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

PETITION FOR REHEARING OF DEFENDANT, CROSS-COMPLAINANT, AND APPELLANT THE SHERWIN-WILLIAMS COMPANY AND JOINDER IN PETITIONS FOR REHEARING OF CONAGRA GROCERY PRODUCTS COMPANY AND NL INDUSTRIES, INC.

JONES DAY
ROBERT A. MITTELSTAEDT (BAR NO. 60359)
555 CALIFORNIA STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
(415) 626-3939 • FAX: (415) 875-5700
ramittelstaedt@jonesday.com

*PAUL MICHAEL POHL *(PRO HAC VICE)*
CHARLES H. MOELLENBERG, JR. *(PRO HAC VICE)*
LEON F. DEJULIUS, JR. *(PRO HAC VICE)*
500 GRANT STREET, SUITE 4500
PITTSBURGH, PENNSYLVANIA 15219
(412) 391-3939 • FAX: (412) 394-7959
pmpohl@jonesday.com
chmoellenberg@jonesday.com
lfdejulius@jonesday.com

HORVITZ & LEVY LLP
DAVID M. AXELRAD (BAR NO. 75731)
LISA PERROCHET (BAR NO. 132858)
3601 WEST OLIVE AVENUE, 8TH FLOOR
(818) 995-0800 • FAX: (844) 497-6592
daxelrad@horvitzlevy.com
lperrochet@horvitzlevy.com

ATTORNEYS FOR DEFENDANT, CROSS-COMPLAINANT AND APPELLANT
THE SHERWIN-WILLIAMS COMPANY

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PETITION FOR REHEARING OF DEFENDANT, CROSS-COMPLAINANT, AND APPELLANT THE SHERWIN-WILLIAMS COMPANY

INTRODUCTION

Pursuant to rules 8.268 and 8.500(c)(2) of the California Rules of Court, The Sherwin-Williams Company respectfully petitions for rehearing and calls the court's attention to various material "misstatements" and "omissions" of both facts and issues in the court's opinion. As just one example, the Court's cited "promotions" for Sherwin-Williams are actually for interior paints that the parties stipulated do not contain lead. Sherwin-Williams also incorporates by reference and joins the petitions for rehearing filed by NL Industries, Inc. and ConAgra Grocery Products Company.

ARGUMENT

I. THE COURT MISSTATED OR OMITTED MATERIAL FACTS AND ISSUES

A. The Court's Finding Of Substantial Evidence That Sherwin-Williams Promoted Paints Containing White Lead Pigments For Interior Residential Use Materially Misstates And Omits Facts and Misstates Issues.

Sherwin-Williams has been held liable for the affirmative promotion of lead paint for interior residential use in the ten plaintiff cities and counties, over a span of more than 50 years. The finding of liability is based solely on two advertisements from 1904, one each in Los Angeles and San Diego, and $5000 in donations to the Lead Industries Association's (LIA) Forest Products-Better Paint campaign (also known as the Lumber Products Better Paint Campaign) during 1937-1941.

The Court's finding is incorrect under its own legal standards because:

1. The ads on which the Court relies are ***not*** promoting the interior use of residential paints containing white lead carbonate pigments (WLC) or white lead sulfate pigments (WLS) (collectively "white lead"). Rather, the two 1904 ads were for a line of paints that

consisted of three interior and two exterior paints. The three interior paints did not contain white lead.

2. There is no evidence of any promotion of white lead paints for interior residential use in any of the other eight plaintiff jurisdictions.
3. The Forest Products Better Paint campaign cannot serve as a basis for liability.
4. The two 1904 ads, even if combined with the Forest Products Better Paint campaign, do not constitute substantial evidence, particularly given the gaps in time.

Thus, in reaching its conclusion, this court misstated and omitted material evidence regarding the content and context of the two ads and the lack of any evidence in the other eight plaintiff jurisdictions. It also misstated and omitted evidence regarding Sherwin-Williams' lack of interest in promoting white lead for residential interiors and the context and lack of impact of the LIA's advertising campaign. Finally, it misstated and failed to address significant First Amendment issues.

1. The 1904 Ads Did Not Promote Paints Containing White Lead Pigments For Interior Residential Use.

Sherwin-Williams did not begin manufacturing WLC pigments until 1910, and it never manufactured WLS pigments. (62 AA 18033 at Stips. 10-11.) Significantly, this court's opinion

omitted that Plaintiffs were unable to identify at trial a single advertisement run by Sherwin-Williams for more than 103 years—going back to 1910—that ever promoted lead for interior residential use, whether dry white lead pigment, white lead in oil or ready-mixed paint containing white lead. (37 RT 5545:9-16.) Also omitted is the admission of Plaintiff's expert 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" (29 RT 4449:1-5), and the parties' stipulation that an independent dealer not found to be Sherwin-Williams' agent ran the only advertisement promoting Sherwin-Williams' white lead in oil, and it appeared in a single jurisdiction's newspaper in 1919. (62 AA 18040 at Stip. 144.) This ad did not recommend the product for use on residential interiors.

Instead, this court relied on a single ad run in 1904, six years before Sherwin-Williams began making WLC, in Los Angeles and San Diego to conclude that there was "substantial evidence" to support the trial court's finding that Sherwin-Williams affirmatively promoted lead paint for residential interiors in all ten plaintiff jurisdictions in all years up to 1950. The court, however, misstates the facts concerning that ad.[1]

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[1] While the Court does not identify the ads to which it refers other than by year and locale, a review of plaintiffs' Trial Exhibit P271 (185 AA 55126) reveals only a single ad from 1904 that discusses "the Sherwin-Williams Paint, Prepared (S.W.P.)" and mentions interior use. That ad was only run in Los Angeles and San Diego in 1904 and was for a line of paints that had three different interior paint products that did not contain white lead.
(continued...)

That ad was for a line of paints that had three interior and two exterior paints. The interior paints did not contain white lead.

The 1904 ad discusses the use of "the Sherwin-Williams Paint, prepared (S.W.P.)" on interiors. However, absent from this court's opinion is the stipulated record evidence that "the Sherwin-Williams Paint, Prepared (S.W.P)" was a line of paints that included both interior and exterior paints and that the interior paints in the SWP line did *not* contain white lead pigments:

- Sherwin-Williams Price List identifying five paints in the SWP line: SWP Colors, SWP Outside Gloss White, SWP China Gloss White, SWP Inside Varnish White, and SWP Flat White. (157 AA 46580 at 46595.)
- Dr. Dunlavy confirmed that there were SWP interior paints and SWP exterior paints, testifying that SWP "is a line of paints that was introduced in 1880. Initially the SWP line included outside gloss white for exterior use . . . . SWP Flat White for interior use and then colors. (45 RT 6624:7-12, 6624:13-25.)
- SWP China Gloss, first introduced in 1894, did not contain white lead. (62 AA 18036 at Stips. 79-82.)

(...continued)
(187 AA 55518–Los Angeles Times 1904; 188 AA 55954–San Diego Union 1904.)

- SWP Inside Varnish White, first introduced in 1902, did not contain white lead. (62 AA 18036 at Stips. 75-78.)
- SWP Flat White, first introduced in 1880 for interior use but later recommended for interiors or exteriors, did not contain white lead. (62 AA 18036-18037 at Stips. 83-88.)

The court also omitted the uncontested testimony that every label found for paints in the SWP line states whether it is for inside or outside use:

- "This shows two labels: One in the upper right is for one of the interior versions of SWP interior white versions. China Gloss White. And as the label indicates, it is for inside use. The larger label on the left is for the outside gloss white. Every label that has survived has the words inside or outside right there on the front label, as well as the formula information." (45 RT 6624:19-25.)
- Label SWP Outside Gloss White. (150 AA 44506.)
- Label SWP China Gloss White. (150 AA 44505.)

Plaintiffs thus did not provide a single advertisement by Sherwin-Williams promoting the ***interior*** residential use of paint containing WLC or WLS pigments in Los Angeles or San Diego, let alone any of the eight other plaintiff jurisdictions.

The court further omits that Plaintiffs' expert *never* testified that Sherwin-Williams promoted *interior* residential

paint containing white lead pigment in San Diego or Los Angeles, or in any other plaintiff jurisdiction:

- When asked to summarize what he "found concerning Sherwin-Williams in the City of San Diego," plaintiffs' expert testified that he found ads "instructing consumers to use lead-based paint ***on*** residential homes." (35 RT 5242:4-5343:8 [Markowitz], emphasis added.) He never testified that Sherwin-Williams instructed or otherwise told consumers through promotions to use "lead-based paint" ***in*** residential homes. (*Ibid.*; see also 35 RT 5247:3-6, 5248:4-5249:2.)
- Also omitted is the absence of any testimony that Sherwin-Williams promoted lead-based paint for residential interiors in Los Angeles (35 RT 5240:11-5241:16); San Francisco (35 RT 5250:13-5251:6); Alameda County (35 RT 5251:7-19); Oakland (35 RT 5251:20-5252:2); Solano County (35 RT 5252:3-14); San Mateo County (35 RT 5252:15-27); Santa Clara County (35 RT 5252:28-5253:8); Monterey County (35 RT 5253:9-16); Ventura County (35 RT 5253:17-22).
- Plaintiffs' other 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." (29 RT 4449:1-5 [Rosner].)

This case is not about promotion of white lead containing paint for use ***on*** exteriors of houses, but rather only ***in*** houses. The court's decision misstated that the two 1904 ads from San Diego and Los Angeles were advertising paints containing white lead for interior residential use; they were not. No other ad does either, whether in those two plaintiff jurisdictions or any of the other eight at any time.

As a result, this court's conclusion that there is substantial evidence for the trial court's finding that Sherwin-Williams affirmatively promoted lead-based paint for residential interiors is incorrect. See *DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336, *as modified* (Apr. 26, 2000) (reversing trial court verdict in favor of plaintiff property owners because there was no evidence to support imposition of inverse condemnation liability: """[I]f the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case.""" (citations omitted)); see also *Kuhn v. Dep't. of Gen. Services* (1994) 22 Cal.App.4th 1627, 1633. As a matter of law, there is no substantial evidence of "promotion" by Sherwin-Williams of interior residential paint with white lead in any plaintiff jurisdiction.

2. The Court Failed To Address First Amendment Issues Raised By Sherwin-Williams.

In addition to misstating the content of the 1904 ads and omitting evidence regarding the SWP line of paints, the court also failed to properly address the First Amendment safeguards raised by Sherwin-Williams. (Cal. Ct. App. Op., Nov. 14, 2017 at 36-37) (Op.).

