EXHIBIT
A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Sumeya Mohamed, Rukia Bile, Abdirisaq Sheikh, Ubah Shire, Paul Stoderl, and Sharon Martin, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

Marquette Management, Inc., G&I X Phoenix Apartments LLC, and Kelly Delisle,

Defendants.

Court No.: 23-cv-1740 (JRT/JFD)

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

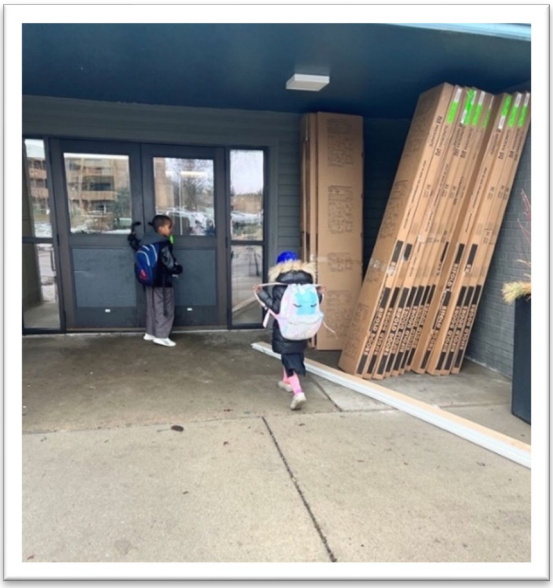
The tenants and tenant families who live at The Haven of Battle Creek ("Haven") apartment complex in Saint Paul urgently need the Court's help in safeguarding their physical health and safety from the risk of catastrophic asbestos disease created by Defendants' egregious violations of state and federal asbestos law.

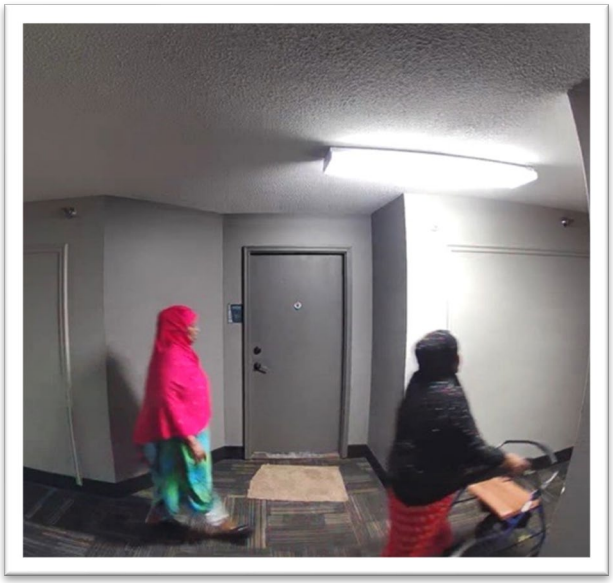
Defendants are now three years into a five-year plan to renovate all the common areas and most of the apartments at the 216-unit complex pursuant to an "investment strategy" in which Defendants openly admit that the purpose of the renovation is to "drive [up] rents" and "improve the renter profile" so that they can re-sell the property at the end of the five-year period for an anticipated $11 million gross profit. (Poradek Ex. 1, at 19.)[1]

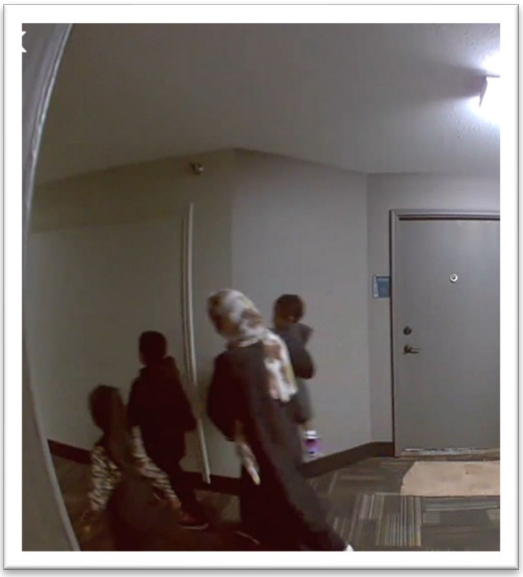
> **INVESTMENT STRATEGY** The Haven of Battle Creek (formerly known as Phoenix Apartments) was developed in 1976. In May 2021, Marquette acquired the property in a joint venture with DRA Advisors and has underwritten a five-year hold period. The opportunity to realize value type returns exists on the following levels:
>
> *Interior Value-Add* – The majority of the unit interiors are in original condition or were updated many years ago. Marquette will update all of the units with stainless-steel appliances, quartz countertops, vinyl plank flooring, and other upgrades to the kitchens, baths, and common areas. In addition to the operational improvements, these interior upgrades will allow Marquette to drive rents and improve the renter profile.

[1] In this brief, all exhibits are attached to the Declaration of James Poradek and cited as "Poradek Ex. __." References to statements in the Declarations of Sumeya Mohamed, Sharon Martin, Alex Dybsky, and Greg Myers are cited as "Mohamed ¶ __," "Martin ¶ __," "Dybsky ¶__," and "Myers ¶ __" respectively.

The undesirable "renter profile" that Defendants seek to "improve" at Haven as a core element of its multimillion-dollar real estate flipping project is in fact a racially diverse tenant population notable for its large number of multigenerational Somali families and Section 8 voucher holders, including many children and senior citizens. It is these Haven tenants whom Defendants have targeted not only for displacement but for incredibly dangerous renovation and maintenance activities that disturb known and suspect asbestos-containing materials throughout the complex. The tenants pictured below are just a few of the Haven residents who have been placed at extreme danger of asbestos exposure by Defendants' unlawful renovation and maintenance activities:







It is well-known today that airborne asbestos is extremely toxic and can cause fatal illness decades after inhalation. As the Minnesota Department of Health has unequivocally warned: "**No amount of asbestos is considered safe. . . . All of the asbestos diseases are difficult to treat. Most are impossible to cure. Stopping asbestos fibers from ever entering your lungs is important. The only cure for most asbestos diseases is to prevent them.**"[2] This grave public health concern is the foundation for federal and state regulatory frameworks designed to prevent asbestos diseases by minimizing the risk of asbestos inhalation by workers and residents during renovation and maintenance—particularly in pre-1981 buildings like Haven where asbestos is highly likely to be present throughout the floor, wall, and ceiling materials. These asbestos laws impose affirmative building material inspection and testing duties on building owners even before renovation and maintenance activities begin. They also

[2]https://www.health.state.mn.us/communities/environment/asbestos/homeowner/heffects.html. In this brief, boldfaced type adds emphasis that was not present in the original text unless otherwise noted.

impose comprehensive workplace safety, notification, and documentation duties on building owners when known, suspect, or presumed asbestos-containing material is likely to be disturbed by those activities.

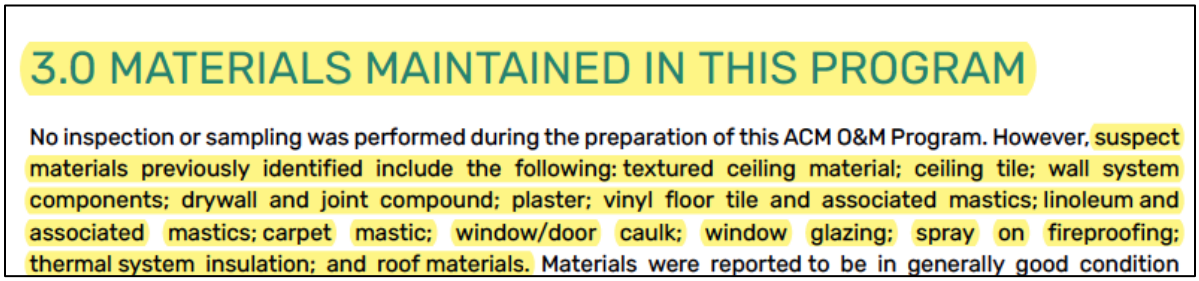
Defendants are fully aware of these laws and that compliance is crucial to the health and safety of Haven tenants. In fact, their investment partner, New York City private equity firm DRA Advisors, retained the environmental consultant Nova Consulting Group to design an "Asbestos Containing Materials Operations and Maintenance Program" for Haven ("Haven Asbestos O&M Program") that "**describes the policies, required procedures, and work practices established for the management of suspect asbestos-containing materials (ACMs)**." (Poradek Ex. 2, at HAVEN000047.) The Haven Asbestos O&M Program expressly acknowledges that **"The facility is subject to Occupational Safety and Health Administration (OSHA), United States Environmental Protection Agency (USEPA), and the State of MN asbestos-related rules and regulations**." (*Id.*) And it expressly explains that the Program "provides a level of assurance that the most prudent steps are being taken to minimize . . . the potential for asbestos exposure" by setting forth "evidence of **the corporation's awareness of the liabilities**" and "**the necessary steps to minimize exposure potential**":

> The O&M Program, when implemented, provides a level of assurance that the most prudent steps are being taken to minimize, and in some instances eliminate, the potential for asbestos exposure for facility employees, tenants, maintenance personnel, vendors, and the general public. Through this directive the O&M Program becomes a document that provides evidence of the corporation's awareness of the liabilities and outlines the necessary steps to minimize exposure potential.

(*Id.*)

Shockingly, however, Defendants have ignored their own Asbestos O&M Program and the asbestos laws on which it is founded since they took over Haven in May 2021. The Haven Asbestos O&M Program mandates as a first principle that "**No known or suspect ACM or PACM [presumed asbestos-containing material] shall be disturbed or involved in any work, in any way, prior to laboratory analysis for asbestos content.**" (*Id.* at HAVEN000050.)

The Haven Asbestos O&M Program then identifies an array of "Materials Maintained in this Program" and warns that "suspect ACM or PACM" permeates virtually every building surface at Haven, including "textured ceiling tile," "drywall," "plaster," "vinyl floor tile and associated mastics," and "carpet mastic."



3.0 MATERIALS MAINTAINED IN THIS PROGRAM

No inspection or sampling was performed during the preparation of this ACM O&M Program. However, suspect materials previously identified include the following: textured ceiling material; ceiling tile; wall system components; drywall and joint compound; plaster; vinyl floor tile and associated mastics; linoleum and associated mastics; carpet mastic; window/door caulk; window glazing; spray on fireproofing; thermal system insulation; and roof materials. Materials were reported to be in generally good condition

(*Id.*) In fact, an earlier study of the property by Nova Consulting that Defendants have long possessed expressly warns that "**asbestos was detected in textured ceiling plaster from apartment units and hallways**":

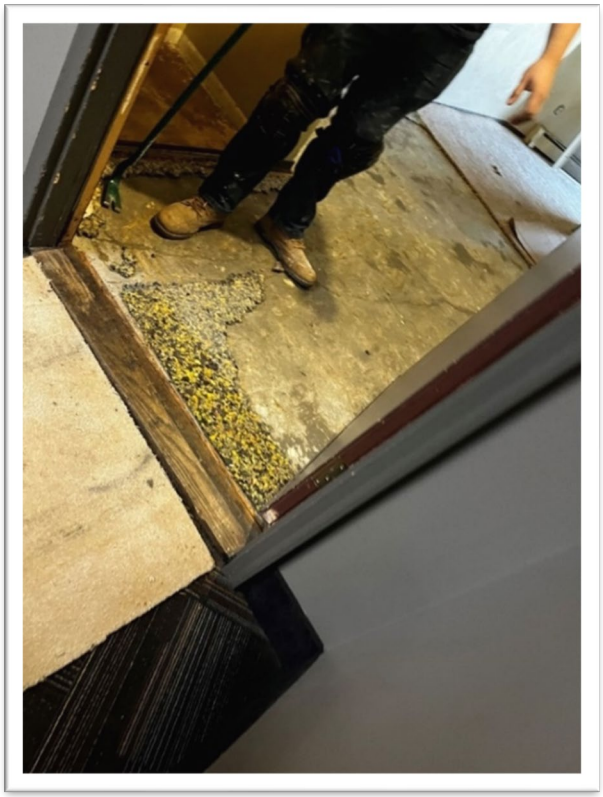
> **4.9 Asbestos-Containing Building Materials (ACBM)**
>
> Historically suspect asbestos-containing building materials noted during the Property visit included flooring and mastic, ceiling tile, textured ceiling plaster, sheetrock and taping compound, and roofing materials. The roof was not observed during Nova's reconnaissance. Prior sampling and testing for asbestos was completed in 1996 and asbestos was detected in textured ceiling plaster from apartment units and hallways. These materials were generally in good condition at the time of Nova's site reconnaissance. Reportedly, an Operations and Maintenance Plan (O&M) was prepared for the Property in 1996. The current site manager, Lea Gilson, was unaware of an O&M Plan in place at the property.
>
> Prior to demolition or renovation activities, previously untested suspect asbestos-containing materials, if identified, that are likely to be impacted should be sampled by a licensed asbestos inspector and analyzed by an accredited laboratory.

(Poradek Ex. 3, at 13.)

