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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF
CALIFORNIA, et al.,

Plaintiffs,

vs.

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants.

AND RELATED CROSS-ACTION.

Case No. 1-00-CV-788657

**ORDER RE: RECALCULATION OF
ABATEMENT FUND**

The above-entitled matter came on regularly for hearing on Friday, August 17, 2018, at 1:30 p.m. in Department 5 (Complex Civil Litigation), the Honorable Thomas E. Kuhnle presiding. Having reviewed and considered the written submissions of all parties, and having listened carefully to arguments of counsel, the Court rules as follows:

1 **I. BACKGROUND**

2 This Court’s Amended Statement of Decision (“ASOD”), issued on March 26, 2014,
3 found Defendants ConAgra Grocery Products Co., NL Industries, Inc., and The Sherwin-
4 Williams Co. (collectively, “Defendants”) jointly and severally liable for abatement of interior
5 lead paint in homes built before 1981 in the Plaintiffs’ jurisdictions. The ASOD ordered
6 Defendants to deposit a total of \$1.15 billion into an abatement fund.

7 Defendants appealed, and in an opinion dated November 14, 2017, the Sixth District
8 Court of Appeal largely upheld the findings and conclusions set forth in the ASOD. (*People v.*
9 *ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51 (“*ConAgra*”).) The Court of Appeal
10 reversed, however, one important conclusion in the ASOD. The Court of Appeal held there was
11 insufficient evidence that Defendants’ wrongful promotional activities were causally connected
12 to lead paint in houses constructed after 1950. As a consequence, the Court of Appeal remanded
13 the matter to this Court and directed it to “recalculate the amount of the abatement fund to limit it
14 to the amount necessary to cover the cost of remediating pre-1951 homes.”

15 The parties agree on many variables necessary for the recalculation, including the number
16 of housing units, an adjustment factor that accounts for certain multi-unit costs, the bulk
17 purchase discount for remediation expenses, and the fraction of housing units that may require
18 remediation. The parties disagree, however, over the per-unit inspection costs and the per-unit
19 remediation costs.

20 **II. THE LEGAL FRAMEWORK**

21 An appellate court can dispose of an appeal in a number of ways. It can affirm, modify
22 or reverse a judgment or order. An appellate court can also reverse with instructions. Trial
23 courts must follow appellate court directions. Any material variance from those directions is
24 unauthorized and void. (See, e.g., *Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851,
25 859-863; *Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.)

1 Here, the Court of Appeal reversed the judgment with directions. It directed this Court to
2 recalculate the amount of the abatement fund and to hold an evidentiary hearing to appoint a
3 receiver. The Court of Appeal's directions limit this Court's discretion. This Court cannot
4 conduct an evidentiary hearing or consider new evidence.¹

5 **III. INSPECTION COSTS**

6 Inspection costs were calculated by multiplying four numbers: (1) the number of housing
7 units; (2) the fraction of homes that do not need to be inspected; (3) an adjustment factor that
8 accounts for lower multi-unit inspection costs; and (4) the per-unit inspection cost. The parties
9 agree there are 1,664,115 pre-1951 housing units. They also agree that 24 percent of those units
10 need not be inspected.² The parties agree the lower costs associated with inspecting multi-unit
11 housing should be determined by multiplying the number of housing units by 0.8. After
12 multiplying these numbers, it is undisputed the abatement fund should cover the costs of
13 inspecting 1,011,782 adjusted housing units.

14 While the parties agree on three of the four variables for calculating inspection costs, they
15 disagree on one: the per-unit inspection cost. The parties' arguments regarding the per-unit
16 inspection cost, and this Court's calculations, are below.

17 **A. Plaintiffs' Calculation of Per-Unit Inspection Costs**

18 Plaintiffs argue the per-unit inspection cost should be \$171. This is based on evidence
19 presented at trial that a reasonable inspection cost for seven "room equivalents" within a unit is
20 \$200. The Court ordered abatement of only interior lead paint. Since an exterior inspection counts
21 as one "room equivalent," Plaintiffs argue the per-unit inspection cost of \$200 should be reduced
22 to \$171. The Plaintiffs presented this analysis to the Court prior to issuance of the ASOD.

