

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: BARBARA D'ALLESANDRO AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278

DECISION AND ORDER AS TO LIABILITY

This matter came before the Administrative Adjudication Division, ("AAD") of the Department of Environmental Management ("DEM"), on a request for a hearing on a Notice of Violation and Order ("NOVO") issued on December 11, 1991 by the Underground Storage Tanks Program ("UST Program").

The within matter is properly before the Hearing Officer pursuant to R.I.G.L. Chapter 12 of Title 46 entitled "Water Pollution", specifically Section 46-12-9, R.I.G.L. Section 42-17.1-2 and Chapter 42-17.6, statutes governing the AAD, (R.I.G.L. Sec. 42-17.7-1 et seq.), the Administrative Procedures Act, (R.I.G.L. Sec. 42-35-1 et seq.) the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials ("Regulations") and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for the Department of Environmental Matters ("AAD Rules"). The proceedings were conducted in accordance with the above-noted statutes and regulations.

The NOVO alleged that Respondent, as owner of an underground storage tank ("UST") facility located at 100 East Avenue, Cranston, Rhode Island ("facility"), violated several provisions of the Regulations, in that (1) documentation has

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 2

not been submitted to the UST Program to indicate that the USTs located at the facility have been precision tested in the years 1989, 1990 and 1991 as required under Section 9(d) of the Regulations, and (2) documentation has not been submitted to the UST Program to indicate that spill containment basins have been installed around all fill pipes at the facility as required under Section 9(b) of the Regulations.

Said NOVO ordered Respondent to discontinue all further use of USTs until the facility came into compliance with the Regulations by either causing the USTs to be removed or by causing all USTs on site to be precision tested and spill containment basins to be installed and all related documentation to be filed with the UST Program. In addition, Respondent was ordered to pay an administrative penalty of \$8,350.00.

Respondent requested an adjudicatory hearing on the NOVO on December 18, 1991. A Status Conference was held at the AAD on April 13, 1992 wherein the parties discussed the outstanding issues.

A Prehearing Conference was held on August 7, 1992 and the requisite Prehearing Conference Record was prepared by the Hearing Officer who conducted same. It was agreed at the Prehearing Conference that the most efficient way to proceed in this matter is to determine the issue of liability first. Pursuant to said agreement an Order was entered by the

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 3

Hearing Officer that the legal issue of whether Barbara D'Allesandro as owner of the facility, is responsible for the UST NOVO and the payment of penalties shall be decided upon submission of an agreed statement of facts and legal memoranda. If necessary, after the legal issue is determined, a hearing will be scheduled on the issue of whether the assessment of the administrative penalty is proper and reasonable or excessive.

The parties thereupon filed the following agreed statements of fact:

1. The Respondent, Barbara D'Allesandro, is the owner of that certain parcel of real property located at 100 East Street, Cranston, RI, otherwise known as Cranston Assessor's Plat 15, Lot 52 (the "Facility").
2. The facility contained seven (7) underground storage tanks, six (6) of which are subject to regulation under the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials filed with the Secretary of State on April 18, 1985 and effective May 8, 1985 ("Regulations").
3. Each of the six (6) underground storage tanks were precision tested on an annual basis for the years 1986, 1987 and 1988 pursuant to sec. 9 (d) of the Regulations.
4. On November 20, 1987, Barbara D'Allesandro and E.C.S. Incorporated d/b/a Express Service Station entered into an indenture of lease for a period of 3 years commencing on November 20, 1987 and terminating on November 19, 1990 for premises located at 100 East Avenue, Cranston. The premises consisted of real estate on which were located a two-bay service station building, a fuel pump island, and underground fuel storage tanks.
5. An Application for Underground Storage Facilities was submitted to Department of Environmental Management, Division of Groundwater and Freshwater Wetlands in 1988 (date stamp mark on photocopy of petitioner's exhibit too faint to read)

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 4

with respect to Express Service Station, 100 East Avenue, Cranston, RI.

a) The Application listed Elizabeth DiLuglio as the applicant and Barbara D'Allesandro as the owner.

b) The application indicated that it was submitted by the owner.

c) Six underground storage tanks containing virgin petroleum product were described in the application.

6. Prior to the time that E.C.S., Incorporated leased the premises, Domenic Cottignoli d/b/a D. Cotti & Son Texaco Service operated a gas station. Mr. Cottignoli filed registration documents in 1985 to register the facility. During the occupancy, Mr. Cotti caused Environmental Research Ltd. to conduct precision tests of the underground storage tanks. The test results for the years 1986 and 1987 were submitted to DEM.

