No. H040880

In the Court of Appeal of the State of California
Sixth Appellate District

The People of the State of California,

Plaintiff and Respondent,

vs.

Atlantic Richfield Company, et al.,

Defendants and Appellants.

APPELLANT CONAGRA GROCERY PRODUCTS COMPANY'S REPLY BRIEF AND JOINDER IN REPLY BRIEFS OF NL INDUSTRIES, INC. AND THE SHERWIN-WILLIAMS COMPANY

Appeal from a Judgment
Santa Clara Superior Court, Case No. 1-00-CV-788657
Honorable James P. Kleinberg

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TABLE OF ABBREVIATIONS

__AA/__	Refers to the Appellants' Appendix by volume and page number
__RT/__	Refers to the Reporters' Transcript by volume and page number
__RA/__	Refers to Respondents' Appendix by volume and page number
ConAOB/__	Refers to Appellant ConAgra's Opening Brief by page number
NLOB/__	Refers to Appellant NL Industries, Inc.'s Opening Brief by page number
SWOB/__	Refers to Appellant The Sherwin-Williams Company's Opening Brief by page number
RB/__	Refers to Respondents' Brief by page number
BLLs	Refers to blood lead levels
CDC	Refers to the Centers for Disease Control
CLPPB	Refers to the Childhood Lead Poisoning Prevention Branch
LIA	Refers to the Lead Industries Association
NPVLA	Refers to the National Paint Varnish and Lacquer Association
Pigeon	Refers to *Pigeon v. W.P. Fuller & Co.*, 156 Cal. 691 (1909)
μg/dL	Refers to micrograms per deciliter

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I. INTRODUCTION

To arrive at its extraordinary $1.15 billion judgment against ConAgra, the trial court ignored the absence of Fuller-specific evidence of knowledge, promotion and causation, disregarded the legal standards this Court has established, and denied ConAgra a fair trial. In its opening brief, ConAgra showed that the trial court's approach to each element of a nuisance claim was legally incorrect, the record does not permit liability under the correct legal standards, and judgment against ConAgra is barred on multiple grounds, including laches, successor liability, constitutional and statutory limits, and other prejudicial errors that mandate reversal. Plaintiffs failed to rebut any of these showings.

First, Plaintiffs fail to account for the complete absence of proof as to Fuller and misdirect the Court by lumping all Defendants together and attributing activity of non-agent trade associations to Fuller. In fact, the only admissible Fuller-specific evidence of knowledge was an appellate opinion involving injury to a plant worker exposed to high levels of lead and testimony of a Fuller employee about what he knew in 1948 after Fuller ceased selling interior residential lead paint. Similarly, the only admissible Fuller-specific evidence of promotion was a purported representative sample of advertisements, many of which were not placed by Fuller, most of which were placed in the 1910s and 1920s, very few of which even mentioned interior residential lead paint, and none of which mentioned lead at all after 1935. There is no evidence that

Fuller promoted interior residential lead paint at a time when Fuller had knowledge that such a use was hazardous, and certainly no evidence that any such Fuller promotion caused anyone to place lead paint inside any home in the jurisdictions.

Plaintiffs never grapple with these gaps in the Fuller-specific evidence. For example, Plaintiffs' expert testified that responsible paint manufacturers should have ceased making interior residential lead paint by 1935, yet the last Fuller advertisement in the record that mentions lead was dated that same year. Thus, there was no evidence that Fuller promoted interior residential lead paint at a time when it should have known this use was hazardous. That being so, the knowing promotion that this Court required in *Santa Clara I* was not established and reversal is required.

Second, Plaintiffs do not rebut ConAgra's showing that the erroneous legal standards the trial court applied to the knowledge, promotion and causation requirements contradict *Santa Clara I* and other well-established precedent. Each legal error independently requires reversal of the judgment.

As to *knowledge,* for public nuisance liability, this Court required heightened knowledge above the product liability standard—that is, actual knowledge that a public health hazard would result from the product use that a Defendant promoted. *Cnty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal.App.4th 292, 309 (2006) ("*Santa Clara I*"). As to *promotion,* this Court held the

public nuisance claim required more than mere production of a defective product or failure to warn of its dangers and instead required proof that the defendant promoted use of the product in a hazardous manner. *Id.* In other words, Plaintiffs were required to prove that, at the time of any promotion, Fuller actually knew that interior residential lead paint would be harmful to vast numbers of children. Since the BLL testing methodology that first led scientists to believe that low levels of lead were harmful did not even exist until decades after the time of the Fuller advertisements in the record, it is plain that Fuller lacked the required knowledge at the time it acted. As to *causation,* the law is well settled that causation may be based only on the actionable conduct. That means the legally required knowledge, promotion and injury must each be established and linked together.

The trial court failed to apply these legal principles. It disregarded Fuller's knowledge at the time of any promotion, which was no greater than that of the general public or the scientific community, and instead applied retroactively what scientists first came to believe decades later. It also concluded promotion could be established by advertisements of a Defendant's paint products alone—whether or not the advertisements involved interior or exterior lead paint or mentioned lead, and regardless of who placed the advertisements. In addition, the trial court dispensed with any causal nexus between the actionable conduct and injury. The trial court found nuisance liability in the absence of evidence that Fuller engaged in promotion of interior residential lead paint, at a time

when Fuller was proven to have the required knowledge, and without any evidence that any such knowing Fuller promotion caused anyone to place lead paint in any home in the jurisdictions. Thus, there was no evidence that Fuller's conduct was a factor at all, much less a substantial factor in creating what the trial court found to be a public nuisance.

Third, Plaintiffs also fail to rebut ConAgra's showing that it is entitled to judgment under the doctrine of laches. Plaintiffs do not contest that they unreasonably delayed in bringing this nuisance suit against ConAgra as Fuller's purported successor until decades after Fuller ceased selling lead paint, and long after the Fuller paint business was sold to O'Brien. By the time Plaintiffs belatedly sued, virtually no witnesses and evidence remained; ConAgra was unable to defend itself and suffered severe prejudice.

Fourth, Plaintiffs failed to prove that ConAgra is the successor to Fuller's paint business liabilities. Plaintiffs do not dispute that they bore the burden to prove that ConAgra succeeded to Fuller's paint liabilities, or that if the Fuller paint liabilities were transferred to O'Brien, ConAgra cannot be liable. Nor do Plaintiffs dispute that the only evidence in the record bearing on this point indicates that the Fuller paint liabilities were transferred to O'Brien. Plaintiffs instead argue only that such evidence was inadmissible. But Plaintiffs ignore: (1) they bore the burden to prove ConAgra's successor liability and without the evidence they challenge, the record would at most be silent on this point and their successor

liability claim would still fail, and (2) Plaintiffs themselves introduced the very evidence that disproves successor liability, but which they now claim to be inadmissible.

Finally, ConAgra has also shown that the trial court's remedies are impermissible, violate constitutional separation of powers limits, violate federal and state constitutional due process and First Amendment protections, and that reversible evidentiary errors occurred at trial.

For each of these reasons, the Court should reverse the judgment against ConAgra.

II. THERE ARE NO FINDINGS—OR EVIDENCE—FULLER HAD ACTUAL KNOWLEDGE INTERIOR RESIDENTIAL LEAD PAINT WOULD CREATE THE PUBLIC HEALTH HAZARD THE TRIAL COURT FOUND

In *Santa Clara I*, this Court defined the knowledge required to impose liability for public nuisance as: "knowledge of the public health hazard that [interior residential lead paint] would create." *Santa Clara I*, 137 Cal.App.4th at 308-10. Thus, this Court defined the knowledge element as actual knowledge that interior residential lead paint would be harmful to vast numbers of children. Because there was no knowledge at the time of any Fuller promotion that it was harmful for children to be exposed to the extremely low levels of lead in lead paint that the trial court found through hindsight

decades later to be a nuisance, this Court's legal standard on the knowledge element was not met.

The trial court ignored this Court's knowledge standard. The evidence showed and the trial court found that it was not known in the 1920s and 1930s that lead paint was harmful to children in the minute quantities the trial court later found to be a current public health hazard. Nevertheless, the court concluded that public nuisance liability could be imposed on Defendants, notwithstanding their lack of actual knowledge at the time. (138AA/41014)

Because the trial court explicitly acknowledged that Defendants' "nascent" knowledge differed from the "more contemporary" knowledge on which the court premised liability (138AA/41014), this case raises the central legal question of whether public nuisance liability can be imposed despite the wide gulf separating Defendants' knowledge at the time of promotion and evolving scientific knowledge decades later. Yet Plaintiffs attempt to avoid this question by misstating the trial court's findings with respect to knowledge. (RB[1]/55-70) They note evidence that it was known many decades ago that exposure to lead in large quantities was harmful—yet they never acknowledge the critical difference

[1] All RB citations are to the originally-filed Respondent's Brief, not to the new version submitted the day before the Reply Brief was due.

between this knowledge and the current opinion of some scientists that lead can be harmful to children at even minute BLLs. (*Compare* RB/56-58 *with* RB/70-74)

Most importantly for ConAgra's purposes, Plaintiffs fail to confront the complete absence of evidence that Fuller had the requisite knowledge.[2] Instead, they argue that the trial court's judgment should be affirmed based on evidence that Fuller knew exposure to massive amounts of lead was hazardous. (RB/56-65) But Fuller's knowledge that lead is dangerous at large levels of industrial exposure is not the same as knowledge that the low-level exposure associated with deteriorated interior residential lead paint could create the public health hazard the trial court found. Because the trial court did not find that Fuller possessed the requisite knowledge and instead admittedly imposed liability on ConAgra based on a different level of knowledge developed decades later, the trial court's knowledge finding must be reversed.

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[2] Plaintiffs' accusation that ConAgra "disregard[ed] fundamental principles of appellate review" [RB/1-3, 5, 44-46] is not well taken. All the Fuller-related evidence Plaintiffs cite was addressed in the opening brief. (*Compare* ConAOB/4-7, 16-28, 31-35 *with* RB/19, 22-23, 31, 33) Likewise, the doctrine of implied findings is inapplicable because ConAgra objected to the trial court's failure to address material controverted issues in its statement of decision, including its failure to identify the "hazard" that Fuller purportedly knew and when it had knowledge of that hazard. (133AA/39469-70; Civ. Proc. Code § 634) Finally, ConAgra's 56,000-page Appellants' Appendix included all material parts of the record and Plaintiffs were able to supplement it with their Respondents' Appendix. Cal. R. Ct. 8.124.

