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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff, Cross-defendant and Respondent, v. CONAGRA GROCERY PRODUCTS COMPANY et al., Defendants and Appellants; THE SHERWIN-WILLIAMS COMPANY, Defendant, Cross-complainant and Appellant.	H040880 (Santa Clara County Super. Ct. No. CV788657)

After a lengthy court trial, the People of the State of California (plaintiff) prevailed in this representative public nuisance action against defendants ConAgra Grocery Products Company (ConAgra), NL Industries, Inc. (NL), and the Sherwin-Williams Company (SWC).[1] The trial court ordered ConAgra, NL, and SWC to pay $1.15 billion into a fund to be used to abate the public nuisance created by interior residential lead paint in the 10

[1] Plaintiff's action was brought on behalf of the residents of Santa Clara County, San Francisco City and County, Alameda County, Los Angeles County, Monterey County, City of Oakland, City of San Diego, San Mateo County, Solano County, and Ventura County. In this opinion, we will refer to these two cities, seven counties, and one city and county as the 10 jurisdictions.

California jurisdictions represented by plaintiff. ConAgra, NL, and SWC (collectively defendants) challenge the court's judgment on many grounds. They contend, among other things, that the court's judgment is not supported by substantial evidence of knowledge, promotion, causation, or abatability. Defendants also challenge the judgment on separation of powers and due process grounds, claim that they were erroneously denied a jury trial, and assert that the trial court made other prejudicial procedural and evidentiary errors.[2] We conclude that the trial court's judgment must be reversed because substantial evidence does not support causation as to residences built after 1950. We also direct the trial court to hold further proceedings on remand regarding the appointment of a suitable receiver. We reject the remainder of defendants' contentions.

I. Plaintiff's Evidence at Trial

"[L]ead is a toxin and causes irreversible brain damage." Childhood lead poisoning is "the number one environmental health problem for children" in California. "Childhood lead poisoning at the level at which it is occurring is definitely an epidemic in California." "The most common source of lead exposure to children in California is lead-based paint and how it contributes to soil and dust contamination in and around housing."[3] Experts have reached a consensus "that lead-based paint is a predominant source of childhood lead exposure [in] pre-1978 housing."[4] Children in pre-1946 housing are subject to "three times

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[2] This is but a partial list of their contentions. SWC and ConAgra also each assert an individual contention.

[3] "Lead-based paint" is not the only source of childhood lead exposure. Children in the 10 jurisdictions have also been exposed to lead from occupational sources (such as lead dust brought home by construction workers), leaded gasoline, imported goods (such as pottery, Mexican candy, and toys), home remedies (such as "Greta" and "Azarcon"), cosmetics, jewelry, spices, and chapulines (grasshoppers).

[4] "'Lead-based paint' means paint or other surface coatings that contain an amount of lead equal to, or in excess of: [¶] (a) one milligram per square centimeter (1.0 mg/cm2); or

the percentage of elevations in blood lead level" as those in post-1978 housing. Lead in homes accounts for at least 70 percent of all childhood lead poisonings. Lead paint is a major contributor to blood lead levels because the lead content of paint is high, while most other lead sources have only trace amounts. And the most common type of lead paint contains white lead carbonate, which is highly absorbable. Between 1929 and 1974, more than 75 percent of the white lead carbonate produced in this country was used in lead paint. Through the 1940s, lead paint contained as much as 50 percent lead.

"Children are exceptionally vulnerable" to lead because "they explore their environment with typical hand-to-mouth contact behavior." Lead paint chips "taste sweet," which may explain why children ingest them. Young children are at especially high risk from residential lead paint because they spend the vast majority of their time in their homes. Infants and young children also absorb much more lead than older children and adults. Because children are smaller, lead intake has a proportionally larger impact on their bodies, and children absorb lead more easily. Children are also more vulnerable to the toxic effects of lead because their biological systems are still developing.

