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-2975

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR STAY

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INTRODUCTION

The Defendants' Motion to Dismiss relies upon misrepresentations as to the substance of Plaintiffs' Complaint, and misapplications or misstatements of law.[1] Defendants first argue that Plaintiffs have failed to plead the requisite facts to sustain their cause of action. Each such argument simply ignores the well-pled allegations within Plaintiffs' Complaint, which unambiguously contradict Defendants' representations. Plaintiffs' Complaint not only sets forth their entitlement to relief, both individually, and on behalf of the putative class, but further sets forth case specific hydrogeologic renderings of groundwater flow from the Perdue Agribusiness facility based upon relevant hydrogeologic literature addressing the Salisbury region, provides a survey of the development of regulations application to PFAS compounds and detailed allegations with respect to each cause of action.

Defendants next argue that their industrial soybean processing operation and refinery is protected by the affirmative defense and prerequisites of Maryland Right to Farm law of Maryland Code, Courts and Judicial Proceedings Article Section 5-403. Defendants' derisive rhetoric notwithstanding, the Perdue Defendants are not protected by Maryland's Right to Farm law. They are not an "agricultural operation" under the statute, as they have not, and cannot, show that they process agricultural products grown at their facility, as required by Md. Code, Cts. & Jud. Proc Section 5-403(a).

Finally, Defendants ask this Court to stay the Plaintiffs' Complaint while the Maryland Department of the Environment ("MDE") examines Perdue's operations. Such relief would be

[1] Defendants repeatedly characterize Plaintiffs as engaged in a "rush to the courthouse," and by inference, suggest a deficiency in the quality of the work product of counsel. This gratuitous commentary is unprofessional, inaccurate, and serves only to distract this Court from the relevant law and allegations.

unprecedented. It would also represent a warrantless and prejudicial delay in the Plaintiffs' entitlement to relief under common law tort doctrines, which this Court is well-equipped to adjudicate, and which MDE will not and cannot pursue.

The Defendants' Motion must be denied.

MOTION TO DISMISS LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) "challenges the legal sufficiency of a complaint." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). It is not intended to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief…'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations. *Id*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). When considering a Rule 12(b)(6) motion to dismiss, the court must accept all well-pled factual allegations as true and view the complaint in the light most favorable to the plaintiff. *Aziz v. Alcolac*, 658 F.3d 388, 391 (4th Cir. 2011).

ARGUMENT

Plaintiffs' Complaint states a plausible entitlement to relief. Defendants' arguments that Plaintiffs have failed to allege the elements of each of their claims is patently false and contradicted by a plain reading of the Complaint. For the reasons set forth below, Defendants' motion should be denied in its entirety.

A. Plaintiffs have appropriately and plausibly stated their entitlement for relief under each specified common law cause of action.

1. Plaintiffs have adequately pled that Perdue caused them injury and damages.

Defendants argue that Plaintiffs have failed to plead that Defendants' conduct proximately caused harm. In support of these arguments, Defendants' Motion sets forth various representations regarding the Plaintiffs' allegations as to causation that are directly contradicted by the Complaint.

a. Plaintiffs have alleged actual exposure.

First, Defendants assert that "Plaintiffs fail to set forth any facts that 'PFAS and other constituents' were actually present in their drinking water." Def. Memo in Supp. of Mot. to Dismiss or Stay (ECF 23-1) at 8. To the contrary, each of the Plaintiffs have alleged actual exposure to drinking water contaminated with PFAS as a result of the Defendants' wrongful conduct. *See*, *e.g.*, Compl. at ¶¶ 74-76; ¶ 78 (as to Plaintiff Rachel M. Chaney); *id.* at ¶¶ 81-88 (as Plaintiffs Doug and Julie Davis); *id.* at ¶¶ 91-98 (as to Plaintiffs Gary and Rebcca Doss). *See also id.* at ¶ 172 ("Through Defendants' negligent, reckless, and/or intentional conduct described above, it has caused and continues to cause PFAS to enter onto the real properties owned, occupied and/or possessed by Plaintiffs and class members in that the wells and lands located on said real properties are contaminated with PFAS chemicals."). There is no pleading requirement which necessitates the inclusion of well testing data or detailed hydrogeologic reports, and Defendants offer no legal

authority to support such a requirement. Plaintiffs' Complaint sets forth a plausible entitlement to relief, including through well-pled allegations regarding Perdue's wrongful conduct, the migration of these PFAS contaminants to the groundwater of the Plaintiffs, and the actual exposure to the Plaintiffs.

b. Plaintiffs have identified with specificality the alleged contaminants.

Next, Defendants assert Plaintiffs' allegations are insufficient because they did not identify with specificity which PFAS analytes contaminated their property. First, while there are methods to chemically speciate different types of PFAS, no such speciation is required to satisfy the pleading standard. Indeed, both MDE and Perdue use this terminology. *See, e.g.*, ECF 23-2 (designating Perdue as a "responsible person" for the "regional PFAS contamination" and directing Perdue to "investigate the nature and extent the PFAS contamination"); ECF 23-3 (correspondence from Perdue to community members described elevated levels of "PFAS," without further specification). Further, Plaintiffs have set forth allegations with respect to certain subtypes of PFAS, in part on the basis of the Defendants' own testing, including that:

- PFOS, PFOA and PFHxS compounds are harmful to human health. *See, e.g.*, Compl. at ¶¶ 37-39.
- Perdue discharged wastewater containing PFAS compounds through land application and direct stream discharge, causing contamination of the groundwater with PFOS, PFOA and PFHxS. *See, e.g.*, *id.* at ¶¶ 58-66.
- That this wrongful conduct has resulted in migration of these PFAS compounds including PFOS and PFHxS to the Plaintiffs and class members' wells. *See, e.g.*, *id.* at ¶ 66.

No more is required, and the Defendants offer no legal authority which would require further chemical speciation of the particular PFAS analytes at issue. In any event, well testing has, in fact, established migration of PFAS contaminants from the Defendants' facility to the homes of Plaintiffs. As Defendants have established through the exhibits to their own Motion, well testing

of Rachel Chaney's 30785 Hambrook Ct. property has shown EPA drinking water standard exceedances of the relevant PFAS constituents, including PFOA, PFOS, and PFHxS. *See* ECF 23-6 at 4. Further, well testing from Ms. Chaney's 508 Barnsdale property also tested above the EPA's demonstrated drinking water standards.[2] *See* Exhibit A. Well testing of the residence of Doug and Julie Davis has also demonstrated exceedances of EPA drinking water standards for PFOS and PFHxS. *Id*. As noted by the Defendants, a well test of Gary and Rebecca Doss on November 14, 2024, did not demonstrate concentrations of PFAS constituents above laboratory detection limits. *See* ECF 23-9 at 4. These results, however, are not dispositive of the claims of Gary and Rebecca Doss, as addressed in Section B, *infra*.

c. Plaintiffs have adequately alleged damages proximately caused by the Defendants' wrongful conduct.

