

**STATE OF RHODE ISLAND
SUPREME COURT**

No. 07-121-A

STATE OF RHODE ISLAND, BY AND THROUGH
PATRICK LYNCH, ATTORNEY GENERAL

VS.

LEAD INDUSTRIES ASSOCIATION, INC., ET AL.

On Appeal From Judgment Entered in the
Providence Superior Court
C.A. No. 99-5526

**BRIEF OF MILLENNIUM HOLDINGS, LLC
ON CAUSATION**

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INTRODUCTION

This brief addresses the issue of causation. If the Court agrees with the arguments set forth in the Brief of NL Industries (NL) on public nuisance, then it need read no further, and should simply reverse and enter judgment for Defendants. If, instead, the Court concludes that Plaintiff's radical theory of a cumulative public nuisance is recognized under the common law of Rhode Island, then it must decide whether Plaintiff's equally radical theory of causation, adopted by the trial court, is viable. Broader than enterprise theory, conspiracy theory or the market share theory that this Court has already rejected, Plaintiff's theory of causation is in essence an "industry" theory. Reduced to its core, the theory espoused by Plaintiff and adopted by the trial court holds that if a plaintiff proves that a company manufactured, promoted or sold lead pigments anywhere in this nation for a brief period of Rhode Island's history, and if some of its pigments might have made it to Rhode Island long ago, then that company, or its successor, can be held responsible for all lead pigments in paints and coatings in or on buildings in Rhode Island.

No judgment from a court of law can stand upon such a theory, or upon such evidence. If the aggregate presence of a type of product in the State is to be recognized as a new basis for liability, then certainly no company should be charged with responsibility beyond the extent to which that company's product is identified as being present and as causing the specific harm for which that company is held liable. Yet, here each Defendant has been held liable to abate – in some undetermined fashion – lead pigments in Rhode Island that it never made or sold, and without any evidence as to whether that Defendant's product is currently in the state and, if so, to what extent.

To provide immediate context for the arguments that follow, this Brief begins with a statement of the case, summarizing both the facts relevant to causation that are set forth in greater detail at pages _ to _ of the Joint Procedural and Factual Background Brief, and the instructions on causation that are discussed in greater detail in the last section of this Brief. Additional facts relevant to causation are also detailed in the body of this Brief in the course of reviewing the specific insufficiencies of Plaintiff’s evidence and the errors in the jury instructions on causation.

This Brief then proceeds directly to the arguments. First, as a matter of law, the evidence is woefully insufficient to support a finding of causation. Second, and in the alternative, even if the verdict were otherwise supportable, it would still need to be set aside due to the fact that the instructions did not properly guide the jury in assessing the evidence on causation, such as it was.

SUMMARY STATEMENT OF THE CASE ON CAUSATION

The public nuisance condition alleged by Plaintiff consisted of “the cumulative presence of lead pigment in paints and coatings in or on buildings throughout the State of Rhode Island.” (A. 319, Transcript of Trial (“Tr.”) 120/135 at 8124, lines (“1.”) 13-15.) Each Defendant – Millennium, NL and Sherwin-Williams – was sued in its capacity “either as the manufacturer of [the] lead pigment” in those paints or coatings “or as the successors in interest to such manufacturers.” (A. 310, Tr. 120/135 at 8115, 1.8-10.) The judgment entered below holds each Defendant responsible for having caused that public nuisance.

At trial, Plaintiff’s witnesses acknowledged that lead pigments had been used in paints since the 1600s or 1700s and were being manufactured and sold before 1820, (A. 2639-40, Tr. 68/135 at 640, 1.25 to 641, 1.1; A. 4279-4280, Tr. 102/135 at 5591, 1.22 to 5592, 1.4.), long before any of the Defendants began manufacturing lead pigment (A. 2893-95, Tr. 74/135 at 1655, 1.8 to

1657, 1.7),¹ and for as long as Rhode Island has been in existence, first as a colony and then as a state. Based on U.S. Census data, Plaintiff estimated 230,000 to 250,000 now-existing homes were built sometime before 1978, and “could have lead-based paint in them.” (A. 2848, Tr. 72/135 at 1372, 1.15-18, A. 2643, 68/135 at 645, 1.16-17; *see also* A. 3346, 82/135 at 2838, 1.16 to 2839, 1.4.) No evidence or analysis was presented showing how old the homes were, when they were built, or when – if ever – paint with lead pigment was applied to those homes.

Notwithstanding the several centuries during which homes were built in Rhode Island and lead pigments were manufactured and used in paints, Plaintiff offered a mere snapshot of the Defendants’ collective sales in the entire United States, with respect to one of many types of lead pigments, covering the brief period between the 1930s and 1940s. (A. 4007, Tr. 100/135 at 5322, 1.24 to 5324, 1.3.) Acknowledging that an undisclosed number of other companies also manufactured lead pigment, Plaintiff’s historian, Professor Rosner, testified that Millennium, NL and Sherwin-Williams – as well as Atlantic Richfield (ARCO), the fourth defendant at trial, collectively made somewhere between 50 and 75 percent of dry white lead sales nationwide during that roughly 10-year period, and between 70 and 80 percent of the nationwide sales for lead-in-oil. (A. 4008, Tr. 100/135 at 5323, 1.7-13.) Professor Rosner admitted he had no knowledge of either the collective or individual Rhode Island market share, if any, for any or all four defendants, or for any of the other companies manufacturing lead pigments for use in paint, at any time. The evidence was also undisputed that these particular Defendants neither made nor sold lead pigments for most of the relevant time period. (*See generally infra* at _____.)

¹ For example, Millennium’s predecessors produced lead pigment from sometime after 1919 to 1958 (A. 2893, Tr. 74/135 at 1655, 1.20-25), 39 years of the 300+ years of use, ceasing production 20 years before the 1978 ban on lead paint.

While Professor Rosner nevertheless offered the bare conclusion that each Defendant “sold and promoted” their lead products in Rhode Island (*e.g.*, A. 4168, Tr. 101/135 at 5482, 1.3-25), he admitted that he was unaware of any actual sales or impact from promotions (*see infra*, at ____). Professor Rosner had no information concerning any Defendant’s alleged sales of lead pigment in Rhode Island (collectively or individually). For example, he did not know of any statistics, sales or production data showing the quantity or dollar value of lead pigment sold in Rhode Island by ARCO’s predecessor, Anaconda, the quantity or dollar value of Sherwin-Williams products sold in Rhode Island, or any evidence of lead-containing products promoted or sold by Millennium’s predecessor, Glidden, in Rhode Island. (A. 4277-4279, Tr. 102/135 at 5589, 1.18 to 5591, 1.5; A. 4539-4540, Tr. 104/135 at 5847, 1.7 to 5848, 1.4; A. 4640, Tr. 104/135 at 5948, 1.2-7.) Nor did he have any data as to how much (if any) of each Defendant’s lead pigments allegedly remain in Rhode Island today, 30 years after the last of the Defendants stopped making them. (*See, e.g.*, A. 4633-4635, Tr. 104/135 at 5941, 1.3 to 5943, 1.3.)

Instead of proffering sales or production data with respect to each of the Defendants individually, or even collectively, or any evidence that any of the Defendants’ lead pigments remain in Rhode Island today, Plaintiff was permitted to place before the jury significant evidence of the conduct of the Lead Industries Association (LIA) – an organization whose acts the trial justice eventually ruled could not be attributed to the Defendants because it was not their agent as a matter of law. (*See generally infra* at ____; A. 3489-90, Tr. 89/135 at 3795, 1.4-9, 3796, 1.9-11; A. 3953-55, Tr. 97/135 at 5127, 1.6 to 5129, 1.9.) This LIA conduct included two limited national promotion campaigns – the Forest Products Better Paint Campaign from 1934 to 1941, and the White Lead Promotion Campaign from 1939 to 1942 that was briefly resumed between 1950 and 1952. (*See generally infra*, §I.B.3.b, A. 4134-4136, Tr. 101/135 at 5448, 1.10

to 5450, 1.1; A. 4146, Tr. 101/135 at 5460, 1.9-18; A. 4187, Tr. 101/135 at 5501, 1.1-7.) Plaintiff's witnesses admitted that they had no evidence that any LIA activities, including the promotional campaigns, had any impact or influence on sales, or any impact whatsoever in Rhode Island. (*See generally infra*, §I.B.3.b., A. 3620-22, Tr. 90/135 at 4007, 1.20 to 4009, 1.3; A. 3687, Tr. 90/135 at 4133, 1.3-6; A. 4304, 4311, 4315, Tr. 102/135 at 5618, 1.13-18, 5623, 1.5-18, 5627, 1.4-7.)

Plaintiff also established that Glidden and Sherwin-Williams had stores at various times in Rhode Island. (*See infra*, Argument, §I.B.3.c.) Even as to these two Defendants, however, there was no evidence that their stores sold lead paint. (*Id.*) Indeed, as to Glidden, there was no evidence that it had a store in Rhode Island of any type, selling anything at all, during the limited number of years during which Glidden included lead pigments within its product offerings.²

The remainder of the causation evidence consisted of isolated advertisements by each of the individual Defendants, and in one case a sales agreement with a Massachusetts company. (*See infra*, Argument, §I.B.3.c.) As with the national LIA campaigns, however, there was no evidence concerning what effect, if any, those few advertisements or agreement had on the actual sale or introduction of a particular Defendant's lead pigments into Rhode Island. (*Id.*)

Perhaps most important, Plaintiff presented no evidence that any of the Defendants' lead pigments were present in or on any building in Rhode Island today, and, further, asserted such a showing was irrelevant to any of the individual Defendant's liability for lead pigments that are

² Professor Rosner, the source of Plaintiff's evidence that Glidden had stores in Rhode Island, did not know whether it had any such store prior to 1958, when Glidden ceased all production of lead pigment. (A. 4817, Tr. 105/135 at 6125, 1.11-22.) The evidence as to Sherwin-Williams showed that it began opening stores in Rhode Island in 1939 – two years after its “White Pigment Catechism” noted the “practical elimination” of white leads in interior paints. (A. 4637, Tr. 104/135 at 5945, 1.14-15; A. 4711, Tr. 105/135 at 6019, 1.6-11, A. 4713-4716, Tr. 105/135 at 6021, 1.23 to 6024, 1.8.) There was no evidence of any NL store in Rhode Island at any time.

present in the state today. (A. 2719-20, Tr. 69/135 at 873, 1.18 to 874, 1.3; A. 2720-21, Tr. 69/135 at 874, 1.24 to 875, 1.5.) In short, Plaintiff's argument is that each of these Defendants is liable to clean up the lead pigments made or sold by lots of other companies no matter how much, if any, lead pigment in the state originated with any Defendant.

After the close of evidence, the trial court reserved ruling on Defendants' motions for judgment as a matter of law. (App. 5044, Tr. 113/135 at 7223, 1.9-13.) The Defendants requested that the trial justice instruct the jury that Plaintiff:

... has the burden to prove for each defendant that the defendant's conduct was both an actual cause and a proximate or legal cause of the public nuisance and the harms that the State contends flow from that public nuisance.

(A. 5560-61, Defendants' Proposed Jury Instructions (Revised), No. 22.) The Defendants' proposed instruction also specified that, to establish the liability of a particular Defendant, Plaintiff had to show that the Defendant's pigment is present in Rhode Island:

To prove an actual causal connection, the State must prove that a defendant's conduct has actually caused its lead pigments to be present in paint in and on buildings in Rhode Island that are part of the alleged public nuisance.

(*Id.*)

True to its theory, Plaintiff objected to this instruction on actual causation, or, indeed, any instruction that "suggests, implies, [or] states to the jury that proof of presence of a product in the State of Rhode Island is something that the State has to prove in order to succeed on its public nuisance claim." (A. 5047-48, Tr. 113/135 at 7228, 1.22 to 7229, 1.1.) Plaintiff asserted the trial justice should instruct the jury that: "[y]ou don't have to find that lead pigment manufactured by a particular defendant is present in particular products in Rhode Island to conclude that they're liable for creating, maintaining, or contributing to the creation or maintenance of the public nuisance. * * * Nor do you have to find that each defendant sold lead pigment in Rhode

Island[.]” (A. 5049, Tr. 113/135 at 7233, 1.2-13.) According to Plaintiff, the causation elements for proving liability for public nuisance were different from the principles of causation generally, arguing:

[T]hose instructions on liability are extremely necessary for understanding what you have to find in a public nuisance case as opposed to the general concepts of proximate cause that will govern a multitude of cases alone, ...we need to have something that anchors it specifically to the law of public nuisance liability.

(A. 5050, Tr. 113/135 at 7234, 1.10-15.) Plaintiff maintained that it need not prove “an ounce” or “a single drop” of a Defendant’s lead pigment was, or is, in Rhode Island to hold that Defendant liable for the cumulative presence of lead pigments here. (A. 5053, Tr. 113/135 at 7254, 1.9, A. 5054, Tr. 113/135 at 7255, 1.5-6.)