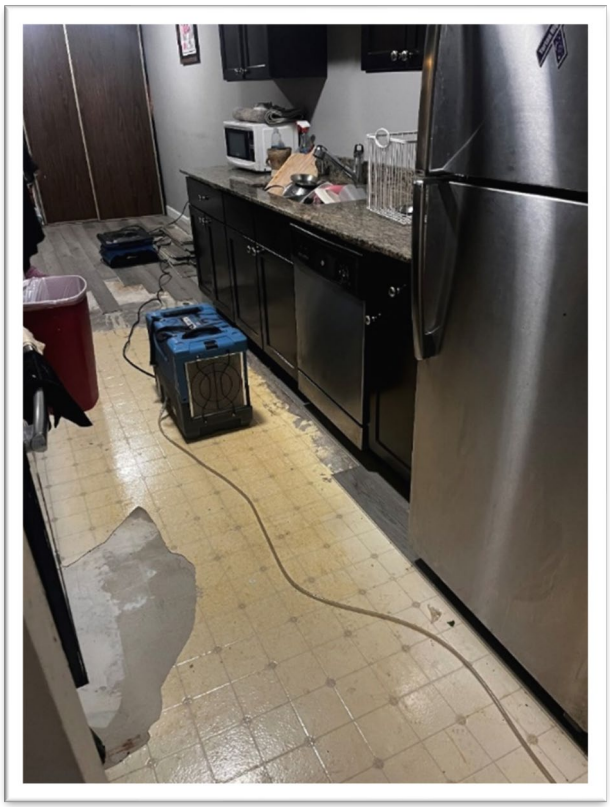
Yet the undisputed evidence is that since 2021 Defendants have systematically violated asbestos safety laws and ignored the "no disturbance" directive of their own Haven Asbestos O&M Program by disturbing and frequently **demolishing** massive quantities of suspect ACM and PACM materials throughout Haven. Defendants are in the middle of a multimillion-dollar renovation project that has included the demolition and full interior renovations of dozens of units, an entire wall in the pool room, full renovation of the exercise room and other common areas, roof and siding repairs, and replacement of electrical panels in all 216 units.

During this renovation, Defendants have exposed Haven tenants to unacceptable asbestos inhalation risk. As shown in the photos below and explained at length in the attached declarations, Defendants have ripped up vinyl flooring, destroyed drywall, and cut open and abraded the textured ceilings where "asbestos was detected" in "apartment units and hallways." Defendants have then carted uncontained demolished suspect ACM

through the hallways and elevators of the complex and surreptitiously loaded them into vans to be transported outside of Haven and exposed to the general public.

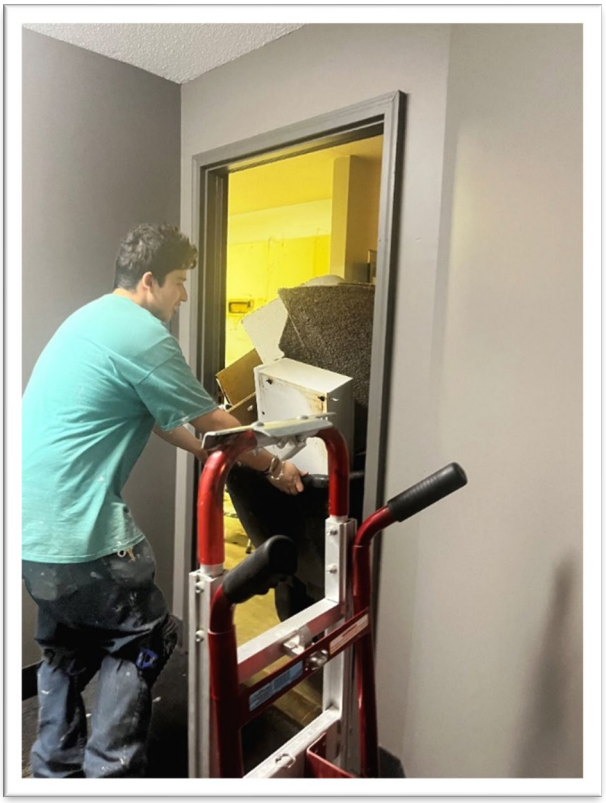


Removing suspect ACM flooring mastic.



Removing presumed ACM vinyl flooring.

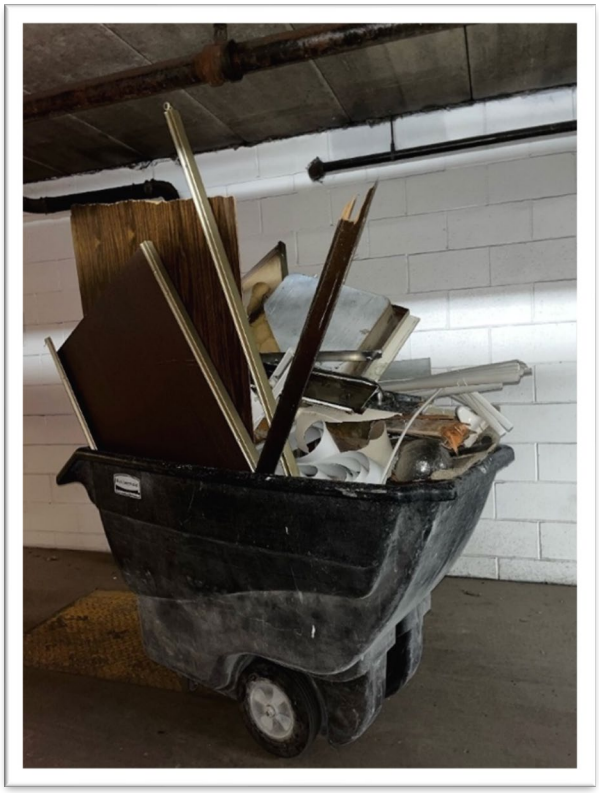
Removing presumed ACM textured ceiling.



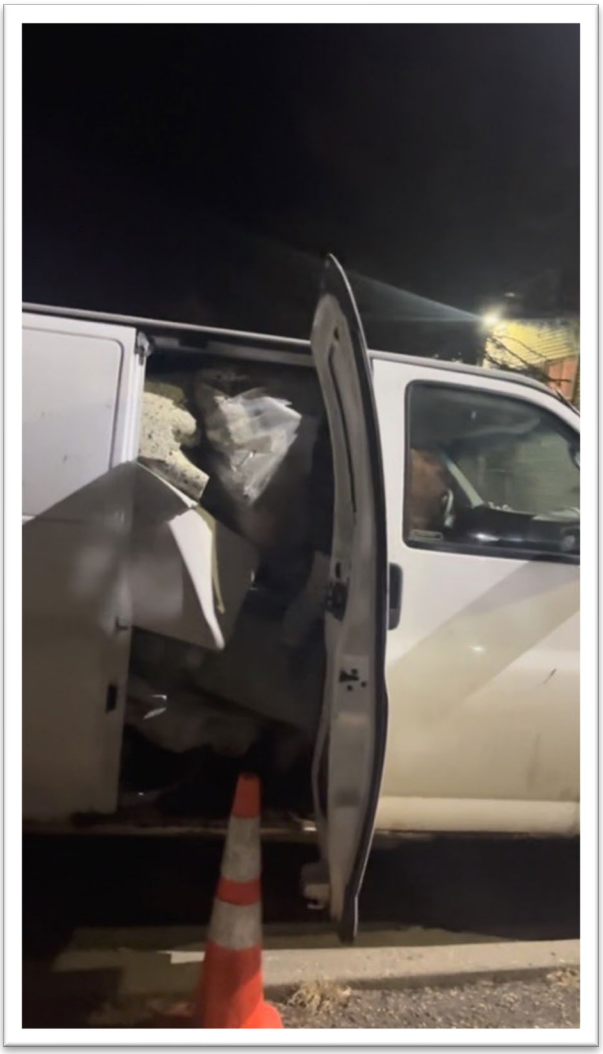
Removing demolition material after disturbance of suspect and presumed ACM drywall.

Carting uncovered suspect ACM drywall in hallways.

Carting uncovered demolition material in hallways after disturbance of suspect and presumed ACM.



Carting uncovered presumed ACM vinyl flooring and demolition material through complex.

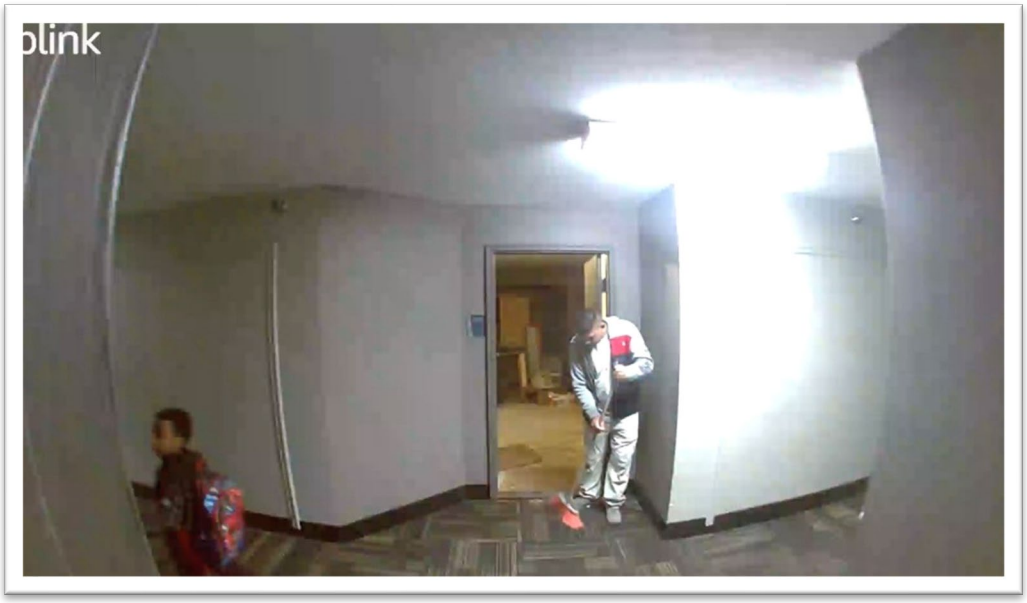


Transporting uncovered demolition material from Haven via private vans to unknown disposal sites.

Even worse, in disturbing and demolishing these massive quantities of suspect and presumed ACM and PACM, Defendants have ignored the asbestos worksite protections required by asbestos safety laws. *See* 29 C.F.R. § 1926.1101(g), (k), (l); 40 C.F.R. §§ 61.145, .150. Defendants have not comprehensively tested for asbestos prior to disturbing or destroying suspect materials. They have not informed tenants or contractors about the asbestos risk. They have not hired contractors who know how to safely handle

suspect materials. They have not displayed required warning signs. They have not isolated areas under renovation from the rest of the building. They have not wetted or otherwise encapsulated suspect materials prior to destruction. And they do not contain demolished suspect materials before moving them through the hallways, elevators, garages, and outside Haven and into the public realm.

In short, Defendants have exposed every resident at Haven to an unconscionable risk of asbestos inhalation, grimly symbolized by the following image of a young Haven tenant walking in front a worker sweeping around—and sending airborne—suspect asbestos dust knocked loose by Defendants' illegal renovation:



This is exactly the toxic exposure that the asbestos laws and Defendants' own Haven Asbestos O&M Program were designed to prevent. It is now clear that people who live at Haven are facing the most serious form of irreparable harm. The Plaintiffs in this case have demanded for eighteen months that Defendants provide documentation demonstrating that they are not violating asbestos law. But all that Defendants have given

in return are the Haven Asbestos O&M Program that Defendants have **ignored** and a handful of laboratory test results that represent a fractional percentage of the testing Defendants would have commissioned if they were attempting to follow asbestos safety requirements.

After Plaintiffs threatened to move for a TRO in December 2023, Defendants stated that they were "committed to complying with the law, and to ensuring that any and all activity occurring at Haven is safe and legal" and agreed to suspend renovation at Haven—but only on the condition that they can resume full renovation on 48-hours' notice. (Poradek Ex. 4, at 1; Ex. 5, at 3.) As the Supreme Court has made clear, however, "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate [litigation], and there is probability of resumption." *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952). And as the Eighth Circuit has also emphasized, "the very existence of improper conduct in the past raises an inference that such conduct will continue in the future even though the improper conduct has been [allegedly] discontinued." *Sec. & Exch. Comm'n v. First Am. Bank & Tr. Co.*, 481 F.2d 673, 682 (8th Cir. 1973).

Given the severity of the threat of irreparable harm coupled with Defendants' abject history of asbestos safety violations during three years of renovation and maintenance at Haven, neither the residents nor the Court can trust Defendants' "protestations of repentance and reform." *Oregon State*, 343 U.S. at 333. "When defendants are shown to have settled into a continuing practice . . . violative of

[governing] laws, courts will not assume that it has been abandoned without clear proof." *Id.* With two years of renovation left in Defendants' five-year real estate flipping strategy, the financial stakes are simply too great for them and their investors to believe they have halted unlawful renovations at Haven for good. To the contrary, there is extensive evidence that Defendants continue **today** to violate asbestos law and their Asbestos O&M Program when performing maintenance and apartment turnover in a building that suffers from repeated leakages and flooding from pipe breakage, all of which require repairs of the textured ceilings, drywall, and flooring that form the primary source of known and suspect ACM and PACM at Haven.

For these reasons, tenants respectfully request the Court issue a preliminary injunction that orders Defendants to comply with asbestos law and appoints an interim administrator to ensure that Defendants truly comply with their own asbestos-safety protocols at Haven.

