STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND,
by and through PATRICK LYNCH,
ATTORNEY GENERAL

Plaintiffs,

v.

LEAD INDUSTRIES ASSOCIATION, INC.,
et al.

Defendants
and Third-
Party Plaintiffs,

v.

RHODE ISLAND HOUSING AND
MORTGAGE FINANCE
CORPORATION, by and through
RICHARD H. GODFREY, Executive
Director; JOHN DOE PROPERTY
OWNERS; AND OTHER JOHN DOES.

Third-Party Defendants.

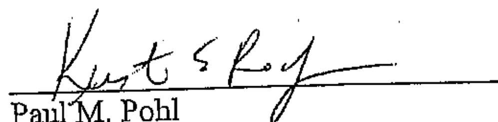
Civil Action No. 99-5226

THE SHERWIN-WILLIAMS COMPANY'S
MOTION TO VALUE THE DUPONT SETTLEMENT, DETERMINE AN APPROPRIATE OFFSET, AND DISGORGE MISALLOCATED SETTLEMENT FUNDS

For all of the reasons set forth in the accompanying Memorandum in Support of Motion to Value the DuPont Settlement, Determine an Appropriate Offset, and Disgorge Misallocated Settlement Funds, The Sherwin-Williams Company moves the Court to conduct appropriate proceedings to value the DuPont settlement and apply it as an offset to any remedy that the Court may order, identify the 600 properties that DuPont shall abate and exclude those properties from

any further abatement proceeding, and order the money earmarked for payment to two private interests be directed to the state treasury. A proposed Order is attached.

Respectfully submitted,



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October 31, 2007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served by the method indicated below upon the following counsel of record on October 31, 2007.

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SHERWIN-WILLIAMS' MEMORANDUM IN SUPPORT OF ITS MOTION TO VALUE THE DUPONT SETTLEMENT, DETERMINE AN APPROPRIATE OFFSET, AND DISGORGE MISALLOCATED SETTLEMENT FUNDS

The State brought this case under its *parens patriae* authority purportedly to remedy an alleged singular public nuisance that was affecting the health, safety and welfare of residents of the State of Rhode Island. *See* 9/27/05 Hearing Tr. at 86 ("Further, this is, as Your Honor's also recognized, this is about the State bringing a claim to vindicate a public right under its parens patriae authority; that is, to protect the public health, safety, and welfare.") (Ex. 1). In announcing his settlement with defendant DuPont, the Attorney General represented that the

proceeds from the settlement "will go straight to" remediating the alleged nuisance, abating 600 homes in Rhode Island, and positively impacting the health and safety of Rhode Island children. Jun. 30, 2005 Press Release (Ex. 2). *See also* 07/08/05 Hearing Tr. at 11-12 (Ex. 3).

Sherwin-Williams brings this Motion, first and foremost, to quantify the DuPont settlement so that Sherwin-Williams may receive a proper offset to its liability for the total value of the settlement. This offset includes not only the value of DuPont's monetary contributions, but also elimination of 600 homes from the remedy phase. Such an offset is required under the Rhode Island Uniform Contribution Among Tortfeasors Act (hereinafter, "Rhode Island UCATA"), and Sherwin-Williams is entitled to receive the offset before being required to do anything, expend any money or fix any properties in the remedial phase of the litigation. Such an offset will ensure that the State does not receive a windfall through multiple recoveries for the same claimed loss.

Determining the offset when one defendant settles and is dismissed out of a case is usually a simple exercise. The parties' settlement agreement outlines the value of the settlement or provides the total monetary consideration paid in exchange for a dismissal. In this instance, the State and DuPont reached a settlement but then took steps to avoid memorializing the terms of the agreement in a formal document. Thus, a hearing should be conducted, with discovery if necessary, to quantify the value of the DuPont settlement. Additionally, because DuPont has not yet made good on its promise to abate 600 homes, the Court will need to determine after the hearing which particular properties DuPont must remedy so that those properties can be removed from defendants' abatement obligations, if any.

In addition to valuing the overall DuPont settlement, Sherwin-Williams also moves to disgorge two monetary amounts from the settlement that were improperly diverted to two purely private purposes, to satisfy either the Attorney General's or the State's counsel's private interests:

- $2,500,000 dollars has been earmarked to pay Brigham and Women's Hospital in Boston ("B & W Hospital") to satisfy a pledge made previously to the Hospital by the State's contingency fee counsel, Motley Rice. This contribution has no connection whatsoever to Rhode Island lead paint issues, and the Attorney General had admitted that he knew of no benefit that Rhode Island citizens will receive from this out-of-state contribution. 01/06/06 Lynch Dep. at 127 (Ex. 4).
- $1,000,000 dollars was allotted to the *alma mater* of the Attorney General, Brown University.

There is absolutely no basis in the law for an Attorney General to sue in the name of the State and then cut a deal whereby settlement money from the case is diverted to third parties, particularly an out-of-state third party. The Attorney General is required to deliver monetary recoveries to the State's General Fund. The Attorney General and his contingent fee counsel cannot bypass the General Assembly and the State's budget process and wheel and deal with State monetary recoveries.

I. The Settlement and Release Between the State and DuPont is Valid.

A. *The Attorney General Dismissed Claims Against DuPont In Exchange For Specific, Enumerated Consideration.*

The State agreed to dismiss its claims against DuPont in consideration for money payments, including payments to B & W Hospital and Brown, and also a specific promise to take abatement action in 600 homes. DuPont first approached the Attorney General's office to

determine what it would take to resolve the State's claims against it in this litigation. In his deposition, the Attorney General's Chief of Staff, Leonard Lopes, testified:

> [Bernie Nash, counsel for DuPont] – in the course of always stating to me, I just stopped writing at that point, that they [DuPont] did not make or sell white lead pigment. And then he just asked, ***"What will it take to get DuPont out of the case?"*** That was it.

