IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RACHEL M. CHANEY, DOUG C. DAVIS, JULIE M. DAVIS, GARY W. DOSS, AND REBECCA R. DOSS, Plaintiffs, v. PERDUE FARMS INC., FPP BUSINESS SERVICES INC. d/b/a PERDUE FARMS INC., PERDUE AGRIBUSINESS LLC, PERDUE AGRIBUSINESS INCORPORATED d/b/a PERDUE AGRIBUSINESS LLC, PERDUE AGRIBUSINESS GRAIN LLC d/b/a PERDUE AGRIBUSINESS LLC, PERDUE FOODS LLC, and PERDUE FOODS INCORPORATED d/b/a PERDUE FOODS LLC, Defendants.	C.A. No.: 1:24-cv-02975

REPLY IN SUPPORT OF
MOTION TO DISMISS OR STAY

INTRODUCTION

"'PFAS' is not a magic word that can be invoked to open automatically the doors to federal litigation," which are secured by a more stringent pleading standard than the mere recitation of the elements of claims. *Bullard v. Costco Wholesale Corp.*, No. 24-cv-03714-RS, 2025 WL 506271, at *2 (N.D. Cal. Feb. 14, 2025) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs must still plead sufficient factual allegations that, if proven, would satisfy the elements of their claims and entitle them to relief. *Id.* Plaintiffs' legal conclusions, adorned only with generic, unparticularized facts, do not meet this standard.

Plaintiffs raced to the courthouse without sufficient facts in an effort to beat MDE's[1] ongoing investigation into (and likely resolution of) the exact circumstances at issue. Plaintiffs accordingly fail to explain why staying this case while MDE investigates—and while Defendants continue to provide remediation to affected community members—would prejudice Plaintiffs such that this Court should disregard the efforts and expertise of an agency diligently performing duties falling squarely in its wheelhouse. Defendants respectfully request that this Court dismiss the Complaint, or, alternatively, stay the case pending completion of MDE's investigation.

ARGUMENT

I. All of Plaintiffs' Claims Fail to State a Claim for Relief.

A. Plaintiffs Cannot Amend Their Complaint in Their Opposition to Allege Causation.

Contrary to Plaintiffs' assertion that Defendants have not challenged all of Plaintiffs' claims (Opp'n at 7),[2] Plaintiffs' failure to allege a factual nexus between their purported injuries

[1] All acronyms and abbreviations retain their meaning from Defendants' Memorandum in Support of their Motion to Dismiss or Stay, ECF No. 23-1.

[2] References to "Opposition" and "Opp'n" refer to Plaintiffs' Memorandum in Support of their Opposition to Defendants' Motion to Dismiss or Stay, ECF No. 33-1. References to "Mem." refer to Defendants' Memorandum in Support of their Motion to Dismiss or Stay, ECF No. 23-1.

and Defendants' conduct is fatal to each claim. (*See* Mem. at 7.) Plaintiffs cite no case law absolving them of the requirement to plead a connection between Defendants' alleged actions and Plaintiffs' purported injuries, which are ill-defined and unparticularized. Instead, Plaintiffs attempt to amend their Complaint through their Opposition, including a footnote positing that certain Plaintiffs have suffered harms associated with PFAS exposure. (*See* Opp'n at 6 n.3.) "[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *State Farm Mut. Auto. Ins. Co. v. Slade Healthcare, Inc.*, 381 F. Supp. 3d 536, 573 (D. Md. 2019) (quoting *Mylan Lab'ys, Inc. v. Akzo*, 770 F. Supp. 1053, 1068 (D. Md. 1991)).[3] As filed, the Complaint sets out a factual background germane to PFAS generally without connecting that PFAS primer to the specific allegations relating to Plaintiffs,[4] and then concludes that Defendants' actions "caused" in some undefined way unspecified injuries. That is not the pleading standard.