There is no dispute that lead-containing paints (whether for exterior or interior residential use) were legal at all times that Sherwin-Williams made and advertised them. The trial court made no finding regarding whether Sherwin-Williams' ads were misleading, despite Sherwin-Williams' request for a finding that the ads were not false or misleading on their face. (99 AA 29314-29315; 133 AA 39585; 28 RT 4156:15-4157:15, 4218:28-4219:20, 4239:10- 4240:4, 4241:15-22; 37 RT 5646:14-5647:12.) And this court's reasoning, too, does not constitute a finding that any particular Sherwin-Williams' ad was misleading, especially given that the two 1904 ads were not for white lead-containing interior paints.

Even plaintiffs' expert admitted, and this court acknowledged, that virtually every Sherwin-Williams' advertisement did no more than generically promote its brand of paints. (30 RT 4466:22-4467:11 [Rosner]; Op. at 47.) Sherwin-Williams never said any paint was safe to eat, nor is eating paint an intended use. Sherwin-Williams also never promoted lead paints as not needing regular maintenance or as safe when

deteriorated. Nor is there any claim that it did so. And plaintiffs' own experts have admitted that the risk of harm that serves as the basis for the public nuisance claim today was not known before recent decades, let alone 100+ years ago when the two ads that this court calls "substantial evidence" were run. (See §I.E *infra;* see also NL Industries, Inc. Petition for Rehearing.) As a result, the court has misstated the First Amendment issues, failed to give them any rigorous analysis, and erroneously concluded that Sherwin-Williams' promotions are not entitled to First Amendment protection.

3. The Court Omits and Misstates Evidence Regarding LIA's Forest Products Better Paint Campaign And Omits The Issue That Liability Cannot Be Premised On Contributions To A Trade Association.

This court's opinion omits the fact that there is no record evidence that any leaflet distributed by the LIA's campaign promoted white lead-containing paint for interior residential use. It also omits Sherwin-Williams' undisputed evidence that it did not participate in the campaign until the campaign promoted ready-mixed paint and that the LIA was not Sherwin-Williams' agent. Finally, the court provides no explanation for how Sherwin-Williams' contributions to the campaign provide a basis for liability when Arco's longer participation and larger

contributions to the campaign at a time when the campaign focused on white lead do not.

a. No Evidence Shows That The LIA's Leaflets Promoted Lead Paint For Interior Residential Use.

The court cites as evidence of Sherwin-Williams' affirmative promotion the LIA's (not Sherwin-Williams') Forest Products Better Paint campaign, saying that the LIA's campaign "promoted lead paint for interior residential use and particularly for use on doors and window frames." (Op. at 48.) The court bases its statement on several assumptions. First, it assumes the content of the leaflets/instructions, although there is no evidence of the language in them. Second, the court assumes that LIA leaflets were Sherwin-Williams' promotions and assumes, by failing to address the issue, that liability can be premised on contributions by Sherwin-Williams to LIA for the campaign. Third, it assumes that the LIA leaflets were distributed in the plaintiff jurisdictions. Fourth, it assumes that windows and doors are solely interior components. And fifth, the court assumes that Sherwin-Williams' paints for interior doors and windows contained WLC at the time of the leaflets. Each assumption is flawed.

First, the court's opinion omits that no one has seen any of the leaflets/instructions and, therefore, no one knows what they actually said. Indeed, the court even notes that plaintiffs'

experts' testimony attempting to describe the content of leaflets he had never seen or read was not credible. (Op. at 39, fn. 34 "Plaintiff's expert testified that these painting instructions included 'methods for how to use paint on sidings *and on floors and on objects in homes* . . . .' (Italics added) The painting instructions were not in evidence . . . . The expert also asserted that these instructions pertained to 'siding interiors,' but he did not explain why the word 'siding' would have been used in the 1930s in reference to interior paneling.") There can be no liability for interior residential promotion when the promotion itself is not identified.

Second, the court omits the fact that any LIA promotion was not a Sherwin-Williams' promotion. There is no evidence in the record that Sherwin-Williams ever saw or approved the leaflets. And the record establishes that the LIA did not act as Sherwin-Williams' agent. (138 AA 41029; see also 178 AA 53077 [Report of Annual Meeting of Members of LIA, 1946, showing more than 65 members of LIA].) Not only does the court omit describing how Sherwin-Williams can be liable for a trade organization's "promotion" where that organization is not its agent, it also omits any substantive discussion of Sherwin-Williams' argument that liability premised on trade association membership and contributions violates its First Amendment rights.

While the court acknowledged that Sherwin-Williams challenged any finding of liability premised on trade association activity, the court did not discuss that issue. Rather it

summarily concluded, "Defendants' lead paint promotional advertising and participation in trade-association-sponsored lead paint promotional advertising were not entitled to any First Amendment protections." (Op. at 37.) The court misstated that the promotions implied that interior residential use of paints with WLC would be safe if deteriorated and not maintained, and it omitted the facts that Sherwin-Williams never said that WLC or lead paint was safe to ingest, and that no Sherwin-Williams' ad ever implied that WLC or interior white lead paints were safe if not maintained and allowed to deteriorate. (Op. at 36-37). The trial court did not find any promotion to be false or misleading. Omitted from the court's decision is any recognition or discussion that "[j]oining 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; see also *NAACP v. Claiborne Hardware* (1982) 458 U.S. 886, 920, 925 [102 S.Ct. 3409, 73 L.Ed.2d 1215]; *Chavers v. Gatke Corp.* (2003) 107 Cal.App.4th 606, 618-619.) Indeed, even plaintiffs did not dispute these principles. Rather they implied that liability for trade association activity should attach under conspiracy law, but plaintiffs' conspiracy claims were long ago dismissed. *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 299 (*Santa Clara*).

Third, the court omits that there is no evidence that promotions from the LIA's Forest Products Better Paint campaign ever ran in any plaintiff jurisdiction. The promotion is,

thus, not relevant because it cannot be tied to the jurisdictions in this case.

Fourth, the court's assumption that windows and doors are solely interior components is flawed and is contradicted by plaintiffs' expert's testimony and other testimony. In fact, the court quotes plaintiffs' expert's testimony stating, "[b]ecause we know that the exterior is subject to weathering, because *windows on the exterior* often have high lead concentrations and they are subject to friction and impact . . . ." (Op. at 56, emphasis added.) (See §I.F *infra*.) In addition, this court has acknowledged that "[t]he primary message conveyed in advertisements for SWC's paints, Monarch paints, and ACME's paints was that there was a specific coating for each purpose and that it was important to get the right coating for each type of use." (Op. at 47.)

Fifth, no Sherwin-Williams' ready-mixed interior paint for windows and doors contained WLC during the Forest Products Better Paint campaign. (62 AA 18033-18040 at Stips. 27-142; 170 AA 50410; 45 RT 6619:11-6620:8, 6621:19-6622:4) Thus, to the extent one of the Forest Products Better Paint campaign leaflets caused an individual to purchase and apply Sherwin-Williams' paint—which no evidence shows—the court's decision omits saying that Sherwin-Williams recommended ready-mixed interior paints for interior components and those interior paints did not have white lead at the time of the campaign. (62 AA 18033-18040 at Stips. 27-142; 170 AA 50410; 45 RT 6619:11-6620:8, 6621:19-6622:4) Thus, the court's opinion omits that any interior doors or interior window components would have used a non-

white lead Sherwin-Williams product, not an exterior lead paint, if painters and purchasers followed Sherwin-Williams' labeling and instructions.

b. The Court Omitted The Undisputed Evidence That Sherwin-Williams Did Not Participate In the Forest Products Better Paint Campaign Until It Shifted Focus Away From White Lead.

The parties stipulated that Sherwin-Williams first contributed to the Forest Products Better Paint campaign only after the campaign shifted its focus away from WLO. (62 AA 18046 at Stips. 217-219.) Because Sherwin-Williams was first and foremost a ready-mixed paint manufacturer, its interests did not lay in the sale of WLO. (45 RT 6606:4-28, 6610:3-6611:19; 157 AA 46753.) It manufactured WLC principally for use in its own paint products. (45 RT 6615:22-6616:14; 62 AA 18033 at Stips. 14-15.) Thus, Sherwin-Williams had no interest in supporting, and did not contribute to, the LIA's Forest Products Better Paint campaign while it focused on white lead in oil. Instead, Sherwin-Williams' contributions were made when the campaign supported the use of ready-mixed paint.

In sum, the court's opinion misstated the fact that Sherwin-Williams affirmatively promoted white lead paint for residential interior use in the ten plaintiff jurisdictions. There is no evidence of any such promotion. It omitted all evidence demonstrating

that Sherwin-Williams had no interest to promote the use of white lead paint in residential interiors and that it promoted the use of its non-lead paints for residential interiors.

c. ARCO's Dismissal Is Inconsistent With And Precludes A Finding That Forest Products Better Paint Campaign Constitutes Substantial Evidence Of Promotion Of Interior Residential Paints Containing White Lead.

ARCO was member of LIA from 1928 until 1971. (35 RT 4160:15-17) It participated in both the Forest Products Better Paint campaign as well as LIA's White Lead Promotion campaign. (35 RT 4159:2-4, 14-20, 4169:13-15) It is undisputed that Sherwin-Williams did not participate in the latter. (62 AA 18033 at Stip. 214.) With respect to the Forest Product Better Paint campaign, the only distinction between ARCO and Sherwin-Williams is that Sherwin-Williams participated to a ***lesser*** degree. ARCO participated during all of the years of the campaign, while Sherwin-Williams only participated from 1937 – 1941. The trial court found that ARCO was not liable; therefore its participation in the campaign did not provide a basis for liability. (138 AA 40940, 41029; see also 35 RT 5287) That finding by the trial court precludes the contradictory finding by this court that contributions over a lesser period of time by Sherwin-Williams can be substantial evidence of promotion. See

Westfour Corp. v. California First Bank (1992) 3 Cal.App.4th 1554, 1561-62 (judgment cannot be upheld on grounds that contradict trial court's findings).

4. The Court Omits Material Facts Showing That Sherwin-Williams Had No Interest In Promoting White Lead For Interior Residential Use.

The absence of any Sherwin-Williams' advertisement of white lead paint for residential interiors is consistent with the myriad facts in the record that Sherwin-Williams had no interest in promoting white lead and that it used white lead pigments for many other non-residential products, all of which were omitted from this court's opinion:

- Plaintiff's expert testified that Sherwin-Williams "didn't have a horse in the race of who would win in the competition between leaded and unleaded paint." (30 RT 4467:17-4468:19 [Rosner].)
- That same expert testified that Sherwin-Williams "didn't really have an interest in promoting leaded paint." (30 RT 4467:12-16; see also SWOB at 6-7.)
- Plaintiff's other historian admitted that he did not know of any paint manufacturer that had done more to remove lead pigments from residential paints – more facts omitted in the court's opinion. (37 RT 5572:16-5573:6 [Markowitz].)