7. On March 29, 1988, Environmental Research of N.E., Ltd. certified precision tests of two underground fuel storage tanks at 100 East Street, Cranston. Such tests were conducted at the request of Al DiLuglio to Express Service. The name of the operator, as listed in the test results, which were submitted to DEM, was Express Service.

8. Precision tests on three tanks were performed by Environmental Research of New England, Ltd. on or about April 19, 1988, at a cost of \$200 each or a total amount of \$600.00. (Invoice No 2218 dated May 10, 1988).

9. In a letter dated September 27, 1988, Leslie A. Gerundio, Engineering Technician at the Division of Groundwater at DEM informed Al DiLuglio of Express Service that DEM was in receipt of precision test results for underground storage tanks at 100 East Avenue but no facility registration was received for this location. Request was made to him that he complete an enclosed registration packet and return it to the office. "Failure to provide the information will deem the precision test results invalid."

10. The owner, Barbara D'Allesandro, was not copied on the above referenced letter from the Department.

11. On October 7, 1988, Elizabeth DiLuglio, as President of E.C.S., Incorporated signed a certificate that the application was prepared under her direction or supervision and that she

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 5

was aware that there are significant penalties for submitting false information.

12. On November 23, 1988, Barbara D'Allesandro sent to DEM a letter enclosing Notification of Underground Storage Tanks by Express Service Station under RCRA and Section 7 of the State environmental regulations.

13. DEM issued a Certificate of Registration for Underground Storage Facilities #00278 dated may 30, 1990 which was valid from July 1, 1989 to June 30, 1990. The Certificate contained the language: "In compliance with Chapter 46-12 of the Rhode Island General Laws, amended and the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials, the owner/operator of an underground storage facility located at Express Service Station, 100 East Avenue, Cranston, RI 02920 is issued this Certificate of Registration to operate an underground storage facility based upon the factual representations contained in the Application for Registration and in accordance with the Regulations for Underground Storage Facilities used for Petroleum Products and Hazardous Materials."

14. All pertinent data concerning the name and address of the responsible corporate officers, of the operator the address and telephone number of the facility were in the files of DEM.

15. A Notice of Violation ("NOV"), numbered 91-00278 was issued to and served upon Respondent in accordance with RI General Laws Section 42-17.1-2(u) on or about December 11, 1991.

16. The NOV ordered the Respondent to discontinue all further use of underground storage tanks or facility components at the facility until the facility is in full compliance. In order to be in full compliance, the Respondent was ordered to either close the underground storage tanks or have all the tanks precision tested and spill containment basins installed with ten (10) days of receipt of the NOV.

17. The Respondent was also ordered in the NOV to pay an administrative penalty of eight thousand three hundred and fifty dollars (\$8,350.00) which the respondent contests.

18. The NOV was received by the respondents and, on or about December 18, 1991, a hearing was requested by Respondent's attorney, David H. Sholes.

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 6

19. The hearing request submitted by David H. Sholes was received by the Department of Environmental Management, Administrative Adjudication Division on December 20, 1992, within the required ten (10) day time period.

20. The NOV states that Elizabeth DiLuglio operated and is designated as the Applicant for the registration of the facility and that Barbara D'Allesandro is the owner of the facility.

21. No precision test results for the facility were forwarded to the Department for the years 1989, 1990 and 1991.

22. On or about January 29, 1992, all seven (7) underground storage tanks were caused to be removed from the facility by the Respondent and the Respondent was issued a certificate of closure by the Department.

23. There is no issue relating to the continued use of the tanks or the installation of spill containment basins around the fill pipes at the facility.

24. A-Team Petroleum, Incorporated removed and disposed of the seven underground tanks and submitted to the owner an invoice No. 1014 dated February 18, 1992 in the amount of \$4,190.38 for the removal and disposal of the underground storage tanks, and the removal of 200 gallons waste water/gasoline.

25. The 1985 version of the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Waste is applicable to this matter.

The parties filed their memoranda and reply briefs. Respondent also filed an affidavit (with her memorandum) wherein she stated essentially that she had leased the subject premises to the operator of the facility for the pertinent period of time encompassing the NOVO, and that pursuant to the indenture of the lease for the subject premises, it was lessee's responsibility to comply with the Regulations, including testing of the USTs on the site.

The parties agreed that the following documents are to be considered full exhibits:

Joint 1. Interoffice memorandum dated February 5, 1992 to Bruce Catteral from Peter Sullivan (1 p.).