The "brain effects [of lead exposure] in children are irreversible," so the "only option is to prevent the exposure in the first place." There is "no safe exposure level" for lead "[b]ecause no measurable level of lead in blood is known to be without deleterious effects, and because once engendered the effects appear to be irreversible." Blood lead levels less than 5 micrograms per deciliter (mcg/dL)[5] can cause children to suffer impaired intellect and behavioral problems.[6] "[E]ven among children with the lowest levels of lead exposure," studies suggest that "there is ongoing harm down to the lowest measurable

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[¶] (b) half of one percent (0.5%) by weight." (Cal. Code Regs., tit. 17, § 35033.) This is what we mean when we use "lead paint" in this opinion.

[5] A microgram (mcg) is a millionth of a gram. A deciliter (dL) is a tenth of a liter.

[6] Bone lead levels are a better indicator than blood lead levels of the impact of lead on intellectual abilities. Blood lead levels may underestimate the impact of lead exposure.

levels." "[B]lood lead levels below 5 micrograms per deciliter are associated with decreased academic achievement, diminished IQ scores, or intellectual abilities, cognitive abilities, attention-related behavior problems and antisocial behaviors . . . ." Lead exposure as a child continues to impact the body when the child becomes an adult. It "has reproductive effects, it has impacts on things like birth weight, and even fertility, delays fertility," and it can be associated with cardiovascular disease.

Even intact lead paint poses a potential risk of future lead poisoning to children because lead paint surfaces will inevitably deteriorate. "[A]ll paint eventually deteriorates. On certain surfaces it deteriorates more rapidly than others[;] mainly those surfaces are high-use surfaces, such as windows and doors." Paint deteriorates when it is exposed to ultraviolet light, water, fungus (such as mildew), friction, or abrasion. More than one-third of pre-1978 homes nationwide with intact lead paint have lead dust.[7] In contrast, only 6 percent of homes without lead paint have lead dust. Lead in soil adjacent to homes generally comes from lead paint, not leaded gas emissions, because post-1978 housing has no soil lead.[8]

Most of the housing in the 10 jurisdictions was built before 1980, with the percentages ranging from 51 to 83 percent and is therefore presumed to contain lead paint.[9]

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[7] "'Lead-contaminated dust' means dust that contains an amount of lead equal to, or in excess of: [¶] (a) forty micrograms per square foot ($40mg/ft^2$) for interior floor surfaces; or [¶] (b) two hundred and fifty micrograms per square foot ($250mg/ft^2$) for interior horizontal surfaces; or [¶] (c) four hundred micrograms per square foot ($400mg/ft^2$) for exterior floor and exterior horizontal surfaces." (Cal. Code Regs., tit. 17, § 35035.)

[8] "'Lead-contaminated soil' means bare soil that contains an amount of lead equal to, or in excess of, four hundred parts per million (400 ppm) in children's play areas and one thousand parts per million (1000 ppm) in all other areas." (Cal. Code Regs., tit. 17, § 35036.)

[9] "'Presumed lead-based paint' means paint or surface coating affixed to a component in or on a structure constructed prior to January 1, 1978." (Cal. Code Regs., tit. 17, § 35043.)

Pre-1940 homes are three times as likely to have lead-based paint hazards,[10] with 86 percent having lead-based paint hazards and 67 percent having "significant" lead-based paint hazards such as"deteriorated lead-based paint."[11] "[H]omes with lead-based paint are 10 times more likely than homes without lead-based paint to have dust lead levels on floors and on window sills above the federal limits." And "homes with lead-based paint are more likely to have soil lead levels on the exterior of the home above the EPA [(federal Environmental Protection Agency)] criteria limits." Even when lead paint is "intact," soil levels can exceed EPA limits. Lead paint creates soil lead "by the friction and impact surfaces, opening and closing windows and doors on a home with lead-based paint," from the deterioration of exterior lead paint, and from "sanding and scraping" when repainting. When there is lead in the soil, it is often tracked into the home, creating household lead dust.

Since the 19th century, the medical profession has recognized that lead paint is toxic and a poison. An 1878 article by an English doctor recognized that the use of lead paint on the interiors of homes could have poisonous effects on the people who lived in the home. An 1895 article by a San Francisco doctor recounted how a child had been poisoned by lead paint that she had scratched off her crib. A 1904 article by a doctor in Queensland, Australia described multiple cases of children being poisoned by lead dust from lead paint on walls and railings of a house. He believed that the lead dust had been ingested by the children after it got on their fingers and thereby into their mouths. His investigation found

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[10] "'Lead hazard' means deteriorated lead-based paint, lead contaminated dust, lead contaminated soil, disturbing lead-based paint or presumed lead-based paint without containment, or any other nuisance which may result in persistent and quantifiable lead exposure." (Cal. Code Regs., tit. 17, § 35037.)