Defendants next assert that Plaintiffs should have provided more detail regarding the health impacts caused by Plaintiffs' exposure to PFAS discharged by Perdue. *See* ECF 23-1 at 8. Plaintiffs have alleged exposure to PFAS compounds from Perdue's operations, including PFOS, PFHxS, and PFOA, and have described within their allegations the particular health impacts known to result from exposure to these compounds. *See* Compl. at ¶¶ 58-60; ¶ 66; ¶¶ 74-98; ¶172; ¶¶ 37-39. These include:

- For PFOA, "testicular cancer, kidney cancer, prostate cancer, endometrial/uterine cancer, breast cancer, along with thyroid disease, ulcerative colitis, pregnancy-induced hypertension, Type-2 diabetes in women, pre-eclampsia, developmental delays in children, and other health conditions." *Id.* at ¶ 37.
- For PFOS, "increased risk for certain cancers, including liver and kidney cancer, changes in liver function, preeclampsia, increased risks of low birth weights,

[2] Well testing results from Rachel Chaney, Doug Davis, and Julie Davis are provided in response to the Defendants' introduction of well testing results in their motion and argument, and are not necessary to resolve the issues before the Court with respect to the relevant pleading requirements under Rule 12(b)(6).

decreased antibodies in children, hypothyroidism and increase thyroid disease, immunosuppression, infertility and increased cholesterol." *Id.* at ¶ 38.

- For PFHxS, "liver function disruptions, thyroid and hormone level changes, developmental effects, decreased antibody response and memory impairment." *Id.* at ¶ 39.

The Plaintiffs' claim for medical damages includes the need for medical monitoring for each Plaintiff, and health impacts on the part of the Plaintiffs Rachel Chaney, Doug Davis and Julie Davis.[3] These well-pled allegations establish a plausible entitlement to relief.

Neither of Defendants' two cited cases support dismissal. In *Shahin v. U.S.*, 2021 WL 2949786, at *6 (D. Md. July 14, 2021), the Court dismissed a *pro se* complaint on a variety of grounds, including the failure to plead sufficient facts to show a plausible connection to unnamed "solvents" and a child's birth injuries. Here, the Plaintiffs have identified the relevant compounds, and the health effects which have been demonstrated to be associated with exposure. Defendants' citation to *Lafferty v. Sherwin-Williams Co.*, 2018 WL 3993448, at *1 (D.N.J., Aug. 21, 2018), a second unreported case cited by the Defendant, is also inapposite, as it addressed the sufficiency of class-wide medical monitoring claims under New Jersey law. While beyond the scope of Defendants' Motion, numerous Courts, particularly involving PFAS exposure, have denied motions to dismiss and motions to summary judgment with respect to class wide medical monitoring allegations. *See, e.g.*, *Baker v. Saint–Gobain Performance Plastics Corp*., 232 F. Supp. 3d 233 (N.D.N.Y. 2017) (denying motion to dismiss medical monitoring claim for PFAS exposure in putative class action); *Sullivan v. Saint-Gobain Performance Plastics Corp.*, 431 F. Supp. 3d

[3] Among those health effects which Plaintiffs allege have been shown to occur by exposure to PFOS, PFOA and PFHxS, Rachel Chaney has been diagnosed with pregnancy induced hypertension and pre-eclampsia. Doug and Julie Davis have been diagnosed with high cholesterol, known to occur as a result of liver function disruptions caused by PFOS and PFHxS. Details regarding these diagnoses and health impacts associated with the Plaintiffs' exposure to PFAS will be developed through discovery and the production of expert reports.

448 (D.Vt. 2019) (denying motion for summary judgment as to medical monitoring claim for PFAS exposure in putative class action). Maryland law under *Exxon Mobil Corp. v. Albright*, 433 Md. 303 (2013) permits recovery for medical monitoring costs resulting from exposure to toxic substances caused by a defendant's tortious conduct, even in the absence of a physical injury.

d. Defendants' arguments address only limited elements of Plaintiffs' claims.

Defendants seek dismissal of all claims, but fail to challenge Plaintiffs well-pled allegations regarding injury to their (and class members') property, wells, soil, and water supply, impairing their use and enjoyment thereof, and diminishing the value of their property because of Perdue's negligent release and dumping of PFAS chemicals. *See* Compl. at ¶¶107(r); ¶ 142; ¶ 146; ¶ 148; ¶¶ 151-52; ¶ 156; ¶ 163; ¶ 173; ¶185(b). Plaintiffs have sufficiently articulated compensable injury, and the Defendants' Motion must be denied.

2. Plaintiffs have stated a Claim for Strict Liability and Abnormally Dangerous Activity.

Defendants assert that Plaintiffs' allegations for strict liability should be dismissed. As with other arguments, Defendants misrepresent the allegations of the Complaint, including as follows:

Defendants' Motion	**Plaintiffs' Complaint**
• *"The Complaint...lacks factual allegations that…(i) any abnormally dangerous activities are occurring at PAB..." ECF 23-1 at 2.*	• **"Defendants' manufacturing processes and negligent, reckless, and/or intentional handling of PFAS constituted an abnormally dangerous activity for which Defendants are strictly liable." Compl. at ¶ 20.**
• *Plaintiffs have not alleged harm from an abnormally dangerous activity. ECF 23-1 at 10.*	• **"As a result of Defendants' abnormally dangerous activities, Plaintiffs and class members have suffered harm to their properties and have suffered and continue to suffer injuries to their bodies and have been forced to mitigate**

damages as set forth herein, as well as below." See, e.g., Compl. at ¶ 123.

