

NORTH CAROLINA  
COUNTY OF WAKE

GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
25CV034830-910

NORTH CAROLINA STATE UNIVERSITY,

Plaintiff,

v.

MONSANTO COMPANY, and  
PHARMACIA LLC,

Defendants.

**BRIEF IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS  
AND MOTION TO STAY**

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Defendants Monsanto Co. and Pharmacia LLC (collectively, “Defendants”) move to dismiss Plaintiff North Carolina State University’s (“NC State”) First Amended Complaint (Oct. 31, 2025) (“Compl.”) and, alternatively, for a stay of this action.

### **INTRODUCTION**

Between 1935 and 1977, the former Monsanto Company (“Old Monsanto”) manufactured and sold chemicals called polychlorinated biphenyls (“PCBs”) to highly sophisticated industrial manufacturing companies. These companies, in turn, incorporated PCBs into a variety of products—including construction materials like adhesives, caulk, and paint—for their durability and fire resistance. Plaintiff NC State intentionally used PCB-containing building materials when it constructed Poe Hall, one of NC State’s campus buildings, between 1968 and 1970. In the five-and-a-half decades since Poe Hall was built, NC State apparently never replaced those PCB-containing materials. NC State now brings this suit against Defendants as Old Monsanto’s alleged successors, seeking to shift the blame to Defendants for the presence of PCBs at Poe Hall.

NC State’s complaint attempts eleven state-law claims, asserting that Old Monsanto is liable under: (1) product-liability theories for allegedly negligently designing PCBs (Counts 3, 5) and negligently failing to warn of risks (Counts 4, 5); (2) property-law theories for allegedly creating an actionable nuisance at Poe Hall (Counts 1-2) and trespassing on NC State’s property (Count 6); and (3) misrepresentation-based theories for allegedly making fraudulent and negligent misrepresentations (Counts 7-9). Beyond those tort claims, the complaint asserts a violation of the North Carolina Oil Pollution and Hazardous Substances Control Act (the “Oil Act” or the “Act”), alleging that Old Monsanto’s lawful sale of PCBs in the stream of commerce constitutes an unlawful “discharge” of hazardous substances “upon the waters or lands of the State” (Count 10). NC State also seeks indemnification (Count 11) from Defendants for potential future liability in PCB-exposure suits that the university may face and for all costs “incurred or to be incurred” for

complying with an allegedly ongoing federal Environmental Protection Agency (“EPA”) investigation—all while repeatedly denying “that any person has sustained personal injury as a result of exposure at Poe Hall.” Compl. ¶ 109; *see id.* ¶¶ 85, 125.

NC State’s claims are time-barred and meritless, and courts have consistently rejected similar suits seeking to hold Defendants liable for the alleged presence of PCBs in buildings. *See Town of Westport v. Monsanto Co.*, 2017 WL 1347671 (D. Mass. Apr. 7, 2017), *aff’d*, 877 F.3d 58 (1st Cir. 2017); *Town of Lexington v. Pharmacia Corp.*, 133 F. Supp. 3d 258 (D. Mass. 2015). For a host of reasons, this Court should reach the same conclusion.

*First*, NC State’s lawsuit is time-barred twice over. Both North Carolina’s product-liability statute of repose and the applicable statutes of limitations preclude the university’s claims. A textbook product-liability action, NC State’s suit is governed by a six-year repose period that runs from the alleged product’s initial purchase. Here, any relevant purchase of PCB-containing materials would have occurred before 1970, when NC State completed Poe Hall’s construction. The repose period has long expired.

The applicable statutes of limitations—typically, three years from each claim’s accrual—also have expired. NC State’s claims accrued when it was allegedly injured by the incorporation of PCB-containing building products—again, no later than the 1970s. NC State cannot evade those limitations periods by invoking the discovery rule to toll the statutes of limitations until the date NC State *should have* known of its alleged injuries. On the complaint’s own telling, that date was more than three years ago. And a separate, ten-year statutory repose period imposes an outer limit on any tolling permitted by the discovery rule. On either repose or limitations grounds, NC State’s suit comes over five decades too late.

*Second*, NC State impermissibly seeks to recover in tort for purely economic losses. North Carolina’s economic-loss rule treats property damage as an unrecoverable economic loss when it stems entirely from an allegedly defective component part. Here, NC State alleges only damage to Poe Hall caused by PCB-containing building materials, an allegedly defective component part. That is not a cognizable tort theory.

*Third*, NC State cannot state the essential elements of any claim. As a threshold matter, NC State fails adequately to allege that Old Monsanto’s conduct manufacturing, designing, and selling raw PCBs proximately caused its alleged injuries. Old Monsanto did not manufacture the building materials that NC State actually used in constructing Poe Hall. And the intervening actions of third parties in manufacturing, distributing, and installing *those* materials—as well as NC State’s apparent decision not to replace them at any time since their original installation—render remote any role allegedly played by Old Monsanto. That alone compels dismissal.

Each of NC State’s product-liability theories is also flawed on its own terms. The design-defect claim fails because NC State impermissibly seeks to impose liability for a chemical product’s inherent chemical properties, and it cannot identify any reasonable alternative design for PCBs. The failure-to-warn claim is equally flawed. On NC State’s own allegations, Old Monsanto’s warnings were adequate as a matter of law. Regardless, the complaint alleges that PCBs already posed “generally recognized hazards” in the 1960s, Compl. ¶ 125, and there is no duty to warn of obvious risks. Credited solely for purposes of this motion to dismiss, NC State’s own allegation defeats its claim. And NC State’s negligence claim is merely derivative of its product-liability claims; it fails for the same reasons.

NC State cannot overcome those obstacles by repackaging its product-liability theories as nuisance or trespass claims. The doctrines of nuisance and trespass protect a plaintiff’s interests

in property (or, in the case of public nuisance, the community’s interest in public rights). But those doctrines have no application where a property owner has voluntarily brought a product onto its property. Trespass requires an *unauthorized* entry *by the defendant*, and NC State here authorized any entry by voluntarily incorporating PCB-containing materials into Poe Hall. Regardless, no unauthorized entry could be attributed to Old Monsanto: It lacked control over PCBs after they were sold to third-party industrial manufacturers, which made the commercial products at issue before they entered the stream of commerce. The same principle forecloses NC State’s nuisance claims, which likewise require control of any alleged nuisance-causing property. And the public-nuisance claim independently fails because NC State does not and cannot identify a violation of any public right.

NC State’s attempted pivot to misrepresentation-based theories for fraud, negligent misrepresentation, and violations of the Unfair Trade and Deceptive Practices Act fares no better. NC State does not come close to pleading with particularity actual reliance on any false representation of fact, as each of those claims requires.

NC State’s invocation of the Oil Act fails in at least three ways. The Oil Act does not provide NC State a cause of action for damages based on alleged discharges upon land. Old Monsanto’s lawful sale of PCB products to third-party manufacturers for integration into building materials is not an unlawful “discharge” within the meaning of the Act. And, in any event, the Act prohibits unlawful discharges only by persons “using, transferring, storing, or transporting oil or other hazardous substances *immediately prior* to a discharge.” N.C. Gen. Stat. § 143-215.77(5) (emphasis added). Here, Old Monsanto merely sold raw PCBs in the stream of commerce—giving up control of PCBs before they were even incorporated into the PCB-containing building materials ultimately used at Poe Hall and that allegedly were released from those materials decades later.

That leaves only NC State’s baseless request for indemnification of potential future liabilities and of the alleged costs of EPA-mandated PCB remediation. North Carolina law limits indemnification to recovery against a joint tortfeasor for the liable party’s overpayment of a judgment to a third party. But Defendants are not tortfeasors to the EPA or to claimants against NC State. And far from overpaying any judgment, NC State continues to deny liability for any personal injury from PCBs at Poe Hall.