01/06/06 Lopes Dep. at 16 (emphasis added) (Ex. 5).

The State understood that DuPont's goal was to be released from claims asserted in this litigation:

> Q. Did you understand that DuPont wanted to undertake the programs that are mentioned here without getting anything in return from the State?
>
> A. That's kind of broad. What do you mean by "anything"?
>
> Q. Anything. With no consideration back from the State whatsoever. Was that your understanding?
>
> A. I would say no, that wasn't my understanding.
>
> * * *
>
> Q. ...Wasn't it—**didn't you understand that DuPont was making this proposal in exchange for being dismissed from this lawsuit by the State?**
>
> A. **I would say yes.**

01/06/06 Lopes Dep. at 33, 35. (Ex. 5) (emphasis added).

The Attorney General also acknowledged that DuPont was seeking to work out a deal to be released from this litigation:

> Q. And when you say "to reach an agreement," the exchange for this program on DuPont's and you ... **understood that DuPont was making this proposal, this offer in March of '04 in exchange for an agreement to dismiss DuPont with prejudice from the pending lawsuit.**
>
> A. MR. KELLY: Objection. Form.

Q. You may answer, sir.

A. **Yes.** But in addition, they were granted the opportunity to assist the thousands of kids that were continuing to be poisoned in Rhode Island and they wanted to seize that opportunity.

01/06/06 Lynch Dep. at 25-6 (Ex. 4).

B. ***The Terms of the Settlement Are Specific and Were Agreed to In Exchange For DuPont's Dismissal With Prejudice From This Litigation.***

The terms of the DuPont settlement agreement were memorialized in an email that was authored by the Attorney General's Chief of Staff, Leonard Lopes, and sent to Attorney General Patrick Lynch. Bernard Nash was present when the settlement agreement was reached as counsel for DuPont, as was DuPont Vice President and Assistant General Counsel Thomas Sager. Also present was DuPont's James Lynn. Under the parties' settlement, DuPont agreed to:

- Pay $1,500,000 ($300,000 per year for five years) for education and training;
- Pay $1,000,000 ($200,000 per year for five years) for community outreach;
- Obtain $12,500,000 in Mikulski Grant monies over five years;
- Pay $1,750,000 ($350,000 per year for five years) for AG Enforcement, Housing Resource Commission's needs, including technical assistance specialist and compliance offers;
- Provide 600 lead safe homes (200 per year for three years) through abatement of lead hazards on the properties most in need of abatement work;
- Pay $2,500,000 to Dana Farber Cancer Institute (this designation was later changed to B & W Hospital);[1] and

[1] After reaching the settlement, the State requested that this $2.5 million dollars be paid to B & W Hospital. 07/08/05 Hearing Tr. at 12 ("And there is a change from what was reported in the press last week. At the State's request, 2.5 million is going to the B & W's Hospital in Boston, not the Dana Farber Cancer Institute that was reported.") (Ex. 3). The State later admitted that its legal counsel had made a pledge to B & W Hospital and that that pledge was a factor in it deciding to change the designation. Lynch Dep. at 96, 134 (Ex. 4). What compounds

- Pay $1,000,000 to Brown University.

(Ex. 10).

In consideration for DuPont's payments and agreement to remediate 600 homes, the State agreed to dismiss its claims against DuPont with prejudice. Additionally, the Attorney General promised to issue a statement indicating that "The Attorney General is dismissing Dupont from its law suit" and "Dupont has committed to helping solve the problem of lead poisoning in Rhode Island which is what our law suit was all about. In light of their commitment, I am dismissing them from this law suit." *Id.* (emphasis added).

C. *The Attorney General and the State's Counsel Announced the DuPont Settlement Publicly, Asserting the Proceeds Would Go to Help Rhode Island.*

On June 30, 2005, after the Attorney General had moved to dismiss DuPont from the litigation, the Attorney General announced the DuPont settlement via a press release. The Attorney General specifically represented that the proceeds of the settlement were to be spent in Rhode Island:

> Attorney General Lynch announces that DuPont Paint will fund multi-million dollar lead paint clean-up effort in Rhode Island.

(Ex. 2). The Attorney General's press release further stated, "What makes this announcement so gratifying is that this money will go straight to cleaning up the mess. It presents a great opportunity for the Attorney General's Office to make a real and lasting impact on the health and safety of Rhode Island's children." *Id.* The press release identified that DuPont would make a

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(continued...)

the problem with this further is that there has, as the Attorney General knows, never been a ruling that the contingent fee agreement is legal. Thus, it seems presumptuous and premature for the Attorney General to authorize a diversion of State funds to satisfy an obligation of contingent fee counsel—in essence, indirectly paying the contingent fee lawyers.

multi-million dollar contribution to the Children's Health Forum (CHF) "for lead paint remediation, public education, and compliance programs in Rhode Island." *Id.*

The Attorney General's press release announcing the settlement did not mention that $2.5 million dollars would go to an out-of-state hospital with no known connection to Rhode Island lead poisoning issues and which, coincidentally, had received an earlier pledge for a donation from the State's contingency fee counsel.