The trial justice upheld Plaintiff’s objection. Refusing to give the Defendants’ requested instructions that would have told the jury what it needed to find in the context of this novel claim, the trial court instead instructed the jury:

You need not find that lead pigment manufactured by the Defendants, or any of them, is present in particular properties in Rhode Island to conclude that Defendants, or one or more of them, are liable for creating, maintaining, or substantially contributing to the creation or maintenance of a public nuisance in this case nor do you have to find that the Defendants, or any of them, sold lead pigment in Rhode Island to conclude that the conduct of such Defendants, or any of them, is a proximate cause of a public nuisance.

(A. 324-325, Tr. 120/135 at 8129, 1.21 to 8130, 1.5.)

ISSUES PRESENTED

Sufficiency of the evidence

1. Does the record contain sufficient evidence for a reasonable jury to conclude that Millennium Holdings, LLC actually and proximately caused the alleged nuisance of the cumulative presence of lead pigments in paints and coating in and on buildings throughout Rhode Island?

2. Does the record contain sufficient evidence for a reasonable jury to conclude that NL Industries actually and proximately caused the alleged nuisance of the cumulative presence of lead pigments in paints and coating in and on buildings throughout Rhode Island?
3. Does the record contain sufficient evidence for a reasonable jury to conclude that Sherwin-Williams Co. actually and proximately caused the alleged nuisance of the cumulative presence of lead pigments in paints and coating in and on buildings throughout Rhode Island?

Jury instructions

1. Did the jury instructions on causation, viewed as a whole, adequately cover the law and not mislead the jury to the resultant prejudice of Defendants?

Millennium respectfully submits that the answer to each of these questions is “No.”

ARGUMENT

I. EACH DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER RULE 50.

A. No Defendant Can Be Held Liable In Tort Absent Proof That It Was Both The Cause-In-Fact And The Proximate Cause Of The Alleged Harm

1. Each Defendant’s Conduct Must Actually Cause the Plaintiff’s Injury.

Few principles are more basic in our system of justice than the rule that, absent grounds for vicarious liability, a person cannot be held liable unless he caused the alleged injury. *See, e.g., Clift v. Vose Hardware, Inc.*, 848 A.2d 1130, 1132 (R.I. 2004) (holding that proof of causation is a fundamental requirement of tort law). This Court has adhered consistently to the “equitable, established principles of causation ... that have guided tort law for centuries.” *Contois v. Town of West Warwick*, 865 A.2d 1019, 1024 (R.I. 2004) (quoting *Mead v. Adrian*,

670 N.W.2d 174, 185 (Iowa 2003) (Cody, J. concurring)). To establish cause-in-fact, the plaintiff must prove that the defendant did something or neglected to do something that actually caused the plaintiff's alleged harm. *See, e.g., Burr v. Fall River News Co.*, 75 R.I. 476, 481, 67 A.2d 694, 696 (1949).

This Court adheres to these traditional causation principles when recognizing modern theories of liability. *See, e.g., Salk v. Alpine*, 115 R.I. 309, 314, 342 A.2d 622, 626 (R.I. 1975) (“[T]he doctrine of strict liability in tort, while eliminating proof of negligence as a requirement for recovery, does not obviate the need to show a causal connection between the defendant and the injury.”). This Court has also rejected novel theories that would relax or compromise these principles. *See, e.g., Contois*, 865 A.2d at 1023 (declining to adopt loss-of-chance doctrine presenting “a more liberal and expansive view of causation” in contrast to traditional theories of tort liability). And this Court has also insisted that the element of causation cannot be established by “possibility” or conjecture. *See Clift*, 848 A.2d at 1132 (plaintiff ““must establish that it is reasonably probable, not merely possible, that the defendant was the source of the offending product. Mere speculation, guess or conjecture is insufficient to establish identification.””) (quoting 1 Louis R. Frumer & Melvin I. Friedman, *Products Liability*, § 3.04[1] at 3-50 to 3-50.1 (2002)).

This Court's decision in *Gorman v. Abbott Laboratories*, 599 A.2d 1364 (R.I. 1991), aptly demonstrates that the mere possibility that a company might have caused the harm is not sufficient to establish causation. There, the plaintiff advanced a market share liability theory accepted in *Sindell v. Abbot Laboratories, Inc.*, 26 Cal.3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980). That theory eliminates the need to prove that it was a specific defendant's product that harmed the plaintiff, thus eliminating the need to prove cause-in-fact for the specific defendant.

This Court expressly rejected that theory, holding that “the establishment of liability requires the identification of the specific defendant.” *Gorman*, 599 A.2d at 1364. In so ruling, this Court joined what is now the substantial majority of American jurisdictions. See “*Concert of Activity*,” “*Alternate Liability*,” “*Enterprise Liability*,” or *Similar Theory For Imposing Liability Upon One or More as Basis For Manufacturers of Defective Uniform Product, In Absence of Identification of Manufacturer of Precise Unit or Batch Causing Injury*, 63 A.L.R.5th 195, § 4 (1998) (market share theory adopted by only minority of jurisdictions). Those jurisdictions in the majority, like this one, reject market share liability and, instead, recognize that identification of the party causing the injury is a “long standing prerequisite” that “separates wrongdoers from innocent actors, and also ensures that wrongdoers are held liable only for the harm they have caused.” *Payton v. Abbott Labs.*, 386 Mass. 546, 571, 437 N.E.2d 171, 188 (1982).

2. Each Defendant’s Conduct Must Also Proximately Cause the Plaintiff’s Injury.

Proving cause-in-fact alone is necessary, but insufficient. The plaintiff must also prove that the defendant’s conduct was the legal, or proximate, cause of the alleged harm. See *Hall v. Eklof Marine Corp.*, 339 F.Supp.2d 369, 376-77, 380 (D.R.I. 2004) (“In order to establish causation, a plaintiff must show that the defendant’s breach of duty was the actual and legal cause of the plaintiff’s harm.”); *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1191 (R.I. 1994) (noting “the elements of both actual and proximate causation necessary to impose liability”); see also W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on The Law of Torts* (hereinafter “*Prosser*”), § 41 at 263, 264 (5th ed. 1984) (using terms “proximate cause” and “legal cause” interchangeably, and describing proximate cause as “merely the limitation which the courts have placed on the actor’s responsibility for the consequences of the actor’s conduct.”) As this Court has noted, a “causal relationship” standard, which is established if the defendant

“merely contribute[s] to the injury,” “is less exacting than what is required for proximate cause.”
Tavares v. Aramark Corp. 841 A.2d 1124, 1128 (R.I. 2004).

When multiple factors or parties contribute to an injury, so determining one is impossible, the concept of substantiality is used to identify which contributions rise to the level of legal, or proximate, cause. The drafters of the Second Restatement of the Law on Torts, for example, use the word “substantial” to differentiate the many factors that combine to cause a harm, and are thus all causes-in-fact, from those events that have a close enough relationship to be deemed a proximate, or legal cause. An actor’s negligent conduct is “a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm ...”. American Law Institute, Restatement (Second) of Torts (hereinafter “*Second Restatement*”) § 431 at 428 (1965).

Comment a to Section 431 explains:

In order to be a legal cause of another’s harm, it is not enough that the harm would not have occurred had the actor not been negligent.... This is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff’s harm. The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using a word in the popular sense,... rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Id., cmt a at 429 (emphasis supplied).

Thus, a cause-in-fact is not a substantial factor in causing the harm, *i.e.*, a proximate cause, if it makes too insignificant a contribution, or is too remote. On the former point, a defendant’s action is not a substantial factor when the defendant “has made a clearly proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.” *Prosser*, § 41 at 267-268. On the latter, “[l]iability cannot be predicated on a prior and

remote cause which merely furnishes the condition or occasion for an injury resulting from an intervening unrelated and efficient cause, even though the injury would not have resulted but for such condition or occasion.” *Clements v. Tashjoin*, 92 R.I. 308, 314, 168 A.2d 472, 475 (1961).

3. Nuisance Law Provides No Exception from These Basic Causation Principles.

There is no exception to these causation requirements for nuisance claims. This Court’s decisions make that clear. See *Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53 (R.I. 1980) (holding that defendant was not liable for noxious odors because there was “virtually no evidence establishing that such odors were caused by any actions on the part of defendant”); *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982) (holding that defendant was liable because laboratory analysis and expert testimony established defendant’s dump site as the only possible source of pollutants); *Gagnon v. Landry*, 103 R.I. 45, 51, 234 A.2d 674, 677-78 (1967) (affirming defense verdict because plaintiffs presented no evidence that defendant was a source of pollution on plaintiffs’ land).

Below, Plaintiff pointed to Section 834 of the *Second Restatement*, contained in Chapter 40 on Nuisance. This Section provides that one is subject to liability for a nuisance “caused by an activity” when he “participates to a substantial extent in carrying it on.” This “substantiality” requirement of Section 834 is a parallel to the “substantial factor” requirement of Section 431 for proximate cause, as comment d to Section 834 itself notes.³ To be held liable for causing a nuisance, as with other torts, the defendant’s conduct need be both a cause-in-fact and substantial. Any suggestion that Section 834 somehow reduces the requirement to prove cause-

³ Comment d to Section 834, entitled “Substantial participation” provides, *inter alia*, that participation must be substantial before an actor can be held liable “because to be a legal cause of harm a person’s conduct must be a substantial factor in bringing it about,” cross-referencing Section 431. *Second Restatement*, § 834, cmt d at 150 (emphasis supplied).

in-fact is rejected both by the comments to Section 834,⁴ and, recently, by the Missouri Supreme Court:

To the extent the city's argument is that the Restatement requires something less than proof of actual causation or should replace actual causation in a public nuisance case, it is incorrect. The comments accompanying section 834 reveal that “substantial participation” refers to legal cause and is not meant to replace the requirements of actual causation. When a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it. This is true because to be a legal cause of harm a person’s conduct must be a substantial factor in bringing it about.

City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 114 (Mo. 2007) (emphasis supplied).

The Missouri Court noted further that, when a product is alleged to have caused the nuisance, the causation requirement includes product identification, *i.e.*, who made or sold the product:

The city’s argument also seems to be that actual causation can be proven by showing that the defendant substantially contributed to the public health hazard created by lead paint via evidence of “community wide marketing and sales of lead paint.” The defendants correctly contend that here, as in [the Missouri Supreme Court decision rejecting market share liability], where a plaintiff claims injury from a product, actual causation can be established only by identifying the defendant who made or sold that product.

Id. (emphasis supplied).

The Missouri Supreme Court hardly stands alone. An Illinois appellate court similarly ruled:

[T]here is no reported Illinois public nuisance case involving a viable lawsuit brought by any municipality in which identification and causation, including the specific location of the nuisance, were not known. In each case cited by plaintiff, the plaintiffs identified a specific defendant whose conduct allegedly caused the

⁴ Comment a, for example, defines “activity” as acts “that are a cause of harm to another’s interest in the use and enjoyment of land.” *Second Restatement*, § 834, cmt b at 149 (emphasis supplied).

claimed nuisance. *See, e.g., People v. Brockman*, 192 Ill.App.3d 680, ... 550 N.E.2d 222 (1989), *aff'd in part & rev'd in part on other grounds*, 143 Ill.2d 351, ... 574 N.E.2d 626 (1991) (in which the State of Illinois commenced an action for public nuisance against landfill operators, seeking removal of toxic wastes at an identified site). Here, however, plaintiff has not identified any specific manufacturer's product at any specific location. Plaintiff is attempting to do what the *Smith*⁵ decision forbids: making each manufacturer the insurer for all harm attributable to the entire universe of all lead pigments produced over a century by many.

City of Chicago v. Am. Cyanamid Co., 355 Ill.App.3d 209, 220, 823 N.E.2d 126, 136-37 (2005).

B. Plaintiff Failed To Prove That Each Defendant Actually And Proximately Caused The Alleged Harm.

Given these basic principles of the law on causation, which this Court has always respected, the first issue posed is whether the evidence submitted to the jury was sufficient to support a finding that each Defendant caused the harm for which each has been held liable. For two reasons, this Court should hold that the evidence is not sufficient to provide a reasonable basis for such a finding. First, as explained in sections B.1 to B.3 below, Plaintiff admittedly failed to present any evidence that would allow the fact-finder to hold each Defendant liable for only the harm caused by its own product, and certainly failed to offer any evidence from which a reasonable fact-finder could determine whether and to what extent each Defendant's product is even in Rhode Island. These failures are each fatal to establishing that each Defendant's conduct was either a cause-in-fact or a substantial, proximate cause of the harm. Second, as explained in section B.4, even if this Court were to allow proof of cause on such a limited showing, the attenuated and remote relationship between the proven conduct and the actual harm would also preclude a finding that the conduct was a proximate cause of that harm.

⁵ *Smith v. Eli Lilly & Co.*, 137 Ill.2d 222, 560 N.E.2d. 324 (1990) (rejecting market share theory in diethyl-stilbestrol (DES) context).

1. The Judgment Cannot Stand In the Absence of Legally Sufficient Evidence to Allow a Reasonable Jury to Find that Each Defendant's Conduct Caused the Public Nuisance For Which That Defendant Is Held Liable.