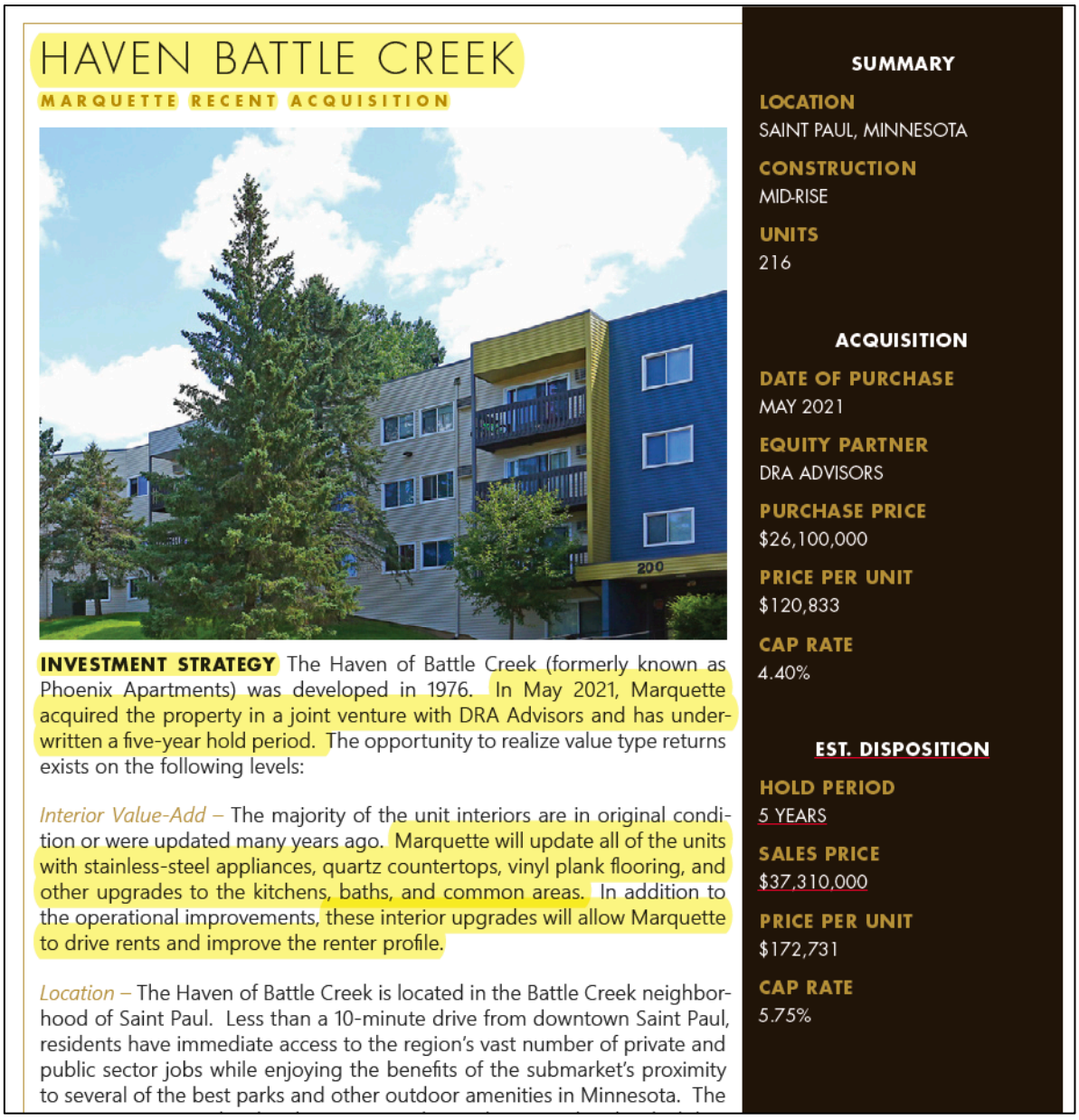
FACTUAL AND LEGAL BACKGROUND

A. Defendants Engage in Unlawful Renovation to "Improve the Renter Profile," Increase Rents, and Flip the Property at a High Profit.

Haven is a 216-unit rental-apartment complex developed in 1976 and located in the Battle Creek neighborhood on the East Side of Saint Paul, Minnesota. Marquette Companies—a company affiliated with Marquette Management—acquired Haven in May 2021 for $26 million as "a joint venture between a fund managed by DRA Advisors and the Marquette Companies."[3]

[3] https://www.us.jll.com/en/newsroom/sale-of-phoenix-apartments-in-battle-creek

At the time of acquisition, most of Haven's units were in their original 1976 condition. Defendants' "Investment Strategy" admits that the purpose for the renovations is to "drive [up] rents" and "improve the renter profile," so that they can flip the property after five years for an $11 million gross profit. This strategy is candidly set forth in Marquette Companies' 2022 Investment Strategy report:



HAVEN BATTLE CREEK

MARQUETTE RECENT ACQUISITION

INVESTMENT STRATEGY The Haven of Battle Creek (formerly known as Phoenix Apartments) was developed in 1976. In May 2021, Marquette acquired the property in a joint venture with DRA Advisors and has underwritten a five-year hold period. The opportunity to realize value type returns exists on the following levels:

Interior Value-Add – The majority of the unit interiors are in original condition or were updated many years ago. Marquette will update all of the units with stainless-steel appliances, quartz countertops, vinyl plank flooring, and other upgrades to the kitchens, baths, and common areas. In addition to the operational improvements, these interior upgrades will allow Marquette to drive rents and improve the renter profile.

Location – The Haven of Battle Creek is located in the Battle Creek neighborhood of Saint Paul. Less than a 10-minute drive from downtown Saint Paul, residents have immediate access to the region's vast number of private and public sector jobs while enjoying the benefits of the submarket's proximity to several of the best parks and other outdoor amenities in Minnesota. The

SUMMARY

LOCATION
SAINT PAUL, MINNESOTA

CONSTRUCTION
MID-RISE

UNITS
216

ACQUISITION

DATE OF PURCHASE
MAY 2021

EQUITY PARTNER
DRA ADVISORS

PURCHASE PRICE
$26,100,000

PRICE PER UNIT
$120,833

CAP RATE
4.40%

EST. DISPOSITION

HOLD PERIOD
5 YEARS

SALES PRICE
$37,310,000

PRICE PER UNIT
$172,731

CAP RATE
5.75%

(Poradek Ex. 1, at 19.) As discussed below, Defendants' renovation plan does not budget for compliance with asbestos safety laws and therefore puts current tenants at unacceptable risk of asbestos disease.

The victims of Defendants' illegal renovation activities are the Haven residents who made up a vibrantly diverse tenant population before Defendants arrived: About one-third were multigenerational Somali-American families; many used Section 8 housing vouchers to assist with rent; many had lived at the Haven for years, including named Plaintiffs Sumeya Mohamed, Rukia Bile, Abdirisaq Sheikh, Paul Stoderl, and Sharon Martin. Ironically, these Haven tenants whom Defendants have targeted for replacement by an "improved renter profile" are the same tenants who have been exposed to airborne asbestos caused by Defendants' unlawful renovation and maintenance activities described below.

B. State and Federal Asbestos Laws Are Designed to Prevent Catastrophic Diseases Caused by Asbestos Inhalation.

Preventing exposure to asbestos is critical to the health and safety of tenants and the public in general. The Minnesota Department of Health publishes a guide for managing asbestos hazards, *Asbestos: Managing your asbestos hazards* ("MDH Asbestos Guide"), which clearly lays out the health dangers faced in residential buildings.[4] As the MDH Asbestos Guide warns, "asbestos diseases are difficult to treat," and "[m]ost are impossible to cure." *Id*. at 10. Asbestos enters the lungs through the inhalation of asbestos fibers, not visible to the naked eye, that become airborne when asbestos materials are

[4]https://www.health.state.mn.us/communities/environment/asbestos/docs/asbbooklet.pdf.

damaged, disturbed, or removed unsafely. *Id.* at 8. Many older building materials contain asbestos, especially in buildings constructed before 1981, such as Haven. *See* 29 C.F.R. § 1926.1101, Apps. B, H. As the MDH Asbestos Guide makes clear, asbestos can be found throughout a vast array of building materials in a residential dwelling:

The following is a list of some common ACM found in homes.

- Adhesives
- Appliance parts
  - Ceiling products
  - Ceiling popcorn texture
  - Ceiling tiles
- Ceiling tile mastic
- Cement-asbestos (Transite) products
  - Chimney flue lining
  - Ducts
  - Pipes
  - Shingles
  - Siding
  - Wall Panels
- Electrical products
  - Cloth wire insulation
  - Electrical panels
- Flooring Products
  - Asphalt floor tile
  - Floor tile mastic
  - Vinyl floor tile
  - Vinyl sheet flooring
- Heating and Cooling System products
  - Boiler insulation
  - Chimney packing
  - Duct work insulation
  - Fireplace mortar
  - Furnace insulation
  - Gaskets
  - Heat shields (paper and cardboard)
  - Pipe insulation
  - Tank insulation
- Paints and Coatings
- Plaster
- Roofing Products
  - Base flashing
  - Felt
  - Shingles
  - Tar or "Black Jack"
- Vermiculite
  - Attic and wall insulation
  - Fireplace decoration
  - Gardening product
- Vinyl wall coverings
- Wall applications
  - Caulking and putties
  - Spackling compounds
- Wallboard or sheetrock
- Wallboard joint compound
- Window glazing

Id. at 13. Activities like sanding, scraping, drilling, cutting, or pounding of asbestos-containing materials can release asbestos fibers into the air such that they can easily be inhaled by those exposed. Once exposed, individuals are at risk for developing catastrophic disease. *Id.* at 10. Stopping or minimizing exposure to asbestos is thus critical, because "[t]he only cure for most asbestos diseases is to prevent them." *Id.*

Given the widely known dangers posed by asbestos, an extensive regulatory framework has been developed to prevent exposure. Two of the most comprehensive

regulatory frameworks are the OSHA Asbestos Construction Standard and the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP), summarized below. Notably, the Haven Asbestos O&M Program admits the "facility is subject to Occupational Safety and Health Administration (OSHA), United States Environmental Protection Agency (USEPA), and the State of MN asbestos-related rules and regulations." (Poradek Ex. 2, at HAVEN000047.)

1. Federal and State OSHA Construction Standard

Both the federal and state OSHA Construction Standard regulate asbestos exposure in all construction work, including renovation, removal, repair, and maintenance activities. 29 C.F.R. § 1926.1101(a); Minn. R. 5205.0010, subp. 6(K), 5205.0660, 5207.0035 (adopting OSHA Construction Standard by reference). To protect against asbestos exposure, the OSHA Construction Standard mandates detailed asbestos identification, record keeping, and work practices for building owners and employers. A "building owner" is defined as the "legal entity . . . which exercises control over management and record keeping functions relating to a building." 29 C.F.R. § 1926.1101(b).

Under the OSHA Construction Standard, before any renovation, repair, or maintenance work can be commenced, a building owner must determine the "presence, location, and quantity" of any ACM or PACM. *Id.* § 1926.1101(k)(1)-(2). OSHA defines ACM as any material containing more than 1% asbestos, and PACM as any thermal system insulation or surfacing material found in buildings constructed prior to 1981. *Id.* § 1926.1101(b). Because PACM is **presumed** to contain asbestos, a building owner must

treat it as asbestos containing until proper laboratory testing confirms that it does not contain asbestos. *Id.* § 1926.1101(k)(5).

In addition, if a building owner "has actual knowledge, or should have known through the exercise of due diligence, that other materials are asbestos containing, they too must be treated as such." *Id.* § 1926.1101(k)(1)(i). As shown in the MDH Asbestos Guide's list of common ACM sources excerpted above, it is widely known in the construction industry that asbestos can be found in a variety of building materials, including dry wall, sheet rock, and taping compound. (Myers ¶21.) Thus, in "the exercise of due diligence," a building owner must identify these suspect asbestos-containing materials and treat them as ACM, unless testing or record evidence shows otherwise. (*Id.*) This is why the Haven Asbestos O&M Program expressly identifies a long list of "suspect ACM" at Haven including "textured ceiling material," "wall system components," "drywall and joint compound," "vinyl floor tile and associated mastics," "carpet mastic," "window/door caulk," and "thermal system insulation" and instructs that "[n]o known or suspect ACM or PACM shall be disturbed or involved in any work, in any way, prior to laboratory analysis for asbestos content." (Poradek Ex. 2, at HAVEN000050; *see also* HAVEN000055 ("Maintenance staff shall avoid disturbing any suspect materials which have not been tested and determined to not contain asbestos.")))

OSHA imposes the duty to comply with asbestos regulations on building owners because "[m]ost asbestos-related construction activities involve previously installed building materials" and "[b]uilding owners often are the only and/or best sources of information concerning them." 29 C.F.R. § 1926.1101(k)(1)(i). Failing to

identify or test for asbestos in the manner set forth in the OSHA Construction Standard prior to disturbing ACM or PACM is a violation of the standard—full stop—even if it is later determined that the materials are asbestos free. *See Sec'y of Lab. v. Trinity Indus., Inc*., 504 F.3d 397, 403 (3d Cir. 2007) ("Actual knowledge of the presence of asbestos is irrelevant—not because it is presumed, but, rather, because a violation of the regulation does not require that any asbestos actually be present. Having failed to conduct tests compliant with 29 C.F.R. § 1926.1101(k)(5), [the building owner] violated the regulation."); *Odyssey Capital Group III, L.P*., 19 BNA OSHC 1252 (OSHRC 2000) (affirming finding of violation when apartment complex owner failed to properly test PACM in ceiling), *rev. denied* 26 Fed. Appx. 5 (D.C. Cir. 2001) .