The State's contingency fee counsel also publicly acknowledged that the parties' agreement constituted a settlement. On June 30, 2005, initial press releases were issued by the Motley Rice firm, lauding a "settlement" in excess of $10 million dollars. (Ex. 6). Fidelma Fitzpatrick, one of the State's trial lawyers, was quoted referring to "[t]he settlement with DuPont" and Jack McConnell, another trial lawyer representing the State, "complemented Attorney General Patrick Lynch for his groundbreaking settlement." *Id.* The press release did not mention that $2.5 million dollars was going to the same out-of-state hospital in satisfaction of a pledge previously made by the Motley Rice firm.[2]

On July 11, 2005, the Court entered an order dismissing DuPont from the case. The order specifically stated, however, that the dismissal "shall be without prejudice to any and all equitable and legal rights of the Defendants… ." 7/11/05 Order (Ex. 7). The Court dismissed DuPont pursuant to Rule 41(a)(2) of the Rhode Island Superior Court Rules of Procedure.

D. *The DuPont-State Agreement Constitutes a Valid Settlement and Release.*

The agreement between DuPont and the State is a settlement and release of claims in the formal legal sense, and comes under the Rhode Island UCATA. Before negotiations commenced

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[2] Should either the State or its counsel contend that a DuPont-State deal does not constitute a settlement and release of claims, Sherwin-Williams moves for leave to conduct further discovery of all of the lawyers and individuals who negotiated the deal. Sherwin-Williams also moves for a hearing, so that it has the opportunity to call witnesses and present evidence to demonstrate the parties' settlement and release.

between DuPont and the State, the State had asserted claims against DuPont claiming that it had caused a singular public nuisance in Rhode Island. 9/28/01 Plf.'s Mem. in Support of: Mot. to Strike Aff. Defenses, Objections to Defs.' Property Identification Interrogatories, Mot. for a Rule 16 Order, and Mot. to Bifurcate and to Sever Third Party Claims, at 17 (discussing joint and several liability of defendants). The claims remained pending, and they provided the incentive and purpose for the parties' negotiations. As DuPont's counsel stated, "What will it take to get DuPont out of the case?"

DuPont's goal was to be released from the States' claims asserted in the litigation, and it made its settlement proposals in exchange for a dismissal with prejudice. The State exchanged its causes of action against DuPont for a settlement package that involved monetary and non-monetary consideration, and it agreed to a consensual dismissal with the effect of extinguishing its claims. In reliance upon the deal, the Court entered an order dismissing DuPont from the litigation with prejudice. It is crystal clear that a settlement and release of claims exists between the State and DuPont, and the Court acted upon the settlement and release by entering its dismissal order.

1. *The Settlement Agreement and Release Are Valid Under the Rhode Island UCATA.*

The Rhode Island UCATA does not require that a release be in writing to be effective and binding.[3] Thus, in addition to the concession by the State's counsel that the agreement is a binding settlement agreement, the Rhode Island UCATA likewise recognizes the validity of the settlement agreement. The Rhode Island UCATA provides:

[3] Though the effectiveness is not impaired by the fact that the settlement is not in writing, this unusual aspect does heighten the defendants' need for discovery in order to understand the complete terms and scope of the settlement. It is anticipated that additional discovery (sought by a separate motion filed concurrently with this one) would enable Sherwin-Williams to further supplement the arguments advanced here.

> A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

R.I. Gen. Laws § 10-6-7. It is evident from the text of the statute that there is no requirement in the Rhode Island UCATA that an agreement be in writing in order to effect a valid release.

The Rhode Island UCATA's policy of recognizing non-written releases is consistent with other jurisdictions where liability apportionment statutes do not specifically require a "written release." *See e.g., Auer v. Kawaski Motors Corp.*, 830 F.2d 535, 540 (4th Cir. 1987) (applying Virginia law) ("There was no formal release or written memorial of the settlement agreement. It is undisputed, however, that in return for the payment of $2,000 by Teledyne, the claims against it were consensually dismissed with prejudice. Ebaugh exchanged his cause of action against Teledyne for a sum of money with the effect of extinguishing his claim against Teledyne. Those are the essential characteristics of a release."); *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364-65 (Ky. Ct. App. 2004) ("A release is a private agreement amongst parties which gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised. That is to say, a release is a surrender of a claimant's right to prosecute a cause of action. In Kentucky, a release is viewed as a contract between the party executing the release and the party being released. A contract, in the absence of a statutory requirement, need not be in writing. As with any valid contract, however, a release must be supported by valuable consideration."); *Myers v. Thomas*, 502 S.W.2d 941, 943 (Tex. Civ. App. 1973) ("The trial court found on an abundance of evidence that she made the settlement and the question now presented is whether the settlement agreement can be made verbally. We do not know of any statute requiring such settlement agreement to be in writing, and we have been cited no case requiring a

written instrument of release. 476 C.J.S. Release s. 6, p. 631, announces the rule: 'In the absence of a statute providing otherwise, a release is not required to be in writing.' ... It is for the Legislature and not the courts to require, as a matter of public policy, releases to be in writing."); *Melo v. Nat'l Fuse & Powder Co.*, 267 F. Supp. 611, 612 (D. Colo. 1967) (applying Utah law) ("It is fundamental, however, that an effective release can be consummated without resort to a particular form of words, for all that is necessary is that the words show an intention to discharge. ... One who has, for a consideration, voluntarily dismissed his action against another with prejudice and on the merits has abandoned his claim and effected a release.") (internal quotations omitted).

Whether the State chooses to call this agreement a "settlement" (as it originally did in June 2005) or now simply an "agreement" (apparently the currently preferred nomenclature) is irrelevant under Rhode Island law. DuPont provided consideration in exchange for a dismissal with prejudice from this litigation. The bargained-for exchange ended the case against DuPont. *Homar, Inc. v. North Farm Assocs.*, 445 A.2d 288, 290 (R.I. 1982) ("The settlement agreement effectively ended that suit. The fact that they acted without their attorneys or that they did not submit the agreement to the court is of no significance whatsoever. Our policy is always to encourage settlement. ... ***Settlement of a disputed liability is as conclusive of the parties' rights as is a judgment that terminates litigation between them***.") (emphasis added). Claims that were pending before the deal were dismissed by the State with prejudice afterwards, in consideration for monetary and non-monetary compensation that DuPont agreed to pay. This is the essence of a settlement under the law. The fact that the State tries to call it something else now, or decided for some unexplained reason not to sign a formal document, does not change the result.