A. The Trial Court Did Not Find That Fuller Had Actual Knowledge That Interior Residential Lead Paint Would Later Create The Public Health Hazard The Trial Court Found

To avoid their failure of proof on knowledge, Plaintiffs attempt first to blur the distinction between knowledge that exposure to large amounts of lead was hazardous and knowledge of the public health hazard the trial court found. (RB/56-65)

The hazard the trial court found to be a nuisance was the danger that deteriorated interior residential lead paint presents to children in the form of exposure to tiny quantities of lead. (138AA/41012-13) The trial court found "there is no safe level of exposure to lead for children, since strong evidence shows that even BLL's less than 10 micrograms may cause irreversible developmental problems in children, including brain, lung and heart damage" and that the "10,000 children living in the [j]urisdictions [with] BLL's above 4.5 μg/dL" represent the "minimum number of children in the [j]urisdictions who were lead poisoned."[3] (138AA/40935, 41012-13, 41074) This knowledge of the hazard is vastly different than knowledge that exposure to lead in large quantities can be harmful.

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[3] Of course, as Defendants have also noted, there are other sources of environmental lead exposure and there was no legally sufficient proof that the use of lead paint in residential interiors is responsible for all children who have such BLLs. (SWOB/14)

The trial court ignored this difference in imposing retroactive liability. It found that Defendants knew of the dangers of high levels of lead exposure through the *Pigeon* case [138AA/40945], and concluded that the link between workplace injury and residential harm is now "obvious" [138AA/40962], although this "link" was unknown at the time of *Pigeon* and for decades thereafter.

The trial court also determined that Defendants (like the general public) had knowledge lead was considered toxic. (138AA/40945) But the trial court never found that Defendants knew at the time of any promotion that there is no safe level of lead exposure or that the deterioration of lead paint may create a risk to vast numbers of children because it exposes them to low levels of lead. Instead, the trial court made a legal ruling that a product, believed at the time to be safe, warrants public nuisance liability because later medical beliefs that the product is hazardous "should" be used to protect children. (138AA/41014)

There is no legal precedent that permits public nuisance liability to be imposed retroactively on such a basis. While changes in medical beliefs and the public policy in favor of protecting children have supported legislative solutions, as ConAgra showed in its opening brief, California Supreme Court precedent forbids strict product liability based on later-developed knowledge that differs from the scientific understanding at the time of the challenged conduct. (ConAOB/19, citing *Carlin v. Superior Court*, 13 Cal.4th 1104, 1112 (1996)) And, in *Santa Clara I*, this Court held that

public nuisance liability must rest on conduct "distinct from and far more egregious" than "simply producing a defective product or failing to warn of a defective product" [*Santa Clara I*, 137 Cal.App.4th at 308-10]—which means that the knowledge required for public nuisance liability must be more rigorous than the knowledge required for strict product liability. Thus, the law does not permit public nuisance liability here, given the substantial gap between Fuller's knowledge at the time and the knowledge the trial court applied decades later.

To try to escape the conclusion that knowledge of the hazard at the time of the actionable conduct is required, Plaintiffs next resort to the same fictional narrative they deployed to get their public nuisance claim past the pleadings: they erroneously claim the trial court found that Defendants knew many decades ago what scientists, the government, and the public first came to believe only recently, yet Defendants concealed their purported superior knowledge from the public. (RB/56-65) Plaintiffs, however, proved no such thing, and the trial court found to the contrary.

The evidence was undisputed that the public health community did not know that low BLLs might be harmful until the late 20th century—decades after Fuller ceased making or advertising interior residential lead paint. Before 1970, BLLs below 60 μg/dL were believed safe. (43RT/6281) In 1971, the BLL thought to be safe was revised downwards to below 40 μg/dL. (*Id.*) In 1978, it was lowered to 30 μg/dL, in 1985 to 25 μg/dL, in 1991 to 10 μg/dL,

and, most recently, in 2012 the CDC concluded no "safe level" of lead has been found. (43RT/6279-83; 174AA/51699, 51866) Indeed, in the prior appeal, Plaintiffs admitted the significant change in medical belief over time and asserted it as a ground to avoid a timeliness bar to their lawsuit. Plaintiffs argued that although they "had known for decades that lead was poisonous, their lack of knowledge of the dangers of *low-level lead exposure*" prevented the statute of limitations on their tort claims from accruing.[4] *See Santa Clara I*, 137 Cal.App.4th at 331 (emphasis in original).

But, Plaintiffs' experts conceded that Defendants did not know anything more about the medical effects of lead than the public health authorities. (36RT/5386) If Defendants knew nothing more than the public, and the evolution in knowledge was significant enough to prevent Plaintiffs' claims from accruing, the knowledge differential cannot then be considered immaterial for purposes of Defendants' nuisance liability.

Finally, Plaintiffs argue that the Court imposed no heightened knowledge requirement but held that Defendants' "*conduct*—not their scienter—must be 'distinct from and far more egregious than simply producing a defective product or failing to warn of a

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[4] In their brief, Plaintiffs accuse ConAgra of improperly citing to their superseded pleading. (RB/64 n.35) The cites in question are to *Santa Clara I*. (ConAOB/23)

defective product.'" (RB/69) They contend that this standard is satisfied merely by showing advertisements of lead paint for interior residential use, irrespective of whether the Defendant had actual knowledge that this use would result in the public health hazard that the trial court found. (*Id.*)

But Plaintiffs' argument does not square with *Santa Clara I*. This Court held Plaintiffs' allegations, *if proven*, that Defendants promoted a product for a use that they knew would create a public health hazard, could support liability for assisting in the creation of a nuisance. That holding is consistent with the rule that it is an actor's knowledge or intent that creates heightened culpability for his or her actions. *See, e.g., Campbell v. Ford Motor Co.*, 206 Cal.App.4th 15, 32 (2012) (culpability under the *Rowland* factors focuses on the actor's knowledge or intent). Heightened scienter, therefore, is essential.

The other points Plaintiffs raise relate to causation, not knowledge. They cite: (1) Section 435 of the Restatement (Second) of Torts; and (2) the principle that a defendant remains liable for injuries that occur in unusual or unforeseeable manners. Neither causation principle provides a basis for holding that the *knowledge* element was proven here. To do as Plaintiffs suggest is to make a manufacturer the "insurer of the safety" of its products, the precise thing courts have repeatedly stated that manufacturers are not. *See O'Neil v. Crane Co.*, 53 Cal.4th 335, 362 (2012).

B. There Is No Substantial Evidence That Fuller Had The Requisite Actual Knowledge

The only competent evidence in the record concerning Fuller's knowledge is (1) evidence that Fuller knew in the early 1900s through *Pigeon* that a plant worker's industrial exposure to high levels of lead from the manufacturing process could injure the worker and (2) the testimony of Neil Barnard who was hired by Fuller in 1948 (after Fuller stopped selling interior residential lead paint) as to his knowledge at that time. Tellingly, that is the only Fuller-specific evidence of knowledge discussed in Plaintiffs' brief. (RB/22-23) This evidence is not sufficient to establish the required knowledge.

As noted, evidence that industrial exposure to high levels of lead can be dangerous is a far cry from evidence that interior residential lead paint may create a public health hazard due to the risk to children from low levels of lead. Likewise, evidence of what *Mr. Barnard* knew at a point in time *after* Fuller had ceased selling interior residential lead paint does not establish what *Fuller* knew decades earlier.

The remainder of the evidence Plaintiffs cite to shore up the holes in their evidence on Fuller-specific knowledge, is inadmissible hearsay, admitted only for the limited purpose of allowing the trial court to evaluate the opinions of Plaintiffs' experts, inadmissible expert testimony, and irrelevant trade association documents (also admitted for a limited purpose). Plaintiffs have failed to address

these defects or explain how unadmitted, inadmissible or irrelevant evidence may be transformed into substantial evidence of *Fuller's* knowledge. (*See* ConAOB/26 n.5)

First, Plaintiffs argue that their experts were permitted to testify concerning each Defendant's knowledge because such matters are outside the realm of common experience and that experts are permitted to rely on inadmissible evidence provided it is the type of evidence on which experts typically rely. (RB/61-62) But, Fuller's subjective knowledge was not the proper subject of expert testimony. *People v. Killebrew*, 103 Cal.App.4th 644, 652-53 (2002), disapproved on another ground by *People v. Vang*, 52 Cal.4th 1038, 1047 (2011); *In re Frank S.*, 141 Cal.App.4th 1192, 1199 (2006). And, while an expert can testify about what was "commonly known" within an industry at a point in time [*cf. Johnson v. Am. Standard, Inc.*, 43 Cal.4th 56, 74 (2008); *Quintal v. Laurel Grove Hosp.*, 62 Cal.2d 154, 163 (1964)], Plaintiffs' experts here purported to opine about what each expert believed each Defendant knew based solely on reading hearsay documents and not based on any special expertise. Such testimony should not have been admitted. *See Johnson*, 43 Cal.4th at 56; *Quintal*, 62 Cal.2d at 154.[5]

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[5] ConAgra lodged numerous objections to the testimony of Plaintiffs' experts and their reliance on hearsay documents admitted for the limited purpose of allowing the court to evaluate their

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Likewise, while an expert is permitted to rely on inadmissible evidence in forming his or her opinion, the leeway afforded experts in this regard is not a means to transform inadmissible evidence into proof of an ultimate fact. *People v. Gardeley*, 14 Cal.4th 605 (1996), the case on which Plaintiffs chiefly rely, recognizes this: "a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact." *Id.* at 619; *see also Korsak v. Atlas Hotels, Inc.*, 2 Cal.App.4th 1516, 1525 (1992) (while expert can rely on inadmissible evidence, expert cannot become vehicle for admission of inadmissible evidence). An expert's opinions must instead be based on admissible record evidence. *PG&E v. Zuckerman*, 189 Cal.App.3d 1113, 1135-36 (1987); *Garibay v. Hemmat*, 161 Cal.App.4th 735, 742-43 (2008).

