



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**APPELLEES' ANSWERING BRIEF**

**WHITE AND WILLIAMS LLP**

**OF COUNSEL:**

**SHOOK, HARDY & BACON L.L.P.**  
**Thomas M. Goutman** (*pro hac vice*)  
**David S. Haase** (*pro hac vice*)  
**Kim Kocher** (*pro hac vice*)  
2001 Market St. Suite 3000  
Philadelphia, PA 19103  
(215) 575-3138

/s/ Christian J. Singewald  
**Christian J. Singewald (#3542)**  
**Timothy S. Martin (#4578)**  
**Daryll Hawthorne-Searight (#6520)**  
Courthouse Square  
600 N. King Street, Suite 800  
Wilmington, DE 19801  
(302) 654-0424  
singewaldc@whiteandwilliams.com  
martint@whiteandwilliams.com  
hawthorned@whiteandwilliams.com  
*Counsel for Appellees, Monsanto  
Company, Solutia Inc., and Pharmacia  
LLC*

Dated: November 7, 2022

**TABLE OF CONTENTS**

|  | <b>Page(s)</b> |
|--|----------------|
| NATURE OF PROCEEDINGS.....   | 1              |
| SUMMARY OF ARGUMENT .....  | 4              |
| STATEMENT OF FACTS .....   | 5              |
| A.    The History of PCBs .....  | 5              |
| B.    The Alleged Effects of PCBs in Delaware.....   | 8              |
| C.    The Alleged Source of PCBs in Delaware.....  | 9              |
| D.    The State’s Claims.....  | 11             |
| ARGUMENT .....   | 13             |
| I.    THE SUPERIOR COURT CORRECTLY REJECTED THE<br>STATE’S UNPRECEDENTED PUBLIC NUISANCE CLAIM FOR<br>THE SALE OF A LAWFUL PRODUCT ..... | 13             |
| A.    Question Presented.....  | 13             |
| B.    Scope of Review.....   | 13             |
| C.    Merits of Argument.....  | 14             |
| 1.    Public Nuisance Is Not Actionable for the Sale of a<br>Product Under Delaware Law.....   | 14             |
| 2.    Majority of Appellate Courts Nationwide Rejects<br>Nuisance Liability for the Sale of a Product.....                               | 17             |
| 3.    Pharmacia Undisputedly Lacked Control of Its PCBs<br>after the Point of Sale.....  | 22             |
| 4.    The Expansion of the Public Nuisance Tort to Products Is<br>Inapt to Cure Downstream Harms .....                                   | 23             |

|      |   |    |
|------|---|----|
| II.  | THE SUPERIOR COURT PROPERLY HELD THAT THE STATE FAILED, AS A MATTER OF LAW, TO STATE A TRESPASS CLAIM.....            | 26 |
| A.   | Question Presented.....   | 26 |
| B.   | Scope of Review.....  | 26 |
| C.   | Merits of Argument.....   | 26 |
| 1.   | The State Lacks Standing to Sue for Trespass.....   | 27 |
| 2.   | Trespass Does Not Lie for the Sale of a Lawful Product .....  | 31 |
| III. | THE SUPERIOR COURT PROPERLY HELD THAT THE STATE FAILED, AS A MATTER OF LAW, TO STATE AN UNJUST ENRICHMENT CLAIM ..... | 35 |
| A.   | Question Presented.....   | 35 |
| B.   | Scope of Review.....  | 35 |
| C.   | Merits of Argument.....   | 35 |
|      | CONCLUSION.....   | 38 |

## TABLE OF AUTHORITIES

|   | <b>Page(s)</b> |
|---|----------------|
| <b>CASES</b>  |                |
| <i>Alexander v. Evraz Claymont Steel Holdings Inc.</i> ,<br>2013 WL 8169799 (Del. Super. Mar. 31, 2013).....                                      | 16             |
| <i>Artesian Water Co. v. Government of New Castle County</i> ,<br>1983 WL 17986 (Del. Ch. Aug. 4, 1983) .....                                     | 16             |
| <i>Burris v. Cross</i> ,<br>583 A.2d 1364 (Del. Super. Ct. 1990).....   | 33             |
| <i>Chernaik v. Brown</i> ,<br>367 Or. 143, 475 P.3d 68 (Or. 2020).....  | 29             |
| <i>City of Bloomington, Ind. v. Westinghouse Elec. Corp.</i> ,<br>891 F.2d 611 (7th Cir. 1989) .....  | passim         |
| <i>City of Manchester v. Nat’l Gypsum Co.</i> ,<br>637 F. Supp. 646,656 (D.R.I. 1986) .....   | 32             |
| <i>City of Philadelphia v. Beretta U.S.A. Corp.</i> ,<br>126 F. Supp. 2d 882 (E.D. Pa. 2000), <i>aff’d</i> , 277 F.3d 415 (3d Cir.<br>2002) ..... | 18             |
| <i>City of Spokane v. Monsanto Co.</i> ,<br>2016 WL 6275164 (E.D. Wash. Oct. 26, 2016) .....  | 19             |
| <i>City of Wyoming v. Procter and Gamble Co.</i> ,<br>210 F. Supp. 3d 1137 (D. Minn. 2016).....   | 17             |
| <i>Clark v. United States</i> ,<br>109 F. Supp. 213,220 (D. Or. 1952), <i>aff’d</i> , 218 F.2d 446 (9th Cir.<br>1954) .....                       | 32             |
| <i>Commonwealth v. Monsanto</i> ,<br>2021 WL 6139209 (Pa. Cmwltth. Dec. 30, 2021).....  | 19             |
| <i>Dayton v. Collison</i> ,<br>2020 WL 3412701 (Del. Super. Ct. June 22, 2020), <i>aff’d</i> , 250 A.3d<br>763 (Del. 2021).....                   | 32, 33         |

|   |        |
|---|--------|
| <i>Del.-Chapel Assocs. v. Conectiv,</i><br>No. 19498-VCL, 2008 Del. Ch. LEXIS 50 (Ch. May 5, 2008) .....                                      | 27     |
| <i>Evans v. Genentech, Inc.,</i><br>2015 Del. Super. LEXIS 27 (Del. Super. Jan. 23, 2015).....  | 5      |
| <i>Formosa Plastics Corp. v. Wilson,</i><br>504 A.2d 1083 (Del. 1986) .....   | 25     |
| <i>Grace v. Morgan,</i><br>2004 WL 26858 (Del. Super. Ct. Jan. 6, 2004) .....   | 35     |
| <i>Hampton v. N. Carolina Pulp Co.,</i><br>27 S.E.2d 538 (N.C. 1943).....   | 17     |
| <i>Home Ins. Co. v. Honaker,</i><br>480 A.2d 652 (Del. 1984) .....  | 35     |
| <i>Illinois Cent. R. Co. v. State of Illinois,</i><br>146 U.S. 387 (1892).....  | 28     |
| <i>In re Lead Paint Litig.,</i><br>191 N.J. 405, 924 A.2d 484 (2007) .....  | 15, 18 |
| <i>In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.,</i><br>2014 WL 840955 (S.D.N.Y. Mar. 3, 2014).....                                   | 29     |
| <i>Intermec IP Corp. v. TransCore, LP,</i><br>2021 WL 3620435 (Del. Super. Ct. Aug. 16, 2021).....  | 37     |
| <i>Int’l Bus. Machs. Corp. v. Comdisco, Inc.,</i><br>C.A. No. 91-C-07-199, 1991 Del. Super. LEXIS 453 (Del. Super.<br>Ct. Dec. 4, 1991) ..... | 7      |
| <i>Jarden, LLC v. ACE Am. Ins. Co.,</i><br>2021 Del. Super. LEXIS 534 (Del. Super. Jul. 30, 2021) .....                                       | 5      |
| <i>KnighTek, LLC v. Jive Commc’ns, Inc.,</i><br>225 A.3d 343 (Del. 2020) .....  | 5, 13  |
| <i>Lechliter v. Del. Dep’t Nat’l Resources,</i><br>2015 WL 9591587 (Del. Ch. Dec. 31, 2015).....  | 16     |

