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OF WISCONSIN

WISCONSIN SUPREME COURT

TYANN MCHENRY,
D'ANGELO SHAYQWAN THOMPSON,
DIJONAE TRAMMELL,
LEAH DAVIS,
NAQUINDA BROOM,
TYRESE BROWN,
JAVION EVANS,
GABRIEL MIRANDA,
TAILIYAH RUSH,
DETARION VALOE,
DEZIREE VALOE, and
ARRIEONA BEAL,

Petitioners,

v.

ARMSTRONG CONTAINERS, INC.,
ATLANTIC RICHFIELD COMPANY,
E.I. DUPONT DE NEMOURS AND COMPANY, and
THE SHERWIN WILLIAMS COMPANY,

Respondents.

APPENDIX TO PETITION TO THE SUPREME COURT OF WISCONSIN TO TAKE JURISDICTION OF AN ORIGINAL ACTION

PART B

Dated: May 10, 2022
Submitted by: Counsel for Petitioners
(as identified on following pages)

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EXHIBIT M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GLENN BURTON, JR.,
Plaintiff,

v. **Case No. 07-C-0303**

AMERICAN CYANAMID CO., et al.,
Defendant.

RAVON OWENS,
Plaintiff,

v. **Case No. 07-C-0441**

AMERICAN CYANAMID CO., et al.,
Defendant.

CESAR SIFUENTES,
Plaintiff,

v. **Case No. 10-C-0075**

AMERICAN CYANAMID CO., et al.,
Defendant.

ERNEST GIBSON,
Plaintiff,

v. **Case No. 07-C-0864**

AMERICAN CYANAMID CO., et al.,
Defendant.

MANIYA ALLEN, et al.,
Plaintiff,

v. **Case No. 11-C-0055**

AMERICAN CYANAMID CO., et al.,
Defendant.

DEZIREE VALOE, et al.,
Plaintiffs,

v. **Case No. 11-C-0425**

AMERICAN CYANAMID CO., et al.,
Defendant.

DIJONAE TRAMMELL, et al.,
Plaintiff,

v. **Case No. 14-C-1423**

AMERICAN CYANAMID CO., et al.,
Defendant.

DECISION AND ORDER

The plaintiffs in these actions allege that they suffered injuries from exposure to white lead carbonate ("WLC"), a dry white powder historically used as the pigment in many lead-based paints. The plaintiffs allege that they were exposed to the paint in the 1990s and early 2000s, while they were children living in homes in Milwaukee, Wisconsin, that had lead-based paint on their surfaces. Because the plaintiffs cannot identify the specific company that manufactured the products that injured them, they could not bring suit until the Wisconsin Supreme Court decided *Thomas ex rel. Gramling v. Mallett*, 285 Wis.2d 236 (2005), in which it adopted a "risk contribution" theory of liability for plaintiffs suing manufacturers of white lead carbonate. The risk-contribution theory modifies the ordinary rule in tort law that a plaintiff must prove that a specific defendant's conduct caused his injury. It instead seeks to apportion liability among the pool of defendants who could have caused the injury. Using this theory, the plaintiffs seek to hold several manufactures of white lead carbonate (or their successors) liable under theories of

negligence and strict liability for the injuries they suffered from ingesting lead paint particles.

The suits now before me were filed between 2007 and 2011 and involve approximately 170 plaintiffs. I have been presiding over most of these cases since their inception and have been presiding over all of them since 2016, when the lone outlier (*Gibson v. American Cyanamid Co.*, Case No. 07-C-0864) was reassigned to me. Since 2016, much has happened. I have decided various matters through dispositive motion practice, the claims of three plaintiffs have gone to trial, one major defendant reached a settlement with all plaintiffs, and the Seventh Circuit has issued a decision that addresses many of the significant issues in this case.

Before me now are the remaining defendants' motions for summary judgment on the claims of all plaintiffs. Although these motions raise several issues, their predominant theme is that all plaintiffs are now bound by prior adverse rulings made by the Seventh Circuit and by me. The defendants contend that, under these prior rulings, no plaintiff may proceed to trial on his or her claims against any defendant. The plaintiffs do not dispute that, if the prior rulings bind all plaintiffs, then the defendants are entitled to summary judgment. However, the plaintiffs urge me not to apply those rulings to plaintiffs whose claims have yet to be tried. The plaintiffs ask me to reconsider a key ruling that I made when deciding an earlier motion for summary judgment that relates to whether the defendants had a duty to warn about the dangers of white lead carbonate. In the alternative, the plaintiffs argue that I may not apply this ruling to those of them whose individual claims have not been explicitly addressed through dispositive motion practice or at trial.

As discussed below, I conclude that my duty-to-warn ruling will stand and that it binds all plaintiffs under the doctrines of law of the case and issue preclusion. For this reason, the defendants are entitled to summary judgment on all claims.

I. BACKGROUND

A. Prior Proceedings

The present litigation commenced when Glenn Burton, Jr., filed a complaint in Milwaukee County Circuit Court against eight manufactures of white lead carbonate. In early 2007, the defendants removed that case to this court under the diversity jurisdiction, and it was assigned to me and given Case Number 07-C-0303. Around the same time, two other cases were filed in state court and removed here and assigned to other judges of this court. The plaintiffs in those cases are Ravon Owens (No. 07-C-0441) and Ernest Gibson (No. 07-C-0864). The Owens case was quickly reassigned to me after the parties refused to consent to the exercise of jurisdiction by a magistrate judge. The Gibson case would remain pending before another judge of this court until 2016, when it was reassigned to me.[1]

In 2010 and 2011, plaintiffs represented by the same counsel as Burton, Owens, and Gibson began filing complaints directly in this court. In early 2010, Cesar Sifuentes (No. 10-C-0075) filed a complaint in this court, and his case was assigned to me. In 2011, over 160 individuals joined together as plaintiffs and filed a single complaint against the manufacturers of white lead carbonate. In that action, *Maniya Allen, et al. v. American*

[1] An eighth case, *Stokes v. American Cyanamid Co., et al.*, No 07-C-0865, was filed in state court and removed here in 2007. However, that case was dismissed in 2016, and therefore I will not discuss it further.

Cyanamid Co., et al., No. 11-C-1155, the plaintiffs indicated on their civil cover sheet that the case was related to the prior cases already pending before me. Under this court's local rule regarding related cases, *see* Civ. L.R. 3, the case was directly assigned to me. Also in 2011, Deziree and Detareion Valoe (No. 11-C-0425) filed a complaint against the manufacturers of white lead carbonate and indicated that it was related to the other lead-paint cases; it, too, was assigned to me. The final case was filed by Dijonae, Ty'Jai, and Jaquan Trammell. These three plaintiffs were originally part of the *Allen* action, but the parties agreed to sever their claims into a separate suit to cure a jurisdictional issue that arose because the Trammells were citizens of the same state as one of the defendants. When the severance occurred in 2014, the new case was assigned to me (Case No. 14-C-1423).

By 2016, all cases were assigned to me and being administered jointly as a single litigation, even though the separate case numbers were not formally consolidated for all purposes under Federal Rule of Civil Procedure 42(a). The plaintiffs were all represented by the same counsel and waged a coordinated campaign. In April 2016, I entered a case management order under which the claims of three plaintiffs—Burton, Owens, and Sifuentes—were to be prepared for trial first. (ECF No. 352 in 07-C-0303.) These are the "first wave" plaintiffs. The same order contemplated a second wave of cases to be prepared for trial, but it did not identify the specific plaintiffs to be included in that wave.

By 2018, the defendants had filed motions for summary judgment on the claims of the first-wave plaintiffs. The claims of those plaintiffs (and all 160+ plaintiffs, for that matter) were for negligence and strict liability. To satisfy certain elements of both their negligence and strict-liability claims, the plaintiffs sought to establish that the

manufacturers of white lead carbonate had a duty to warn consumers about the dangers of ingesting their product. With respect to negligence, the plaintiffs argued that the defendants' failure to warn resulted in a breach of a legally recognized duty. With respect to strict liability, the plaintiffs argued that the failure to warn amounted to a product defect.

In moving for summary judgment, the defendants[2] argued that the legal standard for determining whether they had a duty to warn was the same for both the negligence and the strict-liability claims. The defendants further argued that, under this single standard, manufacturers of white lead carbonate had no duty to warn the plaintiffs or their caregivers about the dangers of lead-based paint because, by the time the plaintiffs were living in their homes in the 1990s and early 2000s, the public was well aware of those dangers. This public knowledge, the defendants argued, gave them reason to believe that those who consumed its products would realize its dangerous condition. Under Wisconsin law, a defendant who has reason to believe that the dangerous condition of its product would be known to consumers cannot be liable for failing to provide a warning. *See Strasser v. Transtech Mobile Fleet Serv., Inc.*, 236 Wis. 2d 435, 460–61 (2000) (quoting Restatement (Second) of Torts, § 388 (1965)).

When I decided the defendants' motions for summary judgment on the claims of the first-wave plaintiffs, I separated the duty-to-warn issue in the negligence context from the duty-to-warn issue in the strict-liability context. *See Burton v. American Cyanamid*, 334 F. Supp. 3d 949, 961–67 (E.D. Wis. 2018). With respect to negligence, I stated that, to survive summary judgment, "each plaintiff must establish that the defendant

[2] The arguments I describe here were made primarily be defendant Sherwin-Williams Co. However, all defendants would eventually adopt Sherwin-Williams' position.

manufacturers owed a duty to that plaintiff to warn him or her (or his or her parents and caregivers) of the risks associated with [white lead carbonate] when used for residential paint." *Id.* at 961. I also recognized that, under Wisconsin law, a defendant who has "reason to believe" that consumers of its product "will realize its dangerous condition" does not have a duty to warn. *Id.* I then concluded that the plaintiffs could not satisfy their burden to prove that the defendants "'had no reason to believe' that plaintiffs or their caregivers would realize that the pigment on their walls was dangerous." *Id.* I reasoned as follows:

> [A]s plaintiffs acknowledge, Sherwin Williams and other paint manufacturers had issued product warnings since at least 1955, while federal, state and local governments have warned of risks of lead in the homes since the 1970s. Defendants therefore had ample reason to believe that persons residing in homes with older paint would be aware of the toxicity of the lead compounds possibly in the paint, and of the various mechanisms by which that lead might be ingested. Deposition testimony of plaintiffs' witnesses supports this point, as parents or caregivers of each plaintiff testified that they knew, before each plaintiff's lead exposure, that children should not eat paint chips because of the risk of lead exposure. I therefore conclude that the defendants did not owe a duty to plaintiffs or their caregivers to warn them directly of the risks associated with [white lead carbonate] in residential paint. Plaintiffs are therefore foreclosed from pursuing negligence claims that rely on a duty to warn theory.

Id. (citations omitted).[3]

With respect to strict liability, I reached a different result. I first recognized that, to prevail on their strict-liability claims, the plaintiffs had to produce evidence "sufficient to raise a question of fact as to whether the hazards of WLC in paint were 'dangerous to an

[3] I also concluded that although the plaintiffs were foreclosed from pursuing negligence claims based on the lack of warnings, the plaintiffs could "continue to pursue negligence claims based on the general duty of ordinary care." *Id.* The Seventh Circuit would later reverse this part of my decision. *See Burton v. E.I. DuPont de Nemours & Co.*, 994 F.3d 791, 817–20 (7th Cir. 2021).

extent beyond that which would be contemplated by the ordinary consumer who purchases it.'" *Id.* at 962. Crucially, I determined that "[t]he 'ordinary consumer' in question here must be understood as the ordinary consumer who purchased or used WLC or paint containing WLC during the years that Sherwin-Williams made WLC, *i.e.*, 1910–1947." *Id.* Focusing on consumer knowledge in 1910–1947 set the strict-liability claim apart from the negligence claim, which, according to me, depended on consumer knowledge in the 1990s and early 2000s, when the plaintiffs were occupying homes covered with lead paint. Having identified the period of 1910–1947 as the relevant period for strict liability, I then found that the plaintiffs had adduced evidence "sufficient to create a triable question of fact whether ordinary consumers and users of paint during [that period] would have contemplated the risk that deteriorating paint would cause children to be exposed to lead." *Id.* at 963. More specifically, I found that the jury could conclude that, between 1910 and 1947, "the public was not fully informed about lead poisoning and the mechanisms of exposure, and [that] therefore the extent of the risks known to Sherwin-Williams would not have been contemplated by consumers and users of paint at the time." *Id.*

In May 2019, the claims of the three first-wave plaintiffs went to trial against the five defendants remaining in the case at that time. Those defendants were American Cyanamid Co., E.I. du Pont de Nemours and Company, Inc., the Sherwin-Williams Company, Armstrong Containers, Inc., and Atlantic Richfield Company. During the trial, I dismissed American Cyanamid from the case for lack of personal jurisdiction, and so the claims against it were not submitted to the jury. I would later dismiss American Cyanamid from all cases for lack of personal jurisdiction, reasoning that all plaintiffs in all cases were bound by the outcome of the first-wave claims against American Cyanamid under the

doctrine of issue preclusion. (ECF No. 364 in No. 11-C-1155.) The jury found three of the four remaining defendants (DuPont, Sherwin-Williams, and Armstrong) liable for both negligence and strict liability and awarded the plaintiffs $2 million each. Those three defendants appealed.

While the appeal of the result of the first-wave trial was pending, the parties filed motions for summary judgment in the "second wave" cases. By this time, four second-wave plaintiffs had been chosen. These plaintiffs were three of the 160 plaintiffs from *Allen* (Latoya Cannon, D'Angelo Thompson, and Tyann McHenry) and one of the three plaintiffs from *Trammell* (Dijonae Trammell). As is relevant here, the defendants argued that summary judgment should be granted on the second-wave plaintiffs' negligence claims based on the duty to warn for the same reason that it was granted on the same claims of the first-wave plaintiffs, namely, because the plaintiffs could not produce evidence from which a jury could reasonably infer that the defendants had no reason to believe that the plaintiffs or their caregivers were unaware of the dangers of lead paint in the 1990s and early 2000s. (*See* Sherman-Williams Br. in Supp. at 4–5, ECF No. 801 in No. 11-C-0055.) In response to this argument, the second-wave plaintiffs conceded that the defendants were entitled to summary judgment on their claims for negligent failure to warn. Specifically, the plaintiffs included this footnote in their brief in opposition to the motion for summary judgment:

> Sherwin-Williams initially argues that Plaintiffs have no claim for negligent failure to warn. (See SW MSJ at 4-5.) Well aware of this Court's previous order, *see Burton v. American Cyanamid*, 334 F. Supp. 3d 949, 961 (E. D. Wis. 2018) ("*Burton II*"), Plaintiffs concede that they do not have surviving claims for negligent failure to warn.

(Pls.' Br. in Opp. at 5 n.8, ECF No. 914 in No. 11-C-0055.) In my decision on the motion for summary judgment in the second-wave cases, I reiterated my conclusion from the first-wave cases that, given the public knowledge of the dangers of lead paint in the 1990s and early 2000s, the plaintiffs were foreclosed from pursuing negligence claims that relied on a duty-to-warn theory. *See Allen v. American Cyanamid*, 527 F. Supp. 3d 982, 996–97 (E.D. Wis. 2021). However, I continued to draw a distinction between the duty to warn under negligence and the duty to warn under strict liability. Thus, as I did in the first-wave cases, I allowed the plaintiffs to proceed on their strict-liability failure-to-warn claims based on the possibility that consumers in the period 1900 to 1950 were unaware of the dangers posed by lead-based paint. *See id.* at 995–96.

In April 2021, shortly after I decided the motions for summary judgment on the claims of the second-wave plaintiffs, the Seventh Circuit issued its decision in the appeal involving the claims of the first-wave plaintiffs. *See Burton v. E.I. du Pont de Nemours & Co.*, 994 F.3d 791 (7th Cir. 2021). This decision contains several holdings that are relevant to the present motions for summary judgment. However, the most significant holding for the future of this litigation is the court's rejection of my conclusion that the legal standard governing claims for failure to warn in the strict-liability context is different from the standard governing claims for failure to warn in the negligence context. The court concluded that, for purposes of both negligence and strict liability, the necessity of warnings turned on "what the ultimate consumer (i.e., the plaintiffs or their caregivers) knew, rather than what consumers in general knew at the time the manufacturer released the product into the market." *Id.* at 823. The court found that I "legally erred in finding that the defendants had a duty to warn for purposes of strict liability after ruling at summary

judgment that they had no duty to warn the plaintiffs on their negligence claims." *Id.* Further, the court noted, the plaintiffs did not appeal my ruling that the defendants had no duty to warn for purposes of the negligence claims. *Id.* The court thus held that my ruling on the negligence claims "compels judgment as a matter of law for [the defendants] on the strict liability claims." *Id.*

B. Current Motions

After the Seventh Circuit remanded the claims of the first-wave plaintiffs to this court, the remaining defendants filed renewed motions for summary judgment based on the court's rulings. These motions apply to all plaintiffs in all seven cases. However, distinguishing among the various "waves" of plaintiffs is still relevant, as the reasons the defendants offer for granting summary judgment vary based on wave.

Regarding the first wave, only three defendants remain: Sherwin-Williams, Armstrong, and DuPont. The Seventh Circuit held that Sherwin-Williams is entitled to judgment as a matter of law on all claims that went to trial during that wave. Thus, the first-wave claims against it are no longer viable, and all that remains is to enter judgment in its favor. The Seventh Circuit held that Armstrong is entitled to judgment as a matter of law on the strict-liability claims and a new trial on the negligence claims, and that DuPont is entitled to a new trial on both claims. Armstrong and DuPont now move for summary judgment on the claims that were remanded for a new trial, and the first-wave plaintiffs have not opposed summary judgment on such claims.

Regarding the second wave, all four defendants (Sherwin-Williams, Armstrong, DuPont, and Atlantic Richfield) contend that they are entitled to summary judgment on all claims within that wave. Their motions are based primarily on my determination in the

prior motion for summary judgment in the second-wave cases that manufacturers of white lead carbonate had no duty to warn modern consumers about the dangers of lead-based paint because, by the 1990s and early 2000s, those dangers were well known. Although my determination originally affected only the plaintiffs' negligence claims, the Seventh Circuit's intervening decision—which holds that the existence of a duty to warn in both the negligence and the strict-liability contexts must be determined based on the knowledge of consumers in the 1990s and early 2000s—makes my determination dispositive of both claims. And the second-wave plaintiffs do not dispute that, if my prior determination is left intact, then the defendants would be entitled to summary judgment on all second-wave claims. However, the second-wave plaintiffs ask me to reconsider my prior determination that modern consumers were sufficiently aware of the dangers of lead-based paint such that no warning from the defendants was required.

The plaintiffs' request for reconsideration is based on evidence they produced for the first time in opposition to the current motions for summary judgment. The plaintiffs contend that this evidence would allow a reasonable jury to find that, although modern consumers may have been aware of some of the dangers of lead-based paint, they were not aware of a specific danger involving lead dust. Here, the plaintiffs submit evidence suggesting that, while modern consumers were generally aware that lead was toxic and that the ingestion of paint chips containing lead could lead to lead poisoning, such consumers were not aware of the dangers posed by the lead dust that formed when paint on the home's surfaces deteriorated. Unlike paint chips, lead dust was virtually invisible, and studies in the 1970s began to show that young children picked up and carried the dust to their mouths during normal hand-to-mouth activities. The plaintiffs contend that,

because in the 1990s and early 2000s the dangers of lead dust were not as well publicized as the dangers of lead chips or the general toxicity of lead-based paint, a jury could reasonably find that the defendants had reason to know that modern consumers required warnings to fully understand the dangers of white lead carbonate.

As for the remaining plaintiffs—that is, all plaintiffs other than those in the first and second waves—the defendants move for summary judgment based on the doctrines of law of the case and issue preclusion.[4] With respect to each doctrine, the defendants focus on my determination involving the first- and second-wave claims that consumers in the 1990s and early 2000s did not require warnings about the dangers of lead paint. The doctrine of law of the case would apply to any plaintiff deemed to be part of the same "case" as the plaintiffs in the second wave.[5] Because the claims of some plaintiffs from *Allen* and *Trammell* were litigated during the second wave, law of the case potentially applies to all 150+ remaining plaintiffs in *Allen* and the two remaining plaintiffs in *Trammell*. The doctrine of issue preclusion, in turn, would apply to the plaintiffs in cases that were not part of the second wave. Only three plaintiffs fall into this category: the two plaintiffs in *Valoe* and the sole plaintiff in *Gibson*.[6]

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[4] With respect to all claims, the defendants also move for summary judgment on other grounds, such as that the plaintiffs' new evidence would not permit a jury to find in their favor on the duty-to-warn issue. However, because the defendants will prevail based on law of the case and issue preclusion, I do not discuss the other grounds raised in their motions.

[5] The plaintiffs in the first wave each brought their own case under separate case numbers, and so there are no remaining plaintiffs in those cases. Thus, law of the case is not relevant to the first wave.

[6] An argument could be made that law of the case applies to the plaintiffs in *Valoe* and *Gibson*, and that issue preclusion applies to the remaining plaintiffs in *Allen* and *Trammell*. However, for purposes of this decision, I will assume that the binding effect of my duty-

The remaining plaintiffs contend that I may not use law of the case or issue preclusion to bar them from relitigating the issue of whether the defendants had a duty to warn consumers in the 1990s and early 2000s of the dangers of white lead carbonate. I discuss their specific arguments below.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is required where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, I view the evidence in the light most favorable to the non-moving party and must grant the motion if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

B. Remaining First-Wave Issues

Because the Seventh Circuit remanded the claims of the first-wave plaintiffs for further proceedings, I must tie up the loose ends that remain in that wave. First, the Seventh Circuit held that Sherwin-Williams was entitled to judgment on all first-wave claims, and therefore I will direct entry of judgment in its favor on those claims. Second, although the Seventh Circuit remanded certain first-wave claims against DuPont and Armstrong for a new trial, the first-wave plaintiffs have not opposed these defendants' renewed motions for summary judgment. Accordingly, I will grant those motions and direct entry of judgment on all remaining claims of the first-wave plaintiffs.

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to-warn determination could apply to the remaining plaintiffs in *Allen* and *Trammell* only through law of the case, and that it could apply to the plaintiffs in *Valoe* and *Gibson* only through issue preclusion.

C. Second-Wave Plaintiffs: Motion for Reconsideration

The second-wave plaintiffs ask that I reconsider my decision at summary judgment that the defendants did not have a duty to warn consumers in the 1990s and early 2000s about the dangers of white lead carbonate. *See Allen*, 527 F. Supp. 3d at 996–97. These plaintiffs cite Federal Rule of Civil Procedure 54(b), which provides that any order or decision "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Although this rule grants me the power to reconsider any nonfinal order, *see Cameo Convalescent Ctr., Inc. v. Percy*, 800 F.2d 108, 110 (7th Cir. 1986), and although the summary-judgment order at issue here is nonfinal for purposes of Rule 54(b), reconsideration is a power to be used sparingly and only in appropriate circumstances. As the Seventh Circuit has stated, "[m]otions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996).

In seeking reconsideration, the second-wave plaintiffs argue that "[t]he facts supporting Defendants' duty to warn of the hidden dangers of lead dust justify relief from the Court's summary judgment ruling." (Pls.' Br. in Opp. at 25, ECF No. 1108 in No. 11-C-0055.) The problem with this argument is that the plaintiffs did not present the facts on which they now rely to the court during proceedings on the original motion for summary judgment. During the initial round of summary judgment in the second-wave cases, the plaintiffs conceded that consumers in the 1990s and early 2000s were aware of the dangers of lead-based paint and therefore did not require warnings. (Pls.' Br. in Opp. at 5 n.8, ECF No. 914 in No. 11-C-0055.) Having conceded this point, the plaintiffs did not

point me to evidence suggesting that modern consumers might have been unaware of the dangers posed by lead dust. Thus, in my decision, I specifically found that manufacturers of white lead carbonate "had ample reason to believe that persons residing in homes with older paint would be aware of the toxicity of the lead compounds possibly in their paint, *and of the various mechanisms by which that lead might be ingested.*" *Allen*, 527 F. Supp 3d at 997 (emphasis added). Such mechanisms would include ingestion of lead dust. Accordingly, my original decision, which was based on the record compiled at the time and on the arguments that the plaintiffs actually made at the time, was undoubtedly correct. There was no manifest error of law or fact.

Although the plaintiffs now present new evidence regarding the modern consumer's lack of knowledge of the dangers of lead dust, that evidence does not qualify as "newly discovered evidence" for purposes of a motion for reconsideration. Such a motion cannot "be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] summary judgment motion." *Caisse Nationale*, 90 F.3d at 1269. To support a motion for reconsideration based on newly discovered evidence, the moving party must show not only that this evidence was newly discovered or unknown to it until after the original proceeding, but also that it could not with reasonable diligence have discovered and produced such evidence during the original proceeding. *Id.* Here, the second-wave plaintiffs do not argue that the evidence they now present was unknown to them during prior proceedings or that they could not with reasonable diligence have discovered or produced that evidence prior to the summary-judgment phase of the second wave. To the contrary, they concede that "[t]his litigation is and always has been focused on the hidden dangers of [white lead carbonate],

specifically including those presented by invisible household dust." (Pls.' Br. in Opp. at 11, ECF No. 1108 in No. 11-C-0055.) That being the case, the plaintiffs were well-equipped to argue, during the prior round of summary judgment, that the defendants had a duty to warn consumers in the 1990s and early 2000s about the dangers of lead dust. However, the plaintiffs chose not to press this argument, perhaps because they believed that my more favorable ruling on the duty to warn in the strict-liability context would hold up on appeal. The plaintiffs' having made a strategic choice that they wish to change is not grounds for reconsideration. Again, the Seventh Circuit's opinion in *Caisse Nationale* is controlling:

> A party seeking to defeat a motion for summary judgment is required to "wheel out all its artillery to defeat it." Belated factual or legal attacks are viewed with great suspicion, and intentionally withholding essential facts for later use on reconsideration is flatly prohibited. Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion.

90 F.3d at 1270 (citations omitted). Here, the distinction between consumer knowledge of the dangers of lead chips and the dangers of lead dust could have been raised and argued during the pendency of the previous motion. Accordingly, I will not now reconsider that ruling in light of the plaintiffs' belated factual and legal attacks.

The Seventh Circuit held that, for purposes of both negligence and strict liability, the requirement of warnings turns on what the defendants had reason to believe about the knowledge of consumers in the 1990s and early 2000s. *Burton*, 994 F.3d at 821–83. This holding is binding on all plaintiffs as a matter of *stare decisis*. *See Wesbrook v. Ulrich*, 840 F.3d 388, 399 (7th Cir. 2016) (Seventh Circuit interpretation of state law has *stare decisis* effect unless state courts call the interpretation into question). Because I

previously determined that the defendants were not required to warn consumers in that period about the dangers of white lead carbonate—including the dangers of lead dust—and because there are no grounds for reconsidering that determination, it follows that all defendants are entitled to summary judgment on all claims of the second-wave plaintiffs.[7]

D. Remaining *Allen* and *Trammell* Plaintiffs: Law of the Case

The next question is whether my decision, rendered at summary judgment during the second wave, that the defendants did not have a duty to warn consumers in the 1990s and early 2000s about the dangers of white lead carbonate, applies to the remaining plaintiffs in *Allen* and *Trammell* as law of the case. Again, this question arises because the second wave included plaintiffs from *Allen* and *Trammell*, and thus the decision at issue was rendered under the caption for each of those cases.

The term "law of the case" expresses the general practice of courts to refuse to reopen, during later stages of the same case, matters that have already been decided. *See Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995). The Seventh Circuit has described the doctrine as a "presumption, one whose strength varies with the circumstances." *Avitia*, 49 F.3d at 1227. The doctrine is not a straitjacket. *Id.* In general, courts recognize three circumstances that justify departing from the law of the case: (1) discovery of new evidence that the party could not have obtained through reasonable effort earlier, (2) an intervening change in the law, and (3) the earlier decision was clearly erroneous. *Kathrein*

[7] All other pending motions relating to the second-wave plaintiffs will be denied as moot.

v. City of Evanston, Ill., 752 F.3d 680, 685 (7th Cir. 2014); *Vidimos, Inc. v. Wysong Laser Co., Inc.*, 179 F.3d 1063, 1065 (7th Cir. 1999).

At the outset, the remaining plaintiffs in *Allen* and *Trammell* contend that the doctrine of law of the case does not apply to their claims because they were not part of the same "case" as the claims of the second-wave plaintiffs. But this is clearly incorrect. Although the remaining plaintiffs have their own *claims*, they chose to bring those claims within the *cases* of *Allen* and *Trammell*. Specifically, all plaintiffs in *Allen* and *Trammell* elected to take advantage of Federal Rule of Civil Procedure 20(a)(1), which provides that "[p]ersons may join in *one action* as plaintiffs" if certain circumstances are satisfied. (Emphasis added.) In this context, the term "action" is a synonym for "case." *See Case, Black's Law Dictionary* (11th ed. 2019). Thus, all plaintiffs in *Allen* are formally parties to the same case, as are all plaintiffs in *Trammell*.[8]

Beyond the formal meaning of the term "case," it is also fair to bind the remaining plaintiffs in *Allen* and *Trammell* to the prior rulings I made on common questions of law or fact. One of the prerequisites to joinder is that a "question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1). The purpose of permitting joinder when there are common questions is "to enable economies in litigation." *Elmore v.*

[8] To support their argument that they are not subject to law of the case, the plaintiffs cite *Insolia v. Philip Morris Inc.*, 216 F.3d 596 (7th Cir. 2000), for the proposition that "the Seventh Circuit has explicitly held that each plaintiff must be afforded an opportunity to prove his or her own case." (Pls.' Br. in Opp. at 26.) However, *Insolia* does not suggest that each plaintiff whose claims were joined under Rule 20(a)(1) may separately litigate common questions of law or fact. The passage the plaintiffs cite was referring to the possibility of hypothetical future plaintiffs proving matters that the current plaintiffs were unable to prove. *See Insolia*, 216 F.3d at 603 (stating that, while current plaintiffs failed to prove that the ordinary consumer in 1935 and in the early 1950s did not appreciate the health risks of smoking, "[a]nother record in another case might be different").

Henderson, 227 F.3d 1009, 1012 (7th Cir. 2000). Here, the state of consumer knowledge in the 1990s and early 2000s about the dangers of lead paint is one such common question, and I answered that question in my summary-judgment order on the claims of the second-wave plaintiffs.[9] Allowing the remaining 150+ plaintiffs in *Allen* and *Trammell* to separately relitigate this issue as part of their own claims would destroy the efficiency that provided the justification for joinder in the first place. Indeed, when, earlier in this suit, the defendants moved to dismiss or sever the claims in *Allen* as misjoined, the plaintiffs identified the efficiency of litigating the "numerous" common questions of law or fact in a single action as a reason to permit joinder. (Pls.' Br. in Opp. to Misjoinder at 10, ECF No. 100 in No. 11-C-0055; *id.* at 15 (arguing that "judicial resources will actually be conserved and not wasted by maintaining the parties to this case as they are at present")). The plaintiffs even described "[p]roof of the failure to warn elements" as being "particularly conducive" to common resolution. (*Id.* at 14.) Having been permitted to proceed jointly on this question, the plaintiffs cannot now claim that it is unfair to bind them to the common answer. *Cf. Looper v. Cook Inc.*, 20 F.4th 387, 397 (7th Cir. 2021) (noting that, in light of "the common ground among the cases that justifies the use of the MDL [*i.e.*, multidistrict litigation] process in the first place," it would be unfair to allow a party to contradict its prior position on a common issue of law or fact within the MDL).

[9] Technically, I answered that common question in my summary-judgment decision on the claims of the first-wave plaintiffs and then applied that common answer to the second-wave plaintiffs when those plaintiffs did not argue for a different result. But the important point is that the common question has been answered for purposes of the *Allen* and *Trammell* cases.

Having determined that my prior decision regarding the duty to warn consumers in the 1990s and early 2000s about the dangers of white lead carbonate is law of the case for purposes of the *Allen* and *Trammell* cases, I now examine whether one of the three general circumstances that justify departing from the law of the case applies. The first circumstance is discovery of new evidence that the plaintiffs could not have reasonably produced prior to the decision that is law of the case. *See Vidimos*, 179 F.3d at 1065. Here, as I explained in Part II.C, the plaintiffs have not shown that the distinction they now seek to draw between consumer knowledge of the dangers of lead chips and the dangers of lead dust is based on evidence they could not have adduced in opposition to the original motions for summary judgment. Thus, the exception for newly discovered evidence does not apply.

The second circumstance is an intervening change in the law. Here, the plaintiffs point to the Seventh Circuit's decision in the first-wave cases as a potential change in the law or another "special circumstance" that warrants departure from the law of the case. (Pls.' Br. in Opp. at 28–29 & n.11.) But the Seventh Circuit did not change the legal standards that govern whether a manufacturer has a duty to warn for purposes of a negligence claim. Instead, the court applied the same law that I applied. *See Burton*, 994 F.3d at 822 ("In a negligence action, a manufacturer is not liable unless it 'has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition.' *Strasser v. Transtech Mobile Fleet Serv., Inc.*, 236 Wis.2d 435 (quoting Restatement (Second) of Torts § 388 (1965))."). It is true that the Seventh Circuit disagreed with my interpretation of Wisconsin law on the issue of which consumers matter for purposes of determining whether warnings were required in the context of a strict-

liability claim—I said that consumers from 1900–1950 mattered, but the Seventh Circuit held that consumers from the 1990s and early 2000s mattered. *Id.* at 823. But that change in the law does not affect the factual question regarding what consumers in the 1990s or early 2000s knew about the dangers of lead paint. Thus, the intervening decision from the Seventh Circuit does not warrant a departure from the law of the case.

The final circumstance for setting aside the law of the case is when the court is convinced that its earlier ruling was erroneous. *Avitia*, 49 F.3d at 1227 ("A judge may reexamine his earlier ruling (or the ruling of a judge previously assigned to the case, or of a previous panel if the doctrine is invoked at the appellate level) if he has a conviction at once strong and reasonable that the earlier ruling was wrong, and if rescinding it would not cause undue harm to the party that had benefited from it."); *Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 603 (7th Cir. 1993) (doctrine of law of the case does not prevent court from correcting "demonstrable errors"). However, as I explained in Part II.C, my decision could not have been erroneous because the plaintiffs conceded that consumers in the 1990s and early 2000s were aware of the dangers of lead-based paint and therefore did not require warnings. (Pls.' Br. in Opp. at 5 n.8, ECF No. 914 in No. 11-C-0055.) Having conceded this point, the plaintiffs did not point me to evidence suggesting that modern consumers might have been unaware of the dangers posed by lead dust. Thus, my original decision, which was based on the record compiled at the time and on the arguments that the plaintiffs actually made at the time, was undoubtedly correct.

Ultimately, the only reason the plaintiffs can offer for departing from the law of the case is that, given the Seventh Circuit's opinion in the first-wave cases, my determination regarding the knowledge of modern consumers is now dispositive of both the negligence

and the strict-liability claims instead of only the negligence claims. But this change in the significance of the determination is not itself a circumstance that justifies reopening a settled question. Notably, at the time I made the original determination, the issue was not insignificant. The plaintiffs' claims for negligent failure to warn depended on it, and the plaintiffs were not guaranteed a victory on their other negligence claims or on their strict-liability claims. Thus, the plaintiffs had every incentive and opportunity to demonstrate, at the time of summary judgment in the second-wave cases, that a reasonable jury could find that the defendants had reason to believe that consumers in the 1990s and early 2000s were unaware of the dangers of lead dust, even if those same consumers were aware of the dangers of lead paint generally. But instead of developing an argument along those lines, the plaintiffs conceded the issue and focused on other arguments. Although I do not criticize the plaintiffs for adopting this strategy—indeed, that strategy might have given the plaintiffs their best odds of success—a party's desire to change legal strategy during a later stage of the case does not justify a departure from the law of the case. *See Burley v. Gagacki*, 834 F.3d 606, 619 (6th Cir. 2016).

In short, I conclude that the remaining plaintiffs in *Allen* and *Trammell* are bound by my prior determination that the defendants had no duty to warn children or their caregivers in the 1990s and later of the dangers of white lead carbonate, including the dangers of lead dust. *See Allen*, 527 F. Supp. 3d at 997. In light of that determination, the defendants are entitled to summary judgment on such plaintiffs' claims for negligence and strict liability.

E. *Valoe* and *Gibson*: Issue Preclusion

The final question is whether my decision in the second-wave cases regarding the knowledge of modern consumers binds the remaining three plaintiffs: Deziree and Detareion Valoe and Ernest Gibson. These plaintiffs were not formal parties to *Allen* or *Trammell* or any of the first-wave cases, and thus it is at least arguable that the doctrine of law of the case does not bind them to the prior ruling made in those cases. However, the plaintiffs in *Valoe* and *Gibson* share the same interests as the plaintiffs in in *Allen*, *Trammell*, and the first-wave cases, and they are represented by the same attorneys, who have pursued a common strategy across all cases. The defendants argue that, in light of these facts, the plaintiffs in *Valoe* and *Gibson* are bound by my decision in the second-wave cases under the doctrine of issue preclusion.

The doctrine of issue preclusion (formerly known as collateral estoppel), like the doctrine of claim preclusion (formerly known as *res judicata*), determines the preclusive effect of a prior judgment. When the judgment at issue was rendered by a federal court, its preclusive effect is determined by federal common law. *Taylor v. Strugell*, 553 U.S. 880, 891 (2008). However, when the federal court rendered the judgment while sitting in diversity, federal common law incorporates the rules of preclusion that would be applied by the state courts of the state in which the federal court sits. *Id.* at 891 n.4; *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Thus, to determine whether the plaintiffs in *Valoe* and *Gibson* are subject to issue preclusion, I apply Wisconsin law.

Issue preclusion "is a doctrine designed to limit the relitigation of issues that have been contested in a previous action between the same or different parties." *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 687 (1993). When applying the doctrine, "courts

balance competing goals of judicial efficiency and finality, protection against repetitious or harassing litigation, and the right to litigate one's claims before a jury." *Id.* at 688. Under Wisconsin law, a two-step analysis is used to determine whether issue preclusion applies: first, the court asks whether issue preclusion can, as a matter of law, be applied; if so, the court then asks whether the application of issue preclusion would be fundamentally fair. *In re Estate of Rille ex rel. Rille*, 300 Wis. 2d 1, 19 (2007). In the first step, a court must determine "whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." *Id.* at 20. Where, as here, a party seeks to apply issue preclusion against a person who was not a formal party to the prior action, the first step also requires that the court determine whether the person was "in privity with or had sufficient identity of interest" with a person who was a party to that action such that applying issue preclusion would comport with due process. *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 224 (1999). In the second step, a court considers five factors, "which are not exclusive or dispositive," in determining whether application of issue preclusion is fundamentally fair. *Rille*, 300 Wis. 2d at 20.

Before turning to this two-step analysis, I pause to consider whether any "judgment" has been entered in the second-wave cases that could have issue preclusive effect. The plaintiffs do not dispute that such a judgment has been entered, but I raise this issue on my own because a final judgment under Federal Rules of Civil Procedure 54 and 58 has not been entered in the second-wave cases. Thus, my summary-judgment decision in the second-wave cases is not final for purposes of appellate review. However, "it is a mistake to equate the concept of finality for purposes of appellate review with the

concept of finality for purposes of issue preclusion." *Haber v. Biomet, Inc.*, 578 F.3d 553, 557 (7th Cir. 2009). The finality requirement for appellate review ensures that court resources are used efficiently and that the appellate court sees the entire case. *Id.* The finality requirement in issue preclusion also serves efficiency, but in a different way: "by ensuring that parties who have fully and fairly litigated a particular issue (which is expressly resolved and necessary to the outcome) do not receive more than one bite at the apple." *Id.* Courts generally follow the Restatement of Judgments when determining finality for purposes of issue preclusion, which states that "'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Restatement (Second) of Judgments § 13 (Am. Law Inst. 1982); *see Coleman v. Comm'r*, 16 F.3d 821, 830 (7th Cir. 1994) (following this section of the Restatement); *Rille*, 300 Wis. 2d at 24 n.24 ("Wisconsin courts have consistently relied on the Restatement (Second) Judgments for guidance when deciding questions related to issue preclusion.").