Second, Plaintiffs' reference to medical journal articles to establish Fuller's knowledge is similarly deficient. (RB/56-57) While Plaintiffs state that each Defendant "kept abreast of the medical and scientific literature relating to lead paint and childhood lead poisoning," the record cites Plaintiffs supply do not support this statement as to Fuller. (*See* RB/19, citing 35RT/5309-10, 5318-19 [discussing Defendants other than Fuller], 5331-32 [discussing

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opinions. (*See, e.g.,* 36AA/10345-54; 25RT/3723-28; 28RT/4149-50, 4164-65; 32RT/4778-79; 35RT/5276-77, 5329-30, 5331-32)

Fuller, but saying nothing about whether Fuller kept abreast of developments in the medical and scientific literature])

Moreover, to the extent Plaintiffs argue it can be inferred Fuller was aware of this literature because "the sale of lead pigments and paints for interior use comprised a sizeable part of [Fuller's] business, and [Fuller] knew that the health harms caused by lead could jeopardize that business" [RB/65 (citations omitted)], this too is wrong. While an "inference can serve as substantial evidence for a finding, the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork." *Shandralina G. v. Homonchuk*, 147 Cal.App.4th 395, 411 (2007) (internal quotation marks omitted). The inference Plaintiffs suggest constitutes mere speculation about what Fuller may or may not have known 80 years earlier—speculation to which ConAgra cannot respond due to the lack of available witnesses and records. (*See* pp. 38-40, *infra* [addressing laches])

Third, the trade association documents from the 1930s Plaintiffs cite are not substantial evidence that Fuller had the requisite knowledge at the time of any "promotion." (*See* RB/20, 59, citing 35RT/5297-99 [1937], 5301-02 [1937], 5303-05 [1939], 5306-07 [1930]; 5335-39 [1955]) Moreover, Plaintiffs' argument that the trade association documents suffice to support a finding of Fuller's knowledge contradicts the trial court's findings as to ARCO. The trial court found that Fuller and ARCO were both

members of the LIA and NPVLA until 1935. (138AA/40940-42; *see also* 35RT/5276, 5287) Yet, the trial court concluded that ARCO (which unlike Fuller actually attended the associations' meetings) lacked the requisite knowledge required for nuisance liability. (138AA/41016) As a result, the trial court impliedly found that the trade association documents were insufficient standing alone to support a knowledge finding. *See Mohun v. Timm,* 20 Cal.App.2d 136, 139 (1937) (appellate court cannot imply findings that would create an irreconcilable conflict with other aspects of the judgment).

For all of these reasons, the trial court's knowledge finding as to Fuller is unsupported by either law or evidence.

III. THE TRIAL COURT COMMITTED LEGAL ERROR BY DISREGARDING THIS COURT'S PROMOTION STANDARD, AND PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE OF PROMOTION UNDER ANY STANDARD

A. The Trial Court Failed To Apply This Court's Standard For Promotion

In *Santa Clara I,* this Court held liability for nuisance requires a showing of Defendants' promotion of interior residential lead paint. To differentiate this "far more egregious" conduct from simply producing or failing to warn of a defective product, this Court explained the showing required "is quite similar to instructing the purchaser to use the product in a hazardous manner…." *Santa Clara I*, 137 Cal.App.4th at 309. This Court mandated these

promotion requirements, along with the knowledge requirement, to prevent public nuisance from becoming nothing more than a disguised product liability claim, which would be barred by the statute of limitations. *Id.* at 309, distinguishing *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal.App.4th 28, 42 (2004) (manufacturers and distributors of dry cleaning solvents who "specifically instructed a user to dispose of wastes in such a manner … to have caused or permitted a discharge" could be liable for nuisance) and *City of San Diego v. U.S. Gypsum*, 30 Cal.App.4th 575, 578 (1994) (manufacturers and distributors of asbestos-containing building materials could not be liable for nuisance).

To highlight the type of promotion which could give rise to nuisance liability, this Court pointed to Plaintiffs' allegations that Defendants concealed the dangers of lead, lobbied against the regulation of lead, and mounted a massive campaign to promote the interior use of lead paint in private homes. *Santa Clara I*, 137 Cal.App.4th at 306. Yet, Plaintiffs failed to prove that Fuller engaged in any such conduct. (ConAOB/28-31) Instead, Plaintiffs persuaded the trial court to impose liability based on generic advertising of any Fuller paint (with or without lead)—advertising which is indistinguishable from the mere production and sale of a product or failing to warn of its dangers.

Plaintiffs' brief embraces the trial court's erroneously broad legal standard imposing liability on Fuller for *any* advertisement of its paint at any time, irrespective of whether it mentioned lead,

related to interior use, or was placed after Fuller ceased selling interior residential lead paint. (RB/79-81) Plaintiffs also rely on evidence of advertisements placed by other companies.[6] (*See* Footnote 6, *infra*) Accordingly, judgment should be entered for ConAgra due to the trial court's misapplication of the promotion standard. At a minimum, a new trial should be ordered to evaluate that element under a legally correct standard for "promotion."

B. The Evidence Does Not Support A Finding Of Promotion By Fuller Even Under The Trial Court's Incorrect "Promotion" Standard

Applying its erroneous "promotion" standard, the trial court concluded Fuller promoted interior residential lead paint until 1948—*three decades* prior to the 1980 date through which the abatement order ran. (138AA/40955) And as established by the opening brief and confirmed by the respondent's brief,[7] there is insufficient evidence to support even the 1948 date. (ConAOB/29-31; RB/80-81)

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[6] Plaintiffs' expert conceded he had no information concerning any relationship between Fuller and other companies advertising Fuller paints. (29RT/4387)

[7] Contrary to Plaintiffs' claim [RB/80], ConAgra never conceded that *any* Fuller advertisements, including those prior to 1929, constitute actionable promotion. (*See, e.g.,* ConAOB/32 ["Setting aside that the ads in evidence are not the 'promotion' required in *Santa Clara I*…."])

To support their contention that Fuller promoted interior residential lead paint "throughout the 20th century," Plaintiffs point only to certain advertisements between 1929 and 1935, including generic advertisements for "paint." They argue that because Fuller produced lead paint during this period, its advertisements "promoted" interior residential lead paint. (RB/80-81)[8] But advertisements that do not mention interior lead paint cannot constitute the kind of promotion this Court outlined. *Santa Clara I,* 137 Cal.App.4th at 306, 309 ("similar to instructing the purchaser to use the product in a hazardous manner").

Plaintiffs try to fill this evidentiary void by referencing their experts' testimony as to what supposedly thousands of documents—*not in the record*—show. (RB/83-84) Plaintiffs ignore: (1) their burden to prove promotion through actual evidence; (2) the hundreds of advertisements Plaintiffs *did* present; and (3) the fact that the experts' testimony improperly intertwined both interior and

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[8] Plaintiffs cite only *one* advertisement placed after 1935 including "lead." (RB/80, citing 181AA/53890) This single advertisement, which never mentions interior residential use, was placed by the Fuller *Export* Department, which according to Plaintiffs' expert, sold lead paint to *Australia*, not in the jurisdictions. (181AA/53890; 29RT/4386) Plaintiffs cite to nine other advertisements from prior to 1935. (RB/80) Six are not Fuller-placed advertisements [181AA/53962, 53964; 182AA/54100, 54102] and the other three do not mention interior residential use [181AA/53999; 182AA/54001, 54245].

exterior lead paint advertisements, as well as generic paint advertising. (*See id.*)

1. The "Representative Advertisements" And "Expert" Testimony On Which Plaintiffs Rely Do Not Support A Finding That Fuller Promoted Interior Residential Lead Paint

Plaintiffs bear the burden of proof, and one can assume they chose and submitted the advertisements in their "representative" sample that are most favorable to their position. (*See, e.g.,* 29RT/4385*;* 36RT/5410 [Dr. Markowitz testified the advertisements are "representative" of other advertisements not submitted]; *see also Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal.App.4th 1160, 1206 (1996)) Plaintiffs point to no restrictions by the trial court on what advertisements they could submit, or why they chose not to submit all evidence necessary to support their case. (RB/80-81)

The advertisements Plaintiffs submitted did not establish "promotion" of interior residential lead paint through 1948. When Dr. Markowitz was questioned about a "representative" Fuller advertisement from 1961, he conceded (and the trial court agreed) that this advertisement *did not mention lead.* (29RT/4385, 4389) Similarly, Plaintiffs' "sample" includes not one Fuller-placed advertisement mentioning "lead" after 1935. (RB/80) It also includes multiple "representative advertisements" that advertised *exterior* paint. (*See*, *e.g.*, 148AA/43855, 43975-82, 44025, 44029, 44033, 44052-53, 44062) Thus, the only conclusion that the record

evidence supports is that Fuller placed some advertisements for lead paint in the 1910s and the 1920s, and ceased altogether after the mid-1930s. (*See* ConAOB/29-32)

Plaintiffs claim that to the extent the advertisements they submitted do not support the trial court's finding of promotion through 1948 (and they do not), their experts' testimony makes up for this shortfall. (RB/80-81) This argument also fails. As Plaintiffs' citation to *In re Lockheed Litig. Cases*, 115 Cal.App.4th 558, 563 (2004) makes clear, an expert cannot testify based on evidence that provides *no reasonable basis* for the expert's opinion. (RB/83)[9] For example, Plaintiffs' brief cites Dr. Markowitz's testimony that Fuller Pure Prepared paint contained white lead until 1958 [RB/25, 118], but he admitted this testimony was based on the testimony of Mr. Barnard [35RT/5285], who testified without contradiction that by the time he came to work for Fuller in 1948, Fuller no longer made *any* interior lead paint [ConAOB/5, citing 112AA/33088-90, 33102-03].

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[9] Contrary to Plaintiffs' contentions [RB/84], *Kraemer v. Superior Oil Co.*, 240 Cal.App.2d 642 (1966) (trial court may rely on properly supported expert testimony in complex land dispute) and *Lunghi v. Clark Equip. Co.*, 153 Cal.App.3d 485 (1984) (juries rely heavily on expert witness testimony in product liability design defect cases) have no relevance to the reading of advertisements into the record done by Plaintiffs' experts here.

Dr. Rosner's testimony, cited by the trial court in the ASOD, provides *no* dates for Fuller's alleged promotion of interior residential lead paint. (138AA/40956, citing 28RT/4251) Dr. Markowitz's testimony, also cited by the trial court in the ASOD, relied extensively on generic paint advertising without differentiating between interior and exterior paint. (138AA/40956, citing 35RT/5286-87) Similarly, an article about a Fuller radio "jingle" on which Dr. Markowitz relied never mentions lead paint. (28RT/4251; 4 SRA/58/913-914) Therefore, this expert testimony about "promotions" provides no support for Plaintiffs' contention that Fuller promoted interior residential lead paint, as this Court required.

2. The Trial Court Finding That The Trade Associations Were Not Defendants' Agents Precludes A Promotion Finding Based On Association Activity

Plaintiffs argue that trade association advertisements constitute legally sufficient proof that Fuller engaged in the required promotion and claim Defendants acted in a "concerted" fashion. (RB/80, 89) But, the trial court found to the contrary, stating that the trade associations could not be considered "agents" of any Defendants. (138AA/41029) That finding bars Plaintiffs' arguments that seek to satisfy the promotion element based on the actions of the legally distinct, non-agent trade associations. *See Westfour Corp. v. California First Bank*, 3 Cal.App.4th 1554, 1561-62 (1992)

(judgment cannot be upheld on grounds that contradict trial court's express findings).