This is not surprising given the undisputed, but omitted, evidence that Sherwin-Williams' strategy departed from traditional WLO:

- Starting in the mid-1870s, when white lead in oil was the gold standard, Sherwin-Williams promoted factory-made, ready-mixed paints with no WLC, offering a specific paint for each purpose. (45 RT 6606:4-28, 6610:3-6611:19; 157 AA 46753.)
- It developed unique formulas for hundreds of residential, commercial, railway, auto, industrial, road, bridge, and marine paints. (44 RT 6488:2-10; 45 RT 6615:22-6616:3.)
- Sherwin-Williams' competitive strategy was to dissuade customers from using WLO. (45 RT 6606:15-24, 6610:3-8, 6637:3-6.)
- Sherwin-Williams used the WLC it manufactured primarily in its own non-residential, non-interior paints. (45 RT 6615:22-6616:14; 62 AA 18033 at Stips 14-15.)
- There is no evidence that the "predominant" outlet for Sherwin-Williams' WLC was "house paint," let alone interior residential paint. (SWRB at 24.) Plaintiffs' historian conceded that the data did not distinguish between residential versus non-residential use, and interior versus exterior use. (29 RT 4438:24- 4439:6; see also 28 RT 4288:16-28.)

- To fight laws restricting the sale of its non-lead, ready-mixed paints, Sherwin-Williams challenged another state's "paint adulteration" statute all the way to the U.S. Supreme Court, but lost. (168 AA 49989-49998.) That statute required special labeling for paints that were not pure lead-in-oil or zinc-in-oil. (*Ibid.*) Sherwin-Williams faced opposition from master painters, government agencies, and consumers to its ready-mixed paints. (45 RT 6605:10-16, 6610:9-15.)
- All advertisements introduced by plaintiffs either are from or after 1943[2]; refer to paints that did not contain WLC or were not intended for interior residential use; were run by independent dealers; or only mention paint brands that Sherwin-Williams had not yet acquired. (185-188 AA 55126-56075.)

It is indisputable that there is ***no*** evidence of a Sherwin-Williams ad for a white lead-containing interior residential paint in eight of the ten plaintiff jurisdictions. It is also indisputable that this court's finding that the two 1904 ads in Los Angeles and San Diego constitute substantial evidence ignores the stipulated evidence that the SWP line had three ***non***-white lead interior SWP paints, the labels state inside or outside use. It also ignores

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[2] Sherwin-Williams removed WLC from the few wartime Family Paint formulations that contained it by 1943. No ads promoted Family Paint in the plaintiffs' jurisdictions during the few years that it contained WLC.

the many admissions of plaintiffs' experts that there are no Sherwin-Williams ads for white lead-containing interior residential paints, the admission of plaintiffs' historian that no defendant had the requisite knowledge of the risk of harm until the mid-1930s (see § I.E.1), and the trial court's finding that knowledge at that time was in its "nascent stage"—not the "contemporary knowledge" of today. Further, this court's findings on the Forest Products Better Paint campaign are unsupportable as a matter of law and also are factually erroneous. As such, a rehearing and a reversal of this court's ruling on promotion are merited.

B. The Court Misstates and Omits Evidence and Takes Contradictory Positions to Reach Its Conclusion on Causation.

1. The Court Omitted The Time And Geographic Gaps In Evidence Of Sherwin-Williams' Promotions.

Because no Sherwin-Williams' ad promotes the interior residential use of white lead, the court's opinion misstated that there are facts showing that Sherwin-Williams' promotions caused the use of lead paint in residential interiors. It further misstated that a single ad in San Diego or Los Angeles in 1904 can support causation of residential interior use in any other jurisdiction or at any other time. Indeed, any such finding is

inconsistent with the court's findings regarding the lack of evidence of any affirmative promotion of lead paint for interior residential use in post-1950 houses. (Op. at 55.)

This court stated with respect to the post-1950 time frame, "[w]e can find no evidence in the record that supports an inference that the promotions of defendants prior to 1951 continued to cause the use of lead paint on residential interiors decades later." (Op. at 55.) Had this court applied the same standard to the gap of 33 years between the two ads in 1904 and the 1937 Forest Products Better Paint campaign contributions, Sherwin-Williams would not be held liable for houses constructed in those gap years. And the court cites no evidence as to Sherwin-Williams after the final 1941 monetary contribution to the Forest Products Better Paint campaign. Because Sherwin-Williams' contribution to the campaign cannot be a basis for liability for the reasons mentioned in Section I.A.3 (pp. 7-12 *supra*), there is no factual basis to hold Sherwin-Williams liable for any homes, but certainly not any homes built after 1904.

Each individual Plaintiff needed to provide evidence of regular promotion by Sherwin-Williams of white lead paints for interior residential use (1) in its jurisdiction; and (2) during the entire time frame up to 1950. The court's decision misstated that there was such evidence; there was not.

2. The Court Omitted That No Evidence Shows Reliance On Any Sherwin-Williams' Ad.

As stipulated, no evidence shows that anyone relied on Sherwin-Williams' ads to use WLC in residential interiors. (138 AA 40990-40991.) Moreover, no expert testified that an ad run in one jurisdiction affected the sale or use of paint in another jurisdiction. This court's decision fails to acknowledge this lack of reliance evidence and, therefore, misstates that substantial evidence supports a finding that Sherwin-Williams' ads caused the alleged public nuisance.

3. The Court Ignores Plaintiffs' Admissions That There Is No Evidence That The Forest Products Better Paint Campaign Increased The Presence Of White Lead In Residential Interiors In The Jurisdictions.

In determining that the Forest Products Better Paint campaign caused more white lead to be present in the plaintiff jurisdictions, the court omitted plaintiffs' expert's admission that he does not know whether the LIA's promotional campaigns increased the use of white lead containing paints:

- Dr. Rosner testified that he could not say whether promotional campaigns "caused increase or decrease or whether it changed trajectory minimally, I can't

tell. Quantitative data is not there to say that." (29 RT 4351:3-12.)

- He also admitted that the campaign failed to reverse the decline in WLC use nationally. (29 RT 4364:20-4365:8.)

Further, during the time Sherwin-Williams contributed to the LIA's Forest Products Better Paint campaign, it is undisputed that none of its paints meant for interior residential use contained any white lead (see §I.A.3.(a) at pp.14-15 *supra*); a fact also omitted in the court's decision. Rather the court identifies Sherwin-Williams' products that did contain white leads (Op. at 46-47), but omits that virtually all are exterior products[3] and none were advertised for interior residential use in any plaintiff jurisdiction. (29 RT 4449:1-5 [Rosner]) Nor did Sherwin-Williams intend or expect that consumers would use exterior paints inside homes, because exterior paints had

[3] Porch and Deck, Concrete & Stucco, and the various "House Paints" mentioned by the Court are all exterior paints. Of all the paints manufactured by Sherwin-Williams over its 150+ year history, only three interior paints ever used white lead pigment made by Sherwin-Williams and then only in certain colors and in limited years. Six of 25 colors for Inside Floor Paint had WLC from 1910-1913 (62 AA 18034-18035 at Stips. 47-57.) Seven colors of Family Paint (a general utility paint) contained WLC during October 1941-1943 due to wartime shortages of other pigments. (62 AA 18035-18036 at Stips. 57, 58, 61-65.) No ads for these interior paints ran in the plaintiff jurisdictions during the few years that some formulas had white lead. One formula of Enameloid in 1936 contained less than 1 percent WLC and would not be considered a lead-based paint even under the 1971 federal statute. (62 AA 18035 at Stips. 53-54.)

different performance characteristics and were more expensive than interior paints. (45 RT 6691:19-28.) The court's decision misstates that Sherwin-Williams' liability for affirmative promotion is only based on paints intended for interior residential use, when in fact its decision, like the trial court's decision, is incorrectly premised on paints intended for exterior residential use only. (See 134 AA 39637; Op. at 47-48.)

Finally, the court omitted evidence showing that the Forest Products Better Paint Campaign did not reach the Pacific Coast until 1939:

- LIA Annual Meeting Minutes – "The Lumber Products – Better Paint Campaign continued to function during the year and covered the southwest and Pacific Coast, ***areas not hitherto reached***, as well as parts of the middle west." (179 AA 53105, emphasis added.)

In sum, the court's decision misstated that there is record evidence supporting the conclusion that the LIA's Forest Products advertising campaign caused the use of lead-based paint for residential interiors in plaintiffs' jurisdictions. In fact, there is no such evidence, as plaintiffs' expert admitted.

4. The Court Omitted Evidence Regarding Decades Of Public Education Regarding Lead Hazards.

The court did not acknowledge or discuss the massive public education and outreach conducted by the CLPPP programs in plaintiffs' jurisdictions:

- "And what it shows is that in total they reported conducting 53,811 events. They distributed 2,317,000 materials related to those events, and that they reported that they had reached approximately 9,000,000 consumers in the Plaintiff Counties and Cities." (44 RT 6489:8-6490:1.)

All of this evidence, too, breaks any possible chain of causation between the alleged nuisance today and one ad appearing in a newspaper in two cities in 1904 for a line of products that included non-white lead interior paints and minor financial contributions to LIA's general product advertising not limited to interior residential use from 1937-41 or to the West Coast.

5. The Court Ignored Laws Placing The Duty On Property Owners To Maintain Paint And Prevent Lead Paint Hazards.

While the court's decision acknowledges that defendants presented the issue of property owner neglect, the court

characterized the owners' breach of duty as "passive neglect" and did not discuss their obligations under California law. (Op. at 51-53.) Without citing to the evidence, the court summarily stated that the impact of owner neglect was an issue for the trier of fact and that a rational trier of fact could have reached the conclusion that "defendants' wrongful promotions of lead paint for interior residential use were not unduly remote . . . ." (Op. at 52.) The court's decision ignores Sherwin-Williams' unrefuted evidence that:

- The Housing Law requires property owners to prevent and remediate "lead hazards," defined as "deteriorated lead-based paint." (See Health & Saf. Code, §§ 17920.10, 17980, subds. (b)(1) & (e); Cal. Code Regs., tit. 17, § 35037.)
- Routine maintenance can prevent "lead hazards." (38 RT 5743:27-5744:2; 45 RT 6704:14-20; 141 AA 41748; 144 AA 42834, 42837.) And plaintiffs' own brochures and pamphlets encourage and instruct owners on how to do the routine maintenance that can prevent lead hazards. (38 RT 5743:27-5744:2; 45 RT 6704:14-20; 141 AA 41748; 144 AA 42834, 42837.)
- Enforcement mechanisms exist for noncompliant owners including loss of tax deductions and criminal penalties. (See Health & Saf. Code, §§ 17980, subds. (b)(1) and (e), 17985, 17992, 17995-17995.2.) Senate Bill No. 460 also amended Civil Code section 1941.1 to make a dwelling "untenantable" if it has "lead

hazards" violating Health & Safety Code section 17920.10, in addition to a dwelling "in which there exists…(c) Any nuisance." (Health & Saf. Code, § 17920.3; 169 AA 50168-50172, 50226-50231, 50247-50251, 50398-50400; 170 AA 50401-50404.) Declaring buildings "untenantable" has severe consequences for owners. (See Civ. Code, §§ 1942 subd. (a) [permitting a tenant to repair and deduct cost from rent, or to vacate premises], 1942.3 [shifting burden to landlord to prove habitability], 1942.4 [landlord who fails to address violation of Health & Safety Code section 17920.10 within 35 days is liable for general and special damages], 1942.5 [penalties for retaliation against tenants who report untenantable conditions].)