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24 ¹ The narrow task of recalculating amounts for the abatement fund contrasts with the Court of Appeal's direction to hold an evidentiary hearing regarding the appointment of a receiver.

25 ² The parties agree that mobile homes, zero-bedroom units, seasonal or recreational units, and units for the elderly do not need to be inspected because they are unlikely to be occupied by children or could be expected to have no lead-based paint.

1 **B. Defendants' Calculation of Per-Unit Inspection Costs**

2 Defendants contend the per-unit inspection cost should be \$140.62. Defendants argue the
3 total number of pre-1981 housing units set forth in the ASOD is 3,555,630. (ASOD at p. 109.)
4 When the total number of housing units is multiplied by the multi-unit adjustment figure of 0.8, the
5 total number of pre-1981 adjusted housing units is 2,844,504. The ASOD found the inspection
6 costs should total \$400,000,000. (*Ibid.*) The total inspection costs (\$400,000,000) divided by the
7 adjusted number of housing units (2,844,504) results in an inspection cost of \$140.62 per unit.
8 Defendants argue the same per-unit inspection cost should be used for pre-1951 units.

9 **C. The Court's Recalculation of Inspection Costs**

10 The Court agrees with Defendants that the same per-unit inspection cost specified in the
11 ASOD should be used in the recalculation directed by the Court of Appeal. The Court further
12 agrees the ASOD uses an inspection cost of \$140.62 for each pre-1981 adjusted housing unit,
13 and refers to it as "a reasonable cost of inspection." (ASOD at p. 109.) The Court did not use
14 the \$171 inspection cost urged by Plaintiffs during trial. The parties agree the adjusted number
15 of pre-1951 units is 1,011,782. Therefore, by multiplying the agreed-upon number of adjusted
16 units (1,011,782) by the per unit inspection cost (\$140.62), this Court finds \$142,276,785 should
17 be deposited into the abatement fund for inspection costs.

18 **IV. REMEDIATION COSTS**

19 Remediation costs were calculated by multiplying four numbers: (1) the number of
20 housing units; (2) the fraction of units that do not need to be remediated; (3) the fraction of the
21 remaining units that are likely to be remediated; and (4) the per-unit remediation cost. As noted
22 above, the parties agree the number of "pre-1951" housing units is 1,664,116. When housing
23 units that do not need to be remediated are excluded, 1,264,728 remain. The parties agree that
24 14 percent of the remaining units are likely to be remediated. This means 177,062 units are likely
25

1 to be remediated. The parties disagree, however, on the per-unit remediation cost. The parties'
2 arguments regarding the per-unit remediation cost, and this Court's calculations, are below.

3 **A. Per-Unit Remediation Cost Calculations in the ASOD**

4 The calculation of remediation costs in the ASOD appears in a single footnote. That
5 footnote cites evidence supporting the per-unit cost of lead remediation for the interior and exterior
6 of housing units. The Court excluded exterior remediation costs. The footnote explains how:

7 At trial, Dr. Jacobs testified that remediation of homes in the Jurisdictions,
8 performed in accordance with the procedures set forth in the People's Abatement
9 Plan, would average \$2,000 per housing unit. (1532:18-1533:18; see also P262
10 at 23-24.) Since approximately 76 percent of lead remediation costs are
11 attributable to interior remediation, the average per-unit cost of remediation can
12 be reduced from \$2,000/unit to approximately \$1,500/unit (\$1,500 is
13 approximately 76 percent of \$2,000).

14 (ASOD at p.109, fn. 24.)

15 The ASOD relies on the testimony of Dr. David Jacobs to arrive at the total cost of
16 interior and exterior remediation. Dr. Jacobs served as an expert witness for Plaintiffs.
17 Dr. Jacobs testified he calculated the \$2000 per housing unit cost by speaking to a "few
18 jurisdictions here in the state, and also used my knowledge of the costs incurred in the HUD
19 Program and basically took an average." Dr. Jacobs testified "these costs are for the highest risk,
20 so the worst-off housing." He also took into account the costs for multi-family units, and then
21 reduced his cost estimate by applying a discount for bulk purchases. After he "applied all of
22 those factors," he "came up with a per-cost estimate of around \$2000/unit." As noted above, the
23 ASOD adopts this estimate.