Beyond the identification and testing of ACM and PACM, the OSHA Construction Standard prescribes exacting safe-handling procedures that building owners and employers must follow when engaging in renovation, repair, and maintenance work. The OSHA-required procedures vary depending on type of material to be disturbed, but generally require the use of "wet methods" so that asbestos fibers cannot become airborne, specialized ventilation systems in work areas, the avoidance of techniques that cause fibers to become airborne, such as breaking, cutting, or sanding of materials, the use of impermeable drop cloths and plastic barriers to isolate work areas, and the use of specialized respirators by workers, among other requirements. 29 C.F.R. § 1926.1101(g).

2. EPA Asbestos NESHAP

In addition to OSHA, the EPA's NESHAP standard for demolition and renovation, found in 40 C.F.R. Part 61, Subpart M, is an independent regulatory regime that building

owners must follow when dealing with asbestos. Minnesota's Pollution Control Agency has incorporated these regulations by reference. *See* Minn. R. 7011.9920. Under the asbestos NESHAP regulations, "renovation" is defined as the "altering [of] a facility or one or more facility components in any way," 40 C.F.R. § 61.141, and can include activities such as scraping asbestos insulation off a ceiling, removing soundproofing, or drilling through asbestos ceiling plaster. Residential structures with five or more dwelling units are subject to the asbestos NESHAP. *Id.* (defining "facility").

Under NESHAP, an "owner and operator" of a subject facility must "thoroughly inspect the affected facility . . . where the demolition or renovation operation will occur for the presence of asbestos . . . **prior** to the commencement of demolition and renovation." *Id.* § 61.145(a). The pre-renovation survey must be conducted regardless of the amount of asbestos known or believed to be present. *See Fried v. Sungard Recovery Servs., Inc.*, 925 F. Supp. 364, 372 (E.D. Pa. 1996) ("A renovation is not limited to an activity that involves asbestos. For this reason, Defendant had a duty to inspect its facility regardless of the amount of asbestos it was aware of before the inspection."). In addition, "owner or operator" is broadly defined and includes "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated." 40 C.F.R. § 61.141; *see also United States v. B & W Inv. Properties*, 38 F.3d 362, 367 (7th Cir. 1994) (affirming determination that property management company qualified as "owner or operator" because company's name appeared on lease, asbestos removal contracts, and legal papers filed against tenant).

If an owner or operator's renovation activities will disturb a threshold amount of asbestos, as identified in the pre-renovation survey,[5] they must provide written notification to the EPA (or delegated authority) prior to the renovation activity. 40 C.F.R. § 61.145(b). In addition, owners and operators whose work impacts a threshold amount of asbestos must adhere to specific procedures for the storage, removal, and disposal of asbestos. *Id.* §§ 61.145(c), 61.150. The asbestos NESHAP "provide[s] strict liability for civil violations." *United States v. J & D Enterprises of Duluth*, 955 F. Supp. 1153, 1158 (D. Minn. 1997) (citing *B & W Inv. Properties*, 38 F.3d at 367); *see also United States v. Sealtite Corp.*, 739 F. Supp. 464, 468 (E.D. Ark. 1990).

3. Minnesota's Statutory Covenants of Habitability

Under Minnesota's statutory covenants of habitability, landlords must "maintain the premises in compliance with the applicable health and safety laws." Minn. Stat. § 504B.161, subd. 1(a)(4). In *Fritz v. Warthen*, the Minnesota Supreme Court recognized section 504B.161 as creating a "statutory right" for residential tenants to rent from a landlord who guarantees that it will "maintain the premises in compliance with the applicable health and safety laws." 213 N.W.2d 339, 342 (Minn. 1973); *id.* at 340-41 ("As a part of tenants' rights legislation enacted by the 1971 legislature, a landlord is now held . . . to covenant to keep leased residential premises . . . in compliance with applicable health and safety laws."). Defendants have recognized and affirmed their

[5] The threshold amount is 260 linear feet on pipes and 160 square feet on other facility components and is determined by predicting the combined amount of asbestos to be removed or stripped during a calendar year. 40 C.F.R. § 61.145(a)(4)(i), (iii).

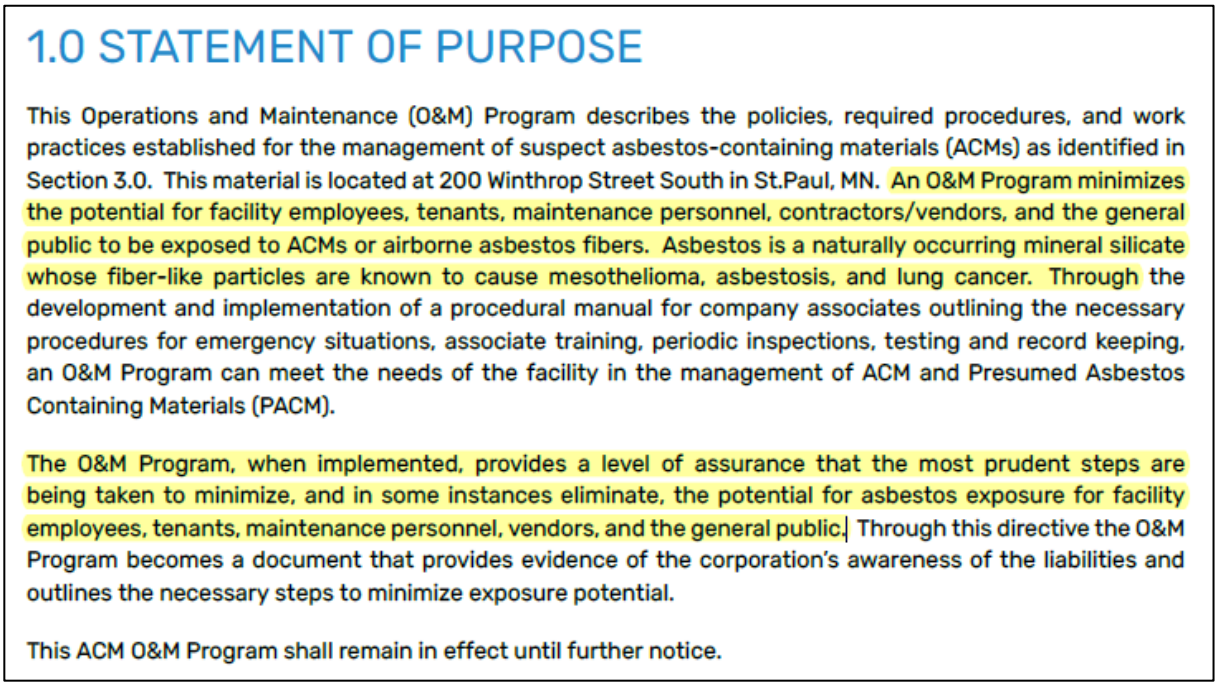
obligations under section 504B.161 by covenanting "[p]ursuant to state law" "to maintain the apartment in compliance with the applicable health and safety laws." (Poradek Ex. 6, ¶32(c).)

The OSHA Construction Standard and the asbestos NESHAP regulations are critical health and safety laws with which a landlord must comply. Both laws protect the health and welfare of tenants by ensuring exposure to asbestos is prevented or minimized in buildings undergoing renovation, repair, or maintenance work. Complying with these laws is essential in the landlord-tenant context, where tenants must rely on their landlords to not only perform necessary repairs and maintenance, but to protect them from silent killers such as asbestos and lead present within their building's materials.

A recent Minnesota court order made clear that section 504B.161 necessitates landlord compliance with safety laws that prevent exposure to environmental hazards. In *State v. HavenBrook Homes, LLC*, Minnesota's Attorney General moved for a temporary injunction, alleging that a property management company was exposing its tenants to lead hazards by failing to comply with federal and state lead safety laws, in violation of section 504B.161. No. 62-CV-22-780 at *2-3 (Minn. Dist. Ct. Dec 22, 2023) (Order Related to Motion for a Temporary Injunction). (Poradek Ex. 7.) In granting the Attorney General's motion, the district court noted the "life altering" health consequences resulting from lead-paint exposure and ordered the property management company to comply with Minnesota's covenants of habitability through compliance with state and federal lead safety laws. *Id.* at *7; No. 62-CV-22-780 (Minn. Dist. Ct. Dec 22, 2023) (Order Granting Temporary Injunction). (Poradek Exs. 7, 8.)

C. Defendants Knowingly Violate Asbestos Law and Expose Tenants to Asbestos Inhalation.

Defendants know that they have a legal duty to protect Haven residents from asbestos exposure when conducting renovation and maintenance activities. Just before Defendants took over management of Haven in May 2021, the national environmental consulting firm Nova Consulting Group provided Defendants with the Haven Asbestos O&M Program for the property. (Poradek Ex. 2) The Program's Statement of Purpose, reproduced below, states that the intent of the Program is to minimize or eliminate the risk of asbestos exposure for tenants, staff, and the general public.



1.0 STATEMENT OF PURPOSE

This Operations and Maintenance (O&M) Program describes the policies, required procedures, and work practices established for the management of suspect asbestos-containing materials (ACMs) as identified in Section 3.0. This material is located at 200 Winthrop Street South in St.Paul, MN. An O&M Program minimizes the potential for facility employees, tenants, maintenance personnel, contractors/vendors, and the general public to be exposed to ACMs or airborne asbestos fibers. Asbestos is a naturally occurring mineral silicate whose fiber-like particles are known to cause mesothelioma, asbestosis, and lung cancer. Through the development and implementation of a procedural manual for company associates outlining the necessary procedures for emergency situations, associate training, periodic inspections, testing and record keeping, an O&M Program can meet the needs of the facility in the management of ACM and Presumed Asbestos Containing Materials (PACM).

The O&M Program, when implemented, provides a level of assurance that the most prudent steps are being taken to minimize, and in some instances eliminate, the potential for asbestos exposure for facility employees, tenants, maintenance personnel, vendors, and the general public. Through this directive the O&M Program becomes a document that provides evidence of the corporation's awareness of the liabilities and outlines the necessary steps to minimize exposure potential.

This ACM O&M Program shall remain in effect until further notice.

(Poradek Ex. 2, at HAVEN000047.)

Defendants also know that asbestos exposure is a dangerous risk at Haven. Indeed, an earlier environmental assessment from Nova Consulting (the "2017 Nova Report") confirmed the presence of asbestos in the building and identified specific materials that

are suspected to contain asbestos. (Poradek Ex. 3.) The 2017 Nova Report noted that the textured ceiling in Haven hallways and apartments had tested positive for asbestos:

> **4.9 Asbestos-Containing Building Materials (ACBM)**
>
> Historically suspect asbestos-containing building materials noted during the Property visit included flooring and mastic, ceiling tile, textured ceiling plaster, sheetrock and taping compound, and roofing materials. The roof was not observed during Nova's reconnaissance. Prior sampling and testing for asbestos was completed in 1996 and asbestos was detected in textured ceiling plaster from apartment units and hallways. These materials were generally in good condition at the time of Nova's site reconnaissance. Reportedly, an Operations and Maintenance Plan (O&M) was prepared for the Property in 1996. The current site manager, Lea Gilson, was unaware of an O&M Plan in place at the property.
>
> Prior to demolition or renovation activities, previously untested suspect asbestos-containing materials, if identified, that are likely to be impacted should be sampled by a licensed asbestos inspector and analyzed by an accredited laboratory.

(*Id.*, at 13.)

Both the 2017 Nova Report and the Haven Asbestos O&M Program explained that numerous suspect ACMs have been observed at Haven, such as flooring, ceiling tile, sheetrock, and taping compound. (*Id.*; Poradek Ex. 2 at HAVEN000050.) Thus, the Haven Asbestos O&M Program contained this key directive: "No known or suspect ACM or PACM shall be disturbed or involved in any work, in any way, prior to laboratory analysis for asbestos content."

3.0 MATERIALS MAINTAINED IN THIS PROGRAM

No inspection or sampling was performed during the preparation of this ACM O&M Program. However, suspect materials previously identified include the following: textured ceiling material; ceiling tile; wall system components; drywall and joint compound; plaster; vinyl floor tile and associated mastics; linoleum and associated mastics; carpet mastic; window/door caulk; window glazing; spray on fireproofing; thermal system insulation; and roof materials. Materials were reported to be in generally good condition throughout the Property. Based on the reported condition of the ACM and PACM, it can effectively be managed in place under the provisions of an O&M Program.

The OSHA regulation 29 CFR 1926.1101, requires certain construction materials to be presumed to contain asbestos, for purposes of this regulation. All TSI, surfacing material, and asphalt/vinyl flooring that are present in a building constructed no later than 1980 and have not been appropriately tested are PACM.

Note: There may be supplemental information (reports, addendum, etc.) that may alter the listed materials above. If so, these supplemental documents must be maintained with this O&M Program.