Under Super. R. Civ. P. 50(a)(1)(a)(1), judgment as a matter of law is appropriate “[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” *See also Franco v. Latina*, 916 A.2d 1251, 1258-59 (R.I. 2007) (affirming judgment as a matter of law; “[o]ur review of a decision on a motion for judgment as a matter of law is *de novo*. Accordingly, we employ the same standards as the trial justice in reviewing the evidence. The trial justice will grant the motion if, after viewing the evidence in the light most favorable to the nonmoving party, she determines that the nonmoving party has not presented legally sufficient evidence to allow the trier of fact to arrive at a verdict in his favor.”) (citations omitted).

Here, there is no dispute that proof of causation is required and that, with the trial concluded, Plaintiff has been fully heard on the issue. The question remaining for this Court is whether the evidence submitted by Plaintiff provided a legally sufficient basis for a finding that each Defendant caused the harm for which it is being held liable – the cumulative presence of lead pigments in paint on buildings throughout the state.

2. Plaintiff's Failure to Prove Product Identification is Fatal.

Each Defendant or its predecessor was once a manufacturer and seller of lead pigments, and has been sued as such. No Defendant is accused of applying lead paint to any building, of owning any building in which there is lead paint, or of being responsible for the failure to maintain lead paint in a safe condition in any building in Rhode Island. Nor is any Defendant now properly charged with vicarious liability for harm caused by an agent or the like. Rather,

each Defendant or its predecessor stands accused of having made and sold a product – lead pigment – that is causing harm today, or will cause harm in the future, in the form of a nuisance.

As noted *supra* at 6 and in the Joint Procedural and Factual Background Brief, Plaintiff either could not or would not identify the party that made the specific product that is causing the particular harm. Because such identification is required, Plaintiff’s lack of evidence on this point requires judgment for each Defendant as a matter of law. Otherwise, there is no thread of causation-in-fact running from that party to the harm. Establishing that a Defendant made a similar type of product does not suffice. To the contrary, Plaintiff’s elimination of cause-in-fact product identification adopts a theory of collective liability that goes beyond even the market share theory rejected by this Court in *Gorman*.

a. Plaintiff’s Failure to Prove Product Identification Constituted Failure to Prove Cause-in-Fact.

If a house is unsafe today because it contains peeling lead paint with lead pigment made by Eagle Picher or one of any number of non-Defendants that made lead pigments over the years,⁶ no Defendant here is a cause-in-fact of that condition. Rather, as this Court held in *Gorman*, “the establishment of liability requires the identification of the specific defendant responsible for the injury.” *Gorman*, 599 A.2d at 1364. Or, as held by the Missouri Supreme Court in *City of St. Louis*, “where the plaintiff seeks to hold the defendants liable on the basis that their products caused harm to the plaintiff, the identification requirement must be satisfied.” 226 S.W.3d at 115.

⁶ See, e.g., A. 4270, Tr. 102/135 at 5582, 1.10-13 (identifying Eagle Picher as a lead pigment manufacturer). Plaintiff’s historian, Professor Rosner, testified that thirteen companies contributed to the LIA white lead promotion campaign in the 1940s. (Tr. 102/135 at 5612, 1.9-11.) Neither Glidden nor Sherwin-Williams was included in these thirteen. (A. 4146, Tr. 101/135 at 5460, 1.3-6; A. 4636-4637, Tr. 104/135 at 5844, 1.1 to 5845, 1.5.)

If this Court adheres to this simple and most basic of principles, then this case is over. Plaintiff here did not prove, and did not even attempt to prove, that the product of any individual Defendant is on any building in Rhode Island. Before trial, Plaintiff indicated it could not identify the source of lead pigment, and should not have to. (A. 2377, Tr. 43/135 at 52, 1.6-20.) At trial, one of Plaintiff's witnesses, Dr. Girard, was asked whether such evidence could be provided. Plaintiff's objection on relevancy grounds was sustained, notwithstanding an offer of proof based on Dr. Girard's deposition testimony that Dr. Girard "believes it's feasible for him to determine the source of pigment and that the State never asked him to do it, even though he thought it was feasible." (A. 2722-23, Tr. 69/135 at 876, 1.17 to 877, 1.1.) Consistently, Plaintiff offered no building records, store invoices, contractor testimony, or any other type of evidence showing, or even tending to show, who made the lead pigment at any location.

Rather, Plaintiff took the position – with which the trial court agreed – that it could aggregate in one case all of the possible locations where lead pigments in paint might be present, and thereby eliminate the need to establish that each individual Defendant's lead pigment is present and causing any particular harm at any particular location.⁷ The truly radical nature of this argument, as a matter of common sense and basic logic, cannot be overstated.

Imagine, for example, that the claim were made that lead pigments in paint on the walls of a specific house – say 1 Main Street – is a nuisance. Under *Gorman*, no plaintiff could establish that Manufacturer X caused that nuisance merely by showing that Manufacturer X had

⁷ Plaintiff's insistence on not identifying any Defendant's lead pigment at any location is thus two-fold. Not only did it successfully refuse to identify any Defendant's lead pigment, it also refused to identify any specific location in which any manufacturer's lead pigment could be found. The only evidence Plaintiff provided of a specific dwelling unit in which lead pigment could be found was evidence that one of the Plaintiff's witnesses owned a house with lead paint in it. Plaintiff offered no evidence that any Defendant's lead pigment was in that house. In a second property discussed, Plaintiff carefully and purposefully redacted any indication of its location. (A. 2670-72, Tr. 68/135 at 752, 1.3 to 754, 1.15, 758, 1.1-4.)

10 percent of the lead pigments being sold in Rhode Island at the time 1 Main Street was painted. Similarly, if the owner of 2 Main Street made the same claim with the same evidence in the same case, the result would be the same: proving a company was in the market and might have sold the lead pigments is simply not enough. And, as *Gorman* holds, even proving that a group of defendants as a whole accounted for virtually all sales in the market (which Plaintiff here never even attempted to prove) is not enough.

Yet Plaintiff's argument is that if 1 Main Street and 2 Main Street are lumped together with enough other properties, then causation can be established for all properties with the exact same evidence that would clearly be insufficient to prove causation for any one of the properties. At base, the notion seems to be that by collectivizing the nuisance, Plaintiff can collectivize causation and thereby eliminate any requirement to link any Defendant with the specific product located in any housing unit at all. If accepted, Plaintiff's argument would mean that a defendant putting a pollutant in the Pawtuxet River in Kent County might be required to clean up not only the Pettequamscutt River in Washington County, but all the other rivers in Rhode Island. In Plaintiff's world, Rhode Island in effect becomes a single imaginary river, such that anyone who pollutes (or even might have polluted) any part is deemed to pollute the whole. Indeed, Plaintiff actually suggested such a fiction below. (A. 2317-18, Tr. 35/135 at 55, 1.19 to 56, 1.15.)

In the real world, liability is still based on proof that a defendant's product caused – in fact and in law – an actual hazard, in a real, identifiable place, so that there is a real and substantial connection between that defendant and the harm. Thus, the Rhode Island abatement statute provides:

Action to abate nuisance – Contents – Whenever a nuisance is alleged to exist, the attorney general or any citizen of the state may bring an action in the name of the state ... to abate the nuisance and to perpetually enjoin the person or persons maintaining the nuisance and any or all persons owning any legal or equitable

interest in the place from further maintaining or permitting the nuisance The complaint ... shall ... set forth ... a description of the place complained of

R.I.G.L. 1956 §10-1-1 (emphasis supplied).⁸

No logic or law justifies excusing a plaintiff from proving the source and location of the alleged nuisance simply by expanding the number of premises where the plaintiff alleges that the nuisance exists. Courts in Missouri and Illinois have rejected this same attempt. *See City of St. Louis*, 226 S.W.3d at 116 (dismissing public nuisance claim against former lead paint and pigments manufacturers based on the presence of lead paint in the plaintiff City’s pre-1978 “housing” on causation grounds; the “widespread” nature of the alleged injury did not excuse the City from its normal burdens of proof of causation, where it sought costs relating to abatement of “numerous” but “certain” properties); *City of Chicago*, 355 Ill.App.3d at 220, 823 N.E.2d at 136-37 (“evidence of community wide” sales is insufficient).

These are not isolated decisions. *See Jackson v. Glidden Co.*, No. 87779, 2007 Ohio App. LEXIS 268, at *8-9, 2007 Ohio 277, ¶12 (Jan. 25, 2007), *rev. denied*, 2007 Ohio 2904, 114 Ohio. St. 3d 1426, 868 N.E.2d 680 (Table) (affirming summary judgment of product liability and nuisance claims against former lead pigments manufacturers by relying on *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187 (Ohio 1998), in which the Ohio Supreme Court rejected market share liability); *Spring Branch Indep. Sch. Dist. v. NL Indus., Inc.*, No. 01-02-01006-CV, 2004 Texas

⁸ At one point, the trial court appears to have recognized the difficulties of treating Plaintiff’s claim as a single fictional nuisance, as opposed to separate nuisances at each housing unit shown to contain a lead hazard:

“Court: You start with 250,000. Where do you end up? When does the public nuisance disappear?
Counsel: Your honor –
Court: Does it have to be all 250,000?”

(A. 5089, Tr. 116/135 at 7476, 1.13-17.)

App. LEXIS 5577, at *9, *12-13 (June 24, 2004) (petition history) (affirming summary judgment against school district that did not prove that former manufacturer's lead pigment was present on any district building). In short, product identification is necessary to show cause-in-fact.

b. Plaintiff's Theory is More Radical Than the Market Share Theory Rejected By this Court in *Gorman*.

To demonstrate the truly radical nature of Plaintiff's effort to circumvent the requirement that it prove product identification in this case, one need merely observe the ways in which Plaintiff's theory actually goes beyond the market share approach that this Court rejected in *Gorman*. According to Plaintiff, as the number of otherwise entirely discrete locations swells in its pleadings, the quantum and quality of evidence required to establish causation shrinks, until one finally reaches the point reached here, where a mere possibility that a Defendant's product is at some unidentified, unknown number of locations is enough. The law of no state anywhere has become so removed from fairness and common sense, in a no-fault and no-defect situation such as this one, turning cause-in-fact to cause-in-fiction.

To the contrary, Plaintiff's theory would not survive even under the less radical, albeit minority view market share theory already rejected by this Court in *Gorman* as a substitute for proving causation. See *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1253 (5th Cir. 1997) (even if Louisiana were to accept market share theory, rejecting theory in context of lead pigment claim where there was "no allegation of when the pigment was applied, or that defendants' market shares were constant over the whole period that lead pigment was used" and where "a 'major producer' [was] absent from the case"); *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 550-51 (1st Cir. 1993) (even if Massachusetts would adopt a market share theory, lead pigment manufacturers could not be sued under that theory due to paint layering, long span of time, and varied participation in market). A recent case in New York (which recognizes DES

market share liability) lists many of the reasons why imposing liability in a lead pigment case based on market share data makes no sense. *Brenner v. Am. Cyanamid*, 263 A.D.2d 165, 170-73, 699 N.Y.S.2d 848, *judgment aff'd*, 288 A.D.2d 869, 732 N.Y.S.2d 799, 852-53 (4th Dep't 2001).⁹ See also *Skipworth v. Lead Indus. Ass'n, Inc.*, 547 Pa. 224, 232, 234, 690 A.2d 169, 172-73 (1997) (refusing to recognize market share liability or any other alternative liability theories because, unlike the DES situation in which the market share theory was adopted, the time period in a lead paint case is far more lengthy than a DES case, and lead pigments manufactured over time have had different chemical formulations, different amounts of lead and different potential toxicity).

Only one court has applied a theory of liability that does not require a plaintiff to trace the specific location of the plaintiff's alleged injury to the lead pigment of the specific manufacturer. See *Thomas v. Mallet*, 285 Wis.2d 236, 701 N.W. 2d 523 (2005). *Thomas* involved a claim in which guardians sued various lead pigment manufacturers in strict liability and negligence based on a child's lead poisoning from lead pigment found in two residences where the child had lived. *Id.* at 246-47, 701 N.W.2d at 528. The Wisconsin Supreme Court denied summary judgment, holding that the plaintiff did not have to identify the specific manufacturer of the lead pigment found at each of these locations, based on an expansion of Wisconsin's "risk contribution" theory of collective liability. *Id.* at 245, 701 N.W.2d at 528. The original, unexpanded Wisconsin "risk contribution" theory – a version of market share

⁹ Some of the lead pigments found in interior paints may have been manufactured by non-defendants; plaintiffs did not identify the market share of defendants for interior residential paint, which is the harmful use; plaintiffs could not identify a narrow time period in which the paint was applied; lead paint, unlike DES, is not fungible, containing varying amounts of lead pigments; paint manufacturers decide which pigments to use and what quantities; owners and landlords control the hazards of paint when it flakes and peels and becomes ingested and inhaled; and the injuries could have resulted from something other than lead or some source other than lead-based paint.

which that Court applied in DES cases – has been rejected in numerous other jurisdictions. *Id.* at 346, 701 N.W.2d at 577 n. 10 (Wilcox, dissenting) (listing decisions). The Wisconsin majority’s expansion of its risk contribution collective liability theory to the lead pigment context is unique. *See id.* at 381, 701 N.W.2d at 594 (“These shortcomings are the reason that no other court has ever adopted any form of market share liability in lead paint cases.”) (also listing and discussing cases). And it falls short of what Plaintiff demanded and got here.

