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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 REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page**

Other Authorities

PRELIMINARY STATEMENT

In their Answering Brief, Defendants Below, Appellees Pharmacia LLC, Monsanto Company, and Solutia Inc. (collectively "Monsanto") seek to recast the State's public nuisance, trespass, and unjust enrichment claims as "novel environmental product liability torts." Appellees' Br. 2. There is nothing novel about the State's claims. Public nuisance, trespass, and unjust enrichment are well-established common law remedies for the harms Monsanto's PCBs cause in Delaware. In truth, it is Monsanto that asks this Court to impose novel requirements on these claims, arguing, for example, that "control of the instrumentality" is an element of public nuisance and trespass, when neither this Court nor the common law requires it. *Id*. at 19.

Tellingly, Monsanto ignores the numerous state and federal court decisions allowing equivalent common-law claims to proceed against Monsanto for similar harms by Monsanto's PCBs to lands, waters, and wildlife. The Superior Court's ruling dismissing the State's claims breaks from established common-law principles. The State respectfully requests that this Court reverse the Superior Court.

ARGUMENT

I. The State Adequately Pleads Its Public Nuisance Claim

A. Monsanto does not dispute the existence of a public nuisance

Although Monsanto seeks to portray the State's public nuisance claim as novel and even "the invention of a new cause of action," *id.* at 25, it is neither novel nor of the State's invention. An action by a sovereign to address pollution of a public waterway is perhaps the quintessential public nuisance claim. *See* Opening Br. 18-19. Here, the State seeks to recover under a theory of public nuisance for the pollution of Delaware's waters, lands, and natural resources with PCBs, a class of toxic, persistent chemicals. Seeking liability for environmental contamination under a theory of public nuisance breaks no new ground.

As William Prosser wrote over fifty years ago, public nuisance and private nuisance are distinct actions in the common-law tradition:

> There are, then, two and only two kinds of nuisance, which are quite unrelated except in the vague general way that each of them causes inconvenience to someone, and in the common name, which naturally has led the courts to apply to the two some of the same substantive rules of law. A private nuisance is narrowly restricted to the invasion of interests in the use and enjoyment of land. It is only a tort, and the remedy for it lies exclusively with the individual whose rights have been disturbed. A public nuisance is a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure.

William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966) (footnotes omitted).

Here, there is no credible argument that PCBs in Delaware's lands, waters, fish, and wildlife do not interfere with the rights of the community at large. People cannot eat fish caught in many Delaware waterways because those fish contain dangerous levels of PCBs. A047-52 ¶¶ 93-109. The State has dedicated significant resources to remediating PCB contamination throughout Delaware. A046 ¶ 90, A057-58 ¶ 120. In short, Delaware's case falls squarely within the bounds of the public nuisance law Prosser describes.

Monsanto insists the State's claim is a "new cause of action" simply because the PCBs that now contaminate Delaware's environment were used in a variety of products. But Monsanto misses the point: the State's claim arises from the interference of this persistent chemical with the rights of the public, not from harm to users or consumers of PCB-containing products. And while Monsanto portrays the State's claim as novel, the only thing that makes this case of any particular note, from a legal standpoint, is that—rather than entering the environment through a smokestack or drainage pipe—the chemical contaminant leached, leaked, was vaporized, or otherwise escaped into the environment from the various applications for which Monsanto marketed its PCBs. The fault lies not with the sellers of capacitors, paints, caulk, carbonless copy paper, or other PCB-containing products, but with Monsanto—as it was Monsanto who knew that PCBs would escape through foreseeable (and proper) uses of those products.

The framework for evaluating an action for public nuisance boils down to two questions: (1) whether an interference with a public right exists, and (2) who can be held liable for it. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 281 (E.D.N.Y. 2004) ("Satisfaction of the causation requirement for liability in public nuisance actions requires proof that a defendant, alone or with others, created, contributed to, or maintained the alleged interference with the public right."). Monsanto does not dispute that the State has adequately alleged that the presence of Monsanto's PCBs constitutes an interference with a right common to the public. Instead, as discussed below, the only question is whether Monsanto, based on the State's allegations, can be held legally responsible as the cause of that public nuisance.

