No. S246102

In the Supreme Court of California

The People,

Plaintiff,

v.

ConAgra Grocery Products Co., et. al,

Defendants and Appellants.

The Sherwin-Williams Company,

Defendant, Cross-complainant, and Appellant.

Court of Appeal, Sixth Appellate District Court
Case No. H040880

Santa Clara County Superior Court, Case No. CV788657
Honorable James T. Kleinberg

NL Industries' Reply in Support of Review

BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
*Jameson R. Jones (*pro hac pending*)
Andre M. Pauka (*pro hac pending*)
1801 Wewatta Street, Suite 1200
Denver, Colorado 80202
Tel: 303-592-3123
jameson.jones@bartlit-beck.com

SNELL & WILMER L.L.P.
Richard A. Derevan (#60960)
Todd E. Lundell (#250813)
600 Anton Blvd., Suite 1400
Costa Mesa, California 92626
Tel: 714-427-7000
Fax: 714-427-7799
e-mail: rderevan@swlaw.com

MCMANIS FAULKNER
James McManis (#40958)
William Faulkner (#83385)
Fairmont Plaza, 10th Floor
50 West San Fernando Street
San Jose, California 95113
Tel: 408-279-8700
wfaulkner@mcmanislaw.com

Attorneys for Petitioner, NL Industries, Inc.

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Introduction

The People's answer to NL's petition serially brushes aside each of the important legal questions presented. Nothing to see here, the People say, because the appellate court applied "well-established principles of California law" and "broke no new ground." [Answer at 2.] Nothing could be further from the truth.

Like a Potemkin village, the People's façade disappears with the most cursory of examinations. As to each individual question, the People are wrong. But the breathtaking scope of the judgment and its vast implications for public nuisance law are most clearly exposed by stepping back and viewing the judgment as a whole. Simply describing what the trial and appellate courts have held manifests the need for this Court's review.

Going far beyond legislative enactments, a single judge declared all deteriorated lead paint and all lead paint on doors and windows in *private* homes to be an indivisible *public* nuisance. The court never took evidence of harm at any particular place, or even determined what portion of homes contain defendants' products. Finding each of NL, Sherwin Williams, and ConAgra at least a minor force in causing the nuisance, the court made three companies (out of the hundreds or thousands that promoted lead paint) responsible for funding a vast government program to inspect and remediate homes throughout half of California. Defendants have thus been made insurers of all interior lead paint, regardless of whether any defendant supplied it.

Nothing in the People's answer refutes the need for review of any of the important legal questions raised:

Public rights. The People cannot identify a single precedent—from any state—supporting application of public nuisance law to countless separate uses of a product which causes harms only in private spaces, at different times, and in different locations. Without support, the People's assertion that "contamination of housing by lead paint is no different than the contamination of a river [a public resource] by a pollutant" [Answer at 18] is nonsensical. This Court should grant review to determine whether such circumstances amount to a public nuisance or merely an aggregation of private harms, as other state appellate courts have held.

Nuisance per se. The People do not dispute that the trial court took no evidence of harm at any location. Nor do they refute that the trial court's complex administrative program—to inspect and remediate millions of private homes—is far more akin to a legislative prerogative than a judgment any court has ever entered. The People simply ignore the question by emphasizing that the court's *remedy* only tackles *certain* lead paint. [Answer at 23.] This Court's review is required before such a massive court-created administrative program should proceed.

Jury trial. The People do not acknowledge the court of appeal's concession that no decision of this Court speaks to the scope of the jury trial right for public nuisance abatement cases. [Opn. at 86.] Review is needed to settle this important question.

Knowledge. The People's answer claims defendants knew of today's harms when promoting lead paint, but they utterly ignore the trial court's admission that it held defendants "retroactively liable" based on "more contemporary knowledge." [139 AA 41153; *People v. Atlantic Richfield Co.* (Cal.Super.Ct. Santa Clara County, Mar. 26, 2014, No. 100CV788657) 2014 WL 1385823, at *53]. Despite asserting defendants' purported knowledge, the People ignore the unrefuted fact that scientists first found evidence that lead could be a hazard in ordinary house dust in the 1970s. [NL Pet. at 12.] It was even later—not until the turn of the 21st century—when scientists first hypothesized there may be no safe level of lead exposure. [NL Pet. at 12; Opn. at 11 n.18.] The People blur these basic truths, asking this Court to leave defendants responsible for a nuisance justified only by today's science, based on decades-old (in some cases century-old) conduct.

