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David H. Yamasaki

Chief Executive Officer/Clerk

Superior Court of CA, County of Santa Clara

Case #1-00-CV-788657 Filing #G-59619

By R. Walker, Deputy

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**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA**

THE PEOPLE OF THE STATE OF  
CALIFORNIA,  
Plaintiff,

Case No.: 1-00-CV-788657

vs.

**STATEMENT OF DECISION**

ATLANTIC RICHFIELD COMPANY,  
CONAGRA GROCERY PRODUCTS  
COMPANY, E.I. DU PONT DE NEMOURS  
AND COMPANY, NL INDUSTRIES, INC.,  
and THE SHERWIN-WILLIAMS COMPANY,

Defendants.

AND RELATED CROSS-ACTION.

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1 The People seek an order to abate the alleged public nuisance created by lead paint  
2 manufactured or sold by five Defendants in ten jurisdictions in California. Filed thirteen years  
3 ago, the matter came on for a bench trial on July 15-18, 22-25, 29-30, August 1, August 5-8,  
4 August 12-15, August 19-22, 2013 in Department 1 (Complex Civil Litigation), the Honorable  
5 James P. Kleinberg presiding.<sup>1</sup> The appearances of counsel for each trial day are as noted in  
6 the record. Pursuant to the Court's Order of August 16, 2013 each party simultaneously  
7 submitted its detailed version of a proposed statement of decision ("PSOD") for the Court to  
8 consider in rendering this opinion. And, on September 23, 2013 the greater part of the day was  
9 devoted to closing arguments. Following argument the matter was submitted for decision. On  
10 November 4, 2013 the Court issued an Order directing the parties to address issues pertaining  
11 to the proposed plan of abatement with which the parties complied; the case then stood  
12 resubmitted for decision as of November 26, 2013.

13 On December 16, 2013 the Court issued its Proposed Statement of Decision. On  
14 December 31, 2013, consistent with the Rules of Court, all parties submitted objections to the  
15 Court's proposed decision, which have been reviewed and considered.<sup>2</sup> To the extent the Court  
16 has not revised its decision as stated herein, all objections by the parties are **OVERRULED**.

17 The Court, having read and considered the oral and written evidence, having observed  
18 the witnesses testifying in court, and having considered testimony introduced through  
19 depositions, having considered the supporting and opposing memoranda of all parties, having  
20 heard and considered the arguments of counsel, and good cause appearing therefore, makes the  
21 following findings and conclusions:

22 **I. THE PARTIES**

23 **A. Plaintiff and Cross-defendants**

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27 <sup>1</sup> The People withdrew their requested jury demand and on February 3, 2012 the Court struck the jury demand  
asserted by Defendants. Defendants did not seek appellate review of that order.

28 <sup>2</sup> The objections were of varying lengths: The People (4 pages), ARCO (7 pages), ConAgra (24 pages), DuPont (9  
pages), NL (18 pages), and Sherwin-Williams (111 pages).

1 Plaintiff is the People of the State of California (People), acting by and through the  
2 County Counsels of Santa Clara, Alameda, Los Angeles, Monterey, San Mateo, Solano, and  
3 Ventura Counties and the City Attorneys of Oakland, San Diego, and San Francisco. The  
4 People, for purposes of this action, are residents of the counties of Santa Clara, Alameda, Los  
5 Angeles, Monterey, San Mateo, Solano, and Ventura Counties and the cities of Oakland, San  
6 Diego, and San Francisco (collectively and referred to herein as “Jurisdictions”). Cross-  
7 Defendant Counties of Santa Clara, Alameda, Los Angeles, Monterey, San Mateo, Solano, and  
8 Ventura are charter or general law counties organized and existing under the Constitution and  
9 laws of the State of California. Cross-Defendant City and County of San Francisco is a charter  
10 city and county organized and existing under the Constitution and laws of the State of  
11 California. Cross-Defendant Cities of San Diego and Oakland are charter cities organized and  
12 existing under the Constitution and laws of the State of California. In this decision the Plaintiff  
13 is referred to as the People, the public entities, and the Jurisdictions.  
14

15 Throughout this litigation, the public entities have been represented both by their  
16 respective government counsel and by private counsel.<sup>3</sup>

17 **B. Defendants**

18 Defendants and Cross-Complainant Sherwin-Williams Company were among the  
19 largest manufacturers and sellers of lead pigment and paint containing lead pigment in the  
20 United States in the 20th century. (*Fed. Trade Com. v. Nat. Lead Co.* (1957) 352 U.S. 419,  
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26 • <sup>3</sup> In *County of Santa Clara v. Superior Court* (2010) 50 Cal. 4<sup>th</sup> 35 the Supreme Court addressed the issue of whether  
27 private counsel retained by the People were entitled to receive in the form of a public nuisance  
28 fees and costs through contingent fee arrangements. The Supreme Court held those arrangements were permitted.

1 424; P517 at 1-3, 9.)<sup>4</sup> The predominant use of white lead pigment was for paint applications.  
2 (Tr. 543:21-26.)<sup>5</sup>

3 Defendant Atlantic Richfield Company (“ARCO”) is a Delaware corporation with its  
4 principal place of business in Illinois. Defendant ConAgra Grocery Products (“ConAgra”) is a  
5 Delaware corporation with its principal place of business in Nevada. Defendant E.I. Du Pont de  
6 Nemours and Company (“DuPont”) is a Delaware corporation with its principal place of  
7 business in Delaware. Defendant NL Industries (“NL”), formerly known as the National Lead  
8 Company, is a New Jersey corporation with its principal place of business in Texas. Defendant  
9 Sherwin-Williams Company (“SW”) is an Ohio corporation with its principal place of business  
10 in Ohio. SW is also a cross-complainant, seeking declaratory relief.

11 As described more fully below, the corporate histories of ARCO and ConAgra are of  
12 some moment in this litigation.

13  
14 **C. ARCO, ConAgra, and successor liability**

15 Both ARCO and ConAgra make the threshold argument that since they were the result  
16 of prior mergers and acquisitions, and the alleged bad acts occurred years before the present  
17 iteration of these companies, they cannot be liable for any wrongs of their predecessors.

18 The People sue ARCO as alleged successor to The Anaconda Company and certain of  
19 its former subsidiaries. (¶ 9.) The evidence shows promotion by two of the subsidiaries:  
20 Anaconda Lead Products Company (“ALPC”), and International Smelting & Refining  
21 Company (“IS&R”). ALPC operated a lead pigment manufacturing plant in East Chicago,  
22 Indiana from 1920 until 1936, when ALPC was dissolved. (Ex. 291\_004.) IS&R was the sole  
23 shareholder of ALPC at the time of its dissolution. ALPC’s assets and properties were  
24

25  
26 <sup>4</sup> Defendant E.I. Du Pont de Nemours and Company was not a party to the FTC proceeding.

27 <sup>5</sup> As used in this decision, “Tr.” refers to the trial transcript by page and line, “Dkt.” Refers to the Court’s  
28 Complex Civil case-specific website, “P” refers to Plaintiffs’ trial exhibits; Defendants’ trial exhibits are similarly  
noted. “¶” refers to paragraphs in the operative complaint. The Court permitted the parties to introduce testimony  
by way of depositions subject to objections which the Court ruled upon. The net testimony was admitted along  
with attendant exhibits.

1 distributed to IS&R upon ALPC's dissolution. IS&R became the owner of the East Chicago  
2 plant at that time, and operated the plant from 1936 until 1946, when it sold the plant to an  
3 unrelated entity and exited the lead pigment business. (Exs. 285, 291\_004.)

4 When ALPC, and later IS&R, operated the East Chicago plant, the plant produced dry  
5 white lead carbonate pigment for sale under the "Anaconda" brand name to manufacturers of  
6 paint and to manufacturers of non-paint products such as ceramics. (Ex. 285.) Beginning in  
7 1931, the plant also produced white lead-in-oil, which also was sold under the "Anaconda"  
8 brand name. (*Id.*) Plaintiffs' evidence of promotions published by any alleged ARCO  
9 predecessor before 1936 consists of promotions published by ALPC.

10 ARCO maintains it has not succeeded to the liability, if any, that ALPC would have for  
11 those promotions if it still existed. ARCO contends the shareholders of a dissolved corporation  
12 do not succeed to its liabilities as a result of the dissolution. Thus, ARCO argues, IS&R did  
13 not succeed to the liabilities, if any, of ALPC. Although IS&R later merged with the  
14 Anaconda Company, which in turn merged with ARCO, it is submitted those mergers do not  
15 provide any basis for holding ARCO to be the successor to the liabilities of ALPC.

16 As for ConAgra, in 1962 W.P. Fuller & Co. merged with Hunt Foods and Industries  
17 ("Hunt") (Ex. 1 to People's Request for Judicial Notice ("PRJNMA")); in 1968 Hunt, Canada  
18 Dry and McCall consolidated to form Norton-Simon (Ex. 2 to PRJNMA); in 1993 Norton-  
19 Simon merged with Beatrice U.S. Food Corp. to form the Beatrice Company (Ex. 3 to  
20 PRJNMA); and later in 1993 Beatrice Company merged into Hunt-Wesson, Inc. (Ex. 4 to  
21 PRJNMA); in 1999 Hunt-Wesson, Inc. changed its name to ConAgra Grocery Products  
22 Company (Ex. 5 to PRJNMA).

23 ConAgra introduced evidence that in 1964, before Hunt merged with Canada Dry and  
24 McCall to form Norton-Simon, Hunt transferred all assets and liabilities relating to the paint  
25 business of W.P. Fuller & Co. to a separate and distinct subsidiary named W.P. Fuller Paint  
26 Co. (Ex. 1447.001-009.) W.P. Fuller Paint Co. remained in business for several years after its  
27 creation. (*Id.* at 11-23.) In 1967 W.P. Fuller Paint Co. sold the assets and liabilities of the  
28

1 paint business to Fuller-O'Brien Corporation ("O'Brien"). Unlike Hunt, O'Brien was a paint  
2 company and remained in the paint business years after its acquisition of W.P. Fuller Paint  
3 Co.'s assets and liabilities. (Ex. 12 to Anderson Depo at pages 227, 592.) W.P. Fuller Paint  
4 Co. changed its name to WPF, Inc. and dissolved in 1968. (Ex. 1447.011-023.) ConAgra  
5 maintains that because any paint liabilities of Fuller were never passed to Norton-Simon, the  
6 chain of potential successor liability was broken. And, ConAgra argues, because this is an  
7 equitable action, the facts and law must be evaluated through the lens of equity and the  
8 question is whether imposition of liability would not only be legally appropriate, but would be  
9 fair and just under the circumstances.<sup>6</sup>

10  
11 The People have addressed these arguments as follows:

12 "If one corporation has merged into another, the surviving corporation is subject to all  
13 liabilities of the merged or now-defunct corporation." (Cal. Prac. Guide Pers. Inj. Ch. 2(II)-F, §  
14 2:1681, citing Corp. Code, § 1107.) "Generally, the purchaser of a corporation's business or  
15 assets does not become liable for the transferor's obligations simply by reason of the purchase.  
16 But the rule is otherwise if the purchaser assumes the corporation's liabilities as part of the  
17 purchase price." (Cal. Prac. Guide Pers. Inj. Ch. 2(II)-F, § 2:1682, citations omitted.) Absent a  
18 true merger or express assumption following an asset sale, successor liability may be imposed  
19 in the event of a *de facto* merger, whereby a corporate acquisition in the form of an asset  
20 purchase achieves the same results as a merger. (*Marks v. Minnesota Mining & Mfg. Co.*  
21 (1986) 187 Cal.App.3d 1429, 1435.) Successor liability may also be imposed pursuant to the  
22 mere continuation doctrine, where the purchaser acquires the seller's assets for inadequate  
23 consideration or one or more persons were officers, directors or stockholders of both  
24 corporations. (*Ray v. Alad* (1977) 19 Cal.3d 22, 29.) "Notwithstanding the absence of a true  
25 merger, a 'de facto' merger or an express assumption, an assumption of liability may be  
26 implied in law where it is both 'fair' to do so and necessary to prevent injustice." (Cal. Prac.

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6 ConAgra is occasionally referred to in this decision as Fuller for historical context.



1 Guide Pers. Inj. Ch. 2(II)-F, § 2:1682, citing *Alad, supra*, 19 Cal.3d 22, and other cases.)<sup>7</sup>

2  
3 **D. Decision on successor liability of ARCO and ConAgra**

4 The Court finds ARCO succeeded to the liabilities of Anaconda and IS&R pursuant to  
5 corporate mergers and/or express assumption of liabilities and that IS&R's liabilities included  
6 that of its agent, ASC. IS&R's liabilities included those of ALPC and ASC, which IS&R  
7 succeeded to under the *de facto* merger and/or mere continuation doctrines. And, by  
8 succeeding to the liabilities of ALPC, IS&R also succeeded to the liabilities of ALPC's agent,  
9 ASC, pursuant to agency principles. All of these entities are referred to jointly herein as  
10 "ARCO." Similarly, the Court finds ConAgra succeeded to Fuller's liabilities as a result of a  
11 series of corporate mergers and/or the express assumption of liabilities. (¶¶ 8-12.)

12 **The Court finds it is fair and appropriate in this case to so hold and necessary to**  
13 **prevent an injustice. Therefore, ARCO and ConAgra do not avoid liability on this**  
14 **ground.**

15  
16 **II. PRE-TRIAL PROCEDURAL HISTORY AND RELEVANT AUTHORITIES**

17 The public entities' claims against defendants originally included causes of action for  
18 fraud, strict liability, negligence, unfair business practices, and public nuisance. *County of*  
19 *Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 300 (hereinafter cited as  
20 "Appeals Decision") The Superior Court (Judge Jack Komar) granted defendants' motion for  
21 summary judgment on all causes of action. The Court of Appeal reversed the Superior Court's  
22 judgment of dismissal and ordered the lower court to reinstate the public-nuisance, negligence,  
23 strict liability, and fraud causes of action. (*Id. at p. 333.*)

24  
25  
26 <sup>7</sup> In response ARCO and ConAgra argue *Ray* offers limited guidance because *Ray* was a products liability case, not an  
27 equitable action relating to an alleged public nuisance. In products liability cases, successor liability is imposed  
28 for several policy reasons such as the ability of successor entities to spread the risk of liability among current  
purchasers of the product line and the fact that the goodwill of the predecessor is typically enjoyed by the  
successor. *Id. at 25.* The Court holds the latter policy reason to be persuasive.

1           Thereafter, the public entities filed a fourth amended complaint (“FAC”) that alleged a  
2 single cause of action for public nuisance, and sought only abatement; that is the claim at issue  
3 in this decision.

4           The relevant statutory law provides:

5           “Anything which is injurious to health ... or is indecent or offensive to the senses, or an  
6 obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life  
7 or property ... is a nuisance.” Civ. Code, § 3479

8           “A public nuisance is one which affects at the same time an entire community or  
9 neighborhood, or any considerable number of persons, although the extent of the annoyance or  
damage inflicted upon individuals may be unequal.” Civ. Code, § 3480

10          Abatement, pursuant to Civ. Code, § 3491 is the result sought in this case.

11          A civil action may be brought in the name of the people of the State of California to  
12 abate a public nuisance. Code Civ. Proc., § 731; Gov. Code, § 26528

13          “[P]ublic nuisances are offenses against, or interferences with, the exercise of rights  
14 common to the public.” (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103) “Of  
15 course, not every interference with collective social interests constitutes a public nuisance. To  
16 qualify, and thus be enjoined [or abatable], the interference must be both substantial and  
17 unreasonable.” *Acuna* at 1105. It is substantial if it causes significant harm and unreasonable if  
18 its social utility is outweighed by the gravity of the harm inflicted. *Id.*

19          When hearing this case on pleading issues the Appeals Decision held Santa Clara, San  
20 Francisco, and Oakland brought a civil action in the name of the People seeking to abate a  
21 public nuisance. The public entities alleged that lead causes grave harm, is injurious to health,  
22 and interferes with the comfortable enjoyment of life and property. The Court of Appeal found  
23 the complaint was adequate to allege the existence of a public nuisance for which these  
24 entities, acting as the People, could seek abatement. Subsequently, the Supreme Court declined  
25 to review the Appeals Decision.<sup>8</sup> Thus, the following language of the Appeals Decision is  
26 controlling:

27  
28 <sup>8</sup> Rehearing denied by *County of Santa Clara v. Atlantic Richfield Company*, 2006 Cal.App. LEXIS 438 (Cal.App.  
6<sup>th</sup> Dist., Mar. 24, 2006) Time for Granting or Denying Review Extended *County of Santa Clara v. Atlantic*

1 Here, the representative cause of action is a public nuisance action brought *on behalf of*  
2 *the People seeking abatement*. Santa Clara, SF, and Oakland are *not* seeking *damages* for  
3 injury to *their* property or the cost of remediating *their* property. Liability is not based merely  
4 on production of a product or failure to warn. Instead, liability is premised on defendants'  
5 *promotion of lead paint for interior use* with knowledge of the hazard that such use would  
6 create. This conduct is distinct from and far more egregious than simply producing a defective  
7 product or failing to warn of a defective product; indeed, it is quite similar to instructing the  
8 purchaser to use the product in a hazardous manner, which *Modesto [City of Modesto*  
9 *Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4<sup>th</sup> 28] found *could* create  
10 nuisance liability. (emphasis in original) *Id.* at 309

11 \*\*\*

12 Because this type of nuisance action does not seek damages but rather abatement, a  
13 plaintiff may obtain relief before the hazard causes any physical injury or physical damage to  
14 property. A public nuisance cause of action is not premised on a defect in a product or a failure  
15 to warn but on affirmative conduct that assisted in the creation of a hazardous condition. Here,  
16 the alleged basis for defendants' liability for the public nuisance created by lead paint is their  
17 affirmative promotion of lead paint for interior use, not their mere manufacture and distribution  
18 of lead paint or their failure to warn of its hazards. *Id.* at 309-310

19 \*\*\*

20 [L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls  
21 the property, nor on whether he is in a position to abate the nuisance; the critical question is  
22 whether the defendant *created or assisted in the creation of the nuisance*. (emphasis supplied)  
23 *Id.* at 306, quoting *Modesto* at 38

24 The People sought to prove that defendants assisted in the creation of this nuisance by  
25 concealing the dangers of lead, mounting a campaign against its regulation, and promoting lead  
26 paint for interior use. The People further claimed defendants did so despite their knowledge for  
27 nearly a century that such a use of lead paint was hazardous. Had defendants not done so, it is  
28 asserted, lead paint would not have been incorporated into the interiors of such a large number  
of structures and would not have created the public health hazard that the People contend now  
exists.

As noted by the Court of Appeal:

A public nuisance cause of action is not premised on a defect in a product or a failure to  
warn but on affirmative conduct that assisted in the creation of a hazardous condition. Here, the  
alleged basis for defendants' liability for the public nuisance created by lead paint is their

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*Richfield Company*, 2006 Cal. LEXIS 7476 (Cal., May 22, 2006) Review denied by *County of Santa Clara v.*  
*Atlantic Richfield Company*, 2006 Cal. LEXIS 7622 (Cal., June 21, 2006)

1 affirmative promotion<sup>9</sup> of lead paint for interior use, not their mere manufacture and  
2 distribution of lead paint or their failure to warn of its hazards. *Appeals Decision* at 309-310

3 While this Court may take judicial notice of decisions from other jurisdictions that  
4 pertain to lead paint litigation (e.g., Rhode Island, Wisconsin), those cases are not controlling  
5 and are of marginal value because of the varied legal standards involved.

6 **III. TRIAL**

7 Trial to the Court of the sole remaining cause of action – public nuisance – began on  
8 July 15, 2013 after years of intense discovery and motion practice.<sup>10</sup> Over the course of 23 trial  
9 days the parties introduced over 450 exhibits into evidence. At the close of live testimony, the  
10 parties – as permitted by the Court -- submitted 25 depositions with attendant exhibits, portions  
11 of which were admitted into evidence after the Court ruled on objections. During the trial the  
12 Court ruled on over 30 written evidentiary objections and motions.<sup>11</sup>

13  
14  
15 <sup>9</sup> The Court adopts the standard definition of “promotion”: “the act of furthering the growth or development of  
16 something; *especially*: the furtherance of the acceptance and sale of merchandise through advertising, publicity, or  
discounting” Merriam-Webster Dictionary, 2013

17 <sup>10</sup> Retired United States District Judge Eugene M. Lynch served as appointed discovery referee and held over 60  
18 hearings and conferences. SW objects the Court did not allow sufficient time for discovery; that objection is  
OVERRULED.

19 <sup>11</sup> The Court initially allocated 30 hours to each side (Plaintiff on the one hand, Defendants the other) for the  
20 presentation of live testimony (opening statements, motions, closing arguments, and procedural sessions were not  
included). On its own motion the Court expanded the time to 40 hours per side after reviewing the parties’ more  
21 thoughtful witness time estimates. Defendants objected to this allocation and asserted that the imposition of time  
limits for testimony violated due process. The Court disagrees. Both California and federal courts have regularly  
22 upheld time limitations on testimony. (*Hernandez v. Kieferle* (2011) 200 Cal.App.4th 419, 438; see also *General  
Signal Corp. v. MCI Telecommunications Corp.* (9th Cir. 1995) 66 F.3d 1500, 1508, citing *Monotype Corp. v.  
Intl. Typeface Corp.* (9th Cir.1994) 43 F.3d 443, 451 [finding the court's time limit reasonable, even though it  
23 provided significantly less time than the parties estimated would be required]. Imposing time limits is well within  
this Court’s discretion (see, e.g., *K.C. Multimedia, Inc. v. Bank of Am. Tech. and Operations, Inc.* (2009) 171  
24 Cal.App.4th 939, 951), and permitted by §352 of the Evidence Code. Each Defendant had time to present its case  
and, in addition, the Court provided Defendants with extra time after they had exceeded their allotment. (Tr.  
25 3146:20-3147:2; 3239:24-3240:2.) Defendants were able to conduct examinations of their own expert witnesses as  
well as lengthy cross examinations of the People’s witnesses (often in excess of the direct examination times), to  
26 present additional testimony through depositions, and to enter hundreds of documents into evidence. Each  
Defendant had ample opportunity to present the evidence in support of its case through able counsel who brought  
27 extensive experience in “lead paint” litigation to this case. Finally, after reviewing Defendants’ offers of proof  
regarding testimony that *might* have been presented with additional time [Dkt. Nos. 3459, 3460, 3461, 3462,  
28 3463, 3464, 3465, 3466, 3467, 3468 & 3473], it is noteworthy and convincing that the Defendants did not claim  
surprise as to any of the People’s testimony at trial. The Court does not find that Defendants’ proffered testimony  
would have changed its findings or conclusions. None of the parties sought appellate relief as to these limits.

1       **The trial concerned the following issues:**

- 2       • Is white lead carbonate and the paint in which it is a key ingredient harmful,  
3       particularly to children?
- 4       • If so, what harms does it cause?
- 5       • Is there a present danger that needs to be addressed by the Court?
- 6       • Did the Defendants promote and sell this product in the Jurisdictions?
- 7       • If so, during what period and to what extent?
- 8       • Did the defendants sell the product with actual or constructive knowledge (if  
9       constructive knowledge was deemed sufficient) that it was harmful?
- 10      • To what extent are higher blood lead levels due to non-paint sources, such as deposits  
11      from gasoline? Or candies? Or water? And does the existence of these other sources  
12      supplant any liability of these defendants?
- 13      • Does intact lead paint pose a hazard? And if so, to what extent?
- 14      • Does the undisputed reduction in tested blood lead levels over time mean the issues in  
15      this case are resolved?
- 16      • To what extent do existing programs at all government levels deal with the problem?
- 17      • Is the issue with local governments a lack of resources, or a lack of will by those  
18      entities?
- 19      • Is the proposed abatement solution unrealistic as to cost, time, or manageability?
- 20      • Is the proposed abatement solution itself unlikely to be successful in the long run?
- 21      • Do other defenses, such as those raising constitutional issues, preclude liability?

22       **IV. THRESHOLD FINDINGS**

23       Two threshold issues are disposed of as follows:

24       **First, the question of “pigment” versus “paint.”** SW in particular strenuously argued  
25       that lead pigment must be differentiated from lead paint. It is undisputed that certain companies  
26       made pigment and sold it as a component for paint. Therefore, and in contrast, the argument is  
27

1 since paint was produced by many companies, it is wrong to hold these five defendants liable  
2 for paint manufactured and installed by others. The Court adopts a different position: that lead  
3 pigment is, by itself, not applied to walls and woodwork but is the dangerous component of  
4 paint. The Appeals Decision speaks of “lead paint” and, as it must, the Court is bound by that  
5 definition of the product at issue.

6 **Second, the Court has considered the issue of exterior versus interior paint.** Again,  
7 the Appeals Decision provides direction: “Here, the alleged basis for defendants' liability for  
8 the public nuisance created by lead paint is their affirmative promotion of lead paint **for**  
9 **interior use**, not their mere manufacture and distribution of lead paint or their failure to warn  
10 of its hazards.” (emphasis supplied) *Id.* at 310 Of equal significance, and beyond the cited  
11 language, the Court is convinced the People have not sustained their burden of proof regarding  
12 exterior paint and the element of causation. This is so because there are multiple causes of lead  
13 found on the outside of houses, including the residue from leaded gasoline and that tracked  
14 from other locations, that make it improper for the court to connect these defendants to outside  
15 hazards.

16 **Therefore, based on both the language of the Appeals Decision and,**  
17 **independently, the lack of persuasive evidence, this decision is based solely on the issue of**  
18 **lead paint as produced, promoted, sold, and used for interior use.**

## 20 **V. PLAINTIFF’S LEGAL AND EVIDENTIARY POSITIONS**

### 21 **Plaintiff contends as follows:**<sup>12</sup>

#### 22 **A. Legal standards**

23 In a public nuisance case seeking only abatement, “the burden of the People [is] to  
24 prove the case only by a preponderance of the evidence.” (*People v. Frangadakis* (1960) 184  
25  
26  
27

28 <sup>12</sup> In this decision the Court draws heavily upon the detailed PSODs supplied by the parties.

1 Cal.App.2d 540, 549-50; see also Evid. Code, § 115 [“Except as otherwise provided by law,  
2 the burden of proof requires proof by a preponderance of the evidence”].)

3 Among the rights common to the public is the right to public health. This includes the  
4 right to be free from the harmful effects of lead in paint. Lead in homes in the Jurisdictions is  
5 injurious to health and interferes with the comfortable enjoyment of life and property. (¶¶ 31-  
6 36, 82-95, 100-103.), is a nuisance that affects entire communities and a considerable number  
7 of persons residing in those Jurisdictions (FAC ¶¶ 37-41, 46-72.), and causes and is likely to  
8 cause significant harm to children, families, and the community at large. (FAC ¶¶ 31-72, 82-  
9 95, 100-103, 218-221, 228-231.)

### 11 **B. Defendants’ Knowledge**

12 The Defendants, as delineated and limited further in this Decision, are liable for public  
13 nuisance if it promoted “lead paint for . . . use with knowledge of the hazard that such use  
14 would create.” Appeals Decision at 317. Each Defendant’s knowledge of that hazard may be  
15 actual or *constructive*. (See *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of*  
16 *America, Inc.* (1990) 221 Cal.App.3d 1601, 1620 [holding that defendant may be liable for  
17 public nuisance if it “knew or should have known” that its disposal practices might threaten the  
18 water supply]; *Ileto v. Glock Inc.* (9th Cir.) 349 F.3d 1191, 1214-15 [holding, under California  
19 nuisance law, that defendants may be liable if they knew or should have known of hazard  
20 caused by their promotion, distribution, and sale of firearms].)

21 This is consistent with general tort law principles – which require only proof of  
22 constructive knowledge – as well as nuisance law. (See *John B. v. Superior Court* (2006) 38  
23 Cal.4th 1177, 1190 [reviewing constructive knowledge requirement within general negligence  
24 principles]; *Leslie Salt Co. v. San Francisco Bay Conservation & Development Com.* (1984)  
25 153 Cal.App.3d 605 [discussing property owners’ liability for nuisance where the owners knew  
26 or should have known of the condition that constitutes the nuisance].) Each Defendant’s actual  
27 or constructive knowledge may be proven by both direct *and* circumstantial evidence. “Both  
28

1 direct and circumstantial evidence are admissible in proof of a disputed fact,” and “[n]either is  
2 entitled to any greater weight than the other.” (3 Witkin, Cal. Evid. (4th ed.) § 846.) “A verdict  
3 or finding may be founded on circumstantial evidence alone, even on circumstantial evidence  
4 that is opposed by direct and positive testimony.” (*Id.* at § 856.)

5 Courts have held in a variety of tort cases that actual knowledge may be proven by  
6 circumstantial evidence. (See, e.g., *Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th  
7 181, 190, [circumstantial evidence used to prove knowledge of dangerous property conditions];  
8 *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 723  
9 [circumstantial evidence used to prove knowledge for purposes of notice requirement for  
10 sexual abuse case]; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 163-64 [circumstantial  
11 evidence used to prove landlord’s knowledge of animal’s dangerous propensities].)

12 As recited in Civil Jury Instruction 202:

13  
14 Evidence can come in many forms. It can be testimony about what someone saw or heard or  
15 smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.  
16 Direct evidence can prove a fact by itself. For example, if a witness testifies she saw a jet plane  
17 flying across the sky, that testimony is direct evidence that a plane flew across the sky. Some  
18 evidence proves a fact indirectly. For example, a witness testifies that he saw only the white  
19 trail that jet planes often leave. This indirect evidence is sometimes referred to as  
20 "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane  
21 flew across the sky. As far as the law is concerned, it makes no difference whether evidence is  
22 direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or  
23 indirect, you should give every piece of evidence whatever weight you think it deserves.

24 Even if the People have not proven that each Defendant had *actual* knowledge of the  
25 hazard that was created by the use of lead paint on homes in the Jurisdictions, the People  
26 contend they have proven that the Defendants had *constructive* knowledge of that hazard.  
27 (FAC ¶¶73-136.) The Court agrees with the People on this point.