Here, I conclude that my determination at summary judgment in the second wave on the issue of modern consumer knowledge of the dangers of white lead carbonate was sufficiently firm to be accorded preclusive effect. That decision was not in any way tentative or uncertain; rather, I rendered it after the parties were fully heard, and I supported the decision with a reasoned opinion. Moreover, the Wisconsin Supreme Court has held that "[a] summary judgment in favor of the defendant is sufficient to meet the requirement of a conclusive and final judgment." *Rille*, 300 Wis. 2d at 24 (quoting *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis.2d 306, 310–11, (1983)). This holding appeared in a case in which the summary judgment was given issue preclusive effect within "the four

corners of the same lawsuit." *Id.* at 21. Thus, the Wisconsin Supreme Court would give preclusive effect to my summary-judgment decision in the second-wave cases even though I have yet to enter final judgment under Rules 54 and 58 on the claims of the second-wave plaintiffs.[10]

Having determined that my decision at summary judgment is final for purposes of issue preclusion, I return to the two-step analysis governing whether that doctrine should be applied. First, I examine whether issue preclusion may be applied as a matter of law. Here, there is no dispute that the issue of whether a jury could reasonably find that consumers in the 1990s and early 2000s were unaware of the dangers of white lead carbonate, such that the defendants were required to issue warnings, was actually litigated and determined at summary judgment in the second-wave cases. There is also no dispute that the determination of this issue was essential to the judgment. Thus, these elements of issue preclusion are satisfied. *See Rille*, 300 Wis. 2d at 20.

The plaintiffs contend that the judgment in the second-wave cases cannot be applied to them because they were not formal parties to those cases. As noted, however, Wisconsin does not require formal identity of parties. Rather, even if the person sought to be precluded was not a party to the prior action, issue preclusion may apply if the person was "in privity with or had sufficient identity of interest" with a person who was a party to that action such that applying issue preclusion would comport with due process. *Paige K.B.*, 226 Wis. 2d at 224. Wisconsin courts have applied this rule to sequential

[10] Even if a final judgment under Rules 54 and 58 were required, it will be entered immediately after this order is docketed, in accordance with my decision regarding law of the case. This underscores that my summary-judgment decision on the duty to warn is sufficiently firm to be accorded preclusive effect.

litigation by related plaintiffs in personal-injury suits. Specifically, in *Jensen v. Milwaukee County Mutual Insurance Co.*, 204 Wis. 2d 231 (Ct. App. 1996), the Wisconsin Court of Appeals held that a husband's litigation of issues arising out of a car accident against the driver of another vehicle and his liability insurer had preclusive effect in a subsequent suit brought by his wife, who was a passenger in the vehicle driven by the husband, against the same driver's insurer. The court noted that the wife had an "obvious interest in the prior proceeding," and it emphasized that her choice of the same counsel who represented her husband showed that she "approve[d] of the tactics and strategy employed in [the prior] action." *Id.* at 239–40.[11]

In the present case, the plaintiffs in *Valoe* and *Gibson* are in a similar position as was the wife in *Jensen*. They had an "obvious interest" in the first- and second-wave cases, in that the plaintiffs were prosecuting claims against the same defendants under identical legal theories in front of the same court and the same judge, who had been managing all cases jointly. Further, the plaintiffs in *Valoe* and *Gibson* are represented by the same counsel as were the first- and second-wave plaintiffs, which shows that they approved of the tactics and strategy employed in the prior action. Indeed, in a prior order, I determined that, due to the identity of interests among all plaintiffs in these related actions, the plaintiffs in *Valoe* and *Gibson* (among others) were bound by issue preclusion

[11] In the absence of guiding decisions by the state's highest court, federal courts sitting in diversity consult and follow the decisions of intermediate appellate courts unless there is a convincing reason to predict the state's highest court would disagree. *Smith v. RecordQuest, LLC*, 989 F.3d 513, 517 (7th Cir. 2021). Here, I see no convincing reason to predict that the Wisconsin Supreme Court would disagree with *Jensen*. To the contrary, the Wisconsin Supreme Court has discussed the holding of *Jensen* and did not suggest that it was wrongly decided. *See Paige K.B.*, 226 Wis. 2d at 228.

to my determination in the first-wave cases that defendant American Cyanamid was not subject to personal jurisdiction in Wisconsin. *See Allen v. Am. Cyanamid Co.*, No.11-C-0055, 2019 WL 5863979 (E.D. Wis. Nov. 8, 2019). In that order, I identified the "shared counsel" and "tightly coordinated litigation strategy between the present and prior plaintiffs" as reasons to find that the plaintiffs in later waves were bound by a first-wave decision on a common question. *Id.* at *3. As I did in that order, I now conclude that the plaintiffs in *Valoe* and *Gibson* had a "sufficient identity of interest" with the plaintiffs in the earlier waves such that, as a matter of Wisconsin law and due process, issue preclusion can be applied. *Paige K.B.*, 226 Wis. 2d at 226.[12]

Having found that issue preclusion can be applied as a matter of law, I turn to the second step and ask whether applying issue preclusion would be "fundamentally fair." *Rille*, 300 Wis. 2d at 19. When making this fairness determination, Wisconsin courts generally consider the following five non-exclusive and non-dispositive factors:

[12] I note that the Supreme Court of the United States has disapproved of the doctrine of "virtual representation," which has been used to bind nonparties to a judgment rendered in a prior action. *Taylor*, 553 U.S. at 885. However, the holding of *Taylor* applies only to "a federal-question case decided by a federal court." *Id.*at 904. As noted, this case is based on diversity and therefore is governed by Wisconsin's preclusion principles. The plaintiffs have not cited, and I have not found, any Wisconsin cases indicating that the Wisconsin Supreme Court would abandon the "sufficient identity of interest" test in light of *Taylor.* Moreover, this case presents a stronger case for nonparty preclusion than does the usual case involving virtual representation. Here, the plaintiffs essentially agreed to litigate their claims as part of a conglomeration of related cases being prosecuted by the same counsel in front of the same court and judge in a tightly coordinated manner. In contrast, virtual representation usually involves entirely separate litigation by parties with nothing more than similar litigation objectives and a loose relationship. *See id.* at 885–91. Thus, even if the Wisconsin Supreme Court would disapprove of the doctrine of virtual representation, I do not believe that it would hold that, as a matter of law, issue preclusion cannot apply to the *Valoe* and *Gibson* plaintiffs.

(1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law;

(2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;

(3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;

(4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and

(5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Id. at 20, 29.

Here, the first factor nominally favors the *Valoe* and *Gibson* plaintiffs, as they cannot force the second-wave plaintiffs to appeal my prior summary-judgment ruling. However, because all plaintiffs are represented by the same counsel and have been engaged in coordinated litigation, I have no doubt that, if any plaintiff in any wave saw grounds for appealing my prior ruling, then the second-wave plaintiffs would file an appeal.

Regarding the second factor, as I explained in the context of law of the case, there has not been a material change in the law since the time I decided the prior motions for summary judgment in the second wave. Although the Seventh Circuit's intervening decision in the first-wave cases altered some of my prior rulings, that decision did not disturb the legal principles that caused me to determine that the defendants had reason

to believe that modern consumers were fully aware of the dangers of white lead carbonate. Thus, the second factor favors the defendants.

Regarding the third factor, I see nothing in the quality or extensiveness of proceedings between "the two courts" that would warrant relitigation of the issue. Indeed, both cases were litigated before the same judge of the same court by the same counsel. And the proceedings in the first and second waves were extensive and of high quality. As noted, by the time I decided the duty-to-warn issue in the second wave, I had already considered it in the first wave. In both the first and the second waves, the plaintiffs were represented by highly qualified counsel who had ample time to research and investigate this issue and take whatever discovery they thought relevant to the issue.[13] Thus, the third factor favors the defendants.

Regarding the fourth factor, it clearly favors the defendants, as the burdens of persuasion have not shifted between the earlier waves and now.

Finally, as to the fifth factor, I see no matters of public policy or individual circumstances that would render the application of issue preclusion fundamentally unfair, such as an inadequate opportunity or incentive to obtain a full and fair adjudication in the prior proceeding. As I discussed in the context of law of the case, the second-wave

[13] I note that, during briefing on the current motions for summary judgment, I granted the plaintiffs leave to take additional discovery on the duty-to-warn issue. In my order granting such leave, I stated that "the remaining plaintiffs have not had an opportunity to conduct discovery into this issue." (ECF No. 1103 at 4.) However, the first- and second-wave plaintiffs did have an opportunity to take discovery on this issue, which is the important point for purposes of the third factor. Moreover, I issued the order for additional discovery before I had fully evaluated the defendants' positions on law of the case and issue preclusion. Now that I have done so, I believe that the remaining plaintiffs were not entitled to a separate round of discovery on this issue.

plaintiffs had every opportunity and incentive to show that a reasonable jury could find that the defendants had reason to believe that consumers in the 1990s and early 2000s were unaware of the dangers of lead dust, even if those same consumers were aware of the dangers of lead paint generally. That was so because their claims for negligent failure to warn depended on it and the plaintiffs were not guaranteed a victory on their other negligence claims or on their strict-liability claims. Thus, the adjudication in the prior proceeding was full and fair.

Perhaps most importantly, by the time the second-wave plaintiffs filed their brief in opposition to the defendants' motions for summary judgment on the duty-to-warn issue, I had already put all plaintiffs on notice that my decisions on common questions of law or fact would have issue preclusive effect across all the lead-paint claims in the related actions pending before me. That notice was my decision on American Cyanamid's motion to dismiss for lack of personal jurisdiction, which I issued in November 2019. As I discussed above, in that decision, I determined that all plaintiffs in the related cases were bound by the first-wave plaintiffs' litigation of the personal-jurisdiction issue, which was a common issue among all cases. In opposing the application of issue preclusion at that time, the plaintiffs (including those in *Valoe* and *Gibson*) claimed that it would be fundamentally unfair to apply issue preclusion against them because the plaintiffs in the first wave "did not understand that they were representing any other plaintiffs." *Allen*, 2019 WL 5863979, at *3. I rejected that argument and stated that it was not unfair to the other plaintiffs to give the jurisdictional ruling preclusive effect. Thus, by November 2019, all plaintiffs should have understood that the plaintiffs in the earlier proceedings *were* representing the plaintiffs in the later proceedings as to common questions of law or fact.

The plaintiffs filed their response to the defendants' motions for summary judgment on the second-wave claims on June 29, 2020. (ECF No. 914 in 11-C-155 and ECF No. 670 in 14-C-1423.) By that time, the plaintiffs in *Valoe* and *Gibson* should have known that their interests were at stake in the second-wave proceedings. Accordingly, it would not be fundamentally unfair to bind them to a decision on a common issue rendered in those proceedings.

Because issue preclusion applies to the plaintiffs in *Valoe* and *Gibson*, the defendants are entitled to summary judgment on their claims for negligent failure to warn and strict-liability failure to warn. Moreover, as a matter of *stare decisis*, the defendants are entitled to summary judgment on the plaintiffs' other negligence claims. *See Burton*, 994 F.3d at 817–20.

III. CONCLUSION

Before concluding, I recognize that ending the claims of 150+ injured plaintiffs under the doctrines of law of the case and issue preclusion may seem harsh. But our system of litigation is built on the principle that parties are entitled one full and fair round of litigation on an issue. Further, when multiple plaintiffs join together and bring a series of related claims before the same court using the same counsel and legal strategies, principles of efficiency and fairness require that the plaintiffs receive only one opportunity to litigate common questions of law or fact. Allowing the plaintiffs to use the nature of a complex lawsuit to litigate common questions serially would give them an unfair advantage. The earliest plaintiffs could test a legal strategy and, if it fails, request reconsideration during further proceedings. Later plaintiffs, if not bound by the result of earlier proceedings, could repeatedly try out new approaches to common questions in

each wave of the proceedings. At the same time, the defendants, as formal parties to each case, would be forced to relitigate the same questions over and over. Indeed, there is no doubt that, had the plaintiffs prevailed on the duty-to-warn issue during the first and second waves, the defendants would be bound by that ruling in all waves. The fact that the earlier plaintiffs did not prevail does not justify giving the later plaintiffs a second bite at the apple when, all along, the plaintiffs have been aligned in interest and pursuing a common legal strategy through the same counsel. Moreover, permitting repetitive litigation on common questions would unnecessarily strain judicial resources and destroy the efficiencies that justified use of the common procedure in the first place. In short, principles of fairness, efficiency, and finality dictate that all plaintiffs and all defendants in these related actions be bound by the court's rulings on common questions of fact or law. Because the key common rulings have gone against the plaintiffs, the defendants are entitled to summary judgment.

For the reasons stated, **IT IS ORDERED** that defendant Sherwin-Williams' motion for leave to file its renewed motion for summary judgment at 11-cv-0055 at ECF No. 1085 and 14-cv-1423 ECF No. 759 is **GRANTED.**

IT IS FURTHER ORDERED that defendant Armstrong's motion for leave to file notice of joinder in Du Pont's renewed motion for summary judgment at 07-cv-0303 ECF No. 1830 is **GRANTED.**

IT IS FURTHER ORDERED that defendant Armstrong's motion for joinder at 11-CV-0055 ECF No. 1089 and 11-cv-0425 ECF No. 280 is **GRANTED.**

IT IS FURTHER ORDERED that defendant Du Pont's renewed motion for summary judgment at 07-cv-0303 ECF No. 1853 is **GRANTED.**

IT IS FURTHER ORDERED that defendant Atlantic Richfield's motion for summary judgment at 07-cv-0864 ECF No. 427, 11-cv-0425 ECF No. 270, and 14-cv-1423 ECF No. 755 is **GRANTED**.

IT IS FURTHER ORDERED that defendant Sherwin-Williams' motion for summary judgment at 07-cv-0864 ECF No. 431, 11-cv-0055 at ECF No. 1082, 11-cv-0425 ECF No. 274, and 14-cv-1423 ECF No. 760 is **GRANTED**.

IT IS FURTHER ORDERED that defendant Du Pont's motion for joinder at 07-cv-0864 ECF No. 434, 11-cv-0055 at ECF No. 1086, 11-cv-0425 ECF No. 277, and 14-cv-1423 ECF No. 763 is **GRANTED**.

IT IS FURTHER ORDERED that defendant Armstrong's motion for joinder at 07-cv-0864 ECF No. 437 is **GRANTED**.

IT IS FURTHER ORDERED that plaintiffs' motion to strike Sherwin-Williams' supplemental reports in the Second Wave cases at 11-cv-0055 ECF No. 1071 and 14-cv-1423 ECF No. 748 is **DENIED AS MOOT.**

IT IS FURTHER ORDERED that defendant Sherwin-Williams' motion for reconsideration of the court's exclusion of defense expert John Goldberg at 11-cv-0055 ECF No. 1075 and 14-cv-1423 ECF No. 753 is **DENIED AS MOOT.**

IT IS FURTHER ORDERED that defendant Atlantic Richfield's motion for summary judgment at 11-cv-0055 ECF No. 1078 is **GRANTED**.

IT IS FURTHER ORDERED that defendant Sherman-Williams' motion for judicial notice at 07-cv-864 ECF No. 459, 11-cv-0055 ECF No. 1112, 11-cv-0425 ECF No. 303, and 14-cv-1423 ECF No. 786 is **DENIED AS MOOT**.

The Clerk of Court is directed to enter judgment in favor of the defendants in all cases.

Dated at Milwaukee, Wisconsin, this 2nd day of March, 2022.

s/Lynn Adelman
LYNN ADELMAN
United States District Judge

EXHIBIT N

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GLENN BURTON, **Plaintiff,** **v.** **AMERICAN CYANAMID CO., *et al,*** **Defendants.**	**CASE NO. 07-CV-0303**
RAVON OWENS, **Plaintiff,** **v.** **AMERICAN CYANAMID CO., *et al,*** **Defendants.**	**CASE NO. 07-CV-0441**
CESAR SIFUENTES, **Plaintiff,** **v.** **AMERICAN CYANAMID CO., *et al,*** **Defendants.**	**CASE NO. 10-CV-0075**
MANIYA ALLEN, et al., **Plaintiffs,** **v.** **AMERICAN CYANAMID CO., *et al,*** **Defendants.**	**CASE NO. 11-CV-0055**
DIJONAE TRAMMELL, et al., **Plaintiff,** **v.** **AMERICAN CYANAMID CO., *et al,*** **Defendants.**	**CASE NO. 14-CV-1423**
ERNEST GIBSON, **Plaintiff,**	**CASE NO. 07-CV-0864**

v. **AMERICAN CYANAMID CO., *et al,*** **Defendants.**	
DESIREE VALOE, et al., **Plaintiff,**	**CASE NO. 11-CV-0425**
v. **AMERICAN CYANAMID CO., *et al,*** **Defendants.**	

PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e)

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PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e)

Plaintiffs in each of the above-captioned actions hereby move pursuant to Federal Rule of Civil Procedure 59(e). In support of their motion, Plaintiffs state as follows:

INTRODUCTION

In *Thomas ex rel. Gramling v. Mallett*, the Wisconsin Supreme Court found that lead poisoned children had a Constitutional right to an "adequate remedy" which did not previously exist under Wisconsin law. 285 Wis. 2d 236, 294-95 (2005) (emphasis in original). The Wisconsin Supreme Court considered the lengthy history of lead poisoning in Wisconsin, and concluded that application of risk-contribution to white lead carbonate ("WLC") cases was necessary to ensure that the "entirely innocent plaintiff . . . [who was] severely harmed by a substance they had no control over" had an ***adequate*** remedy against the companies "who may have provided the product that caused the injuries." *Id.* at 306. Indeed, the Wisconsin Supreme Court determined that "the interests of justice and fundamental fairness demand that the latter should bear the cost of injury." *Id.* Instead of honoring the Constitutional rights of those victims, the federal court has deprived all WLC victims of those protections by ensuring that they would never have *any* remedy for the copious wrongs committed by the WLC producers or promoters. This Court's shocking decision—issued without even a passing glace at compelling and copious evidence in the record—is absolutely antithetical to the notions of justice and fundamental fairness embraced by the Wisconsin Supreme Court.

Plaintiffs bring this motion to alter or amend judgment under Rule 59(e) to allow the Court to correct its mistakes of law and fact, and to encourage it to reconsider its fundamentally unfair ruling summarily disposing of the cases of more than 150 children who were poisoned in their own homes by Defendants' products—the vast majority of whom have never had their

cases activated for discovery and were never named in a fully briefed and considered motion for summary judgment. As the Court previously stated:

> [T]he remaining plaintiffs never had an opportunity to conduct discovery into [the issue of modern consumer knowledge], and I am very reluctant to deny them that opportunity. Such evidence would be essential in opposing the defendants' motions for summary judgment. Plaintiffs should be permitted to conduct discovery on this issue before I rule on summary judgment.

See Allen v. American Cyanamid Co. et al, 11-cv-0055, Order on Motion to Stay, Dkt. 1103 at 4.

As such, less than a year ago, the Court asked Plaintiffs to present evidence that modern consumers in the 1990's and early 2000's were not aware of the specific dangers of WLC contained in lead paint, including lead dust. In November of 2021, Plaintiffs did so; they compiled and submitted a mountain of evidence and supporting expert testimony establishing a lack of consumer knowledge at the time of their injuries—and therefore a duty to warn on behalf of the Defendants. That evidence currently sits before the Court and has never even been addressed. Instead of considering that evidence, and allowing each of the Plaintiff's separate claims to be determined on their merits of the evidence provided, the Court abruptly reversed course, abandoned its prior Order, and extended and distorted the Wisconsin law of "issue preclusion" and "law of the case" beyond recognition, depriving the victims of WLC of any adequate remedy for the wrongs that had been perpetrated on them.

In so ruling, the Court effectively reversed its prior rulings—denying the consolidation of these cases for pre-trial and trial purposes—without any prior notice to the more than 150 separate Plaintiffs. Throughout this litigation, the Court has repeatedly required the Plaintiffs, or subsets thereof, to file motions for consolidation on specific issues, which Plaintiffs, or subsets thereof, have repeatedly done. Despite those rulings, and more than a decade of practice, this Court summarily reversed course and decided to *de facto* consolidate these matters under the

guise of "law of the case" and "issue preclusion." For the reasons below, those rulings constitute manifest errors of law or fact justifying reconsideration under Rule 59(e).

STATUS OF THE LITIGATION

As this Court is well aware, judgement has been entered in all of the cases that were pending before it. But that is not the end of the road for Plaintiffs or other lead-poisoned children.

Another risk-contribution case was filed against these Defendants in Wisconsin state court on behalf of a similarly situated plaintiff, Areionna Beal. Ms. Beal has asked the Wisconsin state court to issue a declaratory judgment on several issues of Wisconsin risk-contribution law—as set forth in *Thomas*, 285 Wis. 2d 236—that Plaintiff believes were misinterpreted by the federal courts in this litigation. While that motion was pending, however, Defendants improperly removed that action to federal court, and it is assigned to the Honorable Judge Pamela Pepper of this Court. This manifestly improper removal was a naked attempt to ensure that the Wisconsin Supreme Court could not consider and interpret the reach of its own jurisprudence and that the federal courts' evisceration of risk-contribution for the existing federal plaintiffs could not be considered by the very court that decides Wisconsin law. While Ms. Beal intends to swiftly seek remand so that her arguments regarding the elements of her claims can be determined, without further delay, in her chosen forum, Defendants' improper removal all but ensures that the Plaintiffs currently before this Court will not be able to avail themselves of the Wisconsin Supreme Court's interpretation of the scope of risk-contribution in the *Beal* case. Instead, even if the Wisconsin Supreme Court determines that the federal courts improperly interpreted and applied Wisconsin law, there is the substantial risk that the instant Plaintiffs,

procedurally, may not be able to reverse the judgments entered against them simply because of the timing of the various decisions and appeals.

STANDARD OF LAW

Federal Rule of Civil Procedure 59(e) permits a district court to entertain a motion to alter or amend a judgment. The Rule "essentially enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy*, 51 F.3d 746, 749 (7th Cir. 1995). A party seeking to prevail on a Rule 59(e) motion to amend judgment must establish "(1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Blue v. Hartford Life & Acc. Ins. Co.*, 698 F.3d 587, 598 (7th Cir. 2012).

ARGUMENT

The Court's March 3, 2022, Decision and Order should be altered because it was based upon a manifest error of law or fact.

I. The Court erred by not considering first-wave Plaintiffs' oppositions to Defendants' renewed motions for summary judgment.

On March 3, 2022, this Court entered a Decision and Order awarding summary judgement to the Defendants in the three first-wave cases—*Burton*, *Owens*, and *Sifuentes*. That Order mistakenly states that Plaintiffs did not oppose Defendants' (Armstrong's and DuPont's) renewed motions for summary judgment:

> [A]lthough the Seventh Circuit remanded certain first-wave claims against DuPont and Armstrong for a new trial, **the first-wave plaintiffs have not opposed these defendants' renewed motions for summary judgment**. Accordingly, I will grant those motions and direct entry of judgment on all remaining claims of the first-wave plaintiffs.

Burton v. American Cyanamid Co et al, No. 07-cv-0303 ("*Burton*"), Dkt. 1866 at 14 (emphasis added) (hereinafter the "Order"); *see also id.* at 11 ("Armstrong and DuPont now move for

summary judgment on the claims that were remanded for a new trial, and the first-wave plaintiffs have not opposed summary judgment on such claims."). As such, the Court's ruling on the first-wave motions for summary judgment was based upon a perceived lack of opposition to those motions, and not a ruling on the arguments in the parties' briefing.

Plaintiffs Burton, Owens, and Sifuentes, however, timely filed their oppositions to Defendants' renewed motions for summary judgment and ask that this Court acknowledge and fully consider the arguments made therein. Specifically, on May 20, 2021, Armstrong and DuPont filed their motions for leave to file renewed motions for summary judgment, attaching their moving briefs as exhibits to the motions for leave. *See Burton,* Dkt. 1829 and 1830. On June 7, 2021, this Court entered a scheduling order requiring Plaintiffs' oppositions to those motions for summary judgment to be filed by July 21, 2021. *See Burton,* Dkt. 1836. On July 15, 2021, the Court entered an order stating: "I will order the deadlines for the motions for summary judgment regarding the non-remand cases stayed until Plaintiffs' 56(d) motions are resolved. The deadlines for the summary judgment motions regarding the remanded cases [Burton, Owens, and Sifuentes] will not be altered." *See Burton,* Dkt. 1846. In accordance with that schedule, on July 20 and 21, Plaintiffs Burton, Owens, and Sifuentes filed their oppositions to Armstrong and DuPont's motions for summary judgment, their oppositions to the accompanying statements of undisputed facts, and a supporting declaration of Plaintiffs' counsel. *See Burton,* Dkt. 1847, 1848, 1849, 1850, and 1851. Plaintiffs also submitted paper courtesy copies of these filings to the Court. Plaintiffs could not link their filings to Defendants' dispositive motions, however, because the clerk of the court's office had not yet accepted those motions for filings.[1]

[1] On March 7, 2022, Defendant E.I du Pont de Nemours filed a "Motion to Correct Misstatement Pursuant to Rule 60(a)." *Burton*, Dkt. No. 1868. The Court has not ruled on Defendant's motion.

As such, the Court erred by not considering Plaintiffs' arguments in opposition to Armstrong's and DuPont's renewed motions for summary judgment in *Burton*, *Owens*, and *Sifuentes*.

II. The Court erred in applying law of the case to the Remaining Plaintiffs in *Allen* and *Trammell*.

The Court's summary judgment ruling with regard to the remaining, non-second-wave Plaintiffs (the "Remaining Plaintiffs")—roughly 150 plaintiffs—hinges solely on its application of law of the case to those Plaintiffs' claims. Order n.6 ("for purposes of this decision, I will assume that the binding effect of my duty-to-warn determination could apply to the remaining plaintiffs in *Allen* and *Trammell* only through law of the case."). The Court erred in denying these Plaintiffs an opportunity to prove their claims—and by refusing to even consider the evidence they presented in response to summary judgment.

First, the Court specifically recognized that its findings of fact on summary judgment in the second-wave cases were "non-final order(s)." Order at 15 (citing Fed. R. Civ. P. 54(b)).[2] Generally, only "final judgments may qualify as law of the case." *Poche v. Joubran*, 389 F. App'x 768, 774 (10th Cir. 2010); *Unioil, Inc. v. Elledge*, 962 F.2d 988, 993 (10th Cir. 1992); *Lindner v. Union Pac. R. Co.*, 762 F.3d 568, 571-72 (7th Cir. 2014) ("courts generally do not treat prior rulings as law of the case unless the previous order was final."). The doctrine is less applicable where "a ruling remains subject to reconsideration." *Wallace v. United States*, 372 F. App'x 826, 828 (10th Cir. 2010) (unpublished). This means that "district courts generally remain free to reconsider their earlier interlocutory orders." *Been v. O.K. Indus., Inc.*, 495 F.3d

[2] The Court drew a distinction between "the finality required for appellate review" and "the finality requirement in issue preclusion" but recognized that "a final judgment under Federal Rules of Civil Procedure 54 and 58 has not been entered in the second-wave cases." Order at 25.

1217, 1225 (10th Cir. 2007) (*citing Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005); *United States v. Smith*, 389 F.3d 944, 949 (9th Cir. 2004) (explaining that a district court may review its prior rulings so long as it retains jurisdiction over the case)). And "interlocutory rulings ordinarily do not constitute the law of the case." *Daumont-Colón v. Cooperativa de Ahorro y Crédito de Caguas*, 982 F.3d 20, 24 (1st Cir. 2020).

Moreover, the law of the case doctrine "'posits that when a court decides upon a *rule of law*, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Hernandez v. NJK Contrs., Inc.*, 2015 U.S. Dist. LEXIS 57568 at *31 (E.D.N.Y., May 1, 2015) (*quoting* 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE, ¶ 0.404 (1980)). Conversely, "the law-of-the-case doctrine [] acknowledges that *different facts* will lead to a different legal analysis to which the doctrine cannot apply." *Graves v. Lioi*, 930 F.3d 307, 318, (4th Cir. 2019) (emphasis added); *see also Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 69 (4th Cir. 1988) (stating that the law of the case doctrine applies "unless" one of several exceptions applies, including the subsequent development of "substantially different evidence"). And "when a court is presented with a different record at a new stage of the case, the law-of-the-case doctrine will no longer constrain the court's review." *Graves*, 930 F.3d at 318. This Court explicitly recognized that different evidence developed by the Remaining Plaintiffs could change the Court's analysis and ruling. *Allen*, Dkt. 1103 at 4; *see also*, Order at n.13 ("the remaining plaintiffs have not had an opportunity to conduct discovery into this issue."). Here, it is undeniable that the Court was "presented with a different record" on Defendants' renewed motions for summary judgment on the remaining, non-second-wave Plaintiffs cases. In short,

the *non-final* nature of the Court's determination *of fact*[3] in the individual second-wave plaintiffs' claims—based upon the evidence submitted at the time—should not bind the subsequent, non-second-wave Plaintiffs in *Allen* and *Trammell*.

The Court's application of law of the case turns on its determination that all these Plaintiffs were "in the same case." *Arizona v. California*, 460 U.S. 605, 607 (1983) ("the [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages *in the same case*."). The Court's conclusion relies on the fact that the remaining, non-second-wave Plaintiffs' cases were named on the consolidated complaints filed in *Allen* and *Trammell*. Specifically, the Court recognized that "the remaining plaintiffs have their own claims" but concluded that these 150+ Plaintiffs did not have separable cases because they chose to "join in *one action*" with second-wave Plaintiffs under Federal Rule of Civil Procedure 20(a)(1). Order at 19 (emphasis original). The Court cites to no case law applying law of the case to separate plaintiffs, with separate claims, simply because they were named on the same complaint pursuant to Rule 20(a)(1). *Id.* Instead, the Court points to Rule 20(a)(1)'s use of the term "one action," and states that, according to Black's Law Dictionary, the "the term action is a synonym for 'case.'" *Id.* But Black's Law Dictionary also defines "case" as a "controversy at law or equity," and then then defines "separable controversy" as "*a claim* that is separate and independent from the *other claims* being asserted in

[3] For law of the case to apply, the court must have already "actually decided" the relevant issue. *Universal Guar. Life Ins. Co. v. Coughlin*, 481 F.3d 458, 462, (7th Cir. 2007) (where prior case did not actually resolve an issue of fact, law of the case was not applicable). The Court's belief that the individual Second-wave plaintiffs "conceded this point" on summary judgment only demonstrates that the issue was not decided on the evidence with respect to the Second-wave Plaintiffs' claims. Order at 15-16. Therefore, law of the case cannot be applied to the remaining Plaintiffs' claims regardless of whether the second-wave ruling was issued "in the same case" as theirs (which it was not).

a suit." *See "Case" and "Controversy," Black's Law Dictionary* (11th ed. 2019) (emphasis added). The Court recognized that each Plaintiff has his or her own claims (based upon their individual circumstances and injuries),[4] therefore, they also each bring a separable "controversy at law or equity"—meaning they each retain their own "case" under Black's definitions.

Moreover, the language used throughout the Court's case management order indicated that each of the Plaintiffs, including those included in the second-wave, had his or her own "case;" for example the Court stated:

> In addition to the four initial [first-wave] cases, the parties will prepare a total of eight additional *cases* for early resolution. The *cases* will be prepared concurrently with the initial cases. Plaintiffs will choose four *cases* for inclusion in the group of eight, and defendants will collectively choose four *cases* for inclusion in the group of eight.

Allen, Dkt. No. 189, Case Management Order, April 1, 2016 at 3 (emphasis added).

In the end, the Court simply selected one synonym over another (in the same definition). But it has been specifically noted that the definition of case or controversy turns on labels that are themselves "elastic, inconstant, and imprecise." Charles Alan Wright, *The Law of Federal Courts* § 12, at 60-61 (5th ed. 1994). It is a manifest injustice to base the dismissal of more than 150 Plaintiffs' claims on such infirm and shifting ground. The Court should have simply reviewed the evidence proffered by the Remaining Plaintiffs.

The Court cites to *Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000) for the principle that joinder of claims under Rule 20(a) enables "economies of litigation." Order at 19-20. Plaintiffs do not dispute that joinder pursuant to Rule 20(a) can lead to judicial economy, but

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[4] The court further acknowledged as much by splitting the Plaintiffs into Waves, allowing individualized discovery in each individual case, requiring separate dispositive motions, and setting separate trials on plaintiffs' claims.

Elmore does not deal with the impact of joinder on law of the case, nor does it ultimately support the Court's conclusion in remaining Plaintiffs' cases. In *Elmore*, the Seventh Circuit held:

> When there are several plaintiffs in a single suit and one is dismissed out, whether under Rule 21 or any other rule or doctrine, *it is as if he had brought a separate suit that was dismissed.* We cannot find a case on the point; but it seems to us clear as a matter of first principles. The purpose of Rule 20(a) in permitting joinder in a single suit of persons who have separate claims, albeit growing out of a single incident, transaction, or series of events, *is to enable economies in litigation, not to merge the plaintiffs' rights* so that the defendant loses defenses that he might have had against one of the plaintiffs.

Elmore, 227 F.3d at 1011-1012 (emphasis added). Here, like in *Elmore*, the dismissal of the second-wave Plaintiffs' negligent failure to warn claims should have been treated as if they were "brought in a separate suit,"[5] and Plaintiffs' rights should not have been merged in a way that prevented them their day in court.

Other courts have held—in a variety of other circumstances—that consolidated cases remain separate actions for the purpose of law of the case. As the Sixth Circuit explained:

> This raises the question of whether consolidated cases, like those at issue here, can be considered the "same case" for law-of-the-case purposes. In answering this question, we begin with the well-established principle "that consolidated cases remain separate actions." *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994). "[A]lthough consolidation is permitted as a matter of convenience and economy in administration, it does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 412 (6th Cir. 1998) (internal brackets and quotation marks omitted) (quoting *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97, 53 S.Ct. 721, 77 L.Ed. 1331 (1933)).

GMAC Mortg., LLC v. McKeever, 651 F. App'x 332, 338-39 (6th Cir. 2016). Similarly, several courts have held that "the law-of-the-case doctrine does not apply between separate [post-conviction] motions by federal defendants tried together" in an underlying case. *Edmonds v.*

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[5] "Suit" is another synonym of "case." *See "Case," Black's Law Dictionary* (11th ed. 2019).

Smith, 922 F.3d 737, 740 (6th Cir. 2019); *see also United States v. Lawrence*, 179 F.3d 343, 351 (5th Cir. 1999). Absent parties' rights should not be determined by the arguments of other parties simply because they are joined in an action.

The Court points to Plaintiffs' prior arguments about the efficiencies of joinder under Rule 20(a)(1) and the conduciveness of certain questions—including "proof of the failure to warn elements"—to common resolution. Order at 20. But that is not the procedure that was ultimately adopted by the Court. The Court separated the Plaintiffs into waves of individual trial cases, requiring each to prove his or her own claims separately. Under the process adopted by the Court, the first-wave summary judgment rulings were not automatically binding on the second-wave Plaintiffs[6]—instead the Court required separate summary judgment briefing on each Plaintiff's claims (including the elements of their failure to warn claims). *See* Order at n.9. As discussed further below, the Court repeatedly refused to consolidate these cases for pretrial discovery and dispositive motions. *See infra* at 27-29. Given its established process, there was no indication that the Court would now adopt a "common answer" to one particular issue of fact (modern consumer knowledge) in all the Remaining Plaintiffs' cases. *See* Order at 20.

The Court cites to *Looper v. Cook Inc.*, 20 F.4th 387, 2021 U.S. App. LEXIS 37211, *23 (7th Cir. 2021) for the argument that "in light of 'the common ground among the cases that justifies the use of the MDL process in the first place,' it would be unfair to allow a party to contradict its prior position on a common issue of law or fact within the MDL." Order at 20. In *Looper*, however, the Seventh Circuit was dealing with "*a party*" contradicting *its own* position on "a decisive procedural issue." *Id.* *Looper* does not support the use of law of the case to bind

[6] Likewise, the jury's findings of fact (against Defendants) in the first-wave trials were not considered binding on any common questions in the second-wave.

a plaintiff or party to the arguments or positions taken by *other parties*—in motions not directed at their claims—in a consolidated action. And it certainly does not support the argument that those separate parties are bound by the facts or evidence presented by earlier plaintiffs. In fact, *Looper* specifically recognized that "for many purposes, such as requiring separate judgments," cases in multidistrict litigations retain "separate identities" despite the consolidation of those cases and the use of short-form complaints. *See id.*

As the Court acknowledges, in *Insolia v. Philip Morris*, the Seventh Circuit rejected the argument that one plaintiff's lack of evidence should prevent a subsequent plaintiff's ability to prove the elements of his or her claims, holding:

> Another record in another case might be different. Another plaintiff might marshal better evidence that the haze of the tobacco companies' propaganda obscured whatever health hazards were known to the average consumer.

216 F.3d 596, 603 (7th Cir. 2000). The Court attempts to distinguish *Insolia* on the basis that it did not involve plaintiffs "whose claims were joined under Rule 20(a)(1)." Order at n.8. While it is true that the Seventh Circuit's opinion in *Insolia* did not mention the potential impact of joinder under Rule 20(a)(1) on its opinion, it cannot be said that Rule 20(a)(1) played no part in that litigation. In *Insolia*, plaintiffs initially chose to join their claims under Rule 20(a)(1)—but the district court later severed the claims into three separate actions pursuant to Rule 21. *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 547, 551 (W.D.Wis. 1999). As such, given the procedural history of that case, the fact that the Seventh Circuit did not feel the need to address the impact of joinder of a plaintiff's claims under Rule 20 on its general holding that each plaintiff should be afforded the opportunity to marshal her own evidence on a common question of fact—consumers' knowledge of risks—indicates that it is not the distinguishing factor that this Court views it as. Moreover, the Court's attempt to distinguish *Insolia* as only applying to the

possibility of "future plaintiffs proving matters the current plaintiffs were unable to prove" ignores the fact that the Court separated the Plaintiffs in this litigation into waves, and therefore, the second-wave summary judgment motions only applied to the second-wave Plaintiffs' claims, and the Remaining Plaintiffs who were not a part of first-wave or second-wave *do* constitute the "future plaintiffs" that the Court acknowledges *Insolia* protects. *See* Order at n.8. Just as the Seventh Circuit in *Insolia* did not believe it appropriate to attribute the concessions, or the failures of proof, of one plaintiff to subsequent plaintiffs' claims, so should this Court have refrained from applying the second-wave Plaintiffs' evidentiary showing to the absent Plaintiffs' claims. *Insolia*, 216 F.3d at 603.