- The Jurisdiction CLPPP witnesses admitted that enforcement is the most effective and most cost-effective way to prevent child lead exposure. (SWOB at 36; 38 RT 5716:20-5717:24.)
- Plaintiffs admitted that children can live safely in homes containing lead-based paint as long as the paint is maintained. (*E.g.,* 25 RT 3786:22-26 [Johanns]; 31 RT 4722:4-7 [Dr. Rangan: "ridiculous" to say a child will be lead-poisoned because lead-based paint is in house]; 33 RT 4967:11-13 [Courtney]; see also 46 RT 6832:28-6833:8 [Heckman].) This is borne out by other evidence

omitted from the court's decision. For example, approximately 80 percent of San Mateo County residences presumably had lead-based paint (33RT 5023:6-8), yet no child's BLL requiring intervention was traced to lead-based paint (see 143 AA 42502-42561).

- Therefore, the court misstated that property owners' failure to prevent or abate lead hazards amounts to "passive neglect," when in fact their misconduct is a criminal violation. (Op. at 53.) Under California law, their violation of housing codes and criminal laws is an intervening and superseding cause that breaks the chain of causation between any promotion decades earlier and the public nuisance condition found by the court today. (Penal Code, § 372; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090 (*Acuna*); *In re Firearm Cases* (2005) 126 Cal.App.4th 959.)

The court also misstates the record evidence that innumerable actors intervened and controlled the use and maintenance of lead-based paint after its lawful sale, and misstates that those who were influenced by defendants' "promotions" were the sole "conduit between defendants' actions and the current hazard." (Op. at 53.) In fact, ***no*** evidence shows a single person who purchased or used lead paint for residential interiors because of Sherwin-Williams' advertisements. The undisputed evidence also shows that many actors existed between the manufacture of the pigment and the property owner

today, and those actors made choices on whether to remove, maintain, abate, or neglect any white-lead containing interior paint. (SWOB at 13, 31-32.) As a matter of fact and law, Sherwin-Williams is too remote and it cannot be liable decades after the lawful sale of its products when hazards arose because particular owners ignored their duty to maintain and to prevent or abate lead paint hazards. For that reason, all federal, state, and local laws and regulations place the responsibility on property owners to prevent and abate lead paint hazards.

6. The Court Omitted Evidence Of The Myriad Other Actors That, Unlike Sherwin-Williams, Promoted White Lead For Residential Interior Use.

While erroneously placing liability on Sherwin-Williams for ads that did not in fact promote white lead for interior residential use, the court ignored evidence that thousands of manufacturers, architects, scientists, government chemists and purchasing agents, retailers, and painters promoted lead-based paint for residential interiors for decades, while Sherwin-Williams promoted its non-lead, interior residential paints. (29 RT 4433:3-4434:4; 45 RT 6647:3-10; see also §I.E.1 *infra*.) The court also ignored Plaintiffs' historian's admission that he "can't tell" whether any WLC present in California today is attributable to Sherwin-Williams. (29 RT 4440:11-14.)

7. The Court Omits That No Government Has Determined That Lead-Based Paints Are A Public Nuisance.

No federal, state, or local public health agency has concluded that children's lead exposure is a public nuisance today. (98 AA 28889 [¶ 1]; 126 AA 37318:21-37319:5 [Charlton]; 33 RT 4921:6-10, 4925:7-14 [Courtney].)

C. The Court Omits Key Facts Showing That This Case Has Always Been About The Defendants' Manufacture of Two Pigments For Use In Interior Residential Lead Paints.

This court mistakenly calls defendants' position that this case is about pigment production "frivolous." (Op. at 114.) The court's statement misapprehends the procedural history of the litigation and omits that plaintiffs themselves characterized the case as being about the manufacture of two white lead pigments for use in interior residential paint.

After this court's 2006 decision, plaintiffs filed their Fourth Amended Complaint (FAC). The FAC sued defendants as former producers of "Lead." (4 AA 617 [¶ 1].) During fact discovery in 2012, plaintiffs defined "Lead" as used in the FAC as WLC and WLS pigments, not lead-based paint. (133 AA 39524; 138 AA 40940.) The trial court's Statement of Decision even discusses

"Defendants' Manufacturing of Lead Pigments for Use in House Paints . . . ." (138 AA 40940) before conflating it into a paint case.

Plaintiffs made a deliberate, strategic decision in how they framed the products at issue—they claimed to have joined as defendants the bulk of the manufacturers of WLC and WLS. (24 RT 3628:3-5, 3629:4-7.) In his opening argument, plaintiffs' counsel stated that the defendants "represented practically the entire economic power in the white lead pigment industry." (24 RT 3627:2-9.) That representation was significant for plaintiffs' causation argument, since plaintiffs did not intend to prove, and could not prove, that any defendant's white lead pigments or residential paints were present in any property in any jurisdiction, let alone a substantial number of properties community-wide. He could not make that representation about manufacturers of interior residential paints.

Because plaintiffs stipulated that Sherwin-Williams never manufactured WLS pigments (62 AA 18033 at Stips. 10-11), Sherwin-Williams can only be liable for its promotion of WLC for interior residential use. The record is bare of any such Sherwin-Williams' promotion of WLC pigments in any plaintiff jurisdiction. The court's decision further errs by holding Sherwin-Williams liable for times before it made WLC pigments and for times after it stopped making WLC pigments. To change the products at issue during and after trial violates the California rules and deprives Sherwin-Williams of due process of law, because it failed to receive notice of the claims against it in time to prepare a defense. (See Code Civ. Proc., § 420; *Lackner v.*

North (2006) 135 Cal.App.4th 1188, 1201, fn. 5 [declining to consider claims not alleged in the complaint, which "delimit[s] the scope of the issues to be determined"].) By shifting the product from white lead pigment as pleaded by plaintiffs to promotion of interior white lead paint, and by shifting the public nuisance from presence of the white lead pigment as pleaded by plaintiffs to deteriorated paint in housing, the Court also fails to account for the useful life and intended use of the product. Thus, this court's statement that this case has always been about lead paint is factually and legally incorrect.

D. The Court Omits Key Facts Regarding The Definition Of Lead Paint.

Beyond misstating the pigment/paint distinction, the trial court fashioned its own definition of lead-based paint by categorizing a paint with any amount of lead as lead-based paint. This court omits that plaintiffs' expert testified that lead-based paint is paint with "high lead content"; or 100 percent [sic] or 70 percent [sic] pure white lead." (30 RT 4464:14-21 [Rosner].) It also omits that none of Sherwin-Williams' interior paints that contained WLC meets plaintiff's expert's definition of lead paint. It also ignored the various standards and laws defining lead-based paint such as the American Standards Association's 1955 standard or the initial federal Lead-Based Paint Lead Poisoning Prevention Act in 1971. (140 AA 41409; 43 RT 6267:2-10.)

E. There Is No Evidence Of, And The Court Misstates The Facts Purportedly Supporting Its Finding Of, Actual Knowledge On The Part Of Sherwin-Williams.

Departing from its 2006 decision requiring actual knowledge, this court moved to a lesser constructive knowledge standard holding that inferences supporting that a defendant "must have known" are sufficient. (Op.at 26-27.) Applying that lesser standard, the court found that because Sherwin-Williams was "a leader" in the paint manufacturing industry, it "must have known" that there existed a health hazard to children from interior paints containing white lead pigments. (Op.at 25-31.)

To support its conclusion, the court cites to two non-Sherwin-Williams documents, one document from the files of Sherwin-Williams, and its supposition that Sherwin-Williams would have received information from the LIA. The court, however, omits that there is ***zero*** evidence that Sherwin-Williams received either of the two non-Sherwin-Williams documents or any information from the LIA prior to 1937, by which time it was not making any ready-mixed paints for interior residential use that contained white lead pigments. The court also ignores the plain language of the 1900 article that Sherwin-Williams published to alert painters to the occupational risks arising from the deterioration of ***exterior*** use of white lead in oil and encouraging them to avoid that risk by using a ready-mixed exterior paint including zinc pigments in addition to lead (zinc minimized chalking).

In addition, the trial court recognized that "the state of knowledge was admittedly in its nascent stages" but then advocated applying "contemporary knowledge" to find defendants liable. (138 AA 40883.) Further, plaintiffs' own experts conceded that Sherwin-Williams did not know, when it made WLC, of today's alleged risk to children from low BLLs, once considered safe, that can come from ingesting lead in household dust and water. Sherwin-Williams respectfully refers the court to NL Industries' petition for rehearing, which demonstrates that the lead hazards underlying the trial court's and this court's decisions were unknown and unknowable while defendants were making white leads and white lead interior paints.

1. The Court Omitted That Plaintiffs Admitted That Today's Alleged Health Hazard Was Unknown And Unknowable When Sherwin-Williams Was Making WLC.

In ruling that defendants had actual knowledge, the court omitted the admission of plaintiffs' historian that defendants did not have enough knowledge about "lead paint dangers" to stop selling interior lead-based paint until the "mid to late 1930s." (36 RT 5402:9-19 [Markowitz].) Thus, no defendant should be charged with sufficient knowledge prior to that time. Moreover, this court did not acknowledge the trial court's conclusion that knowledge of low-level effects of lead is "more contemporary," that knowledge was "in its nascent stage," and "shouldn't we take

advantage of this more contemporary knowledge[.]" (138 AA 40883, 41014.) The court fails to square this more contemporary knowledge with its reliance on 1904 ads.

Plaintiffs also conceded that Sherwin-Williams had no secret information that was unknown to public health officials about health risks to children from lead-based paint (35 RT 5364:1-28; 36 RT 5386:4-20; see also 139 AA 41263-41265 (1915 article by Wiley stating "lead sounds its own warning")), but the court did not consider this fact in its opinion. Nor did it address the unrebutted defense evidence that federal, state, and local governments continued to specify and recommend the use of white lead for residential interior paints during and long after the time that Sherwin-Williams made WLC:

- Federal, state, and local governments specified the use of white lead in oil or paints containing white lead pigments in residential interiors through the 1950s and exteriors through the 1970s. (155 AA 46086-46093; 155-156 AA 46094-46308.)
- The U.S. Bureau of Standards recommended white lead paint for use on schoolhouse walls and ceilings in 1928 and 1930. (139 AA 41292-41296.) The Forest Products Laboratory of the U.S. Departure of Agriculture recommended pure white lead-in-oil and mixed paints with lead pigment for residential exterior and interior painting. (139 AA 41329-41336; 43 RT 6312:28-6315:7 [English].)

