H040880

# IN THE COURT OF APPEAL
# OF THE STATE OF CALIFORNIA
## SIXTH APPELLATE DISTRICT

**THE PEOPLE OF THE STATE OF CALIFORNIA,**
*Plaintiff, Appellee, and Appellant,*

*v.*

**ATLANTIC RICHFIELD COMPANY, et al.,**
*Defendants and Appellants.*

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA • CASE NO. 1-00-CV-788657
JAMES P. KLEINBERG, JUDGE

# REPLY BRIEF OF DEFENDANT, CROSS-COMPLAINANT AND APPELLANT THE SHERWIN-WILLIAMS COMPANY AND JOINDER IN REPLY BRIEFS OF CONAGRA GROCERY PRODUCTS COMPANY AND NL INDUSTRIES, INC.


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## GLOSSARY OF TERMS

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|---|---|
| **4AC** | Fourth Amended Complaint, dated March 16, 2011 |
| **BLLs** | Blood lead levels |
| **CDC** | United States Centers for Disease Control and Prevention |
| **CDPH** | California Department of Public Health |
| **CLPPB** | Childhood Lead Poisoning Prevention Branch |
| **CLPPP** | Childhood Lead Poisoning Prevention Program |
| **COB** | Opening Brief of ConAgra Grocery Products |
| **CPSC** | United States Consumer Products Safety Commission |
| **EBLLs** | Elevated Blood Lead Levels |
| **HUD** | United States Department of Housing and Urban Development |
| **LBP** | Lead-based paint |
| **LIA** | The Lead Industries Association |
| **NLOB** | Opening Brief of NL Industries |
| **NPVLA** | The National Paint, Varnish and Lacquer Association |
| **RB** | Respondents' Opening Brief |
| **SWOB** | Opening Brief of The Sherwin-Williams Company |
| **µg/dL** | Micrograms per deciliter |
| **WLC** | White lead carbonate pigments |
| **WLO** | White lead-in-oil |
| **WLS** | White lead sulfate pigments |

# GLOSSARY OF CITED WITNESSES

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## INTRODUCTION

### A. Plaintiffs Have Improperly Redefined The Case On Appeal Because They Lack Evidence To Satisfy This Court's Legal Standards.

This appeal is not about conflicting evidence or credibility of witnesses. Plaintiffs have no evidence to support essential elements of their case, and the trial court misapplied this court's legal standards to hold Sherwin-Williams liable. To disguise their lack of evidence and the errors of law, plaintiffs now seek to change their case and the law. They could not and did not prove the case that they pleaded and told this court they were going to prove.

In its touchstone decision, this court restricted the case to promotion for interior residential use. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 309 (*Santa Clara*).) In discovery, plaintiffs narrowed the products to white lead carbonate pigments ("WLC").[1] No evidence shows that Sherwin-Williams promoted WLC or lead-based paint ("LBP") for residential interiors. In fact, as defined by plaintiffs, Sherwin-Williams never made an interior "lead-based paint." (30RT/4464:14-21.) Obviously, Sherwin-Williams had no incentive to promote interior residential LBP when it was not making it.

At trial, plaintiffs convinced the trial court to allow evidence of ads for exterior residential use and even generic

[1] (138AA/40940; 133AA/39524.) Plaintiffs also included white lead sulfate pigments in their definition of "Lead," but stipulated that Sherwin-Williams did not make white lead sulfate pigments. (62AA/18033 [10].)

brand and product line advertising not mentioning lead. As a result of their tactics, the record became full of those ads and testimony not relevant to promotion of WLC or LBP for interior residential use. The trial court then erred by basing its findings on ads for paint, lead-based paint, or house paint, not specific to interior use of LBP or WLC. On appeal, plaintiffs also erroneously rely on ads for exterior house paints or Sherwin-Williams' brand in general. Consequently, the evidence is insufficient to prove promotion for interior residential use, as this court required.

This court directed plaintiffs to show conduct "distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product …." (*Santa Clara*, 137 Cal.App.4th at 309.) It required proof of "affirmative" promotion, quite similar to an instruction, for a known hazardous use. (*Id.*) Remarkably, despite this court's legal standard and the undisputed evidence that Sherwin-Williams hardly made any interior residential paint with WLC, plaintiffs rely heavily on Sherwin-Williams' historical manufacture and distribution of WLC and paint generally. No evidence exists that Sherwin-Williams instructed consumers to use WLC or LBP for a known hazardous use.

Moreover, plaintiffs had to prove Sherwin-Williams' "intentional promotion" of WLC pigments for residential interiors with "knowledge of the hazard that such use would create." (*Id.* at 309.) There is no evidence that Sherwin-Williams knew, when it was making WLC from 1910-1947, that the presence of WLC in interior paint would create the public health hazard from low-

level lead exposure that plaintiffs allege. In 2006, the court accepted plaintiffs' distinction between general knowledge "for decades that lead was poisonous," and "lack of knowledge [before 1998] of the dangers of *low-level lead exposure* …." (*Id.* at 331 [emphasis in original].) In addition, although "constructive knowledge" is not enough, plaintiffs mistakenly persist in discussing risks that they claim Sherwin-Williams should have known or foreseen.[2]

As plaintiffs acknowledge (RB/76), the court never excused plaintiffs from proving "but-for" and legal causation. (*Santa Clara,* 137 Cal.App.4th at 306, 309.) Yet, plaintiffs now contend they did not have to prove that Sherwin-Williams' conduct created a hazard threatening anyone at any property (RB/87-88), let alone a hazard tied to a wrongful promotion. There is no evidence that anyone saw and relied on any wrongful promotion by Sherwin-Williams, and no expert testified that any wrongful promotion by Sherwin-Williams increased interior residential use of WLC in the Jurisdictions. Moreover, the alleged hazard today is too remote from Sherwin-Williams' purported misconduct over 65 years ago. Plaintiffs' evidence does not demonstrate either fact or legal causation.

Perhaps trying to avoid their inability to prove causation and the major obstacles arising from property owner responsibility, plaintiffs defined the alleged public nuisance as

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[2] Plaintiffs say their complaint alleged that defendants knew or should have known of the health risk, but they cite to the different class action public nuisance claim that this court dismissed. (*Id.* at 304 n.4.)

the presence of "Lead." However, well-maintained LBP is not a hazard under California law. (H&S Code §17920.10.) On appeal, plaintiffs often shift to discussing the risks from deteriorated LBP and lead paint hazards, not the mere presence of intact LBP, as the public health hazard. (*E.g.*, RB/123 ["the nuisance is based not on 'lead' in the abstract but on deteriorating lead paint …."].)

Because a public nuisance action aims to prevent future harm, this court limited the remedy to injunctive relief of abatement. (*Santa Clara*, 137 Cal.App.4th at 311; *accord* Code of Civ. Proc. §731.) This court affirmed dismissal of the class action nuisance claim because it sought *"damages for injuries caused to plaintiffs' property by a product,"* and the court was "reluctant to extend liability for damages under a public nuisance theory to an arena that is otherwise fully encompassed by products liability law." (*Id.* at 313 [emphasis in original].) Plaintiffs improperly ask the court to affirm the trial court's award of money damages.

In its 2006 decision, this court said: "'An abatement of a nuisance is accomplished by a court of equity by means of an injunction proper and suitable to the facts of each case.'" (*Id.* at 310 [quoting *Sullivan v. Royer* (1887) 72 Cal. 248, 249].) Yet, the trial court never made findings, and plaintiffs have no evidence, meeting the standards for abatement. Defendants cannot be ordered to abate private properties that they neither own nor control, there is no finding or evidence that any Sherwin-Williams' product threatens probable and imminent harm to any child, and there is no finding or evidence that the trial court's abatement program will be more effective than enforcement of existing laws and prevention programs.

Equity and due process also require that Sherwin-Williams' liability, if any, be proportionate to consequences it caused. However, plaintiffs ask the court to hold Sherwin-Williams liable to pay for the inspection and abatement of all covered pre-1981 residences (RB/94-96), even though plaintiffs have not identified any Sherwin-Williams' product at any property, and its WLC could not be in any property built after it stopped making WLC in 1947.

Each Jurisdiction had to prove its claim against each defendant individually. Yet, plaintiffs refer to "defendants" as a group and seek to hold each liable because of purportedly concerted action through trade associations. However, an earlier claim of conspiracy was dismissed. (*Santa Clara*, 137 Cal.App.4th at 299.)

When the court reviews the entire record, it will find no evidence, let alone substantial evidence, to support essential legal elements of plaintiffs' claim.

### B. Additional Legal Errors Permeate The Trial Court's Decision.

Other constitutional and legal errors each independently mandate reversal as a matter of law.

Plaintiffs did not identify any location of the alleged nuisance or the presence of any Sherwin-Williams' product anywhere. Tort and due process principles forbid plaintiffs' theory of "collective public nuisance" and the severely disproportionate, retroactive liability that flows from that theory.

Well-maintained LBP inside a residence is permitted by statute and, therefore, cannot be a public nuisance. (H&S Code

§17920.10; Code Regs., tit. 17, §35037; Civ. Code §3482.) Plaintiffs never address this issue or Section 3482.

Constitutional safeguards protect Sherwin-Williams' commercial speech, because there is no finding or evidence that a Sherwin-Williams' promotion was false and misleading. Sherwin-Williams' conduct complied with the law in effect at the time of its conduct.

Plaintiffs' change of theory after trial, the truncated time of trial, the prohibition of recross-examination, and other procedural errors denied Sherwin-Williams due process. It did not have a fair opportunity to discover relevant evidence and present its defenses.

Finally, at plaintiffs' urging, the trial court impermissibly substituted its judgment for that of the Legislature. Funding of government programs is the Legislature's prerogative—and there can be no doubt that plaintiffs asked for, and the trial court impermissibly created, a novel, never-tested government grant program funded by defendants, supervised by the Jurisdictions' Board of Supervisors, administered by the State's CLPPB, and implemented by the local CLPPPs. (138AA/41020-41022, 41027-41028.)

## ARGUMENT

### I. SHERWIN-WILLIAMS HAS MET THE STANDARD OF APPELLATE REVIEW TO REVERSE THE JUDGMENT.

#### A. Plaintiffs Must Show That Substantial Evidence Supports The Judgment.

Plaintiffs claim that Sherwin-Williams has disregarded the applicable standard of review and that the evidence supports the

judgment when viewed in the light most favorable to plaintiffs. (*See*, *e.g.*, RB/1, 4-5, 43, 61, 65, 87.) Not so. Plaintiffs overlook fundamental principles governing appellate review of the sufficiency of evidence, particularly when First Amendment rights are at stake. (*See San Francisco Unified School Dist. ex. rel. Contreras v. First Student, Inc.* (2013) 213 Cal.App.4th 1212, 1227 [requiring "independent examination of the supporting record" in cases raising First Amendment concerns].)