No known or suspect ACM or PACM shall be disturbed or involved in any work, in any way, prior to laboratory analysis for asbestos content.

(Poradek Ex. 2, at HAVEN000050.). The same directive is set forth later in the Program:

7.2 Asbestos Cleaning Procedures

Maintenance staff shall avoid disturbing any suspect materials which have not been tested and determined to not contain asbestos. These disturbances may cause the release of asbestos fibers, even if the asbestos-containing materials have been encapsulated.

(*Id.* at HAVEN000055.)

The Plaintiffs have been asking Defendants for eighteen months to provide documentation of the "laboratory analysis for asbestos content" of "known or suspect ACM or PACM" that is required by Defendants' own operations plan before ACM or PACM is "disturbed or involved in any work." Specifically, in August 2022, August 2023, December 2023, and January 2024, Plaintiffs requested that Defendants provide the following categories of documentation, which correspond to threshold asbestos safety requirements and the Haven Asbestos O&M Program:

- Documentation showing that Defendants determined the "presence, location, and quantity" of ACM or PACM, as required by the OSHA Construction Standard, 29 C.F.R. § 1926.1101(k)(2)(i);
- Documentation showing that Defendants conducted a comprehensive building survey to identify asbestos hazards prior to any renovation activity, as required by the asbestos NESHAP, 40 C.F.R. § 61.145(a);
- Documentation showing that Defendants have completed periodic visual inspections as mandated by the Haven Asbestos O&M Program.

(Poradek Exs. 4 (at 4-5), 9-11.)

After eighteen months of asking for this threshold documentation, during which time Defendants engaged in extensive renovations to common areas and individual units at Haven, two extremely narrow asbestos test results are all that Defendants' have provided. The tested samples were obtained from just four units and three hallway areas and represented only a tiny subset of the presumed and suspect ACMs present at Haven. (Poradek Ex. 12.) Such testing comes nowhere near meeting Defendants' obligations under OSHA, NESHAP, or the Haven Asbestos O&M Program to comprehensively test all presumed and suspect ACM in Haven. (*see* Myers ¶33.)

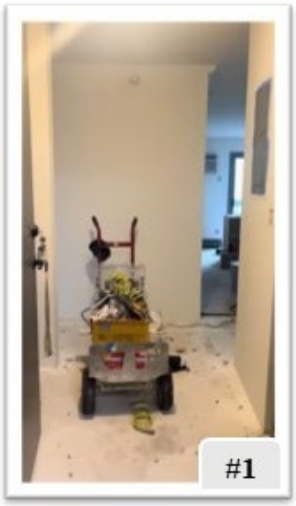
Despite failing to identify or test for asbestos in the building, Defendants engaged in extensive renovation, along with routine maintenance and repair work. In 2021 and 2022, Defendants completed 40 full-unit renovations; replaced flooring in 49 units; resurfaced or replaced 31 tubs and showers; changed out electrical panels in all 216 units; removed and replaced 11 air-conditioning wall units; replaced common area and unit

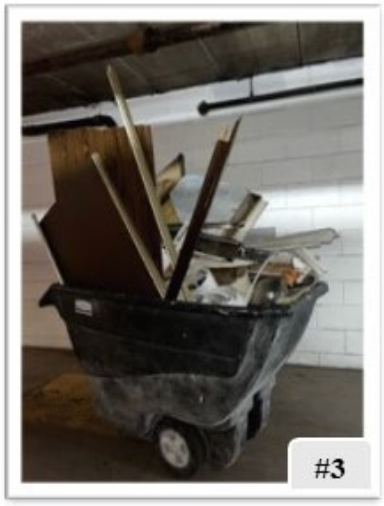
doors; painted and repaired Haven's exterior; replaced Haven's boiler motor, heat exchanger, and select pipes; repaired the roof; completed over $100,000 worth of maintenance to the garage; made renovations costing in excess of $600,000 to common areas, including the pool and fitness center; repaired ceilings damaged by water; patched damaged walls; and turned over dozens of units between tenants. (Poradek Ex. 13, at 3; Mohamed ¶15.) Defendants' documents also make it clear that 52 full-unit renovations were to be conducted in 2023 and 52 full-unit renovations are to be conducted in 2024. (Poradek Ex. 14, at 2.)

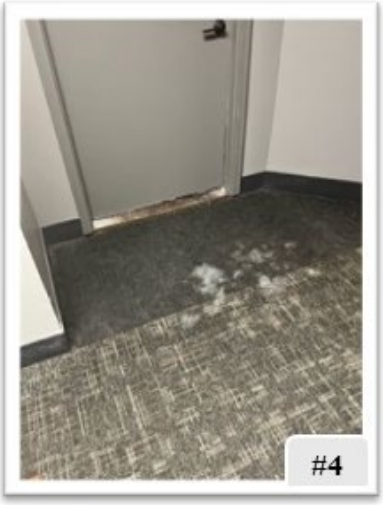
Defendants' failure to identify and test for asbestos hazards prior to conducting their extensive renovation, repair, and maintenance activities is an indisputable violation of the OSHA Construction Standard and NESHAP. *See Trinity Indus., Inc*., 504 F.3d at 403 (failing to conduct tests compliant with the OSHA Construction standard is a *per se* violation); *Fried*, 925 F. Supp. at 372 (building owner/operator has duty to inspect prior to renovation).

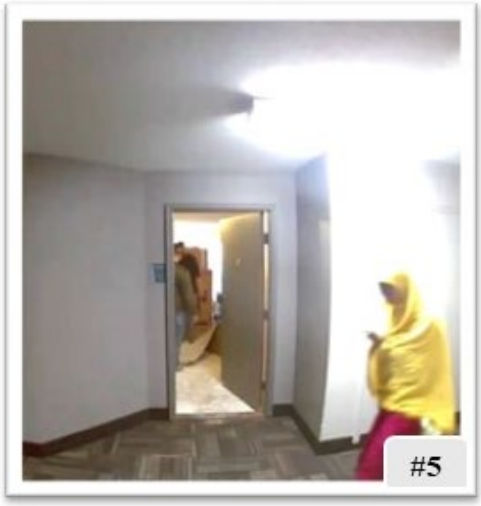
But beyond failing to identify or test for asbestos hazards, Defendants and their contractors have disastrously failed to comply with the work practices prescribed by either the OSHA Construction Standard, NESHAP, or its own Haven Asbestos O&M Program. For example, the photos below confirm that Defendants failed to seal off units being renovated from the rest of the building (Photo Nos. 1, 5, 6), tracked construction debris throughout the building (Nos. 4, 6), carted unsealed suspect ACM through hallways (Nos. 2, 3), disposed of waste in open dumpsters (No. 3), and used clean-up methods that risked reagitating any asbestos fibers that had been released (No. 6.).

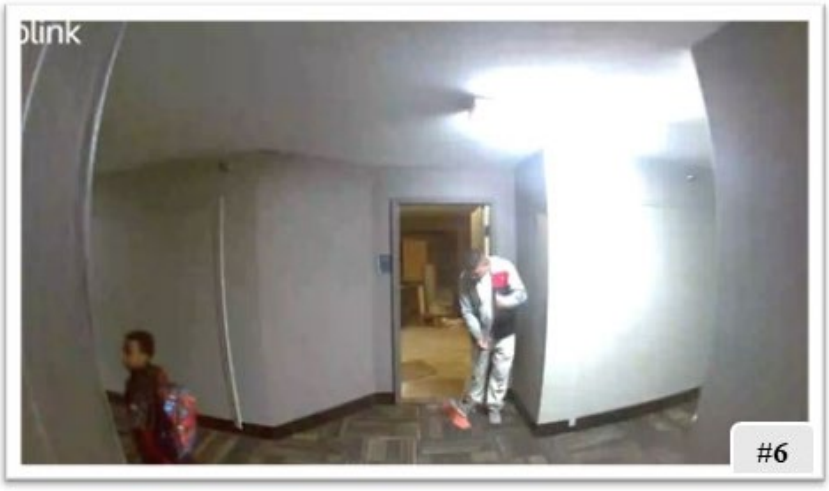
(Myers ¶¶38, 40, 43-45.)











In sum, beginning in May 2021, Defendants have engaged in systematic violations of asbestos safety laws while performing renovation, maintenance, and repair work at Haven. These actions expose Haven tenants, Defendants' employees, and the general public to the incredibly dangerous risk of asbestos inhalation.

D. Defendants' Dangerous Renovation and Maintenance System Continues.

On August 31, 2023, Plaintiffs' counsel demanded that Defendants immediately stop all renovation at Haven after learning that Defendants had in their possession the 2017 Nova Report, which identified the presence of asbestos at Haven. (Poradek Ex. 15.) Then, after renovation appeared to accelerate during the late fall of 2023, Plaintiffs' counsel informed Defendants in December 2023 that it planned to bring a TRO and preliminary injunction to protect Haven tenants from possible asbestos exposure. (Poradek Ex. 4, at 4.) After engaging in an expedited meet and confer process, the parties entered into an agreement on December 18, 2023, in which Defendants and one of their main contractors Doci Companies agreed to stop renovations at Haven, but only on the condition that they "reserve[] the right to rescind this agreement on 48 hours' notice." (Poradek Ex. 5.)

In the following weeks, former Defendant Doci Companies (who were likely not informed of the known asbestos risks at Haven by Defendants, as required by OSHA) confirmed that it was permanently halting all participation in renovation work and removing its employees from Haven, and Plaintiffs voluntarily dismissed them from the case. [ECF 74] However, Defendants have resisted proposals from Plaintiffs involving a commitment to stop all further renovation during the litigation. (Poradek Ex. 16.) Given

that there are still two years left in Defendants' renovation of Haven under its five-year "investment strategy" and their financial commitments to the investment fund operated by their equity partner DRA Advisors, they will have no realistic choice but to move ahead with the remaining full-unit renovations. Indeed, Defendants still advertise on their website that Haven is "undergoing extensive renovations":


The Haven of Battle Creek

Apartments in St. Paul

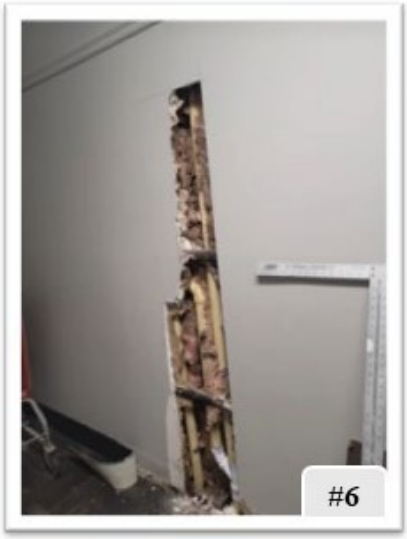
Under new Management! Welcome to The Haven of Battle Creek Apartments. Our unique apartment community is undergoing extensive renovations and will feature updates to the leasing office, fitness center, large indoor pool, package room, work from home tech stations and outdoor lounge and gill stations. Conveniently located near the St. Paul Downtown Airport and Battle Creek Regional Park, these expansive 1, 2 and 3 bedroom apartment homes offer select homes with granite countertops, stainless steel appliances, espresso colored cabinetry, wood style flooring and spacious closets. Contact us

(Poradek ¶27.) Moreover, Defendants' submissions to the City of St. Paul last year in support of a rent increase under the City's rent stabilization law reveal financial commitments that would require them to finish their renovation at Haven. Marquette executives told the City in 2023 that (1) "[o]ur business plan encompasse[s] renovating every remaining unit at the time of our acquisition," (2) "[i]t is ownership's goal to continue with the initial business plan that was created prior to our purchase of the property," and (3) "our equity partner on the asset is getting a bit pushy and this process has definitely gone on a bit longer than what was initially relayed." (Poradek Ex. 17, at 1; Ex. 18, at 3, 10.) Defendants' "business plan" had a budget with very specific goals for

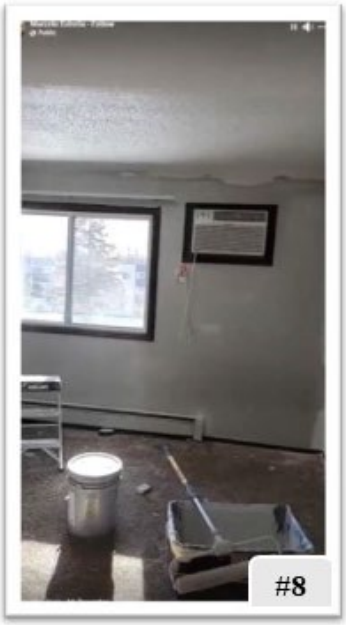
renovation in 2024, including: 52 full-unit renovations, 15 floor replacements, 14 appliance replacements, 13 tub and shower resurfacings or replacements, 15 patio door replacements, 12 air-conditioning wall unit replacements, exterior lighting upgrades, hallway painting, and trash chute door replacements. (Poradek Ex. 14, at 2.)

Defendants must also continue to perform regular maintenance and repairs in a building that suffers from what Defendants themselves admit is "deferred maintenance," repeated flooding from pipe breakage, and repeated water and heating system failures. (Poradek Ex. 1, at 19; Mohamed ¶¶16-17; Martin ¶2, ¶9.) Likewise, Defendants' relentless displacement of Haven tenants to "improve the renter profile" will require Defendants to turn over numerous apartments going forward.

