. D7) As such, the Department concludes that Ms. Sandberg properly applied a value of two for this factor for each violation, indicating that the "violation extended well beyond time when it could have been stopped or corrected [and was an] ongoing problem." (Ex. D7).

Appellants argue that the Department's calculation here is erroneous because Ms. Sandberg testified that she did not know the exact number of days that the violations occurred. (*Appellants' Brief* at 43 (citing HMT at 157-58, 161-62). Additionally, Appellants point out that there is "nothing in Exhibit D7 that stated how many days should be considered in the duration calculation." (*Appellants' Brief* at 43).

This tribunal finds that the Department has the better argument here. While Appellants are correct that Ms. Sandberg could not pinpoint the number of days on which the violations occurred, this tribunal finds her methodology reasonable based

on her first-hand experience in dealing with asbestos abatement at the Subject Property in this matter.

Furthermore, this tribunal has found Ms. Sandberg to be a credible witness and someone with a great deal of experience in dealing with enforcement of asbestos-related regulations. Pennsylvania law is clear that credibility and evidentiary weight are within this tribunal's discretion as the factfinder in this case. *See Birdsboro & Birdsboro Mun. Auth. v. Dept. of Envtl. Prot.*, 795 A.2d 444, 447-48 (Pa. Cmwlth. Ct. 2002) ("It is axiomatic that questions of resolving conflicts in the evidence, witness credibility, and evidentiary weight are properly within the exclusive discretion of the fact-finding agency."). The Department has met its burden of proof with respect to the duration of the violations.

7. Willfulness of Violations

The ACHD assigned Appellants a "2," the highest level of severity, for willfulness. The Department summarizes, "[D]espite the Emergency/Enforcement Order notifying them of (1) what they had to do to comply, (2) the consequences of noncompliance, and (3) the possibility of monetary penalty, and despite the Department mailing the Orders to Appellants and posting notices at the property, Appellants did not comply with the Emergency/Enforcement Orders. (*ACHD Brief* at 43 (citing HMT at 98-102; Exs. D2, D3, D6)).

The Department also points to Ms. Sandberg's investigation of the Subject Property regarding Appellants' actions: "The testimony of and photographs taken by Ms. Sandberg further established and corroborated that Appellants intentionally

switched, concealed, and cleaned off equipment before providing it to ACHD for inspection and testing. (*ACHD Brief* at 43 (citing HMT at 59-64, 573-77; Ex. D1)).

Furthermore, the Department points to Appellants' extensive experience in real estate. RJ has been working in real estate in the United States since 1993, and at the Ability to Pay Hearing, Appellants' accountant explained that VJ and RJ are "active real estate professionals." (ABT at 140, 239-41). The Department thus concludes, "[A]ny claims that Appellants were not aware of ACHD's asbestos regulations or did not knowingly violate them lack any credibility." (*ACHD Brief* at 44).

Appellants argue that the ACHD was wrong to assign them a "2" under the Penalty Calculation Guidance. (*Appellants' Brief* at 44). Specifically, Appellants assert, "No Appellant could be said to have known all the regulations, certainly not VJ or RJ." (*Id.* at 45). Also, regarding their businesses, Appellants emphasize that "VJ and RJ testified they are very small, their other businesses have little value and are family oriented." (*Id.* at 46 (citing ABT at 43-44, 56, 139, 192-96).

This tribunal holds that the ACHD has the better argument here. RJ and VJ are experienced real estate professionals. They knew, or should have known, what the relevant regulations are regarding asbestos. Appellants' argument that they could not have known all the regulations is an empty one. Ignorance of the law is no excuse. And VJ and RJ's testimony about the alleged smallness of their businesses is simply self-serving. The Department has met its burden of proof with respect to willfulness.

8. Economic Benefit

The Department has chosen to discount the value of its economic benefit calculation from the final penalty. (*ACHD Brief* at 4, 44).

9. Degree of Non-cooperation

The Department assigned Appellants a "3" under the Penalty Calculation Guidance, indicating "Defendant[s] abusive; refuses to cooperate." (Ex. D7). The Department argues that this assignment of a "3" was justified because in Ms. Sandberg's estimation, "Appellants were trying to obfuscate the investigation as part of their overall refusal to cooperate with the Emergency/Enforcement Orders." (*ACHD Brief* at 45). In support of their argument, the ACHD points to Ms. Sandberg's justification on the penalty calculation form, detailing Appellants' efforts to interfere with her investigation of the Subject Property:

> "The owners of the property continue to deny improperly removing the asbestos containing material from the Former Westinghouse Facility. On two occasions, the owners violated ACHD's enforcement order and asked employees to enter #501 to remove equipment that was used to grind ACM. The owners have refused to disclose the location of the ACM and were slow to allow inspectors to inspect equipment used to grind asbestos containing mastic. The owners have failed to submit a permit application and full asbestos survey as required by Article XXI. These facts lead ACHD to use the highest factor in calculating the penalty." (Ex. D7).

Appellants respond that Ms. Sandberg's calculation was erroneous because "[t]here is no testimony from any witness that spoke to or made any request of any Appellant." (*Appellants' Brief* at 47). They point out that Ms. Sandberg and Mr. Yakubisin never met or spoke with VJ or RJ. (*Id.* (citing HMT at 280-84, 571-75)).