B. Public nuisance requires neither "control of the instrumentality" nor adjacent property use

Each of Monsanto's arguments in its Answering Brief goes to the question of who can be held liable for the nuisance created by PCBs. Monsanto argues first that product manufacturers are categorically excluded from liability under public nuisance law. Appellees' Br. 14-16. But this argument is inconsistent with Delaware law and the common law generally. *See* Opening Br. 13-17.

Monsanto next argues that it cannot be liable because it did not control its PCBs after manufacturing and distributing them, and that control is a "time-honored element" of a public nuisance claim. Appellees' Br. 1. This is incorrect:

control is not and has never been an element of a public nuisance claim. Numerous courts, as well as the Restatement, have recognized this.

As the State discussed in its Opening Brief, the Illinois Supreme Court, after delving into nuisance law, concluded that "[c]ontrol is not a separate element of causation in nuisance cases that must be pleaded and proven in addition to cause in fact and legal cause," but, "rather, a relevant factor in both the proximate cause inquiry and in the ability of the court to fashion appropriate injunctive relief." *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1132 (Ill. 2004). That is, "control" emerged as a factor in private nuisance cases involving land as a remedial issue where injunctive relief is sought. In cases not involving land, "control" may be relevant to the causation analysis, in which case "[t]he question then becomes entirely one of foreseeability." *Id.* at 1134-35; *see also* Opening Br. 16-17, 24. But "control" is not a standalone element of a public nuisance claim.

A federal court in Maryland reached the same conclusion in a case involving groundwater contaminated with MTBE, holding that "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***." *State of Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467-68 (D. Md. 2019) (emphasis added). In Baltimore's case against Monsanto for PCB contamination, the court likewise held that "[d]espite

Defendants' assertion that the City has failed to plead Monsanto's control over the alleged nuisance, control is not a required element to plead public nuisance under Maryland law." *Mayor & City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014, at *9 (D. Md. Mar. 31, 2020). The court further held, "The City has sufficiently alleged that Defendants created or substantially participated in the creation of PCBs, even though Defendants may not have maintained control over the contaminants once disseminated in the City's waters." *Id.*, at *10. Similarly, in Pennsylvania's case against Monsanto, the court held that "neither the Second Restatement nor Pennsylvania law requires, in order to be found to have created a public nuisance, that the creator must at all times control the nuisance-creating product[.]" *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 649 (Pa. Commw. Ct. 2021).[1]

A "control" requirement would also contradict the common-law rule that "[o]ne is subject to liability for a nuisance caused by an activity, 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 (1979) (stating that this principle applies to both private and public nuisance claims). As the California

[1] Monsanto argues that the State in its Opening Brief "misleadingly" cites other decisions upholding public nuisance claims against Monsanto that "did not address the element of control at all." Appellees' Br. 19 n.5. Those decisions did not address "control" because it is not an element of a public nuisance claim.

Court of Appeal explained with respect to claims involving lead paint, "liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 549 (Cal. Ct. App. 2017) (citation omitted). Furthermore, "[u]nder general tort law, liability for nuisance may be imposed upon one who sets in motion the forces which eventually cause the tortious act[.]" *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 712 P.2d 914, 920 (Ariz. 1985) (citing Restatement (Second) of Torts § 824 cmt. b).

In addition to arguing for imposition of a "control" requirement, Monsanto suggests that nuisances can only arise from a defendant's use of land. *See* Appellees' Br. 16-17. This is wrong. It is well established in the common law that public nuisance claims need not involve land use. Restatement (Second) of Torts § 821B, cmt. h (1979) ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land."). *See also People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1997) (whereas private nuisance is "tied to and designed to vindicate individual ownership interests in land," public nuisance "is aimed at the protection and redress of community interests"). As noted above, public nuisance can include any condition that creates

"an interference with the rights of the community at large." Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. at 999.