|   |            |
|---|------------|
| <i>Mayor and City Council of Baltimore v. Monsanto Co.</i> ,<br>2020 WL 1529014 (D. Md. Mar. 31, 2020) .....              | 19         |
| <i>Morrison v. Berry</i> ,<br>191 A.3d 268 (Del. 2018) .....  | 5          |
| <i>Nemec v. Shrader</i> ,<br>991 A.2d 1120 (Del. 2010) .....  | 37         |
| <i>New Jersey Dep’t of Env’tl. Prat. v. Hess Corp.</i> ,<br>2020 WL 1683180 (N.J. Super. Ct. App. Div. Apr. 7, 2020)..... | 28         |
| <i>New Mexico v. General Elec. Co.</i> ,<br>467 F.3d 1223 (10th Cir. 2006) .....  | 29         |
| <i>Oregon v. Monsanto Co.</i> ,<br>No. 18-cv-00540 (Or. Cir. Ct. Jan. 9, 2019).....                                       | 19         |
| <i>Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.</i> ,<br>995 P.2d 657,664 (Alaska 2000) .....                        | 31, 33     |
| <i>Patton v. Simone</i> ,<br>1992 WL 398478 (Del. Super. 1992) .....  | 15         |
| <i>Pennsylvania R. Co. v. Sagamore Coal Co.</i> ,<br>126 A. 386 (Pa. 1924).....   | 17         |
| <i>People v. Truckee Lumber Co.</i> ,<br>48 P. 374 (Cal. 1897) .....  | 16         |
| <i>People ex re. Spitzer v. Sturm, Ruger &amp; Co., Inc.</i> ,<br>761 N.Y.S. 2d 192 (N.Y. App. Div. 2003) .....           | 18, 24, 25 |
| <i>Peterson v. King Cnty.</i> ,<br>45 Wash. 2d 860, 278 P.2d 774 (1954) .....   | 16         |
| <i>Pilots’ Ass’n for Bay &amp; River Delaware v. Lynch</i> ,<br>1992 WL 390697 (Del. Super. Ct. Nov. 19, 1992).....       | 27         |
| <i>Robinson v. Oakwood Vill., LLC</i> ,<br>2017 WL 1548549 (Del. Ch. Apr. 28, 2017).....                                  | 27, 31, 33 |

|   |                |
|---|----------------|
| <i>Sills v. Smith &amp; Wesson Corporation</i> ,<br>2000 WL 33113806 (Del. Super. Ct. Dec. 1, 2000).....                            | passim         |
| <i>State ex rel. Bove v. Hill</i> ,<br>39 Del. Ch. 511, 167 A.2d 738 (1961) .....   | 16             |
| <i>State ex rel. Buckson v. Sposato</i> ,<br>43 Del. Ch. 443, 235 A.2d 841 (1967) .....   | 16             |
| <i>State ex rel. Jennings v. Purdue Pharma L.P.</i> ,<br>2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019) .....                        | passim         |
| <i>State ex rel. Wear v. Springfield Gas &amp; Elec. Co.</i> ,<br>204 S.W. 942 (Mo. Ct. App. 1918) .....                            | 17             |
| <i>State of Maryland v. Exxon Mobil Corp.</i> ,<br>406 F. Supp. 3d 420 (D. Md. 2019).....   | 29, 32         |
| <i>State of New Hampshire v. 3M Company</i> ,<br>2020 N.H. Super. LEXIS 29 (N.H. Super. Ct. June 25, 2020).....                     | 29             |
| <i>State of Oklahoma v. Johnson &amp; Johnson</i> ,<br>499 P.3d 719 (Ok. 2021).....   | passim         |
| <i>State of Rhode Island v. Lead Industries, Ass’n, Inc.</i> ,<br>951 A.2d 428 (R.I. 2008).....                                     | 17, 19, 20, 21 |
| <i>Tioga Public School Dist. No. 15 of Williams County, State of ND. v. U.S. Gypsum Co.</i> ,<br>984 F.2d 915 (8th Cir. 1993) ..... | 18, 24         |
| <i>Totta v. CCSB Fin. Corp.</i> ,<br>2021 Del. Ch. LEXIS 245 (Del. Ch. Oct. 20, 2021).....  | 5              |
| <i>Town of Hooksett Sch. Dist. v. W.R. Grace &amp; Co.</i> ,<br>617 F. Supp. 126 (D.N.H. 1984).....                                 | 31             |
| <i>Town of Westport v. Monsanto Co.</i> ,<br>2015 WL 1321466 (D. Mass. Mar. 24, 2015) .....   | 31             |
| <i>Town of Westport v. Monsanto Co.</i> ,<br>877 F.3d 58 (1st Cir. 2017).....   | 6              |

*Wells Fargo Bank, N.A. v. Est. of Malkin*,  
278 A.3d 53 (Del. 2022) .....35

*Williams v. Manning*,  
2009 WL 960670 (Del. Super. Ct. Mar. 13, 2009).....8

**STATUTES AND COURT RULES**

40 C.F.R. § 761 *et seq.*.....7

41 Fed. Reg. 14134-36.....7

43 Fed. Reg. 7150-7164 .....7

44 Fed. Reg. 31514 .....7

Comprehensive Environmental Response, Compensation, and  
Liability Act, 42 U.S.C. § 9601 *et seq.*.....8

Delaware Hazardous Substance Cleanup Act, 7 Del. C. § 9101 *et seq.*.....8



## **NATURE OF PROCEEDINGS**

The State of Delaware seeks an unprecedented expansion of product liability against the manufacturer for the placement of its product into the stream of commerce in Delaware. The State asks this Court to extend public nuisance, trespass, and unjust enrichment tort liability against Defendants Pharmacia LLC, Monsanto Company, and Solutia Inc. (collectively “Pharmacia”) for the lawful sale of its chemical product that allegedly escaped into the environment after the point of sale through ordinary usage by third parties. And, in this case, the State seeks to impose liability 45 years after Pharmacia ceased production of its product. In *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019), *Sills v. Smith & Wesson Corporation*, 2000 WL 33113806 (Del. Super. Ct. Dec. 1, 2000), and now this case, the Superior Court has properly refused to extend public nuisance, trespass, and unjust enrichment tort liability to the product manufacturer for the downstream risks of the sale of a lawful product.

The State asks this Court to overrule *Purdue*, *Sills*, and this case, based on its misconception that the Superior Court has carved out a “product exception” to traditional public nuisance and trespass theories. To the contrary, the defendant’s control of the intruding agent is a time-honored element of nuisance and trespass law in Delaware. In *Purdue*, *Sills*, and this case, the Superior Court

properly concluded Delaware does not impose nuisance or trespass liability on manufacturers for the downstream risks of a product after it has left the manufacturer's control.

Multiple governmental entities across the country, like the State of Delaware, have attempted to regulate product manufacturers under the guise of public nuisance lawsuits for external downstream societal, public health, and environmental risks of lawfully sold products. As these cases reach appellate courts across the nation, the appellate courts have overwhelmingly refused to extend public nuisance liability to the product manufacturer for the placement of a lawful product into the stream of commerce. It would be unprecedented for this Court to extend public nuisance liability to Pharmacia's manufacture, promotion, and sale of its product.

