

IN THE SUPREME COURT OF MISSOURI

CITY OF ST. LOUIS	)	
	)	
Appellants,	)	
vs.	)	Supreme Court No. SC88230
	)	
BENJAMIN MOORE & COMPANY,	)	Court of Appeals No. ED87702
MILLENNIUM CHEMICALS, INC.,	)	Court of Appeals
MILLENNIUM HOLDINGS, LLC,	)	Eastern District
	)	
MILLENNIUM INORGANIC	)	Circuit Court No. 002-246
CHEMICALS, INC., NL INDUSTRIES	)	Circuit Court for St. Louis City
INC., PPG ARCHITECTURAL FINISHES,	)	
INC., SCM CORPORATION, THE	)	
SHERWIN-WILLIAMS COMPANY, AND	)	
XBD, INC.	)	
	)	
Respondents.	)	

AMICUS BRIEF OF NATIONAL PAINTS & COATINGS ASSOCIATION IN  
SUPPORT OF RESPONDENTS

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## STATEMENT OF INTEREST

NPCA is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. As the preeminent organization representing the coatings industry in the United States, NPCA's primary role is to serve as an advocate and ally for its membership on legislative, regulatory and judicial issues at the federal, state, and local levels. In addition, NPCA provides members with such services as research and technical information, statistical management information, legal guidance, and community service project support. Collectively, NPCA represents companies with greater than 95% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

NCPA and its member companies have undertaken significant voluntary efforts to address the problems of lead poisoning arising from the failure of property owners to maintain their property in lead safe condition. While intact lead paint is not a health hazard, a risk of lead exposure does arise where property owners allow historically applied lead paint to chip or deteriorate. As recognized by the U.S. Environmental Protection Agency, NPCA has spearheaded a number of initiatives to address this problem, such as a 2003 landmark cooperative agreement with Attorneys General from 46 states, plus the District of Columbia and three territories, "which establishes a national program of consumer paint warnings, point-of-sale information, and education and training to avoid the potential exposure to [EPA-HUD] lead-dust standards." EPA Sector

Strategies Performance Report (March 2006), at 64.<sup>1</sup> In addition, NPCA founded the Community Lead Education and Reduction Corps (“CLEARCorps”), a joint public service partnership of the paint industry and the non-profit Shriver Center at the University of Maryland. Since 1995, CLEARCorps has protected thousands of young children from the risk of lead exposure through directed education programs and on-the-ground assistance for property owners, families and children across the country, including in St. Louis.<sup>2</sup>

The present lawsuit does not provide any meaningful opportunity to address or ameliorate the problem of lead exposure. Defendants have not sold lead paint for decades. Defendants do not have any control over property owners who fail to maintain their properties as required by law, nor do they have any ability or authority to abate potentially hazardous conditions in these private properties.<sup>3</sup> Thus, the City does not even ask in this litigation for injunctive or equitable relief and the trial court below repeatedly held that the City was not entitled to seek such relief in this case. Nor is this case about properly assigning fault. Defendant’s participation in the manufacture and sale of lead paint prior to 1978 was completely lawful. As EPA recognizes, intact lead paint does not give rise to any health risk. And the City admits that it cannot identify any

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<sup>1</sup> Relevant excerpts of the EPA report are attached hereto as Ex. 1. A complete copy of the report can be found at <http://www.epa.gov/sectors/performance.html>.

<sup>2</sup> This and further information about CLEARCorps is available at <http://www.clearcorps.org>.

<sup>3</sup> See St. Louis City Revised Code § 11.22.120.

defendant as the source of lead paint at any of the properties for which it seeks recovery for the costs of abatement.

Rather this case is about money, and the City's attempts to distort not one, but two separate bodies of well-established common law to transform product manufacturers into the insurers of public health. For the reasons set forth herein, NPCA strongly urges this Court to resist the City's siren call, affirm the fundamental principles of product identification and public nuisance law threatened by the City's claim, and affirm the dismissal of the City's claims.