2. *The Court Accepted the Validity of the Release and Settlement as a Basis For Entering the Dismissal Order.*

Rule 1.4 of the Superior Court Rules of Procedure provides, "All agreements of the parties or attorneys touching the business of the court shall be in writing, unless orally made or assented to by them in the presence of the court when disposing of such business, or they will be considered of no validity." Here, the State did put the terms of the settlement and release agreement on the record when it moved for dismissal to the Court's satisfaction *See* 7/8/05 Tr. at 11-12 ("So, I think that for the purposes of today it might be helpful if I put on the record exactly what the terms are. ...") (Ex. 3); 10/18/05 Tr. at 23 ("Mr. Williams put the terms of the arrangement on the record, and the defendants are aware of that. We do not have information beyond that at this point.") (Ex. 8).

The dismissal was then entered by the Court pursuant to Rhode Island Superior Court Rule of Civil Procedure 41(a)(2), which provides, "Except as provided in paragraph (1) of this subdivision of this rule, *an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. ... Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.*" (emphasis added). Thus, in dismissing this *parens patriae*-based case against defendant DuPont, the Court had to satisfy itself that it was upon proper "*terms and conditions.*" The Court was satisfied that the State and DuPont met Rule 1.4 or else it would not have entered its Rule 41(a)(2) Order. *See Homar Inc.*, 445 A.2d at 290 ("The agreement upon which the case before us is based was a valid settlement agreement with full consideration and it is enforceable. The parties met and conferred with the obvious intent of settling their differences over the original construction agreement. The settlement agreement effectively ended that suit. The fact that they acted without their attorneys or that they did not submit the agreement to the court is of no

significance whatsoever."). Thus, the Court, having been presented evidence of an agreement, entered the dismissal order with prejudice.

II. The Rhode Island UCATA Requires a Credit To the Non-Settling Defendants.

A. *Valuation of the Settlement Achieves the Purpose of the Rhode Island UCATA.*

Because there was a settlement and release, this Court must value the DuPont settlement before the Court can take up the remedy phase of this litigation. The Court must provide an appropriate offset to defendants Sherwin-Williams, Millennium and National Lead for both the value of DuPont's monetary contributions and the elimination of 600 homes from the mix of properties, if any, that need to be abated. The DuPont settlement must be valued, in order to credit this value in an equitable manner as required by law. The Court must then consider a remedy, if any, as to the remaining defendants.

Rhode Island's statute determines how to allocate the benefits of a settlement where parties who share responsibility for a particular act are not all before the court as the result of a dismissal, or settlement, of claims against certain defendants. *See* R.I. Gen Laws § 10-6-1, *et seq.*; *Lawrence v. Pokraka*, 606 A.2d 987, 988 (R.I. 1992) ("This provision [of the Rhode Island UCATA] is predicated upon the fundamental doctrine that an injured person is entitled to only one satisfaction of the tort, even though two or more parties contributed to the loss. This principle was not altered by the enactment of § 10-6-7 which proscribes double recovery by unequivocally mandating that a release 'reduces the claim against the other tortfeasors in the amount of the consideration paid for the release.'") (internal quotation omitted). The Rhode Island UCATA provides mechanisms for crediting non-settling defendants for value received by plaintiffs in satisfaction of its claims. Rhode Island law is clear that one of the paramount reasons for enacting its statute was to ensure that a plaintiff does not obtain a windfall recovery. *See, e.g., Augustine v. Langlais*, 121 R.I. 802, 804-05 (1979) ("The cases that have considered

statutes identical to s. 10-6-7 universally hold that amounts paid by settling defendants must be credited to the verdict amount returned against nonsettling tortfeasors. … We perceive no reason to adopt a different view. These decisions are predicated upon the fundamental doctrine that an injured person is entitled to only one satisfaction of the tort, even though two or more parties contributed to the loss.").

Here, the State has received bargained-for monies and a pledge of future action in exchange for dismissing its claims against DuPont for public nuisance. Accordingly, pursuant to the Rhode Island UCATA, the remaining defendants are entitled to a credit in the form of (1) a monetary offset for the total value of defendant's payments under the settlement; and (2) the removal of 600 homes from any abatement remedy that might be implemented. To fail to value DuPont's monetary payments and remedial actions and then allocate that value to Sherwin-Williams and the other defendants would violate Rhode Island law and the fundamental policy against double recovery.

B. ***The Rhode Island UCATA Requires an Offset.***

Under the Rhode Island UCATA, if a settling defendant is a joint tortfeasor,[4] then the