With respect to the LIA advertising campaigns, there is no competent evidence Fuller participated in them. The only record cites that Plaintiffs or the trial court supplied in support of the notion that Fuller participated in the LIA's campaigns are cites to the testimony of Dr. Rosner. (*See* 138AA/40950-52; RB/26, 83, citing 28RT/4157-59, 4161-63, 4168, 4188) However, Dr. Rosner admitted that during deposition he testified Fuller did not contribute to these campaigns, he was unable to produce any evidence to support any changed testimony at trial, and he might be wrong. (29RT/4393-95)

And, both the record evidence and the trial court's findings make clear the NPVLA campaigns promoted "paint" generically and thus are not evidence of knowing promotion of interior residential lead paint. (*See* 138AA/40952-53; 28RT/4158, 4162-64; 29RT/4407) Thus, Fuller's alleged participation in those campaigns cannot support the trial court's promotion finding.

In sum, the record contains no Fuller-placed advertisements after 1935 that even mention lead. The advertisements after 1935 include numerous examples of advertisements solely for exterior paint or that merely advertise Fuller "paint." Accordingly, the evidence does not support the trial court's finding that Fuller promoted interior residential lead paint through 1948, and is

certainly insufficient to impose liability for abating all pre-1980 homes in the jurisdictions. Plaintiffs' attempts to buttress their deficient showing with expert testimony or trade association advertisements fails to fill this void in proof of promotion. For all of these reasons, the trial court's promotion finding as to Fuller is unsupported by either the law or the evidence.

IV. THE TRIAL COURT ERRED IN FINDING CAUSATION BECAUSE THE EVIDENCE DID NOT LINK THE PUBLIC NUISANCE TO ANY FULLER PROMOTION OF INTERIOR RESIDENTIAL LEAD PAINT WITH THE REQUIRED KNOWLEDGE

Plaintiffs ignore the standard this Court articulated in *Santa Clara I* and seek to stretch the law of causation beyond legal bounds. Thus, once again, a pure question of law is dispositive on this element—the very definition of causation demonstrates that Plaintiffs did not establish this requirement.

In *Santa Clara I*, this Court required liability "for assisting in the creation of a nuisance" to rest on knowing promotion. *Santa Clara I*, 137 Cal.App.4th at 308-10. If the nuisance would have resulted even without the defendant's knowing promotion, the defendant is not liable. *See Viner v. Sweet*, 30 Cal.4th 1232, 1240 (2003) (a defendant's conduct is not a substantial factor in bringing about harm if the harm would have been sustained even without that defendant's conduct).

Plaintiffs, like the trial court, focus on Fuller's past *production* of lead paint, without tying together the required causation elements: (1) knowledge, (2) promotion, and (3) the nuisance as the court defined it—widespread interior residential lead paint in the jurisdictions. (RB/84-86) There is no evidence that any knowing Fuller promotion substantially factored into the creation of a nuisance in the 3.55 million homes in the jurisdictions—mostly constructed between 1940 and 1980.

A. Plaintiffs Failed To Prove Knowing Fuller Promotion Was A Substantial Factor In Creating A Nuisance In The 3.55 Million Homes Subject To Abatement

Rather than address the required connection between these three elements (knowledge, promotion and substantial factor in creating the nuisance), Plaintiffs argue: (1) Fuller "manufactured lead pigments for use in paints"; (2) Fuller "operated [a] large lead pigment or paint manufacturing plant[]"; (3) Fuller "sold lead pigments and paints and had a 'substantial presence in the residential paint market'"; and (4) these factors plus the evidence of Fuller advertising support the trial court's causation finding. (RB/75, 84-93) But noticeably absent is citation to any evidence that ties together any Fuller *knowledge*, *promotion*, and *substantial assistance* in creating the nuisance.

As the evidence shows, there is no connection between: (1) the earliest date Plaintiffs' expert testified a reasonable paint company would have known of the hazards associated with interior

residential lead paint (1935); (2) the last date a Fuller advertisement in evidence mentions lead paint (1935); (3) the date measurement of BLLs first became possible (mid-1930s); and (4) the dates of construction of the 3.55 million homes in the jurisdictions through 1980 (2.75 million of which were built after the last Fuller advertisement that mentions lead). (*See* 180AA/53527, 53536, 53545, 53558, 53563, 53581, 53590, 53599 [number of homes constructed in each jurisdiction by decade])[10]

Plaintiffs' expert identified the mid-1930s as the date when, in his view, a responsible paint manufacturer should have ceased manufacturing interior lead paint. (36RT/5402) Approximately 91% of the Fuller advertisements mentioning lead paint were placed *prior to 1930*, and the last one mentioning lead was placed in 1935. There is thus no overlap between the last date Fuller allegedly "promoted" interior residential lead paint (1935) and the date by which it assertedly should have known that such a use was hazardous (1935).

Thus, there is *no* evidence, direct or otherwise, of Fuller's *promotion* of interior residential lead paint *while* it had *knowledge* of the purported hazard. Accordingly, there is *zero* evidence on which

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[10] Plaintiffs' arguments that their experts' testimony and the trade association advertising campaigns fill the gaps in the causation evidence [RB/91-92] fail for the same reasons as they did for the deficiencies in the promotion evidence. (*See* pp. 22-25, *supra*)

an inference of causation can be based, precluding Plaintiffs' reliance on cases stating that inferences are allowable. (RB 87, citing *State ex rel. Wilson v. Superior Court*, 227 Cal.App.4th 579, 604-05 (2014) and *Ermoian v. Desert Hosp.*, 152 Cal.App.4th 475, 500-01 (2007))

Not only is there no evidence of any knowing promotion by Fuller, but there certainly is no evidence that any such knowing promotion caused anyone to place lead paint inside any of the 3.55 million homes that are subject to abatement. Plaintiffs do not dispute that there were 691 paint manufacturers in California from 1910 to 1947, and thousands of paint retailers. (45RT/6644-46) Plaintiffs try to bypass this issue by arguing Fuller was among the "handful" of companies that manufactured and sold lead pigment *and* lead paint. (RB/24) However, the ASOD makes clear that liability was imposed based on promotion and sale of *interior residential lead paint*. (138AA/40928-29) The hundreds of paint manufacturers and thousands of paint retailers thus must be considered when evaluating substantial factor causation.

Given the number of paint manufacturers and retailers in California, and the absence of *any* evidence linking Fuller's conduct to the placement of any lead paint inside any home, the evidence of causation is insufficient. Plaintiffs cite no case that has sustained a causation finding where there is no evidence that permits an assessment of who contributed what to the problem at issue.

B. Plaintiffs Improperly Attempt To Classify All 3.55 Million Homes As A Single Indivisible Nuisance

The trial court's causation finding also fails due to another error of law on which the finding rests. To evade the absence of causation proof, Plaintiffs erroneously defined the "nuisance" as single and indivisible, arguing that the potential presence of lead paint inside multiple separate homes could be aggregated. By this device, Plaintiffs claimed, and the trial court agreed, it was unnecessary to prove Fuller's conduct caused the contamination of any single home, and it sufficed to *infer* that Fuller contributed to the collective contamination of all pre-1980 homes in some unspecified way. This is legally incorrect.

The controlling law holds that a party cannot be liable for a nuisance he or she did not create. *See Connor v. Grasso*, 41 Cal.2d 229, 232 (1953). The Restatement section that Plaintiffs cite recognizes that a defendant can be liable only for its own contribution to a nuisance. (RB/76, citing Restatement (Second) Torts § 840E) Every home here is a separate property, and there is no evidence that lead paint located in one home poses a risk to those who reside in a different home. Thus, there is no permissible basis to aggregate the homes. To hold ConAgra liable, Plaintiffs were required to prove which homes (if any) were contaminated as a result of actionable Fuller conduct. *See KFC W., Inc. v. Meghrig*, 23 Cal.App.4th 1167, 1178 (1994) (harm linked to specific property). Because Plaintiffs did not even try to make this showing,

there was a complete failure of causation proof, entitling ConAgra to judgment.

Plaintiffs' reliance on *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090 (1997), *People ex rel. Reisig v. Acuna*, 182 Cal.App.4th 866 (2010), and *People ex. rel. Totten v. Colonia Chiques*, 156 Cal.App.4th 31 (2007), for the proposition that Plaintiffs did not have to draw *any* connection between particular homes and Fuller's actions, is misplaced. (RB/87-88) All of these criminal gang injunction cases required a showing of a connection between the defendants' actions, the specific limited geographic area in which the activity occurred, and the purported nuisance—gang activity. *Id.*; *see also KFC W., Inc.*, 23 Cal.App.4th at 1178.

For the same reasons, the trial court's finding of causation cannot be affirmed based on Plaintiffs' argument that but for Fuller's conduct, there would be less lead inside homes in the jurisdictions. (RB/76) That is not the legally correct test since the homes may not be treated as indivisible. Moreover, given the complete failure to link purported Fuller knowledge to purported Fuller promotion, and to thereafter link such knowing promotion to any use of lead paint inside even one home, there is insufficient evidence to infer there would be *any* less lead paint in the jurisdictions but for knowing Fuller promotion. Because there is insufficient evidence that Fuller was a substantial factor in creating a hazard in *any* home, there is insufficient evidence to support the causation finding as to *all* the homes, even viewed collectively.

In sum, the evidence does not suffice to support the trial court's causation finding.

V. PLAINTIFFS DO NOT RESPOND TO THE FAILURE OF THE ABATABILITY ELEMENT

As ConAgra showed, courts in other states reject similar public nuisance claims against lead paint manufacturers as a matter of law on the ground, *inter alia*, that the defendants do not control the private homes in which the lead paint is found. (ConAOB/36-37) Our Supreme Court also precludes a public nuisance claim where the extent of contamination, and the cost and effectiveness of the remediation plan are unknown or uncertain. (ConAOB/37-38, citing *Mangini v. Aerojet-Gen. Corp.* 12 Cal.4th 1087, 1103 (1996) ("*Mangini II*"))

Plaintiffs do not respond to ConAgra's challenge to the abatability element. They thus fail to provide any persuasive ground to hold that the nuisance here is abatable. This is an independent reason why ConAgra is entitled to judgment.

VI. LACHES BARS PLAINTIFFS' NUISANCE SUIT AGAINST CONAGRA

Plaintiffs do not dispute that application of the doctrine of laches against a public entity is a question of law to be decided by this Court de novo. *City & Cnty. of San Francisco v. Ballard*, 136 Cal.App.4th 381, 392 (2006). Plaintiffs also do not dispute the material facts supporting laches taken from the ASOD.

