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David H. Yamasaki
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
Case #1-00-CV-788657 Filing #G-54797
By C. Pinacate, Deputy

1 **OFFICE OF THE COUNTY COUNSEL**
2 **COUNTY OF SANTA CLARA**
3 ORRY P. KORB (SBN 114399)
4 DANNY CHOU (SBN 180240)
5 JENNY S. LAM (SBN 259819)
6 70 West Hedding Street
7 East Wing, 9th Floor
8 San Jose, CA 95110
9 Telephone: (408) 299-5900
10 Facsimile: (408) 292-7240

11 **SAN FRANCISCO CITY ATTORNEY**
12 DENNIS J. HERRERA (SBN 139669)
13 City Attorney
14 OWEN J. CLEMENTS (SBN 141805)
15 Chief of Special Litigation
16 ERIN BERNSTEIN (SBN 231539)
17 Deputy City Attorney
18 1390 Market Street, Sixth Floor
19 San Francisco, CA 94102
20 Telephone: (415) 554-3800
21 Facsimile: (415) 554-3837

COTCHETT, PITRE & McCARTHY, LLP
JOSEPH W. COTCHETT (SBN 36324)
NANCY L. FINEMAN (SBN 124870)
ARON K. LIANG (SBN 228936)
BRIAN M. SCHNARR (SBN 275587)
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577

22 *Attorneys for the People of the State of California*

23 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**

24 **COUNTY OF SANTA CLARA**

25 THE PEOPLE OF THE STATE OF)
26 CALIFORNIA, et al.,)
27)
28)
29 Plaintiff,)
30 v.)
31)
32 ATLANTIC RICHFIELD COMPANY, et)
33 al.,)
34)
35 Defendants.)

Case No. 1-00-CV-788657

NOTICE OF ENTRY OF ORDER

Dept.: 1
Hon. James P. Kleinberg

First Filing: June 1, 2000
Trial Date: TBD

36 AND RELATED CROSS-ACTION.
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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 12, 2013, the Court issued the attached Order
3 denying Defendants Sherwin-Williams and NL Industries' Motions for Summary Judgment.

4
5 Dated: June 12, 2013

COTCHETT, PITRE & McCARTHY, LLP

6
7 By: 

NANCY L. FINEMAN

Attorneys for the People of the State of California

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Exhibit 1

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Jun 12, 2013 1:24 PM

David H. Yamasaki
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
Case #1-00-CV-788657 Filing #G-54780
By R. Walker, Deputy

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA**

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through Santa Clara County Counsel Orry P. Korb; San Francisco City Attorney Dennis Herrera; Alameda County Counsel Donna R. Ziegler; Los Angeles County Counsel John F. Krattli; Monterey County Counsel Charles McKee; Oakland City Attorney Barbara Parker; San Diego City Attorney Jan Goldsmith; San Mateo County Counsel John C. Beiers; Solano County Counsel Dennis Bunting; and Ventura County Counsel Leroy Smith,

Plaintiff,

v.
ATLANTIC RICHFIELD COMPANY, et al.,

Defendants.

Case No. 1-00-CV-788657
~~PROPOSED~~ ORDER DENYING DEFENDANTS SHERWIN-WILLIAMS AND NL INDUSTRIES' MOTIONS FOR SUMMARY JUDGMENT

Date: May 31, 2013
Time: 9:00 a.m.
Dept: 1
Judge: Honorable James P. Kleinberg

Date of First Filing: March 23, 2000
Trial Date: June 24, 2013

1 This is an action by a group of governmental entities (the "Prosecuting Entities") on
2 behalf of the People of the State of California (the "People") seeking to hold certain paint
3 manufacturers responsible for the lead paint contained in private and public homes, buildings,
4 and properties throughout the State of California. The operative Fourth Amended Complaint
5 ("4AC") asserts a single cause of action for public nuisance.