The *Thomas* decision, singular in itself, does not involve a massive “cumulative presence” claim like the one presented here. The *Thomas* plaintiff (unlike Plaintiff here) identified the specific locations where the lead pigment causing the alleged harm to the specific individual plaintiff actually existed. And even then, the plaintiff (unlike Plaintiff here) was required to show the breach of a duty, *i.e.*, fault, or a defect. *Id.* at 320-21; 701 N.W.2d at 564; *see* Joint Procedural and Factual Background Brief **at X**.

Here, it is undisputed that Plaintiff has no evidence identifying the lead pigments that it claims constitute the alleged nuisance as lead pigments made or sold by each or any Defendant. For this reason, judgment should be reversed for failure to prove that each Defendant was a cause-in-fact of the harm.

3. Plaintiff Also Failed to Prove Whether and to What Extent Any Defendant’s Lead Pigments Are Even In Rhode Island.

Even if this Court were inclined to hold that each Defendant could be held liable for causing a nuisance based on lead pigments contained in unidentified housing units in Rhode Island without any identification of the source of the lead pigment in any one of them, Plaintiff’s case here still fails because Plaintiff has not proven the “substantial contribution” required under its own unique theory of collective liability. To the contrary, Plaintiff has offered no evidence from which one could reasonably determine to what extent, if any, lead pigment made by any

Defendant entered and remains present in Rhode Island. The absence of such evidence provides an alternative ground for reversing the judgment below even if this Court is otherwise inclined to drop any requirement of product identification.

To explain why this is so, the next sections of this Brief review the actual evidence that the Plaintiff offered to establish causation. As testified to by Plaintiff's experts, Professors Rosner and Markowitz, that evidence falls into three categories: a tiny slice of incomplete market share data for a limited time frame and the wrong geographic area; evidence of activities of the LIA that the trial court determined could not be attributed to any Defendant; and a smattering of unconnected anecdotes claimed to demonstrate that some of each Defendant's lead pigment might have been sold in Rhode Island at some point in time.

In addressing this evidence, this Brief reviews "the evidence in a light most favorable to the nonmoving party and draw[s] all reasonable inferences without weighing the evidence or assessing the credibility of the witnesses." *Caranci v. Howard*, 708 A.2d 1321, 1327 (R.I. 1998) (citing *Pantalone v. Advanced Energy Delivery Sys., Inc.*, 694 A.2d 1213, 1216 (R.I. 1997)). To be reasonable, however, inferences cannot be based on conjecture, speculation or surmise, *Long v. Atlantic PBS, Inc.*, 681 A.2d 249, 252 (R.I. 1996), and a party opposing judgment as a matter of law is obliged to provide "more than a scintilla of evidence[.]" *Segret, Inc. v. Gilman Knitwear Co., Inc.*, 207 F.3d 56, 65 (1st Cir. 2000); see also *Foster-Glocester Reg. Sch. Comm. v. B. of Review*, 854 A.2d 1008, 1012 (R.I. 2004) ("Legally competent evidence is defined as such evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla[.]"). If "no reasonable jury could find for the nonmoving party without relying on mere speculation or suspicion[.]" *DeAngelis v. Crestwood Nursing and Convalescent Home*, 694 A.2d 745, 746 (R.I. 1997), then judgment must be entered for the

moving party. Under these standards, the evidence cannot sustain the massive liability imposed in this case.

a. Plaintiff's Market Share Evidence Provides No Reasonable Basis For Determining Whether and to What Extent Any Defendant's Lead Pigments Are In Rhode Island.

To the extent markets are even relevant, the relevant market here is the sale/use of lead pigments in Rhode Island from the late 1600s until 1978, when lead paint was used in this state. (See A. 2639-40, Tr. 68/135 at 640, 1.23 to 641, 1.4; A. 2728-29, Tr. 69/135 at 891, 1.25 to 892, 1.4; A. 4614-4616, Tr. 104/135 at 5922, 1.9 to 5924, 1.18.) Rather than attempting to prove the individual market share of any of the three Defendants in Rhode Island for any of those 300-plus years, Plaintiff relied on the aggregate market share of a group of entities that included but was not limited to these three Defendants, for a brief period of time, for one type of lead pigment, throughout the continental United States. This evidence, viewed most favorably to Plaintiff, showed only the following:

- Glidden had a zero share in any market for any lead pigment from the late 1600s until 1919, and a zero share from 1958 on. Between 1919 and 1958, it manufactured various types of pigments, the amount of each of which was not proved, and for a one to three-year period in the 1920s owned a zinc mine in California that a document from an unknown author 20 years later suggests might have produced some unproven amount of lead.¹⁰ (See A. 1511, Ex. 207; A. 2893, Tr. 74/135 at 1655, 1.20-1.25; A. 4601-4602, Tr. 104/135 at 5809, 1.25 to 5810, 1.3; A. 4816-4817, Tr. 105/135 at 6124, 1.2 to 6125, 1.4.)

¹⁰ Glidden produced an unknown amount of white lead carbonate from 1924 until 1958; red lead and litharge from 1929 until 1951; and some lead chromate at some unknown time after 1919 until 1946. (A. 2893, Tr. 74/135 at 1655, 1.15-25.)

- NL had a zero share in any market for any lead pigment from the late 1600s until 1891, and from 1975 on. Between those dates, it made white and red lead pigments, the amount of which were not proved, and at some point it made lead chromates and lead silicates, the amount of which were not proved. NL at some point also owned a lead mine that might have produced some unproven amount of lead. (A. 2894, Tr. 74/135 at 1656, 1.5-9; A. 4009, Tr. 100/135 at 5324, 1.8-18.)
- Sherwin-Williams had a zero share in any market for any lead pigment from the late 1600s until at least 1903, and from 1971 on. Between those dates, Sherwin-Williams made various types of lead pigments, the amounts of which were not proved.¹¹ There was also testimony that at some date Sherwin-Williams owned a zinc mine in New Mexico that could have produced lead. (A. 4733, Tr. 105/135 at 6041, 1.6-8.)
- During the roughly ten-year period from the mid-1930s to the mid-1940s, Glidden, NL, Sherwin-Williams, and a fourth defendant company, ARCO, were among “only a handful” of lead pigment manufacturers in the United States. (A. 4008, Tr. 100/135 at 5323, 1.18-21.) More specifically, in the mid-1930s to the mid-1940s, the four entities collectively accounted for 50-75 percent of total sales of dry white lead pigment in the United States and 70-80 percent of the total sales of lead-in-oil in the United States. (A. 4007-4008, Tr. 100/135 at 5322, 1.24 to 5323, 1.13; A. 1514.)

¹¹ The parties stipulated that Sherwin-Williams was incorporated in 1884; it manufactured certain types of lead pigments, including white lead carbonate, leaded zinc oxide, red lead, litharge, lead chromates and molybdate orange at various times for a variety of uses; it produced white lead carbonate from approximately 1910 until 1947 in a factory in Chicago; it made red lead primarily for use in metals paint from 1921 until 1947, also in Chicago; it produced leaded zinc oxide in Kansas for use in exterior paints from approximately 1904 until 1971; it made lead chromates, mainly for nonresidential use in Cleveland, Chicago, and Newark; and it made molybdate orange from 1903 through approximately 1969, again mainly for non-residential use, in Cleveland, Chicago, and in Newark from 1937 until 1969. (A. 2894-95, Tr. 74/135 at 1656, 1.13 to 1657, 1.10.)

This so-called market share evidence suffers from three major deficiencies: First, because it is collective, it does not establish that any individual Defendant ever had any substantial share of the sales of any lead pigment in the United States. Second, it does not establish either the Defendants' individual (or even collective) market shares in Rhode Island at any time. Finally, to the extent it says anything about shares of sales collectively in the United States, it covers only white dry lead pigment and lead-in-oil, not other types of lead pigment, and for only a small percentage of the time during which lead pigments were used in paint.

i. The market share evidence is collective, and thus offers no basis for determining that any individual Defendant had a substantial share of any market.

Because the market share evidence is collective, describing only the aggregate shares of four companies (or a “handful” of companies), it provides no support for finding that any individual Defendant ever had a substantial share of any market. For example, viewed most favorably to Plaintiff, the evidence does show that Glidden, together with three other companies, made 50-70 percent of total sales nationwide for a particular type of lead pigment during a 10-year period ending right after World War II.¹² But it does not show whether Glidden's portion of that 50-70 percent was a small portion or almost all of the lead pigment at issue. Thus, even for that limited period and that limited type of pigment, the jury was left to speculate what Glidden's actual market share was. The same is true of the other Defendants.¹³ That by itself renders the

¹² White lead carbonate was one type of lead pigment used in paint, but, as Dr. Girard testified, not the only one. (A. 2641-42, Tr. 68/135 at 642, 1.10 to 643, 1.11 (describing what a pigment is, and noting that “[T]here have been, of course, a number of lead-based pigments used over the last century,” including white lead, red lead, and lead oxides); A. 2644, Tr. 68/135 at 648, 1.3-9 (“white lead carbonated was the biggest one, but there were other lead pigments as well. There was red lead pigment. There were lead oxides that were used.”); *see also* A. 1241, Ex. 137 (listing white lead, red lead, litharge, lead chromates and other lead pigments).)

¹³ The trial court refused to let Sherwin-Williams show that its individual national market share was less than 1% for dry white lead and less than 5% for white lead-in-oil. (A. ____ - ____,

alleged market share data meaningless as against any individual Defendant. But even as a collective figure for the three Defendants here, it was meaningless because the 50-70 percent figure included sales by an additional entity, ARCO, that was dismissed from this case on other grounds. Whether that entity accounted for almost all or none of the sales again was another question left to the jury's speculation. This collective market share evidence, therefore, offers no basis for determining even the collective share of these three Defendants.

ii. The extraterritorial market share evidence was not shown to apply to Rhode Island, and its use unconstitutionally punishes Defendants for lawful conduct in other states.

Apart from the foregoing defects, Plaintiff's market share evidence concerned the wrong geographic markets. Testimony by one witness that four companies sold up to 70 percent of a lead pigment in the country as a whole in the 1930s or 1940s offers no reasonable basis for determining even the collective market share of lead pigment sales for those companies in Rhode Island during that time period. Plaintiff, who bore the burden, offered no evidence that there was any meaningful "national market," with equal market penetration by all companies in all regions, long before the construction of a national highway system. Nevertheless, in citing this evidence as somehow probative, *see* A. 397, *State v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32, at *134 (R.I. Super. Ct. Feb. 26, 2007), the trial court apparently assumed that the jury could presume that the three Defendants (even without ARCO's unknown share) held a large share of the Rhode Island market, at least collectively. There is simply no way to know or to reasonably infer that is true, and, therefore, no foundation for such a conclusion, even for the ten years Plaintiff focused upon, and certainly not for the relevant 300-year period during which lead paint

Tr. 100/135 at 5319, 1.18 to 5322, 1.8; *see also* A. ___-___ Tr. 114/135 at 7354, 1.8 to 7359, 1.24; A. 1677, 1790, SW1009, 1010.)

was used in Rhode Island housing. Such evidence thus was utterly meaningless with respect to causation.

The use of aggregate market share data from 48 states is especially problematic because it punishes a party for conduct that is entirely performed and felt outside of Rhode Island. The more sales that one of these companies made outside Rhode Island, for example, the larger would be their collective “national market share,” and thus the greater the likelihood they would be found liable in Rhode Island under the approach taken by the trial court. As the United States Supreme Court held in *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989), “a state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid under the Commerce Clause.” Likewise, the full faith and credit clause prohibits any state from imposing its laws “except with reference to its own jurisdiction.” *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). Finally, the due process clause similarly limits the imposition of liability under state law to conduct that is substantially connected to that state. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975) (holding that a state has no legitimate interest in regulating activities occurring outside its borders).¹⁴

¹⁴ The impermissibly extraterritorial reach of this State’s suit is underscored by the fact that the State brought its unprecedented public nuisance action against only out-of-state companies. Professor Rosner testified that he did not investigate certain in-state entities that manufactured, sold and/or promoted lead-pigment products in Rhode Island. (A. 4679-4681, Tr. 105/135 at 5987, 1.11 to 5989, 1.22.) This was a lawsuit designed to be brought only against out-of-state companies and thus not surprisingly relied heavily on attacking their out-of-state conduct in order to encourage speculation and hold them liable for conditions in Rhode Island. The commerce clause prohibits states from engaging in such differential treatment that “benefit[s] in-state economic interest at the expense of out-of-state competitors.” *Devito Trucking Inc. v. Rhode Island Solid Waste Mgmt. Corp.*, 770 F. Supp. 775, 780 (D. R.I. 1991) (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

iii. The market share evidence covers only a small percentage of the relevant time period.