Fuller ceased selling lead paint for interior residential use no later than 1948. (138AA/40955) In 1962, Fuller merged with Hunt Foods & Industries, Inc. ("Hunt"), which then transferred the Fuller paint business into a subsidiary. (138AA/40922) O'Brien acquired the Fuller paint business in 1967 from the Hunt subsidiary, which dissolved in 1968. (*Id.*) The Hunt merger that resulted in ConAgra also took place in 1968. (*Id.*) ConAgra has never operated a paint business and lead paint has been banned in the United States since 1978. (138AA/40933) But Plaintiffs did not sue ConAgra, as one of two alleged successors of Fuller (O'Brien being the other), until 2001, *53 years* after the last possible date Fuller sold interior residential lead paint, *34 years* after O'Brien acquired the Fuller paint business, and *23 years* after lead paint was banned.

Utilizing the de novo standard of review, this Court should conclude that Plaintiffs' nuisance suit against ConAgra is barred by the doctrine of laches.

A. The Defense Of Laches Applies To A Public Entity Suit To Abate A Public Nuisance

1. Section 3490 Bars Application Of Laches Only When A Defendant Seeks To *Continue* Harmful Conduct

Civil Code section 3490, entitled "Prescriptive Right Denied," proscribes a statute of limitations or laches defense for certain types of public nuisances. Not all public nuisance claims are exempt from the general rule requiring the timely filing of suit.

Rather, such an exemption applies only to *attempts to* "*legalize*" continuing public nuisances "*amounting to an actual obstruction of public right*." *See* Civ. Code § 3490 (emphasis added). Plaintiffs make no attempt in their brief to address this "legalize" language. (RB/111-12) They thus impliedly concede that the laches defense here does not seek to legalize *continuing* conduct. Under its plain language, section 3490 cannot bar ConAgra's laches defense.

The statutes distinguish between (1) a public nuisance that is injurious to health and (2) a public nuisance that is an actual obstruction of public right. *See* Civ. Code § 3479. It is only the latter to which the laches bar applies. Civ. Code § 3490. But it is only the former that describes the public nuisance found by the trial court. Contrary to Plaintiffs' assertion [RB/111], the trial court did not find an actual obstruction of public right (nor would such a finding be entitled to any deference). Instead, the court found that interior residential lead paint in pre-1980 homes in the jurisdictions "is injurious to health and interferes with the comfortable enjoyment of life and property." (138AA/40929-30; *see also Santa Clara I,* 137 Cal.App.4th at 305-06) The court then erroneously concluded *categorically* "that laches is not a defense to a public nuisance claim seeking abatement." (138AA/41001)[11]

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[11] Plaintiffs' reliance on *Acuna* [RB/51-52] is puzzling. In that case, the Supreme Court held that concerted *ongoing* gang activity in public areas of a neighborhood constitutes a public nuisance that

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As such, the trial court misconstrued the statute in concluding that laches did not apply to the public nuisance here.

2. Public Entity Actions Are Subject To Laches

Despite section 3490's inapplicability, Plaintiffs—relying almost exclusively on the trial court's erroneous interpretation of the law—argue that laches categorically cannot be applied against a public entity in an action to abate a public nuisance. (RB/111-12) That is simply not the law.

In support of this argument, Plaintiffs misconstrue Court of Appeal cases applying laches to such actions. (RB/113, citing *Ballard*, 136 Cal.App.4th at 386 and *City & Cnty. of San Francisco v. Pacello*, 85 Cal.App.3d 637, 641-642 (1978)) Those cases hold that laches may bar an action by a public entity to abate a nuisance if, as here, "'a grave injustice would be done if [laches] were not applied....'" *Ballard*, 136 Cal.App.4th at 392.

Plaintiffs argue that the Court should disregard *Ballard* and *Pacello* because they do not discuss section 3490. (RB/113) That is not surprising because *Ballard* and *Pacello* involve actions brought

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may be enjoined. *Acuna*, 14 Cal.4th at 1120. It did not conclude that such activity constituted an *actual obstruction* of *public right* and did not address laches at all.

by a public entity to abate public nuisances that were not actual obstructions of public rights. *Ballard*, 136 Cal.App.4th at 390-91 (fire sprinklers); *Pacello*, 85 Cal.App.3d at 645 (zoning and permit violations for rental unit). As such, section 3490 was facially inapplicable and there was no need to discuss it. More importantly, the two cases do show that there is no categorical prohibition against application of laches in actions by public entities to abate public nuisances not precluded by section 3490.

Plaintiffs also argue *Ballard* and *Pacello* are distinguishable in that they involve "nuisances per se." (RB/113) But Plaintiffs fail to explain why that makes a difference. A nuisance per se is conduct legislatively declared to be a nuisance by statute or ordinance. *Beck Dev. Co.,* 44 Cal.App.4th at 1206. A nuisance per se may also qualify as a public nuisance as described in section 3479. *See City of Bakersfield v. Miller*, 64 Cal.2d 93, 100 (1966) (fire hazard declared nuisance by ordinance also nuisance injurious to health under section 3479). Thus, section 3490 could apply to a nuisance per se amounting to an actual obstruction of public right.

Plaintiffs also ignore that the cases on which they rely [RB/111-12] have barred a laches defense only when a defendant attempts to *legalize* an *actual* obstruction of public right.[12] *People*

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12 Contrary to Plaintiffs' contention [RB/112], the dicta in *Mangini v. Aerojet-Gen. Corp.*, 230 Cal.App.3d 1125, 1142 (1991) that "[s]ection 3490 has been construed to mean that the statute of

Continued on next page.

v. Gold Run Ditch & Mining Co., 66 Cal. 138, 152 (1884) (continuing discharge of mine debris to obstructing river); *Bristow*, 103 Cal.App. at 756 (continuing pollution of water in irrigation ditch obstructing its flow); *see also Strong v. Sullivan*, 180 Cal. 331, 334 (1919) (continuing operation of portable lunch wagon); *Wade v. Campbell*, 200 Cal.App.2d 54, 61 (1962) (continuing operation of dairy); *Williams v. Blue Bird Laundry Co.*, 85 Cal.App. 388, 395 (1927) (continuing operation of laundry).

In short, the case law makes clear that there is no categorical prohibition against application of the doctrine of laches in an action by a public entity to abate a public nuisance.

B. The Public Nuisance Found By The Trial Court Is A Permanent Nuisance

Plaintiffs contend that, if the doctrine of laches may bar an action by a public entity to abate a public nuisance, the doctrine should not be applied here because the nuisance found by the trial court is a continuing nuisance to which laches is inapplicable.

Continued from previous page.

limitations is no defense to an action brought by a public entity to abate a public nuisance" must be understood in light of the actual obstruction cases it cites for that proposition. *See City of Turlock v. Bristow*, 103 Cal.App. 750, 756 (1930) (discussed on p. 35); *Town of Cloverdale v. Smith*, 128 Cal. 230, 235 (1900) (seeking to continue operation of ditch that flooded town streets).

(RB/113) Once again, resolution of this issue is a legal one for this Court to decide de novo.

The California Supreme Court stated the test for distinguishing between permanent and continuing nuisances in *Mangini II*, 12 Cal.4th at 1097-98. That test is "whether the nuisance can be abated at any time." *Beck Dev. Co.*, 44 Cal.App.4th at 1219-20. In this context, "abatable" means reasonably abatable in light of the considerations that enter into the determination, such as expense, time, and legitimate competing interests. *Mangini II*, 12 Cal.4th at 1100. Where the extent of contamination, the effectiveness of any remedial measures, and the costs of remediation are uncertain, the nuisance is not abatable. *Id.*

Plaintiffs address none of these considerations. They say only that the "abatement remedy ordered by the trial court uses proven methods that will dramatically reduce childhood lead poisoning …. Its economic benefits far exceed its costs." (RB/113) But Plaintiffs ignore: (1) the extraordinary $1.15 billion cost either standing alone or in relation to Fuller's conduct; (2) the Legislature's adoption of successful alternative remedies that already have dramatically reduced childhood BLLs; (3) the sheer speculation regarding whether the judgment will impact BLLs in the jurisdictions in light of their already reduced levels and other environmental lead sources; (4) the uncertainty concerning the extent of interior residential lead paint in the jurisdictions (let alone any such paint attributable to Fuller); and (5) the sheer speculation of how many homeowners will

become aware of the abatement program, contact the Plan administrator, allow entry to their homes for inspections, and allow abatement of any lead paint found.

Similar to *Mangini II* and *Beck*, here the extraordinary cost of abatement, the uncertainty concerning the extent of any problem, the availability of other alternatives adopted by the Legislature, and the unfeasibility and uncertain effectiveness of the abatement plan, show that the nuisance found by the trial court is not abatable, the nuisance is permanent, and laches bars this action.

C. ConAgra Was Severely Prejudiced By Plaintiffs' Extraordinary Delay

Plaintiffs do not dispute their decades-long delay in bringing this action, nor contend the delay was reasonable. (RB/113-14) Instead, they contend only that ConAgra failed to establish that it was prejudiced by Plaintiffs' delay. (*Id.*) Plaintiffs argue that because they bore the burden of proof, the absence of evidence caused by the delay harms them and not ConAgra.[13] The trial court made the same mistake. (138AA/41001) While ConAgra agrees that Plaintiffs failed to meet their burden of proof, that does not

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[13] *Marriage of Keener*, 26 Cal.App.4th 186, 192-93 (1994) was an adverse possession case in which "all presumptions favor the record owner of the property." The court held that since "all doubts are resolved against the adverse possessor," the prejudice due to the loss of testimony prejudiced the adverse possessor plaintiff and not the record owner defendant. *Id.*

mean that ConAgra was not also severely prejudiced by the extreme delay. If Plaintiffs' contention were the law, laches would never bar a plaintiff's claim.

The prejudice establishing a laches defense is shown where the plaintiff's delay causes detriment to the *defendant*. *See, e.g., Stafford v. Ballinger*, 199 Cal.App.2d 289, 296 (1962). And, changes in position by virtue of subsequent sales of a business also may constitute prejudice. *See id.* (sale of property). Prejudice may also arise from the loss of evidence. *Maguire v. Hibernia Sav. & Loan Soc'y*, 23 Cal.2d 719, 736 (1944) ("Where, for example, an action is commenced many years after its accrual, the death of witnesses or destruction of evidence, presumed as well as actual, may prejudice the defendant and justify denial of relief."); *Garrity v. Miller*, 204 Cal. 454, 460 (1928) (death of witnesses can constitute prejudice); *Getty v. Getty*, 187 Cal.App.3d 1159, 1171 (1986) (same); *Gerhard v. Stephens*, 68 Cal.2d 864, 904 n.44 (1968) (defendant need not establish that the testimony would have been favorable to him). Here, ConAgra has established prejudice as a matter of law—witnesses were deceased and documents were lost due to the fact the Fuller paint business changed hands.

