H040880

In the Court of Appeal of the State of California
Sixth Appellate District

The People of the State of California,
Plaintiff and Appellant,

v.

Atlantic Richfield Company, et al.,
Defendants and Appellants.

Santa Clara County Superior Court; Case No. CV788657
Honorable James P. Kleinberg

NL Industries, Inc.'s Petition for Rehearing

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Pursuant to Rule 8.268 of the Rules of Court, NL Industries, Inc., respectfully seeks rehearing of this appeal. The Court's opinion contains a significant number of misstatements of facts and issues. NL also incorporates by reference and joins the petitions for rehearing filed by Sherwin Williams and ConAgra.

I
The Court's Opinion Contains Several Omissions and Misstatements of Issues and Facts Related to Defendants' Knowledge of Lead's Hazards

In affirming the trial court's judgment of liability, the Court misstated and omitted several key facts and issues related to NL's (and the scientific community's) knowledge of the hazards of lead paint.

California Supreme Court precedent establishes—even for strict products liability—that a plaintiff must prove that "a particular risk . . . was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time." *Carlin v. Super. Ct. (Upjohn Co.)* (1996) 13 Cal.4th 1104, 1112. This Court, however, affirmed liability for public nuisance on a lesser standard—substituting supposition about what Defendants must have known for actual knowledge of today's hazard. And the Court further based its determination on incorrect and incomplete factual recitations.

A. The Science of Lead's Hazards Changed Dramatically

The Court concluded that NL and the other Defendants "must have known" that the interior use of lead paint created "a

serious health hazard" and that this hazard was "well known in the paint industry." (Opinion at 28-30.) The Court's factual conclusions about what Defendants "must have known," go beyond the trial court's findings and are factually unsupported.

People, to be sure, have known since antiquity that lead is poisonous. (Opinion at 20.) What the Court's opinion omits is an indisputable sea change in the science of how harmful lead is, what concentrations are harmful in humans, and how children are exposed to such harmful levels. Because Defendants could not have known about hazards discovered by science only recently, the trial court's findings and this Court's inferences of knowledge cannot be supported.

The Court failed to acknowledge the trial court's own admission that it held Defendants "retroactively liable" to "take advantage of . . . more contemporary knowledge." In the trial court's own words:

> The related issue is whether the Defendants can be held **retroactively liable when the state of knowledge was admittedly in its nascent stage.** The Court takes judicial notice of the fact that drugs, facilities, foods, and products of all kinds that were at one time viewed as harmless are later shown to be anything but. Yes, the governmental agencies charged with public safety may have been late to their conclusions that lead was poisonous. But that is not a valid reason to turn a blind eye to the existing problem. All this says is medicine has advanced; **shouldn't we take advantage of this more contemporary knowledge** to protect thousands of lives?

[138 AA 41014 (emphasis added).] This Court should at a minimum acknowledge the trial court's finding that Defendants *did not know* of the hazards on which the nuisance is based and clarify whether such knowledge is necessary for liability.

The scientific understanding of lead's hazards has indisputably and dramatically changed over time. The Court omits that scientists first began to worry about truly small levels of lead in the 1970s—more than 20 years after Defendants had ceased promoting lead paint. Prior to 1970, blood lead levels between 60 and 80 µg/dl (where observable symptoms from lead exposure first appear) were considered the "threshold of lead poisoning." [140 AA 41419.] Notably, lead-science pioneer Julian Chisolm, Jr. first questioned in Scientific American in 1971: "Is it possible that a content of lead in the body that is insufficient to cause obvious symptoms can nevertheless give rise to slowly evolving and long-lasting effects? The question is at present unanswered . . . ." [140 AA 41412.] In 1991, when decreasing the level of concern from 25 µg/dl to 10 µg/dl the CDC confirmed that even these higher blood lead levels above 10 µg/dl were "previously considered safe." [140 AA 41523.]