"Substantial evidence" must support the trial court's findings "on each and every element which the law requires to support recovery." (*Beck Dev. Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205; *see also In re Shaputis* (2011) 53 Cal.4th 192, 210, n.7 ["'A substantial evidence inquiry examines … if the record contains reasonable, credible evidence of solid value'"].) Consistent with this standard of review, Sherwin-Williams' Opening Brief described the relevant evidence on the elements of plaintiffs' claim in the light most favorable to plaintiffs. No matter how favorably the remainder of the record may be construed for plaintiffs, their concessions and stipulations, other undisputed evidence, and especially the absence of evidence demonstrate as a matter of law that plaintiffs did not satisfy their burden of proof on essential legal elements of their claims. And, of course, "the trial court's legal conclusions are not binding on appeal …. Legal questions must be reviewed de novo." (*PJNR, Inc. v. Dep't of Real Estate* (1991) 230 Cal.App.3d 1176, 1183.)

### B. Plaintiffs Must Show That The Trial Court Made Adequate Findings Supported By The Facts.

Plaintiffs are mistaken that the trial court made all findings or conclusions necessary to the judgment. Sherwin-Williams' Objections listed the omissions. (*See*, *e.g.*, RB/40, 43-46; *see also* 133AA/39492-134AA/39613 [*e.g.*, 133AA/39503-39507, 39529-39541, 39546-39547, 39566-39568].) This brief also identifies those omitted, necessary findings. (*See, e.g.*, 30, 36, 37-38, 42-43, *infra*.) "[F]ailure of a court to explain the factual and legal basis for its decision on a principal controverted issue … is error of a most serious, prejudicial, and reversible nature …." (*McCurter v. Older* (1985) 173 Cal.App.3d 582, 593 [internal citations omitted], *disapproved on other grounds by In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1137.)

Plaintiffs cannot rely on the doctrine of implied findings to fill the void in the trial court's statement of decision. Sherwin-Williams complied with Code of Civil Procedure section 634 by bringing to the trial court's attention the omissions or ambiguities in its proposed statement of decision.[3] (*See*, *e.g.*, *M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1518, 1528-29 n.20.) Therefore, there can be no inference that the trial court decided in plaintiffs' favor on the core issues for which there are no findings. (*In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 453 n.4.)

[3] (*See* 99AA/29301-29343; 133AA/39492-134AA/39613.)

### C. The Court May Review The Foundation For Plaintiffs' Expert Testimony.

Plaintiffs claim that the court must accept plaintiffs' expert testimony. (*See, e.g.*, RB/56-58, 61-62, 83-84, 130.) They are wrong. Whether expert testimony has an adequate foundation is a question of law that does not involve the reweighing of testimony. (*See Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1373 ["These problems do not go to the weight of [the expert's] testimony. Because his opinions and conclusions were nothing more than speculation, his testimony could not constitute substantial evidence in support of a verdict in [plaintiff's] favor, and it is for this reason that the trial court correctly excluded the testimony in its entirety"]; *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

In sum, the standards for appellate review not only permit, but instruct, the court to scrutinize the entire record to determine whether substantial evidence supports the trial court's findings against Sherwin-Williams. It does not.

## II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT FINDING SHERWIN-WILLIAMS LIABLE FOR A PUBLIC NUISANCE.

### A. Sherwin-Williams Did Not Promote White Lead Pigments For Residential Interiors.

Despite plaintiffs' mantra of "defendants'" egregious, wrongful promotion, no evidence shows that Sherwin-Williams instructed consumers to use either WLC or paint containing WLC for residential interiors:

- The trial court did not identify a single Sherwin-Williams' advertisement that affirmatively promoted WLC or LBP for residential interiors. (*See* SWOB/18.)
- Plaintiffs' historian was unaware of any Sherwin-Williams' advertisement instructing the use of WLC in residential interiors (*see* SWOB/19), and testified that Sherwin-Williams "didn't really have an interest in promoting leaded paint." (30RT/4467:12-16; *see also* SWOB/6-7.)
- It was lawful to use WLC and LBP on residential interiors when Sherwin-Williams made WLC. (*See* SWOB/6.)[4]
- There is no evidence that any Sherwin-Williams' plant in California made WLC or interior paint with WLC, or that any store in the Jurisdictions sold a Sherwin-Williams' product with WLC for residential interiors.[5]

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[4] Sherwin-Williams' compliance with the law at the time of manufacture distinguishes *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93. (RB/37.)

In *City of Bakersfield*, the property owner violated the building code at the time of the alleged nuisance. (*Id.* at 96.) *City of Bakersfield* did not consider, and therefore never held, that a product manufacturer in compliance with all applicable laws at the time of manufacture and sale could be held liable for a public nuisance decades later for products still present in a building that did not meet subsequent regulatory standards. In any event, intact LBP meets regulatory standards today.

[5] Using misleading word choices, plaintiffs argue that the Oakland plant had an advertising department to promote "its paints" (RB/29), and the Alameda and Los Angeles plants "produced lead house paints." (RB/32.) They say nothing about

What plaintiffs do say is wrought with error and hyperbole, unsupported by evidence.

***First***, it is undisputed that no Sherwin-Williams' interior residential paint met plaintiffs' definition of LBP or ever had any WLC, aside from *de minimis* exceptions not promoted in the Jurisdictions. (*See* SWOB/7-8.) Nevertheless, plaintiffs speculate: "Because the primary outlet for lead pigments was house paints …, the trial court reasonably inferred that each Defendant sold large amounts of lead pigments and paints for home use in the Jurisdictions throughout the 20th century." (RB/84-85; *see also id.* 85-86.) Not only are lawful product sales not wrongful promotion, but there is no evidence that the "predominant" outlet for Sherwin-Williams' WLC was "house paint," let alone interior residential paint. (RB/24.) Plaintiffs' historian conceded that the data did not distinguish between residential versus non-residential use, and interior versus exterior use. (29RT/4438:24-4439:6; *see also* 28RT/4288:16-28.)

It is undisputed that Sherwin-Williams used its WLC in hundreds of different formulas for commercial, railway, auto, industrial, road, bridge, and marine paints. (45RT/6615:22-6616:3; 44RT/6488:2-10.) Plaintiffs' citations only show that Sherwin-Williams used its pigments generically in its own paint.

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(continued…)

interior use of WLC or LBP. The painting trade typically used the term "house paint" to mean exterior, not interior, paint. (*See, e.g.*, 173AA/51417; 185AA/55132, 55137, 55156.) Plaintiffs' brief often discusses "paint," "lead paint," or "house paint" in such a misleading way.

(*See, e.g.*, RB/24 [citing 45RT/6666:18-6667:1; 28RT/4152:26-4153:14].) Not a single document states that a "predominant" outlet for Sherwin-Williams' WLC was interior residential paint.

In short, the evidence does not permit the speculative inferences plaintiffs demand. (*Beck*, 44 Cal.App.4th at 1204 ["[T]he trier of the facts may not indulge in the inference when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men."].)

***Second***, no evidence supports plaintiffs' assertion that "Sherwin-Williams' advertisements show affirmative promotion of lead paint for interior use in the Jurisdictions." (RB/77.) Plaintiffs' own historian conceded that he was "not aware of any ad from Sherwin-Williams that says that a painter or a consumer should use white lead pigment in interior residential paints." (29RT/4449:1-5.)

Apparently abandoning the few Sherwin-Williams' ads that plaintiffs' historian characterized at trial as "representative" (28RT/4240:10-14), plaintiffs are still trying to find evidence that "Sherwin-Williams was telling consumers that they could and should use its lead paint in their homes." (RB/79.) Of the twenty advertisements plaintiffs now cite (RB/78):

- Only two are Sherwin-Williams' ads, and they concern exterior SWP House Paint (187AA/55520, 55657); interior SWP formulas did not have WLC (62AA/18036-18038 [75-88]; 45RT/6626:3-6627:24).
- Acme White Lead & Color Works published two ads, one for auto paint, and the other for its paints

generally, including Kem-Tone, a revolutionary, non-lead, water-based, interior paint. (185AA/55131, 187AA/55632; 45RT/6618:3-16.) "Lead" appears only in the company name.

- The remaining 16 ads are for "Monarch" paint. (*See* RB/78.) All were run by an independent retailer, not Sherwin-Williams. All but two never mention interior use. Plaintiffs did not rely on these ads during trial or in previous briefing, and the trial court did not cite them. No evidence establishes that those ads can be attributed to Sherwin-Williams or that the advertised Monarch paints are in any Jurisdiction residence.

***Third***, plaintiffs claim that Sherwin-Williams' advertisements <u>not</u> mentioning WLC assisted in creating the public nuisance. (RB/78-79.) Their argument is legally untenable under this court's "affirmative and knowing" promotion standard. (*Santa Clara*, 137 Cal.App.4th at 309 [citing *City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575].) This court gave, as an example of wrongful conduct, a manufacturer's explicit instruction to dump hazardous solvents into the sewer in violation of existing law. (*Santa Clara*, 137 Cal.App.4th at 309 [citing *City of Modesto Redevelopment Agency v. Super. Ct.* (2004) 119 Cal.App.4th 28, 41].) That instruction directed illegal conduct known then to violate the law. Logic, as well as this court's prior decision, say that an advertisement for paint with no WLC cannot promote the use of

WLC, and an ad not mentioning lead simply does not instruct consumers to use lead.

Equally unsupported is plaintiffs' assertion that Sherwin-Williams "promoted" lead pigments and white lead-in-oil ("WLO") in the Jurisdictions. (RB/30.) Plaintiffs cite to bare price listings and quotations for Sherwin-Williams' Old Dutch Process WLO and dry white lead from 1924 to 1927. (62AA/18045 [203-204].) Those price listings do not instruct or promote any particular use.

***Fourth***, there is no evidence that Sherwin-Williams "coordinated its promotional activities with … [trade association] campaigns and provided each campaign with funding, resources, and written materials." (RB/89.) As a matter of law, those associations' activities cannot be imputed to Sherwin-Williams because they were not Sherwin-Williams' agents. (138AA/41029.) As a matter of fact, Sherwin-Williams never contributed money to LIA's separate White Lead Promotion, because it was antithetical to Sherwin-Williams' interest in promoting ready-mixed paints. (62AA/18046 [213-214].) Nor did Sherwin-Williams receive the internal LIA documents or minutes that plaintiffs introduced at trial. (30RT/4460:27-4461:9.)

Plaintiffs mistakenly suggest that Sherwin-Williams joined the LIA's Forest Products-Better Paint Campaign in 1934. (RB/26.) Sherwin-Williams first contributed in 1937, after the campaign shifted focus away from WLO, and it contributed only $5000 total over time. (62AA/18046 [217-219].) Sherwin-Williams' purpose then was to promote its ready mixed paints. (*Id.*) Moreover, plaintiffs' historian had no data showing that campaign had any effect on use of WLC in the Jurisdictions.

(29RT/4350:17-4351:12.) That campaign failed to reverse the decline in WLC use nationally. (29RT/4364:20-4365:8.)

Finally, NPVLA's campaigns merely encouraged painting and did not instruct the use of WLC or LBP in residential interiors. If an ad encouraging consumers to use paint is a wrongful promotion, then every paint manufacturer, retailer, and master painter engaged in wrongful promotion, and the legal standard for public nuisance is much *less* egregious than a failure-to-warn claim.

In sum, there is no evidence, much less substantial evidence, of wrongful, affirmative promotion by Sherwin-Williams.

### B. When It Made WLC, Sherwin-Williams Had No Knowledge Of The Hazard Alleged Today.

Plaintiffs failed to prove that Sherwin-Williams knew, at the same time it was making and supposedly promoting WLC and WLC-containing paint for residential interiors, of the public health hazard alleged today. Plaintiffs attempt to rely on constructive or even no knowledge. (RB/66-70.) Their argument is both legally erroneous and devoid of any evidence.