ConAgra cataloged the prejudice caused by Plaintiffs' delay. (ConAOB/45-46) In a one-sentence response, Plaintiffs say only "ConAgra's reference to one witness who testified at deposition that he did not know what any lost records would have revealed is insufficient to establish prejudice." (RB/114) That is precisely the

point. Because of Plaintiffs' exceptionally long delay in filing suit, there *are no witnesses remaining* to testify about a 50-year old dissolved subsidiary of an alleged predecessor.

And Plaintiffs have nothing at all to say about the other examples of extreme prejudice caused to ConAgra by Plaintiffs' unreasonable delay. (*See* ConAOB/45-46)

In sum, Plaintiffs' unreasonable delay in bringing this suit against ConAgra as an asserted successor of Fuller prejudiced ConAgra, the asserted wrongful conduct is not continuing, and the Legislature has already resolved the competing public policies and implemented successful lead mitigation laws. (ConAOB/44-47) Laches bars the suit, so ConAgra is entitled to judgment.

VII. PLAINTIFFS DID NOT MEET THEIR BURDEN OF ESTABLISHING THAT CONAGRA IS A SUCCESSOR TO ANY FULLER LEAD PAINT LIABILITIES

Plaintiffs do not challenge that they bore the burden to prove ConAgra succeeded to Fuller's tort liabilities. (RB/114-20) In addition, Plaintiffs do not dispute that in 1964 Hunt created a subsidiary, WPFPC [RB/115 n.67], and do not challenge that Hunt transferred the Fuller paint business to that subsidiary. Nor do Plaintiffs challenge that WPFPC dissolved in 1968. Finally, Plaintiffs do not dispute that any successor liability of ConAgra was cut off as a matter of law if WPFPC accepted all past tort liabilities of the Fuller paint business in connection with the transfer of the

assets of that business. That leaves only one legal issue for this Court to resolve on appeal: did Plaintiffs prove ConAgra's successor liability for any lead paint liabilities of Fuller when the undisputed evidence shows a transfer of the assets and all liabilities of the Fuller paint business to WPFPC, *prior to the 1968 merger that gave rise to ConAgra*. The answer is no.

A. The Material Evidence Concerning WPFPC's Acceptance Of All Liabilities Of The Fuller Paint Business Is Undisputed

Plaintiffs contend that they established successor liability by presenting evidence of several corporate transactions that took place after Fuller stopped selling interior residential lead paint. (RB/115) But Plaintiffs cannot meet their burden of proof by presenting part of the historical evidence and ignoring the rest.

Plaintiffs acknowledge that Hunt created WPFPC and transferred the Fuller paint business to that subsidiary. (RB/115 n.67) The December 9, 1964 Board Resolution documenting the transfer of the paint business provides: "RESOLVED, that this Corporation [WPFPC] accept the proposal that [Hunt] transfer to this Corporation the inventories, rights, credits, good will and other assets, other than certain fixed assets, consisting principally of certain lands, buildings, machinery and equipment which have been mutually agreed upon, of the business carried on by W.P. Fuller & Co., a Division of Hunt, *subject to all of its liabilities*." (123AA/36461, emphasis added).

Thus, the WPFPC Board Resolution documents an offer by Hunt to transfer assets of the Fuller paint business to WPFPC and the acceptance by WPFPC of that offer and "all" liabilities of the Fuller paint business. This evidence is all that is necessary to establish WPFPC's acceptance of the Fuller paint liabilities. *See Henkel v. Hartford Accident and Indem. Co.*, 29 Cal.4th 934, 939 (2003) (existence of contract to transfer assets and liabilities may be shown by board resolutions). Because the Board Resolution shows that the Fuller paint liabilities passed to WPFPC, which then was sold to O'Brien, the record precludes a finding that Plaintiffs met their burden to prove ConAgra's successor liability.

Recognizing the Board Resolution contradicts their successor liability claim, Plaintiffs devote 1½ pages of their brief [RB/115-116] to evidentiary objections to the Board Resolution even though (1) Plaintiffs themselves submitted this evidence to the trial court [123AA/36400-06, 36460-65; 40RT/6008-09], (2) they did not object to its admission [40RT/6008-09], (3) the trial court admitted the evidence for all purposes [123AA/36398]; and (4) Plaintiffs themselves point the Court to a 1999 Delaware lawsuit between O'Brien and Hunt-Wesson (ConAgra's predecessor) involving the same Board Resolution. (RB/117 n.68, citing *The O'Brien Corp. v. Hunt-Wesson, Inc.*, 1999 WL 126996, *3 (Del. Ch. Feb. 25, 1999)). Needless to say, any objections to the Board Resolution have been waived [*Keener v. Jeld–Wen, Inc.*, 46 Cal.4th 247, 264 (2009)], particularly in light of Plaintiffs' reliance on similar documents to try to establish successor liability for ConAgra.

In any event, Plaintiffs' current argument that the Board Resolution is not admissible gets them nowhere since they bore the burden to prove successor liability. Merely negating the resolution does not satisfy Plaintiffs' affirmative burden of proof. *See Reese v. Smith* 9 Cal.2d 324, 328 (1937) ("'If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary); *Roddenberry v. Roddenberry*, 44 Cal.App.4th 634, 655 (1996) ("An absence of evidence is not the equivalent of substantial evidence. If an absence of evidence could satisfy the burden of proof, the concept of burden of proof would have no meaning.") (citation omitted); *Estate of Kuttler*, 185 Cal.App.2d 189, 198 (1960) ("Rejection of [witness] testimony does not create evidence to the contrary of what is thus discarded.").

Because no substantial evidence affirmatively proves ConAgra succeeded to Fuller's paint liabilities, Plaintiffs failed to meet their burden of proof and ConAgra is entitled to judgment.

B. Hunt's Transfer Of The Assets And Liabilities Of The Fuller Paint Business To WPFPC Cuts Off Any Successor Liability For ConAgra

The Board Resolution documented an agreement between Hunt and WPFPC to transfer the Fuller paint business assets to WPFPC and an acceptance by WPFPC of all the liabilities of that paint business. Plaintiffs contend that the agreement did not clearly provide for the assumption of the Fuller tort liabilities. But, as a

case cited by both parties makes clear [RB/117, ConAOB/52], the acceptance by WPFPC of "all" liabilities was sufficient to transfer the tort liability for the paint business to WPFPC. *SCM Corp. v. Berkel, Inc.*, 73 Cal.App.3d 49, 58 (1977).

In *SCM*, a product liability plaintiff sued both the successor of the original manufacturer (SCM) and a corporation that purchased a product line from the original manufacturer (Berkel) for personal injuries arising out of a product. *Id.* at 52-53. The product line transfer agreement provided that Berkel agreed to "assume all liabilities, obligations, contracts, orders for the purchase of materials and warranties" related to that product line. *Id.* at 54. The court held that the assumption of "all liabilities" included the assumption of product liability: "[w]e conclude that although principles of contract law should apply and the intention of the parties should be determinative, it should not be necessary to look for unusually clear, express language in order to find a provision transferring tort liability in the sale of a business or line of business." *Id.* at 58-59.

As ConAgra explained [ConAOB/52], the holding of *SCM* is consistent with public policy: "[f]rom the standpoint of deterring the manufacture of future defective products, it would appear to be more important to deter the corporation which is still manufacturing that line of products than the corporation which is no longer making them.... [I]f corporations in [Berkel's] position are forced to bear the loss, they are in a better position to spread the loss among other

users of the same type of product, while [SCM] is no longer in a position to do so." *SCM*, 73 Cal.App.3d at 57.[14]

Just like the SCM/Berkel agreement, the agreement between Hunt and WPFPC transferred all the liabilities of the Fuller paint business to WPFPC. Accordingly, WPFPC assumed any of Fuller's paint-related tort liabilities, including product liability and the nuisance liability at issue in this case and those liabilities did not remain with Hunt and were not transferred by merger to ConAgra.[15]

C. WPFPC's Sale Of The Fuller Paint Business To O'Brien And O'Brien's Continuation Of That Paint Business Passed The Liabilities Of The Paint Business From WPFPC To O'Brien

In 1967 O'Brien acquired the Fuller paint business from WPFPC/Hunt and continued that business as Fuller-O'Brien. *See,*

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[14] The other cases cited by plaintiffs [RB/117] stand for non-controversial (albeit irrelevant) statements of law with which ConAgra agrees. *Burbank Studios v. Workmen's Comp. Appeals Bd.*, 134 Cal.App.3d 929, 935 (1982) (contract elements include an offer and acceptance); *California Nat'l Bank v. Woodbridge Plaza LLC*, 164 Cal.App.4th 137, 143 (2008) (language in a contract must be construed as a whole); *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal.2d 40, 44 (1964) (agreements for indemnification *against one's own* negligence must be clear and explicit).

[15] Although not addressed by Plaintiffs, as ConAgra established in its opening brief [ConAOB/51-52], WPFPC, then WPF, Inc., dissolved in 1968. Under Delaware law, no suit for a defective product may be brought against a dissolved corporation more than three years after its dissolution. Thus, any claims based on liabilities of Fuller transferred to WPFPC are time barred.

e.g., O'Brien, 1999 WL 126996, *2 ("On June 30, 1967, Fuller-O'Brien Corporation, a Delaware corporation, purchased certain assets of Hunt-Fuller, a Delaware corporation. At the time of the asset purchase (the '1967 Asset Purchase'), Fuller-O'Brien was a wholly-owned subsidiary of O'Brien, an Indiana corporation. Hunt-Fuller was a wholly-owned subsidiary of Hunt Foods and Industries, Inc. ('Hunt Foods'), a Delaware corporation. [¶] In 1975, Fuller O'Brien merged into O'Brien. O'Brien is its successor-by-merger."). Although Plaintiffs again quibble about the evidence that they submitted and to which they did not object [RB/119], those arguments are waived and there is no conflicting evidence.