B. Plaintiffs' Pleading Is Deficient as to Each Individual Claim.[5]

1. *Plaintiffs' Complaint Fails to State a Claim for an Abnormally Dangerous Activity (Count I).*

To avoid the natural conclusion that agricultural operations on agricultural land are not abnormally dangerous activities,[6] Plaintiffs ignore the strictures that limit strict liability to only

[3] Moreover, even if the new, unpled allegations are considered, Plaintiffs fail to allege a causal nexus between Plaintiffs' alleged exposure and the injuries. For example, there are no allegations of when the harm occurred or how that timeframe relates to the purported exposure.

[4] Plaintiffs criticize Defendants for attaching test results, but Plaintiffs' argument that more testing and analysis is required confirms the propriety of staying this case to allow MDE's investigation and analysis to proceed (Opp'n at 21), which is why Defendants attached test results in support of their motion to *stay* (Mem. Exs. E, G–H).

[5] Because Plaintiffs have conceded that Counts VI and VII are not cognizable under Maryland law (*see* Opp'n at 20–21), Defendants reiterate their request that Counts VI and VII be dismissed.

[6] Plaintiffs do not contest that Defendants operate an agricultural facility (*compare* Mem. at 10–11, *with* Compl. ¶ 56), or that Defendants operate this agricultural facility on agricultural land. (*See* Compl. Figure 1 (illustrating agricultural nature of site); Opp'n, at 8–9 (failing to contest that Defendants operate their agricultural facility on agricultural land).)

those activities that are so inherently dangerous that they cannot be rendered safe. The resulting allegations sound in negligence, as illustrated by Plaintiffs' contention that the "relevant" abnormally dangerous activity was "negligent . . . handling of PFAS." (Opp'n at 8 (providing that the state of mind could have been reckless or intentional, as well); *see also* Compl. ¶ 120 (same).) The law, however, does not permit repackaging a negligence claim into one of strict liability. *See, e.g.*, *Voelker v. Delmarva Power & Light Co.*, 727 F. Supp. 991, 994 (D. Md. 1989) (declining to hold a transmission line operator strictly liable when power lines were concealed by trees because the suit was "better suited for resolution through traditional negligence claims" as opposed to strict liability claims); *Campos v. BP Prods. N. Am. Inc.*, No. 13-cv-8376, 2014 WL 5858625, at *8 (N.D. Ill. Nov. 12, 2014) (declining to treat the improper storage of a dust-like by-product as abnormally dangerous because to do so would "turn every negligence action into a strict liability one"). Defendants' agricultural operation is a classic example of an activity that courts find does not constitute an abnormally dangerous activity. *Cf. Desaire v. Solomon Valley Co-Op, Inc.*, No. 94-1271-PFK, 1995 WL 580064, at *4–5 (D. Kan. Sep. 14, 1995) (granting motion to dismiss abnormally dangerous activity claim, concluding "ground-based use of herbicides in a rural and agricultural environment is not abnormally dangerous"); *Clark v. Di Prima*, 51 Cal. Rptr. 49, 53 (Cal. Ct. App. 1966) ("[T]he normal or customary irrigation of crops does not constitute an ultrahazardous undertaking nor carry with it the risk of absolute liability.").

Plaintiffs rely primarily on *Yommer v. McKenzie*, a case in which gasoline from a fuel station's underground storage tank leaked onto an adjacent property. 255 Md. 220 (1969). In *Yommer*, the then-Court of Appeals held that the inappropriateness of storing large quantities of gasoline directly adjacent to residential wells could support strict liability. *Id.* at 224–25. *Yommer* does not, however, stand for the proposition that any handling of gasoline is an abnormally

dangerous activity. To the contrary, *Yommer* explained that operating a gas station in a residential area was not an abnormally dangerous activity, but the storage of large gasoline tanks near residential wells was. *Id.* at 224. Plaintiffs extrapolate *Yommer* to conclude that Defendants' agricultural activities, taking place on approximately 250 acres of agricultural land, are abnormally dangerous because the land is "adjacent to residential property." (Opp'n at 9.) This takes *Yommer* too far, which Plaintiffs seem to acknowledge by narrowing the activity in question to "negligent . . . handling of PFAS." (Opp'n at 9.)

