No. H040880

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

The People of the State of California,

Plaintiff and Respondent,

vs.

Atlantic Richfield Company, et al.,

Defendants and Appellants.

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

Appeal from a Judgment
Santa Clara Superior Court, Case No. 1-00-CV-788657
Honorable James P. Kleinberg

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I. INTRODUCTION

This Court's November 14, 2017 opinion ("Opinion") reversed the judgment in part but continues to hold ConAgra Grocery Products Company ("ConAgra") liable to inspect and abate all homes built before 1951 in the plaintiff jurisdictions on the theory that W.P. Fuller & Co. ("Fuller") promoted lead paint for interior use with knowledge that use was hazardous and thus caused lead paint harms that render ConAgra liable for all pre-1951 homes.

The Opinion correctly notes that the Court "cannot rely solely on the expert testimony produced by [Plaintiffs]" in ascertaining whether substantial evidence exists to support the trial court's judgment. (Opn/24) Rather, "a conclusion expressed by an expert cannot provide by itself substantial evidence to support a finding unless the *basis* for the expert's conclusion is itself supported by substantial evidence." (Opn/25)

This portion of the Opinion is right on the mark. But, the Opinion misses the critical next step in the analysis that establishes Defendants' right to judgment. As set forth below, many of the key "facts" that formed the bases for the experts' opinions were not established through competent proof. In this regard, Plaintiffs' case wholly failed based on a problem that the California Supreme Court addressed in its recent opinion in *People v. Sanchez*, 63 Cal.4th 665 (2016).

In *Sanchez*, like here, the People presented an expert who simply parroted as the basis of his opinion hearsay on which he had relied but of which he had no personal knowledge. Our Supreme Court reversed the judgment on the ground that facts essential to liability were supplied only through hearsay. The Court explained:

> Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. *The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge*.

Id. at 676 (emphasis added).

Our Supreme Court also was clear that Plaintiffs' method of "proof" in this case is impermissible: "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, *unless they are independently proven by competent evidence or are covered by a hearsay exception*." *Id.* at 686 (emphasis added).

Here, the facts essential to defendants' liability were never proven through the type of independent proof by competent evidence that our Supreme Court requires. Instead, Plaintiffs relied solely on the impermissible device of presenting experts who had no personal knowledge to parrot hearsay that was *not admitted for its truth at*

trial. The trial court admitted documents underlying the experts' opinions into evidence only for the limited purpose of allowing the court to understand the bases of the opinions. (Opn/95-96 & fn. 63) As the Opinion notes, the experts' opinions are not substantial evidence because the basis for an expert's opinion must "itself [be] supported by substantial evidence." (Opn/25) And as *Sanchez* makes clear, the limited purpose admission of the documents underlying the experts' opinions also does not qualify as substantial evidence.

No "witness with personal knowledge of these case-specific facts," *Sanchez*, 63 Cal.4th at 676, testified to Fuller's knowledge, promotion and causation. Under controlling California Supreme Court authority, that omission was fatal to Plaintiffs' case and their reliance upon expert opinions and the trial court's admission for a limited purpose of the documents that underlay those opinions could not substitute for the required competent proof.

The Opinion's discussion of *Sanchez* [Opn/102-03], missed the critical point. First, the trial court admitted the writings upon which the experts relied only for a limited purpose—it did *not* admit them under the hearsay exception for "ancient documents" contained in Evidence Code § 1331. Since the documents were *not* admitted for their truth, they could not constitute substantial evidence of Fuller's knowledge, promotion or causation. Second, it would have been reversible error to admit the documents under the ancient writings exception to show Fuller's knowledge, promotion, or

causation. That exception would have required that the statement in the writings "has been since generally acted upon as true by persons having an interest in the matter." *See* Evid. Code § 1331. There was no showing below that any written statement relating to Fuller's knowledge, promotion or causation "has been since generally acted upon as true by persons having an interest in the matter."

Sanchez is controlling authority and it requires competent proof of Fuller's knowledge, promotion or causation. The record contains no such proof. For these reasons and as further demonstrated below, ConAgra respectfully requests rehearing and joins in the additional grounds for rehearing set forth in the petitions of co-appellants NL Industries, Inc. ("NL") and The Sherwin Williams Company ("Sherwin Williams").

