EFiled: Oct 06 2022 10:00AM EDT
Filing ID 68220385
Case Number 279,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,	)	
Plaintiff Below, Appellant,	)	No. 279, 2022
v.	)	Appeal from the Superior Court of the State of Delaware, C.A. No. N21C-09-179 MMJ CCLD
MONSANTO COMPANY, SOLUTIA, INC., and PHARMACIA LLC,	)	
Defendants Below, Appellees.	)	

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal asks the Court to resolve whether the State of Delaware may pursue claims for public nuisance, trespass, and unjust enrichment against Monsanto Company, Solutia Incorporated, and Pharmacia LLC (collectively, "Monsanto") for Monsanto's legacy of contaminating Delaware's lands, waters, and resources with polychlorinated biphenyls ("PCBs"). PCBs are a family of toxic "forever chemicals" that have profound impacts on the health of fish, wildlife, and people. For forty years, Monsanto was the sole producer of PCBs in the United States. Monsanto's PCB manufacturing finally came to a halt in 1977, after Congress banned the manufacture of PCBs. By then, Monsanto had already produced and sold over 640,000 metric tons of PCBs. Most of those PCBs have ended up in the environment, as Monsanto knew they would.

Today, Delaware's lands and waterways remain contaminated with Monsanto's PCBs. This contamination has a real and direct impact on Delawareans and Delaware's natural resources. Delaware's harms from PCBs are no surprise to Monsanto. Monsanto knew for decades that its PCBs were toxic, that PCBs routinely entered the environment through the ordinary use of PCB-containing products, and that they would not biodegrade in the natural environment. Nonetheless, for years, Monsanto expanded production and aggressively promoted PCB use. Even when independent scientists sounded the

alarm beginning in 1966 that the chemical residue turning up in fish, bird, and mammal tissue samples around the globe—including in marine environments far from industrial sites—appeared to be PCBs, Monsanto continued to ramp up its PCB production.

The State has been dealing with the toxic legacy of Monsanto's conduct for years. On September 22, 2021, Delaware filed its Complaint against Monsanto, alleging claims of public nuisance, trespass, and unjust enrichment based on the harms caused by Monsanto's PCBs to Delaware's lands, waters, fish, and wildlife. On December 17, 2021, Monsanto moved to dismiss the State's claims pursuant to Superior Court Civil Rule 12(b)(6). On July 11, 2022, the Superior Court granted Monsanto's motion as to each of the State's claims.

The Superior Court's dismissal renders Delaware an outlier. Across the country, state and federal courts applying well-settled common-law principles have allowed nearly identical claims to proceed against Monsanto for similar harms Monsanto's PCBs have caused those jurisdictions' lands, waters, and wildlife. The State's claims fit well within established theories of tort liability. The State is not asking this Court to create new law, but rather to apply established common law principles to a persistent, pervasive harm.

The Superior Court erred by creating impediments to these causes of action which did not exist at common law and are not applicable here. Its decision would

leave Delaware and its citizens with the continued burden of cleaning up the contamination that, as alleged by the State, resulted from Monsanto's intentional conduct and has caused extensive harm to Delaware's natural resources. Reversing the lower court would protect long-established and important principles rooted in common law. Accordingly, the State appeals.

SUMMARY OF ARGUMENT

1. The Superior Court erred by holding that the State failed to allege a claim for public nuisance. A public nuisance is a nuisance that affects rights to which every citizen is entitled, and a party properly states a claim for public nuisance when it alleges an unreasonable interference with rights common to the general public. There is no "products-based" exclusion or "control over the instrumentality" element to public nuisance claims, and the Superior Court erred by imposing both. The State has alleged that Monsanto's PCBs interfere with the common right to clean water, lands, and natural resources throughout Delaware and that Monsanto knew this interference was substantially certain to result from Monsanto's conduct. The allegations in the Complaint are more than sufficient to state a claim for public nuisance.

2. The Superior Court erred by holding that the State failed to allege a claim for trespass. The State possesses an inalienable ownership interest in the lands submerged beneath waterways within Delaware. In holding that the State lacks standing to pursue a trespass claim, the Superior Court added and then misapplied an "exclusive possession" element that is inconsistent with well-settled law. And the Superior Court's analysis again inserted and misapplied a "control over the instrumentality" requirement for trespass that is not part of Delaware law. The State has alleged that Monsanto's PCBs are present in lands to which

Delaware holds title and that Monsanto knew its PCBs would enter those lands through the ordinary use of products containing Monsanto's PCBs. That is more than sufficient to state a claim for trespass.

3. The Superior Court erred when it held that Delaware failed to allege a claim for unjust enrichment. Its conclusion that it lacks jurisdiction over the claim is inconsistent with this Court's precedent that the Superior Court has jurisdiction over unjust enrichment claims that seek only the recovery of damages. The State has adequately alleged that Monsanto has been unjustly enriched.

STATEMENT OF FACTS

Watersheds throughout Delaware are impaired by PCBs. This includes the Delaware River and Bay, the Saint Jones, Appoquinimink, and Christina Rivers, and the Brandywine, Red Clay, and White Clay Creeks. A046 ¶ 91. PCB concentrations in some Delaware watersheds are so high that the State has advised the public not to consume any fish from those waters. A056 ¶ 118.

Monsanto began manufacturing PCBs in 1935. A022 ¶¶ 40-41. Monsanto knew even then that PCBs' chemical composition makes them incredibly stable; PCBs break down extremely slowly, if at all. A020 ¶ 35. By at least 1937, Monsanto also knew that PCBs were toxic to humans and animals, and Monsanto knew by the 1950s that PCBs could escape into and contaminate the environment through the ordinary use, maintenance, and disposal of PCB-containing products. A026 ¶ 52. From 1935 through 1977—when Congress banned the manufacture and sale of PCBs—Monsanto was the only company in the United States manufacturing PCBs for widespread commercial use. A010 ¶ 5, A022 ¶ 42.

Even minute concentrations of PCBs in the environment cause dramatic impacts on an ecosystem. PCBs are lipophilic and largely insoluble in water, and therefore tend to accumulate in animals' fatty tissues. A020 ¶ 36, A025 ¶ 48. PCBs typically enter the food chain when small organisms ingest them, and their accumulative effect is magnified with each step up the food chain. As a result,

PCB concentrations in the fatty tissues of predators such as larger fish, birds, and mammals, including humans, may be many times higher than the PCB concentration in open water. A024-25 ¶¶ 47-48.