Delaware has recognized for over half a century that the product manufacturer's duty is limited to the supply of a product reasonably safe for its intended use. Hoping to upend the allocation of risk set by long-standing product liability law, the State calls upon this Court to convert traditional nuisance, trespass, and unjust enrichment theories into boundless environmental product liability torts.

The State's novel environmental product liability torts would subject virtually every product manufacturer to uncertain environmental tort liability in

Delaware long after the sale of its product: The automobile manufacturer would not know if it may be subject to tort liability for air pollution from exhaust fumes; the pharmaceutical manufacturer would not know if it may be subject to tort liability for medications flushed into the water supply; and the plastic bag manufacturer would not know if it may be subject to tort liability for discarded bags blamed for harm to wildlife.

By asking this Court to adopt its novel environmental product liability tort, the State fails to recognize that it is the province of the legislature, not the judiciary, to set public policy and balance the competing interests at play in environmental regulation. And, this lawsuit would call upon the judiciary to commit its limited resources to address environmental conditions that multiple regulatory authorities, including the Environmental Protection Agency, the Delaware River Basin Commission, and the Delaware Department of Natural Resources and Environmental Control, are already actively redressing through an existing comprehensive environmental regulatory framework.

## SUMMARY OF ARGUMENT

(1) Pharmacia denies that the Superior Court erred in dismissing the State's public nuisance claim. The State's public nuisance claim is not cognizable because Delaware law does not recognize public nuisance liability for the placement of a lawful product into the stream of commerce. The State does not allege that Pharmacia exercised control of its product at the time of the alleged nuisance.

(2) Pharmacia denies that the Superior Court erred in dismissing the State's trespass claim. The State's trespass claim is not cognizable because:

(a) The State lacks standing to sue in trespass for property it holds in trust.

(b) Delaware law does not recognize trespass liability for the placement of a lawful product into the stream of commerce. The State does not allege that Pharmacia exercised control of its product at the time of the alleged trespass.

(3) Pharmacia denies that the Superior Court erred in dismissing the State's claim for unjust enrichment. The State's unjust enrichment claim is not cognizable because the State does not allege any benefit conferred on Pharmacia by its alleged remediation of Delaware lands and waters or corresponding duty in Pharmacia to repay the State for its expenditures.

## STATEMENT OF FACTS<sup>1</sup>

### **A. The History of PCBs**

Pharmacia designed, marketed, and sold PCBs (polychlorinated biphenyls) in bulk for use by sophisticated third-party manufacturers in a variety of commercial products and industrial applications, including the principal application of non-flammable fluid in electrical equipment, from the 1930s until 1977. (A014 ¶17, A019 ¶33, A023 ¶44); (Op. at 2); *see, e.g., City of Bloomington, Ind. v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989). As the State admits, PCBs possessed valuable chemical properties: “PCBs are fire resistant because of their high flash points, and they are also minimally water soluble, chemically stable, and possess excellent dielectric properties.” (A020 ¶35); (Op. at 2).

PCB molecules are imperceptible in the environment absent scientific testing. (A033 ¶65); Interdepartmental Task Force on PCBs,

---

<sup>1</sup>As required by Rule 12(b)(6), *KnighTek, LLC v. Jive Commc’ns, Inc.*, 225 A.3d 343, 350 (Del. 2020), Pharmacia does not dispute the factual allegations set forth in the State’s complaint. Like the trial court, this Court may take judicial notice of the content of the governmental reports and regulations incorporated by reference in the State’s Complaint as if set forth in full therein. *Morrison v. Berry*, 191 A.3d 268, at n.20 (Del. 2018); *Jarden, LLC v. ACE Am. Ins. Co.*, 2021 Del. Super. LEXIS 534 (Del. Super. Jul. 30, 2021); *Evans v. Genentech, Inc.*, 2015 Del. Super. LEXIS 27 (Del. Super. Jan. 23, 2015); *see Totta v. CCSB Fin. Corp.*, 2021 Del. Ch. LEXIS 245, at \*6 (Del. Ch. Oct. 20, 2021).

POLYCHLORINATED BIPHENYLS AND THE ENVIRONMENT (May 1972) (“ITF 1972 Report”), p.10-11 (noting advancements in scientific technology to identify and measure PCBs in the environment); U.S. Environmental Protection Agency, REVIEW OF PCB LEVELS IN THE ENVIRONMENT (Jan. 1976) (“EPA 1976 Report”), p.1 (noting the “complexity and difficulty of PCB identification and measurement” in the environment); *Town of Westport v. Monsanto Co.*, 877 F.3d 58, 66 (1st Cir. 2017) (at environmental levels, “PCBs are ‘invisible to the naked eye,’ and ‘lack a characteristic odor or appearance to alert users of their presence’”); (Op. at 2).

In 1971, an Interdepartmental Task Force, including the EPA, investigated the presence of PCBs in the environment. *See* ITF 1972 Report; (Op. at 3). The Task Force noted that “[p]robably the largest amounts of PCBs circulating in the environment reach it through industrial and municipal discharges to inland and coastal waters.” ITF 1972 Report, p.4; (Op. at 3). As of 1972, the Task Force reported that “[t]here are currently no toxicological or ecological data available to indicate that the levels of PCBs currently known to be in the environment constitute a threat to human health.” ITF 1972 Report, p.3; (Op. at 3). After the 1972 report, the EPA reassessed PCB levels in the environment nationwide. EPA 1976 Report, p.1; (Op. at 3). The EPA’s 1976 follow-up report notably contains no data regarding PCBs in water, sediment, soil, or air in Delaware. (Op. at 3).

In 1970-71, Pharmacia voluntarily ended the sale of PCBs for all uses except in electrical capacitors and transformers. ITF 1972 Report, p.2, 4; (Op. at 3). In its 1972 report, the Task Force remarked that PCBs have provided an advantage over substitute oil-based products for use in electrical apparatus because of “superior cooling, insulating, and dielectric properties,” superior “reliability,” and virtual “freedom from flammability” and “explosion hazards.” ITF 1972 Report, p.2, 12 (Op. at 3-4). The Task Force explained that the continued use of PCBs in electrical transformers and capacitor is necessary for fire safety reasons and “presents a minimal risk of environmental contamination.” ITF 1972 Report, p.4 (Op. at 4).

In 1976, the EPA issued guidelines pertaining to the disposal of PCB-containing wastes in conjunction with the Toxic Substances Control Act of 1976 (“TSCA”). 41 Fed. Reg. 14134-36; (Op. at 4). The EPA explicitly placed the responsibility for proper disposal of PCBs on the generators of PCB-containing wastes from industrial facilities. 41 Fed. Reg. 14134-36; (Op. at 4). By 1979, the EPA promulgated comprehensive regulations governing the cleanup and disposal of PCBs and PCB-containing products. *See* 40 C.F.R. §761; 43 Fed. Reg. 7150-7164, 44 Fed. Reg. 31514; (Op. at 4). In 1979, the EPA restricted the manufacture, processing, use, and distribution of PCBs to specifically exempted and authorized activities. 40 C.F.R. § 761 *et seq.*; (Op. at 4).

In the 1980s, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.*, among other environmental legislation, to remediate hazardous waste sites and regulate the discharge of waste, including PCBs. (Op. at 4). The State of Delaware subsequently enacted the Delaware Hazardous Substance Cleanup Act, 7 Del. C. § 9101 *et seq.*, to address sites not governed by CERCLA. (Op. at 4).