In sum, the judgment makes three defendants insurers for an entire industry's worth of lead paint, based on conduct no worse than selling a lawful product and failing to warn of unknowable hazards. This Court should determine the appropriate limits on claimed public nuisances stemming from the promotion and sale of products.

The number of filed complaints following the court of appeal's blueprint for liability is growing by the week. Review is warranted before these courts expend substantial judicial resources tackling what amount to legislative problems, with the relevant legal principles unsettled.

Legal Discussion

A. Whether interior lead paint invades public rights is an important legal question requiring review

The People have no answer to the importance of the question whether lead paint invades public rights—other than to say that the issue "is not . . . close." [Answer at 18.] This remarkable assertion does not bear the lightest scrutiny.

The People's ipse dixit impugns the competence of the high courts of sister states, which have seen the answer as obvious, but in *defendants' favor*. The Rhode Island Supreme Court found that identical claims regarding lead paint fell "*far short* of alleging an interference with a public right as that term traditionally has been understood in the law." *State of Rhode Island v. Lead Industries Ass'n, Inc.* (R.I. 2008) 951 A.2d 428, 453 (emphasis added); *see also City of Chicago v. American Cyanamid Co.* (Ill.App. 2005) 823 N.E.2d 126, 132-33.

The People disclaim any "conflict" with courts of other states on the ground that the California Civil Code defines public nuisance more broadly. [Answer at 21.] But the People never analyze the text of the statute.

For there to be a public nuisance, the Civil Code requires that there must be "one" thing "which affects *at the same time* an entire community or neighborhood, or any considerable number of persons." Civ. Code § 3480 (emphasis added). This Court has interpreted the statutory text to require that there be an

interference with "collective social interests" rather than many private harms. *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105.

The People do not explain how lead paint in millions of private homes throughout the state (each with different histories and timing of exposure) can be considered "one" thing that affects enough people "at the same time." Instead of addressing the statutory language, the People argue that "[t]he contamination of housing by lead paint is no different than the contamination of a river by a pollutant." [Answer at 18.] A single contaminated river (itself a public resource with shared rights of access) is simply not comparable to a product placed in millions of separate, private homes, at different times, with different ownership and different histories, affecting only the individuals inside each home. No case has ever found that public nuisance applies by bundling discrete places or hazards that affect people separately.

It is true that health threats affecting people inside private properties can, at times, rise to a public nuisance. [Answer at 19.] But that is only when—as the cases cited in the People's answer show—sufficient people are affected by a common source through their use of a public resource. *Birke v. Oakland Worldwide* (2009) 169 Cal.App.4th 1540, 1548 (allegations established cigarette smoke in the air of outdoor "common areas" affected a substantial number of people "at the same time"); *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 121 (holding that allegations of waste matter that "severely pollutes the air"

sufficed to withstand demurrer); *People v. McDonald* (2006) 137 Cal.App.4th 521, 539 (public urination "on a busy commercial street"). Here, the health threat does not come from a single outside source to affect a considerable number of people. There is no "spread of smoke, dust or fumes." [See Answer at 19-20.]

And contrary to the People's assertion [Answer at 20-21], *Acuna*, *supra*, did not hold that harms "suffered in private residences created a public nuisance." Far from it. The Rocksprings gang in *Acuna* "obstruct[ed] the free use of property" by preventing residents' "free passage" through *public* spaces. *Id.* at 1120. *Acuna* did not concern alleged harms to people *inside* their homes but the fact that they were often trapped there by the gang's dominion over the streets *outside*.[1]

Moreover, California's statutory law is based on and perpetuates common law rules "except in those instances where [the Code's] language clearly and unequivocally discloses an intention to depart from, alter, or abrogate" them. *In re Elizalde's Estate* (1920) 182 Cal. 427, 433; see also *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 814-16; Civ. Code § 5. Section 3480 did not abrogate the common law of public rights. To the contrary, the

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[1] Wood's treatise does not establish that "promotion and sale of an 'unhealthy' product" justifies a nuisance injunction like the one at issue here. [Answer at 20, citing Wood, *A Practical Treatise on Law of Nuisances in their Various Forms* (1st ed. 1875) §71, p. 73.] As this Court has held, the fact that certain business activities "were recognized as public nuisances in criminal prosecutions," does not mean "that an equity action on behalf of the state might be maintained at common law to enjoin the operation." *People v. Lim* (1941) 18 Cal.2d 872, 876.

requirement of simultaneous effects to a large number requires people to be affected in a public way. See Wood, A Practical Treatise on the Law of Nuisances in Their Various Forms (1st ed. 1875) § 19, p. 29 (explaining that a nuisance must cause widespread effects "at one and the same time" to be public).