Even if law of the case could be applied to the Remaining Plaintiffs' claims, the Court recognizes that the intervening Seventh Circuit decision in *Burton*, *Owens*, and *Sifuentes* constituted a "change in the law." Order at 22. Specifically, the Court acknowledged that the Seventh Circuit "disagreed with [its] interpretation of Wisconsin law on the issue of which consumers matter for purposes of determining whether warnings were required in the context of strict-liability claim—[it] said that consumers from 1900-1950 mattered, but the Seventh Circuit held that consumers from the 1990s and early 2000s mattered." Order at 21-22. The Court goes on to declare: "that change in the law does not affect the factual question regarding what consumers in the 1990s or early 2000s knew about the dangers of lead paint." *Id.* at 22. But the change in the law *did* affect the evidence Plaintiffs needed to submit to support their claims. That is undeniable where the first-wave Plaintiffs were permitted to proceed to trial but the second-wave Plaintiffs—and now all Remaining Plaintiffs—had their cases poured out due to the Court's refusal to consider the evidence submitted after the Seventh Circuit's ruling. But even if the Seventh Circuit's ruling did not constitute an intervening change in the law, the procedural

history of this litigation puts is squarely within the "other changed circumstances that justify waiver" of the law of the case doctrine. *Vidimos, Inc. v. Wysong Laser Co.*, 179 F.3d 1063, 1065 (7th Cir. 1999).[7]

Finally, law of the case should not have been applied because this Court's erroneous conclusion that "modern consumer knowledge" constrains the lead poisoned children's negligent failure to warn claims is directly at odds with the Wisconsin Supreme Court's decision in *Thomas*. The error starts with the law. In *Thomas*, the plaintiff was poisoned by WLC in the 1990s, a fact that was discussed at great length in the decision itself. 285 Wis. 2d at 245. The Wisconsin Supreme Court—after fully considering the date of Steven Thomas' poisoning, the public health history of lead poisoning in Wisconsin, and the development of consumer knowledge concerning WLC and its deadly legacy—permitted Mr. Thomas to proceed with negligence claims against these manufacturers. The posture of the *Burton, Sifuentes* and *Owens* cases pre-trial recognized two negligence theories: negligent failure to warn, which was dismissed at summary judgment *on the factual record specific to each of those cases individually*, and general negligence, which was subsequently dismissed by the Seventh Circuit in *Burton v. E.I. du Pont de Nemours & Co.*, 994 F.3d 791 (7th Cir. 2021). This Court now adds insult to injury by finding that, based solely on the specific evidence in three individual trial cases, no other Plaintiff will ever be able to exercise his or her Constitutional right. The Seventh Circuit ruling plus this Court's latest decree combines to eviscerate and overrule the Wisconsin

[7] In *Vidimos*, the Seventh Circuit affirmed the application of law of the case "in a case involving modest stakes" where the party alleging error did not timely seek rehearing and instead decided to "lie in wait" for years before presenting its argument for reconsideration in a second appeal. 179 F.3d at 1065-66. Conversely, here, in a high stakes case involving more than 150 lead-poisoned children, Plaintiffs immediately sought reconsideration of the Court's prior rulings and quickly supplemented the record after the Seventh Circuit reversed the first-wave jury verdicts.

Supreme Court's explicit and unequivocal finding that lead poisoned children were permitted to pursue a negligence against these WLC promoters and producers. Each of the remaining Plaintiffs were poisoned during the same general time frame and, as such, has the same right to an adequate remedy the Wisconsin Supreme Court provided to Mr. Thomas.

Indeed, the "modern consumer knowledge" standard is particularly troubling when seen for what it is—a very thinly-veiled judicial finding that the parents and caregivers of all children poisoned in the 1990s (and later) knowingly allowed their children to be poisoned. In finding that no child is permitted to proceed with his or her claim under this theory, the Court determined that the dangers associated with invisible WLC were so well known—as a matter of law—in the community that these Defendants had no reason to warn of what everyone purportedly already knew or should have known. This essentially means the Court agrees with the WLC manufacturers that the parents of the hundreds of thousands of children—whose futures have been compromised by this insidious neurotoxin in their homes—knowingly or negligently placed their children in harm's way; that although each knew of the extent of this threat, they nevertheless disregarded it and allowed their children to be lead poisoned. This defies both logic and the evidence. Where so many children are poisoned at such an enormous rate, with thousands upon thousands upon thousands poisoned each year, there is a logical inference that parents and caregivers did not know of the true threat of WLC to their children. The Court has *never* pointed to evidence supporting its conclusion that "modern consumers" understood the dangers of the various methods of exposure to WLC—including the ingestion of lead dust. Moreover, in ruling on Defendants' summary judgment motions in the first-wave cases, the Court looked to the knowledge of the individual Plaintiffs and caregivers in *Burton*, *Owens*, and *Sifuentes*—not to the objective knowledge of modern consumers, in general. *Burton v. Am.*

Cyanamid, 334 F. Supp. 3d 949, 961 (W.D.Wis. 2018) ("Deposition testimony of plaintiffs' witnesses supports this point, as parents or caregivers of each plaintiff testified that they knew, before each plaintiff's lead exposure, that children should not eat paint chips because of the risk of lead exposure."). Given the Court's reliance on case-specific evidence for its determination of fact, it is unreasonable to hold that the remaining 150+ Plaintiffs should have expected to be bound by the "knowledge" of the parents and caregivers in those three individual cases.

In short, this remains a disputed issue of fact that the Court should have allowed a jury to determine based upon the evidence presented at trial. Instead, the Court's ruling essentially sweeps *Thomas* aside—not only for these unfortunate Plaintiffs, but for all lead-poisoning cases in Wisconsin.

The Court's statement that "plaintiffs did not point me to evidence suggesting that modern consumers might have been unaware of the dangers posed by lead dust" is not accurate. Order at 22; *see also id.* at 15. The Court's statement is based on its belief that the individual second-wave plaintiffs "conceded" that consumers in the 1990s and early 2000s were aware of the dangers of lead paint and lead dust. Plaintiffs dispute making any such concession of fact,[8] but even they had, the fact remains that at the time of its law of the case determination the Court was in possession of ample evidence demonstrating, at the very least, an issue of fact exists as to whether consumers in the 1990s and early 2000s were unaware of the various dangers of WLC in

[8] The second-wave Plaintiffs never conceded that consumers were aware of the dangers of lead paint—and certainly did not concede any knowledge of the WLC dust pathway. In support of its conclusion to the contrary, the Court cites to footnote 8 in second-wave Plaintiffs' Opposition to Summary Judgment. Order at 22 (citing Pls.' Br. in Opp. at 5 n.8, ECF No. 914 in No. 11-C-0055). But the language in that footnote makes no concession of fact—it merely recognizes that an application of the Court's prior ruling would be determinative of their negligent failure to warn claims. *Id.* And even if such a "concession" was made by the individual second-wave Plaintiffs—that concession should not be applied to the independent claims of the remaining Plaintiffs who were not subject to those motions for summary judgment.

paint (including lead dust). *See e.g. Allen*, No. 11-cv-00055, Dkt. No. 1108. The Court has chosen not to consider the evidence submitted by the Plaintiffs—including the 150+ Remaining Plaintiffs whose claims where not subject to the prior second-wave summary judgment motions—but it is before the Court, nonetheless. The purpose of reconsideration, and the goal in correcting a manifest error, should be to arrive at the correct ruling based upon all of the facts and evidence.[9] That has not occurred here. Even if the Court's "original decision" was correct based upon the record and arguments compiled by the individual second-wave Plaintiffs (Order at 22), it is rendered a clear and manifest error of fact by the evidence submitted in response to the motions for summary judgment on the Remaining Plaintiffs' claims.

III. The Court erred in applying Issue Preclusion to *Valoe* and *Gibson*

The Court's summary judgment ruling in *Valoe* and *Gibson* hinges solely on its application of issue preclusion to those Plaintiffs' claims. Order n.6 ("for purposes of this decision, I will assume that the binding effect of my duty-to-warn determination . . . could apply to the remaining plaintiffs in *Valoe* and *Gibson* only through issue preclusion."). The Court erred in applying issue preclusion to individuals who were not parties to *Allen*, *Trammell*, or any of the first-wave cases in which the Court's prior rulings were issued. *See* Order at 24 (recognizing Valoe and Gibson are not parties to the other cases).

"Due process requires that the litigant had sufficient opportunity to be heard. In other words, due process requires that the litigant have at least one full and fair opportunity to litigate an issue before being bound by a prior determination of that issue. It is fundamental that nonparties cannot be bound by a prior litigation unless their interests are deemed to have been

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[9] *Arizona*, 460 U.S. at 644 ("Federal courts have traditionally thought that correcting a manifest injustice was reason enough to reconsider a prior ruling.")

litigated. Anything less is a violation of the litigant's due process rights." *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 226 (1999). As the Court opined, to avoid a violation of a party's due process rights, Wisconsin law applies a two-step analysis to determine if issue preclusion is available—first asking if issue preclusion can, as a matter of law, be applied; and if so, whether the application of issue preclusion would be fundamentally fair. Order at 25 (*citing In re Estate of Rille ex rel. Rille*, 300 Wis. 2d 1, 19 (2007)). Here, neither step of the analysis is satisfied, and issue preclusion cannot be applied to *Valoe* and *Gibson*.

A. Issue preclusion cannot be applied as a matter of law.

As the Court recognized, for issue preclusion to apply the issue or fact must have been "actually litigated and determined in the prior proceeding by a valid judgment in a previous action," and the determination must have been "essential to the judgment." The Court summarily "conclude[d] that [its] determination at summary judgment in the second wave on the issue of modern consumer knowledge of the dangers of white lead carbonate was sufficiently firm to be accorded preclusive effect." Order at 26. But earlier in its Order, the Court itself recognized that is summary judgment rulings in the second-wave cases were "non-final order(s)," Order at 15 (citing Fed. R. Civ. P. 54(b)),[10] and conceded that those rulings were a result of the second-wave Plaintiffs' decision not to contest the issue of modern consumer knowledge of the various dangers of lead paint. Order at 23 ("instead of developing an argument along those lines [modern consumer knowledge], the [second-wave] plaintiffs conceded the issue and focused on other arguments."). The Court's belief that the individual second-wave Plaintiffs

[10] The Court attempts to draw a distinction between "the finality required for appellate review" and "the finality requirement in issue preclusion" but recognized that "a final judgment under Federal Rules of Civil Procedure 54 and 58 has not been entered in the second-wave cases." Order at 25.

"conceded this point" on summary judgment only demonstrates that the issue was not "actually litigated" in the prior proceeding and issue preclusion cannot apply as a matter of law.

Second, as the Court also recognized, "where, as here, a party seeks to apply issue preclusion against a person who was not a formal party to the prior action, the first step [] requires that the court determine whether the person was 'in privity with or had sufficient identity of interest" with a person who was a party to that action such that applying issue preclusion would comport with due process." Order at 25 (*quoting Paige K.B.*, 226 Wis. 2d at 224.) Here, Plaintiffs Valoe and Gibson are neither "in privity" with the (unrelated) second-wave Plaintiffs nor do their claims have "sufficient identity of interests." The Court seems to concede that Valoe and Gibson are not in privity to the prior plaintiffs,[11] but finds that "sufficient identity of interests" exists simply because Valoe's and Gibson's claims are similar to the first- and second-wave Plaintiffs' claims, and they are represented by the same counsel.

But as explained by the Wisconsin courts: "a litigant has a sufficient identity of interest with a party to a prior proceeding if the litigant's interests in the prior case can be deemed to have been litigated." *Estate of Read v. Kronberg*, 361 Wis. 2d 284 (Ct. App. 2015) (quoting *Paige K.B.*, 226 Wis. 2d at 226). The Court's statement that Valoe and Gibson "had an obvious interest in the first- and second-wave cases, in that plaintiffs were prosecuting claims against the same defendants under identical legal theories in front of the same court and the same judge" (Order at 28) confuses having a legally recognized interest in the case of another party and simply having a reason to be interested in its outcome. *Amber J.F. v. Richard B. (In re Amber J.F.)*, 205 Wis. 2d 510, 516 (Ct. App. 1996) ("privity is not established merely because

[11] "To be in privity the parties must be 'so closely aligned that they represent the same legal interest." *Paige K.B.*, 226 Wis. 2d at 226. No privity exists here, as each Plaintiff has separate claims.

mother and child are interested in the same question or in proving the same facts. In order to be in privity with a party to a judgment, one must have such absolute identity of interests that the party to the earlier action represented the same legal interest as the non-party to that first action."). Valoe's and Gibson's due process rights are not forfeited simply because the facts of their cases overlap with those of another plaintiff's case.

The sole case relied upon by the Court for its application of issue preclusion, *Jensen v. Milwaukee County Mutual Insurance Co.*, 204 Wis. 2d 231 (Ct. App. 1996), is easily distinguishable. In *Jensen*, the intermediate Wisconsin appellate court held that issue preclusion barred a wife from relitigating negligence questions that were resolved against her husband (by the jury) in a prior automobile accident case to which she was not a party but in which she actively participated. *See id.* In *Jensen*, unlike in *Gibson* and *Valoe*, the plaintiff to which issue preclusion was applied: was the wife of the driver and a passenger in the car involved in the accident in the first action; "actively participated in the prior action as a critical witness;" and "was present throughout the proceedings." *Id.* at 238-39. Additionally, the Court's reliance on *Jensen* for its finding of a "sufficient identity of interest" in *Gibson* and *Valoe* is undermined by the fact that the *Jensen* court never actually discussed the first-step of Wisconsin's two-step analysis—*i.e.*, privity and/or "sufficient identity of interests"—the *Jensen* court simply stated that such an interest must exist, and then launched directly into its consideration of the five fundamental fairness factors. *Id.* at 237.

For this reason, *Jensen* also cannot support the Court's argument that a "sufficient identity of interest" exists because Valoe and Gibson are "represented by the same counsel as the first- and second-wave plaintiffs." Order at 28-29, and n.12. Contrary to the Court's assertion, *Jensen* did not "emphasize[]" plaintiff's "choice of the same counsel who represented her

husband" *in relation to the fist-step of the analysis*—it pointed to that fact only when weighing the third and fifth factors of *the fundamental fairness test*. Order at 28. To Plaintiffs' knowledge—and the Court has not provided any support to the contrary—no Wisconsin court has ever looked to a party's choice in counsel to determine the first-step of the analysis; *i.e.*, whether the party was "in privity with or had sufficient identity of interest" with a person who was a party to that action such that applying issue preclusion would comport with the requirements of due process. *See Paige K.B.*, 226 Wis. 2d at 224.[12]

The Court apparently would have required counsel for the first-wave Plaintiffs to compromise the best interests of those individual Plaintiffs for the—potential but uncertain—best interest of subsequent Plaintiffs in other cases. In essence, the Court would require counsel for the first-wave Plaintiffs to provide less than the zealous representation that the governing rules of ethics require. *See* Wis. SCR 20:1.7.

Moreover, *Jensen* is an outlier—the *Jensen* court even noted that, prior to its decision, "the defensive use of issue preclusion against a nonparty in the former action has never been successfully used in any reported appellate decision." 204 Wis. 2d at 234. Wisconsin courts regularly refuse to find privity or a sufficient identity of interest to apply issue preclusion—even in cases where the parties are *related* (by blood or contract) to each other. *Mayonia M.M. v. Keith N.*, 202 Wis. 2d 461, 465 (Ct. App. 1996) (affirming trial court decision that neither claim preclusion nor issue preclusion barred second paternity action against same defendant where first

[12] There is no authority for the proposition that identity of lawyers in similar matters confers identity of interests by separate plaintiffs in separate cases. Indeed, the logical extension of this inexplicable ruling would wreak havoc on the judicial system: for example, all clients of Jones Day in similar litigation matters would be construed as having sufficient identity of interests to have each be bound by the decisions in the others' cases. That simply is not how the judicial system works, and it provides a disincentive for attorneys to specialize in matters or for clients to hire lawyers who have developed subject matter expertise.

action was brought by district attorney and second by child); *Amber J.F.*, 205 Wis. 2d 505 (following *Mayonia*, affirming trial court's decisions that second paternity action, when mother brought first action and child second, is not barred by claim preclusion or issue preclusion); *Teacher Retirement Sys. of Texas v. Badger XVI Ltd. Partnership*, 205 Wis. 2d 525 (Ct. App. 1996) (reversing trial court's decision to apply issue preclusion against litigant who was not a party or in privity with parties in first proceeding).

Here, Gibson and Valoe had no connection other than their choice of counsel. They were unrelated to the prior Plaintiffs, played no role in those cases or claims, were injured in separate incidences and/or occurrences, have not had case-specific discovery taken in their cases, and were not named in Defendants' prior motions for summary judgment despite having cases pending before the Court. The Court's use of *Jensen* to find a sufficient identity of interest to bind them to the findings of fact in the individual second-wave Plaintiffs' cases is a wildly unprecedented expansion of Wisconsin issue preclusion law.

B. The application of issue preclusion is not fundamentally fair.

As the first-step of Wisconsin's issue preclusion analysis was not met, it cannot be applied to *Valoe* or *Gibson* as a matter of law. *Paige K.B.*, 226 Wis. 2d at 224. Even if the Court could have reached the five-factor test for fundamental fairness, however, the circumstances in *Valoe* and *Gibson* did not warrant the application of issue preclusion to their cases.

In conducting the "fundamental fairness" test, a Wisconsin court considers the following factors:

(1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment;

(2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law;

(3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;

(4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and/or

(5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Michelle T. v. Crozier, 173 Wis. 2d 681, 688-89 (1993). Analysis of those factors reveals the application of issue preclusion to Gibson and Valoe is *not* fundamentally fair.

1. Could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment? No.

The Court's Order states that it is applying its ruling on the issue of modern consumer knowledge in the second-wave Plaintiffs case to the claims brought by Gibson and Valoe. Order at 26. The Court specifically recognized, however, that the summary judgment rulings in the second-wave cases were "not final for purposes of appellate review." *Id.* at 25.[13] Regardless of whether those decisions were final judgments subject to appeal by the individual second-wave Plaintiffs (or the Remaining Plaintiffs for that matter), however, Plaintiffs Valoe or Gibson certainly had no right to seek review of rulings that they were not even a party to. And the Court has provided no insight or support for its puzzling conclusion that "if any plaintiff in any wave

[13] In fact, the only Plaintiffs who could have appealed the Court's ruling on negligent failure to warn, are Burton, Owens, and Sifuentes—and only *after* a final judgement had been issued in their cases. That final judgment came in the form of a $2,000,000 jury verdict in their favor. The decision of those three first-wave Plaintiffs not to appeal the Court's finding of fact on negligent failure to warn—which would have required a retrial of all of their claims—cannot bind other Plaintiffs in completely different circumstances.

saw grounds for appealing my prior ruling, then the second-wave plaintiffs would file an appeal." Order at 30.

The Court also impermissibly conflates and confuses Plaintiffs with their attorneys; they are not the same and each fulfills a different role with different responsibilities in each case. The Court cites no support for its comment that, because Gibson and Valoe are represented by the same counsel as the second-wave Plaintiffs, their appellate interests may be otherwise protected. *Id.* The identity of Plaintiffs' counsel has no bearing on this factor—which explicitly focuses on whether *a party* had a right "*as a matter of law*" to seek review of the judgement in the other party's case. This factor clearly weighs against a finding of fundamental fairness.

2. Is the question one of law that involves two distinct claims or intervening contextual shifts in the law? Yes.

The Court states: "as I explained in the context of law of the case, there has not been a material change in the law since the time I decided prior motions for summary judgment in the second wave." Order at 30. But in its law of the case discussion, the Court stated that the Seventh Circuit's decision in the first-wave cases *did* constitute a "change in the law." Order at 21-22. The Court went on to declare that the "change in the law does not affect the factual question regarding what consumers in the 1990s or early 2000s knew about the dangers of lead paint," *id.* at 22, but even if that were true, it does not render the change in the law irrelevant for purposes of this factor. Plaintiffs' knowledge that—due to the change in the law—both their negligent failure to warn claims *and* their strict liability failure to warn claims would now be governed by this same question of fact—modern consumer knowledge—would certainly cause Plaintiffs to take a different strategy in pursuing their individual claims. And Wisconsin courts recognize that denying the ability of a subsequent party to adjust its strategy based upon a change in the law would weigh against the fundamental fairness of applying issue preclusion to their

claims. *Jensen*, 204 Wis. 2d at 238-239 ("Moreover, there have been no intervening changes in the law of negligence *which would suggest a different strategy in litigating that issue or a different jury answer*.").

3. Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue? Yes.

While *Gibson* and *Valoe* involve the same court and counsel as the prior cases, the third factor also focuses on the "extensiveness of the proceedings" relating to the issue being considered. Here, regardless of the reason why, it is undeniable that the issue of what consumers knew in the 1990s-2000s was not the "focus of the prior proceeding" like negligence was in *Jensen*. *Id.* at 239. In fact, the Court recognized that: (1) the issue was not contested in the second-wave cases; and (2) it has not previously considered the full universe of evidence that was submitted in response to Defendants' motions for summary judgment in *Gibson* and *Valoe*. *See* Order at 16 and 22. As such, this question has not been "fully litigated." *See id.*

4. Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second? Yes.

"It is inappropriate to apply issue preclusion if the burden of proof was lesser in the first action than in the second." *Jensen*, 204 Wis. 2d at 239 (citing *Crowall v. Heritage Mut. Ins. Co.*, 118 Wis. 2d 120, 126 n.5 (Ct. App. 1984)). Here, while the burden of proof did not change on the issue of *Gibson's* and *Valoe's* negligent failure to warn claim, the burden of proof applied by this Court to first- and second-wave Plaintiffs' strict liability failure to warn claims was lesser than what it later applied to strict liability failure to warn after the Seventh Circuit's ruling (and summary judgment briefing was already closed in the second-wave cases). Specifically, in the earlier proceeding, the Court did not require Plaintiffs to establish that consumers in the 1990s

and early 2000s were unaware of the various dangers of lead paint in order to proceed to trial in strict liability. The Seventh Circuit held that the district court erred by not requiring such a showing. *See* Order at 21-22. But Gibson and Valoe had no reason to anticipate that change in the burden of proof, and it is fundamentally unfair to deny them a chance to satisfy the new burden of proof—especially where that evidence is currently before the Court.

5. Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? Yes.

Both public policy and individual circumstances render the application of issue preclusion to *Gibson* and *Valoe* fundamentally unfair. In *Thomas*, 285 Wis. 2d 236, the Wisconsin Supreme Court specifically intended to create a cause of action for children injured under the exact circumstances as *Gibson* and *Valoe*—children who had been poisoned by the WLC contained in the paint (and dust) in their homes. These individual Plaintiffs could not have possibly predicted the federal court's application of varying legal principles and requirements—well beyond those set forth by the Wisconsin Supreme Court in *Thomas*—to effectively unwind and render toothless *Thomas*' application of risk-contribution to WLC poisoning cases.[14]

Given the unsettled nature of the law, it is fundamentally unfair to summarily dispose of Plaintiffs' cases in the name of "judicial efficiency." Even *Jensen*, a case relied upon by the Court, specifically recognized that the non-party plaintiff in that case "points to nothing which

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[14] The idea that "modern consumer knowledge" prevents these claims from proceeding ignores the fact that Thomas himself was exposed to WLC in lead paint in the 1990s. *Thomas*, 285 Wis. 2d at 245. That fact did not seem to concern the Wisconsin Supreme Court when it set forth the elements by which he needed to establish his claims—when it considered *all of the facts* set forth in *Thomas*, including those relating to consumer knowledge. Moreover, as a practical matter, the idea that the dangers of lead dust were so well-known in the 1990s as to eliminate any duty to warn on behalf of the Defendants essentially holds that these Plaintiffs' parents and caregivers knowingly allowed their children to be poisoned.

suggests that the evidence or legal strategy would be any different in this action." 204 Wis. 2d at 240. That is clearly not the case here. The Court itself has recognized that both the evidence presented, and the legal strategy employed, by Valoe and Gibson would change based upon the Seventh Circuit's ruling. *See* Order at 23.

The Court's reliance on its own November 2019 decision—holding that personal jurisdiction did not lie against American Cyanamid and that the opinion applied across the litigation—does not support its conclusion that "by November 2019, all plaintiffs should have understood that the plaintiffs in the earlier proceeding were representing the plaintiffs in the later proceedings as to common questions of law or fact." Order at 32 (emphasis in original). Simply because one personal jurisdiction order was intended to apply across the litigation did not put the Plaintiffs on notice that the Court's other orders were entitled to the same treatment. If that were the case, the Plaintiffs would not have been divided into waves to begin with.

The unfairness of the Court's entry of judgment against all of the individual lead poisoned children is starkly demonstrated by the procedural travel of these cases. The Court concluded that "when multiple plaintiffs join together and bring a series of related claims before the same court using the same counsel and legal strategies, principles of efficiency and fairness require that the plaintiffs receive only one opportunity to litigate common issues of fact or law." Order at 33. It is the Court, however, for more than a decade that has repeatedly rebuffed Plaintiffs' efforts to consolidate the cases for pretrial discovery and dispositive motions, and instead, required Plaintiffs to file specific motions for partial consolidation for limited purposes. Each of those Plaintiffs relied on those repeated and consistent orders from the Court when fashioning the litigation strategy in the individual cases.

Accordingly, Plaintiffs filed joint motions to partially consolidate cases for the limited purposes of obtaining rulings on specific motions that would apply to all of the cases whenever the need to do so presented itself. For example:

- On August 14, 2009, the then pending Plaintiffs in four of the cases filed a motion to partially consolidate the cases "for purposes of pretrial management of discovery and dispositive motions." *Burton*, Dkt. No. 70 at 2. Defendants opposed consolidation and the Court denied the motion on March 1, 2010. *Burton*, Dkt. No. 124.

- On June 30, 2010, Plaintiffs again sought consolidation for "pretrial management" in what was then 5 separately filed cases. *Burton*. Dkt No. 129. Defendants again opposed the motion and the Court denied the motion on August 10, 2010. Burton, Dkt. No. 150 ("Plaintiffs contend that consolidation will facilitate processing of the cases and particularly the discovery phase. I doubt this is so and thus will decline to revisit my previous decision denying consolidation.").

- On October 14, 2014, Plaintiffs filed a joint motion captioned in each of the cases asking the Court to partially consolidate for the limited purpose of deciding multiple motions related to a *Pierringer* settlement of all claims against one of the Defendants, NL Industries. *Burton*, Dkt. No. 233. The Court granted the motion—over the non-settling Defendants' objection—on November 10, 2014. *Burton*, Dkt. No. 244.

- In December of 2014, each of the Defendants filed separate motions to dismiss for lack of personal jurisdiction in each of the individually captioned cases. *See Burton*, Dkt. No. 252, 253, 256, 259, 260.

- On June 18, 2015, Plaintiffs filed a joint motion captioned "Motion to Partially Consolidate These Cases Solely for the Determination of Defendants' Motions for Judgment on the Pleadings Based on Personal Jurisdiction," which was again opposed by all of the Defendants (separately under individual cases captions). *Burton*, Dkt. No. 285, 286, 287.

- On July 15, 2015, the Court issued a order granting a motion for partial consolidation while emphasizing that "the above captioned cases are consolidated for the limited purpose of resolving the pending motions for lack of personal jurisdiction." *Burton*, Dkt. No 294, at p. 3.

- On October 14, 2015, Plaintiffs again filed a motion for partial consolidation of all of the cases for the limited purpose of having the Court decide a motion for a protective order regarding the confidentiality of documents related to the *Pierringer* settlement that had been previously approved. *Burton*, Dkt. No. 331. Despite Defendants' opposition, the Court granted the motion "for the limited purpose of resolving the pending motion for a protective order." *Burton*, Dkt. No. 371.

- On December 12, 2018, on the eve of the first set of jury trials, three individual plaintiffs filed a joint motion to consolidate their three cases for trial. *Burton*, Dkt. No. 1093. Defendants again opposed, but the Court granted consolidation of the three first-wave cases on January 18, 2019. *Burton*, Dkt. Nos. 1101 and 1118. [15]

As demonstrated above, the record of narrowly-tailored, limited, and partial consolidations undermines any assertion by the Court that the Plaintiffs should have anticipated that its summary judgment ruling—issued on a factually-intense, dispositive issue in a few specific cases—was intended to apply to all of the other Plaintiffs' cases. The Court's ruling is simply untethered and inconsistent with the prior practice adopted by both the Court and the parties.

CONCLUSION

For the reasons above, Plaintiffs ask that the Court alter or amend its Order.

Dated this 31st day of March 2022

Respectfully submitted,

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[15] The Plaintiffs continued the practice of filing limited purpose consolidation motions whenever it was contemplated that a ruling on a substantive or procedural motion was being sought that would apply to more than one case. *See Allen,* Dkt. Nos. 278, 979, 980, 982, 985.

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Attorneys for Plaintiffs

EXHIBIT O

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

RUBEN BAEZ GODOY, Minor, by his guardian ad litem, SUSAN M. GRAMLING,

Plaintiff,

v.

Case No. _____
SUMMONS
Case Code 30107

E.I. DUPONT DE NEMOURS AND COMPANY,
8025 Excelsior Dr.
c/o CT Corporation System
Suite 200
Madison, WI 53717

HON. FRANCIS WASIELEWSKI, BR. 17

CIVIL P

CONAGRA FOODS, INC.,
25 W. Main St
c/o CSC-Lawyers Incorporating Service Company
Madison, WI 53703

THE SHERWIN-WILLIAMS COMPANY,
8025 Excelsior Dr.
c/o CT Corporation System
Suite 200
Madison, WI 53717

WALTER STANKOWSKI
2437 West Kimberly Avenue
Milwaukee, Wisconsin 53221,

WAYNE STANKOWSKI
W2127605 Annes Way
Muskego, WI 53150

WISCONSIN ELECTRIC POWER COMPANY
c/o Douglas Leher, Esquire
1111 East Sumner Street
Hartford, Wisconsin 53027-0670

Defendants.

FILED
MAR 23 2007
CLERK OF COURT OF APPEALS
OF WISCONSIN

THE STATE OF WISCONSIN, TO ABOVE-NAMED DEFENDANTS:

JURY DEMAND FE
FEE: $72.00

You are hereby notified that the above-named plaintiff has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: Clerk of Circuit Court, Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin 53233, and to plaintiffs' attorney, whose address is Law Offices of Peter Earle, First Financial Centre, 700 North Water Street, Suite 646, Milwaukee, WI 53202.

You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated at Milwaukee, Wisconsin, this 11th day of January, 2006.

LAW OFFICES OF PETER EARLE
Attorneys for Plaintiff

By: _____
Peter G. Earle
State Bar No. 1012176

Address:
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Milwaukee, WI 53202
Telephone: (414) 276-1076

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

RUBEN BAEZ GODOY, Minor, by his guardian ad litem, SUSAN M. GRAMLING,

Plaintiffs,

vs.

E.I. DUPONT DE NEMOURS AND COMPANY;
CONAGRA FOODS, INC.;
THE SHERWIN-WILLIAMS COMPANY;
WALTER STANKOWSKI;
WAYNE STANKOWSKI, AND
WISCONSIN ELECTRIC POWER COMPANY
;

Defendants,

COMPLAINT

Case No. _____

Case code 30107

FILED
JAN 11 20
JOHN BARRETT
Clerk of Circuit Court

Now Comes the above-named Plaintiff, by his attorneys, for a cause of action against the above- named defendants, and alleges and shows to the Court as follows:

PARTIES

1. Ruben Baez Godoy is a minor and is a resident of the State of Wisconsin, residing at 4414 North 56th Street, Milwaukee, Wisconsin.

2. E.I. Du Pont de Nemours and Company ("Du Pont") is a Delaware corporation with its principal place of business in Delaware.

3. ConAgra Foods, Inc., ("ConAgra"), the successor-in-interest to W P Fuller Company and

Fuller O'Brien, is a Delaware corporation with its principal place of business in Nebraska.

4. The Sherwin-Williams Company ("Sherwin-Williams") is an Ohio corporation with its principal place of business in Ohio.

5. Walter Stankowski is an adult resident of the State of Wisconsin and at all times material, Walter Stankowski owned, maintained, supervised and had control of the property located at 1502 West Windlake Avenue, Milwaukee, Wisconsin, which was constructed in the year 1900.

6. Wayne Stankowski is and adult resident of the State of Wisconsin and at all times material, Wayne Stankowski maintained, managed, and supervised the property located at 1502 West Windlake Avenue, Milwaukee, Wisconsin on behalf of the property owner, Walter Stankowski.

7. That the defendant, Wisconsin Electric Power Company, is a Wisconsin corporation and has made certain payments on behalf of the minor-Plaintiff, with respect to medical, hospital and/or disability expenses which were incurred by the minor-Plaintiff as a result of the unlawful acts alleged here; said defendants is joined as a party for the purpose of complying with the provisions of § 803.08 Wis. Stats.

8. Walter Stankowski and Wayne Stankowski are collectively referred to herein as "Landlord Defendants."

9. At all pertinent times, Sherwin Williams, LLC, ConAgra, and DuPont (hereafter referred to as "Industry Defendant") together with each Industry Defendants' agents, servants, employees, alter egos, and predecessor corporations, manufactured, processed, marketed, promoted, supplied, distributed and/or sold white lead carbonate products used as a pigment in paints and coatings for residential use in the State during the relevant time period.

FACTS

10. On or about March 01, 1998, Ruben Baez-Godoy's family entered into a residential rental agreement for the rental of property located at 1502 West Windlake Avenue. Thereafter, Ruben Baez-Godoy and his family occupied the premises through November 01, 1998.

11. During the period that the plaintiff resided at 1502 West Windlake Avenue, Milwaukee, Wisconsin, the surfaces at the residence were coated with paint containing a white lead carbonate pigment that was manufactured, processed, marketed, promoted, supplied, distributed and/or sold by the Industry Defendants thereby causing the plaintiff to be exposed to and ingest said white lead carbonate.

12. The white lead carbonate pigment manufactured, processed, marketed, promoted, supplied, distributed and/or sold by the Industry Defendants was and is an inherently defective and unreasonably dangerous product.

13. Specifically, the white lead pigment manufactured, processed, marketed, promoted, supplied, distributed and/or sold by the Industry Defendants is hazardous because exposure of children to white lead pigment causes severe and permanent injuries, including, but not limited to learning disabilities, decrements in intelligence, and deficits in a wide range of neuropsychological functioning, including visual motor skills, fine motor skills, verbal skills, attention and concentration, memory, comprehension and impulse control. It can also cause coma, seizure and death.

14. All of the white lead pigment manufactured, processed, marketed, promoted, supplied, distributed and/or sold for use in paint by the Industry Defendants was functionally

interchangeable, physically indistinguishable and identically defective.

15. The Plaintiff is unable to identify the specific manufacturer, supplier and/or distributor of the white lead carbonate present in the residences in which he was exposed. The Plaintiff's inability to identify the manufacturer, supplier and/or distributor of the white lead pigment was not and is not the fault of the Plaintiff.

16. Although the use of all leaded pigments was banned in the United States in 1978, white lead carbonate is still present in and on many homes, schools, hospitals and other public and private buildings throughout the State, including the premises located at 1502 West Windlake Avenue, in the City of Milwaukee, Wisconsin.

17. The Industry Defendants knew and/or should have known since at least the early 1900's that white lead carbonate is hazardous to human health, and in particular to children. For example, in its employee newsletter for the month of January 1900, Sherwin Williams published the following statement:

> ***"It is also familiarly known that white lead is a deadly cumulative poison, while zinc is innocuous. It is true, therefore, that any paint is poisonous in proportion to the percentage of lead contained in it."***

18. The Industry Defendants also knew and/or should have known that there existed, at all relevant times, safer alternatives to the use of white lead carbonate as a pigment for residential paints and coatings.

19. Despite its knowledge that white lead carbonate pigment, when used as intended, was hazardous to human health, the Industry Defendants manufactured, processed, marketed, promoted, supplied, distributed and/or sold white lead carbonate pigments, failed to warn of the

hazardous nature of white lead carbonate pigment, and failed to adequately test white lead carbonate pigments.

20. The Industry Defendants also contributed to the creation of a risk of harm to children when they failed to disclose the hazardous nature of white lead and instead marketed and falsely represented its products containing white lead carbonate as safe.

21. Specifically, the Industry Defendants engaged in promotional campaigns that failed to disclose the dangers of using and exposing children to paint and coatings products containing white lead carbonate pigments. Further, the Industry Defendants marketed paints and coatings containing white lead carbonate as a product that fostered health and well-being and that could be used safely on interior and exterior surfaces where the presence of children was likely.

22. Despite the knowledge of the Industry Defendants regarding the hazards of white lead when used as a pigment in paint, they failed to disclose the dangers of using and exposing children to white lead and thereby knowingly contributed to the creation of the risk of harm to the Plaintiff.

23. Instead, for decades the Industry Defendants marketed white lead as a safe product that fostered health and well-being and promoted white lead as a pigment for use in areas inhabited by children.

24. The Industry Defendants also contributed to the creation of the risk of harm to the Plaintiff through participation in trade associations such as the Lead Industries Association ("LIA") and the National Paint, Varnish, & Lacquer Association (NPVLA), and said activity included, *inter alia*, marketing white lead as a pigment in paint through misleading advertisements and promotions.

25. Through the LIA and NPVLA, the Industry Defendants also sought to suppress all unfavorable information and publicity about white lead carbonate without regard for the truth of such information and despite its own contrary knowledge about the severe hazards posed by white lead carbonate when used as a pigment in paint.

26. As a result of the intentional, negligent and other wrongful conduct of the Industry Defendants in manufacturing, processing, marketing, promoting, supplying, distributing and/or selling white lead carbonate, said hazardous product is present in and on the residence located at 1502 West Windlake Avenue in the City of Milwaukee, Wisconsin.

27. Beginning in March of 1998, the plaintiff sustained lead poisoning by ingesting white lead carbonate derived from intact accessible painted surfaces, paint chips, paint flakes and dust that was derived from paints and coatings in and on the residence located at the premises located at 1502 West Windlake Avenue, Milwaukee, Wisconsin.

28. During the course of his tenancy at 1502 West Windlake Avenue Milwaukee, Wisconsin, the plaintiff continued to be poisoned by the ongoing ingestion of white lead carbonate derived from the surfaces of the aforementioned premises which were painted with paints and coatings containing said pigment.

29. The Landlord Defendants knew, or in the use of ordinary care should have known, that there was intact but deteriorated accessible painted surfaces, as well as, peeling and chipping paint in and on the residence located at 1502 West Windlake Avenue, Milwaukee, Wisconsin. This knowledge was obtained or should have been obtained prior to the plaintiff's occupancy of said premises, as well as on numerous occasions during the course of plaintiff's tenancy in said premises.

30. The Landlord Defendants did not test for the presence of paints and coatings containing white lead carbonate in and on the residence located at 1502 West Windlake Avenue, Milwaukee, Wisconsin at any time before or during the time that the plaintiff resided there.

31. On or about June 18, 1998, the City of Milwaukee Health Department notified the Landlord Defendants that an inspection of the residence located at 1502 West Windlake Avenuue, Milwaukee, Wisconsin disclosed the following:

a. the presence of intact accessible painted and coated surfaces containing lead pigments;

b. loose, peeling, flaking, or chipped paint which contained a hazardous concentration of lead pigments;

c. that the aforementioned conditions tended to cause lead poisoning;

d. the aforementioned conditions were a violation of the Milwaukee Code of Ordinances, including but not limited to §66-20, 66-22, and 66-29; and

32. The lead hazards referred to in the preceding paragraph, which constituted violations of the Milwaukee Code of Ordinances, were not corrected in a timely fashion and continued to pose a health hazard to the plaintiff throughout his tenancy at said premises and in fact poisoned the plaintiff by causing catastrophic and toxic levels of lead in his blood stream.

33. At all relevant times, the conduct of each Defendant was malicious and in reckless and/or intentional disregard for the rights of the Plaintiff.

34. As a direct and proximate result of these and other wrongful actions by each Defendant, the Plaintiff has suffered severe and permanent injuries, including, but not limited to, great pain of body and mind and significant neurological deficits, past and future hospital and medical

expenses, and impairment of the Plaintiff's ability to live and enjoy life, all in an unspecified amount pursuant to Wisconsin Statutes.

FIRST CAUSE OF ACTION
Strict Liability (Industry Defendants)

35. The Plaintiff re-alleges and incorporates herein by reference the foregoing paragraphs of this complaint.

36. The Industry Defendants have at all times material to this action been engaged in the business of manufacturing, promoting, selling, distributing, and/or supplying of white lead carbonate which was used in the painting, staining, construction of, and the maintenance and remodeling of the residence located at 1502 West Windlake Avenuel in the City of Milwaukee, Wisconsin.

