VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

STATE OF VERMONT, Plaintiff v. 3M COMPANY, et al., Defendants	Docket No. 547-6-19 Cncv

RULING ON MOTIONS TO DISMISS

This case is brought by the State of Vermont against manufacturers of per- and polyfluoroalkyl substances (PFAS). The State alleges that PFAS are toxic chemicals that threaten human health at extremely low levels, and that Defendants are responsible for contamination of drinking water, groundwater and other natural resources in Vermont. Defendant 3M Company (3M) moves to dismiss five of the eight causes of action: those for natural resource damage, design defect, public nuisance, private nuisance, and trespass. 3M does not challenge the claim brought under the state's Groundwater Protection Act, the claim for failure to warn, or the negligence claim.

Defendants EI Dupont Nemours & Co., Chemours Co., Chemours Co. FC, Corteva and Dupont Inc. (jointly Dupont Defendants) all move to dismiss on some of the same grounds and also on the ground that the complaint is insufficiently detailed, and move in the alternative for a more definite statement.

3M's Motion

Grant of a motion to dismiss for failure to state a claim "is proper only when it is beyond doubt that there exist no facts or circumstances[] consistent with the complaint that would entitle the plaintiff to relief. . . [T]he threshold a plaintiff must cross in order to meet our notice-pleading standard is exceedingly low." Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575 (quotation and citations omitted). Such motions "are disfavored and should be rarely granted." Id. In analyzing the motion, the court must "assume as true all factual allegations pleaded by the nonmoving party." Amiot v. Ames, 166 Vt. 288, 291 (1997)(citation omitted). In other words, the question is whether Plaintiff could win at trial if the allegations were proved.

Natural Resources Damage

The State's claim for "natural resources damage" is a claim brought under the common law "public trust doctrine" to protect surface waters, groundwater, and wildlife. The State asserts that this doctrine gives it "the duty to protect public trust resources from threats by private actors, so as to meet 'changing conditions and the [needs] of the public.'" Opposition at 7, quoting State v. Cent. Vt. Ry., 153 Vt. 337, 342 (1989). 3M argues that the doctrine is limited to preserving navigable waterways and the lands beneath them, and addresses only physical encroachments.

3M is correct that the history of the doctrine is grounded in protecting navigable waters. The doctrine may have had its roots in the Magna Carta, is "entrenched in the Vermont Constitution," and "means that navigable waters and the land below them are held in common by the people of this state." City of Montpelier v. Barnett, 2012 VT 32, ¶ 18, 191 Vt. 441. However, the Supreme Court has rejected the idea that navigation is the only focus of the doctrine. It noted in one case involving impacts upon fish that navigation

was "only one of the public rights involved; the other is in the common property in the fish, which it is the duty of the State to safeguard." State v. Malmquist, 114 Vt. 96, 106 (1944). The goal is "to preserve such waters for the common and public use of all." Hazen v. Perkins, 92 Vt. 414, 419 (1918). The rationale behind the doctrine is that "[t]he ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental . . . ." Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 455 (1892).

Public health, as is clear from the current pandemic, is unquestionably of as much—if not more—public concern to the people of Vermont as is navigation. The Barnett case itself discussed the doctrine in the context of regulations directed at protecting drinking water. Barnett, 2012 VT 32, ¶¶ 1–2; *accord* State v. Hess Corp., 20 A.3d 212, 217 (N. H. 2011) (a state has the "responsibility to protect its citizens from toxins in their drinking water"). The Legislature has recognized that groundwater, too, is "held in trust for the public" and that it is "essential to the health, safety and welfare of the people of Vermont . . . ." 10 V.S.A. § 1390. It has also recognized that "the fish and wildlife of Vermont are held in trust by the State for the benefit of the citizens of Vermont . . . ." Id. § 4081(a)(1).[1] In a recent criminal case involving illegal baiting and feeding of deer, Justices Carroll and Eaton referred to wildlife being "held in the public trust" and "Vermonters' continuing stake in the wild resources of our state." State v. Dupuis, 2018