#### 1. No Evidence Shows Sherwin-Williams' Actual Knowledge Of The Hazard Alleged Today.

Since antiquity, it has been common knowledge that lead ingested in significant quantities over time can be harmful. (138AA/40934; 43RT/6348:20-23.) Knowing the risk of low-level exposure is quite different, as this court has recognized. (*Santa Clara*, 137 Cal.App.4th at 331.)

Plaintiffs claim that "[d]efendants were well aware of the risk to children posed by deteriorating lead paint at the time Defendants promoted and sold lead pigments and paints for interior use." (RB/58.) But, plaintiffs' historians never showed that Sherwin-Williams knew, during the limited period it manufactured WLC, of today's alleged risk to children from ultra-low BLLs. (37RT/5558:5-12; 36RT/5386:14-20 [Markowitz]; 32RT/4777:14-4779:23 [Kosnett].) If that low-level risk were so well known, the State and Jurisdictions presumably would not have specified the use of interior residential LBP into the 1950's after Sherwin-Williams stopped making WLC. (*See* SWOB/6.) Moreover, to this day, federal, state, and local governments do not consider intact LBP to be a public health hazard. (*See* H&S Code §17920.10; Code Regs., tit. 17, §35037; 170AA/50635.) Therefore, promotion of WLC or LBP for interior use before 1950 could not have been an instruction for a known hazardous or unlawful use.

Plaintiffs fail to identify any evidence of Sherwin-Williams' knowledge before 1947 that low-level exposure from asymptomatic BLLs could harm children.[6] They make a number of factually incorrect statements contradicted by the evidence.

Plaintiffs misstate the testimony of Sherwin-Williams' historian as referring to children. (RB/57 [*citing* 45RT/6648:15-19].) Dr. Dunlavy actually testified that the risk of occupational

[6] Plaintiffs confusingly use the term "lead poisoning" to mean different things—symptomatic lead poisoning, asymptomatic effects found in epidemiological studies, or undue lead exposure under the contemporary reference level.

lead exposure was widely understood in the early 1900's. (45RT/6648:15-6649:14 ["I am telling you that the concern I have seen reflected in Sherwin-Williams' documents had to do with occupational hazards."].)

Nor is there any support for plaintiffs' assumption that Sherwin-Williams was better informed than government officials and the public. Plaintiffs admit that no evidence shows that Sherwin-Williams knew of the historical medical literature on which their historian relied. (32RT/4777:14-4779:23.) Moreover, plaintiffs' historian agreed that no defendant concealed any knowledge of health risks to children. (36RT/5386:4-20.) LIA-funded research was published. (35RT/5363:5-5364:28.) Dr. Markowitz relied on studies and information distributed by the LIA and NPVLA "concerning lead poisoning and hazards of lead that was available in the medical, and scientific, and popular literature." (*See* 35RT/5297:5-5298:3 [cited at RB/58-59].) There is no evidence Sherwin-Williams knew of health risks to children not publicly known.

Plaintiffs also misinterpret a 1900 *Chameleon* article. (RB/21.) Its purpose was to convince master painters to use safer ready-mixed paints with zinc pigments instead of WLO. (45RT/6652:4-6653:21 [Dunlavy].) The article recounted the "*familiarly known*" risk of WLO chalking outside. (179AA/53356-53357 ["disintegrates and is blown about by the wind"; describing "rain, fog, etc."].) "Chalking" of WLO only occurs outside, due to sunlight. (45RT/6653:2-18; *see also* 45RT/6705:14-18.) The article never mentions a risk to children from either inside household dust or low-level BLLs (which could not then be measured).

In reality, the earliest Sherwin-Williams' document to refer to a hazard to children from LBP was written in 1937 by an industrial hygiene consultant. He mentioned the benefit from Sherwin-Williams' use of lithopone, a non-lead pigment, in removing a risk to children from "chew[ing] up flaked-off paint." (45RT/6638:12-6639:8.) He was not discussing today's alleged risk from low-level exposure or plaintiffs' alleged hazard of intact LBP.

Finally, plaintiffs assert that Sherwin-Williams' knowledge gave it "ample reason" to halt its alleged promotion and sale of WLC. (RB/60.) However, plaintiffs' historian testified that defendants did not have enough knowledge about "lead paint dangers" to stop selling interior LBP until the "mid to late 1930s." (36RT/5402:9-19 [Markowitz].) Plaintiffs point to no Sherwin-Williams' advertisement promoting WLC or LBP for residential interiors after then.

### 2. No Law Or Evidence Supports Plaintiffs' "Constructive" Knowledge Theory.

The trial court erroneously permitted a "constructive knowledge" theory to serve as a basis for its decision. (138AA/41013-41014.) It conflicts with this court's holding that conduct must be "distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product." (*Santa Clara*, 137 Cal.App.4th at 309.)[7]

[7] Plaintiffs even suggest that no knowledge was needed at the time of promotion. (RB/68.) But, their cited cases involve conduct violating a statute or regulation, unlike here.

Indeed, one cannot knowingly instruct a hazardous use without knowing the use is hazardous.

In any event, no evidence shows that Sherwin-Williams could have known of today's alleged hazard before it stopped making WLC in 1947. Plaintiffs have admitted, and this court recognized, no scientific or medical knowledge existed before 1998 regarding the alleged risks of low-level lead exposure. (*Id.* at 330; *see also* 140AA/41491-41512, 41507 ["[W]hat constitutes the health effects of lead is an evolving concept that has changed dramatically."].) Yet, the trial court's finding of a public nuisance is premised on that low-level lead exposure. (*See* 138AA/41012-41013.) Plaintiffs' claim should be rejected, as it "is physically impossible or inherently improbable and such inherent improbability plainly appears." (*Beck*, 44 Cal.App.4th at 1204.)

Plaintiffs claim that "physicians in the 1930s concluded that there was no safe level of childhood lead exposure." (RB/57.) This is false. Up until 1970, the federal government defined children's "undue" lead exposure by a BLL of 60 µg/dL or higher. (176AA/52313; *see also* NLOB/16.) It is implausible that Sherwin-Williams knew of risks from low-level exposure, which could not be measured, when it was making WLC. (43RT/6305:10-13.)

In 2003, over 65 years after Sherwin-Williams last made WLC, plaintiffs' medical expert agreed that "[i]t remains unclear whether lead associated cognitive deficits occur at concentrations below 10 micrograms per deciliter." (27RT/4057:4-4058:10; 176AA/52267; *see also* 126AA/37500:20-127AA/37502:1 [citing 98AA/28955-28962].) An adverse effect at those low BLLs is still

an unsettled hypothesis. (27RT/4058:3-9 [Lanphear]; 43RT/6383:28-6384:12, 6387:10-16 [Garabrant]; 176AA/52266-52275; 98AA/28891-28892 ¶9.)

Plaintiffs' toxicologists and doctors admit that their views of today's risk at BLLs below 10 µg/dL formed only in the "last five or more years." (*See* 27RT/4004:18-4005:15 [cited at RB/57].) The trial court concluded this knowledge was "more contemporary." (138AA/41014.) Plaintiffs contort the evidence to claim that the medical community knew before the 1950's that low-level exposure could cause harm. (*See* NL Reply Brief/21-23, 29-36.)

In sum, there is no evidence, much less substantial evidence, that Sherwin-Williams knew, when it made WLC, of the public health hazard alleged by plaintiffs.

### C. There Is No Evidence That Sherwin-Williams' Conduct Created Or Assisted In Creating The Alleged Public Nuisance.

This court specified plaintiffs' burden to prove causation: but for Sherwin-Williams' affirmative, wrongful promotions, "lead paint would not have been incorporated into the interiors of such a large number of buildings and would not have created the enormous public health hazard that now exists." (*Id.* at 306.) No evidence supports this essential element.

The lack of evidence reflects the undisputed fact that WLC and interior LBP were sold in California before Sherwin-Williams arrived, thousands of manufacturers and master painters mixed WLC into interior residential paint, and government officials and architects continued to specify its use after Sherwin-Williams stopped making it. (SWOB/10, 27.) The court should look at the

entire LBP market when considering Sherwin-Williams' role in the promotion of LBP for residential interiors. (*See Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 488-491.) Without specific evidence linking Sherwin-Williams' conduct to the widespread interior use of WLC or LBP, the court may not infer causation. It is unsubstantiated guesswork to say that, among the multitude of actors involved, any ad or promotion by Sherwin-Williams caused the use of WLC in California.

### 1. Plaintiffs Have No Evidence Of Causation-In-Fact.

***First***, plaintiffs did not show that Sherwin-Williams' WLC or LBP is in a "large number of buildings" creating a "public health hazard." Plaintiffs' historian conceded he "can't tell" whether any WLC present in California today is attributable to Sherwin-Williams. (29RT/4440:11-14.) Instead, plaintiffs say they do not have to show that Sherwin-Williams' WLC or LBP is present in any Jurisdiction home. (RB/86-87.) They are wrong. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239-1240.)

Absent evidence, the court may not indulge in "inferences," as plaintiffs suggest (RB/84-85, 86-87; *People v. Stein* (1974) 94 Cal.App.3d 235, 239 ["A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established."].) The Supreme Court rejected this sort of conjecture to prove causation in *Merrill*. (26 Cal.4th at 490; *see* SWOB/28-29.)

No evidence supports an inference of causation here. Plaintiffs say that Sherwin-Williams produced, sold, and promoted lead pigments and paints "throughout the 20th

century." (RB/84-86.) This, too, is wrong. Plaintiffs stipulated that no Sherwin-Williams' interior residential paint had WLC, but for *de minimis* exceptions not advertised in the Jurisdictions, and Sherwin-Williams last made WLC in 1947. (SWOB/7-8; 62AA/18033, 18035 [11, 61-65].)

Also false is plaintiffs' contention that Sherwin-Williams' WLC shipped for a few years to factories and warehouses was "used in house paints." (RB/32.) No evidence shows how or where its WLC was used. (*See, e.g.*, 29RT/4438:24-4440:16.) Any inference of interior residential use would be speculative, because Sherwin-Williams used its WLC in many paints other than residential interior paint. (45RT/6615:22-6616:3; 44RT/6488:2-10.) Presence of WLC in a warehouse over 80 years ago is not proof of its presence today inside a Jurisdiction residence.

Plaintiffs complain that tracing defendants' products to specific places is "unnecessary because public nuisance law protects the community, not individual properties or persons." (RB/87.) But, plaintiffs' cases identify where the nuisance occurred; in the "gang" cases, for example, the nuisance took place in specified geographic areas, where identified gang members' public misconduct harmed a neighborhood, as substantiated by eyewitness testimony. (*See* RB/87-88 [citing, *e.g.*, *People ex. rel. Totten v. Colonia Chiques* (2007) 156 Cal.App.4th 31, 37].) In contrast, plaintiffs have not identified the presence of Sherwin-Williams' WLC or LBP anywhere.

***Second***, plaintiffs never showed, as this court required, any connection between a wrongful Sherwin-Williams' advertisement and the presence of its (or anyone's) WLC in any residential

interior. Sherwin-Williams challenged plaintiffs to show evidence that Sherwin-Williams' promotions caused the presence of WLC in residences today. (*See* SWOB/27.) There is no evidence that anyone relied on Sherwin-Williams' ads to use WLC in residential interiors. (138AA/40991.) Consequently, plaintiffs could meet their burden only through expert testimony, which they did not proffer. (41AA/11736-11745.)