28 **The Court finds this constructive knowledge took a variety of forms, including:**

Defendants’ Internal publications (SW and NL)

Litigation (the *Pigeon* case described below) (ConAgra)

Internal manuals (SW)



1 Marketing contrasting newer, safe products to lead paint (DuPont)  
2 Information and industry positions via trade associations (LIA and NVLP) of which  
3 defendants were members

4 Specific testimonial references include:

5 Bartlett Article (1878) at p. 34 Tr. 1168

6 Sinkler Article (1894) at p. 42 Tr. 1174

7 Newmark (1895) Tr. 1174

8 Gibson (1904) Ex. P28 Tr. 1184-85 (found in Index MediProperties)

9 Osher (1907) Tr. 1186

10 Blackfan (1917) Ex. P22 Tr. 1190

11 McKhann (1933) Ex. P23 Tr. 1194

12 Medical Journal of Australia (1933) Ex. P30 Tr. 1197-98

13 Aub (1926) Ex. P31 Tr. 1203

14 Porritt (1931) Ex. P29 Tr. 1206

15 New York Journal of Medicine (1935) Ex. P 55 Tr. 1208

16 Minot (1938) Ex. P24

17 UK Ministry of Health (1938) Ex. P69 Tr. 1213

18 Journal of Diseases of Children (1943) Ex. P21 Tr. 1215

19 Despite this actual and constructive knowledge, Defendants promoted lead pigment  
20 and/or lead paint for home use. (FAC ¶¶ 73-217.) (*See Jones v. Vilsack* (8th Cir. 2001) 272  
21 F.3d 1030, 1035 [“promotional activities take many forms” including retail displays, coupons,  
22 and samples].) Defendants’ assertion that they were not aware of the effects of low-level lead  
23 exposure until long after they stopped producing and promoting lead paint is of no moment.  
24 The Defendants knew or should reasonably have known that exposure to lead at high levels,  
25 including exposure to lead paint, was fatal or at least detrimental to children’s health. That  
26 knowledge alone should have caused the Defendants to cease their promotion and sale of lead  
27 pigment and/or lead paint for home use. Instead, after becoming aware of the hazards  
28

1 associated with lead paint, they continued to sell it. (FAC ¶¶ 73-221.) Defendants’ argument  
2 that they should not be held liable because they did not understand the full panoply of harms  
3 caused by lead poisoning is simply not persuasive and contrary to law. (*Crowe v. McBride*  
4 (1944) 25 Cal.2d 318, 322 [“As said in the Restatement, Torts, section 435: ‘If the actor's  
5 conduct is a substantial factor in bringing about harm to another, the fact that the actor neither  
6 foresaw nor should have foreseen the *extent* of the harm or the *manner* in which it occurred  
7 does not prevent him from being liable.’”], (emphasis added.)

8 And, as the Court of Appeals held: “The fact that the pre-1978 manufacture and  
9 distribution of lead paint was ‘in accordance with all existing statutes does not immunize it  
10 from subsequent abatement as a public nuisance.’” Appeals Decision at 310.

11  
12 **C. Harm from Lead is Well-Documented**

13 According to the Centers for Disease Control and Prevention (“CDC”),

14  
15 Lead is a poison that affects virtually every system in the body. It is particularly  
16 harmful to the developing brain and nervous system of fetuses and young  
17 children. . . . The risks of lead exposure are not based on theoretical calculations.  
They are well known from studies of children themselves and are not extrapolated  
from data on laboratory animals or high-dose occupational exposures.

18 (CDC, *Preventing Lead Poisoning in Young Children* (1991) Ex. 7. Children are particularly  
19 susceptible to lead poisoning because they absorb lead much more readily than adults, and  
20 because their brains and nervous systems are still developing.

21 In 1978, the U.S. Consumer Product Safety Commission banned the use of lead-based  
22 paint in order to reduce the risk of lead poisoning in children. Eight years later the California  
23 Legislature declared childhood lead exposure the most significant childhood environmental  
24 health problem in the state, and enacted statutes and regulations aimed at reducing human  
25 exposure to lead. (*See, e.g.*, Cal. Health & Saf. Code § 124125.) Despite this federal and  
26 statewide effort, California children continue to be harmed by lead-based paint each year, and  
27 lead-based paint remains the leading cause of lead poisoning in children who live in older  
28 housing.

1 On May 16, 2012, the CDC eliminated the blood lead level of concern that had been  
2 used to define lead poisoning in recognition of the fact that “no safe blood lead level in  
3 children has been identified.” (*See CDC Response to Advisory Committee on Childhood Lead*  
4 *Poisoning Prevention Recommendations in “Low Level Lead Exposure Harms Children: A*  
5 *Renewed Call of Primary Prevention,”* U.S. CDC (May 16, 2012) (“CDC Response”).)<sup>13</sup>

6 Since antiquity, it has been well known that lead is highly toxic and causes severe  
7 health consequences when ingested. (Tr. 2723:14-2725:1.) Infants and toddlers are most  
8 vulnerable to lead poisoning because they absorb far more lead than adults and older children.  
9 Because their brains and other organs are still rapidly developing, infants and toddlers also  
10 sustain far greater damage when exposed to lead. (Tr. 109:20-110:20; 134:23-136:8.) When  
11 ingested in large quantities, lead is fatal. High-level lead exposure can cause seizures and  
12 coma, necessitating hospitalization, invasive medical procedures, and administration of drugs  
13 with significant side effects. It can also cause brain swelling, kidney damage, anemia,  
14 disintegration of blood cells, and severe abdominal complaints. Intermediate lead exposure is  
15 associated with damage to hemoglobin, calcium and vitamin D metabolism, and nerve  
16 conduction. (Tr. 350:11-351:10 [discussing P278\_002], 354:10-355:24 [relying on P40],  
17 1090:4-18, 1094:1-1095:15.)

18  
19 Even relatively low levels of lead exposure have severe health consequences. Blood  
20 lead levels (BLLs) between 5 and 10 µg/dL are associated with adverse effects on  
21 development, delayed puberty, decreased growth and hearing, as well as increased anti-social,  
22 delinquent, and criminal behavior. (Tr. 350:11-351:10 [discussing P278\_2], 356:3-23 [relying  
23 on P35], 361:8-362:23 [discussing P48], 363:19-364:15 [relying on P278 at 6-7], 398:19-  
24 401:15 [discussing P18], 954:25-956:3, 2796:225 [discussing P18 at 47]; P18 at 20, 21, 30, 45  
25 & 47, P19 at 11 & 25, P20 at 2, P40 at 1, P45 at 18-19 & P48.)

26  
27 <sup>13</sup> Defendants asserted that Dr. Mary Jean Brown, Chief of the Healthy Homes/Lead Poisoning Prevention Branch of  
28 the CDC said on November 14, 2011 that the lead problem had been solved. This is incorrect, as pointed out in Ex.  
1583.406 where Dr. Brown states “one of the things we’re fighting, one of the myths we’re fighting is that lead has  
been solved.”

1 Any level of lead exposure significantly lowers a child's Intelligence Quotient (IQ).  
2 The decline in IQ is steepest at lower BLLs. Thus, even BLLs below 5 µg/dL are associated  
3 with decreased IQ and academic abilities, difficulty with problem solving, memory  
4 impairment, attention-related behaviors such as ADHD, and anti-social behavior. (Tr. 350:11-  
5 351:10 [discussing P 278 at 2]; 358:13-360:27 [relying on P38]; 388:26-389:14 [discussing  
6 P278 at 11], 954:25-955:10, 966:1-8, 2316:18-2317:1; P18 at 20, 21, 30, 45 & 47, P19 at 11 &  
7 25, P20\_2, P45 at 18-19, P48, P54.)

8 Consequently, the drop in IQ of a lead-poisoned child substantially reduces his or her  
9 likelihood of leading a happy, productive life. (Tr. 385:2-389:14; 397:22-398:18 [discussing  
10 P54], 420:11-16 [same], 2320:22-2321:18; P54, P278A.) Such a drop in IQ lowers the  
11 community's average IQ, increases the number of people considered mentally retarded, and  
12 reduces the number of people considered gifted. Lead exposure has been associated with the  
13 loss of 23 million IQ points among a cohort of American children. This IQ drop diminishes the  
14 productivity and well-being of each affected community and society as a whole. (Tr. 385:2-  
15 389:14; 397:22-398:18 [discussing P54], 420:11-16 [same], 2320:22-2321:18; P54, P278A.)  
16

17 From 2007 to 2010, at least 50,000 children under six in the Jurisdictions had BLLs  
18 above 4.5 µg/dL. In 2010 alone, more than 10,000 children living in the Jurisdictions had BLLs  
19 above 4.5 µg/dL. (P223; P239; D1411.5.) These numbers, drawn from the RASSCLE database,  
20 represent the minimum number of children in the Jurisdictions who were lead poisoned. (Tr.  
21 3261:18-25.)

22 The Court finds that children with elevated BLLS identified in RASSCLE represent "the  
23 tip of the iceberg" and understates the prevalence of childhood lead exposure in the Jurisdictions.  
24 This is because RASSCLE does not include children who are at greatest risk for lead exposure,  
25 such as children who do not have insurance or regular access to health care. Even so, the number  
26 of children with elevated BLLS in the Jurisdictions in 2010 identified by RASSCLE is  
27 substantial. That number is far greater than the number of persons who contract whopping cough  
28 (pertussis), tuberculosis, hanta virus, and other communicable diseases each year. If the same

1 number of children contracted one of those diseases in a year, public health officials would call it  
2 an epidemic. (Tr. 1373:5-12, 3247:27-3248:5, 3259:23-3261:17, 3261:26-3262:7.)

3 Moreover, lead paint “disproportionally impacts low income and minority children. (Tr.  
4 905:20-906:9, 986:21-987:6, 999:12-1000:23, 1365:19-23, 1370:18-1371:10, 2309:21-2310:8.,  
5 905:20-906:9, 986:21-987:18, 999:12-1000:23, 1365:19-23, 1370:18-1371:10, 2309:21-2310:8;  
6 P45.) African American children and, to a lesser extent, Latino children have much higher  
7 average BLLs than white children. (Tr. 986:21-987:18; 2583:5-9, P45.)

8 These consequences are not recent discoveries. Over 100 years ago, in 1900, SW’s  
9 internal publication stated, “It is also familiarly known that *white lead is a deadly cumulative*  
10 *poison*, while zinc white is innocuous. It is true, therefore, that *any paint is poisonous in*  
11 *proportion to the percentage of lead contained in it.*” Ex. 155

#### 13 **D. The Inevitable Deterioration of Lead Paint is Not Disputed**

14  
15 Lead paint inevitably deteriorates, leaving behind lead-contaminated chips, flakes, and  
16 dust. Dust from deteriorating lead paint deposits on floors, windowsills, and other interior  
17 surfaces. (Tr. 190:28-191:27, 1262:16-28; 3092:21-3093:8, 3130:22-28; 3131:13-3133:4; P10,  
18 table 5.7.) Deterioration is dramatically accelerated when lead paint is on high friction  
19 surfaces, such as windowsills and doors. (Tr. 175:16-22, 160:13-24, 992:21-993:1, 3129:7-14.)  
20 Deterioration of lead paint on the exterior of homes contaminates surrounding soil. Lead  
21 contaminated soil is often tracked into homes. (Tr. 176:14-27, 982:23-983:10 [relying on P16,  
22 P28\_16], 986:5-13, 2053:2-7.) Lead contamination in soil and dust in older homes is almost  
23 always due to lead in paint rather than other environmental contaminates. (Tr. 192:23-194:22  
24 [relying on P10 at 4-5, Table 6.3, P11 at 1-6], P277\_18, 985:4-27 [relying on P16, P280\_17],  
25 1500:16-24, 1501:6-1502:18; P45\_40.)

#### 27 **E. Young Children are at Greatest Risk**

1 As part of normal development, young children engage in hand-to-mouth behavior, and  
2 often ingest dust, soil, and other particles. Young children also regularly chew on accessible  
3 surfaces and objects, including windowsills and other interior woodwork. (Tr.134:23-136:8,  
4 161:1-16, 1374:22-28, 1461:3-14, 1462:16-28.) Through these normal developmental  
5 behaviors, children in homes containing lead paint ingest that paint in the form of dust, paint  
6 chips or flakes. (Tr. 159:10-160:12.) A chip of lead paint that is approximately the size of a  
7 period at the end of a sentence is sufficient to cause a BLL of 20 micrograms per deciliter if  
8 ingested by a young child. (Tr. 156:6-19.) One gram of lead, the amount of material contained  
9 in a standard packet of sugar, if spread over 100 rooms, each measuring 10 feet by 10 feet,  
10 would be sufficient to create a lead dust hazard at two times the level recommended by the  
11 EPA. (Tr. 2201:21-2203:28.) Lead paint on high friction surfaces presents an immediate  
12 hazard, even if it is presently intact, because normal use causes the paint to degrade, exposing  
13 young children to lead dust. (Tr. 160:13-161:16, 175:1-22, 178:20-25, 2053:2-7.) When intact  
14 lead paint is on surfaces such as windowsills and railings that can be mouthed or chewed by a  
15 child, the paint is a hazard regardless of whether it is intact. (Tr. 160:13-161:16, 1090:23-  
16 1092:21.) Furthermore, lead paint that is currently intact poses a substantial risk of future harm  
17 because it will inevitably degrade and be disturbed by normal residential activities, such as  
18 renovations. (Tr. 1417:7-27, 3133:9-28.)  
19

20  
21 **F. Experts, Federal Agencies, Physician Associations, and the Public Entities**  
22 **Agree That Lead Paint Is the Primary Source of Lead Exposure for Young**  
23 **Children Living In Pre-1978 Housing**

24 Leading experts in the field of lead poisoning are virtually unanimous in concluding  
25 that lead paint is the primary cause of lead poisoning in young children. (Tr. 140:13-141:19,  
26 344:17-22, 2120:15-23.) The federal agencies tasked with identifying the causes of lead  
27 poisoning agree that lead paint is the primary source of childhood lead exposure. For example,  
28 in 2012, the CDC's Advisory Committee on Childhood Lead Poisoning Prevention reported

1 that “lead-based paint hazards, including deteriorated paint, and lead contaminated dust and  
 2 soil still remain by far the largest contributors to childhood lead exposure on a population  
 3 basis. ” (Tr. 110:21-111:4, 130:18-132:18, 137:11-20; P9\_14; P11 at 1-6; P45\_40.) The  
 4 American Academy of Pediatrics recognizes that “[t]he source of most lead poisoning in  
 5 children now is dust and chips from deteriorating lead paint on interior surfaces.” (Tr. 132:6-  
 6 17; P66\_1037.) Lead paint accounts for at least 70 percent of childhood lead poisoning and is  
 7 the dominant cause of lead poisoning in children living in older homes. (Tr. 983:12-988:17,  
 8 1502:6-25.) Nationally, children living in pre-1978 homes are 13 times more likely to have an  
 9 elevated BLL than those living in post-1978 homes. (Tr. 961:6-17.) In California, 80 to 90  
 10 percent of cases of childhood lead poisoning involve children living in pre-1980 homes. (Tr.  
 11 1364:18-1365:5.) And, consistent with national and statewide data, lead paint is the primary  
 12 source of lead poisoning for children in the Jurisdictions. (Tr. 183:7-15, 905:15-906:9,  
 13 1097:19-1098:5, 1404:29-1405:4, 1413:6-28, 2043:10-25, 2057:19-2058:7, 2229:5-10, 2239:7-  
 14 2240:9, 2288:4-17, 2320:22-2321:18, 3263:9-3264:7.)

### 16 **G. Lead Paint is Prevalent in the Jurisdictions**

17 In 1978, the U.S. Consumer Product Safety Commission prohibited the use of lead-  
 18 based paint in homes. (16 Code Fed. Regs § 1303.4.) The 2010 census data shows that over 4.7  
 19 million homes in the Jurisdictions were built before the 1978 ban. (P261; *see also* P283\_014.)

20 The chart below depicts the estimated number of pre-1950 and pre-1978 homes in each of the  
 21 Jurisdictions according to the census:  
 22

23 <b>Public Entity</b>	<b>Pre-1950</b>	<b>1950 – 1979</b>	<b>Total Housing Units (2010 Estimate)</b>
24 Alameda	173,981	255,444	<b>429,425</b>
25 Los Angeles	912,852	1,737,349	<b>2,650,201</b>
26 Monterey	18,772	71,014	<b>89,786</b>
27 San Mateo	56,556	159,769	<b>216,325</b>
Santa Clara	61,411	364,823	<b>426,234</b>
28 Solano	18,559	60,519	<b>79,078</b>

Ventura	19,854	154,134	<b>173,988</b>
San Diego	62,330	255,456	<b>317,786</b>
San Francisco	226,333	91,472	<b>317,805</b>
Totals	1,550,648	3,149,981	<b>4,700,628</b>

According to the 2011 U.S. Department of Housing and Urban Development (HUD) Healthy Homes Survey, 52 percent of pre-1978 homes contain lead-based paint hazards. And a large percentage of these homes have children under six years of age living there. Because of the prevalence of lead-based paint in California, all homes built before 1978 are presumed to contain lead-based paint. 143:5-15 [referring to P277\_10], 982:23-983:10, 7 Cal. Code. Regs. § 35043.) The prevalence of lead paint in California homes is not surprising given the large amount of lead pigment used in paint before the 1978 ban. From 1929 to 1974, 77 percent (1,978,547 tons) of white lead sold in the U.S. was used in paint. An NL advertisement in 1924 noted that 350,000,000 pounds of white lead were used in paint every year in the United States – “enough paint to cover with one coat about 3,000,000 houses of average size.” (Tr. 149:20-28 [relying on P4\_7]; P230.) Inspections confirm that their pre-1978 homes in the Jurisdictions often contain lead paint. (*See, e.g.*, Tr. 183:7-15; 1413:6-28.)

Due to limited resources, government programs in the Jurisdictions have not significantly reduced the number of homes containing lead paint. (Tr. 577:24-581:20, 601:10-22, 641:19-25, 644:11-21, 2295:13-27.)

#### **H. The Continuing Effect of Lead Paint**

From 2007 to 2010, at least 50,000 children under six in the Jurisdictions had BLLs above 4.5 µg/dL. In 2010 alone, more than 10,000 children living in the Jurisdictions had BLLs above 4.5 µg/dL. (P223; P239; D1411.5.) These numbers, drawn from the Response and



1 Surveillance System for Childhood Lead Exposure (“RASSCLE”) database,<sup>14</sup> represent the  
2 minimum number of children in the Jurisdictions who were lead poisoned. (Tr. 3261:18-25.)  
3 Children with elevated BLLS identified in RASSCLE understates the prevalence of childhood  
4 lead exposure in the Jurisdictions. This is so because RASSCLE does not include children who  
5 are at greatest risk for lead exposure, such as children who do not have insurance or regular  
6 access to health care. The number of children with elevated BLLS in the Jurisdictions in 2010  
7 identified by RASSCLE is substantial. That number is far greater than the number of persons  
8 who contract pertussis, tuberculosis, hanta virus, and other communicable diseases each year.  
9 (Tr. 1373:5-12, 3247:27-3248:5, 3259:23-3261:17, 3261:26-3262:7.) Moreover, lead paint  
10 “disproportionally impacts low income and minority kids. And these are kids who can least  
11 afford to take the hit.” (Tr. 905:20-906:9, 986:21-987:6, 999:12-1000:23, 1365:19-23,  
12 1370:18-1371:10, 2309:21-2310:8.)

14 **I. Defendants’ Manufacturing of Lead Pigments for Use in House Paints and as**  
15 **Members of Trade Associations**

16  
17 Defendants promoted and sold their lead pigments: (1) as dry white lead carbonate; (2)  
18 as white lead-in-oil; and (3) in paints containing white lead pigments. As described by Dr.  
19 David Rosner, lead pigments are “the basic ingredient that goes into paint, whether it is in a  
20 box, or whether it is in a can, or whether it is mixed or not mixed, it is the cake mix that makes  
21 the cake.” (Tr. 66:5-11; see also Tr. 664:16-666:17; P517.)

22 ARCO manufactured lead pigments for use in house paints from 1920 until 1946.  
23 ARCO was a member of the Lead Industries Association (“LIA”) from 1928 until 1971 and a  
24 Class B member of the National Paint Varnish and Lacquer Association (“NPVLA”) from  
25

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27 <sup>14</sup> RASSCLE is used by the Childhood Lead Poisoning Prevention Branch (“CLPPB”) to collect information on  
28 children found to have elevated blood lead levels. RASSCLE was re-engineered as a state-wide, web-based  
information system known as RASSCLE II. This program only addresses children who have been tested. Tr.980

1 1933 through 1944. (Tr. 1675:9-25.)<sup>15</sup>

2 ConAgra manufactured lead pigments for use in house paints from 1894 until 1958.  
3 ConAgra was a member of the LIA from 1928 through 1958 and a Class A member of the  
4 NPVLA from 1933 through 1962. (Tr. 1663:27-1664:19.)

5 DuPont manufactured lead pigments for use in house paints from 1917 through 1924  
6 and then continued to manufacture lead pigments through its contract with NL through the  
7 1960s. DuPont was a member of the LIA from 1948 through 1958 and a Class A member of  
8 the NPVLA from 1933 through 1972. (Tr. 1656:24-1657:7.)

9 NL manufactured lead pigments for use in house paints from 1891 until 1978. NL was  
10 a member of the LIA from 1928 until 1978 and a member of the NPVLA from 1933 through  
11 1977. (Tr. 1647:4-16.)

12 SW manufactured lead pigments for use in house paints from 1910 to 1947. It  
13 manufactured paints with lead pigments from 1880 through the 1970s. SW was a member of  
14 the LIA from 1928 through May 1947 and was a Class A member of the NPVLA from 1933  
15 through 1981. (Tr. 1626:15-23.)

16  
17 **J. Role of the Trade Associations**

18 It was generally known that childhood lead poisoning disproportionately affected poor  
19 and minority children. (Tr. 1727:16-20.) In 1935, the LIA’s Director of Health and Safety  
20 wrote a letter describing the problem of childhood lead poisoning as “a major ‘headache,’ this  
21 being in part due . . . to the fact that the only real remedy lies in educating a relatively  
22 ineducable category of parents.” (Tr. 1723:17-1725:24 [relying on P78].) He went on to say  
23 that “[i]t is mainly a slum problem with us.”(*Id.*) In 1956, he reiterated this to the Assistant  
24 Secretary of the U.S. Department of the Interior. (Tr. 1725:5-1726:7 [relying on P145\_1]; see  
25 also 1725:5 – 1726:7 [relying on P145\_001 (“The basic solution is to get rid of our slums, but  
26  
27

28  

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15 The role of the NIA and NPVLA is described below.

1 even Uncle Sam can't seem to swing that one. Next in importance is to educate the parents, but  
2 most of the cases are in Negro and Puerto Rican families, and how does one tackle that job?"]])  
3 and reiterated this at a LIA meeting in 1958 (Tr. 1726:10 – 1727:15 [relying on P86\_25 (“One  
4 can readily understand why, to the operator of a smelter in California or a lead products plant  
5 in Texas, the doings of slum children in our eastern cities may seem of little consequence.”)]).

6 Each Defendant, except DuPont, also learned about the harms of lead exposure through  
7 association-sponsored conferences. For example, the LIA held a confidential conference of its  
8 members in 1937 which included physicians to discuss lead poisoning. Ex. 154  
9 Representatives from NL, SW, and ARCO attended. Transcripts of the conference – “an  
10 invaluable summary of present day medical knowledge about lead” – were sent to LIA  
11 members, including ConAgra. Although the conference focused on industrial lead poisoning,  
12 it discussed childhood lead poisoning. Specifically, conference participants discussed a child  
13 who had died from lead poisoning, childhood lead poisoning cases involving lead paint in  
14 homes, and the difficulty of removing lead from a child's body. (Tr. 1687:1-1689:27, 1690:18-  
15 1691:5 [relying on P98 & P154].)

16  
17 Each Defendant learned about childhood lead poisoning through LIA and/or NPVLA  
18 communications. For example, the NPVLA's executive committee—which included NL—sent  
19 a confidential memo in 1939 to its Class A members—which included SW, ConAgra and  
20 DuPont. That memo explained that the dangers of lead paint to children were not limited to  
21 their toys, equipment, and furniture. (Tr. 1691:12-1693:23 [relying on P81].)

22 NL, ARCO, and DuPont learned about childhood lead poisoning through trade  
23 association meetings. For example, during a 1930 meeting of the LIA's Board of Directors,  
24 which included NL, the Board discussed negative publicity regarding lead products, including  
25 a report that: (1) lead poisoning of children who chewed on toys, cradles, and woodwork  
26 painted with lead paint occurred more frequently than formerly thought; (2) small amounts of  
27 lead could kill a child; and (3) physicians were not recognizing lead poisoning. (Tr. 1694:15-  
28 1695:21 [relying on P75 & P166].)

1 The LIA only disseminated the information it gathered about the hazards of lead paint  
2 and childhood lead poisoning to its members. It did not disseminate this information to  
3 government agencies or the public. In fact, the LIA often marked its documents as confidential  
4 to try to ensure that they would not receive this information. (Tr. 1689:8-18, 1690:16-1691:2  
5 [relying on P98 & P154].)

6  
7 **K. Knowledge of the Defendants - Generally**

8 At the same time they were promoting lead paint for home use, each Defendant knew  
9 that high level exposure to lead—and, in particular, lead paint—was fatal. Each Defendant also  
10 knew that lower level lead exposure harmed children. (Tr. 1624:21-1625:17, 1687:1-1688:27,  
11 1690:18-1691:5, 1694:15-1695:21, 1696:19-1697:9, 1697:23-1698:26, 1699:17-1701:3,  
12 1702:20-1703:14, 1705:21-1706:5, 1706:19-1707:2, 1707:14-21, 1707:22-27, 1708:14-1709:4,  
13 1709:5-20, 1709:21-27, 1710:5-1711:3, 1713:16-1714:3, 1715:1-26, 1716:6-23, 1716:20-  
14 1717:8, 1718:10-24, 1719:11-1720:7, 2848:16-26, 2854:4-9, 2855:21-2856:7 [relying on P76,  
15 P81, P142, P154, P155\_16, P157, P159, P166, P168 at 4-11, P177, P183, P184, P197 at 117,  
16 P506])

17 Medical and scientific literature published as early as 1917 identified both extreme and  
18 subtle effects of lead poisoning, and recognized the dangers of low-level lead exposure. (Tr.  
19 1165:2-24, 1166:06-28, 1191:15-1192:13, 1197:7-18, 1199:14-3, 1202:7-1203:14, 1204:26-  
20 1205:28, 1207:2-22, 1209:18-1210:19, 1211:22-1213:7, 1214-1215:1, 1217:1-23 [relying on  
21 P22, P23, P24, P29, P30, P31, P55, P69, P226].) Accounts of children poisoned by lead paint  
22 appeared in medical literature published as early as 1878. (Tr. 1165:2-9, 1168:14-21, 1171:10-  
23 26, 1175:28-1177:13, 1178:8-1179:9, 1186:1-1187:7, 1195:21-1191:15 [relying on P21, P22,  
24 P24, P23, P29, P30, P31, P34, P42, P43, P55].)

25 Additional reports in the medical and scientific literature dating back to the early 1900s  
26 identified lead dust generated by deteriorating interior and exterior lead paint in homes as a  
27 source of lead poisoning for children. (Tr. 1165:10-21, 1171:10-1174:16, 1181:5-1183:12,  
28

1 1186:1-1187:6, 1188:17-1189:07, 1192:9-25, 1218:13-1219:1, 1219:27-1220:10, 1245:15-  
2 1246:15 [relying on P28, P8, P34]; see also 2848:16-26; P197.)

3 In the 1920s, scientists from the Paint Manufacturers Association reported that lead  
4 paint used on the interiors of homes would deteriorate, and that lead dust resulting from this  
5 deterioration would poison children and cause serious injury. (See Tr. 1189:8-26.) Medical and  
6 scientific literature published before the 1950s often observed that reported cases of lead  
7 poisoning represented only a small fraction of the adults and children poisoned by lead paint.  
8 (See Tr. 1165:22-1166:5, 1196:20-1197:6, 1208:7-13) It was accepted by the medical and  
9 scientific community before the 1950s, as reflected in literature from as early as 1894, that lead  
10 paint was a significant cause of childhood lead poisoning. (Tr. 1197:7-18, 1217:24-1218:12,  
11 1274:1-23 [relying on P226 [compendium of articles].) Even before the 1950s, the medical and  
12 scientific community recognized that children were particularly vulnerable to lead poisoning,  
13 and that the harmful effects of lead poisoning were permanent. (See Tr. 1167:12-23; 1215:28-  
14 1216:26 [relying on P21].) (See Tr. 1167:1-11; 1195:21-1196:15 [relying on P23].) As early as  
15 1933, the medical and scientific community called for the elimination of lead paint in areas  
16 frequented by children – including their homes. (See Tr. 1167:24-1168:08, 1198:17-13,  
17 1200:4-14, 1200:24-1201:28 [relying on P30].) Other countries began banning the use of lead  
18 paint, particularly for home use, in the 1920s and 1930s. (Tr. 354:24-355:24 [relying on P40],  
19 1702:20-1703:14 [replying on P142 at 9].)  
20

21  
22 **L. Knowledge of the Individual Defendants**

23 **1. ARCO**

24 ARCO knew of the hazards of lead paint – including childhood lead poisoning – at the  
25 time it promoted, manufactured, and sold lead pigments for home use. (Tr. 1709:21-27.)  
26 ARCO learned of the hazards of lead paint – including childhood lead poisoning – through  
27 physician(s) it employed and information it received from trade associations. (Tr. 1685:15-  
28 1686:3, 1687:1-1689:27, 1690:18-1691:5 [relying on P98 & P154], 1710:5-1711:3 [relying on

1 P168].) ARCO’s own internal documents establish that ARCO knew about the hazards of lead  
2 paint. In a letter dated 1918, ARCO personnel suggested that one way to eliminate the  
3 “poisonous effects” of lead for its workers was “[e]limination of the dust,” minimizing the time  
4 that workers were exposed to the dust, and transferring workers once they showed symptoms  
5 of poisoning. (P168\_13.) Personnel were also aware that poisoning was caused by particles  
6 both ingested and inhaled. In another letter dated December 16, 1921, plant personnel from  
7 ARCO discussed their interest in learning more about the prevention and detection of lead  
8 poisoning in the workplace and asked for more medical information on the subject. The letter  
9 attached a medical article dated March, 1921 discussing industrial lead poisoning and the role  
10 of lead dust. (Tr. 1709:21-27 [relying on P168]). The letter and article further demonstrate that  
11 ARCO personnel followed the medical and scientific literature regarding the hazards of lead  
12 and had actual knowledge of those harms. (*Ibid.*) ARCO had actual knowledge of the hazards  
13 of lead paint – including childhood lead poisoning – for the duration of its manufacturing,  
14 promotion, and sale of lead pigments for home use. (Tr. 1624:21-1625:17.)