### **B. The Alleged Effects of PCBs in Delaware**

The State does not allege any PCB-related harm until almost 20 years after Pharmacia ceased production of PCBs when multiple regulatory authorities, including the EPA, the Delaware River Basin Commission (“DRBC”), the Delaware Department of Natural Resources and Environmental Control (“DNREC”), and the Delaware Department of Health and Social Services, began to address PCBs in the Delaware River, the Delaware Bay, the Christina River Basin, and related tributaries. *See, e.g.*, (A045 ¶88, A048 ¶95, A049 ¶98, A055 ¶114).

The State alleges that Zone 5 of the Delaware River and Zone 6 of the Delaware Bay were listed as impaired for PCBs under Section 303(d) of the Clean Water Act in 1996, (A048 ¶97, A050 ¶103); the DRBC implemented a total maximum daily load (“TMDL”) for PCBs for Zone 5 of the River in 2003,



(A048 ¶97); the DRBC implemented a TMDL for the Bay in 2006, (A050 ¶103); PCBs were detected in certain fish species as of 2006, (A055 ¶116 n.28); and Delaware has implemented general fish consumption advisories since 2007, (A056 ¶117).

### **C. The Alleged Source of PCBs in Delaware**

The State bases its claims against Pharmacia solely on the escape of PCBs into the environment after the point of sale to third parties. The State admits that Pharmacia did not manufacture PCBs in or near Delaware. (A023 ¶43). Nor does the State does allege that Pharmacia itself discharged, dumped, spilled, leaked, or disposed of PCBs in or near Delaware.

The State identifies over a dozen industrial facilities owned and operated by third parties as the direct sources of PCBs in the State’s water bodies, *e.g.*, three Amtrak Rail facilities, American Scrap and Waste, the Dravo Shipyard, and American Tank and Trailer Cleaning, (A052 ¶109); orphan sites, (A052-53 ¶110); Superfund sites like Harvey Knott & Drum, Inc., (A053-54 ¶111); a former 420-acre steel production facility, (A054-55 ¶113); and the site of a former military base, (A055 ¶114).

The State specifies that the Amtrak Rail facilities comprise “*the largest chronic source of PCB loading to the Delaware River in the State.*” (A054 ¶112) (emphasis added); (Op. at 5). The State explains that, for decades,

transformers on the trains contained PCBs, which were released into the soil during maintenance, repair, and overhaul at the facilities. (A054 ¶112); (Op. at 5).

The State alleges that DNREC and, in part, the EPA have been engaged in the investigation and remediation of all of the sites identified in the Complaint. (A052-54 ¶¶109-12). In particular, the State alleges that it has been working for years with Amtrak through the Voluntary Cleanup Program to remediate the railyard site. (A054 ¶112; (Op. at 5).<sup>2</sup>

---

<sup>2</sup>Under the State's Voluntary Cleanup Program, the responsible party pays for investigation, remediation, and monitoring of the contaminated site, and reimburses the State for its oversight costs:

The Voluntary Cleanup Program (VCP) is available to all parties who may be liable for the contamination of a property, but who wish to settle their liabilities with the Department of Natural Resources and Environmental Control under the Hazardous Substance Cleanup Act (HSCA).

Current owners of contaminated properties may volunteer to clean up the site before the department orders a cleanup under HSCA. This could result in a speedier and less costly cleanup.

....

If the site is determined to be eligible, applicants must sign a Voluntary Cleanup Program Agreement. The applicant agrees to allow the Remediation Section to oversee the investigation and cleanup of the site, and to pay the cost of that oversight.

<<https://dnrec.alpha.delaware.gov/waste-hazardous/remediation/voluntary-cleanup>>>

The State does not allege that Pharmacia had any special relationship with any third-party manufacturer of PCB-containing products, any industrial facility that used PCBs, any end-user of PCB products, or any landfill or other disposal facility in Delaware or elsewhere. Nor does the State allege that Pharmacia is a potentially responsible party for the remediation of any of the contaminated sites identified in the Complaint.

Apart from the direct discharge of PCBs from the Delaware sites, the State does not identify any specific source of PCBs in Delaware. Instead, the State amorphously alleges that PCBs escaped into the environment at large from the intended use of PCBs by third parties in so-called “open” applications; leaks and discharge from the failure of “closed” applications; and spillage, leakage, dumping, and improper disposal by industrial manufacturers. (A023-24 ¶45). The State then generally alleges that, after initial release into the environment from the unidentified sources, PCBs passively migrate by air, water, soil and sediment significant distances “often to remote areas far from the location of their initial release.” (A024-25 ¶47, A026 ¶51).

#### **D. The State’s Claims**

The State does not allege any decline in the fish, bird, or other wildlife populations in Delaware due to PCBs. Indeed, the State does not allege that PCBs have caused any actual harm to wildlife in Delaware. Nor does the State

allege any instance of personal injury due to PCBs in Delaware lands and waters. Rather, the State apparently seeks to recover past and future regulatory oversight costs to investigate, monitor, and detect PCBs in the environment, (A046 ¶90); costs to implement water quality criteria, Section 303(d) listings, TMDLs, and fish consumption advisories, (A048 ¶95, A052-53 ¶110, A056 ¶117, A056-57 ¶118, A057-58 ¶120); cleanup costs to remediate Voluntary Cleanup, Superfund, “orphaned,” and other mixed-funding sites, (A012 ¶9, A012-13¶10, A052¶109, A052-53¶110, A053-54¶111); and costs for remediation of PCBs in the waterways, (A057-58 ¶120).

## ARGUMENT

### **I. THE SUPERIOR COURT CORRECTLY REJECTED THE STATE’S UNPRECEDENTED PUBLIC NUISANCE CLAIM FOR THE SALE OF A LAWFUL PRODUCT**

#### **A. Question Presented**

Did the Superior Court correctly reject the State’s attempt to convert the public nuisance theory into an expansive environmental product liability tort for the placement of a lawful product into the stream of commerce contrary to Delaware law? Pharmacia raised the question below in its Motion to Dismiss, Reply, and oral argument on the motion. (A068-100, A151-70, A171-237). The Superior Court agreed with Pharmacia and dismissed the State’s public nuisance claim. (Op. at 6-11, 18-19).

#### **B. Scope of Review**

Dismissal is appropriate under Rule (12)(b)(6) when it appears with reasonable certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven to support the claims asserted. *KnighTek, LLC v. Jive Commc’ns, Inc.*, 225 A.3d 343, 350 (Del. 2020). This Court, like the Superior Court, may not accept conclusory allegations unsupported by specific facts, nor draw unreasonable inferences in the plaintiff’s favor, under Rule (12)(b)(6). *Id.*

## C. Merits of Argument

### 1. *Public Nuisance Is Not Actionable for the Sale of a Product Under Delaware Law*

In Delaware, “[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.” *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at \*12-13 (Del. Super. Ct. Feb. 4, 2019). The Delaware Superior Court has now confirmed this principle in three separate cases: Delaware does not recognize public nuisance claims for products. *See, e.g., id.* at \*12. In *Purdue*, the Superior Court refused to recognize the State’s novel public nuisance claim for the sale of opioids. *Id.* at \*12-13. In *Sills v. Smith & Wesson Corporation*, 2000 WL 33113806 (Del. Super. Ct. Dec. 1, 2000), the Superior Court rejected public nuisance liability for the design, marketing, and sale of handguns. And, in this case, the Superior Court refused to expand public nuisance liability to the design, manufacture, and sale of a chemical product.