*Finally*, if this Court does not dismiss the suit outright, it should stay this case pending the EPA’s exercise of its primary jurisdiction. The complaint alleges that NC State is in ongoing regulatory engagement with the EPA, which has primary jurisdiction under the Toxic Substances Control Act of 1976 (“TSCA”) over efforts to remediate and abate PCB contamination. The Court should not short-circuit that process and prematurely adjudicate claims for relief that the EPA may render moot.

### **BACKGROUND**

From 1935 until the 1970s, Old Monsanto lawfully manufactured and sold PCBs for a variety of common applications. Compl. ¶¶ 19, 32. Companies in the building industry, for instance, deemed PCBs useful for their chemical stability, fire resistance, and electrical insulation, *id.* ¶¶ 24, 27-28, and those companies purchased and independently incorporated those chemicals into building materials like caulks, sealants, mastics, adhesives, and paints, *id.* ¶¶ 53, 65, 67.<sup>1</sup>

Poe Hall is a seven-story building at NC State University constructed between 1968 and 1970, when PCB-containing materials were in “wide circulation among” the building industry. Compl. ¶ 69. Poe Hall was allegedly constructed using “building materials containing PCBs—

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<sup>1</sup> Defendants accept the well-pleaded factual allegations of the complaint as true solely for purposes of this motion to dismiss and do not thereby waive any rights.

including caulks, adhesives, mastics, and HVAC duct sealants” that NC State or its architects, engineers, and contractors “specified and installed.” *Id.* ¶¶ 69-70.

NC State alleges that Old Monsanto’s marketing materials in the 1940s, ’50s, and ’60s described PCBs as “non-volatile at normal temperatures” and “suitable for use in building caulks, sealants, mastics, adhesives, and paints.” Compl. ¶¶ 57, 68 (internal quotation marks omitted). The complaint does not allege that NC State or its contractors relied on any specific statement in building Poe Hall nearly a decade later. To the contrary, NC State alleges that “at the time Defendants’ PCB and PCB-containing products were manufactured,” *id.* ¶ 108, potential human health risks posed by PCBs were “generally recognized,” *id.* ¶ 125, and “were known or reasonably knowable . . . in light of regulatory and public health guidance,” *id.* ¶ 114. NC State nonetheless “allow[ed] PCB-containing materials to be incorporated into Poe Hall.” *Id.* ¶ 193.

Old Monsanto voluntarily ceased manufacturing the PCB formulations at issue here, called Aroclors, in 1971. Compl. ¶ 23. Five years later, Congress passed TSCA, which largely precluded PCB production in the United States effective January 1, 1978. Compl. ¶ 32; 15 U.S.C § 2605(e)(2)(A). Pursuant to TSCA, the EPA promulgated regulations requiring the remediation and disposal of building materials containing PCBs at concentrations greater than 50 parts per million (“ppm”) in 1979. *Id.* ¶ 32; *see* 40 C.F.R. pt. 761.

Nearly four decades later, in 2018, NC State tested Poe Hall’s exterior and allegedly confirmed the presence of PCBs in its building materials. Compl. Ex. C, at 1 (referencing and linking to report containing 2018 findings, <https://www.ncsu.edu/wp-content/uploads/2024/06/Indoor-Env-Investigation-Report-Second-Phase.pdf>) (attached hereto as Ex. A). Apparently, despite PCBs’ allegedly “generally recognized hazards,” *id.* ¶ 125, NC State had not replaced Poe

Hall's PCB-containing materials at any time after 1970. NC State does not allege that it closed Poe Hall in 2018.

NC State's complaint does not mention the 2018 testing referenced in exhibits to the complaint. Rather, NC State alleges that it identified PCBs at Poe Hall "[a]fter questions arose *in August 2023* regarding Poe Hall's environmental conditions." Compl. ¶ 33 (emphasis added). According to NC State, a further investigation revealed PCBs in "bulk materials associated with the building's HVAC components." *Id.* NC State ultimately closed Poe Hall in November 2023. *Id.* ¶ 34. The complaint alleges that subsequent testing in 2024 "confirmed the presence of PCBs" in a few locations, "primarily Aroclor 1262 in a gold-colored sealant used inside HVAC supply ducts" and in "window caulking." *Id.* ¶¶ 36-37.

In early 2024, NC State submitted an investigative report to the EPA. Compl. ¶ 41. In a June 2024 letter appended to the complaint, the EPA responded by recommending only that NC State "develop a plan and schedule for the removal of building materials and products containing PCBs [greater than or equal to] 50 ppm and any PCB-contaminated substrates[.]" Compl. Ex. A at 1.

Now, five-and-a-half decades after Poe Hall was built, NC State has brought suit against Defendants as Old Monsanto's purported successors. The amended complaint asserts 11 claims "arising from [Old] Monsanto's manufacture, promotion, sale, and furnishing of PCBs used in building materials" at Poe Hall. Compl. ¶ 3. Notwithstanding the EPA's targeted June 2024 recommendation, *id.* Ex. A at 1, NC State claims that it "must essentially demolish Poe Hall and replace it with an entirely new building," *id.* ¶ 42. NC State also maintains that it is the subject of PCB-exposure suits brought by employees of NC State. *Id.* ¶ 227. But NC State does not concede

that “any person sustained personal injury as a result of exposure at Poe Hall.” *Id.* ¶ 109; *see id.* ¶¶ 85, 125.

### **GOVERNING STANDARDS**

A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.” *Mauck v. Cherry Oil Co.*, 388 N.C. 325, 332, 921 S.E. 2d 109, 115 (2025). “Dismissal is proper when the complaint, on its face, shows that no law supports the claim, that it lacks facts needed to make a good claim, or that the facts alleged defeat it outright.” *Id.* at 332, S.E. 2d at 115-16 (internal quotation marks and brackets omitted).

“[W]hen ruling on [a] Rule 12(b)(6) motio[n],” “a court may properly consider documents which are the subject of a plaintiff’s complaint and to which the complaint specifically refers even though they are presented by the defendant.” *Oberlin Cap., L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E. 2d 840, 847 (2001). Although the Court must “accept well-pleaded facts as true” in ruling on a motion to dismiss, it does “not credit bare legal conclusions or unwarranted deductions of fact.” *Mauck*, 388 N.C. at 333, 921 S.E. 2d at 116 (internal quotation marks omitted).

### **ARGUMENT**

NC State’s suit improperly seeks to shift blame to Defendants for NC State’s decisions to use PCB-containing materials in constructing Poe Hall and then not to remove them in the 55 years since. NC State’s claims lack merit and are time-barred. Other courts have rejected similar attempts to impose liability on Defendants for the presence of PCBs in buildings. *Westport*, 2017 WL 1347671, at \*12; *Lexington*, 133 F. Supp. 3d at 273. This Court should similarly dismiss the complaint with prejudice or, at minimum, stay the case pending the EPA’s exercise of its primary jurisdiction.

**I. NC State’s claims are time-barred.**

North Carolina’s statutes of repose and limitations “set an expiration date” for civil claims. *Christie v. Hartley Const., Inc.*, 367 N.C. 534, 538, 766 S.E. 283, 286 (2014). A “statute of limitations or repose defense” should be decided on a motion to dismiss “if it appears on the face of the complaint that such a statute bars the claim.” *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E. 2d 784, 786 (1994). That is the case here: The complaint alleges facts showing that NC State’s claims are expired.

**A. NC State’s claims are barred by the statute of repose.**

A statute of repose poses “an unyielding and absolute barrier that prevents a plaintiff’s right of action even before [the] cause of action may accrue.” *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E. 2d 469, 475 (1985). Designed to promote finality, repose periods run “automatically” upon the occurrence of a specified event, regardless of when the claim accrues or when the plaintiff “discover[s]” its injury. *Christie*, 367 N.C. at 539, 766 S.E. at 286. The applicable product-liability repose period here bars NC State’s claims across the board.