Plaintiffs' other cited cases are similarly inapposite. In *Shongo v. CSX Transportation, Inc.*, the activity at issue was storing flammable coal, which exploded. 2023 WL 4027121, at *1, *9 (D. Md. June 14, 2023). In *Ryan v. Greif, Inc.*, the plaintiffs alleged that the defendants had "knowingly used PFAS6[7] chemicals in their manufacturing processes for many decades" and included specific allegations about how PFAS chemicals are used in the production of paper products (the activity at issue). No. 22-CV-40089-MRG, 2023 WL 5979711, at *2, *24 (D. Mass. Sept. 1, 2023), *report and recommendation adopted in part, rejected in part*, 708 F. Supp. 3d 148 (D. Mass. 2023). In neither case did the plaintiffs claim the activity was abnormally dangerous *because* the activity was conducted "negligently." Notable, as well, is that, in each cited case, unlike Plaintiffs' allegations, the defendants knew they were engaging in the activity deemed to be abnormally dangerous. *Id.*; *Shongo*, 2023 WL 4027121, at *1; *Yommer*, 255 Md. at 225.

Plaintiffs' negligence-based theory of strict liability mirrors an argument this Court rejected in *Rich ex rel. C.M. v. Dennison Plumbing & Heating*, No. 23-cv-705-SAG, 2023 WL

[7] The court used "PFAS6" to refer "to six specific PFAS compounds regulated by MassDEP, including (1) PFOS; (2) PFOA; (3) perfluorohexane sulfonic acid (PFHxS); (4) perfluorononanoic acid (PFNA); (5) perfluoroheptanoic acid (PFHpA); and (6) perfluorodecanoic acid (PFDA)." *Id.* at *3 n.9.

6049488, at *2 (D. Md. Sept. 15, 2023). In *Rich*, a plaintiff argued that the operation of a hot water heater and bathtub/shower valve(s) without a functioning temperature control was abnormally dangerous because "under [the] particular circumstances" (*i.e.*, without a functioning temperature control device) the hot water heater and shower valves created "unusual risks." *Id.* at *3. This Court rejected the plaintiff's reasoning because, despite the unusual circumstances, the operation of the hot water heater in a residential property was appropriate for its location. *Id.* This Court's distinguishing rationale from *Rich* applies to the present case with equal force. *See id.* Ultimately, as this Court recognized in *Rich*, activities of common use that are intrinsically valuable do not become abnormally dangerous merely because something went wrong that posed unanticipated risks.[8] *See id.* But that is all that Plaintiffs have alleged here.

2. Plaintiffs Do Not Plausibly Allege That Defendants Negligently Ignored Foreseeable Harms (Count II).

The parties dispute whether Plaintiffs have adequately alleged Defendants owed Plaintiffs a duty and thereafter breached that duty. (Mem. at 13–14; Opp'n at 11–14.) "[T]he existence of a legal duty is a question of law to be decided by the court." *Valentine v. On Target, Inc.*, 353 Md. 544, 549 (1999). Plaintiffs allege Defendants owed three duties: (1) A duty to occupants of neighboring land to use care when conducting activities on the land so as to avoid causing harm to

[8] Additionally, Plaintiffs have failed to sufficiently allege a high degree of risk of serious harm and rely upon vague claims of current ailments with no specificity as to the seriousness of the alleged current ailments. Plaintiffs criticize Defendants' citation to *Gallagher v. H.V. Pierhomes, LLC*, 182 Md. App. 94, 110 (2008), as "clearly inappropriate," arguing that the minor damage to a historic home from pile driving in *Gallagher* is not comparable to the risks of PFAS contamination alleged by Plaintiffs. (*See* Opp'n at 10.) However, this critique exposes the issue at the heart of Plaintiffs' pleading insufficiency—it is impossible to know whether Plaintiffs are allegedly suffering from minor or serious ailments. Plaintiffs allege a range of risks associated with PFAS exposure, yet some of those risks, such as "increased cholesterol," are relatively minor, while others, such as "liver and kidney cancer," are quite serious. (Compl. ¶ 38.) Though there is a great deal of daylight between "increased cholesterol" and "liver and kidney cancer" (Compl. ¶ 38), Plaintiffs never specify where the named Plaintiffs lie on this spectrum of serious-to-minor ailments. (*See id.* ¶¶ 76, 83, 86, 95, 97.)