6 Defendants Sherwin-Williams Company ("Sherwin-Williams") and NL Industries, Inc.
7 ("NL") move for summary judgment.

8 **Sherwin-Williams' Arguments**

9 Sherwin-Williams argues the People cannot prove the existence of a nuisance or establish
10 a causal link between Sherwin-Williams' white lead and any asserted health risks because the
11 People do not have any evidence regarding the sale, presence, location or condition of any
12 Sherwin-Williams white lead product. (See Sherwin-Williams' [SW] Sep. St. of Mat. Facts
13 [MF] 9-10.) According to Sherwin-Williams, the People know of no specific residential
14 addresses within the jurisdictions of the Prosecuting Entities where paint containing lead
15 manufactured or sold by Sherwin-Williams is present, and the People cannot otherwise identify
16 any building containing Sherwin-Williams white lead carbonate. (SW MF 3, 4, 8.) Sherwin-
17 Williams further submits that the People do not know the chemical composition of lead paint in
18 any residential building in the subject jurisdictions, and they have no evidence of the date on
19 which any paint product containing lead was applied in their jurisdictions or of the volume of
20 sales within their jurisdictions of lead paint manufactured by any of the Defendants. (SW MF 5-
21 7.)

22 Sherwin-Williams argues the People's expansive public nuisance theory would violate
23 due process, because without identifying the nuisance's location or submitting individualized
24 proof of cause, Sherwin-Williams is prevented from mounting a defense to show that white lead
25 carbonate is not present at specific locations, that there are alternative causes for lead poisoning
26 (e.g., gasoline, pipes), or that liability should be apportioned to the parties maintaining the
27 nuisance. Sherwin-Williams further argues that the People's claim requires an unconstitutionally
28 vague application of public nuisance law because Sherwin-Williams had no fair notice before

1 1947 that it could be liable for public nuisance for promoting a product that, outside of its
2 control, might become a future nuisance.

3 Sherwin-Williams' supporting evidence consists of interrogatory responses and
4 stipulations by the People,¹ Sherwin-Williams' advertisements,² excerpts from the deposition
5 transcripts of the People's experts,³ excerpts from Defendants' expert disclosure and deposition
6 transcript of Defendants' expert,⁴ various historical documents regarding Sherwin-Williams'
7 sales,⁵ documents from other cases before the Federal Trade Commission and the Wisconsin
8 Circuit Court,⁶ excerpts from the deposition transcripts of the People's witnesses,⁷ and briefs
9 filed with the California Court of Appeal in a prior appeal in this matter.⁸

10 The People object to and move to strike Sherwin-Williams' material facts 1 and 2 on the
11 ground that they are not facts, but legal argument. The objections are **OVERRULED**. These
12 material facts do not misstate the People's position in such a way as to impede the Court's ability
13 to determine whether triable material issues of fact exist.

14 **NL's Arguments**

15 NL argues the People's nuisance theory is fatally flawed because it fails to tie the alleged
16 nuisance to a specific location, and therefore turns this case into a trial of the abstract idea of lead
17 paint in unknown places rather than an adjudication of the "specific injurious impact" of the
18 alleged nuisance on surrounding lands. NL further argues that the People fail to identify a public
19 right that is invaded by the presence of lead, as opposed to a private nuisance for property
20 owners.

21 ¹ See Separate Statement of Undisp. Material Facts ISO Sherwin-Williams' MSJ nos. 1-13, 16-20.

22 ² Exhs. 5-8 to Decl. Dara R. Levinson ISO MJS.

23 ³ Levinson Exhs. 2, 3, 10, 13.

24 ⁴ Levinson Exhs. 4, 9.

25 ⁵ Levinson Exhs. 11-12.

26 ⁶ Levinson Exhs. 14-16.

27 ⁷ Levinson Exhs. 17-18, 22.

28 ⁸ Levinson Exhs. 19-21.

1 NL's supporting evidence consists of portions of the 4AC, interrogatory responses and
2 stipulations by the People,⁹ excerpts from transcripts of hearings in this matter,¹⁰ the People's
3 Motion in Limine filed Dec. 2, 2011),¹¹ the People's Abatement Plan,¹² and a computer print-out
4 from an article from *The Phoenix*, dated Feb. 28, 2007.