24 The ASOD concludes only interior remediation should take place. To exclude exterior
25 remediation costs, the ASOD cites a report dated May 1, 2004 which is titled "Evaluation of the
HUD Lead-Based Paint Hazard Control Grant Program - Final Report" ("HUD Evaluation").
The HUD Evaluation estimates the median cost of interior remediation is \$5,960 per unit, and
the median cost of exterior remediation is \$1,870 per unit. Based on these estimates, the ASOD

1 states that 76 percent of the total remediation cost could be attributed to interior remediation
2 costs, which averages approximately \$1,500 per unit.

3 **B. Plaintiffs' Per-Unit Remediation Cost Calculations**

4 Plaintiffs argue the per-unit remediation cost for pre-1951 housing units should be
5 \$3,196. Plaintiffs argue the per-unit cost for the pre-1951 housing units is higher than the
6 pre-1981 per unit cost because: (1) those units had a higher prevalence of lead-based paint
7 hazards; (2) lead paint used prior to 1951 had higher concentrations of lead; and (3) more interior
8 surfaces in pre-1951 units are likely to be coated with lead paint. (People's Brief Re
9 Recalculation of Abatement Fund, at p. 7.)

10 To support their calculation, Plaintiffs rely on the HUD Evaluation, which presents the
11 costs of remediating the interiors of multi-unit dwellings built before 1950 in a number of
12 jurisdictions in the United States. Plaintiffs contend the HUD Evaluation data show the median
13 interior remediation cost is \$6,800 per unit. After multiplying \$6,800 by the agreed-upon
14 53 percent bulk purchase discount, Plaintiffs conclude the interior remediation cost should be
15 \$3,196 per unit. Multiplying this by 177,062 housing units, Plaintiffs argue remediation costs of
16 \$565,890,152 should be deposited into the abatement fund.

17 Defendants challenge Plaintiffs' calculations.

18 First, Defendants argue the \$1500 per-unit remediation cost in the ASOD already
19 accounts for higher levels of lead found in older housing units because, according to Plaintiffs'
20 expert Dr. Jacobs, that cost is based on estimates for the "worst off" and "highest risk" housing
21 units.

22 Second, Defendants argue Plaintiffs' \$6,800 per-unit remediation cost is based on a
23 remediation strategy that is more expensive than the remediation plan set forth in the ASOD.
24 Dr. Jacobs was asked at trial if the cost of the abatement strategy in the HUD Evaluation
25 matched the strategy that was ultimately adopted by the Court. Dr. Jacobs responded: "No.

1 That's not what the plan does at all." (Decl. of Andre M. Pauka in Support of Defs. Response to
2 the People's Mtn. for Recalculation of the Abatement Fund, at Ex. J, p. 5803:21.) He testified
3 the strategy that was adopted by the Court would be tailored based on risk assessments and
4 reports. (*Id.* at p. 5803:21-28.) The result is that remediation costs resulting from Dr. Jacobs's
5 abatement plan would be lower than those set forth in the HUD Evaluation.

6 Third, Defendants argue the cost figures in the HUD Evaluation are for housing located
7 across the United States and that California housing units have remediation costs that are lower
8 than elsewhere. Defendants note the lower remediation costs in California are corroborated in
9 the HUD Evaluation, and also in Plaintiffs' Abatement Plan, which states, "[H]ouses in
10 California treated under the HUD lead hazard control grant program have much lower levels of
11 lead-based paint compared to the rest of the nation." (Decl. of Laura Holcomb in Support of the
12 People's Post-Remand Brief Re Recalculation of Abatement Fund ("Holcomb Decl."), at Tab 2,
13 p. SRA1521.)