North Carolina’s product-liability statute of repose bars product-liability actions “brought more than six years after the date of initial purchase for use or consumption” of the alleged product. N.C. Gen. Stat. § 1-50(a)(6) (2008); see *Robinson v. Bridgestone/Firestone N. Am. Tire, L.L.C.*, 209 N.C. App. 310, 314, 703 S.E. 2d 883, 314 (2011). “[E]nacted with Chapter 99B,” North Carolina’s product-liability statute, Section 1-50(a)(6) “cover[s] those actions to which that chapter applies”—*i.e.*, ““any action brought for . . . property damage caused by or resulting from the manufacture, . . . design, formulation, . . . warning, instructing, marketing, selling, advertising . . . or labeling of any product.”” *Bernick v. Jurden*, 306 N.C. 435, 446 & n.5, 293 S.E. 405, 413 & n.5 (1982) (emphasis added) (quoting N.C. Gen. Stat. § 99B-1). The six-year repose period thus

covers “the multiplicity of claims that can arise out of a defective product,” regardless of how the claim is labeled. *Colony Hill Condo. I Ass’n v. Colony Co.*, 70 N.C. App. 390, 396, 320 S.E. 273, 277 (1984); *see Vogl v. LVD Corp.*, 132 N.C. App. 797, 802, 514 S.E. 113, 116 (1999) (negligence); *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 138 N.C. App. 70, 75, 138 S.E. 321, 325-26 (2000) (breach of warranty).<sup>2</sup>

This is a textbook “products liability action” under Chapter 99B. NC State claims “property damage caused by or resulting from” the alleged “manufacture,” “design,” or “warning[s]” of PCBs. *Bernick*, 306 N.C. at 446 n.5, 293 S.E. 2d at 413 n.5 (quoting N.C. Gen. Stat. § 99B-1). In NC State’s words: “NC State asserts claims arising from [Old] Monsanto’s manufacture, promotion, sale, and furnishing of PCBs used in building materials that contaminated Poe Hall,” Compl. ¶ 3, and this “action” expressly “seeks damages . . . against Defendants for [PCB] contamination” at Poe Hall, *id.* ¶ 1. NC State’s eleven claims uniformly rely on that basic premise. *See id.* ¶ 83 (public nuisance); ¶¶ 101-02 (private nuisance); ¶ 108 (design defect); ¶ 124 (failure to warn); ¶ 148-49 (negligence); ¶ 172 (trespass); ¶¶ 183, 185 (unfair and deceptive trade practices); ¶ 195 (fraud); ¶¶ 202, 207 (negligent misrepresentation); ¶¶ 217, 222 (Oil Act); ¶ 229 (indemnity).

The six-year product-liability statute of repose bars NC State’s complaint. Poe Hall’s construction was completed by October 1, 1970. Compl. ¶ 30. The initial purchase and delivery of any PCBs used in PCB-containing construction materials that NC State used at Poe Hall occurred no later than that date—and in reality would have occurred much earlier. NC State’s six-

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<sup>2</sup> Although Section 1-50(a)(6)’s six-year repose provision was repealed on October 1, 2009, it continues to apply to actions based on products “first delivered or purchased before” that date. *Weiss v. Cont’l Aerospace Techs., Inc.*, 298 N.C. App. 293, 296-97, 914 S.E. 2d 66, 69 (2025).

year window to file suit thus closed no later than October 1, 1976. Its suit, therefore, comes nearly five decades too late.

This case exemplifies the finality concerns that animate North Carolina’s product-liability statute of repose. With the “number of suits being brought against manufacturers . . . increasing during” the 1970s, the General Assembly “sought to curtail such suits” by enacting Section 1-50(a)(6) and to foreclose potential plaintiffs from “bring[ing] a product liability action within an indefinite period of time after the product reaches the stream of commerce.” *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 55, 332 S.E. 2d 67, 73-74 (1985) (internal quotation marks omitted). These concerns apply with special force to “older products,” *id.* at 55, 332 S.E. at 74—such as PCBs, which Old Monsanto stopped manufacturing in the 1970s.

NC State cannot sidestep this straightforward application of North Carolina law by invoking the common-law doctrine of *nullum tempus*. In some circumstances, *nullum tempus* exempts state entities from otherwise applicable time bars for suits brought in a sovereign capacity to vindicate public rights. That doctrine does not apply, however, when the pertinent statute of repose abrogates *nullum tempus* by “expressly includ[ing] the State.” *Town of Littleton v. Layne Heavy Civ., Inc.*, 261 N.C. App. 88, 91, 819 S.E. 101, 103 (2018) (internal quotation marks omitted). Here, the product-liability statute of repose expressly “applies to actions brought . . . by the State or a political subdivision of the State,” N.C. Gen. Stat. § 1-50(b)—a provision enacted to “repea[l] the common law doctrine of *nullum tempus*.” S.L. 1995-291, § 2. *Nullum tempus* thus cannot save NC State’s claims from dismissal under the product-liability statute of repose.

**B. NC State’s claims are barred by the applicable statutes of limitations.**

NC State’s claims are independently time-barred by the applicable statutes of limitations. A limitations period for “a particular claim begins running when that claim accrues, which generally occurs at the moment a complete and present cause of action exists to allow a plaintiff

to file suit and obtain relief.” *Honeycutt v. Weaver*, 257 N.C. App. 599, 604, 812 S.E. 859, 862 (2018).

With one exception, each of NC State’s claims is governed by N.C. Gen. Stat. § 1-52’s three-year limitations period. *See* N.C. Gen. Stat. § 1-52(2) (“liability created by statute, either state or federal”); (3) (trespass); (9) (fraud); (16) (catch-all for “physical damage to claimant’s property”).<sup>3</sup> NC State’s statutory unfair trade practices claim is subject to a four-year limitations period that runs from the date of an alleged violation. *Id.* § 75-16.2.

NC State brought this suit more than three (or four) years after the date its claims accrued. The complaint alleges that Old Monsanto stopped manufactured PCBs in the United States in 1977, Compl. ¶ 27, and that it stopped manufacturing the primary PCBs allegedly found in Poe Hall (Aroclor 1262) several years before that, in 1971, *id.* ¶¶ 22-23, 36-37. NC State further alleges that Poe Hall was constructed “between approximately 1968 and 1970,” and that Old Monsanto’s allegedly actionable marketing statements were made and “in wide circulation” during the same period. *Id.* ¶ 69. On the most charitable view, any allegedly actionable conduct ceased by 1970—and certainly no later than 1977, when Old Monsanto stopped manufacturing PCBs altogether. *Id.* ¶ 27.

NC State may argue that Section 1-52(16)’s discovery rule tolls the limitations period until the date the property damage became “apparent or ought reasonably to have become apparent to

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<sup>3</sup> *See Wilson v. McLeod Oil Co.*, 327 N.C. 491, 511, 398 S.E. 586, 596 (1990) (applying Section 1-52 to claims under the Oil Act and for nuisance); *Dickerson v. CRC Indus., Inc.*, 2025 WL 1981434, at \*2 (E.D.N.C. July 16, 2025) (same for design defect); *Garner v. Vradelis*, 2009 WL 10688029, at \*3 (E.D.N.C. Aug. 31, 2009) (same for failure to warn); *Anderson v. WMCI Charlotte II, LLC*, 297 N.C. App. 731, 297 S.E. 2d 309 (2025) (unpublished) (same for negligence); *Cebula v. Givens Ests., Inc.*, 235 N.C. App. 217, 763 S.E. 2d 338 (2014) (unpublished) (same for fraud and misrepresentation); *Ingram v. Smith*, 16 N.C. App. 147, 152, 191 S.E. 390, 394 (1972) (same for implied indemnity).

the claimant, whichever event first occurs.” N.C. Gen. Stat. § 1-52(16). But Section 1-52(16) tempers its discovery rule with its own statute of repose: That repose provision bars any claim for property damage ten years after “the last act or omission of the defendant giving rise to the cause of action,” *regardless of* when the injury was discovered. *Id.*; *see Misenheimer v. Burris*, 360 N.C. 620, 623-24, 637 S.E. 2d 173, 176 (2006). Because any allegedly actionable conduct here occurred more than ten years ago, the discovery rule is irrelevant.