### **COUNTERSTATEMENT OF FACTS**

While lead exposure poses a serious health issue for some children, the City's suggestion that extraordinary judicial intervention is necessary to address the problem is without factual basis. As a result of legislative and regulatory efforts – in addition to voluntary initiatives like those discussed above – there have been dramatic improvements in blood lead levels both in the United States and Missouri over the past thirty years. As reported by the Centers for Disease Control (“CDC”), the percentage of children nationwide aged 1-5 with blood lead levels (“BLLs”) greater than 10  $\mu\text{g}/\text{dL}$  (thus meeting the CDC standard of elevated) has dropped sharply over the past 30 years, from 77.8% in the period 1976-1980 to 4.4% in 1991-1994 to 1.6% in 1999-2002.<sup>4</sup> In 1993, Missouri established a Childhood Lead Poisoning Prevention Program to address the issue of lead

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<sup>4</sup> See *Blood Lead Levels -- United States, 1999-2002*, MMWR Weekly 54(20); 513-516 (May 27, 2005), available online at CDC website at <http://www.cdc.gov/MMWR/preview/mmwrhtml/mm5420a5.htm>.



poisoning within the state. According to the Missouri Department of Health and Senior Services (DHSS), “[s]ince that time, the program has made great strides to increase the number of children in Missouri receiving a blood lead test and assuring follow-up services which, in conjunction with legislative changes, have decreased the prevalence rate of lead poisoning.”<sup>5</sup> The CDC reports that the percentage of children < 72 months old in Missouri with BLLs > 10 µg/dL has dropped each year since 1997 (12.12%) to 2005 (2.29%), the latest year for which there is reported data.<sup>6</sup> While the percentage of children in St. Louis with elevated blood lead levels is higher than the statewide figures, this percentage likewise has been dropping significantly in recent years and the successful efforts both nationally and statewide amply demonstrate that this issue can be, and is being, successfully addressed by the legislative and executive branches of government.

Lead exposures in Missouri arise from a number of sources in addition to deteriorating lead paint. The Missouri DHSS explains:

Missouri is the number one producer of lead ore and lead by-products in the United States. Mining and smelting activity continue in parts of Missouri, and result in an environment with risk for lead poisoning. Mining waste products often end up on driveways, in yards, or even in children’s play areas, while dust, air and soil around mining activity have

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<sup>5</sup> Missouri DHSS, *Childhood Lead Poisoning Elimination Plan*, at 2, available online at <http://www.cdc.gov/nceh/lead/StrategicElimPlans/MOLead%20Poisoning%20Elimination%20Plan.pdf>.

<sup>6</sup> See CDC Surveillance Data, 1997-2005, Tested and Confirmed Elevated Blood Lead Levels by State, Year and Blood Lead Level Group for Children <72 mos, available online at <http://www.cdc.gov/nceh/lead/surv/stats.htm>.

shown elevated levels of lead contamination. There are currently three Superfund areas in Missouri that are noted for lead contamination.<sup>7</sup>

As reported by the EPA, other sources of lead exposure include, *inter alia*, drinking water delivered through lead pipes or pipes using lead solder, soil contaminated by past use of leaded gasoline in cars, and occupational exposures.<sup>8</sup>

The risks of lead exposures in Missouri are being addressed through the legislative and executive branches of the state and municipal governments. The Missouri DHSS reports: “Missouri has historically, and continues to receive state legislative support for lead poisoning prevention activities.”<sup>9</sup> Missouri statutes provide, *inter alia*, for a Lead Advisory Committee on Lead Poisoning, annual testing of children in high risk areas with home lead assessments for children with elevated blood levels, the requirement of lead hazard controls in homes with identified lead hazards, training of lead abatement workers and inspection of lead abatement projects, and the creation of a Lead Abatement loan or

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<sup>7</sup> Missouri DHSS, *Childhood Lead Poisoning Elimination Plan*, at 2. Children living in Missouri’s “Lead Belt” mining area are nearly six times as likely to have elevated lead blood levels than are children living in other areas of Missouri. See Tom Uhlenbrook, *Mine Wastes Menace Lead Belt, Study Shows; High Levels of Metal Found in Children’s Blood*, St. Louis Post Dispatch, August 4, 1996, at p. 1A.