Monsanto marketed its PCBs for a broad range of industrial and consumer applications. In addition to dielectric fluids in capacitors and transformers—what Monsanto misleadingly termed "closed applications"—PCBs were used in hydraulic fluids, heat transfer and cooling systems, sealants, inks, adhesives, plasticizers, paints, and carbonless copy paper. A023-24 ¶¶ 44-45. These uses were termed "open applications" because nothing barred the PCBs from entering directly into the environment; PCBs inevitably escaped from these products into the natural environment simply through ordinary use. A023 ¶ 45. Even in the ostensibly "closed" applications, PCBs escaped into the environment through normal maintenance, leaks, volatilization into the air, and disposal. *Id.* Ultimately, PCBs entered the environment from every single application for which Monsanto made and sold its PCBs. Over four decades, Monsanto produced and sold over 640,000 metric tons of PCBs in the United States. A023 ¶ 43.

Beginning in 1966, independent scientists reported detecting PCBs in wildlife samples across the globe. A033 ¶ 65, A035 ¶ 68. As public attention to PCB pollution grew, pressure on Monsanto intensified. Finally, in 1969, Monsanto formed a PCB "Ad Hoc Committee" to protect Monsanto's reputation and preserve

the significant revenue stream from the manufacture and sale of PCBs. A036-37 ¶¶ 69-70. In a confidential internal report, the Ad Hoc Committee acknowledged that PCBs "may be a global contaminant" and noted, "In one application alone (highway paints), one million lbs/year are used. Through abrasion and leaching we can assume that nearly all of this Aroclor [PCB fluid] winds up in the environment." A037-38 ¶ 71. Rather than cease production, Monsanto identified "actions which must be undertaken to prolong the manufacture, sale and use of" PCBs. A038 ¶ 72. Ultimately, Monsanto determined "there [was] too much customer/market need and selfishly too much Monsanto profit" to stop producing PCBs. A039-40 ¶¶ 75-76. The following year, Monsanto's PCB production volume was the highest in its history, at 85 million pounds. A040-41 ¶ 77.

Delaware has borne, and will continue to bear, significant costs because of the contamination of its environment by Monsanto's PCBs. The consequences of this PCB contamination include impaired water quality, impairment of publicly owned lands, interference with the public's right to fish as illustrated by the State's fish consumption advisories, and threats to wildlife. A047-52 ¶¶ 93-109. The State has invested substantial resources investigating, monitoring, and remediating PCB contamination in its lands, waters, and wildlife. A046 ¶ 90, A057-58 ¶ 120. Its work has resulted in decreased PCB concentrations in historically contaminated areas. *Id.* While these remedial efforts demonstrate that it is possible to undo the

harms caused by Monsanto's PCBs, the expense of doing so is immense. *Id.* Monsanto, not Delaware taxpayers, should pay to clean up Monsanto's mess.

ARGUMENT

I. The Superior Court Erred When It Dismissed the State's Claim for Public Nuisance

A. Question Presented

Did the Superior Court err by dismissing the State's claim for public nuisance? This question was raised below (A115-A128**)** and considered by the Superior Court (Op. 6-11).

B. Scope of Review

This Court reviews a decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* to "determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (citation omitted). In reviewing the dismissal, this Court "view[s] the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations." *Id.* Dismissal is appropriate only if it appears "with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief." *Id.*

C. Merits

"A public nuisance is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B. Delaware courts have long applied that standard, and this Court has never questioned it. *See, e.g.*, *Lechliter v. Delaware Dep't of Nat. Res. & Envtl. Control*, 2015 WL 9591587, at *17 n.130 (Del. Ch. Dec. 31, 2015), *aff'd*, 146 A.3d 358 (Del. 2016) (quoting Restatement (Second) of Torts § 821B(1) (1979); *see also Alexander v. Evraz Claymont Steel Holdings, Inc.*, 2013 WL 8169799, at *2 n.5 (Del. Super. Mar. 31, 2013) (same). "A public nuisance has been defined as a nuisance which affects the rights to which every citizen is entitled[,]" and which "injuriously affects such part of the public as necessarily comes in contact with it in the exercise of a public or common right." *Artesian Water Co. v. Government of New Castle Cty.*, 1983 WL 17986, at *22 (Del. Ch. Aug 4, 1983) (citing *Murden v. Comm'rs. of Town of Lewes*, 96 A. 506 (Del. Super. 1915), *aff'd.*, 108 A. 74 (Del. 1919); 58 Am. Jur. 2d, Nuisances § 7, p.561; *State ex rel. Bove v. Hill*, 167 A.2d 738, 741 (Del. Ch. 1961); Restatement (Second) of Torts § 821B)).

The Restatement (Second) of Torts imposes no limitations on the types of conduct that can create an actionable nuisance. To the contrary, it defines nuisance-causing "activity" to include "all acts that are a cause of harm." Restatement (Second) of Torts § 834 cmt. b. Indeed, under well-established

principles in both public and private nuisance, a defendant may be held liable for nuisance "not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." Restatement (Second) of Torts § 834.

Unlike a private nuisance, a public nuisance "does not necessarily involve interference with use and enjoyment of land." Restatement (Second) of Torts § 821B cmt. h. *See also* 58 Am. Jur. 2d Nuisances § 26 ("There need not be injury to real property in order for there to be a public nuisance, and neither the use or misuse of land nor the invasion of property rights of another is required for a public nuisance to be found." (footnotes omitted)).[1] Delaware courts have adhered to that well-settled rule. *See, e.g.*, *State ex. rel. Buckson v. Sposato*, 235 A.2d 841, 846 (Del. Ch. 1967) ("At common law a public nuisance involved conduct which produced material annoyance, inconvenience, or discomfort."). To state a claim for public nuisance, the State need only allege that Monsanto unreasonably interfered with a right common to the general public. The allegations in the Complaint meet that standard.

[1] *See also Philadelphia Elec. Co. v. Hercules*, 762 F.2d 303, 315 (3rd Cir. 1985) ("Whereas private nuisance requires an invasion of another's interest in the private use and enjoyment of land, a public nuisance is 'an unreasonable interference with a right common to the general public.'") (citing Restatement (Second) of Torts § 821B(1)); *City of Gary ex. rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1233 (Ind. 2003) ("[w]e are not persuaded that a public nuisance necessarily involves either an unlawful activity or the use of land").

The Superior Court did not apply this well-settled law to the State's public nuisance claim. Rather, the Superior Court, relying on its own earlier flawed decision in another case, and inapposite caselaw from other jurisdictions, held that (1) Delaware courts should "limit[] actions for public nuisance by excluding products-based public nuisance claims" and (2) under Delaware law a public nuisance claim for environmental contamination arises only when a defendant "exercises control over the instrumentality that caused the nuisance at the time of the nuisance." Op. 7. These holdings cannot be reconciled with Delaware law and are inconsistent with the many decisions from other jurisdictions that have addressed the same issue of Monsanto's potential liability for public nuisance.