37. The white lead carbonate that the Plaintiff was exposed to was in substantially the same condition as it was before leaving the control of the Industry Defendants.

38. At the time that the white lead carbonate left the possession and control of the Industry Defendants, it was a defective and unreasonably dangerous product because, when used in the manner in which it was intended to be used and/or for the purpose that it was reasonably foreseeable it may have been used, it caused substantial and severe injuries to the Plaintiff.

39. The defective condition of the white lead carbonate manufactured, marketed, promoted, supplied, distributed and/or sold by Industry Defendants was a factor that substantially contributed to the Plaintiff's injuries.

SECOND CAUSE OF ACTION
Negligence (Industry Defendant)

40. The Plaintiff re-alleges and incorporates herein by reference the foregoing paragraphs of this complaint.

41. The Industry Defendants knew or should have known that white lead carbonate when used as a pigment in residential paints and coatings was harmful to children coming into contact with it.

42. Despite the knowledge that white lead carbonate posed an unreasonable risk to the health and welfare of children exposed thereto, the Industry Defendants continued to manufacture, promote, sell, distribute, and/or supply white lead carbonate which was used in and on the residences located at 1502 West Windlake Avenue in the City of Milwaukee, Wisconsin.

43. At all times material hereto, the Industry Defendants were under an obligation of due care to refrain from any act which would cause foreseeable harm to others.

44. At all times material, the Industry Defendants were under a continuing duty to warn about the hazards of its white lead carbonate products.

45. The Industry Defendants also owed a heightened duty of care because its conduct directly impacted the health and welfare of children.

46. The Industry Defendants breached their duties by engaging in conduct that posed an unreasonable risk of harm, including, among other things:

a. selling white lead carbonate without warning the general public of the dangerous characteristics thereof;

b. continuing to fail to adequately warn the general public of the dangerous

characteristics of white lead carbonate following the sale of its product through the present time;

c. failing to adequately test white lead carbonate for use in residential paints and coatings; and/or

d. continuing to manufacture, promote, sell, distribute, and/or supply white lead carbonate when they knew, or in the exercise of ordinary care, should have known that white lead carbonate was harmful to children and other persons coming into contact with it.

47. The negligence of the Industry Defendants was a factor that substantially contributed to the Plaintiff's injuries.

THIRD CAUSE OF ACTION
Negligence (Landlord Defendants)

48. The Plaintiff re-alleges and incorporates herein by reference the foregoing paragraphs of this complaint.

49. The Landlord Dedendants failed to exercise ordinary care and was negligent with regard to the presence of lead paint at the residence located at 1502 West Windlake Avenue, Milwaukee, Wisconsin prior to and during the entire time that the Plaintiff resided at said property and was exposed to lead pigments therein.

50. The Landlord Defendants' negligence included, but was not limited to, the manner in which they maintained the premises in which the Plaintiff sustained injury.

51. The negligence of the Landlord Defendants was a factor that substantially contributed to the Plaintiff's injuries.

WHEREFORE the Plaintiff demands judgment against each Defendant, jointly and severally, as follows:

1. For the Plaintiff, Ruben Baez Godoy, in an unspecified amount pursuant to Wisconsin Statutes, including but not limited to compensatory and punitive damages;

2. For pre-judgment and post-judgment interest, together with the costs, disbursements of this action;

3. For any other remedy the court deems just and equitable under the circumstances.

PLAINTIFF HEREBY DEMANDS A JURY TRIAL.

Dated at Milwaukee, Wisconsin, this 11th day of January, 2006.

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EXHIBIT P

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MANIYA ALLEN, et al.,
Plaintiffs, **CASE NO. 11-CV-0055**

v.

AMERICAN CYANAMID CO., *et al,*
Defendants.

DIJONAE TRAMMELL,
Plaintiff, **CASE NO. 14-CV-1423**

v.

AMERICAN CYANAMID CO., *et al,*
Defendants.

ERNEST GIBSON,
Plaintiff, **CASE NO. 07-CV-0864**

v.

AMERICAN CYANAMID CO., *et al,*
Defendants.

DESIREE VALOE, et al.,
Plaintiff, **CASE NO. 11-CV-0425**

v.

AMERICAN CYANAMID CO., *et al,*
Defendants.

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, AND MOTION TO RECONSIDER THE COURT'S ORDER OF SUMMARY JUDGMENT ON WAVE 2 PLAINTIFFS' NEGLIGENT FAILURE TO WARN CLAIMS

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INTRODUCTION

With one minor exception,[1] Defendants' arguments for summary judgment[2] hinge entirely on their request for a finding of fact that Defendants owed no duty to warn Plaintiffs because "by the time the plaintiffs suffered their alleged injuries, the dangers of WLC and lead in general were well known." *See Allen v. AM. Cyanamid Co.*, 527 F. Supp. 3d 982, 997 (E.D. Wis. 2021). As demonstrated below, the specific risks associated with children's ingestion of invisible White Lead Carbonate ("WLC") dust on the floors and surfaces of their homes were, or should have been, known to Defendants, but were not contemplated by ordinary consumers (moms, dads, and caregivers) at the time of Plaintiffs' injuries starting in the 1990s.[3] As such, Defendants had a

[1] Atlantic Richfield makes the "additional" argument that it alone is entitled to summary judgment on the grounds "to the extent its alleged predecessors supplied white lead carbonate as a component in paint." Dkt. No. 1079 at 5, 11-cv-00055.

[2] Sherwin Williams Company ("Sherwin-Williams") moved for summary judgment against "all Plaintiffs' claims in all remaining risk-contribution cases," arguing that Plaintiffs' negligence and strict liability failure to warn claims are legally insufficient, and there are no triable issues in these cases." *See* Dkt. No. 1084, 11-cv-00055 ("S-W Br."). Armstrong Containers, Inc. ("Armstrong") and E.I. du Pont de Nemours & Co. ("DuPont") filed notices of joinder in Sherwin-Williams' motion for summary judgment. *See* Dkt. Nos. 1087 (hereafter "Armstrong's Br.") and 1089 (hereafter "DuPont Br."), 11-cv-00055. Atlantic Richfield Company ("ARCO") filed its own, separate motion for summary judgment on "all plaintiffs' claims," similarly dependent on the assertion that Plaintiffs are unable to prove a duty to warn exists. *See* Dkt. No. 1079, 11-cv-00055 ("ARCO Br."). Defendants filed their motions and joinders in each of the four remained actions. *See* Dkts. *Allen v. American Cyanamid Co., et al* (No. 11-cv-00055), *Gibson v. American Cyanamid Co., et al* (No._07-cv-00864), *Valoe v. American Cyanamid Co., et al* (No. 11-cv-00425), and *Trammell v. American Cyanamid Co., et al* (No. 14-cv-01423). The motions and memorandums filed in each action are materially identical. Plaintiffs respond to all of Defendants' motions herein.

[3] *See* Plaintiffs' Response to Sherwin-Williams's Statement of Proposed Material Facts in Support of Its Renewed Motion for Summary Judgment, along with exhibits cited therein; *see also* the Plaintiffs' Statement of Additional Facts That Require Denial of Summary Judgment ("Stat. Add. Facts") appended to the Plaintiffs' Response, citing Ex. A attached to the Declaration of Fidelma Fitzpatrick ("Declaration"), filed contemporaneously herewith; *see also* Stat. Add. Facts ¶ 3, Exs. V, W, and X; ¶ 6, Ex. S, Y, Z; ¶ 12, Ex. E; 14, Ex. P, Q, R, V, W, X; ¶ 15-16, Ex. G; ¶ 18, Ex. H; ¶ 19, Ex. I; ¶ 20, Ex. D; ¶¶ 2122, Ex. J; and ¶ 23, Exs. T and U. The Statements of Additional Facts in response to Sherwin Williams's motion are incorporated by reference in Plaintiffs' responses to ARCO's, Armstrong's and DuPont's statements of fact. Thus, in the interest of economy, Plaintiffs cite to the additional facts filed in response to Sherwin-Williams's motion, herein.

duty to warn of those hidden dangers of their WLC-containing paint products, and their failure to do so renders them negligent and their products defective. At the very least, a question of fact exists as to the level of consumer knowledge, and as a result, the existence of a duty.

For the reasons below, the Court should: (1) deny summary judgment on the remaining Plaintiffs' negligence and strict liability failure to warn claims; and (2) revisit its decision on Wave 2 Plaintiffs' negligence failure to warn claims.

BACKGROUND

Defendants argue that there is no cause of action available to any of the children poisoned by their WLC products despite the clear mandate of the Wisconsin Supreme Court in *Thomas ex. Rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005). As *Thomas* is still controlling Wisconsin law on Plaintiffs' risk-contribution claims, it cannot simply be washed away by the Seventh Circuit's opinion in *Burton v. E.I. du Pont de Nemours & Co.*, 994 F.3d 791 (7th Cir. 2021) ("*Burton*"). *See Robinson v. Ada S. McKinley Community Services, Inc.*, 19 F. 3d 359, 363 (7th Cir. 1994) (federal courts sitting in diversity are bound by the decisions of a state's highest court.). That is effectively what is at risk with Defendants' motions.

Plaintiffs suffered childhood injuries due to poisoning from paint containing WLC—precisely the same injury suffered by plaintiff Thomas. *See* Stat. Add. Facts ¶ 2, Exs. A and B. There is no fact of consequence distinguishing Thomas's case from those brought by these Plaintiffs. In fact, Thomas himself was "born on June 23, 1990," and alleged "that he sustained lead poisoning by ingesting lead paint from accessible painted surfaces, paint chips, and paint flakes and dust at two different houses he lived in during the early 1990's." *Thomas*, 701 N.W.2d at 528. Specifically, Thomas claimed to be poisoned by the lead paint in the houses he

inhabited as late as "November 1993." *Id.*[4] Defendants still insist, however, that there is absolutely no path to recovery for Plaintiffs, because they had no duty to warn consumers in the 1990s—such as Thomas and Plaintiffs—of the dangers of their WLC product. That simply cannot be without superseding or abrogating the Wisconsin Supreme Court's decision in *Thomas*—which was specifically intended to, and did, create a cause of action for these children. *See Thomas*, 701 N.W.2d 523. Furthermore, to do so would violate each lead-poisoned child's Constitutional right to a remedy that was explicitly recognized by the Wisconsin Supreme Court in *Thomas*.

Based upon the Seventh Circuit's ruling in *Burton*, Defendants moved for summary judgment in all remaining risk-contribution cases. Defendants concede, however, that the appellate court's opinion in *Burton* reversed the jury's verdicts in those cases on a few, purely legal grounds. S-W Br. at 1. None of those rulings require summary judgement on the remaining Plaintiffs' claims. In fact, only one of those rulings is even pertinent to Defendants' current motions: the scope of Defendants' duty to warn.

As such, Plaintiffs previously requested the opportunity to take additional discovery on the issue of whether a duty to warn existed at the time of their injuries, and the Court granted Plaintiffs ninety days to "conduct discovery limited to the issue of whether the defendants knew of dangers presented by the product which were not known to consumers at the time of the injuries." Order Staying Non-Remanded Cases and Allowing Discovery, Aug. 24, 2021, Dkt. No. 1862, 07-cv-00303. Accordingly, Plaintiffs served additional discovery requests on Defendants, and Plaintiffs' experts, Dr. David Jacobs and David Rosner, have provided reports

[4] While the Wisconsin Supreme Court did not specifically address Defendants' duty to warn in *Thomas*, claims based upon the existence of such a duty were ultimately allowed to go to a jury. *Thomas*, 701 N.W.2d at n.2.

addressing the question of the public's general understanding of lead paint and the contaminated dust and soil it generates. *See* Ex. C, Expert Report of David E. Jacobs ("Jacobs Report"); Ex. M, Expert Report of David Rosner ("Rosner Report"). As demonstrated below, the evidence clearly establishes Defendants' duty to warn based upon their knowledge of the dangers associated with WLC-containing dust, which were not commonly known by consumers in the 1990s and 2000s.

LEGAL STANDARD

Summary judgment is granted when "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Jaburek v. Foxx*, 813 F.3d 626, 630-31 (7th Cir. 2016); *see also* Federal Rule of Civil Procedure ("Rule") 56. Disputes of material fact are those that create "a genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Salima v. Scherwood S., Inc.* 38 F.3d 929, 931 (7th Cir. 1994) ("Where there are genuine disputes of material fact, resolution is capable only through trial, and summary judgment is, therefore, inappropriate."). The moving party has the burden of showing that there are no genuine disputes of material fact and that it is entitled to judgment as a matter of law. *Spierer v. Rossman*, 798 F.3d 502, 507 (7th Cir. 2015). The Court must draw "all inferences in the light most favorable to the non-moving party[.]" *Id.*

ARGUMENT

Defendants assert that Plaintiffs cannot establish a warning defect under negligence because "a manufacturer … does not have a duty to warn about dangers that are … *so commonly known* that it can reasonably be assumed that users will be familiar with them." *E.g.*, S-W Br. at 8 (quoting WIS. JI-CIVIL § 3242) (emphasis added). Similarly, Defendants argue Plaintiffs

cannot establish a duty to warn under strict liability because "the widespread public awareness of the alleged danger [of lead] before the time of all Plaintiffs' exposure bars strict liability." *E.g.*, *id.* at 11. As such, the crux of the issue on both negligence and strict liability is Plaintiffs' ability to establish Defendants had a duty to warn of unknown risks of lead paint. As Plaintiffs can, and will, establish Defendants were aware of "hidden dangers" of lead paint not contemplated by consumers at the time of their injuries, they were under a duty to warn of those dangers, and their failure to do so constitutes negligence and a defect under strict liability. As such, Plaintiffs respectfully request the Court deny Defendants' motions for summary judgement.

I. Defendants had a duty to warn of the hidden dangers of lead paint, including those of lead dust, in the 1990s, 2000s, and beyond.

At the very least, the evidence below is sufficient to create a triable issue of fact with regard to when, *if ever,* the specific, hidden dangers posed by WLC-containing household dust became so commonly understood as to extinguish Defendants' duty to warn.

A. Defendants had a duty to warn of the specific nature of WLC's risks.

Defendants do not cite to a single piece of evidence, line of testimony, or expert opinion supporting their fact-based argument that consumers in the 1990s and early 2000s were aware of the dangers of lead dust. *See* ARCO Br. at 2-5; S-W Br. at 5, 8-11. For that reason alone, their motions for summary judgment should fail.

It is true that in previously holding that the *Burton* plaintiffs' caregivers were aware of the general toxicity of lead, and that children should not eat paint chips, this Court opined that paint manufacturers issued product warnings, and that federal, state, and local governments began warning of the risks of lead-based paint in homes in the 1970s. *Burton v. Am. Cyanamid,* 334 F. Supp. 3d 949, 961 (E.D. Wis. 2018). The Court also pointed to the *Burton* plaintiffs' caregivers' deposition testimony for support that they knew, before the *Burton* plaintiffs' exposures to lead-

based paint, that children should not eat paint chips because of the risk of lead exposure. *Id.* Subsequently, the Court found judgement as a matter of law to be appropriate on Wave 2 Plaintiffs' negligent failure to warn claims based upon its prior holding that "by the time the plaintiffs suffered their alleged injuries, the dangers of WLC and lead in general were well known and WLC manufacturers and sellers had ample reason to believe that persons residing in homes with older paint would be aware of the toxicity of the lead compounds possibly in their paint, and of the various mechanisms by which that lead might be ingested." *Allen*, 527 F. Supp. 3d at 997.

The Court's prior analyses, however, were incomplete because they focused on consumers' knowledge of the *general* dangers of lead, and the ingestion of lead paint *chips*. They did not sufficiently consider the specific, hidden dangers presented by lead *dust*. Stat. Add. Facts ¶ 1, Exs. D, E, F, G, H; ¶ 4., Exs. D, I, J; ¶ 7, Ex. I; ¶¶ 89, Ex. D; and ¶ 10, Ex. K. Defendants' actual knowledge of these insidious hazards establishes a duty to warn Plaintiffs and their caregivers, and those similarly situated. *Id.* ¶ 1, Ex. D ; ¶ 7, Ex. I; ¶ 11, Ex. E; ¶ 12, Ex. F ¶ 23, Exs. G and H.

In *Thomas*, the Wisconsin Supreme Court noted the "more common" dangers of lead dust. 701 N.W.2d at 533 ("a child does not have to eat paint chips to become poisoned. It is more common for children to ingest dust and soil contaminated with lead from paint that either has flaked or chalked as it aged or has been otherwise disturbed during home maintenance or renovation."). In fact, this Court's ruling regarding the *Burton* plaintiffs' negligent failure to warn claims is at odds with the opinion's later recognition of the true, hidden dangers of Defendants' products (in its discussion of Defendants' duty to warn on strict liability):

> The parties agree that since Greek and Roman times, it has been common knowledge that lead is toxic if too much is ingested; thus if the only danger of WLC were that it is toxic when consumed directly, the manufacturer would be under no special duty to warn about the toxicity of lead so long as the purchaser knew that the product contained lead. However, the danger known to Sherwin-Williams was more extensive than mere toxicity. For example, Sherwin-Williams knew that the noxious

> quality of lead paint "becomes serious in paint which disintegrates and is blown about by the wind." Would ordinary consumers purchasing paint containing WLC between 1910 and 1947 have contemplated the possibility that the paint would disintegrate and possibly distribute lead elsewhere in their homes?

Burton, 334 F. Supp. 3d at 961-62. That is still the crux of the issue in the remaining Plaintiffs' cases—would ordinary consumers in the 1990s have contemplated the specific risks associated with paint deterioration and the resulting lead dust? The evidence below demonstrates the answer is: No. At the very least, the question cannot be answered affirmatively *as a matter of law*.

Plaintiffs do not contest that society has known of the *general* danger of ingesting lead since antiquity. It is black letter law, however, that "a general warning is not necessarily adequate to warn of a specific danger." *Tanner v. Shoupe*, 596 N.W.2d 805 (Ct. App. 1999); *see also Kozlowski v. John E. Smith's Sons Co.*, 275 N.W.2d 915, 923 (Wis. 1979) (holding that it was a jury question whether a general warning to avoid excessive pressure was adequate to reveal the danger of an exploding safety ring at a high-pressure setting); *Schur v. Fox River Tractor Co.*, 218 N.W. 2d 279, 283-85 (Wis. 1974) (the jury should determine whether the general warning on a piece of farm equipment was adequate to warn of the specific danger caused by the unusual placement of a lever that controlled the fan causing plaintiff's injury.). As such, the duty question cannot be answered by the fact that consumers generally knew that lead is poisonous—or even that they knew that eating paint chips is dangerous—when the evidence will establish Defendants knew of the specific, hidden dangers presented by invisible lead dust, and had no reason to believe that ordinary consumers would reasonably anticipate those dangers.

B. Defendants knew of the specific and unique dangers of lead dust.

This litigation is and always has been focused on the hidden dangers of WLC, specifically including those presented by invisible household dust. Plaintiffs' experts have repeatedly opined that lead dust is the primary risk leading to lead poisoning in children of the Plaintiffs' generation. For

example, in his prior report, Plaintiffs' expert Dr. David Jacobs opined that the association between "the presence of lead-based paint and lead-contaminated house dust and contaminated soil" is well-established. Stat. Add. Facts ¶ 7, Ex. I. Plaintiffs' experts also testified at the *Burton* trial about the specific dangers of lead dust. Specifically, Dr. Bruce Lanphear testified that he and his colleagues "found that lead-contaminated house dust was *the major contributor*" of childhood lead poisoning. *Id.* ¶ 8, Ex. D. In fact, Dr. Lanphear testified that "household dust *is the principal pathway* of exposure." *Id.* at 598:25-599:3 (emphasis added). Dr. Jacobs further testified about the "paint chip misconception"—explaining how people misconstrue the ingestion of paint chips with "the more common mechanism through which the lead gets from the paint binder into the children's bodies [which] is through [the] generation of dust," and opined that "instead *most of it* goes through this dust and hand contact." *Id.* ¶ 24 at Ex. L (emphasis added).[5] The President's Task Force evidence discussed at trial corroborates Plaintiffs' experts' testimony that the most common source of lead exposure for children today is lead-based paint in older housing and the lead-contaminated dust and soil. *Id.* ¶ 10, Ex. K.

Plaintiffs' experts also established—and will do so again—that Defendants have long known of the risk of lead poisoning caused by dust. For example, Plaintiffs' expert public health historian, David Rosner has submitted a report in Plaintiffs' cases specifically detailing the history and evidence of Defendants' knowledge of the dangers of WLC-containing household dust. *See* Ex. M, Rosner Report. In the *Burton* trial, Dr. Rosner testified that by 1904 the medical literature warned of the risks associated with children's exposure to lead dust, and that due to the identification of these risks associated with lead dust, Defendants had a "responsibility to know"

[5] Plaintiffs' expert, Dr. Markowitz, opined about the dangers of using wire brush, scraper, or blow torch on a painted surface—because it generated lead dust—but Defendants actually advocated the use of those tools on painted surfaces as late as the 1950s and 1960s. *Id.* ¶ 25, Ex. AA.

that their product was poisoning children "by 1920 at the latest." *Id.* ¶ 11, Ex. E. In fact, defense expert, Dr. Dunlavy, agreed that as of 1900, Defendants were generally aware of this poisonous quality when lead turns to dust. *Id.* ¶ 12, Ex. F.

Finally, ARCO has admitted that it "did not warn the ordinary Consumer about the risks or dangers of Lead Dust between 1900 and 2011," and Armstrong and DuPont have made the same admission for the periods during which they manufactured WLC. *See* Exs N, O, and P (ARCO's Resp. to Pls. Req. For Admis. No. 3; DuPont Resp. to Pls. Req. For Admis. No. 3, and Armstrong Resp. to Pls. Req. For Admis. No. 3). Sherwin-Williams denied Plaintiffs' request for admission on that issue—but refused to "review documents previously produced to Plaintiffs' counsel" or specifically identify *any* individual documents supporting its denial. *See* Ex. Q (Sherwin-Williams Resp. To Pls. Req. For Admis. No. 3).

C. Plaintiffs and consumers did not contemplate the hidden risks of lead dust.

The evidence establishes a genuine issue of material fact regarding whether the dangers of lead paint deterioration, friction surfaces, and the presence of lead dust were known by Plaintiffs, their caregivers, and ordinary consumers at the time of the Plaintiffs' injuries.

1. Evidence of Plaintiffs' and their caregivers' lack of knowledge.

As an initial matter, several Plaintiffs' and their caregivers' have supplied affidavits attesting to their lack of knowledge of the dangers of lead dust. *See id.* ¶ 3, Exs. R, S, T, U, V, W and X. And while case-specific discovery has not been taken in the vast majority of the Plaintiffs' cases, it is anticipated that the remaining Plaintiffs and caregivers will similarly testify—so, there should be no dispute as to what "the ultimate consumer (*i.e.*, the plaintiffs or their caregivers) knew" in these cases. *See Burton,* 994 F.3d at 823. As Defendants have submitted no evidence to the contrary in connection with their summary judgment motions, the inquiry may arguably stop at the Plaintiffs'

and their caregivers' knowledge of the risks, as the appellate court seemed to question whether Wisconsin law even requires the application of the "consumer contemplation" test, stating: "even if [the consumer contemplation] test was relevant to duty to warn, it focuses on ordinary consumers *in the plaintiffs' situation." Id.*[6]

2. Evidence of the general public's lack of knowledge.

In this case, however, a duty to warn also exists under the consumer contemplation test. The evidence—including testimony from the WLC manufacturer defendants' own experts—establishes Defendants had *no reason to believe* the dangers presented by invisible lead dust "would be contemplated by any ordinary consumer who has ordinary knowledge which is common to the community." *Estate of Schilling v. Blount, Inc,* 449 N.W.2d 56, 59 (Wis. Ct. App. 1989). Therefore, Defendants had a duty to warn of the dangers known to them, but not known by consumers "in Plaintiffs' situation." *Burton*, 994 F.3d at 823.

a. Evidence of consumer knowledge already adduced.

Defendants' own expert, John Sharpless, admitted that from 1900 to 1950 there was nothing in the public domain that would have informed parents or caregivers that their children could be poisoned by the dust from deteriorated residential paint. Stat. Add. Facts ¶15, Ex. Y. As Sharpless unequivocally admitted, "parents didn't know that" lead dust was a danger to their children. *Id.* ¶ 16. There is no testimony or evidence—none—that these risks later became common knowledge.

In fact, Defendants argued that there was not a single reference to invisible lead dust as a source or pathway for childhood lead poisoning until the 1970s. *Id.* ¶ 17, Exs. Z and AA. Defendants' expert, Dr. Peter English, testified that "the first time that house dust was mentioned

[6] The Wisconsin Supreme Court has been clear that all strict product liability cases are governed by the consumer contemplation test. *Horst v. Deere & Co.*, 769 N.W.2d 536, 555 (Wis. 2009).

in the American medical literature as a potential source of lead causing childhood lead poisoning" was not until 1974—and even then, he claimed it was a "new scientific idea" that the medical community had posited, and required more study. *Id.* ¶ 18, Ex. AB (emphasis added). Similarly, Dr. English proffers the following in his report: "[u]ntil the mid-1970's, however, there was no discussion among medical and public health authorities regarding household dust picked up by young children and carried to the mouth during their normal activities, or lead in the air, as significant childhood lead hazards. And it was not until the mid to late 1970's or early 1980's that medical and public health authorities viewed household dust or lead in the air as potentially significant childhood lead hazards." *Id.* ¶ 16, Ex. AC. Notwithstanding the proffered testimony of Defendants' experts, Plaintiffs successfully disputed that argument and established that the medical and scientific literature from decades earlier—along with Defendants' own internal documents—established the dangers of lead dust. Crucially, however, as Plaintiffs' expert David Rosner testified, those types of medical and scientific journal articles were not accessible to parents and other general consumers. *Id*, ¶ 20, Ex. E.

Defense expert Patrick Connor's testimony bolsters the dearth of publicly available information regarding the dangers of lead in household dust. He testified that even lead-based paint inspectors and environmental risk assessors were still "learning" about the issues related to lead paint deterioration ***in the 1990s***, including "the hand-to-mouth interaction of a child, and [the fact that] they were ingesting lead and predominantly dust-related lead." *Id.* ¶ 21, Ex. AD. In fact, Mr. Connor testified that it was not until after Congress passed the Housing and Community Development Act of 1992 that the Environmental Protection Agency ("EPA") was tasked with defining the dangers from lead dust "so risk assessors would really know what

they're looking for"—and the EPA did not issue its final rules or definitions regarding these dangers ***until 2001***. *Id.* at 3818:16-3819:16. *Id.* ¶ 22, Ex. AD.

Thus, Defendants' own experts' opinions and testimony—asserting a lack of available information about the dangers of lead dust—completely undermines any argument that the dangers of lead dust were commonly known to the *general public* at the time of Plaintiffs' injuries. Certainly, Defendants cannot credibly claim that the knowledge was so pervasive as to negate any question of fact on their duty to warn of these risks.

Finally, the knowledge of the ordinary consumer should be analyzed in light of Defendants' and the lead paint industry's efforts to misinform the public (through advertising and promotional activities) and otherwise hide the true dangers of lead and its various ingestion pathways. *Id* at ¶ 27, Ex. AE. If the alleged risks were so obvious to the ultimate consumers, then there would be no need for those efforts to obscure the dangers of lead dust. As Dr. Rosner testified, however, it was vital for the industry to keep the true dangers of lead unknown, as no parent would knowingly expose their child to the risk of lead poisoning. *Id.* at ¶28, Ex. AA.

b. Dr. Jacobs' November 2021 Report and reliance documents provide additional evidence of a lack of consumer knowledge of the dangers of lead dust.

In connection with the filing of this opposition brief, Dr. Jacobs has provided a report focusing on the question of the public's general understanding of lead paint and the contaminated dust and soil it generates. *See* Ex. C, Jacobs Report. Plaintiffs do not have the space herein to fully explore the opinions and support contained in that 21-page report, but instead highlight just some of the evidence supporting Dr. Jacobs' opinions, including his opinion that "despite certain public health education and regulatory changes over the years, the public still

does not fully grasp the dangers of residential lead paint nor the pathways of exposure. This was especially true in the mid-1990s to 2000's." *Id.* at 3.

This lack of consumer awareness—and need for additional education and warnings—is well documented. As recently as 2014, a court-ordered abatement plan required ongoing educational efforts based upon the lack of public knowledge of the hidden dangers of lead paint. *Id.* at 4 (citing *People v Atlantic Richfield Company, et al.*, Superior Court of California, County of Santa Clara, Case No. 1-00-CV-788657, Amended Statement of Decision at 98). Indeed, as Dr. Jacobs explains, virtually all health departments found it necessary to provide educational outreach about this hidden danger of lead paint throughout the 1990s and into the 2000s:

> Throughout the 1990s (and into the 2000s and today) federal, state, and local governments spent hundreds of millions of dollars in an effort to warn consumers/parents of the dangers of lead dust. This undeniably establishes a need for public education due to a lack of knowledge by the general public and that it was necessary.

Id. at 4-5, 8. A jury may draw an inference about the ordinary consumers' lack of knowledge about the specific dangers of lead paint from the fact that local, state, and federal agencies—well into the 2000s and beyond—have found it necessary to spend significant resources on campaigns aimed at educating homeowners of the hidden dangers of household dust containing WLC. For example, in the late 1990s Dr. Jacobs took part in HUD's "Campaign for Lead Safe America" which featured public service announcements and education efforts targeting parents and consumers, recognizing their lack of knowledge of the dangers of lead. *Id.* at 15. Similarly, he worked with the State of Michigan and the United Parents Against Lead in 1996 to distribute materials to try to educate parents (across the country) about the dangers of lead dust. In fact, "National Lead Poisoning Prevention Week" was not launched until the year 2000, but has now "reached international scope." *Id.* at 16. These are just a few of the many governmental and private efforts

to bridge the knowledge gap that existed in the 1990s, continued into the 2000s, and arguably exists to this day. *See id; see also* Stat. Add. Facts, ¶ 26, Exs. AF, AG, AH, AI, AJ, and AE.

In 1994, HUD conducted a household survey where 44% of the respondents *admitted* to not knowing that lead paint produced dangerous dust; and the authors concluded that for lower income families—such as those in Plaintiffs' situation—the awareness was even lower. *Id.* at 10. Moreover, when Congress passed Title X of the 1992 Housing and Community Development Act, it specifically recognized the need for the federal government to "take a leadership role" in creating an "informed public," and one of the stated purposes of Title X was "to educate the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards." *Id.* at 8 (citing Housing and Community Development Act of 1992. Title X. Public Law 102-550, Sections 1002(8) and 1003(7)). Those congressional statements directly contradict Defendants' argument that these dangers were "so commonly known" that there was no duty to warn of them. *E.g.*, S-W Br. at 8.

As Dr. Jacobs further opines: "[t]he federal government passed regulations in 1996 requiring landlords to warn people of the dangers of lead paint in housing. That alone should be sufficient to demonstrate that the dangers of lead paint were not so well known to the general public in the 1990s. This means that reasonable efforts by the industry to also warn about this risk were still needed. In fact, to this day property owners are required to warn tenants and buyers of the dangers of lead." *Id.* at 21; *see also id.* at 8-9 (citing 1992 Housing and Community Development Act, Title X, Public Law 102-550). If the federal government imposes a duty on landlords to warn consumers of the dangers of lead paint—including lead dust—surely the manufacturers of the poisonous WLC product have a similar duty to warn.

While the passage of Title X and the educational efforts that followed certainly raised *some* awareness, the press and media coverage throughout the 1990s and into the 2000s evidences a general lack of public knowledge of the dangers of WLC-containing dust:

- July 1991 Newsweek article "Lead And Your Kids" discussing how what "most Americans believed about lead poisoning was wrong," and how, contrary to the public's misconception, the homeowners' children were "probably not [poisoned] from eating paint chips but from fine paint dust." Further stating: "But the CDC faces a dilemma: how to make people more aware of lead's hazard's without creating a stampede of hysterical parents. Health departments and medical labs could not now handle a surge in demand for blood tests...But most families won't take such dramatic steps, or for that matter, test their own children. The problem isn't a lack of money or legal expertise. They simply don't realize—or can't believe—that the dust on their windowsill might be quietly stealing part of their child's potential." *Id.* at 11;

- February 1991 Time Magazine article "Controlling a Childhood Menace" stating: "For many years public health officials assumed that most cases were the result of toddlers' eating the sweet-tasting chips and flakes. More recently, however, researchers have recognized that dust from deteriorating paint, settling onto window-sills, furniture and carpets, poses a more pervasive threat." *Id.* at 11-12;

- 1999 article "Family's dream house turns into a poison 'nightmare'" quoting homeowners as stating: "We thought because the paint was gone, that all the lead was gone. This was our tragic mistake." *Id.* at 12;

- May 2000 St. Louis Post-Dispatch article "Madison County Gets Grant to Clean Up Lead Hazard; Money Will Assist People Near EPA's Superfund Site' Program Began Two Years Ago" stating: "We have a lot of education to do to make sure parents understand lead poisoning." *Id.*;

- March 2000 Rocky Mountain News article "Much-needed repairs" quoting an employee of the local Northeast Denver Housing Center as stating: "We are so ignorant in our area on the fact of lead poisoning." *Id.* at 13;

- October 1999 Chicago-Defender article "Federal grants to aid victims of lead paint" stating: "There are misconceptions about how you get lead poisoning,' [HUD Secretary Cuomo] said, adding that children do not eat it like they eat potato chips. 'Lead from door frames and windows is worn away and dust forms on the floor. Then a child picks up the dust on his or her hands and winds up ingesting the dust,' he said." *Id.* at 13-14;

- 1999 City of Harrisburg newsletter quoting a public health nurse as stating: "A lot of people think that kids have to eat lead paint chips to get lead poisoning, but they usually get it from inhaling or ingesting lead dust." *Id.* at 14;

- November 1999 Bangor Daily News article "[Senator] Collins calls lead paint major hazard for kids" stating: "parents and public health officials testified that the public often doesn't know enough about the dangers and the ways to guard against it." *Id.* at 12;

- October 2000 Capital Times (Madison, WI) article "Lead Paint a Hurdle for Landlords; Regulations May Hurt Section 8" recognizing that even physicians were not aware of true dangers, stating: "As of 2000, the Madison Public Health Department was still trying to get the information out to doctors that lead poisoning is not something we don't need to worry about." *Id.* at 14; and

- August 2006 Washingtonian magazine article "Why is Lead Still Poisoning Our Children?" recognizing that even public housing agencies were not aware of the true dangers, stating: "The Department of Consumer and Regulatory Affairs] usually see[s] peeling paint as a cosmetic problem, not something that can damage a child's brain. If they do flag a property for paint problems, they usually tell the owner to scrape the paint, which can make the hazard worse...Education of the public is critical." *Id.*

The fact that news and media outlets consistently reported on the general public's—*i.e.*, the ordinary consumer's—lack of knowledge of the hidden dangers of WLC-containing household dust throughout the relevant time period demonstrates a triable question of fact on that issue.

Likewise, the press releases issued by regulatory bodies recognized the lack of public knowledge of the dangers of lead dust, and the need for further education and warning:

- October 2000 HUD News and 1997 "The Lead Post" recognizing the need for "education and outreach programs." *Id.* at 14-15;

- March 2006 EPA press release stating: "Parents can unknowingly poison their children when they disrupt lead-based painted surfaces during renovations."

At a Congressional hearing in 1999, senators, experts (including Dr. Jacobs), and poisoned children's parents discussed the public's lack of knowledge of the hidden dangers of lead dust, and the vital need to educate parents and consumers about those specific dangers, stating:

- "Educating homeowners, landlords, real estate agents and contractors about the hazards is another very important part of the solution. Fifty percent of Maine families with children with high blood lead levels had recently renovated their homes. They inadvertently created the dangerous dust from disturbed lead paint that affected their children."

- "So there are things that we can do and one of the things we must do is get the word out—such as public education, public awareness—and that is critical and that is why, again, Senator Collins' hearing today is so absolutely important and typical of her service to the people of Maine. She is getting the word out."

- "People do not want to see young children exposed to lead which affects their development and causes their health to deteriorate. They want to help out if they know what to do, and it is our job to give them information."

- "I am convinced that after people hear what you went through, it will help raise public awareness and alert a lot of other parents."

- [From Parent's Testimony]: "Finally, there is an undeniable need for general lead education. I cannot count how many times I have been asked: Was Sammy chewing the woodwork or did he eat paint chips? I feel there is a spreading myth that children get lead poisoning from eating paint chips. That is not the case and parents do not really know the truth and realities about lead poisoning and are being greatly misled.... So I just do not understand since lead paint has been an issue since 1978 why we are only this far in awareness."

- "And I think it is common that many of us have the misconception that you have encountered, thinking this was a problem of the past and that it had somehow been cured once we banned lead-based paint after 1978. Or we have the misconception, which is one I shared prior to getting into this issue, that the child was not eating paint chips so there was not a problem. Of course, in neither of your cases was it a problem with eating paint chips but, rather, with the insidious dust."

Id. at 12-13 (citing Subcommittee on Public Health, US Senate Health, Education, Labor and Pensions Committee, November 15, 1999, Lewiston, Maine). If the dangers associated with lead dust were so well-known at the time of Plaintiffs' injuries that manufacturers had no duty to warn of them, then there would have been no need for all of these efforts.

c. Defendants' recent document production demonstrates consumers in the 1990s/2000s were unaware of the dangers of lead dust.

On November 4, 2021, Defendants served their responses to Plaintiffs' discovery requests on the issue of consumer knowledge.[7] The documents Defendants produced in connection with

[7] Plaintiffs' First Set of Interlocking Requests for Admission and Requests for Production Per the Court's Decision and Order Signed August 24, 2021.

those responses further demonstrate the dangers of WLC-containing dust were not so well-known in the 1990s and early 2000s as to extinguish Defendants' duty to warn of those dangers, such as:

- December 2005, Milwaukee Journal Sentinel article stating: "Ignorance. Some parents say they didn't know much about lead poisoning or didn't pay attention until their children were diagnosed." *See* Ex. AK;

- October 1999 article "Rural Residents' Knowledge of Lead Poisoning Prevention" stating: "Lead poisoning is preventable and exposures to children can decrease when community members are aware of the ramifications of lead poisoning and are knowledgeable about prevention strategies. However, without an understanding of these prevention strategies and ramifications, parents, grandparents, and others will not have the basis to even contemplate changing behaviors and reducing lead exposures." *See* Ex. AL;

- August 1999, NPCA letter stating: "To effectively prevent lead poisoning, testing must be coupled with community education and controlling lead hazards in at-risk housing." *See* Ex. AM;

- December 1998 article "What Do Parents Know About Lead Poisoning" stating: "Parents do not have much knowledge of ways to prevent childhood lead poisoning." *See* Ex. AN;

- July 1997 article "Caregivers' Knowledge and Perceptions of Preventing Childhood Lead Poisoning" stating: "Nevertheless, results suggest that even caregivers of children in high-risk areas do not mention lead poisoning as a health concern. About 61% of the sample identified eating paint chips as a cause of lead poisoning, whereas only 15% identified lead paint dust as a source of lead poisoning. Approximately 49% of the caregivers reported that they "never" or only "sometimes" perform recommended prevention activities. The Philadelphia Department of Public Health used these findings to review and modify education and outreach to prevent lead poisoning." *See* Ex. AO;

- March 1996, CBS This Morning: "Most of us have no idea how to tell if there is lead paint in our homes, or what to do about it." … "We think the public has a right to know. We think with information, people can make good decisions to protect the health of their children." *See* Ex. AP;

- January 1995 AIHA "Is Lead a Problem in My Home?" stating: "Unfortunately, practical advice to parents on how to protect themselves and their children has not been widely available." *See* Ex. AQ;

- April 1997 - brochures aimed at educating parents on how to protect their children from lead. *See* Ex. AR;

- 1998 Environmental Protection Agency Fact Sheet: "Recognizing that many families might be unaware that their homes might contain lead-based paint, section 406(a) of TSCA directed EPA to publish, after notice and comment, a lead hazard information pamphlet providing comprehensive information to the general public on lead-based paint in housing, the risks of exposure, and the precautions for avoiding exposure." *See* Ex. AS; and

- July 1991 article "Lead and Your Kids" stating: "They simply don't realize—or can't believe—that the dust on their windowsill might be quietly stealing part of their child's potential." *See* Ex. AT.