The People misrepresent the Restatement when they argue that "California's statutory definition of a public right is broader" than that of other states. [Answer at 21 (citing Rest. 2d Torts § 821B com. g).] The California case cited in the comment stands for the unremarkable proposition that malodorous air (a public resource) emanating from a single source affected "a considerable number of persons in the neighborhood." *Wade v. Campbell* (1962) 200 Cal.App.2d 54, 58-59. Contrary to the Restatement's observation that some statutes may demand less, the Civil Code requires plaintiffs to prove "offenses against, or interferences with, the exercise of *rights common to the public*." *Acuna*, *supra*, 14 Cal.4th 1090, 1103. That public rights requirement indeed "marks the entire field [of public nuisance] even today." *Ibid.*

Calling private housing a "public health" issue or a "public resource" does not address the legal standard of public rights; it avoids the question. This Court should answer, not avoid. Lead paint exposures occur only "within the most private and intimate of surroundings." *State of Rhode Island*, *supra*, 951 A.2d at 454 (cleaned up). This Court should decide whether, as other courts have held, that means lead paint does not concern "the rights traditionally understood as public rights." *Ibid.* (cleaned up).

B. This Court should grant review to determine if a court may establish a nuisance per se

The People do not contest that this Court decades ago declared "[a]n end to the [then] expansive trend," at least for California, of "government by [public nuisance] injunction." *Acuna*, *supra*, 14 Cal.4th at 1106 (cleaned up). Nor do the People disagree that this judgment—funding local governments' lead-related efforts throughout half of California—is one of the most aggressive forms of "government by injunction" yet contrived. This Court should grant review to answer whether the power exercised (declaring a product in millions of unidentified private spaces a public nuisance) is part of the judicial power and authorized under the Civil Code.

The People do not provide any basis for courts to declare categorical nuisances. Instead, they parrot the court of appeal, arguing that this judgment is not a legislative nuisance per se because "the trial court 'crafted a very limited order requiring abatement of only deteriorated interior lead paint, and lead paint on friction surfaces, and lead-contaminated soil.'" [Answer at 23.]

The trial court's order is many things, but "very limited" is not one. Defendants have been ordered to pay the cities and counties to find *all* lead paint (not just deteriorated lead paint) in every pre-1951 home through half of California. [139 AA 41160.] And defendants must pay to remediate *all* deteriorated paint and to replace *all* lead-painted doors, windows, and floors, wherever such paint may be found. Further, the People claim it is only a matter of time before *all* lead paint deteriorates. [Answer at 26.]

The judgment is no less a nuisance per se because the court took evidence and made findings about the general subject of lead paint. [Answer at 23.] Legislatures typically do the same when passing laws. What the trial court did *not* do was to take evidence about the conditions or the risk of harm in any one of the 3.55 million homes it was ruling on, nor in any part of the ten cities and counties. It was an "abstract" ruling on lead paint, see *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 388, because the court took no evidence about lead paint as it exists in "the circumstances and the locality" at issue. *Ibid.* Its ruling excused the People from proving harm at any location, which is just what nuisance per se does. See 58 Am.Jur.2d Nuisances, § 15 ("liability is absolute and injury to the public is presumed").

Nuisance per se is a generalization; it says that something is *always* a hazard in *all* homes. It is a shortcut driven by policy choices, not case-specific evidence. That is why nuisance per se is an exercise of legislative power. As Justice Cardozo explained, the legislator may create rules "in a manner altogether abstract," but the judge must decide "particular cases . . . with reference to problems absolutely concrete." Cardozo, The Nature of the Judicial Process (1921) p. 120.

There is simply no precedent for a court doing what the trial court did here and defining a nuisance throughout the state. This Court has never sanctioned such an order, and this Court's review is necessary if California is to condone the enforcement of public policy statewide, based on the fiat of a single judge.