5 The People object to and move to strike NL's reliance on the July 8, 2011 hearing
6 transcript.¹³ The People argue statements made by counsel for the People at the hearing do not
7 constitute evidence that can support a motion for summary judgment. The point is well-taken,
8 and the objection is **SUSTAINED**. The People also object to and move to strike NL's material
9 facts 1-9 on the ground that they are not facts, but legal arguments. The objections are
10 **OVERRULED**. These material facts do not misstate the People's position in such a way as to
11 impede the Court's ability to determine whether triable material issues of fact exist.

12 **Legal Standards – Summary Judgment**

13 "Any party may move for summary judgment in any action or proceeding if it is
14 contended that the action has no merit or that there is no defense to the action or proceeding."
15 (Cal. Code Civ. Proc., § 437c, subd. (a).) Summary judgment involves a three step process: (1)
16 identify the issues as framed by the pleadings; (2) determine whether the moving party has
17 established facts negating the opposing party's claims and justifying judgment in the movant's
18 favor; and (3) determine whether the opposition demonstrates the existence of a triable issue of
19 material fact. (*Lease & Rental Management Corp. v. Arrowhead Central Credit Union* (2005)
20 126 Cal.App.4th 1052, 1057-1058.)

21 "[T]he party moving for summary judgment bears an initial burden of production to make
22 a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atl.*
23 *Richfield Co.* (2001) 25 Cal.4th 826, 850.) "A defendant seeking summary judgment must show

24 ⁹ Exhs. 1, 8 to Decl. Andre M. Pauka ISO NL's MSJ.

25 ¹⁰ Pauka Exhs. 2, 4, 5.

26 ¹¹ NL's Sep. St., MF 5. 9.

27 ¹² NL's Sep. St. MF 10.

28 ¹³ Decl. Andrew M. Pauka ISO NL's MSJ, Exh. 2.

1 that at least one element of the plaintiff's cause of action cannot be established, or that there is a
2 complete defense to the cause of action." (*Alex R. Thomas & Co. v. Mutual Service Casualty*
3 *Ins. Co.* (2002) 98 Cal.App.4th 66, 72.) The court must liberally construe evidence in support of
4 the party opposing summary judgment and resolve all doubts concerning the evidence in favor of
5 that party. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389.)

6 **Judicial Notice**

7 In opposition to Sherwin-Williams' motion, the People request judicial notice of: (1)
8 various newspaper advertisements (Markowitz¹⁴ Exhs. J-N); (2) Stipulation As to Certain Facts
9 Entered into Between the Sherwin-Williams Company and the Federal Trade Commission, dated
10 December 6, 1940 (Markowitz Exh. O); (3) U.S. Department of Housing and Urban
11 Development Office of Lead Hazard Control National Survey of Lead and Allergens in Housing,
12 Final Report, April 18, 2001 (RJN¹⁵ Tab 1); (4) Report of Assembly Committee On Housing and
13 Community Development (SB 460), August 15, 2002 (RJN Tab 2); (5) Guidelines for the
14 Evaluation and Control of Lead-Based Paint Hazards In Housing, U.S. Department of Housing
15 and Urban Development, June 1995, Chapter 8 (RJN Tab 3); (6) original data from the
16 California Lead Poisoning Prevention Branch displayed online by the CEHTP Science Team of
17 the California Department of Public Health, California Environmental Health Tracking Program,
18 dated September 27, 2010 (RJN Tab 4); (7) Low Level Lead Exposure Harms Children: A
19 Renewed Call for Primary Prevention Report of the Advisory Committee on Childhood Lead
20 Poisoning Prevention of the Centers for Disease Control and Prevention (RJN Tab 5); (8) CDC
21 Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations
22 in "Low Level Lead Exposure Harms Children: A Renewed Call of Primary Prevention" (RJN
23 Tab 6).