Defendants' own documents therefore establish an issue of fact as to the ordinary consumer's knowledge of the dangers of WLC-containing household dust in the 1990s and 2000s. The closest Defendants come to supporting their assertion that parent-consumers were aware of the hidden dangers of lead is to vaguely assert "[t]here were paint industry warnings from at least 1955, and government warnings from the 1970s, 1980s, and 1990s, disclosing the dangers of lead paint long before the plaintiffs were allegedly exposed to white lead carbonate." ARCO Br. at 5 (*citing Burton*, 994 F.3d at 808-09). But that argument fails for two reasons: (1) the referenced paint industry warnings did not disclose the dangers of *lead dust*; and (2) even if they had, the fact that a warning is given does not establish public awareness of those dangers. Defendants cite to no authority for the idea that, once a danger is disclosed in some form, there is no longer a duty to warn consumers.

Based upon the 1999 Wisconsin Supreme Court decision in *Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429, 447 (Wis. 1999), Sherwin-Williams takes the remarkable position that Wisconsin law "does not permit" this Court to find that the specific, hidden dangers of lead dust were *not* commonly known. S-W Br. at 9. But Sherwin-Williams' quotation of *Peace* misconstrues both the Wisconsin Supreme Court's language and its meaning. *Id.* When the Wisconsin Supreme Court stated "[b]y the mid-1980s, recognition of the problem was widespread," it was referring to the more general problem of "lead poisoning in the home and

workplace and the role of lead-based paint"—not specifically the dangers of WLC-containing dust at issue here. *Peace*, 596 N.W.2d a 447. In fact, the court specifically stated that it was not providing a "history of the evolving awareness" of the lead paint "problem." *Id.* Likewise, Sherwin-Williams' citation to *Antwaun A. v. Heritage Mut. Ins. Co.*, 596 N.W.2d 456, 463 (Wis. 1999), for the language "by 1989, the dangers of lead paint in residential housing … [were] extensively known" also misconstrues the court's holding. S-W Br. at 9. *Antwuan A.* did not even discuss lead poisoning from WLC-containing dust from deteriorated residential paint—let alone discuss consumer awareness of that hidden danger—but instead focused on the landlord's knowledge of the dangers of "peeling or chipping paint." *Antwaun A.*, 596 N.W.2d at 464.

In short, there is no evidence—zero—demonstrating consumers at the time of Plaintiffs' injuries contemplated the hidden dangers associated with lead dust. The fact that consumers knew, generally, that lead is poisonous is not enough to conclude as a matter of law that ordinary consumers had knowledge of the specific, more common, but less perceivable mechanism of poisoning: dust exposure. Whether the dangers associated with household dust containing WLC from Defendants' products were "so commonly known" as to negate the duty to warn is a question of fact that should not be taken away from the jury.

II. Because Defendants had a duty to warn, summary judgment is not available on Plaintiffs' negligent failure to warn claims, and the Court should revisit its ruling in the Wave 2 cases.

Plaintiffs recognize that pursuant to the appellate court's opinion in *Burton* they must show a "defect" to proceed on a negligence claim in these product liability cases. *Burton*, 994 F.3d at 818-19. Plaintiffs alleged a warning defect, but the Court issued summary judgment on the Wave 2 Plaintiffs' negligence theory based upon its finding that Defendants did not owe a duty to warn Plaintiffs or their caregivers of any hidden, or unknown, dangers associated with Defendants' lead

paint. *Allen*, 527 F. Supp. 3d at 997. Based upon the evidence discussed above—establishing a duty to warn Plaintiffs, their caregivers, and those similarly situated, of the dangers of invisible, toxic household dust containing WLC derived from painted friction surfaces—summary judgment is not appropriate on the remaining Plaintiffs' negligent failure to warn claims.

Moreover, based upon this same evidence, Wave 2 Plaintiffs request that the Court reconsider its ruling with regard to their negligent failure to warn claims under Federal Rule of Civil Procedure 54(b), which provides: "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."[8] The facts supporting Defendants' duty to warn of the hidden dangers of lead dust justify relief from the Court's summary judgment ruling.

III. Summary judgment is not appropriate on Plaintiffs' strict liability claims because Defendants' WLC is unreasonably dangerous.

As stated above, and as Defendants recognize, Wisconsin applies the "consumer contemplation test" to determine whether a product is "unreasonably" dangerous under its strict liability law. S-W Br. at 10 (*citing Horst v. Deere & Co.*, 769 N.W.2d 536, 543 (Wis. 2009). Under the consumer contemplation test, the applicable question is whether the alleged danger "would be contemplated by any ordinary consumer who has ordinary knowledge which is common to the community." *Estate of Schilling*, 449 N.W.2d at 59. As demonstrated in Section I, ample evidence demonstrates ordinary consumers in Plaintiffs' situation were unaware of the dangers of household dust containing WLC derived from painted friction surfaces. Defendants have

[8] In the alternative, Plaintiffs request reconsideration under any other Rule or theory deemed appropriate by the Court given the procedural posture of the cases.

thus far submitted no evidence to the contrary, and therefore, summary judgment is not available on Plaintiffs' strict liability claims.

IV. Neither "law of the case" nor "issue preclusion" require judgment as a matter of law.

Contrary to Defendants' insistence, neither "law of the case" nor "issue preclusion" prevent this Court from considering whether they had a duty to warn. *E.g.*, S-W Br. at 6. The remaining Plaintiffs cannot be denied their day in court.

As this Court recognized: "the remaining plaintiffs have not had an opportunity to conduct discovery into this issue, and I am very reluctant to deny them that opportunity." Order of Aug. 24, 2021, Dkt. No. 1862, 07-cv-00303. In fact, the Seventh Circuit has explicitly held that each plaintiff must be afforded an opportunity to prove his or her own case—including the opportunity to put forth evidence regarding consumer knowledge:

> This decision does not foreclose the possibility that other plaintiffs might prevail on a strict liability claim against the tobacco industry. Another record in another case might be different. Another plaintiff might marshal better evidence that the haze of the tobacco companies' propaganda obscured whatever health hazards were known to the average consumer. We explicitly reject the tobacco industry's invitation to declare that cigarettes are not unreasonably dangerous.

v. Phillip Morris, Inc., 216 F.3d 596, 603 (7th Cir. 2000). Here, Plaintiffs have submitted additional evidence and expert opinions supporting their argument that consumers in the 1990s and 2000s were not aware of the hidden dangers associated with WLC contained in household dust. That evidence must be fully and independently weighed on Defendants' motions for summary judgment.

Sherwin-Williams is wrong when it asserts: "[u]nder the Seventh Circuit's analysis, widespread knowledge of that danger by the 1990s precludes as a matter of law every Plaintiff from satisfying essential elements of his or her claims." S-W Br. at 1-2. First, the Seventh Circuit made no such determination and conducted no such "analysis." It merely referenced—without

review or analysis—this Court's prior ruling regarding the *Burton* Plaintiffs' negligent failure to warn claims, and in light of this Court's prior finding of fact, held that a "identical" duty analysis would require the same result under both claims:

> For these reasons, the court legally erred in finding that the defendants had a duty to warn for purposes of strict liability after ruling at summary judgment that they had no duty to warn the plaintiffs on their negligence claims. The plaintiffs have not appealed the court's ruling that the defendants had no duty to warn for purposes of the negligence claims. This ruling compels judgment as a matter of law for Sherwin-Williams and Armstrong on the strict liability claims.

Burton, 994 F.3d at 823. There is no ruling "as a matter of law" where the appellate court has not reviewed or determined a particular issue. *See Overseas Shipholding Group, Inc. v. Skinner,* 767 F. Supp. 287, 296 (D.C.D.C. 1991) ("In the case in which the mandate of the appellate court does not address a particular issue, the appellate judgment, on this issue, does not establish the law of the case, and on appeal from the judgment entered after remand, it may be reviewed by the appellate court.").[9] As such, the Seventh Circuit made no factual or legal ruling in *Burton* that would preclude the Plaintiffs' failure to warn claims. Second, even if the Sevent Circuit had made such a determination in *Burton*, that holding was based upon the facts and arguments presented on appeal—and it has no relevance to this Court's determination of whether a genuine issue of material fact exists *in these Plaintiffs' cases*. Third, as stated above, neither this Court's nor the Seventh Circuit's opinion focused on the specific, hidden dangers of WLC-containing dust. And fourth, even if there had been a ruling directly on point, that finding of fact would not

[9] The *Burton* Plaintiffs' negligent failure to warn claims were not addressed by the Seventh Circuit on appeal because the *Burton* Plaintiffs had neither reason nor obligation to raise them—they had won their cases. *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) ("the failure of an appellee to have raised all possible alternative grounds for affirming the district court's decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver. The bringing of possible alternative grounds for affirmance is a privilege rather than a duty.").

prevent the remaining Plaintiffs from presenting their own, additional evidence regarding consumer knowledge. *Insolia*, 216 F.3d at 603.

A. "Law of the case" does not bar Plaintiffs' failure to warn claims.

As an initial matter, Sherwin-Williams is wrong when it argues that the "law of the case" doctrine could have any bearing on the *non*-Wave 2 Plaintiffs' claims. S-W Br. at 6. As the Supreme Court has held, "the [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages *in the same case*." *Arizona v. California*, 460 U.S. 605, 607 (1983). The claims brought by the *non*-Wave 2 Plaintiffs are not "in the same case" as the Wave 2 Plaintiffs. *See Insolia*, 216 F.3d at 603. The fact that more than one Plaintiff was included on a caption does not negate the fact that each Plaintiff is bringing individual claims and cases. Just as each Plaintiff must establish his or her own claims at trial, the Court's rulings in the Wave 2 Plaintiffs' cases have no binding effect on the other, remaining Plaintiffs' claims. Sherwin-Williams cites no law supporting its argument to the contrary. S-W Br. at 6.[10]

Furthermore, the law of the case doctrine does not prevent this Court from reconsidering its rulings on the Wave 2 Plaintiffs' failure to warn claims. *Id.* ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); *Payne v. Churchich*, 161 F.3d 1030, 1046 (7th Cir. 1998) ("a court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance"). Courts regularly reconsider prior rulings where the facts or circumstances have changed. Therefore, the Court's Wave 2 summary judgement ruling—issued

[10] Neither of the two cases Sherwin-Williams cites supports the argument that the law of the case doctrine can be used to apply a ruling from one party's case to a subsequent, or different party's claims. S-W Br. at 6-7 (citing *Urologix, Inc. v. ProstaLund AB*, 256 F. Supp. 2d 911, 914 (E.D. Wis. 2003), and *McCormick v. Excel Corp.*, 413 F. Supp. 2d 967, 970 (E.D. Wis. 2006)).

earlier this year, prior the Seventh Circuit's ruling in *Burton,* and prior to the Plaintiffs' supplementation of the evidence regarding consumer knowledge—does not serve as law of the case as to the Wave 2 Plaintiffs' failure to warn should the Court determine it to be erroneous. *See e.g., Starcon Intern, Inc. v. International Brotherhood of Boilermakers*, 540 F.3d 276, 278 (7th Cir. 2006).[11] Here, the appellate court's directives in *Burton*, as well as the facts discussed herein (relating to the unknown dangers of lead dust), warrant reexamination of the duty to warn, and correspondingly, reconsideration of the Wave 2 Plaintiffs' negligent failure to warn claims.

B. "Issue preclusion" does not prevent Plaintiffs' failure to warn claims.

Likewise, issue preclusion cannot serve to defeat the claims of Plaintiffs who have yet to have their day in court. *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) ("A person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court."); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who ... has never had an opportunity to be heard."); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 321, 322 n.8 (1977) (explaining the "elementary" legal principle that a person who was not a party to a prior lawsuit cannot be bound by its result); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment . .. in a litigation in which he is not designated as a party . . .."). Tellingly, Sherwin-Williams does not cite a single case where issue preclusion was applied to defeat the claim of a

[11] Even where law of the case is applicable, "the law-of-the-case doctrine may yield if an intervening change in the law, *or some other special circumstance*, warrants reexamining the claim." *Carmody v. Bd. of Trs. of the Univ. of Ill.*, 893 F.3d 397, 408 (7th Cir. 2018) (emphasis added).

plaintiff who was not a party in the earlier trial or proceeding.[12] Even if issue preclusion were available, its application here would not comport with the principals of fundamental fairness.[13]

V. Atlantic Richfield is not entitled to summary on its "additional" predecessor liability and component manufacturer arguments

ARCO claims it is entitled to summary judgment on Plaintiffs' strict liability failure to warn claims on the additional ground that its predecessors only sold WLC as a component part for use by third-party paint manufacturers and that none of its predecessors "manufactured paint." ARCO Br. at 5. According to ARCO, there was no factual dispute during the *Burton* trial because (1) one of Plaintiffs' experts testified that "ARCO never made prepared paint products," and (2) Plaintiffs' counsel stated during closing argument that "ARCO didn't make these ready mixed paints that you've heard about with Sherwin-Williams and DuPont and Armstrong, the MacGregor Company." *Id.* at 5-6. ARCO takes the above quoted trial testimony out of context, however, and wrongfully conflates the terms "ready mixed paints" and "prepared paints" with white lead-in-oil which is a finished residential paint product to which the retail customer must add additional linseed oil, turpentine, and drier before applying the paint. As evidenced below, ARCO's argument fails when one considers the undisputable fact that ARCO's predecessors referred to Anaconda white lead-in-oil as a "paint" in its retail marketing materials directed at homeowners. While the Plaintiffs do not dispute that Anaconda's dry white lead and white lead-in-oil were also sold in bulk as component parts to some third-party paint manufacturers,

[12] In the only case Sherwin-Williams cites, *In re Est. of Rille ex rel. Rille*, 728 N.W.2d 693, 702-03 (Wis. 2007), both the party asserting issue preclusion and the party against whom it was asserted were parties to the prior proceeding.

[13] Wisconsin permits nonmutual offensive collateral estoppel *only* in cases in which issue preclusion would meet a "fundamental fairness" standard. *Michelle T. v. Crozier*, N.W.2d 327, 331 (Wis. 1993). The factors permitting the exceptional relief of nonmutual offensive collateral estoppel clearly cannot be met here—and Defendants do not even attempt to make such an argument.

ARCO's predecessors' marketing establishes at least some of Anaconda's white lead-in-oil was, in fact, marketed directly to homeowners as finished residential paint products at the retail level.

For example, during the summer of 1938, ARCO's predecessor, IS&R, produced a full-page advertisement for its white lead-in-oil and captioned it: "*For better, more durable paint,* ANACONDA WHITE LEAD." Declaration of Fidelma Fitzpatrick, Ex. AU at 18. The first paragraph of the advertisement stated:

> Today as always, *white lead paint* is regarded as best for exterior gloss and interior flat uses. Furthermore, at today's low prices [Summer 1938] *white lead costs no more per gallon than most other paints*. But of more importance, no paint serves at less cost per square foot per year than white lead. White lead covers better, goes farther, and spreads faster. This means fewer gallons and fewer hours on the job. Lasting longer, washing well, wearing evenly, white lead leaves a smooth surface for repainting. *Id.* (emphasis added).

The advertisement concluded as follows:

> Homes painted with Anaconda White Lead *do* look fresh longer. And for interior flat paints, the extreme whiteness of Anaconda White Lead makes possible cleaner, purer tints – particularly important when you want the full beauty of delicate pastel shades. Thoroughly ground in the finest linseed oil, it is available through leading paint jobbers and dealers. *Id.*

In another marketing brochure entitled "*The Story of* ANACONDA ELECTROLYTIC WHITE LEAD," ARCO's predecessor, IS&R, also explicitly marketed its white lead-in-oil directly to homeowners as follows:

> Its true white color permits cleaner tints that are strikingly brilliant. The pure white base, to which the tint is added, does not have the slightly muddy cast that is present in ordinary lead. Anaconda Lead-In-Oil weathers by a slow chalking process. It produces a film that will last for years and one that washes itself clean as it ages. Inside or out, Anaconda White Lead surpasses as a decorative medium, yet costs no more. Employ a good painter. He knows the different woods and how to treat the surface before applying paint. Then insist that he use Anaconda White Lead-in-Oil. *Anaconda White Lead-in-Oil is sold by leading paint and hardware stores and lumber yards*. When you select paint, be sure to specify Anaconda.

Fidelma Fitzpatrick, Ex. AV at PNYC00000021 (emphasis added)

A third example of the marketing of Anaconda White Lead-in-Oil by ARCO's predecessor, ALPC, was a brochure entitled "ANACONDA LEAD-IN-OIL COLOR FORMULAS" in which ALPC provided detailed mixing instructions to residential paint consumers who, unlike master painters, did not "know how to prepare good lead paints." The brochure provided the residential paint consumer with instructions for the proportions of additional linseed oil, turpentine and drier to be added to its Anaconda white lead-in-oil paste. Fidelma Fitzpatrick, Ex. AW.

In a fourth example, the evidentiary record from the FTC case contains the sworn testimony of the sales manager for ARCO's predecessor, Frank H. Hurless, dated September 16, 1947. He testified that ALPC and IS&R sold Anaconda white lead-in-oil at the retail level in Wisconsin through unique written consignment contracts prepared especially for retail sales in that state. Fidelma Fitzpatrick, Ex. AX at pp.1869-70. In an advertisement published in the Madison Capitol Times on May 15, 1939, a retail paint and wallpaper dealer, Economy Wallpaper Company, advertised Anaconda White lead along with a variety of other brands of paint directly to the consuming public as opposed to a component part for use by paint manufacturers. Fidelma Fitzpatrick, Ex. AY.

In sum, Plaintiffs do not dispute that some of the white lead-in-oil manufactured and marketed by ARCO's predecessor was sold at an industrial level to other paint manufacturers for use as a component pigment in their pre-mixed paints. The bottom-line, however, that ARCO cannot dispute that its predecessors also marketed Anaconda brand white lead-in-oil directly to homeowners as a finished residential paint product available at the retail level. Therefore, ARCO is not entitled to summary judgment on Plaintiffs' strict liability failure to warn claims.

CONCLUSION

For the reasons set forth above, this Court should enter an Order: (1) denying summary judgment on the remaining Plaintiffs' negligence strict liability failure to warn claims; and (2) reconsidering its decision on Wave 2 Plaintiffs' negligence failure to warn claims.

Dated this 22nd day of November 2021

Respectfully submitted,

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Attorneys for Plaintiffs

EXHIBIT Q

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

GLENN BURTON, JR.,
Plaintiff,

CASE NO. 07-CV-0303

AMERICAN CYANAMID CO.,et al,
Defendants.

RAVON OWENS,
Plaintiff,

CASE NO. 07-CV-0441

AMERICAN CYANAMID CO., et al,
Defendants.

CESAR SIFUENTES,
Plaintiff,

CASE NO. 10-CV-0075

AMERICAN CYANAMID CO.,et al,
Defendants.

DIJONAE TRAMMELL,
Plaintiff,

CASE NO. 14-CV-1423

AMERICAN CYANAMID CO., et al,
Defendants.

MANIYA ALLEN, et al.,
Plaintiffs,

CASE NO. Il-cv-0055

AMERICAN CYANAMID CO.,et al,
Defendants.

ERNEST GIBSON,
Plaintiff,

CASE NO. 07-CV-0864

AMERICAN CYANAMID CO., et al,
Defendants.

DESIREE VALOE, et al.,
Plaintiff, CASE NO. Il-cv-0425

AMERICAN CYANAMID CO., et al,
Defendants.

Expert Report of David E. Jacobs, PhD, CIH

Qualifications

I am one of the nation's authorities on childhood lead poisoning prevention and have published many papers in the peer-reviewed literature and elsewhere (see CV at Attachment A), including book chapters on lead toxicity, [1] exposure assessment[2] and the association between residential leadbased paint and childhood lead poisoning.

I am a board-certified Industrial Hygienist and the principal author of the HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing,[3 4] the first federal interagency strategy to eliminate childhood lead poisoning, a national survey of lead-based paint in the nation's

[1] Jacobs DE. Lead (Book Chapter) In: Patty's Toxicology, 6th Edition, Eds. Eula Bingham and Barbara Cohrssen, John Wiley and Sons (Accepted Nov 2011).

[2] Jacobs DE. Housing and Exposure to Lead (Book Chapter). IN: Braubach M, Jacobs DE, Ormandy D (eds). Environmental burden of disease associated with inadequate housing: A method guide to the quantification of health impacts of selected housing risks in the WHO European Region. World Health Organization (Europe). June 2011. [3] Jacobs DE. Lead-Based Paint as a Major Source of Childhood Lead Poisoning: A Review of the Evidence in Lead In Paint, Soil and Dust: Health Risks, Exposure Studies, Control Measures and Quality Assurance, Michael E. Beard and S.D. Allen Iske, Eds, American Society for Testing and Materials, Philadelphia, p. 175-187, 1995.

[3] Jacobs DE, et al. HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing, Department of Housing and Urban Development, Washington DC, 1995 (principal author)

[4] Jacobs DE, Matte TD, Moos LV, Nilles B, Rodman J. Eliminating Childhood Lead Poisoning: A Federal Strategy, President's Task Force on Children's Environmental Health Risks and Safety Risks, principal author, Washington DC (March 2000).

housing stock,[5] a complex analysis of studies ofthe relationship ofdust lead and children' s blood lead levels (that later became the scientific foundation for the EPA lead dust standards)[6] and

[5] Jacobs DE, Clickner RL, Zhou JL, Viet SM, Marker DA, Rogers JW, Zeldin DC, Broene P and W. Friedman. The Prevalence of Lead-Based Paint Hazards in U.S. Housing, Environ Health Perspect 110:A599-A606, Sept 13, 2002.

[6] Lanphear BP, Matte TD, Rogers J, Clickner RP, Dietz B, Bornschein RL, Succop P, Mahaffey KR, Dixon S, Galke W, Rabinowitz, Farfel M, Rohde C, Schwartz J, Ashley PJ, Jacobs DE. The Contribution ofLead-Contaminated House Dust and Residential Soil to Children's Blood Lead Levels: A Pooled Analysis of 12 Epidemiologic Studies, Env. Research, 79:51-68, 1998.

two reports to Congress. [7][8] I was appointed to expert panels on lead by the Centers for Disease Control and Prevention (CDC), [9][10][11] the Environmental Protection Agency [11] and the World Health Organization.12

I am presently employed as an Adjunct Associate Professor in the School of Public Health at the University of Illinois at Chicago; the Chief Scientist at the National Center for Healthy Housing; and a faculty associate at the Bloomberg School of Public Health at Johns Hopkins University. Previously, I served as the Director of the Office of Healthy Homes and Lead Hazard Control at the U.S. Department of Housing and Urban Development from 1995 — 2004, where I was responsible for setting national policy in lead poisoning prevention, research, public education, grants, technical assistance and other matters. I was previously the Deputy Director of the National Center for Lead Safe Housing and was a research scientist at the Georgia Institute of Technology, where among other duties I directed the EPA Southern Lead-Based Paint Training Consortium. I have overseen numerous lead-based paint inspections, risk assessments, abatement and hazard control operations, and have degrees in Environmental Engineering, Technology and Science Policy, Environmental Health and Political Science. I am also a licensed lead risk assessor in Illinois.

Each of the opinions that I offer is to a reasonable degree of scientific certainty in my primary field of expertise.

Opinions

This report addresses the question of the public's general understanding of lead paint and the contaminated dust and soil it generates. In general, despite certain public health education and regulatory changes over the years, the public still does not fully grasp the dangers of residential lead paint nor the pathways of exposure. This was especially true in the mid-1990s to 2000's, as documented below. I also provide evidence that, although there were some general education efforts during that time, the intense education that provided detail on lead contaminated dust and paint chip ingestion occurred during case management and inspections after a child had already been poisoned in this time period.

As detailed below, various educational efforts were made in response to earlier promotional campaigns carried out by the industry before 1971 that recommended the use of lead paint, despite the industry's knowledge that lead paint was hazardous. Such earlier campaigns and the state of

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[7] Jacobs DE, et al. Moving Toward a Lead-Safe America: A Report to the Congress of the United States, (principal author), US Department of Housing and Urban Development, Washington DC, February 1997

[8] Jacobs DE, Friedman W, Ashley PJ, McNairy M. The Healthy Homes Initiative: A Report to Congress, U.S. Dept Housing and Urban Development, Office of Lead Hazard Control, April 1999.

[9] National Childhood Lead Poisoning Prevention Advisory Committee, Centers for Disease Control and Prevention, ex-officio member 1995-2004

[10] Lead Dust Review Panel, Science Advisory Board (US EPA), 2010-2011

[11] Report on the WHO Technical Meeting On Quantifying Disease From Inadequate Housing, Bonn Germany, November 28-30, 2005, World Health Organization Regional Office for Europe, (contributing author), published April 2006

knowledge that lead paint was dangerous were cited in a recent 2014 California Court case [12] and documented by two historians who recounted the lead paint industry's various advertising and promotional activities. [13] The California judgment included a detailed abatement plan to be funded by the defendants, in which the Court provided for "the establishment of an administrative process to carry out inspections, abatement, and education" (emphasis added). [14]Even in 2014, the Court recognized the importance of education and improving the public's knowledge of lead paint and its hazards. Furthermore. lead paint public education remains an ongoing activity, as described at the end of this report. As I explain below, the state of public knowledge justifies this ongoing educational effort order by the California court in 2014.

In most cases, local health departments, including Milwaukee's, during the 1990s and 2000s, were forced to take a "canary in the coal mines" triage approach, due to the fact that lead poisoning was at epidemic proportions. This "secondary prevention" approach meant conducting blood lead screening campaigns and then taking action, including education, after a child's blood lead level exceeded CDC trigger levels. In my capacity as director of HUD's lead poisoning prevention program from 1995-2004, I had the opportunity to work with many health departments around the country, including Milwaukee's, which received lead hazard control grants from HUD. In Milwaukee's case and in others across the country, although there were efforts to reach the public in general through mass media and other avenues, most of the targeted and most intense educational activity occurred almost exclusively after children had already been poisoned. This education activity was a standard feature of health department case management procedures. The standard of care was to conduct lead inspections and risk assessments to identify the specific pathway of exposure in the poisoned child's home and then provide educational activities targeted to those specific pathways and order remediation. Because most houses remained uninspected, public knowledge of lead paint, and in particular knowledge of specific pathways, was limited. In my experience, virtually all health departments provided educational materials as part of the post-exposure inspection process —further demonstrating the need to inform the public of the dangers of lead paint—including lead dust—throughout the 1990s and into the 2000s.

Educational Efforts before 1990

Prior to 1990, most public education efforts on childhood lead poisoning revolved around the perception that the main problem was children who ate paint chips. The first federal lead paint law, the 1971 Lead-Based Paint Poisoning Prevention Act provided for local grants from the Department of Health Education and Welfare (now the Department of Health and Human Services) and stated:

> A [15]local program should include (l) educational programs intended to communicate the health danger and prevalence of lead-based paint poisoning among children of inner city areas to parents, educators and local health officials (emphasis added). [16]

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[12] People v Atlantic Richfield Company, et al., Superior Court of California, County of Santa Clara, Case No. 1-00CV-788657. Amended Statement of Decision, March 26, 2014.

[13] Markowitz and Rosner, Deceit and Denial. First Edition 2013. Univ of California Press

[14] People v Atlantic Richfield Company, et al., Superior Court of California, County of Santa Clara, Case No. 1-00CV-788657. Amended Statement of Decision, p. 98

[15] Lead Based Paint Poisoning Prevention Act, Public Law 91-695, January 13, 1971 [HR 19172]

In 1978, CDC's first statement on childhood lead poisoning was issued. It featured a recognition that screening was necessary until "removal" of lead from the environment could occur. The recommendations on screening, diagnosis, treatment, and follow-up of children with lead absorption and lead poisoning were all described in detail. But CDC also stated:

> The ultimate preventive goal is identification and removal of lead in the environment before it enters the child. Until this occurs, screening, diagnosis, treatment, and environmental management will continue to be necessary public health activities.[16]

The focus from CDC remained on medical treatment after exposure had already occurred (the "canary in the coal mine approach") and a simplistic "removal" of lead without a recognition of exposure pathways, especially lead-contaminated settled house dust, which later became an important component of public education on lead paint. (Canaries were sometimes used in coal mines to detect hazardous gases before miners succumbed, much as children's elevated blood lead levels were used to detect lead-based paint hazards).

In 1985, CDC highlighted the direct ingestion of lead paint, stating:

> Pica, the repeated ingestion of nonfood substances, has frequently been implicated in the etiology of lead toxicity in young children. In many cases, however, lead-paint ingestion is simply the result of the normal mouthing behavior of small children who live in leadcontaminated homes.»

The 1985 CDC statement also highlighted education: "The community and especially parents of preschool children who live in older, deteriorating neighborhoods should be informed at every available opportunity of the need to have children screened periodically for lead poisoning" (emphasis added).

The idea that it was ingestion of paint chips was also manifested by X-Rays of poisoned children's abdomen, which showed the presence of paint chips (Figure l). [17] In this sense, paint chips were more "visible" than dust.

Figure 1. X-Ray of a Child's Stomach (The Arrows Point to Lead Paint Chips)

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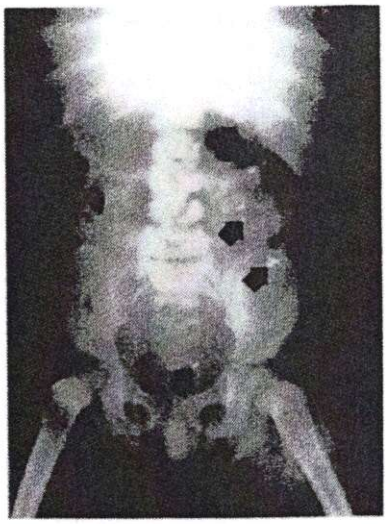
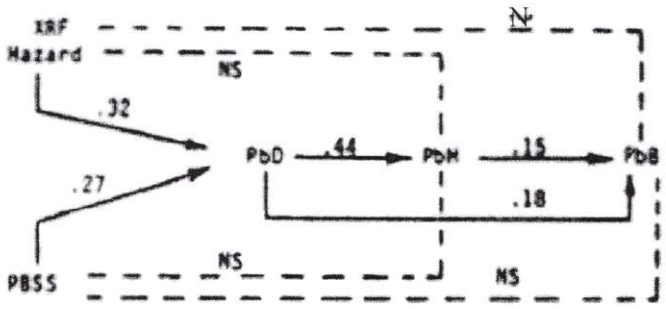
[16] CDC. Preventing lead poisoning in young children: a statement by the Center for Disease Control: April 1978. Atlanta, Georgia: Department of Health, Education, and Welfare, 1978. https://stacks.cdc.gov/view/cdc/1 1 184 [16] Centers for Disease Control (now Centers for Disease Control and Prevention). Preventing Lead Poisoning in Young Children, A Statement by the Centers for Disease Control, January 1985

[17] McElvaine MD, DeUngria EG, Matte TD, Copley CG, Binder S. Prevalence of radiographic evidence ofpaint chip ingestion among children with moderate to severe lead poisoning, St. Louis, Missouri, 1989-90, Pediatrics 89:740742 (1992).





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Emergence of Pathway Studies in the Late 1980s

The 1985 CDC statement began to acknowledge the importance of lead-contaminated house dust. This reflected advancement in scientific knowledge but should not be mistaken for awareness in the general population. By the mid-1980s, pathway studies revealed a more complicated but more precise picture of how most children were exposed to the dangers of lead paint; it was not only eating paint chips but exposure to invisible lead contaminated house dust.

One important example of pathway research from the mid-1980s that came to inform government policy based on science and educational messages from the mid-1980s is shown in Figure 2.[18]

E

t!

Ln(PbB) = 1.276 + .152 Ln (PbH) + .182 Ln (PbD)
Ln(PbH) = -0.966 + .444 Ln (PbD)
Ln(PbD) = 4.691 + .325 Ln (XRFHAZ) + .268 Ln (P

Figure 2. Pathways of lead exposure from paint to dust to blood lead.

.22

(POSS) .52

[18] Bornschein RL, Succop P, Kraft KM, Clark CS, Peace B, Hammond PB. Exterior surface dust lead, interior house dust lead and childhood lead exposure in an urban environment. In Hemphill DD (ed). Trace Substances in Environmental Health, 20. Proceedings of University of Missouri's 20th Annual Conference, June 1986. University of Missouri, Columbia, Missouri, 1987.

Alt coefficients are significant at p<.05; Støftfc•nt

Source: Bornschein et al. Exterior surface dust lead, interior house dust lead and childhood lead exposure in an urban environment. In: Trace Substances in Environmental Health Il, 1986 A Symposium. Editor: DD Hemphill, University of Missouri, Columbia

In the figure, the solid and dotted lines show statistically significant and not significant (NS) exposure pathways, respectively. In this study, lead in paint was measured by XRF (X-ray fluorescence), lead in soil (PbS) was measured by chemical laboratory analysis, lead in settled house was measured by wipe sampling (PbD), the amount of lead dust on children's hand was also measured by wipe sampling (PbH) and finally lead in children's blood (PbB) was measured by venipuncture and subsequent laboratory analysis.

This study was confirmed by others[19] and showed that there was often no direct relationship between lead in the paint and children's blood lead. These and other studies changed the prevailing view that only the content of lead in paint mattered and paint chip ingestion was the main route of exposure. It also affected the nature of public education on the subject, which strove to incorporate the often invisible lead-contaminated house dust and soil into messages to the public.

In short, the significant pathway of exposure was from paint and soil to interior settled lead house dust to lead dust on children's hands (from the inevitable contact with household surfaces), and then ingestion through normal hand-to-mouth contact and absorption into the blood stream where it attacked the nervous system and other organs. This overturned earlier studies from the 1970s that held only paint chip ingestion was a significant exposure pathway. However, this message was far more difficult to include in public education efforts, because it involved not only deteriorated paint, but also small, settled dust particles that were generally not visible to the naked eye.

The CDC 1991 Lead Poisoning Statement

Throughout the 1990s, virtually all health departments relied on the CDC 1991 lead poisoning statement, which stated: "All children with blood lead levels 15 gg/dL [micrograms of lead per deciliter of blood] should receive individual case management including nutritional and educational interventions." Although this statement also called for "community-wide environmental interventions and educational campaigns," this remained poorly defined. The focus in Milwaukee and elsewhere was on case management of children with higher blood lead levels. Indeed, the CDC 1991 statement said, ". . .there are several reasons for not attempting to do interventions directed at individual children to lower blood lead levels of 10-14 gg/dL" which meant there were inadequate resources[22] (emphasis added).

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[19] Lanphear BP, Matte TD, Rogers J, Clickner RP, Dietz B, Bornschein RL, Succop P, Mahaffey KR, Dixon S, Galke W, Rabinowitz M, Farfel M, Rohde C, Schwartz J, Ashley P, Jacobs DE. The contribution of lead-contaminated house dust and residential soil to children's blood lead levels. A pooled analysis of 12 epidemiologic studies. Environ Res. 1998 Oct;79(1):51-68. doi: 10.1006/enrs.1998.3859. PubMed PMID: 9756680.

Title X of the 1992 Housing and Community Development Act

Congress reacted to the new pathway science in the late 1980s and the lack of awareness by passing Title X. Among its Findings was this statement:

> The Federal Government must take a leadership role in building the infrastructure -including an informed public. State and local delivery systems, certified inspectors, contractors, and laboratories, trained workers... (emphasis added).

Title X also stated among its purposes: "to educate the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards.. ." (emphasis added).[24]

Title X 's most important public education requirement was disclosure of information concerning lead upon transfer of residential property in Section 1018. The regulation implementing this law took effect in 1996 and is codified as a joint HUD/EPA regulation.[25] Among its requirements was the explicit disclosure not only of lead content in paint, but dust and soil as well (but only if that was already "known" because the rule did not mandate testing). Most houses still remained uninspected for lead problems, with the notable exception of homes with children who had already been poisoned.

In Title X, Congress specifically required exact warning language to be included in lease and sales contracts, a reflection of the need for education. The warning language said:

> Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.[20]

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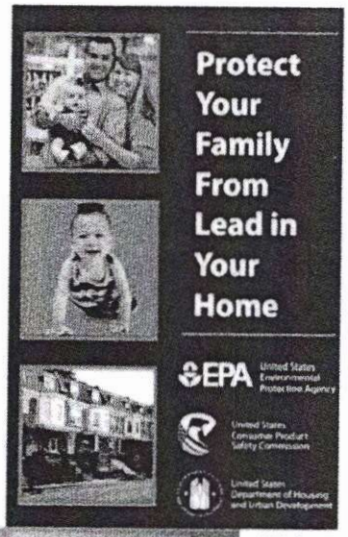
[22] CDC. Preventing Lead Poisoning in Young Children, A Statement from the Centers for Disease Control, Oct 1991,

[23] Housing and Community Development Act of 1992. Title X. Public Law 102-550, Section 1002(8).

[24] Housing and Community Development Act of 1992. Title X. Public Law 102-550, Section 1003(7).

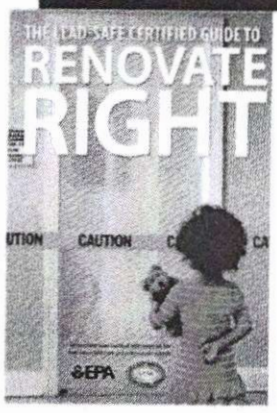
[25] 24 CFR Part 35 and 40 CFR Part 745. Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead Based Paint Hazards in Housing. Federal Register / Vol. 61, No. 45, 9064 https://www.hud.gov/program offices/healthy homes/enforcement/disclosure

[20] Lead warning statement. https://www.hud.gov/sites/documents/DOC 12343.PDF



Risk assessments include the measurement of lead in dust and soil, not only paint.

The disclosure rule also required that the buyer or renter receive an educational pamphlet, another recognition of the need for more education. The pamphlet stated: "Lead from paint, chips, and dust can pose serious health hazards" (emphasis added).[21][22]The pamphlet described in detail how paint is related to dust: "Lead dust can form when lead-based paint is scraped, sanded, or heated. Lead dust also forms when painted surfaces containing lead bump or rub together. Lead paint chips and dust can get on surfaces and objects that people touch. Settled lead dust can reenter the air when the home is vacuumed or swept, or when people walk through it." The pamphlet also described the issue of visibility this way: "Remember, lead from paint chips—which you can see—and lead dust—which you may not be able to see—both can be hazards" (emphasis added).



Title X which anothe require EPA o individ safe w copy o renova until D

Title X also focused on renovation, repair and painting activities, all of which are known to release lead contaminated dust. Congress required another educational pamphlet to be provided for such activities. The requirement involves using only a Lead-Safe Certified firm approved by EPA or an EPA-authorized state program, the use of qualified trained individuals (Lead-Safe Certified renovators) who follow specific leadsafe work practices to prevent lead contamination and provision of a copy of EPA's lead hazard information pamphlet (Renovate Right). The renovation rule pamphlet requirement did not become fully effective until December 2008.[28]

The Lead-Based Paint Awareness Survey

The passage of Title X was accompanied by considerable press coverage, such as a Newsweek cover story in 1991.[23] Yet public knowledge was still considered by most in the field to be inadequate, which was supported by a survey.