The State mistakenly contends that the Superior Court adopted a novel “product-based exclusion” to public nuisance liability in *Purdue*, *Sills*, and this case. But, to the contrary, the Superior Court simply adhered to the long-standing principle of Delaware law that public nuisance liability does not attach absent the defendant’s control of the nuisance-causing agent. In reaching its decisions in *Purdue*, *Sills*, and this case, the Superior Court recognized that a

product-based theory is out of step with the historical link of public nuisance liability to the defendant's use of property under Delaware law. *See, e.g., Purdue*, 2019 WL 446382, at \*11 n.63 (citing *Patton v. Simone*, 1992 WL 398478 (Del. Super. 1992)).<sup>3</sup> The significance of the link to land, as explained by the New Jersey Supreme Court, is that “a public nuisance, by definition, is related to conduct, performed in a location within the actor’s control,” *In re Lead Paint Litig.*, 191 N.J. 405, 429, 924 A.2d 484, 499 (2007). In *Patton v. Simone*, 1992 WL 398478 (Del. Super. 1992), the Superior Court reinforced the element of control, tied to the use of land, by refusing to impose nuisance liability against an elevator service contractor for the dangerous condition of a customer’s elevator – even though the contractor knowingly perpetuated the nuisance – because the owner, not the contractor, controlled the premises. *Id.* at \*9. The Superior Court’s rejection of product-based nuisance claims in *Purdue*, *Sills*, and this case, embodies judicial recognition that the product manufacturer cannot be liable for what it does not control.

In the history of public nuisance law in Delaware, the State can cite no

---

<sup>3</sup>“Under Delaware law, a public nuisance is ‘activity which produces some tangible injury to *neighboring property* or persons coming into contact with it and which a court considers to be objectionable under the circumstances.’” *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019) (quoting *Patton v. Simone*, 1992 WL 398478, at \*9 (Del. Super. 1992) (emphasis added)).

controlling case law embracing the State's expansive theory of public nuisance liability for the placement of a lawful product into the stream of commerce. To the contrary, the State exclusively relies on Delaware case law that falls squarely within the traditional limits of public nuisance theory pertaining to the defendant's use of land. *See* Appellant's Brief at 11, 12, 18-21 (*citing Artesian Water Co. v. Government of New Castle County*, 1983 WL 17986 (Del. Ch. Aug. 4, 1983) (groundwater pollution seeping from landfill); *Alexander v. Evraz Claymont Steel Holdings Inc.*, 2013 WL 8169799 (Del. Super. Mar. 31, 2013) (toxic emissions from steel plant affecting neighboring property owners); *Lechliter v. Del. Dep't Nat'l Resources*, 2015 WL 9591587 (Del. Ch. Dec. 31, 2015) (noise and light disturbances from wind turbine on neighboring property); *State ex rel. Buckson v. Sposato*, 43 Del. Ch. 443, 451, 235 A.2d 841, 846 (1967) (operation of gambling house); *State ex rel. Bove v. Hill*, 39 Del. Ch. 511, 513, 167 A.2d 738, 740 (1961) (business places operated in a populated area in blatant, contemptuous and illegal manner); *Peterson v. King Cnty.*, 45 Wash. 2d 860, 863, 278 P.2d 774, 776 (1954) (landslide from uphill property)).

The State additionally misplaces reliance on traditional nuisance cases from other jurisdictions also involving the defendant's use of land in support of its mistaken assertion that there is nothing novel about its product-based nuisance theory. *See* Appellant's Brief at 18-19 (*citing People v. Truckee*



*Lumber Co.*, 48 P. 374 (Cal. 1897) (discharge of refuse by saw mill and box factory into adjacent river); *State ex rel. Wear v. Springfield Gas & Elec. Co.*, 204 S.W. 942 (Mo. Ct. App. 1918) (discharge of wastewater by gas company into adjacent creek); *Pennsylvania R. Co. v. Sagamore Coal Co.*, 126 A. 386 (Pa. 1924) (drainage of acid mine water into adjacent creek); *Hampton v. N. Carolina Pulp Co.*, 27 S.E.2d 538 (N.C. 1943) (discharge of pulp plant wastewater into adjacent river)).<sup>4</sup>

## **2. Majority of Appellate Courts Nationwide Rejects Nuisance Liability for the Sale of a Product**

In reaching its decisions in *Purdue, Sills*, and this case, the Superior Court recognized that the great weight of appellate authority from other jurisdictions rejects public nuisance liability for the placement of a product into the stream of commerce. See *State of Oklahoma v. Johnson & Johnson*, 499 P.3d 719, 725 (Ok. 2021) (“our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products”); *State v. Lead Industries, Ass’n, Inc.*, 951 A.2d 428, 456 (R.I. 2008) (“[t]he law of public

---

<sup>4</sup>The State also erroneously relies on the distinguishable district court case, *City of Wyoming v. Procter and Gamble Co.*, 210 F. Supp. 3d 1137 (D. Minn. 2016), which, unlike this case, involved a cause of action based on breach of warranty and misrepresentation, where the city was deemed a third-party beneficiary of the manufacturer’s warranties, and a direct causal connection existed between the harm to the municipality and the manufacturer’s misrepresentation.

nuisance never before has been applied to products, however harmful”); *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (“were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations to the tort of public nuisance”); *People ex re. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S. 2d 192, 196 (N.Y. App. Div. 2003) (“giving a green light to a common-law public nuisance cause of action today will . . . likely open the courthouse doors to a flood of limitless, similar theories of public nuisance . . . against a wide and varied array of other commercial and manufacturing enterprises and activities”); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000), *aff’d*, 277 F.3d 415, 421 (3d Cir. 2002) (recognizing that extension of public nuisance law to sale of product would be unprecedented nationwide for an appellate court); *City of Bloomington, Ind. v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (rejecting nuisance cause of action “[s]ince the pleadings do not set forth facts from which it could be concluded that Monsanto retained the right to control the PCBs beyond the point of sale to [its customer]”); *Tioga Public School Dist. No. 15 of Williams County, State of ND. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (“Nuisance . . . would become a

monster that would devour in one gulp the entire law of tort”).<sup>5</sup>

The State erroneously suggests that *State of Oklahoma v. Johnson & Johnson*, 499 P.3d 719 (Ok. 2021); *State v. Lead Industries, Ass’n, Inc.*, 951 A.2d 428 (R.I. 2008); and *City of Bloomington, Ind. v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989), establish a mere foreseeability of harm test for public nuisance when, to the contrary, the Courts expressly confirmed that public nuisance is not actionable absent the defendant’s control of the instrumentality at the time of the nuisance.<sup>6</sup>

In *Johnson & Johnson*, where the State of Oklahoma claimed the ordinary

---

<sup>5</sup>The majority of jurisdictions maintain that “control at the time the damage occurs is a time-honored element of public nuisance.” *State v. Lead Indus., Ass’n*, 951 A.2d 428, 449-50 (R.I. 2008) (collecting cases). The State cites no appellate court decisions from other jurisdictions sanctioning nuisance liability against Pharmacia for the sale of PCBs. Instead, the State misleadingly cites trial court orders sustaining public nuisance claims against Pharmacia at the pleadings stage in other jurisdictions which either did not address the element of control at all, *e.g. Oregon v. Monsanto Co.*, No. 18-cv-00540 (Or. Cir. Ct. Jan. 9, 2019) (addressing nuisance per se and causation); *City of Spokane v. Monsanto Co.*, 2016 WL 6275164 (E.D. Wash. Oct. 26, 2016) (addressing causation); involved a rare federal court decision rejecting the element of control under state law, *e.g., Mayor and City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014 (D. Md. Mar. 31, 2020); or involved state court reliance on a prior federal court decision, *Baltimore*, when eliminating the element of control from state nuisance law, *e.g., Commonwealth v. Monsanto*, 2021 WL 6139209, \*19-\*20 (Pa. Cmwlth. Dec. 30, 2021).