[4] Defendants do not concede that they are jointly and severally liable for any public nuisance in this case. As has been raised with the Court previously, if the Court finds that an abatement order should issue, then Sherwin-Williams asserts that the Court, as part of the exercise of its equitable powers, should equitably apportion responsibility for the remedy. The Court, in fact, has never ruled upon this open issue. Sherwin-Williams' position is that equitable apportionment of any liability is proper. The State, however, has claimed that all defendants, including DuPont, are joint tortfeasors who share common responsibility for the public nuisance. *See, e.g.*, 9/28/01 Plf.'s Mem. in Support of: Mot. to Strike Aff. Defenses, Objections. to Defs.' Property Identification Interrogatories, Mot. for a Rule 16 Order, and Mot. to Bifurcate and to Sever Third Party Claims at 17 (discussing joint and several liability of defendants); 7/29/05 Plf.'s Objection to the Sherwin-Williams Company's Mot. for Partial Summary Judgment Due to Lack of Proof of Causation, at 34 (explaining why these defendants were sued as "primarily responsible" parties versus third parties and other potential contributors). The State also previously claimed that all defendants, including DuPont, were liable for the same ***singular public nuisance***. Indeed, the State's repeated refrain has been that this suit was brought to abate an alleged singular public nuisance that is affecting the health of the children of Rhode Island. *See, e.g.*, 9/20/05 Hearing Tr. at 87-88 ("But when there is a ***singular injury such as a singular public nuisance*** that's created by collective conduct…") (Ex. 9) (emphasis added); *Shepardson v. Consolildated Med. Equip., Inc.*, 714 A.2d 1181, 1183 (R.I. 1998) (both the parties "are clearly joint tortfeasors under the act because they are both allegedly liable in tort for the same injury to plaintiffs"); *Cooney v. Molis*, 640 A.2d 527, 528 (R.I. 1994) (Parties "are clearly joint tortfeasors under the act because they are both allegedly liable in tort for the same injury to plaintiff").

non-settling defendants are entitled to an offset of the full value of the settlement or the amount of reduction identified in the release documents, whichever is higher. R.I. Gen. Laws § 10-6-7. *See also Shepardson*, 714 A.2d at 1183-84 ("Simply stated, amounts paid by settling defendants are credited to the verdict amount returned against the remaining defendants, or the award of the jury is reduced by the proportion of reduction provided by the release, whichever is greater."); *Lawrence*, 606 A.2d at 988 ("The statute provides that 'amounts paid by settling defendants *must* be credited to the verdict amount returned against nonsettling joint tortfeasors.'") (emphasis added). The Rhode Island UCATA is explicit in requiring that the non-settling defendants receive an offset by way of a credit when assessing responsibility on a defendant-by-defendant basis:

> A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; *but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release*, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

R.I. Gen. Laws § 10-6-7 (emphasis added). The Rhode Island UCATA also explicitly requires that the amount of consideration "paid for the release" of claims reduces the claims against the other non-settling tortfeasors. *Id.*

Here, *the State* has repeatedly claimed that all defendants, including DuPont, are joint tortfeasors who share common responsibility for a public nuisance. In addition, the State's dismissal of its claims against DuPont in exchange for articulated, specific consideration operates as a release. Accordingly, pursuant to Rhode Island law, the value of DuPont's

(continued...)

If the Court accepts the State's position, then the Rhode Island UCATA applies and defendants are entitled to a statutory offset of their liability for the 600 homes DuPont has agreed to remedy, together with the value of defendant's monetary contributions under its settlement.

settlement needs to be determined and then offset against any recovery the State may obtain from the remaining defendants. *See Merrill v. Trenn*, 706 A.2d 1305 (R.I. 1998) (discussing method to calculate the damages liability of non-settling tortfeasors when the injured party had previously obtained a pretrial settlement payment from another alleged tortfeasors); *Wilson v. Krasnoff*, 560 A.2d 335, 339 (R.I. 1989) (Joint injury is caused by other parties who have "engaged in common wrongs"). In the circumstances present here, the Rhode Island UCATA is applicable to this settlement. The Court must determine the value of the settlement and also deal with the part of the settlement where DuPont agreed to abate 600 houses.

Mindful of the need to avoid double recovery and apply the laws of Rhode Island regarding settlement credits, the Court has recognized the need to preserve the equitable and legal rights of the remaining defendants in dismissing DuPont. The Court ordered that the dismissal was "without prejudice to any and all equitable and legal rights of the Defendants." 7/11/05 Order (Ex. 7). It is now time to determine these rights consistent with Rhode Island law. Under the Rhode Island UCATA, defendants are entitled to an offset for the full, determined value of the DuPont settlement, and this issue needs to be resolved before proceeding to the remedy phase, particularly since an integral part of the DuPont settlement included abatement of 600 properties.[5]

[5] Further discovery is necessary to conduct this valuation. The specifics of the abatement of the 600 properties and the ultimate valuation of that work must be determined. The status of that effort remains unknown to defendants and may still be in development. *See* Attorney General Advisory Comm'n on Lead, Proposed Lead Remediation Program (9/14/06) (attached as Ex. 11).

C. *The Defendants Are Further Entitled to an Offset For the Full Value of the DuPont Promise to Abate 600 Homes.*

The remedy phase cannot begin until the 600 DuPont abatement properties are identified and excluded from the abatement plan.[6] Attorney General Lynch has confirmed DuPont's agreement to remedy 600 properties regardless of the cost:

> A. So again, when you ask me about the value of this agreement in my mind, it's – I – priceless is probably more accurate because let's say that the price, for whatever reason, all these college kids never want to paint houses anymore or these companies that come in and clean houses, it changes and the industry changes such that the cost estimates that are currently put out there skyrocket to 20,000, as a minimum, up to 30 or 40,000 per house just for lead-safe, right? **Then DuPont is still responsible for 600 houses and the value of this deal or the agreement in itself skyrockets to, again, my math's worse, but 30 million.**

See 01/06/06 Lynch Dep. at 65 (Ex. 4) (emphasis added). The Attorney General's Chief of Staff has likewise confirmed this agreement:

> Q. Was it-did I hear you correctly that if a home cost more than $12,000 to make lead-safe that DuPont has agreed to pay more than the $12,000?
>
> A. What they-what was the agreement from my understanding was there wasn't a certain figure as to what to make a home lead-safe would cost. Patrick put out a number, Bernie put out a number and it was just taken as the number. It doesn't necessarily mean that was the number. Because I won't - I won't speak for DuPont, but if they can make a home lead-safe for $2,000 then that's not an issue with us so long as the home is made lead-safe. We only were concerned that X number of homes became lead-safe. 600 of them over three years.
>
> Q. So just so that we're clear. The agreement focuses on the number of 600 lead-safe homes, correct?
>
> A. That's correct.