<sup>8</sup> See EPA, *Protect Your Child From Lead Poisoning: Where Lead is Found*, available at EPA website at <http://www.epa.gov/lead>; see also EPA, Office of Resource and Development, *Air Quality Criteria for Lead*, Vol. 1., chapter 3 “Routes of Human Exposure to Lead and Observed Environmental Concentrations,” EPA/600/R-05/144aF (Oct. 2006) (discussing various sources of lead exposures), available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=158823>

<sup>9</sup> Missouri DHSS, *Childhood Lead Poisoning Elimination Plan*, at 4.

grant program.<sup>10</sup> The City likewise has significant authority to address the risks of lead exposure. Missouri DHHS explains:

St. Louis City Health Department has the authority to require the property owner to comply with the requirement to correct and treat the condition creating the lead hazard, or correct the condition themselves and charge the cost to the owner. They may place a lien on the property if payment is not received. They may also refer violations to the City Counselor's Office for prosecution. The City has authority to create, keep and update a list of lead safe residences and temporary housing options.<sup>11</sup>

This legislative and regulatory framework is appropriately directed at property owners, who are the parties in control of the conditions that can give rise to exposure from deteriorated lead paint and whose misconduct is required for any exposures to occur. As EPA explains, “[l]ead-based paint that is in good condition is usually not a hazard.”<sup>12</sup> It is only where property owners unlawfully allow lead paint to chip or deteriorate that it can give rise to lead exposures and associated health problems. The risk of lead exposure thus arises due to specific unlawful acts of private parties – not party to this litigation – at particular properties under their control.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See EPA, *Protect Your Child From Lead Poisoning: Where Lead is Likely to be a Hazard*, available at EPA website at <http://www.epa.gov/lead>

## ARGUMENT

The City urges this Court to reject well-established Missouri precedents, abandon the causation requirement, and endorse a far-reaching expansion of state common law doctrines of product identification so as to allow it to pursue claims of industry wide liability against a subset of former manufacturers of lead pigment and lead-containing paints or their alleged successors. The City's legal theories would create dangerous disincentives for product manufacturers and other industrial defendants who might otherwise do business in Missouri and would open wide the Missouri courthouse doors to plaintiffs' mass tort and class action attorneys from neighboring states like Illinois that have properly rejected such arguments.

The City's reach particularly exceeds its grasp, given the ill fit between its novel theory and the factual setting of its legal claims. The City argues that the Court should adopt the market share liability doctrine it properly rejected in *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) (en banc), and asks the Court to ignore the fact that the lead paint market does not satisfy the conditions that even courts accepting market share liability have required, such as fungibility of product and a stable, temporally limited and well-defined market. The City's claims were properly dismissed below and that dismissal should be affirmed.

I. The Trial Court's Rejection of the City's Market Share Liability Theory Should Be Affirmed

A. Market Share Liability is Contrary to Missouri Law and Bad Public Policy

In *Zafft*, this Court held that “market share liability is unfair, unworkable, and contrary to Missouri law, as well as unsound public policy.” 676 S.W.2d at 246. The Court rejected plaintiffs’ arguments – made by the City here as well – that market share liability properly allocated liability among potential defendants based upon their relative likelihood of having caused the injury at issue. “[M]arket share liability continues the risk that the actual wrongdoer is not among the named defendants, and exposes those joined to liability greater than their responsibility.” *Id.*

In so ruling, the Court acknowledged the impulse that motivated the handful of courts that recognized market share liability in the personal injury context to “strain[] existing law or adopt[] novel theories.” *Id.* “Yet simply to state ... that as between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury and that defendants can better absorb this cost ignores strong countervailing consideration.” *Id.* (citations omitted) “Competing with the interests of [plaintiffs] are legitimate concerns that [market share] liability will discourage desired ... research and development while adding little incentive to production of safe products, for all companies face potential liability regardless of their efforts.” *Id.* at 247.