<sup>6</sup>The State erroneously conflates causation with the distinct element of control. To the extent the Courts discuss foreseeability, it is distinctly in reference to the plaintiff’s burden of proving proximate causation. *See, e.g., State v. Lead Indus., Ass’n, Inc.*, 951 A.2d 428, 451 (R.I. 2008).

use of opioids led to a public health crisis, the Supreme Court of Oklahoma reversed a \$465 million verdict, ruling that public nuisance liability does not extend to the manufacture, marketing, and sale of lawful products. *Johnson & Johnson*, 499 P.3d at 721. The Court reasoned that the manufacturer’s duty is to put a non-defective product on the market: “There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold.” *Id.* at 728. The Court concluded that, without post-sale control of its product, the manufacturer cannot be held liable for public nuisance. *Id.*

The Court explained that Johnson & Johnson, who sold the product (for over 20 years) that was later alleged to constitute a nuisance, did not control the instrumentality at the time the nuisance occurred. *Id.* Rather, the Court reasoned that “the alleged nuisance in this case is several times removed from the initial manufacture and distribution of opioids by J&J.” *Id.* The Court emphasized that, “[e]ven with its influential marketing, J&J ultimately could not control: (1) how wholesalers distributed its products, (2) how regulations and legislation governed the distribution of its products by prescribers and pharmacies; (3) how doctors prescribed its products, (4) how pharmacies dispersed its products, and (5) how individual patients used its product or how a patient responded to its product, regardless of any warning or instruction given.” *Id.* at 728-29.

In *State v. Lead Industries*, the Rhode Island Supreme Court reversed a

jury verdict against lead pigment manufacturers, reasoning, *inter alia*, that “defendants were not in control of any lead pigment at the time the lead caused harm to children in Rhode Island,” *Lead Industries*, 951 A.2d at 435. The Court recognized that “liability in a public nuisance action ‘turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise.’ Importantly, the defendant must have had control over the nuisance-causing instrumentality at the time that the damage occurred.” *Id.* at 499 (citations omitted).

In *Bloomington*, the Seventh Circuit refused to permit the City to proceed against Monsanto in public nuisance for Monsanto’s customer’s discharge of PCBs into the environment. Monsanto sold PCBs to Westinghouse, which operated a local manufacturing facility, for use in its finished products. The City alleged that Westinghouse discharged PCB-containing effluent into the sewers and disposed of PCB-containing waste in local landfills. The Court ruled that, because “the pleadings do not set forth facts from which it could be concluded that Monsanto retained the right to control the PCBs beyond the point of sale to Westinghouse,” Monsanto could not be held liable in nuisance. *Bloomington*, 891 F.2d at 614. Rather, the Court explained, “Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product.” *Id.* at 614.

**3. *Pharmacia Undisputedly Lacked Control of Its PCBs after the Point of Sale***

The State does not allege that Pharmacia controlled its PCBs at the time of the alleged public nuisance in Delaware. The State does not allege that Pharmacia itself dumped, spilled, or disposed of PCBs in Delaware. Rather, the State identified over a dozen industrial sites, owned and operated by third parties over whom Pharmacia had no control, as the primary sources of PCBs in Delaware waterways. The State specifically identified Amtrak Rail facilities as “the largest chronic source of PCB loading to the Delaware River in the State.” Comp1. ¶112. The State does not allege that Pharmacia manufactured PCBs in Delaware, operated any site that discharged PCBs in Delaware, or had any special relationship with any third-party that released PCBs in Delaware.

On appeal, the State makes no reference to the Amtrak Rail facility, or any other third-party PCB discharger identified in the complaint, as the cause of the alleged public nuisance. It is undisputed that multiple federal and state agencies are already actively engaged in the remediation, conservation, and development of these sites.

Instead, the State now limits its theory against Pharmacia to broad generalizations that PCBs, by their nature, escaped from unidentified end products, at unknown locations, under unknown conditions, at unknown concentrations, and at unspecified times; passively migrated great distances

often far from their original sources; and eventually ended up in the Delaware lands and waters at issue in this lawsuit.

The State’s own allegations demonstrate “the alleged nuisance in this case is several times removed from the initial manufacture and distribution” of PCBs by Pharmacia, *Johnson & Johnson*, 499 P.3d at 728. Pharmacia, which sold PCBs in bulk, did not control: (1) how wholesalers distributed its products; (2) how formulators and other customers manufactured PCB-containing products; (3) how third parties used finished PCB-containing products or that Pharmacia would have even known who the customers of its customers were in Delaware; (4) how industrial, municipal, and other facilities used, spilled, or disposed of PCBs; or (5) how the multiple site owners, identified by the State as the primary sources of PCBs, released PCBs into the Delaware River, Delaware Bay, and Christina River Basin. Notably, the State does not allege that Pharmacia had any control over the Amtrak Rail facilities site that the State has identified as the “largest chronic source” of PCBs in the Delaware River.

***4. The Expansion of the Public Nuisance Tort to Products Is Inapt to Cure Downstream Harms***

This Court should reject the State’s request to create an expansive new products-based public nuisance cause of action. Finding the public nuisance theory fundamentally ill-suited to regulate the sale of products, the Supreme Court of Oklahoma rightly cautioned that extending public nuisance law to the

manufacturing, marketing, and selling of products would allow consumers to “convert almost every products liability action into a [public] nuisance claim.” *Johnson & Johnson*, 499 P.3d at 729-30 (citation omitted). “Nuisance would become a monster that would devour in one gulp the entire law of tort” in Delaware. *Tioga*, 984 F.2d at 921.

The expansion of public nuisance to the sale of products would expose myriad lawful business practices to vast unpredictable potential nuisance liability in Delaware:

Without [the traditional] limits [to public nuisance liability], businesses have no way to know whether they might face nuisance liability for manufacturing, marketing, or selling products, i.e., will a sugar manufacturer or the fast food industry be liable for obesity, will an alcohol manufacturer be liable for psychological harms, or will a car manufacturer be liable for health hazards from lung disease to dementia or for air pollution.

*Johnson & Johnson*, 499 P.3d at 731.

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.

*Sturm, Ruger & Co.*, 761 N.Y.S.2d at 196-97.

As the Oklahoma Supreme Court recognized, the judicial expansion of public nuisance liability is an inapt mechanism to address public policy:

The district court’s expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the



legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems. Further, the district court stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.

*Id.* The State's proposed expansion of the tort of public nuisance to the sale of lawful products is a particularly inapt substitute for environmental regulation that rests on complex public policy matters that should be dealt with by the legislature. The conditions and limitations placed on the state to enforce its authority to protect the environment is governed by a well-defined statutory and regulatory framework. *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1090 (Del. 1986). In this case, the invention of a new cause of action is not necessary to address the alleged harm. Multiple federal, interstate, and state agencies are already actively involved in the environmental remediation of the sites identified in the complaint.

## **II. THE SUPERIOR COURT PROPERLY HELD THAT THE STATE FAILED, AS A MATTER OF LAW, TO STATE A TRESPASS CLAIM**

### **A. Question Presented**

Did the Superior Court properly reject the State's novel trespass claim when: (a) the State lacks standing to sue for damages in trespass for the claimed harm to public trust property and, in the alternative, (b) Delaware does not recognize trespass liability for the placement of a product into the stream of commerce? Pharmacia raised the questions below in its Motion to Dismiss, Reply, and oral argument on the motion. (A068-100, A151-70, A171-237). The Superior Court agreed with Pharmacia and dismissed the State's claim. (Op. at 11-16, 18-19).

### **B. Scope of Review**

Pharmacia incorporates by reference its statement in part I(B).