24 Sherwin-Williams does not oppose the request for purposes of this motion only. The
25 request is **GRANTED** as to the existence of the newspaper advertisements (Evid. Code, § 452,
26

27 ¹⁴ Declaration of Gerald Markowitz, Attachment 2 to Evid. ISO People's Opp. to Sherwin-Williams' MSJ.

28 ¹⁵ People's RJN, Attachment 4 to Evid. ISO People's Opp. to Sherwin-Williams' MSJ.

1 subd. (h)), the Stipulation between Sherwin-Williams and the FTC, the census data from the
2 California Lead Poisoning Prevention Branch, and the reports of HUD, the Assembly Committee
3 on Housing and Community Development, the Advisory Committee on Childhood Lead
4 Poisoning Prevention of the Centers for Disease Control and Prevention, and the CDC as official
5 records and reports of federal and state administrative agencies (Evid. Code, § 452, subd. (c)).

6 In opposition to NL's motion, the People request judicial notice of: (1) Findings of Fact
7 of the Federal Trade Commission in *National Lead Company v. Federal Trade Commission*,
8 Case No. 10835 (Earle¹⁶ Exh. 2); (2) relevant pages of the Mineral Year Books for the years
9 1924, 1939, 1942, and 1949 published by the U.S. Department of Commerce and the U.S.
10 Bureau of Mines (Earle Exh. 3); (3) National Lead Company advertisement from April 1924
11 edition of National Geographic Magazine (Mushak¹⁷ Attach. B); (4) original data from the
12 California Lead Poisoning Prevention Branch displayed online by the CEHTP Science Team of
13 the California Department of Public Health, California Environmental Health Tracking Program,
14 September 27, 2010 (Mushak Attach. 1); (5) Analysis of Impediments to Fair Housing Choice,
15 created by the City of Los Angeles, Los Angeles Housing Department (Mushak Attach. 11); (6)
16 six documents generated by the San Diego County Childhood Lead Poisoning Prevention
17 Program and available online (Mushak Attachs. 12-17); and (7) Promoting Healthy Homes to
18 Prevent Disease and Injury to San Francisco Residents: A Pilot Project for WIC Recipients
19 (2008-1010), created by the City and County of San Francisco, Department of Public Health
20 (Mushak Attachs. 22, 23).

21 NL opposes the request, arguing (1) the documents in the request are irrelevant to the
22 issues raised in NL's motion; (2) the newspaper advertisements are not matters of such common
23 knowledge and are reasonably subject to dispute for purposes of Evidence Code section 452
24 subdivision (h); (3) the data compilations gathered by the cities are not official government acts

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27 ¹⁶ Declaration of Peter G. Earle, Attach. A to Evid. ISO People's Opp. to NL's MSJ.

28 ¹⁷ Declaration of Paul Mushak, Attach. B to Evid. ISO People's Opp. to NL'S MSJ.

1 for purposes of Evidence Code section 452 subdivision (c), and the matters contained within
2 them are reasonably disputable.

3 The request is **GRANTED** as to the existence of these official records under Evidence
4 Code section 452 subdivision (c), and the existence of the newspaper advertisements under
5 Evidence Code section 452 subdivision (h). These documents are relevant to counter NL's
6 argument that the People's public nuisance theory is too abstract.

7 **Existence of a Public Nuisance**

8 "Anything which is injurious to health, including, but not limited to, the illegal sale of
9 controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use
10 of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully
11 obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay,
12 stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." (Cal. Civ.
13 Code, § 3479.)

14 "A public nuisance is one which affects at the same time an entire community or
15 neighborhood, or any considerable number of persons, although the extent of the annoyance or
16 damage inflicted upon individuals may be unequal." (Cal. Civ. Code, § 3480.) "It is this
17 *community* aspect of the public nuisance...that distinguishes it from its private cousin, and makes
18 possible its use, by means of the equitable injunction, to protect the quality of organized social
19 life. Of course, not every interference with collective social interests constitutes a public
20 nuisance. To qualify, and thus be enjoined, the interference must be both substantial and
21 unreasonable." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105, emphasis in
22 original.) "The Restatement Second formulates the requirement of substantiality as proof of
23 'significant harm,' defined as a 'real and appreciable invasion of the plaintiff's interests,' one
24 that is 'definitely offensive, seriously annoying or intolerable.' [Citation.] The measure is an
25 objective one: 'If normal persons in that locality would not be substantially annoyed or disturbed
26 by the situation, then the invasion is not a significant one' [Citation.] The
27 unreasonableness of a given interference represents a judgment reached by comparing the social
28 utility of an activity against the gravity of the harm it inflicts, taking into account a handful of