C. This Court should grant review to determine if a right to a jury exists in disputed public nuisance cases

The People also provide no reason to defer review of the jury trial right for public nuisance abatement suits. Calling the law "so well-settled that the Court should not disturb it" [Answer at 34], the People ignore the court of appeal's conclusion that "[t]here is no binding California Supreme Court holding on the issue of whether a jury trial is required." [Opn. at 88.]

Contrary to the People's obfuscation [Answer at 33 n.12], there is no plausible argument that the two sentences on public nuisance in *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 299, were either "responsive to the issues raised on appeal" or "intended to guide the parties and the trial court," *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1158-1159 (citation omitted).[2]

Nor does the dicta in *One 1941 Chevrolet* answer the question presented. The actual holding—that property which is not a nuisance per se but is capable of lawful use requires a jury trial before forfeiture—supports the right of a jury in disputed nuisance cases. On the facts of *One 1941 Chevrolet*, the marijuana was illegal per se, but the automobile was not; therefore (this Court held) the automobile's owner had a right of

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[2] Similarly, the right of jury trial was not even at issue in *People v. Lim* (1941) 18 Cal.2d 872. *Compare* People's Answer at 33 (asserting a relevant "holding" in *Lim*).

jury trial to determine whether the car was being used for unlawful purposes:

> While property kept in violation of law which is incapable of lawful use and declared to be a nuisance per se may be forfeited without a trial by jury, it does not follow that property ordinarily used for lawful purposes—innocent property—may be forfeited without a trial by jury where an issue of fact is joined as to whether the property was being used for an unlawful purpose . . . .

One 1941 Chevrolet, supra, 37 Cal.2d at 299. Here, consistent with *One 1941 Chevrolet*, where lead paint can be a nuisance only in certain circumstances but not others, a jury was required.

By contrast, the People cannot so easily cast aside the holding in *Farrell v. City of Ontario* (1919) 39 Cal.App. 351, 355-57. In *Farrell*, the court of appeal logically needed to hold that a jury was required in *all* public nuisance cases, regardless of remedy. The trial court in *Farrell* had overturned a jury's damage verdict by exercising an equitable court's jurisdiction to decide the entire case (including legal issues). See *id.* at 351, 353-55. The specific question in *Farrell* was whether a jury was required on the damage claim (because that was the only issue before the court). But, in addressing the court of equity's power over the entire case, the court held that "a court of purely equitable jurisdiction" could not even "consider [a] petition for equitable relief" on a public nuisance without a jury trial. *Id* at 355-56.

The ratio decidendi of a case—the "'principle or rule which constitutes the ground of [a] decision'"—is precedential. *Bunch v. Coachella Valley Water Dist.* (1989) 214 Cal.App.3d 203, 212 (quoting 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, p. 753). Put another way, "statements of law [that] were necessary to the decision" constitute the holdings of a case. *Id.* Even though *Farrell* involved a claim for damages, its holding covered whether disputed public nuisance claims require a jury in cases seeking purely equitable remedies. A square conflict thus exists between *Farrell* and the remaining cases the People cite. The Court should grant review of this important question of California law.

D. The culpability required for product-based public nuisances merits review

Finally, the People provide no coherent reason for the Court to deny review over the culpable knowledge required in cases like this. Whether liability for a public nuisance can be based on scientific knowledge developed long after a product was marketed is an important question warranting resolution.

In failure-to-warn cases, this Court has held, the plaintiff must prove that a risk was known or knowable "in light of the generally recognized and prevailing best scientific and medical knowledge available at the time." *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112. The court of appeal's first opinion in this case declared that the People would have to prove "affirmative promotion" of interior lead paint with "knowledge of the hazard that such use would create." *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 309-10. The court

explained that it was requiring conduct "distinct from and far more egregious than simply producing a defective product or failing to warn." *Id.* at 309.

After remand, neither the trial court nor the court of appeal held the People to proving the culpable knowledge required even for products liability. The People offer a narrative silent as to time and specifics, arguing that NL is just "quarrel[ing] with inferences drawn from evidence." [Answer at 25.] Not so.

In particular, even though the People's entire case was based on the hazard presented by invisible lead dust, the answer ignores that scientists first found evidence of that problem in 1974—more than two decades after the promotion of interior lead paint ceased. [NL Pet. at 12.] It was not until the turn of the 21st century that scientists first hypothesized there may be no safe level of lead exposure. [NL Pet. at 12; Opn. at 11 n.18.] Because childhood lead exposures have fallen dramatically, both discoveries were necessary to declare a present nuisance.

