CALIFORNIA APPELLATE LAW GROUP
APPELLATE COUNSEL IN CALIFORNIA AND THE NINTH CIRCUIT

January 16, 2018

Via TrueFiling

Chief Justice Cantil-Sakauye &
Honorable Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: Letter of Amicus Curiae Supporting Petitions for Review in *People v. ConAgra Grocery Products Company et al.*, California Supreme Court No. S246102

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

The Chamber of Commerce of the United States of America submits this letter in support of the petitions for review filed by ConAgra Grocery Products Company, NL Industries, Inc., and the Sherwin-Williams Company.

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. No party or counsel for any party funded or authored this letter.

There are many reasons to be concerned with the Court of Appeal's opinion in this case. We write to emphasize several issues affecting the specific interests of our members and those similarly situated – those who manufacture, market, and distribute products to the general public and seek to comply with the law responsibly.

Using a theory of public nuisance in a case of products liability

First and foremost, the opinion states a new and startlingly broad theory of liability. No one disputes that lead in products, including paint products, causes harm if ingested. There also is no dispute that liability

can and often should result from placing harmful products on the market. And no one disputes that, if the elements of a claim for products liability are met, and no applicable defenses exist, liability should be imposed. The law of products liability was developed to respond to exactly that situation and has evolved over the years to establish an appropriate balance between the interests of the public and those who develop, manufacture, distribute, and sell products. But the court in this case affirmed liability on a theory of public nuisance – a fault-based theory that was never intended to be a substitute for products liability and is poorly designed to handle issues arising from the manufacture or sale of defective or harmful products. By imposing liability for public nuisance for what in reality is a claim of defective product, the appellate court abandoned decades of thought and doctrine that have shaped the law of products liability, created liability where it should not exist, and injected uncertainty and confusion into what has been a relatively stable area of the law.

The startling breadth of the court's approach is illustrated by a second, similarly troubling, flaw in its opinion. To provide relief on a theory of public nuisance, the court had to apply it to the use of a product within a private household, thus extending the theory of public nuisance to private harms. In so doing, the court departed from classic law responding to public nuisance and rendered irrelevant other law that traditionally determines when liability should attach for harm to a discrete individual affected by a discrete product at a discrete location. The Court of Appeal justified its holding by explaining that the "community has a collective social interest in the safety of children in residential housing," and, residential housing is "an essential community resource." (Opn., p. 63.) While both assertions may be true in some abstract sense, paint used in a private residence has no effect on other residences, and does not affect the public at large as required to find a public nuisance. In short, to reach the decision it did, the court not only abandoned fundamental principles of products liability, it also abandoned fundamental principles of public nuisance law.

Moreover, as Sherwin-Williams' petition explains at pages 18-21, the opinion directly conflicts with other California cases establishing that the theory of public nuisance is not an appropriate substitute for products liability. And as NL Industries' petition explains at pages 19-20, the opinion directly and irreconcilably conflicts with case law established in other jurisdictions. This creates an impossible situation for members of the business community and for those who advise them. By recognizing an unprecedented theory of public nuisance liability that sweeps far beyond

the limits of product liability law, the court's approach makes it all but impossible to assess the potential for liability in real time.

"Promotion" as a basis for public nuisance liability

The Court of Appeal justified its decision by pinning liability to the conduct of *promoting* the use of lead-based paint, standing for the alarming proposition that advertisements can create liability for public nuisance. (Opn., p. 26.) Once again, the theory adopted by the court is both novel and extremely broad. By deeming promotion to be the operative conduct, the opinion effectively extends products liability to persons or entities who did not manufacture, produce, or sell the product at issue. That extension is disturbing in and of itself, but the court compounded the problem by adopting an exceedingly broad definition of "promotion," imposing liability if it is possible to cobble together assertions made at different times and in different formats to claim a defendant has endorsed a potentially harmful use of a product. The opinion also deems it a "promotion" to make a monetary contribution to a trade association that independently promotes the use of a generic product or identifies the product's advantageous qualities without also warning against its potential for harm. (Opn., pp. 37-48.) The opinion accordingly provides authority for trapping persons and entities who at all times acted in good faith with no intent to suggest to the general public that a product is safe for all uses.