1. The Superior Court's "Products-Based Nuisance Exclusion" and "Control of Instrumentality" Requirement Are Not Part of Delaware Law

In dismissing the State's public nuisance claim, the only Delaware authorities the Superior Court relied on are two earlier Superior Court decisions, *Sills v. Smith & Wesson Corporation*, 2000 WL 33113806 (Del. Super. Dec. 1, 2000) and *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Feb. 4, 2019). As discussed below, in *Purdue Pharma*, the Superior Court incorporated and improperly expanded upon dicta from *Sills* speculating about hypothetical restrictions on public nuisance claims. The Superior Court also created, out of whole cloth, a "control of the instrumentality" requirement without

foundation in Delaware law. The Superior Court treated both the expanded dicta from *Sills* and its "control of instrumentality" requirement from *Purdue* as settled law in its decision below.

In *Sills*, the City of Wilmington asserted claims including negligence and nuisance against several handgun manufacturers and trade associations for harm arising from gun violence. The *Sills* court recognized that, under Delaware law, there is "no express authority [] requiring public nuisance claims be restricted to those based on land use." 2000 WL 33113806, at *7. The court then speculated, without citation, that "Delaware courts remain hesitant to expand public nuisance" and that Delaware law might not recognize claims for "public nuisance based upon products." *Id.* Nonetheless, the court stopped short of rejecting the plaintiffs' public nuisance claim on the merits, instead concluding the public nuisance claim was "subsumed" within the plaintiffs' negligence claims, which were allowed to proceed. *Id.* As a result, the court held, "plaintiffs' allegations have already been addressed. There is no independent claim for public nuisance, at least not along the lines alleged by plaintiffs." *Id.* The *Sills* court did not hold that Delaware law precludes all claims for "products-based public nuisance claims."

In *Purdue Pharma*, the State alleged claims for negligence, public nuisance, consumer fraud, unjust enrichment, and civil conspiracy against opioid manufacturers, distributors, and pharmacies for harms from the opioid epidemic.

The Superior Court relied on *Sills* as the sole Delaware authority for its conclusion that "[i]n Delaware, public nuisance claims have not been recognized for products." 2019 WL 446382, at *12 (citing *Sills*, 2000 WL 33113806, at *7). In other words, in *Purdue Pharma*, the Superior Court took speculative, unsupported dicta from *Sills* and created a new categorical restriction on Delaware public nuisance claims. The same judge reiterated this restriction in the decision below. *See* Op. 7 (stating that in *Purdue Pharma* "[t]his Court also concluded that Delaware does not recognize public nuisance claims for products").[2]

The court in *Purdue Pharma* then went one step further. Without any analysis or discussion, the court proclaimed that under Delaware law "[a] defendant is not liable for public nuisance unless it exercises control over the instrumentality that caused the nuisance at the time of the nuisance." 2019 WL 446382, at *13. As to this additional new restriction on public nuisance claims in Delaware, the Superior Court cited *Patton v. Simone*, 1992 WL 183064 (Del. Super. June 25, 1992). The court did not explain its reference to *Patton*, but that case does not create or support the "control over instrumentality" requirement imposed by the Superior Court in *Purdue Pharma*.

[2] In creating this new restriction, the Superior Court rephrased the dicta in *Sills*—from "have not been recognized" to "does not recognize"—a significant change in meaning.

Patton was a wrongful death case based on a theory of negligent servicing of an elevator shaft, in which the plaintiff also alleged nuisance claims. The Superior Court dismissed the nuisance claim against the elevator servicer, stating "[t]his was not [the elevator servicer's] property, therefore, it cannot be the source of the nuisance." *Patton*, 1992 WL 398478, at *9. It was undisputed that the elevator servicer did not facilitate access to the elevator shaft. *Id.* at *4. *Patton* cannot properly be read as creating a "control" requirement for Delaware public nuisance claims. At most, Patton's brief discussion of nuisance affirms the more basic proposition that a party who does not create a nuisance cannot be liable for it.

Control over the instrumentality of a nuisance is not a standalone element of a public nuisance claim. On the contrary, "when the nuisance results from the use or misuse of an object apart from land, or from conduct unrelated to a defendant's use of land, lack of control of the instrumentality at the time of injury is not an absolute bar to liability." *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E. 2d 1099, 1132 (Ill. 2004). *See also State of Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467-68 (D. Md. 2019) (rejecting "control" requirement for public nuisance liability and stating "Maryland courts have found that a defendant who created or substantially participated in the creation of the nuisance may be held liable even though he (or it) no longer has control over the nuisance-causing instrumentality"). Rather than being a separate element, "control" in nuisance

cases generally emerged as an issue related to whether injunctive relief is appropriate in private nuisance claims involving land use. Examining cases involving a defendant's control, the Illinois Supreme Court observed, "[t]hese cases stand for the unremarkable proposition that an injunction will not issue, ordering a defendant to abate a nuisance upon the land, if he has no authority, by reason of ownership or possession, to enter upon the land." *City of Chicago*, 821 N.E. 2d at 1131. The court found that such cases "offer scant support for the imposition of a separate control requirement in public nuisance cases that are not predicated on the defendant's use of land." *Id.*

Patton and *Sills* provide similarly "scant support" for imposing a separate control requirement under Delaware law. Nonetheless, in the decision below, the Superior Court, relying on its own flawed conclusion in *Purdue Pharma*, imposed such a requirement, holding that "a defendant is not liable for public nuisance unless it exercises control over the instrumentality that caused the nuisance at the time of the nuisance." Op. 7 (quoting *Purdue Pharma*, 2019 WL 446382, at *13).

These two missteps—creating a categorical exclusion of public nuisance claims involving products, and imposing a separate "control" requirement—resulted in the Superior Court's erroneous conclusion that, under Delaware law, the State has not alleged a viable claim for public nuisance. The Superior Court's departures from established common law find no support from the prior decisions

of this Court, nor from courts in other jurisdictions that have applied the same common-law public nuisance principles to harm from products, including PCB contamination.

2. The State Has Alleged a Public Nuisance Claim

When the flawed underpinnings of the Superior Court's analysis are removed, the need for reversal is apparent. There is nothing novel about a public nuisance claim based on environmental contamination. Environmental contamination, such as water or air pollution, indisputably interferes with a public right, as Delaware courts have recognized. *See Alexander*, 2013 WL 8169799, at *2 ("[it] is no stretch to conclude that Defendant's alleged interference with air quality constitutes interference with a public right and therefore constitutes a public nuisance"); *Artesian Water Co.*, 1983 WL 17986, at *22 (denying summary judgment on public nuisance claim involving groundwater pollution from a landfill, holding that "[t]he right to reasonable groundwater use is a right which all landowners possess and … may be termed a common or public right").

Indeed, the contamination of public resources—particularly waterways—is a classic public nuisance. As the California Supreme Court observed in 1897:

> "The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state, as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the

> recognized prerogatives of the sovereign, coming to us from the common law[.]"