Just like manufacture does not prove wrongful promotion, the mere fact of "promotion" of WLC would not prove causation. Promotion "in the air" is not enough to prove a tort. (*See Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339, 341 ["'Proof of negligence in the air, so to speak, will not do.'"]; *see also Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118.) Defendants' purportedly "affirmative" manufacture, promotion, and sale of lead paint for interior use cannot suffice without proof of causation to "establish public nuisance liability." (RB/92-93.)

Absent evidence of a causal connection between a wrongful Sherwin-Williams' advertisement and the presence of Sherwin-Williams' WLC in any residential interior, plaintiffs next contend that "[c]onsumers did not distinguish between interior and exterior house paints." (RB/79, n.43.) But, they have no evidence to support their implausible argument,[8] and the trial court

[8] One citation pertains to another company only. (37RT/5618:12-27.) Another citation contains testimony stricken from the record. (37RT/5582:2-14.)

Sherwin-Williams listed its paint ingredients on its labels from at least 1908, (62AA/18049 [263]), and the exterior paint

rejected it by finding DuPont not liable despite its advertising of exterior LBP. (138AA/41017-41018.)

***Third***, plaintiffs did not show that Sherwin-Williams' WLC was a substantial factor in creating the "enormous public health hazard" alleged. Plaintiffs never refute Sherwin-Williams' miniscule contribution to lead in California's environment: only 0.1% of all lead used in California since 1894. (44RT/6488:11-20; 29RT/4438:18-23; 157AA/46762-46771.) Rather, plaintiffs say that the trial court "properly discounted" this testimony. (RB/91.) In fact, Dr. Van Liere calculated Sherwin-Williams' California contribution using reliable data, and he compared Sherwin-Williams' contribution to total lead, just as the State used total environmental contamination in determining fees to fund its CLPPP. (44RT/6486:16-6487:12, 6488:15-20; *Equilon Enterprises v. State Bd. of Equalization* (2010) 189 Cal.App.4th 865, 877 (*Equilon*).)

***Fourth***, the purported "prevalence of Defendants' promotions" has no probative value because Sherwin-Williams did not promote WLC for residential interiors, and no evidence shows that Sherwin-Williams' brand advertising affected the use of WLC in residential interiors. (RB/93; 29RT/4351:3-12.)

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(continued…)

labels prescribed exterior use. (45RT/6624:19-25.) Sherwin-Williams did not intend or expect that consumers would use exterior paints inside homes, because exterior paints had different performance characteristics and were more expensive than interior paints. (45RT/6691:19-28.)

***Fifth***, plaintiffs cannot distinguish *Merrill* by calling gun manufacturers "passive." (RB/93.) Firearm manufacturers' advertising of guns is not "passive." As *Merrill* held, (26 Cal.4th at 489-491), the court may not reasonably infer causation from the mere fact of manufacture or promotion—and there is no evidence of any sale of Sherwin-Williams' WLC or interior residential paint with WLC in the Jurisdictions.

***Finally***, plaintiffs say, without authority, that plaintiffs do not have to prove individual harm in a public nuisance action. (RB/92-93.) However, the California Supreme Court has never found community-wide harm without proof of harm to a public right at particular locations.

In sum, no evidence connects any wrongful promotion by Sherwin-Williams to the presence of WLC in Jurisdictions today.

### 2. Plaintiffs Have Not Demonstrated Legal Causation.

Plaintiffs sidestep legal causation. Many factors of law and public policy preclude a finding of legal causation. (*See Ferguson v. Lieff, Cabreser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.)

No evidence connects some unidentified Sherwin-Williams' ad from over 65 years ago to property conditions presenting a hazard to children today. The time period is far too long—decades longer than the few short years found to be too attenuated in *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 974, 989.

Moreover, innumerable actors intervened and controlled the use and maintenance of LBP after its lawful sale, including

architects, master painters, and property owners who decided for their own reasons to use LBP inside a residence; property owners who decided whether to maintain any LBP; painters who repainted properly or not; inspectors who allowed LBP to remain; federal, state, and local laws regulating LBP; widespread public education informing owners how to prevent ingestion by children (44RT/6489:8-6490:1); and federal, state, and local childhood prevention programs. For this reason, too, the alleged causal connection is too indirect and remote. (*Id.* at 988-989.)

In short, plaintiffs have failed to demonstrate any legal or policy basis for a finding of causation. *See generally Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 779 [courts will not impose liability "where the injury suffered is connected only distantly and indirectly to the defendant's [allegedly] negligent act"].)

### D. Plaintiffs Cannot Avoid Their Failure Of Proof By Claiming A Public Health Crisis.

No federal, state, or local public health agency has concluded that children's lead exposure is a public health crisis today. (98AA/28889 ¶1; 33RT/4921:6-10, 4925:7-14 [Courtney]; 126AA/37318:21-37319:5 [Charlton].) Reflecting the absence of any crisis, in 2012 the State of California did not identify childhood lead exposure as a public health priority. (*See* 89AA/26346 ¶7, 26351 ¶8; *see also* 90AA/26425-93AA/27309; 81AA/23771-23772.)

Plaintiffs proclaim a public health crisis for a simple reason: to distract the court from their lack of evidence and to justify a judicial takeover of childhood lead prevention programs. The

evidence does not substantiate plaintiffs' alarm. California children's BLLs, already below the national average, continue to decline. (42RT/6125:4-6126:5 [Washburn]; 172AA/51005-51008, 51010-51011; 168AA/49958.) In some counties, like Santa Clara, nearly 99% of the tests fell below 5 µg/dL. (181AA/53715.)

Plaintiffs and the trial court's findings cite the number of children with BLLs at or above 5 µg/dL. (RB/7 [citing 7SRA-84/1714-1751; 181AA/53704-53717; 138AA/40935].) Yet, neither the CDC, the State, nor any Jurisdiction defines 5 µg/dL to be "lead poisoning." (31RT/4617:16-24 [Gottesfeld]; 30RT/4521:11-20 [Fensterscheib]; 27RT/4048:17-21 [Lanphear].)

A BLL of 5 µg/dL is the CDC's new "reference value," adopted in 2012 (65 years after Sherwin-Williams last made WLC), to identify children who have an unusual exposure by today's statistical measures. (30RT/4565:2-22 [Gottesfeld]; 174AA/51862-51877.) The reference level is not health-based and is not a medical diagnosis of "lead poisoning." (31RT/4619:8-22 [Gottesfeld]; 174AA/51867-51868.) If it were, then in 1976-1980, the entire nation would have been "lead poisoned." At that time 99.8% of a healthy, representative sample of U.S. children aged 1 to 5 years had BLLs of 5 µg/dL or more. (98AA/28890 ¶5.)

The evidence does not demonstrate that the presence of interior LBP is contributing significantly to BLLs. As the undisputed data show, despite millions of pre-1981 housing units in the Jurisdictions, 0.08% children tested in 2011 had a BLL at the intervention level of 15 µg/dL or greater. (144AA/42664.) If a miniscule LBP chip can cause a BLL of 20 µg/dL as plaintiffs claim (RB/14), then California children have scant exposure to

LBP chips. BLLs of children in California and the Jurisdictions are declining at a faster rate than the decline in pre-1980 housing. (33RT/4923:1-4, 4927:4-25, 4960:11-16 [Courtney]; 89AA/26346 ¶7, 26356.)[9]

The data do not show a community-wide prevalence of EBLLs resulting from the presence of LBP in pre-1981 housing (and none from a Sherwin-Williams' product). Therefore, as a matter of law, plaintiffs have not proven the existence of a public nuisance, let alone a nuisance created by Sherwin-Williams. (Civ. Code §3480.) As the data also show, the public health question is not the number of residences estimated to have LBP. The question is the source of lead that children are ingesting—in other words, it is a question of property maintenance, it is a question of sources that will vary by property, and it is a question requiring inspection and discovery at each property.[10]

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[9] (*See also* NLOB/18-19.)

[10] California data, which are more probative than older, national data on which plaintiffs relied (26RT/3922:2-7; 27RT/4033:7-28, 4034:19-23; 34RT/5095:24-5096:1; *see also* 42RT/6129:10-23), also demonstrate that LBP is no longer the primary source of children's exposure. Monterey estimates that 98-99% of children's exposure comes from lead in food, remedies, cosmetics, and ceramics, and has contemplated dropping out of the CLPPP program. (168AA/49894; *see also* SWOB/30.) The Get the Lead Out Coalition, which includes CLPPP representatives from six Jurisdictions, acknowledges that LBP is no longer a main culprit, but blaming paint justifies HUD funding. (89AA/26347-26348 ¶9.) Because other sources, such as leaded gasoline in soil, Mexican candies, and home remedies, are available to children, CLPPPs do not assume that LBP is the culprit for a child's EBLL; they inspect the child's residence to determine accessible sources. (33RT/5000:14-5001:14;

### E. The Court Erred in Mandating Joint and Several Liability.

The trial court erred by refusing to apportion Sherwin-Williams' liability and holding it 100% liable to pay to inspect and abate all pre-1981 residences covered by the judgment. Although the court found that defendants are culpable in "varying degrees" (138AA/41011-41012), it erroneously concluded that each defendant is "responsible for the whole" when "*damages* cannot be apportioned." (*Compare* 138AA/41002 [emphasis added] and RB/94 [citing *Carlotto, Ltd. v. County of Ventura* (1975) 47 Cal.App.3d 931, 937 [negligence case apportioning damages]] *with* SWOB/40-41.) But this is *not* a damages case; as a case brought in equity, the court must do equity and hold each defendant liable only for its contribution. (SWOB/40-41.)

The standards for equitable apportionment are far less exacting than the standards for proof of damages. (*See* Rest.3d Torts: Apportionment of Liability §26 cmt. h; *Cal. Orange Co. v. Riverside Portland Cement Co.* (1920) 50 Cal.App. 522, 528 [apportioning liability based on the "best possible estimate" of each defendant's contribution]; *see also Griffith v. Kerrigan* (1952) 109 Cal.App.2d 637, 639.) Plaintiffs concede that Sherwin-Williams only had to provide a "reasonable basis" for apportionment. (RB/94.)

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25RT/3781:4-15.) Defendants were erroneously denied the opportunity to inspect the alleged nuisance properties. (*See* 54-55, *infra*.)

Rather than defend the trial court's conclusion that "Defendants offered no evidence that an abatement remedy can be apportioned" (138AA/41002), plaintiffs acknowledge that Sherwin-Williams did offer evidence of apportionment. Plaintiffs again contend that such evidence should be "discounted" (RB/95), but they cannot rewrite the trial court's opinion. The trial court failed to make necessary findings regarding apportionment despite multiple objections. (133AA/39586-39589.)

Moreover, there was no basis for the trial court to discount Sherwin-Williams' evidence. Dr. Van Liere testified without contradiction that Sherwin-Williams was responsible for only 0.1% of the lead in California. (*See* 24, *supra*.) Nor is there any dispute that the State also set Sherwin-Williams' CLPPP fee in a miniscule range based on its responsibility for environmental lead. (62AA/18047-18049 [220-262].)