The Court was guided in its analysis by University of Missouri Professor David Fischer’s seminal article, *Products Liability – An Analysis of Market Share Liability*, 34 Vand. L. Rev. 1623 (1981). In his article, Professor Fischer forcefully rebuts the policy arguments that the City raises here in defense of its market share liability theory. As Professor Fischer explains, the elements of defect and causation inherent in common tort law are designed not to compensate every injured plaintiff but to strike an appropriate

societal balance between the right of plaintiffs to be protected from unreasonably dangerous products and the rights of defendants to be protected from liability that is unduly burdensome. This Court agreed:

Missouri law does not guarantee relief to every deserving plaintiff. ... The development of products liability and comparative negligence in this state leaves this established requirement of proving causation intact; neither logic nor fairness requires this Court to dispense with this requirement in the present cases ... To shift the burden of proof on causation to [defendants] substantially alters the existing rights and liabilities of the litigants.

*Zafft*, at 246-47.

Professor Fischer explains that for a number of reasons “the risk of over-deterrence in market share liability cases is extremely high.” *Market Share Liability*, at 1657. First, “over-deterrence could result if the manufacturer perceives this additional cost to be greater than it feasibly can transfer to the consumers of products. Under these circumstances, the manufacturer might decide against manufacturing the product at all, which – if the product is worthwhile – will thwart the goal of not discouraging socially desirable activity.” *Id.* at 1654. This risk is increased by the fact that manufacturers often must base their decisions upon incomplete information. “If a product presents a risk of causing an unknown harm in the distant future, the market share liability theory may induce the manufacturer to withhold the product from the market, notwithstanding that the product ultimately might prove to be entirely harmless.” *Id.*<sup>13</sup>

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<sup>13</sup> In this case, while the health risks of *deteriorated* lead paint are now apparent, historically lead paint was favored not only for its durability but for its perceived health advantages. Lona L. Trott, *American Red Cross Textbook on Red Cross Home Nursing*

Second, “[t]he market share liability theory also creates the possibility of over-deterrence in a more serious way because the theory creates the very real possibility that a defendant will be held liable for more harm than it actually caused.” *Id.* at 1656.

Professor Fischer identified “numerous practical and theoretical difficulties that make the theory unlikely to be able to apportion damages in proportion to the amount of harm caused,” *id.*, likely divergent views on the definition of the relevant market, problems of proof, the likelihood that named defendants will be required to pay the shares of unavailable or unnamed market participants, and the further distortions that arise from the limited acceptance of the doctrine in different states. *Id.* at 1642-47. This risk is particularly present where, as here, a plaintiff brings suit against only a subset of companies that comprised the market but seeks to hold each named defendant jointly and severally liable. *Id.* at 1645-47.

Third, market share liability gives rise to over-deterrence because of the “enormous litigation costs that are associated with the theory.” Because claims of

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(1942), at 137 (relevant excerpts attached as Ex. 2) (“Children, sick people, and old people who cannot defend themselves often suffer severely from bedbugs bites. Bedbugs live in cracks in the walls, around baseboards, under loose wallpaper, and in crevices of beds and bedsprings. ... A coat of lead paint to floors and woodwork will often seal the cracks the bugs inhabit and put an end to them.”); Joseph H. Koffolt & James R. Withrow, “Paint and Varnish,” Ohio State University Studies Engineering Series, March 1936 at 1 (relevant excerpts attached as Ex. 3) (“Painting plays an important part in preventing disease and conserving life. Hospitals for many years have recognized that painted walls are effective weapons against the cultivation and propagation of disease-causing bacteria; walls are rendered washable and waterproof, and so inhospitable to organisms.”); Henry A. Gardner, Papers on Paints and Varnish 401 (1920) (relevant excerpts attached as Ex. 4) (“[There is no doubt that] from the standpoint of sanitation and hygiene, properly painted wall surfaces are far superior to papered walls...”).

industrywide liability necessarily expand the number of defendants dramatically and leads to complicated and often competing analyses of the alleged market, “[t]he legal fees and administrative costs arising from litigation of this magnitude could easily rival the cost of the plaintiff’s judgment.” *Id.* at 1657.