In 1994, HUD contracted with the Census to design and conduct a household survey which would focus, among other things, on lead paint knowledge as a supplement to the Current Population

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[21] Protect your family from Lead, EPA, CPSC and HUD. https://www.epa.gov/sites/default/files/202004/documents/lead-in-your-home-portrait-color-2020-508.pdf

[22] CFR Part 745. Subpart E—Residential Property Renovation. 63 FR 29919, June 1, 1998. :745.81 Effective dates. https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=79d9123c529d8f8ca792833afe6b664f&ty=HTML&h=L&n=pt40.31.745&r=PART#

[23] Newsweek. July 14, 1991 cover story

Survey (CPS), which is a nationally representative survey. [24] This survey focused on the public's understanding of 5 questions about lead poisoning:

Does lead causes health problems for children; Is
eating paint chips a hazard?
Is lead paint found in older homes.
Does lead affect a child's ability to learn?
Does lead affect an unborn child?
Does lead paint produce a harmful dust?

The results for all respondents are shown in Table 1 below, reproduced from the original article. They show that, although 91 percent of respondents knew that lead paint produced health problems, and 90 percent thought eating paint chips caused problems, far fewer understood the importance of lead dust in the mid- 1990s. For example, 44% of the respondents at the time did not know that lead paint produced dangerous dust.

TABLE 1. Don't Know Rates

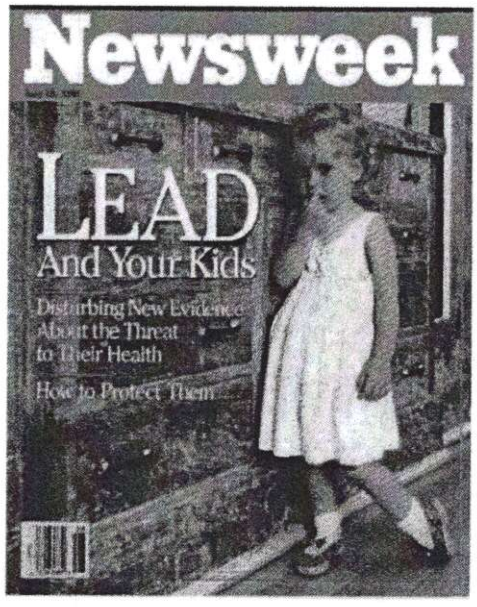
Item	Percent Don't Know	N
Health problems	9	4249
Found in older homes	18	8351
Ability to leam	25	11637
Unbom children	44	20628
Dust		20458
Eating paint chips	10	1545

For those with less education, low-income and from Black families, awareness of the importance of lead dust was even lower. The authors state, 'there seems to be higher don't know rates among respondents with lower income and.. .those who are not White."

In short, despite various educational efforts, almost half of the public did not grasp the importance of lead-contaminated house dust, which was the main route of exposure for most children in the mid-

[24] How Do You Measure "Awareness"? Experiences With The Lead-Based Paint Survey. Susan Ciochetto, Bureau of the Census; Barbara A. Haley, U.S. Department of Housing and Urban Development. file:///C:/Users/DavidJacobs/Downloads/Howdoyoumeasureawareness.pdf

1990s. And there were large percentages who did not know that lead paint is found in older homes or affected the ability to learn.



These findings and others prompted HUD and other federal agencies to fund a variety of education programs, including funding for United Parents Against Lead and the Campaign for a Lead Safe America and Sesame Street from Public TV and other efforts.

Other Historical Lead Education Efforts and Media Coverage

In 1991, Newsweek magazine published a cover story on lead paint, which contained the following regarding the Tackling family and public knowledge of lead paint:

> "But this April, the Tacklings learned that much of what they and most Americans believed about lead poisoning was wrong. Test showed both Jessica and Nicholas had lead poisoning. They probably got it not from eating paint chips but from fine paint dust—stirred up in part by the renovations Bruce did to make the house just like new and the vacuuming Helene did to make it pristine.. .Most middle-class parents would have the same reaction as the Tacklings: denial and disbelief. Isn't lead poisoning something that happens only in the ghetto, where poor children eat flakes of paint?...But the CDC faces a dilemma: how to make people more aware of lead's hazard's without creating a stampede of hysterical parents. Health departments and medical labs could not now handle a surge in demand for blood tests.. .But most families won't take such dramatic steps, or for that matter, test their own children. The problem isn't a lack of money or legal expertise. They simply don't realize—or can't believe—that the dust on their windowsill might be [31] quietly stealing part of their child's potential.

Time magazine also published an important story underscoring the insidious nature of lead dust, and quoting John Rosen, a renowned pediatrician who had treated many lead poisoned children for decades:

> "For many years public health officials assumed that most cases were the result of toddlers' eating the sweet-tasting chips and flakes. More recently, however, researchers have recognized that dust from deteriorating paint, settling onto window-sills, furniture and carpets, poses a more pervasive threat. 'It's the teddy bear lying in the corner on the lead-laden dust that the children are touching,' says Rosen."

[31] Newsweek magazine. Lead And Your Kids" July 15, 1991

Another article quoted a family that had attempted the removal of lead paint, highlighting the lack of knowledge about lead dust and how it can remain even when the paint that released it had been removed:

> "We thought because the paint was gone, that all the lead was gone. This was our tragic mistake."

In 1999, Senator Susan Collins is reported as stating: "[t]he bad news is that the U.S. is making insufficient progress in dealing with the major source of childhood lead poisoning today leadbased paint in older housing. Contrary to popular belief, it is the dust from deteriorating or disturbed lead paint, rather than paint chips, that is the primary source of lead poisoning."

Shortly following a Congressional hearing in Lewiston Maine (at which I testified), an article titled, "Collins calls lead paint major hazard for kids" stated that:

> ". . .parents and public health officials testified that the public often doesn't know enough about the danger and the ways to" guard against it.

Senators Collins and Reed and other witnesses made extensive remarks concerning public education on lead paint and lead dust at that hearing:

> Educating homeowners, landlords, real estate agents and contractors about the hazards is another very important part of the solution. Fifty percent of Maine families with children with high blood lead levels had recently renovated their homes. They inadvertently created the dangerous dust from disturbed lead paint that affected their children... So there are things that we can do and one of the things we must do is get the word out— such as public education, public awareness—and that is critical and that is why, again, Senator Collins' hearing today is so absolutely important and typical of her service to the people of Maine. She is getting the word out.
>
> Again, we emphasize screening and treating for the children, identifying and removing the sources of pollution, we should educate parents, landlords and the whole community. •I believe this is one issue where knowledge is very powerful. People do not want to see young children exposed to lead which affects their development and causes their health to deteriorate. They want to help out if they know what to do, and it is our job to give them information.
>
> I want to thank you [parents] personally, both of you, for coming forward today and sharing your stories, sharing your experience. I am convinced that after people hear what

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[xi] Time magazine. Controlling a Childhood Menace, Feb. 25, 1991

[xii] Family's dream house turns to poison 'nightmare'". Nov 16, 1999.

[xiii] Lead Poisoning: A Serious Threat To Our Children's Health And Development. Sept 18, 1999

[xiv] Bangor Daily News, Collins calls lead paint major hazard for kids. Bangor Daily News, Nov 16, 1999.

> you went through, it will help raise public awareness and alert a lot of other parents. I am convinced that by sharing your personal experience, you are going to save many children across the State of Maine from going through what your children unfortunately have endured.
>
> [From Parent's Testimony]: Finally, there is an undeniable need for general lead education. I cannot count how many times I have been asked: Was Sammy chewing the woodwork or did he eat paint chips? I feel there is a spreading myth that children get lead poisoning from

eating paint chips. That is not the case and parents do not really know the truth and realities about lead poisoning and are being greatly misled. Section 1317(b) of the Lead Poisoning Control Act states that the need for, and I quote, "an Educational and publicity program to inform the general public, health care providers and other appropriate groups of the dangers, frequency and sources of lead poisoning..." I believe this initiative has not been carried out to its full potential. So I just do not understand since lead paint has been an issue since 1978 why we are only this far in awareness. And I am sorry if I mumbled and jumbled through this.

Senator COLLINS: You were very eloquent. I want to thank you both for your testimony. It is absolutely heartbreaking to hear what you have gone through. And I get the feeling that both of you blame yourselves to some extent. You really should not... I only became aware of this issue a year ago after some very close friends of mine in Bangor had their 3 children tested and found out, much to their shock, that each of their children had an elevated blood-lead level. And I think it is common that many of us have the misconception that you have encountered, thinking this was a problem of the past and that it had somehow been cured once we banned lead-based paint after 1978. Or we have the misconception, which is one I shared prior to getting into this issue, that the child was not eating paint chips so there was not a problem. Of course, in neither of your cases was it a problem with eating paint chips but, rather, with the insidious dust. Again, that reflects, and I am sure your realtor is horrified by what you have gone through now, that we need to have a much better public education campaign. We need to do a better job with pediatricians, we need to do a better job with contractors, with realtors, with parents. This lack of awareness is endangering the health of our children, and you really have played such an important role by coming forward today.[36]

The ignorance seemed to span the country. For example, in Denver, a paper quoted an employee of the local Northeast Denver Housing Center:

"We are so ignorant in our area on the fact of lead poisoning.»

At HUD, I had many meetings with then-Secretary Andrew Cuomo, who I recall was initially surprised about the importance of lead dust, but he did articulate its importance in a Chicago newspaper:

« Subcommittee on Public Health, US Senate Health, Education, Labor and Pensions Committee, November 15, 1999, Lewiston, Maine.

» Rocky Mountain News. March 21, 2000

" 'There are misconceptions about how you get lead poisoning,' [HUD Secretary Andrew Cuomo] said, adding that children do not eat it like they eat potato chips. 'Lead from door frames and windows is worn away and dust forms on the floor. Then a child picks up the dust on his or her hands and winds up ingesting the dust,' he said. 38

A local housing department newsletter quoted a public health nurse:

"A lot of people think that kids have to eat lead paint chips to get lead poisoning, but they usually get it from inhaling or ingesting lead " dust.

In 2006, a local housing agency also discussed in a newspaper the problem that deteriorated paint was often regarded only as a minor cosmetic problem, not a health hazard:

> ....[The Department of Consumer and Regulatory Affairs] usually see[s] peeling paint as a cosmetic problem, not something that can damage a child's brain. If they do flag a property for paint problems, they usually tell the owner to scrape the paint, which can make the hazard worse.. .Education of the public is critical. "

Another common misunderstanding, even among physicians, was that the lead paint problem had already been solved. An article in a Wisconsin paper noted:

> "As of 2000, the Madison Public Health Department was still trying to get the information out to doctors that lead poisoning is not something we don't need to worry about.„

Government agencies also worked hard to educate the public, beyond the disclosure and renovation regulations. For example, EPA issued a press release stating:

> "Most of those children are poisoned by deteriorated lead-based paint and the contaminated soil and dust it generates... Particularly at-risk are families renovating older structures and low-income families living in dilapidated housing. Parents can unknowingly poison their children when they disrupt lead-based painted surfaces during renovations, for example.„

HUD had an extensive public education effort as well, publishing "HUD News" and "The Lead Post" and helping a Sesame Street pubic TV show address lead poisoning. These stated:

> "Between 1992-2000 HUD spent $500 million on lead-safety—including money for community education and outreach. Everyday [HUD] help[s] people in our community learn more about lead.. .HUD spent $51 million in 1997, in part to "develop education

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" Chicago Defender, Federal grants to aid victims of lead paint. Oct 30, 1999.

" Community Ink (A Newsletter of the City of Harrisburg — Department of Building and Housing Development).

Family of Lead-Poisoned Child Gets Grant to Reduce Hazards. Fall 1999.

" Washingtonian magazine, August 2006. "Why is Lead Still Poisoning Our Children?" p. 123.-

" Capital Times. Lead Paint a Hurdle for Landlords; Regulations May Hurt Section 8. Oct 10, 2000 (Madison, WI) [42] EPA "News Release" of 3/6/96

> and outreach programs. The Sesame Street program included references to dust and renovations.

During my time at HUD, I helped launch the "Campaign for a Lead Safe America," which began in 1997 with a White House Press Conference featuring Tipper Gore (the second lady), EPA Administrator Carol Browner, HUD Secretary Andrew Cuomo and Baltimore Mayor Kurt Schmoke and other high ranking officials and media personalities, including members of the Women's Basketball Association. The Campaign produced many documents, fliers and other educational materials, all emphasizing the importance of paint and the insidious and invisible nature

of lead dust in home remodeling, maintenance, painting and disturbing lead paint, including the following from various documents:

> "Most people have the mistaken belief that children have to eat chips of paint to be poisoned. In fact, children usually are poisoned when they swallow dust that has been contaminated by lead from peeling or damaged lead paint. The lead-contaminated dust settles on floors and other surfaces, gets onto children's hands or toys and then in their mouths."
> "Most children are poisoned by lead-contaminated dust."
> "What you Should Know About Lead Paint and Home Improvement"
> "What you Should Know About Maintaining a Lead-Safe Rental Property"
> "What you Should Know About Hiring a Lead-Safe Painting or Remodeling Contractor

The Campaign also featured public service announcements, which targeting parents/consumers and portraying them as saying: "We never imagined that

Coping with Your Child's Diagnosis

dust from lead could poison our children." It also targeted tradespeople, warning "They [consumer clients] didn 't know lead dust from old paint could poison their children...your clients may not know about the dangers of lead paint and dust." Targeted efforts were also devoted to rental property owners, portraying them as saying "I never realized the hazards of lead-contaminated dust." The Campaign released materials aimed at parents, such as "Make Your Home Lead-Safe" warning that most children are poisoned in their homes by invisible lead dust and the danger of doing remodeling without lead-safe work practices. The Campaign included many partners, such as

of Lead Poisoning

[43] HUD News, Oct 6, 2000 and The Lead Post, Winter 1997
[44] Lead Safe American Campaign Fliers and Materials, 1997

television networks, banks, home inspectors, national and local organizations and associations.[25]

In 1996, HUD worked with the State of Michigan and the United Parents Against Lead to reach parents and warn them about lead paint and lead dust. The pamphlet was used across the country and chapters of parents

[25] Lead Safe American Campaign Fliers and Materials, 1997

groups formed to help get the education message out.[2627]

In 2000, Senator Jack Reed of Rhode Island

launched National Lead Poisoning Prevention Week, which is the last week of October and has now reached international scope.47 [28]

Many local jurisdictions have also conducted similar efforts, documented by numerous proclamations, and other materials.[49] In addition to printed materials, local educational efforts also provide products such as educational T-shirts, such as that shown in this picture.

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Current Lead Education Efforts

Education remains a requirement for many lead poisoning prevention government grants and activities because it is widely recognized that public awareness still is inadequate. For example, the nation's largest lead hazard control program at HUD explicitly asked in its Notice of Funding Availability about public education plans for applicants to:

> "Describe how grassroots community-based non-profit organizations, including faithbased organizations, will be involved in your grant program's activities. These activities may include outreach, community education, marketing, program sustainability activities and lead-based paint inspections/risk assessments and lead hazard control work. If you [the grant applicant] do not describe strong engagement with external non-profit organizations... you will not receive full points." Later in the same application, HUD states: "You must describe how the intended education program(s) will be culturally sensitive, targeted, and linguistically appropriate and identify the means available to
>
> supply the educational materials in other languages common to the community (emphasis added).

[5]

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[26] Coping with your Child's Diagnosis. United Parents Against Lead and State of Michigan. 1996

[27] Senator Jack Reed Honored by National and Local Groups. Press Release, National Center for Healthy Housing. MARCH 21 ST, 2014. Credited with "Rebooting" Federal Healthy Homes/Lead Poisoning Prevention Efforts at the Centers for Disease Control and Prevention https://nchh.org/2014/03/senator-jack-reed-honored-by-national-and-local-groups/

[28] IPEN 2018. International Lead Poisoning Prevention Week Of Action. October 21-27, 2018 https://ipen.org/sites/default/files/documents/ipen-lead-week-of-action-2018-vl 4.pdf [49] see: Files

CDC and EPA also have extensive on-going public education activities, reflecting the on-going need. Furthermore, the new California programs that will address lead paint hazards in homes that is funded by the defendant lead paint companies all have major public education components, which as previously noted above, the Court had specifically included in its abatement plan.

State of Lead Poisoning Knowledge Held by the Caregivers of Plaintiffs

The general populations' state of unawareness as to the dangers of lead dust is mirrored in the limited knowledge of these hazards by parents and caregivers in the cases before this court. For example, in the cases tried in 2019, none of the caregivers understood the critical importance of lead contaminated house dust and some did not understand the importance of lead-contaminated paint chips. For example, Ravon Owens' mother testified:

> Q: Did you understand that it was not healthy for kids to eat paint chips whether they contained lead or anything else?
> A: No.
> Q: You did not know that?
> A: I didn't know that. No, I didn't.
> Q: Did you think it was okay for kids to eat paint chips, whether they contained lead or don't contain lead?
> A: No, I didn't.
> Q: You didn't think it was okay?
> A: No, I didn't.
> Q: Clearly, as someone who's in her late teens or 20s, you would have known that it's not healthy for kids to be putting paint in their mouth, right?
> A: Correct.
> Q: And is that why you would take a paint chip out of his hand, if you saw him with a paint chip in his hand?
> A: I took it out of his hand because I didn't think he should have been playing with it.
> Q: And why shouldn't he have been playing with it?
> A: I don't know. I didn't know back then. [51]

Glenn Burton's mother testified that she had no knowledge of lead until her child was poisoned:

> A: I had no knowledge of the effects of lead, because when your kid gets lead, they send you to like a lead poisoning class or something and they tell you things to look for in your kid's growth and behavior, you know, patterns.
> Q: This was when he first had his blood tested for lead you went to this class? A: Yeah, yeah.

[50] HUD Notice of Funding Availability for Lead Hazard Control Grant Program. 2017. https://www.hud.gov/sites/documents/2017LBPHCNOFA.PDF [51] Conley, Dashawna Dep., 185:22- 186:20, May 24, 2016.

> Q: What did they tell you to look for?

A: Certain -- I don't remember all the stuff, but I know learning disabilities and something.[29]

Glenn Burton's father testified about eating paint but made no reference to lead dust, suggesting he had no knowledge of the main route of exposure for most children:

Q: Have you known all your life that it's bad to eat paint?
A: I know that it ain't good -Q: All right.
A: -- to eat paint.
Q: It's pretty obvious, right?
A: Right. [30]

Cesar Sifuentes' father also did not appear to understand paint chips or lead contaminated dust issues, but also emphasized it was not a lack of parental care that was the problem. He testified:

Q: Before you moved into the apartment owned by Mr. Pacheco, okay, you knew that children should not eat paint chips.
A: No. I got here in '99. No, they didn't know yet.
Q: Isn't it common sense that children should not eat paint?
A: Well, I think so, yes, yes. It's not for lack of anyone taking care of them.[31]

There is also evidence that the city's inspectors and case management personnel in these cases provided lead educational materials in the course of their duties after the children were already poisoned. For example, the deposition of Adam Hartung, a city inspector in the Owens case states:

Q: And then Exhibit 4046 is the pamphlet that you brought with you titled Lead Poisoning, Protect Your Children; is that correct?
A: Yes.
Q: And to your recollection, this was the pamphlet that you would hand out to parents of children when you would conduct the lead inspection?
A: Yes. And I would go over this with the parents.[3233]

Similarly, in the Burton case, the case management report of Mary Walker, a health department nurse (done after the elevated blood lead level has already been diagnosed) states: "Lead teach completed. Discussed and issued lead folder."56 The "service date record" of 8/26/2002 also answers "Y" (yes) for all these metrics of the education:

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[29] Burton Ruby Dep., July 19, 2016.
[30] Burton, sr., Glenn Dep., 80:1-7, May 18, 2016.
[31] Sifuentes, Reuben Dep., 69:20-70:9, June 9, 2016.
[32] Hartung, Adam Dep., 66:4-67:4, Nov 13, 2018.
[33] Burton G Med-OOOI 155-0001170. 8/26/2002. Page 0001156.

[52] Burton Ruby Dep., 73:25-74:20. J

> Parent/caregiver [34]has adequate knowledge of prevention and management of lead toxicity. Parent/caregiver verbalizes exposure sources, routes and effects of lead poisoning. Parent/caregiver verbalizes understanding and importance of high Ca [calcium], high Fe [iron], and low fat diet. Parent/caregiver verbalizes importance of frequent hand washing. Parent/caregiver demonstrates or verbalizes strategies to decrease lead exposures.,,
> Again, on March 19, 2003 and June 18, 2003, the record states "completed" for "Goal l . Lead Education.[35]

In the Sifuentes case, a health department staff person stated in her deposition:

> . . .generally families were educated if their child was lead poisoned. I mean, we would have programs or health fairs where the general community was educated by, you know, having flyers and sheets of information generally instructing families... but if the child's lead level was elevated, that's when we came in and did the really detailed and did the follow-up visits and did the education on diet and made sure the parent got the child in for retesting and things like that.[36]

The deposition of the inspector in the Sifuentes case, Neil Rice, contains this exchange:

> Q: Would that indicate that either you or Alex reviewed what you found with the tenants?
> A: Yes.
> Q: And would that be the time where you would explain to the tenants, you have to clean up any paint chips, you should clean up any --
> A: Keep the wells clean. We'll vacuum them out for you today. Try to keep them clean until we get a contractor in to abate them.[37]

Affidavits from a sampling of various other Plaintiffs in the lead litigation further bolster my conclusions about the lack of awareness of the dangers presented by lead dust held by general population.

Lead Dust and Blood Lead Levels

Paint lead levels and dust lead levels are known to be highly correlated with each other and with blood lead levels. For example, HUD's national lead paint survey shows that in homes with no lead paint, 95% had no dust hazards either. But in homes with deteriorated interior lead paint, 61% had dust lead hazards.[38]

[34] Burton G Med-OOOI 155-0001170. 8/26/2002. Page 0001165.
[35] Burton G Med-OOOI 155-0001170. Page 0001169.
[36] Frazier, Wanda Dep., 1:19-12:21, July 27, 2016.
[37] Rice, Neil, Dep., 112:10-19, May 31, 2016.
[38] Jacobs DE, Clickner RL, Zhou JL, Viet SM, Marker DA, Rogers JW, Zeldin DC, Broene P and W. Friedman. The Prevalence of Lead-Based Paint Hazards in U.S. Housing, Environ Health Perspect 110:A599-A606, Sept 13, 2002.

Another study showed that the probability of blood lead levels exceeding 10 gg/dL (the level of concern CDC established in 1991) increases as floor dust lead levels increase. Specifically, that study showed the probability of an elevated blood lead level is below 1% for a low dust lead level of 1.5 gg/ft^2 (micrograms of lead per square foot of surface area). But when floor dust lead levels increase to 40 gg/ft^2 the probability of an elevated blood lead level increases by a factor of ten (to 11.5%). At the 2012 CDC blood lead reference value of 5 gg/dL, the probability increases to an astonishing 5 1.8%.[39] In 2021, CDC reduced the blood lead reference value to 3.5 gg/dL,[40]which would make the probability even higher.

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Together, these demonstrate the high degree of correlation between lead paint content, dust lead and blood lead.

Conclusion

Lead paint problems still remain poorly understood by the public. There are likely many reasons for this. It may be that many believe the problem was solved in 1978 when lead was finally banned from new residential paint by the Consumer Product Safety Commission under orders from Congress. It is also likely that because most lead poisoning cases do not exhibit overt clinical symptoms and instead show more subtle but very large and significant neurodevelopmental and other effects, the public may not grasp its true significance. Parents may be unable to fully grasp the danger until their own children are poisoned and an inspection occurs showing specific lead paint hazards in their home.

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[39] Dixon SL, Gaitens JM, Jacobs DE, Strauss W, Nagaraja J, Pivetz T, Wilson JW, Ashley PJ. U.S. Children's Exposure to Residential Dust Lead, 1999-2004: II. The Contribution of Lead-contaminated Dust to Children's Blood Lead Levels, Env Health Perspect 117: 468-474 (2009)

[40] Perri Zeitz Ruckart, Robert L. Jones, Joseph G. Courtney, Tanya Telfair LeBlanc, Wilma Jackson, Mateusz P. Karwowski, Po-Yung Cheng, Paul Allwood, Erik R. Svendsen, Patrick N. Breysse. Update of the Blood Lead Reference Value — United States, 2021. Morbidity and Mortality Weekly Report. MMWR, October 29, 2021, Vol. 70, No. 4, 1509-1512

[41] Dixon SL, Gaitens JM, Jacobs DE, Strauss W, Nagaraja J, Pivetz T, Wilson JW, Ashley PJ. U.S. Children's Exposure to Residential Dust Lead, 1999-2004: II. The Contribution of Lead-contaminated Dust to Children's Blood

Lead Levels, Env Health Perspect 117: 468-474 (2009)

[42] Perri Zeitz Ruckart, Robert L. Jones, Joseph G. Courtney, Tanya Telfair LeBlanc, Wilma Jackson, Mateusz P. Karwowski, Po-Yung Cheng, Paul Allwood, Erik R. Svendsen, Patrick N. Breysse. Update of the Blood Lead Reference Value — United States, 2021. Morbidity and Mortality Weekly Report. MMWR, October 29, 2021, Vol. 70, No. 4, 1509-1512

In particular, the evidence shows that the main route of exposure, the ingestion of invisible leadcontaminated dust particles through normal hand-to-mouth activity, is not adequately grasped. Dust control involves difficult cleaning activities that remove dust one may not be able to see, which is a challenge for both parents and remediation contractors. Educational training providers

often use a lead dust training visualization kit, which I displayed to the jury in the Wisconsin cases during my testimony, to show how dust contamination may be hard to see.

Smaller particles are more easily absorbed through a child's digestive system. One study showed that there was "an inverse relationship" between particle size and lead absorption (the smaller the particle the higher the absorption). That study showed a five-fold increase of absorption as particle size decreased in paint.[43]

The evidence presented here shows that there were numerous news articles and publications to attempt to address the misconception that children get lead poisoned by eating paint chips, and the general lack of knowledge by consumers/parents of the dangers of lead dust. Throughout the 1990s (and into the 2000s and today) federal, state, and local governments spent hundreds of millions of dollars in an effort to warn consumers/parents of the dangers of lead dust. This undeniably establishes a need for public education due to a lack of knowledge by the general public and that it was necessary.

The federal government passed regulations in 1996 requiring landlords to warn people of the dangers of lead paint in housing. That alone should be sufficient to demonstrate that the dangers of lead paint were not so well known to the general public in the 1990s. This means that reasonable efforts by the industry to also warn about this risk were still needed. In fact, to this day property owners are required to warn tenants and buyers of the dangers of lead. If there was no need to do so, that would not be required.

The evidence also shows that the parents did not appear to grasp the importance of lead paint chips and also the importance of lead contaminated dust until after their children had already been poisoned.

The association between lead paint, lead dust and elevated blood lead levels has been researched extensively and is widely accepted within the scientific community. Yet the magnitude of the problem remains a major problem. HUD's most recent national survey shows that the number of homes with deteriorated lead paint actually increased by 4.6 million homes from 2005 to 2018 as the housing stock continues to age. 29 million homes still have a lead paint hazard in the form of deteriorated lead paint, or lead-contaminated house dust or bare lead-contaminated soil. 21.6% of African-American households live in a home with lead paint hazards and 23.6% of households in poverty live in such homes. And 22% of homes with a child under six years old have lead paint hazards.[44]

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[43] Barltrop and Meek. Effect of Particle Size on Lead Absorption from the Gut. Archives of Environmental Health. July/August 1979. 280-285

[44] Presentation from HUD: Findings on Lead-Based Paint/Hazards from the American Healthy Homes Survey II CDC Lead Exposure and Prevention Advisory Committee Meeting. Peter Ashley. May 14, 2021

The belief that the hazards associated with lead paint and the contaminated dust and soil it generates was well understood by the public and especially by high-risk populations in the 1990s and later is not supported by the evidence.

Each of these opinions I hold to a reasonable degree of scientific certainty.
Dated this 18th day of November 2021.

David E. Jacobs, Ph.D., CIH

EXHIBIT R

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GLENN BURTON, JR.,

Plaintiff,

Case No.: 07-CV-00303

RAVON OWENS,

Plaintiff, Case No. 07-C-0441

CESAR SIFUENTES,

Plaintiff, Case No. 10-C-0075

vs.

AMERICAN CYANAMID ET AL,

Defendants.

RULE 26 EXPERT REPORT OF GERALD MARKOWITZ PhD

Gerald Markowitz is Distinguished Professor of History at John Jay College of Criminal Justice and the Graduate Center, City University of New York and an adjunct professor of Sociomedical Sciences at Columbia's Mailman School of Public Health. He received his doctorate from the Department of History of the University of Wisconsin and has been teaching at John Jay since 1970. He is the recipient of numerous grants from private and federal agencies, including the Milbank Memorial Fund, National Endowment for the Humanities and the National Science Foundation. He has been awarded the Viseltear Prize for Outstanding Work in the History of the Public Health from the

American Public Health Association in 2000. His Curriculum Vitae is attached as Exhibit

Dr. Markowitz is an expert on the history of lead, lead poisoning, and the historical manufacture, promotion and sale of lead pigments and lead paints. He relies on his education, training, publications and review of the literature and internal documents for each Defendant and their trade associations for the opinions in this report. Each opinion is held to a reasonable degree of historical certainty.

Opinion 1: Each of the Defendants Manufactured, Marketed, Promoted and Sold White Lead Carbonate both Nationally and in Wisconsin.

A. Sherwin-Williams

The Sherwin-Williams Company was incorporated in 1884. Sherwin-Williams manufactured white lead carbonate from 1910 until 1947. Its predecessor corporations, Acme White Lead [1920] and Detroit White Lead [1917], produced white lead for use in paints in the 1800's. Sherwin-Williams sold its white lead carbonate to consumers as white lead in oil and included in prepared paint products. In addition to Sherwin-Williams branded paints, Sherwin-Williams also acquired and sold prepared paints with Lead through other companies it acquired, including Calumet Paint Company [1888], Lewis Berger & Sons [1905], , Martin-Senour Company [1917], Hemingway & Company [1919],

Lowe Brothers [1929], John T. Lucas [1929], WW Lawrence [1929], Peninsular Paint & Varnish [1930], The Lincoln Paint and Color Company [1930] and Bredell Paint Company [1930]. [1] Lowe Brothers had a subsidiary, Wisconsin Paint and Supply Company, located in Green Bay that was established in 1927 and distributed Lowe Brothers products. On

[1] N17929

January 31, 1936 Lowe Brothers bought Wisconsin Paint and Supply Company. [1] Ozark Smelting & Refining [1916] sold Lead and products containing Lead.

In addition to using its own White Lead in its consumer products, SherwinWilliams had approved the following suppliers to provide it with additional requirements of White Lead: National Lead, Carter White Lead (National Lead); Eagle Picher; Anaconda; John R. MacGregor; Glidden; and DuPont. [2] Sherwin-Williams never identified or otherwise distinguished between the suppliers of the White Lead carbonate contained in its consumer products.[3] Although Sherwin-Williams claims it ceased producing white lead in 1947,[4] Sherwin-Williams continued to sell white lead and leaded paints to consumers and professionals. After 1947, it bought its white lead requirements primarily from National Lead, from whom it had obtained white lead in the past.[5]

Sherwin-Williams promoted its Lead nationally both individually and in conjunction with organizations of which it was a member. Sherwin-Williams was a member of the LIA from 1928 until its resignation in 1947. Sherwin-Williams was a Class A member

[1] N46220, N46223, N46222
[2] N15807, N15822, N15823, N15824, N15825, N13519
[3] October 28, 2016 deposition of Colleen Dunlavy @ 145
[4] N4453, N25419, NI 1831, N12876
[5] N15850, N15853, N16051, N16052, N15844, N13525, N13559, N13521, N13519, N13518, N13516, N13515, N13514, 13513, N13511, N13510, N13508, N13507, N13502, N13501, N13538, N13495, N13492, N13488, N13487, N13536, N13535, N13481, N13480, N13534, N13533

of the NPVLA from 1933 until 1978. At various times from 1933 until 1978 Sherwin-Williams was represented on the Executive Committee and from 1958 through 1978 was represented on the Board of Directors.

For practically as long as Sherwin-Williams has been in business, it has had traveling salesmen whose territories included Wisconsin. Sherwin-Williams had agents and dealers in Wisconsin beginning in 1901. They were located in Omro, Hartford, La Crosse, Clintonville, Florence, Antigo, La Valle, Melrose, Milwaukee, Eau Claire, Dartford, Menomee Falls, Campbellsport, Green Bay, Appleton, Manitowac, Oshkosh, Richfield, Red Granite, Slinger, Waupaca, Waupun, Marion , Van Dyne, Berlin, and Sheboygan.8

Sherwin-Williams sponsored the "Metropolitan Opera Auditions of the Air" which were broadcast over station WTMJ in Milwaukee. It claimed that "[e]ach year this program has become more and more important because of the work it is accomplishing entirely aside from its commercial value. Thus it differs greatly from the average radio program but builds tremendous good will for Sherwin-Williams products and Sherwin-Williams dealers."9

[7] N18316, N18317, N23475, N23476, N23477, N23478, N23479, N23481, N23484, N23485, N23486, N23487, N23492, N23493, N23494, N23500, N23504 N23505, N23506, N23509, N23511, N23512, N23533, N23534, N23535, N23538, N23540, N23542, N23553, N23554, N23555, N23556, N23557, N23558, N23559, N23560, N23561, N23562, N23563, N23564, N23565, N23566, N23568, N23604, N23608, N23609, N23610, N23611, N23612, N23613, N23614, N23615, N23619, N23626, N23635, N46235, N46239, N46241, N46242, N46243, N46244, N46245, N46246, N46303.

[8] N14239, N17954, N17955, N17956, N17957, N17958, N17959, N17960, N17961, N17962, N17963, N17964, N18083, N18121, N23357, N23360, N23528, N23666, N23678, N23686, N23700, N23703, N23709, N23729, N23732, N23733, N23734, N23754, N43236, N43240, N46257

[9] N46253

Sherwin-Williams had corporate owned stores in several Wisconsin cities including Antigo [19611 [10], Appleton [19541 [11], Ashland [1958] [12], Baraboo [1958] [13], Beaver Dam [19561 [14], Beloit [1955] [15], Chippewa Falls [1961] [16], Eau Claire [19551 [17], Fond du Lac [1955]18, Green Bay [various] [19], Janesville [1949] [20], Kenosha [1954][21], La Crosse [1956122, Madison [1954][23], Manitowac [1956][24], Marinette [1955][25], Menomonee Falls

[1968][26], Monroe [1960][27], Moses Lake [19621 [28], Oshkosh [1948] [6], Plymouth [19661 [7],

Portage [1958] [8], Racine [19611 [9], Rhinelander [19581 [10], Sheboygan [19551 [11], Stevens

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[10] N25142 [11] N24298
[12] N24366
[13] N25087
[14] N25633 [15] N24307, N24312, N24316
N25157
[17] N24318
[18] N24315, N24320
[19] N25177, N24331
[20] 7790
[21] N24298
[22] N25633
[23] N24299
[24] N24343, N25072
[25] N24299•, N24318
[26] N25624
[27] N25117
[28] N25179

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[6] N23724
[7] N17790
[8] N24365
[9] N25140
[10] N25070, N25077
[11] N24307

Point [1954] [12], Superior [19571[13], Watertown [1956] [14], Waukesha [19561 [15], Wausau [19571[16], west Allis [19611[17], and Wilmar [1967][18].

Sherwin-Williams opened a warehouse in Milwaukee in 1930 and started opening additional stores.[19]stores in 1927 and continued adding

In 1938, Lowe Brothers had district sub warehouses[20] in Eau Claire, Green Bay, Kenosha, La Crosse, Milwaukee, Oshkosh, Racine, Sheboygan, and Superior. Lowe Brothers had a retail store in Green Bay [19381[21].

Acme White Lead & Color Works had a store in Milwaukee [19681[22].

Sherwin-Williams' documents show shipments of white lead into Milwaukee. In 1929-1930, 52,387 h pounds of ODP white lead in oil were shipped into Milwaukee.[23] In 1930-1931, 36,809 h pounds of white lead in oil, 21,100 pounds of soft paste lead, 3,950 pounds of Zi10[24], and 250 pounds of soft paste Zilo were shipped into Milwaukee.[25] In 1931-1932, 22,976 pounds of white lead-in-oil, 2 9,450 pounds of soft paste lead, 2800

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[12] N24299
[13] N24348, N24350
[14] N24339
[15] N24332
[16] N24354
[17] N25150
[18] N17791
[19] N25406, NI 7931, N24316, N24320, NI 7793, N25135, NI 7795, N17790, N24298, N25101, N25104, N25108, N25622, N24352, N24360, N24344, N24361, N16545, N23404, NI 7794, 7796, NI 7797, NI 7798
[20] N17942
[21] N17942, N18121, N43236
[22] N25625
[23] N17143
[24] N15945
[25] N17663

pounds of Zilo, and 200 pounds of soft Zilo were shipped into Milwaukee.[26] In 1932-1933,

14,984 pounds of white lead-in-oil, 17, 150 pounds of soft paste lead and 425 pounds of Zilo were shipped into Milwaukee.[50]

Additional evidence of Sherwin-Williams and its' affiliated companies presence in Milwaukee can be found in the various telephone and business directories from Milwaukee and advertisements and analyses found in the local newspapers.51

ARCO

Atlantic Richfield is the successor to International Smelting & Refining and Anaconda Lead Products. International Smelting & Refining was incorporated in 1909. [52] Anaconda Lead Products Company was incorporated in 1919. [53] These companies

[26] N15942

produced, marketed, promoted and sold their own white lead carbonate between 1919 and 1946.

In 1914, Anaconda Copper & Mining Company acquired the assets of International Smelting & Refining. In 1936, Anaconda Lead Products Company was dissolved and its assets and properties were taken over by International Smelting & Refining and its manufacturing process continued. The Federal Trade Commission at page 3736 of the record found that "The principal officers of respondents Anaconda and International have always been the same, and it is apparent from the record that respondent International and the former Anaconda Lead Products Company were in fact mere operating divisions of respondent Anaconda, with no substantial separate identity of their own. All of the acts of respondent International, of Anaconda Lead Products Company, and of Anaconda Sales

[50] N17545
[51] See Exhibit D.
[52] 1079

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Company [27]referred to in these findings were for and in behalf of respondent Anaconda and such acts will hereafter be treated as the acts of respondent Anaconda."

Anaconda began producing white lead in 1919. Prior to 1936, dry white lead and white lead in oil were produced by Anaconda Lead Products Company, a subsidiary of Anaconda, and were sold and distributed in commerce by Anaconda Lead Products Company and Anaconda Sales Company, another wholly-owned and controlled Anaconda subsidiary.

[27] N10838

From 1936 to the fall of 1946, lead pigments produced by International were sold and distributed by Anaconda Sales Company. Various predecessors were members of the LIA from 1928 until 1971. Anaconda Sales Co. was a Class B member of the NPVLA from 1933 until 1944.

Anaconda Lead Products acknowledged Sherwin-Williams as a direct competitor and Sherwin-Williams was "obviously interested in shutting down the White Lead Plant [of Anaconda] if possible.»