- California favored white lead in oil by passing statutes prohibiting paint "adulteration" and requiring special labeling for paints that were not pure lead-in-oil or zinc-in-oil. (168 AA 49983-49988.)
- As late as 1950, the State taught painters to use white lead in residential paints. (45 RT 6704:6-13; 155 AA 46033.)
- Until 1973, California and certain Jurisdictions still specified lead-based paint for new buildings. (See, e.g., 45 RT 6697:17-6703:13; 155 AA 46154-46159.)
- The trial court recognized that these governmental agencies "charged with public safety" did not determine that "lead was poisonous" at the time Sherwin-Williams manufactured WLC pigments (138 AA 40883); thus precluding any finding of actual knowledge on the part of Sherwin-Williams.

2. This Court Omitted That The Trial Court Found No Evidence That Sherwin-Williams Received The 1910 and 1914 Documents.

This court's decision omitted that the trial court found no foundation for the admission against Sherwin-Williams or any other defendant of the 1910 and 1914 documents this court cites as "substantial evidence":

- Responding to defense counsel's objection, the trial court stated, "I think unless there is a foundation

showing that the Defendants had knowledge of these particular articles or writings, I think it is pretty hard for me to say that they did in fact have notice. That objection will be sustained." (32 RT 4778:26-4779:8; SWOB at 22.)

- Plaintiffs never laid that foundation for any documents presented through Dr. Kosnett (plaintiffs' medical state of the art historian), and the trial court repeatedly sustained defendants' objection admitting each document only for "the limited purpose" and "subject to" defense counsels' objections, but not as notice of any defendants' knowledge. (32 RT 4777:25-4780:7 (P34), 4784:4-9 (P42), 4787:8-14 (P43), 4788:23-4789:1 (P28), 4797:3-14 (P08), 4799:9-25 (P22), 4802:1-22 (P226), 4804:8-19 (P23), 4807:6-12 (P30), 4812:24-4813:2 (P31), 4815:17-23 (P29), 4817:25-4818:3 (P55), 4820:11-17 (P24), 4822:22-28 (P69), 4824:20-26) (P21).)

Because the trial court did not admit these documents against Sherwin-Williams or any other defendant for the purpose of notice,[4] they cannot provide any evidence, let alone "substantial evidence," to support a finding of "actual knowledge."

[4] P008 (173 AA 51544), the 1910 Congressional testimony, was admitted but under the government records exception to the hearsay rule. The court did not admit it as evidence of notice to or knowledge any defendant. (See 32 RT 4778:26-4779:8, 4797:3-12.)

3. There Is No Evidence That Sherwin-Williams Received Documents Or Communications From LIA In The Early 1930s.

The court states in its opinion:

> Each of the defendants was a member of the LIA in the 1930s when the LIA promulgated information to its members about the "frequent occurrence" of children being poisoned by lead paint from "toys, cradles, and woodwork," which included the fact that even a small amount of lead could kill a child. The LIA information given to its members (including all three defendants) referenced a national newspaper article . . . .

(Op. at 30.) The court, however, never states the evidentiary basis for its conclusion that the LIA promulgated information to its members about health risks to children or that Sherwin-Williams in particular received such information. (*Ibid.*) Rather, the court assumes, without facts, that Sherwin-Williams received information because it was an LIA member. (*Id.*) This assumption omits the lack of evidence that Sherwin-Williams received those communications from LIA and is no more than speculation. (30 RT 4460:27-4461:9; see also ConAgra Grocery Products Company's Petition for Rehearing.)

4. The LIA 1937 Medical Conference Did Not Inform Company Physicians Of Today's Claimed Health Risks.

The court cites the 1937 LIA medical conference as substantial evidence of Sherwin-Williams' actual knowledge of the hazard to children. However, the only point that Sherwin-Williams supposedly learned from that medical conference is that "[t]o get rid of the lead in children is almost impossible." (Op. at 34.) This point does not provide any evidence supporting Sherwin-Williams' actual knowledge of today's alleged health risks to children. The court also omits that Sherwin-Williams had no white lead paints recommended for interior residential use at the time of that conference. (62 AA 18033-18040 at Stips. 27-142; 170 AA 50410; 45 RT 6619:11-6620:8, 6621:19-6622:4).)

5. The Concern In the 1900 Article Was About Exterior Paint and Occupational Risks.

The court opines that Sherwin-Williams "knew no later than 1900 that lead paint was prone to deterioration and that it posed a serious risk of harm to those exposed to it." (Op. at 34.) Then, without any citation to any record evidence, it goes on to state "the trial court could have reasonably concluded that SWC knew that deterioration of interior residential lead paint would pose an even more serious risk that would be heightened with respect to young children . . . ." (*Ibid.*) This statement by the

court is based on a 1900 article in a Sherwin-Williams' publication. The court's statement, however, misinterprets the article; omits the record evidence that interior paint does not "chalk" or disintegrate; and ignores the undisputed fact that the first indication in the record that Sherwin-Williams knew of a potential danger to children from interior paint is the 1937 Industrial Hygiene Survey by McCord.

a. The 1900 Article Was Not About Risks To Children From Interior Paint Containing White Lead.

The purpose of the 1900 article was to convince master painters to use ready-mixed paints with zinc pigments instead of pure white lead in oil. (45 RT 6626:28-6627:5, 6652:4-6653:21 [Dunlavy].) The article recounted the "familiarly known" risk of white lead in oil chalking outside. (179 AA 53356-53357 ["disintegrates and is blown about by the wind"; describing "rain, fog, etc."].) The article never mentions a risk to children from either inside household dust or low-level BLLs (which could not then be measured). The court ignores these facts and also omits Sherwin-Williams' undisputed evidence that "chalking" of white lead in oil only occurs outside, due to sunlight and weathering; inside lead paint does not chalk. (45 RT 6653:2-18; see also 45 RT 6705:14-18.) As a result, this article provides no basis for the court to conclude that Sherwin-Williams had actual knowledge of

a risk of harm to children from interior residential use of paints with white lead pigments.

b. The 1937 McCord Industrial Hygiene Survey

As plaintiffs' expert admitted, but the court's decision omits, the McCord Survey, which was an industrial hygiene survey commissioned by Sherwin-Williams and conducted by an outside consultant, is the first reference in any Sherwin-Williams' document to a report of a child ingesting or eating deteriorated, flaked-off residential lead-containing paint. (37 RT 5564:17-5565:8; see also 45 RT 6638:12-6639:8.) Also omitted is the fact that Sherwin-Williams had no interior ready mixed paints with white lead at the time of the McCord Survey. (62 AA 18033-18040 at Stips. 27-142; 170 AA 50410; 45 RT 6619:11-6620:8, 6621:19-6622:4.)

c. The Court Omitted Other Material Evidence Demonstrating A Lack Of Knowledge By Sherwin-Williams.

- Dr. Markowitz admitted he has no documents showing that Sherwin-Williams knew of a single child that had been poisoned by exposure to one of its paints at any time. (36 RT 5386:14-20 [Markowitz]; 37 RT 5558:5-12.)

- Dr. Gottesfeld admitted "the science has shifted." (31 RT 4659:14-16.)
- Dr. Lanphear admitted that, as of 2003, "[i]t remains unclear whether lead associated cognitive deficits occur at concentrations below 10 micrograms per deciliter." (27 RT 4058:3-6.)
- Plaintiffs' toxicologists and doctors admit that their views of today's risk of harm at BLLs below 10 ug/dL formed only in the "last five or more years." (See 27 RT 4004:18-4005:15 [cited at SWRB at 57].)

None of the "evidence" cited by this court supports a conclusion that Sherwin-Williams had actual knowledge of today's potential health hazard from interior lead-based paint when it was making WLC or the few interior residential paints with WLC.

F. The Court Misstated The Evidence Regarding Soil.

The question in this case is not whether exterior lead paint may have contributed to lead in soil; rather it is whether interior paint containing white lead pigments caused white lead to be in outside soil of residences in plaintiffs' jurisdictions. Nevertheless the court misstates the facts by reciting evidence relating solely to residential exteriors. In fact, the court quotes plaintiffs' expert's testimony stating, "[b]ecause we know that the exterior is subject to weathering, because ***windows on the exterior*** often have high lead concentrations and they are subject to friction and

impact . . . ." (Op.at 56, emphasis added.) Immediately after, and in direct contradiction to the quoted evidence, the court then misstates that "plaintiff;s [sic] evidence established that a prime contributor to soil lead was lead paint on the friction surfaces of windows and doors, ***which are interior, rather than exterior surfaces.***" (Op. at 56, emphasis added.) Not a single plaintiff or defense expert testified that interior residential paint contributes to soil lead. There is no evidence that interior residential paint contributes to lead in soil outside. The reverse is true: lead in soil, especially from leaded gasoline emissions, is tracked inside. (25 RT 3778:22-27; 31 RT 4594:5-13.) This court's opinion omits that the trial court excluded exterior paint and did not find that interior lead-based paint contributes to lead in soil. (138 AA 40929.) By misstating and omitting evidence, this court impermissibly drew an inference in favor of plaintiffs that is in direct contradiction to the admissions of plaintiffs' experts.

G. The Court Misstates The Evidence From Sherwin-Williams That Required The Trial Court To Apportion Any Finding Of Fault.

Sherwin-Williams provided evidence to the trial court that would have allowed apportionment on any number of bases. This court ignores that evidence and misstates that Sherwin-Williams' evidence "did not establish that an entity's share of the total amount of lead used in California bore any relationship to that entity's liability for the amount of lead paint in residences in the

10 jurisdictions." (Op. at 71.) This conclusion further ignores that virtually none[5] of the hundreds of formulations of Sherwin-Williams' paints for interior residential use contained white lead pigments and the utter lack of evidence that those few interior paints with white lead were promoted in any of the plaintiffs' jurisdictions;[6] it ignores the record evidence that Sherwin-Williams' shipments of dry white lead and white lead in oil were less than 1 percent and 5 percent respectively of national shipments; and it discounts without basis Sherwin-Williams' other evidence showing its minimal contribution of lead into California. Thus, this court's decision misstates that no evidence permits apportionment of liability or divisibility of harm. In fact, the record shows, at most, that Sherwin-Williams was a de minimis contributor to the presence of white lead on the interiors of houses in California, and thus, if liable at all, should be apportioned a de minimis share.