These modern scientific developments led even the trial court to acknowledge that liability was retroactive:

> The related issue is whether the Defendants can be held *retroactively liable when the state of knowledge was admittedly in its nascent stage*. The Court takes judicial notice of the fact that drugs, facilities, foods, and products of all kinds that were at one time viewed as harmless are later shown to be anything but . . . . All this says is medicine has

> advanced; *shouldn't we take advantage of this more contemporary knowledge* to protect thousands of lives?

[139 AA 41153 (emphasis added).]

The indisputable scientific advances and the trial court's admission (which the People also ignore) show that the question of culpability here is not (as the People argue) a fact-bound dispute about permissible inferences. It was undisputed that defendants knew nothing more than what was published in the medical literature. [36 RT 5386]. This case thus presents a legal question essential to defining the boundaries of public nuisance. This Court should determine whether California public nuisance law requires manufacturers to insure their products against sea-changes in science, or whether the same standards existing in product liability law apply.

The People's conditional request that the Court decide whether "actual knowledge, rather than constructive knowledge, was necessary" [Answer at 4] reveals the importance of review. Although the court of appeal disclaimed liability based on constructive knowledge, it affirmed based on exactly that—inferences about what Defendants "must have known" from isolated speeches made by two individuals unaffiliated with any defendant. [Opn. at 27-31.] This court should settle the law.

* * *

The combined effect of the court of appeal's legal innovations—making manufacturers insurers of their products against changing science, without regard to legislative judgments or traditional requirements for product liability—has predictably started a wave of copycat lawsuits. Public nuisance suits blaming oil companies for global warming are multiplying, with three more lawsuits filed in the last 40 days. See *County of Santa Cruz v. Chevron* (Cal.Super.Ct. County of Santa Cruz, Dec. 20, 2017) Case No. 17-CV-3242; *City of Santa Cruz v. Chevron* (Cal.Super.Ct. County of Santa Cruz, Dec. 20, 2017) Case No. 17-CV-3243; *City of Richmond v. Chevron Corp.* (Cal.Super.Ct. Contra Costa County, Jan. 22, 2018) Case No. MSC18-00055.[3]

These suits unabashedly copy the court of appeal's blueprint, with proponents predicting a "massive wave of litigation" mirroring "claims recently upheld in high-profile lead paint litigation." Hayes, *Exxon Mobil, BP, Others Face New Climate Change Suits*, Bloomberg BNA Toxics Law Rptr. (Dec. 21, 2017), *available at* https://www.bna.com/exxon-mobil-bp-n73014473249 (last visited Jan. 28, 2018). Absent review, more claims related to other products are inevitable.

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[3] Five previously filed suits have been removed to federal court with remand motions pending. See *People ex rel. City of Oakland v. BP P.L.C.* (N.D.Cal.) Case No. 3:17-cv-06011-WHA; *People ex rel. City of San Francisco v. BP P.L.C.* (N.D.Cal.) Case No. 3:17-cv-06012-WHA; *County of Marin v. Chevron Corp.* (N.D.Cal.) Case No. 3:17-cv-4929-VC; *City of Imperial Beach v. Chevron Corp.* (N.D.Cal.) Case No. 3:17-cv-4934-VC; *County of Marin v. Chevron Corp.* (N.D.Cal.) Case No. 3:17-cv-4935-VC.

The People argue that this Court need not worry about follow-on suits because the requirement that a public nuisance be "substantial and unreasonable" provides protection from limitless liability. [Answer at 52.] The problem, however, is that science develops over time, making products viewed as societally advantageous today subject to second-guessing decades later or even contemporaneously (in the case of oil) by judges that disagree with legislative decisions. This Court should grant review now to clarify the law before courts expend substantial resources litigating such product-related nuisance claims.

Conclusion

This Court should grant review to clarify the requirements of public nuisance and determine whether trial courts, sitting without a jury, have the sweeping authority exercised in this case. NL also joins in and incorporates Sherwin Williams' and ConAgra's Replies to the Consolidated Answer to the Petitions for Review.