The market share evidence on which Plaintiff relied also covers only a small percentage of the relevant time period. Plaintiff's witnesses explained that lead paint was used in Rhode Island from the 1600s until 1978. Beyond conceding that none of these Defendants made or sold lead pigment for more than a fraction of that relevant time period, Plaintiff made no attempt to match its percentage-of-sales evidence to, for example, total production nationwide over time, so as to prove that Defendants and ARCO sold a substantial percentage of the total lead pigment used in this nation over the relevant three centuries. There was no evidence as to what percentages of houses now in Rhode Island were built during any of the respective time periods, including any of the limited windows of time during which each Defendant sold lead pigment. Nor was there any evidence as to what percentage of houses were painted with lead paint in each time period, or that currently have any lead pigment in any condition still on them. There was substantial evidence that, during all the years when these Defendants made lead pigments, there were many non-lead interior paints sold by, among others, these Defendants. (*See* Joint Procedural and Factual Background Brief at ____.)

In sum, on this "market share" record, there is no basis upon which any reasonable juror could conclude that any substantial percentage of the housing units with lead paint in them today in Rhode Island contain lead pigments manufactured or sold by any particular Defendant. All one can do is conclude that it is possible that some unidentified number of houses were painted with an unidentified amount of lead paint containing some type of lead pigment(s) made by, for example, Glidden after 1919 and before 1958, and that some unspecified number of those houses remain today. Determining on this record whether such a possibility is probable would be complete guesswork. So, too, would be any effort to determine whether a few or a substantial

number of houses ever had Glidden lead pigment in them, or whether a few or a substantial number do to this day. And the same is true for each Defendant. Speculation of this type would be doubly flawed: it is entirely improper, and even if it were proper, it would prove way too little to support a finding that each of these Defendants caused the “cumulative presence” as defined by Plaintiff.

Finally, at least under a market share theory, liability is allocated by a jury in accordance with market share based on an accurate market allocation.¹⁵ In the instant case, however, liability was measured in flat yes or no terms, triggered only by the nebulous and wholly-undefined “substantial” contribution standard, with the threshold of “substantiality” unspecified. Plaintiff alleged that four of many lead pigments manufacturers, with unproven collective and individual market shares in Rhode Island, were responsible for the entire cumulative presence of lead pigments in buildings throughout Rhode Island. That by itself is deeply flawed because their individual market shares were never proved – for Rhode Island or any other geographic region. Worse, still, the jury found one of the four—ARCO—not liable, thereby reducing the total (unproven) market share of the remaining Defendants by an entirely unknown amount. Yet, the trial court has stated that it will somehow decide how to parse out liability among the three Defendants in some manner that may or may not bear any relationship to whatever it was that the jurors thought each Defendant did. As a result, if affirmed, this will truly be the first common law case ever, at least in this country, in which there is no attempt to find a consistent causal connection from act-to-harm-to-remedy.

¹⁵ Under the market share theory, if a manufacturer produced 33 percent of the product causing the harm during the relevant time period, then that manufacturer would be liable for one-third of the damages. *See* American Law Institute, Restatement (Third) of Torts § 15, cmt c. (1998) (“if a court does adopt some form of proportional liability, the liability of each defendant is properly limited to the individual defendant's share of the market. The rules of joint and several liability are incompatible with a market share approach.”)

b. Plaintiff's LIA Promotional Evidence Did Not Demonstrate Any Conduct Attributable to Defendants, Nor Any Conduct For Which Anyone Could Be Found Liable.

Plaintiff's second piece of evidence fares no better. As noted in the Joint Procedural and Factual Background Brief, Plaintiff submitted a great deal of material, primarily through Professor Markowitz, discussing the activities of the Lead Industries Association (LIA). (*See* Joint Procedural and Factual Background Brief at X.) Plaintiff presented evidence that the LIA ran two national campaigns promoting the use of lead products and otherwise did the things that many industry associations do in Washington – lobbying. This evidence comprised of a great portion of Plaintiff's whole attempt to show causation, and was emphasized in Plaintiff's closing, when counsel argued as follows:

Now, the defendants, you know, they tried to distance themselves from the LIA today. But they can't really wash their hands of the LIA so easily when each one of them was a member. And each one of them attended a meeting where they were told that lead in paint was poisoning kids.

(A. 5166, Tr. 119/135 at 7933, 1.17-22); and

What the State is saying is that if you don't agree with your industry organization, get out or speak out or do something different. Don't continue paying your dues. Don't keep funding the programs, don't keep going to meetings, don't keep serving on the board of directors, don't keep serving on committees Not one, not a single one of these defendants said stop it. Not a single one of them— not a single one of them quit the LIA to protest their conduct.

(A. 5167, Tr. 119/135 at 7934, 1.6-19; *see also* A. 2052-03, Tr. 64/135 at 33, 1.7 to 34, 1.17.)¹⁶

Like Plaintiff's market share evidence, this LIA material fails to say anything about any Defendant's contribution to the cumulative presence of lead pigments remaining in Rhode Island

¹⁶ Counsel also introduced statements by LIA personnel that could easily be read as racist. (A. 3505-06, Tr. 89/135 at 3846, 1.15 to 3847, 1.23.)

buildings.¹⁷ It also reflects an improper (and indeed, unconstitutional) attempt to impose guilt by association.

First, Plaintiff failed to prove that the LIA was an agent of any Defendant. To the contrary, after allowing the jury to hear all of Plaintiff's LIA evidence, the trial court ruled that the LIA was not an agent of any Defendant. Hence, as the trial court ultimately ruled, the LIA's activities are simply not attributable to any one of them. (*See* Joint Procedural and Factual Background Brief **at X**.) Because these activities constitute evidence of conduct by a non-party, they simply cannot be used to establish any Defendant's substantial contribution to this alleged nuisance.¹⁸

Second, and in any event, none of the LIA evidence includes any proof of any impact on lead pigment sales in Rhode Island. There was no evidence that any LIA activity actually caused any lead pigment to enter Rhode Island, otherwise focused in any way on Rhode Island or even referred to any Defendant's products.

Through Professor Rosner, Plaintiff presented evidence that Defendants were somehow associated with two national promotion campaigns conducted by the LIA: NL and SW

¹⁷ Professor Markowitz admitted that none of his testimony or the exhibits admitted during through his testimony showed any Rhode Island activity or impact. (A. 3620-21, Tr. 90/135 at 4007, 1.20 to 3847, 1.21.)

¹⁸ The trial court nonetheless admitted some of the LIA evidence as to each Defendant to show that Defendants' "knowledge" (A. 4914-15, Tr. 108/135 at 6553, 1.8 to 6554, 1.4), even though lack of knowledge was not a defense because the court found that fault was not an element of the nuisance claim. (*See* A. 323-325, Tr. 120/135 at 8128, 1.24 to 8130, 1.11.) As noted, *supra*, Plaintiff pressed this knowledge point at closing. Whatever the relevance of knowledge in this no-fault case as presented to this jury (and there was evidence that the Defendants, like the government, had no such knowledge of harm, *see, e.g.*, A. 2686, Tr. 69/135 at 814, 1.20-21; A. 3187-90, Tr. 78/135 at 2230, 1.24 to 2231, 1.16, 2232, 1.24 to 2233, 1.7; A. 3025, Tr. 90/135 at 4023, 1.15-19; A. 4456-4457, Tr. 103/135 at 5766, 1.22 to 5767, 1.5, 5770, 1.21 to 5771, 1.20), this alleged knowledge says nothing about causation, *i.e.*, whether any of a Defendant's lead pigments came into Rhode Island; if so, whether a sufficient amount remains to substantially contribute to an alleged cumulative public nuisance; and how any Defendant otherwise in fact substantially contributed to the alleged nuisance.

contributed to the Forest Products Better Paint Campaign from 1934 until 1942; NL contributed to the White Lead Promotion Campaign in 1939 to 1942; and all three Defendants participated in the vestiges of the White Lead Promotion Campaign in either 1950 or 1952 (with Glidden's participation measured not by financial contribution – which was zero – but solely by attendance at a meeting in which the campaign was discussed). (A. 4134-4136, Tr. 101/135 at 5448, 1.10 to 5450, 1.6; A. 4145-4146, Tr. 101/135 at 5459, 1.25 to 5460, 1.6; A. 4187, Tr. 101/135 at 5501, 1.1-12; A. 1496, A. 894, Ex #195; A. 4187-90, Tr. 101/135 at 5501, 1.1 to 5504, 1.4, A. 4536, Tr. 104/135 at 5844, 1.1-9.) Even assuming that these tangential relations rendered these LIA campaigns attributable to any Defendant (which they cannot), nothing in the record shows that these campaigns caused substantial amounts of any Defendant's lead pigments to enter Rhode Island, let alone remain in buildings throughout the state today.

As a threshold matter, time alone precludes any such a conclusion: [] two national campaigns, each occurring over a few of the 300 or so years Rhode Island has used lead paints, could not have resulted in a substantial contribution. Further, Professor Rosner conceded that the LIA promotions, however large and expensive, failed to cause any increase in sales of lead pigments anywhere. To the contrary, sales of lead pigments continued to decline. Thus, the market for white lead diminished by half from 1932 through the initial campaigns. (*See* A. 4304, Tr. 102/135 at 5616, 1.5-15.) Except for the spike during WWII, that decline was never reversed. (*Id.*)¹⁹

The larger of the two campaigns was the White Lead Promotion Campaign that began in 1939. The LIA puffed the results of this campaign to the members who had funded it, calling it

¹⁹ Sales increased in the 1940s due to military needs. (*See* A. 4182, Tr. 101/135 at 5496, 1. 5-19 citing LIA minutes of September 22, 1941 (A. 1104, Plaintiff's Exhibit 123), touting the demand for white lead, but noting that it is difficult to tell whether this had anything to do with the campaign, given the military demand at the time.)

very successful. (*E.g.*, A. 4169, Tr. 101/135 at 5500, 1.5-19.) But Professor Rosner admitted that, to the extent that the LIA was claiming or suggesting that the promotion had increased consumer sales, or even stemmed the decline in consumer sales, it was simply wrong:

Question: Well, we know it wasn't real [to say the decline had been stemmed]; isn't that right?

Rosner: That's right.

(A. 4317-4318, Tr. 102/135 at 5629, 1.24 to 5630, 1.3.)

Thus, even Professor Rosner described the results of the original White Lead promotion campaign as “disappointing.” (A. 4316, Tr. 102/135 at 5628, 1.20-25.) He also conceded that the brief resumption of the white lead promotion in 1950 was also not successful. (A. 4191, Tr. 101/135 at 5505, 1.12-14.)

Aside from this evidence affirmatively indicating that these campaigns did not cause the appreciable sale of lead pigment for residential use anywhere, the record evidence about promotions also says nothing about sales in Rhode Island.²⁰ Plaintiff tried to show that the 1939 campaign reached Rhode Island (almost 70 years ago) in four ways (there was no attempt at all to make such a showing as to the other LIA campaigns):

- The LIA advertised in national magazines sold in Rhode Island (dates and length of time unspecified). (A. 4167, Tr. 101/135 at 5481, 1.14-18.)
- An Iowa professor developed a radio show broadcast in Rhode Island (when, how often, for how long, and how broad the reach of the broadcast were all unspecified), and

²⁰ The trial court recognized this point when dismissing Plaintiff's claim against Conagra: “[E]ven if one were to assume based upon the snippets read into the record by Plaintiff's course of comments from the LIA with respect to the success of the campaigns that, in fact, those campaigns were successful on a national basis then also it was successful in Rhode Island, which is an inference that is not necessarily justified.” (A. 2359-60, Tr. 40/135 at 64, 1.17 to 65, 1.1.)

developed brochures which were ordered by the Agricultural College. (A. 4156-4158, Tr. 101/135 at 5470, 1.18 to 5472, 1.12.)

- The LIA sent one or more press releases to the Providence Journal in 1939-1940. (A. 4172-4173, Tr. 101/135 at 5486, 1.18 to 5487, 1.7.)²¹

These Rhode Island aspects of the original White Lead Promotion Campaign, such as they were, were no more successful than their national counterparts, as Professor Rosner admitted. (A. 4305; 102/135 at 5617, 1.12-23.)

Thus, nothing in this LIA promotional evidence (even if otherwise attributable to Defendants) forms the basis of any reasonable inference of an influx of any lead pigments onto buildings in Rhode Island, let alone an influx of any particular Defendant's product, so that Defendants can each be deemed the substantial cause of a cumulative presence nuisance remaining in the state today.