## 16 2. ConAgra

17 ConAgra knew of the hazards of lead paint – including childhood lead poisoning –  
18 when it promoted, manufactured, and sold lead pigments for home use. (Tr. 1624:21-1625:17.)  
19 ConAgra knew about the hazards of lead paint when the California Supreme Court upheld a  
20 jury verdict finding that ConAgra knew about the dangers of white lead production for its  
21 workers. (*Pigeon v. W.P. Fuller* (1909) 156 Cal. 691, 702 : “There was abundant testimony  
22 tending to show that the process of the manufacture of white lead, as conducted by [ConAgra],  
23 was dangerous to those assisting in the work; the danger arising from the inhalation of fumes  
24 and vapor . . . and of particles of dust coming from the metal after it had been corroded in the  
25 process of converting it into white lead”; *see also* Tr. 1718:10-24.)

26  
27 Neal Barnard, a former ConAgra employee who developed paint formulas for the  
28 company from 1948 until 1967, worked with lead pigments during the time that ConAgra

1 produced lead paint. During that time, Mr. Barnard knew that white lead pigment was toxic. He  
2 also knew that lead paint chalked and that the resulting lead dust could be ingested by touching  
3 the paint. (Barnard Depo. 55:25-56:5, 62:11-62:17.)

4 ConAgra learned of the hazards of lead paint – including childhood lead poisoning –  
5 through information it received from trade associations. (Tr. 1687:1-1689:27, 1690:18-1691:5  
6 [relying on Exs. P81, P154], 1691:12-1692:14, 1692:18-1693:23.) And ConAgra had actual  
7 knowledge of the hazards of lead paint – including childhood lead poisoning – for the duration  
8 of its production, marketing, and sale of lead pigments and paint for home use. (Tr. 1624:21-  
9 1625:17.)

### 11 3. DuPont

12 DuPont acquired Cawley Clark & Company and Harrison Brothers in 1917 as its first  
13 foray into the paint business. DuPont acquired Harrison Brothers, in part, to acquire its  
14 knowledge about paint and paint pigments, including lead paint and pigment. (Tr. 1711:12-  
15 1712:19 [relying on P172\_20], 2852:21-2854:9 [relying on P275 at 10].)

16 By 1913, Harrison Brothers was promoting interior residential paints without lead by  
17 touting that those paints did not contain “poisonous” white lead pigments and discussed the  
18 absence of poisonous pigments making painted rooms safe for occupants. (Tr. 2848:2-26  
19 [discussing P197].) Since this was an advertising gambit by a leading paint manufacturer and  
20 necessary competitor of the other defendants, this document undermines the “no knowledge”  
21 argument of the other defendants in this case.

22 The paints that DuPont acquired from Harrison Brothers were described in a brochure  
23 that stated that wallpapers containing lead continually resulted in the circulation of dust and  
24 were especially unsuitable for children’s bedrooms and nurseries. (Tr. 2855:18-2856:12  
25 [discussing P506].) The brochure also stated that Harrison’s paint contained “no lead, arsenic,  
26 or poisonous material of any description . . . .” (Tr. 2847:23-2848:26 [discussing P197].)  
27 DuPont’s 1918 advertisements for its Sanitary Flat Wall Finish stated that “good taste decrees  
28

1 and health demands the elimination of poisonous pigments” – including lead pigments. (Tr.  
2 1713:16-1714:3 [discussing P2 at 14], 1715:1-26; [relying on P177].)

3 In 1937, the Baltimore Public Health Department informed DuPont’s Medical Director  
4 that nearly two dozen children had died of lead poisoning. The letter explained to DuPont that  
5 each of these children died after chewing on a painted surface, and that the Department was  
6 recommending use of paint without lead. (Tr. 1716:6-23 [relying on P159].)

7 DuPont learned of the hazards of lead paint – including childhood lead poisoning –  
8 through physician(s) it employed and information it received from trade associations. (Tr.  
9 1687:1-1689:27, 1690:18-1691:5 [relying on P98 & P154].)

10 DuPont had actual knowledge of the hazards of lead paint – including childhood lead  
11 poisoning – for the duration of its production, marketing, and sale of lead pigments and paint  
12 for home use. (Tr. 1624:21-1625:17.)

13  
14 **4. NL**

15 NL had actual knowledge of the hazards of lead paint, including childhood lead  
16 poisoning. NL obtained this knowledge through its own review of the scientific and medical  
17 literature, LIA communications, LIA and NPVLA meetings, and its own experiences. NL  
18 employed medical doctors who were well aware of the hazards of lead paint and tracked the  
19 medical literature on this subject. [Tr. 1687:1-1690:27, 1690:18-1691:5 [relying on P81, P988  
20 and P154].)

21 NL was aware of the hazards of lead dust. For example, in 1912, NL acknowledged that  
22 “[i]n the manufacture of the various products of Lead, there are two sources of danger to the  
23 health of workmen therein employed; viz., the fumes arising from the smelting or melting of  
24 metallic lead, and the dust arising in the processes of making white lead and lead oxides.” (P76  
25 at 4.) NL’s corporate representative confirmed that, by the mid to late 1920s, NL knew that  
26 children who chewed on toys, cribs, and other objects with lead paint could die from lead  
27  
28



1 poisoning. That representative acknowledged that NL was probably aware that children could  
2 have convulsions after being exposed to lead in paint. (Tr. 1988:1-1994:3.)

3 During a 1930 meeting of the LIA Board of Directors, it was reinforced to NL that  
4 childhood lead poisoning caused by chewing on toys, cradles and woodwork (such as  
5 windowsills) containing lead paint occurred more frequently than formerly thought. (Tr.  
6 1694:23-1696:3 [describing P166]; see also Tr. 1693:24-1694:22 [relying on P75].)

7  
8 **5. SW**

9 SW had actual knowledge of the hazards associated with lead paint by 1900. In 1900,  
10 SW, in its internal publication, *Chameleon*, told its employees that:

11 It is also familiarly known that white lead is a deadly cumulative poison,  
12 while zinc white is innocuous. It is true, therefore, that any paint is poisonous  
13 in proportion to the percentage of lead contained in it. This noxious quality  
14 becomes serious in a paint which disintegrates and is blown about by the  
15 wind: but if a paint containing lead (such as the better class of combinations)  
16 is not subject to chalking, the danger is minimized. (P155.)

17 When asked whether SW knew, before 1910, that lead paint could cause lead  
18 poisoning, SW's own expert, Dr. Colleen Dunlavy, acknowledged that "[t]he hazards of . . .  
19 lead paints were widely understood for a long time" and that the "hazards [of lead paint] to  
20 workers, in particular, were well-known and reflected in Sherwin-Williams' documents." (Tr.  
21 3036:18-19.)

22 This is also clear from articles published by SW's employees. For example, in June  
23 1928, the Journal of Chemical Education published an article by a SW employee who noted  
24 that "[v]olumes ha[d] been written on this pigment [lead]," as well as "the facts that it is rather  
25 poisonous and has been legislated out of use in some countries." (P142.)

26 In an internal letter in 1969, an SW executive admitted that "[a]s to a solution to the  
27 problem, a very simple statement, but very difficult to carry out, would be to remove the source  
28 of lead or put it behind barriers so that the children could not get to it." (Tr. 1473:24-1474:23  
[relying on P161].)

1 SW learned of the hazards of lead paint – including childhood lead poisoning – through  
2 physicians it employed and information it received from trade associations. (Tr. 1687:1-  
3 1689:27, 1690:18-1691:5 [relying on P98 & P154].)

4 SW had actual knowledge of the hazards of lead paint – including childhood lead  
5 poisoning – for the duration of its production, marketing, and sale of lead pigments and lead  
6 paint for home use. (Tr. 1705:21-1706:5.)

7 Based on the facts cited above, the Court finds each Defendant was on notice of the  
8 harms associated with lead paint no later than the 1920s and 1930s. Thus, each Defendant had  
9 – at the very least --*constructive* knowledge of the hazards created by its promotion of lead  
10 pigment for home use.  
11

12 **M. Causation**

13 California has adopted the substantial factor test of the Restatement Second of Torts.  
14 (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239.) This test “subsumes the traditional ‘but for’ test  
15 of causation.” (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 969.) Under this test,  
16 independent tortfeasors are liable so long as their conduct was a “substantial factor in bringing  
17 about the injury.” (*Ibid.*) A plaintiff need only “exclud[e] the probability that other forces alone  
18 produced the injury;” it need not show that a defendant is the sole cause of the injury. (*Arreola*  
19 *v. County of Monterey* (2002) 99 Cal.App.4th 722, 748-49.) Where a defendant’s conduct plays  
20 more than an “‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss,”  
21 that conduct is a substantial factor in causing the injury. (*Rutherford*, at 969.)  
22

23 Thus, multiple defendants are liable for public nuisance if they “created or assisted in  
24 the creation of the nuisance.” (Appeals Decision at 309.) This is true even if the acts of each  
25 defendant are independent concurrent causes of the injury. (*Ibid.*) It is also irrelevant “whether  
26 the defendant owns, possesses or controls the property [which is the site of the nuisance].”  
27 (*Ibid.*)  
28

1 The People contend that each Defendant promoted lead paint and/or lead pigment in the  
 2 Jurisdictions. Whether Defendants' promotions explicitly mentioned lead is irrelevant. The  
 3 question is whether Defendants promoted house paints containing lead. *Ibid.*

4  
 5 **N. Defendants Promoted and Sold Lead Pigment and/Or Lead Paint in the**  
 6 **Jurisdictions**

7 The Defendants manufactured lead pigments for use in paints in the 20th century. And  
 8 each Defendant, except ARCO, used these pigments in its own paints. (Tr. 509:13-17; 549:25-  
 9 550:24.) Each Defendant promoted lead pigment and/or lead paint for use on homes within  
 10 each of the Jurisdictions, despite knowledge of the hazards of lead.

11 Defendants' promotions included, among other things, ads (1) explicitly telling  
 12 consumers to use lead paint on their homes; (2) telling consumers to use specific paints or lines  
 13 of paint that contained lead without mentioning that those paints contained lead; (3) directing  
 14 consumers to stores where brochures featuring lead paint were provided to customers; and (4)  
 15 promoting "full line" dealers of the Defendant's paint, including the Defendant's lead paint.  
 16 (Tr. 1634:18-1635:15.)

17 These promotions targeted ordinary consumers as well as painters, trades people, and  
 18 paint manufacturers. (Tr. 1961:16-1963:9.)

19 Drs. David Rosner and Gerald Markowitz, the People's historical experts, identified  
 20 newspaper advertisements promoting lead paint manufactured by DuPont, ConAgra (Fuller),  
 21 NL, and SW that ran in newspapers in each of the Jurisdictions between 1900 and 1972. (See  
 22 P233\_1.)

23 The following chart identifies the number of ads the People's experts identified (P233):

<b>Entity</b>	<b>DuPont</b>	<b>Fuller</b>	<b>NL</b>	<b>SW</b>
Alameda County	269	233	240	401
Los Angeles County	28	131	81	350
Monterey County	167	328	162	704
Oakland	162	143	168	221
City of San Diego	63	269	98	685
San Francisco	127	272	126	229
San Mateo County	111	183	219	149
Santa Clara County	207	347	444	305

Solano County	137	152	260	301
Ventura County	14	28	127	229

### 1. Campaigns

In addition to their individual promotion efforts, Defendants also jointly promoted lead paint in the Jurisdictions through campaigns organized by the LIA and/or NPVLA. (Tr. 552:19-553:22.) The purpose of these joint campaigns, which are identified in the chart below, was to sustain, increase, and prolong the use of lead paint. (Tr. 559:21-27.)

Trade Association	Campaign Name	Campaign Years	Involved Defendants
LIA	Forest Products – Better Paint	1934-1939	Fuller, NL, and SW
LIA	White Lead Promotion	1939- 1942; resumed for a brief time after World War II in 1950	Fuller and NL
NPVLA	Save the Surface	First half of the 20th century	DuPont, Fuller, NL and SW
NPVLA	Clean Up – Paint Up	First half of the 20th century	DuPont, Fuller, NL and SW

The Forest Products Better Paint Campaign (“FPBP Campaign”) primarily promoted the use of lead pigments on lumber. The Campaign was active in California because lumber was a popular building material for California homes. (Tr. 567:6-24; P185.) The LIA targeted lumber associations on the West Coast, including the California Redwood Association in San Francisco, persuading these associations to enclose two million folders containing “painting instructions” with all bundles of siding for homes. The instructions directed consumers to use lead paint on the interior and exterior of their homes. (Tr.571:23-573:2.) LIA documents confirm that the FPBP Campaign was successful and identify tangible benefits it provided to the lead pigment industry. For example, the LIA reported that because of the Campaign, lumber producers were recommending use of lead paint, over 20,000 lumberyards were selling only lead paint, and that lead paint was now carried by several thousand lumberyards that had never carried it before. (Tr. 575: 6-28; 578:8; P91\_8 and 9.)

1 The LIA also reported that the FPBP Campaign increased the lead content in some  
2 paints, and that one of the largest paint manufacturers in the U.S., the Paraffin Companies in  
3 San Francisco, went from producing leadless paint to paint with 60 percent white lead. (Tr.  
4 578:23-579:9.) The LIA further reported that 20,000,000 labels were to be affixed to sashes  
5 and doors sold in the United States. These labels advertised white lead on the sashes and  
6 doors. (Tr.580:10-21.)

7 The White Lead Promotion Campaign (“White Lead Campaign”) was a joint  
8 advertising campaign “aimed specifically at white lead promotion in general.” According to  
9 Dr. Rosner, the purpose of the campaign was “to promote the sale of high grade paint, which,  
10 of course means white lead,” prevent loss of market position, increase sales, refute allegations  
11 that lead paint was hazardous, and improve the “reputation” of the product. The overarching  
12 goal was to “show [ ] the importance of white lead to industry [and] help offset the constant  
13 threat of anti-lead legislation and propaganda.” (Tr. 561:25-563:2 [relying on P80].)

14 The Campaign targeted ordinary consumers, convincing them to apply lead paint to  
15 their homes, as well as the painters, and the paint industry more generally. (Tr.869:3-8.) The  
16 Campaign generated at least hundreds of advertisements in paint trade journals and national  
17 consumer magazines between 1939 and 1942. Dr. Rosner testified that between 1939 and  
18 1941, approximately 13,881,000 White Lead Campaign ads appeared in national magazines  
19 such as the *Saturday Evening Post*, *Colliers*, *Better Homes & Gardens*, and *American Home*.  
20 In 1942, an additional 8,000,000 advertisements were placed in similar national magazines.  
21 (Tr. 586:15-19, 866:22-868:10 [discussing P120], Tr. 869:9, 872:12; Dc503; see also P294,  
22 P295, P296, P297, P 298.)

23 These national magazines circulated widely in California, including the Jurisdictions.  
24 (Tr. 648:7-653:13 [relying on P190].) In 1942, for example, they reached at least 585,792  
25 California consumers. (Tr. 648:19-649:21, 650:13-26, 653:5-13, P120, P190.)

26 The LIA touted the White Lead Campaign as so successful that the demand for white  
27 lead outstripped supply. In the first eight months of 1941, the total sales of all lead pigments  
28

1 increased 37.6 percent – “a very substantial increase.” (Tr. 599:11-23; 602:4-17; 604:19-  
2 605:7.)

3 The Save the Surface Campaign (“Surface Campaign”) conducted by the NPVLA  
4 promoted paint sales, including sales of lead paint, by encouraging consumers to use paint to  
5 protect household surfaces. The campaign included advertisements by individual companies  
6 and collective advertisements with a common logo and slogan. (Tr. 559:2-16.) The Surface  
7 Campaign was very active in California and was considered quite successful. For example,  
8 DuPont’s magazine stated in 1920 that its paint sales increased as a result of the Campaign.  
9 (Tr. 620: 23-16, 621:24-27, 622:4-11; P189 12.)

10 The NPVLA’s Clean Up – Paint Up Campaign (“Paint Up Campaign”) was a joint  
11 effort by different companies to promote paint generally, including lead paint, and to promote  
12 their own brands of paint when possible. The Paint Up Campaign ran advertisements in each of  
13 the Jurisdictions. (Tr. 616:20-617:18, 618:27-619:11.) The NPVLA described the Paint Up  
14 Campaign as “undoubtedly” one of the most effective promotions of paint ever. (Tr. 623: 23-  
15 624:15.)

## 17 2. ARCO’s role

18 ARCO began producing dry white lead in 1919 and made its first sale in 1920. (P285-  
19 002.) ARCO began promoting lead pigment for house paints in the January 1920 edition of the  
20 paint trade journal, *Drugs, Oils & Paints*. That national trade journal was circulated in  
21 California. (P01; Tr. 647:9-27, 647:28 - 648:6, 653:5-13; P120.) ARCO advertised its dry  
22 white lead for use as a house paint pigment in the journal throughout 1920 on a monthly basis.  
23 Its advertisements in *Drugs, Oils & Paints* from October 1920 through January 1921 promoted  
24 dry white lead as a pigment for paint as opposed to other industrial uses. (647:9- 648:6, relying  
25 on P001.)

26 From February 1921 through November 1921, ARCO’s monthly advertisements for dry  
27 white lead in *Drugs, Oils & Paints* stated that ARCO had warehouses in Los Angeles and San  
28

1 Francisco. These ads ran through at least December 1921. And beginning in January 1922, the  
2 ads stated that ARCO maintained “warehouse stocks [of dry white lead] in principal cities.” In  
3 1923, ARCO had a listing in the San Francisco City Directory under the category of “paint  
4 manufacturers.” (Tr. 1679:14-22, relying on P001; P218.)

5 In 1931, ARCO began to manufacture white lead-in-oil. ARCO continued to advertise  
6 its lead products for house paint in national paint trade journals through October 1936. Those  
7 advertisements appeared monthly in national paint trade publications like *American Painter*  
8 *and Decorator*; *American Paint Journal*; *Paint and Varnish Production Manager*; *National*  
9 *Painters Magazine*; *Paint, Oil and Chemical Review*; and *Painter and Decorator*. ARCO  
10 directed these ads – which circulated in California – to the paint trade. A number of those ads  
11 referred, either in words or pictures, to using ARCO white lead to paint houses. (P285\_002 –  
12 285\_003; P01; P120; Tr. 653:5-13.)

13  
14 Between 1931 and 1935, paint companies in California purchased white lead from  
15 ARCO. DeGregory Paint Stores of Los Angeles, advertised in the *Los Angeles Times* on  
16 September 23, 1934, and January 7, 1940, that it had lead paste for sale. ARCO’s sales records  
17 show that DeGregory Paint Stores purchased white lead from ARCO in 1934, and continued to  
18 purchase white lead through at least 1937. Similarly, Kunst Brothers of San Francisco made  
19 seven different purchases of white lead from ARCO between 1931 and 1935, and advertised  
20 white lead for sale in the *Oakland Tribune* on six occasions between March 1934 and October  
21 1935. (Tr 1680:2-26, 2024:3-21; P01; Tr. 1682:1- 1683:4, 1683:6-22; P258; P259; P260.)

22 Ledgers show that ARCO supplied lead pigments to paint manufacturers that sold paint  
23 nationally, including DuPont and Glidden. (Tr. 2024:23-2025:2.) ARCO continued to produce,  
24 promote, and sell dry white lead and white lead-in-oil until the July 1946. From November  
25 1936 through at least the end of 1938, ARCO continued its paint trade advertising campaign.  
26 (P285\_002 – P285\_003; P01.)

27 In 1940, ARCO published a brochure entitled “The Story of Anaconda Electrolytic  
28 White Lead.” The brochure promoted ARCO’s white lead-in-oil to homeowners, noting that it

1 produces “an all-round **paint** of highest quality” and that “[i]nside or out, *Anaconda White*  
2 *Lead surpasses as a decorative medium, yet costs no more.*” (P01; Tr. 699:24-27; 873:19-  
3 876:1) (emphasis added).

4 In a memorandum filed with the Federal Trade Commission on October 2, 1946,  
5 ARCO stated that it manufactured and sold white lead pigments from 1919 to 1946. (P258 at 1-  
6 3.)

7 ARCO admitted that it solicited business on the west coast and had warehouses in Los  
8 Angeles, San Francisco, and Oakland that shipped lead pigments to customers in the immediate  
9 vicinity, including San Jose, Berkeley, Hayward, Long Beach, Pasadena, Glendale, Burbank,  
10 Hollywood, and San Diego. (P258 at 4, 7.)

11 ARCO had a business location (not a retail establishment) in San Francisco, listed in  
12 the San Francisco City Directory in 1923. (Tr. 1679:14-19.)

14 **3. ConAgra manufactured, promoted and sold lead pigment and paint**  
15 **for home use in the Jurisdictions**

16 ConAgra acquired Phoenix White Lead and Color Works in 1894 and the RN Mason  
17 Company in 1928. ConAgra manufactured lead pigments for use in house paints from 1894  
18 until 1958 and manufactured, promoted and sold lead paint in California from 1894 until 1948.  
19 (Tr. 653:22-661:3; 1667:25- 1668:19, 1663:27-1664:19.) ConAgra’s plant in San Francisco  
20 was moved in 1898 to South San Francisco and was the biggest paint factory west of the  
21 Mississippi River. By 1919, ConAgra shipped an average of 200 tons of lead paint daily from  
22 its South San Francisco plant to retailers throughout California for use in homes. (Tr. 1666:25-  
23 1667:4; Ex. 183) ConAgra also produced lead pigment for use in house paints and sold some of  
24 those paints at its Los Angeles factory. (Barnard at 30:15-30:25; Tr. at 1666:25-1667:4.)

25 Neal Barnard, a former ConAgra employee who developed paint formulas for the  
26 company from 1948 until 1967, testified that ConAgra used white lead from NL in its paints.  
27 (Barnard at 7:15-21.) ConAgra sold 280 tons of white lead to SW for use in lead paint in 1956  
28 and 1957. 658:24-659:9; P204.)



1 ConAgra had a significant presence (under the Fuller name) in the residential lead paint  
 2 market in each of the jurisdictions during the 20th century. (Tr. 1667:9-12, 1675:4-8.) ConAgra  
 3 had locations in each of the Jurisdictions where its lead house paints were sold. (Tr. 1667:9-  
 4 12.) The following chart summarizes ConAgra's history of advertisements, stores, and dealers  
 5 in the Jurisdictions during the time that it manufactured, promoted and sold lead paint for home  
 6 use.

<b>Jurisdiction</b>	<b>Earliest Store, Branch or Dealer</b>	<b>No. of Stores, Branches, &amp; Dealers</b>
Alameda (with Oakland)	1894	Over 164
Oakland	1894	Over 100
Los Angeles	1894	23
Monterey	1922	Over 20
San Diego	1894	Over 25
San Francisco	1894	Over 200
San Mateo	1921	Over 50
Santa Clara	1902	Over 75
Solano	1920	Over 10
Ventura Co.	1923	Over 10

15  
 16 ConAgra extensively advertised lead paint for home use in the Jurisdictions. (P233.)  
 17 ConAgra's promotional materials included booklets and other materials promoting lead paint,  
 18 as well as commercial jingles that aired on local radio. (Tr. 646:3-25.) ConAgra newspaper  
 19 advertisements instructed consumers to use lead paint on their homes, including the exteriors,  
 20 and some ads featured the full line of ConAgra paints at a time when ConAgra sold lead paints.  
 21 (Tr. 1674:24-1675:2.)

22  
 23 **4. Du Pont manufactured, promoted, and sold lead pigment and lead  
 24 paint for home use in the Jurisdictions**

25 DuPont acquired Harrison Brothers and Cawley Clark & Company in 1917 and sold  
 26 lead paint from 1917 until the 1960s. (Tr. 1651:22-1652:2; 1656:24-1657:7.) DuPont  
 27 manufactured its own lead pigment from 1917 to 1924. One of its lead pigment manufacturing  
 28 facilities was located in South San Francisco. (1651:22-1652:9.) After 1924, DuPont  
 contracted with NL for lead pigment for use in its paints. DuPont provided NL with the raw

1 materials, instructions, and packaging needed to manufacture lead pigment that met DuPont's  
2 needs. (Tr. 1656:24-1657:7.)

3 DuPont had a presence in the residential lead paint market in each of the Jurisdictions  
4 in the 20th century. (Tr. 1663:18-22.) DuPont's lead pigment was sold in California as early as  
5 the late 1910s. By 1919, DuPont's national trade journal advertisements for lead pigment listed  
6 sales agents for Los Angeles and San Francisco. (Tr. 885:19-39; 886:13-27; 888:17-24;  
7 2970:7-2971:3; P177; P2 34.)

8 DuPont had dealers and stores selling its lead paint for home use in each of the  
9 Jurisdictions. (1662: 14-17.) The following chart summarizes DuPont's history of  
10 advertisements, stores, and dealers in the Jurisdictions during the time that it manufactured,  
11 promoted and sold lead paint for home use.  
12

<b>Jurisdiction</b>	<b>Earliest Ad</b>	<b>Earliest Store or Dealer</b>	<b>No. of Stores &amp; Dealers</b>
Alameda Co. (with Oakland)	1927	1942	Over 130
Oakland	1927	1942	Over 30
Los Angeles Co.	[No info]	1929	5
Monterey Co.	1926	[No info]	Over 25
San Diego City	1926	[No info]	Over 20
San Francisco	1927	1929	Over 100*
San Mateo Co.	1927	[No info]	Over 80
Santa Clara Co.	1927	[No info]	Over 100
Solano Co.	1927	[No info]	Over 20
Ventura Co.	1946	1946	5

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21  
22 DuPont advertised lead paint for home use to paint dealers, consumers, and master  
23 painters in the Jurisdictions. (Tr. 644:11-21) The number of DuPont advertisements for lead  
24 paint increased from the 1920s through the 1960s. Approximately 1,271 DuPont ads instructed  
25 consumers and painters to use lead paint in homes for interior or exterior use or promoted full-  
26 line dealers. Full- line dealers sold lead paint as well as lead-free paint in the Jurisdictions. (Tr.  
27 1663:3-1663:17, 2012:27-2013:4) DuPont advertised lead paint for home use without telling  
28 purchasers that the paint contained lead. For example, DuPont manufactured and promoted

1 lead paints, including No. 39 Primer, in California through the 1960s. DuPont's expert paint  
2 chemist, Dr. Lamb, testified that the No. 39 Primer that DuPont promoted in the *Oakland*  
3 *Tribune* on March 30, 1961 had approximately 140,000 parts per million of lead. (Tr. 2012:22-  
4 26; 2014:8-2015:14; 2967:5 to 2868:8.)

5  
6 **5. NL manufactured, promoted and sold lead pigments and lead paint**  
7 **for home use in the Jurisdictions**

8 NL manufactured lead pigment from 1891 to 1978 and was the largest American  
9 manufacturer, promoter and seller of lead pigments for use in house paint. (See *Federal Trade*  
10 *Com. v. Natl. Lead Co.* (1957) 352 U.S. 419, 424.) NL regularly sold lead pigments to paint  
11 manufacturers in California from 1900 to 1972 and had a substantial presence in the residential  
12 lead paint market in the Jurisdictions during the 20th century. (Tr. 1647: 21-1648:5; 1648:9-  
13 1649:2; 1651:13-21.) NL operated lead pigment manufacturing plants in San Francisco and  
14 Los Angeles and a warehouse in Oakland. (Markowitz, 1647:21-1648:5; Stipulation Exhibit 2.)

15 NL's dry white lead was available for sale in the Jurisdictions from 1900 to 1972.  
16 (Stipulation 46.) In 1941 alone, NL sold 528,000 pounds of dry white lead to customers in Los  
17 Angeles and 60,000 pounds of dry white lead to customers in the City of Palo Alto.  
18 (Stipulations 35-36.) And between 1920 and 1941, NL's San Francisco branch sold 82,674  
19 tons of white lead-in-oil. (Stipulations 12-33).

20 From 1900 to 1972, NL promoted its lead paints in the Jurisdictions. During that time,  
21 NL regularly advertised its lead paints for home use in local newspapers in the Jurisdictions  
22 and in national magazines that reached consumers in the Jurisdictions. (Stipulation 39-40;  
23 P233; Tr. 1649:3-20; 1651:13-21.) NL also advertised its lead paints for home use in trade  
24 journals directed to the paint manufacturing industry. (Stipulation 41.) Finally, NL regularly  
25 marketed and promoted its white lead-in-oil (paste) for home use in the Jurisdictions from  
26 1900 to 1972. (Stipulations 47-48.)

27 Because NL had been formed by the acquisition of over 50 competitors between 1891  
28 and 1935, NL used the Dutch Boy image as a unifying symbol for the company and its white

1 lead-in-oil and dry white lead products. (Tr. 639:7-19; 640:27-641:25; P82.) Various Dutch  
2 Boy house paints manufactured by NL that contained white lead carbonate were marketed,  
3 promoted, and sold in the Jurisdictions from 1940 to 1972. (Tr.1648:16-26.) In its handbook on  
4 painting, NL promoted lead pigments for use on the interiors of homes and instructed  
5 consumers on how to apply it. (Tr. 1650:22-1651:12; P140.)  
6

7 **6. SW manufactured, promoted, and sold lead pigment and paint for**  
8 **home use in the Jurisdictions**

9 SW manufactured lead pigments for use in house paints from 1910 to 1947. It  
10 manufactured paints with lead pigments from 1880 through the 1970s. SW was a member of  
11 the LIA from 1928 through May 1947 and was a Class A member of NPVLA from 1933  
12 through 1981. (Tr. 1626:15-23.) The following facts regarding SW are relevant:

- 13 • SW sold lead paint as early as 1880, and despite knowing the hazards of lead paint at least as  
14 early as 1900, SW sold lead paint until 1972. (Tr:1626:15-23; 1644: 22-24.)
- 15 • Between 1886 and 1943, SW used over 160,000 tons of white lead. (Stip. 187.)
- 16 • From 1910 to at least 1947, SW also manufactured lead pigment. (Tr. 1626:15-23.)
- 17 • SW had a substantial presence in the residential paint market in the Jurisdictions throughout  
18 the 20th century. Between 1930 and 1933 alone, SW distributed approximately 3,091,484  
19 pounds of lead pigment to its warehouses and factories in San Francisco, Oakland, and Los  
20 Angeles. (Tr. 1627:25-1628:5; 1646:20-1647:2; Stips. 166, 190-202.)
- 21 • SW also had two manufacturing plants in California: one in Emeryville (Alameda County)  
22 and one in Los Angeles. Both produced lead house paints for sale in California. (Tr. 1627:14-  
23 24.)
- 24 • SW had stores and dealers in each of the Jurisdictions selling its lead house paints. (Tr,  
25 1627:25-1628:5, P234.)  
26

27 The following chart summarizes SW's history of advertisements, stores, and dealers in  
28 the Jurisdictions during the time that SW manufactured, promoted and sold lead paint for home  
use.