People v. Truckee Lumber Co., 48 P. 374, 374 (Cal. 1897) (citation omitted). Thus, whether river pollution resulting from the defendant's acts constituted a public nuisance was "not open to serious question." *Id.* Nuisance actions at common law are replete with examples of such claims. *See, e.g.*, *State ex rel. Wear v. Springfield Gas & Elec. Co.*, 204 S.W. 942, 944 (Mo. Ct. App. 1918) (stream pollution detrimental to public health and "depriv[ing] the public of its right to fish in said streams" constituted public nuisance); *Pennsylvania R. Co. v. Sagamore Coal Co.*, 126 A. 386, 391 (Pa. 1924) (pollution of stream used by the public is public nuisance); *Hampton v. N. Carolina Pulp Co.*, 27 S.E.2d 538, 547 (N.C. 1943) (pollution of river with chemicals is public nuisance).

Delaware's effort to recover under a public nuisance theory for harms to its lands, waters, and natural resources caused by Monsanto's PCBs fits squarely within this common law tradition. The State has adequately alleged the existence of a public nuisance. PCBs interfere with the public's ability to use and enjoy resources, including fish, wildlife, land, and water held by the State. A049 ¶ 98, A050 ¶ 104, A051-52 ¶ 108, A055-57 ¶¶ 116-118.

The Superior Court does not appear to disagree that contamination of Delaware's natural resources with a toxic chemical is a public nuisance. Instead, the Court found the Court of Chancery's decisions in *Alexander* and *Artesian*

Water Co. distinguishable because they "involve pollution from an adjacent property." Op. 10. But, the source of a pollutant has no bearing on whether the pollutant interferes with a right common to the public—i.e., whether a public nuisance exists. *See, e.g.*, *Peterson v. King Cnty.*, 278 P.2d 774, 775 (Wash. 1954) ("the alleged existence of a nuisance refers to the interests invaded, and not to any particular kind of conduct which has led to the invasion"); *see also* William L. Prosser, Handbook of the Law of Torts § 87 (4th ed. 1971) (same).

Although the Superior Court did not articulate why it mattered that *Alexander* and *Artesian Water Co.* "involve pollution from an adjacent property," it appears the court perhaps believed that only adjacent property owners could be *liable* for a public nuisance. Op. 10. But, if so, the court again missed the mark: *Alexander* and *Artesian Water Co.* do not stand for a requirement that *only* pollution from an adjacent property can support a public nuisance claim. Rather, they reiterate the well-established common-law definition of public nuisance as an unreasonable interference with a public right. *Alexander*, 2013 WL 8169799, at *2; *Artesian Water Co.*, 1983 WL 17986, at *22; *see also* Restatement (Second) of Torts § 821B(1). The question of *who* is liable turns not on the defendant's physical proximity to the nuisance, but whether it knew or had reason to know its acts would create the nuisance condition. Restatement (Second) of Torts § 821B(2)(a), (c) (defendant is liable for a public nuisance when its "conduct is of a

continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right"). Also, where an activity "has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person who . . . participated to a substantial extent in the activity is subject to the liability for a nuisance, for the continuing harm." Restatement (Second) of Torts § 834 cmt. e; *see also Artesian Water Co.*, 1983 WL 17986, at *20 ("Activity which creates a condition which invades another's interest after the activity itself ceases may still result in liability on the part of those who participated in the activity.") (citing Restatement (Second) of Torts § 834 cmt. e).

Here, the Complaint alleges abundant facts detailing Monsanto's role in the creation of this public nuisance and its knowledge that its development, sale, and promotion of PCBs would cause precisely the harms Delaware feels today. Monsanto was the sole U.S. manufacturer of PCBs for commercial use from 1935 until PCBs were banned by Congress in 1977. A022 ¶¶ 40-42. Monsanto knew by 1937 that PCBs were toxic. A027 ¶¶ 53-54. Monsanto was aware that PCBs inevitably would make it into the environment—from both "open" and "closed" applications—and "that there is no practical course of action" that could be taken with regard to PCBs so "as to prevent environmental contamination." A031-39 ¶¶ 62-74. Yet, as scientific evidence of widespread contamination grew, Monsanto

minimized the harmful effects of PCBs to the public and its customers. A026-44 ¶¶ 52-87. Monsanto decided against trying to mitigate PCB contamination because "there is too much Monsanto profit" that would be lost, and Monsanto did not want "to lose one dollar of business." A039-40 ¶¶ 75-76. Despite its awareness of the harm, Monsanto chose to continue manufacturing and distributing its PCBs, understanding that those PCBs would inevitably contaminate the environment. The harm is not merely something that Monsanto should have known, but a foreseeable result it knew and understood. Yet Monsanto acted for years with reckless indifference to the consequences. On the facts alleged, Monsanto may be held responsible for the harms caused by the public nuisance it created.

3. Cases From Other Jurisdictions Regarding Opioids and Lead Paint Are Inapposite

In the proceedings below, Monsanto argued that the State's public nuisance claim, which arises from contamination of Delaware's natural resources, is analogous to public nuisance claims arising from the opioid crisis and gun violence, and the Superior Court relied on those cases in dismissing the State's claim. Those cases are distinguishable. Claims based on opioid abuse and gun violence arguably raise questions of intervening causes that do not pertain to contamination resulting from the ordinary and intended use and disposal of PCB-containing products. As set forth in the Complaint, release of PCBs into the environment was not only inevitable but also known to Monsanto. The State's

allegations of direct causation distinguish this case from the cases relied upon by the Superior Court.

In dismissing the State's public nuisance claim, the Superior Court relied on *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 728 (Okla. 2021), which involved a statutory public nuisance claim against a prescription opioid manufacturer. The *Hunter* court's opinion does not support the Superior Court's ruling for several reasons.

First, even under the Oklahoma Supreme Court's reasoning, the State has alleged an interference with a public right and, therefore, a public nuisance. In *Hunter*, the court found that harms resulting from the opioid epidemic could not be deemed a violation of a public right. *See id.* at 727 (holding damages sought were "not for a communal injury but are instead more in line with a private tort action for individual injuries sustained from use of a lawful product and in providing medical treatment or preventive treatment to certain, though numerous, individuals"). Significantly, while rejecting claims based on marketing prescription opioids, the *Hunter* court highlighted claims involving pollution of public waters as an example of a traditional public nuisance claim, reasoning that "a public right is a right to a public good, such as 'an indivisible resource shared by the public at large, like air, water, or public rights-of-way.'" *Id.* at 726 (citation omitted); *see also id.* at 727 (listing "pollution in drinking water" as example of a

nuisance interfering with public health). Thus, environmental contamination from Monsanto's PCBs constitutes a public nuisance even under the Oklahoma Supreme Court's restrictive interpretation of the Oklahoma nuisance statute.