Plaintiffs have met and exceeded the pleading standard to assert a cause of action for strict liability. Maryland courts have adopted the general principle from the Restatement (Second) of Torts § 519 (1977), which states that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." *Gallagher v. H.V. Pierhomes, LLC,* 182 Md. App. 94, 105 (2008) (quoting Restatement (Second) of Torts § 519). Section 520 sets forth the following factors to be considered in determining whether an activity is abnormally dangerous:

> (a) existence of a high degree of some harm to the person, land or chattels of another;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520, at 36. "More emphasis is placed on the fifth factor: the appropriateness of the activity in relation to its location." *Toms v. Calvary Assembly of God, Inc.*, 446 Md. 543, 553 (2016) (citing *Yommer v. McKenzie*, 255 Md. 220, 224 (1969)). Defendants argue that the relevant conduct at issue is "engaging in agricultural activities in an agricultural area." *See* ECF 23-1 at 11. But this is not the conduct at issue in this case, nor the appropriate analysis under Maryland law. As alleged, the abnormally dangerous activity at issue is their "negligent, reckless, and/or intentional handling of PFAS," which they knew or should have known would cause contamination of community groundwater. Compl. at ¶ 20; ¶ 126. This is directly

analogous to *Yommer*, wherein gasoline from a fuel station leaked onto an adjacent property. There, the Court noted:

> Although the operation of a gasoline station does not of itself involve 'a high degree of risk of some harm to the person, land or chattels of others,' the placing of a large underground gasoline tank in close proximity to the appellees' residence and well does involve such a risk, since it is not a matter of common usage.

Yommer, 255 Md. at 224-25.

Just as the relevant "activity" in *Yommer* was not the "operation of a gasoline station", the activity here is not "agricultural activit[y]", but rather their receipt, handling and disposal of PFAS containing waste material. Plaintiffs have provided detailed allegations regarding the extraordinary toxicity associated with exposure to these PFAS compounds. In particular, Plaintiffs have alleged that the EPA's Maximum Contaminant Levels for PFOA and PFOS are 4 ppt[4] (*see* Compl. at ¶ 48), and that exposure is associated with numerous forms of cancer and other life-threatening conditions. *See, e.g.*, Compl. at ¶¶ 37-39. Perdue was land applying millions of gallons of wastewater containing these compounds every year to fields and forests directly adjacent to residential property and discharging tens of millions of gallons every month to Peggy's Branch, a small stream that courses through Plaintiffs' neighborhoods. *See, e.g.*, Compl. at ¶¶ 58-68. Land application or direct discharge of PFAS containing wastewater is not a common or acceptable means of disposal of this hazardous substance, and assuredly land application or stream discharge should not be undertaken so close to densely populated residential areas. This disposal method provides no value to the community.

[4] A concentration of 4 parts per trillion ("ppt") is equivalent to approximately one drop of PFOA or PFOS spread over five Olympic size swimming pools.

These facts are analogous to those in *Ryan v. Greif, Inc.*, 708 F. Supp. 3d 148, 176 (D. Mass. 2023), in which Plaintiffs alleged that the Defendants, including a paper mill, had inappropriately disposed of a PFAS containing sludge, resulting in groundwater contamination. The Court concluded that the Plaintiffs had properly alleged an ultrahazardous activity where they were alleged to have been "receiving, improperly disposing, and repurposing materials the defendants know or have reason to know is toxic to humans and can migrate into groundwater." *Id*. at 176. Plaintiffs have made analogous allegations here regarding Perdue's handling and disposal of PFAS. Compl. at ¶ 20; ¶¶ 126-29.

Finally, Defendants argue that Plaintiffs have failed to plead "what, if any, 'high degree of risk' or 'harm that results from the risk' will occur" and by citation to *Gallagher v. H.V. Pierhomes, LLC*, 182 Md. App. 94 (2008), suggest that any harm here is not "major in degree." *See* ECF 23-1 at 11, 12. As set forth in detail above, the Plaintiffs have alleged a high degree of risk and harm. Defendants' analogy to *Gallagher* is clearly inappropriate. There, the Court found that the damage was not major in degree, where the claimed damages were "relatively minor damage to a 200-year-old home from the vibrations of the pile driving." *Id.* at 110. Plaintiffs have pled with specificity that Perdue's handling of PFAS has resulted in residential groundwater contamination of compounds at concentrations well beyond limits imposed for the protection of human health, causing health impacts and a substantially elevated risk of life-threatening medical conditions. *See, e.g.*, Compl. at ¶¶ 36-40; ¶ 126; ¶ 131. The harm here is "major in degree" and "sufficiently serious." *See* ECF 23-1 at 12.

At this stage, Plaintiffs have met the pleading requirements for strict liability. *See, e.g.*, *Shongo v. CSX Transportation, Inc.*, 2023 WL 4027121, at *9 (D. Md. June 14, 2023) (finding Plaintiffs allegations that "the collection and handling of flammable coal directly adjacent to a

residential neighborhood qualifies as an abnormally dangerous activity under Maryland law" were "sufficient to state a plausible strict liability claim").

3. Plaintiffs have adequately plead a claim for negligence, including the existence of a duty.

Defendants assert that Plaintiffs have failed to plead the existence of a duty to the Plaintiffs. Yet again, Defendants base their motion to dismiss on misrepresentations of the Plaintiffs' Complaint, including:

Defendants' Motion	**Plaintiffs' Complaint**
• *[Plaintiffs] fail to allege that Defendants were under a duty to protect Plaintiffs from the alleged injuries" ECF 23-1 at 13.*	• **Defendants had a duty to take all reasonable measures to ensure that PFAS would be effectively contained and not discharged into the surrounding environment. Compl. at ¶ 128.** • **Defendants had a duty to ensure that the manufacturing processes it chose to employ did not unreasonably endanger the potable water relied upon by the residents of surrounding communities, including the Plaintiffs and class members. *Id.* at ¶ 129.** • **Defendants, aware of the adverse effects of theses chemicals, had a duty to prevent the discharge of such toxic chemicals into the environment, as well as to prevent the toxic chemicals from escaping from their property into Plaintiffs' and class members' well water." *Id.* at ¶ 143.** • **Defendants owed a duty to proceed with all reasonable and necessary care to prevent Plaintiffs' and class members well water from becoming contaminated with dangerous PFAS chemicals." *Id.* at ¶ 144; ¶ 147.**
• *"The Complaint...lacks factual allegations that…that Defendants knew or should have*	• **"Defendants knew or should have known that PFAS contained in**

known of PFAS-contaminated groundwater below PAB...” ECF 23-1 at 2.	**materials used in the manufacturing process at Defendants’ Agribusiness Facility would result in the release of PFAS into the environment, the contamination of the groundwater, ingestion of the groundwater by the surrounding communities...” Compl. at ¶ 126; ¶¶ 68-70.**
• *“The Complaint also lacks factual allegations that...that the presence of such PFAS could foreseeably cause Plaintiffs’ alleged harm” ECF 23-1 at 2.*	• **“Defendants knew or should have known that PFAS contained in materials used in the manufacturing process at Defendants’ Agribusiness Facility would result in the release of PFAS into the environment, the contamination of the groundwater, ingestion of the groundwater by the surrounding communities, accumulation of PFAS in the bodies of members of those communities, including Plaintiffs and class members, and adverse health effects to those people, including Plaintiffs and class members. Compl. at ¶¶ 126-27.**