II. THERE IS NO SUBSTANTIAL EVIDENCE OF FULLER'S PROMOTION OF LEAD PAINT FOR INTERIOR RESIDENTIAL USE

The Opinion acknowledges the absence of record evidence of Fuller's promotion of lead paint for interior residential use. As the Opinion explains, most of the advertisements presented during the trial "did *not* promote *interior* residential use of *lead* paint" [Opn/36-37], or "were not placed by Fuller, but instead by paint stores or hardware retailers" without any evidence "that Fuller had any involvement in the placement of advertisements by hardware and paint stores" [Opn/38]. Accordingly, these advertisements

"cannot be attributed to Fuller and cannot show that Fuller promoted lead paint for interior residential use." (Opn/38)

The Opinion cites only two things as substantial evidence of Fuller's promotion of lead paint for interior use: (i) Fuller's supposed participation in LIA advertising campaigns; and (ii) what the Opinion calls, the "most important evidence" of Fuller's promotion, a 1931 brochure that told consumers who purchased Fuller lead paint that they could use it for interior applications. (Opn/39-42) The Opinion overlooks that neither fact was established through competent evidence, but rather both were introduced solely through expert opinion without any competent evidentiary support.

The only record evidence that Plaintiffs or the trial court ever cited in support of the proposition that Fuller participated in the LIA's campaigns is the testimony of Dr. Rosner. (*See* 138AA/40950-52; RB/26, 83, citing 28RT/4157-59, 4161-63, 4168, 4188) There is, however, nothing in the record to support Dr. Rosner's testimony that Fuller participated in the LIA campaigns. Under the principles stated in the Opinion, his statement that Fuller participated in the LIA campaign is ipse dixit and cannot, absent an underlying basis in record evidence, serve as substantial evidence.

What is more, Dr. Rosner's statement at trial that Fuller participated in LIA campaigns contradicted his prior deposition testimony that it had not contributed to them. (29RT/4393-95) At

trial, Dr. Rosner acknowledged he had testified that Fuller had not contributed to these campaigns, but explained that he believed Fuller participated in them because it had been a member of the LIA during the campaigns. (29RT/4395) The Opinion, however, clarifies that Fuller's membership in the LIA alone did not suffice to make it liable for LIA campaigns, but rather that liability attached because Fuller supposedly was among the LIA "member companies" that actually participated in these campaigns by funding them. (Opn/39)

But, there is no record evidence that establishes the required actual participation. Dr. Rosner had no personal knowledge whether Fuller funded the campaigns, so he was required to identify evidence that it did so. He instead admitted he had none and might be mistaken on this point. (29/RT4393-95) Under the requirement in the Opinion, and the California Supreme Court authority in *Sanchez*, Dr. Rosner's opinion is insufficient because Plaintiffs failed to introduce independent proof that Fuller participated in the LIA's campaigns. *Sanchez*, 63 Cal.4th at 686; *see also People v. Gardeley*, 14 Cal.4th 605, 619 (1996) ("a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact").

The trial court stated that its ruling admitting the hearsay underlying Plaintiffs' experts' opinions was permissible because:

> An expert may generally base his or her opinion on any matter known to him or her including hearsay not

> otherwise admissible, which may be reasonably relied on for that purpose. That's a 1993 case from the California Supreme Court, *People vs. Montiel*, citation is 5 Cal.4th 877.

(25RT/3725-26)

Two problems with this ruling warrant rehearing.

First, *Montiel* is one of the cases that *Sanchez* expressly disapproves. *See Sanchez*, 63 Cal.4th at 686 & fn. 13 (disapproving *Montiel*). Thus, the trial court's stated bases for admitting hearsay was a rule that our Supreme Court has disapproved.

Second, separate and apart from whether the trial court was permitted to admit documents for the limited purpose of evaluating the experts' opinions, such limited purpose admission cannot substitute as competent proof. In *Sanchez*, the California Supreme Court reiterated the long settled rule that the "facts" recited by an expert must be established independently through competent proof. But here, the documents on which the experts relied where not admitted for their truth, and Plaintiffs did not introduce any other competent proof of the facts essential to ConAgra's liability. Under controlling California Supreme Court authority, therefore, there is no competent evidence of the facts essential to ConAgra's liability.