Indeed, there is clear evidence that Defendants continue to perform maintenance that violates asbestos safety laws. First, Defendants have hired as their maintenance manager Marcelo Estrella, *see* Poradek Ex. 19, at 1-2—the same contractor who played a significant role in Defendants' illegal renovation work at Haven. Mr. Estrella owns and operates Amaya All Painting LLC, which performs maintenance and renovation work implicating ACM and PACM, including "popcorn replacement," "knock-down," and "dry-wall hang." (Poradek ¶26.) Both Mr. Estrella's personal Facebook page and Amaya's Facebook page have numerous videos showing renovation and repair work done at Haven. (Mohamed ¶15.) These video postings appear beginning in July 2022 and continue through December 2023. Screengrabs are reproduced below and clearly show work that disturbs and impacts suspect and presumed ACM, including popcorn ceilings with known ACM in #7, 8, 9, 11 and drywall in #6, 10. (*Id.*; Myers ¶¶38-40.)


#6


#7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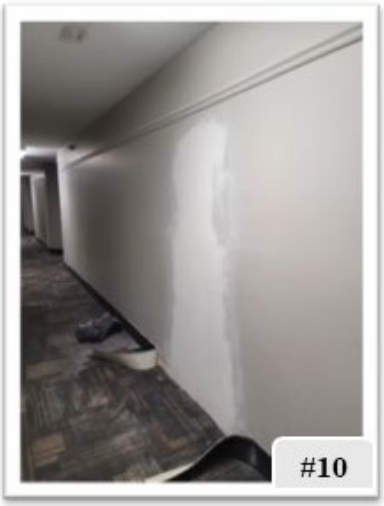
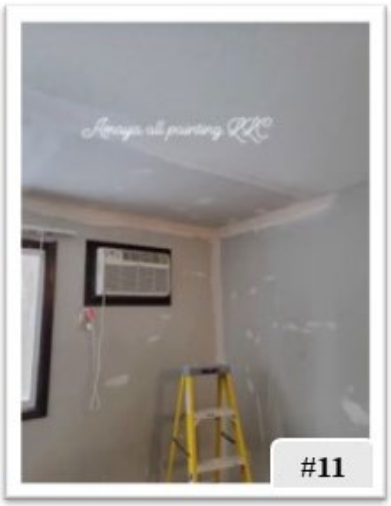
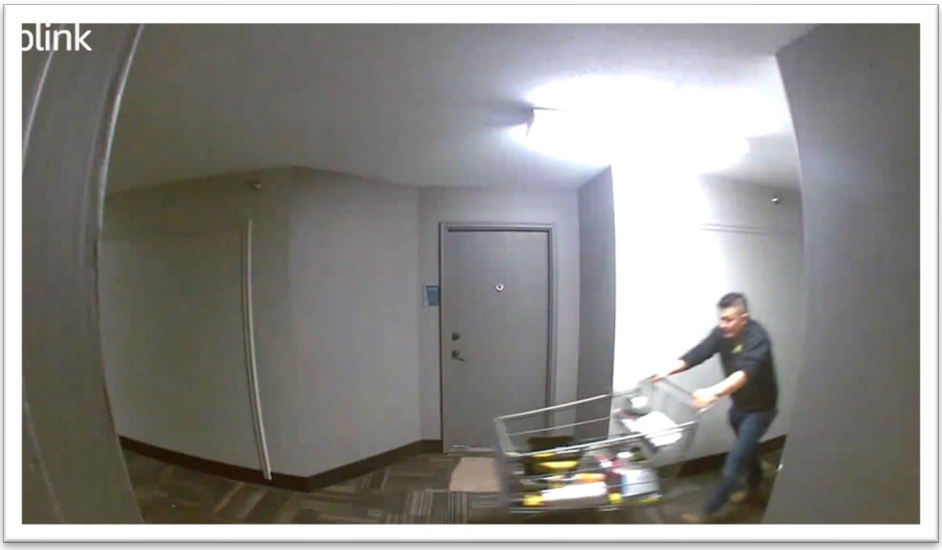
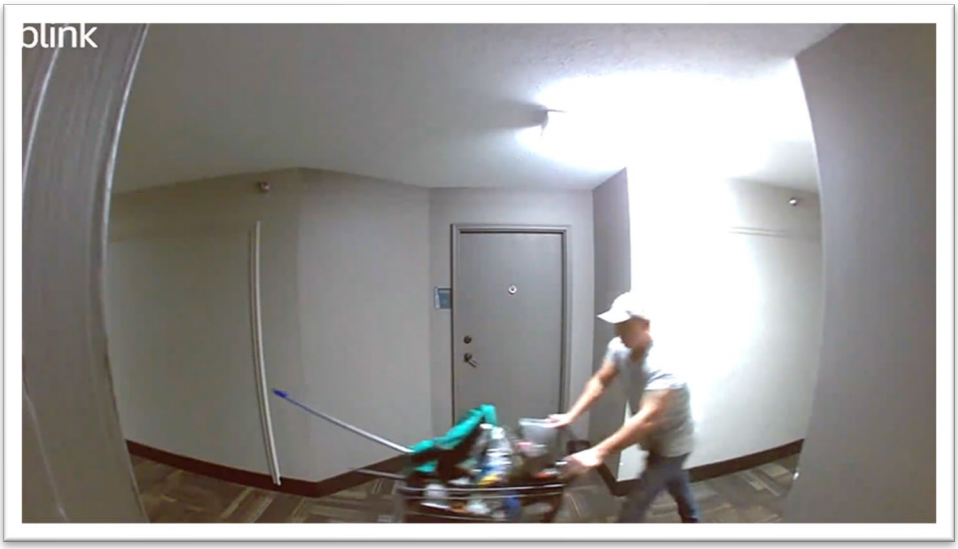

#10


#11

The renovation work shown in the photos trigger both asbestos law and Haven Asbestos O&M Program work safety requirements, which require testing, sealing off, wetting/encapsulating, and specialized ventilation, among many other requirements. It is immediately clear from the photos themselves that Mr. Estrella does not follow these work safety requirements. Thus, Defendants have placed someone with a track record of asbestos law violations in charge of Haven's maintenance system going forward. Moreover, Mr. Estrella appears to be continuing these unsafe work practices. In recent weeks, he and other maintenance staff have been walking through Haven's hallways pushing shopping carts loaded with tools and building materials. In one cart, a long-handled paint roller—a tool used to paint ceilings—can be seen.

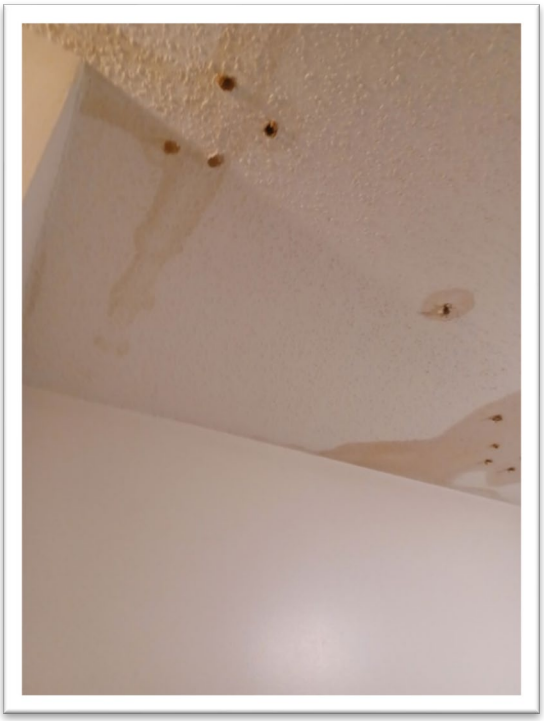




Mr. Estrella previously used shopping carts to transfer tools and building materials when performing illegal renovation work at Haven. (*see* Mohamed ¶15.) Thus, every indication is that Mr. Estrella is continuing his prior unsafe practices.

Second, the maintenance and turnover work that Defendants and Mr. Estrella are performing clearly implicates asbestos safety laws and the Haven Asbestos O&M Program. Such work is necessary to address the normal wear-and-tear in an aging building but must be done safely. For example, pipe leakage, water flooding, and water shutoff issues related to Haven's aging plumbing infrastructure have been pervasive throughout the building, and have become much more common occurrences since Defendants took over and mounted their complex-wide renovation efforts. (*see* Martin ¶2, ¶9; Mohamed ¶16.) Such water leakage and flooding events will inevitably cause damage to suspect ACM and PACM, including popcorn ceilings, drywall, and flooring, and necessitate repairs that need to be conducted in a safe and legally compliant way. In the case of Plaintiff Sharon Martin, her unit's ceiling, walls, and floor experienced

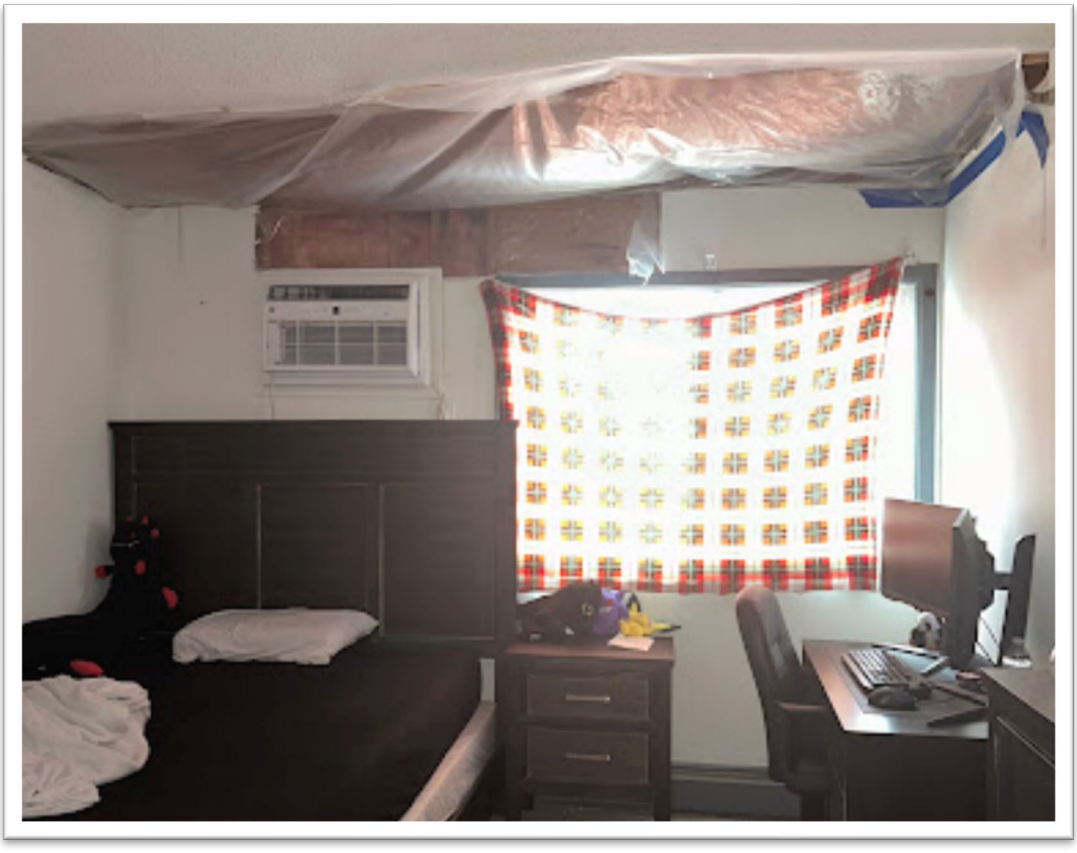
significant water damage as a result of a flooding event. (Martin ¶6.) Almost immediately after the water damage occurred, Defendants' staff cut holes in Ms. Martin's popcorn ceiling. (*Id.* at 7-8.) The staff did not isolate the area and Ms. Martin was able to walk through the damaged apartment and take pictures of the disturbed ceiling. (*Id.*) The ceiling was fully repaired after Ms. Martin moved out, but there is no record or other indication that the repair work was done in a legally compliant way. (*Id.* at 8.)



Beyond Ms. Martin's experience, maintenance reports show that on January 2, 2024, a resident reported that "a lot of water" had been "going into their bedroom," and on January 5, 2024, a maintenance staff "pulled tile up" to replace an old toilet with flushing issues. (Poradek Ex. 20, at HAVEN000230.) In February and March of 2024, Haven residents were informed that repairs were in progress because of "a broken water

line," malfunctioning boilers, and a pool pump that was out. (Mohamed ¶17.) All of these maintenance and repair activities likely involve the disturbance of suspect ACM or PACM. Yet, every indication is that this maintenance is being performed without compliance with asbestos laws and the Haven Asbestos O&M Program.

