

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of NEW
YORK CITY COALITION TO END LEAD
POISONING, *et al.*

Petitioners-Plaintiffs-Respondents,

for a Judgment pursuant to Article 78
and § 3001 of the Civil Practice Law and
Rules

-against-

PETER VALLONE, as Speaker of the New
York City Council; *et al.*

Respondents-Defendants-Appellants.

New York County
Clerk's Index No.
120911/99

**REPLY AFFIDAVIT OF MARTIN RUTSTEIN, PH.D.,
IN SUPPORT OF PETITIONERS' CROSS-MOTION FOR A VACATUR OF
AUTOMATIC STAY, IF NECESSARY**

State of New York)
 :ss.:
County of Orange)

MARTIN RUTSTEIN, Ph.D., being duly sworn, states as follows
under oath:

1. I make this reply affidavit in further support of
petitioners' cross-motion to vacate any automatic stay, if
necessary, of the Judgment entered below on February 22, 2001.
This affirmation is based upon my own personal knowledge.

2. I previously submitted an affidavit on March 27, 2001,
in the initial cross-motion papers, and my credentials are stated
therein.

3. I have reviewed the April 17, 2001, Reply Affidavit of
Dr. Jessica Leighton, annexed to appellants' reply papers on their
motion. Dr. Leighton's characterization of the 1.0 mg/cm² standard

as being the "nationally accepted standard," while not inaccurate, is essentially meaningless to the issues here, and is indicative that the City's thinking on these issues is many years out of date with current science and technology. My prior affidavit discussed present day technology, not what was out there ten years ago. By analogy, I can buy an old dilapidated pickup truck that will get me from here to there, or I can get a modern vehicle that will get me there much more safely, quickly, and comfortably. But the limitations of the former should hardly be used for setting the standards for what is achievable today.

4. The 1.0 mg/cm² so-called "standard" was selected years ago based on the limited capabilities of XRF machines at the time, primarily the Princeton Gamma-Tech (PGT) machines that were in widely used then (including by New York City Department of Health). We are now on our fourth generation of XRF instruments.

5. The first generation of XRF instruments were used primarily in the petroleum and mining industries, in the 1970s and 1980s, to detect a variety of metals. With the growing need to have the capacity to detect lead in the field for health purposes, these instruments were adapted to test selectively for lead (as opposed to other elements). The second generation, represented by instruments such as the Princeton Gamma Tech (formerly used by the Health Department for many years), Warrington, and others, were "direct read" instruments, which required manual substrate

correction (i.e., physically removing a sample of paint to get a baseline reading of the underlying surface material).

6. While this second generation of instruments were good, they were not excellent, and there were problems of precision and accuracy, especially with regard to removing or not removing the substrate. As a result, manufacturers, such as Scitec and RMD, developed a third generation of instruments that read both the K and L shells of the atomic structure of lead-in-paint, and via software enhancements eliminated the need to do substrate correction by manually removing paint. These instruments were examined very critically by the federal EPA in a report issued in 1995 ("A Field Test of Lead-Based Paint Testing Technologies," May 1995, EPA 747-R-95-002b). Among the conclusions was that instruments, such as Niton, that used only L shell readings were not sufficiently accurate or precise.

7. Based on that study, the industry set out to do develop yet another generation of enhanced instruments. The Niton is an example of where the software and design have greatly improved, and the present fourth generation of XRF instruments can discern lead levels much more rigorously than any of the prior generations.

8. One can use these modern instruments to take extremely precise readings just by watching the readout screen and running the device for a longer period to improve accuracy and precision; the screen will display the error rate as it diminishes. As I noted in my prior affidavit, these devices have not only been

validated by rigorous scientific testing, but are in fact capable of measuring down to the level of 0.1 mg/cm² within an accuracy of a few percent.

9. Regardless of Dr. Leighton's contentions that 0.7 mg/cm² is technically difficult to enforce – contentions which (for the reasons set out in my prior affidavit) I believe lack merit – the fact remains that raising the limit of permissible lead content in paint, as LL 38 did, from 0.7 mg/cm² to 1.0 mg/cm², effectively means that the permissible level of lead was raised by nearly 50%. This permits numerous situations where lead paint exists to escape regulatory control by arbitrarily classifying it as “lead free”, even though it might not be “lead safe”. There are undeniably adverse health impacts that arise from allowing children to remain in the presence of such conditions, unregulated because of LL 38. One such obvious example is a window or door friction surface that is continually releasing lead into the ambient environment.

10. Dr. Leighton's arguments regarding lead chip samples (which generally are taken to measure lead as a percent-by-weight) are hardly compelling. For one thing, if paint chip sampling is performed correctly, in accordance with HUD's *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing* (Chapter 7)(1995, revised in 1997), there is no hazard, and no professional who collects samples should do otherwise. Secondly, as I understand it, in 1995 the Supreme Court in NYCCELP v. Giuliani declared that a contestation of a presumed LL 1 violation