The People's own medical expert testified about this change in science. Dr. Lanphear explained that lead until recently has been assumed to "have a threshold, a level below which there is no harm." [26 RT 3962.] The brand-new theory that there may be "no safe level" of lead is what gave rise to this lawsuit's concerns—researchers' desire to further "ratchet down the

exposure that children experience." [*Id.*] The People in fact argued to this Court in 2006 that new studies in the 1990's and early 2000's first established the concerns underlying this lawsuit—the harms from lead exposure at truly low levels. *Santa Clara v. Atlantic Richfield Co.,* (2006) 137 Cal. App. 4th 292, 330.

The Court should also grant rehearing with respect to its conclusions regarding lead in house dust. The Court held that Defendants must have known that "deteriorating lead paint exposed the occupants of the residence to 'very dangerous' lead dust" and that "knowledge of the specific pathway by which children consume lead dust was not essential" for liability. (Opinion at 32.) This statement of fact, however, is contrary to the scientific evidence.

The Court refers to one medical article from Australia, written by Lockhart Gibson, and one U.S. textbook discussing Gibson's publications. (Opinion at 5-6.) Yet the Australian cases described by Gibson involved huge quantities of lead from desiccated paint, mostly from outdoor verandahs. Gibson described paint that "when rubbed yield a powdery substance to the touch and possibly distribute it to the dust of the rooms." [175 AA 51950.] Gibson indeed made clear he was not talking about lead in ordinary house dust—he sought "to get rid of the idea that only small quantities are ingested." [175 AA 51949.].

United States researchers, moreover, viewed Gibson's findings as irrelevant to medical practice in the United States. Julian Chisolm wrote in 1989 that "For seventy years, Gibson's

observations lay fallow. Indeed, for many years, the epidemic of lead poisoning in Queensland children was not believed by physicians elsewhere who apparently considered the Queensland physicians primitive and perhaps addlepated by the heat." [140 AA 41514.] Defendants are being charged with conclusively knowing what contemporaneous medical experts rejected as incorrect, or at the very least not relevant to the United States.

Lead in ordinary house dust was first hypothesized as a potential concern in 1974, although at that time "no evidence to support th[e] idea" existed. [140 AA 41432, 41434.] Julian Chisolm confirmed that Sayre's study broke new ground on the importance of lead in dust. Chisolm wrote in 1989 that "Sayre et al. (1974) were the first to report significant relationships among dust lead (PbH), hand lead (PbB), and blood lead (PbD) in young children." [140 AA 41514.] The fact that lead in ordinary house dust was *first* identified by science as a *potential* hazard in the 1970's makes unsupportable the Court's holding (or any trial court finding) that NL *must have known* about that hazard in the first half of the 20th century.

The trial court could not have found a public nuisance existing today absent these dramatic changes in the science of lead's hazards. The trial court was in fact explicit that the nuisance it found was based on the brand new conception of "no safe level" of lead—which was the "most important[]" fact to its decision. [138 AA 41012.] This Court should therefore either reverse its decision or clarify that Defendants are being held

liable for a conception of lead's hazards they not only *did not know* but *could not have known.*

B. What Defendants Must Have Known Cannot Be Divorced from Conclusions of Medical Researchers and Public Health Authorities

The Court's omission of the conclusions drawn by U.S. medical researchers and public health authorities requires rehearing. Medical researchers and public health authorities knew every bit as much as (if not more than) NL and the other Defendants, and these experts never drew the conclusion that lead paint was unsafe for interior use during the relevant period. No finding about what NL or other Defendants "must have known" can be justified without reference to what other experts and scientists concluded based on the same information.

NL held no hidden knowledge regarding the hazards of lead paint—everything NL knew was published in the medical literature. [36 RT 5386-87.] Yet medical researchers and public health authorities (having as much information on the subject as NL) accepted lead paint as safe to use on interiors.