[1] 3M argues that the Legislature's creation of a statutory process for protection of groundwater replaces any otherwise applicable public trust doctrine. *See* 10 V.S.A. §§ 1390, 1410. However, the Legislature expressly stated that it did not intend to "supplant . . . common-law remedies." Id. § 1410(f). The same is true of the statute addressing hazardous materials that damage natural resources, including "fish, wildlife, biota, air, surface water, groundwater, wetlands, drinking water supplies, or State-held public lands." Id. and (e)-(f)(remedies in statute shall not limit common law remedies, and barring double recovery under statute and other remedies).

VT 86, ¶¶ 43, 50, 208 Vt. 196 (Carroll, J. and Eaton J., dissenting). They noted that in an early Vermont case the Court "explained that '[t]he State, the representative of the people, the common owner of all things ferae naturae, not only has the right, but is under a duty, to preserve and increase such common property.'" Id. ¶ 48, quoting State v. Theriault, 70 Vt. 617, 622 (1898); *accord*, State of Ga. v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (In a parens patriae case such as this, "the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.").

While Vermont case law has not delineated the exact parameters of the public trust doctrine, other states have held that it is broader than merely navigable waters. *See, e.g.*, Hess Corp., 161 N.H. at 431 ("The public trust doctrine provides that the government holds public lands, waters and other natural resources in trust for the benefit of its citizens."); In re Water Use Permit Applications, 9 P.3d 409, 447 (Haw. 2000) ("the public trust doctrine applies to all water resources, unlimited by any surface-ground distinction"); Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 495 (Alaska 1988) (based upon state constitution, state has "a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people"). As one commentator has noted, "courts are increasingly likely to view the doctrine as inclusive of important natural resources other than navigable waterways." M. Blumm & A. Paulsen, The Public Trust in Wildlife, 2013 Utah L. Rev. 1437, 1451 (2013).

As the State points out, our Supreme Court has declared as follows:

> The doctrine is not fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit. The very purposes of the public trust have evolved in tandem with the changing public perception of the values and uses of waterways. Nor is the doctrine fixed in its form among jurisdictions, as there is no universal and uniform law upon the subject.

State v. Cent. Vermont Ry., Inc., 153 Vt. 337, 342 (1989) (internal quotations and citations omitted). Given that the trial courts are instructed to "be especially reluctant to dismiss on the basis of pleadings when the asserted theory of liability is novel or extreme"—Ass'n of Haystack Prop. Owners, Inc. v. Sprague, 145 Vt. 443, 447 (1985)—the Central Vermont Railway case mandates that the motion to dismiss on this issue be denied.

Design Defect

3M next seeks dismissal of the State's claim for a design defect. 3M seeks dismissal of this claim on the theory that it lacks a necessary allegation that a reasonable alternative design existed. As the State points out, however broadly the requirement has been adopted elsewhere, Vermont cases do not describe such a requirement. *See* Zaleskie v. Joyce, 133 Vt. 150, 154–55 (1975); Webb v. Navistar International Transportation Corp., 166 Vt. 119, 126–27 (1996); *accord*, A. Twerski & J. Henderson, Jr., Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility, 74 Brook. L. Rev. 1061, 1106 n.203 (2009) ("The issue is still unclear" in Vermont). In any case, the complaint adequately alleges that there were "safer alternatives" available. Complaint ¶¶ 145, 247(k).

Public Nuisance

A public nuisance is "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979). "Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience . . . ." Id. Historically "public nuisances included interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial

mosquitoes . . . ." Id. cmt b. "Redress of the wrong to the entire community is left to its duly appointed representatives." Restatement (Second) of Torts § 821C cmt. a (1979). Thus, for example, the Second Circuit found that New York City had "sufficiently alleged interference with rights common to the general public" when it asserted that "unrestrained emissions of greenhouse gases will increase the temperature in the City, which will in turn increase heat-related deaths, damage the coastal infrastructure, and wreak havoc in residents' daily lives." Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 366 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011).