Jurisdiction	Earliest Ad	Earliest Store or Dealer	No. of Stores & Dealers
Alameda (with Oakland)	1907	1924	Over 55
Oakland	1907	1924	Over 30
Los Angeles	[No info]	1892	75 by 1915 alone
Monterey	1925	1947	Over 25
San Diego	1922	1892	20
San Francisco	1906	1901	Over 50
San Mateo	1903	1947	2
Santa Clara	1913	1945	Over 45
Solano	1921	1958	Over 12
Ventura	1929	1946	10

(Tr. 1629:4-16, 1630:4-10, 1636:14-19, 1638:25 – 1639:1, 1639:7-16, 1639:20-28, 1640:3-11, 1640:15-25, 1640:28-1641:8, 1641:17-22, 1641:9-16, P234.)

SW was one of the first companies to engage in national advertising and to establish an advertising department to promote its paints. According to SW, its national advertising campaigns reached four out of five families in the United States and virtually all of their dealers' localities. (Tr. 638:6-639:1; 638:6-639:1; Stip. 155-156.) SW ads appeared in the Jurisdictions in each decade from the 1900s to the 1970s. (Tr. 1645:19-1646:6; P234.) SW extensively advertised lead paint in the Jurisdictions and instructed consumers in those Jurisdictions to use lead paint on interior and exterior surfaces of their homes. (Tr. 1630:22-1631:8.)

SW also advertised a full line of paints, some of which contained lead. SWP paint was the most prominent SW product that contained lead and was available in the Jurisdictions. More homes were painted with SW house paint than any other competitor's. (Tr. 1642:19-26.) SW advertised price quotes for lead-in-oil that it manufactured and sold. These quotes appeared in California newspapers, including the *San Francisco Examiner*, *Los Angeles Examiner*, and *Oakland Tribune*. (Tr. 3058:28-3061:17; P522; P523.) SW's national and California-specific advertising campaign sponsored local ads to help local dealers in California promote its paints. (Tr. 637:8-14; 637:26-638:5.) Because SW's ads did not always clearly

1 identify whether its paints contained lead, consumers would not know whether a particular  
2 paint contained lead. (Tr. 2032:14-2033:3.)

3 SW also acquired a number of companies that sold and promoted paints containing lead  
4 pigments in the Jurisdictions. It acquired Martin-Senour Company in 1917, Detroit White Lead  
5 Works in 1917, Acme White Lead & Color Works in 1920, The Lowe Brothers Company in  
6 1929, W.W. Lawrence & Co. in 1929, and a partial interest in John Lucas & Co. in 1930,  
7 followed by the full acquisition in 1934. These companies sold house paints containing lead  
8 pigments in addition to SW's own house paints containing lead pigment. (Tr 1626:24-1627:10,  
9 1638:13-23; 1643:6-1644:21; Stips. 158-165, P282 4.)  
10

11 **O. Defendants promoted lead paint even though alternatives were available**

12 Durable, marketable alternatives to lead paint existed by the early 1900s. (Tr. 578:23-  
13 579:6 [discussing P91 at 9], 1624:21-1625:6, 1949:23-1950:5, 1972:26-1973:9, 2039:6-12  
14 3104:23-3105:13; Stip. 183 with SW.) When various countries banned lead paint during the  
15 1920s and 1930s, these non-lead-based alternatives were used in place of lead paint. (Tr.  
16 1702:20-1703:14; P142 at 9.) By the 1910s, SW itself made what it considered to be durable,  
17 quality exterior house paint that did not contain lead. DuPont likewise made a safe, durable  
18 paint that did not contain lead by the 1910s. (Tr. 858:16-24, 2010:14-2011:3, 2037:23-  
19 2039:12, 3103:25-3104:5, 3105:4-25.) Each Defendant was aware that these alternatives  
20 existed, but nonetheless persisted in promoting lead pigment and paint. (Tr. 860:17-26; 889:24-  
21 890:11; 891:26-892:12 [discussing P5 at 3]; 1624:21-1625:6; 1705:2-20; 1715:11-26 [relying  
22 on P177]; 1951:9-1952:6 [discussing P150 at P27]; 1972:26-1973:9; 2012:27-2013:15 [relying  
23 on P233 & P269]; 3104:23-3105:13.)  
24

25 **VI. SUMMARY OF THE DEFENDANTS' ARGUMENTS**

26 Although each defendant asserts specific defenses, the following are common to all,  
27 some of which are dealt with earlier in this decision:  
28

- *Liability requires actual, not constructive knowledge*

1 The court finds otherwise; constructive knowledge is sufficient. See Section V.B. above.

- 2 • *If defendants are liable for constructive knowledge there was no such knowledge*  
3 *at the time (1<sup>st</sup> half of the 20<sup>th</sup> century) lead was put into paint*

4  
5 The Court finds otherwise; there is persuasive evidence that such knowledge was  
6 available. For example:

7 Markowitz: NL knew in 1912 – Ex. P76

8 Markowitz: Barn painted with lead paint and sick cattle (1949) Ex. P 157

9 Markowitz: SW’s Chameleon (1900) Ex. P155 at pp. 16 and 22

10 Markowitz: SW’s Chemist (1928) Ex. P142

11 ConAngra (as Fuller) *Pigeon* case

12 LIA bulletin commenting on health commentators in 1939 - @561-562

13 Kosnett: @ 1168-1215

- 14 • *Even if there was some knowledge lead was dangerous, but in the context of*  
15 *workplaces, not home paint*

16 The Court finds this is not a credible defense; the link between workplace exposure and  
17 harm and residences is obvious.

- 18 • *Defendants could not have been expected to have such knowledge when the*  
19 *leading authorities in medicine and government didn’t say there was such a*  
20 *hazard (e.g., higher BLLs were the norm by government standards)*

21 As the Court of Appeals stated: “The fact that the pre-1978 manufacture and distribution  
22 of lead paint was ‘in accordance with all existing statutes does not immunize it from  
23 subsequent abatement as a public nuisance.’” Appeals Decision at 310.

24 Other defenses asserted:

- 25  
26 • The “promotion” element as stated in the Appeals Decision has not been  
27 satisfied

- 1           • Assuming older housing is the problem, why has there been such a decline in
- 2           blood lead levels? Because bad paint is being covered, and intact lead paint is not
- 3           hazardous
- 4           • No market share analysis done, so how can these five defendants be held liable
- 5           for all purveyors of paint?
- 6           • Incidence of lead poisoning is so low that this is a *de minimus* problem not
- 7           worthy of abatement
- 8           • To the extent it is a problem, the California Legislature has proscribed solution
- 9           • The solution (CLPPS) has worked, and is a great “success story”
- 10          • Local governments have the resources to address the problem but lack the will to
- 11          do so
- 12          • Proposed remedy too expensive
- 13          • It is the property owner’s responsibility to fix the problem

## 14 **VII. INDIVIDUAL DEFENDANTS’ RESPONSES**

### 15 **A. ARCO**

#### 16 **ARCO’s position:**

#### 17 **1. Knowledge**

18           There is no evidence that establishes knowledge by ARCO prior to April 1937 of any  
19 health effects to children from exposure to residential lead paint. Exhibit 154 transcript of an  
20 April 6, 1937 conference that chiefly addressed occupational lead poisoning among adult  
21 factory workers but also included limited references to childhood lead poisoning. (TR.  
22 1750:11-17, 1764:9-1766:3.) The transcript references two previously published case reports  
23 of symptomatic lead poisoning in children with very high blood lead levels; but it says nothing  
24 about whether those children ingested lead from paint. (Ex. 154\_006-008.) As Plaintiff’s  
25 expert acknowledged, one of the published case reports that Dr. Aub described showed that the  
26 child had ingested lead from water; the other did not say what the source of the child’s lead  
27 exposure was. (TR. 1750:11-17, 1752:1-17, 1752:25-28, 1764:9-1766:3.)  
28



1                                    **2.        Promotion**

2                                    ARCO’s alleged predecessors ceased all promotion of lead pigment, and left the lead  
3 pigment business, decades before research on the risk of low-level exposures in asymptomatic  
4 children began to be published in the late 1970s and over a half century before the CDC  
5 reduced its “level of concern” to 10 µg/dL and the “reference level” to 5 µg/dL.

6                                    The evidence fails to show that promotion by ARCO caused application of lead paint  
7 on homes within the Jurisdictions. Plaintiffs’ experts supervised an extensive search of  
8 newspapers published within the plaintiff Jurisdictions for advertisements promoting any lead  
9 paint or pigment products manufactured by any of the defendants. (TR. 1631:22-1632:7,  
10 1632:27-1633:6, 1634:1-20, 1976:1-15; Ex. 233.) Significantly, the search yielded no  
11 newspaper advertisements promoting Anaconda brand products or purporting to have been  
12 published on behalf of ARCO at any time. (TR. 1865:21-1866:7, 1866:13-17, 1869:16-22,  
13 1870:15-19, 1871:1-6, 1871:17-24.) Thus, no alleged ARCO predecessor promoted lead paint  
14 or pigment in the plaintiff Jurisdictions through newspaper advertisements. Nor is there any  
15 evidence that ARCO promoted lead paint or pigment at any time through broadcast media,  
16 billboards, or point-of-sale advertisements in stores.

17  
18                                    The sole evidence of promotion by any alleged ARCO predecessor consists of  
19 magazine advertisements contained within Exhibit 1, a compendium of documents. Those  
20 advertisements break down into two categories: advertisements published before and after the  
21 April 1937 conference.

22                                    Exhibit 1 also includes 51 advertisements promoting Anaconda brand white lead  
23 carbonate that appeared before April 6, 1937, in the same journals directed to paint  
24 manufacturers and professional painters as the post-April 6, 1937 advertisements, at various  
25 times during two brief periods: 1920-22 and 1935-37. (Ex. 1 at 3, 17, 21-25, 27-33, 38-39, 44-  
26 89 and 90-115.) These advertisements all pre-date Plaintiffs’ proffered evidence of knowledge  
27 by ARCO of any lead risk. These advertisements therefore do not constitute promotion with  
28 knowledge.

1           There is no evidence that the trade journals that carried them circulated or were read by  
2 anyone within California. Plaintiffs offered no evidence, and *stipulated* that they know of no  
3 evidence, identifying anyone who bought or used lead paint on homes in the Jurisdictions or  
4 elsewhere in California after reading, seeing or hearing them. (Court Ex. 12 [Stip.], at ¶ 2.)<sup>16</sup>  
5 There is no evidence that these advertisements were effective by any other measure, and no  
6 witness testified that they were.

7           The People have suggested that three pieces of evidence show that Anaconda white  
8 lead pigment was sold for use in paint for residential applications in California, but the  
9 evidence they cite would not support such a finding. They cite (i) advertisements in *Drugs,*  
10 *Oils & Paints* between February 1921 and November 1921 that list Los Angeles and San  
11 Francisco, among 14 other cities outside California, as places where Anaconda Lead Products  
12 Company had warehouses (Ex. P001\_070-089) (similar advertisements in the same journal in  
13 later months omit California locations from the list of places where warehouses were  
14 maintained), (ii) statements in a memorandum submitted to the FTC (Ex. 285) to the effect that  
15 the alleged predecessors' nationwide system for pricing sales of white lead carbonate included  
16 a methodology for determining prices of any sales that might occur in California, and (iii) trial  
17 balances from the accounting records of Anaconda Sales Company for fiscal years ending in  
18 1931, 1934, and 1935 (Exs. 258-260), which show accounts receivable balances due from  
19 various entities, including some in California, but do not make it possible to determine whether  
20 the balances arose from sales of white lead or sales of zinc oxide, a non-lead pigment. (TR.  
21 1884:23-26, 1885:9-14, 1887:5-14.)  
22

23           Exhibit 1 includes two newspaper advertisements by the DeGregory Paint Company,  
24 one from 1940 and another from 1934, advertising unbranded "lead and zinc paste." (Ex.  
25 1\_001-002.) These documents do not constitute promotion by ARCO, because there is no  
26 evidence that any alleged predecessor placed the advertisements and the advertisements do not  
27

28  

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<sup>16</sup> As noted herein stipulations between the parties resolved certain key issues.

1 mention the Anaconda brand. (TR. 1891:6-11, 1895:15-26.) Plaintiffs have asserted that  
2 DeGregory purchased Anaconda white lead, suggesting that the lead pigment contained in the  
3 unbranded “Lead and Zinc Paste” advertised by DeGregory somehow must have been supplied  
4 by ARCO.

5         However, the DeGregory advertisements do not identify white lead carbonate as the  
6 type of lead pigment contained in DeGregory’s “lead and zinc paste.” Undisputed testimony  
7 from an expert witness, Dr. Bierwagen, establishes that there were multiple different types of  
8 lead pigments in use in addition to white lead carbonate. (TR. 3077:11-19.) There is no  
9 evidence that DeGregory’s “lead and zinc paste” contained white lead carbonate rather than  
10 some form of lead pigment that the alleged ARCO predecessors did not sell. Second, Plaintiffs  
11 have cited in support of their argument Exhibits 259 and 260, which are trial balances from the  
12 accounting records of Anaconda Sales Company. These documents show accounts receivable  
13 balances due from DeGregory, but they do not establish any sales of white lead carbonate  
14 pigment to DeGregory (or to any other paint manufacturer in California) because they show  
15 only dollar amounts and do not make it possible to determine whether the balances arise from  
16 sales of white lead or sales of zinc oxide, a non-lead pigment. (TR. 1884:23-26, 1885:9-14,  
17 1887:5-14.)

18         Exhibit 1 includes six newspaper advertisements for unbranded “pure white lead” by  
19 Kunst Bros., a paint retailer in Oakland, dated in 1934 and 1935. These documents do not  
20 constitute or establish promotion by ARCO, because there is no evidence that they placed the  
21 advertisements and the advertisements do not mention the Anaconda brand. (TR. 1891:6-11,  
22 1895:15-17.) There is no evidence that Kunst Bros. purchased white lead from ARCO. See  
23 Exhibits 258 and 259. Exhibit 259 is an Anaconda Sales Company trial balance that shows  
24 account receivable balances from various companies, including Kunst Bros., but does not say  
25 whether the balances arose from sales of zinc oxide or white lead. Plaintiffs’ assertion that it  
26 must be one rather the other is speculation. Exhibit 258, a similar document dating from the  
27 1931 fiscal year, is irrelevant for the same reason.  
28

1                                   **3.       Causation**

2           The law governing causation requires Plaintiffs to prove that ARCO’s conduct was a  
3 “substantial factor” in causing the alleged harm of widespread presence of paint containing  
4 white lead carbonate pigment within pre-1978 private residences throughout the plaintiff  
5 Jurisdictions. ARCO cannot be held liable for the alleged public nuisance because Plaintiffs  
6 presented no evidence that any conduct by ARCO caused *any* portion of the alleged public  
7 nuisance.

8           There also is no evidence that ARCO actually sold white lead carbonate pigment for  
9 use in residential paint in California. Plaintiffs conducted an extensive investigation to identify  
10 defendants’ stores and dealers in California and found none for any of ARCO’s alleged  
11 predecessors. (Ex. 234; *see also* TR. 1637:3-1638:3 (description of investigation process).)

12           The only manufacturing facility for Anaconda White Lead was in Indiana (Ex.  
13 285\_002-003), putting Anaconda White Lead at a competitive disadvantage for any California  
14 sales compared to white lead brands manufactured by companies with California plants.  
15 Anaconda White Lead also was a late entrant into the market, attempting to sell its product at a  
16 time when demand overall was decreasing. The summary of the history of U.S. white lead  
17 production since 1884 proffered by Dr. Mushak shows that most white lead carbonate was  
18 produced in the decades before 1920 and that the peak year was 1922, just two years after  
19 Anaconda White Lead began to be produced. (*See* Ex. 230.) Dr. Mushak’s chart shows, and  
20 Dr. Rosner agreed, that white lead production declined thereafter so rapidly that by the late  
21 1930s total white lead production was only half of what it had been in the early 1920s. (Ex.  
22 230; TR. 711:11-20, 742:15-18, 760:10-13.)

23           Each of the above-listed items of evidence is at most consistent with, but not probative  
24 of, the possibility that ARCO sold some white lead carbonate pigment in California for some  
25 purpose. That is not enough to permit the inference that such sales occurred. A permissible  
26 inference is “more than a surmise or a conjecture,” and “cannot be based on mere possibilities;  
27  
28

1 it must be based on probabilities.” *Aguimatang v. Calif. State Lottery*, 234 Cal. App. 3d 769,  
2 800 (1991) (citations omitted).

3 Even if the Court were to infer that some sales of Anaconda white lead carbonate  
4 pigment occurred in California, that would not establish a factual link between ARCO and the  
5 alleged public nuisance, which consists of paint containing white lead carbonate pigment that  
6 is now present in homes.

7 Plaintiffs stipulated that they had no such evidence that: (i) such pigment was used to  
8 make paint rather than a non-paint product (such as ceramics); (ii) the paint was applied to one  
9 or more residences within the plaintiff Jurisdictions rather than to some other structure that is  
10 not part of this case; and (iii) the residence(s) to which it was applied are still standing.

11  
12 **B. ConAgra**

13 **ConAgra’s position:**

14  
15 **1. Knowledge**

16 With regard to ConAgra the People rely on *Pigeon v. W. P. Fuller & Co.*, 156 Cal. 691  
17 (1909), (Ex. 184), a 1919 newspaper article describing a tour of Fuller’s South San Francisco  
18 plant which references precautions taken to protect workers from “poisonous” dust created  
19 during the process of converting pig lead into white lead carbonate (Ex. 183), and Fuller’s  
20 membership in LIA and NPVLA.

21 ConAgra argues *Pigeon* is distinguishable. As described in Ex. 183 and Ex. 184, work  
22 in a white lead factory was a dangerous occupation which exposed workers to enormous  
23 quantities of lead through a “melting,” “grinding,” and “pulverizing” process which generated  
24 lead dust, fumes and vapors. Workers inhaled fumes and dust with quantities of lead sufficient  
25 to cause “loss of teeth, paralysis and derangement of the digestive organs.” (Ex. 184.006.)  
26 ConAgra asserts it was not proven at trial that anyone connected the workplace hazard to  
27 residences.  
28

1  
2 As to membership in the LIA or the NPVLA, there is no evidence that any Fuller  
3 representative attended meetings of either trade association where such information was  
4 purportedly disclosed. (TR. 785:6-14 [Rosner].) The trade association meeting minutes  
5 introduced by the People demonstrate that Fuller was not in attendance. (Ex. 104, Ex. 107, Ex.  
6 108, Ex. 112, Ex. 114.) Nor did the People establish that Fuller acquired any knowledge from  
7 the meeting minutes or other writings issued by the LIA or NPVLA, as there is no evidence  
8 that any representative of Fuller actually received and reviewed any such documents, much  
9 less a representative with sufficient authority to impute knowledge to Fuller.

10 The People did not prove that Fuller had any direct knowledge of the substance of  
11 relevant medical/scientific literature. They were not widely circulated. If at all, the literature  
12 was available for review only in medical libraries and locatable only through the use of an  
13 “index medicus.” (TR. 1185:14-23 [Kosnett].)

14 The pre-1950 medical/scientific literature did not describe childhood lead poisoning  
15 from deteriorated lead paint and/or dust. Rather, the literature primarily involved lead  
16 poisoning from high doses of lead as a result of chewing on objects such as cribs, toys and  
17 children’s furniture and were viewed by the public health professionals of the times as related  
18 to a behavioral abnormality called “pica.” (Ex. 1004; Ex. 1382; TR. 2664:23-2666:18;  
19 2671:26-2674:22 [English].)

## 20 21 **2. Promotion**

22 For example, Ex. 233 purports to be a summary of the number of “Newspaper  
23 Advertisements by Defendants” in each Jurisdiction during the time period 1900-1972. For  
24 Fuller, the summary reported a total of 2,086 advertisements. However, the schedule  
25 supporting Ex. 233 identified 715 Fuller-related advertisements. The People subsequently  
26 offered Ex. 268, which was a collection of 515 Fuller-related advertisements. (TR. 1980:25-  
27 1982:19 [Markowitz].)

28 Dr. Markowitz acknowledged that many of the advertisements did not promote lead

1 paint, but were for the purpose of “getting people to come into the store.” (TR. 1801:3-4  
 2 [Markowitz].) Still other advertisements simply promoted the Fuller brand, and not any  
 3 particular lead-based paint product. (TR. 1794:22-1795:10 [Markowitz].) Dr. Markowitz also  
 4 included advertisements by retail stores, with no evidence linking Fuller’s involvement in the  
 5 content or placement of those advertisements. (TR. 1800:21-1801:25 [Markowitz].) He  
 6 included an advertisement run by a lumberyard in 1965 (after Fuller stopped producing lead  
 7 paint) based on speculation that the stores may have had “leftover stock.” (*Id.*)

8 Over the 72-year period embraced by the historical research of Dr. Markowitz, there  
 9 were 300 advertisements which appear to have been placed by Fuller (as opposed to a third  
 10 party) and which reference a product that may have contained lead. A schedule summarizing  
 11 the number of advertisements by decade is as follows:  
 12

Decade	Fuller Ads in Ex. 268 Purporting to Relate to a Lead-based Paint
1900s	3
1910s	11
1920s	258
1930s	20
1940s	7 (exterior paint)
1950s	1 (export)
1960s	0
1970s	0
<b>Total</b>	<b>300</b>

13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22 Based on the record, there was minimal advertising activity by Fuller after the 1930s,  
 23 and none related to interior lead paint. While Dr. Markowitz testified that the advertisements  
 24 contained in Exhibit 233 were only a representative sample, the People presented no other  
 25 evidence relating to Fuller’s advertisements.  
 26

### 3. Causation

27  
 28 The People offered no evidence to establish that Fuller’s advertising activity was a

1 substantial factor in causing the alleged public nuisance. There is no basis in the record to  
2 conclude that Fuller’s advertisements were a “but-for” cause of the presence today of lead in  
3 the more than 4.7 million homes located throughout the geographical limits of the Jurisdictions  
4 that are presumed to have lead paint.

5  
6 **4. Laches**

7 The doctrine of laches is applicable to claims brought by public entities. *See, e.g., City*  
8 *and County of San Francisco v. Pacello*, 85 Cal.App.3d 637 (1978); *People v. Department of*  
9 *Housing & Community Dev.*, 45 Cal.App.3d 185 (1975). As the *Department of Housing* court  
10 explained, “[w]hen the government is a party, invocation of . . . laches . . . rests upon the belief that  
11 government should be held to a standard of ‘rectangular rectitude’ in dealing with its citizens.”  
*Department of Housing*, 45 Cal.App.3d at 196.

12 Laches is also available in public nuisance cases brought by public entities. *City and*  
13 *County of San Francisco v. Pacello*, 85 Cal.App.3d 637 (1978). California Civil Code Section  
14 3490 does not alter this result. By its express language, this section applies only to those public  
15 nuisances that amount to “actual obstruction[s] of a public right.” Cal. Civ. Code § 3490.  
16 Here, by the People’s own admission, the requested abatement relates solely to private  
17 residential properties. (May 3, 2012 Joint Stipulation Regarding Buildings at Issue.)  
Accordingly, Section 3490 does not apply to this case.

18 Courts have not barred application of the laches defense in cases concerning the  
19 enforcement of a defined governmental policy. Rather, the cases have balanced the  
20 governmental interest against the impact on the private litigant. *Pacello*, 85 Cal. App. 3d at  
21 646. In *People v. Department of Housing & Community Dev.*, 45 Cal. App. 3d 185 (1975), the  
22 People brought a mandamus action against the department for failure to fulfill the requirements  
23 of the California Environmental Quality Act before issuing a permit. *Id.* The People sought to  
24 have the permit rescinded. *Id.* Even though the 180-day statute of limitations on the suit had  
25 not yet run, the trial court found that the action was barred by laches. *Id.* The finding was  
26 upheld on appeal. *Id.* The appellate court noted the strong public policy for environmental  
27 protection, but found that the presence of public interest was not a bar to equitable defenses.  
28 *Id.* Instead, a weighing process would ascertain whether the injustice to be avoided was  
sufficient to counterbalance the effect of the defense upon a public interest. *Id.*



1 Similarly, the California Supreme Court in *City of Long Beach v. Mansell*, 3 Cal. 3d  
2 462, 496-497 (1970), emphasized that private litigants are not categorically precluded from  
3 asserting equitable defenses, including laches, against a governmental entity, even when the  
4 governmental action purportedly promotes a policy adopted for public protection. *Id.* The  
5 *Mansell* court adopted the following balancing principle:

6 The government may be bound by an equitable estoppel in the same manner as a  
7 private party when the elements requisite to such an estoppel against a private  
8 party are present and, in the considered view of a court of equity, the injustice  
9 to justify any effect upon public interest or policy which would result from the  
10 raising of an estoppel.

11 *Id.* at 496-497

## 12 C. DUPONT

### 13 DuPont's position:

#### 14 1. History relevant to DuPont

15 Only DuPont paint products that were available for sale in California are relevant in  
16 this case. (Ex. 2012, ¶ 3.) DuPont's white lead-in-oil was never identified or listed as  
17 available for sale in any California newspaper or California hardware catalog identified by the  
18 parties. (Ex. 2012, ¶ 11.) The parties have stipulated that DuPont's interior residential paint  
19 products never contained white lead pigments. (Ex. 2012, ¶¶ 26-39; see also TR. 2609:11-19  
20 [Lamb].)

21 As noted above, DuPont entered the paint business in 1917 when it acquired Harrisons,  
22 Inc. ("Harrisons"). (Ex. 2012, ¶ 1.) In 1917 DuPont also acquired Cawley Clark & Company  
23 ("Cawley Clark"), a manufacturer of high-grade colorants for paint. (TR. 2909:21-2910:3  
24 [Bugos].) Together Harrisons and Cawley Clark owned Beckton White, a manufacturer of  
25 lithopone, a lead-free white pigment used for interior residential paints. (TR. 2909:13-2910:3  
26 [Bugos].) Due to these acquisitions, by 1918 DuPont was the country's largest manufacturer  
27 of lithopone. (TR. 2918:1-21 [Bugos].) DuPont later became the country's and then the  
28

1 world's largest manufacturer of titanium dioxide, another lead-free white pigment used for  
2 interior and, later, exterior residential paints. (*Ibid.*)

3 DuPont manufactured white lead carbonate from March 1917 until December 1924 at  
4 only one plant, in Philadelphia, Pennsylvania. (Ex. 2012, ¶ 4.) DuPont acquired the  
5 Philadelphia plant when it purchased Harrisons; Cawley Clark never manufactured white lead  
6 pigment. (TR. 2909:13-2910:3 [Bugos].)

7 After acquiring Harrisons, Cawley Clark, and other companies starting in about 1917,  
8 DuPont attempted to establish its paint and pigment businesses. (TR. 2913:17-2915:19  
9 [Bugos].) Neither business was initially profitable (TR. 2915:10-19 [Bugos]) and the company  
10 was nearly out of the white lead pigment business four years after it acquired Harrisons (Ex.  
11 1297; TR. 2922:10-19 [Bugos]). DuPont ceased manufacturing any white lead carbonate  
12 pigment by the end of 1924. (Ex. 2012, ¶ 4.)

13 Because it was focused on pigments other than white lead, DuPont did not join LIA  
14 until 1948, 20 years after that trade association was formed. (Ex. 2012, ¶ 18; TR. 2929:12-27  
15 [Bugos].) DuPont joined the LIA due to products unrelated to white lead pigment or lead  
16 paint. (TR. 2929:12-24 [Bugos].) DuPont was not a member of any of the LIA's White Lead  
17 Committees and did not participate in any way in the LIA's White Lead Promotion Campaigns  
18 or Programs or the LIA's Forest Products – Better Paint Campaign. (Ex. 2012, ¶¶ 20-24; TR.  
19 2929:12-27 [Bugos].) DuPont was a member of NPVLA from 1933 through 1972 (Ex. 2012, ¶  
20 16), but NPVLA promoted only the use of paint generally and did not affirmatively promote  
21 white lead pigment or lead paint (TR. 834:22-835:3 [Rosner]; 2928:23-2929:5 [Bugos]).  
22

## 24 **2. Knowledge**

25 Dr. Markowitz testified that DuPont did not possess any secret or otherwise non-public  
26 knowledge concerning risks posed by residential lead paint. (TR. 1773:14-20.) To the  
27 contrary, the first evidence offered by the People of DuPont being informed that children were  
28 being harmed by lead paint in their homes was a 1937 letter from the Baltimore, Maryland

1 health department. (Ex. 159; TR. 1716:13-19 [Markowitz].) That letter referred solely to  
2 children being harmed by eating paint off cribs, and did not mention interior or exterior  
3 residential surfaces. (*Ibid.*) The City requested DuPont’s help in obtaining information about  
4 alternative, lead-free paints for repainting children’s furniture, including cribs (*ibid.*), and  
5 DuPont offered to look into developing such paints. (TR. 1861:28-1862:3, 1862:24-1863:26  
6 [Markowitz].) In fact, DuPont already offered a lead-free paint for those purposes at that time,  
7 as part of its Duco line. (TR. 1863:27-1865:8 [Markowitz]; Ex. 2012, ¶ 34.)  
8

### 9 **3. Promotion**

10 Dr. Markowitz offered a general opinion that DuPont promoted lead paint in California  
11 (TR. 1624:21-1625:11), based upon a collection of 1,271 advertisements pertaining to DuPont.  
12 (TR. 1663:9-11.) In that collection, Dr. Markowitz included advertisements that (i) referred to  
13 lead paint explicitly (such as through use of the word “lead”); (ii) referred to a paint product  
14 containing white lead pigment; (iii) referred to a paint line that included a paint product  
15 containing white lead pigment; or (iv) referred to any other residential paint product (i.e., those  
16 that did not contain any white lead pigment). (TR. 1794:22-1795:10.)  
17

#### 18 **(a) Advertisements**

19 First, advertisements that did not refer to a paint product that contained white lead  
20 pigment or a line with such a product are irrelevant to this case. Dr. Markowitz speculated that  
21 such advertisements for non-lead paint products *might* induce a consumer to visit a store,  
22 where he or she *might* see promotional materials for a lead paint. (TR. 1839:22-27.) But Dr.  
23 Markowitz admitted he has seen no such in-store promotional materials for DuPont. (TR.  
24 1840:21-1841:4.)  
25

26 Second, Dr. Markowitz lacked the knowledge to separate advertisements that referred  
27 to lead paints, or lines with lead paints, from advertisements for non-lead paint products.  
28 (TR. 1831:3-1839:21, 1842:26-1843:1.) Dr. Markowitz could not state how many  
advertisements in his collection actually referred to a DuPont paint product that contained

1 white lead pigment. (TR. 1839:17-21, 1843:2-7.) Because Dr. Markowitz was unable to  
2 separate potentially relevant from irrelevant advertisements, there is no support for his opinion  
3 that DuPont promoted residential lead paint.