These plainly contradicted arguments leave little substance to the Defendants’ arguments regarding duty. Plaintiffs have alleged that the Perdue Defendants had a duty to ensure that the toxic PFAS chemicals they were handling were effectively contained and did not contaminate the potable water of the communities adjacent to the facility. Compl. at ¶¶ 126-129; ¶¶ 68-70. Plaintiffs have further alleged that they were or should have been aware of the risk of migration, as well as the resulting health effects to the community. *Id.* at ¶¶ 28-53; ¶¶ 126-27.

Moreover, beyond alleging that Perdue knew or should have known prior to 2023 that they were contaminating Plaintiffs’ properties, Plaintiffs additionally allege *actual knowledge* by Perdue in 2023. More specifically, Plaintiffs’ Complaint alleges that “MDE discovered in September 2023 that Defendants’ wastewater that is disposed on cropland and forested areas by

spray irrigation at the Agribusiness Facility contained highly elevated levels of PFAS compounds, including 694 ppt of PFOS and 40 ppt of PFOA. On information and belief, a portion of this same wastewater also is directly discharged to Peggy's Branch." *Id.* at ¶ 60. Even with actual knowledge, Perdue failed to contact residents or inform them of the elevated levels of PFAS until September 30, 2024, more than a year later. Perdue, not only foreseeing, but knowing of the harm, allowed the Plaintiffs and class members to continue consuming water contaminated with PFAS.

Notably, the Defendants do not dispute that they owe a legal duty to the Plaintiffs. It is well established in Maryland that landowners and/or occupiers of land owe a duty to their neighbors.[5] These duties include:

- A duty to occupants of neighboring land to use care when conducting activities on the land so as to avoid causing harm to the neighboring land. *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 77 (1994) (citing *Toy v. Atl. Gulf & Pac. Co.*, 176 Md. 197, 208-09 (1939)).
- A duty of reasonable care to its neighbors to maintain the property in a manner that would not cause an unreasonable risk. *Steamfitters Loc. Union No. 602*, 469 Md. at 733.
- A duty not to impair ownership rights through water contamination. *Exxon Corp. v. Yarema*, 69 Md. App. 124, 153 (1986) (holding under the theory of negligence, the leaking underground storage tanks, as well as Exxon's tardy remedial response to contain the contamination, constituted a breach of its duty to its neighboring landowners not to impair their ownership rights through water contamination).

Plaintiffs' Complaint adequately alleges that PFAS contamination was foreseeable, and adequately states that Defendants had knowledge of the nature and toxicity of PFAS, had actual knowledge of PFAS in its wastewater, failed to take reasonable actions to mitigate the problem

[5] It is well-established that one must use his own rights and property so as to do no injury to those of others. *See, e.g., Frenkil v. Johnson, to Use of Nat'l Retailers Mut. Ins. Co.*, 3 A.2d 479, 482 (1939); *La Belle Epoque, LLC v. Old Eur. Antique Manor, LLC*, 958 A.2d 269, 283 (2008); *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 233 A.3d 59, 76 (2020).

they are causing, and failed to warn area residents. Plaintiffs have established that Perdue owed a duty to the Plaintiffs and class members.

4. Perdue's industrial processes and refinery do not qualify as agricultural operations which receive protection under Maryland's Right to Farm Law.

Perdue asserts an affirmative defense that for purposes of this case they are an "agricultural operation" pursuant to the "right to farm" statute of Md. Code Ann., Cts. & Jud. Proc. § 5-403, and the Wicomico Co. Code § 186, and as a result, an action must be first brought before the Wicomico County Agricultural Reconciliation Committee.

When a defendant asserts an affirmative defense, the defendant has taken the affirmative of an issue and therefore assumes the burden of production and the burden of persuasion as to the elements of that defense. *Bd. of Trustees, Cmty. Coll. of Baltimore Cnty. v. Patient First Corp.*, 444 Md. 452, 470 (2015), (citing *Crowther v. Hirschmann*, 174 Md. 100 (1938)); *see also Lima Twp. v. Bateson*, 838 N.W.2d 898, 906 (Mich. App. 2013) (describing the Michigan right to farm act as an affirmative defense, and denying summary judgment on grounds that there was a dispute of material fact regarding its application to the Defendants' conduct).

First, the Perdue Agribusiness facility, which operates as an industrial soybean processor and refinery, is not an "agricultural operation" pursuant to Maryland's right to farm statute. Md. Code Ann., Cts. & Jud. Proc. § 5-403. Maryland Code Ann., Cts. & Jud. Proc. § 5-403(a)(2) defines an "agricultural operation" as "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**." (emphasis added).[6]

Perdue does not assert, and cannot establish, that the soybeans processed and refined at its industrial facility were grown, raised, or cultivated at the Perdue Agribusiness facility, as opposed to sourced from a variety of international and domestic farming operations, and transported by barge or truck for processing and refining at their Salisbury industrial facility. Further, Perdue cannot establish that its discharge of PFAS was in connection with any agricultural operation, as required to assert this affirmative defense, as it continues to maintain publicly that it does not know the source of the PFAS in its wastewater. *See*, *e.g.*, ECF 23-3.