The State alleges that Defendants created a public nuisance by placing their PFAS products into the stream of commerce in Vermont, knowing that they would escape and contaminate State natural resources and property, including "soils, sediments, groundwater, surface waters, wildlife, and drinking water supplies, and knowing that the products "posed substantial risks to human health." Complaint ¶ 284. The complaint asserts that the nuisance is continuing, as the PFAS is migrating, and that the State has incurred and will incur various costs in remedying the problem. Id. ¶¶ 289–90. The State also seeks injunctive relief to abate the nuisance. Id. at 64.

3M argues that the complaint lacks a necessary allegation that the Defendants controlled the PFAS at the time of the nuisance, and could not so allege because Defendants relinquished control when they sold the products. Motion at 8. 3M cites no Vermont caselaw supporting this argument, and the State accurately points to language in the Restatement suggesting that a defendant may be held liable for harm that continues after that defendant's actions have ceased, and that "substantial participation" in a chain of actions can be sufficient. Restatement (Second) of Torts § 834 and cmts. d and e (1979). Other courts have rejected similar claims by manufacturers. *See, e.g.,* In re Methyl

Tertiary Butyl Ether (MTBE) Prod. Liab. Litig., 725 F.3d 65, 121 (2d Cir. 2013). This court has also recently rejected such a claim. State v. Cardinal Health, No. 279-3-19 Cncv, Entry Regarding Motion to Dismiss at 8–9 (May 12, 2020). For purposes of a motion to dismiss, the pleading is sufficient.

Next 3M argues that this court should follow Judge Teachout's ruling in State of Vermont v. Atlantic Richfield, No. 340-6-14 Wncv (July 31, 2019), by holding that this is essentially a products liability claim and not a nuisance claim. The court is not persuaded. First, while that decision was concerned with duplicate claims—Atl. Richfield at 13—parties are entitled to raise multiple, even conflicting, theories of a case. While they cannot recover duplicative relief, and may have to elect which claims to proceed on at trial, there is no bar to pleading alternative theories in a complaint. V.R.C.P. 8(a)("Relief in the alternative or of several different types may be demanded"); Brown v. City of New York, No. 02 CV 6337 NG LB, 2005 WL 758781, at *4 (E.D.N.Y. Mar. 30, 2005) ("plaintiff is free to plead alternate theories of liability, even if those theories are inconsistent").

Second, the other concern raised in that ruling was that allowing the nuisance claim would "result in a substantial enlargement of the statute of limitations for parallel claims" and would "eviscerate the policy underlying the statutes of limitations for the non-property claims based on the same facts." Atl. Richfield at 13-15. That is not an issue raised here.

3M also raises the question of whether the State can recover money damages for injuries to public resources—as opposed to properties *owned* by the State—rather than merely abatement of the nuisance. 3M cites two cases for this proposition. *See* In re Lead Paint Litig., 924 A.2d 484, 499 (N.J. 2007) ("a public entity which proceeds against the one in control of the nuisance may only seek to abate, at the expense of the one in control

of the nuisance"); Atl. Richfield, *supra*. However, other courts have reached the opposite conclusion. *See, e.g.*, State of Maine v. M/V Tamano, 357 F. Supp. 1097, 1101–02 (D. Me. 1973) (citing cases). The general rule is that if a plaintiff can prove a "special injury," damages can be recovered in a public nuisance case. *See* Baxter v. Winooski Tpk. Co., 22 Vt. 114, 119 (1849) ("whenever a party has sustained distinct injury, or loss, peculiar to himself, of the nature stated in the declaration, from the wrongful act, or neglect, of another, even though it constitute a public nuisance, he is entitled to recover in an action for his damages"). If the State expended funds to clean up a nuisance, it may potentially recover for those expenditures. The decision recently submitted by the Dupont Defendants suggests that this debate may essentially boil down to semantics. New Jersey Dept. of Env. Prot. v. Hess Corp., No. A-2893-18T2, 2020 WL 1683180 * 6 (N.J. App. Div. April 7, 2020). The court there held that the State did not have the right to recover "damages" for public nuisance, only abatement, but noted that the latter could include costs expended by the State in abating the nuisance—essentially what we are referring to here as damages.