Professor Fischer ended his analysis with a warning that is as relevant today as it was when first heeded by this Court over 20 years ago:

While the goal of compensating injured accident victims is worthwhile, it cannot be regarded as the sole objective of tort law. The adversary system was designed to resolve disputes among individuals in an impartial manner, and any attempt to convert it into a compensation system will fail because of the enormous cost to society. The market share liability theory is a dangerous step towards just such a conversion, and courts in the future should reject it as a method for imposing liability in civil cases.

*Market Share Liability*, at 1662.

B. Market Share Liability is Particularly Ill-Suited in this Case

The arguments against market share liability are particularly compelling in this litigation. Even those courts that have accepted market share liability have largely done so in situations fundamentally different from those presented in this case. *See Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (adopting market share liability in case where plaintiff developed cancer as a result of her mother’s ingestion during a nine month period of pregnancy of diethylstilbestrol (“DES”), a drug with an identical formula manufactured by a number of identified companies).

The emotional argument underpinning the market share theory – compensating “[p]laintiffs [that] are innocent and claim serious injuries” allegedly caused by



defendants' wrongdoing, *Zafft*, 676 S.W.2d at 246 – does not apply here. This case is not aimed at compensating the victims of lead poisoning or even abating the conditions giving rise to the risk. Nor is it aimed at penalizing those whose wrongdoing caused the risk, the property owners who unlawfully failed to maintain their properties in a lead safe condition. See *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 139 (Ill. App. 2005) (“the conduct of defendants in promoting and lawfully selling lead-containing pigments decades ago, which was subsequently lawfully used by others, cannot be a legal cause of plaintiff’s complained-of injury, where the hazard only exists because Chicago landowners continue to violate laws that require them to remove *deteriorated* paint”). Rather, any damages award in this case will go to the City coffers where it will – perversely – protect the financial interests of the wrongdoing landlords who otherwise are required by statute to pay for the costs of abatement here being sought.

Further, unlike the case of DES, where there was at least some hope of defining a market based on the limited time period at issue, complete fungibility of the generic drug, and a defined group of market participant drug manufacturers, the long history and the changing and diverse nature of the lead paint market defy any ability of the parties or the Court to confidently determine market shares here.<sup>14</sup> Other courts that have examined

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<sup>14</sup> This is not to say that application of market share liability proved manageable even in DES litigation. To the contrary, following *Sindell*, California trial courts struggled mightily to apply the market share doctrine. As the Illinois Supreme Court recounted in *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 337 (Ill. 1990):

In San Francisco, the trial court determined that the only logical or practical definition for “market” would have to be on a national scale because the parties were unable to present data on a more narrow market, which the

this market have identified the following practical barriers to any application of market share liability in lead paint litigation:

- Lead Paint Was Manufactured by a Changing Group of Companies over an Extended Time Period. In DES litigation, plaintiffs used the drug at most for a nine-month period of pregnancy. Here, by sharp contrast, the City seeks compensation for abatement of lead paint that may have been applied to buildings in St. Louis over a more than one hundred year period during which such paints were on the market. Over that time period, numerous companies entered and left the market, many of which no longer exist and are not defendants in this lawsuit. The multitude of players was particularly prevalent in St. Louis, which, as of 1920, led the country in the manufacture of paint pigments.<sup>15</sup> As the Pennsylvania Supreme Court explained, the long and changing nature of the lead paint market precludes any accurate calculation of any defendant's market share:

The difficulty in applying market share liability where such an expansive relevant period as one hundred years is at issue

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State supreme court directed it should attempt to do. The trial judge in Los Angeles expressed exasperation with the task of attempting to formulate market shares after spending over four weeks examining the DES market. (*Stapp v. Abbott Laboratories* (Super.Ct. Los Angeles County), No. C 344407 ("The harsh blunt fact that the evidence has shown is that that information and data is just not available" and "when the Supreme Court, \*\*\* without having any evidence says that you can determine what the [sales are] as to a particular manufacturer, it's just, just not there. That data doesn't exist".))