[6] As Sherwin-Williams has briefed elsewhere, if the remedy now sought is properly characterized as funding or money, than no equitable relief can be ordered.

01/06/06 Lopes Dep. at 162-3 (Ex. 5). Moreover, the State indicated that where multiple families live in one dwelling, DuPont agreed to count that dwelling as **one** abatement property. *See* Lynch Dep. at 148-9 (Ex. 4).

The Court should permit discovery and hold an evidentiary hearing to identify the actual 600 properties that DuPont will abate, taking into account the full nature of the settlement agreement and properly counting properties to reach the tally of 600 properties. Given the dramatic decline in EBLs in Rhode Island in the last two years, the Court, or if appropriate a jury, may then determine that once DuPont abates its 600 homes, a public nuisance no longer exists. Moreover, the full value of the monetary consideration paid by DuPont also must be determined so that an offset can be calculated. At a minimum, defendants should also get a $1.5 million credit toward education and training, a $1.0 million credit for community outreach and a $1.75 million credit for abatement, as a result of the DuPont agreement.

III. The Attorney General Should be Compelled to Turn Over the DuPont Settlement Funds to the Rhode Island General Treasury.

The State brought and litigated this case in its *parens patriae* authority to remedy an alleged public nuisance in the state of Rhode Island. The Court recognized the State's standing based on *parens patriae*:

> A state's authority to vindicate certain interests of the state and its citizens is often referred to as a parens patriae action. Parens patriae means literally parent of the country. ... The doctrine creates an exception to normal rules of standing applied to private citizens in recognition of the special role that a State plays in pursuing its quasi-sovereign interests in the well-being of its populace. ... In order to maintain [a parens patriae] action, ... [t]he State must express a quasi-sovereign interest. ... Although the articulation of such interests is a matter for case-by-case development - neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract – certain characteristics of such interests are so far evident. These characteristics fall into two general categories. **First, a State has a quasi-sovereign interest in the health and well-**

> **being - both physical and economic - of its residents in general.** Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

State v. Lead Indus. Ass'n, Inc., No. 99-5226, 2001 WL 345830, at *3-4 (R.I. Super. Ct. Apr. 2, 2001) (emphasis added) (citations omitted). Because the State brought this suit in a fiduciary-like capacity to protect Rhode Island citizens, any recovery should go to the general treasury – to abate the alleged nuisance that formed the basis for the State's claims in the first phase of this case.

Yet, despite its representations about the public good, the Attorney General has not designated all of the DuPont settlement proceeds to benefit the citizens of Rhode Island. These funds must go to the Rhode Island treasury. The Attorney General has admitted as much:

> Q. Now, one other question on this topic. You mentioned that the money did not go to state coffers the way that settlement money usually goes. Did I get that right?
>
> A. I did say that.
>
> Q. Typically, settlements negotiated and received by the State that involve payments to the State have to go into State coffers, as you put it, to use the crude, term, and I'm fine with that. Is that right?
>
> A. Correct.

01/06/06 Lynch Dep. at 140 (Ex. 4). However, contrary to the required practice of State payments going into the State coffers, the Attorney General here has done something different. He instead has personally allocated funds completely bypassing the State's treasury and the normal legislative appropriations process. He has also directed that funds be used for purely private purposes, to satisfy his own and private interests.

Specifically, some settlement funds have been earmarked for a Massachusetts hospital with no clear ties to abating an alleged public nuisance affecting the public health and welfare of Rhode Island citizens. Other settlement funds have been designated to be sent to the Attorney

General's *alma mater*, Brown University. These were improper and unauthorized diversions of State funds. These decisions were made without reference to statutory or constitutional provisions and without consultation with the state legislature. There was no legislative appropriation made; there was no legislative directive. Rather, the Attorney General, acting on his own (or with his contingent fee counsel) and without authority, selected the programs and institutions that would receive a significant portion of the DuPont settlement. These funds are not being devoted to tackling the alleged public nuisance in Rhode Island that formed the basis for this litigation. Rather, they are being designated to benefit private purposes. Therefore, they should be returned to the State treasury, along with any other consideration received in exchange for the dismissal.

A. *The Attorney General Has Directed Millions of Dollars of DuPont Funds to a Private Hospital In Massachusetts.*

The Attorney General has directed that $2.5 million dollars of the DuPont settlement be paid to a Massachusetts hospital, B & W Hospital. This money was allocated to B & W Hospital, even though the Attorney General stated earlier that he wanted all of the money to go to abating the nuisance in Rhode Island and even though he knew that payment to B & W Hospital had no connection to Rhode Island lead poisoning issues:

> I just wanted it [the money] to go to the problem. I didn't want to lose it to - I think it goes back to your administrative costs. I wanted every dime that I envisioned to be an appropriate or a best number I could get for the State in the agreement or I meant for the issue. I say the people, and so we talked about how is the best way to do that.

01/06/06 Lynch Dep. at 36 (Ex. 4) (emphasis added). *See id.* at 35-6 ("I wanted to find a vehicle that would help get every penny of it to the problem that we were - that lingered in our communities and would linger with us for years to come."). He later testified:

> Q. ...at the time the transaction was consummated, did you have any information that the payment of $2.5 by DuPont to Brigham and Women's Hospital or Dana-Farber would somehow help solve childhood lead poisoning in Rhode Island?
>
> A. No.