4 Third, Dr. Markowitz did not exclude advertisements placed by third parties, such as  
5 painters or dealers. (TR. 1841:10-17, 1842:1-4, 1843:8-11.) Dr. Markowitz did not identify  
6 any California newspaper advertisement as placed by DuPont, rather than a third party.  
7 DuPont's expert paint chemist, Dr. Lamb, reviewed Dr. Markowitz's collection of  
8 1,271 advertisements between 1900 and 1966 and determined that only 130 of the  
9 advertisements referred to a DuPont paint product that contained white lead pigment or a paint  
10 line including such a product. (TR. 2834:7-13.) This testimony was uncontroverted.

11 Of the 130 advertisements identified by Dr. Lamb, only two advertisements used the  
12 word "lead." (TR. 2834:17-2835:3.) The remainder referred to an *exterior* residential paint (or  
13 paint line) that contained some amount of white lead pigment, but did not discuss lead or tout  
14 its virtues. Dr. Lamb organized these advertisements into a chart displaying the number in  
15 each Jurisdiction, by decade. (Ex. 1408.1; TR. 2833:18-2834:13.) Dr. Markowitz's collection  
16 included no such advertisements in Ventura County and only one advertisement (during a  
17 period of 66 years) in Monterey and Solano Counties. (Ex. 1408.1.) There were just seven  
18 advertisements found in Santa Clara County and eight in San Mateo County and the City of  
19 San Diego. (*Id.*) Los Angeles County, the largest Jurisdiction, had just 13 such  
20 advertisements, and only three after 1930. (*Id.*) The only Jurisdictions where more than  
21 20 advertisements were found that referred to a DuPont paint product or line containing white  
22 lead pigment were Alameda County and the City of Oakland, which shared the *Oakland*  
23 *Tribune*. (*Id.*) And only nine such advertisements were found after 1950. (*Id.*)  
24  
25

26 **(b) White Lead Pigment and Sales**

27 The People contend that DuPont sold white lead pigment to paint manufacturers in  
28 California. The People referred to DuPont as part of the "white lead pigment industry" (TR.

1 26:4-6.), referring to a 1940s Federal Trade Commission enforcement action that ultimately  
2 reached the United States Supreme Court. (*Ibid.*) But DuPont was *not* a party to that  
3 enforcement action and the People’s statement that DuPont was part of “the white lead pigment  
4 industry” finds no evidentiary support in the record. (See Ex. 517.) The People tacitly  
5 acknowledged the point in cross-examination of Defendants’ medical historian, Dr. English,  
6 when their counsel referred to 1930s meetings of the “lead paint industry” that did not include  
7 DuPont. (TR. 2711:13-2712:23, 2716:7-25.) It was stipulated that DuPont did not join the  
8 LIA until 1948, 20 years after it was founded, and did not participate in any of the LIA’s white  
9 lead pigment promotional campaigns. (Ex. 2012, ¶¶ 18, 20-24.) And Dr. Markowitz conceded  
10 on cross-examination that there is only a “theoretical possibility” that DuPont sold white lead  
11 pigment for use in residential paints in the Jurisdictions. (TR. 1850:28-1851:13.)

12  
13 DuPont had no dealers in any of the Jurisdictions until 1924. (TR. 1659:9-1661:21  
14 [Markowitz].) DuPont had a branch office in the Old Chronicle Building in San Francisco that  
15 was able to handle inquiries for a wide variety of products, but it was stipulated there is no  
16 evidence that DuPont’s office in the Old Chronicle Building in San Francisco was a retail  
17 establishment for any product, including pigment or paint. (*Id.*, ¶ 13.)

18 The People’s historian, Dr. Markowitz, testified that DuPont advertised white lead  
19 carbonate pigment as available for purchase in San Francisco, through L.H. Butcher, from  
20 1918 through 1920. (TR. 1657:8-1658:8.) The People’s sole evidence is trade journal  
21 advertisements; the People presented no documentary evidence of any such sale by DuPont and  
22 identified no alleged DuPont customer. The People also presented no evidence that the trade  
23 journal in which the advertisements appeared was circulated in California. The People  
24 reviewed newspaper advertisements in the Jurisdictions during this time period, but found no  
25 advertisement for any DuPont paint product before 1924. (TR. 1659:9-1661:21, 1827:24-  
26 1828:9 [Markowitz].) On cross-examination, Dr. Markowitz testified that he had identified  
27 only a “theoretical possibility” that DuPont ever sold white lead carbonate in California and  
28 had no proof of any actual sale. (TR. 1850:28-1851:13.)

1 DuPont's historian, Dr. Bugos, testified concerning the same trade journal  
2 advertisements. Dr. Bugos explained that his review of the historical record revealed that  
3 Cawley Clark had a business relationship with L.H. Butcher *prior* to DuPont's acquisition of  
4 Cawley Clark in 1917 and that the relationship continued through 1920. (TR. 2931:21-  
5 2932:3.) Dr. Bugos testified that the scope of L.H. Butcher's representation was limited to  
6 colored pigments and lithopone. (TR. 2931:17-2932:3). As Dr. Bugos explained, "the  
7 relationship with Cawley Clark was always with Butcher and Butcher with Cawley Clark."  
8 (*Ibid.*)

9  
10 When DuPont advertised white lead carbonate alone, as the only product mentioned in  
11 an advertisement, L.H. Butcher was *not* listed in the advertisement as a Pacific Coast  
12 Representative. (TR. 2934:20-2935:5, 2936:20-26 [Bugos]; Ex. 1434.) Instead, L.H. Butcher  
13 was listed *only* in "coalition advertisements" that included the colored pigments and lithopone.  
14 (TR. 2932:16-2933:12 [Bugos].) L.H. Butcher's own advertisements at this time did *not* state  
15 that it had white lead pigment available for sale (whether manufactured by DuPont or someone  
16 else). (TR. 2934:28-2935:5 [Bugos].) In addition, the historical record shows that L.H.  
17 Butcher sold red lead manufactured by Eagle Picher, one of DuPont's competitors. (TR.  
18 2935:6-15, 2936:9-18 [Bugos]; Ex. 1429.) Dr. Bugos gave uncontroverted testimony that a  
19 representative such as L.H. Butcher would not have sold more than one company's red lead.  
20 (TR. 2935:6-15.) As red lead also is listed in DuPont trade journal advertisements that mention  
21 L.H. Butcher, it is thus clear that L.H. Butcher did not sell *all* of the DuPont products listed in  
22 those coalition advertisements. As Dr. Bugos testified, there is no reliable historical evidence  
23 that L.H. Butcher ever represented in California, much less sold, any white lead carbonate  
24 pigment made by DuPont. (TR. 2931:8-2932:3.)

25  
26 **(c) Interior Residential Lead Paint**

27 The parties stipulated that DuPont interior residential paints did not contain white lead  
28 pigment. (Ex. 2012, ¶¶ 26-39; see also TR. 1862:6-17 [Markowitz]; 2609:11-19 [Lamb].)The

1 evidence shows that DuPont never sold or affirmatively promoted an interior residential paint  
2 containing white lead pigment in any of the Jurisdictions. The only evidence offered by the  
3 People that an interior DuPont residential paint containing white lead pigment was ever  
4 allegedly available for sale in any of the Jurisdictions was a June 1919 *DuPont Magazine*. (Ex.  
5 276.) The magazine at issue referred to a paint line called “Harrisons Town & Country.” (TR.  
6 2008:27-2009:2 [Markowitz].)

7 As an initial matter, the People stipulated that from 1917 through 1920 the “Harrisons  
8 Town & Country” line included a *separate* exterior paint. (Ex. 2012, ¶ 2 [referring to  
9 Harrisons Town & Country Outside White Paint]; see also *id.* ¶¶ 26-27 [other paints that also  
10 were part of Harrisons Town & Country line did not contain white lead pigment].) The name  
11 “Harrisons Town & Country” thus referred to a line of paints (i.e., a brand), rather than a single  
12 paint intended for both exterior and interior use. Uncontroverted testimony by Dr. Bugos also  
13 supports this finding. (TR. 2937:8-2939:21.) DuPont’s expert paint chemist, Dr. Lamb,  
14 provided uncontroverted testimony that the *interior* paint sold under the “Harrisons Town &  
15 Country” brand contained lithopone, rather than white lead pigment. (TR. 2608:26-2609:5, see  
16 also TR. 2939:25-2940:2 [Bugos].)

17 In addition, the People offered no evidence that “Harrisons Town & Country” paints  
18 were ever available for sale from DuPont in California. DuPont ceased use of the brand name  
19 “Harrisons Town & Country” in its paint line in 1920. (Ex. 2012, ¶ 2; TR. 2938:7-14  
20 [Bugos].) The People identified no DuPont dealer or advertisement for any DuPont paint  
21 product in any of the Jurisdictions before 1924. (TR. 1659:9-1661:21, 1827:24-1828:9  
22 [Markowitz].) Accordingly, the “Harrisons Town & Country” line of paints was rebranded  
23 four years *before* DuPont paint products first became available in the Jurisdictions.  
24 (TR. 2939:16-21 [Bugos].) For this additional reason, the product is irrelevant to this case.  
25 (Ex. 2012, ¶ 3.)  
26  
27

#### 28 **4. Causation**

1 Dr. Rosner offered testimony concerning national advertising, both individually and  
2 through trade association activities. Dr. Rosner testified that in reviewing DuPont's national  
3 activities, he sought to identify DuPont's efforts to promote paint generally and did not  
4 consider whether the products advertised actually contained white lead pigment. (TR. 805:14-  
5 23, 807:15-22.) Dr. Markowitz offered testimony concerning advertising specific to  
6 California. Neither witness showed that DuPont intentionally or affirmatively promoted the  
7 use of lead paint in or on residences in the Jurisdictions.

8 Dr. Rosner testified concerning national advertising mostly undertaken by DuPont from  
9 1918 through 1920. (TR. 644:11-21; Ex. 2 at pp. 12-22.) But the referenced advertisements  
10 listed many of the diverse products that DuPont offered at that time, including dozens of  
11 products unrelated to paint. (See, e.g., Ex. 2 at pp. 18, 22.) Dr. Rosner could provide no  
12 evidence that the "national" magazines in which he had identified DuPont advertisements were  
13 actually circulated in California. (TR. 811:23-812:7, 813:10-13.) In addition, as discussed  
14 previously, the People have not proven that DuPont had a retail presence in California before  
15 1924 (TR. 1659:9-1661:21, 1827:24-1828:9 [Markowitz]), so earlier advertisements cannot  
16 provide a basis for liability.

17 Dr. Rosner also testified about national promotional campaigns undertaken by the LIA  
18 and the NPVLA. However, DuPont did not join the LIA until 1948, was never a member of  
19 any of the LIA's White Lead Committees, and did not participate in any way in the LIA's  
20 White Lead Promotion Campaigns or Programs or the LIA's Forest Products – Better Paint  
21 Campaign. (Ex. 2012, ¶¶ 18-24; TR. 2929:12-27 [Bugos].) The NPVLA national promotional  
22 campaigns do not establish that DuPont intentionally or affirmatively promoted the use of lead  
23 paint on residential exteriors.

24 The People offered no testimony that any particular advertisement referring to a  
25 DuPont paint product was false or misleading. The People's historian, Dr. Markowitz, testified  
26 on redirect that some defendants may have misled consumers because advertisements for lead  
27 paint did not state that the paint contained white lead pigment. (TR. 1965:8-17.) But DuPont's  
28



1 historian, Dr. Bugos, offered uncontroverted testimony that DuPont *always* listed the  
2 ingredients of its paints on the can labels. (TR. 2941:22-2942:23; see also Ex. 1428.)  
3 Similarly, Dr. Bugos gave uncontroverted testimony that DuPont labeled its residential paint  
4 products clearly as being for interior or exterior use. (TR. 2940:3-2941:19.) So, consumers  
5 were informed whether a DuPont paint product contained lead and whether it should be used  
6 for interior or exterior purposes.

7 The remaining advertisements cannot serve as a basis for liability. Two of the  
8 advertisements concern DuPont's No. 39 House Primer. The evidence shows that product  
9 contained just 13.7 percent white lead pigment and was used as a first coat, *under* a lead-free  
10 exterior paint. (TR. 2824:17-23 [Lamb].) Further, the product's label truthfully and accurately  
11 disclosed its ingredients, by percentage, and stated that it was for *exterior* use. (TR. 2940:3-  
12 2941:19, 2941:22-2942:23 [Bugos]; see also Ex. 1428.) There is no evidentiary basis to  
13 support a conclusion DuPont had knowledge upon which to consider an exterior primer  
14 containing a small percentage of white lead pigment to present a risk of hazardous lead  
15 exposure in the 1960s, when the No. 39 House Primer was last manufactured. To the contrary,  
16 the People's historian, Dr. Markowitz, testified that DuPont had no special knowledge  
17 concerning potential risks presented by exterior lead paint. (TR. 1773:14-20.)  
18

19 **D. NL INDUSTRIES**

20 **NL's position:**

21 **1. Knowledge**

22 While adopting arguments by its co-defendants, NL presented a detailed defense that  
23 asserts this is "litigation by hindsight." Essentially, the argument is that since NL could not  
24 have known more than then-existing medical knowledge offered, liability cannot attach.  
25

26 The earliest reports of children poisoned from house paint came from Dr. Lockhart  
27 Gibson in Queensland, Australia in the 1890s and early 1900s. Gibson described the total  
28 disintegration of lead paint in the semi-tropical sun, heat, and moisture. As a result, children

1 acquired copious amounts of pure lead “dust” on their hands. (TR 2669 [English]) U.S.  
2 medical writers such as Dr. David Edsall (1907) read of Gibson’s cases but took away no  
3 lesson to change the use of lead paint in this country. (TR 1235-36 [Kosnett])

4 Dr. Julian Chisolm wrote in 1989 that Gibson’s concerns went largely unheeded by the  
5 medical profession in Australia. (Ex. 1057.02; TR 2669:26-2670:10 [English]) The first U.S.  
6 cases of children exposed to lead from paint used on houses came in the 1910s. Dr. Kenneth  
7 Blackfan at Baltimore’s Johns Hopkins Hospital reported two children lead-poisoned from  
8 chewing on painted furniture. The children had eaten large quantities of paint over long  
9 periods of time. (Ex. 22.05 [p. 885, top] Dr. Blackfan urged that “energetic prophylactic  
10 measures be taken with children who habitually eat painted articles.” (Ex. 22.06 [p. 887])  
11 Blackfan cited Gibson’s Queensland cases but he did not suggest a limitation on the use of lead  
12 paint. (TR 1253:6-14 [Kosnett])

13  
14 Dr. Harvey Wiley, a respected U.S. public health official, in his 1915 *Good*  
15 *Housekeeping* article, reminded readers of the poisonous qualities of lead but reassured them  
16 “there need be little fear of poisoning from . . . lead in the paint.” (Ex. 1000.02, col. 2; *see* TR  
17 1250 [Kosnett]) In the 1920s, Dr. John Ruddock (1924) in Los Angeles and Dr. Charles  
18 McKhann (1926) at Boston Children’s Hospital established the “pica” diagnosis for children  
19 lead-poisoned by chewing extensive quantities of paint from cribs, furniture, and window sills.  
20 (Ex. 1004; Ex. 1382) These physicians saw the problem as a behavioral abnormality which  
21 could be solved by parental intervention with children who ate non-food substances. (TR  
22 2675-77 [English]) Both Ruddock and McKhann mentioned Gibson’s Queensland cases.  
23 However, knowing these cases as well as their own, neither Ruddock nor McKhann  
24 recommended a limitation on the use of lead paint in homes. (*Id.*; TR 1253:10-1255:10  
25 [Kosnett])

26 NL appears to have gained some knowledge of the published cases involving children’s  
27 toys, cribs, and furniture around this time. NL’s historian, Dr. Sicilia, testified by deposition  
28 that the company followed medical literature focused upon industrial lead poisoning. Sicilia

1 believed NL probably learned of “children chewing on objects with which they had intimate  
2 contact such as cribs, toys, and furniture” by the mid- to late 1920s. (Ex. 1420, Sicilia depo at  
3 27-28; *see id.* at 12-15) There is no evidence NL knew more than this from the literature. (TR  
4 1747:8-18 [Markowitz]) After the LIA was created in 1928, NL was present to hear  
5 information that the LIA Secretary, Felix Wormser, provided at meetings. (Ex. 1420 at 27)  
6 The People’s historian agreed there was no evidence NL possessed *actual* knowledge of lead  
7 poisoning of children in the home environment before the LIA’s December 1930 meeting,  
8 discussed *infra.* (TR 1743:26-1744:3 [Markowitz])

9  
10 In November 1930, the U.S. Public Health Service summarized the reports of childhood  
11 lead-paint poisoning in a release to the government’s inter-agency newspaper, *U.S. Daily.*  
12 Historical records show that the Public Health Service knew of the Gibson, Blackfan,  
13 Ruddock, and McKhann cases. (TR 2674:27-2676:4 [English]) The Public Health Service and  
14 Surgeon General became actively involved in the issue. (TR 2675-2681 [English]) The next  
15 month, at a December 1930 meeting, the LIA’s Wormser informed members that the *U.S.*  
16 *Daily* had reported cases of “babies and children allegedly being lead-poisoned by chewing  
17 paint on cribs.” (Ex. 75.02) Wormser sometimes reported in later meetings about publicly  
18 reported cases of lead poisoning in adults and children. The LIA minutes show that Wormser  
19 provided little hard information to the members about childhood poisoning after his 1930  
20 report on “cribs.” His comments largely were complaints about inaccurate publicity and his  
21 reassurances to members that the LIA was investigating cases through experts such as  
22 Dr. Joseph Aub of the Harvard Medical School. (*E.g.*, Ex. 77.04) Wormser assured members  
23 that the LIA was not afraid of the truth and was learning from experts that much of the  
24 publicity was mistaken. (*E.g.*, Ex. 108.08-.09)

25  
26 The People’s case rests on information known or available to Defendants concerning  
27 the toxicity of lead in large accumulations, arriving by high exposure pathways such as  
28 unventilated factories (in the 1900s-10s) or children’s prolonged chewing of lead-painted toys,  
cribs, and furniture (in the 1920s-30s). However, the People’s case for a present-day “public

1 nuisance” rests on more recent scientific concerns about low-dose lead hazards having no toxic  
2 threshold (*see* CDC 2012, Ex. 20), reaching children by the route of house dust (*see* CDC  
3 1991, Ex. 7; Sayre 1974, Ex. 1050).

4 The People’s witnesses testified that there is no safe level of lead. (*See, e.g.*, TR  
5 358:24-359:5 [Lanphear]; TR 962:28-963:5 [Gottesfeld]; TR 2316:20-25 [Matyas]) Many of  
6 them cited the CDC’s 2012 “reference level” of 5 µg/dL of blood lead to measure the number  
7 of children affected by lead. Dr. Fenstersheib testified that 344 children in Santa Clara County  
8 “were lead poisoned” at levels above 5 µg/dL in 2010. (TR 904:15-22) Mr. Walseth said there  
9 were 959 children in San Francisco above 5 µg/dL. (TR 2054:5-8) Dr. Matyas cited “an  
10 enormously large number” being lead-poisoned in the state at the new reference level of 5  
11 µg/dL. (TR 2350:12-17)

12  
13 The People linked the latest studies of low-threshold toxicity with the house-dust  
14 pathway first identified by Dr. Sayre in 1974. According to the People’s abatement expert,  
15 Dr. Jacobs, the “main pathway of [children’s] exposure” is “from lead paint to lead in house  
16 dust, to hand-to-mouth contact.” (TR 1461:8-10) The house-dust pathway ran through his  
17 testimony about, *e.g.*, the HUD studies and the up/down movement of windows. (TR 1461:25-  
18 28, 1513-14, 2194-95 [Jacobs]) In redirect examination, Jacobs used this metaphor:

19  
20 Q. For example, imagine the amount of sugar in a one-gram packet. . . . This  
21 amount of lead dust spread evenly over 100 rooms would contaminate  
22 those rooms at twice the level recommended by the EPA; is that right?

23  
24 A. Yes. . . . [T]he fact is it is very easy to create lead dust. (TR 2202:12-  
25 2203:6, *quoting* Ex. 1078.01)

26  
27 In contrast, the People’s witnesses mentioned just one case of a child being poisoned in  
28 recent years at blood lead levels high enough to be considered toxic in the decades before  
1970. Dr. Rangan discussed a child brought to the hospital with blood lead of 78 µg/dL whose  
x-rays showed lead chips. (TR 1094) It is not clear that any other cases described by the  
People’s witnesses reached such a level. (*See* TR 1091-92 [Rangan]; TR 1373-74 [Navarro])

1 In fact, the CDC web page summarizing California blood leads reported two children in the  
2 state above 70 µg/dL in 2009, zero in 2010, and zero in 2011, regardless of source. (Ex. 1402)

3 The People argue Defendants should not have promoted lead paint after 1900, perhaps  
4 even 1884 (*cf.* TR 144:23-27 [Mushak]), and yet their own historian does not criticize  
5 companies for selling lead paint before the mid-1920s, if then. Markowitz’ reason for  
6 choosing that date is it coincides with the earliest U.S. reports by Ruddock (1924) and  
7 McKhann (1926) of children poisoned from chewing house paint on sills. Markowitz’ position  
8 is manufacturers should have abandoned their product at the first indication of a potential  
9 hazard in the medical journals, even when the physicians did not recommend such a response.

10 NL admits it is possible to find a “thread” of opinion in U.S. medical literature  
11 suggesting that the interior use of lead paint should be limited. At a 1933 medical conference,  
12 Dr. Robert Kehoe commented from the audience that there should be “strenuous efforts” to  
13 eliminate lead from the “environment” of children. Dr. Kosnett quoted Kehoe but omitted the  
14 recommendation by the main speaker, Dr. McKhann, appearing one paragraph earlier on the  
15 page. (TR 1201:7-11, 1254:2-25) McKhann urged that “dissemination to mothers of  
16 information on the subject should result in prevention of the disease.” (Ex. 23.05 [p. 1135, col.  
17 1, “Summary” ¶ 2] (emphasis added)) (Kosnett also cited a 1940 consumer article but did not  
18 claim any Defendant ever saw it. (TR 1201:19-28))

19 NL relies on what it terms the “mainstream of medical opinion.” Thus, in 1931, the  
20 Surgeon General advised the public in *Child Welfare* magazine that lead paint had “wide fields  
21 of usefulness,” but “the painting of babies’ toys and cribs is not one of them.” (Ex. 1010.02)  
22 The U.S. Children’s Bureau issued similar advice to parents, urging caution not to repaint  
23 babies’ toys, cribs, and furniture with lead paint. (Ex. 1013.02, col. 4; Ex. 1019.05 [p. 17];  
24 TR 2677:26-2681:25 [English])

25 The Baltimore Health Department gave advice by radio and print similar to that of the  
26 Surgeon General and Children’s Bureau, focusing on using non-lead paint for toys and cribs.  
27 (Ex. 1015.04; TR 2681:27-2685:5 [English])  
28

1 Dr. Kosnett omitted mainstream science for a second time when he argued that low-  
2 level toxicity of lead was already known in the 1930s. Kosnett focused on the Myers (1935)  
3 article for the author's concern that 24 µg/dL might be harmful. (TR 1210:9-22 [Kosnett];  
4 Ex. 55) But in cross, Kosnett conceded that the Myers article was the "exception for his time"  
5 as he was "the only one at that time saying a level below 25 [µg/dL] was harmful." (TR  
6 1262:18-1263:8 [Kosnett]) The scientific mainstream was represented by lead researchers  
7 Harold Blumberg (1937) at Johns Hopkins and Emanuel Kaplan (1942) at the Baltimore Health  
8 Department, whose blood lead studies placed the toxic threshold at 80 µg/dL and the onset of  
9 true lead poisoning in the range 100-200 µg/dL. (Ex. 1377; Ex. 1026; TR 2686-88 [English];  
10 TR 1263-65 [Kosnett])  
11

12 Retrospective articles written by public health authorities like Dr. Julian Chisolm  
13 (Johns Hopkins) and Dr. Jane Lin-Fu (HEW) have recognized that the concept of lead toxicity  
14 changed radically after 1970. (See Ex. 1047; Ex. 1056) Dr. Lin-Fu stated in 1985:

15 [I]t should be obvious that what constitutes the health effects of lead is an  
16 evolving concept that has changed dramatically since lead toxicity was first  
17 recognized in ancient times. In the last 10-15 years [since 1970-1975], as  
18 scientific advances and modern technologies have provided more sensitive  
19 measures of biochemical, psychological and electrophysiological changes  
20 associated with relatively 'low' levels of lead exposure, the concept has  
21 undergone further scrutiny and changes that were fraught with controversies.  
Such controversies perhaps stem from the fact that what should be accepted as  
'normal' lead exposures in today's world is a heatedly debated question.  
(Ex. 1056.17 [p. 58])

## 22 2. Decline of Lead Paint

23 The use of white lead declined after 1922. Factory-made paint with new pigments like  
24 titanium dioxide permitted the elimination of lead from interior paint for most uses not  
25 requiring high durability or water resistance, and they allowed a reduced amount of lead in  
26 exterior paints while keeping some lead pigment for its superior performance against weather  
27 and ultraviolet exposure. (TR 3081:10-3082:4 [Bierwagen])  
28

1 Small amounts of white lead may have been used for interior paint in the 1940s, and  
2 some publications continued to advise that lead could be used on interiors. (TR 1650  
3 [Markowitz]) But mainstream medicine began to turn against interior lead paint at that time.  
4 In late 1943, Dr. Randolph Byers and Elizabeth Lord wrote in the *American Journal of*  
5 *Diseases of Children* about long-term intellectual deficits in children previously having acute  
6 lead poisoning, and in the middle of their article, the authors advised against lead paint for  
7 interiors. (TR 1770 [Markowitz]) Unlike Dr. Kosnett, Dr. Markowitz recognized Byers and  
8 Lord (1943) as the first recommendation from any U.S. doctor or public health authority to  
9 restrict the use of lead paint on home surfaces for children’s safety. (TR 1770-71)

10 The “Baetjer and Watt” report of 1949 found that many of the cases were children in  
11 poorly maintained inner-city housing who ate peeling paint. (Ex. 1033; TR 2700-01 [English])  
12 This was recognized as a new source for childhood lead poisoning not previously noted to any  
13 large extent. (TR 2700-01 [English])

14 The Baetjer and Watt report led directly to Baltimore’s first-in-the-nation city  
15 ordinance against the use of lead paint for home interiors, issued in 1951 by Dr. Huntington  
16 Williams, the Health Commissioner. (TR 2699-701 [English]) The LIA embraced Baltimore’s  
17 approach and distributed the Baetjer and Watt report to other cities and public health officials.  
18 The LIA then worked with the American Standards Association to develop a warning label for  
19 paint containing more than 1% lead, saying it was not to be used for interiors. This ASA  
20 labeling standard issued in 1955 was supported by major U.S. medical organizations, federal  
21 agencies, city health departments, and manufacturers. (Ex. 1041; TR 2701-02 [English])

22 The 1955 ASA labeling standard marked the formal end of interior lead paint in  
23 America. In historical overview, prior to Baltimore in 1951, no U.S. public health authority had  
24 ever made a recommendation that lead paint was inappropriate to use in the vicinity of  
25 children. (See TR 1270 [Kosnett]; TR 2677-85 [English])  
26  
27

28 **3. State of Medical Knowledge**

1           The medical idea of lead poisoning changed dramatically in the 1970s. Chisolm’s 1971  
2 article in *Scientific American* described the disease of lead poisoning as it was previously  
3 known – a disease of recognizable symptoms first occurring mildly at 60 µg/dL and acutely  
4 above 80 µg/dL. (Ex. 1047.08 [p. 22, col. 2]; TR 2637 [English]) As late as 1972, U.S. health  
5 experts incrementally reset the “safe” level of blood lead in children, the “permissible” daily  
6 consumption of lead by children, and the allowable quantity of lead in house paint, so that even  
7 the “pica” children who ate paint would not exceed a daily maximum of lead. (Ex. 1387;  
8 Ex. 1048; Ex. 1049; TR 2639-47 [English])

9           The concept of non-symptomatic lead poisoning at lower levels emerged only as the  
10 1970s ended. (Ex. 48.01; TR 379 [Lanphear]; TR 2655-57 [English]) Computer-based studies  
11 of children’s IQ found differences that were correlated with lead, and continuing research  
12 pushed down the level of concern through the 1980s and 1990s. (Ex. 1427; Ex. 1058; TR  
13 2655-61 [English]) Dr. John Sayre’s 1974 article based on his Rochester studies launched  
14 research in a new direction concerning the possibility of microscopic lead in ordinary house  
15 dust as a pathway for children’s exposure. (Ex. 1050.04 [p. 269] (“The thought that dust may  
16 be a source in childhood lead poisoning is not a new one,” citing, however, recent articles  
17 dated 1970 and 1973.)) Sayre recognized that, while a large lead source like peeling paint was  
18 needed for children to get blood lead above 60-80 µg/dL, house dust might provide enough  
19 lead for children to reach lower but “undue” levels like 25-40 µg/dL. Researchers began  
20 looking at dust as a pathway to the observed levels of blood lead in some older homes.  
21 (TR 2652 [English])

22           These new ideas of childhood lead poisoning coalesced in the CDC’s 1991 “Preventing  
23 Lead Poisoning in Young Children.” (Ex. 1058) There the CDC reduced its “intervention  
24 level” to 10 µg/dL because of new science suggesting adverse effects in children “at blood lead  
25 levels previously believed to be safe.” (*Id.* at .08 [p. 1, ¶ 1]) It observed that no threshold was  
26 being identified for the harmful effects of lead. (*Id.* at .09 [p. 2, ¶ 2]) And it added “lead-  
27 contaminated dusts and soils” to its list of the primary pathways for children’s lead exposure  
28



1 along with lead paint. (*Id.* at .11 [p. 4, ¶ 1]) This recognition and acceptance of house dust as  
2 a pathway came 40 years after the use of lead paint in interiors had ended.