In sum, the court cannot say that it is "beyond doubt that there exist no facts or circumstances[] consistent with the complaint that would entitle the plaintiff to" damages. Bock, 2008 VT 81, ¶ 4. In any case, this goes to the remedy if the State succeeds, not whether it has stated a substantive claim. For both reasons, this is not a basis for dismissal.

Private Nuisance

The private nuisance claim is distinct, asserting that "the State's property and public trust resources" including state parks, water bodies, wells and groundwater, have been and continue to be contaminated. Complaint ¶ 294. 3M makes the same "control"

and "it's a products liability claim" arguments addressed above, and the court reaches the same conclusion.

Next, the company argues that this court should follow the Washington Superior Court in holding that private nuisance claims can be asserted only if the nuisance arises from one landowner interfering with a neighboring property-owner's use of its land. The court agrees that the interference must be to land. "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts § 821D (1979). However, that does not mean the harm must originate next door. The court fails to see why a person flying over in a small plane and dumping chemicals on my land should not be as liable for the harm as if she poured them while standing on her adjoining lot, and 3M cites noting to suggest such a distinction. The Restatement suggests otherwise. Restatement (Second) of Torts § 822 and cmt. b (1979) ("One is subject to liability for a private nuisance if . . . his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land," and "private nuisance has reference to the interest invaded and not to the type of conduct that subjects the actor to liability[.]"). Judge Teachout's decision acknowledged that "Vermont courts have not directly addressed the issue"—Atl. Richfield at 12—and this court finds that it is therefore not a basis for dismissal.

3M next argues that the State cannot bring a claim for harm to property it does not own. Motion at 13. That argument overlooks the role of the State in a *parens patriae* claim, in which it asserts the rights of its citizens. "*Parens patriae* . . . does not require state ownership of such resources." Hess, 20 A.3d at 216. Thus, the court in Hess found that the State was "not precluded from recovering damages related to MTBE contamination in a privately owned well." Id. The court noted that "the fact that MTBE is

detected in a privately owned well does not necessarily preclude the State from pursuing damages for the costs of investigating, monitoring, treating, remediating, replacing, or otherwise restoring such wells." Id. at 221. While there may be issues at trial regarding the scope of such damages, the claim is not subject to dismissal.

Trespass

Finally, 3M challenges the cause of action for trespass, which asserts claims both in a *parens patriae* capacity and for harm to lands owned by the State. 3M argues that the claim fails for lack of a tangible invasion on land, lack of control of the instrumentality of harm, and because the State cannot recover for trespass on lands owned by others.

As 3M notes, the Vermont Supreme Court considered, noted that "Vermont law is silent on this issue," and left for another day the question of whether "intangible" materials such as airborne particles can be the basis for a trespass claim. John Larkin, Inc. v. Marceau, 2008 VT 61, ¶¶ 13–14, 184 Vt. 207. Given that, this court cannot say that such a claim inevitably would fail. It is thus not a basis for dismissal even if chemicals such as PFAS are considered intangible—a question the court need not reach.

3M notes that any trespass occurred when purchasers of its products released them in Vermont, and therefore it was not in control of the products at the time of any trespass. However, "it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." Restatement (Second) of Torts § 158 cmt. i (1965). Courts have reached differing conclusions on how this doctrine applies to manufacturers and distributors of products that later cause harm. *Compare, e.g.,* City of Bloomington v. Westinghouse Elec. Corp., 891 F. 2d 611, 615 (7th Cir. 1989) (ruling that there is no trespass liability for sellers after the product has left

their ownership and possession) *with* In re MTBE Prod. Liab. Litig., 725 F.3d at 120 (upholding jury finding that refiner and supplier of gasoline was liable for contamination of groundwater because of substantial certainty this would result from the product's use). Vermont case law does not resolve the question, and thus the court cannot say it has no chance of success. The State could potentially demonstrate at trial that 3M had such knowledge, and so alleges. Complaint ¶ 307.