<sup>15</sup> See Wendy Shaw, *A Tale of Two Cities: The Best of Times, the Worst of Times. Inequality in St. Louis' Metro-East*, at 2, available at <http://www.siue.edu/~wshaw/esl.htm>.

is that entities who could not have been producers of the lead paint which injured [plaintiff] would almost assuredly be held liable. Over the one hundred year period at issue, several of the pigment manufacturers entered and left the lead paint market. Thus, application of the market share theory to this situation would virtually ensure that certain pigment manufacturers would be held liable where they could not possibly have been a potential tortfeasor.

*Skipworth v. Lead Indus. Ass'n*, 690 A.2d 169, 173 (Pa. 1997); *see also Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 550-51 (1st Cir. 1993) (“defendants’ contributions to the lead paint market varied significantly during this time period. Given these facts, it is difficult to discern the basis upon which any market share determination would be premised.”); *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848, 852-53 (App. Div 1999) (“During that extended time period, some of the defendants entered and left the white lead carbonate market.”).

The fluid nature of the market not only gives rise to the risk of a defendant being held liable where it could not have been a potential tortfeasor, but also creates a situation where defendants could be held liable for more than their actual share of the market, which likewise gives rise to the dangers of over-deterrence identified by Professor Fischer. *See Santiago*, 3 F.3d at 551. The risk of misidentification and misallocation of liability is significantly compounded in lead paint litigation by the decades that have passed since there was any lead paint market and the lack of historical records that would allow even an attempt to define the market reliably from the late 1800s through to the 1970s when the market was in existence.

The City's suggestion that it might provide market information, *e.g.*, through historical information regarding advertisements for lead paints and pigments, merely underscores the impossible nature of the challenge posed by any application of its market share theory. Using this "evidence" (and even assuming accurate records of advertisements were available), a court would improperly inflate the market share of a national painting company who blankets the country with lead paint advertisements, but sells very little lead paint in St. Louis and improperly deflate (or miss altogether) the local lead paint company that sells a tremendous amount of lead paint into St. Louis, but whose advertisements never mentioned lead paint and no longer exists today.

As Professor Fischer explains, the passage of time and changing nature of the market also gives rise to an incentive for plaintiffs to suppress probative evidence. If the City were to uncover evidence demonstrating that a specific insolvent or no longer existing company manufactured the lead paint that was applied to specific properties for which the City seeks the cost of abatement, the City would recover nothing.<sup>16</sup> Absent such evidence, however, the City would recover damages from the named defendants under the market share theory. "This anomaly provides [the City] with an incentive to suppress evidence which indicates that an insolvent company supplied the product."

*Market Share Liability*, at 1650.

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<sup>16</sup> This is not merely a theoretical possibility. Because of insolvency, for example, the City has not named Eagle-Picher as a defendant, notwithstanding the fact that it was a major producer of lead compound used in lead paints. *See Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1253 (5th Cir. 1997) (adopting and incorporating district court opinion) (discussing Eagle-Picher). Further, the City has elected to drop two other potential defendants, Dupont and ARCO.

- Lead Paint Was Not A Fungible Product. In DES cases, defendants manufactured an identical product that, to the extent used by plaintiff, gave rise to an identical risk. This is not the case with lead paint. Rather, “it is undisputed that lead pigments had different chemical formulations, contained different amounts of lead, and differed in potential toxicity.” *Skipworth*, 690 A.2d at 173. Lead paint was manufactured using a number of different lead compounds, including white lead carbonate, leaded zinc oxide, lead chromate, lead silicate, and lead sulfate. *Brenner*, 699 N.Y.S.2d at 852. Further, paint manufacturers used differing amounts of lead compounds in their paints. “Some lead based paint contained 10% lead pigment, while other paint was more toxic, containing as much as 50% lead pigment.” *Id.* at 853; *see also Jackson v. Glidden Co.*, No. 87779, 2007 WL 184662, \*4 (Ohio App. Jan. 25, 2007) (manufacturers used different formulas and a variety of lead pigments in lead paint). And “differing formulae of lead paint result in differing levels of bioavailability of the lead. ... Because of these differences in bioavailability, a child who ingests dust or chips of lead paint containing equal amounts of lead derived from two lead paints will *not* generally develop equal elevation in internal lead level.” *Skipworth*, 690 A.2d at 173 (internal quotes omitted).