Second, the *Hunter* court found that the opioid manufacturer "'did not control the instrumentality alleged to constitute the nuisance at the time it occurred.'" Op. 9 (quoting *Hunter*, 499 P.3d at 728). The court, discussing "control," pointed to various actors in the prescription drug supply chain—wholesalers, doctors, pharmacies, individual patients—over whom the manufacturer did not have control. *See Hunter*, 499 P.3d at 728-29. Although the court used the word "control," its focus on various intervening actors in the opioid supply chain illustrates the conclusion reached by the Supreme Court of Illinois in the gun context: the question of control, in nuisance cases arising from conduct unrelated to a defendant's use of land, "becomes entirely one of foreseeability." *City of Chicago*, 821 N.E.2d at 1134-35. In *City of Chicago*, the court explained that "[l]egal cause will be found if reasonable persons in the retail business of selling firearms would have seen the creation of the nuisance in the city of Chicago as a likely result of their conduct." 821 N.E.2d at 1134. Even if foreseeability could be seen as a close call with respect to gun violence[3] or opioid abuse, it is not

[3] Ultimately, the court in *City of Chicago* held that third parties' intentional misuse of the defendants' products was an unforeseeable intervening cause. While the State disagrees with that holding, at the very least, even under that case's

a close call here. The State alleges that environmental contamination was inevitable from the ordinary and expected use of Monsanto's PCB-containing products, and that Monsanto was aware of this while still manufacturing PCBs. A023-24 ¶ 45, A037-38 ¶¶ 71-72. Once Monsanto released its PCBs into the stream of commerce, those PCBs ended up in the environment, not because of unforeseeable intervening acts by third parties, but by the nature of the PCBs themselves and the uses Monsanto intended for them. Because of this, the State's claim is distinguishable from public nuisance claims in the gun or opioid contexts.

The Rhode Island Supreme Court's decision in *State v. Lead Industries Association, Inc.* is distinguishable for the same reasons. In that case, the court rejected the plaintiffs' claim that because children were exposed to toxic lead through peeling and chipped paint, lead paint manufacturers were responsible for creating a public nuisance. The court concluded that the harm caused by lead paint resulted from the failure of landlords to maintain properties and prevent paint from chipping, partly because Rhode Island had enacted legislation designating landlords as "responsible for maintaining their premises and ensuring that the premises are lead-safe." 951 A.2d 428, 457 (R.I. 2008). Importantly, the Rhode

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reasoning a product manufacturer may be held liable under a nuisance theory where the harms caused by its product are inevitable and will occur no matter how the product is used.

Island Supreme Court "agree[d] with the Illinois Supreme Court that '[t]he proper inquiry regarding legal cause involves an assessment of foreseeability, in which we ask whether the injury is of a type that a reasonable person would see as a likely result of his conduct.'" *Id.* at 451 (citing *City of Chicago*, 821 N.E.2d at 1127). Whereas landlords not maintaining their properties and allowing paint to peel off walls could arguably be unforeseeable, here, the allegations set forth in the Complaint leave no question that environmental contamination was a foreseeable, indeed inevitable, result of Monsanto's conduct.

In addition, like the Oklahoma Supreme Court in *Hunter*, the Rhode Island Supreme Court held that the alleged nuisance did not constitute an interference with a public right but was rather an "interference with the private rights of numerous individuals," explaining that "[t]he term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way." *Id.* at 453-54. The court recognized the long history of public nuisance claims based on environmental pollution. *See id.* at 444 ("By the fourteenth century, courts began to apply public nuisance principles to protect rights common to the public, including 'roadway safety, air and water pollution, disorderly conduct, and public health'") (citation omitted); *see also id.* at 454 ("the rights traditionally understood as public rights for public nuisance purposes" include "pollution of air or navigable streams") (citation omitted). Thus,

even under Rhode Island law, PCB contamination is an interference with a public right.

The only PCB-related case discussed by the Superior Court, *City of Bloomington, Indiana. v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989), also highlights control as a factor relevant to causation. *See* Op. 8. There, the City of Bloomington sued both Westinghouse and Monsanto for the contamination resulting from improper disposal of PCBs by Westinghouse, a Monsanto customer. Because the plaintiff alleged that Westinghouse created the nuisance "by not safely disposing of the product," the court deemed Westinghouse an intervening cause such that Monsanto could not be liable. *City of Bloomington*, 891 F.2d at 614. That is not this case here: far from alleging an intervening cause, the State alleges that Monsanto knew its PCBs would enter the environment through their ordinary and expected uses. A023-24 ¶ 45, A025 ¶ 48, A031-33 ¶¶ 62-63. When a nuisance results from the *expected* use of a product, courts have found that customers' use does not break the causal chain to absolve the manufacturer from liability. *See, e.g.*, *City of Wyoming v. Procter & Gamble Co.*, 210 F. Supp. 3d 1137, 1162 (D. Minn. 2016) (holding city stated public nuisance claim against manufacturers of so-called "flushable" wipes that, when used as directed, created problems in municipal sewer systems and where defendants "continued their sales after gaining knowledge of the alleged problems").

Not only are *Hunter*, *Lead Industries*, and *Bloomington* distinguishable, the Superior Court ignored cases that are effectively identical to the State's case here. This case is one of many brought by state and local governments seeking to hold Monsanto liable for the harm caused by its PCBs. Other courts have consistently rejected Monsanto's arguments that a public nuisance claim does not lie against Monsanto because, among other things, Monsanto's PCBs entered the environment through their intended uses and from customers handling and disposing of Monsanto's PCB-containing products as directed. In Pennsylvania, for example, the court sustained Pennsylvania's public nuisance claim "despite that Plaintiffs [did] not specifically allege that Defendants *themselves* 'discharged' or 'put or placed [PCBs] into any of the waters of the Commonwealth,'" because the plaintiffs alleged that Monsanto "knew that the uses for which they marketed, sold, and distributed PCB mixtures would result in leaching, leaking, and escaping their intended applications and contaminating (i.e., polluting) [the Commonwealth's] waters." *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 652 (Pa. Commw. Ct. 2021). The court distinguished a gun case relied on by Monsanto, reasoning that with guns, "when the products left the manufacturer's control, they were legal and non-defective, and any harm that resulted from their negligent or criminal use was beyond the manufacturer's instruction and control," but that PCBs "in and of

themselves and can disperse inadvertently, without intervening negligent or criminal conduct." *Id.* at 650.