As a result, O'Brien was the successor to the Fuller paint business liabilities. *See Ray v. Alad Corp.*, 19 Cal.3d 22, 31 (1977). On appeal, Plaintiffs contend that the product line exception applies only to strict product liability and does not apply to other torts like nuisance. (RB/119) Successor liability applies, however, where the transaction is a de facto merger or the purchase of assets of a business is a mere continuation of the seller's business. *Ray,* 19 Cal.3d at 28. Successor liability is an equitable doctrine. *Cleveland v. Johnson*, 209 Cal.App.4th 1315, 1331 (2012). "As with other equitable doctrines, it is appropriate to examine successor liability issues on their own unique facts and considerations of fairness and equity apply." *Id.* at 1330 (internal quotation marks omitted).

Here, public policy and equitable considerations support a conclusion that the asset sale was a de facto merger of WPFPC (which then dissolved) and that Fuller-O'Brien was a mere continuation of the Fuller paint business operated by WPFPC, and thus O'Brien is the successor of the Fuller paint business. As this Court recognized in *Santa Clara I,* the allegations in this case addressed both public nuisance and product liability causes of action [137 Cal.App.4th at 310]. Thus, there is no sound reason why the product line exception should not be applicable. *Cf. Monarch Bay II v. Prof'l Serv. Indus., Inc.*, 75 Cal.App.4th 1213, 1217-18 (1999) (refusing to extend product line exception to professional negligence).

For all these reasons, the Court should hold that Plaintiffs did not establish that ConAgra was the successor of Fuller and should reverse the judgment against ConAgra.

VIII. NEITHER DUE PROCESS NOR THE EVIDENCE SUPPORT THE TRIAL COURT'S EXCESSIVE DAMAGES AWARD

The trial court's remedy bears no relationship to the remedy authorized by this Court or to any harm caused by Fuller. This Court previously limited Plaintiffs' remedies to abatement, in order to prevent the public nuisance claim from morphing into a products liability claim. *Santa Clara I*, 137 Cal.App.4th at 313. In sustaining the trial court's demurrer to Plaintiffs' class-action public nuisance claim, this Court rejected claims for any damages, holding that "the class plaintiffs' public

nuisance cause of action is much more like a products liability cause of action because it is, at its core, an action for damages for injuries caused to plaintiffs' property by a product, while the core of the representative cause of action is an action for remediation of a public health hazard." *Id.*

Yet, the trial court nonetheless awarded $1,150,000,000 to Plaintiffs for injuries to private homes allegedly caused by Defendants' paint products. (138AA/41027) Additionally, the trial court dispensed with each of the Defendants' due process rights by appointing a party (the State) as a "receiver" for the fund, without the "receiver" or Defendants' consent and without any hearing to determine whether such an entity qualified to act as a receiver. (138AA/41020) The judgment must be reversed because of the improper remedy ordered by the trial court.

A. The Abatement Plan Is Nothing More Than A Damages Award For Past Harm—Which Is Barred In A Representative Public Nuisance Action

Plaintiffs are entitled solely to injunctive relief and not damages. *Santa Clara I*, 137 Cal.App.4th at 310-311. "[T]he plaintiffs in a representative public nuisance action may not avoid this rule by seeking damages in the form of the 'costs of abatement.'" *Id.* The Plan is nothing more than a thinly-disguised damages award to Plaintiffs for unattributed past harm to private homes over which Defendants have no control. (138AA/41027 ["The [d]efendants against whom judgment is entered, jointly and severally, shall pay to the People of the State of California, in a manner consistent with California law, $1,150,000,000…."])

The Plan funds are to be disbursed to each Plaintiff supervised solely by each jurisdiction's board of supervisors or city council, with no oversight. And although the Plan nominally refers to the possibility that unused funds will be returned to Defendants, no method is established for any such return. (138AA/41028) Funds that Defendants have no ability to recover cannot be other than a damages award to Plaintiffs.

In arguing that payment of $1,150,000,000 into the abatement fund is injunctive relief and not damages, Plaintiffs rely on the holding of only a single California case. (RB/126, citing *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 837-41 (1990)) But that case holds exactly the opposite of what Plaintiffs claim. *AIU Ins.*, 51 Cal.3d at 837 ("reimbursement of environmental response costs is 'damages'"). And, the other authorities cited by Plaintiffs are of no relevance. (RB/125, citing *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982) [dicta concerning whether a preliminary injunction could require the defendant to fund a diagnostic study under federal statute] and *Cnty. of Santa Clara v. Superior Court*, 50 Cal.4th 35, 55-56 (2010) [noting that under the procedural history of this case Defendants may be required to pay into an abatement fund])[16]

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16 The cases cited by Plaintiffs for the proposition that court-ordered abatement funds are routine [RB/125 n.71] establish nothing of the kind. For the most part the funds were established pursuant to stipulation or did not involve an abatement fund at all. *Rickley v. Goodfriend*, 212 Cal.App.4th 1136, 1143 (2013) (suit against attorney for misuse of trust account funds); *Safeco Ins. Co. v. Fireman's Fund Ins. Co.*, 148 Cal.App.4th 620, 627 (2007) (insurance dispute involving settlement payment into a trust); *People ex rel. City of Willits v. Certain*

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Finally, the costs that make up the abatement fund include "outreach" to persuade property owners to voluntarily enroll in the Plan [134AA/39742-43], the maintenance of a public database of suspected lead paint properties [*id.*], inspections of 3.55 million homes in the jurisdictions built prior to 1981 [*id.*], the development of "actionable lead hazard control work specifications" for individual homes [134AA/39747], the replacement and not remediation of windows, doors and floors [134AA/39742], covering outside soil [*id.*], the repair of building deficiencies such as water leaks [*id.*], and education of families [*id.*]. Not only does the Plan impermissibly exceed the lead paint remediation standards set forth in the applicable statutes and regulations [*see* ConAOB/54-55] (an issue that Plaintiffs fail to address), as this laundry list of costs included in the trial court's abatement fund remedy makes clear, the $1,150,000,000 is damages masquerading as an injunction.

Accordingly, the remedy must be reversed.

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Underwriters at Lloyd's of London, 97 Cal.App.4th 1125, 1127-28 (2002) (insurance dispute involving consent decree for trust fund); *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F.Supp. 180, 188 (D.D.C. 1984) (preliminary injunction requiring plane manufacturer to pay for diagnostic tests to determine whether children were suffering from brain dysfunction due to crash of defendants' plane).

B. The Trial Court's Appointment Of A Party-Affiliated Receiver With No Notice Or Hearing Deprived Defendants Of Their Due Process Rights And Usurped The Functions Of The Executive And Legislative Branches

Plaintiffs argue that the trial court did not usurp the legislative function, by claiming the court simply "interpreted" the law in authorizing this unprecedented nuisance remedy. (RB/122) But the cases demonstrate that the judiciary interprets *existing* laws. (*Id.*)[17] Plaintiffs point to no existing regulatory scheme the court interpreted to support the court's creation of an overbroad plan requiring oversight by various governmental agencies and coordination in numerous jurisdictions. Moreover, Plaintiffs' record citations demonstrate the CLPPB engages in educational and abatement activities, meaning this judgment infringes on the core duties of

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[17] None of the cases in the respondents' brief support the trial court's creation of a legislative-type, broad-based scheme involving numerous governmental agencies. *See McClung v. Emp't Dev. Dep't*, 34 Cal.4th 467, 469 (2004) (legislative branch enacts laws, and interpreting these laws is a judicial function); *Le Francois v. Goel*, 35 Cal.4th 1094, 1103 (2005) (legislature may enact statutes affecting functions of judicial branch); *In re Shawna M.*, 19 Cal.App.4th 1686, 1690 (1993) (reversing trial court's improper delegation of its discretion to a State agency); *Marine Forests Soc. v. California Coastal Comm'n*, 36 Cal.4th 1, 45 (2005) (evaluated the *Legislature's* impingement on core *executive* functions); *California Oregon Power Co. v. Superior Court*, 45 Cal.2d 858, 869-71 (1955) (addressing court's *jurisdiction* over whether a State agency created a nuisance, and refusing to address whether any *remedies* the court might order are beyond the court's power); *Acre v. Kaiser Found. Health Plan, Inc.*, 181 Cal.App.4th 471, 501-02 (2010) (trial court could address whether health care plans cover certain treatments, because legislative-type evaluations of complex issues of economic policy were not required); *In re Rosenkrantz*, 29 Cal.4th 616, 662-67 (2002) (affirming judiciary's power to review a decision by the executive branch).

a State agency. (33RT/4912 [describing CLPPB's education programs and policies for reducing lead in homes, soil, gasoline and cans])

Plaintiffs also never address another fundamental error in the trial court's appointment of the State as a receiver—the State never consented to act as a receiver. The judicial branch cannot usurp the legislative and executive branch functions by pressing a government agency into service to implement an ad hoc "plan" in which the State had no input.

In addition, Plaintiffs fail to address the State and the CLPPB's status as party-affiliated entities, preventing either from acting in the interests of all parties; in fact, *none* of the cases Plaintiffs cite authorize a court to appoint a party or party-affiliated entity to act as a receiver. (RB/127-129, citing *City and Cnty. of San Francisco v. Daley*, 16 Cal.App.4th 734, 744 (1993) [no argument that receiver was a party or party-affiliated entity]; *City of Santa Monica v. Gonzalez*, 43 Cal.4th 905, 916 (2008) [third-party receiver unrelated to the parties]; *McCarthy v. Poulsen*, 173 Cal.App.3d 1212, 1219 n.3 (1985) [reversing appointment of parties as trustees when they did not agree to appointment]; *Boland v. Cecil*, 65 Cal.App.2d Supp. 832, 841 (1944) [suit against public officer is essentially suit against State]) Nor have Plaintiffs cited to any case stating a *State or one of its agents* may act as a receiver. (RB/127-28, citing *Havemeyer v. Superior Court*, 84 Cal. 327, 389-90 (1890) [when a receiver is a person, the receiver holds property on the court's behalf]; *Pac. Indem. Co. v. Workmen's Comp. Appeals Bd.*, 258 Cal.App.2d 35, 40 (1968) [same])

Plaintiffs also provide no authority that any monies received by the State, as required by the Plan, would not be placed into the State treasury and subject to all of the regulations governing the treasury as opposed to the control of the court, as a receivership requires. (*Compare* 138AA/41027 ["The Defendants against whom judgment is entered, jointly and severally, shall pay to the People of the State of California, in a manner consistent with California law, $1,150,000,000…."] *with State v. Altus Finance, S.A.*, 36 Cal.4th 1284, 1298 (2005) [affirming court's authority *by statute* to order title to all of company's assets to be held in Insurance Commissioner's name as conservator of a bankrupt insurance company—but noting that the "proceeds were not transferred to the state's General Fund"]). Indeed, there is no authority for Plaintiffs' claim that receivership funds deposited into the State treasury could be treated any differently than other treasury funds.