One prominent doctor and public health authority, for example, informed families that there "need be little fear of poisoning" from the use of lead paint. [139 AA 41264 (Wiley 1915).] Other medical researchers concluded that "dissemination to mothers of information on the subject" of lead poisoning from chewing painted articles "should result in prevention of the disease." [175 AA 51914 (McKhann, 1933).] The Surgeon General,

too, knowing about the reported cases of children dying from chewing lead painted articles still concluded that lead paint had "wide fields of usefulness"; it was just that "the painting of babies' toys and cribs [was] not one of them." [139 AA 41298.]

U.S. health agencies like the Public Health Service, the Children's Bureau, and the National Bureau of Standards made recommendations against lead paint where they saw fit. For example, they recommended that lead paint should not be used for toys and cribs. [43 RT 6297-98, 6300-305.] But public health agencies never recommended that lead paint was unsafe for use on interior surfaces before 1951. To the contrary, U.S. and California agencies recommended and specified that lead paint should be used for interiors into the 1950's. [43 RT 6309-18.]

The conclusions of prominent medical authorities and governmental agencies precludes any inference that NL and others "must have known" that lead paint was necessarily unsafe for interior use. The Court's omission of these medical authorities' recommendations and prescriptions for preventing harm renders the Court's recitation of facts incorrect.

C. The Court Misconstrued Two Speeches to Justify an Inference of Knowledge

The Court affirmed knowledge of "a serious health hazard" from interior lead paint in large part on snippets from two isolated speeches—one 1910 congressional hearing and one 1914 speech. (Opinion at 28-30.) A handful of sentences from two speeches—neither of which references any scientific or medical

article or knowledge—cannot establish that NL or anyone else "must have known" that all interior use of lead paint was unsafe. Neither speech says that interior lead paint use should cease entirely. And both address a purported hazard of lead inhalation that is both different from today's concern regarding lead paint and also scientifically unsupportable.

With respect to the 1910 Congressional Hearing, the Court omitted that even the proponents of the bill agreed that white lead "was the best material known as a pigment" for paint. [173 AA 51550; *see also* 173 AA 51553.] Further, the bill was not addressed principally at protecting the public, but was instead for "painters, suffering from lead poisoning which is due to external contact." [173 AA 51550.] Nothing about the bill was intended to prevent or diminish the use of white lead; its intention was to warn painters "in order that they may be careful in handling it." [173 AA 51563.]

The Court references statements from that hearing made by Congressman Bartholdt. But Bartholdt was not a doctor and held no apparent scientific expertise related to paint. The cited statements thus have no bearing on what Defendants must have known with respect to lead's hazards. Bartholdt himself admitted that at that time "[w]e kn[e]w very little of the injurious effect" of lead. [173 AA 51546.] And his description of "atoms of white lead that are filling the air now" which "we inhale" [173 AA 51546.], was never a correct description of any hazard from dried lead paint—in the early 1900s or today.

No science supports the idea that lead dust from dried paint enters the air and leads to significant exposure through inhalation. To the contrary, the identified hazard is that of lead dust from floors and windowsills, ingested through hand-to-mouth behavior. That hazard, as discussed above, was first hypothesized in the 1970s. The fact that Congressman Bartholdt could not articulate a correct description of lead's hazards in 1910 undermines any inference that Defendants must have known anything from that congressional hearing.

The Court's reliance on Mr. Gardner's 1914 speech is similarly unsupportable. Mr. Gardner's speech principally concerned industrial poisoning to painters (mostly from toxic vapors but also from lead exposure). [179 AA 53359-70.] Buried in his discussion are a few sentences advocating care "in guarding against lead dust in our public buildings." [179 AA 53364.] Gardner then talks about the hazard of lead dust inhalation—the "presence of such dust in the atmosphere of a room" being "dangerous to the health of the inmates." *Id.* This description of lead's hazards bears no resemblance to today's concerns or what prompted the jurisdictions to file suit.