Further, two key findings by the trial court preclude holding Fuller liable for LIA campaigns based solely on its bare membership in the LIA: (1) the court's finding that LIA was not Defendants'

agent [138AA/41029]; and (2) its finding that ARCO (who was a LIA member from 1928 until 1971) was not liable [138AA/40940, 41029; *see also* 35RT/5287]. Those findings prevent Fuller's alleged membership in the LIA by itself from being a basis to affirm. *See Westfour Corp. v. California First Bank*, 3 Cal.App.4th 1554, 1561-62 (1992) (judgment cannot be upheld on grounds that contradict trial court's findings). The constitutional right to freedom of association likewise precluded imposition of liability for LIA activities based on bare membership in LIA. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920, 924 (1982).

The Opinion also overlooks that there was no substantial evidence that Fuller received or reviewed the documents of the LIA, and the association meeting minutes indicate Fuller was not in attendance. (29RT/4391; 35RT/5298-5300; 178AA/53069-70, 53082, 53096; 179AA/53113-14; 53133-34)

Moreover, the 1931 brochure is not substantial evidence of Fuller promotion because the trial court admitted the brochure into evidence only for the "limited purpose" of allowing the court to understand the bases for the opinions of Plaintiffs' experts. (35RT/5284-85) The Opinion notes this limitation [Opn/95-64 & fn. 63], but reasons that ConAgra waived any objection to the admissibility of this document by failing to lodge a specific objection [*id.*].

This reasoning is flawed for two reasons. First, the trial court's ruling established the "limited purpose" for which the 1931 brochure could be considered at trial, so the document could not be used for other purposes, regardless of any objections. The trial court did not, as the Opinion concludes [Opn/103], adhere to the limited purpose limitation. Rather, the trial court, like the Opinion, erroneously relied upon these materials admitted only for a limited purpose as independent proof of facts essential to liability. But, a document cannot be admitted for the limited purpose of allowing a court to understand the basis of an expert's opinion, but then relied upon as independent proof of the underlying fact. *See Sanchez*, 63 Cal.4th at 686; *Gardeley*, 14 Cal.4th at 619.

Further, even if the 1931 brochure was admitted for more than a limited purpose, the document would not constitute substantial evidence of a promotion that would give rise to liability. There was, for instance, no testimony from a "witness with personal knowledge of these case-specific facts," *Sanchez*, 63 Cal.4th at 676, demonstrating how this brochure was used, how prevalent its use was, or when the brochure was used and for how long a period of time. Without those facts being established through competent proof, this brochure could not serve as substantial evidence of Fuller's promotion.

Lastly, ConAgra and the other defendants made ample objections to consideration of the brochure and other documents like it. At the outset of the trial, the trial court made a "blanket ruling"

that documents like the brochure on which Plaintiffs' experts were going to rely would be admitted without regard to admissibility for the limited purpose of allowing the trial court to understand the expert's opinion, and there was no need to further object to this limited purpose admission. (*See* 25RT/3726-27 ["So if you want a blanket ruling now, I will give it to you and it will save a lot of time from moving up and down, it is on the record, and you can cite it as a point o[n] appeal."]) That ruling sufficed to preserve ConAgra's ability to raise this issue and eliminated the need for Defendants to object to the admissibility of each document admitted for a "limited purpose." *See People v. Sandoval*, 41 Cal.4th 825, 837 (2007) ["An objection is not required when it would have been futile"]; *see also People v. Perkins*, 109 Cal.App.4th 1562, 1567 (2003).

In short, the facts that the Opinion identifies as the basis for Fuller's liability for promotion—the 1931 brochure and Fuller's purported funding of the LIA campaigns—were not proven at trial through the method that the California Supreme Court has held is *mandatory*: the facts underlying the expert's opinion must be "independently proven by competent evidence," *Sanchez*, 63 Cal.4th at 686, i.e. "by calling witnesses with personal knowledge of those case-specific facts" [*id.* at 676]. ConAgra is entitled to judgment.