ARCO's predecessors sold white lead carbonate to Sherwin-Williams (Acme White Lead) and various customers in Wisconsin. Among the customers in Wisconsin were A.G. Nelson Co, F.D. Hayes, Buffham's Inc., Bogital Decorating Co., Decorators Supply House, Frank Gill Co., Gordon Lumber & Supply, Milton Hardware, Mr. Horeb Hardware, Sauer Paint & Wallpaper, Venestra Lumber & Supply Co., State Street Hardware, and Green County Lumber Company.[28] Green County Lumber Company and Sauer Paint & Wallpaper carried consigned stocks of white lead in oil.[29] Wm. F. Zummach

[28] N10146, N10158, N10209, N10825, N10827, N10852, N10855, N10857, N10860, N15830, N51411, N51412, N51413, N51414, N13524, N13538, N13484, N13480, N13479

[29] N51411

was the Wisconsin state distributor of white lead products.[30] In addition, ARCO's predecessors sold white lead carbonate to various paint manufacturers that had a presence in Milwaukee. Among these companies are Ault & Wiborg Varnish Works, Barrett Varnish, Berry Bothers, Carbolineum Wood Preserving, Certainteed Products, Colonial Works, Consolidated Paint Co., Cook Paint & Varnish; Detroit Graphite, Devoe &

Reynolds., E.I. DuPont de Nemours Co., Glidden Co., A.C. Horn, Jamestown Wood Finishing Co., Mautz Paint & Varnish Co., McGuire Woodlock Paint Co., O'Neil Duro

Co., Passanno-Hutcheon Co., Phelan Faust Paint Co., Pittsburgh Plate Glass, Pratt & Lambert, Sherwin-Williams Co., Standard Varnish Works Products, Valspar Paints &

Varnishes and Wm. F. Zummach. [31]

Additional evidence of ARCO's presence in Milwaukee can be found in the various telephone and business directories from Milwaukee and advertisements and analyses found in the local newspapers.59

DuPont

DuPont was founded in 1802. DuPont claims that it manufactured white lead carbonate from 1917 until 1924. DuPont, however, is listed as a producer in the Minerals Yearbook as late as 1931, and arguably as late as 1932. DuPont sold white lead carbonate to Sherwin-Williams [Acme White Lead].[32] DuPont and National Lead entered into a contract, beginning

[30] N10158

[31] N10142, N10146, N10148, N10158, N10823, N10825, N10827, N10852, N10855, NI 1013, NI 1014, NI 1168, NI 1169, NI 1170, N12838, N51350, N51411, N51413 [59] see Exhibit D.

[32] N13519

in 1924, wherein DuPont supplied pig lead, raw linseed, oil, turpentine and containers to National Lead and National Lead converted the pig lead into white lead

carbonate, [33]dry and in oil, and shipped it back to DuPont. The contract states that National Lead would mix and grind the white lead "in accordance with [DuPont's] specifications. "This arrangement continued until at least 1948 according to James Matthews.[62] The testimony of James C. Burrows taken in the Lewis case establishes that DuPont owned the lead and other material at all stages. [34][35] DuPont was a member of the LIA from 1947 until its resignation on December l, 1958. DuPont rejoined the LIA in 1962 and continued as a member until 1982. Du Pont was a Class A member of the NPVLA from 1933 through 1978. DuPont also became a Class B member in 1944 and maintained dual Class status through 1978. DuPont had representatives on the Executive Committee of the NPVLA from 1933 through 1978 and on the Board of Directors from 1958 through 1978.

In its 1918 Advertising Survey, DuPont noted that Wisconsin had a combined circulation of 496,443 general magazines and various papers and that a 100 foot Harrison sign was located in Milwaukee. Only sixteen states even had DuPont signs.64 John

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[33] N3187. see also N3183, N3190, N3192, N3195, N3196, N49675, N50827 [62] June 6, 2002 deposition of James Matthews at 27.

[34] September 21, 2004 deposition of James Burrows at 149-150

[35] N50848

PritzlaffHardware, was a distributor for DuPont's products within the State of Wisconsin. PritzlaffHardware was considered within the Chicago Territory. [36] DuPont had a salesman from its Chicago office that covered Wisconsin and the Upper Peninsula of Michigan in at least 1925.[37] The Chicago branch office sold trade sale products including white lead in

oi [38] No later than 1946, DuPont had a warehouse in Milwaukee for its trade sale products.[39]

Additional evidence of DuPont's presence in Milwaukee can be found in the various telephone and business directories from Milwaukee and advertisements and analyses found in the local newspapers.[40]

Armstrong

John R. MacGregor Lead Co. was founded in 1937 by John R. MacGregor and E.R.

[36] N50765
[37] N50817
[38] N49863
[39] N51377
[40] see Exhibit D.

T. Armstrong. In 1941, MacGregor Lead became a wholly-owned subsidiary ofArmstrong Paint & Varnish. MacGregor Lead produced white lead from 1937 until it was sold in 1971. MacGregor Lead supplied the white lead to Armstrong for manufacturing Armstrong's coatings. Armstrong sold Armstrong White Lead and Armstrong Paste White as exterior white paste paints. [41] Armstrong's Mixed Paint also contained white lead carbonate.[42]MacGregor sold its Scotch Laddie White Lead to Elliott Paints & Varnish which used it in the manufacture of its "Elliott's 100% Pure Lead-Zinc Paste Paint. [43] Armstrong made a paint comparable to Scotch Laddie for Ace Hardware stores. [44] MacGregor Lead also sold white lead to paint manufacturers such as Enterprise Paint Company and Premier Paint Company.[74] Joseph Kelly, an executive with Armstrong Trade Sales division of Elliott Paint Company, testified that Milwaukee was one of the geographical areas where a large

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volume of Scotch Laddie paint was sold. [March 23, 1973 deposition of Joseph J. Kelly @ p. 135]. Mr. Kelly also testified that professional painters were the largest volume of purchasers

[41] N4883, N4889
[42] N23218
[43] N4546
[44] April 17, 1973 deposition of Wayne Wilkins @ pp. 8 - 10 [74]
April 17, 1973 deposition of Eugene Mack @ p. 24

of Scotch Laddie and the home owner volume was negligible. [March 23, 1973 deposition of Joseph J. Kelly @ p. 65].

Additional evidence of Armstrong/MacGregor's presence in Milwaukee can be found in the various telephone and business directories from Milwaukee and advertisements and analyses found in the local newspapers.[45][46]

MacGregor Lead was a member of the LIA from 1940 until 1972 and of the NPVLA from 1940 until 1973. Armstrong Paint & Varnish was also a member of the NPVLA.76

American Cyanamid

American Cyanamid was incorporated in Maine on July 22, 1907. In 1971, Cyanamid purchased the John R. MacGregor Lead Co. from Armstrong[47] and continued the production of white lead. American Cyanamid supplied white lead carbonate to Armstrong for use in paints.[48] American Cyanamid projected sales of white lead carbonate to Armstrong for use in paint at least through 1976. [49] Cyanamid was also a member of the

[45] See Exhibit D.
[46] N48313
[47] N8712
[48] N8722
[49] N8823

LIA in 1972 and the NPVLA from 1933 until 1977.

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Evidence of American Cyanamid's presence in Milwaukee can be found in the various telephone and business directories from Milwaukee and advertisements and analyses found in the local newspapers.[50]

Opinion 2: Each of the Defendants was a member of at least one Industry Trade Association. Those associations engaged in joint promotion campaigns for White Lead Carbonate that failed to warn consumers and parents about the dangers of White Lead Carbonate to Children

A. National Paint Varnish & Lacquer Association

The National Paint, Varnish & Lacquer Association can trace its roots back to 1888 when it was formed as the National Paint, Oil & Varnish Association, Inc. In 1933 the American Paint & Varnish Manufacturers Association[51] and the National Paint, Oil, &

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[50] see Exhibit D.

[51] The American Paint & Varnish Manufacturers Association was created by the merger of the Paint Manufacturers Association, which was formerly known as the Paint Grinders Association, and the National Varnish Manufacturers Association [N51401 and www.paint.org] [52]N42655

Varnish Association merged to form the National Paint, Varnish & Lacquer Association, Inc. which was incorporated on December l, 1933. The articles of incorporation state that one purpose of the NPVLA was "to safeguard the interests of the public. There were various classes of membership. Class A members were manufacturers of paint, varnishes, etc. and Class B members were manufacturers of materials used in connection with the manufacture or application of paints, varnishes, etc. Class A members were entitled to one vote at the Association meetings.

There was a local NPVLA association, located in Milwaukee, Wisconsin. At various times, Sherwin-Williams[52], American Cyanamid[53], and DuPont[54] were members of the local association.

B. Lead Industries Association

The Lead Industries Association [LIA] was founded in November, 1928. [55][56][57][58] It was incorporated under the laws of the State of New York for non-profit associations in 1961 and its name became Lead Industries Association, Inc. 87 „In 1928, at the instigation of the late Clinton H. Crane, then president of St. Joseph Lead Company, and with the cooperation of other leaders in the lead industry, ten lead producing and consuming companies in the United States and Canada subscribed equally to an underwriting fund to finance establishment of a trade association for the lead industry . . ."88 The LIA was formed as a vertical organization because: "Being a vertical organization of producers and consumers, it has been able to attack many problems without fear of following a course that would be detrimental to any segment of the industry."89 "The wisdom of forming a vertical association has been proved many times in subsequent years. The complexities of modern

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[52] N42653, N42654, N42655, N42656, N42657, N42658, N42659, N42660, N42661, N42663, N42664, N42665, N42666, N42667, N42668, N42669, N42670, N42671, N42715, N42716, N42717, N42720, N42721, N42722, N42723, N42724, N42725, N42727, N42728, N42729, N43992, N43993

[53] N42659, N42661, N42662, N42663, N42664, N42665, N42669, N42670, N42671, N42674, N42675, N42720, N42721, N42724, N42725

[54] N42659, N42661, N42662, N42663, N42664, N42665, N42669, N42671, N42720, N42721, N42722, N42724, N42725, N43992

[55] N2391

[56] N1749

[57] N237

[58] N2405

business make it difficult to divorce the best interest of any one branch of an industry from

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any other branch. There is rarely something that is harmful to a part of one industry that is not harmful to other parts of the same industry in the long run. The same may be said of things that benefit a part of the industry.,,

The stated purposes of the LIA were:

- To collect and publish statistical information relating to the production, distribution, marketing, consumption and use of lead and lead products;
- To disseminate accurate information regarding lead products and how they best may be used;
- To develop methods for the improvement of the welfare of those engaged in the lead industries, or in the use of its product; and for such other purposes as, from time to time, may be of benefit to the lead industries.
- In general to promote the serviceability of the lead industries to the community at large. 91

One of the principal objects of the LIA was to "combat substitution of inferior

articles for lead. This purpose is repeated in numerous documents. For example: "One of the major purposes for which it [LIA] was formed was to safeguard lead from substitution by other materials."[90]

The lead industry, mainly through the LIA, funded research on Lead. However, it was noted by some in the industry that the research was not well-defined or worthwhile. For example, Dr. Willard Machle, of Ethyl Corporation, stated: "It is the observer's [Machle] opinion that Lead Industries Association suffers from lack of good medical advice to assist them in defining their problems, carrying out a research program, and

[90] N44
[91] N590
[92] N570
[93] N603

translation of results into practices and information for dissemination. "[94] Dr. Robert Kehoe went further in a letter to Ethyl Corporation stating: Lead Industries Association is apparently willing and anxious to continue their investigations at Harvard University. Now Felix and Joe Aub and some others would not like me any better for saying so, but the money they have thus far invested at Harvard has gone down a rat hole. Practically the entire work of this group has been demonstrated to be inaccurate, the fundamental conclusions have been shown to be unsound, and actually the work introduced confusion rather than clarity in an important matter. "

The LIA was conducting health and safety work for the benefit of the lead industry: "Directly or indirectly, the intent of all our health and safety work is to be of service to industry.

"96 As the LIA pointed out: "As time goes on our health and safety work more and more demonstrates its value in protecting our markets and avoiding governmental regulations onerous to our industry."97 The LIA also pointed out: "I hope you will agree with me that our health and safety activities are not just an altruistic public service. They can also mean just as much in dollars and cents to you as any market or product development or research program can.„

In the November 1940 issue of Lead magazine there is an article about a low income housing development had been completed in West Allis, Wisconsin. All ofthe homes were

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[94] N18424
[95] N18422
[96] N225
[97] N645
[98] N227

painted with white lead. Hawley Wilbur of the Wilbur Lumber Company was involved in the financing and handling of the project."

Also in 1940, it was reported to the members supporting the White Lead Promotion Program that the field representative had visited Kenosha, Wisconsin which was a "lucky town" for him and he found a "number of lead users among the painters.„100

At the May 18, 1941 meeting of the White Lead Division, at which John R. MacGregor was present, it was reported that the Educational Service Division had placed

Paint Study Cabinets and Instruction Units in 196 high school and college vocational agriculture departments in Wisconsin and that Painting Instruction Units, teaching supplies, trainee's reference books and film strips had been placed in Veterans On-Farm Training Programs in Wisconsin.101

The Lead Industries Association had a promotional film, The Lead Matrix. It was reported in March 1966 that a TV station in Milwaukee might be showing the movie and then it was reported that it was shown on TV station WISC in Milwaukee during June 1966.102

Opinion 3: Defendants, individually and through their industry associations, promoted lead for use without warning of the hazards of Lead to Children

Through their advertisements and promotions, these defendants created a market for white lead, promoting and reinforcing the perception that no paint was as good, or as sanitary, as Lead paints. These advertisements and promotions, conducted individually and through the LIA and the NPVLA, did not warn consumers of the dangers of using Lead

[99] N899
[100] N2880 N2924
[102] N3467, N3435

paint [59]in homes despite the fact that each Defendant knew or should have known of those dangers. Furthermore, these advertisements and promotions increased the demand, and consequently the use, of Lead in residential settings.

[59] N23541

Sherwin-Williams

Although in 1900 Sherwin-Williams had recognized internally that lead in paint is a "deadly cumulative poison,"103 and in 1904 had told its agents that lead paint was hazardous to the inhabitants of houses, [60] it did not warn the public or consumers of those dangers. Instead, in 1922 the company advocated using lead-based paint on children's toys in its publication, "The Home Painting Manual," which stated that "[s]ome of the more elaborate toys -- rocking horses, wagons, etc., may be brightened up now and then with a little S-W Family Paint, SWP . . . as desired." [61] These paints contained significant amounts

of Lead.

Between 1923 and 1928, Sherwin-Williams, in advertisements in the Saturday Evening Post, and other national and regional magazines, recommended using white leadbased "SWP House Paint" and "S-W Family Paint" on interior surfaces including walls, woodwork, doors, and ceilings, and on toys. [62] These advertisements did not contain any warnings to the public or consumers about the dangers of such use of Lead paints.

Sherwin-Williams continued to advertise and promote paints contining Lead for residential use without alerting or warning the public or consumers of the dangers of Lead. The February 1927 edition of Chameleon boasted that Sherwin-Williams had placed

[60] N3624

[61] N23045

[62] N55, N23660, N29215, N46331, N46529

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"[n]inety-nine advertisements in the nation's lead magazines and farm papers — each two pages, making 198 pages in all — every page in colors — either two or four — going into more than 20,000,000 homes — with a total number of individual impressions of more than 65,000,000. „107 The same year, Sherwin-Williams, in its training material, said "TODAY MORE SWP IS SOLD THAN ANY OTHER PREPARED PAINT PRODUCED BY ANY OTHER MANUFACTURER ANYWHERE IN THE WORLD. This training material also notes that SWP is for use on exterior and interior surfaces of buildings.

From at least 1936 until the 1940s, Sherwin-Williams advertised its Enameloid paint for use on toys. This paint contained 2% white lead in 1936. [110] Yet in 1930, the LIA assured the public that there was no lead in paint used on toys, and, by letter dated May 2, 1935, Sherwin-Williams itself assured Dr. Ella Oppenheimer of the U.S. Children's Bureau that toy enamels "generally contain only non-poisonous pigments.„1 1 1

Although Dr. McCord, in 1937, had explicitly warned Sherwin-Williams of the hazards of white lead to children [1 12], Sherwin-Williams sold white lead paint for interior use as late as the 1950s. In 1937, Sherwin-Williams sold ODP White Lead for interior use.1 13 In the 1930s, Sherwin-Williams promoted its SWP House Paint for interior use, which

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[107] N46272

N46272

[108] N49738 [109]

N19, N10794

N18385

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N 16356. It was well-known, by this date, that even small amounts of lead could poison a child. For example, the LIA discussed, at its Board of Directors meeting on December 12, 1930, the November 20, 1930 article in the United States Daily stating that "small amounts of lead which may cause only chronic lead poisoning in an older person may be of sufficient quantity to cause acute poisoning, leading to death, in an infant." N 16357 1 12 N 15949

[113] N4362

contained "enormous quantities of white lead.„114 In 1939 it promoted the use of SWP House Paint for interior use.115 In 1941, Sherwin-Williams provided instructions for using its white lead pigment on "interior walls and woodwork. "116 Sherwin-Williams' ZILO pigment, sold for interior use in 1941, contained 75% white lead. [117] During the 1940s, at least seven of Sherwin-Williams' Family Paints, sold for interior and exterior use, were formulated with white lead.

In 1940, Sherwin-Williams stipulated that its advertisements "created a public demand for its products throughout all of the states of the United States and in the District of Columbia. . .„118

Sherwin-Williams bragged that it had "the finest and best" Dealer organization in the industry. It was Sherwin-Williams plan "to work with our Dealers in every way to supply vigorous and positive merchandising, advertising and selling plans which will enable our Dealer to maintain their undeniable leadership in paint merchandising in their respective communities.„119

As late as December 1954, Sherwin-Williams sold "House Paint" that contained 28% white lead and bore the label "For Exterior or Interior Use. 120

In additional to advertising in national publications distributed in Wisconsin, including The Painter and Decorator, Better Homes and Gardens, Collier's Magazine, and

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[114] Id.
[115] N141
N40030 [117]
N4040, N4374
N17929

N46253
[120] N18384, N18726, N18727 N18728

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The Saturday Evening Post, Sherwin-Williams also advertised in Wisconsin Agriculturist. [63]

DuPont

DuPont similarly advertised and promoted Lead for residential use without warning of its dangers. In 1918, DuPont initiated a $1,500,000 national promotion campaign, which it characterized as "colossal." It declared that it "intend[ed] to make [its newly acquired lead paint line] the most sought after in the country. The campaign would involve advertising in 36 national magazines and various farm papers, including Wisconsin Farmer.[64][65]

Before 1920, paint reached the consumer through stores served by wholesalers. Improved roads lead to the development of large marketing centers. Department stores and some chain stores started selling paints and small chains of paint stores, some of whom manufactured their own paints, started springing up. These forced some large manufacturers to establish their own stores. Up to this time, most of DuPont's sales were made to retailers through wholesalers. This method of selling was expensive and did not help in getting the leading accounts because they "were usually tied up by one of the older manufacturers of long association.»

[63] N69, N29215, N46331
[64] N50848
[65] N43223

DuPont brought all of its trade sale products under the DuPont name and trademark in 1923. [66] To break down resistance and to bring about an appreciation of DuPont and its products, DuPont advertised to the consumer. [67] The first national advertisement of this

[66] N50760
[67] N43223

newly branded "DuPont Line of Paints and Varnishes" appeared in the Saturday Evening Post on February 24, 1923. "Following this, there was a series of two page advertisements featuring full size packages of the leading items, and a tie-in with the dealer, which was the real beginning ofthe Trade Sales Department's growth. „126 As time went on, DuPont made progress and began to eliminate the wholesaler as unnecessary in their chain of

[127] dis

tribution.

In a 1923 memo, DuPont acknowledged "[t]he bulk of all contracting painter business today is handled through dealers" and "[e]very new agent established is an outlet to painters in that community." DuPont decided to concentrate on the "dealer-consumer market" rather than the "master painter market" because it was the easiest market to cover;

[128] the

least sales resistance is encountered; it provides greater volume and more diversity.

DuPont promoted its white lead for interior and exterior use. [129] DuPont offered an Architectural Service Bureau that would work "in close cooperation with the painting contractor, the agent, the distributor and the home owner in the development of wood finishes and in specifying the paints and varnishes for all exterior and interior purposes."

In this same document DuPont recommended white lead in oil for interior and exterior

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use.

Between 1930 and 1946, the number of DuPont stores went from 5 to 52. During the next few years a number of novel and modern merchandising ideas were introduced to stimulate sales, such as the famous "Paint Parade" featuring paint specials with attractive

[126] N50760
[127] N43223
[128] N50783
[129] N3153
[130] N50788

consumer broadsides for local distribution. "Millions of these broadsides were sold to the

dealers on a 50-50 basis, and not only stimulated consumer interest but really created new alert

dealer sales effort."131

Armstrong

John R. MacGregor Lead Company claimed is was "a corroder of pure pig lead and manufacturer of Scotch Laddie Pure White Lead in Oil and other White Lead Paints, of which Scotch Laddie Titanized Pure White Lead Paint is a leading favorite." That its methods of processing lead and manufacturing paints guaranteed paint products that were unexcelled for service and performance. The Scotch Laddie label was a label in which you could place complete trust. John R. MacGregor, founder of the company, had "been a paint man for his entire lifetime" and was "recognized as an authority on paint of all types and

White Lead Paints in particular.„

MacGregor Lead Co. promoted its Scotch Laddie paints and primers as being richer in white lead which guaranteed extra durability, smoother application and amazing whiteness and having superior quality and big value. Advertisements appeared in The Reader's Digest, Better Homes & Gardens House & Garden Remodeling Guide, Better Homes & Gardens Home Improvement Ideas, and House Beautiful's Building Manual during 1964. [133] Many of these magazines were circulated in Wisconsin. MacGregor

used a Consumer Guide Report in advertisements that stated "this paint (pure white lead paint)

[131] N43223
[132] NS 1403
[133] NS 1404

if [68]used exclusively, remains best for homeowners wishing to allow long intervals — longer than the durability of any other white or tinted paint — to elapse " between jobs.

ARCO

International Smelting & Refining recognized the necessity ofpromoting white lead in order to "increase the consumption of pig lead in a market where the lead does not return."135 Mr. Case attached the LIA's justification for the white lead promotion campaign which noted that white lead is "constantly subject to attack from the health standpoint" and the campaign "would help offset the constant threat of anti-lead legislation and propaganda." [69]

Anaconda advertised its white lead in American Paint Journal Paint and Varnish

[68] N63
[69] N29

Production Manager, Drugs. Oil and Paints, Painter & Decorator, National Painter's Magazine, and Paint Oil and Chemical Review. [70][71] Anaconda acknowledged that white lead-in-oil is paint and it "was a very useful paint. „138 Anaconda also promoted its White for exterior and interior use.[72] It recommended using white lead "no Lead-In-Oil as paint, „ [73] of these advertisements or promotions matter what kind of job you have None contained warnings about the dangers of the use of Lead in residential settings. These

[134] N51406

advertisements appeared in national publications that were circulated in Wisconsin, including The Painter and Decorator.

American Cyanamid

American Cyanamid advertised its pigments in national publications that were circulated in Wisconsin, including The Saturday Evening Post. None of these advertisements or promotions contained warnings about the dangers of the use of Lead in residential settings.

The Lead Industries Association

[70] N43710, N123, N32, N121

[71] N47441, Deposition of Joseph Kalt taken April 6, 2006.

[72] N135, N51416, NS 1417, N51349

[73] NI 16. Other Anaconda advertisements are N32, N34, N 107, NI 10, NI 12, NI 13, NI 15, N118, N119, N120, N122, N123, N125 N126, N127, N128, N129 N130, N134, N138, N172, N173, N174, N178, N10005, N10006, N10007, N10008, N10009, NIOOIO, NIOOII, N10012, N10013, N10014, N10015, N10016, NI0017, N10018, N10019, N10020, N10021, N10022, N10023, N10024, N10025, N10026, N10027, N10028, N10029, N1030, N10031, NI 1187, 1188, NI 1189.

General promotion

The LIA engaged in an affirmative promotional campaign to increase the use of Lead in paints and coatings; none of these promotional campaigns contained warnings about the dangers of using Lead in residential settings. The campaign was launched at a time when the LIA and its members perceived a decline in the use and desirability of Lead as a pigment in paints and coatings. It was also at a time when each of the defendants actually knew of should have known because of the abundant available literature, of the serious health consequences to children of exposure to Lead. Through the LIA, the Defendants launched successful advertising and promotional campaigns stressing the advantages of using Lead, creating a false aura of safety surrounding their products. From 1928 until the mid-1950s, through books, magazines, salespersons, technical assistance, special campaigns, scientific conferences, and labeling recommendations, the LIA and the lead industry Defendants promoted the use of lead pigments for interior, domestic use.

In November, 1930, the LIA began publication of "Lead" magazine, which was to provide painters, among others, with "new and old uses of lead." In 1931, circulation was

about [74] 6,000,[141] rising to 32,000 in 1941 [142] and to 50,000 in 1956. [143] Lead was a success: "Hardly an issue goes out but what results in a stimulation of inquiry from architects, plumbers and others. 144

In 1931 the Lead Industries Association produced a book, Useful Information about

[74] N31

Lead which suggested that the "prospective paint user" would be well advised to use paints containing a high percentage of lead, "the higher the better." In a section entitled, "White Lead in Paint," it stated that "well painted buildings, both inside and out, go hand in hand with improved sanitation." The book included no warnings of the dangers of lead, despite the fact it was produced "to disseminate accurate information about lead products and how they best may be used.„145

The LIA aggressively promoted lead-based paint for interior and exterior application into the 1950s. For example, in the LIA's publication, LEAD dozens of articles were published promoting lead-based paint for all interior domestic applications:

- November 1930 -- "This is illustrated by the fact that both houses are painted with pure white lead and oil inside and out. [75]
- January 1933 -- "Painting Interiors with White Lead for Efficiency„ [7677]
- May 1933 -- "White Lead Interior Keep Singer Building Paint Costs Low„148
- January 1934 -- "White Lead Paint Essential to Fine Decoration [78]

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141 N576 [142]
N2945
[143] N637
[144] N2395

- July 1935 -- "Interior and Exterior Always Painted with Pure White Lead" 150

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[75] N761
[76] N778
[77] N783
[78] N792

- January 1936 -- "Specifications Call for White Lead for Both Exterior and Interior Painting,,151
- January 1938 -- "White Lead Paint Economical for Interiors 152
- January 1942 -- "Beauty, Variability Plus Economy with White Lead Stencilled Walls "153
- June 1944 -- "Pure white lead paint, mixed on the job, is being used throughout,,154
- December 1944 -- "Pure White Lead Paint Stencil Decoration Practical Wall Treatment for Public Rooms 155

Many LIA advertisements were directed specifically toward encouraging the use of lead paint in the interiors of "low-cost homes." The September 1941 issue recounted how the entire town of Boys Town, Nebraska, created to house homeless, abandoned boys, was painted with white lead, noting particularly the beautiful white lead paint job on the interior of the new chapel. [156] The November 1939 issue contained an article about the new home built with U.S.D.A. assistance for "Willis and Julia Thurman, Negro small land owners in Elmore County, Alabama," and their children, at a cost of $690.50, in which "all painting was done with white lead and oil, similar to the practice of the Farm Security Administration. 157 During World War Il, the LIA crowed about the construction of a

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[150] N832
151
N835
[152] N885
N910
[154] N945
155
N953. For other examples of promotions, for interior use, found in LEAD see N789, N827, N828, NEO, N866, N867, N874, N875, N879, N880, N881, N882, N883, N888, N895, N896, N905, N907, N909, N911, N927, N930, N942, N960, N982, N1222 156N147
[157] N883

Bridgeport, [79]Connecticut housing project by the Federal Works Agency, "Painted Inside and Out with White Lead."158 In July 1939, under the headline, Successful Low-Cost Homes Benefit With White Lead, the LIA quoted a developer with approval as saying, "A sure sign of wise low cost home building is the fact the 'we use pure white lead on all our work,'" and went on to remark on the interior and exterior use of white lead in the tiny house pictured. [80]

Not only was lead-based paint promoted for interior applications in private homes, the LIA also promoted it for interior use in public buildings [81], including schools [82] • churches [8384], hospitals163• and apartment buildings[8586].

The LIA ran the same or similar articles as advertisements in magazines such as American Painter and Decorator and Architectural Forum. In the February 1940 issue of American Painter, the LIA claimed that it was advertising "to millions of homeowners every month. "165

In 1941, the LIA published a book entitled Painting Farm Buildings and Equipment, which recommended white lead for domestic interiors, provided handy formulas for "home-mixed interior paint," and suggested that lower walls be painted with darker colors of lead

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[79] N912

[80] N881. see e.g., N144, N879, N882

[81] N898, N912, N913, N925

[82] N914

[83] N900, N908

[84] N21

[85] N897

[86] N 18373

paint so that finger marks of small children would be less visible. This book sold more

than 100,000 copies. [87] In 1949, the LIA republished Painting Farm Buildings and Equipment. [8889]

The LIA saw its promotional work as an important antidote to the negative publicity that lead was receiving in the national press: "The problem of how to obtain a better press for our products is indeed a troublesome one. Our promotional work and especially our national advertising helps to build up good-will for our metal and in the long run will share in dispelling anxiety about its use. In any event the problem remains serious for our industry. Hardly a day passes but what this office has to devote some attention to lead poisoning.,,168

In 1942, the LIA published a booklet entitled, "What to Expect From White Lead Paint," in which it promoted the use of white lead for both interior and exterior surfaces, suggesting that for "interior wood, plaster and wall board," 40 pounds of white lead should be mixed with lead mixing or reducing oil to produce enough paint to cover 1000 square feet of surface. [90]

Continuing to promote white lead for both exteriors as well as interiors, in 1952 the LIA published Lead in Modern Industry. It stated:

> [W]hite lead ... has practically no undesirable qualities to nullify its advantages [T]he profitable application of white lead is not confined to exterior use. Pure white lead paints can be utilized

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[87] N44, N124
[88] N44
[89] N2401
[90] N51402
N142
170

to advantage for interior decoration, particularly in public and traditional buildings 170

While promoting lead for interior use, this book acknowledged that lead poisoning could occur when lead gained "entrance into the human system in measurable quantity either through inhalation of vapors and dusts or ingestion of lead compounds introduced into the mouth on the fingers It maintained that "ingestion is by far the less important [danger] and is most often associated with children chewing on objects coated with paints containing lead." The chapter allayed readers' fears by claiming that "since most inside paints and paints used by manufacturers on children's furniture and toys contained no lead, a hazard usually exists only if children are allowed to chew outside painted surfaces, like porch railings, or if parents inadvertently repaint furniture with outside house paint. 171 The LIA's simultaneous promotion of lead paint for interiors demonstrated the falsity of this statement.

In December 1952, the LIA decided to "discontinue all activities of the Association relating to the promotion of white lead in house paints." It transferred funds to red lead

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activities. "It was apparently felt that the economic obstacles faced by white lead pigments nullify whatever technical advantages these pigments enjoy and thus further expenditures of money by the Association are not justified.„172

Nevertheless, even after this, and at least until 1962, the LIA continued to distribute Lead in Modern Industry, in which it advocated the use of white lead for interiors.173

171 Id.
172 N2930
N1117

31

In 1952, John R. MacGregor, ignoring the hundreds of reports of childhood lead poisoning each year, predicted that the LIA's "advertising of white lead advantages will undoubtedly help the trend . . . to the increased use of white lead. "174

Notwithstanding repeated statements over the years that it no longer produced white lead paint for interior use, the industry continued to sell white lead paints that were applied on interiors, either because they were specified for interior use or because they contained no labels warning that interior use could cause lead poisoning.

Forest Products — Better Paint Campaign

Believing that "[t]here is a definite relation between the use of white lead and the

170

use of lumber in construction," in 1934 the LIA initiated a "Forest Products -- Better Paint Campaign." This Campaign was funded by LIA members including Sherwin-Williams and IS&R/Anaconda.

The premise for the Forest Products -- Better Paint Campaign was reported in the June 5, 1934 Report of the Secretary for the Lead Industries Association:

> White lead is at present the most important outlet for pig lead metal. There is a definite relation between the use of white lead and the use of lumber in construction. The more lumber used, the more white lead should be marketed. The lumber industry has suffered from some of the inferior and cheap paints used in painting homes and other structures made of wood, as it has discouraged the construction of wood homes. In an effort to correct this situation, the Lead Industries Association is supporting a campaign entitled the Forest Products — Better Paint Campaign, supported through a separate fund to which the white lead manufacturers and the mining companies have contributed. [175]

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[174] N3304
N2395

32 67

The progress of the Forest Products -- Better Paint campaign was reported through the LIA Secretary's Report. The first progress report on the campaign is found in the September 25, 1934 Report:

> Forest Products — Better Paint Campaign — This Campaign was begun the first of 1934 and has continued, without interruption, being supported by four white lead manufacturing companies and the mining companies.. . .

[175]

> The members supporting the program have been supplied with periodic reports of progress . Even though the campaign is only about nine months old, it promises to be a useful means of cooperating with a large and influential group of lumber manufactures in the marketing of both products. [91]

The following year, the LIA reported again on the success of the program. In the minutes of the LIA annual meeting held on June 13, 1935 it is reported that "Already there are signs that some manufacturers of patently low-grade leadless paint, who have been cultivating the lumber outlet, are changing their formulae to include lead.„177 A few months later, the LIA board of directors was told at the October 1, 1935 meeting that:

> Forest Products -- Better Paint Campaign — This Campaign has recently also received the endorsement of the Southern Cypress Association so that it now possesses the support of practically all the important lumber associations in the United States. The best evidence of its progress is the fact that the prepared paint industry is trying to find a common ground in which it can also cooperate with the lumber companies and ourselves in accomplishing the objectives of the Forest Products — Better Paint Campaign. Many lumber yards are putting white lead on their retail shelves where they never sold it before and some leadless paints, formerly sold as a high quality product, are now including lead. The campaign recommends either white lead in oil or the highest grade prepared paint. [178]

[91] N592 [177]
N23
N599
[170]

Similar success was reported for the following years as well. In a letter containing the Secretary's Report sent to all LIA members on February 19, 1936 it was reported that "Forest Products — Better Paint Campaign — During its second year, the Forest Products — Better Paint Campaign continued to arouse intense interest among lumber groups of the importance of good paint on good lumber. . . Evidence reaches us that not only is the distribution of white lead in oil growing in lumber yards, but many yards formerly handling prepared paint of questionable quality are now stocking superior merchandise Results from the Campaign should accrue to us, as they apparently have, from the use of more white lead in oil paste paint or dry white lead in prepared paint.„179

A 1937 article on the Campaign in Lead featured a picture of the nursery of a model house, part of a traveling display that the LIA had sent around the country. [180]

In 1937, it was reported at the LIA board of directors meeting that:

> We discussed many problems affecting the use of lumber and paint in industry and I am pleased to report that the meeting was most successful in bringing about a close cooperation between the groups at interest.
>
> The Southern Pine Association is interested in the use of painting instruction labels on its drop siding and we anticipate that other manufacturers of drop siding, particularly in the northwest, made of Douglas Fir, will follow suit. This will add millions of additional circulars calling attention to the advisability of using nothing but white lead in oil, or the highest grade prepared paint on lumber.
>
> We are cooperating with the Red Cedar Shingle Bureau in furnishing a small part of a film telling the story of red cedar shingles. Our part has been to supply the painting portion of the film, which, of course, will emphasize the desirability of using white lead in oil or high-grade prepared paint on cedar

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[179] N1773
N2395, N865

> shingles. At no expense to us, the Red Cedar Shingle Bureau is going to exhibit the moving picture film all over the United States. [92]

Then at the board of directors meeting held on December 21, 1937 a short update was contained within the minutes:

> Lumber Products-Better Paint Campaign — Here, also, a detailed report has been furnished each Director and nothing need be added to the statements made. Although it is not possible to fix accurately the benefits to the members of the Association, received directly from the Campaign, I believe that the use of white lead can not help but be benefited either as straight white lead or a constituent of high-grade paint. Moreover, individual lumber manufacturing associations, which publish handbooks and pamphlets on their products, now include reference to white lead as well as prepared paint, whereas, prior to the work of our Campaign, no mention had been made of the pigment. [93]

Additional success and work by the campaign was reported at the 1938 annual meeting:

> Miscellaneous — It has been disturbing to observe numerous attacks made upon white lead by a few competitive paint products, illustrating the divergent points of view existing between some prepared paint manufacturers and the producers of white lead.
>
> From our early experience with the Lumber Products-Better Paint Campaign, we know that at least one manufacturer of low-grade paint, who had gone so far as to make bitter attacks on our product, quickly changed his formula and incorporated white lead in his paint, after the Campaign was launched, and the

[92] N608
[93] N616

attacks ceased abruptly. Perhaps there is a lesson in this episode.
94

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In the report summarizing the activities of the LIA in 1938 that was attached to the minutes of the board of directors meeting held on January 24, 1939, an extensive report on the campaign was given:

> Lumber Products -- Better Paint Campaign — A detailed review of the work of the campaign was provided each subscriber to this special program. A summary, as follows, of the definite results attributable to this campaign may be helpful: Lumber Products-Better Paint Campaign _Summary of certain tangible benefits accruing to the white lead industry. a. All the principal producers of soft and hard lumber in the United States, such as redwood, cypress, cedar, pine and others, specify white lead or high-grade prepared paint which contains white lead. At their own expense, estimated at $6,000 per year, they print and distribute painting instruction leaflets (2,000,000 copies). b. The Douglas Fir Plywood Association recommends the use of white lead exclusively. It has printed 40,000 leaflets, in color, at a cost of $2,000 and distributed them to every architect in the United States, as well as others. They have also donated two trailers to our campaign at a cost of $1500. c. The Red Cedar Shingle Bureau, representing 93 per cent of the industry, recognizes white lead in oil exclusively in its advertising and features white lead in oil in its Centigrade model homes. Ten of its field men promote the use of white lead in connection with their own activities through motion pictures, without cost to us. d. The Southern Pine Association features white lead in its architectural and engineering manual. e. Aluminum priming has been

94 N2397

eliminated from the literature of the regional lumber associations. f. Over 20,000 retail lumber yards are giving us cooperation in selling only first quality paint and dispensing with the sale of cheap paint. g. White lead has been placed in several thousand lumber yards that never handled it before. Although we have no definite figures, our white lead producing members tell us that their sales to lumber yards have increased substantially. h. A prominent prepared paint company in Milwaukee, as a result of the Campaign, is producing a 100 per cent white lead content prepared paint, white and in five colors, and in gallon and half-gallon cans. i. Some paint companies have increased the lead content of their paint. The Paraffine Companies in San Francisco, one of the largest paint manufacturers in the United States, which viciously attacked white lead for years

and turned out a leadless product, now carries 60 per cent white lead in its outside paint. j. I believe the influence of the lumber industry was one of the reasons why the National Paint, Varnish and Lacquer Association has recently passed a resolution advocating the printing of paint formulas on the containers of prepared paints. k. The Western Pine Association, at the San Francisco Fair, will paint its model home inside and out with white lead and publicize this specification. l. The sash and door manufacturers are preparing to spend $18,000 next year to print 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. m. Several agricultural extension services of universities are revising their farm manuals and recommending white lead in the text. n. If the campaign continues in 1939 on the same basis as in 1938 the lumber industry's expenditures in cooperation with the campaign will more than match our own.

Similar results have accrued to manufacturers of high-grade prepared paint and as the highest grade prepared paints contain lead, the white lead industry has profited in that direction also.[95]

[95] N581

The above information was given almost verbatim to the members at the annual meeting held on May 16, 1939. [96]

Such reports continued at the Board of Directors meetings in 1940 [97], 1941 [98], and 1942 [99]. These documents evidence the success of the Lumber Products - Better Paint campaign in increasing the use of white lead in paints.