14 **C. Defendants' Per-Unit Remediation Cost Calculations**

15 Defendants argue the Court should apply the per-unit remediation cost of \$1,506.66 that
16 was used in the ASOD. Defendants argue this figure already accounts for remediating the
17 "highest risk" and "worst off" housing units. Multiplying the per-unit remediation cost by
18 177,062 housing units, Defendants argue remediation costs totaling \$266,772,233 should be
19 deposited into the abatement fund.

20 **D. The Court's Analysis of Per-Unit Remediation Costs**

21 Had the Court of Appeal had reversed without directions, this Court could order a new
22 trial on pre-1951 remediation costs and weigh the evidence. Here, however, all this Court can do
23 is to recalculate the remediation costs. This Court cannot assess the credibility of witnesses, it
24 cannot reweigh the evidence, and it cannot assess independently the numerous equitable factors
25 that informed the conclusions reached in the ASOD.

1 Plaintiffs argue the Court should rely on the remediation cost of \$6,800 per unit in the
2 HUD Evaluation. But as noted above, the remediation cost in the HUD Evaluation is not tied to
3 the remediation strategy adopted in the ASOD. Likewise it does not reflect the HUD
4 Evaluation's assessment of the condition of California's pre-1951 housing stock, which
5 Dr. Jacobs admitted "have much lower levels of lead-based paint compared to the rest of the
6 nation." The remediation costs set forth in the HUD Evaluation are also not something on which
7 the ASOD relies.³ Instead, the ASOD relies on Dr. Jacobs's multi-factored estimate of
8 remediation costs, both interior and exterior.

9 Plaintiffs make the point that per-unit remediation cost for pre-1951 housing units should
10 be higher than the pre-1981 units. The estimate in the HUD Evaluation on which they rely,
11 however, is inconsistent with other evidence on which Dr. Jacobs relied. And Dr. Jacobs's own
12 plan relies on remediating the "worst off" and "highest risk" housing units which he admits "may
13 overestimate the costs." (Holcomb Decl., at Tab 14, p. 1533:7-8.) In the absence of a reliable
14 estimate specifically directed at pre-1951 remediation costs, and with an estimate based on
15 "worst off" and "highest risk" pre-1981 housing units, the Court concludes the recalculation of
16 the remediation costs should be based on the pre-unit remediation cost of \$1506.66 used in the
17 ASOD.⁴ By multiplying the agreed upon number of housing units (177,062) by the per unit
18 remediation cost in the ASOD (\$1,506.66), this Court finds \$266,772,233 should be deposited
19 into the abatement fund for remediation costs.

20 **V. ABATEMENT FUND TOTAL**

21 The Court has recalculated the inspection costs and finds they should total \$142,276,785.
22 The Court has recalculated the remediation costs and finds they should total \$266,772,233. The
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24 ³ The ASOD only uses the HUD Evaluation numbers to calculate the relative costs of interior and exterior remediation.

25 ⁴ The Court found the remediation cost to be "approximately \$1500/unit." (ASOD at p. 109, fn. 24.) More precisely, 497,788 unit would be remediated, which in light of the \$750,000,000 awarded for remediation, means the per-unit cost would be \$1506.66.

1 total amount of the Abatement Fund should therefore be \$409,049,018. These funds must be
2 disbursed in the manner set forth in the ASOD.

3 **VI. ABATEMENT FUND DISTRIBUTION**

4 The ASOD states that abatement funds shall be distributed based on each jurisdiction's
5 share of pre-1980 housing units. (ASOD at pp. 20-21; 110.) During the hearing on this matter
6 the parties agreed on the percentage share of abatement funds to be received by each jurisdiction:


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Jurisdiction	Percent	Dollars
Alameda	11%	\$44,995,392
Los Angeles	57%	\$233,157,941
Monterey	2%	\$8,180,980
San Mateo	5%	\$20,452,451
Santa Clara	5%	\$20,452,451
San Diego	5%	\$20,452,451
San Francisco	11%	\$44,995,392
Solano	2%	\$8,180,980
Ventura	2%	\$8,180,980
Total	100%	\$409,049,018

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18 *Alameda County includes the residents of the City of Oakland

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20 Dated: September 4, 2018


21 Thomas E. Kuhnle
22 Judge of the Superior Court
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