Finally, Plaintiffs attempt to distract from the fact that the trial court held no evidentiary hearing on the appointment of a receiver, by claiming the issue arose during the bench trial and post-trial motions. (RB/128-29) However, Plaintiffs first raised the issue of a receiver in a motion to modify *after* the court issued a judgment. (135AA/40105-11) The motion did not set forth any of the factual requirements necessary to appoint a receiver. (*Id.*; Civ. Proc. Code § 564, et seq. [noting requirements for a receiver such as the receiver not being a party or person interested in the action, and posting a bond]) And the court held no evidentiary hearing dedicated to establishing the elements necessary for the appointment of a receiver in this action. (48RT/7642-49)

Plaintiffs cite no cases authorizing appointment of a receiver without such an evidentiary hearing. (RB/128-29, citing *Fed. Nat'l Mortg. Ass'n v. Bugna*, 57 Cal.App.4th 529, 533 n.1 (1997) [reversing order directing funds to receiver following ex parte appointment of receiver]; *Neider v. Dardi*, 130 Cal.App.2d 646, 650 (1955) [affirming appointment of a receiver with no mention of a hearing]; *Cohen v. Herbert*, 186 Cal.App.2d 488, 494 (1960) [order appointing a receiver reversed because defendants did not have sufficient time to prepare for the *hearing* appointing the receiver]) The trial court simply adopted Plaintiffs' proposed revisions to its statement of decision, and appointed the State a receiver without any proof the State agreed to the appointment or met any of the requirements for a receiver. (136AA/40296-306; 138AA/40916-41053; Civ. Proc. Code § 564, et seq.)

The trial court's failure to hold an evidentiary hearing to determine the statutory requirements of whether (1) a receiver was warranted in this case and (2) Plaintiffs' proposed receiver met any of the requirements of a receiver, violated Defendants' due process rights. The judgment should be reversed for this reason as well.

IX. TRIAL ERRORS DEPRIVED DEFENDANTS OF THEIR RIGHTS TO RECEIVE A FULL AND FAIR TRIAL

A. The Trial Court's Blanket Denial Of Recross-Examination Was Reversible Error

In no reported California case has a trial court forbidden all recross-examination, without regard to the content of the direct testimony or its effect upon the trial.

There are good reasons for this 150 years of judicial forbearance. The California Supreme Court declared cross-examination to be a "fundamental right" in 1859. *Jackson v. Feather River & Gibsonville Water Co.*, 14 Cal. 18, 23 (1859). The Evidence Code empowers the trial judge to control the order and extent of witness examination. *See*, *e.g.*, Evid. Code §§ 320, 352. Recognizing that truth is the ultimate goal, judges are required to exercise discretion before prohibiting cross-examination. *Id.*

The trial court had a different view: "[w]e don't do [recross-examination] here. Read the Guidelines. We have direct, cross, and redirect." (30RT/4504) This prohibition extended to every witness no matter what he or she said on redirect examination. As a consequence the trier of fact received abundant and often critical testimony which was untested by cross-examination.

Plaintiffs rely mainly on an unpublished federal district court decision in support of their argument that recross-examination was unnecessary, *United States v. Kerr*, 2013 WL 4430917, *9 (D. Ariz. Aug. 16, 2013). In *Kerr*, the district court upheld its own earlier ruling that recross-examination would not be allowed because "the Government did not raise new matters on redirect examination." *Id.* at *8, *12. The court's analysis says that as a matter of due process, recross-examination must be permitted as to "new matter" introduced on redirect, but is otherwise subject to the court's discretion. *Id.* at *12.

After the trial in this case, *Kerr* was affirmed by the Ninth Circuit in *United States v. Quiel*, -- F. App'x. --, 2014 WL 7234935 (9th Cir. Dec. 19, 2014), which confirmed that recross-examination is discretionary in some circumstances, but mandatory in others: "allowing recross is within the sound discretion of the trial court except where new matter is elicited on redirect examination, in which case denial of recross as to that new matter violates the Confrontation Clause." *Id.* at *1.

This is not the law in California. Recross-examination is defined in Evidence Code section 763, and recognized as part of the usual interrogation of witnesses in section 772(a). No reported case suggests that recross-examination may be eliminated arbitrarily. This is consistent with the Evidence Code which vests trial courts with discretion to control the examination of witnesses. The trial court's blanket rule was the antithesis of discretion.

Plaintiffs make two other arguments. (RB/109-10) One is failure to object. But ConAgra and its co-defendants did object again and again. (25RT/3792; 30RT/4504-05; 31RT/4691; 37RT/5584, 5592, 5599-600, 5653; 38RT/5821-24; 40RT/6001) In fact, the trial court gave ConAgra a standing objection to the prohibition against recross-examination. (30RT/4505)

Moreover, "[a]n objection is not required when it would have been futile." *People v. Sandoval*, 41 Cal.4th 825, 837 (2007); *see also People v. Perkins*, 109 Cal.App.4th 1562, 1567 (2003). The

stated "reason" for the trial court's prohibition was simply that "[W]e don't do that here." (30RT/4504) Defendants invoked Evidence Code section 772, but to no avail. (30RT/4504-05) Nothing in the record suggests that another objection could have dislodged the trial court's arbitrary and categorical ban on recross-examination.

Finally, Plaintiffs argue that no prejudice has been shown. Their own brief, however, is compelling evidence to the contrary. After the trial court told the experienced Plaintiffs' counsel that evidence developed on redirect examination could not be challenged, Plaintiffs took full advantage of that erroneous ruling to introduce the meat of their case on redirect examination.

That is what their brief shows. Dozens of times Plaintiffs have cited to redirect examinations as the record evidence for propositions they consider fundamental to their case. (RB/7, 10-13, 15-16, 18, 20, 27-30, 42, 60-61, 64, 104, 109, 130-32, citing 25RT/3791-93; 26RT/3929; 27RT/4113; 30RT/4474-75, 4478-79; 31RT/4689, 4690, 4732; 32RT/4774-75, 4881, 4883-84; 33RT/4974-75, 5014-15, 5048, 5051; 37RT/5574-83, 5585-86, 5590-91, 5594-600, 5602-05, 5607-10, 5614-15, 5618, 5632-33, 5641, 5643-44, 5646-53; 39RT/5804, 5809-10, 5812-13, 5815-16, 5822-23, 5894-95, 5925-26; 40RT/5999; 46RT/6870-7) In many instances the citations to redirect examination are augmented by citations to other examinations, but it is impossible to know which questions and answers were critical to the decision. Because it is

impossible to show with exactitude how the denial of recross-examination affected the outcome, prejudice necessarily is inferable where the prohibited examination could have addressed a material disputed point at trial. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) ("A reasonable jury might have received a significantly different impression of Fleetwood's credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.").

California requires trial judges to exercise their discretion. "We don't do that here" is arbitrary, not discretionary. It inhibits the search for truth and denies due process. The blanket prohibition on all recross-examination warrants reversal of the judgment.

B. "Limited Purpose" Documents Considered For The Truth Of Their Content

In its opening brief, ConAgra identified the archive of documents which the trial court admitted for the "limited purpose of evaluating expert opinions," but subsequently relied on in making its decision. (ConAOB/21-22; 25-26) Plaintiffs' attempts to justify the erroneous admission and use of these materials are addressed above. (*See* pp. 13-16, 23, *supra*)

C. Hearsay Improperly Admitted As "Government Documents"

In its opening brief, ConAgra identified a distinct, but not dissimilar evidentiary error—the wrongful admission of hearsay

"government documents." (ConAOB/60 n.14) Plaintiffs chose not to address this point, which the Court may construe as an admission. *People v. Werner*, 207 Cal.App.4th 1195, 1212 (2012); *People v. Bouzas*, 53 Cal.3d 467, 480 (1991).

X. JOINDER IN BRIEFS OF CO-APPELLANTS

ConAgra joins in and incorporates all common grounds in the reply briefs of NL Industries, Inc. and the Sherwin-Williams Company, including Sections II.C (knowledge), II.D (first amendment) and II.F (right to jury trial) of NL's reply brief and Sections II.B (knowledge), III.A (first amendment), III.B-C (due process), IV (separation of powers) and V.A-B (fair trial—specifically, denial of recross-examination and time limits) of Sherwin-Williams' reply brief.

XI. CONCLUSION

By their inability to answer the points raised in the opening briefs, Plaintiffs have confirmed that the judgment should be reversed with directions to enter judgment for ConAgra. Alternatively, in no event does this record support judgment against ConAgra for abating any homes constructed after 1935. So at a minimum, this Court should reverse and order a new trial limited to determining whether Fuller's pre-1936 conduct warrants any abatement liability for any homes constructed prior to 1936.

DATED: February 6, 2015

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CERTIFICATION OF WORD COUNT PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(C)(1)

I, Raymond A. Cardozo, declare and state as follows:

1. The facts set forth herein below are personally known to me, and I have firsthand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

2. I am one of the appellate attorneys principally responsible for the preparation of the Appellant's Reply Brief in this case.

3. The Appellant's Reply Brief was produced on a computer, using the word processing program Microsoft Word 2010.

4. According to the Word Count feature of Microsoft Word 2010, the Appellant's Reply Brief contains 13, 785 words, including footnotes, but not including the table of abbreviations, table of contents, table of authorities, signature block, and this Certification.

5. Accordingly, the Appellant's Reply Brief complies with the requirement set forth in Rule 8.204(c)(1), that a brief produced on a computer must not exceed 14,000 words, including footnotes.

I declare under penalty of perjury that the forgoing is true and correct and that this declaration is executed on February 6, 2015, at Los Angeles, California.

Raymond Cardozo

Raymond A. Cardozo

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Court of Appeal, Sixth Appellate District, Case No. H040880
(Santa Clara Superior Court Case No. 1-00-CV-788657)

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 101 Second Street, Suite 1800, San Francisco, CA 94105. On February 6, 2015, I served the following document(s) by the method indicated below:

APPELLANT CONAGRA GROCERY PRODUCTS COMPANY'S REPLY BRIEF AND JOINDER IN REPLY BRIEFS OF NL INDUSTRIES, INC. AND THE SHERWIN-WILLIAMS COMPANY

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth in the attached Service List. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

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☐ BY ☐ UPS NEXT DAY AIR ☐ FEDERAL EXPRESS ☐ OVERNIGHT DELIVERY: I deposited such envelope in a facility regularly maintained by ☐ UPS with delivery fees fully provided for or delivered the envelope to a courier or driver of ☐ UPS authorized to receive documents at Reed Smith LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, California 90071 with delivery fees fully provided for.

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Myra R. Taylor

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