The Ohio Supreme Court rejected gun manufacturer defendants' argument that public nuisance claims required land use, holding that, "although we have often applied public nuisance law to actions connected to real property or to statutory or regulatory violations involving public health or safety, we have never held that public nuisance law is strictly limited to these types of actions." *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) (citation omitted). Likewise, the Supreme Court of Indiana, evaluating a similar argument, was "not persuaded that a public nuisance necessarily involves either an unlawful activity or the use of land." *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1232 (Ind. 2003). In response to the defendants' argument that "all Indiana cases to date have fallen into one of these two categories," the court held, "that is due to the happenstance of how the particular public nuisance actions arose and not to any principle of law." *Id.*

Here, Monsanto argues, like the defendants in *City of Gary*, that because two Delaware trial court cases cited by the State involved public nuisances arising from nearby properties, Delaware law limits liability in public nuisance to land-use cases. Appellees' Br. 16 (citing *Artesian Water Co. v. Government of New Castle Cty.*, 1983 WL 17986 (Del. Ch. Aug 4, 1983) and *Alexander v. Evraz Claymont*

Steel Holdings, Inc., 2013 WL 8169799 (Del. Super. Mar. 31, 2013)). But this is flawed logic, and the *Artesian Water* and *Alexander* courts never suggested otherwise. As the Supreme Court of Indiana held, the fact that prior decisions involve claims that *have* arisen from land use does not mean all public nuisance claims *must* arise from land use.

Similarly, there is no geographic proximity requirement for liability in public nuisance. The Second Circuit, in a case involving MTBE contamination, explained that the answer to the question of who can be liable for public nuisance depends not on geographic proximity but on foreseeability:

> Our sister Circuits have reached differing conclusions when presented with common law nuisance claims against a manufacturer who was not in geographic proximity to the plaintiff. . . .
>
> These cases turn in large part, however, not on the geographic proximity of the defendant to the nuisance but on whether the defendant knew that its product would endanger public health, and whether the defendant took steps to mitigate the risks associated with its product.

In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig., 725 F.3d 65, 122 n.43 (2d Cir. 2013) (citations omitted).

Monsanto's efforts to impose "control" and land-use requirements on public nuisance claims ignore the historical origins of public nuisance at common law, and are inconsistent with the common law of Delaware and the majority of other jurisdictions.

C. On the facts alleged, Monsanto can be liable for the public nuisance caused by its PCBs

Because the question of "control" in public nuisance claims not arising from a defendant's use of land becomes one of foreseeability, the State's allegations are more than adequate. The State alleges the harms from Monsanto's PCBs were not only foreseeable but known to Monsanto. The State's Complaint contains detailed allegations regarding Monsanto's role in the creation of the public nuisance of PCB contamination, including Monsanto's knowledge of PCBs' toxic properties, A027 ¶¶ 53-54, and Monsanto's knowledge that its PCBs were regularly and inevitably released into the environment through their ordinary use in all applications. A031-39 ¶¶ 62-74. Monsanto nonetheless continued to produce PCBs and actively promoted new applications from which PCBs were even more certain to escape into the environment. For example, Monsanto marketed its PCBs for uses such as highway paints or single-use carbon copy paper, from which there was no doubt that every ounce of PCB would wind up in the environment and remain there. A023-24 ¶¶ 44-45; A037-38 ¶ 71.

Even after scientists began reporting the presence of PCBs in wildlife around the world, Monsanto continued to increase PCB production, while downplaying the risks of PCBs in communications to the public and its customers. *See* A026-44 ¶¶ 52-87. Internal documents show that Monsanto resisted taking immediate action to address PCB contamination because "too much Monsanto profit" would

be lost, and Monsanto did not want "to lose one dollar of business." A039-40 ¶¶ 75-76. On these allegations, Monsanto may be held responsible for the harms caused by the public nuisance it created.