the neighboring land (Opp'n at 13 (citing *Rosenblatt v. Exxon Co.*, 335 Md. 58, 77 (1994), an altogether distinguishable case holding that a former tenant does not have a duty to future tenants for contamination of land due to a lack of special relationship)); (2) A duty of reasonable care to its neighbors to maintain the property in a manner that would not cause an unreasonable risk (*id.* (citing *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 733–36 (2020), a case involving the foreseeable fire caused by cigarette butts in mulch that bordered a property)); and (3) A duty not to impair ownership rights through water contamination (*id.* (citing *Exxon Corp. v. Yarema*, 69 Md. App. 124, 153 (1986), in which a court indicated that a negligence claim could succeed in a gas leak contamination case, although plaintiffs recovered under a nuisance theory)).

Putting aside each of the distinguishable aspects of the cases from which Plaintiffs extrapolate duties, "the principal determinant of duty [is] foreseeability." *Patton v. United States of Am. Rugby Football*, 381 Md. 627, 637 (2004) (quoting *Jacques v. First Nat'l Bank of Md.*, 307 Md. 527, 535 (1986)). Plaintiffs have failed to sufficiently allege a foreseeable harm for two reasons.

First, Plaintiffs' Complaint makes clear that scientific advancements surrounding PFAS have taken decades to emerge (Compl. ¶¶ 41–55), but Plaintiffs fail to allege *when* Defendants allegedly "knew or should have known" of the migratory capabilities of PFAS, the flow of groundwater, and the allegedly ensuing risks to Plaintiffs. Without an allegation as to when Defendants were chargeable with such knowledge, the Court and Defendants would need to speculate as to the timing of the duty arising and allegedly being breached, because a duty can only exist and thereafter be breached if the harm is foreseeable. *Patton*, 381 Md. at 637; *Jacques*, 307 Md. at 535.

Unlike fires or gas leaks, as to which the danger, presence, and migratory capabilities of the harmful substance are a matter of common sense, *e.g.*, *Steamfitters Loc. Union No. 602*, 469 Md. at 733–36; *Exxon Corp.*, 69 Md. App. at 153, an invisible, previously unregulated chemical is far more difficult to foresee posing significant harm. Even in September 2023 and/or January 2024 (the only dates Plaintiffs identify), Plaintiffs only allege that Defendants found PFAS on *Defendants'* property (a 250-acre facility). This allegation does not compel the conclusion that Defendants knew at that time that the invisible chemical could migrate outside of the 250 acres on which PAB operates. The fact that Plaintiffs allege Defendants knew the direction and extent of groundwater migration is illustrative of the leaps Plaintiffs must make because Plaintiffs fail to allege why an agricultural business would be privy to or need to know hydrogeological mechanisms governing groundwater flow. (*See* Compl. ¶¶ 62–65.) Ultimately, without an allegation as to when Defendants were on notice of migratory risks, Plaintiffs' Complaint fails to allege adequately that the risks to residents about which Plaintiffs complain were foreseeable.

The second major flaw in Plaintiffs' negligence theory is that generalized harms to the public, without more specific allegations, are insufficient to establish a duty. In Maryland, a duty does not arise "based solely on an imprecise notion of a foreseeability of risk of harm to the public in general." *See, e.g.*, *Valentine*, 353 Md. at 549. Yet that is precisely what Plaintiffs attempt to do by pointing to the risk of harm to the public in general from PFAS (*see* Compl. ¶¶ 31–40), and imputing that knowledge to Defendants without further explanation (*see* Compl. ¶¶ 126–27).

When Plaintiffs' conclusory language is discarded, the Complaint alleges that Defendants are responsible for the presence of PFAS in groundwater, no matter when the PFAS migrated there or how or whether the Defendants could have foreseen the migration. That does not plead a claim for negligence.