In any event, the Court's opinion omits that there is no evidence that NL or any other Defendant was aware of the content of these speeches, let alone evidence that NL or any other Defendant believed the cited references to be true. Isolated references in speeches to inhalation of lead dust is insufficient to conclude that it was "well known in the paint manufacturing

industry" that all use of lead paint for interiors was unsafe. (Opinion at 28.) If the government, industry, or science had drawn such conclusions, such warnings would have been repeated in a great many more documents and publications, and the People would not need to rely on such buried snippets from speeches to support their case. Isolated references like these cannot support the inference that NL or anyone else *must have known* of the public health hazard the use of lead for interiors would create.

D. Deaths from Lead Paint Never Involved Low Level Exposures

The Court asserted that NL and other Defendants knew in the 1930s that "even a small amount of lead could kill a child." (Opinion at 30.) The Court's use of the labels "small amount" and "low levels," is factually unsupportable by today's standards.

One U.S. Daily article in 1930, it is true, references the possibility that "small amounts of lead . . . may be of sufficient quantity to cause acute poisoning, leading to death, in an infant." [179 AA 53372.] But the scientific understanding of what constitutes a small amount of lead was not the same in 1930 as it is today. That U.S. Daily article indeed referred to children "chewing paint from toys, cradles, and woodwork." [*Id.*]

The children who died or obtained severe lead poisoning ingested massive quantities of lead by today's standards. Dr. Blackfan's cases, for example, involved a child that had "entirely gnawed off" the paint from a bedstead and another pair that had

"ruined a set of parlor furniture by eating the paint off of it." [175 AA 51907.]

As noted above, the lead poisoning diagnosed in Blackfan's and other medical articles was occurring at blood lead levels well above 70 µg/dl. [43 RT 6254-58, 6261-62, 6308-309.] By contrast, the People identified only one case of a child poisoned in recent years at such levels—one Los Angeles child at 78 µg/dL. [31 RT 4702.] Out of 12 million California children tested from 2009 - 2011, the CDC web page summarizing California blood lead levels reported two children in the State above 70 µg/dL in 2009, zero in 2010, and zero in 2011. [144 AA 42664.] Lead poisoning as understood through 1970 is exceedingly rare today.

Even in the 1970s, scientists were not concerned about the low levels of exposure that worry public health authorities today. Scientists in 1971 determined that it would be "permissible" for a child to eat up to 300 milligrams of lead per day as the "permissible total lead intake." [140 AA 41421.] The trial court's judgment, by contrast, is based on a concern about even the most minute levels of lead in ordinary house dust. [43 RT 6253-54, 6325.] What science considers a small amount of lead today would have been deemed beyond inconsequential when NL was last selling lead pigment for interior use. The risk today was thus *not* "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time." *Carlin*, 13 Cal.4th at 1112.

E. Bans of Lead Paint Contribute Nothing to Knowledge of Safety for Interior Use

The opinion notes (at 6) that in 1922, Queensland, Australia banned lead paint from areas to which young children had access and refers ambiguously (at 7) to an expert who testified that "[a] number of European countries banned lead-based paint soon" after 1909. The opinion also notes (at 7) that a 1943 American medical article called for a ban on interior residential use of lead paint. Omitted from the opinion is the context that shows these bans said nothing about whether interior use of lead paint should be prevented prior to 1950.

For example, the Australian ban only covered exterior uses of lead paint in one region of the country because of unique weathering patterns in Queensland. [7 SRA 1712-13; 37 RT 5610-11; 32 RT 4841-43.] The European bans, moreover, were enacted to protect painters—not because of the risks of interior paint for the residents of homes. [35 RT 5350-51.] Further, the UK in fact reversed a recommended ban in that country because the government found "for outside painting and certain internal painting there is no efficient substitute for lead." [144 AA 42614; 32 RT 4835-37.] Finally, the 1943 Byers and Lord Article was the first call to restrict the use of lead paint in any American medical literature. [36 RT 5383.] All of this context is necessary to evaluation of the knowledge that the companies had. The Court should grant rehearing to correct its errors and omissions.