Plaintiffs further concede that property owners "bear some indeterminate responsibility," but they fault defendants for not providing an evidentiary basis for apportionment. (RB/96.) However, the trial court denied defendants' motion to join individual property owners, precluded defendants from inspecting properties, and allowed plaintiffs to assert a single, collective public nuisance without regard to individual property conditions or owner maintenance. (SWOB/46.) Plaintiffs' argument merely highlights the trial court's prejudicial error in precluding individualized determinations of liability.[11] (*See*

[11] Plaintiffs further suggest that concerted action justifies joint and several liability. (RB/94-95.) However, plaintiffs' conspiracy claim was dismissed years ago. (*Santa Clara*, 137

*Rutherford v. Owens-Illinois, Inc.* (1977) 16 Cal.4th 953, 979 ["When there are hundreds of suppliers of an injury-producing product, the probability that any of a handful of joined defendants is responsible for plaintiff's injury becomes so remote that it is unfair to require defendants to exonerate themselves."].)

The trial court had other ways to apportion Sherwin-Williams' liability—including by market share,[12] property-by-property, or even relevant years or ads. The resulting severely disproportional, retroactive liability is not equitable and violates both due process and California law. (SWOB/44-47.)

### F. Plaintiffs' Evidence Does Not Satisfy The Legal Standards For A Mandatory Injunction Of Abatement.

To obtain an abatement injunction against Sherwin-Williams, plaintiffs had to prove, "with reasonable certainty," that its paint with WLC inside residences presents a probable or imminent harm. (*Beck Dev. Co.,* 44 Cal.App.4th at 1213; *Helix Land Co. v. City of San Diego* (1978) 82 Cal.App.3d 932, 951.) No evidence shows that any child has been harmed, or faces a

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Cal.App.4th at 299.) Moreover, the outside trade associations never acted as Sherwin-Williams' agent (138AA/41029), and the trial court did not find any constitutionally unprotected, unlawful activity by the trade associations.

[12] The FTC data for interstate shipments of WLC would provide other data for apportionment. Sherwin-Williams' market share for the years measured in the late 1930's and early 1940's was nil for dry WLC and less than 5% for WLO for all uses. (62AA/18050 [269-270].)

probable or imminent risk of harm, from the presence of Sherwin-Williams' WLC or LBP, if any.

Plaintiffs' claim is premised on the implausible argument that "[l]ead paint … inevitably deteriorates, even if properly maintained." (RB/2, 129.) The court must follow state regulations declaring intact LBP not a hazard, even on friction surfaces. (H&S Code §17920.10.) It is also undisputed that millions of California children live safely in homes presumed to have LBP. Public health agencies do not say that LBP "inevitably deteriorates"; they advise prudent maintenance, which owners can accomplish affordably and safely according to regulations and recommended procedures. (141AA/41748; 144AA/42834; *see also* 45RT/6704:14-20.)

Nor does plaintiffs' evidence show "how the abatement program would reduce children's BLLs beyond the continuing decline and 'be the end of the problem.'" (SWOB/34 [citing *Beck Dev. Co.,* 44 Cal.App.4th at 1221].) The CDC has concluded that research is needed to find an effective intervention to lower BLLs below 10 µg/dL. (SWOB/34.) Although Sherwin-Williams challenged plaintiffs to produce evidence that the proposed abatement remedy would be more effective than enforcement of existing laws and regulations, they did not. In fact, the Jurisdiction CLPPP witnesses admitted that enforcement is the most effective and most cost-effective way to prevent child lead exposure. (SWOB/36; 38RT/5716:20-5717:24.)

Plaintiffs say that many studies support their abatement remedy. (RB/129-130.) Their experts' own studies actually demonstrate that: (1) there has never been an abatement project

like the planned remedy, with abatement of intact LBP inside homes, or with its massive scale (34RT/5180:4-14);[13] (2) abatement does not reduce BLLs of children with low to moderate BLLs (likely because other lead sources in soil, water, food, ceramics, and second-hand cigarette smoke predominate today[14]), but may increase their BLLs, even when carefully done—meaning that the trial court's abatement program would put at risk over 97% of children;[15] (3) spot paint repair and

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[13] Plaintiffs argue that Dr. Jacobs' testimony demonstrates that "the remedy employs proven methods practiced nationwide." (RB/129 [citing 34RT/5083:11-25].) In fact, Dr. Jacobs' cited testimony was not justifying the trial court's abatement plan. He simply answered "no" to the question whether "an abatement plan or lead hazard control plan that includes testing and inspection, remediation of existing hazards, and education [is] a new concept." (34RT/5083:11-15.)

[14] Although the trial court minimized sources of lead other than LBP (138AA/41015), Dr. Jacobs' article concludes, "for children with BLLs <10 µg/dL, no single exposure source predominates." (SWOB/35; 176AA/52316-52324, 52317; *see also* 176AA/52316-52324, 52317 [Jacobs co-author] ["Nonpaint lead exposure sources are insufficiently characterized, and their importance is often underestimated."]; 13SRA/3085; 175AA/51940-51945 [Lanphear co-author] ["Lead … is ubiquitous in the urban environment."].)

[15] Dr. Jacobs' article reports that EBLL children occur when LBP is "disturbed" during rehabilitation, repainting, or "improper abatement activities." (94AA/27715 ¶3.) The testimony of Benjamin Heckman and the offers of proof for David Jacobs, Marcia Williams and Patricia Buffler confirm the potential risk from poor abatement. (46RT/6788:15-6791:18; 95AA/28189-28199 ¶¶30-31; 89AA/26342-26349 ¶¶8, 11-12 [Buffler] ["implementing plaintiffs' abatement plan would … contradict the current successful public health programs in many ways … [and] disturb lead paint in potentially thousands of homes"].)

cleaning reduce dust and blood lead levels as effectively as the trial court's abatement remedy (34RT/5186:22-5187:27 [Jacobs]; 177AA/52512 ["No differential interior strategy effect was noted for declines in blood lead"]; *see also* 147AA/43698-43719, 43719); and (4) window replacement, as the trial court proposes, does not significantly reduce lead floor dust, which is children's main exposure pathway to interior LBP (*id.*; 140AA/41581 [Table 1], 41583 [Fig. 1]; 38RT/5712:27-5713:4, 5717:4-24 [Jacobs]). That plaintiffs' experts relied on these studies demonstrates the lack of foundation for their opinions and the lack of evidentiary support for the trial court findings, which rely on those opinions. (*See* Sections I.B. and I.C, *supra*.)[16]

Similarly, plaintiffs have no evidence to justify the award of damages to pay for abatement of soil outside homes. Plaintiffs have no evidence that Sherwin-Williams' interior WLC or LBP is in the soil.[17] The trial court excluded exterior paint and did not find that interior LBP contributes to lead in soil. (138AA/40929.)

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[16] The complexity of the scientific, socio-economic, and public policy issues surrounding prevention of child lead exposure confirms why those issues lie within the Legislature's domain and discretion. (*See* Section IV, *infra*.) Dr. Jacobs received no input from CLPPB on his abatement plan. (38RT/5772:4-6 [Jacobs].) He also did not consult with California public officials about the impact of the declaration of a public nuisance or his proposed abatement plan on government budgets, ability to issue municipal bonds, insurance rates or insurability, or tax assessments. (38RT/5772:10-5773:26 [Jacobs].)

[17] As Dr. Jacobs testified, to him "[i]t doesn't matter what the source is. The lead in soil could come from gasoline, it could come from paint, it could come from industrial source emission, it doesn't matter." (38RT/5738:12-5739:7 [Jacobs].)

Plaintiffs do not point to a single study or regulatory finding demonstrating that interior LBP contributes to lead in soil. The reverse is true: lead in soil, especially from gasoline, is tracked inside. (31RT/4594:5-13; 25RT/3778:22-27.) As the State of California has concluded, "[n]o other source of lead exposure presents such a pervasive and persistent danger." (101AA/29857; *see also* 33RT/4967:14-18 [Courtney] [lead in soil from gasoline is the "dominant" source for children's BLLs].)

Plaintiffs try to justify the abatement remedy by saying, without authority, that "Defendants cannot avoid liability because property owners failed to maintain their properties." (RB/129.) However, plaintiffs cannot read out of public nuisance law owners' common law and regulatory duties to maintain their properties, as well as causation-in-fact, proximate causation, misuse, and superseding cause. (SWOB/31-32, 38.) They also say "the People did not have to make such a showing [that "abatement can be achieved at a reasonable cost by reasonable means"]." (RB/131.) But, the Supreme Court has ruled that courts may order abatement only when it can be achieved "at a reasonable cost by reasonable means." (*Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1103.) Although plaintiffs cite to the Court of Appeal's decision in *Mangini* to make a different point, they inexplicably fail to acknowledge the Supreme Court's standard for an abatement remedy. (RB/112-113.)

As a last resort, plaintiffs argue that government funding has been cut for inspection and abatement programs, and that government programs have reached the limits of their

effectiveness. (RB/131-132.) However, the CLPPB, which has spent over $300 million to prevent childhood lead exposure, and Jurisdiction CLPPPs have never asked the Legislature for more funding. (126AA/37323:3-9; 37388:5-21 [Charlton].) Some Jurisdiction CLPPPs have not spent all of their CLPPP funding. (126AA/37269:25-37270:5, 37324:18-37325:1 [Charlton]; 39RT/5866:25-5867:15.) Moreover, it is the Legislature's province to set funding for government programs and to determine their adequacy. The court's power to enjoin a public nuisance does not allow it to interfere with or supplement government programs. (*See* Section IV, *infra*.)

In sum, the trial court made none of the findings necessary for a mandatory injunction. (SWOB/33-37.) A remedy that is not found to be more effective than existing programs, reasonable in means or costs, or reasonably certain to be the end of the problem, and that can create risk to children, contravenes California's standards for a mandatory injunction of abatement. (*Beck Dev. Co.*, 44 Cal.App.4th at 1221; *Mangini*, 12 Cal.4th at 1103.)

### G. Sherwin-Williams Met All Requirements For Declaratory Relief.

Plaintiffs mistakenly argue that Sherwin-Williams has forfeited the right to seek declaratory relief on its cross-complaint. (RB/132-133.) "The existence of an 'actual controversy relating to the legal rights and duties of the respective parties,' suffices to maintain an action for declaratory relief. (Code Civ. Proc., §1060.)" (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 605.) Here, the Jurisdictions alleged the

existence of a public nuisance premised on the mere presence of WLC inside residences.

However, as Sherwin-Williams' cross-complaint alleges, California statutes and regulations establish, as a matter of law, that (a) intact, interior LBP is not a "lead hazard" and, therefore, cannot be a public nuisance, and (b) owners are responsible to prevent and abate "lead hazards" on their properties. (*See* SWOB/42, 49-53.) As a result, plaintiffs' allegations create an "actual controversy" entitling Sherwin-Williams to declaratory relief that would preclude once and for all similar public nuisance claims by the Jurisdictions or other property owners. (*Ludgate Ins. Co.*, 82 Cal.App.4th at 605-606.)