Similarly, an Oregon court sustained Oregon's public nuisance claim against Monsanto, explaining that the "allegations do more than allege that Defendants merely produced and sold the PCBs at issue. They allege that Defendants knew that the PCBs would inevitably wind up polluting Oregon's waters through the normal, ordinary use of Defendants' customers." *Oregon v. Monsanto Co.*, 2019 WL 11815008, at *7 (Or. Cir. Ct. Jan. 9, 2019). *See also City of Spokane v. Monsanto Co.*, 2016 WL 6275164, at *8 (E.D. Wash. Oct. 26, 2016) (upholding nuisance claim where city alleged Monsanto's PCBs entered the Spokane River "even when, and regardless of whether, products containing PCBs were used or disposed of as intended," and thus "[i]t is easily inferred from the complaint's allegation that PCBs would foreseeably contaminate waterbodies in which PCB containing products were widely used"); *Mayor & City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014 (D. Md. Mar. 31, 2020) (same); *see also City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096, 1107 (W.D. Wash. 2017) ("Seattle has alleged facts suggesting that improper disposal of PCBs was foreseeable to (and even recommended by) Monsanto," and "[o]nly unforeseeable intervening acts break the chain of causation").

The interference with water quality, fish consumption, and ability to use and enjoy Delaware's natural resources caused by the persistent presence of PCBs is a quintessential interference with a public right and a public nuisance. The State alleges Monsanto knew its PCBs would inevitably enter the environment through their ordinary and intended use and disposal. Because the harm alleged was plainly foreseeable, Monsanto "should not be permitted to escape liability merely because [it] did not pour PCBs into the [State's] environment first-hand." *Commonwealth v. Monsanto*, 269 A.3d at 652.

II. The Superior Court Erred When It Dismissed the State's Claim for Trespass

A. Question Presented

Did the Superior Court err by dismissing the State claim for trespass? This question was raised below (A128-A138) and considered by the Superior Court (Op. 11-16).

B. Scope of Review

The State incorporates by reference its statement in Section I.B, *supra*.

C. Merits

To state a *prima facie* case of trespass, a plaintiff must allege the plaintiff's lawful possession of the property, the defendant's entry onto the plaintiff's land without consent or privilege, and damages. *Cochran v. City of Wilmington*, 23 Del. 315 (7 Penne. 315) (Del. Super. 1909). Liability for trespass lies for any improper invasion "committed on, beneath, or above the surface of the earth." Restatement (Second) of Torts, § 159(1).

The Superior Court departed from that long-established law. First, after concluding that the State lacks "exclusive possession" of its lands, the court held that the State lacked standing to pursue a trespass claim. Op. 15. The court then held that the State could not proceed on its trespass claim for the additional reason that "[t]here is no allegation of control by Defendants of the instrumentality at the

time at which the pollution occurred" and absent "some exercise of ownership or control over the intruding instrumentality" no trespass claim can lie. *Id.*

Reversal is required here, for two reasons. First, the State lawfully possesses the lands for which it seeks recovery of damages in trespass. The "exclusive possession" requirement created and applied by the Superior Court disregards centuries of precedent that eliminate any ambiguity regarding the State's possessory rights here. Second, as with the State's nuisance claim, a defendant's "control over the instrumentality" when the trespass occurs is not an element of the claim.

1. The State Holds Title to Its Lands, Including Submerged Lands Under Navigable Waters

Delaware holds an inalienable ownership interest in all navigable waters and submerged and submersible lands within the state, extending at least to the low water mark. *See Bailey v. Philadelphia, W. & B.R. Co.*, 4 Del. (4 Harr.) 389 (Del. June 1, 1846) ("The State has the right of a proprietor over navigable streams entirely within its borders[.]"). Delaware was a proprietary colony, so this ownership interest was first granted from the King of England to the proprietor, and subsequently passed to the State when the United States gained independence from England. *See New Jersey v. Delaware*, 291 U.S. 361, 364-71 (1934) (tracing the history of the State's proprietary interest in navigable waters and submerged lands within Delaware); *see also Hardin v. Jordan*, 140 U.S. 371, 382 (1891)

("This right of the states to regulate and control the shores of tide-waters, and the land under them, is the same as that which is exercised by the crown in England."). Although the public may use and access these lands and waters for traveling and fishing, the State, because it holds title, has the right to restrict access and to protect the lands under navigable waters from unwanted trespasses. *Bailey*, 4 Del. at 389; *see also Hardin*, 140 U.S. at 381 ("the title to the share and lands under water and in front of land so granted inures to the state in which they are situated"). This ownership interest, alone, grants the State standing to bring this trespass claim, and the standing analysis properly should end here.

The Superior Court's error appears to stem, in part, from its misunderstanding of the distinction between the scope of the State's trespass and nuisance claims. The State's trespass claim is narrower than its public nuisance claim. In its public nuisance claim, the State seeks recovery for harm to all resources held in trust, including fish and wildlife. In its trespass claim, the State seeks recovery only for harm "caused by Defendants' continuing trespass upon State lands and the costs of removing Defendants' PCBs from State lands." A065 ¶ 2(A).

In dismissing the State's trespass claim over State lands, the Superior Court confused the distinction between land and water. Specifically, the court wrote:

> "It is undisputed that the state has ***regulatory control*** over State land and resources. However, there is no support for the proposition that

> the State has ***exclusive possession*** of water. Lack of exclusive possession negates the State's standing to seek damages on a trespass theory."

Op. 15 (emphasis in original). The State's ownership of water is not material to the harm for which the State seeks recovery in trespass.[4]

The Superior Court also appears to misapprehend the word "exclusive," which in the context of trespass means the right to exclude unwanted persons or objects. *See, e.g.*, *Kane v. NVR, Inc.*, 2020 WL 3027239, at *6 (Del. Ch. June 5, 2020) (trespass "consists of an interference with the possessor's interest in excluding others from the land") (quoting Restatement (Second) of Torts § 163); *see also* Dan B. Dobbs *et al.*, *The Law of Torts* § 52 (2d ed.) ("The right to exclusive possession of land" means "the right to exclude others from land ….). While Delaware courts have recognized that "exclusive possession is sufficient" to maintain a trespass, "the law adjudges the rightful possession to him who has the legal title." *Bartholomew v. Edwards*, 6 Del. 17, 17 (Del. Super. 1855). Because the State holds title to the lands at issue, it has lawful possession sufficient to maintain its trespass claim.

[4] The Superior Court is incorrect that the State lacks a possessory interest in water. The State's possessory interest in its navigable waters predates statehood. *See New Jersey*, 291 U.S. at 364-71. But the issue is immaterial to the State's trespass claim, where the State seeks to recover for harms to its lands caused by Monsanto's PCBs.