Dated: January 29, 2018

SNELL & WILMER L.L.P.
Richard A. Derevan
Todd E. Lundell

MCMANIS FAULKNER
James McManis
William Faulkner

BARTLIT BECK HERMAN
PALENCHAR & SCOTT, LLP
Jameson R. Jones
Andre M. Pauka

By: /s/ *Richard A. Derevan*
Richard A. Derevan

Attorneys for Appellant, NL Industries, Inc.

Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this petition, it contains 3924 words, exclusive of the matters that may be omitted under rule 8.504(d)(3).

Dated: January 29, 2018

SNELL & WILMER L.L.P.
Richard A. Derevan
Todd E. Lundell

MCMANIS FAULKNER
James McManis
William Faulkner

BARTLIT BECK HERMAN
PALENCHAR & SCOTT, LLP
Jameson R. Jones
Andre M. Pauka

By: /s/ *Richard A. Derevan*
Richard A. Derevan

Attorneys for Appellant, NL Industries, Inc.

Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, # 1400, Costa Mesa, California 92626-7689.

On January 29, 2018, I served, in the manner indicated below, the foregoing document described as **NL Industries' Reply in Support of Review** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

☒ BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A)) as indicated on the service list.

☐ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)), as indicated on the service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 29, 2018 at Costa Mesa, California.

s/Diane Williams
Diane Williams

Service List

Attorneys for The People
[By Electronic Service]

Danny Yeh Chou
Office of the County Counsel
70 W. Hedding Street
East Wing, 9th Floor
San Jose, CA 95110
danny.chou@cco.sccgov.org

Owen James Clements
Office City Attorney
1390 Market St, 7th Floor
San Francisco, CA 94102
owen.clements@sfgov.org

Joseph W. Cotchett
Cotchett, Pitre
& McCarthy, LLP
840 Malcolm Rd., # 200
Burlingame, CA 94010
jcotchett@cpmlegal.com

Andrew James Massey
Office of the County Counsel
Alameda County
1221 Oak Street, # 450
Oakland, CA 94612-4296
andrew.massey@acgov.org

Andrea E. Ross
Office of the County Counsel
of Los Angeles
500 W Temple Street, # 648
Los Angeles, CA 90012
aross@counsel.lacounty.gov

William Merrill Litt
Office of County Counsel
168 West Alisal Street, 3rd Fl.
Salinas, CA 93901-2439
littwm@co.monterey.ca.us

Paul Frederick Prather
Office of the City Attorney
City of San Diego
1200 3rd Ave., # 1100
San Diego, CA 92101
pprather@sandiego.gov

Wendy Marie Garbers
Oakland City Attorney
One Frank H. Ogawa Plaza,
6th Floor
Oakland, CA 94612
wgarbers@oaklandcityattorney.org

Rebecca Maxine Archer
County San Mateo
Office County Counsel
400 County Center, 6th Floor
Hall of Justice & Records
Redwood City, CA 94063
rmarcher@smcgov.org

Dennis Bunting
Office of the County Counsel
Solano County
675 Texas Street, # 6600
Fairfield, CA 94533
dwbunting@solanocounty.com

Eric J A Walts
Office of the County Counsel
County of Ventura
800 S. Victoria Ave., L/C #1830
Ventura, CA 93009
eric.walts@ventura.org

Robert J. McConnell
Motley Rice LLC
132 South Main Street
Providence, RI 02903
rmcconnell@motleyrice.com

Peter G. Earle
Law Offices of Peter Earle, LLC.
839 North Jefferson St, # 300
Milwaukee, WI 53202
peter@earle-law.com

Stacey Monica Leyton
Altshuler Berzon LLP
177 Post St., # 300
San Francisco, CA 94108
sleyton@altshulerberzon.com

Mary Alexander
Mary Alexander & Associates
44 Montgomery Street, # 1303
San Francisco, CA 94104
malexander@maryalexanderlaw.com

Fidelma Fitzpatrick
Motley Rice LLP
132 South Main Street
Providence, RI 02903
ffitzpatrick@motleyrice.com

Attorneys for ConAgra Grocery Products Company
[By Electronic Service]

Raymond A. Cardozo
Reed Smith
101 Second St., # 1800
San Francisco, CA 94105-3659
rcardozo@reedsmith.com

Allen Ruby
525 University Avenue, # 1400
Palo Alto, CA 94303
allen.ruby@skadden.com

Margaret Anne Grignon
Reed Smith LLP
101 Second Street, # 1800
San Francisco, CA 94105
mgrignon@reedsmith.com