#### 3 4 **4. Promotion**

5 The Court of Appeal framed the case as one alleging “intentional promotion of the use  
6 of lead paint on the interiors of buildings with knowledge of the public health hazard that this  
7 use would create.” Appeals Decision at 310.

##### 8 **(a) The Campaigns**

9 The People’s evidence showed no misrepresentation in Defendants’ ads or in the LIA’s  
10 promotional campaigns. Indeed, much of the evidence from Drs. Markowitz and Rosner  
11 showed nothing except that Defendants or their local retailers listed the paint for sale.

##### 12 **(b) Government standards**

13 The federal agencies said almost exactly what NL and the LIA said about white lead.  
14 The Forest Products Laboratory of the U.S. Department of Agriculture tested paint for decades  
15 and published its recommendations to the public. In 1939, Chief Chemist F.L. Browne gave  
16 advice to homeowners for exterior and interior painting, and he strongly praised the  
17 performance qualities of both pure white lead-in-oil and the mixed paints with lead pigment.  
18 (Ex. 1020; TR 2692-95 [English]) Dr. Browne wrote to the LIA the same year urging more  
19 white lead so as to maintain the quality of house paints. (Ex. 118.26; TR 749-54 [Rosner]) In  
20 1953, the Forest Products Laboratory continued to endorse white lead paint for exterior use  
21 because of its superior performance under adverse conditions. (Ex. 1037; TR 2697-98  
22 [English])

23 Chemists at the National Bureau of Standards, U.S. Department of Commerce, endorsed  
24 white lead in a 1924 government manual. (Ex. 1005; TR 2688-90) In the late 1930s, they  
25 advised the Minneapolis and New York City school boards to use more white lead in schools,  
26 including their interior painting. (Exs. 1007, 1008, 1009; TR 2690-92 [English]) The Bureau  
27  
28

1 of Standards specified lead paint for government buildings, inside and out, in the 1950s and  
2 1960s. (TR 2689-90 [English]) A group exhibit contains many other federal and state  
3 recommendations and specifications for lead paint over many years. (Exs. 1643, 1645, 1646)

4 NL's last promotional statement for interior use of lead paint was in a manual dated  
5 1950 (Ex. 140), and its ads for *exterior* use ended by 1972. (See Ex. 233). The People  
6 presented no evidence that Defendants knew more than the federal agencies about health risks  
7 to children from lead-painted homes. To the contrary, in 1930 the U.S. Public Health Service  
8 publicized the reports of childhood lead poisoning in *U.S. Daily*, which was a publication  
9 specifically written for other agencies of the government. Thereafter, representatives of federal  
10 agencies often attended the meetings of the LIA along with members. (See, e.g., Ex. 85.03;  
11 Ex. 114.03; Ex. 112.03)

12  
13 **(c) Lobbying**

14 The People allege that "Defendants tried to stop the government from regulating lead  
15 and to prevent the government from requiring warnings about lead's hazards." *Appeals*  
16 *Decision at 300*. Dr. Markowitz identified two efforts by the LIA to influence laws that may  
17 have regulated the use of lead paint: Massachusetts in 1933 and Maryland in 1949. (TR 1748-  
18 49, 1777-79) However, Markowitz did not know what restrictions were proposed in  
19 Massachusetts or what change occurred in its discussions with the LIA. (TR 1748-49) As for  
20 Maryland, he noted the LIA's involvement with state officials, but he admitted that the 1949  
21 Toxic Finishes Act, which did not concern house paint, was repealed when public health  
22 officials like Huntington Williams deemed it unworkable. (TR 1779-80) As for labeling laws,  
23 the NPVLA contributed its views to California's occupational health regulators in 1947 for  
24 writing a painters' safety warning. The NPVLA was one of many commentators, and  
25 Markowitz speculates that the final regulation might have been delayed by a few months to  
26 consider the NPVLA's input. (TR 1781-82)

1 The preference of most public health authorities was for the ASA's approach in the  
2 1955 labeling standard, telling people where not to use lead paint. (Ex. 1039) The LIA  
3 opposed some other proposals because it wanted to avoid a balkanized system of different  
4 labeling standards, and it opposed labels calling lead paint "Poison." (*See, e.g.*, Exs. 112.11,  
5 114.12, 85.06, 86.23) The objection to "Poison" labels was not the secrecy of lead toxicity,  
6 which was no secret, but the proper categorization of consumer chemicals by the acuteness of  
7 the danger from physical contact. Prominent public health authorities of the time such as  
8 Dr. Robert Mellins of the U.S. Public Health Service (also working with the Chicago  
9 Department of Health) agreed with LIA that there was more appropriate labeling for lead paint  
10 than "Poison." (Ex. 1039.02; *see* TR 1783 [Markowitz])  
11

12 **E. SHERWIN-WILLIAMS**

13 **SW's position:**

14 **1. Knowledge**

15 SW's position is it cannot be liable when its knowledge was no greater than that of the  
16 public.  
17

18 Drs. Kosnett and Markowitz had no evidence that SW knew of the medical literature  
19 discussed by Dr. Kosnett. TR. 1168:14-1170:23 [Kosnett]; TR. 1944:5-12 [Markowitz]; TR.  
20 1944:5-12 [Markowitz] (testifying that he had not seen "a single document that informed SW  
21 that a child had been poisoned from exposure to one of SW's paints or pigments"); *see also*  
22 TR. 1744:28-1745:12 [Markowitz] (no evidence that the U.S. Daily was distributed to LIA  
23 members or SW specifically). Drs. Markowitz and Dunlavy agreed that the first SW document  
24 mentioning a risk to children from ingesting flaked-off lead paint was written in 1937 and  
25 limited to interior paint. TR. 1950:17-1952:15 [Markowitz]; TR. 3026:12-3027:13 [Dunlavy].  
26 At that time, SW's interior ready-mixed paints did not contain white lead carbonate ("WLC").  
27 Stip. 48; TR. 3007:11-3008:8 [Dunlavy]. That SW was aware of occupational risks to factory  
28 workers or painters as early as 1900 does not establish that SW knew that WLC used in paints

1 in homes posed the low-level exposure risk to children now alleged by Plaintiffs. TR.  
2 2734:18-27 [English]. *See, e.g., Campbell v. Ford Motor Co.*, 206 Cal. App. 4th 15, 31 (2012)

## 3 4 **2. Promotion**

5 The parties stipulated that SW made WLC pigment from 1910 to 1947 at a plant in  
6 Chicago, that SW did not make white lead sulfate, and that SW's WLC was used primarily in  
7 its own products. SW Stipulation Re. Admissibility of Certain Docs., Facts, July 1, 2013, ECF  
8 No. 3240 ("Stip[s].") 10-15.

9 In contrast to lead production and use, SW emphasized the use of lithopone and other  
10 zinc pigments as opposed to white lead in oil. TR. 2998:20-2999:6, 2999:10-19 [Dunlavy]. Its  
11 business plan was to oppose white lead in oil and to promote its ready-mixed paints, pitting  
12 itself against the master painters and at times the LIA. TR. 2998:3-8 [Dunlavy]; TR. 3149:12-  
13 3150:9 [Teece]. SW did not financially support the LIA's White Lead Promotion Campaign.  
14 Stips. 213-14. Plaintiffs conceded that SW did not attempt to prevent government regulation of  
15 white lead pigment or lead-based paint. TR. 861:12-862:23 [Rosner]; TR. 1940:7-10  
16 [Markowitz].

17 Plaintiffs identified a single ad for Old Dutch Process ("ODP") in 1919 in the *Los*  
18 *Angeles Times*. Stip. 144. That ad, however, was run not by SW, but by an independent  
19 dealer. *Id.* SW's ad campaigns promoted against the use of white lead in oil. *See, e.g., Ex.*  
20 *1706.14; Ex. 1706.16.* Plaintiffs have produced no evidence showing the amounts of ODP sold  
21 in California, where or how it was used, or its presence today. Dr. Rosner conceded that SW's  
22 ads were "generic" ads for its brand and prepared paints, not for white lead. TR. 859:22-860:4;  
23 *see also* TR. 837:20-838:2.

24  
25 Dr. Rosner testified about the "Save the Surface" and "Clean Up Paint Up" campaigns  
26 of NPVLA of which SW was a member. TR. 553:11-22; 557:10-559:27. First, those  
27 campaigns encouraged the public to paint. TR. 801:10-13, 836:6-11 [Rosner]. They were not  
28

1 promotions of white lead. Second, trade association actions cannot be imputed to any single  
2 member, and the associations were not SW's agents.

3 SW's advertisements for interior residential paints did not promote WLC, in part  
4 because its interior paints, including enamels for woodwork, never contained WLC, except for  
5 trivial exceptions. Stip. 28-29, 48, 53-54, 57-58, 72-73, 84-85; TR. 3007:11-3008:8, 3009:19-  
6 3011:27 [Dunlavy]; TR. 1951:4-8 [Markowitz]; *see also* Ex. 1889.

7 Dr. Markowitz could not name another American paint manufacturer that had done  
8 more to develop and market non-lead pigments and paints for residential use than SW. TR.  
9 1958:16-1959:6. Dr. Teece concluded the federal government could not have banned the  
10 residential use of lead paint in 1978 were it not for SW's technological innovation. TR.  
11 3153:6-15, 3162:6-15.

12 In addition to admitting that SW's ads were generic and not for white lead, Plaintiffs  
13 offered no evidence that SW's ads were false or misleading. They did not prove their  
14 allegations of deceit and misinformation. Corporations have a constitutional right to  
15 truthfully advertise legal products, even products, such as alcohol and tobacco, that may harm  
16 public health. U.S. Const. amend. 1; Cal. Const., art. I, § 2, subd. (a); *Lorillard Tobacco Co. v.*  
17 *Reilly*, 533 U.S. 525, 553-54, 571 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484  
18 (1996) Similar to the advertisements in *Lorillard* and *44 Liquormart*, SW's advertisements  
19 contain only prices or descriptions for its products and do not encourage an illegal use or  
20 hazardous misuse (unlike instructions to dump solvents into sewers in violation of the Polanco  
21 Act, as in *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28  
22 (2004)).  
23

### 24 25 **3. Causation**

26 Plaintiffs have no evidence that SW's WLC is actually present in their jurisdictions, let  
27 alone where it is, how much, and in what condition. Dr. Markowitz had no evidence of sales  
28 of SW's lead-based paint with WLC, volume or dates of those sales, whether those sales were

1 caused by SW's alleged wrongful promotions, and whether any SW's WLC products remain  
2 today in the Plaintiff jurisdictions. *See, e.g.*, TR. 1937:16-26, 1938:27-1939:2.

3 Dr. Rosner conceded that "we can't really tell" whether SW had any effect on the  
4 presence of white lead in California. *See* TR. 832:10-17; *see also* TR. 831:19-832:17 ("Q. You  
5 tried to -- during the course of your work in this case -- assess how big a player SW was in the  
6 white lead carbonate pigment market . . . . [and, to that end, testified in your deposition that,  
7 s]ince we have no numbers for California, we can't really tell. . . . A. Right; for exact numbers  
8 we could not tell."). Plaintiffs have no evidence showing any increase in the sale of SW's  
9 white lead for residential use because of any promotion. TR. 745:3-12 [Rosner] (whether  
10 promotional campaigns "caused increase or decrease or whether it changed trajectory  
11 minimally, [Rosner] can't tell. Quantitative data is not there to say that.").

12  
13 No data attribute a specific share of environmental lead to white lead, and of that  
14 unknown white lead share, SW's contribution is virtually nonexistent. Ex. 1883. Dr. Van  
15 Liere estimated that SW's white lead for all uses in California contributed a mere 0.1% of the  
16 total lead consumed in the state from 1894 to 2009. TR. 2877:11-20. That low number cannot  
17 support a finding that SW's WLC, if present, is a substantial factor in causing a community-  
18 wide public nuisance.

19  
20 **4. Other sources**

21 Although some of Plaintiffs' witnesses declared that paint is the major source of lead in  
22 soil, they did not test the sources of lead in soil and dust. Dr. Courtney actually did a "Source  
23 Analysis" in California and concluded that gasoline is the most "dominant" source. TR.  
24 1357:14-18. The State has found that six times more lead was put into California's  
25 environment via lead from gasoline than by paint and coatings. *See Equilon*, 189 Cal. App. 4th  
26 at 870; Charlton Dep. 40:13-25. Evidence shows that lead in dust and soil comes from a mix  
27 of sources, with gasoline as the major contributor. Moreover, Plaintiffs' evidence does not  
28

1 allow the Court to decide how much of the alleged lead hazard to children comes from exterior  
2 paint exposures as compared to interior paint or myriad other sources.

3  
4 **5. Owner's fault**

5 To the extent that deteriorated white lead-based paint contributes to children's BLLs,  
6 that exposure is solely attributable to owners' neglect and violation of their legal duties to  
7 prevent and abate lead hazards in their properties. Health & Safety Code §§ 17920, 17980,  
8 17980.2, 105251; Cal. Code Regs. Tit 17, §§ 35001 *et seq.* Their failure to comply with lead  
9 hazard prevention laws has solely created and caused any nuisance, if one exists today,  
10 (Restatement (Second) of Torts § 433; *see People v. Acosta*, 284 Cal. Rptr. 117, 122 (1991)),  
11 and they are the superseding cause of any harm. *Melton v. Boustred*, 183 Cal. App. 4th 521  
12 (2010); *Martinez v. Pac. Bell*, 225 Cal. App. 3d 1557 (1990)

13  
14 **6. Not significant problem**

15 In Monterey County, 98-99% of all lead cases "deal with children who have been  
16 exposed to a lead source outside of the United States, usually Mexico," including traditional  
17 food preparations and folk medicines. Ex. 1829.69. According to Monterey Childhood Lead  
18 Poisoning Prevention Program ("CLPPP") officials, lead cases due to exposure to lead-based  
19 paint (not specified to be white lead) are "very rare." Goldstein Dep. Ex. 8. So rare, in fact,  
20 that Monterey admitted in its progress report that "[w]e finally had one housing-related case in  
21 Jan. This is the first in several years, and was not in our usual case group." Ex. 1135.66. For  
22 San Diego, the largest source of children's elevated BLLs is Mexican candy. Hicks Dep.  
23 135:2-6. In San Mateo County, the "key" source of elevated BLLs in children—constituting  
24 75% of cases—is exposure to "foreign products like ceramics or food or having taken home  
25 remedies while in Mexico." Goldstein Dep. Ex. 7. Santa Clara's "premise is that our cases do  
26 not generally stem from a child's exposure to leaded paint or soil, (with a few exceptions) but  
27 more from their cultural and daily living practices." Ex. 1184; *see also* Exs. 1180.2, 1215.408,  
28 1215.378. Likewise, in Solano County, cultural practices serve as the source of lead exposure

1 for most children. Ex. 1238; *see also* TR. 2371:23-28 [Matyas]. In Ventura County, one of  
2 “the most common causes of lead poisoning in children is candy.” Chan Dep. Ex. 15 (Offer of  
3 Proof). So, too, in Alameda County, Los Angeles County, and San Francisco, non-paint  
4 sources are major contributors to elevated BLLs. *See, e.g.*, Goldstein Dep. Ex. 34; TR.  
5 1104:13-25 [Rangan]; TR. 2069:3-24 [Walseth]. Notably, members of the Get the Lead Out  
6 Coalition, a coalition of the Bay Area CLPPP program officials concluded: “The [State]  
7 Branch focuses on paint sources, as often do the Counties, because it justifies the funding,  
8 however the coalition can address issues re: toys, ceramics, candies, cosmetics, sources that  
9 may be considered secondary. In reality in many communities these are the main culprits.”  
10 Goldstein Dep. 237:16-24, 238:9-14, 239:5-240:12, 241:5-12 & Ex. 33.

11  
12 Plaintiffs’ case hinges on alleged asymptomatic cognitive harms in children arising  
13 from very low BLLs. TR. 357:10-11 [Lanphear] (“[W]e focused on blood lead levels under 10  
14 because that’s where the vast majority of children fell”). According to Dr. Valerie Charlton,  
15 Director of the State’s CLPPB, there was no suggestion before 2003 of any potential harm to  
16 children from those very low BLLs. Charlton Dep. 374:20-376:1. The question was unsettled  
17 then and still is. TR. 2740:26-2741:8, 2763:28-2764:12 [Garabrant]; *see also* TR. 468:5-22  
18 [Lanphear]; Ex. 38. As Plaintiffs’ expert Mr. Gottesfeld agreed, “the science has shifted” over  
19 the last few years. TR. 1051:14-16; *see also* TR. 1110:21 [Rangan] (“Times have changed.”).  
20 In setting a new reference BLL of 5 µg/dL for children just last year, Mr. Gottesfeld explained,  
21 the CDC “move[d] the goalposts.” TR. 1039:15-1040:4.

## 22 23 **7. The “safe” level has changed**

24 Over the years, various public health agencies and the medical community, including  
25 the CDC, established what they believed to be “safe” levels of lead for children. As medical  
26 knowledge evolved, the “safe” level was reduced starting in the 1970s from 60 µg/dL to 40  
27 µg/dL to 25 µg/dL. Ex. 1058.14-15. In 1991, the CDC said that 10 µg/dL was a “level[] of  
28 concern,” but not lead poisoning. Ex. 1058.8, .14; TR. 2659:24-2660:7 [English]. In 2012,



1 CDC set 5 µg/dL as a “reference value,” which it defined as the BLL of the highest 2.5% of  
2 children. Ex. 20.6. However, the new reference level is not health-based and will change over  
3 time to identify those children with unusual exposure. TR. 1010:5-15, 1011:8-22 [Gottesfeld].  
4

### 5 **VIII. SHERWIN-WILLIAMS’ CROSS-CLAIM**

6 SW asserts that under California law intact lead-containing paint is not a “lead hazard,”  
7 and California property owners who have failed to maintain their properties to prevent a lead  
8 hazard are solely responsible for abatement.

9 If the Court were to declare the presence of intact lead paint to be a public nuisance,  
10 SW argues it would in essence adopt a position rejected by the Legislature and also trigger §  
11 17920.3, contrary to legislative intent. Further, Civil Code § 1941.1 renders “untenantable” any  
12 building that contains *either* a “lead hazard,” under Health & Safety Code § 17920.10 *or* any  
13 “nuisance” under § 17920.3. Designation as an “untenantable” building has adverse  
14 consequences for the owner. *See* Civ. Code §§ 1942(a) (permitting a tenant to repair and  
15 deduct the cost from rent or vacate the premises), 1942.3 (shifting burden to the landlord in an  
16 unlawful detainer action to prove habitability), 1942.4(a) (establishing liability for owner that  
17 fails to address a violation of Health & Safety Code § 17920.10 within 35 days of notification),  
18 1942.5 (imposing penalties for retaliation against a tenant reporting an untenable condition).  
19 If the Court were to find a nuisance here, SW argues, it would likely trigger consequences that  
20 the Legislature sought to avoid.  
21

22 The Housing division of the Health & Safety Code creates provisions authorizing  
23 enforcement to correct violations and abate hazards:

- 24 • Section 17980(c)(1) authorizes enforcement authorities to seek injunctions requiring  
25 abatement of § 17920.10 violations, but provides that *the owner* “shall have the choice of  
26 repairing or demolishing.”
- 27 • Section 17980(e) requires the agency to notify “the owner” that tax deductions related to  
28 the property may be disallowed under Rev. & Tax. Code §§ 17274 and 24463.5 if the  
owner fails timely to repair the violation.

- Sections 17985 & 17992 authorize the agency to record a notice of pending action and holds any subsequent purchaser responsible to repair the violation.
- Sections 17995-17995.2 provide criminal penalties for violations of the Housing law.

These provisions require remediation only of “lead-based paint hazards.” No Plaintiff requires remediation of intact lead paint, and all permit interim abatement of “lead-based paint hazards.” All hold property owners solely responsible for repair of “lead-based paint hazards.” *See, e.g.*, TR. 1431:6-1432:7, 1433:28-1434:3 [Peterson]; TR. 2372:13-2373:6 [Matyas]; Forshey Dep. 85:16-86:6; Allen Dep. 424:2-426:7, 429:7-14, 430:14-19; Charlton Dep. 117:6-23, 118:17-119:1, 177:25-179:15. The ordinances of the Jurisdictions follow the Housing law model by prohibiting “hazards,” but not intact lead-based paint, and by holding property owners solely responsible for repairing the “hazards.” San Diego Mun. Code § 54.1003; S.F. Health Code § 1603(cc); L.A. Cnty. Code § 11.28.010 E-F; *see also* TR. 185:16-23, 187:20-24 [Johanns]; TR. 2068:21-27, 2074:3-19 [Walseth].

#### **IX. THE PEOPLE’S RESPONSE TO SW’S CROSS-COMPLAINT**

Lead on homes is a public nuisance regardless of whether intact lead paint is a “lead hazard” within the meaning of Health & Safety Code §§ 17920.10 and 105251 or a valid existing ordinance. A condition need not be unlawful to constitute a public nuisance. Appeals Decision at 310. Civil Code § 3483 does not make property owners who have created or maintained a “lead hazard” within the meaning of Health & Safety Code §§ 17920.10 and 105251 and their predecessors *solely* responsible for the creation or maintenance or any nuisance or public nuisance resulting from the “lead hazard” or for abatement of the “lead hazard.” Defendants are liable for creating or assisting in the creation of the public nuisance caused by the presence of lead paint in homes, regardless of whether the paint constitutes a “lead hazard” as defined by statute. SW’s claims for declaratory relief therefore fail on the merits.

1 Further, there is no need for the Court to address the issues raised by SW through  
2 declaratory relief, as they are subsumed in the Court’s ruling in the main action. (*California*  
3 *Ins. Guar. Assn. v. Sup. Ct. (Jakes)* (1991) 231 Cal.App.3d 1617, 1623.) This case therefore  
4 does not present circumstances where it is “necessary or proper at the time under all the  
5 circumstances” to grant declaratory relief. (Code Civ. Proc., § 1061.)

6 There is no “actual, present controversy over a proper subject” for declaratory relief  
7 between SW and the Cross-Defendant Counties and Cities. (*City of Cotati v. Cashman* (2002)  
8 29 Cal.4th 69, 79.) This is especially true where, as here, the parties to the main action (the  
9 People and Defendants) have stipulated that no relief is being sought for any public building.  
10 (Ex. P15; Ex. P13.) Thus, SW seeks a declaration concerning a purely academic point of law  
11 related to the possible future application of California statutes to non-parties (that is, private  
12 homeowners). “Courts do not decide abstract questions of law.” (*Connerly v. Schwarzenegger*  
13 (2007) 146 Cal.App.4th 739, 746.)

14  
15 **For each of these reasons, which are in addition to and independent of this Court’s**  
16 **ruling on the merits in the main action, this Court DENIES SW’s claims for declaratory**  
17 **relief.**

18 **X. DEFENDANTS’ AFFIRMATIVE DEFENSES**

19 Defendants have asserted multiple affirmative defenses for which they bear the burden  
20 of proof. (Evid. Code § 500.) Defendants have abandoned all affirmative defenses that were  
21 raised in their answer but not identified in the Joint Statement of Controverted Facts. Further,  
22 they forfeited all affirmative defenses not pled in their answer. (*California Acad. of Sciences v.*  
23 *County of Fresno* (1987) 192 Cal.App.3d 1436, 1442.) For the reasons set forth below, the  
24 Court finds that Defendants have failed to prove their affirmative defenses they did not  
25 abandon or forfeit by a preponderance of the evidence.  
26

27  
28 **1. Civil Code section 3482 does not bar this action**

1            “[S]tatutes like California Health & Safety Code section 17920.10 that merely define  
2 lead hazards cannot be read so broadly as to immunize the conduct at issue in this lawsuit,  
3 particularly the promotion of lead paint with knowledge of its hazards (which the Court of  
4 Appeal has already found to state a sufficient claim for public nuisance).” (Dkt No. 3191  
5 [Order Denying Defendants’ SW and NL Industries’ Motions for Summary Judgment filed  
6 June 12, 2013 at 10:19-22].)

7  
8            **2. The People do not have to identify the specific location of a nuisance  
9 or a specific product sold by Defendants**

10            Under *Gallo, supra*, 14 Cal.4th at 1118 and *In re Firearms Cases* (2005) 126  
11 Cal.App.4th 959, 987, fn. 21, the People – who have proven that the liable Defendants’  
12 promotion of lead paint resulted in harm to the community at large – need not identify the  
13 specific location of the nuisance or a specific product sold by each such Defendant. (Dkt No.  
14 3191 at 6:7-11:2].) The People have demonstrated that lead paint exists in homes in the  
15 Jurisdictions. (¶¶ 62-72.)

16  
17            **3. The People do not need to prove reliance**

18            Reliance is not an element of a public nuisance cause of action. (Dkt. No. 1037 [Order  
19 after Hearing of February 3, 2012 filed February 6, 2012 at 3-9]; see also *Firearm Cases*,  
20 *supra*, 126 Cal.App.4th at 988-89 [holding that plaintiff need only show that “a defendant’s  
21 acts are likely to cause a significant invasion of a public right”]; *City of Modesto v. Superior*  
22 *Court* (2004) 119 Cal.App.4th 28, 40-41 [failing to require actual reliance to establish public  
23 nuisance claim].)

24  
25            **4. There is no intervening or superseding cause**

26            Blaming the well-worn stereotypes of “slum landlords,” “bad parents,” “the poor,” and  
27 “the government” does not relieve Defendants of liability. (*Perez v. VAS S.P.A.* (2010) 188  
28 Cal.App.4th 658, 680-81.) And the existence of alternative sources of lead poisoning are

1 irrelevant to whether lead paint in the Jurisdictions is a nuisance. (*See Vowinckel v. N. Clark &*  
2 *Sons* (1932) 216 Cal. 156, 164; *Wade v. Campbell* (1963) 200 Cal.App.2d 54.)

3  
4 **5. The People have not failed to join indispensable parties or misjoined parties**

5 As held by this Court, owners of buildings allegedly containing lead paint are not  
6 indispensable parties. (Dkt. No. 211 [Order after Hearing filed June 14, 2011 Ex. A at 2-5].)  
7 Defendants failed to provide evidence demonstrating that the People failed to join any other  
8 indispensable parties. There also has been no evidence that the People misjoined parties. As  
9 previously held by the Court on several occasions, the doctrines of primary jurisdiction and  
10 equitable abstention do not bar this public nuisance action on behalf of the People. (Dkt. No.  
11 1037 [Order after Hearing of Feb. 3, 2012 filed Feb. 6, 2012 at 16-20].)

12  
13 **6. The distinction between lead pigment and paint is immaterial**

14 While certain Defendants have distinguished between paint containing lead pigments  
15 and the lead pigments themselves (notably SW), this distinction is not material. Lead pigments  
16 were applied to homes when: (1) mixed on site by master painters or other tradesmen; (2)  
17 mixed into lead-in-oil sold to consumers and/or tradesmen; or (3) mixed into ready-made  
18 paints sold to consumers. The end result was the same: application of lead pigments on homes  
19 in the Jurisdictions. It is the liable Defendants' knowing promotion and sale of lead pigments –  
20 in whatever form – for home use that renders them liable.

21  
22 **7. The Noerr Pennington doctrine does not apply**

23 The *Noerr-Pennington* doctrine “shields defendants from liability for their actions in  
24 petitioning government officials[; i]t does not provide a basis for exclusion of *evidence* of  
25 lobbying activities that might be relevant to show a defendant’s knowledge of the dangerous  
26 nature of its product. . . .” (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 680, see  
27 also *In re Brand Name Prescription Drugs Antitrust Litigation* (7th Cir. 1999) 186 F.3d 781,  
28 789.) The People have not sued Defendants *for* their lobbying activities; they have introduced

1 evidence of Defendants’ lobbying activities (e.g., through the LIA) to show Defendants’  
2 knowledge of the hazards of lead in paint at the time of their lobbying activities. Hence, the  
3 *Noerr-Pennington* doctrine does not apply.

4  
5 **8. The doctrine of laches does not act as a bar**

6 “No lapse of time can legalize a public nuisance, amounting to an actual obstruction of  
7 public right.” (Civ. Code, § 3490.) Thus, California courts have consistently held that laches is  
8 not a defense to a public nuisance claim seeking abatement. (*Strong v. Sullivan* (1919) 180 Cal.  
9 331, 334; see also *Wade, supra*, 200 Cal.App.2d at 61; *City of Turlock v. Bristow* (1930) 103  
10 Cal.App. 750, 756; *Williams v. Blue Bird Laundry Co.* (1927) 85 Cal.App. 388, 395.)

11 Even if laches may be applied, it is “not available as a defense” in this case because the  
12 People’s claim concerns “a public policy” – the health and safety of young children. (See *City*  
13 *and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 395.)

14 Because the nuisance is ongoing, the People did not unreasonably delay in bringing this  
15 action. Defendants have also shown no prejudice. Any loss of evidence due to the passage of  
16 time has resulted in greater prejudice to the People than Defendants.

17  
18 **9. Liability for the public nuisance does not infringe upon Defendants’**  
19 **freedom of speech, freedom of association or freedom to petition the**  
20 **government**

21 Defendants contend the case “impermissibly premises liability” on the exercise of the  
22 “rights to freedom of speech, freedom of association, and freedom to petition the government.”  
23 [Joint Statement of Controverted Issues at ¶ 11]. But the People may use speech as evidence.  
24 Defendants contend the speech due constitutional protection is their advertising. (Tr. 99:20-  
25 100:14.) Their advertisements are evidence that Defendants were promoting their products in  
26 the Jurisdictions. Section V.N. *above*. Such evidence was expressly contemplated by the  
27 Appeals Decision, *supra*, at 310. Further, advertisements may themselves constitute a basis for  
28 liability. (See, e.g., *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 328.)

1 Nor are Defendants’ rights to freedom of association impermissibly curtailed by the  
2 imposition of public nuisance liability. The First Amendment protects associations “for the  
3 purpose of engaging in those activities protected by the First Amendment—speech, assembly,  
4 petition for the redress of grievances, and the exercise of religion.” (*City of Dallas v. Stanglin*  
5 (1989) 490 U.S. 19, 24.) However, an “[a]ssociation that is merely commercial does not  
6 implicate any fundamental right.” (*American Acad. of Pain Management v. Joseph* (9th Cir.  
7 2004) 353 F.3d 1099, 1112.) Liability in this case is not premised on any Defendant’s  
8 membership in the LIA; the trial testimony related to the LIA is merely evidence of  
9 promotional activity and each Defendants’ knowledge of the hazards created by lead paint. (¶¶  
10 72-78, 96-104.)