Contrary to Monsanto's assertion that it would be "unprecedented" for this Court to allow the State's public nuisance action to proceed, Appellees' Br. 2, the Superior Court's ruling is an outlier. Numerous courts, evaluating substantially similar allegations, have allowed public nuisance claims against Monsanto for PCB contamination, including state and federal courts in Maryland, Pennsylvania, Oregon, Ohio, California, and Washington. Opening Br. 28-29. These rulings emphasized that Monsanto was not merely a product manufacturer with no inkling of the "downstream harms" caused by its PCBs. For example, in Oregon's case against Monsanto, the court reasoned that Oregon's 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. That is, the allegations are that it was Defendants' sale of these products into Oregon that inexorably led to the pollution giving rise to the claimed public nuisance. These allegations, if proven, would be sufficient to prove causation, as well as the other required elements for a public nuisance claim.

Oregon v. Monsanto Co., 2019 WL 11815008, at *7 (Or. Cir. Ct. Jan. 9, 2019). *See also Baltimore v. Monsanto Co.*, 2020 WL 1529014, at *10 (upholding public nuisance claim where Baltimore alleged that "Monsanto had extensive knowledge

about PCB's harmful effects" and "intentionally withheld this information and misrepresented to the public and government officials that PCBs were safe").

Instead of addressing these PCB cases, Monsanto relies heavily on an opioid case ruling from Oklahoma and a lead paint case in Rhode Island. Appellees' Br. 17-21. In both cases, however, the court grappled with whether the alleged harms constituted an interference with a public right, *see* Opening Br. 23-26, which is not at issue here. The only PCB-related case Monsanto discusses is *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989), in which the court determined Westinghouse to be an intervening cause based on its improper disposal of PCBs. *See* Opening Br. 27. To the extent Monsanto wishes to argue that the actions of its customers in Delaware were unforeseeable intervening causes, it may do so, just as it may dispute any of the State's allegations about the foreseeability of the harms caused by PCBs. But these are issues of fact, not a legal bar to the State's public nuisance claim. These decisions, therefore, are of little value in guiding this Court's analysis.

For these reasons and those discussed in the State's Opening Brief, the Superior Court's dismissal of the State's public nuisance claim should be reversed.

II. The State Adequately Pleads Its Trespass Claim

A. The State has standing to pursue its trespass claim

To state its claim for trespass, the State need allege only that Monsanto's PCBs have entered onto, and harmed, property of which the State is in lawful possession. *See generally Cochran v. City of Wilmington*, 77 A. 963 (Del. Super. 1909). The allegations in the Complaint readily meet these pleading standards. *See* A060-62 ¶¶ 132-137 (alleging that Monsanto's production and use of PCBs has resulted in contamination of, and interference with, "property that the State owns, possesses, controls or holds in trust"); A046-52 ¶¶ 91-109, A055 ¶ 115 (alleging specific lands and waterways affected by PCBs).

Monsanto argues that, because the State holds public lands under the public trust doctrine, it cannot have "exclusive possession" of those lands and therefore lacks standing to pursue its claim for trespass. Appellees' Br. 28. "Exclusive" possession does not connote sole or unique possession. It means instead the right to exclude. *See, e.g.*, Restatement (Second) of Torts § 163, cmt. d ("The wrong [of trespass] . . . consists of an interference with the possessor's interest in excluding others"). Monsanto argues as if the State must exclude everyone for possession to be exclusive. But Delaware's interest is such that it can selectively choose whom to exclude—same as any other landowner. The right to exclude trespassers implies the right to permit others ("licensees" or "permittees") onto State lands or waters.

The public trust doctrine does not, as Monsanto advocates, prohibit the State from seeking to prevent trespass onto state lands or somehow divest the State of its authority and responsibility to protect those lands from intrusion by third parties. In fact, in exercising the public trust, the State can and should identify as trespassers those who cause harm. Excluding trespassers is consistent with exclusive possession.

For well over a century, Delaware law has been unequivocal that the State has a right to exclude others from property the State holds in public trust. *See Bailey v. Phila., Wilmington & Balt. R.R. Co.*, 4 Del. 389, 395-396 (1846) ("[T]he State has the unrestricted right of a proprietor over its waters; and may obstruct or close the same, if the public interest or convenience requires it to do so[.]").

