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

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

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.,

Defendants-Appellants.

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**AFFIDAVIT OF JESSICA LEIGHTON IN FURTHER SUPPORT OF DEFENDANTS' MOTION, AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION**

New York County Index
No. 120911/99

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

**JESSICA LEIGHTON**, **Ph. D,** being duly sworn, deposes and says:

1. I am the Assistant Commissioner for Environmental Risk Assessment and Communication at the City of New York's Department of Health ("DOH"). I hold a doctorate in Epidemiology and a Masters in Public Health from Columbia University. I have been employed by DOH since 1989. My responsibilities within DOH include supervision of DOH's Lead Poisoning Prevention Program ("LPPP"). I am fully familiar with the facts and circumstances stated herein based upon personal knowledge and upon conversations with DOH and City

employees. I submit this affidavit in further support of defendants' motion, and in opposition to plaintiffs' cross-motion.

2. As I stated in my prior affidavit, maintaining the status quo during the appeal process is critical to continuing the success of declining numbers of children with elevated blood lead levels. I previously discussed the testing and poisoning rates for 1999 and 2000 (the first full year that Local Law 38 was in effect), and noted that in 2000 there had been a significant decrease in the number of children with elevated lead levels of 20 micrograms per deciliter (mcg/dL) or greater in New York City. (In 1999, there were 707 children 6 months to 6 years of age reported with an elevated blood lead level of 20 mcg/dL or above, and in 2000, there were 536, a decline of 24%.) This occurred during the same time period that the number of children 6 months to 6 years of age tested for lead poisoning increased. (In 1999, 296,726 children were tested, and in 2000, 318,907 children were tested, an increase of 7%.)[1] In 1998, there were 944 children 6 months to 6 years of age with elevated lead of 20 mcg/dL; the same year, 306,410 children 6 months to 6 years of age were tested for elevated blood lead levels.

3. An analysis of these three years of data reveal that the percent decline in the rate of children with blood lead levels of 20 mcg/dL or greater (the number of children 6 months to 6 years with elevated blood lead levels divided by the number of children 6 months to 6 years tested in the same year) was 23% from 1998 to 1999. The percent decline in the rate was even greater, 29%, from 1999 to 2000.

[1] Although not scientifically validated, DOH's Lead Poisoning Prevention Program believes that the increased testing rate in the year 2000 may be due, in part, to Local Law 38's mandate that owners of multiple dwellings deliver to occupants (upon commencement of occupancy) the DOH pamphlet on Local Law 38 and lead paint poisoning and that owners send notices annually to tenants asking if children under the age of six are residing in a tenant's apartment. The DOH pamphlet includes a section about testing for elevated blood lead levels, and a phone number to call "for information on how and where to get [children] screened, tested, diagnosed or treated, if necessary, for lead." A copy of the pamphlet is attached to the defendants' moving papers as Exhibit I.

4. As Dr. Evelyn A. Maus points out in her affidavit at paragraph 6, I previously stated that there are a variety of factors that explain the dramatic decline since 1970 in the incidence of lead poisoning. See P.Ex. 119 at 542. That statement is as true today as it was several years ago. It is nonetheless impressive that there has been a 9% decrease from 1999 to 2000 in the number of children 6 months to 6 years with elevated blood lead levels. This decrease occurred even with a 7% increase in testing, which would likely result in the identification of more children with elevated blood lead levels. (Moreover, these statistics certainly indicate that the Local Law 38 disaster scenarios painted by plaintiffs has not resulted in an increased incidence of lead poisoning.) Most importantly, however, Dr. Maus completely fails to address -- much less controvert -- one of the most critical issues presented in defendants' motion: if the regulatory framework to address lead paint hazards is repeatedly changed, those who will suffer the most are young children.

5. I have also reviewed the affidavit of Martin Rutstein, Ph. D., which plaintiffs submitted to support the proposition that X-Ray fluorescence ("XRF") machines are technologically capable of detecting lead paint at 0.7 $mg/cm^2$ level. Plaintiffs and Dr. Rutstein conveniently fail to address the chief concerns I previously expressed if the City were forced to adopt Local Law 1's antiquated definition of lead paint a 0.7 $mg/cm^2$ or at least 0.5% of lead by weight in comparison to Local Law 38's nationally accepted standard of 1.0 $mg/cm^2$. Specifically, the 1.0 $mg/cm^2$ standard is based on scientific testing. While precision and accuracy studies were conducted at various levels, inconclusive ranges were established only at the 1.0 $mg/cm^2$ standard. A complete description of this testing process is included in the affidavit of my predecessor, Dr. Susan Klitzman, which was submitted in the NYCCELP v. Giuliani case, a copy of which is attached as Exhibit F. In that affidavit, Dr. Klitzman stated:

> To my knowledge, no standardization or validation study has been conducted for any XRF instrument currently available to evaluate readings at the 0.7 mg/cm$^2$ threshold. As a result, tests at a standard other than 1.0 mg/cm$^2$ are more vulnerable to challenge.