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 7

- Joint 2. Letter dated January 31, 1992 to Clerk, Administrative Adjudication Division from David Sholes, Esq., with attached Motion for leave to assert a third-party complaint (5 pp.).
- Joint 3. Letter dated January 24, 1992 to David Sholes, Esq., from Sandra J. Calvert (1 p.).
- Joint 4. Request for Hearing dated December 18, 1991 submitted by David Sholes, Esq. (2 pp.).
- Joint 5. Copy of Certified Mail Return Receipt to Robert P. Moretti and cover letter to Notice of Violation ("NOV") (2 pp.).
- Joint 6. Copy of Certified Mail Return Receipt to Elizabeth DiLuglio with attached cover letter and NOV (7 pp.).
- Joint 7. Copy of Certified Mail Return Receipt to Barbara D'Allesandro with attached cover letter and NOV (13 pp.).
- Joint 8. Copy of NOV to Barbara D'Allesandro which was filed in the Land Evidence Records in Cranston, RI (6 pp.).
- Joint 9. Copy of NOV to Elizabeth DiLuglio which was filed in the Land Evidence Records in Cranston, RI (6 pp.).
- Joint 10. Certificate of Registration for Underground Storage Facilities dated May 30, 1990 (1 p.).
- Joint 11. Certificate of Registration for Underground Storage Facilities dated April 11, 1985 (2 pp.).
- Joint 12. Notification of Underground Storage Tanks dated November 23, 1988 bearing identification No. 278 (2 pp.).
- Joint 13. Notification of Underground Storage Tanks dated December 5, 1988 bearing identification No. 278 (2 pp.).
- Joint 14. Copy of site plan entitled "Proposed Site Plan Change of Use, A.P. 15, Lots 52 & 1632, located in Cranston, RI (1 p.).

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 8

- Joint 15. Application for Underground Storage Facilities dated November 28, 1988 (3 pp.).
- Joint 16. Copy of City of Cranston Application for Renewal of Permit for Storage of Hazardous Substance - Fee (1 p.).
- Joint 17. Letter dated November 23, 1988 to Rhode Island Department of Environmental Management, Division of Water Resources from Barbara D'Allesandro (1 p.).
- Joint 18. Letter dated January 31, 1992 to Ms. D'Allesandro from Bruce Catterall (1 p.).
- Joint 19. Application for Underground Storage Facilities dated March 21, 1985 (2 pp.).
- Joint 20. Letter dated April 28, 1987 to Saverio Mancieri of the Department from Domenic Cotti with attached interoffice memorandum re: precision tests (2 pp.).
- Joint 21. Copy of Site Plan indicating location of underground storage tanks on site (1 p.).
- Joint 22. Certificate of Closure for Underground Storage Facilities dated January 29, 1992 with attachments (6 pp.).
- Joint 23. Letter dated July 29, 1991 to Al DiLuglio from Saverio Mancieri of the Department (1 p.).
- Joint 24. Complaint Report dated July 23, 1991 prepared by M. Toti (1 p.).
- Joint 25. Copy of Noncompliance Sheet bearing date of July 29, 1991 (1 p.).
- Joint 26. Data Chart for Tank System Tightness Test certification dated April 7, 1986 (6 pp.).
- Joint 27. Data Chart for Tank System Tightness Test certification dated June 1, 1987 (5 pp.).
- Joint 28. Data Chart for Tank System Tightness Test certification dated June 11, 1987.
- Joint 29. Data Chart for Tank System Tightness Test certification dated March 29, 1988 (3 pp.).

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 9

- Joint 30. Data Chart for Tank System Tightness Test certification dated May 12, 1988 (8 pp.).
- Joint 31. Invoice No. 1014 from A-Team Petroleum, Inc. to Lake View Farms for the removal of the tanks. (1 p.).
- Joint 32. Invoice No. 1016 from A-Team Petroleum, Inc., dated February 25, 1992 for testing, removal and disposal of contaminated soil at 100 East Avenue, Cranston, RI (1 p.).
- Joint 33. Certificate of Registration for Underground Storage Facility dated December 4, 1990.
- Joint 34. Letter dated September 27, 1988 to Al DiLuglio from Leslie A. Gerundio (1 p.).

The parties submitted by stipulation an agreed statement of facts (as set forth herein) and said stipulated facts are adopted and incorporated by reference thereto as the Findings of Fact. The sole issue to be addressed at this time is:

Whether Barbara D'Allesandro, as owner of the facility, is responsible for the UST NOV and the payment of penalties?