Lynch Dep. at 127 (Ex. 4). The Attorney General rejected the idea of sending this money to Rhode Island-based hospitals and facilities. 01/06/06 Lynch Dep. at 143 (Ex. 4).

The reason that a Boston-based hospital was selected – indeed, replacing the original designation of the Dana Farber Cancer Institute after the settlement had been reached – was that the State's contingency fee counsel owed a pledge to B & W Hospital. It appears that the Attorney General was making this gift to the Boston entity to satisfy his lawyers' outstanding monetary obligations, since counsel would not be receiving any fees from the DuPont settlement.

> Q. As we sit here today, sir, isn't it your understanding that the $2.5 million in charitable contributions earmarked for the Brigham and Women's Hospital is in partial or full satisfaction of an amount owed by the Motley Rice law firm to the Brigham and Women's Hospital?
>
> MS. ALLAIRE-JOHNSON: Objection.
>
> A. It is my understanding that there may be a situation regarding the law firm and that institution. As to how much, I have not an idea ...
>
> Q. Tell me your understanding as to what that situation may be.
>
> A. My understanding is that Motley Rice and Dana-Farber, there may be monies owed. As to why and how, I have no idea. And that's all I know on that."

1/6/06 Lopes Dep. at 125-26 (Ex. 5).[7]

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[7] The funds were diverted to satisfy an obligation of the State's outside counsel at a time when the Attorney General and its counsel knew that the Rhode Island Supreme Court had not yet passed on the legality of the contingent fee agreement.

B. ***The Attorney General Has No Authority to Appropriate Money to Personal Causes.***

The role of the attorney general in state government is of great import, as the attorney general is the visible legal arm of a state, serving as the legal representative of a sovereign state. The attorney general renders legal advice to state agencies, exercises the police powers of a state and, as has been done in this case, embodies the *parens patriae* authority of a state, which grants the attorney general the ability to bring actions on behalf of the citizenry. In *Berger v. U.S.*, the U.S. Supreme Court described the role of a government attorney:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. *But, while he may strike hard blows, he is not at liberty to strike foul ones.*

295 U.S. 78, 88 (1935) (emphasis added).

The same can be said for an attorney general's role in a civil case brought on behalf of a state. In achieving the functions of his office, the Rhode Island Attorney General's roles and responsibilities are outlined by statute. R.I. Gen. Laws § 42-9-1, *et al.* Among those duties, the Attorney General is tasked with serving the public interest and, as a public official, he must not use his office for private gain. *See* R.I. Gen. Laws § 36-14-1. Pursuant to this statue, even the mere appearance of impropriety is improper and not permitted.

The Rhode Island Attorney General does not have the power to set up *ad hoc* committees and appropriate settlement monies. That is the exclusive province of the legislature, and the Attorney General has wrongfully circumvented this constitutional division of labor by cutting the legislature out of the appropriation process. Section 35-4-2 of the General Laws of Rhode Island

provides that "All revenue of the state of whatever character shall be paid into the hands of the general treasurer and credited to the general funds of the state, except in such cases as the general assembly may by law specifically allocate to a special fund." R. I. Gen Laws § 35-4-2 (emphasis added). First, all monies must go to the Rhode Island treasury. The Attorney General has no power to direct monies rightfully belonging to the State elsewhere. *Id.* These monies are consideration to obtain settlement of the State's claim—they belong to the State. Secondly, to the extent that monies will be sent to other programs or to new committees or causes, it is up to the General Assembly to allocate those monies, not the Attorney General. *Id.* The State Treasurer has the responsibility for actually allocating funds, as directed by law through the appropriation process. R.I. Gen Laws § 35-4-4 ("All moneys due to the state shall be paid to the general treasurer, who shall be responsible for the safekeeping and proper disbursement thereof according to law.").

Indeed, in two instances where the Attorney General's *parens patriae* authority has been set forth by statute, both instances indicate that settlement monies cannot be distributed based on the Attorney General's own whims. Section 6-36-12 of the Rhode Island General Laws addresses the Attorney General's *parens patriae* authority relating to antitrust violations. In particular, the statute provides:

> The amount of the plaintiff's attorney's fees, if any, shall be determined by the court, and any attorney's fees awarded to the attorney general shall be deposited with the state as general revenues; ... Monetary relief recovered in an action under this section shall: (1) be distributed in any manner that the court in its discretion may authorize; or (2) be deemed a civil penalty by the court and deposited with the state as general revenues; ...

Id. at § (e)(1), (f). Similarly, in the context of environmental injury compensation, Section 46-12.3-5 provides that when the Attorney General is awarded attorney's fees when a suit is filed as *parens patriae* on behalf of the State, those fees shall be deposited with the State as general

revenue. R.I. Gen Laws § 46-12.3-5(e)(1). The statue further provides that "Monetary relief recovered in an action under this section shall: (i) Be distributed in such manner as the court in its discretion may authorize; or (ii) Be deemed a civil penalty by the court and deposited with the state as general revenues; ..." *Id.* at (e)(2). Either way, the decision as to allocation of State money does not rest with the Attorney General. Obviously, the intent behind a *parens patriae* suit is to recover monies for use by the State. The only way for that money to be properly used is through appropriations designated by the legislature or in a manner approved by the Court.

Here, the Motley Rice firm's previous pledge to B & W Hospital was a factor in the Attorney General's decision to select an out-of-state institution to receive settlement funds obtained for claims prosecuted under the State's *parens patriae* powers – claims to remedy a public nuisance in Rhode Island. 01/06/06 Lynch Dep. at 96, 134 (Ex. 4). Although the Attorney General claimed publicly the monies were "go[ing] straight to clean up the mess," they instead have been paid to resolve the State's attorneys' private pledge. Jun. 30, 2005 Press Release (Ex. 2). And this was done prior to any determination that the contingent fee deal is legal. The funds should be turned over to the State Treasurer.