II
The Court's Opinion Contains Several Omissions and Misstatements of Issues and Facts Related to Causation and Other Issues

Rehearing is also necessary because the Court misstated facts and issues related to other matters important to the judgment.

A. California Law Codified the Common Law of Public Nuisance

The Court wrote that Defendants "seem to concede" that Rhode Island and Illinois public nuisance laws "are not as broad as California's." (Opinion at 63.) This statement is not correct—either as a description of the law or as to any concession. As set forth in NL's briefs, the California Civil Code codified the common law of public nuisance. [NL AOB at 21-22.] Indeed, the Civil Code's statutory text—requiring that there be "one" thing "which affects at the same time an entire community or neighborhood, or any considerable number of persons," Civ. Code §3480—requires "one" nuisance to exist in a particular place and invade public rights before it can be enjoined as a public nuisance. [NL AOB at 27-28; NL ARB at 16-18.]

B. The Trial Court Declared a Single Nuisance from Separate Private Homes

The Court's opinion states that the trial court did not treat pre-1981 homes as an "indivisible group" because it distinguished houses built before 1950 for the purposes of its remediation plan. (Opinion at 55, n.45.) But, for the purpose of finding causation, the trial court found simply that "NL's conduct was a substantial

factor in bringing about the public nuisance" for the entire group of pre-1981 houses, without entering any findings as to whether a nuisance exists or causation had been established for any individual houses or even any subgroups of houses. [139 AA 41158.]

The opinion omits the fact that every house has its own separate and specific history of painting and maintenance, including how and why it was painted, whether it contains lead paint, and whether the property owners have maintained that paint in the intervening decades. The trial court could have required evidence, either through testimony or documents, for those houses that contain lead paint on interior surfaces, to establish who made the lead paint and why it was applied, whether in reliance on a defendant's promotion, or pursuant to government specifications, or for some other reason. But the trial court entered its nuisance and causation findings with no evidence that anyone applied lead paint to the interior of a residence in reliance on any NL or other promotion. [78 AA 22969-70.] Such a declaration of a nuisance in the abstract (and responsibility for it) is a legislative power.

C. No Causal Connection Exists for Abatement of Soil

The Court's opinion upholds the trial court order to cover lead-contaminated soil, stating:

> "Lead concentrations are highest close to the home "[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, and because the previous painting jobs could have caused sanding and scraping on the exterior of a home which often then resides as contamination of the soil close to the home." **. . .** Thus, plaintiff's 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."

(Opinion at 56, emphasis added.) This statement is self-contradictory: it shifts from saying exterior paint friction causes lead in soil to concluding that interior paint friction is a contributor.

In fact, the record shows that most lead in soil is from sources other than paint. Dr. Courtney of the California Department of Public Health testified that lead in soil from decades of use of leaded gasoline "is the dominant source of exposure for the majority of California children." [33 RT 4967.] Lead in soil comes primarily from exhaust of leaded gasoline used from 1920 to 1990 and secondarily from industrial sources and the erosion of exterior painted surfaces. [33 RT 4931-32; 33 RT 4938-42.] The trial court made no finding of a relationship between interior lead paint and soil, and nothing in the record would support it. As there is no liability for exterior paint, there can be no remedy for its contribution to soil lead. The Court should grant rehearing on this basis.

D. There is No Evidence Defendants' Promotions Caused Any Increase in Lead Paint in the Jurisdictions

The opinion finds company promotion caused the nuisance based solely on the purported finding (at 40) that LIA campaigns caused a "great increase" in interior lead paint sales. In fact, there was no such evidence. The opinion's discussion of causation is inherently speculative. The People's expert conceded: "there are effective advertising campaigns and ineffective ones." [29 RT 4350-51.]