1 relevant factors. [Citation.] Here again, the standard is an objective one: “[T]he question is not
2 whether the particular plaintiff found the invasion unreasonable, but “whether reasonable persons
3 generally, looking at the whole situation impartially and objectively, would consider it
4 unreasonable.” [Citation.]” (*Acuna, supra*, 14 Cal.4th at p. 1105.)

5 “Lead is a toxin that affects the central nervous system and is particularly damaging to
6 the developing nervous system of young children and fetuses.”¹⁸ The California Legislature has
7 declared “that childhood lead exposure represents the most significant childhood environmental
8 problem in the state today[.]” (Cal. Health & Saf. Code, § 124125.) The People allege that the
9 presence of lead in and around homes and other property throughout the State of California is a
10 public nuisance because it is injurious to public health so as to substantially and unreasonably
11 interfere with the comfortable enjoyment of life and/or property and the right to health, safety,
12 peace, comfort, and convenience.¹⁹ The People allege Defendants “created and/or contributed to
13 the creation of and/or assisted in the creation and/or were a substantial contributing factor in the
14 creation of [this] public nuisance...through the conduct described in this cause of action and
15 elsewhere throughout the Fourth Amended Complaint, including, but not limited to: [¶] a.
16 Engaging in a massive campaign to promote the use of Lead on the interiors and exteriors of
17 private residences...; [¶] Failing to warn the public about the nature of Lead and its attendant
18 health hazards; [¶] c. Systematically selling, promoting, distributing Lead throughout California
19 for exterior and interior use, including use on furniture and toys, despite medical reports
20 indicating that children were dying and suffering from serious injuries from Lead; [¶] Engaging
21 in a campaign to discredit the medical and scientific literature linking Lead poisoning to Lead;
22 [¶] e. Engaging in a concerted campaign to stop regulation of, and restrictions on, the use of
23 Lead; [¶] f. Developing and establishing programs to increase the market for Lead.”²⁰

24 ¹⁸ National Survey of Lead and Allergens in Housing, Final Report vol. 1, RJN Tab 1 at p. 1-1.

25 ¹⁹ 4AC ¶¶ 86-90.

26 ²⁰ 4AC ¶ 91. Notably, the instant motions for summary judgment by Sherwin-Williams and NL do not address the
27 allegations in the 4AC that Defendants engaged in a campaign to discredit the medical and scientific literature
28 regarding lead poisoning, and to stop regulation of, and restrictions on, the use of lead. (4AC ¶ 91.d, e.) This alone
may justify denial of the motions, because in order to obtain summary judgment, a defendant must show that the
entire action has no merit. (See Code Civ. Proc., § 437c, subd. (a).)

1 As alleged, the People's public nuisance theory is not simply about the abstract idea of
2 lead paint. Rather, it is premised on the physical presence of lead in and around homes in the
3 subject jurisdictions. The 4AC "clearly alleges that lead *remains present* in buildings in Santa
4 Clara, SF, and Oakland, and that removal of this lead is necessary to prevent future harm to the
5 public." (*County of Santa Clara v. Atlantic Richfield Co.* (2006), 137 Cal.App.4th 292, 311,
6 italics in original.) Sherwin-Williams argues the People cannot prove the existence of such a
7 nuisance without identifying specific properties containing Sherwin-Williams' white lead
8 carbonate. However, the People submit that the CLPPP files and RASSCLE and assessor
9 databases provide proof of the existence of lead-based paint in residences, and that employees
10 for the Prosecuting Entities can testify that lead paint exists in their respective jurisdictions and
11 has caused harm.²¹ If this evidence is credited, then the People will have shown the existence of
12 a condition that is injurious to health and an obstruction to the free use of property, and that
13 affects a considerable number of persons in a similar, substantial and unreasonable way. (Civ.
14 Code, §§ 3479, 3480.)