[11] "'Deteriorated lead-based paint' means lead-based paint or presumed lead-based paint that is cracking, chalking, flaking, chipping, peeling, non-intact, failed, or otherwise separating from a component." (Cal. Code Regs., tit. 17, § 35022.)

lead dust on interior walls where the paint was still in "good condition."[12] An authoritative 1907 textbook edited by a noted American doctor, which was widely used in medical education, discussed the 1904 article and observed that children had been poisoned by lead paint on woodwork in their homes that had produced lead dust and gotten onto their hands.[13] These articles "recognized the dust pathway from paint on a wall, to dust on the floor, to the hands of children, into their mouth[s], as a way of ingestion."

Many medical articles by doctors in the early 20th century described lead poisoning of children from lead paint. A 1917 article by an American doctor discussed the 1904 Australian article and also described the cases of multiple children who had gnawed lead paint off furniture and died. A 1926 article discussed the case of a child who had died from lead poisoning after she "gnawed" lead paint off her bed. A 1933 article pointed out that "children get exposed to lead-based paint in the homes by their common tendency to put things in their mouth[s]." It also stated that most cases involved infants and small children and that children were more susceptible to lead poisoning than adults. Another 1933 article noted: "It must be obvious that for every child who becomes paralysed by lead there must be literally hundreds who have been affected by the poison in some more or less minor degree." "[T]he extent of the lead paint menace has been minimized, and in consequence, literally thousands of children have been allowed to run the risks of lead absorption."

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[12] In 1922, Queensland, Australia banned lead paint from areas to which young children had access.

[13] Plaintiff presented an expert who testified that in 1909 public health officials and doctors were suggesting that there be legislation banning lead paint due to the risk of exposure for children. This expert cited his own 2005 article in which he asserted that researchers had stated in 1909 that "[p]aint containing lead should never be employed where children, especially young children, are accustomed to play," and "[a] number of European countries banned lead-based paint soon thereafter." He also relied on a seven-page "annotated bibliography" that he had prepared, which listed, but did not include, numerous articles that he had reviewed.

Published medical articles in this era recognized that even small amounts of lead could cause children to suffer harm. A 1931 British Medical Journal article discussed the "insidious" effects of "infinitesimal doses of lead" over a long period of time. A 1935 American medical journal article suggested that there were "insidious" "cumulative effects of infinitesimal doses of lead" that could be "obscure." A 1938 British medical article stated that "the harmful effects of continued small doses of lead begin from the moment the lead is absorbed" and can lead to a long series of "subtle" harms. It opined that "there is no threshold below which still smaller doses can be regarded as being without some adverse effect." A 1943 American medical journal article discussed the impact of early childhood subacute lead poisoning on a child's intelligence and subsequent academic achievement; it called for a ban on interior residential use of lead paint.

Knowledge about the toxic properties of lead paint was not limited to the medical profession. In May 1910, the United States House of Representatives' Committee on Interstate and Foreign Commerce held a hearing on a bill aimed at preventing lead poisoning. The bill would have required products containing white lead to "be labeled conspicuously and securely with a skull and crossbones and the words: 'White lead: poison.'" The sponsor of the bill noted that France had already "entirely prohibited the use of white lead because of its injurious character" and that "all countries of Europe" had already enacted legislation like his proposal. He spoke of "the injurious effect of these atoms of white lead that are filling the air now; they come loose from doors, from window sills, from everywhere, we inhale them and consequently disease is caused which physicians do not understand and can not say what it really is, but it is, in many cases, simply a case of lead poisoning." Another proponent of the bill observed that "the most eminent scientists and doctors of Great Britain" had "found that the small particles that result from chalking, especially from internal painting and external painting as well, when taken by inhalation into the lungs, are absorbed and become a poison to the system." This congressional

hearing was attended by an attorney for "practically all of the paint manufacturers of this country" who stated their opposition to the proposal. The bill failed.