3. Defendants Are an "Agricultural Operation," Requiring Dismissal of Plaintiffs' Nuisance Claims (Counts III and IV).

Plaintiffs contend that Defendants do not qualify as an "agricultural operation" under Md. Code Ann., Cts. & Jud. Proc. (CJP) § 5-403(a)(2), and are, therefore, not protected from nuisance suits under the Maryland Right to Farm statute. (Opp'n at 14–16); *see* CJP § 5-403(e) (providing prerequisites to nuisance suits against "agricultural . . . operation[s]"). Plaintiffs' argument defies ordinary principles of statutory construction and is unsupported by the legislative history.

Section 5-403(a)(2) states:

> "Agricultural operation" means an operation for the processing of agricultural crops or on-farm production, harvesting, or marketing of any agricultural, horticultural, silvicultural, aquacultural, or apicultural product that has been grown, raised, or cultivated by the farmer.

As alleged, Defendants operate an industrial soybean processor and refinery, hatcheries, and marigold greenhouses, all of which would qualify Defendants as an "[a]gricultural operation." (*See* Compl. ¶ 56.) Plaintiffs skirt past Defendants' hatcheries and marigold greenhouses (indisputably operations involving "product that has been grown, raised, or cultivated" by Defendants)[9] and focus entirely on Defendants' soybean processing operations, as the soybeans are not "grown by" Defendants. (*See* Opp'n at 14–15.) Plaintiffs' myopic focus on Defendants' soybean processing is to no avail, however, because Defendants' soybean processing operation also qualifies as an agricultural operation under the statute.

[9] Under a plain reading of the statute, the hatcheries qualify as "on-farm production, . . . of any agricultural . . . product." CJP § 5-403(a)(2); *see Agriculture*, Merriam-Webster, https://www.merriam-webster.com/dictionary/agriculture (last visited Feb. 24, 2025) (defining agriculture as "the science, art, or practice of cultivating the soil, producing crops, and raising livestock"). Additionally, the marigold greenhouses constitute "on-farm production, . . . of any . . . horticultural . . . product." CJP § 5-403(a)(2); *see Horticulture*, Merriam-Webster, https://www.merriam-webster.com/dictionary/horticulture (last visited Feb. 24, 2025) (defining horticulture as "the science and art of growing fruits, vegetables, flowers, or ornamental plants").

Plaintiffs contend that the final phrase of CJP § 5-403(a)(2) (*i.e.*, the phrase "that has been grown, raised, or cultivated by the farmer") operates as a limiting clause that applies to *each* preceding clause, including the first. Thus, Plaintiffs argue the first clause, which defines an agricultural operation as "an operation for the processing of agricultural crops," is limited by the final phrase, "that has been grown, raised, or cultivated by the farmer," which would narrow the class of entities protected from nuisance suits under the statute to those entities that process crops that they themselves "gr[e]w, raised, or cultivated." (Opp'n at 14–16.)

Defendants contend the phrase "that has been grown, raised, or cultivated by the farmer" limits only the immediately preceding clause related to a variety of "on-farm" activities resulting in a "product." *See* CJP § 5-403(a)(2) (providing that "on-farm production, harvesting, or marketing of any agricultural, horticultural, silvicultural, aquacultural, or apicultural product that has been grown, raised, or cultivated by the farmer" qualifies as an "agricultural operation"). The final clause does not limit the first clause, "an operation for the processing of agricultural crops." Under this reading, the definition of an "agricultural operation" includes any "operation for the processing of agricultural crops," regardless of where they were "grown, raised, or cultivated." Plaintiffs promote the former reading believing it would save their nuisance claims from dismissal (though, as noted, Plaintiffs ignore Defendants' other agricultural operations, discussed *supra*). Only the latter interpretation, however, is reasonable under the plain language of the statute.

First, Plaintiffs' interpretation is grammatically flawed. The first clause concerns "crops," a plural noun, which does not agree with the singular verb phrase introducing the limiting clause, "has been grown," but the singular verb phrase does agree with the singular noun that precedes it, "product." CJP § 5-403(a)(2). If the legislature intended the limiting clause to modify both nouns, then both "crops" and "product" would have been singular.