### **C. Merits of Argument**

The Superior Court correctly held that the tort of trespass does not provide the State a remedy. As properly found by the Court, the State, first, lacks standing to sue in trespass because it has no exclusive right to possession of the public lands and waters at issue in this case. The Court, further, properly held that the State failed to state a trespass claim because, like public nuisance, Delaware law does not extend the tort of trespass to the sale of a lawful product.

### ***1. The State Lacks Standing to Sue for Trespass***

“The doctrine of standing requires that a party seeking relief from the court allege some injury in fact to a substantive, legally protected interest belonging to him.” *Int’l Bus. Machs. Corp. v. Comdisco, Inc.*, C.A. No. 91-C-07-199, 1991 Del. Super. LEXIS 453, \*42 (Del. Super. Ct. Dec. 4, 1991). In Delaware, the claimant must show that it had lawful possession of the land to establish standing to sue for trespass. *Robinson v. Oakwood Vill., LLC*, 2017 WL 1548549, at \*15 (Del. Ch. Apr. 28, 2017). “[T]respass is a *possessory* action.” *Del.-Chapel Assocs. v. Conectiv*, No. 19498-VCL, 2008 Del. Ch. LEXIS 50, at \*10 (Ch. May 5, 2008) (emphasis added). “Only a person in possession of the property may allege a trespass action.” *Pilots’ Ass’n for Bay & River Delaware v. Lynch*, 1992 WL 390697, \*3 (Del. Super. Ct. Nov. 19, 1992).

The State focuses this lawsuit on the alleged adverse effects of PCBs on the Delaware River, the Delaware Bay, the Christina River Basin, and related tributaries. *See, e.g.*, (A046-47 ¶¶91-92). On appeal, the State limits its trespass claim to “state lands” but identifies no state lands at issue in its trespass claim other than submerged lands beneath the navigable waters allegedly impaired by PCBs. Appellant’s Brief at 6, 32-33. The State lacks standing both as a matter of law and fact to sue for trespass to the beds of its navigable waters.

The State lacks the requisite exclusive possessory interest in lands it holds

in trust to sue for damages in trespass. Damages in trespass for harm to property vindicate the possessor's *proprietary* interests. *Williams v. Manning*, 2009 WL 960670, at \*10 (Del. Super. Ct. Mar. 13, 2009). Indeed, "in Delaware, the measure of damages for trespass of land is the difference between the value of the land before the trespass occurred and the value of the land after the trespass."

*Id.* at \*9.

The State lacks exclusive possession over public trust lands, including the lands beneath navigable waterways as a matter of law:

"The character of [the state's title in public trust property] is distinctive as compared to state-held title in other lands, and different legal rules therefore apply." The public trust doctrine does not confer on states proprietary rights over the trust property: That the state holds the title to the lands under the navigable waters . . . within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.

*Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892) (citations omitted).

As recognized by the Superior Court, the state's sovereign interests do not confer on it the exclusive possessory legal interest required to bring a trespass action for damages to public trust property. *See, e.g., New Jersey Dep't of Env'tl.*

*Prat. v. Hess Corp.*, 2020 WL 1683180, at \*6 (N.J. Super. Ct. App. Div. Apr. 7, 2020) (“Land in the public trust . . . cannot be in ‘exclusive possession’ of the State as the interest created by the doctrine is intended to ensure that others have use of the same land. It does not grant to the State the exclusive possession of property.”); *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 471 (D. Md. 2019) (finding neither state’s “quasi-trustee interest in its natural resources, or proceeding *parens patriae*, confers the requisite possessory interest to sustain a trespass claim”); *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.*, 2014 WL 840955, at \*2 (S.D.N.Y. Mar. 3, 2014) (“‘Land in the public trust is held by the State on behalf of a second party, the people.’ Thus, such land cannot be in ‘exclusive possession’ of the State.” (citation omitted)); *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1247 n.36 (10th Cir. 2006) (“the State as guardian of the public trust has no possessory interest in the sand, gravel, and other minerals that make up the aquifer - a necessary requisite to maintaining a trespass action.”); *State v. 3M Company*, 2020 N.H. Super. LEXIS 29, \*25 (N.H. Super. Ct. June 25, 2020) (rejecting state’s assertion of *parens patriae* standing to sue in trespass for contamination of natural resources).<sup>7</sup>

---

<sup>7</sup>The State incorrectly assumes that Delaware’s inception as a “propriety colony” confers on it proprietary rights in the state’s public trust resources for the recovery of damages in trespass today. See *Chernaik v. Brown*, 367 Or. 143, 159, 475 P.3d 68, 78 (2020) (explaining that the crown transferred to the original 13 states “title to the beds of ‘waters subject to the ebb and flow of the tide,’ but the public ‘retained

The State misleadingly cites provisions of Delaware environmental protection statutes, Appellant’s Brief at 35, which merely confirm that the State has *regulatory* authority to manage, preserve, and protect public trust property. Nothing in the state’s environmental statutory scheme confers on the State standing to pursue a common law trespass action for damages for alleged harm to public trust property.

In addition, the State does not actually allege that PCBs harm the riverbeds themselves. The State does not allege any diminution in property value of the riverbeds due to PCBs. Nor does the State allege that PCBs interfere with any use of the riverbeds or the navigability of the waterways. Instead, the State claims PCBs harm the water bodies, fish, and wildlife, for which the State admittedly lacks standing to sue in trespass.

Finally, the State does not, in fact, exercise exclusive possessory control of the waterways at issue in this lawsuit. To the contrary, the State admittedly shares regulatory authority over the water bodies with the federal government and neighboring states. The State acknowledges that the DRBC, a federal-interstate agency comprised of Delaware, New Jersey, Pennsylvania, New York, and the U.S. Army Corps of Engineers, manages the water quality in the

---

the right of passage and the right to fish in the stream.’’) (citations omitted).

Delaware River and the Delaware Bay. (A048 ¶¶95, A049 ¶¶98). The DRBC also manages the conservation of the water quality and related resources of the Christina River Basin, which straddles Delaware and Pennsylvania, pursuant to the Delaware River Basin Compact.<sup>8</sup> In other words, the State must coordinate with the multiplicity of federal, interstate, and state government agencies with shared jurisdiction to remediate the bodies of water.

## ***2. Trespass Does Not Lie for the Sale of a Lawful Product***

The State’s trespass claim is not actionable for the additional reason that, like public nuisance, Delaware does not recognize trespass liability for the placement of a lawful product into the stream of commerce. The Superior Court correctly ruled that the defendant must exercise ownership or control over the intruding instrumentality at the time of the trespass. (Op. at 15) (citing *Robinson*, 2017 WL 1548549, at \*16 (rejecting trespass liability against former owner not in control of stormwater discharge); *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, 995 P.2d 657,664 (Alaska 2000) (“The general consensus thus suggests that ownership or control of the intruding instrumentality is dispositive of an actor’s trespass liability.”)); *see also Bloomington*, 891 F.2d at 615 (7th Cir. 1989) (“In accordance with the Restatement principles, courts do

---

<sup>8</sup><[www.state.nj.us/drbc/library/documents/compact.pdf](http://www.state.nj.us/drbc/library/documents/compact.pdf)>>

not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers.”); *Town of Westport v. Monsanto Co.*, 2015 WL 1321466, at \*4 (D. Mass. Mar. 24, 2015) (“Courts have dismissed claims of intentional trespass against manufacturers on the basis of a lack of control post-sale.”); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H. 1984) (rejecting trespass claim against manufacturers because their “ownership and control of the asbestos products ceased at the time of sale.”); *City of Manchester v. Nat’l Gypsum Co.*, 637 F. Supp. 646,656 (D.R.I. 1986) (finding no intentional invasion where “the defendants’ ownership and control over the asbestos products ceased after the time of manufacture and sale.”); *Clark v. United States*, 109 F. Supp. 213,220 (D. Or. 1952), *aff’d*, 218 F.2d 446 (9th Cir. 1954) (rejecting trespass claim where defendant had no control of intruding instrumentality); *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 471 (D. Md. 2019) (“[W]hen an adjacent property is invaded by an inanimate or intangible object it is obvious that the defendant must have some connection with or some control over that object in order for an action in trespass to be successful against him.”).