A few years later, in 1914, Henry Gardner, who was the assistant director of the Institute of Industrial Research and also the director of the Paint Manufacturers Association's Educational Bureau, published a speech that he had given to the International Association of Master House Painters and Decorators of the United States and Canada at that association's annual convention in February 1914. In this speech, Gardner acknowledged that "the presence of [white lead] dust in the atmosphere of a room is very dangerous to the health of the inmates" and that "[l]ead poisoning may occur through inhalation of [lead] dust . . . ."

Despite this evidence of the toxic properties of white lead, the main use for white lead in the 20th century was as a pigment for paint.[14] NL, SWC, and ConAgra's predecessor, Fuller, were among the handful of companies that manufactured white lead carbonate pigments during the 20th century, and all three of them used white lead carbonate pigment to make paint. NL, SWC, and Fuller were all leaders in the lead paint industry, and they knew at that time that lead dust was poisonous. They were also aware that lead paint "powders and chalks" "soon after it is applied" and routinely produces lead dust after a couple of years.

In 1922, NL, SWC, and Fuller were making white lead carbonate pigment, using it in their paints, and promoting white lead pigment in paint for use on and in residential homes. Sales of white lead peaked in 1922. There was a decrease in the use of lead paint in the 1920s and early 1930s. By 1944, during World War II, the use of lead paint for residential interiors had declined to a low level.

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[14] Plaintiff's experts defined "lead-based paint" as either paint containing lead pigment or paint that was "either considered 100 percent or 70 percent pure white lead . . . or alternatively mixed paint with . . . 'high-lead content.'"

NL manufactured white lead carbonate pigment from 1891 to 1978, and it had manufacturing facilities in San Francisco and Los Angeles that manufactured white lead carbonate pigments in California between 1900 and 1972. It sold those pigments to California paint manufacturers, used them in its own paint products sold in California, and advertised and promoted paint products containing those pigments for residential use within the 10 jurisdictions during that same period. NL "kept up with the medical literature" about lead poisoning. NL's 1912 annual report acknowledged that lead dust was a "danger to the health" of workers exposed to it in the making of white lead. By the mid to late 1920s, NL knew that children who chewed on things painted with lead paint could get lead poisoning and die from it. Nevertheless, NL's lead paints were marketed for residential use and sold in and advertised in the 10 jurisdictions between 1900 and 1972. NL produced a handbook for consumers in 1950 that instructed them to use lead paint on the interiors of their homes.

ConAgra's predecessor, Fuller, manufactured white lead carbonate pigment from 1894 until at least 1958. Fuller manufactured white lead carbonate pigment at its San Francisco factory until 1898, when it moved its factory to South San Francisco. At this factory, Fuller refined white lead carbonate and was a "major producer" of lead paint. Fuller also had a plant in Los Angeles. Fuller's lead paints were sold at its own stores and by independent dealers in all 10 jurisdictions between 1894 and 1961.[15] Fuller knew that lead dust was poisonous. In 1919, an article about Fuller's South San Francisco plant noted that lead dust is poisonous.

SWC began manufacturing paints containing white lead carbonate pigments in 1880. SWC's internal publication, The Chameleon, published an article in 1900 that acknowledged the many dangers of lead paint. It stated: "A familiar characteristic of white lead is its tendency to crumble from the surface, popularly known as chalking"; "It is also familiarly known that white lead is a deadly cumulative poison"; and "This noxious quality

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[15] Fuller also produced and sold non-lead paints.

becomes serious in a paint that disintegrates and is blown about by the wind." In 1910, SWC bought a lead mine, which it utilized to manufacture white lead carbonate pigment from 1910 to 1947 for use in its own paints. SWC stopped manufacturing white lead carbonate in 1947, but it continued to make lead paint until 1958.[16] SWC had plants in Emeryville and later in Los Angeles that manufactured paint containing white lead carbonate. SWC continued to sell lead paint until 1972. SWC removed all lead from its residential paints by the end of 1972.