Id. at ¶ 18 (emphasis added). Neither plaintiffs nor Dr. Rutstein indicate that there has been any validation study for the 0.7 mg/cm$^2$ standard.

6. Most significantly, neither plaintiffs nor Dr. Rutstein dispute that relying on a 0.7 mg/cm$^2$ standard will result in an increased number of owners that contest LPPP XRF test results, which will further delay timely abatement, to the detriment of children with elevated lead levels. Nor do plaintiffs or Dr. Rutstein dispute that under Local Law 1's lead paint definition, owners may challenge LPPP test results by collecting lead paint chip samples for laboratory analysis, and that the process of collecting paint chip samples, where intact surfaces are disturbed, will create lead hazards where none existed, to the detriment of children. Finally, while Dr. Rutstein argues that the 0.7 mg/cm$^2$ standard is technologically feasible, plaintiffs apparently concur with the wisdom of the 1.0 mg/cm$^2$ standard, since they supported legislation, Intro. 205, that proposed that this standard be adopted. See DR.Ex. B (Intro. 205 at p. 5, §27-2056.2(3)).

7. I have also reviewed the affidavit of Mary Gearhart, the mother of a one-year old son. Ms. Gearhart apparently believes that New York City's "code enforcement agencies" cannot "respond to hazardous lead dust situations before [her] child is irreparably harmed by lead dust." Gearhart Aff. ¶ 12; see also id. at ¶¶ 5 & 11. Ms. Gearhart is mistaken. Specifically, the LPPP Lead Abatement Safety Unit ("LASU") responds to precisely the type of conditions of which Ms. Gearhart complains.[2] Pursuant to NYC Health Code §§ 3.09 & 173.15, LASU

[2] According to the LPPP records, in November 2000 the LPPP mailed various brochures to Ms. Gearhart, including DOH's "Guide to New York City Local Law 38 of 1999." The "Where to Get Help" section of this pamphlet contains a description of LASU, and its phone number. See D.Ex. I. On February 28, 2001, nearly three months after these materials were sent, Mr. Gearhart

investigates complaints of unsafe lead paint work practices in, among other places, tenants' apartments, one and two family homes and in common areas such as hallways.

8. Finally, plaintiffs apparently dismiss the concerns I set forth in my prior affidavit, at paragraphs 9 and 10, about the dangers of abating intact lead paint and the burdens LPPP would face if ordered to inspect every intact paint surface. See Pls.' Br. at 33, n. 30.[3] Plaintiffs biggest concern appears to be situations where children are repeatedly poisoned, id.; their solution to this very real problem is to require complete abatement in every case of a lead poisoned child. The LPPP's experience, however, is that repeat poisonings are relatively infrequent. Moreover, the danger of these extreme cases driving public health policy is apparent; requiring abatement of all intact surfaces in every instance could, in fact, lead to an increase in lead poisoning for the reasons set forth supra note 3.

9. For the foregoing reasons and those detailed in my prior affidavit, it is respectfully requested that the defendants' motion be granted, and the plaintiffs' cross-motion be denied.

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complained about dust in the hallway of her building. LASU inspected the public areas in Ms. Gearhart's building later that day and on March 5, 2001. The February 28th inspection indicated that "No active work is taking place. Observed no dust or debris hazard at time of inspection. Renovations are taking place in several apartments. Observed plastic air locks on the doors of these apartments." Similarly, the March 5th inspection indicated that "Work was not active at time of inspection. Did not observe any lead or dust hazard at time of inspection." Attached as Exhibit G are copies of the two inspection reports.

[3] Plaintiffs insist that every surface must be inspected in a unit where a child with an elevated blood lead level resides, yet fail to address the dangers of requiring abatement of intact lead paint that would lead to an increase in lead poisoning cases. As noted in my prior affidavit, owners who receive a Commissioner's Order to Abate all intact lead paint will face costs that could easily reach $15,000 to $20,000 per apartment unit. For a variety of reasons -- lack of EPA certified workers, lack of funds or an unwillingness to pay such bills -- many abatements would not be performed in a timely or safe manner. Most troubling, however, is that it is likely that real lead paint hazards (involving deteriorated paint in units where children reside) will not be corrected in a timely and safe manner, to the detriment of children.

JESSICA LEIGHTON, Ph.D.

Sworn to me this
__ day of __, 2001

Notary Public