C. *The Attorney General Further Sent Money to His Alma Mater, Brown University.*

The Attorney General similarly allocated settlement monies to his *alma mater*, Brown University, without any known or stated authorization. The Attorney General's Chief of Staff testified that the donation to Brown was the Attorney General's idea:

> Q. And I take it he was asking or recommending that DuPont fund some sort of medical initiative or institute at a college or university?
>
> A. ***I believe at this point in time it was Patrick thinking aloud to them, saying that's something that he'd be possibly interested in doing.***

01/06/06 Lopes Dep. at 108 (emphasis added) (Ex. 5).

An Attorney General, as a public official must wield the State's power without any consideration of private gain. "It is elementary in constitutional law that the public money may be expended for or devoted to a public use but not to a private purpose." *Opinion to the Governor*, 76 R.I. 249, 255 (1949).

It is audacious for an Attorney General to sue in the name of the State and then divert the funds recovered away from the State treasury to a private entity he happens to like. The Attorney General announced in his press release that money was going to Brown Medical School "to study childhood lead poisoning." Jun. 30, 2005 Press Release (Ex. 2). There was no authorization for him to bypass the Legislature in deciding how Rhode Island's funds should be distributed. Indeed, the Attorney General stated at that time, "I'm hopeful that our next generation of doctors will be able to see the difference we all made by seizing this opportunity and cleaning up our community." *Id.* What the Attorney General failed to mention was that he had no authority to engage in such a diversion and, in the end, the State did not control how this money would be spent or whom it will ultimately benefit. Again, this appropriation did not abate any lead nuisance in the homes of Rhode Island, which was the cornerstone of the State's *parens patriae* claim. Instead, the Attorney General himself decided how to allocate these funds to suit his personal interests.

D. *The Attorney General Should Turn Over All Settlement Monies to the State Treasury.*

Where an attorney general exceeds his authority, a court can strike down such *ultra vires* actions. *Council for Owner Occupied Housing, Inc. v. Abrams*, 135 A.D.2d 13 (N.Y. App. Div.), *aff'd* 72 N.Y.2d 553 (N.Y. 1988) (striking regulation issued by Attorney General governing conversion of real property into cooperative properties). In this case, the court held:

> Finally, we find nothing in any of the legislative history of these statutes which suggests an intention to provide defendant [attorney

> general] with such unfettered authority in this area. It is well settled that an executive official may not usurp the power of the Legislature by adopting remedial measures that go beyond his grant of authority.

Id. at 15 (citations omitted). The Rhode Island Attorney General has no statutory authority to, in essence, accept monies and immediately direct them out of state as consideration in exchange for a dismissal with prejudice. The Attorney General, however, assumed such authority. In fact, it was at the request of the Attorney General that one of the beneficiaries identified by DuPont was changed. Thus, the settlement money was in the control of the Attorney General. He directed it to specific beneficiaries. Simply put, the Attorney General's actions in allocating money received in exchange for compromising a State claim exceeds the authority vested in his office.

The people of Rhode Island are entitled to the full benefit of the DuPont settlement, as this case was brought on their behalf under the State's *parens patriae* power. Thus, monies that have been improperly allocated out-of-state should be returned to the Rhode Island general treasury, along with any monies received as consideration in exchange for DuPont's dismissal. The Attorney General was never given discretion to put settlement proceeds to use to suit private interests. No legislative enactments have been introduced in connection with this litigation that would afford such power to the Attorney General. *Compare Broselow v. Fisher*, 319 F.3d 605, 610 (3d Cir. 2003) (where state recovered settlement from tobacco companies under *parens patriae* power the States had been explicitly granted the authority to use the funds for any purpose the States deemed appropriate). All of these monies rightfully should go to the State for use in abating the alleged public nuisance, as it is in the State's name that this action was brought. In addition to ordering these funds to be turned over, Sherwin-Williams and other defendants are entitled to include the value of such funds in calculating the offset for any individual contributions that might eventually be ordered. If it is alternatively determined that the

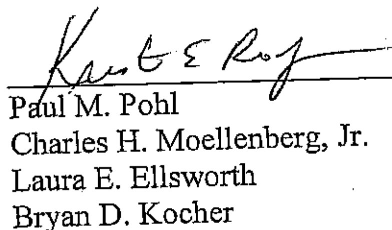
respective parties must contribute subject to equitable apportionment, then DuPont's role and its settlement must be considered in an appropriate proceeding on that point.

All monies, including those sent out of State, should be for the benefit of Rhode Island. They were proffered by DuPont as consideration for obtaining a dismissal of a claim that belongs to the state of Rhode Island. The Attorney General does not have the power to appropriate ***any*** settlement money because the money rightfully belongs to the State in settlement of State claims. The two earmarked payments to B & W Hospital and Brown should be rescinded. They should also be included in the valuation of the settlement proceeds, so that Sherwin-Williams and other defendants can receive a proper offset under Rhode Island law.

CONCLUSION

WHEREFORE, for all of the reasons asserted above, Sherwin-Williams moves for the Court to conduct appropriate proceedings to value the DuPont settlement and apply it as an offset to any remedy that the Court may order. The Court must also value the agreement by DuPont to abate 600 properties before it can accurately determine the scope of the public nuisance and the role, if any, that the remaining defendants should play in any proposed remedial plan. Finally, Sherwin-Williams moves that the money allotted to the two private interests be paid into the state treasury.

Respectfully submitted,



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