Third, even if LIA's actions were attributable to one of the Defendants, and even if such evidence could be deemed to suggest substantial contribution to a Rhode Island-wide cumulative nuisance, such evidence could not be used to support the imposition of liability, for the reasons explained at pages __ to __ of the Sherwin-Williams Brief. The United States Supreme Court has consistently reversed state courts that seek to impose liability upon people or companies because of their membership in lawful associations, or their efforts to argue their interests to

²¹ Plaintiff also tendered evidence that a campaign staffer visited several public officials in Rhode Island (A. 4160; Tr. 101/135 at 5474, 1. 24 to 5479, 1. 14; *but see*, A. 4237-4238; Tr. 102/135 at 5549, 1. 25 to 5550, 1. 12 (there is no evidence that one of these visits actually took place.)) The causation relevance of this purported visit was never articulated, given, among other things, public buildings are not a part of the claimed nuisance. (*See* A. 297-298, A. 2322-23, 2325, 2327, 2338, Tr. 37/135 at 2, 1. 1 to 3, 1.1, 5, 1. 12 -20, 7, 1. 12-20, 18, 1. 9-12.)

governments. ? cites And there is no doubt that such an imposition of liability for petitioning the government is precisely what Plaintiff used this evidence to accomplish here.²²

In sum, for the foregoing three independent reasons, the LIA evidence says nothing upon which any reasonable person could properly rely to determine whether and to what extent each Defendant made or sold lead pigment currently located in paint on buildings throughout Rhode Island.

c. The Remaining Evidence Against Each Defendant Fell Woefully Short Of Establishing Causation.

For the reasons discussed above, under Rhode Island (and federal) law, the LIA evidence says nothing regarding whether any Defendant’s conduct caused lead pigment to enter the state, and, if so, in what remaining quantity. Similarly, the collective market share evidence shows, at most, only that some entirely unproven amount of any Defendant’s lead pigments could have been used in Rhode Island during some years. The remaining bit and pieces of isolated evidence specific to each Defendant prove even less.

²² Plaintiff’s counsel could not have been more blatant in closing:

- “[T]he primary reason that lead paint remained legal for as long as it did was because economic forces fought hard to keep it legal.” (A. 5154, Tr. 119/135 at 7921, 1.10-12.)
- “In 1934, NL and Glidden were told about proposed restrictions on lead in Massachusetts. . . . ‘It was particularly important to obtain a hearing and settlement in Massachusetts [to avoid being] plagued with an extension of similar restrictive painting legislation in other states.’ The concern was simply that it might spread to other states” (A. 5173-74, Tr. 119/135 at 7940, 1.25 to 7941, 1.7.)
- “The state and federal agencies specified lead in paint because defendants made and promoted it as a good and safe product. You know, all government decisions are influenced by private industry.” (A. 5188, Tr. 119/135 at 7955, 1.1-5.)

Professor Rosner was the only witness to testify about any Rhode Island activity by any Defendant. He stated that each Defendant (including ARCO) sold and promoted lead pigment in the state. (A. 4168, Tr. 101/135 at 5482, 1.3-25.)²³ As discussed below, however, the record is bereft of evidence to support his conclusory opinion. In any event, his testimony is illuminating for what it does not say. Professor Rosner simply did not testify on the matter at issue: how much of any Defendant's lead pigment is in the buildings that exist today and make up the so-called cumulative presence? Thus, even if one were to accept *arguendo* Professor Rosner's bald conclusion that each Defendant once sold some lead pigment in Rhode Island, one would have no idea at all how much any Defendant once sold in Rhode Island, and whether any of it, much less how much, is here today. Neither Professor Rosner nor any other witness made any attempt to do what one would think the Plaintiff had to do even under Plaintiff's theory: offer evidence from which a reasonable jury could find, at least roughly, how much of a Defendant's lead pigment is located in housing units in Rhode Island today.

i. Millennium.

Aside from the so-called market share and unattributable LIA evidence noted above, Plaintiff's proof of causation against Millennium centered upon the testimony of Plaintiff's historian, Professor Rosner, who opined that, at some unspecified time, and in some unspecified amount, Glidden had sold and promoted lead products in Rhode Island. (A. 4756-4760, Tr. 105/135 at 6067, 1.15 to 6068, 1.6.) The actual evidence invoked was as follows: Glidden ran two ads in national media; created other materials promoting Glidden paints; owned a lead mine in California; had a sales agency agreement in 1952 with a Massachusetts company that might

²³ Millennium objected to this conclusory opinion on the ground that it lacked the factual foundation required by Rhode Island law. The objection was overruled. (A. 4168, Tr. 101/135 at 5482, 1.15-21.)

have procured orders for lead pigment from Glidden from two Rhode Island entities; and owned stores in Rhode Island at some unspecified time. (*See* Joint Procedural and Factual Background Brief at X.) That is all Plaintiff's witnesses offered after efforts, as they described them, to scour hundreds of thousands of documents for evidence that Millennium caused the presence of lead pigments throughout Rhode Island. (*See generally* A. ____, Tr. 87/135 at 3685, 1.12-14; A. ____, Tr. 87/135 at 3567, 1.2-7; A. ____, Tr. 89/135 at 3956, 1.16-19.)

The responses are simple.

First, as for Glidden's "promotional" activity, Plaintiff pointed to a 1936 ad that ran in two national publications; a 1936 booklet describing Glidden paints for which there is no evidence of use in Rhode Island; and a 1957 brochure about exterior house paint. (A. 1318, Ex. 179; A. 1323, Ex. 183; A. 1295, Ex. 173; A. 4121-4126, Tr. 101/135 at 5435, 1.20 to 5440, 1.5, A. 4521-4524, Tr. 104/135 at 5829, 1.21 to 5832, 1.6; A. 4113-4115, Tr. 101/135 at 5427, 1.8 to 5429, 1.1; A. 4533-4534, Tr. 104/135 at 5841, 1.7 to 5842, 1.24; A. 4102-4104, Tr. 101/135 at 5416, 1.16 to 5418, 1.4; A. 4529-4534, Tr. 104/135 at 5837, 1.3 to 5841, 1.4.) There was no evidence that these materials caused the sale of even a single ounce of lead pigment in Rhode Island in 1936 or 1957, much less a deluge of lead pigments over the centuries.

Second, the evidence of the mine appeared to be reference to a California zinc mine owned for one to three years in the 1920s, which one document of unknown authorship suggested (20 years later) also contained lead. (A. 4504-4518, Tr. 104/135 at 5812, 1.9 to 5826, 1.14; A. 4815-4816, Tr. 105/135 at 6123, 1.16 to 6124, 1.10; A. 1511, Ex. 207, A. 1549, 1551, 1556, 1559, MH 1002, 1005, 1006, 1007.) There was no evidence that any lead from that mine in California actually traveled in the 1920s 2,300 miles to Rhode Island, much less that it did so

in meaningful quantities. To the contrary, the mine was described by contemporary documents as producing minerals used “in the California trade.” (A. 1549, Exh. MH 1002.)

Third, as for the Glidden stores, there is no evidence that any of their stores sold paint containing lead pigments. More starkly, there is no evidence that those stores even existed before Glidden ceased all sales of lead pigment in 1958.²⁴

Fourth, the 1952 sales agency agreement gave a Massachusetts company the right (but not the obligation) to procure orders for Glidden white lead carbonate pigment, for 19 companies in three New England states. (See A. 1508, Ex. 206; A. 4760-4762, Tr. 105/135 at 6068, 1.13 to 6070, 1.16; A. 4812-4815, Tr. 105/135 at 6120, 1.9 to 6123, 1.14.) There were only two Rhode Island entities on the list. (A. 1511, Ex. 207; A. 4814, Tr. 105/135 at 6122, 1.11-15.) There is no evidence that the Massachusetts company actually procured any such order (and, *a fortiori*, no evidence of purchases in substantial quantities). There is no evidence that Glidden accepted or filled any such order, no evidence whether any such order came from either of the two Rhode Island companies on its list, and no evidence what quantity, if any, was ever ordered. (A. 4815, Tr. 105/135 at 6123, 1.1-13.) And there is no evidence as to whether either of the two Rhode Island companies ever made paint intended for residential use (with or without lead pigments).

Given this remarkably barren record, Plaintiff had to rely on improper appeals in an effort to get a jury simply to speculate how much if any Millennium product is in Rhode Island. On this record, such speculation would have required a literal chain of guesses: (a) a guess that the Massachusetts company actually processed an order for some amount of lead pigment; (b) a guess that the orders came from one of the two Rhode Island entities; (c) a guess that Glidden accepted and filled this order; (d) a guess that the Rhode Island company then made lead paint

²⁴ The record does show that, for a period of time, Glidden was the largest manufacturer of types of non-lead pigments. (A. 4497, Tr. 104/135 at 5805, 1.10-17.)

from the pigment; (e) a guess that the Rhode Island company then sold that lead pigment product at retail for residential purposes; (f) a guess that whoever bought that lead paint in 1952 used the lead paint on a housing unit in Rhode Island; (g) a guess that all this occurred in substantial quantities; (h) a guess that those housing units still exist 55+ years later; and (i) a guess that the Glidden lead pigment has remained on these housing units for those 55+ years in such large quantities that it accounts for a substantial portion of the lead pigments in Rhode Island today. In this chain of “reasoning,” the existence of the single 1952 agreement is a fact; everything else is sheer conjecture. It is for this reason insufficient to sustain the verdict. *See Kilgore v. Shepard Co.*, 52 R.I. 151, 158 A.2d 720, 721 (1932) (“Inferences based on mere conjecture or probabilities will not support a verdict[.]”) (citation omitted); *Nahigian v. Belcher & Loomis Hardware Co.*, 66 R.I. 194, 18 A.2d 388, 389 (1941) (“A plaintiff may not rely upon mere conjecture to establish any of the essential elements of the allegations upon which he relied”) (citations omitted); *see also Mead v. Pappa Razzi*, 899 A.2d 437, 441 n.3 (R.I. 2006) (“[A] pyramid of inferences must be rejected when the facts from which [the primary inference] is drawn are susceptible of another reasonable inference”) (quoting *Waldman v. Shipyard Marina, Inc.*, 102 R.I. 366, 374, 230 A.2d 841, 845 (1967) (internal quotes omitted; alteration in *Mead*)); *Waldman*, 102 R.I. at 374, 230 A.2d at 844-845 (“[a] trier of fact may draw reasonable inferences from established evidentiary facts,” but cannot rely on a “pyramiding of inferences”; an “inference drawn from another inference is rejected as being without probative force. Obviously the reason for the rule is to protect litigants against verdicts predicated upon speculation or remote possibility.”)

The question of quantity deserves special note. Even the trial judge recognized that one can of paint would not support a finding of liability.²⁵ Yet, were two cans, or one hundred cans, or one million cans enough? And how could the jury possibly know what the amount was given the complete absence of any evidence on this point? Having decided to urge the creation of such a monumental claim, Plaintiff had a duty to present real proof in a court of law that would provide some basis for more than guess work. Plaintiff failed even to try to do this.

Thus, when the dust clears, and the record is carefully examined for the evidence ultimately admitted to show Millennium actually and proximately caused this alleged nuisance, there is nothing. From the bits and factoids, one might speculate that some Glidden lead pigment could have come into Rhode Island at some time; but that is all. Without any evidence of any quantity of Glidden lead pigment either entering or remaining (indeed, without any evidence of any Glidden lead pigment in fact located on any building in Rhode Island today), nothing suggests, let alone provides a basis for concluding, that Glidden should be held liable for the “cumulative presence” of lead pigment throughout Rhode Island today. This Court should therefore vacate the judgment against Millennium and order that judgment be entered in its favor on the grounds that Plaintiff failed to prove in fact and law that Millennium caused the harm for which Plaintiff sought to hold it liable. *See, e.g., Kennedy v. Tempest*, 594 A.2d 385, 388-89 (R.I. 1991) (reversing and remanding for entry of judgment in favor of defendant where evidence was insufficient).

²⁵ *See* A. ____-____, *State v. LIA*, 2007 R.I. Super LEXIS at *28-29 (if a Defendant “sold only one can of lead-containing paint in Rhode Island, it would be a cause of the public nuisance, but it would not be a legal cause because selling one can of paint is unlikely to be considered ‘substantial’”), quoting *Second Restatement* § 834, cmt d).

ii. NL

The isolated bits and pieces of evidence offered with respect to NL were no more probative or informative with respect to actual or proximate causation than was the evidence with respect to Millennium's predecessor, Glidden.

National Sales: Other than the so-called market share evidence (*see supra* at 25-32), Plaintiff offered only a single fact about NL's sales nationally: Professor Rosner testified that NL owned one lead mine. (A. 4009; Tr. 100/135 at 5324, 1.8-18.) He did not say when or how long NL owned the mine, where it was located, or how much lead the mine produced.

Rhode Island Sales: Beyond Professor Rosner's assertion that NL sold lead products in Rhode Island (*see supra* 38)²⁶, Plaintiff offered no evidence that any NL product was ever sold at any time anywhere in Rhode Island – no evidence of stores; no evidence of local agents; no evidence of sales representatives; no evidence of actual sales.