Monsanto relies on *Illinois Central Rail Co. v. State of Illinois*, 146 U.S. 387 (1892), for the proposition that under the public trust doctrine, Delaware retains no proprietary rights over its public lands. Appellees' Br. 28.[2] *Illinois Central Rail* undermines, rather than supports, Monsanto's argument. In that case, the Supreme Court reaffirmed that under the public trust doctrine, "abdication of the general control of the state over lands under the navigable waters . . . is not consistent with

[2] In its Answering Brief, Monsanto misquotes *Illinois Central Rail Co.* Monsanto attributes to that case the phrase, "The public trust doctrine does not confer on the states proprietary rights over the trust property," Appellees' Br. 28, but that language does not appear anywhere in the opinion.

the exercise of that trust . . . to preserve such waters for the use of the public." 146 U.S. at 452-53. As the Court explained, "[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id*. at 453. The Court held that the State retained "control, dominion, and ownership" of those lands. *Id.* at 464. *Illinois Central Rail* stands for the unremarkable proposition that Delaware has ownership and control—including the right to exclude—over its state lands and the lands it holds in public trust.

Monsanto's remaining authorities are inapposite. As discussed in the State's Opening Brief, the groundwater cases on which the Superior Court and Monsanto rely do not address harms to state-owned lands held in public trust. *See generally* Opening Br. 34-36 (discussing cases); *New Jersey Dep't of Envtl. Prot. v. Hess Corp.*, 2020 WL 1683180, at *5 (N.J. Super. Ct. App. April 7, 2020) (addressing trespass claims arising from harms to groundwater and surface water, not to state-owned lands);[3] *In re MTBE Prod. Liab. Litig.*, 2014 WL 840955, at *1 (S.D.N.Y.

[3] *Hess* also appears to be inconsistent with New Jersey law. In its unpublished decision, the intermediate appellate court cites *State v. Ventron Corp.*, 468 A.2d 150, 159 (N.J. 1983), for the proposition that "[a] trespass requires that the invasion be to land that is in the *exclusive* possession of the plaintiff." *Hess*, 2020 WL 1683180, at *6 (emphasis added). The referenced passage from *Ventron* discusses the evolution of the claim of trespass under English common law; it does not establish "exclusive possession" as an element of a trespass claim. The

March 3, 2014) (addressing trespass claims involving groundwaters not owned by the State of New Jersey, located under privately owned lands); *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1247 n.36 (10th Cir. 2006) (New Mexico's role as trustee over groundwaters did not give it "possessory interest in sand, gravel, and other minerals" that were not part of state-owned lands). *State v. 3M Co.*, 2020 N.H. Super LEXIS 29 (N.H. Super. Ct. June 25, 2020), is similarly unavailing. That decision addressed New Hampshire's authority to pursue claims in *parens patriae* for invasions of its citizens' ownership interests, not (as here) claims directly for harms to state-owned lands in which Delaware has a proprietary interest. These cases lend no credence to Monsanto's argument that the State lacks a necessary possessory interest to pursue its trespass claims here. The State has possession of its lands and the right to exclude trespassers. That is all that is required.

B. Control never has been an element of trespass under Delaware law

Prior to the Superior Court's decision in this case, no Delaware court had ever held that control over the instrumentality is an element of trespass. The elements under Delaware law, as in most jurisdictions, are the plaintiff's lawful possession of property and the defendant's entry on to the plaintiff's property

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court in *Hess* cites no authority that the public trust doctrine somehow deprives a state of the authority to pursue a trespass claim. *Id.*

without consent or privilege. *Cochran*, 77 A. at 963. As to entry onto property, Delaware courts have applied a proximate cause analysis. *See, e.g.*, *Newark Square, LLC v. Ladutko*, 2017 WL 544606, at *3 (Del. Super. Feb. 10, 2017) (stating that, "for liability to exist, a defendant must take some action that proximately causes damage to another's property"); *Gordon v. Nat'l R.R. Passenger Corp.*, 1997 WL 298320, at *15 (Del. Ch. Apr. 18, 1997) (holding liability arises when defendant knew or should have known that the placement of PCB-contaminated soil would be likely to cause a trespass).