James P. Fitzgerald
McGrath, North, Mullin & Kratz
First National Tower
1601 Dodge Street, # 3700
Omaha, NE 68102
jfitzgerald@mcgrathnorth.com

James J. Frost
McGarth North Mullin & Kratz
First National Tower
1601 Dodge Street, # 3700
Omaha, NE 68164
jfrost@mcgrathnorth.com

Attorneys for The Sherwin-Williams Company
[By Electronic Service]

John Wesley Edwards
Jones Day
1755 Embarcadero Road
Palo Alto, CA 94303
jwedwards@jonesday.com

David M. Axelrad
Horvitz & Levy LLP
3601 W. Olive Ave., 8th Floor
Burbank, CA 91505-4681
daxelrad@horvitzlevy.com

Robert A. Mittelstaedt
Jones Day
555 California St., 26th Floor
San Francisco, CA 94104
ramittelstaedt@jonesday.com

Lisa Jean Perrochet
Horvitz & Levy
15760 Ventura Blvd., 18th floor
Encino, CA 94436-3000
lperrochet@horvitzlevy.com

Cynthia Helene Cwik
Jones Day
12265 El Camino Real # 200
San Diego, CA 92130
chcwik@jonesday.com

Charles H. Moellenberg, Jr.
Jones Day
500 Grant Street, # 4500
Pittsburgh, PA 15219
chmoellenberg@jonesday.com

Paul Michael Pohl
Jones Day
500 Grant Street, # 4500
Pittsburgh, PA 15219
pmpohl@jonesday.com

Leon F. DeJulius
Jones Day
500 Grant Street, # 4500
Pittsburgh, PA 15219
lfdejulius@jonesday.com

Attorneys for NL Industries, Inc.
[By Electronic Service]

Jameson Jones
Bartlit Beck Herman Palenchar & Scott, LLP
1801 Wewatta Street, # 1200
Denver, CO 80202
jameson.jones@bartlit-beck.com

Andre M. Pauka
Bartlit Beck Herman Palenchar & Scott, LLP
1801 Wewatta Street, # 1200
Denver, CO 80202
andre.pauka@bartlit-beck.com

William Faulkner
McManis Faulkner
50 W. San Fernando St., 10th Fl
San Jose, CA 95113
wfaulkner@mcmanislaw.com

James McManis
McManis Faulkner
50 W. San Fernando St 10th Fl.
San Jose, CA 95113
jmcmanis@mcmanislaw.com

Todd Lundell
Snell & Wilmer L.L.P.
600 Anton Blvd., #600
Costa Mesa, CA 92626
tlundell@swlaw.com

Attorneys for E.I. Du Pont de Nemours Company
[Served by Electronic copy, per agreement with counsel]

Clement L. Glynn
Glynn & Finley
100 Pringle Avenue, # 500
Walnut Creek, CA 94596
cglynn@glynnfinley.com

Daniel Miles Kolkey
Gibson Dunn & Crutcher LLP
555 Mission St., # 3000
San Francisco, CA 94105-2933
dkolkey@gibsondunn.com

Theodore Joseph Boutrous, Jr
Gibson Dunn & Crutcher LLP
333 S Grand Ave
Los Angeles, CA 90071-3197
tboutrous@gibsondunn.com

Christian Henneke
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA 23225
chenneke@mcguirewoods.com

Joy C. Fuhr
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA 23219
jfuhr@mcguirewoods.com

Steven R. Williams
McGuire Woods LLP
One James Center
901 East Cary Street
Richmond, VA 23219
srwilliams@mcguirewoods.com

Attorneys for Atlantic Richfield Company
[Served by Electronic copy, per agreement with counsel]

Sean O'Leary Morris
Arnold & Porter LLP
777 South Figueroa St., 44th Fl.
Los Angeles, CA 90017-5844
sean.morris@apks.com

Jerome B. Falk
Arnold & Porter LLP
Three Embarcadero Cntr 7th Fl
San Francisco, CA 94111-1600
jerome.falk@apks.com

Bruce Kelly
Arnold & Porter LLP
399 Park Avenue
New York, NY 10022-4690
bruce.kelly@apks.com

Philip H. Curtis
Arnold & Porter LLP
399 Park Avenue
New York, NY 10022-4690
philip.curtis@apks.com

William H. Voth
Arnold & Porter LLP
399 Park Avenue
New York, 10022-4690
william.voth@apks.com