Indeed, just two weeks ago, a former tenant posted a scathing Google review that included a photo of a bedroom in her Haven unit in which large sections of popcorn ceiling and drywall had been cut out directly over what seems to be a child's bed, with the damaged suspect and presumed ACM contained only by slipshod plastic sheeting peeling from the wall and ceiling—brazen violations of asbestos law (Poradek ¶28):



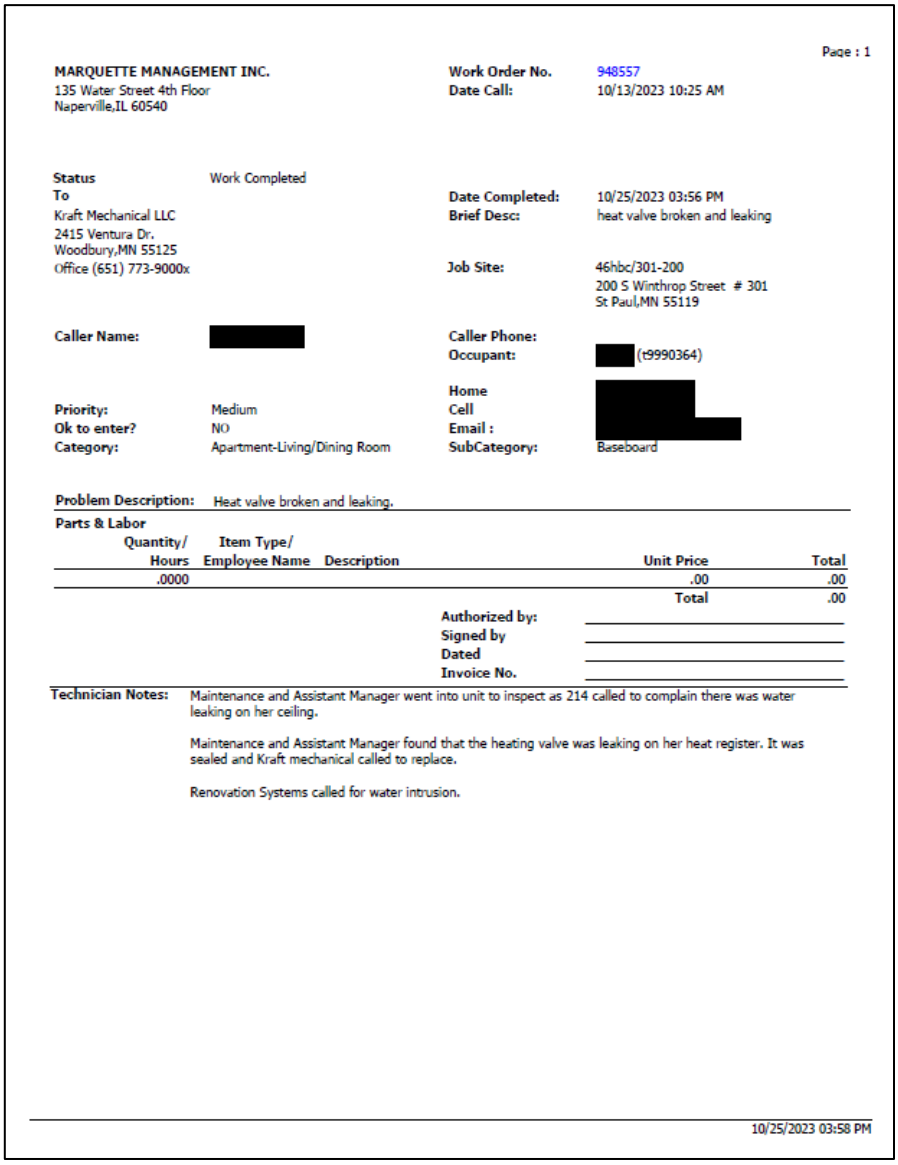
Third, Defendants do not have basic documentation of compliance with asbestos safety laws and their own Haven Asbestos O&M Program in connection with maintenance or apartment turnover work. Plaintiffs have repeatedly asked for any such documentation for eighteen months. (Poradek Exs. 4, 9-11.) Defendants have still not provided inspection reports, and the limited testing documents provided confirm that Defendants do not have a system for sufficient testing—if they did, the testing data would be exponentially more robust.

On January 9, 2024, Defendants finally disclosed the existence of the Haven Asbestos O&M Program. (Poradek ¶3.) On January 24, 2024, Plaintiffs' counsel requested all documents required to be maintained under the Haven Asbestos O&M Program, including work request forms and training documentation. (Poradek Ex. 11, at 1; Ex. 2 at HAVEN000055, HAVEN000065-73.) Defendants did not provide these documents. However, documents obtained from a previous rent escrow action confirm that Defendants' current maintenance authorization system does not comply with the Haven O&M Program. Here is the form required by Defendants' O&M Program:

JOB REQUEST FORM FOR MAINTENANCE WORK			
Name		Date	
Telephone No.		Job Request No.	
Requested Start Date		Anticipated Finish Date	
Address		Building No.	Room No(s)
Description of Work:			
Description of any asbestos-containing material that might be affected. If known include location and type			
Name of Requestor	Telephone No	Name of Supervisor	Telephone No
Submit this application to Asbestos Program Manager			
Note: An application must be submitted for all maintenance work whether or not ACM might be affected. An authorization must them be received before any work can proceed			
☐ Granted	☐ With Conditions*	☐ Denied	
Job Request No.	*Conditions:		

(Poradek Ex. 2, at HAVEN000068.) As shown, the Haven Asbestos O&M form prompts a "description of any asbestos-containing material that might be affected," notes that the form "must be submitted for all maintenance work whether or not ACM might be affected" and that authorization from the asbestos program manager "must [] be received before any work can proceed," and also includes an authorization section to be completed by the asbestos program manager.

The current form, reproduced below, includes none of these elements:



Page : 1

MARQUETTE MANAGEMENT INC.
135 Water Street 4th Floor
Naperville,IL 60540

Work Order No. 948557
Date Call: 10/13/2023 10:25 AM

Status Work Completed
To
Kraft Mechanical LLC
2415 Ventura Dr.
Woodbury,MN 55125
Office (651) 773-9000x

Date Completed: 10/25/2023 03:56 PM
Brief Desc: heat valve broken and leaking

Job Site: 46hbc/301-200
200 S Winthrop Street # 301
St Paul,MN 55119

Caller Name: [redacted]
Caller Phone:
Occupant: [redacted] (t9990364)

Home
Cell
Email : [redacted]

Priority: Medium
Ok to enter? NO
Category: Apartment-Living/Dining Room
SubCategory: Baseboard

Problem Description: Heat valve broken and leaking.

Parts & Labor

Quantity/ Hours	Item Type/ Employee Name	Description	Unit Price	Total
.0000			.00	.00
			Total	.00

Authorized by: _____
Signed by _____
Dated _____
Invoice No. _____

Technician Notes: Maintenance and Assistant Manager went into unit to inspect as 214 called to complain there was water leaking on her ceiling.

Maintenance and Assistant Manager found that the heating valve was leaking on her heat register. It was sealed and Kraft mechanical called to replace.

Renovation Systems called for water intrusion.

10/25/2023 03:58 PM

(Poradek Ex. 21.)

Tellingly, only a few weeks ago, when Plaintiff Paul Stoderl's stove and refrigerator stopped working, Plaintiffs' counsel requested that Defendants replace those appliances and produce documentation to show compliance with the asbestos-safety protocols of the Haven Asbestos O&M Program. For the first time, Defendants produced the forms required under the Haven Asbestos O&M Program. But the job request number

on the form makes it clear how unusual this instance of compliance with the Program is—the request number is 2024-**01**. (Poradek Ex. 22.) In addition, the name of the maintenance "requestor" on the form is Mr. Estrella, who as just discussed played a primary role in the illegal renovation. And the name of the "asbestos program manager" on the form is Kelly Delisle, a defendant in this case and the on-site property manager at Haven who directly supervised the renovation activities described above that exposed hundreds of residents to asbestos inhalation. The fact that Defendants have chosen to appoint chronic violators of asbestos law as the persons responsible for compliance with the Haven Asbestos O&M Program only underscores the need for injunctive relief, including an independent administrator.

ARGUMENT

A. The Legal Framework for Preliminary Injunction

Courts evaluating a motion for preliminary injunction weigh the four *Dataphase* factors set forth in the Eighth Circuit decision of the same name: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm injunctive relief would cause to the other litigants; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). When applying these factors, "a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene." *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 601 (8th Cir. 1999) (quotation omitted).

B. The *Dataphase* Factors Weigh Decisively in Support of a Preliminary Injunction.

1. Plaintiffs are likely to succeed on the merits.

The first *Dataphase* factor is likelihood of success on the merits. This Court aptly summarized the law related to this *Dataphase* factor in *Rud v. Johnston*, No. CV 23-0486 (JRT/LIB), 2023 WL 2600206, at *5 (D. Minn. Mar. 22, 2023):

> "[A]n injunction cannot issue if there is no chance of success on the merits." *Mid-Am. Real Estate Co. v. Iowa Realty Co.*, 406 F.3d 969, 972 (8th Cir. 2005). However, the question is not whether the movant has "prove[d] a greater than fifty per cent likelihood that [they] will prevail," *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007), but rather whether any of their claims provide a "fair ground for litigation." *Watkins*, 346 F.3d at 844. . . . [T]his factor simply requires the movant to show that they have a "fair chance of prevailing" on their claims. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008).

Here, Plaintiffs have demonstrated a strong likelihood of success on the merits of their claim in Count One of the Amended Complaint that Defendants have engaged in unlawful and unsafe renovation and maintenance that violates its covenants under Minn. Stat. § 504B.161 to "maintain the premises in compliance with the applicable health and safety laws." Subd. 1(a)(4). In *Fritz v. Warthen*, the Minnesota Supreme Court held that every Minnesota tenant has a "statutory right" under Minn. Stat. § 504B.161 to rent from a landlord who guarantees that it will "maintain the premises in compliance with the applicable health and safety laws." 213 N.W.2d 339, 342 (Minn. 1973). "As a part of tenants' rights legislation enacted by the 1971 legislature, a landlord is now held . . . to covenant to keep leased residential premises . . . in compliance with applicable health and safety laws." *Id.* at 340-41. Thus, the tenant has a right to redress "a violation of the

covenants of habitability" through "**an action against the landlord**." *Ellis v. Doe*, 924 N.W.2d 259, 261-62 (Minn. 2019).

In *State v. HavenBrook Homes, LLC*, the Minnesota Attorney General recently prevailed on a similar injunctive motion that sought landlord compliance with lead safety laws in the context of repairs, maintenance, and renovation under Minn. Stat. § 504B.161. The district court determined that the Attorney General met its burden of success on the merits by presenting "specific examples of conduct" showing that defendants had "engaged in practices that either exposed or risked exposure of lead to tenants" in violation of state and federal lead protections and section 504B.161. No. 62-CV-22-780 at *8-9. (Poradek Ex. 7.)

As set forth in detail above and in the supporting declarations, there is overwhelming evidence that Defendants' ongoing renovation and maintenance practices violate state and federal asbestos law. In violating these core health and safety laws, Defendants have failed to "maintain the premises in compliance with the applicable health and safety laws." Minn. Stat. § 504B.161, subd. 1(a)(4). This is far more than a "fair ground for litigation." *Rud,* 2023 WL 2600206, at *5. It is an undisputed and catastrophic violation of health and safety law that goes to the heart of why Minnesota has enacted statutory covenants of habitability in the first place.

2. Plaintiffs face a threat of irreparable harm from asbestos exposure.

The second *Dataphase* factor is the threat of irreparable harm in the absence of relief. "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *General*

Motors Corp. v. Harry Brown's, LLC, 563 F.3d 312, 319 (8th Cir. 2009). "However, the alleged harm need not be occurring or be certain to occur before a court may grant relief." *Richland/Wilkin*, 826 F.3d at 1037 (quotation omitted).

The Supreme Court has recognized that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable." *Amoco Production Company v. Village of Gambell*, 480 U.S. 531, 545 (1987). "If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id.* In turn, the Eighth Circuit has found that violation of environmental laws "'causes [irreparable] harm itself, specifically the risk that real environmental harm will occur through inadequate foresight and deliberation.'" *Richland/Wilkin*, 826 F.3d at 1037 (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011)). In *State v. HavenBrook Homes, LLC*, the Minnesota district court applied these concepts to conclude that a property management company's failure to comply with lead safety laws posed a threat of irreparable harm to the tenants living in its properties. No. 62-CV-22-780 at *4-6 (Poradek Ex. 7.) In doing so, the court noted that the property management company's history of noncompliance with lead safety laws, coupled with the "life-altering" consequences of lead exposure, presented a significant risk to tenants' health showing irreparable harm. *Id.* at *4-6, 7. As the *HavenBrook* court concluded: "the [Minnesota Attorney General] has established irreparable harm if the requested injunctive relief is not granted. The risk to the health and safety of the tenants, particularly children, is significant and could affect their lives."