- Dr. Dunlavy's uncontroverted testimony was that Sherwin-Williams was responsible for less than 5 percent of white lead in oil shipments and less than 1 percent of dry white lead shipments nationally.[7] (168

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[5] See n.3, *supra*.

[6] At most, if one were to accept the erroneous characterization of the two 1904 ads identified by the court, "promotion" occurred in San Diego and Los Angeles in one year.

[7] The FTC data for interstate shipments of WLC reflected share of the market in late 1930s and early 1940s. This data was the basis for plaintiffs' original claim of market share liability that it (continued...)

AA 50005-50006; 45 RT 6642:27-6643:11 [Dunlavy].) If anything, the evidence suggests that Sherwin-Williams' share in California would be less, because its only WLC plant was thousands of miles away in Chicago. (See 62 AA 18033 at Stip. [¶ 13]; 168 AA 50005.)

- Dr. Van Liere testified without contradiction, and the uncontested record showed, that Sherwin-Williams was responsible for only 0.1 percent of the lead in California. (29 RT 4438:18-23; 44 RT 6488:11-20; 157 AA 46762-46771.) This court's decision omits that Dr. Van Liere's use of total lead in California to calculate that percentage is consistent with the methodology used by the California State Board of Equalization in *Equilon Enterprises v. State Bd. of Equalization* (2010) 189 Cal.App.4th 865, to calculate Sherwin-Williams' annual fee to pay into the Childhood Lead Poisoning Prevention Fund. (62 AA 18047-18049 at Stips. 220-262.) The Court of Appeal affirmed the State's assessment of 85 percent of responsibility to former producers of lead gasoline and only 14 percent to former producers of lead paint. (*Equilon* at p. 870.) Thus, this court's criticism of Dr.

(...continued)
later stipulated it was not pursuing. (29 RT 4437:23-27, 4438:7-23.)

Van Liere's opinion conflicts with the Court of Appeal's decision in *Equilon*.

- This court's decision also omitted any discussion of other ways in which the evidence would permit apportionment of Sherwin-Williams' liability, such as by percentage of ads promoting WLC pigments or paints with WLC pigments for interior residential use; number of years in which Sherwin-Williams had such promotions; percentage of properties with Sherwin-Williams' WLC pigments or interior paints with those pigments; or time period.

H. The Court Omits The Myriad Problems Presented By The Abatement Remedy.

Sherwin-Williams identified the lack of evidence justifying the trial court's abatement remedy as well as a number of problems created by it. This court, however, failed to address those issues. First, the court omits that Sherwin-Williams' WLC pigments or paints containing WLC have not been found at any property in any plaintiff jurisdiction, nor does any evidence show that either its WLC pigments or interior residential lead paints are present because of a wrongful "promotion" by it. (See §I.A *supra.*)

Second, Sherwin-Williams had no opportunity during discovery or trial to develop and present evidence that its paint is not present at any property, or to demonstrate that other persons

are responsible for lead hazards, lead in soil, water leaks, and other structural problems at any property. (SWOB at 46; SWRB at 54.)

Third, the court ignores the adverse policy implications of rewarding property owners who fail to maintain their properties, by giving them priority in abatement; new windows, doors and floors; and property renovation, such as roof and plumbing repairs. (SWRB at 54.) This is especially so since such conduct by property owners violates California law. See §I.B.5 *supra.*

Fourth, no evidence shows that owners, if allowed to be parties, would agree to a declaration that the presence of lead-based paint in their properties is a public nuisance, or to have their properties black-listed in a public database if they choose not to enroll in the trial court's remedy. (SWOB at 46, fn. 16.)

Finally, in reaching this remedy the trial court usurped the power reserved to the legislature to define what is and is not a public nuisance. (*Acuna*, *supra,* 14 Cal.4th at p. 1107). Neither this court nor the trial court has the authority to declare the Legislature's CLPPP program and funding inadequate. (See 138 AA 41012; *Cal. Sch. Bds. Assn. v. State* (2011) 192 Cal.App.4th 770, 798-799; *Cty. of Butte v. Super. Ct.* (1985) 176 Cal.App.3d 693, 699.) Where, as here, the Legislature has decided the amount and method of funding, and has declared that funding to be exclusive and sufficient (Health & Saf. Code, § 105310 subd. (f)), the courts may not create and fund their own supplemental and conflicting program to abate lead paint hazards because they decide that more should be done. (See *Cal. School Bds. Assn.,* at

p. 797; *Cty. of Los Angeles v. Commission of State Mandates* (1995) 32 Cal.App.4th 805, 820.) The court also ignored the admissions from plaintiffs' own witnesses that enforcement of existing housing codes is the most effective and cost-effective way to prevent and abate lead paint hazards in their jurisdictions. (*E.g.*, 25 RT 3791:4-13, 3789:26-3790:9 [Johanns]; 171 AA 50892; see also 144 AA 42856; 145 AA 43035; 150 AA 44560-44565.)

Instead of enforcing the public policy as already set forth by the Legislature and rejecting the trial court's improper declaration of nuisance and improper remedy, this court sanctioned the trial court's decision that set new and conflicting public policy. (Op. at 64-69.) In doing so, the court ignores the issue presented by Sherwin-Williams that it is not the role of courts to set or change funding implemented by the Legislature. The court further omits the evidence that some jurisdictions' CLPPPs do not spend all of their annual allotment from CLPPB (120 AA 35467:13-23, 35468:10-13; 168 AA 49959; 33 RT 5044:13-5045:26; 39 RT 5866:19-5867:3), and that CLPPB has also not asked for more funds and is meeting its program goals ahead of schedule (126 AA 37292:18-37293:4, 37295:17-37298:6; 33 RT 4923:1-9; see also SWOB at 14, 51-55; SWRB at 45-49.)

I. The Court Omitted The Issue Of Sherwin-Williams' Right To A Separate Trial.

Sherwin-Williams raised as an issue on appeal its right to a separate trial given both the time limits imposed by the trial

court and Sherwin-Williams' differing interests from the other defendants. (SWOB at 57; SWRB at 51-52.) This court did not address that issue in its Opinion. Denial of a separate trial permitted and exacerbated the problems caused by the procedural errors during trial and by testimony that lumped all defendants together without any individual evidence implicating Sherwin-Williams.

J. The Court Omitted The Issue That The Remedy Conflicts With Existing Law.

Although omitted in the court's decision, the remedy conflicts with current standards by requiring abatement of intact lead-based paint on windows, doors, floors, and stairs; and by imposing lower dust and soil clearance standards. (See SWOB at 37-39; SWRB at 46.) Federal, state, and local public health authorities do not recommend or require abatement of intact lead-based paint 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 lead-based paint. (140 AA 41567-41577; 144 AA 42899-145 AA 42901; see also 31 RT 4602:18-25; 34 RT 5178:10-13.) The court's opinion also omits that children's health is no place for a trial court's experimentation with a remedy of unprecedented scope; it does not consider the very real risks to children, to which plaintiffs' experts testified, of the abatement specified by the plaintiffs' plan. (34 RT 5179:15-5180:14; 94 AA

27715 [¶ 3] (Jacobs article noting that EBLL children occur when lead-based paint is "disturbed" during rehabilitation, repainting, or "improper abatement activities"].)

K. The Court Omitted The Issue Of Failure To Join Necessary And Indispensable Parties.

This court failed to address the issue raised by Sherwin-Williams that although the trial court defined "the People" to include jurisdiction residents (138 AA 40920), it erroneously denied defendants' motion to join property owners as indispensable parties, to their prejudice, too (4 AA 669-692; 5 AA 957-963). Failure to include property owners prejudiced Sherwin-Williams' defense by not allowing it to inspect individual properties and develop evidence against those negligent owners who created any conditions potentially hazardous to children. (See §I.H *supra*.)

II. THE COURT MISSTATES AND OMITS MATERIAL FACTS FROM THE RECORD REGARDING PROCEDURAL ERRORS THAT DEPRIVED SHERWIN-WILLIAMS OF A FAIR TRIAL

A. This Court Misstates Facts Regarding The Trial Court's Imposition Of Time Limits.

This court states, "[A]ny time limit order should be reasonable, mindful that ***each party*** is entitled to a full and fair opportunity to present its case." (Op. at 112 (citation omitted).) Absent from the court's opinion, however, are the many facts showing that Sherwin-Williams was deprived of that opportunity.

1. The Trial Court's Treatment Of Defendants As One Side Was Clear Error.

At trial, five separate defendants had to refute the claims of ten separate plaintiff jurisdictions. In essence, the proceeding combined 50 separate cases.[8] The vast scope of the case pleaded by plaintiffs raised myriad issues, including:

- More than 150 years of paint technology;

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[8] Plaintiffs had previously pleaded a conspiracy claim. The conspiracy cause of action was dismissed. (*Santa Clara*, *supra*, 137 Cal.App.4th at p. 299.) And plaintiffs stipulated that they were not asserting market share liability. (29 RT 4437:23-27, 4438:7-23.)

- Each defendant's corporate history, formulas, marketing, and advertising;
- The conditions of housing and the existence of a public nuisance in each of the ten separate jurisdictions;
- The history of California's statutes, regulations, and CLPPP programs;
- More than 150 years of public health history;
- More than 150 years of evolving scientific knowledge;
- Vast numbers of housing inspections and local and national public health statistics;
- The workings of trade associations;
- Causation in each plaintiff jurisdiction as to each defendant; and
- The details of a mammoth and unprecedented remediation remedy.

The trial court gave each "side" 40 hours to present evidence. This limitation was extremely prejudicial to Sherwin-Williams. First, as Sherwin-Williams objected repeatedly, the defendants did not have congruent interests and therefore should not have been considered a "side." (24 RT 3612:26-3614:15 [trial court denying Sherwin-Williams' and ConAgra's motions to sever the defendants with regard to the time allotted to present evidence]; 46 AA 13466-13467 [Joint Pre-Trial Statement in which Defendants requested a minimum of four weeks to present their side of the case]; 88 AA 25937-25948; 99 AA 29256 [Sherwin-Williams' Mot. for Additional Time or for Mistrial, filed

on 8/15/13 and denied on 8/23/13].) Second, this treatment of all defendants as one side permitted plaintiffs to improperly "lump" defendants together and conflate evidence. Third, treatment as a "side" limited Sherwin-Williams' presentation of evidence.

a. Defendants Had Disparate And Conflicting Interests.

Contrary to the trial court's presumption, the defendants had varying, and often conflicting, interests. For example, ARCO did not make paint; it made and sold pigment only. ARCO, thus, wanted the proceeding to be a "paint" case. In contrast, based on the way plaintiffs' pleaded the case, their discovery responses, and their counsel's opening statement, plaintiffs' case was based on production of white lead pigments for use in paint. Pigment is a component of paint. It is not the finished product. Sales and advertising for pigments and paints were done differently and were aimed at different customers. There were thousands of paint manufacturers, mixers and sellers, but not nearly as many manufacturers of pigments over the last 150 years. Plaintiffs advanced a pigment case because they wanted to avoid the due process problems of finding liability without proof of causation and then arbitrarily assigning joint and several liability for the entire remedy (without paint sales data) to these few defendants who were among thousands of paint sellers.