Respondent contends that she should not be held liable for the administrative penalty imposed by the UST Program in this matter since she did not breach any Statute or Regulation. It is Respondent's position that under the Statutes and Regulations in effect at the time of the alleged violations, the owner of real estate cannot be held responsible to pay an administrative penalty when the operator of a gas station fails to register USTs or to have the tanks precision tested on an annual basis.

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 10

It is argued by Respondent that the Regulations impose separate burdens or sanctions against owners and operators of UST facilities; that it was the duty and responsibility of the operator to comply with testing and registration requirements (by the Regulations and also pursuant to the lease for said premises); that the owner had no control over the daily operation of the facility; that the owner should not be liable for the nonfeasance of the operator; and therefore Respondent, as owner of the facility, is not responsible for the violations in the NOVO or the payment of the penalty.

Respondent also maintains that the DEM lacks jurisdiction to impose the instant administrative penalties against the owner, and that the imposition of such penalties is constitutionally impermissible.

It is the position of the UST Program that owners and operators are jointly responsible for the proper operation, maintenance and regulatory compliance of a UST Facility. The UST Program argues that the Respondent's responsibility for the maintenance of the USTs (including precision testing and spill containment installation) cannot be completely delegated to another; that the contractual arrangement between owner and operator does not relieve the Respondent of her duty to comply with the Regulations; and that the Respondent as owner can be held responsible for the violations in the NOVO and can be ordered to pay the administrative penalty imposed therein.

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 11

It has been stipulated by the parties that the 1985 version of the Regulations are applicable to this matter. Said Regulations were duly enacted pursuant to the authority granted to the Director of DEM by Section 46-12-3 of the R.I.G.L.

The NOVO cites Respondent for violations of Sections 9(b) and 9(d) of the Regulations.

Section 9(b) of the Regulations provides:

"All underground storage tanks at existing facilities shall be fitted with spill containment basins around all fill pipes within two (2) years of the effective date of these regulations".

Section 9(d) of the Regulations provides:

"All existing facility underground storage tanks for which the dates of installation are unknown or unverifiable shall be precision tested within one (1) year of the effective date of these regulations, and annually thereafter."

The Respondent, as owner of the facility and the USTs, has the responsibility and duty to install spill containment basins and to conduct precision testing despite the presence of an operator on the site. Although the Regulations under consideration do not state specifically the party responsible for compliance with the requirements for spill containment basins and precision testing, it is clear from the Regulations as a whole that owners and operators remain responsible for compliance with these provisions. The failure to comply with the subject requirements is an obvious breach of the

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 12

Regulations by both owner and operator.

The documentary evidence demonstrates that the Respondent retained sufficient continuous control over the facility and the USTs to hold her responsible for the USTs precision testing and spill containment installation. Merely because the Facility Registration Section (No. 7) specifically charges operators with the responsibility for registration, this does not mean that only the operator should be responsible for compliance with other Sections, such as those for spill containment basins and precision testing (Section 9). The NOVO cites Respondent for failure to precision test USTs and failure to install spill containment basins for USTs, and responsibility for registration has no bearing on this matter.

Owners should not be allowed to avoid responsibility for the safety precaution measures mandated by the Regulations (such as spill containment basins and precision testing) solely because the Regulations do not state specifically that owners should be responsible for same. A clear reading of the Regulations in their entirety establishes that the owner as well as the operator should be responsible for the installation, use and maintenance of all facility components and related equipment in order to protect the groundwaters and surface waters of the State from pollution from USTs.

Respondent cannot delegate her duties and responsibilities as owner of the Facility and the USTs to the

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 13

operator for purposes of compliance with the Regulations. Even an effective delegation does not relieve the delegating party of its duty. As the Uniform Commercial Code puts it "no delegation of performance relieves the party delegating of any duty to perform or any liability for breach".¹ E.A. Farnsworth, Contracts Section 11.10 p. 126 (1990). The provisions in the lease for the subject premises (that lessee operator shall comply with certain regulatory requirements) does not relieve the owner of her responsibility to comply with the Regulations. The performance required by a duty can often be delegated; but by such a delegation the duty itself is not escaped. A. Corbin, Corbin on Contracts Section 866, p. 452 (1951). When a duty is delegated, however, the delegating party (delegant) continues to remain liable. If this were not so every solvent person could obtain freedom from his debts by delegating them to an insolvent. Calamari & Perillo, Contracts, Third Edition, Section 18-25, p. 757 (1987). Barbara D'Allesandro, as owner of the Facility and the USTs, remains responsible under the Regulations for the installation of spill containment basins and precision testing of the USTs despite the provisions in the lease.