III. THERE IS NO SUBSTANTIAL EVIDENCE FULLER HAD THE REQUIRED KNOWLEDGE AT THE TIME OF ANY PROMOTION

Plaintiffs failed to introduce competent evidence that Fuller had the required knowledge for the same reason: they relied solely on expert opinions and documents admitted only for a limited purpose, but not for their truth. (*See* 25RT/3723-27 [trial court's blanket ruling on admissibility of documents upon which the experts were basing their opinions]; *see also, e.g.,* 28RT/4149, 4152-54, 4165-87, 4195-221, 4227-230; 35RT/5299, 5302, 5306-07, 5323, 5327, 5330-31, 5336-43, 5369; 40RT/6019 [admission of specific documents for the "limited purpose" of allowing the trial court to understand the experts' opinions])

While that problem alone warrants rehearing, NL and Sherwin Williams also detail in their petitions for rehearing, in which ConAgra joins and incorporates herein, the undisputed evidence of the evolution of knowledge of lead's hazards, and the absence of any connection between the purported knowledge evidence discussed in the Opinion and Fuller. The insufficiency of the knowledge evidence as to Fuller is highlighted by another undisputed point.

The People's own expert, Dr. Markowitz, testified that a responsible paint company should have ceased manufacturing lead paint for interior use in the mid-1930s. (36RT/5402) That is an admission that Defendants lacked the requisite knowledge before the

mid-1930s. Yet as noted, the only Fuller promotion that the Opinion identifies is the 1931 brochure—i.e. a promotion that occurred before Fuller had the required knowledge. The absence of any evidence that Fuller promoted interior lead paint at a time when it knew such use was hazardous is another reason to grant rehearing.

IV. THERE IS NO SUBSTANTIAL EVIDENCE FULLER ASSISTED IN CREATING A NUISANCE IN ALL PRE-1950 HOUSES

Based upon the 1931 brochure and the LIA campaigns that ran from 1934 onward, the Opinion concludes that ConAgra is liable for abating all pre-1951 homes. (Opn/41-43, 48-53) This reasoning is erroneous and conflicts with the Opinion's reversal as to post-1950 homes.

To begin, the duration and scope of the LIA campaigns should be clarified. The Opinion states that the Forest Products campaign lasted from 1934 through 1941 and that the White Lead Promotion campaign ran from 1939 through 1944 and from 1950 through 1952. (Opn/39-40) There is, however, no evidence that the White Lead Promotion campaign promoted lead paint for interior residential use after 1940. Indeed, while Plaintiffs' expert testified that campaign briefly resumed in the 1950s, he testified it did not promote any specific paint brand, or distinguish between exterior and interior use. (*See* 28RT/4158, 4188-89, 4212, 4222) The Opinion appears to recognize this in acknowledging the lack of any post-1950 promotion by Defendants. (Opn/53-55)

In reversing the judgment as to post-1950 homes, the Opinion notes Plaintiffs' failure to introduce "any evidence of an affirmative promotion by NL, SWC, or Fuller of lead paint for interior residential use after 1950." (Opn/53) The Opinion concludes there is "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." (Opn/55)

This reasoning thus requires a causative link between each defendant's knowing promotion and the use of lead paint on residential interiors. But, even setting aside *arguendo*, the incompetence of Plaintiffs' evidence, the "evidence" of Fuller's promotion is a single brochure from 1931 (without any competent evidence demonstrating how the brochure was used, by whom, or for how long), and Fuller's purported membership in the LIA when LIA ran campaigns from 1934 through 1941. This cannot suffice to hold ConAgra liable for all pre-1951 houses. There is, for instance, no explanation for how Fuller could be responsible for lead paint placed on homes prior to 1931 or after 1941.

The disconnect between the Opinion's stated bases for liability and the scope of the liability highlights the fundamental defect in Plaintiffs' causation theory. At issue is lead paint that was placed inside separate homes at separate times by separate persons for separate reasons—which may or may not have included any particular "promotion" of lead paint for interior use. It was undisputed that thousands of manufacturers, architects, scientists,

government chemists and purchasing agents, retailers, and painters promoted the use of lead paint in residential interiors for decades. (29RT/4433-4434; 45RT/6647) Under controlling California Supreme Court authority, each defendant could only be liable to abate those particular homes that each defendant's own knowing promotions caused to be painted with lead paint. *See O'Neil v. Crane Co.*, 53 Cal.4th 335, 362-65 (2012) (liability for defective product limited to harms caused by one's own product).