In any event, NC State’s alleged injuries “ought reasonably to have become apparent” through the exercise of reasonable diligence far more than three (or four) years ago. N.C. Gen. Stat. § 1-52(16); *see Latham v. Latham*, 184 N.C. 55, ¶ 4, 113 S.E. 623, 627 (1922) (discovery rule tolls claim until the relevant facts “should have been discovered” through “proper diligence”). NC State alleges that by the late 1970s, Congress and the EPA had acted to generally ban the “manufacture, processing, distribution in commerce, or use of PCBs.” Compl. ¶¶ 33; *see* 15 U.S.C. § 2605(e)(2)(A); 40 C.F.R. pt. 761. Even at the time Old Monsanto was manufacturing PCBs, the complaint alleges, PCBs posed “generally recognized hazards” and risks that were allegedly “reasonably foreseeable . . . in light of regulatory and public health guidance.” Compl. ¶¶ 125, 132. Accepting those allegations for purposes of this motion, *supra* at 5 n.1, NC State should have known of its potential injuries no later than the late 1970s and exercised “reasonable diligence to discover” them. *Doe v. Roman Cath. Diocese of Charlotte, NC*, 242 N.C. App. 538, 539, 775 S.E. 918, 920 (2015).

The complaint also makes clear that NC State *actually* knew of the presence of PCBs more than three (or four) years ago, well before “questions arose in August 2023” about Poe Hall’s condition. Compl. ¶ 33. As described by a report linked in an exhibit to the complaint, NC State conducted testing that revealed elevated PCB levels from sampling of a Poe Hall classroom in

April 2018. Ex. A, Apps. F1-F2; *see Oberlin*, 147 N.C. App. at 60, 554 S.E. at 847 (court may consider “documents . . . to which the complaint specifically refers” in assessing motion to dismiss).<sup>4</sup> The discovery rule does not require awareness “of the full extent of the damages,” and at the latest, NC State’s claimed *actual* knowledge that “*some*” PCBs were present in Poe Hall “complete[d] [its] cause of action” in April 2018. *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 69 N.C. App. 505, 509, 317 S.E. 41, 43 (1984) (emphasis added), *aff’d*, 313 N.C. 488, 329 S.E. 2d 350 (1985). NC State still did not timely bring suit.

*Nullum tempus* again does not excuse NC State’s untimeliness. Although the relevant limitations periods in Section 1-52 do not expressly include the State, *nullum tempus* applies only to suits the government brings in its *sovereign* capacity to protect the public. *Littleton*, 261 N.C. App. at 92, 819 S.E. at 103-04.

Here, NC State is decidedly *not* bringing suit to safeguard the interests of the injured public. NC State alleges that PCB contamination has “caused significant costs, inconvenience, and annoyance to NC State,” Compl. ¶ 89, “loss of value to Plaintiff’s property,” *id.* ¶ 105, and other “monetary damages,” *id.* ¶ 98. Those allegations and requests for monetary damages underscore this suit’s similarity to any lawsuit for property damage that could be brought by a private litigant. *Cf. Glenn v. City of Raleigh*, 246 N.C. 469, 477, 98 S.E. 913, 919 (1957) (holding that a city’s operation of a public park for “pecuniary profit” was not a governmental function). Indeed, NC State refuses to “alleg[e] or conced[e] that any person has sustained personal injury as a result of exposure at Poe Hall.” Compl. ¶ 109; *see id.* ¶¶ 85, 125. That repeated refrain directly undercuts

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<sup>4</sup> Even if NC State had not specifically referred to the report in a complaint exhibit, the Court may take judicial notice of the report as an “important public documen[t].” *State ex rel. Utils. Comm’n. v. Southern Bell Telephone Co.*, 289 N.C. 286, 287, 221 S.E. 2d 322, 323 (1976); *see Brinkley-Caldwell v. Britthaven, Inc.*, 264 N.C. App. 637, 825 S.E. 2d 1 (2019) (unpublished) (considering “two public records appended as exhibits” on a Rule 12(b)(6) motion).

NC State’s conclusory assertion that it seeks to vindicate any public right. *Id.* ¶¶ 90-91. And NC State continues to deny responsibility in the pending exposure suits on which it bases its unfounded requests for reimbursement and indemnification. *Id.* ¶¶ 109, 237-38. The university thus brings this suit not *to represent* the public, but to offload responsibility for alleged liabilities *it owes to* the public.

## **II. The economic loss rule bars NC State’s claims.**

NC State’s complaint also fails because it impermissibly seeks recovery only for “purely economic losses,” which are subject to contract law and “are not recoverable under tort law.” *Crescent Univ. City Venture, LLC v. Trussway Mfg., Inc.*, 376 N.C. 54, 60, 852 S.E. 98, 102 (2020). In a product-liability suit, losses are compensable only if they are attributable to a “physical injury to person or to a tangible thing *other than the defective product itself.*” *Reece v. Homette Corp.*, 110 N.C. App. 462, 466, 429 S.E. 2d 758, 770 (1993) (emphasis added) (internal quotation marks omitted). “[D]amages to the product itself” are treated as non-compensable economic loss. *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 401, 499 S.E. 2d 772, 780 (1998). Likewise, when “a component part of a product or a system injures the rest of the product or the system,” the damage is considered non-compensable injury to the defective product itself, not damage to other property. *Land v. Tall H. Bldg. Co.*, 165 N.C. App. 880, 884, 602 S.E. 2d 1, 4 (2004) (internal quotation marks omitted).

*Land* is instructive. There, the North Carolina Court of Appeals rejected recovery on a “tort theory” for damages to a home caused by a defective stucco finish. 165 N.C. App. at 884, 602 S.E. at 3. Because the stucco was a “component of plaintiffs’ house,” the court reasoned, “any damage caused by the [stucco] constitutes damage to the house itself”—“purely economic loss.” *Id.* at 884-85, 602 S.E. at 4 (internal quotations omitted). North Carolina courts have consistently

reached the same conclusion on similar facts. *See, e.g., Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller, Inc.*, 175 N.C. App. 339, 346, 623 S.E. 334, 339-40 (2006) (damage to a wastewater treatment plant caused by defective generators is purely economic loss); *Gregory v. Atrium Door & Window Co.*, 106 N.C. App. 142, 144, 415 S.E. 574, 574 (1992) (water damage to house caused by defective doors is purely economic loss); *Wilson v. Dryvit Sys., Inc.*, 206 F. Supp. 2d 749, 753 (E.D.N.C. 2002) (“water intrusion, sheathing deterioration, and rotting” damage to house caused by defective exterior cladding is purely economic loss). So have other courts. *See, e.g., Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 849-51 (6th Cir. 2002) (applying Kentucky’s economic-loss rule to bar claim for damage to building caused by allegedly defective chemicals used to treat wood in the building); *N.W. Arkansas Masonry, Inc. v. Summit Specialty Prods., Inc.*, 31 P.3d 982, 988 (Kan. App. 2001) (applying Kansas’s economic-loss rule to bar claim for damage to wall caused by allegedly defective cement powder).

Under those precedents, NC State’s claims fail as a matter of law. NC State seeks to hold Defendants liable for allegedly defective PCBs incorporated into building materials that purportedly damaged the rest of Poe Hall. *See* Compl. ¶¶ 30-31, 42, 80. But like an exterior finish on a house, the PCB-containing products at issue—caulks, adhesives, mastics, and HVAC duct sealants, Compl. ¶ 70—are “component parts” of Poe Hall incorporated into the building. Any damage they may have caused to Poe Hall is “purely economic loss” not compensable in tort. *Land*, 161 N.C. App. at 884, 602 S.E. at 3. All of NC State’s claims sound in tort, and all are barred.<sup>5</sup>

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<sup>5</sup> *See, e.g., Crescent Univ.*, 376 N.C. at 60, 852 S.E. at 102 (applying economic loss rule to negligence claim); *Reece*, 110 N.C. App. at 466, 429 S.E. at 770 (product liability); *Boone Ford, Inc. v. IME Scheduler, Inc.*, 262 N.C. App. 169, 174, 822 S.E. 2d 95, 99 (2018) (negligent misrepresentation); *X Corp. v. Corning Inc.*, 2018 WL 4113333, at \*10 (E.D.N.C. Aug. 28, 2018)

### III. NC State fails to state any cognizable claim.

Beyond the threshold defects above, NC State fails to allege “the essential elements” of any claim. *Mauck*, 388 N.C. at 333, 921 S.E. 2d at 116.