Two trade associations, the Lead Industries Association (LIA) and the National Paint, Varnish, and Lacquer Association (NPVLA) promoted the use of lead paint. Fuller, NL, and SWC were members of both the LIA and the NPVLA. The LIA, which was created in 1928, promoted the use of white lead pigments in residential paint by sponsoring two advertising campaigns, the Forest Products Better Paint campaign and the White Lead Promotion campaign, in the first half of the 20th century. The LIA knew that white lead was being attacked from "a health standpoint," and these campaigns were designed to increase the consumption of lead.

The LIA provided its members with information about lead hazards and lead poisoning that was available in medical and scientific literature at the time. NL was present at a 1930 LIA board of directors meeting at which a 1930 article about lead poisoning of babies and children from chewing lead paint off of cribs was discussed. The article, which ran in the U.S. Daily, a publication "Presenting the Official News" of the government, stated that lead poisoning from "chewing paint from toys, cradles, and woodwork" was "a more frequent occurrence" than previously thought and noted that even a small amount of lead could kill a child. The article also noted that "[c]hildren are very susceptible to lead" and that the "most common sources of lead poisoning in children are paint on various objects within reach of a child and lead pipes . . . ."

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[16] Some of SWC's paints did not contain white lead pigment.

In 1934, the LIA launched its Forest Products campaign, which promoted lead paint for interior residential use. At a 1935 LIA annual meeting, it was acknowledged that childhood lead poisoning disproportionately affected poor and minority children and that there were thousands of cases annually. Yet the LIA fought against the imposition of regulations on lead. A 1937 LIA conference on lead poisoning was attended by representatives from NL and SWC, and Fuller received a transcript of the conference. Both industrial lead poisoning and childhood lead poisoning were discussed at the 1937 conference. There was discussion of research that showed it was nearly impossible to get rid of lead once it got into a child's body. Attendees at the conference were asked by the head of the LIA not to discuss what they learned at the conference in order to avoid unfavorable publicity connecting lead paint to lead poisoning. The LIA's Forest Products campaign continued through 1941.

The NPVLA, unlike the LIA, represented paint manufacturers regardless of whether they used lead pigments.[17] The NPVLA ran advertising campaigns promoting paint throughout the first half of the 20th century. One was called Save the Surface in 1920 and 1921. The other was called Clean Up Paint Up and was ongoing in 1949. All three companies were involved in both advertising campaigns. Neither of the NPVLA's campaigns distinguished between lead paint and non-lead paint, but these campaigns included advertisements promoting all three companies' lead paint products.

Lead paint was banned in the United States in 1978. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 302 (*Santa Clara I*).) In 1991, the Centers for Disease Control (the CDC) set the "level of concern" for lead at a blood lead level (BLL) of 10 mcg/dL.[18] In 2012, the CDC replaced this standard with a "reference

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[17] Fuller was a member of the NPVLA from 1933 to 1962. NL was an NPVLA member from 1933 to 1977. SWC was a member of the NPVLA from 1933 to 1981.

[18] The impact of blood lead levels below 10 mcg/dL was not well understood until 2005.

value" of 5 mcg/dL, which represents the top 2.5 percent of BLLs in children under the age of five. "[T]he reference value simply denotes the worst or the highest exposed children in a population." At that point, national data reflected that 5.3 percent of children living in pre-1950 housing had BLLs exceeding that value, while only 0.4 percent of children living in post-1978 housing had BLLs exceeding that value.

In 1995, the California Legislature enacted the Childhood Lead Poisoning Prevention Act of 1991. (Health & Saf. Code, §§ 105275, 124125; Stats. 1995, ch. 415, § 8.) This act created the Childhood Lead Poisoning Prevention Program (CLPPP). (Health & Saf. Code, § 124125.) The Childhood Lead Poisoning Prevention Branch (CLPPB), a division of California's Department of Public Health, was accorded the role of coordinating the state's approach to childhood lead exposure and childhood lead poisoning. The CLPPB devotes its resources to outreach, education, case management programs to track those who have been lead poisoned or exposed to lead, and programs to address lead hazards. The CLPPB also contracts with and supervises 43 county CLPPPs.