Plaintiffs' expert and the stipulations conceded that Sherwin-Williams used virtually all of its white lead pigments

internally. (29 RT 4436:15-4437:2 [Rosner testifying that Sherwin-Williams' WLC was primarily for its own consumption]; 62 AA 18033 at Stips. 14-15.) Sherwin-Williams did not advertise or promote WLC pigments and had no incentive to promote or market its WLC pigments to other paint manufacturers or downstream customers. (29 RT 4437:3-7 [Rosner agreeing that he could not find any ads where Sherwin-Williams was promoting the sale of WLC to paint manufacturers]; 45 RT 6615:22-6616:14 [Dunlavy].) Plaintiffs could identify no ad from Sherwin-Williams promoting sales of WLC pigments. (29 RT 4449:1-5 [Rosner testifying that he is not aware of any Sherwin-Williams ad saying that a consumer should use white lead pigment in interior paints]; see also 37 RT 5545:9-16 [Markowitz].) As a result, if this case concerned the promotion of white lead pigments, as the operative FAC alleged and plaintiffs' discovery responses confirmed, Sherwin-Williams should have been dismissed.

After trial, the trial court transformed the case into one of paint promotion. This change in the products at issue resulted in severe prejudice to Sherwin-Williams. When plaintiffs could find no retail ads from ARCO promoting paint, the court found that the case against ARCO failed. (138 AA 40953-40955, 41016.) Because the trial court and this court mistakenly believed that Sherwin-Williams had placed ads in a single year, in two plaintiff jurisdictions only, promoting white lead paints for interior residential use, Sherwin-Williams was held liable. Thus, this court erred and ignored the record when it said the paint-pigment

distinction argued by Sherwin-Williams was frivolous – quite to the contrary it was, at least as to Sherwin-Williams and ARCO, outcome determinative.

b. Treatment Of Plaintiffs And Defendants As Collective "Sides" Permitted Plaintiffs To Conflate Their Proof.

The treatment of defendants as a "side" allowed plaintiffs and their experts to repeatedly talk about "these defendants," the "industry," and "their" trade association and campaigns – lumping the defendants together. (See, e.g., 24 RT 3627:2-9 [plaintiffs' referring to defendants' collective market share in their opening statement]; 27 RT 4113:10-17 [Rosner testifying generally about Defendants' manufacture of white lead pigments in the 20th century]; 28 RT 4157:19-26 [Rosner testifying about "Defendants'" involvement in national promotion campaigns without specifying who participated in what or when]; 4165:16-4166:5 [Rosner testifying generally about significance of White Lead Promotion Campaign, which Plaintiffs stipulated that Sherwin-Williams did not join]; 29 RT 4447:21-4448:4 [Testimony showing that a graph used by Plaintiffs purporting to show a spike in white lead carbonate sales correlating to the Forest Products Better Paint Campaign did not correlate to Sherwin-Williams' involvement in the campaign]; 35 RT 5236:21-5247:6 [Markowitz summarizing opinions regarding "Defendants" collectively].) Lumping Sherwin-Williams together with other

defendants resulted in the court's misstatement of facts concerning Sherwin-Williams. (See, e.g., Op. at 40 (Finding that LIA's campaigns created a great increase in the use of white lead without differentiating between the sole campaign Sherwin-Williams contributed to and others that it did not contribute to or participate in like the White Lead Promotion campaign.)

In addition, and equally prejudicial, treatment of plaintiffs as a side has led to findings of promotion and public nuisance in jurisdictions that wholly lacked proof of either. For example, there was no evidence of Sherwin-Williams' promotion of white lead paint for interior residential use in Alameda, Monterey, Oakland, San Francisco, San Mateo, Santa Clara, Solano or Ventura, yet the trial court found Sherwin-Williams liable in those jurisdictions. This court perpetuated that prejudice by finding that there was substantial evidence to support the trial court's decision based on a single ad in San Diego and a single ad in Los Angeles in one year before Sherwin-Williams began to make WLC. (See §I.A.1 *supra.*)

Similarly, Sherwin-Williams presented evidence in several jurisdictions that sources other than lead paint were the primary cause of elevated blood lead levels in those jurisdictions, yet the trial court and this court found a public nuisance caused by lead paint in those jurisdictions by omitting those facts. (See 143 AA 42501 [Santa Clara CLPPP's "cases do not generally stem from a child's exposure to leaded paint or soil (with a few exceptions) but more from their cultural and daily living practices"]; 27 RT 4063:5-10; 39 RT 5864:22-5865:1, 5881:25-5882:1 ["most elevated

blood lead levels are linked to foods, candies, and imported cookware rather than paint"]; 122 AA 36159 [EBLLs from lead-based paint are "very rare" in Monterey County]; 89 AA 26347-26348 [¶ 9] [collecting testimony and reports of jurisdiction employees]; see also 33 RT 4968:2-6 [Courtney]; see also, e.g., 25 RT 3778:6-13; 31 RT 4713:1-4721:3; 33 RT 4987:20-4988:25 [Los Angeles County]; 39 RT 5916:21-5922:20 [Alameda County]; 39 RT 5858:4-16 [Monterey County]; 40 RT 5984:26-5986:4, 5988:14-5989:18 [Solano County]; 117 AA 34635:12-34636:6 [San Diego]; 120 AA 35501:13-19, 35508:25-35510:2; 122 AA 36042:20-36043:17, 36046:3-36047:1; 141 AA 41740, 41751, 41753; 143 AA 42501; 168 AA 49824, 49894, 49936; 170 AA 50632, 50637, 50688, 50800.)

Thus, instead of holding each plaintiff to its individual proof against Sherwin-Williams alone, this court's decision, like the trial court's, excused the absence of proof and permitted "proof"[9] from one jurisdiction in one year to serve as "proof" for all other jurisdictions in all other years.

[9] As detailed above, because the court misstated the evidence, proof of promotion and causation was entirely lacking in any jurisdiction. But even accepting this court's identification of the proof supposedly supporting the trial court's decision, that proof fails and cannot support a finding of liability in any jurisdiction other than the one from which the proof came.

c. The Time Limits Prevented Sherwin-Williams From Putting on Necessary Evidence For Its Defense.

The trial court's artificial and unduly restrictive time limits also prevented Sherwin-Williams from introducing important evidence for its defense of the case. This court's decision failed to mention that Sherwin-Williams was last on the pleadings and, as result, the last defendant to present its case. At that point, only two hours remained of the defendants' allotted 40 hours for Sherwin-Williams to present four unique experts and to address more than 140 years of company conduct, paint chemistry, and medical history, and to refute 10 different jurisdictions' facts and the proposed remedy. (22 RT 3320:21-26; see generally 135 AA 39960-39961 [¶¶ 6-8].) A personal injury plaintiff in a dog bite case typically has more time than the trial court allowed Sherwin-Williams to defend a case worth potentially more than $1 billion in damages.

The unfair prejudice from the time constraints was compounded when the trial court and this court did not consider the offers of proof submitted for the direct and cross examinations of witnesses that Sherwin-Williams did not have time to do, and when the trial court, after inviting the parties to submit deposition testimony in lieu of calling fact witnesses at trial, then arbitrarily refused to consider almost half of the depositions submitted by Sherwin-Williams and other defendants–more facts that this court omitted. (99 AA 29251-29256, 29290-29300; 134

AA 39635-39636.) This fundamentally unfair restriction on Sherwin-Williams not only violates federal and state due process, but also should mean that this court should not give the usual deference to the trial court's findings of fact. (See *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 267; *McCarthy v. Mobile Cranes, Inc.* (1962) 199 Cal.App.2d 500, 506-508.

B. Plaintiffs Used The Trial Court's Categorical Prohibition Of Re-Cross Examination To Introduce New Evidence During Redirect Examination that Sherwin-Williams Could Not Challenge by Further Cross-Examination.

While the Court discussed the trial court's blanket prohibition of re-cross examination, it did so only in a theoretical way and did not acknowledge that issue as one of plaintiffs' abuse of the trial court's ruling to the detriment of defendants. Specifically, plaintiffs, knowing there was no re-cross examination, repeatedly brought out new evidence and new exhibits for the first time on re-direct examination so that Sherwin-Williams could not examine their witness about the new evidence and testimony.[10] For example, Sherwin-Williams' cross-examination of plaintiffs' historian, Dr. Markowitz, demonstrated that Exhibit 233, an 88-page purported summary of defendants'

[10] Defendants objected each time this was done and requested re-cross examination each time. (See, e.g., 37 RT 5599:14-5600:12 [Markowitz]; 39 RT 5823:26-5824:7 [Jacobs])

ads, was misleading and inaccurate. (36 RT 5454:5-5455:18, 5410:27-5416:26; 37 RT 5547:4-5550:15.) During re-direct examination, he then introduced and testified for the first time, over Sherwin-Williams' objection, about 950 Sherwin-Williams' ads, implying that they promoted interior lead-based paint, which they did not. (37 RT 5593:12-27, 5598:28-5600:12, 5643:4-20; 185 AA 55126-55188, 56075.) Sherwin-Williams had no opportunity to cross-examine him on the new testimony and exhibits, yet the trial court, and now this court, have relied on those ads that were introduced for the first time on re-cross examination to find Sherwin-Williams liable. (SWOB at 57). In other words, Sherwin-Williams' liability for promotion is based on evidence about which it had no opportunity to cross-examine the witness. There can be no more distinct denial of due process than this.

This court's decision omits and misstates the unfair prejudice to Sherwin-Williams and other defendants from plaintiffs' gamesmanship that deprived defendants of their due process rights to a fair trial. The court makes the unsubstantiated statement that "defendants do not contend on appeal the trial court prejudicially erred in overruling their specific beyond-the-scope objections." (Op. at 107.) This misstates the record. The defendants would not have needed re-cross examination and they would not be raising the issue on appeal if the trial court had properly sustained their objections to the improper re-direct examination. Defendants' arguments concerning the unfair impact of the denial of re-cross examination

arise because the trial court erred in not limiting the re-direct examination.

In addition, because Sherwin-Williams' cross-examination of plaintiffs' experts was curtailed by the time limits and by the trial court's refusal to allow re-cross, Sherwin-Williams submitted several offers of proof at the conclusion of the trial. This court's opinion notes that the trial court "acceded to [Mr. Pohl's] request to 'file something' later." (Op. at 109.) Sherwin-Williams submitted offers of proof at the close of trial. This court's opinion omits, however, that the trial court refused to accept a single one of the offers of proof submitted by Sherwin-Williams:

- All Offers of Proof excluded by trial court. (99 AA 29251-29256, 29290-300; 100 AA 29429-29430; 134 AA 39635-39636.)