#### A. NC State cannot allege proximate causation for any of its claims.

NC State’s claims each depend on a showing that Old Monsanto’s alleged conduct proximately caused NC State’s injuries. *See, e.g., Cedarbrook Residential Ctr., Inc. v. N.C. Dep’t of Health & Hum. Servs.*, 383 N.C. 31, 61, 881 S.E. 2d 558, 580 (2022) (negligence); N.C. Gen. Stat. §§ 99B-5(a), 99B-6(a) (design defect and failure to warn); *Hampton v. Town of Spindale*, 210 N.C. 546, 187 S.E. 775, 776-77 (1936) (nuisance); *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 88-90, 747 S.E. 2d 220, 226-27 (2013) (unfair trade practices and fraud); *cf.* N.C. Gen. Stat. § 143-215.83(a) (Oil Act). “Reasonable foreseeability is one of the necessary elements of proximate cause.” *Pittman v. Frost*, 261 N.C. 349, 352, 134 S.E. 2d 687, 689 (1964). Accordingly, Defendants can be held liable only for harms that were “reasonably foreseeable” on the specific “facts” and “under the conditions as they existed.” *Id.*

The complaint does not adequately “allege proximate causation.” *Dove v. Harvey*, 168 N.C. App. 687, 694, 608 S.E. 2d 798, 802 (2005) (affirming grant of motion to dismiss on this basis). NC State alleges that Old Monsanto manufactured, marketed, and sold *raw* PCBs and PCB mixtures to sophisticated third-party industrial manufacturing companies. Compl. ¶¶ 18-24, 27, 43, 65, 71. NC State’s purported injuries are multiple steps removed from that alleged conduct: They uniformly stem from allegedly actionable levels of PCBs purportedly released from *finished, end products* that were manufactured and sold by those *third-party industrial manufacturing companies*, and that *NC State itself or its third-party contractors* then purchased and installed at

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(nuisance); *Land*, 161 N.C. App. at 884, 602 S.E. at 3 (indemnity); *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 625 (M.D.N.C. 2006) (unfair and deceptive trade practices).

Poe Hall. *E.g., id.* ¶¶ 27-31, 71. There are thus numerous “intermediaries”—including third-party manufacturers of finished PCB-containing products, “distributors,” “contractors, facility managers, or other entities in the chain of distribution,” Compl. ¶ 138—whose independent actions led more directly to the harm here than Old Monsanto’s. Given NC State’s theory of the case, the relevant question is whether it was reasonably foreseeable that *all* of these intermediaries would act and fail to act in ways that would specifically lead to the release of PCBs at “a level requiring remediation” in Poe Hall more than 50 years after its completion, *Westport*, 877 F.3d at 65.

NC State has not alleged facts to support that showing. Old Monsanto “had no control of its products through the multiple levels of distribution, including after it sold the [PCBs] to distributors and wholesalers, which were then dispersed to” yet other third parties for incorporation into end products and sale to customers. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 728 (Okla. 2021). The complaint alleges neither that Old Monsanto oversaw how PCBs were incorporated into third-party end products nor that it was involved in deciding which products to use at Poe Hall. *See* Compl. ¶¶ 69-72. Nor does the complaint purport to excuse NC State’s own apparent decision to leave PCB-containing products intact in Poe Hall across five decades—and thus to allow PCBs allegedly to “escap[e] their original applications . . . over time.” *Id.* ¶ 31. Those intervening acts “rende[r]” Old Monsanto’s “effect in the causation remote.” *Coleman v. Rudisill*, 131 N.C. App. 530, 532, 508 S.E. 297, 299 (1998) (internal quotation marks omitted).

Nor does the complaint allege that Old Monsanto should even have known the actionable level of PCB exposure in a campus building when it manufactured the PCBs at issue; the EPA established those levels in 1979, nearly a decade after Poe Hall was constructed and after Old Monsanto stopped manufacturing PCBs. *See* Compl. ¶ 32; 40 C.F.R. pt. 761. Those are necessary facts: As the complaint recognizes, PCBs require remediation only above certain levels, and the

level of PCBs that might cause harm varies based on factors such as ventilation, heat exposure, and the type of PCBs involved. *Id.* ¶¶ 22, 32, 61, 137.

At bottom, NC State cannot show that, at the time Old Monsanto manufactured the raw PCBs at issue, it should have foreseen that those PCBs ultimately would result in actionable levels at Poe Hall in 2024. The intervening acts of innumerable third parties, the passage of five decades, and NC State’s own voluntary acts defeat proximate causation as a matter of law.

**B. NC State cannot state a claim for product liability (Counts 3-5).**

NC State’s complaint fails to substantiate its central theory—product liability for PCBs. NC State’s design defect, failure to warn, and negligence claims should be dismissed.

***Design Defect (Count 3).*** To state a design-defect claim, NC State must allege facts showing that Old Monsanto’s “unreasonabl[e]” design of PCBs proximately caused its injuries, and that Old Monsanto “unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation” that could have been “reasonably adopted” and would have “substantially reduced the risk of harm without substantially impairing” the product’s “usefulness.” N.C. Gen. Stat. § 99B-6(a); *see DeWitt v. Eveready Battery Co.*, 144 N.C. App. 143, 155, 55 S.E. 2d 511, 518 (2001). No product-liability claim may lie “based upon an inherent characteristic of the product that cannot be eliminated without substantially compromising the product’s usefulness or desirability and that is recognized by the ordinary person with the ordinary knowledge common to the community.” N.C. Gen. Stat. § 99B-6(c).

NC State fails to state a design-defect claim. Most fundamentally, the complaint faults “inherent characteristic[s]” of PCBs that were allegedly widely “recognized” when Poe Hall was built. N.C. Gen. Stat. § 99B-6(c); Compl. ¶ 125. NC State asserts that PCBs allegedly pose “health risks” and have the defective characteristics of “semi-volatility, migration, and persistence.”

Compl. ¶¶ 108, 110, 112. But the complaint also alleges that some degree of volatilization is “inevitabl[e].” *Id.* ¶¶ 61, 70. And it acknowledges that PCBs’ alleged “toxic[ity],” “persistence,” and “chemical stability” are both inherent in their chemical structure and precisely the traits that made them useful in “industrial and commercial applications.” *Id.* ¶¶ 24, 26-27. NC State does not allege that a different method of combining “carbon, hydrogen, and chlorine atoms” would have created PCBs that would still be useful as components of building materials while manifesting different characteristics. *Id.* ¶ 17. “PCBs cannot be PCBs without . . . their inherent characteristics.” *Lexington*, 133 F. Supp. 3d at 270. Each of these characteristics were allegedly “generally recognized,” Compl. ¶ 125, “accepted in the scientific community,” and described in “regulatory and public health guidance,” *id.* ¶ 114.

Applying a similar inherent-characteristic rule, other courts have rejected theories seeking to hold Defendants liable for PCBs on product-liability theories indistinguishable from NC State’s. *See Milwaukee Metro. Sewerage Dist. v. Monsanto Co.*, No. 2023CV007313, Dkt. 85 (Wis. Cir. Ct. June 17, 2024) (attached hereto as Ex. B, together with relevant transcript excerpt). North Carolina law likewise forecloses design-defect liability here. N.C. Gen. Stat. § 99B-6(c).