The CLPPB focuses on children who are one or two years old. Health care providers are required to order that a child be screened for lead poisoning at age one and at age two if "the child receives services from a publicly funded program for low-income children." (Cal. Code Regs., tit. 17, § 37100.) Medical laboratories are required to report all BLLs to the CLPPB. (Health & Saf. Code, § 124130; Stats. 2002, ch. 931, § 11.) The CLPPB considers it a "case" of lead poisoning if a child's BLL exceeds 19.5 mcg/dL or persistently exceeds 14.5 mcg/dL. In such cases, a public health nurse and an environmental health specialist visit the child's home to try to determine potential sources of the lead poisoning.

National average BLLs have declined precipitously since the 1970s, falling by about 90 percent. In 1980, it was estimated that 88.3 percent of children had BLLs in excess of 10 mcg/dL. By 2008, it was estimated that less than one percent of children had BLLs over 10

mcg/dL.[19] Nevertheless, in 2010, around 22,000 children under the age of six in California had BLLs over 4.5 mcg/dL. And at the time of trial in 2013, California had more than 2,000 children with BLLs over 10 mcg/dL and more than 15,000 additional children with BLLs over 5 mcg/dL. Children in California with BLLs over 9.5 mcg/dL represented 0.35 percent of California's children.[20]

Children in the 10 jurisdictions are continuing to be exposed to lead from the lead paint in their homes and to suffer deleterious effects from that lead. Although only a small percentage of the children in these jurisdictions are screened for lead, thousands of children are found to have BLLs of concern each year.

Lead poisoning from lead paint is "the number one environmental children's health issue in Alameda County." The primary cause of lead poisoning in Alameda County is lead paint. About 75 percent of Alameda County's homes are pre-1980, which amounts to 430,000 units. Nearly 174,000 of those units are pre-1950. Alameda County is able to screen only 46 percent of the children under the age of six who are poor and live in pre-1978 homes. Alameda County's CLPPP opens a case only when there is a lead-poisoned child with a BLL of 20 mcg/dL or two BLLs of 15 mcg/dL. In 2012, 14 children met that standard in Alameda County. That triggers an investigation of the home and education of the parents about sources of exposure. There is no funding for remediation. Alameda County's CLPPP also tries to do outreach and education to families with children who have BLLs of 5 mcg/dL or higher,[21] but there is no funding for dealing with these children. In 2010, there were 14 children in that category.

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[19] The prevalence of elevated BLLs in children under the age of six in California appeared to have declined 60 percent from 2003 to 2010.

[20] Because the laboratories doing the tests lack the ability to report precise results, BLLs of 4.5 are rounded up to 5 and BLLs of 9.5 are rounded up to 10.

[21] The limits of detection do not permit such precise measurement, so the CLPPP actually provides these services when the BLL is over 4.5 mcg/dL.

for "inside" use.[43] In addition, SWC participated in the LIA's Forest Products campaign from 1937 to 1941, which promoted lead paint for interior residential use and particularly for use on doors and window frames.

SWC had the requisite knowledge in 1900 of the public health hazard posed by lead paint, but it nevertheless continued to promote lead paint for interior residential use thereafter. This evidence supports the trial court's finding that SWC engaged in the requisite wrongful promotion.

4. Causation

Defendants contend that plaintiff did not produce substantial evidence that *their* promotions of lead paint for interior residential use were a substantial factor in *causing* the nuisance that the trial court required them to abate. First, they contend that there was no evidence that their promotions actually had an impact on the use of lead paint on residential interiors. Second, they contend that their wrongful promotions were too remote from the current presence of any public health hazard created by interior residential lead paint, which, they claim, is largely due to owner neglect, renovations, intervening actors (architects, painters, etc.), and repainting that has taken place in the interim. Third, they argue that, because they did not promote lead paint for interior residential use after 1950, they could not be held responsible for use of lead paint on residential interiors of homes built after 1950. The trial court's judgment required defendants to remediate interior lead paint in all homes built before 1980, even though most of those homes were built after 1950. Fourth, they maintain that there was no evidence that their promotions of lead paint

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[43] Although many of the advertisements for SWC paints were placed by hardware stores or other retailers, SWC paid half of the cost of advertising by its authorized dealers, so these advertisements may properly be attributed to SWC. A 1924 lumber store advertisement in Monterey for Monarch lead paint suggested that it could be used for interiors. However, the stipulation between SWC and plaintiff was that this paint contained lead between 1925 and 1930, which does not include 1924 when this advertisement was placed.

for interior residential use had a causal connection to the water leaks and soil lead that the court ordered them to remediate. Fifth, defendants claim that plaintiff was required to show that their individual lead paints are currently present in a large number of homes in the 10 jurisdictions. Sixth, they argue that due process requires that their liability for remediation be proportionate to their individual contributions.