Yet it accepted the offers of proof submitted by plaintiffs:

- Order accepting offers of proof submitted by plaintiffs. (89 AA 26336-26337.)

III. JOINDER IN PETITIONS FOR REHEARING OF CONAGRA GROCERY PRODUCTS AND NL INDUSTRIES, INC.

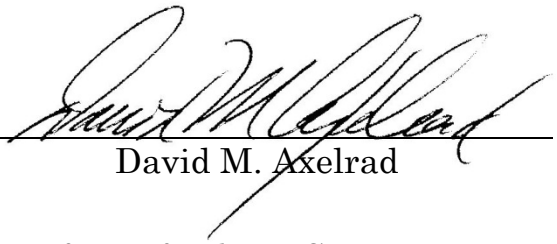
Sherwin-Williams joins the petitions for rehearing submitted by ConAgra Grocery Products and NL Industries, except section III of ConAgra's petition for rehearing, which does not address common issues.

CONCLUSION

Because the court's opinion misstated and omitted numerous dispositive facts and legal issues, the court should grant rehearing, reverse the trial court, and enter judgment in favor of Sherwin-Williams.

November 29, 2017

JONES DAY
ROBERT A. MITTELSTAEDT
PAUL MICHAEL POHL
CHARLES H. MOELLENBERG, JR.
LEON F. DEJULIUS, JR.
HORVITZ & LEVY LLP
DAVID M. AXELRAD
LISA PERROCHET

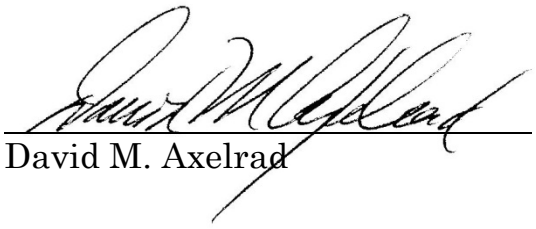
By: 
David M. Axelrad

Attorneys for Defendant, Cross-Complainant and Appellant
THE SHERWIN-WILLIAMS COMPANY

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 12,760 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: November 29, 2017



David M. Axelrad

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

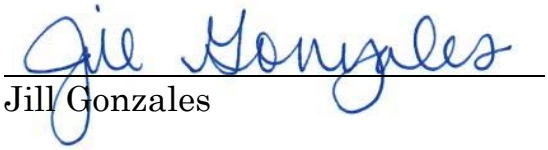
On November 29, 2017, I served true copies of the following document(s) described as **PETITION FOR REHEARING OF DEFENDANT, CROSS-COMPLAINANT, AND APPELLANT THE SHERWIN-WILLIAMS COMPANY AND JOINDER IN PETITIONS FOR REHEARING OF CONAGRA GROCERY PRODUCTS COMPANY AND NL INDUSTRIES, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on November 29, 2017, at Burbank, California.



Jill Gonzales

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People v. ConAgra Grocery Products Company, et al.
Case No. H040880

Counsel Name/Address	Party(ies) Represented
Nancy L. Fineman Joseph W. Cotchett Cotchett, Pitre & McCarthy, LLP 840 Malcolm Road, Suite 200 Burlingame, CA 94010 nfineman@cpmlegal.com jcotchett@cpmlegal.com	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Robert J. McConnell Fidelma L. Fitzpatrick Motley Rice LLC 321 S. Main Street, 2nd Floor Providence, RI 02903-7108 bmcconnell@motleyrice.com ffitzpatrick@motleyrice.com	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Danny Y. Chou Orry P. Korb Greta S. Hansen Jenny S. Lam Office of County Counsel County of Santa Clara 70 W. Hedding Street East Wing, 9th Floor San Jose, CA 95110 danny.chou@cco.sccgov.org orry.korb@cco.sccgov.org greta.hansen@cco.sccgov.org jenny.lam@cco.sccgov.org	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Owen J. Clements Erin B. Bernstein San Francisco City Attorney's Office 1390 Market Street, Seventh Floor San Francisco, CA 94102 owen.clements@sfgov.org erin.bernstein@sfgov.org	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**

Andrew J. Massey Donna R. Ziegler Office of the County Counsel Alameda County 1221 Oak Street, Suite 450 Oakland, CA 94612	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Andrea E. Ross Office of the County Counsel of Los Angeles 500 W Temple Street, Suite 648 Los Angeles, CA 90012 aross@counsel.lacounty.gov	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
William M. Litt Charles J. McKee Office of County Counsel 168 West Alisal Street, Third Floor Salinas, CA 93901-2439 littwm@co.monterey.ca.us mckeecj@co.monterey.ca.us	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Paul F. Prather Jan I. Goldsmith Office of the City Attorney City of San Diego 1200 3rd Avenue, Suite 1100 San Diego, CA 92101 pprather@sandiego.gov cityattorney@sandiego.gov	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Barbara J. Parker Oakland City Attorney One Frank H. Ogawa Plaza, 6th Fl. Oakland, CA 94612 bjparker@oaklandcityattorney.org	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**

Rebecca M. Archer John C. Beiers County Counsel County of San Mateo Hall of Justice & Records 400 County Center, 6th Floor Redwood City, CA 94063 rmarcher@co.sanmateo.ca.us jbeiers@smcgov.org	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Dennis Bunting Office of the County Counsel Solano County 675 Texas Street, Suite 6600 Fairfield, CA 94533 dwbunting@solanocounty.com	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Eric J A Walts LeRoy Smith Office of the County Counsel County of Ventura 800 S. Victoria Avenue, UC #1830 Ventura, CA 93009	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Peter G. Earle Law Offices of Peter G. Earle, LLC 839 North Jefferson Street, Suite 300 Milwaukee, WI 53202 peter@earle-law.com	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Stacey M. Leyton Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108 sleyton@altshulerberzon.com	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**
Mary Alexander Mary Alexander & Associates 44 Montgomery Street, Suite 1303 San Francisco, CA 94104 malexander@maryalexanderlaw.com	Counsel for Plaintiff, Respondent and Cross-Appellant **The People of the State of California**

Raymond A. Cardozo Reed Smith 101 Second Street, Suite 1800 San Francisco, CA 94105-3659 rcardozo@reedsmith.com	Counsel for Defendant and Appellant **ConAgra Grocery Products Company**
Allen J. Ruby Skadden, Arps, Slate, Meagher & Flom LLP 525 University Avenue, Suite 1100 Palo Alto, CA 94301 allen.ruby@skadden.com	Counsel for Defendant and Appellant **ConAgra Grocery Products Company**
James P. Fitzgerald James J. Frost McGrath, North, Mullib & Kratz, PC LLO First National Tower 1601 Dodge Street, Suite 3700 Omaha, NE 68102 jfitzgerald@mcgrathnorth.com jfrost@mcgrathnorth.com	Counsel for Defendant and Appellant **ConAgra Grocery Products Company**
Robert A. Mittelstaedt Jones Day 555 California Street, 26th Floor San Francisco, CA 94101 ramittelstaedt@jonesday.com	Counsel for Defendant, Cross-Complainant and Appellant **The Sherwin-Williams Company**
Paul M. Pohl Charles H. Moellenberg Leon F. DeJulius, Jr. Jones Day 500 Grant Street, Suite 4500 Pittsburgh, PA 15219-2514 pmpohl@jonesday.com chmoellenberg@jonesday.com lfdejulius@jonesday.com	Counsel for Defendant, Cross-Complainant and Appellant **The Sherwin-Williams Company**

James H. McManis William W. Faulkner McManis Faulkner 50 W. San Fernando Street, 10th Fl. San Jose, CA 95113 jmcmanis@mcmanislaw.com wfaulkner@mcmanislaw.com	Counsel for Defendant and Appellant **NL Industries**
Andre M. Pauka Jameson R. Jones Bartlit, Beck, Herman, Palenchar & Scott LLP 1899 Wynkoop Street, Suite 800 Denver, CO 80202 andre.pauka@barlit-beck.com jameson.jones@barlit-beck.com	Counsel for Defendant and Appellant **NL Industries**
Richard A. Derevan Todd E. Lundell Snell & Wilmer, L.L.P. 600 Anton Boulevard, Suite 1400 Costa Mesa, CA 92626-7689 rderevan@swlaw.com tlundell@swlaw.com	Counsel for Defendant and Appellant **NL Industries**
Christopher M. Kieser Pacific Legal Foundation 930 G Street Sacramento, CA 95814 ckieser@pacificlegal.com	Amicus Curiae for Appellant **Pacific Legal Foundation**
Dario B. de Ghetaldi Corey, Luzaich, de Ghetaldi & Nastari & Riddle, LLP 700 El Camino Real P.O. Box 669 Millbrae, CA 94030 deg@coreylaw.com	Amicus Curiae for Respondent **American Academy of Pediatrics, California**
Paula K. Canny Law Office of Paula Canny 840 Hinckley Road, Suite 101 Burlingame, CA 94010 pkcanny@aol.com	Amicus Curiae for Respondent **California Conference of Local Health Officers**

Amir M. Nassihi Shook Hardy & Bacon LLP 1 Montgomery Suite 2700 San Francisco, CA 94104 anassihi@shb.com	Amicus Curiae for Appellant **NFIB Small Business Legal Center, et al.**
Ingrid M. Evans Evans Law Firm Inc. 3053 Fillmore Street #236 San Francisco, CA 94123 ingrid@evanslaw.com	Amicus Curiae for Respondent **Changelab Solutions et al.**
Fred J. Hiestand 3418 Third Avenue, Suite 1 Sacramento, CA 95817 fhiestand@aol.com	Amicus Curiae for Appellant **Civil Justice Association of California**
Michael E. Wall Natural Resources Defense Council 111 Sutter Street, 21st Floor San Francisco, CA 94104-4545 mwall@nrdc.org	Amicus Curiae for Respondent **Environmental Health Coalition and Healthy Homes Collaborative**
Jonathon Krois Natural Resources Defense Council 40 West 20th Street, 11th Floor New York, NY 10011 jkrois@nrdc.org	Amicus Curiae for Respondent **Environmental Health Coalition and Healthy Homes Collaborative**
Honorable James P. Kleinberg Santa Clara County Superior Court 191 N. First Street, Dept. 1 San Jose, CA 95113-1090 (408) 882-2110	Trial Judge [Case No. 1-00-CV-788657]
Clerk, California Supreme Court 350 McAllister Street, Room 1295 San Francisco, CA 94102	[*Electronic copy only* pursuant to Cal. Rules of Court, rule 8.212(c)(2)] http://www.courts.ca.gov/17384.htm