Application of Wicomico County Code § 186 also requires Perdue to establish that it falls within its own definition of "agricultural operation." The Wicomico County Code includes the definition of "operation" as set forth in Maryland Code, Cts. & Jud. Proc. § 5-403,[7] and identifies with specificity certain types of agricultural operations. Perdue has similarly failed to establish that it meets the criteria set forth in the Wicomico Code. Further, to the extent that the definition of "agricultural operation" under the Wicomico County Code is broader than the Maryland Code, Wicomico County cannot abridge the Plaintiffs' common law rights to assert nuisance and negligence causes of action. "The enactment of a county legislative body not only must fall within

[6] Legislative history of Md. Code, Cts. and Jud. Proc. § 4-503 confirms that the limiting clause "that has been grown, raised or cultivated by the farmer," applies to operations which qualify as engaged in "the processing of agricultural crops." The Senate Concurrence note to 1998 S.B. 404, which revised the definition of "agricultural operation," clarifies that a House amendment responsible for the addition of "the processing of agricultural crops," sought only to exclude operations engaged in the processing of other agricultural goods, not to broaden application of the right to farm act to those processing crops other than those "grown, raised or cultivated by the farmer." Senate Concurrence to 1998 S.B. 404, attached as Exhibit B.

[7] Wicomico County Code § 186 refers to Maryland Code, Cts. & Jud. Proc. §5-308(a), which was renumbered to § 5-403 in 1997.

a legislative field delegated by the State Constitution or statutes pertinent to that county's method of government but must also fit the definition of a 'local law.'" 96 Md. Op. Att'y 139 at 158 (citing *McCrory Corp. v. Fowler*, 319 Md. 12 (1990)). Changes to common law causes of action are not "local" in nature. *Id*. at 160 (citing *McCrory*, 319 Md. at 19-21); *Gunpowder Horse Stables, Inc. v. State Farm Auto. Ins. Co.*, 108 Md. App. 612 (1996). The Maryland Office of the Attorney General has considered the authority of Counties to adopt legislation to prevent a person from filing a nuisance suit, including in the context of local right to farm laws, and has concluded that no such authority exists. *See, e.g.*, Correspondence from Maryland OAG to Attorney for Worchester County, dated October 20, 1998, attached as Exhibit C (concluding that the "...county lacks authority to prevent a person from filing a nuisance complaint..."); 96 Md. Op. Att'y 139 at 158 (concluding, "[i]n short, the elements of, and defense to, a common law cause of action are matters affecting the people of the State generally and...are not subject to local government regulation").

Further, even if Perdue's relevant operations fell within the definition of an "agricultural operation" under Md. Code, Cts. & Jud. Proc. § 5-403(a)(2), which they do not, Plaintiffs' negligence allegations preclude application of the prerequisites to suit and limitations of liability. The limitation of nuisance liability under Md. Code, Cts. & Jud. Proc. § 5-403(c)(1) applies only where the operation "is not conducted in a negligent manner," and therefore would not apply on the facts as alleged. Presentation of this matter to the Wicomico County Agricultural Reconciliation Board would serve no purpose, as it has no authority to address the merits of the Plaintiffs claim for negligence, even were Md. Code, Cts. & Jud. Proc. § 5-403 to apply. *See, e.g.*, Maryland Department of Agriculture Legislative Comment on 2006 HB 396, attached as Exhibit

D (supporting the adoption of prerequisites to filing suit, and explaining a purpose of the local agency filing requirement as helping to resolve disputes for which there is no nuisance liability).

5. Plaintiffs have appropriately pled their claims for public nuisance.

Plaintiffs have brought causes of action for both private nuisance (Count III)[8] and public nuisance (Count IV). Courts have recognized PFAS groundwater contamination as giving rise to a cause of action for both private and public nuisance to neighboring landowners. *See, e.g., Ryan,* 708 F. Supp. 3d at 174.

Defendants ask this Court to dismiss Plaintiffs' claims for public nuisance. Maryland has adopted the Restatement (Second) of Torts § 821B, which defines a public nuisance as "an unreasonable interference with a right common to the general public." Damages are recoverable for private nuisance where one has "suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement (Second) of Torts § 821C.

Defendants seek dismissal on Plaintiffs' claim for public nuisance on the basis that their alleged contamination of the groundwater does not "interference with a public right that is common to all members of the general public", and that Plaintiffs cannot show a "special and particular damage." *See* ECF 23-1 at 15. In support of their argument that groundwater contamination is not the interference with a "public right," Defendants cite generic authority, but omit the cases wherein Courts applying Maryland law addressed this question and specifically held to the contrary. Multiple courts applying Maryland law have concluded that local groundwater contamination

[8] Beyond their general arguments with respect to causation, and application of Md. Code, Cts. & Jud. Proc. § 5-403, Defendants do not dispute that Plaintiffs have plausibly alleged a cause of action for private nuisance.

represents the interference with a public right. In *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 457 F. Supp. 2d 298 (S.D.N.Y. 2006), the defendants sought to dismiss plaintiffs' public nuisance claim in a groundwater contamination case, arguing, as here, that contamination of the groundwater limited to a particular community did not represent the interference with a right common to the public. *Id*. at 309. The Court disagreed. Applying Maryland law, the Court denied the Motion to Dismiss, holding that "[o]ne public interest that is central to this case is the use of the state's groundwater" and that "though a plaintiff may have usufructuary rights to the groundwater, this does not eliminate the public quality of the state's water resources." *Id*. at 310. The Court noted that courts in other states had reached similar conclusions. *Id*. (citing *N.Y. v. Shore Realty Corp*., 759 F.2d 1032, 1050 (2d Cir. 1985)); *see also Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1057 (D.N.J. 1993). Similarly, in *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467 (D. Md. 2019), the Court denied a motion to dismiss a claim for public nuisance, citing *R.I. v. Atl. Richfield Co.*, 357 F. Supp. 3d 129, 142 (D.R.I. 2018), for the proposition that "[w]idespread water pollution is indeed a quintessential public nuisance."

Plaintiffs have further shown the type of harm necessary for recovery of damages. As noted in the Restatement (Second) of Torts § 821C, comment d: "[w]hen the public nuisance causes personal injury to the plaintiff or physical harm to his land or chattels, the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained."

It is on this basis that Courts have found that residents harmed by groundwater contamination may assert claims for public nuisance. *See*, *e.g.*, *Ryan.*, 708 F. Supp. 3d at 174 (denying motion to dismiss public nuisance claims in PFAS groundwater contamination matter,

and finding property harms satisfied pleading requirements). The Plaintiffs have plausibly alleged public nuisance.