Appellants further argue that they fully remediated the conditions at the Subject Property. (*Appellants' Brief* at 47 (citing HMT at 497-501, 599-600, 607)).

This tribunal holds that the ACHD has the better argument here. The record from the Merits Hearing is clear that Ms. Sandberg and Mr. Yakubisin (1) had to repeatedly request Appellants to have access to the equipment to inspect; (2) had to wait to get access to equipment provided to Appellants; and (3) that when Ms. Sandberg and Mr. Yakubisin finally got access to the equipment provided by the Appellants, the equipment was contaminated with mud and straw. (HMT at 160). Ms. Sandberg's penalty calculation notes support these findings and further detail Appellants' efforts to stymie the ACHD's investigation. The ACHD has met its burden of proof here.

10. Deterrence of Future Violations

Regarding deterrence of future violations, Ms. Sandberg assigned Appellants a "3," the most severe penalty level. (Ex. D7). At the hearing, Ms. Sandberg explained that the "Deterrence of Future Violations" factor is intended to "ensure that other members of the regulated community [...] understand that when these types of violations occur that they are serious and that they should be complied with." (HMT at 161).

The Department argues that a "3" was appropriate here because Ms. Sandberg considered the "high-profile nature of any development of the site, including development involving the illegal removal of hundreds of thousands of square feet of ACM." (*ACHD Brief* at 45-46). Essentially, the ACHD argues that the

egregiousness of Appellants' unlawful removal of asbestos coupled with the high level of publicity surrounding this matter warranted the most severe penalty.

Appellants assert that the ACHD's calculation here was erroneous because, "[t]here is no widespread knowledge of the violation," and no members of the public were called to testify." (*Appellants' Brief* at 49). Appellants also point out that an attorney for the Pittsburgh Post-Gazette attempted to participate in the Ability to Pay hearing, he was denied access. (*Id.*). Appellants conclude, "Thus, not only is there no evidence, there was apparently no real-world interest in these proceedings." (*Id.*).

This tribunal finds the ACHD has the better argument here. This was indeed a high-profile case that garnered significant public and media attention. And the evidence indicates that Appellants unlawfully removed hundreds of thousands of square feet of ACM, meriting the most severe penalty allowable here. (HMT at 161, Ex. D7).

Additionally, Appellants' "no real-world interest" line of reasoning is laughable. The fact that a leading regional newspaper like the Pittsburgh Post-Gazette wanted to participate in the Ability to Pay Hearing indicates that there was "real-world interest" in these proceedings. Furthermore, this tribunal closed the Ability to Pay hearing to the public at Appellants' request. Appellants' attempt to shield the proceedings from public view suggests there was (or is) public interest in this case. The ACHD has met its burden of proof here.

h. Recusal

Finally, this tribunal must address Appellants' longstanding recusal argument. Since the outset of this case, Appellants have filed numerous recusal motions. This tribunal has addressed this issue time and time again, and rejected them each time as lacking merit. (*See Churchill Community Development et al. v. Allegheny County Health Department (Civil Penalty)*, Docket no. ACHD-17-006) (December 20, 2017) at pp. 5-6)[7].

Appellants essentially repeat their same contentions in their brief here. Their two-pronged argument is: (1) That in the Raymond Sida matter, Mr. Slater "held that the Jains are liable," thus rendering him conflicted; and (2) That Mr. Slater commingled prosecutorial and adjudicatory functions because he "sought and gave advice and obtained direction from ACHD employees, attorneys and Dr. Erika Hacker[8]." (*Appellants' Brief* at 61).

Regarding the Raymond Sida matter, this tribunal did not hold that the Jains were liable for anything. The Jains were not even parties to that case. This tribunal merely dismissed the appeal because the ACHD decided not to pursue its case. There was nothing substantive for this tribunal to decide.

As to Appellants' allegation that this tribunal "sought and gave advice and obtained direction from ACHD employees, attorneys, and Dr. Erika Hacker," this

[7] Available at Churchill-Inability-to-Pay-Administrative-Decision.pdf (alleghenycounty.us).

[8] To this tribunal's knowledge, no one named Dr. Erika Hacker has ever worked for the ACHD. Perhaps they're referring to Dr. Karen Hacker, who served as the Director in the mid-2010s?

tribunal did none of those things. Appellants are pulling those contentions out of thin air. Appellants' recusal argument is baseless.

V. CONCLUSION

After reviewing the testimony and evidence from the Ability to Pay Hearing and the Merits Hearing, the briefs submitted by the parties, and the relevant statutes, regulations, and case law, this tribunal finds that the Allegheny County Health Department met its burden of proving by a preponderance of the evidence that the civil penalty it issued against Appellants is justified. Appellants have thirty (30) days from the date of this Order to pay $1,091,675 to the Allegheny County Health Department Clean Air Fund. Appellants' Appeal in this matter is hereby **DISMISSED**. This administrative decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.

Max Slater, Esq.[9]
Administrative Hearing Officer
Allegheny County Health Department

January 12, 2023
Dated:

[9] Max Slater, Esq. currently is a full-time employee of the Commonwealth of Pennsylvania, Department of Human Services. However, he was employed as the Hearing Officer of the Allegheny County Health Department at the time of both the 2017 Prepayment Hearing and the 2022 Merits Hearing in this matter. Mr. Slater has received written permission from the Commonwealth of Pennsylvania to adjudicate the present matter.