Further, it would be impossible today to accurately determine the specific formulations of the many different brands of lead paint historically used in the City. Because of the weight of lead paints and the high costs of transportation, the lead paint market was dominated well into the middle of the 20th century by small manufacturers in discrete markets. As one scholar explained, this created a highly competitive and secretive market place: “At the turn of the century, the paint industry relied on secret

processes and formulas, which were jealously guarded by highly paid foremen who took their knowledge with them from job to job. In some factories, components were identified by numbers so that workers would not know what materials they were mixing.”<sup>17</sup>

This factual setting precludes any honest application of market share liability. Quoting again from Professor Fischer: “The [market share liability] theory cannot be applied in cases where quality control standards differ within the industry, since under these circumstances, some manufacturers will produce safer products than others. The imposition of liability in this situation actually could reduce a manufacturer’s incentive to produce safer products.” *Market Share Liability*, at 1653. “If a manufacturer realizes that it will be held liable for a portion of the harm regardless of the amount of care it takes in the production of its products, then the manufacturer will have little incentive to implement effective quality control techniques.” *Id.*

- Lead Paint Was Used for Different Purposes Which Pose Differing Risks: The City’s claim arises primarily from the use of lead paint on interior residential surfaces, where chipping and deteriorating paint gives rise to a greater risk of exposure. However, lead paint was used for numerous other purposes, including exterior surfaces and nonresidential purposes that are not alleged to be harmful. *Brenner*, at 852. Thus, any

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<sup>17</sup> Anne Cooper Funderberg, *Paint Without Pain*, 17(4) *Invention & Technology Magazine* (Spring 2002), available on line at [http://www.americanheritage.com/articles/magazine/it/2002/4/2002\\_4\\_48.shtml](http://www.americanheritage.com/articles/magazine/it/2002/4/2002_4_48.shtml).

market share analysis would need to separate out the market for paint used for interior surfaces, an impossible task.

C. The City Cannot Avoid the Fatal Flaws in Its Market Share Theory By Alleging Public Nuisance.

The City seeks to justify its request that the Court repudiate *Zafft* by arguing that its claim sounds not in products liability but in public nuisance. But as the Illinois Court of Appeals recognized in rejecting the identical argument, there is nothing in public nuisance law that allows a municipality to pursue a claim of public nuisance without identifying the specific defendant that caused the alleged nuisance. *City of Chicago*, 823 N.E.2d at 135-36. The City's related suggestion that the many practical impediments to its market share theory are somehow obviated because it is seeking recovery for damages to the "community at large" rather than to individual properties is similarly without merit. Even if the City could establish the percentage market shares of each of the defendants for all lead paint products sold in St. Louis over its history – which it cannot – it still would face insurmountable hurdles in accounting for the many other historical market players that entered and left the market over time, the varying share of the market held by different participants during different periods, and the differing uses and formulation of lead paints across manufacturers and over time. Moreover, the City's insinuation that the Court could limit the scope of any recognition of market share liability by restricting it to cases involving a large number of properties is simply false. Rather than posing a limitation on future cases, the requested ruling would put up a welcome sign to plaintiffs' counsel to bring mass tort and class action suits into the state.

The City's demand that it be absolved of its obligation to establish causation as to each specific defendant is part of a broader effort by plaintiffs' counsel to use public nuisance law to avoid the important evidentiary safeguards imposed by products liability law. While today the City attempts to use public nuisance law to impose liability on manufacturers of lead paint, a few years back it was attempting (unsuccessfully) to use public nuisance law to impose liability on gun manufacturers. *See City of St. Louis v. Cernicek*, No. 02CC-1299, 2003 WL 22533578 (Mo. Cir. Oct. 15, 2003). While in this case the target defendants are lead paint manufacturers, in other cases plaintiffs have attempted to use public nuisance law to go after local companies, like Anheuser Busch, for their sale of beer. *See Alston v. Advanced Brands & Importing Co.*, No. Civ. 05-72629, 2006 WL 1374514 (E.D. Mich. May 19, 2006); *Eisenberg v. Anheuser-Busch, Inc.*, No. 1:04 CV 1081, 2006 WL 290308 (N.D. Ohio Feb. 2, 2006); *Goodwin v. Anheuser-Busch Cos.*, No. BC310105, 2005 WL 280330 (Cal. Super. Ct. Jan. 28, 2005). Other recent targets of public nuisance lawsuits include manufacturers of such widely divergent products as automobiles,<sup>18</sup> video games,<sup>19</sup> and genetically modified corn.<sup>20</sup>