The Superior Court's analysis ignores that the State holds title to the lands at issue. While the State's ownership is moderated by the public trust doctrine, the rights this doctrine conveys to the public do not prevent the State from bringing a trespass claim. By allowing access to others, the State does not relinquish its lawful possession or its right to exclude trespassers. The public trust doctrine merely ensures that these lands are used for the benefit of the people and that, generally, the public has the right to travel over, hunt, or fish on such lands. But the State holds title to these lands and may "impair or take away these public rights for public purposes." *Bailey*, 4 Del. at 389. The public trust doctrine may place some narrow limits on how the State manages these resources, but it does not deprive the State of the right to protect them from unwanted trespasses. Indeed, protecting these lands for the public is one of the State's most important obligations. *See, e.g.*, 7 Del. C. § 6001 (describing the State's broad authority to manage and protect State lands); *id.* §§ 7201-7217 (describing the State's authority to permit activities that could affect subaqueous lands).

For the proposition that the public trust doctrine deprives the State of its ownership interest in land, the Superior Court relied solely on *New Jersey Department of Environmental Protection v. Hess Corporation*, 2020 WL 1683180 (N.J. Super. Ct. App. April 7, 2020). That reliance is misplaced. The plaintiffs' trespass claim in *Hess* related to harms to "water resources"—namely groundwater

and surface water—and not to state-owned lands. *Id*. at *5. And the *Hess* court cites no authority that the public trust doctrine somehow deprives a state of the authority to pursue a trespass claim with respect to state-owned land. *Id.* at *6.

The other cases relied on by Monsanto below are similarly distinguishable. In *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, agencies within the State of New Jersey sought to recover for harm to groundwaters caused by the gasoline additive methyl tertiary butyl ether ("MTBE"). *See* 2014 WL 840955, at *1 (S.D.N.Y. March 3, 2014). The groundwaters were not owned by New Jersey or the plaintiff agencies, but rather lay under or on private land. *Id.* at *3. In *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006), the court determined that New Mexico's role as trustee of groundwater did not give it the necessary "possessory interest in the sand, gravel, and other minerals that make up the aquifer" in which the groundwater was contained to maintain a trespass action. 467 F.3d at 1247 n.36. Those are groundwater cases, where the plaintiff lacked a possessory interest in the waters and/or the impacted lands. Here, the State's trespass claim relates to lands to which Delaware holds title, not to waters contained within privately owned land.

Monsanto's reliance below on *State v. Exxon Mobil Corp.*, 406 F. Supp 3d 420 (D. Md. 2019), illustrates the confusion Monsanto sowed below between claims for trespass to *land* and trespass to privately owned waters. In *Exxon*

Mobil, the court dismissed the State of Maryland's trespass claim only to the extent that Maryland sought to proceed as a *parens patriae* representative for private citizens' interest in groundwaters. The court explicitly allowed Maryland's trespass claim to proceed against gasoline manufacturers, marketers and distributors for harms caused by MTBE contamination to land "that the State *does* own directly." *Id.* at 471.

The State owns and controls its lands, including the lands below its navigable waters. It has standing to pursue claims for harms to those lands. The Superior Court erred when it held otherwise.

2. "Control" Is Not an Element of Trespass Under Delaware Law

As with its ruling on the State's public nuisance claim, in dismissing the State's trespass claim, the Superior Court again introduced a new "control of the instrumentality" element that is not part of Delaware law. This additional requirement is inconsistent with the Superior Court's own recitation of the "three elements" of a trespass claim at the outset of its analysis. *See* Op. 11 (providing that the three elements of a trespass claim under Delaware law are lawful possession of land, unauthorized entry, and damages).

The Superior Court relied on *Robinson v. Oakwood Village, LLC*, 2017 WL 1548549 (Del. Ch. April 28, 2017), as the only Delaware authority for the proposition that a defendant who has "exercised no ownership or control over the

property" cannot be held liable for trespass. Op. 12. However, nothing in *Robinson* supports that reading or conclusion. At issue in *Robinson* was whether a plaintiff had properly alleged a claim for trespass caused by water intrusion from a neighboring property. The court held that the entity whose stormwater system caused the trespass could be held liable for trespass, but that liability did not extend to "implicate any Defendant that played any role in developing the stormwater system in question." 2017 WL 1548549, at *16. *Robinson* does not address the liability of a party who manufactures, distributes, and sells a harmful, toxic chemical with full knowledge that the chemical will enter onto another's land and cause extensive damages.

The Superior Court's reading of *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, 995 P.2d 657 (Alaska 2000), also disregards a key distinction between that case and the scenario presented here. Op. 14-15. In *Parks*, the plaintiff sought to recover for harms caused by leaking underground fuel tanks. The court upheld dismissal of a trespass claim against a fuel supplier, who did not own the tanks, and could not have known that the fuel supplied would eventually pass through the faulty tanks and contaminate the property. However, the Alaska Supreme Court recognized that parties assume liability "when they 'set[] in motion a force which, in the usual course of events, will damage property of another.'" *Parks*, 995 P.2d at 665 (internal citation omitted). That is precisely what the State

alleges here: by producing and selling PCBs that would inevitably be released into the environment, where they would persist, bioaccumulate, and leave a lasting toxic legacy, Monsanto set in motion a force, the consequences of which Delaware is still reckoning with today.

Under well-established principles of tort law, "[o]ne is subject to liability to another for trespass . . . if he intentionally . . . enters land in the possession of the other, or causes a thing or third person to do so[.]" Restatement (Second) of Torts, § 158. Causing a thing to enter another's land is intentional when "an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." *Id.*, cmt. i. Courts routinely permit trespass claims against manufacturers in the context of property contamination caused by toxic chemicals. *See, e.g.*, *Martin v. Reynolds Metals Co.*, 342 P.2d 790, 794 (Or. 1959) (aluminum manufacturing operation committed trespass when its fluoride compounds settled onto and contaminated the plaintiff's land); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F. 3d 65, 120 (2d Cir. 2013) (Exxon, as the "refiner and supplier" of gasoline, was not "too remote from any actual spills or leaks" to be deemed the cause of trespass based on water contamination; the jury properly concluded that Exxon "knew that the gasoline containing MTBE that it manufactured, refined, sold and/or supplied would be spilled"); *Lugue v. Hercules, Inc.*, 12 F. Supp. 2d 1351, 1359-61 (S.D. Ga 1997) (questions of fact precluded

summary judgment on plaintiff's trespass claim against toxaphene manufacturer). Most state courts that have addressed the issue have allowed claims against Monsanto for trespass on publicly owned lands contaminated by PCBs to proceed. *See, e.g.*, *Oregon v. Monsanto*, 2019 WL 11815008, at *9 (rejecting "the proposition that the general elements of trespass do not apply to a party whose relevant actions were in the context of manufacturing a product and/or placing that product into a stream of commerce"); *Maryland v. Monsanto Co., et al.*, Case No. 24-C-21-005251 (Md. Cir. Ct. May 2, 2022), A241 (denying motion to dismiss trespass claim); *Ohio v. Monsanto Co., et al*., Case No. A 18 01237 (Ham. Ct. Comm. Pl. Sept. 19, 2018), A144-150 (same). Control over the instrumentality is not an element of a trespass claim in Delaware. The Superior Court's creation and application of that element was particularly misplaced here, where the State has alleged that it was inevitable that Monsanto's PCBs would contaminate Delaware's lands.