Unsurprisingly, NC State also fails to offer any reasonable alternative design—much less one that could have been “reasonably adopted” and further mitigated the asserted risks of persistence, migration, and volatility without “substantially impairing the usefulness, practicality, or desirability of the product.” N.C. Gen. Stat. § 99B-6(a). If anything, NC State alleges the opposite. *See supra* at 20; Compl. ¶¶ 24, 26-27. NC State’s conclusory allegations (*e.g.*, *id.* ¶¶ 108, 113) that reasonable alternative designs could have been adopted without impairing PCBs’

usefulness are “bare legal conclusions” that should be disregarded. *Mauck*, 388 N.C. at 333, 921 S.E. 2d at 116. The facts actually alleged “defeat” NC State’s claim “outright.” *Id.*<sup>6</sup>

***Failure To Warn (Count 4).*** NC State’s failure-to-warn claim fares no better. To state a claim under N.C. Gen. Stat. § 99B-5, a plaintiff must allege both that the defendant “acted unreasonably” in offering an “inadequate warning” and that the inadequate warning “proximate[ly] cause[d]” the plaintiff’s alleged injuries. N.C. Gen. Stat. § 99B-5(a). Nor can there be liability for “failing to warn about an open and obvious risk.” *Id.* § 99B-5(b). Those principles bar the failure-to-warn claim here.

*First*, the complaint’s allegations show that Old Monsanto’s warnings were “[a]dequate” as a matter of law. N.C. Gen. Stat. § 99B-5(a). The complaint highlights a May 1960 marketing bulletin, Compl. ¶ 58, but that bulletin disclosed each of NC State’s alleged “design defects”—“persistence, semi-volatility, propensity to migrate,” *id.* ¶ 124. The bulletin, for instance, repeatedly explained that PCBs are “chemically stable” and resist “breakdown under a wide variety of environmental conditions,” Monsanto Co., *The Aroclor Compounds* 6, 12 (1960) (attached hereto as Ex. C)—*i.e.*, they persist. It stated that Aroclors have “low volatility,” Ex. C, at 1, 15, 32-33—a description that mirrors NC State’s own allegations of “low volatility” and “semi-volatility,” Compl. ¶¶ 22, 124. And the bulletin warned those who would encounter “Aroclor vapors” in workrooms, recommending “local exhaust ventilation together with general workroom exhaust.” Ex. C, at 42.

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<sup>6</sup> In lieu of a reasonable alternative design, a plaintiff may alternatively allege that “[a]t the time the product left the control of the manufacturer, the design or formulation of the product was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design.” N.C. Gen. Stat. § 99B-6(a)(2). NC State does not even attempt to allege that the design of PCBs was “so unreasonable” that no reasonable person in the 1960s would have used them (or failed to replace them in the following decades). *Id.*

*Second*, on the complaint’s allegations, any risks posed by PCBs would have been “open and obvious” at the time Poe Hall was constructed. N.C. Gen. Stat. § 99B-5(b). A seller is under no duty to warn “a person who in his occupation or profession regularly uses the product against any risk that *should be known* to such a regular user.” *Ziglar v. E. I. Du Pont De Nemours & Co.*, 53 N.C. App. 147, 153, 280 S.E. 2d 510, 515 (1981) (emphasis added). As noted above, the complaint faults Old Monsanto by observing that, at the time of Poe Hall’s construction, the risks of PCBs were “generally recognized hazards,” Compl. ¶ 125, and were “known and/or reasonably foreseeable . . . in light of regulatory and public health guidance,” *id.* ¶ 132. But NC State cannot have it both ways: Accepting those allegations for purposes of this motion only, they show that any risks not only would have been known to Old Monsanto, but also would have been open and obvious to NC State and the sophisticated contractors who constructed Poe Hall.

***Negligence (Count 5)***. NC State’s negligence claim is derivative of its design-defect and failure-to-warn claims, and it fails for the same reasons. *See* Compl. ¶ 168 (summarizing negligence claim as based on “negligence in designing, manufacturing, marketing, and distributing PCBs and PCB-containing products”). Indeed, NC State’s product-liability claims *must be* negligence claims because “Ch. 99B [i]s not a strict liability statute,” *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 452, 406 S.E. 2d 856, 860 (1991), and permits “no strict liability in tort in product liability actions,” N.C. Gen. Stat. § 99B-1.1. NC State’s negligence claim thus adds nothing.

Plaintiff’s negligence per se allegation is likewise deficient. Compl. ¶ 150. The complaint asserts that Old Monsanto violated “applicable federal and state laws and regulations” in designing its PCBs, but it identifies no such law or regulation. *Id.* To the extent NC State means to refer to TSCA and its implementing regulations, TSCA was not enacted until years after Poe Hall’s

construction in 1970. *See id.* ¶ 32 (TSCA and EPA regulations effective 1978 and 1979, respectively). Negligence per se requires a violation of “a public safety statute,” *Hardin v. York Meml. Park*, 221 N.C. App. 317, 326, 730 S.E. 2d 768, 776 (2012), and later-enacted laws do not retroactively render previously lawful conduct negligent per se, *Hinshaw v. Pepper*, 210 N.C. 573, 574, 187 S.E. 786, 787 (1936).

**C. North Carolina law does not recognize NC State’s effort to repackage its defective product-liability claims as nuisance claims (Counts 1 and 2).**

NC State cannot repackage its flawed product-liability claims as claims for public and private nuisance. NC State’s alleged nuisances stem from its voluntary incorporation into its own campus building of PCB-containing products “lawfully placed in the stream of commerce” by third parties. *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001). That is not the stuff of nuisance—and certainly not against Defendants.

Courts across the country have warned that if the law of nuisance were to “encompass product liability, nuisance law ‘would become a monster that would devour in one gulp the entire law of tort.’” *Id.* (quoting *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)); *State v. Lead Industries, Ass’n, Inc.*, 951 A.2d 428, 449 (R.I. 2008) (similar); *see also* Restatement (Third) of Torts § 8 cmt. g (2020). On the face of the amended complaint, that admonition applies here.

NC State’s claims overstep nuisance’s traditional guardrails in at least two ways.

*First*, a fundamental principle of nuisance law is that those with “no control over” the property allegedly causing the nuisance “at the time of the alleged nuisance cannot be held liable therefor.” 58 Am. Jur. 2d *Nuisance* § 92. Traditionally, a private nuisance existed only “when one makes an improper use of *his own property* and in that way injures the land or some incorporeal right of one’s neighbor,” *Evans v. Lochmere Recreation Club, Inc.*, 176 N.C. App. 724, 727, 627

S.E. 2d 340, 342 (2006) (emphasis added), principally “by reason of its location or the manner in which it is constructed, maintained or operated,” *Twitty v. State*, 85 N.C. App. 42, 50, 354 S.E. 2d 296, 301 (1987). The same principles apply to public nuisance. See *State v. Everhardt*, 203 N.C. 610, 166 S.E. 738, 743 (1932); see also *Johnson & Johnson*, 499 P.3d at 730 (describing “a clear national trend to limit public nuisance to land or property use”). And although some courts have extended nuisance principles beyond unreasonable uses of *real* property in some circumstances, courts have refused to countenance liability for nuisances allegedly caused by personal property that a defendant does not own or control: “A manufacturer who produces a substance that, after being sold, creates or contributes to a nuisance cannot be liable for the nuisance-causing activity after the sale unless the manufacturer somehow controls or directs the activity.” *SUEZ Water N.Y. Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511, 545-51 (S.D.N.Y. 2022) (describing this as an “almost absolute rule” and collecting cases).