Here, the Minnesota Department of Health has made clear that "the only cure for most asbestos diseases is to prevent them"—which is exactly why the OSHA and EPA asbestos laws impose such stringent inspection, testing, notice, and workplace safety requirements for building owners, especially owners of buildings the age of Haven, where asbestos is presumed to be present in many materials throughout the complex. (Myers ¶¶29-34.) With this asbestos danger in mind, it is worth quoting at length the irreparable harm analysis in *United States v. Tzavah Urb. Renewal Corp.*, 696 F. Supp. 1013, 1022 (D.N.J. 1988), which granted a preliminary injunction in circumstances similar to those here and which relied in part on an Eighth Circuit analysis of asbestos risk in doing so:

> The presence of ACM within the hotel and the continued emission of asbestos dust into the surrounding community pose a significant health risk to the squatters who intermittently inhabit the hotel as well as the residents and workers who are present in the area. The toxicity of asbestos was described in the preamble to the original asbestos NESHAP:
>
> > Asbestos is a hazardous air pollutant within the meaning of Section 112. Many persons exposed to asbestos dust developed asbestosis when the dust concentration was high or the duration of exposure was long. A large number of studies have shown that there is an association between occupational exposure to asbestos and a higher-than-expected incidence of bronchial cancer. Asbestos also has been identified as a causal factor in the development of mesotheliomas cancers of the membranes lining the chest and abdomen. There are reports of mesothelioma associated with nonoccupational exposures in the neighborhood of asbestos sources. An outstanding feature has been the long period, commonly over 30 years, between the first exposure to asbestos and the appearance of a tumor. There is evidence which indicates mesotheliomas occur after much less exposure to asbestos dust than the exposure associated with asbestos.

> 38 *Fed. Reg.* 8820 (April 6, 1973) (citations omitted). As the Government notes in its brief, the danger of asbestos has also been judicially noted in *Reserve Mining Co. v. Environmental Protection Agency,* 514 F.2d 492, 508-509 n.26, modified, 529 F.2d 181 (8th Cir. 1975).

The *Tzavah* court's finding of irreparable harm applies with full force here: Plaintiffs' have "made a clear showing of irreparable harm and the imposition of [money damages] would in no way compensate [tenants] exposed to asbestos as a result of the defendants' disregard for" NESHAP and OSHA asbestos law. *See id.* at 1023.

Defendants may argue that injunctive relief is inappropriate because they have temporarily halted renovation and are now purportedly taking steps to comply with the asbestos law and the Haven Asbestos O&M Program. As the Supreme Court has emphasized, however, "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate [litigation], and there is probability of resumption." *Oregon State*, 343 U.S. at 333. The Eighth Circuit has likewise made clear that "the very existence of improper conduct in the past raises an inference that such conduct will continue in the future even though the improper conduct has been [allegedly] discontinued." *Sec. & Exch. Comm'n*, 481 F.2d at 682; *see also United States v. Hopkins Dodge Sales, Inc.*, 661 F. Supp. 1155, 1158 (D. Minn. 1987) ("The absence of current violations does not rebut the inference, from past violations, that future violations are reasonably likely."); *Campbell v. Minneapolis Pub. Hous. Auth. In & For City of Minneapolis*, 175 F.R.D. 531, 538 (D. Minn. 1997) ("Courts view efforts made to avoid injunctive relief by instituting reforms after litigation has begun with some skepticism."); *Sawczyn v. BMO*

Harris Bank Nat. Ass'n, 8 F. Supp. 3d 1108, 1114 (D. Minn. 2014) ("[I]f [defendant] **was** trying in earnest to comply with [governing law] and yet these alleged violations went unnoticed and unrepaired for eighteen months, then [defendant's] procedures were utterly ineffective. This seriously undermines [defendant's] contention that it will properly maintain the [property] in the future.").

Indeed, as the Supreme Court has stated, "When defendants are shown to have settled into a continuing practice . . . violative of [governing] laws, courts will not assume that it has been abandoned without clear proof." *Oregon State*, 343 U.S. at 333. Here, despite repeated requests from Plaintiffs, Defendants' have provided **no proof**—much less "clear proof"—that they are now complying with asbestos laws and their own internal asbestos safety procedures, or that they have permanently stopped renovation. Background Section D above sets forth comprehensive evidence that the violations continue today. Indeed, the two people Defendants have appointed to ensure compliance with the Haven Asbestos O&M Program—property manager Kelly Delisle and maintenance manager Marcelo Estrella—were both directly responsible for Defendants' egregious violations of asbestos law at Haven. The proverbial foxes are now guarding the hen house. There can be no question that, as in *Tzavah*, "[t]he defendants' long history of non-compliance . . . reveal a risk of continued and recurring violations." 696 F. Supp. at 1019. "To permit a building owner to commence renovation and when asbestos is discovered, simply discontinue work with impunity, defies the purpose and logic of the [asbestos] statute[s]." *Id.*

3. The balancing of relative harms strongly favors an injunction.

The third *Dataphase* factor is balance of harms. "The balance-of-harms factor involves assess[ing] the harm the movant would suffer absent an injunction, as well as the harm the other parties would experience if the injunction issued." *Midwest Sign & Screen Printing Supply Co. v. Dalpe*, 386 F. Supp. 3d 1037, 1057 (D. Minn. 2019) (quotation omitted). "[T]he balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545.

"This prong of the test for injunctive relief is easily met: the danger of asbestos has been established, while no potential for hardship to the defendants has been suggested." *Tzavah*, 696 F. Supp. at 1023. Plaintiffs face incalculably greater harm if the Court denies this motion than Defendants will face if the Court issues a temporary injunction. As explained above, Defendants' illegal renovation, repair, and maintenance puts the health of tenants, workers, and the public at extreme risk. The negative health effects of asbestos exposure are irreversible.

In contrast, Defendants face no cognizable harm if the Court grants this motion. "A preliminary injunction mandating defendants' compliance [with asbestos law] poses no cognizable risk of hardship to defendants." *Id.* Defendants must simply perform its renovation, repair, and maintenance work in a manner that complies with its own Haven Asbestos O&M Program, asbestos law, and the habitability covenants it was required to comply with when it decided to become the landlord at Haven. "[A]n injunction does not unduly harm the defendants. It does not put them out of business, but simply ensures that they will conduct their business in a manner which does not violate [the law]." *F.T.C. v.*

Kitco of Nevada, Inc., 612 F. Supp. 1282, 1296-97 (D. Minn. 1985); *see also HavenBrook Homes*, No. 62-CV-22-78 at *9 (finding compliance with lead safety laws imposed no substantial harm on defendants because they were sophisticated property management company with adequate means and resources) (Poradek Ex. 7). Moreover, where "defendants contend that they have made good faith efforts at compliance and have continually asserted that they intend to comply with the asbestos [law]. . . the relief requested will not harm them at all, it will only comport with their professed intentions." *Tzavah*, 696 F. Supp. at 1023.

4. The public policy expressed in Minnesota law strongly favors an injunction.

The fourth *Dataphase* factor is the public interest. The *Tzavah* court put it aptly: "The extreme danger of [asbestos] exposure also underscores that it is in the public interest to enjoin the defendants' unlawful conduct." *Id.* And this is not a hypothetical public interest. In addition to endangering tenants, Defendants' unlawful renovation practices directly expose workers, guests, and anybody in the public who comes into contact with the suspect ACM and PACM. The Minnesota Supreme Court has repeatedly emphasized the public interest served by section 504B.161's "protection of the health, safety, and welfare of tenants and their families." *Cent. Hous. Assocs., LP v. Olson*, 929 N.W.2d 398, 409 (Minn. 2019). "[T]he public 'has a strong interest in preventing dangerous conditions from developing [in rental housing], even unknown or unintentionally, that would be hazardous to the tenants, their neighbors, and [Minnesota] citizens.'" *Id.* (quoting *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 167 (Minn. 2017)); *see also HavenBrook Homes*, No. 62-CV-22-78 at *7 (finding a "significant

[public] interest in ensuring that landlords abide by their obligations to conduct repairs . . . in accordance with best practices as well as state and federal health and safety laws" because of lead's "life-altering" "health consequences") (Poradek Ex. 7).

C. This Court Should Appoint an Administrator to Ensure Compliance with Asbestos Laws and Defendants' Own Asbestos Protection Procedures.

Given the danger of the threat of irreparable harm and Defendants' long history of violating the law and their own Haven Asbestos O&M Program, Plaintiffs ask the Court to appoint an administrator under Minn. Stat. § 504B.425(d) to ensure Haven tenants are not exposed to asbestos going forward. Appointment of an administrator is one of the remedies available to tenants who have proved "a violation of any state, county or city health, safety, housing, building, fire prevention, or housing maintenance code applicable to the building" in a tenant remedies action pursuant to section 504B.395. Minn. Stat. § 504B.001, subd. 14(1). Section 504B.425(a) states that "[i]f the court finds that the complaint in section 504B.395 has been proved, it may, in its discretion, take any of the actions described in paragraphs (b) to (g), either alone or in combination." One of those actions is appointing an administrator to provide direct oversight of the property to ensure that the violations are stopped and remediated. Minn. Stat. § 504B.425(d). While Plaintiffs here have not brought a separate tenant remedies action under section 504B.395, the property-wide violations of asbestos law by Defendants are precisely the kind of systematic habitability violation that the administrator statute is designed to remediate—and thus forms the model for one aspect of the preliminary injunctive relief sought by this motion. For this reason, Plaintiffs propose that the Court appoint

Lighthouse Management as administrator, a respected asset recovery firm with extensive experience serving as an administrator in multi-unit residential buildings with serious habitability violations. (*see* Dybsky ¶¶3-4.)

D. This Court Should Waive Any Bond or Security.

The Court should waive the bond with respect to Plaintiffs under the circumstances here because the motion is brought in the public interest by and on behalf of low-income tenants whose health and safety is directly endangered by violation of state and federal environmental laws. "Although a bond is usually required under Rule 65(c), Fed. R. Civ. P., the amount of such bond is within the discretion of the trial court, *see Stockslager v. Carroll Electric Cooperative Corporation,* 528 F.2d 949, 951 (8th Cir. 1976), and the bond may be waived in a proper case." *Little Earth of United Tribes, Inc. v. HUD*, 584 F. Supp. 1301, 1303 (D. Minn. 1983) (*citing Wayne Chemical, Inc. v. Columbus Agency Serv. Corp*., 567 F.2d 692, 701 (7th Cir. 1977)). "If the public interest favors it, the Court may waive the bond requirement." *Council on Am.-Islamic Rels.-Minnesota v. Atlas Aegis, LLC*, 497 F. Supp. 3d 371, 380 (D. Minn. 2020).

In *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers*, the Eighth Circuit affirmed this Court's decision to waive the bond requirement in an environmental law case, holding that "it was permissible for the district court to waive the bond requirement based on its evaluation of public interest in this specific case." 826 F.3d at 1043. In the decision below, this Court concluded that it was appropriate to waive the "bond requirement in Rule 65 in order to ensure that plaintiffs—especially those with limited resources—will still take action to enforce [the

environmental laws in that case].” No. CIV. 13-2262 JRT/LIB, 2015 WL 3887709, at *4 (D. Minn. June 24, 2015).

In reaching that decision, this Court favorably cited caselaw recognizing that waiver of the bond requirement is important in cases like this one because of its “‘potential chilling effect on litigation to protect the environment and the public interest’” that would “‘impede Plaintiff’s access to judicial review.’” *Id.* at *2 (quoting *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012) and *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1247-48 (D. Colo. 2009)). *See also Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (holding district court could waive posting of a bond given strong public interest in preventing workers from unknowingly being exposed to possible carcinogen); *Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991) (in lawsuits to enforce “public interests, arising out of comprehensive federal health and welfare statutes[,] [a] district court should consider the impact that a bond requirement would have on enforcement of such a right, in order to prevent undue restriction of it.” (quotation omitted)).

CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that the Court grant its motion for preliminary injunction. Plaintiffs request that the Court award the entirety of the relief they seek as detailed in their accompanying Proposed Order.

Date: April 8, 2024

HOUSING JUSTICE CENTER

s/James W. Poradek
James W. Poradek (#0290488)
Abigail Hanson (#0402944)
Northwestern Building
275 East Fourth Street, Suite 590
Saint Paul, MN 55101
jporadek@hjcmn.org
612-723-0517
ahanson@hjcmn.org
612-807-1139 ext. 702

SOMERMEYER SULLIVAN PLLC

Timothy Sullivan (#0391528)
225 South Sixth Street, Suite 3900
Minneapolis, MN 55401
tsullivan@somsull.com
612-643-3486

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Sumeya Mohamed, Rukia Bile, Abdirisaq Sheikh, Ubah Shire, Paul Stoderl, and Sharon Martin, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

Marquette Management, Inc., G&I X Phoenix Apartments LLC, and Kelly Delisle,

Defendants.

Court No.: 23-cv-1740 (JRT/JFD)

RULE 7.1 COMPLIANCE CERTIFICATE

The undersigned hereby certifies that, pursuant to Local Rule 7.1(f), Plaintiffs' Memorandum of Law in Support of their Motion for a Preliminary Injunction contains 9,739 words, as determined through the word count feature of the Microsoft Word for Microsoft 365 word processing software used to prepare the memorandum. The word processing program has been applied specifically to include all text within the body of the document, including headings, footnotes, and quotations. The memorandum was prepared in 13-point proportional font in accordance with the type size limitation of Local Rule 7.1(h)

Date: April 8, 2024

HOUSING JUSTICE CENTER

s/James W. Poradek
James W. Poradek (#0290488)

Abigail Hanson (#0402944)
Northwestern Building
275 East Fourth Street, Suite 590
Saint Paul, MN 55101
jporadek@hjcmn.org
612-723-0517
ahanson@hjcmn.org
612-807-1139 ext. 702

SOMERMEYER SULLIVAN PLLC

Timothy Sullivan (#0391528)
225 South Sixth Street, Suite 3900
Minneapolis, MN 55401
tsullivan@somsull.com
612-643-3486

ATTORNEYS FOR PLAINTIFFS