6. Plaintiffs have stated a claim for trespass.

Defendants allege that Plaintiffs have not stated a claim for trespass. To state a trespass claim under Maryland law, a plaintiff must plausibly allege "(1) an interference with a possessory interest in [her] property; (2) through the defendant's physical act or force against that property; (3) which was executed without [her] consent." *Shongo,* 2023 WL 4027121, at *4 (citing *Uthus v. Valley Mill Camp, Inc.*, 472 Md. 378, 401 (2021)); *see also Brazerol v. Hudson*, 262 Md. 269, 272-73 (1971) quoting *Patapsco Loan Co. v. Hobbs*, 98 A. 239, 241 (Md. 1916) ("Every unauthorized entry upon the property of another is a trespass which entitles the owner to a verdict for some damages.").

First, Defendants assert that Plaintiffs have failed to allege a tangible intrusion, restating their argument that Plaintiffs had not alleged actual exposure. As set forth above, this is incorrect. *See, e.g.*, Compl. at ¶¶ 74-98. Plaintiffs have alleged a tangible intrusion associated with actual intrusion of PFAS compounds onto and underneath their properties. In particular, within Plaintiffs' trespass count alone, they allege:

- Through Defendants' negligent, reckless, and/or intentional conduct described above, it has caused and continues to cause PFAS to enter onto the real properties owned, occupied, and/or possessed by Plaintiffs and class members in that the wells and lands located on said real properties are contaminated with PFAS chemicals. Compl. at ¶ 172.
- Defendants' negligent, reckless, and/or intentional conduct described above has and continues to interfere with Plaintiff's and class members' use, possession, and enjoyment of their real properties in that Defendants' conduct has reduced their property value and caused them to suffer monetary damages associated with monitoring and remediation of their water supplies, and reduced or eliminated their use and enjoyment of their properties. Compl. at ¶ 173.

This intrusion is actionable, particularly given the harmful nature of these compounds.[9] *Shongo,* 2023 WL 4027121, at *5 ("The Maryland courts would likely recognize that the alleged contamination of Plaintiffs' property by "dangerous and carcinogenic" materials is an actionable trespass.").

Next, Defendants argue that Plaintiffs have failed to allege that the trespass occurred as a result of an intentional or negligent act. Again, Defendants confuse the relevant legal standard, asserting that "Plaintiffs must allege Defendants intended for the specific PFAS to migrate to their property (or negligently caused migration to occur)." *See* ECF 23-1 at 17. To the contrary, a trespass occurs "[w]hen a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land." *Shongo*, 2023 WL 4027121, at *4 (citing *Rosenblatt,* 335 Md. at 76-77). "The intentions of the defendant are simply not material." *Ford v. Balt. City Sheriff's Off.*, 149 Md. App. 107, 129 (2002). Here, Plaintiffs' have alleged multiple affirmative acts by Perdue which caused the trespass, including (1) spray irrigating their wastewater, and (2) discharging their wastewater into streams that course through the Plaintiffs' neighborhoods. *See, e.g.*, Compl. ¶¶ 68-69. Plaintiffs have adequately alleged their entitlement to relief.

7. Plaintiffs' allegations regarding vicarious liability and injunctive relief.

Plaintiffs agree that Count VI ("Vicarious Liability") and Count VII ("Preliminary And Permanent Injunction To Cease Pollution And Remediate The Environment") do not represent

[9] To support their argument, Defendants cite *Schuman v. Greenbelthomes, Inc.*, 212 Md. App. 451 (2013). In *Schuman* the plaintiff sued his neighbor because the neighbor smoked cigarettes on his patio, and the smoke odor sometimes traversed such that Mr. Schuman could smell it. Key to the Court's decision that the neighbor's smoking was not a trespass, was that the Schuman "did not argue or provide any evidence that the smoke caused any physical damage to his property." *Id.* at 526.

independent causes of action. Should the Court find it appropriate "dismiss" these Counts, Plaintiffs request that the allegations therein not be stricken, but remain incorporated within the Complaint.

B. Defendants' exhibits are inappropriate for consideration on a Motion to Dismiss.

Defendants' Motion introduces a series of exhibits. These arguments do not bear on the sufficiency of the Plaintiffs' allegations under Federal Rule of Civil Procedure 12(b)(6). Among these materials, Defendants have introduced well testing initiated by Perdue from the residences of two of the three Plaintiffs.[10] In the case of Ms. Chaney, these results demonstrate the presence of PFAS contaminants, including PFOS, PFOA and PFHxS, from the Perdue facility at her former home. *See* ECF 23-6. In the case of Gary and Rebecca Doss, these results are interpreted by the laboratory as showing concentrations of PFAS below the detection limits of the laboratory. *See* ECF 23-9 at 4. These test results are not dispositive of the Doss's claim. First, the factual record as presented does not provide sufficient evidentiary basis to ensure that the laboratory samples were taken prior to any filtration or treatment. Second, these samples, which represent a single time frame, are insufficient even if appropriately taken and analyzed to rule out past, future or even current contamination, given the variability of well concentrations over time. Third, testing at the well fails to rule out groundwater or soil contamination at other sites on the property.

In any toxic tort matter involving groundwater contamination, the assessment of the scope, severity and timeline of exposure is based upon hydrogeologic modeling which takes into account

[10] The samples introduced by Perdue appear to have been taken by Perdue following the filing of Plaintiffs' Complaint. To the extent Perdue's counsel was involved in these efforts to communicate with represented Parties, this conduct would seem to violate Maryland Rule of Professional Conduct 19-304.2, which prohibits communication to a party known to be represented by counsel.

a variety of data, including data only available through discovery. Discovery will provide facts to establish Perdue's historical practices, which will permit an assessment of the extent to which the Doss's property has been impacted by Perdue's actions. At a minimum, given the known and extensive groundwater contamination caused by Perdue through this geographic region, the Doss family has plausibly alleged their claims sufficiently to proceed to discovery.

To the extent that the Court considers conversion of Defendants' Motion to Dismiss to a Motion for Summary Judgment with respect to the claims of Gary and Rebecca Doss, the Plaintiffs request the opportunity to present all material made pertinent to such a motion by Rule 56, or submit an affidavit under Rule 56(d). *See Amirmokri v. Abraham*, 437 F. Supp. 2d 414, 418-19 (D. Md. 2006). As a general rule, "summary judgment is appropriate only after adequate time for discovery." *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The Fourth Circuit has stressed the importance of allowing adequate time for discovery before ruling on a motion for summary judgment, stating: "[s]ummary judgment *before* discovery forces the non-moving party into a fencing match without a sword or mask." *McCray v. Md. Dep't of Transp., Md. Transit Admin.*,741 F.3d 480, 483 (4th Cir. 2014).