## III. PLAINTIFFS CANNOT OVERCOME MULTIPLE, REVERSIBLE CONSTITUTIONAL ERRORS.

### A. The Trial Court Imposed Liability On Sherwin-Williams' Protected Speech And Association Membership.

Plaintiffs acknowledge that tort liability can be imposed only on "misleading" advertisements and promotions. (RB/103; *see also* SWOB/42-43.) The U.S. and California Constitutions protect truthful commercial speech, even when companies promote products with known public health risks. (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 553-554; *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1274.)

Faced with this constitutional mandate, plaintiffs argue that Sherwin-Williams' advertisements were misleading and thus not protected. (RB/103.) But, the trial court made no such necessary finding, though Sherwin-Williams requested a finding on whether Sherwin-Williams' ads were misleading.

(133AA/39585; 28RT/4156:15-4157:15, 4218:28-4219:20, 4239:10-4240:4, 4241:15-22; 37RT/5646:14-5647:12; 99AA/29314-29315.) Without an express finding, plaintiffs cannot overcome the constitutionally protected status of Sherwin-Williams' commercial speech. (*In re Marriage of Hardin*, 38 Cal.App.4th at 453.)

There is no evidence that any Sherwin-Williams' ad was false or misleading, particularly at a time when promotion of LBP by other companies and master painters was common. As plaintiffs' expert admitted, virtually every Sherwin-Williams' advertisement did no more than generically promote its brand of paints. (30RT/4466:22-4467:11 [Rosner].) Sherwin-Williams' ads merely conveyed accurate product descriptions and prices.[18]

Moreover, "[t]o survive constitutional review, [a party asserting misleading content] must build its case on specific evidence." (*Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation* (1994) 512 U.S. 136, 144.) "'Mere speculation or conjecture' will not suffice." (*Id.* at 143 [internal citations omitted].) There is no evidence, as required, that any Sherwin-Williams' ad ever misled any consumer. (*Id.* at 145 n.10 [advertising was not misleading where "[n]either the witnesses, nor [the proponent] in its submissions to this Court, offered evidence that any member of the public has been misled."].) Furthermore, Sherwin-Williams disclosed lead ingredients on its paint labels. (62AA/18049 [263]; 45RT/6621:12-17.)

[18] (*See, e.g.*, 185AA/55127, 55130, 55138, 55143, 55145.)

Plaintiffs argue that "Defendants'" ads in general were "inherently misleading" because they did not disclose that lead could be harmful or that some paints contained lead. (RB/103-104.) Plaintiffs cite two inapposite cases, affirming the constitutionality of future disclosure requirements imposed by law. (RB/103-105 [citing *Milavetz, Gallop & Milavetz, P.A. v. United States* (2010) 559 U.S. 229, 251 and *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985) 471 U.S. 626, 652].) However, these cases neither found past ads misleading nor imposed liability for failure to disclose information not required by law. Plaintiffs' theory is not only unconstitutional, but amounts to an impermissible failure-to-warn claim. (*Santa Clara*, 137 Cal.App.4th at 309.)[19]

The United States Supreme Court has addressed advertisements, like those here, that merely provide accurate information on price and product location. In no case has the Court suggested that an ad was misleading for failing to disclose potential health risks or other "costs." In *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 504, for example, the Supreme Court held that advertisements for discounts on beer were not misleading and were protected speech, even though the

[19] Plaintiffs also cite two cases under California's unfair business practices act. (RB/103-104 [citing *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 134, and *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332, 333].) Neither case deals with the questions of constitutionality raised here. Moreover, this court affirmed dismissal of plaintiffs' unfair business practices claims, including "wrongful conduct, false representations, concealments, and nondisclosures" in 2006. (*Santa Clara*, 137 Cal.App.4th at 331.)

advertisements did not disclose the potential health consequences of drinking alcohol—a disclosure that plaintiffs' new theory would require. (*See also Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476 [striking down ban on disclosing alcohol content on beer labels]; *Bates v. State Bar of Ariz.* (1977) 433 U.S. 350 [striking down ban on attorney fee advertising]; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748 [striking down ban on prescription drug price advertising].)

Due process prevents plaintiffs from recasting the trial court's opinion as holding Sherwin-Williams liable for its marketing, which plaintiffs describe as "course of conduct," rather than its protected speech in advertising (RB/105.) The trial court reached no such conclusion. (*See City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, 28 ["As a general rule, theories not raised in the trial court cannot be raised for the first time on appeal. This is a matter of fundamental fairness to both the trial court and opposing parties."].)

Moreover, even if plaintiffs' new "course of conduct" theory could be considered, the trial court would have a "special obligation" to ensure that civil liability is premised only on unprotected conduct. (*NAACP v. Claiborne Hardware* (1982) 458 U.S. 886, 915-917; *see also Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.* (2003) 538 U.S. 600, 617 ["A State's Attorney General surely cannot gain case-by-case ground this court has declared off limits to legislators."].) In *Claiborne Hardware*, the Supreme Court rejected a verdict in which violent, non-protected tortious conduct was not separated from non-

violent, constitutionally protected speech: "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered." (*Claiborne*, 458 U.S. at 918.)

The U.S. and California Constitutions required the trial court to determine how Sherwin-Williams' non-protected activity, if any, separate and apart from its protected speech, caused the public nuisance. Yet, the trial court identified no improper "course of conduct," and there is no evidentiary basis to make such a finding.

Aside from accurate advertising, the "conduct" to which plaintiffs refer—discounts and promotions, sales and marketing plans, and sharing of information—is constitutionally protected. (*See, e.g.*, *44 Liquormart, Inc.*, 517 U.S. at 504-508; *Sorell v. IMS Health Inc.* (2011) 131 S.Ct. 2653, 2670-2672.) For this reason, too, plaintiffs did not show, and the trial court did not find, how unprotected conduct—distinct and apart from Sherwin-Williams' protected speech—caused the public nuisance.

Independently, the judgment violates Sherwin-Williams' freedom of association. Lacking evidence that Sherwin-Williams promoted WLC or LBP for interior use, plaintiffs cite to the LIA and NPVLA's conduct. Under the U.S. and California Constitutions, however, "[c]ivil liability may not be imposed merely because an individual belonged to a group." (*Claiborne*, 458 U.S. at 920; *see also id.* at 925; *Chavers v. Gatke Corp.* (2003) 107 Cal.App.4th 606, 618-619.) "Joining organizations that

participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial *First Amendment* protection." (*In re Asbestos Sch. Litig.* (3d Cir. 1994) 46 F.3d 1284, 1294 [former asbestos manufacturers cannot be held liable for participation in trade associations].)

Plaintiffs do not appear to dispute these basic constitutional principles but rather imply in a footnote that Sherwin-Williams should be held liable for the NPVLA and LIA's activities under conspiracy law. (*See* RB/105 n.60 [citing *De Jonge v. State of Oregon* (1937) 299 U.S. 353, 365].) Plaintiffs' conspiracy claim was dismissed almost a decade ago. (*Santa Clara,* 137 Cal.App.4th at 299.) Plaintiffs never introduced evidence to show, and the trial court never found, a conspiracy. Accordingly, there is no constitutionally permissible basis to impose any liability on Sherwin-Williams for the NPVLA and LIA's actions. The evidence against Sherwin-Williams must be viewed separately.

In sum, Sherwin-Williams challenged plaintiffs to present any authority holding a product manufacturer liable for truthful advertising of lawful products with a then-unknowable risk of harm. (SWOB/18.) Plaintiffs have no response, because any such liability would be unconstitutional.

### B. Plaintiffs Do Not Defend The Constitutionality Of Their Collective Liability Theory.

With good reason, plaintiffs are silent on the impropriety of their collective nuisance theory. Plaintiffs never explain how the trial court could find Sherwin-Williams liable for a "collective nuisance" without finding any individual nuisance, without

finding any actual hazard or injury to a child caused by Sherwin-Williams, and without tying liability to any identified property. The trial court never found, because there is no evidence, that Sherwin-Williams' WLC or LBP is in any property. It is impossible to find Sherwin-Williams liable for a nuisance everywhere without finding its product anywhere.

Due process requires individualized determinations, reliable methodology, and evidence in order to extrapolate from individual harms to a collective harm. (*Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2560; *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1, 34; *In re Fibreboard Corp.* (5th Cir. 1990) 893 F.2d 706.) Due process also requires a fair opportunity for a defendant to find and present evidence to exculpate itself. (*Philip Morris USA v. Williams* (2007), 549 U.S. 346, 353-354; *In re Complaint of Bankers Trust Co.* (3d Cir. 1984) 752 F.2d 874, 890; *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291-292.) Defendants were not allowed to inspect or test any property, and no individualized evidence was presented to or required by the trial court here. Plaintiffs' entire theory was built on an unconstitutional house of cards that cannot stand.

California courts never have found a nuisance not tied to an identified location and never have held a defendant liable without allowing the defendant to examine the asserted nuisance before trial. (SWOB/45-46.) Plaintiffs do not allege a nuisance *per se* based on some statutory violation. Common-law nuisances, as plaintiffs allege, are not "definitional[]" but "must be determined by reference to the peculiar facts and circumstances shown by evidence." (*Beck Dev. Co.*, 44 Cal.App.4th at 1211.)

The trial court erred by assuming that a mansion is no different than a slumlord's tenement and by denying defendants any opportunity to discover and prove the common sense distinctions between the two.

Sherwin-Williams did not have a fair opportunity to defend and exculpate itself. As plaintiffs do not dispute, Sherwin-Williams never will have the opportunity to inspect a property and demonstrate there is no nuisance condition, the owner was at fault, or there is no imminent harm to any child from its product. (38RT/5787:7-13 [Jacobs].) This is so, even though most pre-1981 homes covered by the judgment were built after Sherwin-Williams last made WLC in 1947. (180AA/53527-53607 [67% of pre-1981 housing in the Jurisdictions was built after 1949].) Due process forbids holding Sherwin-Williams both irrebuttably liable for every pre-1981 property in the Jurisdictions and liable to abate others' products. (*See* SWOB/44-48; *Hale v. Morgan* (1978) 22 Cal.3d 388, 397-398.)

### C. Due Process Precludes Disproportionate Liability Untethered To Any Sherwin-Williams' Wrongful Conduct.

Plaintiffs do not dispute that due process requires the trial court's award to be reasonably related to harm caused by Sherwin-Williams. (SWOB/47-48.) Plaintiffs try to justify the joint and several award of $1.15 billion by arguing that "Defendants successfully manufactured, promoted, and sold lead pigments and paints for interior use in the Jurisdictions throughout the 20th century" and are responsible for the "resulting lead paint in homes." (RB/120.) This is not true for Sherwin-Williams.

No evidence shows Sherwin-Williams' promotion of WLC or LBP for residential interiors, its rare formulas for WLC in interior or general utility paint ended by 1943, and its manufacture of WLC stopped in 1947. (*See* SWOB/2; (62AA/18034-18036 [47-66]; 18033 [12-15]; 45RT/6615:22-6616:14 [Dunlavy].) Plaintiffs never identified any home that contains WLC or LBP as a result of Sherwin-Williams' ads, much less a wrongful ad. Yet, out of thousands of LBP manufacturers, mixers, and retailers (27RT/4113:23-4114:4 [Rosner]; 45RT/6644:10-6646:22 [Dunlavy]), Sherwin-Williams has been ordered to pay for the inspection and abatement of all pre-1981 residences.