The disputed issue was what effect, if any, NL's promotions (or those of other Defendants) had on the use of lead paint, which had declined steeply after the mid-1920s. [29 RT 4317-18; 29 RT 4346-49; 180 AA 53615.] The trial court barred Dr. Rosner from offering opinion testimony, and he did not opine, whether promotional activities had affected historical lead paint sales. [46 AA 13456.] The court allowed Dr. Rosner to testify instead that LIA officials *believed* their promotions had succeeded in "checking the . . . 'downward trend of white lead and its sales.'" [28 RT 4205-06.] Later, contradicting himself, Dr. Rosner admitted that neither he nor the LIA could tell whether the promotions "had any impact on sales or the use of white lead." LIA itself had stated "you can't trust that data" [29 RT 4349-50] and further said that "the primary objective to reverse the downward trend" in white lead sales "had not [] been accomplished." [29 RT 4334; 29 RT 4343; 29 RT 4344; 29 RT 4351; 29 RT 4352.] Ultimately, Dr. Rosner admitted that whether the promotional campaign

"caused increase or decrease or whether it changed the trajectory [of declining lead sales] minimally, I can't tell." [29 RT 4351:10-11.]

Having ignored the actual evidence, which did not show company or LIA promotions had affected (let alone had "great[ly] increased") sales of interior lead paint, the opinion is left without a basis for finding for causation. All the opinion does is find (Opinion at 44-46) that each company "affirmatively promoted lead paint for interior residential use" and (at 51) that LIA promotional campaigns and their individual promotions, were at least "a very minor force" in leading to the current presence of interior residential lead paint. Such total speculation reverses the burden of proof (in effect requiring Defendants to disprove causation) and cannot be the basis for a causation finding.

E. Post-1950 Labeling Prevented Further Interior Use

The Court's opinion diminishes the significance of a 1955 standard eliminating the use of lead-based paint for interiors. The Court remarked:

> The standard states that coatings complying with it "may be marked: 'Conforms to American Standard Z66.1-1955, for use on surfaces that might be chewed by children.' Notably, this standard does not impose any labeling requirement of any kind on lead paint. Although one might draw an inference that the LIA's participation in the creation of this standard encouraged the

> compliance of its members, the trial court was not required to draw that inference.

(Opinion at 54-55.) The Court omitted from its opinion the facts that both NL (then-National Lead) and Sherwin-Williams were members of the committee that wrote the standard, and that committee members thereafter implemented warning labels not to use paint with more than 1% lead (i.e., exterior paint) for indoor surfaces. [43 RT 6319-22; 36 RT 5395-96; 45 RT 6568-70; 140 AA 41408.]

F. The Court's Opinion Misstates Lead Dust Hazards in California

The opinion states that "more than one-third of pre-1978 homes nationwide with intact paint have lead dust" and "only 6 percent of homes without lead paint have lead dust." (Opinion at 4.) These statistics do not correctly portray the relationship between old homes and the presence of dust-lead hazards today.

The statistics the Court cited were presented by plaintiff's expert Dr. Mushak, based on a 1998-1999 National Survey of Lead and Allergens in Housing, which was published in 2001 ("2001 HUD Survey"). [26 RT 3856-57; 7 SRA 1819.] Yet the Court omitted data from the more recent American Healthy Home Survey, which was conducted from June 2005 through March 2006 and published in 2011 ("2011 HUD Survey"). [26 RT 3852, 3856; 173 AA 51571– 174 AA 51685.]

The 2011 HUD Survey provided updated data for lead paint and dust hazards on a regional basis. [26 RT 3841-42.] Dr.

Mushak agreed that the 2011 HUD Survey shows that only 7.5% of pre-1940 houses, and 8.6% of houses built from 1940-59, had lead dust hazards in the West (including California)—far lower than the "one-third" statistic the Court relied upon. [174 AA 51678.] These data show that the dust lead hazard data the Court cited is incorrect and that intact lead paint in housing in the West, including California, is not inevitably deteriorating into lead hazards.

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Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 4,484 words, exclusive of the matters that may be omitted under rule 8.204(c)(3).

Dated: November 29, 2017

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