15 Moreover, the People's public nuisance theory is based on the Defendants' promotion of
16 lead-based paints, resulting in harm to the community at large. Gang injunction cases like *Acuna*
17 illustrate the use of the public nuisance theory without regard to specific properties affected by
18 the alleged nuisance. In upholding an injunction against specified gang activities, the court in
19 *Acuna* cited "48 declarations submitted by the City in support of its plea for injunctive relief
20 [that] paint[ed] a graphic portrait of life in the community of Rocksprings." (*Acuna, supra*, 14
21 Cal.4th at p. 1118.) It does not appear that the court in *Acuna* required proof of injury to every
22 individual or property in Rocksprings in order to find a public nuisance justifying equitable relief
23 for the entire community. Rather, the public nuisance was defined as a general environment of
24 disorderly and criminal behavior that interfered with the quality of life for all Rocksprings
25 residents. Sherwin-Williams and NL counter that *Acuna* involved a specific
26 location/neighborhood that was affected by gang violence, and the injunction in *Acuna* was only

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28 ²¹ See Exhs. 1-6 to Decl. Brian M. Schnarr ISO Opp. to Sherwin-Williams' MSJ. Attach. 3 to Index of Evid. ISO
People's Opp. to Sherwin-Williams' MSJ.

1 against gang activity within a circumscribed four-square-block area.²² However, any discussion
2 in *Acuna* regarding geographic boundaries or the “specific and narrowly described
3 neighborhood” (*Acuna, supra*, 14 Cal.4th at p. 1121) was in connection with the scope of the
4 injunction and constitutional standards for burdening speech, not in determining whether a public
5 nuisance existed. (*Id.* at pp. 1120-1122.) “Public nuisance is not so limited” that it must relate to
6 the use or condition of real property. (See *In re Firearms Cases* (2005) 126 Cal.App.4th 959,
7 987, fn. 21.)

8 In arguing that the People must identify specific properties in order to prove the existence
9 of a public nuisance, Sherwin-Williams and NL rely heavily on *Beck Development Co. v.*
10 *Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160. There, the appellate court
11 reversed a trial court judgment for abatement of a public nuisance, finding there was *no* evidence
12 supporting any “specific injurious impact” of oil subsurface contamination on surrounding lands
13 or public water supplies, nor any evidence “to suggest a possibility that the contamination under
14 Beck’s land might invade the deeper water sources used by the public.” (See *Beck, supra*, 44
15 Cal.App.4th at pp. 1209-1212.) Here however, the record is not devoid of evidence supporting
16 the injurious impact and/or the possibility of future impact of lead paint. As discussed above, the
17 People submit they can demonstrate that lead paint in the subject jurisdictions affects a
18 considerable number of persons by resort to databases, CLPPP files, and the testimony of
19 competent employees for the Prosecuting Entities.

20 NL argues that no “public rights” are involved because the presence of lead-based paint
21 in private homes does not implicate a public right known to the common law. However,
22 California’s public nuisance statute broadly applies to anything which is injurious to health or an
23 obstruction to the free use of property that affects “at the same time an entire community or
24 neighborhood, or any considerable number of persons.” (Cal. Civ. Code, § 3480.) The
25 “community aspect” component to public nuisance is based on the magnitude and impact of the
26 interference or harm. “To qualify, and thus be enjoined, the interference must be both
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28 ²² See NL’s Opp. citing *Acuna, supra*, 14 Cal.4th at pp. 1100, 1121-1122.