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<sup>18</sup> See California Office of Attorney General Press Release, *Attorney General Lockyer Files Lawsuit Against "Big Six" Automakers for Global Warming Damages in California* (issued Sept. 20, 2006) available at <http://ag.ca.gov/newsalerts/release.php?id=1338>

<sup>19</sup> See *Florida Judge Wants to See 'Bully' in Court*, Washington Post, October 12, 2006 at D5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101739.html>

<sup>20</sup> Thomas P. Redick, *Engineering Legal Risk Management into Agricultural Biotech*, Washington Legal Foundation Legal Backgrounder (Jan. 16, 2004).



In *Cernicek*, the circuit court quoted the New York Supreme Court in explaining the dangerous consequences that would follow from ignoring the time-tested principles of causation and product identification set forth in products liability law:

[G]iving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities. All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born. A variety of such lawsuits would leave the starting gate to be welcomed into the legal arena to run their cumbersome course, their vast cost and tenuous reasoning notwithstanding. Indeed, such lawsuits employed to address a host of societal problems would be invited into the courthouse whether the problems they target are real or perceived; whether the problems are in some way caused by, or perhaps merely preceded by, the defendants' completely lawful business practices; regardless of the remoteness of their actual cause or of their foreseeability; and regardless of the existence, remoteness, nature and extent of any intervening causes between defendants' lawful commercial conduct and the alleged harm.

2003 WL 22533578, at \*1 (quoting *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196-97 (2003)). As *Cernicek* and other courts have explained: “the courts have enforced the boundary between the well-developed body of product liability law and public nuisance law. Otherwise, if public nuisance law were permitted to encompass product liability, nuisance law ‘would become a monster that would devour in one gulp the entire law of tort.’” *Id.* at \*2 (quoting *Camden County Bd. of Chosen Freeholders v.*

*Baretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) and *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)).

\* \* \* \*

The Pennsylvania Supreme Court correctly recognized that “application of market share liability to lead paint cases such as this one would lead to a distortion of liability which would be so great as to make determinations of culpability arbitrary and unfair.” *Skipworth*, 690 A.2d at 232. The same ruling is warranted here and the court of appeals opinion should be affirmed.

### CONCLUSION

The City asks this Court to discard well-settled legal precedence, to erase important and time tested doctrines of common law, and to thus transform Missouri into a Mecca for mass, class and other collective tort actions against industry. The Court should decline this invitation. The Court’s exposition of the dangers of market share liability is at least as compelling today as it was in *Zafft*, and is particularly dispositive given the nature and long history of the lead paint market. The trial court’s opinion should be affirmed.

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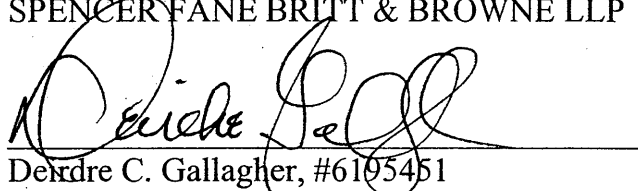
**RULE 84.06(c) CERTIFICATION**

The undersigned hereby certifies that the foregoing brief complies with the limitations imposed by Rule 84.06(b). Further, this brief contains 5,778 words.

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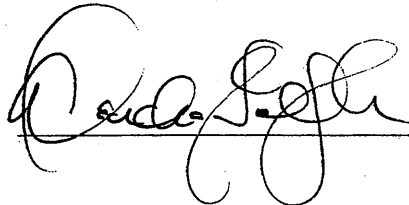
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