No case permits the separate condition of separate properties to be aggregated as an indivisible public nuisance, and every public nuisance case that our Supreme Court has allowed has required individualized proof pertaining to a specified nuisance at a specified location. *See, e.g., People ex rel Gallo v. Acuna*, 14 Cal.4th 1090 (1997); *City of Bakersfield v. Miller*, 64 Cal.2d 93, 99 (1966); *People v. Gold Run Ditch Mining Co.*, 66 Cal.138 (1884).

Individualized proof of what lead paint use resulted from each defendant's own promotions is not only required under controlling California Supreme Court law, but is also a requirement of the federal constitution's due process clause. *See Walmart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2560-61 (2011).

Plaintiffs did not even attempt to make the required individualized showing of what lead paint use (if any) resulted from each defendant's promotions. Rather, Plaintiffs persuaded the trial court to rule that they were not required to prove reliance on the

alleged promotions. (39RT/41138; 23AA/6387-409; 60AA/17632-48; 77AA/22773-76) As Sherwin Williams points out in its petition for rehearing, Plaintiffs also conflated their proof for all defendants and all jurisdictions, further eliminating any ability to tie the scope of liability to each defendant's own culpable conduct (if any).

This cannot be correct under the Opinion's own reasoning. As the Opinion makes clear in reversing the judgment as to post-1950 homes, the judgment cannot be sustained without proof that each defendant's knowing promotion caused the hazards that each defendant is liable to abate. It follows that individualized proof of who (if anyone) relied on each defendant's knowing promotion is essential to establish the *scope* of each defendant's liability. The Court should grant rehearing to address the problems with the scope of each defendant's liability that arise from the Opinion's own logic.

V. JOINDER IN NL'S AND SW'S PETITIONS

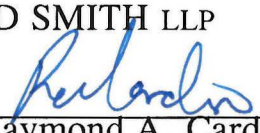
ConAgra joins in the petitions for rehearing filed by NL and Sherwin Williams.

VI. CONCLUSION

For the forgoing reasons, the Court should grant this petition for rehearing and enter judgment in ConAgra's favor.

DATED: November 29, 2017

REED SMITH LLP

By 

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CERTIFICATION OF WORD COUNT PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(C)(1)

I, Raymond A. Cardozo, declare and state as follows:

1. The facts set forth herein below are personally known to me, and I have firsthand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

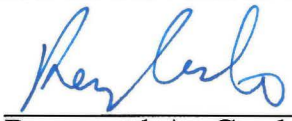
2. I am one of the appellate attorneys principally responsible for the preparation of the Petition for Rehearing in this case.

3. The Petition for Rehearing was produced on a computer, using the word processing program Microsoft Word 2010.

4. According to the Word Count feature of Microsoft Word 2010, the Petition for Rehearing contains 3,357 words, including footnotes, but not including the table of abbreviations, table of contents, table of authorities, signature block, and this Certification.

5. Accordingly, the Petition for Rehearing complies with the requirement set forth in Rule 8.204(c)(1), that a brief produced on a computer must not exceed 14,000 words, including footnotes.

I declare under penalty of perjury that the forgoing is true and correct and that this declaration is executed on November 29, 2017, at San Francisco, California.



Raymond A. Cardozo

PROOF OF SERVICE

The People v. ConAgra Grocery Products Company et al.

Sixth Appellate District Case Nos. H040880

Santa Clara Superior Court Case No. 1-00-CV-788657

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On November 29, 2017, I served the following document(s) by the method indicated below:

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

☒	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

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Trial Court
Case No. 1-00-CV-788657

Clerk, California Supreme Court
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Electronically served
Pursuant to Cal. Rules of Court 8 .212(c)(2)

I declare under penalty of perjury under the State of California that the above is true and correct. Executed on November 29, 2017, at Los Angeles, California.

Heather Valencia