C. A Stay is improper.

MDE's simultaneous investigation of Perdue's facility is not a basis for a stay, and Defendants can identify no relevant authority supporting this request. This public health crisis requires immediate and prompt investigation utilizing all possible resources. The Plaintiffs need, and deserve, representation of their individual interests in a matter that represents an imminent, substantial and irreversible threat to their health, welfare and property.

The doctrine of primary jurisdiction is to be "invoked sparingly, as it often results in added expense and delay." *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005) (citing *Red Lake Band of Chippewa Indians v. Barlow,* 846 F.2d 474, 477 (8th Cir. 1988) (internal quotations omitted)). It "arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency." *U.S. v. Any & All Radio Station Trans. Equip*., 204 F.3d 658, 664 (6th Cir. 1997) (quoting *U.S. v. Haun*, 124 F.3d 745, 749 (6th Cir. 1997)). When applied, "federal courts . . . abstain from hearing certain administrative-related matters until the appropriate agency has had the opportunity to interpret unanswered technical and factual issues." *Fieger v. U.S. Atty. Gen.*, 542 F.3d 1111, 1121 (6th Cir. 2008). There is no "fixed formula" for its application. *Any and All Radio Station*, 204 F.3d at 664 (citing *Haun*, 124 F.3d at 749 and quoting *U.S. v. W. Pac. R. Co*., 352 U.S. 59, 64 (1956)). Every case requires inquiry in to "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id*. When performing this analysis, courts can consider the following factors:

- Whether the question at issue is within the conventional expertise of judges or whether it involves technical or policy considerations within the agency's particular field of expertise ["**Factor one**"]. *Sullivan*, 226 F. Supp. 3d at 297 (citing *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 295 (2d Cir. 2006));
- Whether the question at issue is particularly within the agency's discretion ["**Factor two**"]. *Id.* (citing *Schiller*, 449 F.3d at 295);
- Whether there exists a substantial danger of inconsistent rulings ["**Factor three**"]. *Id.* (citing *Schiller*, 449 F.3d at 295); and
- Whether a prior application to the agency has been made ["**Factor four**"]. *Id.* (citing *Schiller*, 449 F.3d at 295) (quoting *Ellis v. Tribune Television Co.*, 443 F.3d 71, 82-83 (2d Cir. 2006)).

Importantly, these factors should be applied within the context of a balancing test:

- "[t]he court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative

> proceedings ["**Factor five**"]." *Id.* (quoting *Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 223 (2d Cir. 1995)).

In seeking a stay, Perdue misapplies the doctrine of primary jurisdiction by relying on *Stewart v. T-Mobile USA, Inc.*, 2014 WL 12614418 (D.S.C. Oct. 8, 2014). *Stewart* concerned a private cause of action under Federal Telephone Consumer Protection Act of 1991 ("TCPA"), 47 USCA § 227(b)(3). Plaintiffs alleged receipt of calls from the defendant using an automatic telephone dialing system (ATDS), in violation of the TCPA. There, the defendants invoked the primary jurisdiction doctrine on the basis that the FCC was considering a series of petitions that directly related to the interpretation of relevant terms within the TCPA, including the definition of ATDS, which were "ripe for determination" and "likely imminent." *Id.* at *2. The Court granted the stay, largely on the basis that "Congress vested the FCC with the authority to implement, and the discretion to interpret, the TCPA and its accompanying regulations" and were thereby best equipped to address the definitional questions which would be potentially "dispositive" of liability in the citizen suit. *Id.* at *4.

Stewart has no applicability here and may no longer be good law. First, unlike the FCC's vested authority to implement and interpret the TCPA, the Maryland Department of the Environment has not been vested with any authority to address common law toxic tort causes of action, nor do they offer expertise beyond that of the federal judiciary. Second, in *Stewart*, decisions from the agency were "likely imminent." *Id.* at *2. While MDE has known of Perdue's PFAS contamination for over a year, it is unclear whether their investigation will result in any administrative findings. Third, important to the Court's decision in *Stewart* was that the FCC's decision on the relevant petitions was potentially dispositive of the issues before the Court. While not explicitly cited, the dispositive nature of the FCC's determination likely originated in part from

the deference to federal agencies provided under *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984), prior to the Supreme Court's decision in *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024), which overruled *Chevron*. *See, e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) (explaining that the *Chevron* doctrine provides the force of law to certain definitional determinations by the FCC's under the TCPA); *Taylor v. JBS Foods USA*, 2025 WL 102450, at *20 (D.S.D. 2025) (noting that courts should be reluctant to invoke the doctrine of primary jurisdiction, and "[t]his reluctance could be even greater now in the wake of *Loper*"). It is unclear that a District Court addressing those facts today would reach the same result.

Courts have rejected application of the primary jurisdiction doctrine in numerous cases involving environmental contamination. For example, in *Sullivan v. Saint-Gobain Performance Plastics Corp.*, plaintiffs brought a putative class action for negligence, nuisance, trespass, battery, and strict liability against defendant Saint-Gobain Performance Plastics Corporation, alleging that Saint-Gobain and its predecessor caused groundwater and property contamination by discharging PFOA from their facilities which resulted in contamination, diminished property values and other economic loss including remediation and medical monitoring. 226 F. Supp. 3d 288, 290-92 (D. Vt. 2016). Saint-Gobain sought a stay pursuant to the doctrine of primary jurisdiction pending a challenge to the Vermont Department of Environmental Conservation ("DEC") interim groundwater enforcement standard for PFOA and the Vermont Agency of Natural Resources ("ANR") emergency rules concerning PFOA. *Id.* at 292-93.

In rejecting Saint-Gobain's attempt to stay the case on the basis of primary jurisdiction, the Court applied the above-referenced factors, within the context of a balancing test.

It has been well established that requests for monetary damages and medical monitoring are within the province of the court. *Stoll v. Kraft Foods Global, Inc.*, 2010 WL 3702359 (S.D.Ind. Sept. 6, 2010) ("[T]he primary jurisdiction doctrine cannot be used to dismiss or stay claims seeking recovery of monetary damages.") (citing, among others, *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1417-18 (4th Cir. 1994)); *Peters v. Astrazeneca, LP*, 417 F. Supp. 2d 1051, 1058 (W.D.Wis. 2006) (concluding that courts may refuse to stay proceedings, under the primary jurisdiction doctrine, when plaintiffs are seeking damages for injury to person or property, "as this is the type of relief courts routinely evaluate") (citing *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir. 1991)). The *Sullivan* Court's analysis classified factors one and two collectively as "Agency Expertise and Discretion" and, consistent with courts across the country, held that "[t]he questions raised by Plaintiffs' state-law tort claims are all within the conventional expertise of judges." *Sullivan*, 226 F. Supp. 3d at 297-98. Furthermore, while acknowledging that selection of an administrative PFOA concentration threshold is an issue that involves technical or policy considerations within agency discretion, because the Plaintiffs' claims and class definition did not hinge on the standard, "the first two factors do not favor abstention." *Id*. at 298. Similarly, in the present case, 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* Compl. at ¶¶ 99-117.