Causation is an element of a cause of action for public nuisance. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542.) "A connecting element to the prohibited harm must be shown." (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988 (*Firearm Cases*).) The parties agree that the causation element of a public nuisance cause of action is satisfied if the conduct of a defendant is a substantial factor in bringing about the result. (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359 [applying substantial factor standard in a public nuisance action].) "'The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.' [Citation.] Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor' [citation], but a very minor force that does cause harm is a substantial factor [citation]." (*Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79.)

a. Impact and Remoteness

In this case, there was plenty of evidence that defendants' affirmative promotions of lead paint for interior residential use played at least a "minor" role in creating the nuisance that now exists.

First, all three defendants participated in the LIA's Forest Products campaign. The Forest Products campaign began in 1934. In 1935, the LIA reported that its Forest Products campaign had resulted in some manufacturers of leadless paints "changing their formulas to include lead." In 1939, the LIA reported to its members that, as a result of the Forest Products campaign, (1) "[a]ll the principal producers of soft and hard lumber in the United States . . . specify white lead or high grade prepared paint which contains white lead"

through the "distributi[on of] painting instruction leaflets (2,000,000 copies)"; (2) "[s]ome paint companies have increased the lead content of their paint"; and (3) "sash and door manufacturers" would be producing "20,000,000 labels to be affixed to nearly all the sash and doors in the United States, featuring the use of white lead and high-grade prepared paint." In 1941, the LIA reported that the benefits of the Forest Products campaign were continuing. "Lumber associations continued distributing, at their own expense, thousands of painting leaflets recommending white lead or the highest grade prepared paints to be used on their products" and that the "National Door Manufacturing Association" was "the latest to use painting leaflets" to promote the use of white lead. The lumber manufacturers were continuing to include "painting instruction leaflets" with their lumber products. Since lead paint on doors and windows is one of the most hazardous uses for children due to the dust created by their friction surfaces, this campaign played a significant role in creating the nuisance that now exists.

Second, both NL and Fuller gave consumers of their lead paints explicit instructions to use those paints on residential interiors. Fuller's 1931 brochure for its lead paint contained "Directions for Use" instructing consumers to use this lead paint for residential interiors. Since Fuller's advertisements frequently suggested that consumers obtain brochures from a Fuller dealer, the brochure's "Directions for Use" constituted instructions to all those who purchased Fuller's lead paint to use it for residential interiors. NL produced its 1929 paint book, which promoted lead paint for interior residential use, and NL published its 1950 "Handbook on Painting," which explicitly recommended that consumers use white lead paint on interior surfaces.

In sum, by persuading window and door manufacturers to attach written recommendations to all windows and doors that lead paint should be used on those windows and doors, *all three defendants* certainly played a significant role in causing lead paint to be used on at least some of those windows and doors. Further, NL and Fuller, by explicitly instructing consumers to use their lead paints on residential interiors, played an even more

direct role in causing lead paint to be used in such a manner. Again, the trial court could reasonably infer that at least some of those who were the targets of these recommendations heeded them. That is all that the substantial factor test requires.

We cannot credit defendants' claim that there was no evidence that their promotions were even "a very minor force"—"a substantial factor"—in causing the presence of lead paint on residential interiors in the 10 jurisdictions. The LIA's extensive advertising campaigns, in which all three defendants participated, affirmatively promoted to painters, architects, retailers, and consumers the use of lead paint on residential interiors, and each defendant also individually promoted to consumers lead paint for use on residential interiors in the 10 jurisdictions. The LIA judged its promotional campaigns to be a success, and the fact that lead paint remains in place on residential interiors in many homes throughout the 10 jurisdictions decades after all of these promotions ceased reflects that this belief was accurate. We find reasonable the inference that each individual defendant's promotion of lead paint for interior residential use, both through the 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 in a substantial number of homes in the 10 jurisdictions.