White Lead Promotion Campaign

In 1938 the LIA, recognizing the declining sales of white lead, began its White Lead Promotion Campaign, the single largest activity undertaken by the LIA up until that date

[96] N2399
[97] N584
[98] N595
[99] N2384

The LIA described the campaign as follows: "It is not just an advertising campaign but a well-founded promotional drive utilizing, in addition to general consumer and farm magazine advertising, trade paper advertising, organized publicity, field work and other means to arrive at the objective — the sale of more white lead."189 The LIA wrote, "This campaign by showing the importance of white lead to industry would help offset the constant threat of anti-lead legislation and propaganda." [190] The Campaign continued, with an interruption, until 1952, spending more than a million dollars to promote white lead paint. IS&WAnaconda and MacGregor contributed to the White Lead Promotion campaign. Sherwin-Williams participated in the Campaign in the post-war years.191

The justification for the campaign was outlined in a "Confidential - Not for Publication" bulletin sent to the members supporting the white lead promotion campaign on February 20, 1939:

> Reasons for undertaking a trade promotion effort on behalf of white lead are as follows: white is the most important market for the product of the lead miner; white lead consumption has been declining because white lead has been displaced in part by cheap substitute low-grade paints containing chalk, barites, sand and other adulterants, and because white lead receives intensive attack from the advertising of prepared paint companies who stress the greater convenience of using prepared paint, often containing only small amounts of white lead, and who do little or nothing to encourage craftsmanship, the backbone of fine paint work. White lead is being promoted nationally by only one company in face of competition from a great number of competitive prepared paint manufacturers. White lead remains the finest paint pigment known to science and to commerce today. White lead is used in paste form as the sole constituent of paint, or as an ingredient of prepared paints (generally in minor amounts) . . . . White lead will

[189] N2888

[191]

[99] N63 and attachment N29
N2917, N2914

> continue to lose its position in the paint industry unless some effort is devised to offset competitive attacks and to acquaint the public widely with the merits of the product; white lead is also constantly subject to attack from the health standpoint.
>
> It is proposed to correct the situation and to capitalize on the traditionally excellent reputation of white lead paint by cooperatively engaging in a promotional campaign, including various forms of sales promotion, with the objective of not only arresting the downward tendency, but increasing the consumption of white lead. [100]

The lead industry wanted to promote white lead for use in paint because:

> White lead finds its widest outlet in paint manufacture and although other applications of pig lead, such as storage battery manufacture, or cable covering, may consume larger tonnage, the white lead industry is the most important outlet of the lead miner because lead is given permanent disposition and cannot be reclaimed economically.[[1]]

In fact, if one looks at the Minerals Yearbooks, it is easy to see that the paint industry was the largest consumer of white lead carbonate. Between 1929 and 1974, 1,978,598 tons of white lead were used in paint compared to 52,465 tons used in ceramics and 200, 180 tons used in all other products.

The importance of the White Lead Promotion Campaign was outlined in the report of the secretary given at the June 6, 1940 annual meeting of the LIA [101]:

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[100] N64

[1] N741

[101] N2400•, see also N582

[194]

White Lead Promotion Program. The largest single activity since the founding of the Association eleven years ago is its white lead promotion program, an important nation-wide effort to increase the consumption ofwhite lead in the United States and to combat the substitution of inferior pigments for white lead.

The campaign begins its second year with many intricate problems of organization and coordination solved, and with interest in the progress and support of the work growing. It will be a long hard struggle to regain the ground that has been lost over the last seventeen years but with the unexcelled merit of the product as a basis, and with the inspiring example of unanimity set by our mining, smelting and manufacturing members in the first year of the campaign as a background, I am confident of the ultimate satisfying outcome.

One beneficial result of our campaign is the good will it is building up for lead in general. I have always felt that the cultivation of good will for our metal and publicity about the indispensable work it does for mankind is something that lead needs more than other common metals because lead in many forms is constantly under attack on account of its toxic qualities. Our campaign helps to meet this issue.

One of the most interesting results of the campaign has been the growing tendency of paint manufacturers to add a product to their line consisting of 100% prepared white lead paint, in colors. This important step overcomes the barrier of inconvenience which has placed white lead paint at a competitive disadvantage.

It is also noteworthy that attacks on white lead, which was one of the reasons for undertaking our campaign, have declined greatly and that more articles of national interest, specifically endorsing white lead, have appeared in the press during the last

> year than for any period to my recollection. Moreover, government and other specifications are giving increasing recognition to white lead. 194

In that vein, the LIA published several pamphlets and periodicals extolling the virtues of lead pigment in paint starting in the 1930s, including a magazine called LEAD, which had a circulation as high as 80,000. The media selected to carry the white lead promotion campaign advertising for 1939 and into the 1940s include Better Homes & Garden Saturday Evening Post, Colliers and American Home. Each of these publications

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N2400

40 67

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were circulated in Wisconsin. The total promotion media, including trade papers and farm papers, had a total circulation of 12, 100,540. [102]

Like the Forest Products-Better Paint Campaign, the White Lead Promotion Campaign was successful in increasing the use ofLead in paints and coatings. In an August 15, 1939 bulletin sent to the supporting members, the LIA reported:

> One of the significant developments of the White Lead Promotion Program is the fact that several important manufacturers ofprepared paint have begun the manufacture of white lead in colors, ready for the brush. While lead heretofore had only been generally available in paste form, white exclusively, but there is an opportunity for prepared paint manufacturers to market the white lead paint in readymixed form in colors ready for the brush. . .
>
> The prepared paint companies known to us that are now turning out a white lead paint, or are prepared to produce it in the future are as follows:
>
> Patek Bros, Inc. Milwaukee
>
> We estimate that the prepared paint companies listed above will furnish an outlet of some 3,000 dealers through the east and middle west. [196]

Other prepared paint companies listed in this memo also sold paint in Wisconsin, including Hooker Glass & Paint, Passanno-Hutcheon Co. and Phelan-Faust Paint Co. Similarly, in the minutes of the September 27, 1939 advisory committee meeting there is another progress report on the campaign touting its success:

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[102] N3002
N2996
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> The Secretary reported the campaign as steadily gathering momentum in the six months it had been underway, but that it was too early to measure its effects.

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> The Secretary reported that magazine publicity for white lead appeared so much greater than it had been prior to our campaign. Some of the articles were supplied by the Association. While not directly responsible for others, the campaign, added to the advertising of members, was probably one reason for the increasing editorial consideration given white lead. [103]

Other favorable reports on the success ofthe campaign were reported later that year and in following years. In 1939, it was reported that "[t]his campaign has been well and generally supported by our industry. As you know, the mining and smelting interests are quite generally represented, and we are very hopeful as we enter the second year of the campaign, that before long we will be able to report that the white lead interests are 100% represented. . . . Mr. Cornell asked which of the various activities conducted under the White Lead advertising and promotional campaign was considered most valuable. Mr. Peters answered by saying undoubtedly consumer advertising, and pointed out some results which had been immediately felt, such as a growing tendency among some mixed paint companies to make 100 per cent white lead paint in colors.„198

That same year, the LIA noted that:

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[103] N2937
N2941
[151]

> [I]t may be a coincidence, but it is noteworthy that white lead has been receiving increasingly favorable comment by editorial writers and government publications since our Campaign began Our White Lead Campaign is also timely in endeavoring to reverse the tendency which has been apparent in late years among many paint manufacturers, to use as little white lead as possible in their formulations. (White lead being the most expensive of the common pigments, competition makes it attractive for the paint manufacturer to use as little of it as he can.) One important paint manufacturer in 1939 cut the white lead content of his outside paint. I have since learned that the white lead content of his product has been increased.

42

> Another paint manufacturer who has been featuring a completely leadless outside paint has now added lead to it. Our campaign helps to raise the quality of house paint sold in the United States.[104]

The advertising itself was subject to review and approval by a committee of the LIA. Advertising appeared in the following general readership magazines: Saturday Evening Post, Colliers Better Homes and Gardens, American Home, Country Gentleman, and Successful Farming. Total circulation of these magazines was put at 13,881,000, and it was estimated that 67,570,526 separate messages would be carried.[105] The LIA also placed at least 35 articles about white lead in the first two years in Painter and Decorator, the official publication of the Brotherhood of Painters, Decorators and Paperhangers of America, and other trade publications. In the campaign's first two years, the LIA released 91 columns of "Home Owner's Forum" to 800 newspapers and 11 "House of the Month" features to 500 newspapers.

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[104] Id.

[105] N2945, N4449

The LIA also helped to write the Iowa State College Circular, "Selecting and Applying Paints," with 110,000 copies distributed in the first two years. One hundred thousand leaflets and broadsides were sent to stores, stockholders and employees. The LIA mailed 50,000 copies of its promotional booklet, "What to Expect from Lead Paint," and 35,000 copies of the leaflet "How Lumber and Paint Keep Your Home Always in Style. Wormser made clear that white lead was being promoted for use in interiors, a promotion which the LIA believed to be successful.[106]

By 1940, Wormser reported to the LIA members on the positive results of its campaign, which was needed, he said, because lead "is constantly under attack on account

[106] N2935
191

of its toxic qualities." He told of the "growing tendency of paint manufacturers to add a product to their line consisting of 100% prepared white lead paint in colors . . .1t is also noteworthy that attacks on white lead, which was one of the reasons for undertaking our campaign, have declined greatly. . . „202

> As a result of the LIA's efforts, mixed paint companies and white lead paint companies began to manufacture white lead paint in ready-to-use form and it sold well.[203] White lead was made available in more and more colors in prepared paint form. "Mixed paint manufacturers -- who three years ago showed little respect for white lead now show a change of attitude and a willingness to increase their use of white lead pigment under pressure of defense shortages. Many of them definitely favor the Lead Industries campaign.„204

In 1941, the LIA reported that a "large amount of work was performed on this program during the second year, including not only consumer and trade paper advertising but also work in the field with agricultural agencies, federal government bureaus, journeyman painters and lumber groups that should benefit the industry for years to come.

. . .The campaign has grown in influence. One has only to examine literature published editorially by leading magazines such as Better Homes & Gardens Successful Farming, Nation's Agriculture and others to realize that the campaign is influencing editorial thinking about paint in the direction of procuring an improved product for the public.„ 205

Later that same year, the LIA reported that the "white lead industry is now so active that it

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[202] N2400
[203] N2945
[204] Id.
[205] N595

can [107]not fill the demand. If more pig lead were available, the amount of white lead sold would be greatly increased.„206

Again, in 1941 the LIA commented that the White Lead Promotion Campaign:

> . . .has given our industry prestige that is priceless and has helped all the lead promotion work in other fields. It has made it easier for us to procure highly desirable publicity in important channels and has strengthened the hand of many technologists who have prepared reports of their work who have concluded with a high regard for white lead. I refer particularly to University professors and Government Agencies There are many straws to indicate that the campaign has helped the lead industry and the white lead producers in particular, making their job of marketing white lead easier. It has also helped the position of our industry in Washington.[108]

In an April 1942 bulletin to the members supporting the white lead promotion campaign, there is further explanation of the field visits to the different states. This document shows us:

> Municipalities, Counties, States, Institutions — During the past year, a special representative of the Association expanded his contacts among municipal, county, state and institutional authorities to ascertain painting practices and offer advice and assistance as to the revision of specifications when deemed necessary to improve the position of white lead. To date, this representative has made numerous visits in the following states and in addition attends, whenever possible, meetings and conventions of school officials, real estate operators and other groups who specify and buy large quantities of paint . . . Wisconsin.[109]

[107] N596, N2401
[108] N2945
[109] N2898

The White Lead Promotion Campaign continued until the United States' involvement in World War II began to affect the availability of Lead for use in paints and

coatings. At a general promotion fund meeting held on April 13, 1944, the members decided to suspend the white lead promotion program:

> He then turned the meeting over to Mr. Cobbs who reviewed the history of the white lead campaign, which was started on the assumption that about $230,000 would be expended each year in advertising white lead to the public. Mr. Cobbs pointed out that the funds made available for advertising white lead had been as follows: 1939 - $234,999; 1940 $235,246; 1941 - $212,034; 1942 - $157,207; 1943 $114,569.
>
> This indicated a gradual curtailment of the program for various reasons until it was suspended during 1943 because of the shortage of linseed oil, containers, etc., which was beyond the control of the industry. He said that the agency felt that the white lead campaign should be continued regardless of the fact that manufacturers could not supply the white lead, but he recognized the practical reasons for the temporary suspension. He strongly recommended that it be resumed at the earliest possible moment.[110]

The LIA agreed with this assessment and commenced a second White Lead Promotion Campaign as soon as practical. In December, 1949, the LIA recognized the

[110] N2969

"great necessity of work to increase the amount of lead pigments in house paints . . . [and] that if anything were to be done to help the situation it must be done promptly.„ [111]

The LIA then established a White Lead Division. At the first meeting of this division, held on March 7, 1950, the division recognized that the "public, in general, has not been sold on the idea that they must have lead in the paint which they buy in order to get the best paint.„ [112] To combat this, the White Lead Division was divided up into two committees: the white lead technical committee and the white lead advertising committee.

Despite the fact that Sherwin-Williams was no longer a member of the LIA, it participated on both of these committees.

Both committees met on May 18, 1950, first as a group and then separately, to consider how to promote lead pigment in ready mixed house paints and to work out the final details of copy and layout for the first advertisements.[113]

At the annual meeting of members held on May 17, 1951 the following progress report was given:

> Early in 1950 the producers of white lead in the Association decided upon a promotional program to paint manufacturers, using the funds remaining from the consumer white lead

[111] N613
[112] N2909
[113] N2911, N2912, N2914

> advertising campaign terminated during the war. The program was started in July, with technical advertising in half a dozen paint trade papers. Work was also started on the preparation of a technical booklet for the use of paint manufacturers, and it is expected that this booklet will soon be printed. It is, ofcourse, too early to evaluate this program, which was originally laid out to run for a couple of years. Indications are, however, that the advertising has been well received so far and has created favorable comment in the trade. [114]

The LIA finally discontinued its White Lead Promotion Campaign in 1952:

> It was apparently felt that the economic obstacles faced by white lead pigments nullify whatever technical advantages these pigments enjoy and thus further expenditures of money by the Association are not justified.[115]

4-H clubs and municipalities programs

In 1939 the LIA promoted white lead among farmers and their children by starting a project with the 4-H clubs.[116] In 1940 the campaign was expanded to include municipal,

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state and county institutions, targeting schools and even health departments themselves. It was noted that in 1941, the 4-H Club work had been expanded to cover Wisconsin.[216] Two representatives of the LIA traveled throughout the country visiting public institutions to persuade them to use white lead. The representatives described how they made special

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[114] N44. see also N2927

[115] N2930

[116] N2937. See also N2941, in which they found that their efforts had generated so much

efforts to persuade school officials in numerous districts to use white lead in the schools' interiors. In Pierce County, Washington, the LIA representative visited the county health department where he "explained properties of interior white lead paint, stressing sanitary aspects of a highly desirable and washable surface.[217]

The LIA asserted that "A ground swell of white lead interest had been set in motion in important places affecting the consuming habits of the next generation. Vocational school instructors, 4-H club leaders and the like have eagerly received white lead promotional material and expressed a genuine desire for more.„218

Apart from its promotional work directed to the trade and consumers, the LIA was also very active in promoting white lead to various federal, state and local governments. For instance, in 1930 it was reported to the board of directors "In Washington we are endeavoring to secure a change in Government building specifications to permit the easier and wider use of lead products in Government building construction."219 The White Lead Promotion Campaign also helped influence the government:

> The secretary had helped in procuring Government business lately involving probably the largest paint order in history, with specifications requiring either 100% white lead paint or a minimum of 70% white lead in a lead-zinc-inert formulation. The chairman noted that the Government

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interest that "steps had been taken to expand the project in Iowa as quickly as possible." [216] N596 [217] N3001 [218] Id. [219] N2

> specifications paralleled the recommendations of the campaign, i.e., pure white lead or high lead content paint.[117]

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[117] N2944

It was reported:

> One representative has devoted his entire time to calls on state, county and municipal government officials, universities and other large institutions, including some banks and savings and loan associations, in the interest of white lead paint. Reports of these calls have been circulated periodically. They indicate that, while white lead is used to a fairly large extent, further education of these officials, many of whom are ignorant or misinformed about paint, could greatly increase their use of white lead. A presentation of the white lead story for use with these individuals was carefully prepared, as well as specifications and other data which would be supplied them as supplementary material.[118][119]

The government work continued. In 1951, "In addition the promotional activities of the Association required frequent Washington visits. Such matters as Federal Specifications, apprentice training, cooperative testing, and many others, required Government cooperation.„222

NPVLA

DuPont, Sherwin-Williams, and MacGregor participated in the "Save the Surface" and "Paint Up — Clean Up" campaigns of the NPVLA and each had representatives on the — Clean Up" committee.[120]

"Paint Up

DuPont admitted that, because of the "Save the Surface" campaign "Paint sales

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[118] N596

[119] N44. see also N2404, N2403, N596, N2401, N595, N583

[120] N37878, N42653, N42654, N42655, N42656, N42657, N42658, N42659, N42661, N42662, N42663, N42664, N42665, N42666, N42667, N42668, N42669, N42670, N42671, N42672, N42716, N42717, N42723, N42724, N42725, N42727, N42728 [224] N50972

have increased and are increasing as a result of the campaign. . .„224

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The "Save the Surface" campaign prepared stories for use in newspapers and magazines. Among the newspapers that printed the stories was the Milwaukee Journal. The campaign acknowledged "it is very seldom you'll be able to detect our part in these painting promotional stories." The statements about the advantages of painting were often credited as "a statement by a noted architect, a government official, or a quotation from a well-known magazine." Some of the magazines that printed stories of the campaign were Ladies' Home Journal Good Housekeeping, McCalls Better Homes and Gardens The American Home Parents Magazine, and Progressive Farmer. The campaign also had a

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radio series.

The NPVLA admitted: "The Clean Up and Paint Up Campaign is undoubtedly one of the most effective mediums for the promotion of paint sales ever conducted by the National Association and manufacturing members of the Association would do well to direct their local representatives to cooperate to the fullest extent with Campaigns being conducted in their communities" and "the Clean Up and Paint Up Campaign is one of the finest contacts the

industry has with the consuming public, and he stated that a real dent might be made on the industry's prospective markets, if this campaign could be properly extended."226 The NPVLA credited the Clean Up and Paint Up Bureau as "responsible for a large amount of additional business brought into the market through its promotional activities. „227 In 1948 it was reported:

> Clean up — Paint Up cooperates with senior and junior chambers of commerce, city administrations, school authorities and other agencies. Also assists members in tying their sales promotion, through their retail outlets, with the local civic movements. "This is largely accomplished by producing and making available

225 N48314
226 N3914
227 N48314

> suitable Clean Up — Paint Up — Fix Up display material, sales of which totaled $45,000 in early 1948 as against $19,500 in 1947.[121][122]

By 1950 nearly 3,000 cities were participating in the campaign. "Clean Up — Paint Up — Fix Up has not only become America's foremost civic development program and a model for foreign lands, but it is also a powerful merchandise selling force.„229

In addition to these two campaigns, the NPVLA also conducted general advertising on behalf of the industry. It started an advertising campaign in March 1949. Two years later an article entitled "A Job Well Done" noted that "every member of the paint industry has benefited by this program," and that there "is no doubt that this advertising program has helped

121 N42668
122 N42666

to boost paint sales beyond the billion dollar mark." 177 million people were exposed to the industry's story on paints. [123]

Opinion 4: Defendants Failed to Warn Consumers and the Public by Downplaying the Hazards that Each Knew or Should Have Known Were Associated with Lead in Residential Use

The LIA sought to rebut findings of lead poisoning, from whatever source, and to persuade the authors of adverse research to modify their reports. In 1930, when the United States Daily published an article on childhood lead poisoning, LIA Secretary Wormser complained to the LIA Board about this and a New York Daily News article that, "[O]f late we have received much undeserved publicity in newspapers damaging to lead products," and proposed to counteract it by "a program of vigorously investigating each alleged case that arises, taking any remedial steps if necessary, encouraging medical research in lead poisoning, and publishing literature showing the useful role of lead in

[123] N42723, N46831

industry." It was in response to these articles that the LIA conducted a "survey" that led it to conclude that there was no longer any danger to children from lead paint.[124]

Louis Dublin, the statistician at Metropolitan Life who reported the poisoning of children in that company's Statistical Bulletin in 1930, requested that Ella Oppenheimer of the United States Children's Bureau not refer to Metropolitan as the source of any information the Children's Bureau might use in releases on lead poisoning in children:

> In connection with this whole matter please be advised that our Bulletin article received a great deal of publicity against which there was strong remonstrance by the Lead Industries Association. You will readily understand that we wish to avoid any controversy with the lead people. Please, therefore, do not mention the Metropolitan, either directly or by inference, in connection with whatever releases you may make.[125][126]

In response to the papers of Charles F. McKhann and E.C. Vogt, in the spring of 1931 LIA's Wormser "visited Boston for the purpose of discussing the subject of lead poisoning in infants with some of the medical profession there who have caused us to receive some unfavorable publicity about lead." He concluded, "the visit was worthwhile.„233

Responding to attacks on lead was one of the LIA's major activities. In 1932, responding to a report of the death of a child from lead poisoning, Wormser informed a Baltimore official that lead pigments were no longer used for painting furniture.[127] Such a statement was false and Wormser had no basis for making such a statement. In 1935

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[124]

[125] N3610

[126] NI

[127] N18370

Wormser told the Board of Directors "there has been no let up in the amount of attention

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given by the health writers to the subject of lead poisoning and this problem still remains one of great importance to us."[235]

In 1937 the Lead Industries Association sponsored a conference on lead poisoning for the physicians employed by its member companies, including Sherwin-Williams and Anaconda/IS&R. Dr. Joseph Aub, as a research physician, played a leading role in advising the other doctors. Wormser, in his opening remarks, noted that the conference was called because of "a common problem that every company faces namely; [sic] the question of the lead hazard in the industry." He asked the attendees to avoid any public statement about the conference "because our industry, you know, is very often the recipient of unfair and unfortunate publicity . . . . Our industry is always anxious to avoid unsound publicity."[236]

The transcript of the conference -- and the singular knowledge of the hazards of lead which it contains -- was marked "Confidential." Despite the fact that the conference was devoted to industrial poisoning, its proceedings were sprinkled with references to childhood lead poisoning. Dr. Aub, for example, remarked on "a child [who] died of lead poisoning . . . . That shows that lead was scattered over the body of that child and, therefore, was a contributory factor at least to her death." Later he remarked that "here you have a beautiful example . . . of a lead line in a child. This child died and had five times as much lead in the lead line as it had in the bones . . . . Here is a child acutely leaded . . . . As the child grows, this lead is redistributed around through the circulation and is redeposited. . .

. To get rid of the lead in children is almost impossible because it is always being dissolved and circulating around." Still later, Aub remarked that children were more vulnerable to

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[235] N599

[236] N18369

lead poisoning than were men. Because of this he suggested that "people under the age of twenty should not be employed in a lead hazard. They are much more susceptible to it than older people.,,237

In May 1939, Wormser told the Board of Directors that "the lead industry received two blasts in the press recently" and that "as usual the Association investigated these attacks.,,238

On July 11, 1939, the NPVLA Executive Committee met and discussed the NPVLA's "responsibility" to the public and the protection ofthe industry itself with respect to the use of toxic materials in the industry's products. The Committee discussed preparation of "a confidential, carefully worded letter to be sent to all Class A members to be strictly informative and nothing else Sherwin-Williams [D.A. Kohr] and DuPont [W.M. Zintl] had representatives on the Committee who were present.[239]

On July 18, 1939, the Executive Committee sent to Class A members a letter marked "CONFIDENTIAL Not for Publication," in which it informed those members as follows:

> [T]he vital factor concerning toxic materials is to intelligently safeguard the public. People may feel safer in buying materials whose danger they know rather than materials unknown to them.
>
> The following pigments may be considered toxic if they find their way into the stomach. ...
>
> Lead Compounds. White lead, red lead, litharge, lead chromates or other lead pigments.

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237 Id.

238 N582

239 N3593

The NPVLA believed that manufacturers would apply "every precautionary measure in manufacturing, in selling and in use where toxic materials are likely to or do enter a product. " It noted that "children's toys, equipment, furniture, etc. are not the only consideration.„240

The letter went on to notify the Class A members of their legal duty to warn:

> General - The statement of legal principles listed below was prepared for and distributed by the Manufacturing Chemists' Association for the guidance of its members concerned with labeling problems, and is supported by decisions of the courts....
>
> 1. A manufacturer who puts out a dangerous article or substance without accompanying it with a warning as to its dangerous properties is ordinarily liable for any damage which results from such failure to warn.
>
> 9. The manufacturer must know the qualities of his product and cannot escape liability on the ground that he did not know it to be dangerous.
>
> 10. The general rule that a manufacturer is not liable to those not in privity of contract with him does not apply when his product is imminently or inherently dangerous.241

By June 1943, Wormser reported that the LIA "continued to meet attacks on lead due to its toxic qualities by correcting published erroneous statements. This particular activity is apparently endless „242

In 1943, after Randolph Byers published his article with Elizabeth Lord on the longterm effects of lead poisoning on children's intellectual development, he received a visit

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240 N68
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N598

from an LIA official, who threatened to sue him.[128] When Wormser sought LIA consultant Aub's response to the findings of Byers and Lord on the long-term effects of lead poisoning on intellectual development of children, Aub told Wormser that the children were probably defective to begin with.[244] The LIA's response to the article was to ignore Dr. Robert Kehoe's endorsement of it, and instead assert that the relationship between lead poisoning in early infancy and later mental retardation was not proven. Their "Preliminary Report of the Investigation" of the article stated that "many of the alleged cases of lead poisoning were probably nothing of the kind. "245

The LIA sought Dr. Aub's help in rebutting claims that people had died from lead poisoning. In 1945 alone, the LIA sought Aub's help to rebut three reports of death -- two of them children -- from lead poisoning. One involved the death of a two-and-a-half-yearold who had licked his hands after touching fresh paint. Although the treating physician found lead lines in his bones and other symptoms that he described as "obviously a part of the lead poisoning condition," Aub told Wormser that his symptoms "imply an infection, not lead poisoning. ... Therefore, I would not consider it a clear-cut case, although, of course, the bones and the paralyses fit in with a possible diagnosis of lead poisoning." In another case, John R. MacGregor, president of the John R. MacGregor Lead Company, sought the LIA's help in rebutting a coroner's report regarding one of his workers. Wormser

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[128] Markowitz and Rosner "Deceit and Denial" [244] N62 [245] Id. N16046, N16047, N16048
[248]

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forwarded the request to Aub, who responded with possible exculpatory explanations.

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In mid-1945 the LIA investigated "the alleged high incidence of lead poisoning among children along the eastern seaboard as reported in newspapers and medical

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literature. Our studies cast considerable doubt about the genuineness of many cases.

In December 1945, the LIA proposed another full-scale campaign to counteract the "medical and public misinformation usually amounting to actual prejudice against lead, because of its toxic qualities, [which] is a subject of vital importance to all the lead industries in the United States The LIA complained of:

> the spread of considerable anti-lead propaganda and ...occasional faulty medical research which has penetrated deep into medical annals and caused many physicians and hospitals to assume erroneous positions on the question of lead poisoning. ... [This problem is] so fundamental to the future welfare of the lead industries and the continued manufacture and use of many important lead products ... that unless some immediate attention is paid to the problem above and beyond what the Association has already accomplished [and] is currently doing the opposing forces may grow strong enough to do us injury which it would take years of work to correct.

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The LIA called for a concerted effort, which it named "The Safety and Hygiene Program," to undercut the existing literature: "The dissemination of accurate publicity about lead to newspapers, magazines and radio should be organized specifically through a professional agency such as our own advertising agency."[248]

Warning the public was still out of the question for the LIA. Indeed, in 1948, it formalized its informal agreement with the American Zinc Industry ("AZI") that prevented the latter from advertising the toxicity of lead-based paints. The lead industry sought a more formal policy after the publication of statements that made "comparisons between the

[247] N2387
N665

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toxicity of lead and zinc products. „249 The LIA and AZI endorsed "a statement of policy which declared that, while the American Zinc Institute and the Lead Industries Association should feel free to defend any unfair attack upon zinc and lead and their products, any defense measures used in behalf of one product which directly or indirectly, stated or implied, involve an attack upon another, should be declared inimical to the interests of the combined industries.„250

Through the end of the 1940s the LIA maintained that "the problem of lead hygiene is an endless one" that could be addressed by improvements in the workplace and reassurance to the public about the safety of lead: "It is one of the most important activities of the Lead Industries Association as there remains an appalling amount of prejudice against the use of lead products based on fancied notions of lead toxicity.„251

During the early-1950s, "[t]he alarming number of cases of alleged lead poisoning, particularly in children, which are being reported" prompted the LIA to propose $35,000 $40,000 for the production of a "motion picture [which was] the only feasible approach to the problem. „252 This movie was "to be shown to medical students and before meetings of medical societies for the purpose of inducing sound thinking and correcting the many misconceptions prevalent in the medical profession on the subject of lead poisoning.„253 The LIA admitted that by the LIA producing such a film it "would obviate the production

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[249] N671 [250] N609

251 N1848

[252] N619 [253] N280

of a film on this subject by the Public Health Service and would have control over the nature of the film and the material in it.„254

On August 13, 1952, LIA Health and Safety Director Manfred Bowditch wrote to Robert Kehoe about the book Lead in Modern Industry. He apologized for what he himself described as the "meager section" entitled "Safe Handling of Lead and Its Products":

> Before yielding to the quite natural impulse to comment caustically on the meager section starting on page 174, please consider that the volume represents the thinking of our 70-odd member companies and that the book which it supersedes, published in 1931, made no mention of the toxicity of the metal which is our bread and butter.255

Opinion 5: Defendants never warned of the known and knowable dangers until 1955 at the earliest

The defendants knew they had a duty to warn of the hazards associated with white lead carbonate, yet they chose not to adequately warn of these hazards. As early as 1916, Dr. Gardner, through the Scientific Section of the NPVLA, had been urging the adoption of caution labels.[256]

At the June 29, 1937 LIA board of director meeting:

> The Directors discussed the lead poisoning situation with emphasis on the advisability of the Association issuing a leaflet of a general nature on lead poisoning, but it was unanimously felt that it would be better for the Association to continue as it has in the past by disposing of each situation as it arises.[129]

In 1939, as discussed earlier, the NPVLA informed its members of the necessity to

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[129] N608

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warn the public in order to safeguard their health.[130]

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254 N617
N617
255 N1925
256 N4167

John Shaw made a presentation on safety and health hazards that was published in the December 1940 issue of The Paint Industry Magazine. In his presentation, Mr. Shaw acknowledged:

> Now, there is one obligation that I think we really have, not only to our worker in our plant, but to our customers. We ship out into the field various things that are intoxicant or dangerous if not properly used. Good sales service should see that our customer is educated along the lines of prevention of sickness and accident while consuming our products. The manufacturer must educate the public. He can't get out of it. It is just as important to do that as it is to make a good product.[131]

In 1944, Kehoe told Wormser that parents repainted cribs with lead-containing paints.[260] The LIA should have undertaken a program to educate parents not to use lead paint on cribs and other items that children would access.

In 1948, Robert Kehoe asked Manfred Bowditch if, in the LIA's book on painting around the farm, if:

> . ..it would not be a good idea in such a book to give a few warnings to people... It would also seem that, in addition to certain precautions with respect to the safety of animals, something might be said, advantageously, about the environmental conditions in relation to babies and small children.261

At an LIA meeting in the summer of 1953, Kehoe proposed the solution legislated by

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130 N68

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131 N51418 260
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N18455
N14888

France over forty years earlier: elimination of the interior use of lead paints.

> [The] most effective solution of this problem. [is] to eliminate the use of paints . . . of more than very minor lead content for all inside decoration in the household and in the environment ofyoung children. Ifthis is not done voluntarily by a wise industry concerned to handle its own business properly, it will be accomplished ineffectually and with irrelevant difficulties and disadvantages through legislation.262

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Even at this late date, when the production of white lead was a small fraction of what it had been, and when the outcry against childhood lead poisoning was reaching new heights, the LIA did not accept Kehoe's suggestion.

In 1954, to preempt legislation, the industry decided to adopt a voluntary labeling standard. In January of 1954, the president of the NPVLA reported to the Executive Committee:

> The . . . Association retained Dr. A.J. Lanza . . . who has presented our industry's position to the New York City Board of Health relative to lead poisoning and the proposed warning label regulation. This situation is now quiet.
>
> The National and Chicago Association are cooperating with the officials ofthe Chicago Board ofHealth who are working on a regulation concerning lead poisoning. Latest reports indicate Board of Health may sponsor a regulation which will require removal of interior paints from premises where lead poisoning occurs and the replacement with lead-free paints. A complete ban on lead-based paints for interior home use is also being considered by the Chicago Health officials.263

A subcommittee on Model Labeling ofthe NPVLA began to meet to discuss warning labels for their product. They were particularly concerned that "there is much agitation by various groups throughout the United States which could result in conflicting legislation by individual states and municipalities on methods of labeling paint products.„264

T.J. McDowell, counsel at Sherwin-Williams, proposed a "Suggested Course of Action" regarding labeling laws in which he reviewed the pressure that had been exerted on industry to become more responsible: "our industry has suffered from a period of bad

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publicity mostly arising from incidents where it was easier to blame the results on paint than to seek further for the true cause." These incidents included the:

> . . .deaths of small children laid to lead poisoning allegedly incurred while chewing on various painted surfaces.
>
> The legislators from various states are constantly being contacted by pressure groups to pass a law -- any law will do -- to eliminate this hazard to our children . . .
>
> It appears that the best course to pursue from the standpoint ofthe industries interested in the use of lead as a pigment and otherwise is to launch a campaign ofeducation directed at the legislatures to forestall any further unnecessary legislation, at the pressure groups who are promoting the passage of these laws, at the user and sellers of these products so that the proper use is made of them and the hazards reduced to a minimum and most important of all at the general public to remove the false impressions from their minds and educate them in the proper use, the precautions to be taken and the real causes of these unfortunate occurrences.[132]

In May 1954 the Board of Health of New York City proposed a sanitary code provision that would have banned the sale in New York City of paints containing more than 1% lead, and would have required lead paint to be labeled as "poisonous," and not for interior use.[133] The NPVLA, after consultation with the LIA, opposed the proposal as "unnecessary, unjustified

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[132] N3907

[133] NI 1703
N99
NI

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268 1706

„267 and unduly burdensome, lobbying instead for a very narrow warning that emphasized paints' flammability and referred only to dangers that could arise from "surfaces that might be chewed by children," omitting any reference to lead paint as

> „268 to the warning proposed by the American "poisonous . This omission was contrary

Medical Association in September of that year: "WARNING: this paint contains an

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amount of lead which may be POISONOUS and should not be used to paint children's toys or furniture or interior surfaces in dwelling units which might be chewed by children. „269

At the August 12, 1954 meeting of the NPVLA Subcommittee on Model Labeling[270], with representatives of DuPont ad Sherwin-Williams in attendance, there was a report given on the August 1 I th meeting of the ASA Z66 committee. The wording in the proposed ASA standard had been changed from "considered safe" to "deemed suitable" which produced a non-rigid standard. Dr. Foulger of DuPont had attended that meeting also and stated:

> [T]hat the standard, as revised, is very innocuous. Considerable change from the original proposal had resulted. He expressed the belief acceptance of the standard would not cause the paint industry any trouble.

Mr. Hill, from DuPont, remarked "the ASA proposal likely resulted from inaction of others

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270 1702

to offer a better solution" — acknowledging that the industry had not done anything. The

minutes also report that the NPVLA was opposed to standards and that "the ASA project was directed against a problem which could not be solved by labeling, but by education of parents and other interested parties and advocated extreme care in adoption of the ASA standard on the ground that it would not correct the situation." Dr. Foulger stated that the "ASA action is not the solution to the problem of keeping children from being exposed to harmful elements or from being poisoned for that matter. It will take 50 years to correct a situation that has taken hundreds of years to produce." It was pointed out that 'there has been an increased use of paints by the non-professional person and they are not familiar with all the hazard involved."

N18368

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268 1706

The New York City Board of Health, at its October 29, 1954 meeting, dropped the proposed ban of lead paint, and adopted a warning label requirement without the word "poisonous." The NPVLA noted that the word "poison" had been removed as the "result of cooperation" between the New York City Health Department officials and representatives of the New York and National Paint, Varnish, and Lacquer Association.[271] The LIA also claimed some credit: "The initial proposal of the New York City Health Department to require a poison label on all paints containing any lead whatsoever was ultimately modified through the establishment, at our instance, of a committee of the American Standards Association."[272]

In February 1955, the LIA urged its members to oppose a bill then pending in the New York State legislature that would have required warning labels for lead-based paints. LIA Secretary Ziegfeld claimed that this bill was "essentially duplicative" of the New York City law, although, of course, the New York City law did not apply outside New York City.[273] In April of that same year, Ziegfeld informed the LIA membership that following the LIA's lobbying, this bill was still in "committee."274 It did not emerge.

The previous month, LIA Health and Safety Director Manfred Bowditch wrote, in a letter to a British professor:

> With us, childhood lead poisoning is common enough to constitute perhaps my major "headache," this being in part due to the very poor prognosis in many such cases, and also to the fact that the only real remedy lies in educating a relatively ineducable category of parents. It is mainly a slum problem with us, estimated by Kehoe to run into four figures

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N11699
[272] N1578 [273]
N14900
N1840

> annually, and as we have no monopoly on either substandard housing or substandard mentalities in the USA [134]

Shortly thereafter, the American Standards Association, a voluntary group made up of representatives from a variety of medical, public health and industry groups, including the LIA and the NPVLA, developed a standard to "Minimize Hazards to Children." It was drafted by a subcommittee which included representatives of the LIA and DuPont, with an alternate from Sherwin-Williams.[135] The ASA standard provided that paint used for interiors or any surface that children might chew on should contain no more than 1% lead by weight. The standard did not require that the word "poison" be included in the warning. Internally, the lead industry admitted that limiting the amount of lead to 1% of the total pigment "has no foundation either factually or experimentally.,,277

In a June 20, 1956 letter from Bowditch to Jerome Trichter of the New York City Health Depariinent, Bowditch acknowledged warning was not enough, education was needed:

> . . .it is one that seems to me to have a real bearing on the problem of childhood lead poisoning, for it is my understanding that the great majority of our New York City cases stem from this stratum of our population. How is the warning labeling required by your Department going to mean anything to people such as these, or how, for that matter, is the parental education that we advocate to be put across to them? Our long-term objective should of course be to get rid of our slums. . .[278]

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[134] N42
[135] N18536 [277]
N186
N13643

In a December 26, 1957 letter Bowditch acknowledged that with regards to childhood lead poisoning "That of some, but secondary importance is lead paint mistakenly applied by

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ignorant parents to cribs, play pens and other juvenile furniture and subsequently chewed off and ingested."279 This could have been avoided with appropriate and adequate warnings.

In 1958 the LIA Quarterly Report stated: adverse reports and publicity from such centers as Baltimore, Chicago, and St. Louis. . .bids fair to bring about renewed pressure for legislation and regulations of a most unfortunate nature. . . Every effort is being made to confine the regulatory measures above referred to, to the field of warning labels, which, as applied to paints, are obviously less detrimental to our interests than would be any legislation of a prohibitory nature. Through our contacts with state and local health authorities, it is believed that this can be accomplished. "280

Dr. Foulger of DuPont delivered a paper entitled "Precautionary Labeling of Lead Products" at the LIA's Lead Hygiene Conference held in Chicago in November 1958. He acknowledged that a manufacturer has a duty to warn of any hazards involved and if "because of youth or inexperience or for any other reason, the user cannot take full cognizance of the

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warning, the duty is still stronger." He said that warnings may be given in two ways, by precautionary labeling directly on the container or in the form ofpamphlets accompanying the container at sale or sent through the mail in any way associated with that sale. He acknowledged that there was a time when there was no differentiation between exterior and interior paints.281

American Cyanamid took action on June 15, 1972 to assign a "precautionary statement" to basic lead carbonate.282

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279 N7547
280 N1812
281 N50700
282 N8908

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Prior testimony

A list of Dr. Markowitz's prior testimony is attached as Exhibit B.

Compensation

Dr. Markowitz charges $350 per hour.

Dated this 20th day of March, 2017.

Gerald Markowitz

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