The last issue is whether, with regard to properties not owned by the State, it can overcome the need to show that it has exclusive possession of the land trespassed upon. Motion at 36-39. "[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land . . . ." John Larkin, 2008 VT 61, ¶ 8 (quotation and citations omitted). Thus, argues 3M, because the State does not have the exclusive right to use or control the land of the public at large, or of individual citizens on whose behalf it brings this claim, the claim fails. The State responds that this would mean no one has the ability to bring a trespass claim for "certain public trust resources." Opp. at 35.

To the extent that the resources at issue are owned by the State, such as state parks, the State certainly can proceed on this claim. For privately owned lands, a *parens patriae* claim does not fit because such claims are those asserted by the State on behalf of all citizens, not individual citizens. The harder question is who may assert a trespass claim for contamination to such resources as groundwater. While those are resources not owned by the State, they are also not owned by individual property holders. They are resources available to all.

The State relies on the rights of trustees to assert claims on behalf of the trust, but the trust must have a claim to start with for a trustee to assert. If the groundwater is held in trust for all the people of the State, and all may use it, it cannot be said to be "exclusively

possessed" by the State itself. Although the State argues that someone must be able to bring this claim, the court does not agree. There is no requirement that every situation fit into the box of "trespass." While the State points to cases elsewhere that have found the interest of a state to be sufficient to assert such a claim, this court is not persuaded. One either has exclusive possession of land or one doesn't. Some of the cases the State cites rely on statutory authority not cited here, such as State of Oregon v. Monsanto Co., No. 18CV00540 at 16-17 (Or. Cir. Jan. 9, 2019), or found "absolute title" in the state, which is not argued here. State ex rel. Rice v. Stewart, 184 So. 44, 50 (Miss. 1938). The court concludes that because of the lack of exclusive possession, the claims regarding lands not owned by the State do not fit the definition of trespass. *Accord*, In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., No. 08 CIV. 312 SAS, 2014 WL 840955, at *3 (S.D.N.Y. Mar. 3, 2014); Atlantic Richfield at 6. The motion is therefore granted on this claim except as to lands owned by Vermont.

Dupont Defendants' Motion to Dismiss

All other defendants aside from 3M join in the Dupont Defendants' Motion # 16, which seeks to dismiss all but Count 9 of the complaint or, in the alternative, have the court order submission of a more definite statement.

The first argument asserted is that the complaint is insufficiently specific in multiple ways; this is the same basis for the request for a more definite statement. While the court agrees that mere length does not establish that a pleading is thorough, this complaint is more specific than many pleadings that come through the transom here in Vermont. Regardless of standards elsewhere, which might make this court's life easier, it is more than adequate under Vermont's generous pleading rules. The motions to dismiss and for a more definite statement are therefore both denied.

Motion 16 also asserts some of the same substantive arguments addressed above with regard to 3M's motion; the court's ruling need not be restated. However, this motion does raise some arguments not put forth by 3M, as follows.

First, the Dupont Defendants argue that (with the exception of the trespass claim) alleging contamination of water or other resources is not enough to assert an injury without details as to how that contamination has caused actual harm. Motion at 31-35. The case they rely upon, however, is a ruling on summary judgment. State v. Howe Cleaners, Inc., 2010 VT 70, 188 Vt. 303. It is thus a case about proof, not a case about pleading. In any case, the State generally alleges injuries—Complaint ¶¶ 183–85, 203, 216, 224—and the details of those injuries are a proper subject for discovery but not a mandated element of the complaint.

The motion next argues some of the same points about nuisance as in 3M's motion, but adds some distinct arguments. The first is that other than land owned by the State, it cannot assert a private nuisance claim over resources available to the entire citizenry. The motion cites the Restatement for this proposition:

> Uses of land are either private or public. The uses that members of the public are privileged to make of public highways, parks, rivers and lakes, are "public" as distinguished from "private." By private use is meant a use of land that a person is privileged to make as an individual, and not as a member of the public.