Second, Plaintiffs' reading contravenes "the rule of the last antecedent," "[a]n interpretive principle by which a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing." *Prince George's Cnty. v. Thurston*, 479 Md. 575, 589 (2022) (quoting *Rule of the Last Antecedent*, Black's Law Dictionary 1598 (11th ed. 2019)); *Linkus v. Md. St. Bd. of Heating Ventilation, Air-Conditioning & Refrigeration Contractors*, 114 Md. App. 262, 279 (1997).

Applying the principle to the present issue makes clear that the clause "that has been grown, raised, or cultivated by the farmer" limits only the immediately preceding clause. CJP § 5-403(a)(2). The most natural reading of the limiting clause links things that have been "grown . . . by the farmer" to the list of "on-farm" activities in the immediately preceding clause (*i.e.*, to "on-farm production, harvesting, or marketing of any agricultural, horticultural, silvicultural, aquacultural, or apicultural product"). The limiting clause does not "hopscotch[]" over the preceding clause to limit the first clause in the definition, *Prince George's Cnty.*, 479 Md. at 589, which defines an agricultural operation to include "an operation for the processing of agricultural crops." CJP § 5-403(a)(2).

Plaintiffs' contrary argument mirrors the argument rejected in *Sullivan v. Dixon*, 280 Md. 444, 450–51 (1977), where the court examined the meaning of a section within the Maryland Professional Service Corporation Act, Md. Code. Ann., Corps. & Ass'ns § 5-104 (1975 & 1976 Cum. Supp.):

> (b) Corporate investment and ownership of property. -- Notwithstanding any other provision of law, a professional corporation may invest its funds in real estate, mortgages, stocks, bonds, or any other type of investment, and may own real or personal property *necessary for the performance of a professional service.*
> (emphasis added).

The Sullivans contended that the phrase "necessary for the performance of a professional service" modified the entire sentence it concludes. *See Sullivan*, 280 Md. at 450–51. The court rejected this reading, stating that the phrase modified only the directly preceding words dealing with ownership of real or personal property, and noting this conclusion was even more compelling given the "lack of comma" before the qualifying phrase. *Id.* The same is true here, where the qualifying phrase in CJP § 5-403(a)(2) also is not preceded by a comma.

Plaintiffs argue that the legislative history from the 1998 amendment of section 5-403(a)(2) supports that the General Assembly only intended to provide statutory protection from nuisance actions to agricultural operations that grew their own crops. (*See* Opp'n at 15 n.6 (citing "Senate Concurrence" to 1998 S.B. 404, attached as Exhibit B).)[10] There is no support in the legislative history for this conclusion. Instead, the legislative history surrounding the Maryland Right to Farm statute confirms Defendants' interpretation.

In the 1998 amendment of the Maryland Right to Farm statute, the General Assembly sought to expand protections against nuisance claims to more types of facilities. *See* ECF 33-3, at 75 (noting the bill's inclusion of aquaculture and silviculture protected more facilities). During the second reading, the bill proposed defining an agricultural operation only as "an operation for the on-farm production, harvesting, processing or marketing of any agricultural, horticultural, silvicultural, aquacultural, or apicultural product that has been grown by the farmer." ECF 33-3, at 117–18. Under this language, only "on-farm . . . processing" would constitute an "agricultural operation." *See id.* However, the bill's language was modified to define an agricultural operation as "an operation for the processing of agricultural crops or on-farm production, harvesting,

[10] It is unclear to which of the 137-pages in Exhibit B Plaintiffs intended to cite, and Defendants were unable to locate a document entitled "Senate Concurrence."

~~processing,~~ or marketing of any agricultural, horticultural, silvicultural, aquacultural, or apicultural product that has been grown, raised, or cultivated by the farmer."[11] ECF 33-3, at 123. The General Assembly eliminated the limitation that processing must occur "on-farm" to constitute an agricultural activity, and instead, specifically created a new category of "[a]gricultural operation[s]" for the processing of agricultural crops that can occur on-farm or off-farm. Defendants plainly fall within this definition of an "agricultural operation," which is the version of the bill that became law. *See* CJP § 5-403(a)(2).