Plaintiffs never explain how holding Sherwin-Williams liable for millions of housing units that could not contain its WLC or LBP is connected or proportionate to Sherwin-Williams' conduct. The trial court committed constitutional error by holding Sherwin-Williams disproportionately liable for others' conduct. (SWOB/47-48.)

## IV. THE TRIAL COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE.

As plaintiffs do not dispute, "the ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature." (*People ex rel. Gallo v. Acuna (*1997) 14 Cal.4th 1090, 1107.) Nor do plaintiffs dispute that the Legislature, after a thorough investigation, declined to declare the object of their lawsuit—"the presence of Lead"—a public nuisance, and it rejected their remedy—abating intact LBP, even on friction surfaces. Instead, the Legislature has required owners to

maintain their properties in a lead-safe condition, imposed fines and penalties on those who allow LBP to deteriorate, and set regulatory standards for intervention when a hazard exists. (*See* SWOB/49-51.)

Rather than follow the Legislature's directive, the trial court concluded that the Legislature has not done enough. (*See* 138AA/41015-41016.) In dismissing the Legislature's choices, the trial court decided abatement is better than lead-safe paint; the Legislative BLL action level is too high; regulatory standards for lead in dust and soil are too low; and three former WLC manufacturers should pay to abate the presence of all lead in dust and soil despite the State's determination that manufacturers of leaded gasoline bear 85% and numerous paint manufacturers share 14% of responsibility for historic lead in California's environment. (138AA/40993; *Equilon,* 189 Cal.App.4th at 877.)

The trial court did not simply interpret the public nuisance statutes, as plaintiffs disingenuously argue. (RB/122.) Despite the complex scientific and public policy issues concerning the prevention of childhood lead exposure, the trial court substituted its judgment for that of the People's elected representatives. The trial court brushed aside Civil Code §3482 and declared intact, interior LBP to be a public nuisance. The trial court then designed its own remedial program, which conflicts with state standards (*see* SWOB/37-39), and established its own source of funding. The trial court exceeded the constitutional boundaries of its authority. (*See Wolfe v. State Farm Fire & Cas. Ins. Co.* (1996) 46 Cal.App.4th 554, 568 ["It is enough that the Legislature

has tried and will try again to address the problem."]; *Korens v. R. W. Zukin Corp.* (1989) 212 Cal.App.3d 1054, 1059 ["We decline the invitation to do that which the Legislature has left undone."].)

That the Legislature chose a different method of preventing childhood lead exposure than the trial court prefers confers no authority on the trial court to disregard the Legislature's decision, as plaintiffs suggest. (RB/122.) The courts must follow and enforce, not revise or supplement, the Legislature's decision. (*Korens*, 212 Cal.App.3d at 1059; SWOB/51-55.)[20]

Plaintiffs' real problem is that some property owners violate the law—and plaintiffs have not aggressively enforced the law against their constituents. (46RT/6880:19-27 [Allen] ["[N]ot only in Alameda County but pretty much throughout the State, the political will does not exist enough to prioritize the enforcement of the existing laws, housing lead safe work rules."]; *see also* SWOB/36.) The answer is not to encourage and reward scofflaws and slumlords, as the trial court did, by giving them priority in abatement; new windows, doors and floors; and property renovation, such as roof and plumbing repairs. The constitutionally mandated solution is to implement the

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[20] Plaintiffs refer to deteriorating LBP causing EBLLs—which by definition is not lead-safe. (RB/123.) The Legislature has already addressed this hazard. (*See* H&S Code §17920.10; Code Regs., tit. 17, §35037 ["lead hazard" encompasses "deteriorated lead-based paint" and "disturbing lead-based paint without containment"]; Civ. Code §1941.1 [making a dwelling "untenantable" if it has "lead hazards" in violation of H&S Code section 17920.10 or is a "substandard building," which section 17920.3 defines to include any building "in which there exists…(c) Any nuisance."].)

Legislature's programs. (*See Friends of H St. v. City of Sacramento* (1993) 20 Cal.App.4th 152, 165 ["[U]nder the separation of powers doctrine, courts lack power to interfere with legislative action at either the state or local level."].)[21]

The trial court exceeded its jurisdiction and exercised a legislative function when it decided that "[e]xisting programs at all government levels lack the resources to effectively deal with the problem." (138AA/41012.) On appeal, plaintiffs, too, lament that "[t]here are no government resources available to do more." (RB/132.) It is not the court's province to determine that the approximately $300 million spent in the fee-funded CLPPB program is inadequate. (127AA/37569:10-37571:1; *cf.* 126AA/37323:3-9 [CLPPB considers the fee to be adequate].) The Legislature set the fee to provide funding it considered sufficient. (H&S Code §105310(f).)

It is no answer to say that the trial court is not ordering defendants to fund a government program. (RB/123-124.) Defendants have been ordered to pay money to the State (not a party), and the CLPPB is to allocate the fund to CLPPPs (also not parties) by grants. (*See* SWOB/49-55; COB/54-58.) Government employees under the control of the Jurisdictions' Board of Supervisors will run the trial court's program. (139AA/41154-41155, 41167.) In reality, the trial court ordered defendants to

[21] Although unnecessary for decision, the remedy's interference with the Legislature's program is real and substantial. (95AA/28189-28199 ¶¶7-14, 16; 89AA/26342-26349 ¶¶8, 10-11.)

pay for a supplemental government program addressing an issue already handled by the Legislature.

Whatever level of funding might be appropriate, whether the CLPPB's programs are adequate, and whether more should be done are policy questions reserved for the Legislature. (*California Sch. Bds. Assn. v. State* (2011) 192 Cal.App.4th 770, 799 [funding of public programs is "fundamentally a legislative act, entrusted to the Legislature and the Governor and not the judiciary"]; *County of Butte v. Super. Ct.* (1985) 176 Cal.App.3d 693, 699.) The State already has determined Sherwin-Williams' fair share to pay to address the presence of LBP in California. If more money is required or if Sherwin-Williams is not paying its fair share, the Legislature is the forum to remedy that problem. The court cannot usurp the Legislature's role. (*California School Bds. Assn.,* 192 Cal.App.4th at 797; *County of Los Angeles v. Com. of State Mandates* (1995) 32 Cal.App.4th 805, 820.)

## V. THE TRIAL COURT DEPRIVED SHERWIN-WILLIAMS OF A FAIR TRIAL.

The trial court's procedural errors are not merely discretionary decisions permitted to streamline a trial. (RB/106-111.) The trial judge's rush to and through trial prejudiced Sherwin-Williams, contradicted the Evidence Code, and violated due process.

### A. The Trial Court Erred By Denying Recross-Examination.

The trial court did not have discretion to bar all recross-examination. (RB/109.) Parties may recross-examine witnesses on new topics, evidence, and exhibits. (Evid. Code §772(a) ["The

examination of a witness *shall* proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination."] [emphasis added]; *Foster v. Keating* (1953) 120 Cal.App.2d 435, 451 ["It is within the sound discretion of the trial court to define the issues and direct the order of proof but that may not be so done as to preclude a party from adducing competent, material, and relevant evidence which tends to prove or disprove any material issue."].)[22]

The trial court's prohibition of recross-examination was highly prejudicial. Plaintiffs used redirect examination to circumvent cross-examination on material issues. It is undisputed that plaintiffs introduced about 950 Sherwin-Williams' ads on Dr. Markowitz's redirect. He also posited then that consumers confused exterior with interior paints, and that generic promotion of a brand or product line promoted use of interior LBP. (37RT/5598:28-5600:16, 37RT/5598:28-5600:12, 5646:14-5647:12.) Sherwin-Williams was denied recross-examination of plaintiffs' historian on those points (37RT/5598:28-5600:17; 30RT/4504:20-4505:11), all now argued as bases for liability. (RB/77-79; *see also* Section II.A [citing ads from Exhibit 271].)

Sherwin-Williams was entitled to recross-examine plaintiffs' expert to show why his new opinions were inadequate to prove its liability. (*People v. Aragon* (1957) 154 Cal.App.2d

[22] Contrary to plaintiffs' argument (RB/109), defendants preserved this issue by lodging a continuing objection with the trial court. (30RT/4504:20-4505:11.)

646, 659 ["The cross-examination of a witness by an opposing party has been described as, 'the greatest legal engine ever invented for the discovery of truth.' (Wigmore, Evidence, 3d ed., § 1367.) *It is not a privilege which the court may grant or deny, but is an absolute right of the litigant against whom the testimony is offered.*"] [emphasis added]; *Estate of Horman* (1968) 265 Cal.App.2d 796, 808 ["A party is entitled to have received in evidence and considered by the court, before findings are made, all competent, relevant and material evidence on any material issue."].)

### B. The Trial Court Erred By Running The Trial On A Time Clock.

The trial court's unreasonable time limits compounded the prejudice to Sherwin-Williams, which (by virtue of alphabetical order) had insufficient time to present its individual defense. Sherwin-Williams had moved for a separate trial. As a paint manufacturer that did not advertise WLC pigment, that promoted non-lead residential interior paints, and that did not contribute to the LIA's White Lead Promotion (37RT/5572:16-5573:6 [Markowitz]; 45RT/6618:3-16; 46RT/6765:7-6766:15; 62AA/18046 [214], Sherwin-Williams' interests differed from other defendants.

Nevertheless, the trial court denied Sherwin-Williams' request for a separate trial, lumped Sherwin-Williams into a "Defendants" group, and then gave it less than two hours to present its evidence and to dissect over 900 advertisements introduced on redirect. And, because the trial court never required individualized proof from each Jurisdiction as to each

defendant, each defendant had virtually no time to explain why plaintiffs' generic "industry" case did not apply to it.[23] The trial court's arbitrary refusal to entertain offers of proof and its rejection of deposition excerpts, without reviewing them (even though the trial court had suggested defendants file them (100AA/29429-29430)), magnified the error, violated Evidence Code section 351, and further denied Sherwin-Williams and the other defendants a fair opportunity to present their defenses.[24]

For example, the trial court's unfair time limitations prevented Sherwin-Williams from calling at trial medical, public health, and environmental experts who would have presented testimony and data refuting plaintiffs' claims of a public health crisis, harm to public health at low BLLs, and need for another inspection and abatement program. (*See, e.g.*, 89AA/26342-26349 [Buffler]; 95AA/28189-28199 [Williams]; 98AA/28888-28895 [Banner].)

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[23] Plaintiffs contend incorrectly that the trial court expanded the 30-hour time limit to 40 hours on defendants' request. (RB/108.) Defendants had requested at least four weeks to present their defenses. (46AA/13466-13467; 61AA/17845-17862; 59AA/17376; *see also* 21RT/3209:24-3213:26.) The court allowed 40 hours only after plaintiffs added witnesses to their list. (24RT/3611:19-3612:4.)

[24] The trial court tried to justify its rejection of deposition designations by claiming that defendants had not complied with the Complex Court Guidelines. (99AA/29291; RB/106-107.) However, the court mistakenly relied on a guideline that applies only to live testimony.

### C. The Trial Court Erred By Depriving Defendants Full Access To The RASSCLE Database.

The trial court denied defendants a reasonable opportunity to obtain and analyze the full RASSCLE database before trial. (SWOB/56.) Plaintiffs respond by claiming that defendants were not diligent in pursuing the database, and the data were not necessary. (RB/107-108.) Not so.