That rule controls here. Old Monsanto no longer “own[ed] or possess[ed]” the PCBs after they entered the stream of commerce. *Lohr v. Chemours Co. FC, LLC*, 2021 WL 9930063, at \*9 (E.D.N.C. Sept. 27, 2021) (dismissing nuisance claim where defendant did not own or possess injury-causing property). It sold PCBs to third-party manufacturers who “integrate[d] [the] PCB mixtures into construction materials, such as caulk, mastics, adhesives, paint, and other materials,” and those manufacturers in turn sold those materials to third-party architects and contractors, who allegedly incorporated those materials into Poe Hall for NC State. Compl. ¶¶ 65, 67, 69. Accordingly, courts have rejected both public and private nuisance claims in PCB-related cases on the ground that Old Monsanto was no longer “in control of” and did not “possess” the PCBs after selling them. *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989); see *Town of Westport v. Monsanto Co.*, 2015 WL 1321466, at \*4 (D. Mass. Mar. 24, 2015). And

cases rejecting nuisance law as a categorical misfit on similar product-liability theories are legion. *See, e.g., Camden*, 273 F.3d at 540; *Tioga*, 984 F.2d at 920 (rejecting nuisance claim under North Dakota law because a defendant who sells “an asbestos-containing material to a plaintiff lacked control of the product after the sale”).

*Second*, NC State’s public-nuisance claim fails for the independent reason that NC State cannot identify any violation of a public right. “To constitute a public nuisance,” the defendant’s conduct must “constitute an obstruction of public rights,” *id.*, which concern “all the people of the community,” *Wilcher v. Sharpe*, 236 N.C. 308, 310-11, 72 S.E. 2d 662, 664 (1952).

The alleged nuisance here looks nothing like quintessential public nuisances, such as obstructions of public roads and waterways. *F.S. Royster Guano Co. of Virginia v. Lumber Co.*, 168 N.C. 337, 84 S.E. 346, 346 (1915). “[T]he damages [NC] State seeks are not for a communal injury but are instead more in line with a private tort action for individual injuries sustained from use of a lawful product,” *Johnson & Johnson*, 499 P.3d at 727—namely, “costs, inconvenience, and annoyance to NC State,” Compl. ¶ 89, “loss of value to Plaintiff’s property,” *id.* ¶ 105, and other “monetary damages,” *id.* ¶ 98. NC State does not seek to protect “all the people of the community.” *Wilcher*, 236 N.C. at 310-11. To the contrary, it expressly disavows harm beyond its own property by repeatedly refusing to “alleg[e] or conced[e] any person has sustained personal injury as a result of exposure at Poe Hall.” Compl. ¶ 109.

**D. NC State’s trespass claim fails because it cannot allege any unauthorized entry by Old Monsanto (Count 6).**

Similar problems afflict NC State’s trespass claim. To state a claim for trespass, a plaintiff must allege “[1] an *unauthorized* entry [2] by the *defendant*.” *Woodring v. Swieter*, 180 N.C. App. 362, 376, 637 S.E. 2d 269, 280 (2006) (emphases added). There is no claim for trespass when the plaintiff authorizes the entry, *Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 289, 618 S.E. 2d 786,

772 (2006), or when the allegedly trespassing instrumentality was beyond the defendant's "control," *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 370 (M.D.N.C. 1997). NC State's claim fails against both of these barriers.

*First*, NC State alleges that it "allow[ed] PCB-containing materials to be incorporated into Poe Hall." Compl. ¶ 193 (emphasis added). That ends the inquiry: NC State's inability to "alleg[e] that [any] entry onto [its] land was unauthorized" forecloses its trespass claim. *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 33, 588 S.E. 2d 20, 29 (2003).

NC State cannot vitiate its own voluntary acts by pointing to the complaint's conclusory assertions of fraud. Those allegations are not well-pleaded. *See infra* at 27-30; *Broughton*, 161 N.C. App. at 32-33, 588 S.E. 2d at 29 (rejecting trespass claim despite allegation that defendant's allegedly entry was procured by a "fraudulent misrepresentation"). Besides, there is no "per se rule that a misrepresentation . . . invalidates the consent of the party to whom the misrepresentation was made." *Keyzer*, 173 N.C. App. at 290, 618 S.E. 2d at 772. Trespass law "give[s] effect to consent procured by fraud" where the alleged trespass did not "inva[de] . . . any of the specific interests that the tort of trespass seeks to protect." *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995) (Posner, J.) (adopted as "persuasive" in *Keyzer*, 173 N.C. App. at 290). Setting aside that the complaint failed to plead fraud with the requisite particularity, that principle applies here. The purported "trespass" was the release of PCBs from PCB-containing products, allegedly due to the tortious "design, manufacture, marketing, sale, and distribution" of those products. Compl. ¶ 172. Such product-based allegations do not sound in "the inviolability of a person's property," *Keyzer*, 173 N.C. App. at 290, 618 S.E. 2d at 773—the fundamental interest the tort of trespass protects.

*Second*, any unauthorized entry here was not committed *by Old Monsanto* “or an object under [its] control.” *Rudd*, 982 F. Supp. at 370. Under that principle, even the “migration of contaminants onto plaintiff’s property” is not an actionable trespass by a defendant with “no knowledge” of the contamination. *Id.* Likewise, there cannot be trespass when contaminants find their way onto a plaintiff’s property through the independent and superseding acts of *third parties and the plaintiff itself*. Yet that is precisely what NC State alleges: Old Monsanto sold PCBs in the stream of commerce to third party industrial manufacturers who incorporated them into building materials, which NC State’s contractors in turn purchased and used in Poe Hall’s construction. Compl. ¶¶ 65, 67, 69.

Courts have consistently “dismissed claims of intentional trespass against manufacturers on the basis of a lack of control post-sale,” including similar claims involving Old Monsanto. *Westport*, 2015 WL 1321466, at \*4; *see City of Bloomington*, 891 F.2d at 615. In North Carolina, as elsewhere, a trespass claim cannot proceed on the theory that Old Monsanto’s “PCBs entered as a result of the installation of certain building materials on [plaintiff’s] property” where Old Monsanto played no alleged role in that installation. *Westport*, 2015 WL 1321466, at \*5.

**E. NC State fails to plead the elements of fraud, negligent misrepresentation, or an unfair trade practice (Counts 7-9).**

***Fraud (Count 8).*** To state a claim for fraud, NC State must plead that Old Monsanto concealed or knowingly or recklessly made a “false” representation of material “fact,” and that NC State reasonably relied on that representation or concealment in constructing Poe Hall. *Broughton*, 161 N.C. App. at 31, 588 S.E. 2d at 29; *see New Bar P’ship v. Martin*, 221 N.C. App. 302, 309, 729 S.E. 2d 675, 682 (2012) (alleged misrepresentation or concealment must be “reasonably calculated to deceive”). “Allegations of fraud are subject to more exacting pleading requirements.” *Harrold v. Dowd*, 149 N.C. App. 777, 782, 561 S.E. 2d 914, 918 (2002). NC State must plead

“the circumstances constituting fraud” with “particularity,” N.C. R. Civ. P. 9(b), and it thus must allege “definite and specific” misrepresentations, *Value Health Sols., Inc. v. Pharm. Rsch. Assocs.*, 385 N.C. 250, 263, 891 S.E. 2d 100, 112 (2023).

NC State cannot satisfy those requirements. The complaint asserts that Old Monsanto “intentionally made false representations of material fact,” Compl. ¶ 190, but it identifies only a handful of specific statements that Old Monsanto made in a 1949 brochure, a 1960 bulletin, and a 1961 advertisement, *see id.* ¶¶ 57-60. None of the identified statements is actionable.

To start, several are not statements of fact. For instance, the assertion that Old Monsanto’s products are “VIRTUALLY INDESTRUCTIBLE,” Compl. ¶ 60, is the sort of classic “puffery” that is not “actionable fraud” under North Carolina law. *Quidore v. Alliance Plastics, LLC*, 2020 WL 7082566, at \*4 (N.C. Super. Ct. Dec. 3, 2020) (unpublished). The same goes for the “recommend[ation]” that workers exposed to vapors from these products utilize “local exhaust ventilation.” Compl. ¶ 58. A “mere recommendation . . . ordinarily cannot be the basis of a cause of action for fraud,” *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 255, 266 S.E. 2d 610, 616 (1980), and NC State does not dispute the wisdom of that recommendation in any event.