Restatement (Second) of Torts § 821D cmt. c (1979). As with 3M's motion above, the court concludes that a claim made by the State in its *parens patriae* capacity can assert the rights of its citizens to seek abatement of a broadly-disseminated nuisance. Groundwater, for example, is not limited to a particular property owner—it is disseminated throughout the state.

Dupont Defendants also argue that the *parens patriae* and public trust doctrines merely grant standing to the State to assert other substantive claims. The State proffers only a paragraph in response to this argument. Opp. at 33. Our sister state of New Hampshire has stated that while "*parens patriae* is a concept of standing," the public trust doctrine "is its own cause of action . . . ." Hess, 20 A.3d at 216 (quotation omitted). However, as Defendants point out, that was merely dictum and relied solely upon one journal article—by one of the State's lawyers here—which itself contained contradictory statements and cited no cases for this proposition. A. Kanner, The Public Trust Doctrine, Parens Patriae, and the Attorney General As the Guardian of the State's Natural Resources, 16 Duke Envtl. L. & Pol'y F. 57, 62 n. 29 and 111 (2005). While no Vermont Supreme Court case is on point, the State offers no cases beyond Hess's dictum to support the idea that either the public trust or the *parens patriae* doctrine are substantive causes of action. Defendants, on the other hand, point to numerous jurisdictions holding the contrary. On a more basic level, if the State were correct, what would the elements of its claim be? What would it have to prove to win? To what source would the court look for these answers? There must be a recognized cause of action to litigate. Courts do not make such things up as we go along.

The doctrines at issue give the State the right to assert the substantive claims raised in other counts of the complaint—such as nuisance or trespass—but they do not create new substantive clams. Thus, to the extent that the State seeks to assert a freestanding cause of action in Count 1, the motion to dismiss that count is granted. The doctrines, however, properly underly the State's other claims.

Corteva and Dupont Inc's Motion to Dismiss

Two defendants, Corteva, Inc. and Dupont De Nemours, Inc. (New Dupont), separately move to dismiss on grounds distinct to them. They note that they did not exist until 2019, several years after the manufacture and use of PFAS as alleged in the complaint, and that there are insufficient allegations to support any claim against them. Corteva also argues that a parent corporation is not liable for the acts of its subsidiaries unless it "so dominates and controls the subsidiary" that the separate entity is "essentially disregarded . . . ." Ascension Tech. Corp. v. McDonald Invs., Inc., 327 F. Supp. 2d 271, 277–78 (D. Vt. 2003).

The State responds that it is neither seeking to pierce the corporate veil nor attributing subsidiary acts to a parent. Instead, it alleges that both entities have successor liability because they expressly or impliedly took on both assets *and liabilities* of the earlier entities. Ostrowski v. Hydra-Tool Corp., 144 Vt. 305, 307 (1984). The complaint alleges that these defendants both "succeeded to DuPont PFAS liabilities," that Corteva holds certain liabilities of the earlier agricultural and nutritional businesses, and that New Dupont holds the balance of the liabilities. Complaint ¶¶ 6, 29–30. Those allegations, however general, adequately state a claim for successor liability under Vermont's generous pleading standards.

Order

3M's motion to dismiss (Motion # 13) is denied except that the trespass claim is dismissed (as to all Defendants) with regard to all but lands owned by the State. The Dupont Defendants' motion to dismiss (Motion 16) is denied except that (a) the trespass claim is dismissed with regard to all but lands owned by the State, and (b) to the extent that Count 1 seeks to assert a separate substantive cause of action, it is dismissed as to all

Defendants. The motion for a more definite statement (Motion # 17) is denied. The Corteva/Dupont motion to dismiss (Motion # 18) is denied.

Electronically signed on May 28, 2020 at 11:04 AM pursuant to V.R.E.F. 7(d).

Helen M. Toor
Superior Court Judge