In analyzing factor three, which considers whether there is a substantial danger of inconsistent rulings, the *Sullivan* Court held that there was not. The Court held that "[a]n award of damages is unlikely to interfere with the state agencies' efforts" and noted that "courts generally do not defer jurisdiction where plaintiffs seek damages for injuries to their property or person." *Sullivan*, 226 F. Supp. 3d at 298 (citing *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab.*

Litig, 175 F. Supp. 2d at 618). Moreover, and significantly, the *Sullivan* Court also addressed the plaintiffs' claims for equitable relief within the context of factor 3. More specifically, Saint-Gobain argued that an award of equitable relief might conflict with the work of (or relief ordered by) the State agencies, without articulating how any of the equitable relief sought by plaintiffs might conflict with any particular order of those agencies. *Sullivan*, 226 F. Supp. 3d at 298. Saint-Gobain, in support of their position, articulated that they were in discussions with the State regarding water hookups and medical monitoring – issues specifically mentioned in plaintiffs' request for injunctive relief. The Court disagreed, instead holding, "rather than being an impediment or potential conflict, the court views those discussions as potentially helpful to this case, since they might obviate some of the relief that Plaintiffs seek." *Id*. at 299. The Court also noted that where injunctive relief sought by the plaintiffs was not provided by the various administrative agencies, and did not appear to be forthcoming, it was unlikely that the court-ordered relief would be inconsistent with relief available through state statutory or regulatory programs. *Id.* (citing *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d at 618). Similarly, in the present case, the relief Plaintiffs seek is not provided by MDE, nor does it appear to be forthcoming. Mere discussions and a simultaneous state investigation is insufficient. Therefore, it is unlikely that any MDE relief would be inconsistent with the relief sought by the Plaintiffs. Conversely, any discussions between MDE and Perdue are likely to be helpful to this case, consistent with the *Sullivan* Court's conclusion.

Factor four, which considers prior applications to the relevant agency, lacks relevance because while the Defendant has engaged MDE in discussions, and MDE is currently conducting an investigation, MDE will not decide the questions raised by Plaintiff's common-law tort claims. This is strictly within the purview of the Court. Moreover, even assuming *arguendo* the relevance of factor four, an MDE investigation is not exclusive of Plaintiffs' individual rights. This is

especially true within the context of a public health emergency of which MDE has been aware for more than a year-and-a-half, yet and has failed to stop, much less remediate.

Of critical importance to a case involving ongoing and imminent, substantial, and irreversible harm to person and property, is application of the balancing test ("factor five" above), which weights the costs and benefits of a stay. In so doing, the *Sullivan* Court concluded that in a case of PFOA groundwater contamination, the "costs of applying the primary-jurisdiction doctrine...far outweigh the benefits" because "awaiting resolution of the state administrative and appeals process would cause substantial delay in this case." *Sullivan*, 226 F. Supp. 3d at 299 (noting that the state process would likely take years). Similarly, awaiting the conclusion of MDE's investigation, at the expense of Plaintiffs' simultaneous individual right to seek remedy from this Court, will impose substantial prejudice, costs and potential health impacts on the Plaintiffs. Every day this contamination continues, represents a delay in its resolution and remediation.

All relevant factors, when applied, weigh against a stay and promote court resolution of these critically important and time-sensitive allegations.

D. Plaintiffs acted with appropriate urgency in addressing this public health crisis.

Perdue criticizes the urgency with which Plaintiffs filed their Complaint, asserting they raced to the courthouse in haste to file a claim without factual support. The objective facts demonstrate the opposite. Plaintiffs' Complaint reflects the product of consultation with experts in environmental engineering, hydrogeology and wastewater treatment, to investigate the potential source(s) of the PFAS contamination, and identify the groundwater flow in the impacted area.[11]

[11] Consistent with any litigated matter, discovery will continue to develop facts relevant to Plaintiffs claim, including through expert analysis, document production, and continued well

Perdue has known for more than sixteen months that it has PFAS in its wastewater that is contaminating the drinking water supply for residents downgradient of its facility. As Defendants admit in their own brief (*See* ECF 23-2 at 2), on September 12, 2024, a full month before the Complaint was filed, MDE officially determined that Perdue is the "responsible person" "liable for this [PFAS] contamination" and directed "Perdue to take immediate action to investigate the nature and extent of the PFAS contamination in the wells serving the surrounding residential communities." Perdue has failed to take any action to stop the discharge. Meanwhile, operations at the facility continue uninterrupted and the PFAS discharge remains unabated.

Given the nature of this contamination and the toxicity of PFAS, a sense of urgency is needed, and Plaintiffs have acted accordingly. Plaintiffs' Complaint is well pled, the allegations are factually supported, and Defendants' motion should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss or Stay.

BROCKSTEDT MANDALAS FEDERICO LLC
/s/ Philip C. Federico
Philip C. Federico, Fed ID No. 01216
Chase T. Brockstedt (Admitted *pro hac vice*)
Brent P. Ceryes, Fed ID No. 19192
A. Wray Fitch, IV, Fed ID No. 19722
Catherine M. Cramer (Admitted *pro hac vice*)
Matthew P. Legg, Fed ID No. 19904
Stella D. Pratt (Admitted *pro hac vice*)
Tel: (410) 421-7777
Fax: (443) 241-7122
pfederico@lawbmf.com

testing. To-date, expert directed, strategic well-testing from approximately 100 of the over 400 area residents who have retained counsel for representation in this matter has confirmed extensive groundwater contamination, as has well testing conducted by Perdue itself.

cbrockstedt@lawbmf.com
bceryes@lawbmf.com
wfitch@lawbmf.com
ccramer@lawbmf.com
mlegg@lawbmf.com
spratt@lawbmf.com

Counsel for Plaintiffs

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