Using unproven theories and hindsight to establish actual knowledge of causation

As defendants have explained, although it has long been known that the ingestion of lead is harmful, some or all of the "promotions" of their lead-containing products occurred before it was understood that the use of lead in interior paint might result in the ingestion of lead, or that even minute quantities of lead can cause harm. The appellate court, however, reasoned that defendants "must have known" lead in their products would poison children, because various persons and publications theorized as early as the end of the 19th century, and from time to time during the first thirty or forty years of the twentieth century, that painting the interior surfaces of residences with lead paint could result in poisoning. (Opn., pp 5-6, 27-28.) That after advances in technology an uncertain theory ultimately is shown to have some basis in fact does not mean that a maker or seller should have assumed at the outset that the theory was valid. But the opinion endorses exactly that view, substituting hindsight for actual knowledge of causation.

Shifting the burden of proof

The opinion adopts a fault-based theory of liability and explains that a defendant may be held liable only if that defendant's conduct was a "substantial factor" in bringing about the injury. But it then defines "substantial" to include even a "'very minor force,'" and creates a presumption that any "promotion" of a paint product containing lead must have been at least a minor force in the decision to use a lead-containing product. (Opn., p. 49.) Because liability is premised on "promotion," there is no need to establish that a defendant's own product was used in the residence. It is enough that the defendant by some means promoted a lead-containing product – even if simply by contributing to a trade organization. The opinion also eliminates any need to show that anyone suffered actual harm, deeming it sufficient that harm that might have, or might yet result, from the presence of the substance. And it makes no accommodation for the contributions of others to the harm – such as where a product has been misused where there has been a failure to take ordinary measures to prevent the substance from causing harm. (Opn., pp. 49-53.)

The court's opinion therefore makes it all but impossible for a defendant manufacturer or seller to state or prove facts that would avoid liability.

Joint responsibility to remediate

In addition to shifting the burden to each defendant to prove that its promotion was not even a minor cause of a decision to use paint containing lead, it went still further to hold that every person or entity whose communications or contributions might be construed to be an actionable "promotion" must be held jointly liable for the costs of remediating all lead-containing paint used on interior surfaces, reasoning that liability cannot rationally be divided. (Opn., pp. 69-71.) The opinion thus creates authority for imposing full, joint liability on even the most minor players, irrespective of their individual contribution to the harm and irrespective of any other factors that might have led to the need for remediation. Such authority should not become the law, and certainly not without careful study and consideration far beyond that engaged in by the lower courts here.

Conclusion

In conclusion, the Court of Appeal's opinion adopts novel and problematic theories of liability that conflict with the decisions in other cases both within and outside California. It shifts the burden of proof on causation and effectively makes it impossible for a defendant to prove it had no hand in causing the harm. And it holds each named defendant fully and separately liable for the harm irrespective of that defendant's contribution to the harm.

Accordingly, this Court should grant review.

Respectfully Submitted,

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By /s/ Julia Partridge
Julia Partridge

Attorneys for Amicus Curiae
The Chamber of Commerce of the United States of America

PROOF OF SERVICE

I, A. Kathryn Parker, declare as follows:

I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 96 Jessie Street, San Francisco, CA 94105. On January 16, 2018 I mailed the following document:

- **Letter of Amicus Curiae Supporting Petitions for Review in *People v. ConAgra Grocery Products Company et al.*, California Supreme Court No. S246102**

I enclosed a copy of the document identified above in an envelope and, following the ordinary business practices of the California Appellate Law Group LLP, I mailed the above document to the parties listed below. I am readily familiar with the practice of the California Appellate Law Group LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service in San Francisco, California, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing.

The envelopes were addressed as follows:

Hon. James P. Kleinberg
Santa Clara Superior Court
191 N. First Street, Dept. 1
San Jose, CA 95113

Additionally, I caused the within document to be electronically served on all parties and the Court of Appeal through TrueFiling, which will submit a separate proof of service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 16, 2018 at San Francisco, California.

/s/ A. Kathryn Parker
A. Kathryn Parker