11 **The Court finds Defendants’ affirmative defenses do not preclude liability in this**  
12 **case.**

13  
14 **XI. JOINT AND SEVERAL LIABILITY**

15 When multiple tortfeasors are each a substantial factor in creating a public nuisance,  
16 they are jointly and severally liable for that nuisance. (See *American Motorcycle Assn. v.*  
17 *Superior Court* (1978) 20 Cal.3d 578, 586; *Dauenhauer v. Sullivan* (1963) 215 Cal.App.2d  
18 231, 236.)

19 “[W]hen the damages cannot be apportioned between two tortfeasors or between  
20 tortious and nontortious causes, a tortfeasor whose acts have been a substantial factor in  
21 causing the damages is legally responsible for the whole.” (*State v. Allstate Ins. Co.* (2009) 45  
22 Cal.4th 1008, 1036 (*Allstate*); see also *In re Methyl Tertiary Butyl Ether MTBE Products*  
23 *Liability Litigation* (S.D.N.Y. 2011) 824 F.Supp.2d 524, 543.) This is true where multiple  
24 sources of contamination result in a single nuisance. (*Allstate, supra*, 45 Cal.4th at 1032-33,  
25 1036.)

26  
27 Furthermore, where the damages and remedy are indivisible, each defendant is jointly  
28 and severally liable. (*Id.* at 1036) The defendants have the burden of showing that it is possible

1 to apportion the damages. (*Id* at 1033-34.) To the extent each Defendant’s conduct was a  
2 substantial factor in creating the public nuisance and because Defendants offered no evidence  
3 that an abatement remedy can be apportioned, each Defendant is potentially jointly and  
4 severally liable for the public nuisance.

5  
6 **XII. REMEDY<sup>17</sup>**

7 **A. Plaintiff’s Position: Removing Lead on Homes Built Before 1978 Is The**  
8 **Only Way To Ensure That Children Living In Those Homes Are Not**  
9 **Poisoned By Lead.**

10 The People contend:

11 ““Abatement of a nuisance is accomplished by a court of equity by means of an  
12 injunction proper and suitable to the facts of each case.” Appeals Decision *supra*, at 310.  
13 Injunctive relief generally requires a showing of substantial and irreparable injury. (47  
14 Cal.Jur.3d Nuisances §§ 64-65; see also *Thompson v. Kraft Cheese Co. of California* (1930)  
15 210 Cal. 171 [applying substantial and irreparable injury standard in nuisance case].) Lead  
16 poisoning from lead paint causes substantial and irreparable harm in the Jurisdictions. (FAC  
17 ¶¶ 31-72, 82-95, 100-103, 218-221, 228-231.)

18 A public nuisance under Civil Code sections 3479 and 3480, by definition, substantially  
19 and unreasonably interferes with rights common to the public. And in *every* case where a  
20 California court has found a public nuisance under those sections, the court has ordered some  
21 form of abatement. (See, e.g., *Apropertyna, supra*, 14 Cal.4th at 1126; *City of Claremont v.*  
22 *Kruse* (2009) 177 Cal.App.4th 1153, 1165; *People v. Mason* (1981) 124 Cal.App.3d 348, 353-  
23 54.; *People v. Oliver* (1948) 86 Cal.App.2d 885, 886.)

24 The balancing of interests and conveniences in this case weigh in favor of abatement.  
25 (See *Hulbert v. California Portland Cement Co.* (1911) 161 Cal. 239.) Lead paint causes  
26 significant harm to children, families, and the community at large. And the removal of lead  
27

28 <sup>17</sup> See Court Order of November 4, 2013 pursuant to which further memoranda by all parties specifically pertaining to abatement were submitted.



1 paint in affected homes will significantly reduce the number of children poisoned by lead.  
2 These benefits outweigh the costs of abatement. (¶¶ 31-72, 82-95, 100-103, 228-243.)

3 Whether a nuisance can be abated “at a reasonable cost by reasonable means” is  
4 relevant only in *private* nuisance cases. Indeed, the answer to that question only determines  
5 whether a *private* nuisance is permanent or continuing. (See *Mangini v. Aerojet-General Corp.*  
6 (1996) 12 Cal.4th 1087, 1090.) The distinction between permanent and continuing *private*  
7 nuisances affects the remedy and statute of limitations. (See *Spaulding v. Cameron* (1952) 38  
8 Cal.2d 265, 267; *Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 677-79  
9 [discussing continuing and permanent private nuisances].) Private nuisances that cannot be  
10 abated at a reasonable cost and by reasonable means are deemed permanent and can only be  
11 remedied by damages – and not injunctive relief – and are subject to a statute of limitations.  
12 (*Id.* at 675-76.)

13  
14 By contrast, the only remedy for a public nuisance claim on behalf of the People is  
15 abatement – i.e., injunctive relief. (Appeals Decision at 310-11.) Civil Code section 3490  
16 further provides that there is no statute of limitations for a public nuisance claim. (See also *City*  
17 *of Turlock v. Bristow* (1930) 103 Cal. App.750, 756 [“Neither prescriptive right, laches, nor the  
18 statute of limitations is a defense to an action to abate a public nuisance”].) Thus, a public  
19 nuisance, unlike a permanent private nuisance, is, by definition, “abatable.”

20 The People’s abatement plan, it is argued, can abate the public nuisance in this case at a  
21 reasonable cost and by reasonable means. As the California Supreme Court previously  
22 recognized in the second appeal in this case:

23  
24 Although the remedy for the successful prosecution of the present case is unclear, we can  
25 confidently deduce what the remedy will *not be*. This case will not result in an injunction that  
26 prevents defendants from continuing their current business operations. The challenged conduct  
27 (the production and distribution of lead paint) has been illegal since 1978. Accordingly,  
28 whatever the outcome of the litigation, no ongoing business activity will be enjoined. Nor will  
the case prevent defendants from exercising any *First Amendment* right or any other liberty  
interest. Although liability may be based in part on prior commercial speech, the *remedy* will  
not involve enjoining current or future speech. Finally, because the challenged conduct has  
long since ceased, the statute of limitations on any criminal prosecution has run and there is  
neither a threat nor a possibility of criminal liability being imposed upon defendants.

1 The adjudication of this action will involve at least some balancing of interests, such as the  
2 social utility of defendants' product against the harm it has caused, and may implicate the free-  
3 speech rights exercised by defendants when they marketed their products and petitioned the  
4 government to oppose regulations. Nevertheless, that balancing process and those  
5 constitutional rights involve only past acts--not ongoing marketing, petitioning, or  
6 property/business interests. Instead, the trial court will be asked to determine whether  
7 defendants should be held liable for creating a nuisance and, if so, how the nuisance should be  
8 abated. This case will result, at most, in defendants' having to expend resources to abate the  
9 lead-paint nuisance they allegedly created, either by paying into a fund dedicated to that  
10 abatement purpose or by undertaking the abatement themselves. The expenditure of resources  
11 to abate a hazardous substance affecting the environment is the type of remedy one might find  
12 in an ordinary civil case and does not threaten the continued operation of an existing business.  
13 *50 Cal. 4th at 54-56*

14 Childhood Lead Poisoning Prevention Programs operated by the Public Entities have  
15 largely reached their limits. The Public Entities lack the resources to remove lead paint from  
16 homes in their jurisdictions. Thus, the number of lead poisoned children may not increase. But  
17 that number is unlikely to decrease much more, if at all. (Tr. 179:28-190:4, 999:12-1000:23,  
18 1385:27-1386:2, 1407:26-1408:3, 1440:11-1441:6, 1525:16-1526:6, 1525:16-1526:6, 2215:2-  
19 9, 2236:1-4, 2569:24-2570:26, 2355:28-2356:17.) The Public Entities lack the resources to  
20 force homeowners to remove all lead paint from homes in their jurisdictions. Moreover,  
21 enforcement of lead paint abatement requirements against homeowners is often not feasible.  
22 (Tr. 1376:3-16, 2382:19-25, 3263:9-3264:7; 3267:5-18; 3270:5-3271:20.)

23 As long as lead paint remains on homes in the Jurisdictions, children living in those  
24 homes will be at significant risk of lead poisoning. (Tr. 248:22-249:20, 958:23-959:5, 1093:17-  
25 23, 1094:1-1095:15, 1305:1-6, 1405:5-12, 1414:1-1415:22, 1417:7-27, 1438:19-1439:17,  
26 2295:13-27.) Prevention of childhood lead poisoning due to lead paint requires, at minimum,  
27 identification of lead paint on pre-1978 homes and removal of the most immediate lead paint  
28 hazards in those homes. (Tr. 172:28-5, 179:4-15, 1467:24-1470:22, 1492:15-25, 1495:17-  
1496:16; P45\_10; P54.) Experts have demonstrated that abatement of lead paint substantially  
reduces the likelihood that a child will be lead poisoned. (Tr. 411:21-414:3, 997:7-998:24,  
1467:24-1470:22, 1522:7-14, 1550:20-27; P45\_10, P54.)

1 Both the People's and Defendants' abatement experts agreed that abatement of lead  
2 paint hazards in homes is necessary to protect the children living in those homes. (Tr. 1457:19-  
3 1458:7; 3203:9-3204:27.)

4 The benefits of abating lead paint arguably exceed the costs of maintaining the status  
5 quo. Medical treatment, special education costs, lost lifetime earnings, lost tax revenue, and  
6 other costs associated with lead poisoning amount to hundreds of billions of dollars. (Tr.  
7 1542:25-1543:27; 1544:12-13; Ex. P44.) Every dollar spent on reducing lead paint exposure  
8 results in societal savings between \$12 and \$155. (Tr. 1542:25-1543:27, 1544:12-1545:13.)  
9 "This cost-benefit ratio is even better than for vaccines, which have long been described as the  
10 single most cost beneficial medical or public health intervention." (Tr. 1545:27-1546:2.)  
11 Defendants' abatement expert acknowledged that lead paint hazards in homes should be  
12 remediated despite the expense and time required. (Tr. 3202:20-3203:4.)

13  
14 The People's proposed abatement plan (Plan), as revised by the Court, is consistent  
15 with the 2012 recommendations of the CDC's Advisory Committee on Childhood Lead  
16 Poisoning Prevention. (Tr. 1467:24-1470:22; Ex. P45\_10; P54.) The Plan targets pre-1978  
17 homes in the Jurisdictions that pose the greatest risk of lead poisoning to children, requires  
18 outreach and education to homeowners, requires trained individuals to inspect homes for lead  
19 paint, it utilizes abatement techniques that have been used for decades and have been proven to  
20 be safe, and it takes appropriate measures to protect the safety of residents and community  
21 members. The People contend an abatement plan containing these elements will effectively and  
22 efficiently abate the nuisance. (Tr. 1472:12-1473:8; P262.) And Defendants' abatement expert  
23 agreed that lead paint inspections and prioritization of abatement based on those inspections, as  
24 set forth in the Plan, are a sensible way to direct limited resources. (Tr. 3204:28-3209:4.) The  
25 Plan can be implemented in a reasonable amount of time and at a reasonable cost. (Tr.  
26 1547:25-1550:19, 2159:3-7.)

27 The total cost of the Plan as proposed at trial by the People's abatement expert, Dr.  
28 David Jacobs, is \$1.618 billion *if implemented by the Public Entities*. (Tr. 1547-1550; P263.)

1 For the cost of inspection, Dr. Jacobs estimated \$200 per unit if done by the Public Entities, or  
2 \$500 per unit if done by a private contractor. The number of pre-1978 homes within the  
3 Jurisdictions needing inspection is approximately 3,555,000. Because not all units in multi-  
4 family housing must be inspected in light of common painting history, he reduced the  
5 3,555,000 number by 20%. Thus, pursuant to the Jacobs plan the total cost of inspections  
6 would be \$569 million if done by the Public Entities, or \$1.42 billion if done by the Defendants  
7 through private contractors. (Tr. 1547-1549.) Dr. Jacobs estimated the average cost of  
8 abatement to be \$2,007 per unit. He further estimated that approximately 498,000 units in the  
9 Jurisdictions would require abatement. For education and outreach, Dr. Jacobs estimated the  
10 total cost to be \$50 million. (Tr. 1550.) When abatement is performed by trained and certified  
11 individuals, it significantly *reduces* rather than increases the risk of harm from lead paint. (Tr.  
12 1550:25-27176:28-179:3, 1472:12-28.)

13  
14 By limiting the Plan to interior surfaces and conditions, the cost is reduced  
15 substantially, as described below.

16 **B. Defendants' Response to the Proposed Plan**

17 Dr. Jacobs' method for lead paint remediation performs no better than so-called interim  
18 controls focusing on repair and repainting. The Jacobs plan calls for universal inspection of  
19 pre-1978 homes to hunt for lead paint in every room of every house. (TR 1463, 1492 [Jacobs])  
20 As Dr. Jacobs stated, "what we are doing is trying to find a dangerous needle in a haystack."  
21 (TR 1465:23-24) The authoritative HUD study undercuts Jacobs. The goal of HUD's 2004  
22 "fourteen city" study was to compare the effectiveness of different remediation methods upon  
23 children's blood lead and dust lead from actual experience. HUD wanted to learn whether any  
24 one method was significantly superior to others to help the agency plan cost-effective work in  
25 the future. The remediation methods being compared ranged from "cleaning and spot  
26 repainting" (Strategy 02) or "paint stabilization" (Strategy 03) up to "window replacement"  
27 (Strategy 05). (Ex. 70.13 [p. ES-3]) (The "full abatement" strategy (06) was used too rarely to  
28

1 be analyzed. (TR 1575 -76 [Jacobs])) Jacobs’ plan for this case is essentially Strategy 05.  
2 (TR 2095)

3 HUD’s first report two years after property remediation found no significant differences  
4 among Strategies 02 through 05 in terms of children’s blood lead levels or floor dust lead.  
5 (Ex. 70.18 [p. ES-8]) The researchers wrote that floor dust, not window dust, was the “primary  
6 exposure” pathway into children’s blood lead, which could explain why lower window dust  
7 lead in Strategy 05 did not yield lower blood leads. (*Id.*) The three-year follow-up reported by  
8 Clark, *et al.* again found no significant differences among Strategies 02-05 in children’s blood  
9 lead or floor dust lead. (Ex. 1071.09, col. 1, ¶ 6) Blood testing then stopped. The six-year  
10 follow-up reported in Wilson, *et al.* still found no significant differences between remediation  
11 strategies and floor dust lead. (Ex. 1064.11 [p. 247, col. 1, ¶ 2 & col. 2, ¶ 2]) The twelve-year  
12 follow-up reported in Dixon, *et al.* found a steady downward decline in floor dust lead by all  
13 remediation methods, but a slightly lower floor dust lead after window replacement.  
14 (Ex. 1074.06, fig. 1)

15  
16 Jacobs claimed to have found a gain from window replacement at twelve years (which  
17 he later admitted was “not that big” (TR 2196:3-4)). But Jacobs described the twelve-year  
18 results of Dixon, *et al.* very differently from the article. Jacobs claimed that floor dust lead  
19 began to “creep up” after twelve years in homes with maintenance but not window  
20 replacement. (TR 1514) This was a crucial point for him in order to show that measures short  
21 of window replacement do not last, but it was a misstatement. In cross, Jacobs admitted there  
22 was a continuing decline of dust lead that occurred with all methods. (TR 1590:26-1591:8)

23 On redirect examination, Jacobs gave a new explanation why window replacement was  
24 better than maintenance, claiming that “we show [in Dixon, *et al.*] that if we didn’t replace the  
25 windows, . . . 24 percent of the units actually failed clearance standards if the windows were  
26 not replaced. So that’s what I was trying to get at”, but “[w]ith the window replacement, you  
27 didn’t see that result.” (TR 2196:1-6, 13-15) However, the Dixon article contradicts Jacobs  
28 again. The only mention of a 24% failure rate was for all units together with all methods of

1 remediation – window replacement as well as spot repainting – when tested at a 10  $\mu\text{g}/\text{ft}^2$   
2 standard for floors. (Ex. 1074.06, col. 2, ¶ 3) The clearance failure rates at the federal  
3 standard (40  $\mu\text{g}/\text{ft}^2$ ) were actually 8% for all units, 7% for non-window replacement units, 19%  
4 for partial-window replacement units, and 5% for all-window replacement units. (Ex. 1074.04,  
5 Table 1, 2nd line)

6 HUD accepted the study’s outcome in its 2013 Policy Guidance, not allowing funded  
7 window replacement based on presence of lead paint without a demonstrated need. (TR 1571-  
8 72 [Jacobs]) In contrast, Jacobs has never accepted HUD’s findings. Jacobs expected HUD’s  
9 study to support his belief in the superiority of window replacement, and although it failed to  
10 support him, he claims it supports him anyway. The People’s Abatement Plan (Ex. 262) was  
11 prepared by Dr. Jacobs alone. (TR. 1569:23-24 [Jacobs].) It has not been peer reviewed or  
12 reviewed by any scientific body, federal agency, or the California Childhood Lead Poisoning  
13 Prevention Branch.  
14

15 Since the defendants do not have the ability to remediate lead paint on private property,  
16 the People rely on voluntary participation by property owners. (TR. 1487:8-13 [Jacobs].)  
17 Although the People’s expert, Dr. Jacobs, has expressed his opinion that a significant number  
18 of owners would volunteer and, further, that implementation of the Abatement Plan would  
19 “significantly” reduce blood lead levels (TR. 1487:22-1488:9 [Jacobs]), he does not quantify  
20 those conclusions nor does he provide a basis for those speculative opinions.

21 The People propose massive inspection and risk assessment for all residential units  
22 built before 1980, which their expert estimates to be 3.5 million covered units, at a cost of \$1.4  
23 billion and roughly 15 million hours to complete. (TR. 1486:3-14; TR. 2136:22-24 [Jacobs];  
24 TR. 3219:5-18 [Heckman].) Such inspection is overbroad and unnecessary. Persons who  
25 bought or rented pre-1978 houses since 1996 have received an EPA disclosure about lead paint  
26 and the precautions that should be taken, so they should be aware of the possible presence of  
27 lead paint. (TR. 3219:5-18 [Heckman].) Moreover, for homes built from 1940 to 2010, the  
28 date of construction does not predict blood lead levels. And, for houses built before 1940,

1 there is only a .51 µg /dL differential between homes built before 1940 and 1978-89 using  
2 NHANES data. (Ex. 3021.) There is no evidence whether paint was the source for that  
3 difference or that .5 µg/dL matters for children’s health. Data from RASSCLE showed  
4 essentially the same results. (Ex. 3025.)

5 Fewer than 5% of children living in pre-1940 homes have blood lead levels over the  
6 “reference level” of 5 µg/dL recently set by CDC. Only 2% of children living in homes built  
7 between 1940 and 1978 have blood lead levels over 5 µg/dL. (TR. 2518:12-2519:16  
8 [Washburn]; Ex. 3023; Ex. 1404.) Thus, the houses where children with blood lead levels over  
9 5 µg/dL reside comprise a very small percentage (2%-5%) of pre-1978 housing. There is no  
10 evidence that the owners of those 2%-5% of the houses will voluntarily participate in the  
11 inspection and assessment program. As Dr. Jacobs admitted, the People do not know how  
12 many units have lead paint. (TR. 1486:3-10 [Jacobs].) It is overbroad and unnecessary to  
13 inspect and assess 3.5 million homes when looking for the 2%-5% of houses that may  
14 potentially pose a risk that a child may have a blood lead level over 5 µg/dL, particularly when  
15 there is no evidence that the Abatement Plan will lower blood lead levels.  
16

17 Additionally, it is argued it is unnecessary to inspect 3.5 million homes for the “needle  
18 in the haystack” when the jurisdictions already have information to identify properties and  
19 areas that may present a risk for elevated blood lead levels. The Abatement Plan designates as  
20 Priority Group 1 houses and neighborhoods known to local authorities as having multiple  
21 housing code violations and multiple reported elevated blood lead levels (Ex. 262.008). A  
22 relatively small number of properties may account for large numbers of children with elevated  
23 blood lead levels, and the addresses are often linked to repeated cases. (TR. 1024:8-15  
24 [Gottesfeld].)

25 There is a significant risk that an invasive intervention plan requiring the removal and  
26 replacement of building components can increase blood lead levels in children with already  
27 low blood lead levels. (TR. 3200:2-3201:19 [Heckman]; Ex. 1436.) The HUD 3,000 Homes  
28 Study found 9% of children living in abated properties had their blood lead levels increased by

1 more than 5 µg/dL after abatement, thus highlighting the dangers of disturbing lead paint even  
2 under well-supervised projects. (Ex. 70.015.)

3 SW contends the People have not met their burden of proving that the cost of the  
4 Abatement Plan or the time that it will take are reasonable. Dr. Jacobs estimated an average  
5 cost of \$2,007 per unit but that estimate was not peer reviewed or taken from any study of  
6 comparable California data. A study conducted by Dr. Jacobs estimated the cost for window  
7 replacement to be between \$7,000 and \$16,600 for units varying between 800 to 1,800 square  
8 feet. (Ex. 72.019.) Mr. Heckman, who has participated in several hundred abatement projects,  
9 has never been involved in an abatement project involving replacement of windows that cost  
10 under \$2,007 (TR. 3193:8-18; TR. 3193:26-3194:1 [Heckman].) Mr. Heckman has compiled  
11 figures from various remediation programs showing a large range of cost depending upon the  
12 scope of the work. (Ex. 1438.) SW submits the Court should not rely upon Dr. Jacobs. In  
13 conclusion, SW argues that when the Court has “no idea how much [the remedy] would cost  
14 but only knows that it would cost unascertainable millions of dollars, . . . there is not  
15 substantial evidence that the nuisance is abatable.” *Mangini, supra*, 12 Cal. 4th at 1103.  
16

### 17 **XIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### 18 **A. Findings of Fact Summarized**

19 **The Court incorporates by reference and adopts as its Findings of Fact the evidence,**  
20 **including tables and charts, set forth in detail in Sections V. B. through V. O above.**  
21 **In summary the Court finds:**

- 22 • White lead carbonate and the paint in which it is a key ingredient are harmful particularly  
23 to children
- 24 • While the government standards concerning blood lead levels has changed over time,  
25 there is no safe level of lead in blood
- 26 • Lead paint causes significant physical harm to individuals which has lasting effects,  
27 including diminished intellectual capacity of the afflicted  
28



- 1 • There is a clear and present danger in the form of a public nuisance that needs to be
- 2 addressed
- 3 • Defendants, to varying degrees, promoted and sold lead paint in the Jurisdictions for
- 4 years, and in some cases for decades
- 5 • Defendants, to varying degrees, sold lead paint with actual and constructive knowledge
- 6 that it was harmful
- 7 • Defendants, to varying degrees, promoted lead paint even when non-lead paints were
- 8 available
- 9 • Higher blood lead levels are also due to non-paint sources, such as deposits from
- 10 gasoline, candies, and water, but these other causes do not eclipse the more significant
- 11 harm caused by lead paint
- 12 • Truly intact lead paint does not pose a hazard, but since all paint deteriorates over time
- 13 the hazard literally remains just below the surface
- 14 • Lead paint remains the primary source of lead exposure for young children
- 15 • Lead paint is prevalent in the jurisdictions and is of continuing adverse effect
- 16 • While there have been significant reductions in tested blood lead levels over time, the
- 17 issues presented in this case are not resolved
- 18 • Existing programs at all government levels lack the resources to effectively deal with the
- 19 problem

## 20 **B. Conclusions of Law**

21 The Court finds the evidence is overwhelming that lead ingested by anyone is  
22 hazardous. In sufficient doses the ingestion of lead will almost certainly cause ailments ranging  
23 from muscular and skeletal abnormalities to mental defects, all of which are irreversible. There  
24 is compelling evidence that children who have ingested lead will likely suffer from diminished  
25 intellectual capacity. In turn, these children may develop behavior problems including  
26 antisocial behavior. Ultimately society will pay for these problems over time.

27 Various commissions have studied the issue for decades. The most recent official report  
28 in January 2012 was from the Advisory Committee on Childhood Lead Poisoning Prevention

1 of the Center for Disease Control (“CDC”). That Committee released a report recommending a  
2 comprehensive overhaul in how the CDC treats blood lead levels (BLL) in children. Most  
3 importantly, the report’s core scientific claim is that there is no safe level of exposure to lead  
4 for children, since strong evidence shows that even BLL’s less than 10 micrograms may cause  
5 irreversible developmental problems in children, including brain, lung, and heart damage. It  
6 recommended that the CDC eliminate the 10 microgram “level of concern” standard altogether  
7 and switch to a prevention-based approach. The goal of this approach is to pre-emptively avoid  
8 lead exposure rather than handle cases of exposure exceeding a certain limit after they occur.  
9 To implement this strategy, the CDC was asked to set a BLL reference value at the  
10 97.5<sup>th</sup> percentile of BLL’s in children and use that value to identify regions and populations at  
11 greatest risk for lead exposure. The CDC was advised to reduce those risks and update the  
12 reference value every four years. In May 2012 the CDC adopted the Committee’s  
13 recommendations and set the first reference value at 5 micrograms. In the words of Dr. Mary  
14 Jean Brown, it is time to put to rest the “myth that the lead problem is solved.”<sup>18</sup>

15 Of course, by any measure, the remedy sought by the People is of substantial, even  
16 massive proportions. Seeking the abatement of lead by inspections and rehabilitation of tens of  
17 thousands of homes – at a minimum -- is a daunting decision. But the Court is convinced that  
18 although great strides in reducing lead exposure have been made, and the incidence of  
19 exposure with correlative blood lead levels has declined to a low level, thousands of children in  
20 the jurisdictions are still presently and potentially victimized by this chemical.

21 Should the defendants -- or some of them -- bear responsibility for the creation of this  
22 nuisance? To answer that question the Court has to decide whether the standards for liability  
23 proscribed by the Court of Appeal have been satisfied. Those standards are as follows:

24 **Defendants’ knowledge:** The Court is convinced that the knowledge need not be  
25 actual, although proof of actual knowledge has been put in evidence, but that constructive  
26 knowledge will suffice. *See* Section V.B above. The Defendants have described in great detail

---

27  
28 <sup>18</sup> During the trial Defendants made the cynical suggestion that this lower level was only set to allow the  
Committee to keep its funding; the Court finds this unsupported by the evidence and disregards the allegation.

1 the extent of medical and governmental knowledge over the course of decades. Their argument  
2 is they cannot be held responsible for the lead issue because that is “liability by hindsight.” The  
3 evidence is to the contrary. Before the turn of the 20<sup>th</sup> century lead was known to be toxic. Not  
4 only were there reports of this from Australia, but in 1909 the California Supreme Court in  
5 *Pigeon* detailed the reasons for holding ConAgra (Fuller) liable for the severe injuries suffered  
6 by its workers in a lead manufacturing plant. There were discussions on the subject of lead-  
7 related problems held by the trade association whose mission it was to promote this chemical at  
8 least as early as 1900. SW’s own publication of *Chameleon* identified lead as a serious  
9 problem. In 1918 DuPont made an issue in its advertisements that some of its products were  
10 “lead-free.” It is not reasonable to believe these discussions were spontaneous; some persons in  
11 the LIA or among the manufacturers --- for whatever reason --- thought it important enough to  
12 raise the issue. It is telling that the head of the LIA was defensive enough about the situation to  
13 state “the LIA was not afraid of the truth?” Why would he say this if there were not serious  
14 concerns industry-wide about lead? In short, once constructive knowledge is accepted as the  
15 standard there is ample authority to hold the Defendants liable. *See* Section V.L above.

16 **“No proof of specific injury”**

17 SW in particular has continued to reiterate there can be no liability without proof of  
18 lead in specific properties. This position is not consistent with the Appeals Decision or  
19 California law. *See People ex. rel. Gallo v. Acuna* (1997) 14 Cal.4<sup>th</sup> 1090, 1118

20 **“Hindsight”**

21 The related issue is whether the Defendants can be held retroactively liable when the  
22 state of knowledge was admittedly in its nascent stage. The Court takes judicial notice of the  
23 fact that drugs, facilities, foods, and products of all kinds that were at one time viewed as  
24 harmless are later shown to be anything but. Yes, the governmental agencies charged with  
25 public safety may have been late to their conclusions that lead was poisonous. But that is not a  
26 valid reason to turn a blind eye to the existing problem. All this says is medicine has advanced;  
27 shouldn’t we take advantage of this more contemporary knowledge to protect thousands of  
28 lives?

1                   ***“Other causes and problem solved”***

2                   The Court is not persuaded that since the various lead control programs have been  
3 successes no further efforts are appropriate. NL and SW have been particularly intense in  
4 making this argument. But that argument proves the People’s point. It is not surprising that  
5 there are fewer incidents of high BLLs in recent years. As Defendants argue, the CLPP  
6 programs have been successful in reducing these cases. And it may well be that the incidence  
7 of high blood lead levels have decreased; but this does not mean the efforts against lead in  
8 paint should cease. All this argument shows is that the numbers have gone down; no one can  
9 dispute that. What is at issue is whether we should close the door on this issue and do no more  
10 than what we are doing now.

11                   Defendants argued that paint was, and is not the whole problem. However, the Court  
12 finds alternate sources of lead such as water and air contain only trace amounts of lead, and  
13 neither appreciably contributes to lead poisoning in the Jurisdictions. (Tr. 141:20-143:15,  
14 150:14-151:1, 152:21-159:9, 157:24-158:5, 161:1-16, 192:23-194:6, 198:21-200:14; P231.)  
15 Imported food items, pottery, home remedies, and other sources of lead cause lead poisoning in  
16 a small number of children in the Jurisdictions each year. Furthermore, unlike lead paint, these  
17 sources of lead are easily removed from a child’s environment once identified. (Tr. 150:14-  
18 151:21, 152:21-159:9, 1362:11-18, 2051:7-14, 2322:20-2324:19; P232, P231.) But the  
19 existence of other sources of lead exposure has no bearing on whether lead paint constitutes a  
20 public nuisance. It does not change the fact that lead paint is the primary source of lead  
21 poisoning for children in the Jurisdictions who live in pre-1978 housing.