Defendants also contend that their wrongful promotions were too remote from the current hazard to be its "legal cause." They claim that, due to the lapse of time, this hazard is more closely attributable to owner neglect, renovations, painters, architects, and repainting. "A tort is a legal cause of injury only when it is a substantial factor in producing the injury." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) "'"'Legal cause' exists if the actor's conduct is a 'substantial factor' in bringing about the harm and there is no rule of law relieving the actor from liability. [Citations.]"' [Citations.] '"The doctrine of proximate cause limits liability; i.e., in certain situations where the defendant's conduct is an actual cause of the harm, he will nevertheless be absolved because of the manner in which the injury occurred."'" (*Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 665-666.)

"'Proximate cause involves *two* elements.' [Citation.] 'One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event.' [Citation.] . . . [¶] By contrast, the second element focuses on public policy considerations. Because the purported causes of an event may be traced back to the dawn of humanity, the law has imposed additional 'limitations on liability other than simple causality.' [Citation.] 'These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy.' [Citation.] Thus, 'proximate cause' "is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct."'" (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.) "[T]here is no bright line demarcating a legally sufficient proximate cause from one that is too remote. Ordinarily the question will be for the [factfinder], though in some instances undisputed evidence may reveal a cause so remote that a court may properly decide that no rational trier of fact could find the needed nexus." (*People v. Roberts* (1992) 2 Cal.4th 271, 320, fn. 11.)

Defendants argue that they should be absolved of responsibility for the current hazard because their wrongful conduct was "too remote" and "attenuated" from the current hazard.[44] This was a question of fact for the trial court. A rational factfinder could have concluded that defendants' wrongful promotions of lead paint for interior residential use were not unduly remote from the presence of interior residential lead paint placed on those residences during the period of defendants' wrongful promotions and within a reasonable period thereafter. The connection between the long-ago promotions and the current

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[44] The cases that defendants rely on provide no support for their argument. For instance, the portion of *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 (*Cabral*) that they cite concerned a duty determination, not a causation determination. (*Cabral*, at p. 779.) The firearm manufacturers in *Firearm Cases*, *supra*, 126 Cal.App.4th 959, unlike defendants, did not affirmatively promote their products for a dangerous use. (*Firearm Cases*, at pp. 988-989.) *City of Chicago v. American Cyanamid Co.* (Ill. App. Ct. 2005) 355 Ill.App.3d 209 was decided under Illinois law.

presence of lead paint was not particularly attenuated. Those who were influenced by the promotions to use lead paint on residential interiors in the 10 jurisdictions were the single conduit between defendants' actions and the current hazard. Under these circumstances, the trial court could have reasonably concluded that defendants' promotions, which were a substantial factor in creating the current hazard, were not too remote to be considered a legal cause of the current hazard even if the actions of others in response to those promotions and the passive neglect of owners also played a causal role. The court could therefore have concluded that defendants' promotions were the "legal cause" of the current nuisance.

b. Post-1950 Homes

We find merit in defendants' claim that the record lacks substantial evidence to support the court's finding that their wrongful promotions were causally connected to post-1950 homes containing interior lead paint built before 1980.

Plaintiff claims that defendants' wrongful promotions "sustained, increased, and prolonged the use of lead paint in homes *throughout the 20th century*." (Italics added.) It asserts that this can be "inferred" from the "sheer breadth of Defendants' promotional activities" and the fact that there is currently lead paint in homes in the 10 jurisdictions. Plaintiff also claims that NL continued to promote lead paint for interior residential use beyond 1950.

First of all, plaintiff did not produce any evidence of an affirmative promotion by NL, SWC, or Fuller of lead paint for interior residential use after 1950. The advertisements that plaintiff identifies as post-1950 NL promotions did not promote *lead* paint for interior residential use. Those advertisements promoted NL's "Dutch Boy" *brand* of paints and identified interior residential use as one of the uses for NL's "Dutch Boy" brand of paints without suggesting that any *lead* paint be used for interiors. NL stipulated at trial that its "White Lead-in-Oil" and three of its "Dutch Boy" paints contained white lead, and plaintiff presented no evidence that any other NL paint product contained lead. Since NL