1 substantial and unreasonable." (*Acuna, supra*, 14 Cal.4th at p. 1105.) Sherwin-Williams and NL
2 do not argue that the presence of deteriorating lead paint in and around homes in the subject
3 jurisdictions does not meet the substantial and unreasonable standards for an enjoined public
4 nuisance. There is no dispute that the harm of childhood exposure to lead is significant.²³

5 Sherwin-Williams argues the People cannot demonstrate there is a pervasive, imminent
6 health risk from the presence of intact lead paint because under Civil Code section 3482, an act
7 cannot be a nuisance where it is authorized by the express terms of a statute, and state and local
8 regulations like California Health & Safety Code section 17910.10 allow intact lead paint to
9 remain present in homes.

10 Civil Code section 3482 provides that "[n]othing which is done or maintained under the
11 express authority of a statute can be deemed a nuisance." "The statutory protection of Civil
12 Code section 3482 does not apply unless the acts complained of are authorized by the express
13 terms of the statute under which the justification is made, or by the plainest and most necessary
14 implication from the powers expressly conferred, so that it can be fairly stated that the
15 Legislature contemplated the doing of the very act which occasions the injury. . . . Thus, it is
16 necessary that the courts scrutinize the legislative enactment in question to ascertain whether a
17 legislative intent exists to sanction the alleged nuisance." (*Jacobs Farm/Del Cabo, Inc. v.*
18 *Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1530, internal citations and quotation
19 marks omitted.) Here, statutes like California Health & Safety Code section 17920.10 that
20 merely define lead hazards cannot be read so broadly as to immunize the conduct at issue in this
21 lawsuit, particularly the promotion of lead paint with knowledge of its hazards (which the Court
22 of Appeal has already found to state a sufficient claim for public nuisance). Furthermore, non-
23 liability for intact lead paint would not entitle Sherwin-Williams to summary judgment against
24 the People's entire public nuisance claim, since the evidence may still support the existence of
25 deteriorating lead paint that affects a considerable number of persons in the subject jurisdictions.

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28 ²³ See People's RJN Tabs 5, 6.

1 For these reasons, the Court finds there are triable issues of material fact on the existence
2 of a public nuisance.

3 **Causation**

4 Causation is a necessary element of a public nuisance claim. (*In re Firearms, supra*, 126
5 Cal.App.4th at p. 987.) To prove causation, “the plaintiff may use circumstantial evidence to
6 satisfy his or her burden....And the plaintiff need not prove causation with absolute certainty.
7 Rather, the plaintiff need only introduce evidence which affords a reasonable basis for the
8 conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of
9 the result.” (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1245, internal citations and quotation marks
10 omitted.)

11 A defendant may be liable for creating or assisting in the creation of a public nuisance.
12 (See *Santa Clara, supra*, 137 Cal.App.4th at p. 306.) This is a broad but not limitless standard,
13 for merely engaging in a risky practice, without a connecting causative link to a threatened harm,
14 is insufficient for public nuisance liability. (*In re Firearms, supra*, 126 Cal.App.4th at p. 988.)
15 However, the People’s theory is not simply that Defendants engaged in a risky practice of
16 manufacturing and/or selling lead paint, but that they also promoted lead paint with knowledge
17 of its hazards and engaged in other conduct to conceal the health hazards of lead from the public.
18 Neither Sherwin-Williams nor NL presents evidence negating their knowledge of the hazards of
19 lead paint at the time of their promotional activities.

20 Sherwin-Williams submits that it never manufactured white lead sulfate, it manufactured
21 white lead carbonate only between 1910 and 1947, it made and promoted interior residential
22 paints that did not have white lead pigments before and after 1900, its primary lines of interior
23 residential paints did not use white lead pigments, and after 1947, it removed all white lead
24 carbonate pigments from its ready-mixed interior residential paints. (SW MF 12-17.) However,
25 Sherwin-Williams would essentially have the Court weigh the probative value of this evidence in
26 concluding that Sherwin-Williams’ manufacturing and promotional activities could not have
27 assisted in the creation of a public nuisance, even though matters going to the weight of evidence
28 must be disregarded in ruling on a motion for summary judgment. (*Mann v. Cracchiolo* (1985)