The State alleges Monsanto knew PCBs would leach, leak, spill, vaporize, and otherwise enter the environment wherever they were sold, that Monsanto knew PCBs would persist in the environment and concentrate in the food chain, and that Monsanto thus knew to a substantial certainty that its manufacture and sale of PCBs would result in those PCBs entering and harming the environment, including Delaware's lands. *See* A031-43 ¶¶ 62-83, A061 ¶ 135. Taking all inferences in

the State's favor, the State adequately alleged that Monsanto caused its PCBs to enter Delaware's lands, without consent or privilege, and that the presence of its PCBs has caused harms for which the State seeks damages. *See* A061 ¶ 133, A062 ¶ 136. Under Delaware law, that is sufficient to state a claim for trespass.

III. The Superior Court Erred When It Dismissed the State's Claim for Unjust Enrichment

A. Question Presented

Did the Superior Court err by dismissing the State's claim for unjust enrichment? This question was raised below (A138-A141) and considered by the Superior Court (Op. 16-18).

B. Scope of Review

The State incorporates by reference its statement in Section I.B, *supra*.

C. Merits

Under Delaware law, unjust enrichment is '"the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.'" *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988) (internal citation omitted). The elements of an unjust enrichment claim are: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

The Superior Court erred by dismissing the State's claim for unjust enrichment for lack of jurisdiction. Relying on its own prior opinion in *Purdue Pharma*, the court held that "[u]njust enrichment is not a stand-alone claim in Superior Court" and that "[t]he claim must be brought in the Court of Chancery."

Op. 17. The State's claim for unjust enrichment, seeking damages only, is a legal claim over which the Superior Court has jurisdiction. In addition, the Superior Court erred by concluding that Defendants' alleged retention of economic benefits could not constitute an "enrichment" under Delaware law. *Id.* at 18.

1. The Superior Court Has Jurisdiction over Unjust Enrichment Claims Seeking Damages

The claim of unjust enrichment originated in law courts, rather than in courts of equity. *See Garfield o/b/o ODP Corp. v. Allen*, 277 A.3d 296, 348 (Del. Ch. 2022). In *Garfield*, the Court of Chancery delved into the origins of "the absence of a remedy at law" as an element of an unjust enrichment claim, explaining that although unjust enrichment claims had been heard by courts of law, beginning in the mid-nineteenth century, American courts of equity began to hear claims of unjust enrichment. "But because unjust enrichment did not arise in equity and was not a purely equitable claim, a party that sought to assert a claim for unjust enrichment in a court of equity needed to identify a basis for the assertion of equitable jurisdiction." *Id.* As the Court of Chancery observed in *Garfield*, "one source of equitable jurisdiction arises when an equitable remedy is called for because of the absence of an adequate remedy at law." *Id.* at 347. In this way, "a concept tied to equitable jurisdiction seeped into the law of unjust enrichment." *Id.* In other words, law courts have jurisdiction over unjust enrichment claims unless

there is no remedy at law, in which case the claim may be raised in the Court of Chancery.

Contrary to the Superior Court's conclusion that an unjust enrichment claim "must be brought in the Court of Chancery," Op. 17, unjust enrichment claims may be brought in Delaware's law courts. *See Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003) (rejecting argument that unjust enrichment claim permitted the Court of Chancery to retain jurisdiction); *see also Metcap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *5 n.26 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899 (Del. 2009) ("The lack of an adequate remedy at law is not critical to an unjust enrichment claim because some unjust enrichment claims may be heard in the law courts.").

If there is no equitable remedy sought for an unjust enrichment, there is no equitable jurisdiction, and jurisdiction lies in Superior Court. The Superior Court has previously recognized this and retained jurisdiction over unjust enrichment claims in those circumstances. *See, e.g.*, *Grace v. Morgan*, 2004 WL 26858, at *3 (Del. Super. Jan. 6, 2004) (denying motion to dismiss unjust enrichment claim and stating "where plaintiff has pled the first four elements of the claim but sought money damages in order to be made whole, Chancery has no jurisdiction because no equitable remedy is sought"); *St. Search Partners, L.P. v. Ricon Int'l, L.L.C.*, 2005 WL 1953094, at *3 (Del. Super. Aug. 1, 2005) (explaining "[i]f a plaintiff

seeks only damages to correct an unjust enrichment, jurisdiction lies in Superior Court"); *Southeastern Chester Cnty. Refuse Auth. v. BFI Waste Servs. of Penn., LLC*, 2015 WL 3528260, at *5 (Del. Super. June 1, 2015) (same).

The State seeks only damages to remedy the unjust enrichment alleged here. The Superior Court erred by concluding that it did not have jurisdiction over this claim.

2. The State Has Adequately Pleaded an Enrichment

The Superior Court also concluded that "there are no allegations within the Complaint that Defendants were 'enriched.'" Op. 18. The State, however, alleges that Monsanto has been enriched by virtue of being able to walk away from the environmental contamination it created, while the State, and Delawareans, shoulder the burden of cleaning up Monsanto's PCBs throughout Delaware. Specifically, the State alleges that Monsanto should have borne the costs of preventing or remediating contamination in Delaware, and that Monsanto has forced the State to incur significant remediation, monitoring, and investigation costs to protect public health, safety, and the environment from the harmful impacts of PCBs. *See* A062-64 ¶¶ 139, 141-45.

One who "performs another's duty to a third person or to the public is entitled to restitution from the other as necessary to prevent unjust enrichment, if the circumstances justify the decision to intervene without request." Restatement

(Third) of Restitution and Unjust Enrichment § 22 (2011); *see also id.* § 1 (noting as a general principle "prominent topics within the law of restitution in which the defendant's unjust enrichment typically or invariably consists of a reduction in necessary expenditures or a reduced obligation to a third party"). This principle has been applied in the context of a public entity undertaking pollution abatement costs, including in claims against Monsanto for PCB contamination. *See, e.g.*, *Ohio v. Monsanto Co.*, A144-150 (sustaining unjust enrichment claim); *State v. Schenectady Chemicals, Inc.*, 479 N.Y.S.2d 1010, 1014 (N.Y. App. Div. 1984).

Here, the State alleged, to the requisite reasonable conceivability, that Defendants have retained economic benefits, including a reduction in expenditures, as a result of the remediation undertaken by the State. The Superior Court's dismissal should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's dismissal of the State's claims and remand this case to the Superior Court for further proceedings.

Dated: October 6, 2022

Respectfully submitted,

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