National Promotion: The LIA promotions discussed previously were not only unattributable and unsuccessful but generic; Professor Rosner did not discuss the promotion of any specific Defendant's lead pigment, such as NL's but rather lead pigments generally. (A. 4131; Tr. 101/135 at 5445, 1.8-18.) The only NL-specific evidence was several proofs for advertisements for NL's Dutch Boy paint, plus a coloring book, which Plaintiff used to point out

²⁶ The sum total of Professor Rosner's statements as to NL's Rhode Island sales were as follows:

Q. Do you have an opinion ... to a reasonable degree of professional certainty as to whether any of the defendants sold, distributed, advertised, and/or promoted lead products within the state of Rhode Island?

A. Yes, I do.

Q. And what is that opinion as to NL Industries – National Lead:

A. They sold and promoted in the state of Rhode Island.

(A. ____, Tr. 101/135 at 5482, 1.3-11.)

the lack of warnings because they pictured children. (A. 4096-4098; Tr. 101/135 at 5410, 1.17 to 5412, 1.15; A. 4104-4111; Tr. 101/135 at 5418, 1.11 to 5425, 1.10 (addressing A. 1294, 1299-1301, Plaintiff Exhibits 172, 175-177); A. 4115, Tr. 101/135 at 5429, 1.2-9 (discussing A. 1320, Plaintiff Exhibit 180); A. 4118, Tr. 101/135 at 5432, 1.1 to 5435, 1.10 (discussing A. 1433, Plaintiff Exhibit 188). *See also* A. 4812-4816, Tr. 105/135 at 6100, 1.14 to 6101, 1.10 (discussing A. 1501, Plaintiff's Exhibit 198).) Plaintiff made no attempt to show that these advertisements were circulated, or the scope of any circulation or any other fact relevant to causation.

Rhode Island Promotion: Other than Professor Rosner's one-line opinion (*see supra* at 38), and the unsuccessful LIA promotions, Plaintiff introduced no evidence that NL promoted its pigments in Rhode Island.

On this threadbare record, NL has been ordered to abate the lead in 230,000 to 250,000 homes that Plaintiff has estimated could have lead-based paint in them.

iii. Sherwin-Williams

The sparse anecdotal evidence offered with respect to Sherwin-Williams was no more probative or helpful on the causation requirement than that offered against Millennium or NL.

National Sales: Other than the market share evidence (*see supra* at 25-32), Plaintiff offered only a single fact about Sherwin-Williams' sales nationally: Professor Rosner testified that Sherwin-Williams owned a lead mine. Similar to his opinion with respect to Millennium's California mine, however, this conclusion as to Sherwin-Williams appeared to be based on a New Mexico zinc mine that Professor Rosner thought might be mined for lead as well. Professor Rosner could not recall how he discovered this mine, but vaguely recollected "seeing documents about the Magdalena mine, but I don't remember much more about that." (A. 4729, Tr. 105/135 at 6037 1.19-20; *see also* A. 4728-4729, Tr. 105/135 at 6036, 1.25 to 6037, 1.7: "what I

remember seeing were documents in which they owned again, you know, the Magdalena mine. But I am not sure -- ... -- of much more than that”; A. 4732, Tr. 105/135 at 6040 1.22-23: “I came across documents that they, um, bought the – a lead and zinc mine in – in Magdalena”; A. 4733, Tr. 105/135 at 6041 1.6-8: “lead districts often had zinc in their ore and also zinc mines also had lead in their ore as well.”)

And, as noted earlier, the inclusion of the national market share evidence, such as it was, was particularly misleading as to Sherwin-Williams, because its share was so tiny, if not negligible—less than 1 percent for dry white lead and less than 5 percent for white lead-in-oil. (See, e.g., A. 1677, 1790, SW ID 1009, 1010.) The trial court’s refusal to admit this evidence clearly prejudiced Sherwin-Williams. The collective percentage of nation wide sales for four entities combined is the only evidence in the record that attempts to provide any quantification essential for a finding of substantial contribution. Absent the individual market share data, the national data invited the jury to speculate wrongly that Sherwin-Williams contributed equally, if not more, to the national totals.

Rhode Island Sales and Promotion: As with NL, Professor Rosner’s naked assertion that Sherwin-William sold lead products in Rhode Island²⁷ was unsupported by any evidence of actual sales. Instead, as cross-examination revealed, his opinion was based on assumptions.

²⁷ Dr. Rosner testified on direct examination, without supporting facts, that Sherwin-Williams sold and promoted unspecified “lead products” in the State of Rhode Island:

“Q. Do you have an opinion after that review, Professor Rosner, to a reasonable degree of professional certainty as to whether any of the defendants sold, distributed, advertised, and/or promoted lead products within the state of Rhode Island?

A. Yes I do.

* * *

Q. And as to Millennium Holding’s predecessor, Glidden?

Professor Rosner testified on cross-examination, “you advertised it here, had stores here, you sold it here, and I would assume that people bought it here and, hence, I would assume that they used it.” (A. 4633, Tr. 104/135 at 5941, 1.9-12) (emphasis supplied). Upon further questioning, after his “assumption” was pointed out to him, Professor Rosner elaborated further on his series of assumptions:

Q: You’re saying that’s your assumption as you sit here today. Is that what you just said?

A: Well, it’s -- it’s more than an assumption. I know you had stores here. You had one over on Traverse Street. You had a warehouse, you had salesmen here, you had outlets for ACME paint and other paints here. You had a representative who lived in Pawtucket who was here selling something. And I would assume its various products of Sherwin-Williams. . . . And I must assume that you were selling what you usually advertised in throughout the nation, you were selling the same products here. So, therefore, I would assume that they’re here.

(A. 4633-4634, Tr. 104/135 at 5941, 1.13 to 5942, 1.1) (emphasis supplied).

Not a single sales invoice, receipt or other document was ever introduced at trial or identified by Professor Rosner to substantiate this assumptions; no witness testified that he or she purchased a Sherwin-Williams product. No evidence demonstrates that Sherwin-Williams sold lead pigment in Rhode Island, and if so, whether its sales were substantial or whether any of its pigment ended up in paints for residential or consumer use. Accordingly, Professor Rosner’s conclusory opinion that Sherwin-Williams’ pigments were sold in Rhode Island must be

Defense Counsel: Lack of Foundation.

The Court: Overruled

* * *

Q. And as to Sherwin-Williams?

A. They also sold and promoted in the state of Rhode Island.”

(A. 4534, Tr. 104/135 at 5842, 1.3-25.) That was the full extent of Dr. Rosner’s direct testimony on the existence of Sherwin-Williams’ lead pigments in Rhode Island on direct examination.

disregarded as assumptions and speculation that is “in the realm of conjecture and not of fact; and recovery cannot be based on conjecture.” *McGovern v. Michael*, 62 R.I. 485, 6 A.2d 709, 712 (1939); *see also Burrillville Racing Ass’n v. Tellier*, 574 A.2d 749, 752 (R.I. 1990) (“The law is clear . . . that when an expert testifies, he must specifically set forth the factual basis to support his conclusion. If he does not, the court must disregard his testimony.”); *Alterio v. Biltmore Const. Corp.*, 377 A.2d 237, 240 (R.I. 1977) (“Unquestionably, an expert’s opinion must be predicated on facts legally sufficient to form a basis for his conclusion.”).

Professor Rosner’s alternative statement that Sherwin-Williams opened some stores in Rhode Island between 1939 and 1969 (*see* A. 4637, Tr. 104/135 at 5945, 1.14-15), is also insufficient to prove causation. Professor Rosner had no idea what products those stores sold. He admitted that he (i) never performed a comprehensive study of Sherwin-Williams’ product lines over time (A. 4635, Tr. 104/135 at 5943, 1.14-15); (ii) did not study the proportions of Sherwin-Williams’ sales of lead versus non-lead paints (*id.* at 1.21-23), even though he conceded that non-lead paints were Sherwin-Williams’ major paint brands (*id.* at 1.24 to 5944, 1.4); (iii) could not provide the ratio of Sherwin-Williams’ residential versus other types of paint products (*id.* at A. 4636, 104/135 at 5944, 1.21-24), even though he admitted that Sherwin-Williams made a wide variety of paints for purposes other than use on or in buildings (so-called architectural paints), including railway paints, automotive paints, aircraft paints, highway paints, special paints for concrete, and paints for ships and bridges (A. 4621-4623, Tr. 104/135 at 5929, 1.2 to 5931, 1.15); and (iv) possessed no significant knowledge of how Sherwin-Williams sold paints—whether only through stores, or through agents or other companies (A. 4637, Tr. 104/135 at 5945, 1.5-9; *id.*, 1.19-20). Professor Rosner further conceded that he could not identify any person or entity who purchased or used lead-based paints as a result of any Sherwin-

Williams activity in Rhode Island. (A. 4638-4639, Tr. 104/135 at 5946, 1.25 to 5947, 1.6; A. 4639-4640, 104/135 at 5947, 1.18 to 5948, 1.1.) Most importantly, Professor Rosner ignored that the “White Lead Catechism” indicated that the “practical elimination” of the use of white lead for interior use had occurred by 1937 – two years before he testified that Sherwin-Williams had stores in Rhode Island. (A. 4715; Tr. 105/6023 1.7-15.)

In sum, as with Millennium and NL, none of the purported causation evidence pertaining to Sherwin-Williams is sufficient under this Court’s decision in *Waldman*, given, *inter alia*, the impermissible inference-stacking required to find causation. For the jury to deduce cause from Professor Rosner’s testimony, it had to stack inferences: (i) the few Sherwin-Williams stores that opened after Sherwin-Williams largely eliminated white lead pigments from its interior residential products sold lead-based residential products; (ii) a substantial amount of lead-based products were purchased from these stores; (iii) these products contained lead pigments manufactured by Sherwin-Williams; (iv) the paints were applied in a substantial number of Rhode Island buildings; and (v) these products remain in a substantial number of Rhode Island buildings today (vi) causing a cumulative public nuisance.

Similarly, to deduce causation from the available documentary evidence concerning the LIA’s and Sherwin-Williams’ promotional activities, the latter of which consisted of a single *Painter’s Magazine* advertisement in March 1921 for old Dutch process white lead (App. ___-___, Tr. 101/135 at 5429, 1.24 to 5431, 1.1-5.) – the jury had to stack even more inferences, even higher: (i) these out-of-state activities reached individuals in Rhode Island; (ii) they induced substantial purchases of a Sherwin-Williams’ lead-based product; (iii) the product was applied in a substantial number of Rhode Island buildings; (iv) it remains in a substantial number of Rhode Island buildings today; (v) causing a cumulative public nuisance.

These numerous inferences that must be stacked to find causation in this case are far greater than the single impermissible inference at issue in *Waldman* that collected fumes ignited when an engine was started. The jury had to infer everything from the fact of the existence of Sherwin-Williams stores in Rhode Island after it had ceased using white lead pigments in interior residential paint, to the nuisance today. Reversal and judgment for Sherwin-Williams on this record is thus appropriate.

4. Plaintiff's Proof as to Each Defendant Was Too Tenuous and Remote to Establish Liability.

Even if one were to assume, *arguendo*, that the foregoing somehow sufficed to establish that the conduct of each Defendant was a cause-in-fact of the alleged nuisance and that the cause represented a substantial contribution, Plaintiff's claim should still fail because the proven conduct of each Defendant is too far removed from the harm to be legally sufficient. In other words, Plaintiff has failed to establish the required "closeness of the connection between [the] defendant's conduct ... and [the plaintiff's] injury." *Carroll v. Yeaw*, 850 A.2d 90, 93 (R.I. 2004). Or, as one court observed in a decision rejecting a nuisance claim against these same Defendants, "at some point along the causal chain, the passage of time and the span of distance mandate a cut-off point for liability." *City of Chicago*, 355 Ill.App.3d at 224, 823 N.E.2d at 139 (quoting *Mazzagatti v. Everingham*, 512 Pa. 266, 273, 516 A.2d 672, 676 (1986)).

In *Carroll*, the defendant had assisted with a building permit for a stairway that collapsed and injured the plaintiff. 850 A.2d at 92. There were, however, "a series of breaks" in this causal chain: The building official could have authorized the stairway without the permit; someone else actually built the stairway "and so is the source of any alleged design defects"; and the building official could have noticed and fixed the defects. *Id.* at 93. This Court held that the connection was thus too "tenuous" to impose liability. *Id.*

Here, it is clear that a series of breaks in the causal chain were not only possible, but actually occurred. Buildings in Rhode Island were painted with lead paint long before and long after each Defendant made lead pigments. Legislators made choices, regulators made choices, public health officials made choices, builders and contractors made choices, and owners then either kept their units “lead safe” through reasonable upkeep, or did not. Even Plaintiff here made important choices, including whether and to what extent seriously to enforce existing Rhode Island legislation intended to address lead hazards. The chain is even more attenuated when one focuses, as Plaintiff insists, on so-called promotional efforts of the Defendants 60 years or more ago. To hold any Defendant liable because that Defendant promoted the lawful use of lead products at some point, and a Rhode Island resident who saw an ad in New York decided to buy lead paint containing pigments made by another company, is like holding General Motors responsible for fumes from a Ford SUV because the driver got the idea to buy an SUV from a GM ad, and because GM “promoted” SUVs, or, as Plaintiff here put it, “fought hard to keep [SUVs] legal.” (A. 5154, Tr. 119/135 at 7921, 1.11-12.) Even if such a chain of causation were not too speculative, it nevertheless would still fail as a matter of law because it posits a relationship between act and harm that is simply too remote. So, too, here.