1 38 Cal.3d 18, 39.) Moreover, the People dispute Sherwin-Williams' evidence by submitting that
2 Sherwin-Williams used basic lead sulfate in paints, purchased white lead carbonate from other
3 co-defendants and entities for use in its residential paint products beyond the years 1910-1947,
4 and that its interior and exterior residential paints did contain white lead pigments before and
5 after 1900. (See People's Resp. to SW MF 12-17; Addit'l MF 40-54.) The People further
6 submit they have substantial evidence showing that Sherwin-Williams sold and shipped lead-
7 containing paints and coatings in the State of California with knowledge of the dangers of lead.²⁴

8 Citing *Santa Clara, supra*, 137 Cal.App.4th at p. 309, Sherwin-Williams argues there
9 must be a "tight nexus" between the conduct and the harm, akin to instructing a purchaser to use
10 a product in a hazardous manner. However, the Court of Appeal in the cited passage was
11 likening the People's theory with the meritorious theory set forth in *City of Modesto*
12 *Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28. "[L]iability is premised
13 on defendants' promotion of lead paint for interior use with knowledge of the hazard that such
14 use would create. This conduct...is quite similar to instructing the purchaser to use the product
15 in a hazardous manner, which *Modesto* found *could* create nuisance liability." (*Santa Clara,*
16 *supra*, 137 Cal.App.4th at p. 309, original emphasis.) Thus, the cited authority can hardly be
17 said to highlight a deficiency in causation here, nor does it expressly support a "tight nexus"
18 requirement for proving that a defendant's actions assisted in the creation of a public nuisance.

19 This Court has previously acknowledged that the People must connect the presence of
20 lead paint in the Prosecuting Entities' jurisdictions to Sherwin-Williams' promotional conduct.
21 However, Sherwin-Williams and NL fail to demonstrate that the necessary factual link can only
22 be established with evidence of their lead products from each and every afflicted property.
23 Instead, what the People must provide is a reasonable basis for the conclusion that it is more
24 likely than not that the promotional and other activities of the Defendants assisted in the creation
25 of a public nuisance, namely, the presence of lead in and around homes in the subject
26 jurisdictions and affecting a considerable number of persons therein.

27
28 ²⁴ Decl. Markowitz §§ IV-V, Exhs. B-R.

1 The Court finds that there are triable issues on the element of causation.

2 **Due Process**

3 The Court is not persuaded that Sherwin-Williams' due process concerns justify
4 summary judgment. None of the due process cases cited by Sherwin-Williams involved public
5 nuisance actions, let alone California's broad public nuisance law, and Sherwin-Williams is not
6 prevented from defending itself against the material allegations of the People's public nuisance
7 claim under the governing legal authorities and standards.

8 On the issue of vagueness, Sherwin-Williams cites *Hardin v. Sin Claire* (1896) 115 Cal.
9 460 and *Portman v. Clementina Co.* (1957) 147 Cal.App.2d 651 for the position that at the time
10 of the alleged actionable conduct (pre-1947), a nuisance action would lie only against one who
11 controlled or maintained the nuisance, and therefore, the People's theory of public nuisance
12 expands public nuisance liability beyond that which Sherwin-Williams had fair notice.
13 However, neither *Hardin* nor *Portman* clearly support this position, and the cases have in fact
14 been cited for the opposition position. For instance, in *City of Modesto*, the Court of Appeal
15 observed, "It has long been the law in California that [n]ot only is the party who maintains the
16 nuisance liable but also the party or parties who create or assist in its creation are responsible for
17 the ensuing damages. [Citation.]" (*City of Modesto Redevel. Agency, supra*, 119 Cal.App.4th at
18 p. 38, internal quotation marks omitted.) Among the cases cited in support are both *Hardin* and
19 *Portman*. (*Ibid.*)

20 **Conclusion**

21 For all of these reasons, the motions for summary judgment by Sherwin-Williams and NL
22 are DENIED.

23 IT IS SO ORDERED.

24 Dated: 6/12, 2013

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Hon. James P. Kleinberg
Judge of the Superior Court