The State does not allege, nor can it, that Pharmacia controlled PCBs at the time of the alleged trespass into the Delaware lands and waters at issue in this case. *Dayton v. Collison*, 2020 WL 3412701, at \*7 (Del. Super. Ct. June 22,



2020) (requiring the claimant to show that “the actor intended to be upon the particular piece of land in question” to establish trespass.), *aff’d*, 250 A.3d 763 (Del. 2021). Pharmacia cannot, as a matter of law, be deemed to have caused PCBs to enter Delaware based on the alleged release of PCBs by third parties at Delaware facilities. *See Dayton*, 2020 WL 3412701 at \*8 (rejecting trespass claim for conduct of third party over whom defendant had no control). Nor does the State plead any facts remotely tying Pharmacia’s conduct to Delaware at all apart from the general sale of PCBs.<sup>9</sup> The State’s general allegations that, post-sale, PCBs passively migrate significant distances by air, water, soil, and sediment “often to remote areas far from the location of their initial release” do not establish the direct causal connection required to state a trespass claim. *See Parks Hiway*, 995 P.2d at 664 (requiring direct causal connection between actor’s conduct and intrusion of foreign matter on possessor’s land).

As with its public nuisance claim, the State urges the Court to disregard

---

<sup>9</sup>The claimant must also show that the opposing party entered the claimant’s land without consent or privilege to state a claim for trespass. *Robinson v. Oakwood Vill., LLC*, 2017 WL 1548549, at \*15 (Del. Ch. Apr. 28, 2017). The State does not allege that it did not authorize the sale, distribution, and use of PCBs in Delaware and, therefore, the lawful presence of Pharmacia’s PCBs in Delaware does not, as a matter of law, constitute a trespass. *Burris v. Cross*, 583 A.2d 1364, 1377 (Del. Super. Ct. 1990). Rather, the State is required to plead that Pharmacia intentionally caused its PCBs to enter the Delaware public lands and waters at issue in this case. *Dayton v. Collison*, 2020 WL 3412701, at \*7 (Del. Super. Ct. June 22, 2020), *aff’d*, 250 A.3d 763 (Del. 2021).

any element of control of the invading instrumentality, and, instead adopt its novel trespass theory premised on the design, manufacture, and sale of a product that, decades after the point of sale, allegedly enters the environment. Because it is known that a multitude of products, from surgical masks, to cigarette butts, to bottle tops, inevitably end up in the environment and threaten natural resources, the State's novel trespass theory would expose product manufacturers to limitless liability in Delaware. The State's trespass claim, like its public nuisance claim, constitutes an untenable expansion of the product manufacturer's duty for the placement of a lawful product into the stream of commerce under Delaware law.

### **III. THE SUPERIOR COURT PROPERLY HELD THAT THE STATE FAILED, AS A MATTER OF LAW, TO STATE AN UNJUST ENRICHMENT CLAIM**

#### **A. Question Presented**

Did the Superior Court correctly reject the State’s attempt to assert an independent claim for unjust enrichment when the State does not allege any “enrichment” of Pharmacia by the State’s remediation of Delaware lands and waters or corresponding duty in Pharmacia to repay the State for its alleged expenditures? Pharmacia raised the question below in its Motion to Dismiss, Reply, and oral argument on the motion. (A068-100, A151-70, A171-237). The Superior Court agreed with Pharmacia and dismissed the State’s claim. (Op. at 16-19).

#### **B. Scope of Review**

Pharmacia incorporates by reference its statement in part I(B).

#### **C. Merits of Argument**

In its Third Claim for Relief, the State asserts an independent cause of action for unjust enrichment, (A062-65 ¶¶138-48), and seeks “restitution” of its costs in its Prayer for Relief (A066). Because this Court has characterized unjust enrichment as an equitable claim, *see, e.g., Wells Fargo Bank, N.A. v. Est. of Malkin*, 278 A.3d 53, 69 (Del. 2022); *Home Ins. Co. v. Honaker*, 480 A.2d 652, 653 (Del. 1984), Pharmacia submits that the Superior Court correctly determined that jurisdiction over the State’s unjust enrichment claim properly resided with

the Chancery Court.

On the merits, the State failed to plead a viable unjust enrichment claim. Because the State expressly bases liability for unjust enrichment on its nuisance and trespass claims, (A062 ¶139, A062-63 ¶141), the State’s unjust enrichment claim would simply convert every tort into a duplicative unjust enrichment claim.

“The elements of unjust enrichment 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 at law.” *Grace v. Morgan*, 2004 WL 26858, at \*3 (Del. Super. Ct. Jan. 6, 2004).

In its prayer for restitution, the State primarily seeks to recover taxpayer costs it allegedly expended in carrying out its governmental duties to enforce environmental laws and regulations. *Sills*, 2000 WL 33113806, at \*7 (granting motion to dismiss unjust enrichment claim against handgun manufacturers for recovery of increased costs incurred to protect citizens from the unauthorized use of handguns); *Purdue*, 2019 WL 446382, at \*14 (granting motion to dismiss unjust enrichment claim against pharmaceutical manufacturers for recovery of costs related to opioid epidemic).

The State fails to allege any benefit conferred by it on Pharmacia. To the contrary, the State represented to the Superior Court that it conferred a benefit

on Pharmacia by relieving it of its common law duty owed to the State in trespass and nuisance, (A062-63 ¶141, A063 ¶144), when Pharmacia had no pre-existing common law duty to remediate PCBs from Delaware public lands and waters. Indeed, Pharmacia itself would have had no right to enter Delaware’s public lands and waters or any third-party site to remediate the PCBs. As the Superior Court rightly held, Delaware law does not recognize unjust enrichment for potential future liabilities. *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010) (“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.’”). The tort of unjust enrichment does not provide the State a permissible safety net simply because the State’s nuisance and trespass claims fail to provide it the relief it seeks. *Intermec IP Corp. v. TransCore, LP*, 2021 WL 3620435, at \*17 (Del. Super. Ct. Aug. 16, 2021) (rejecting claimant’s contention that, “because its express breach-of-contract claim might fail, its unjust enrichment claim is a permissible safety net.”).

**CONCLUSION**

Based on the foregoing, Pharmacia requests this Honorable Court to affirm the Superior Court's order dismissing the State's Complaint.

Respectfully submitted,

**WHITE AND WILLIAMS LLP**

**OF COUNSEL:**

**SHOOK, HARDY & BACON L.L.P.**

**Thomas M. Goutman** (*pro hac vice*)

**David S. Haase** (*pro hac vice*)

**Kim Kocher** (*pro hac vice*)

2001 Market St. Suite 3000

Philadelphia, PA 19103

(215) 575-3138

*/s/ Christian J. Singewald*

---

**Christian J. Singewald (#3542)**

**Timothy S. Martin (#4578)**

**Daryll Hawthorne-Searight (#6520)**

Courthouse Square

600 N. King Street, Suite 800

Wilmington, DE 19801

(302) 654-0424

singewaldc@whiteandwilliams.com

martint@whiteandwilliams.com

hawthorned@whiteandwilliams.com

*Counsel for Appellees, Monsanto*

*Company, Solutia Inc., and Pharmacia*

*LLC*

Dated: November 7, 2022