The "control" cases Monsanto relies on are unavailing. For example, as discussed in the State's Opening Brief, *Robinson v. Oakwood Village, LLC*, 2017 WL 1548549 (Del. Ch. Apr. 28, 2017), does not address the liability of a party who manufactures and sells a harmful chemical with full knowledge that it will enter onto, and damage, another's property. *See* Opening Br. 37-38; *Robinson*, 2017 WL 154859, at *16. And in *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, the Alaska Supreme Court reaffirmed that a party will be liable for trespass "when they set in motion a force which, in the usual course of events, will damage property of another." 995 P.2d 657, 665 (Alaska 2000) (citation and internal quotation marks omitted). In *Town of Westport v. Monsanto Company*, the court likewise recognized that a trespass claim could proceed against a product "manufacturer where the plaintiffs had alleged that the defendants set in motion 'a

force which in the usual course of events will damage the land of another.'" 2015 WL 1321466, at *5 (D. Mass. Mar. 24, 2015) (citation omitted).

The other cases relied on by Monsanto similarly fail to support Monsanto's argument that control of the instrumentality at the time it causes the harm is a necessary element of a trespass claim. In *City of Bloomington*, 891 F.2d 611, as discussed *supra* Section I.C, Westinghouse's improper disposal of PCBs was deemed an intervening cause; there were no allegations, as here, that Monsanto knew its PCBs would inevitably contaminate Delaware lands through proper and ordinary use of products containing them. In *Town of Hooksett School District v. W.R. Grace & Co.*, 617 F. Supp. 126, 133-134 (D.N.H. 1984), the court dismissed a school district's trespass claim against an asbestos manufacturer because the school district voluntarily purchased and installed the asbestos tiles and products on its property, whereas here, Monsanto distributed its PCBs into Delaware while knowing they would inevitably escape into the surrounding environment without Delaware's knowledge or consent. *See also City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (same). And in *State v. Exxon Mobil Corp.*, the court *allowed* Maryland's trespass claim to proceed, stating that a trespass claim may lie when the defendant has "some connection with" the trespassing object. 406 F. Supp. 3d at 471.

Finally, Monsanto's reliance on *Dayton v. Collision*, 2020 WL 3412701, at *7 (Del. Super. June 22, 2020), is misplaced. At issue in *Dayton* was whether a third-party contractor was the defendant's "servant" for the purposes of assessing vicarious liability. *Id.*, at *8-9. "Control" in that case arose during the court's discussion of the ten-factor test it applied for determining the relationship between a hiring party and its laborer; "control" had nothing to do with the elements of trespass. *Dayton* does not limit a defendant's liability in trespass for introducing a harmful product onto another's property.

None of Monsanto's cases stand for the proposition that the general elements of trespass do not apply to a party who manufactured and sold a product that it knew would invade another's land. A party is liable for trespass if it "intentionally . . . enters land in the possession of the other, or causes a thing or a third person to do so[.]" Restatement (Second) of Torts § 158. For trespass, an act is intentional when it "is done with knowledge that it will to a substantial certainty result in the entry of a foreign matter." *Id.*, cmt. i. Accordingly, time and again, courts allow claims for property harms to proceed against manufacturers of toxic chemicals, regardless of whether the manufacturer "controlled" the chemicals contemporaneously when the contamination occurred. *See, e.g.*, *In re MTBE Prod. Liab. Litig.*, 725 F.3d at 120 (MTBE contamination); *Lugue v. Hercules, Inc.*, 12 F. Supp. 2d 1351, 1359-61 (S.D. Ga. 1977) (toxaphene contamination); *Oregon v.*

Monsanto, 2019 WL 11815008, at *9 (PCBs); *Maryland v. Monsanto Co., et al.*, Case No. 24-C-21-005251 (Md. Cir. Ct. May 2, 2022), A241 (PCBs); *Ohio v. Monsanto Co.*, Case No. A 18 01237 (Ham. Ct. Comm. Pl. Sept 19, 2018), A144-150 (PCBs). The State has alleged that Monsanto knew it was inevitable that its PCBs would leach, leak, spill, vaporize, and otherwise enter Delaware's environment and harm its lands. Those allegations are more than sufficient to state a claim for trespass.