The trial court repeatedly recognized "the importance of the RASSCLE information to Defendants' defense." (40AA/11583; *see also* 59AA/17383.) In November 2012, the court continued the pretrial and trial dates because plaintiffs' "RASSCLE production is not yet near completion, despite Defendants' diligent efforts to obtain this evidence." (40AA/11583.) The trial court ordered plaintiffs to produce the full database by February 2013 to afford defendants sufficient time for expert analysis and discovery. (40AA/11439.) In May 2013, the court again continued the trial date until plaintiffs produced all RASSCLE data. (59AA/17381-17385; 35AA/10174-10176; 40AA/11559; 46AA/13487.) The court acknowledged that "full production of the RASSCLE database and related case files is essential to fair resolution of this case." (59AA/17383.)

Then apparently driven by his retirement date, the trial court reversed itself and rewarded plaintiffs' intransigence by starting trial without full production of the database. (60AA/17650-17653, 17411-17427, 17605-17606.) The court's about-face deprived defendants of critical evidence that would

have refuted plaintiffs' inapposite, outdated national studies of the source of EBLLs—a central issue. (*See* 89AA/26354-26360.)[25]

### D. The Trial Court Erred By Denying Defendants The Opportunity To Inspect Properties.

Plaintiffs blame defendants for not inspecting the alleged nuisance properties. (RB/110-111.) However, the trial court denied defendants' motion to join property owners. (5AA/960-963.) Defendants then requested discovery and inspection of properties to determine the presence of WLC and its manufacturer over a year before trial. (24AA/6616.) The trial court denied that request. (24AA/6616-6618.) When plaintiffs claimed that RASSCLE data would contain the necessary property information (s*ee, e.g.*, 60AA/17669; 43AA/12359), defendants reserved their rights if more information were needed after the production of the RASSCLE data. (60AA/17669.) When it became known that defendants would be forced to trial without the promised full RASSCLE data, Sherwin-Williams promptly requested permission to serve notices of inspection of residences. (60AA/17671.) The trial court denied that request. (70AA/20417.)

The net result of the trial court's rulings was that defendants had neither the full RASSCLE data nor the property inspections. The prejudice is manifest: in violation of due process, defendants had no opportunity to exonerate themselves

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[25] Plaintiffs contend on appeal that the database would have been cumulative. (RB/107.) The trial court rejected this contention and ordered full production. Nothing in the record indicates that the data plaintiffs failed to produce were cumulative of other RASSCLE data. (42RT/6130:22-6131:2; 42RT/6142:22-6143:13 [Washburn].)

at any property, to show that there was no nuisance condition, or to demonstrate that the owner or plaintiffs should bear responsibility for creating or maintaining any nuisance condition. (*Rutherford*, 16 Cal. 4th at 958.)

### E. The Trial Court Erred By Excusing Plaintiffs' Prejudicial Spoliation Of Relevant Evidence.

There is no dispute that, during the litigation, plaintiffs destroyed information on actual property conditions and causes of EBLLs in the Jurisdictions. (*See* 77AA/22624.) Plaintiffs failed to issue timely litigation holds, preserved only limited emails, and destroyed the rest, resulting in destruction of relevant documents requested in discovery. (38AA/10869-10873 [listing testimony of county witnesses who were not aware of retention policies or acknowledged "shredding" and "deleting" relevant documents]; 62AA/18109-18110 [Monterey County admitting that "all emails…were destroyed before January 2009."].)

The trial court recognized that plaintiffs had destroyed "potentially relevant emails, ESI and other documents." (41AA/11745.) However, the court excused plaintiffs' misconduct because defendants had "received a large quantity of discovery" (*Id.*), and it accepted this production as the government's "level best." (23RT/3416:21-3417:24.)[26] No corporate defendant would

[26] For example, Monterey's conduct, during the litigation, is hardly "level best." Monterey destroyed archived emails from 2006 to 2009 (62AA/18107-18110) and did not produce any RASSCLE I data, despite using that database until June 2009. (62AA/18083.) It also deliberately removed from its website the damaging admission that "most of the elevated lead levels are

have been excused from this destruction of adverse evidence—as the trial court recognized. (*Id.* ["[G]overnmental organizations…are not multi-billion dollar corporations with layers of people"].)

Plaintiffs' systemic spoliation prejudiced defendants' ability to cross-examine witnesses and to challenge plaintiffs' summary evidence. The destruction of evidence after plaintiffs filed suit—particularly given plaintiffs' decades-long delay in bringing suit, plaintiffs' failure to produce the full RASSCLE database, the court's preclusion of recross-examination, and the court's denial of discovery into individual properties—further stripped defendants of their due process right to present their defenses. (SWOB/56-60.)

### F. The Trial Court Erred By Changing The Relevant Product.

Finally, plaintiffs do not contest that the trial court changed the products at issue after trial. (SWOB/59-60.) Instead of imposing liability for promotion of WLC and WLS as identified in discovery and the pretrial statement, the trial court imposed liability for promotion of LBP and paint. The trial court violated due process by changing the product at issue after trial. (SWOB/60.)

As a paint manufacturer that did not promote WLC or WLS pigments, this change severely prejudiced Sherwin-Williams. The evidence against Sherwin-Williams on which the trial court

(continued…)

food, candies, and imported cookware rather than paint." (39RT/5858:4-16.)

relied concerned promotion of exterior paint or paint generically, not promotion of WLC for residential interiors. (138AA/40949-40951, 40959-40961.) This remarkable change deprived Sherwin-Williams of fair notice of the claim against it.

## VI. SUMMING UP: PLAINTIFFS' CLAIM IGNORES HISTORY, THE REAL WORLD, AND THE LAW.

Plaintiffs ask this court to rewrite the law, history, and science and to disregard the real world today. Without revising the facts and the law, they cannot prevail.

In the real world, California's prevention of childhood lead exposure is a "public health success," (SWOB/14), CLPPB has not complained about funding, children live safely in residences with well-maintained LBP, and children's BLLs are declining past all-time low levels. Owners of well-maintained Palo Alto apartments or San Bruno bungalows would be surprised to find that their properties are public nuisances, subjecting them to risk of prosecution, because they have LBP inside them. County, City, and District Attorneys are able to prosecute negligent property owners for violating state and city laws requiring them to prevent and abate LBP hazards, and they can prosecute negligent contractors for careless repainting and renovation work. (SWOB/18 n.6.) The CLPPPs admit that enforcement of existing laws is the most effective way to prevent childhood lead exposure.

Federal, state, and local public health authorities do not recommend or require abatement of intact LBP or window replacement. They worry that abatement of houses can increase BLLs, and abatement has not reduced children's low BLLs, because there are myriad common lead sources other than LBP.

(140AA/41567-41577; 144AA/42899-145AA/42901; *see also* 31RT/4602:18-25; 34RT/5178:10-13.)[27]

Plaintiffs' regard for history fares no better. They ignore that the federal and state governments, as well as some of the Jurisdictions, continued to specify and recommend the use of interior residential LBP into the 1950's and exterior LBP into the 1970's. In contrast, Sherwin-Williams was a pioneer in making, selling, and promoting non-lead pigments and interior residential paints without WLC. Virtually none of its interior paints had WLC; the *de minimis* exceptions ended over 70 years ago and were not promoted in the Jurisdictions. Sherwin-Williams had no incentive to promote lead; it had no horse in that race. (30RT/4467:12-4468:9 [Rosner].) In fact, Sherwin-Williams had not promoted the use of lead for 103 years, and plaintiffs' historian could not think of another company that had done more to develop non-lead residential paints than Sherwin-Williams.

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[27] And, the Jurisdictions allow lead to be put into the environment. Although plaintiffs claim that there is no safe level of lead in this case, municipal incinerators and other sources emit tons of lead into the air. (*See* 2012 Lead State Implementation Plan for Los Angeles County, http://www3.aqmd.gov/hb/attachments/2011-2015/2012May/2012-May4-030.pdf [at 61][last visited Feb. 3, 2015].) As a result, Los Angeles County did not meet the National Ambient Air Quality Standard for lead. (*Id.* at 1.) The Jurisdictions also permit some lead in the public water supply, and no regulation limits lead in the soil in public parks. (31RT/4717:18-4719:13; 33RT/5035:12-5036:21; 40RT/5986:9-16.) If the trial court's finding of "no safe level" were affirmed, it would likely have far-reaching socio-economic and regulatory consequences, because lead is ubiquitous from a vast number of sources.

(37RT/5572:16-5573:6, 5545:9-16 [Markowitz]; SWOB/19.) It is not a company that affirmatively instructed its customers to use its products in a known, hazardous way.

Fundamental principles of tort law and due process do not countenance plaintiffs' legal theory, which imposes on one ingredient manufacturer absolute, industry-wide liability for all LBP and lead pigments of any kind made by anyone at any time, without allowing Sherwin-Williams to inspect any property to exculpate itself or to develop evidence of other persons' negligence. (SWOB/44-47; *see also* 54-55, *supra*.) Liability is based on "contemporary," ground-breaking scientific studies unknown when Sherwin-Williams last made WLC over 65 years ago.

Accepting plaintiffs' made-up theory of a collective public nuisance, the trial court imposed joint and several liability with no individualized proof of fault or even apportionment of fault. Plaintiffs were excused from presenting proof of harm at any property to any child by any product made by any manufacturer. The trial court has erroneously "adopt[ed] aggregate causation logic in an incautious manner," because liability does not "reflect the consequences of the defendant's own conduct." (*Paroline v. United States* (2014) 134 S.Ct. 1710, 1724-1725.)

Plaintiffs' theory is as extreme, unprecedented, retroactive, disproportionate, and unconstitutional as it sounds. It is not the stuff of tort law, because it does not require proof of causation or a determination of individualized liability at the alleged public nuisance location. It is a matter constitutionally reserved for the Legislature, which has implemented a comprehensive, successful program to prevent childhood lead exposure.

## JOINDER IN OTHER REPLY BRIEFS

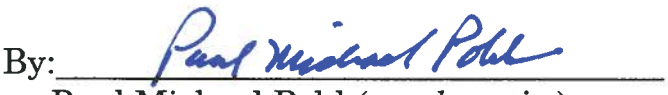
Sherwin-Williams joins the reply briefs submitted by ConAgra Grocery Products and NL Industries, except section VII of ConAgra's reply brief, which does not address common issues.

## CONCLUSION

The court should reverse with directions to enter judgment for Sherwin-Williams and to grant declaratory relief on its cross-complaint. At a minimum, the court should vacate the judgment and remand for a new trial.

DATED: February 6, 2015.

Respectfully submitted,

By: 

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## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed reply brief of The Sherwin-Williams Company is produced using 13-point Roman type including footnotes and contains approximately 13,781 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this reply brief.

Dated: Feb 6, 2015

Paul Michael Pohl

Paul Michael Pohl (*pro hac vice*)
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## 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 1755 Embarcadero Road, Palo Alto, California 94303. On February 6, 2015, I served the following document(s) by the method indicated below:

**REPLY BRIEF OF DEFENDANT, CROSS-COMPLAINANT, AND APPELLANT THE SHERWIN-WILLIAMS COMPANY AND JOINDER IN REPLY BRIEFS OF CONAGRA GROCERY PRODUCTS COMPANY AND NL INDUSTRIES, INC.**

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as set forth below. 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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Moriah E Condos

Moriah Elizabeth Condos

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

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