22                   **What is to be done?**

23                   Regarding the issue of remedy the Court concludes the following:

24                   Consistent with their arguments throughout the trial the Defendants rely on statistics  
25 and percentages. When translated into the lives of children that is not a persuasive position.  
26 The Court is convinced there are thousands of California children in the Jurisdictions whose  
27 lives can be improved, if not saved through a lead abatement plan.  
28

1 The Court further finds that the proposed plan, as amended by the Court, is an  
2 appropriate remedy justified by the facts and the law. In so doing, the Court is persuaded by  
3 Dr. Jacobs' experience and expertise which greatly eclipse that of the Defendants' expert in  
4 these matters. The cost and time will be reduced significantly by limiting the Plan to interior  
5 surfaces. The Plan at trial calls for abatement to be carried out through the establishment of an  
6 administrative process to carry out inspections, abatement, and education. (Tr. 1526:27-  
7 1527:2.) That administrative process would replicate much of the infrastructure and expertise  
8 that currently exists in the Public Entities. (Tr. 1527:3-15.) Creation of a fund, administered by  
9 the Public Entities, dedicated to abatement of lead paint in pre-1978 homes, would eliminate  
10 this replication, and would do so at a lower cost. The Court concludes there is no need to  
11 establish a new bureaucracy since experienced personnel are already in place at the state and  
12 local levels. Similarly, it makes no sense to charge the liable defendants with undertaking this  
13 task. Monitoring the fund encompassed by the Plan will be accomplished by experienced  
14 government employees with control by the Jurisdictions' respective Boards of Supervisors.  
15

16 With these general thoughts in mind, the Court turns to the individual defendants:

17 **ARCO**

18 **The evidence summaries in Sections I.B, I.C., V.L.1, and VII.A above are**  
19 **incorporated by reference.**

20 The Court finds that the evidence as to ARCO does not meet the required elements.  
21 There is a lack of evidence of knowledge by ARCO or its predecessors of adverse health  
22 effects from exposure to residential lead paint during the relevant time period. As described  
23 above, the People have failed to prove by a preponderance of evidence that there is a sufficient  
24 nexus between ARCO and the jurisdictions to impose liability against that defendant. The  
25 People's own experts were unable to make the case that ARCO promoted lead paint in the  
26 jurisdictions. At most ARCO promoted paints containing lead for only two years and that was  
27 to the trade, not the general public. The Court finds the People have not met the burden of  
28

1 proof with regard to ARCO. **Therefore, a judgment of dismissal shall be issued on behalf of**  
2 **ARCO.**

3  
4 **CONAGRA**

5 **The evidence summaries in Sections I.B, I.C., V.L.2, and VII.B above are**  
6 **incorporated by reference.**

7 ConAgra was a large producer and supplier of lead within the jurisdictions. ConAgra  
8 had knowledge of the hazard at a minimum through the facts at issue in *Pigeon*. In spite of that  
9 litigation ConAgra continued to sell lead-based paint into the 1940s. ConAgra was operating to  
10 a major degree in the jurisdictions starting in 1900. Exs. 179, 233, ConAgra continued to sell  
11 lead paint until 1958. Tr. 657, 1673 Its laches defense is discussed earlier in this decision and is  
12 not dispositive. **Judgment shall be entered against ConAgra.**

13  
14 **DUPONT**

15 **The evidence summaries in Sections I.B, V.L.3, and VII.C above are incorporated**  
16 **by reference.**

17 The case against DuPont is largely vitiated by the stipulation that DuPont's interior  
18 residential paint products never contained white lead pigments. DuPont did not produce WLC  
19 in the Jurisdictions, and was a leader in the development of paints without lead content.  
20 DuPont made no sales in California until 1924 and never manufactured WLC in this state.  
21 DuPont did not participate in the lead paint marketing campaigns and did not join the LIA until  
22 1948 and did so as a vehicle to promote other products and not paint. It is telling that DuPont  
23 distanced itself from other paint companies by its products that were lead-free and used that  
24 quality as a key advertising theme.

25 Findings Supportive of DuPont:

26 DuPont joined LIA AFTER campaigns in 1948 Tr. 795

27 Markowitz : DuPont ad touting its paint as "non-poisonous" Ex. P172 Tr. 1711

28 Markowitz : per stip 24 Duco never contained WLC Tr. 1825

1 Markowitz: SSF plant did not produce lead Tr. 1851

2 Markowitz: DuPont's catalogue: flat wall finish made of "non-poisonous pigments" Tr.  
3 1713

4 Markowitz: DuPont advertised fact that it was possible to make paint that was lead-free  
5 Tr. 2010-11

6 Lamb: No DuPont paints used in interiors contained lead Tr. 2607

7 Lamb: few ads for paint with lead Tr. 2834-2840

8 Bugos: DuPont not in paint business until 1917 Tr. 2908

9 Bugos: DuPont never sold WLC in CA Tr. 2921

10 Bugos: DuPont not involved in campaigns Tr. 2929

11 Stip: re Chronicle Bldg Paragraph 12

12 Bugos: DuPont no warehouse or listing of lead paint in Calif. Tr. 2984, 2986

13 **Coupled with the Court's decision to limit this case to interior paint, a judgment of**  
14 **dismissal shall be entered for DuPont.**

15  
16 **NL**

17 **The evidence summaries in Sections I.B, V.L.4, and VII.D above are incorporated**  
18 **by reference.**

19 NL had actual knowledge of the hazards of lead paint as described above. NL was the  
20 largest manufacturer, promoter, and seller of lead pigments for use in house paint as  
21 determined in the FTC proceedings in the 1950s. NL operated large plants in the jurisdictions  
22 and was an active participant in the campaigns organized by LIA. E.g., Forest products  
23 campaign Tr. 709, Ex 82 Tr. 639

24 **Judgment shall be entered against NL.**

25  
26 **SW**

27 **The evidence summaries in Sections I.B, V.L.5, and VII.E above are incorporated**  
28 **by reference.**

1 SW had two plants in the jurisdictions, as well as stores and dealers (Ex. 233, 234, Tr.  
2 1039) selling lead paint. SW transported millions of pounds of lead pigment to its warehouses  
3 and factories during the first four decades of the 20<sup>th</sup> century.<sup>19</sup> SW knew at an early date of  
4 the occupational risks to factory workers from lead dust exposure and it is a reasonable  
5 conclusion that it knew or should have known of the hazards in the home. SW was active in the  
6 FPBP Campaign. Tr. 709 SW's defenses --- insufficient proof of causation, changing levels of  
7 BLLs deemed harmful, blaming negligent property owners, other causes, and that there is no  
8 longer a significant health issue --- are not persuasive. SW's pride in being the first paint  
9 company with chemists on staff is an unintentional admission: with chemists on staff, how can  
10 SW say it didn't fully appreciate the hazards posed by lead paint? Similarly, SW's evidence of  
11 its being the champion of innovation and the do-it-yourselfer with ready-mixed paints is at  
12 odds with it continuing to sell lead-based paint well into the 20<sup>th</sup> century through a large  
13 network of dealers.  
14

15 Ex. 58 Tr. 638

16 **Judgment shall be entered against SW.**

17 **The Court concludes:**

18 **ConAgra's conduct was a cause-in-fact of the public nuisance.**

19 ConAgra, as the successor-in-interest to Fuller, created or assisted in the creation of the  
20 public nuisance. (¶¶76, 137-158, 183-193.) As a result, ConAgra's conduct was a substantial  
21 factor in bringing about the public nuisance.

22 **NL's conduct was a cause-in-fact of the public nuisance.**

23 NL created or assisted in the creation of the public nuisance. (¶¶ 74, 137-158, 174-  
24 182.)

25 \_\_\_\_\_  
26  
27 <sup>19</sup> SW: "Merely doing business in the jurisdictions does not prove liability for causing a nuisance by wrongfully  
28 promoting white lead. Likewise, evidence of white lead shipments to California warehouses, which served many  
areas outside of California, does not show the use, place of use, or the promotion of white lead." The Court asks: *But  
why ship heavy lead across the country to warehouses if not to sell it?*



1 As a result, NL's conduct was a substantial factor in bringing about the public nuisance.

2 **SW's conduct was a cause-in-fact of the public nuisance.**

3 SW created or assisted in the creation of the public nuisance. (§§ 73, 137-173.) As a  
4 result, SW's conduct was a substantial factor in bringing about the public nuisance.

5  
6 **ORDER**

7 The Court orders as follows.

- 8
- 9 1. The Court finds in favor of the People and against ConAgra, NL, and SW on the claim of public nuisance.
  - 10 2. The proper remedy in this case is abatement through the establishment of a fund dedicated to abating the public nuisance. This fund shall be administered by the State of California in a manner consistent with the following abatement plan (the "Plan").<sup>20</sup>

11  
12 **A. Exclusions: The Plan *excludes* the following:**

- 13
- 14 • Institutional group quarters, including correctional facilities, nursing homes, dormitories, non-family military housing (e.g. barracks), mental health psychiatric rehabilitation residences, alcohol/detox living facilities, supervised apartment living quarters for youths over 16, schools, and non-home based day care centers not otherwise included;
  - 15 • Housing designated exclusively for the elderly or occupied by the elderly, unless children are regularly present;
  - 16 • Houses not occupied by young children for which clear evidence exists that demolition will occur within two years;
  - 17 • Houses constructed after 1980; and
  - 18 • Properties documented by an inspection to not contain any lead-based paint.

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21 **B. The Plan does not require full-fledged removal of all lead paint from all surfaces in all homes covered; The plan requires:**

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26 <sup>20</sup> (*County of Santa Clara II, supra*, 50 Cal.4th at pp. 55-56 [describing the potential remedy in this case]; *Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1142-43 [defendant ordered to establish abatement fund]; *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.* (2002) 148 Cal.App.4th 620, 627 [same]; *People ex rel. City of Willits v. Certain Underwriters at Lloyd's of London* (2002) 97 Cal.App.4th 1125 [pursuant to consent decree, defendants ordered to establish trust fund].)

- 1 • Testing of interior surfaces in homes to identify both the presence of lead-based paint  
2 and the presence of lead-based paint hazards;
- 3 • Remediation of lead-based paint on friction surfaces (including windows, doors, and  
4 floors) by either replacement of the building component or by encapsulation or  
5 enclosure of the lead-paint;
- 6 • Remediation of lead-based paint hazards in excess of actionable levels<sup>21</sup> on all other  
7 surfaces through paint stabilization (as opposed to paint removal, enclosure or  
8 encapsulation);
- 9 • Dust removal, covering of bare contaminated soil, proper disposal of waste, post-hazard  
10 control cleanup and dust testing, and occupant and worker protection;
- 11 • Repair of building deficiencies that might cause the corrective measures to fail (e.g.  
12 water leaks) to ensure durability of the lead hazard control measures; and
- 13 • Education of families and homeowners on lead poisoning prevention and paint-  
14 stabilization techniques to remediate lead based paint hazards on non-friction surfaces.

### 13 **C. Administration**

- 15 • Payments into the fund shall be made directly to the State of California’s Childhood  
16 Lead Poisoning Prevention Branch (“CLPPB”).
- 17 • The Jurisdictions shall apply for grant funds from the State on a specific needs basis.
- 18 • The CLPPB will be responsible for reviewing grant applications prepared by the  
19 applying jurisdictions, and thereafter make specific grants to the Jurisdictions.
- 20 • The CLPPB shall be responsible for the administration of the financing of the Plan at  
21 the statewide level.
- 22 • The Jurisdictions, through their existing lead control programs, will administer the Plan  
23 consistent with all applicable State, Federal and local government regulations. The  
24 Jurisdictions shall:
  - 25 ○ Establish the Priority of Inspection and Lead Hazard Control Work
  - 26 ○ Conduct workforce development, if necessary
  - 27 ○ Conduct a public education campaign

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28 <sup>21</sup> Actionable lead for this plan is defined as  $\geq 1$  mg/cm<sup>2</sup> or  $\geq 5,000$  ppm for lead in deteriorated paint,  $\geq 10$   $\mu$ g/ft<sup>2</sup> for  
lead in settled dust on floors, and  $\geq 100$   $\mu$ g/ft<sup>2</sup> for lead on interior window sills.

- 1           ○ Conduct bidding for and payment of hazard control contractors
- 2           ○ Contract with independent contractors to conduct all actionable lead hazard
- 3           control, inspections and risk assessments
- 4           ○ Perform lead hazard control plans for each property
- 5           ○ Conduct all clearance tests
- 6           ○ Design of all hazard control plans for each property that will undergo hazard
- 7           control
- 8           ○ Design of any needed repairs to ensure the viability of hazard control
- 9           ○ Review of payments to hazard control contractors to ensure clearance is
- 10          achieved and all work has been completed in compliance with hazard control
- 11          specifications and to the satisfaction of the owners and occupants before
- 12          certified contractors are paid
- 13          ○ Review workforce development and training operations to ensure the needed
- 14          workforce is being obtained and is in place
- 15          ○ Review of public education and outreach materials and methods

#### 15           **D. Enrollment**

16           Property owners who enroll in the Plan would be screened to see if they own a property  
17           that qualifies for inspection and services. If so, the individual jurisdiction shall  
18           coordinate with that property owner to schedule an inspection for lead based paint  
19           hazards in the home, as described below. The Jurisdiction will keep a complete public  
20           database of all properties that have been enrolled in the Plan, the dates of inspection,  
21           and the manner and method of hazard control services performed at the address, if any.

22           If the property owner does not enroll in the Plan after appropriate educational outreach  
23           and counseling, the property should be deferred for actionable lead hazard control until  
24           the property owner vacates or sells the property, unless there is a child who is at risk. A  
25           listing of properties that have failed to enroll in the Plan or subsequently failed to  
26           undergo actionable lead hazard control will be made available and accessible to the  
27           public.

#### 24           **E. Priorities**

25           In order to balance efficiency, simplicity and practical considerations, the “worst-first”  
26           prioritization option should be used. This means that housing units meeting ***one or***  
27           ***more*** of the following criteria should be treated first and should be assigned to Priority  
28           Group 1.

#### ***PRIORITY GROUP 1***

- 1 • Housing property currently containing children with elevated blood lead levels and  
2 known actionable lead hazards
- 3 • Housing with a history of repeated, multiple poisonings occupied by a young child who  
4 has not (yet) developed an elevated blood lead level and which has never undergone  
5 any form of actionable lead treatment or hazard control
- 6 • Housing with repeated notices of non-compliance with existing lead poisoning  
7 prevention laws
- 8 • Housing with substantial deferred maintenance defined by ten or more code violations  
9 in the past 4 years
- 10 • Housing identified as “high risk” by local authorities
- 11 • Housing located in high-risk census tracts or neighborhoods
- 12 • Vacant units located in high-risk census tracts or neighborhoods whose owners commit  
13 to renting to low-income families following hazard control for a specified time period
- 14 • Properties meeting the criteria shown below should be assigned to the lower risk  
15 Priority Group 2 and should be treated for actionable lead only after most of the higher  
16 risk Priority Group 1 buildings have been completed

15 *PRIORITY GROUP 2*

- 16 • Properties with lower lead paint concentrations or with lead paint on fewer and/or  
17 smaller surfaces (this would include buildings where the maximum paint lead loading is  
18 greater than or equal to 1 mg/cm<sup>2</sup> but less than 5 mg/cm<sup>2</sup> and where the interior lead  
19 painted surface area is less than 100 square feet)
- 20 • Properties with no history of lead poisoning
- 21 • Residential buildings built after 1950 or not in high risk neighborhoods or census tracts
- 22 • Properties that have undergone “gut” rehabilitation, which means that all painted  
23 interior surfaces were removed and replaced with post-1980 building materials, finishes  
24 and coatings
- 25 • Vacant housing units that could one day be occupied by children
- 26 • Properties not located in one of the high risk census tracts
- 27 • The Jurisdictions shall prioritize Properties into Priority Group 1 or 2, as needed to  
28 promote Plan efficiency and public health

**F. Completion of a Comprehensive Lead Hazard Inspection**

1 For most properties that are enrolled in the Plan, a new inspection for the presence or  
2 absence of actionable lead (as defined below) shall be conducted. Tests will be conducted  
3 using a portable X-Ray Fluorescence (“XRF”) instrument, a handheld device that measures the  
4 presence and quantity of lead based paint on surfaces. For those properties that have been  
5 inspected within the past 5 years, the earlier results can be used if desired by the owner or  
6 occupant, so long as they comply with EPA and HUD requirements related to the number of  
7 XRF readings within a given property and the number of housing units tested within a given  
8 multifamily housing development, quality control procedures, and performance of the  
9 inspection by a California certified lead-based paint inspector, and the other criteria specified  
10 below.

11 For all properties that have not been inspected or were inspected more than 5 years ago,  
12 a new actionable lead-based paint inspection should be completed, unless there is adequate  
13 documentation that the property is free of and/or has been made free of actionable lead  
14 hazards. The inspection should be done at a time convenient to the occupant and should be  
15 adequately staffed so that it can be completed in no more than two hours for a typical  
16 California housing unit to reduce the burden on the occupant. Allowance for a longer time for a  
17 larger property should be granted on a case by case basis. All data from the inspection shall be  
18 retained by the Jurisdiction for the life of the building, by the owner of the building until it is  
19 sold or demolished (all data should be transferred to the new owner) and by the inspector for at  
20 least 5 years. The Jurisdiction should construct and populate a publicly available inspection  
21 and hazard control database.

22 Under this Plan, the Jurisdiction will be required to establish programs throughout the  
23 jurisdictions that provide homeowners with access to comprehensive residential lead paint  
24 testing in conformity with the prioritization set forth above. That testing will be available to all  
25 homeowners and residents of Properties not meeting the exclusion criteria set forth above. The  
26 comprehensive lead inspection will properly identify those surfaces with actionable lead and  
27 will identify those Properties that have no lead-based paint. Presumption of actionable lead  
28 hazards will not be permitted. Previous lead inspection data should be used only if it is of  
sufficient quality and only if it is augmented as needed.

Lead paint inspections under this plan must be done in accordance with an XRF  
Performance Characteristics Sheet (PCS) issued by HUD and EPA and have all the required  
measurement and supporting quality control data. It must include lead paint measurements on  
all surfaces with a similar painting history in all rooms, room equivalents, exteriors and site,  
including measurements on floors, walls and ceilings with intact and non-intact paint and  
coatings using the standard HUD lead-based paint inspection protocol.

### **G. Identification and Reporting of Actionable Lead Paint**

The results of the comprehensive lead inspections performed on included housing units  
will be used: (1) to maintain a database that is available to the public documenting the location  
of lead based paint and lead based paint hazards in inspected properties; and (2) as the basis for  
recommending lead hazard control activities in properties.

1 To be considered actionable and therefore eligible for lead hazard control programs as  
2 set forth in the recommendations that follow, the lead levels on surfaces and in dust must meet  
3 certain actionable levels.

4 The level of lead in paint to be considered actionable under this plan should be  $\geq 1$   
5  $\text{mg}/\text{cm}^2$  (or  $\geq 5,000$  ppm if loading cannot be measured for technical reasons). The lead paint  
6 should be measured using field-based XRF lead paint analyzers with a Performance  
7 Characteristics Sheet; sodium rhodizonate, sodium sulfide or other spot test kits should not be  
8 used to determine the presence of actionable lead for the purposes of this plan.

9 The level of lead in settled dust to be considered actionable under this plan should be  
10  $\geq 10 \mu\text{g}/\text{ft}^2$  on floors and  $\geq 100 \mu\text{g}/\text{ft}^2$  on interior window sills. Dust lead should be measured  
11 using the standard wipe sampling method.

### 12 **H. Hazard Control Criteria and Options**

13 Once actionable lead has been found on surfaces or in dust in a property, the property  
14 owner and the Jurisdiction will develop a plan for lead hazard control.

15 Under the Plan, all replaced building components should be at least equal in quality to  
16 the lead painted components they replace. The judgment on what constitutes “equal to” should  
17 be made by the Jurisdiction, that will design the hazard control in collaboration with owners  
18 and occupants. If an owner decides to replace a building component with a higher cost  
19 equivalent item, the incremental cost should be borne by the owner.

20 The plan contemplates that the first prioritization of any lead hazard control plan is  
21 replacement of lead painted windows and doors, which will yield the largest health benefit in  
22 the shortest time period.

23 If the existing substrate is incapable of supporting an enclosure system, it should be  
24 either repaired to support an enclosure, or the component should be replaced.

25 Walls: For lead painted interior walls and ceilings, (new plaster is an acceptable  
26 enclosure method, as long as the new lathe is physically attached to the substrate)

27 Floors & Stairs: Enclosure with new subflooring and finish goods (paint stabilization  
28 should not be permitted on lead-painted floors and lead-painted stairs because of the likelihood  
of deterioration due to traffic and on-going impact).

Ceilings: Paint Stabilization or Enclosure with drywall or equivalent

Window trim: Replacement (or off-site stripping and repainting for ornate, unique  
items)

Window troughs: Replacement or Enclosure

Other window parts: Replacement (or off-site stripping and repainting for ornate,  
unique items)

1 Window or Door Lintels: Replacement (or, if load-bearing, enclosure)

2 Doors Replacement: (or off-site stripping and repainting for ornate, unique items)

3 Door Frames: Replacement (or enclosure if load-bearing)

4 Interior Trim: Replacement (or off-site stripping and repainting for ornate, unique  
5 items) or Paint Stabilization

6 Cabinets/Shelving: Paint Stabilization or Replacement (or off-site stripping and  
7 repainting for ornate, unique items)

8 Radiators/Pipes: Paint Stabilization or Replacement (or off-site stripping and  
9 repainting)

10 Stairs: Enclosure or Replacement

11 Dust Actionable Lead Dust: Removal to Clearance Standards

12 **I. Performance of Hazard Control Work**

13 The results of the actionable lead inspection will be used to devise actionable lead  
14 hazard control work specifications. The specific products and methods, together with the  
15 inspection report and expected timelines, will be presented to the owner and occupants and a  
16 plan will be agreed to between the homeowner and the Jurisdiction.

17 **J. Public Education and Outreach Plan**

18 The Jurisdiction shall conduct a public education and social marketing campaign to  
19 engage the citizens, building owners, construction, and lead mitigation and inspection

20 **K. Costs and Timeline**

21 The Jurisdictions shall utilize their existing expertise in the following areas: Inspection,  
22 Risk Assessment, Hazard Control, Construction, Specification Writing and Bidding;  
23 Contracting and Procurement; Accounting and Payment Processing; Public Education and  
24 Outreach; Toxicology; Environmental, Housing and Public Health Regulation and Practice;  
25 Evaluation; Oversight; Legal; Insurance; Information Technology; Public and Media Relations;  
26 and Clerical and Other Support Staff.

27 **L. Funding**

28 Since the Court orders abatement of interior surfaces only, with the Jurisdictions  
conducting the inspections using their respective staffs, the estimate for inspection costs is  
reduced from \$569,000,000 to \$400,000,000. This is calculated by using the per-unit cost of  
inspection testified to at trial. The total cost of inspection of pre-1978 homes in the

1 Jurisdictions would be 3,555,630 units<sup>22</sup> x 0.8 (reduction for multi-unit residences).<sup>23</sup>  
2 Applying that number to a reasonable cost of inspection yields the \$400,000,000 figure.

3 **M. Cost of Remediation**

4 Remediation limited to interior surfaces results in an estimated cost of remediation of  
5 \$759,284,467, or approximately \$750,000,000.<sup>24</sup>

6 Education expenses are included in these figures.

7 **Conclusion:**

8 **Therefore, the Court orders:**

9 The Defendants against whom judgment is entered, jointly and severally, shall pay to  
10 the State of California, in a manner consistent with California law, \$1,150,000,000 (One  
11 Billion One Hundred Fifty Million Dollars) into a specifically designated, dedicated, and  
12 restricted abatement fund (the “Fund”).

13 The payments into the Fund shall be within 60 days of entry of judgment.

14 The Fund is to be administered by the Director of the California CLPPB program for  
15 the benefit of people within the 10 Jurisdictions and the costs incurred by the State of  
16 California to administer the Fund shall be paid from the Fund.

17 Monies from the Fund shall be disbursed to each jurisdiction to be supervised by that  
18 County’s Board of Supervisors (including the Board of Supervisors of the City and County of  
19 San Francisco) and the city councils of the cities of Oakland and San Diego, consistent with

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19 <sup>22</sup> P283\_015.

20 <sup>23</sup> Tr. 1548:12-21.

21 <sup>24</sup> To determine the cost of interior-only remediation, the Court has considered reducing the Jurisdictions’ estimated  
22 total remediation costs based on the percentage of total remediation costs attributable to interior remediation, as set  
23 forth in the Evaluation of the HUD Lead Hazard Control Grant Program (National Center for Healthy Housing and  
24 University of Cincinnati, 2004) (“HUD Evaluation”) – which was relied on at trial by both the People’s abatement  
25 expert, Dr. David Jacobs, and Defendants’ abatement expert, Mr. Benjamin Heckman. (P70\_119 ¶ 6.2.2 [HUD  
26 Evaluation]; Tr. 1506:24-1508:18, 1510:12-22, 3195:1-3196:4; D1438.4.) According to the HUD Evaluation, the  
27 median cost of interior remediation strategies is approximately \$5,960/unit, while the median cost of exterior  
28 remediation strategies is approximately \$1,870/unit. Using these median values to determine the ratio of interior  
remediation costs to total remediation (interior and exterior) costs suggests that approximately 76% of total  
remediation costs are attributable to interior remediation ( $\$5,960/(\$5,960 + \$1,870)$ ). (P70\_119 ¶ 6.2.2.)

At trial, Dr. Jacobs testified that remediation of homes in the Jurisdictions, performed in accordance with the  
procedures set forth in the People’s Abatement Plan, would average \$2,000 per housing unit. (1532:18-1533:18; *see also* P262 at  
23-24.) Since approximately 76% of lead remediation costs are attributable to interior remediation, the average per-unit cost of  
remediation can be reduced from \$2,000/unit to approximately \$1,500/unit (\$1,500 is approximately 76% of \$2,000). This  
reduces the People’s total estimated remediation cost from approximately \$1,000,000,000 to approximately \$750,000,000.



1 past practices regarding lead detection, removal, and prevention. Each jurisdiction shall be  
2 entitled to receive up to the following maximum percentage and distribution from the fund:<sup>25</sup>

3	Alameda*	9%	\$103,500,000
4	(*including the residents of the City of Oakland)		
5	Los Angeles	55%	\$632,500,000
6	Monterey	2%	\$23,000,000
7	San Mateo	5%	\$57,500,000
8	Santa Clara	9%	\$103,500,000
9	San Diego	7%	\$80,500,000
10	San Francisco	7%	\$80,500,000
11	Solano	2%	\$23,000,000
12	Ventura	4%	\$46,000,000

14 The jurisdictions shall apply for grants from the Fund with a three-step program as  
15 described. Exterior abatement and remediation is excluded from this order.

16 Dr. David Jacobs, or his designee, shall serve as a consultant to the Plan. He shall be  
17 compensated at a rate of \$300 per hour, with payments to be made out of the Fund. His  
18 compensation for any 12 month period shall not exceed \$50,000. Any ordinary expenses  
19 incurred by Dr. Jacobs, such as travel, meals, and incidentals shall be in addition to his hourly  
20 charges and shall be consistent with the State of California reimbursement guidelines for  
21 government employees.

22 The program shall last for four years from the date of total payment by defendants into  
23 the Fund. If, at the end of four years, any funds remain, those monies shall be returned to the  
24 paying defendants in the ratio by which the program was initially funded. The Superior Court  
25 of California, County of Santa Clara, shall have continuing jurisdiction over the Plan and its  
26 implementation.

### 27 SUMMARY OF DECISION

- 28 1. The Court rules against ARCO and ConAgra's defense of no successor liability.
2. The Court rules that constructive notice on the part of the Defendants is sufficient.

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<sup>25</sup> Percentages derived from number of houses pursuant to chart at Section V.H *supra*.

- 1 3. The Court rules against SW's argument that differentiates "pigment" versus  
2 "paint."
- 3 4. The Court bases the decision solely on the issue of lead paint produced,  
4 promoted, sold, and used for interior home use.
- 5 5. The Court rules that Defendants ConAgra, NL, and SW were substantial factors  
6 in causing the injury alleged.
- 7 6. The Court rules that LIA and NPVLA were not agents of Defendants, but were  
8 conduits of information and vehicles by and for the hazards and promotion of  
9 lead paint.
- 10 7. The Court rules that as to Defendants ConAgra, NL, and SW the People have  
11 sustained the burden of proof on all issues delineated by the Appeals Decision.
- 12 8. The Court rules that ARCO and DuPont are found not liable.
- 13 9. The Court finds in favor of the Public Entities and against SW on SW's cross-  
14 claim for declaratory relief.
- 15 10. Defendants' Affirmative Defenses do not bar this action.
- 16 11. The Court orders the institution of the abatement plan and establishment of the  
17 Fund as described above.
- 18 12. The People shall prepare a Judgment consistent with this Decision within 5  
19 days.

20 **SO ORDERED.**

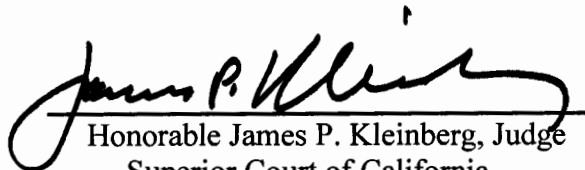
21 Dated: January \_\_\_, 2014

22 \_\_\_\_\_  
23 Honorable James P. Kleinberg, Judge  
24 Superior Court of California  
25  
26  
27  
28

- 1           3. The Court rules against SW's argument that differentiates "pigment" versus  
2           "paint."
- 3           4. The Court bases the decision solely on the issue of lead paint produced,  
4           promoted, sold, and used for interior home use.
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8           conduits of information and vehicles by and for the hazards and promotion of  
9           lead paint.
- 10          7. The Court rules that as to Defendants ConAgra, NL, and SW the People have  
11          sustained the burden of proof on all issues delineated by the Appeals Decision.
- 12          8. The Court rules that ARCO and DuPont are found not liable.
- 13          9. The Court finds in favor of the Public Entities and against SW on SW's cross-  
14          claim for declaratory relief.
- 15          10. Defendants' Affirmative Defenses do not bar this action.
- 16          11. The Court orders the institution of the abatement plan and establishment of the  
17          Fund as described above.
- 18          12. The People shall prepare a Judgment consistent with this Decision within 5  
19          days.

20           **SO ORDERED.**

21           Dated: January 7, 2014

22             
23           Honorable James P. Kleinberg, Judge  
24           Superior Court of California