III. The State Adequately Pleads Its Unjust Enrichment Claim

Monsanto does not meaningfully respond to the State's argument regarding the Superior Court's jurisdiction over the State's unjust enrichment claim. While Monsanto cites *Wells Fargo Bank, N.A. v. Estate of Malkin*, 278 A.3d 53, 69 (Del. 2022), Appellees' Br. 35, this Court's brief discussion of unjust enrichment in that case simply reiterates the elements "of an equitable claim of unjust enrichment," without discussing the nature of an unjust enrichment claim seeking damages. If no equitable remedy is sought, jurisdiction lies in Superior Court. *See* Opening Br. 43-45. Monsanto also suggests that the State's prayer for restitution deprives the Superior Court of jurisdiction. *See* Appellees' Br. 35. But, as the Court of Chancery has explained, "the law courts of this State have long awarded plaintiffs restitution in the form of a money judgment." *Clark v. Teeven Holding Co.*, 625 A.2d 869, 878 (Del. Ch. 1992) (citing cases).

The facts as pled establish that the State has taken actions that have enriched Monsanto at the expense of Delaware taxpayers. For decades, Delaware has investigated and remediated PCB contamination throughout the State to protect its citizens. This is work that Monsanto, not Delaware taxpayers, should fund. The State has thus provided Monsanto a significant benefit, or enrichment, while Monsanto has retained all of profits from a chemical it knew would burden the

State and all Delawareans for generations. The State has pleaded a viable unjust enrichment claim, and has done so in the right court.

IV. Monsanto's Efforts to Narrow Tort Liability Would Allow It to Evade Responsibility for the Harms It Has Caused

Monsanto and its *amici* advocate for a restrictive legal regime whereby Monsanto could elude tort liability for harms Monsanto knew its PCBs inevitably would cause to Delaware's environment. Monsanto and its *amici* assert that, if Delaware public nuisance and trespass law is not revised to add a new "control" element, this Court risks creating "a monster that would devour in one gulp the entire law of tort." Brief of the Chamber of Commerce, *et al.* as *Amici Curiae* 16 (quoting *Tioga Pub. Sch. Dist. No. 15 v. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)). No "monster" arises from holding wrongdoers responsible for the harms they cause. This basic principle has been upheld for centuries through the common-law causes of action on which Delaware relies. The new rule Monsanto and its *amici* propose would unfairly shift the burden of paying for harms a manufacturer knowingly causes onto the State and the public.

Monsanto and its *amici* insist that this Court enact a policy that permanently shields a manufacturer from bearing the costs for harms it knew its products would cause when placed into the stream of commerce. Monsanto's position is, in essence, that because it sold its PCBs for decades (before such sales were prohibited), Monsanto had a license to contaminate and trespass on Delaware's lands. Monsanto's *amici* put a finer point on it: "Many commercial products involve tradeoffs between their uses and their external costs." Brief of the

Chamber of Commerce, *et al.* as *Amici Curiae* 16. Their position is that even if Monsanto knew the harms its PCBs would cause and continued to profit from their sales, Delaware must now bear the "external costs" of Monsanto's actions. In effect, Monsanto would enjoy immunity from liability.

Delaware law has never been so narrowly circumscribed, nor have other jurisdictions interpreting the same common law adopted such novel roadblocks to recovery. The application of law that Monsanto advocates would effectively shield manufacturers from liability for intentional acts that cause significant public harm and would benefit only the wrongdoer. Holding bad actors liable for their intentional conduct, on the other hand, promotes a level playing field, as responsible corporate citizens—who employ reasonable means to ensure public safety and avoid such known harm—are not disadvantaged by having to compete against manufacturers who knowingly choose to disregard public health and the environment. Monsanto and its *amici* urge this Court to adopt new legal standards to "externalize" the harms caused by their conduct onto Delaware taxpayers. That radical shift in policy is not appropriate, not consistent with the common law, and certainly not justified by the facts of this case.

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.

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Respectfully submitted,

STATE OF DELAWARE
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