¹ UCC 2-210(1)

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 14

Respondent's argument that DEM lacks jurisdiction to impose the administrative fine against the owner is without merit. DEM was empowered by the Legislature to issue NOVOS and to impose administrative penalties for violations of the Regulations.

The authority to assess an administrative penalty on a person who fails to comply with any provision of any rule or regulation is contained in R.I.G.L. Section 42-17.6-2; the power to promulgate and enforce Regulations is supplied by R.I.G.L. Section 46-12-3(u); and Section 20 of the Regulations provides that penalties will be assessed in accordance with R.I.G.L. Chapter 46-12 and 42-17.1 for any violation of these Regulations. The UST Program clearly was authorized by Statute and Regulation to issue the NOVO and to impose the administrative penalty against the Respondent.

It is a primary canon of statutory construction that statutory intent is to be found in the words of a statute if they are free from ambiguity and express a reasonable meaning. The statutory terms must be given their plain and ordinary meaning unless a contrary intent is clearly shown on the face of the statute. Little v. Conflict of Interest Commission 121 R.I. 232 (1979). In the instant matter, the administrative penalty imposed against Respondent was authorized and warranted under the pertinent statutes and Regulations. A

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 15

clear reading of the Regulations demonstrates that the provisions concerning spill containment and precision testing are applicable to owners as well as operators; and that penalties may be assessed against both for violations of these requirements.

It is unfortunate that Respondent did not become aware of the violations until the issuance of the NOVO, however the UST Program appropriately contacted the party designated as the contact person at the Facility by Respondent. Owners of Facilities cannot shed their responsibility for the maintenance of the USTs by delegating such duties to operators. It is the owner's prerogative to select an operator for the Facility and the UST Program should not be responsible for a lack of communication between contracting parties nor between the contact person and the owner.

The issue raised by Respondent as to the constitutionality of the imposition of administrative penalties is not properly before the Hearing Officer. The Prehearing Conference Record and the Order entered pursuant thereto (pursuant to agreement of the parties) provide that the sole issue to be considered herein is whether the Respondent, as owner of the facility, is responsible for the UST NOVO and the payment of penalties. This constitutional issue was not raised prior to the submission of Respondent's memorandum, and will not be addressed further herein.

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 16

Based upon the foregoing facts (as submitted in the Stipulation of Facts) and the documentary evidence of record, I conclude as a matter of law that:

- (1) DEM has jurisdiction in this matter.
- (2) That the UST Program has proved by a preponderance of the evidence that the Respondent, Barbara D'Allesandro, has violated the Regulations in that Respondent (1) failed to fit underground storage tanks at an existing facility with spill containment basins around all fill pipes as required by the Regulations; and (2) failed to precision test underground storage tanks in the years 1989, 1990 and 1991 as required by the Regulations.
- (3) The Respondent, Barbara D'Allesandro, as owner of the facility is responsible for the UST NOVO and the payment of penalties.

Wherefore, it is hereby

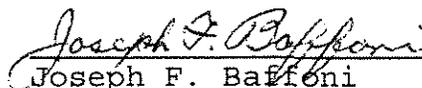
ORDERED

- (1) That the Notice of Violation and Order issued to Barbara D'Allesandro No. UST 91-00278 be and is hereby sustained as the liability of said Respondent.
- (2) That this matter will be rescheduled by separate order of the Administrative Adjudication Division for a hearing on the issue of "Whether the assessment of an administrative penalty of \$8,350.00 is proper and reasonable or excessive".

I hereby recommend the foregoing Decision and Order to the Director for issuance as a Final Order as to Liability.

8-4-93

Date

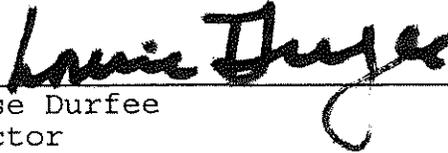


Joseph F. Baffoni

Hearing Officer
Administrative Adjudication Division
Department of Environmental Management
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

BARBARA D'ALLESANDRO
AAD NO. 91-006/GWE
NOTICE OF VIOLATION NO. UST 91-00278
PAGE 17

Entered as a Final Order as to Liability on this 6th
day of August, 1993.



Louise Durfee
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded via regular mail, postage prepaid to David H. Sholes, Esq., Sholes & Sholes, 1375 Warwick Avenue, Warwick, Rhode Island 02888 and via interoffice mail to Brian Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 6th day of August, 1993.