II. IN THE ALTERNATIVE, THE JUDGMENT SHOULD BE VACATED BECAUSE THE JURY INSTRUCTIONS ON CAUSATION, VIEWED AS A WHOLE, WERE ERRONEOUS AND PREJUDICIAL.

Having allowed a trial on the Plaintiff’s “cumulative presence” theory, aggregating into one fictional entity hundreds of thousands of discrete events, the trial court was faced with the challenge of instructing the jury how to determine if a Defendant caused the “presence,” the particular contours of which, even in the abstract, were only loosely defined, and that arose through a series of events over the course of more than 300 years in locations unknown to the jurors. This challenge was especially difficult because, during the trial, the court admitted so

much evidence that could have nothing to do with causation by these Defendants, such as the national activities of the LIA. What the trial court nevertheless did was to provide instructions covering standard general concepts, such as proximate cause, and “setting in motion a chain of events,” all of which provided little guidance in a case such as this. The court then told the jurors several crucial concrete things that Plaintiff need not prove, and rejected Defendants’ requests that he tell the jurors with some specificity what Plaintiff did need to prove. The result, taken as a whole, was an invitation to mischief that Plaintiff readily accepted and that cannot stand. *See Riley v. Stone*, 900 A.2d 1087, 1092 (R.I. 2006) (this Court reviews jury instructions *de novo*, “review[ing] the record and the jury instructions to determine whether the instruction[s] [were] erroneous.”); *Crum v. Horowitz*, 896 A.2d 736, 737 (R.I. 2006) (Mem.) (the instructions must adequately cover the law, and the instructions as a whole are reviewed in light of the meaning and interpretation that a jury composed of competent lay persons would give them) (quoting *Maglioli v. J.P. Noonan Transportation Co.*, 869 A.2d 71, 75 (R.I. 2005).)

Causation Without the Product. For starters, Defendants asked the trial court to instruct the jury that, at the very least, the jury had to find that each Defendant’s lead pigment was present in Rhode Island and contributing to the alleged nuisance:

To prove an actual casual connection, the State must prove that a defendant’s conduct has actually caused its lead pigments to be present in paint and on buildings in Rhode Island that are part of the alleged public nuisance.

(A. 5560-61, Defendant’s Proposed Jury Instructions (Revised), No. 22.)

Plaintiff objected to that requested instruction as follows:

So we would very, very, very strongly object to any jury instruction that suggests, implies, states to the jury that proof of presence of a product in the State of Rhode Island is something that the State has to prove in order to succeed in its public nuisance claim.

(A. 5047-48, Tr. 113/135 at 7228, 1.22 to 7229, 1.1.) Plaintiff maintained that it need not prove “an ounce” or “a single drop” of a Defendant’s lead pigment was, or is, in Rhode Island to hold that Defendant liable for the cumulative presence of lead pigments here. (A. 5053-54, Tr. 113/135 at 7254, 1.9, 7255, 1.5-6.) As legal authority for its position, Plaintiff cited the trial court’s own decision in this case, A. 290, *State v. Lead Indus. Assn.*, 2005 R.I. Super. LEXIS 95 (R.I. Super. Ct. June 3, 2005), *5-6 , in which the court declined to apply the product identification requirement of *Gorman* in this public nuisance case. (A. 5046-48, Tr. 113/135 at 7227, 1.17 to 7229, 1.6.)

The trial court agreed with Plaintiff, and refused to give the jury the requested guidance. Instead, the trial court told the jurors essentially the opposite, as requested by Plaintiff, instructing the jury that:

[It]need not find that lead pigment manufactured by the Defendants, or any of them, is present in particular properties in Rhode Island to conclude that Defendants, or any one or more of them, [were] liable for creating, maintaining, or substantially contributing to the creation or maintenance of a public nuisance.

(A. 324-325, Tr. 120/135 at 8129, 1.21 to 8130, 1.1.)

The court additionally told the jury that it need not find “that the Defendants, or any of them, sold lead pigment in Rhode Island to conclude that the conduct of such Defendants, or any of them, [was] a proximate cause of a public nuisance.” (A. 325, Tr. 120/135 at 8130, 1.2-5.)

Proximate Cause. Having thus refused to tell the jurors that a Defendant could not be held liable if it did not cause its products to be in Rhode Island, the court threw wide open the possible universe of “causes” to which the jurors might point. Unhinged from even their products, and faced with arguments by Plaintiff that not even an ounce need be present in the state, Defendants sought the protection of instructions on the well established concepts of substantiality and remoteness.

First, Defendants offered an instruction on “Substantial Contributing Factor” that was based on Restatement Section 834, comment d and Section 431, comment c as follows:

In determining whether the conduct of any defendant was a “substantial factor” in creating the public nuisance as previously described in these instructions, you may consider the following:

- (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
- (b) whether the actor’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
- (c) lapse of time.

(A. 5562, Defendant’s Proposed Jury Instructions (Revised), No. 23.)

Second, Defendants requested an instruction on “Remote Cause” that would have focused the proximate cause issue on the following factors: “the passage of time, the number of steps between the defendant’s conduct and the state’s alleged public nuisance and harm, the directness or indirectness of those steps, and whether the defendant was realistically in a position to prevent the public nuisance alleged to exist today.” (A. 5563, Defendant’s Proposed Jury Instructions (Revised), No. 24.)

These instructions were critical. Nonetheless, the trial court rejected all of them, and instead instructed only that “Causes that merely are incidental, are not proximate causes.” (A. 323, Tr. 120/135 at 8128, 1.4-5.) The remoteness question was never posed, and hence it was not answered by the jury’s verdict. Instead, the court repeated the approach of telling the jury only what Plaintiff did not have to prove, stating that a Defendant could be found liable for an activity

“even after [the Defendant] has withdrawn from or stopped the activity and even if it is not in a position to stop the harm or to abate the condition.” (A. 324, Tr. 120/135 at 8129, 1.8-11.)²⁸

Aggregate Liability. As to the necessity to prove liability individually as to each Defendant, Defendants’ proposed causation instruction stated that proof of conduct for each separate Defendant was necessary:

Here, to prove causation the State must prove separately for each defendant that the particular defendant, or its alleged predecessor, engaged in activities that were a substantial factor in bringing about the alleged public nuisance in Rhode Island and the injuries and harm found to have been proximately caused thereby.

(A. 5560-61, Defendant’s Proposed Jury Instructions (Revised), No. 22) (emphasis supplied).

Again the court refused. Instead, it quite literally told the jurors that it could combine the acts of all of the Defendants to see if, as combined with the acts of untold others, they were a substantial cause, in which case all Defendants, none of whose acts were a substantial cause, would be liable:

You are asked to decide whether the actions of any of these Defendants, either alone or in combination with others, substantially contributed to the creation of a public nuisance in this state.

(A. 323, Tr. 120/135 at 8128, 1.20-23) (emphasis supplied). Thus, if one Defendant did nothing other than make one can of pigment that is in Rhode Island, the jurors could hold that Defendant liable if it figured that that act “in combination with” the acts of thousands of others who put lead pigments in Rhode Island, substantially caused the nuisance. In a case in which the conspiracy

²⁸ The court’s full instruction was as follows:

The Defendant that participates to a substantial extent in the activity that causes a public nuisance is liable for the nuisance even after it has withdrawn from or stopped the activity and even if it is not in a position to stop the harm or to abate the condition.

(A. 324, Tr. 120/135 at 8129, 1.6-11.)

claim was dismissed, and there was no concert of action claim, and there was a ruling that LIA was not the agent of any Defendant, to invite the jury to consider actions “in combination with” others was clear error. It wrongly allowed jurors to consider acts of others and impute them to each respective Defendant.

Causation Even One More Step Removed. The court further instructed the jury that “[a] Defendant is liable for a public nuisance if the public nuisance is caused by its activity or an activity in which it participated to a substantial extent.” (A. 323-324, Tr. 120/135 at 8128, 1.24 to 8129, 1.2, emphasis supplied.) Under this instruction, a Defendant need not cause the nuisance; it need only participate in an activity that caused the nuisance. In the ordinary case, perhaps this distinction would not make much of a difference. But here, with product identification unproved, and with no instruction on how to determine if a cause is too remote, issuing yet another instruction that augmented the already misdirected guidance given to this jury. For example, the instruction would apparently allow liability to be imposed on a Defendant merely because it, or its predecessor, participated in the “activity” of promoting its own lead pigment even if its promotions had no impact in Rhode Island (or anywhere, for that matter), so long as the “activity” of promoting a lead pigment in some abstract sense collectively contributed to a nuisance in Rhode Island.²⁹

This instruction was putatively based on Section 834 of the *Second Restatement*. Comment b to Section 834 defines the term “activity” as being the “acts of one person” or “of several persons engaged in a common enterprise”. (emphasis supplied). After the court’s dismissal of the conspiracy and agency claims, there was no legal basis for the court to give an

²⁹ This interpretation of “substantial participation” is in fact reflected in the trial court’s decision denying the Defendants’ Rule 50 and 59 motions. (A. 369-375, *State v. LIA*, 2007 R.I. LEXIS at *23-24, *35-36, *40-41.)

instruction that depended on the existence of such an activity. To no avail, Defendants strongly objected to any such instruction that would allow a finding of liability on any basis other than individual conduct. (A. 5051-52, Tr. 113/135 at 7242, 1.7 to 7243, 1.2.)

Causation Even Two More Steps Removed. As noted above, Defendants requested an instruction that would have required the jury to find as to each Defendant that its conduct was “a substantial factor in bringing about the alleged public nuisance in Rhode Island and the injuries and harm found to have been proximately caused thereby.” (A. 5560-61, Defendant’s Proposed Jury Instructions (Revised), No. 22; emphasis supplied.) In other words, the Defendant need to have caused the harm.

The trial court instead divided the proximate cause question into two segments with the following instruction:

In this case in order to prove proximate cause or proximate causation, the State must establish two things: (1) that each Defendant’s conduct was a substantial cause of the public nuisance alleged by the State; and (2) that the public nuisance was a substantial factor in causing injury or harm to the public.

(A. 322, Tr. 120/135 at 8127, 1.17-23.) This instruction improperly severed the required connection between the beginning point (“Defendant’s conduct”) and the end point (the “injury or harm to the public”). Rather than proving each Defendant caused a harm, Plaintiff only had to prove that each was a “substantial cause” of a nuisance, and that the nuisance was a “substantial cause” of the alleged injury. Such a segmented standard has no basis in Rhode Island law or in the *Second Restatement*, which the trial court cited in support of the instruction. [See A. 402, *State v. LIA*, 2007 R.I. LEXIS at *157.] Section 834 of the *Second Restatement* does not suggest a two-part test; rather that Section, states that the defendant’s activity must be “a cause of harm to another’s interest.” Section 834, cmt. b; *see also Second Restatement*, Section 433B cmt. a (“the plaintiff is required to produce evidence that the conduct of the defendant has been a

substantial factor in bringing about the harm he has suffered”). Thus, Defendants were subjected to liability based on a causation standard entirely outside the norms of both Rhode Island law and basic tort principles.

* * *

The question posed is whether the foregoing instructions, and especially the combined effect of refusing limiting instructions and giving improperly broadening instructions, require that the verdict be set aside. An erroneous charge warrants reversal if it can be shown that the jury “could have been misled to the resultant prejudice of the complaining party.” *State v. Sivo*, 925 A.2d 901, 913 (R.I. 2007) (quoting *Saber v. Dan Angelone Chevrolet, Inc.*, 811 A.2d 644, 653 (R.I. 2002); *Brodeur v. Desrosiers*, 505 A.2d 418, 422 (R.I. 1986).) On the foregoing record, it is simply beyond doubt that this jury easily could have been misled by such instructions in a case like this, with Plaintiff seeking to establish a causal link between these Defendants on a record with so little evidence to properly connect each Defendant with the specified harm. Not only does the language of the instructions inexorably lead to this conclusion, but the jury’s initial deadlock, with the instructions repeated to them, underscores its confusion. (See Joint Procedural and Factual Background Brief at ____.)

CONCLUSION

Plaintiff fell woefully short of establishing any causation, much less the type of causation that would be required to justify an order that the Defendants abate the nuisance alleged in this case. For this simple but fundamental reason, the trial court’s judgment should be reversed, and judgment should be entered in favor of Millennium, Sherwin-Williams and NL. Alternatively, the judgment should be reversed and the case should be remanded to the trial court, because the trial court failed to properly instruct the jury on the matter of causation, effectively inviting the

jury to accept Plaintiff's argument that Defendants be punished for the activities of others without any need to find that each Defendant's product is a cause of the harm for which it is being held liable.

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