Accordingly, under a plain text reading of the statute, as informed by the legislative history, Plaintiffs were required to follow the procedures in CJP § 5-403(e) prior to bringing a nuisance claim against Defendants. They have not, so their nuisance claims must be dismissed.[12]

4. Maryland Does Not Recognize "Intangible" Trespass (Count V).

Plaintiffs' trespass claim should be dismissed because it is based on an intangible intrusion of Plaintiffs' land, which is not cognizable trespass under Maryland law. (*See* Mem. at 16–17.) To avoid this conclusion, Plaintiffs first argue they have alleged a tangible invasion "associated with actual intrusion of *PFAS compounds* onto and underneath their properties." (Opp'n at 19 (emphasis added).) Plaintiffs cite only one case supporting their trespass theory (*id.* (citing *Shongo*, 2023 WL 4027121, at *5)), yet in *Shongo* there was no question that the relevant invasion

[11] Underlined text is new and text that is stricken indicates the language was deleted. *See, e.g.*, ECF 33-3, at 121.

[12] To the extent Plaintiffs argue that CJP § 5-403 only bars nuisance actions when there is not also a negligence cause of action (Opp'n at 16), this argument misrepresents the plain language of § 5-403(c). Subsection (c) precludes a nuisance judgment where the agricultural operation complies with applicable permitting requirements and is not negligently operated. CJP § 5-403(c). Subsection (c) does not limit subsection (e)'s requirements for prerequisites to filing suit alleging a nuisance claim. Nor does subsection (c) create a loophole permitting Plaintiffs to bypass subsection (e)'s requirements due to Plaintiffs' self-declared determination that Defendants operated their facility in a "negligent manner." (*See* Opp'n at 16.) Plaintiffs' argument that there is no point following the statutory prerequisites to suit may be a policy argument for the General Assembly, but it does nothing to alleviate Plaintiffs' statutory obligations under CJP § 5-403(e).

was "tangible" because after a massive plume of coal dust, a visible particulate matter, erupted from an explosion, coal dust visibly "blanketed" residential properties. *Shongo*, 2023 WL 4027121, at *2. Unlike coal dust, PFAS are not visually perceptible in water.

Plaintiffs also fail to distinguish Maryland case law directly addressing whether intangible substances can support a trespass action. *See Schuman v. Greenbelthomes, Inc.*, 212 Md. App. 451, 475 (2013) (noting intangible intrusions like "smoke, odor, light and noise are not typically actionable under a trespass theory"). Plaintiffs attempt to distinguish *Schuman* (*see* Opp'n 20 n.9), arguing that the "[k]ey to the Court's decision that the neighbor's smoking was not a trespass, was that the [*sic*] Schuman 'did not argue or provide any evidence that the smoke caused any physical damage to his property.'" (*Id.* (citing *Schuman*, 212 Md. App. at 475–76).) However, this characterization of the court's holding is incorrect. While the court acknowledged that *some* jurisdictions recognize a trespass claim with an invisible trespass when there is physical damage, the then-Court of Special Appeals did not adopt that theory of trespass, reasoning that the plaintiff could not prevail under either theory. *Schuman*, 212 Md. App. at 475–76. This dictum does not mean that Maryland permits a trespass claim for odors or smoke when there is physical damage—it means only that *Schuman* was not the case to adopt such a theory. *See id.* At bottom, Plaintiffs have failed to establish that Maryland law recognizes trespass actions based on the intrusion of intangible substances.

II. In the Alternative, This Case Should Be Stayed to Permit MDE to Complete its Investigation.

Plaintiffs fail to cite any reason why this Court should not exercise its discretion and allow MDE to complete its investigation.[13] They do not, and cannot, claim that MDE is failing to address

[13] To the extent the Court is concerned about the length of the stay, the parties could provide quarterly updates.

this issue, which is solidly within the agency's expertise, or that Plaintiffs and the proposed class will not benefit from the efforts Defendants are undertaking in cooperation with MDE, which include providing POET systems and bottled water, as well as source identification and migration analysis.

Instead, Plaintiffs claim that MDE does not have "authority to address common law toxic tort causes of action." (Opp'n at 24.) This is a strawman. Defendants have never argued that MDE can address toxic torts as a general matter. The issue is whether MDE has authority to oversee and regulate PFAS discharge remediation at PAB, which no one disputes, and whether MDE is doing so in this case, which, again, no one disputes. Plaintiffs' claim that "it is unclear whether [MDE's] investigation will result in any administrative findings" is yet another strawman. (Opp'n at 24.) The test for whether a stay is warranted under the doctrine of primary jurisdiction is not limited to formal proceedings, nor is it limited to issues where the agency formerly enjoyed deference under *Chevron*. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Indeed, *Chevron* and *Loper Bright* concerned deference to an agency's legal interpretations, not its factual findings, which the Supreme Court has emphasized are still entitled to deference when the agency is operating within its area of expertise. *Loper Bright*, 603 U.S. at 388, 402 (citing *Skidmore*, 323 U.S. 134, 140 (1944)). That is precisely what is happening here. MDE is investigating the PFAS contamination at PAB and determining how best to remediate it. These are not legal determinations, but intensely factual ones, and for that reason, are best reserved to the responsible agency.

Plaintiffs rely primarily on *Sullivan v. Saint-Gobain Performance Plastics Corp.*, 226 F. Supp. 3d 288 (D. Vt. 2016), but that case is distinguishable because it dealt with a challenge to

a generally applicable rule, not an investigation into the specific facts at issue in the case. The defendant in *Sullivan* asked the court to stay the class action pending a challenge to generally applicable groundwater PFOA rules promulgated by the State of Vermont. The court found that the rules were "not essential to Plaintiffs' class definition or their legal theories." *Id.* at 298 (citation omitted). The court also noted that Saint-Gobain did not "articulate how any of the equitable relief that Plaintiffs s[ought] might conflict with" the agencies' orders and that "the questions presented . . . [were] not questions that the Vermont agencies or courts handling Saint-Gobain's challenge [were] expected to decide." *Id.* at 298–99. By contrast, MDE is currently investigating issues that are critical to Plaintiffs' specific claims, including but not limited to the source of the PFAS, the scope of the affected area, and the appropriate remediation. These are questions that will inform, at the very least, the core elements of causation and damages for any of Plaintiffs' claims that proceed beyond the Motion to Dismiss. Yet, Plaintiffs would have this Court conclude that "neither the Plaintiffs' claims, nor their class definition hinges on any agency standard or conclusion regarding PFAS in the groundwater and/or nexus between any PFAS and Perdue." (*See* Opp'n at 26.) This strains credulity. So, too, does Plaintiffs' claim that they will be harmed by delay when Plaintiffs cannot dispute that Perdue has taken active, meaningful steps to address the contamination while MDE investigates. None of these facts were part of the record in *Sullivan*.

Plaintiffs claim that a stay in this case would be legally unprecedented, but that is only because the facts are unprecedented. Where an agency is actively working with a defendant to remediate complex, highly technical circumstances overlapping entirely with plaintiffs' claims, the doctrine of primary jurisdiction counsels a court to exercise appropriate discretion and allow that process to proceed without the risk of contradiction from the litigation.

Dated: February 28, 2025

Respectfully submitted,

/s/

Venable LLP
Michael B. MacWilliams
(Federal Bar No. 23442)
Elizabeth C. Rinehart
(Federal Bar No. 19638)
750 E. Pratt Street, Suite 900
Baltimore, MD 21202
(410) 244-7400 (phone)
(410) 244-7742 (fax)
mbmacwilliams@venable.com
lcrinehart@venable.com

J. Douglas Baldridge
(Federal Bar No. 11023)
600 Massachusetts Avenue, N.W.
Washington, DC 20001
(202) 344-4703 (phone)
(202) 344-8300 (fax)
jbaldridge@venable.com

Derek C. Smith
(*pro hac vice* application pending)
227 West Monroe Street, Suite 1900
Chicago, IL 60606
(312) 210-1521 (phone)
(312) 820-3401 (fax)
dcsmith@venable.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2025, I electronically filed this Reply in Support of Defendants' Motion to Dismiss or Stay with the Court and used the CM/ECF system to serve all parties in this action registered with that system.

I FURTHER CERTIFY that a courtesy copy of the foregoing will be sent by overnight mail to chambers.

/s/
Elizabeth C. Rinehart