More fundamentally, NC State does not and cannot plead with particularity that it relied on Old Monsanto’s 1949, 1960, and 1961 statements when it constructed Poe Hall in 1968. *Foley v. L & L Int’l, Inc.*, 88 N.C. App. 710, 715, 364 S.E. 2d 733, 736 (1988) (noting that Rule 9(b)’s requirement extends “to all of the elements of fraud, including the plaintiff’s reasonable reliance”); *Bi v. McAuliffe*, 927 F.3d 177, 184-87 (4th Cir. 2019) (reliance “is every bit as much a ‘circumstance constituting fraud’ as any other element”). NC State asserts that it supposedly relied on these statements “through its agents, architects, engineers, contractors, and other participants involved in the design, specification, and construction of Poe Hall.” Compl. ¶ 206; *see also id.*

¶ 76. But that is a pure conclusory allegation. NC State fails to identify a single specific individual or entity that supposedly even viewed—much less relied on—the specific 1949, 1960, and 1961 statements it cites in its complaint. NC State instead alleges generally that its “architects and contractors” were “within the class of persons [Old] Monsanto intended to influence” with its advertisements, *id.* ¶ 78, and that “[Old] Monsanto’s marketing and technical materials” reached “the building industry, design professionals, and institutional purchasers responsible for selecting materials for new construction,” *id.* ¶ 77. That falls far short of pleading fraud with particularity. *See Bi*, 927 F.3d at 184-87 (affirming dismissal of fraud claims where plaintiffs failed to allege “which of the named plaintiffs . . . relied on each statement”).

Even NC State’s allegations that its purported “agents” relied on Old Monsanto’s statements are not well-pleaded. Compl. ¶ 206. Fraud requires “actual reliance” *by the plaintiff* on the asserted misrepresentations; “indirect” reliance by a third party is not enough, absent a formal agency relationship between the third party and the plaintiff. *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 452, 781 S.E. 2d 1, 9-10 (2015); *see Hospira Inc. v. Alphagary Corp.*, 194 N.C. App. 695, 699-700, 671 S.E. 2d 7, 11 (2009). And “where, as here, the agency relationship is an integral element of an alleged fraud, courts have required the facts establishing agency be pled with Rule 9(b) particularity.” *Woods v. Maytag Co.*, 807 F. Supp. 2d 112, 121 (E.D.N.Y. 2011) (cross-referencing collection of cases); *see Value Health*, 385 N.C. at 265, 891 S.E. 2d at 113 (referring to federal decisions construing Federal Rule 9(b) in interpreting North Carolina’s counterpart rule).

NC State’s allegations of agency are legal conclusions. *See* Compl. ¶¶ 76, 78, 206. NC State does not allege even *generally* that the “design professionals, contractors, . . . or other entities in the chain of distribution” (*id.* ¶ 138) purchased PCB-containing building materials under NC

State’s “authority” and “control.” *Hospira*, 194 N.C. App. at 700, 671 S.E. 2d at 11 (elements of agency). To the contrary, it alleges that these “intermediaries” were independently “responsible for selecting materials for new construction” and, absent the alleged fraud, “could have communicated . . . warnings to Plaintiff or mitigated the risks posed by PCB-containing products.” Compl. ¶¶ 77, 138. NC State certainly does not *specifically* identify any individual or entity that supposedly relied on Old Monsanto’s statements, much less that NC State had an actual agency relationship with any such individual or entity.

Regardless, even if NC State had pleaded reliance with particularity (through agents or otherwise), it has not alleged how any such reliance would have been “reasonable” when constructing a building in 1970, *Broughton*, 161 N.C. App. at 31, 588 S.E. 2d at 29, or that the statements or purported concealments were “reasonably calculated” or “made with intent to deceive” NC State, *New Bar P’ship*, 221 N.C. App. at 309, 729 S.E. 2d at 309. Accordingly, NC State’s fraud claim should be dismissed.

***Negligent Misrepresentation (Count 9)***. NC State’s negligent misrepresentation claim fails for the same reasons. “[C]losely akin to fraud,” that claim also must satisfy Rule 9(b)’s “heightened pleading standard,” *Value Health*, 385 N.C. at 265-66, 891 S.E. 2d at 113, and it requires a showing that the plaintiff “justifiably relie[d]” on misrepresentations “prepared without reasonable care,” *Harrold*, 149 N.C. App. at 783, 561 S.E. 2d at 919. As described above, NC State fails to plead with particularity either any actionable misrepresentations or actual reliance. *See supra* at 27-29.

***Unfair And Deceptive Trade Practices Act (“UDTP”) (Count 7)***. In alleging its “claim for unfair and deceptive trade practices,” NC State “relies on the same facts underlying” its fraud and misrepresentation claims, and its statutory claim therefore “fails for the same reasons.”

*Gottfried v. Covington*, 2014 WL 2921922, at \*5 (N.C. Super. June 25, 2014). Because NC State’s UDTP claim sounds in fraud, NC State still must plead with particularity “actual reliance” on specific “misrepresentation[s].” *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88, 747 S.E. 2d 200, 226 (2013); see *Value Health*, 385 N.C. at 266, 891 S.E. 2d at 113. Again, NC State nowhere pleads that it “affirmatively incorporated [any] alleged misrepresentation into [its] decision-making process,” *Bumpers*, 367 N.C. at 90, 747 S.E. 2d at 227, and it thus cannot allege the “direct reliance” required “to support a UDTP claim,” *D C Custom Freight, LLC v. Tammy A. Ross & Assocs., Inc.*, 273 N.C. App. 220, 234, 848 S.E. 2d 552, 563 (2020).

**F. The lawful sale of products is not an unlawful “discharge” onto state waters or lands under the Oil Act (Count 10).**

NC State next claims that Old Monsanto’s lawful sale of PCBs to third-party manufacturers for incorporation into building materials constitutes an unlawful “discharge” of “hazardous substances into or upon the waters or lands of the State” under the Oil Pollution and Hazardous Substances Control Act, N.C. Gen. Stat. § 143-215.75 *et seq.* (“Oil Act” or the “Act”). Compl. ¶ 215. That claim is baseless. The Oil Act serves as this State’s “complement” to the federal Clean *Water Act*, N.C. Gen. Stat. § 143-215.76, and it would be startling if the Act covered the lawful sale of chemicals for incorporation into building materials installed in a *landlocked* campus building. The Oil Act does not stretch that far and applying it that way would offend basic principles of fair notice. This Court should reject NC State’s theory as a matter of law.

*First*, as a threshold matter, the statute does not confer any applicable right of action on NC State. A statutory right to sue for damages must be “expressly provided” by the legislature “within the statute.” *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 338, 828 S.E. 2d 467, 474 (2019) (quoting *Time Warner Ent. Advance/Newhouse P’ship v. Town of Landis*, 228 N.C. App. 510, 516, 747 S.E. 2d 610, 615 (2013)). Thus, a general statutory prohibition confers no right of

action when it does not “specifically authoriz[e]” parties to sue with “explicit language.” *United Daughters of the Confederacy v. City of Winston-Salem ex rel. Joines*, 383 N.C. 612, 638, 881 S.E. 2d 32, 52 (2022).

The Oil Act’s text does not authorize NC State’s claim. The Act creates a permitting regime for the “discharge” of “oil or other hazardous substances,” and vests primary enforcement authority in the North Carolina Environmental Management Commission, the Department of Environmental Quality, and the Attorney General. *See Carpenter v. Brewer Hendley Oil Co.*, 145 N.C. App. 493, 495-96, 549 S.E. 2d 886, 888-89 (2001); N.C. Gen. Stat. § 143-215.83. The Act comprehensively details the duties of state regulatory bodies in recordation, removal, notice, sanctions, and more. *See* N.C. Gen. Stat. §§ 143-215.78 to 88B.<sup>7</sup> In contrast, express rights-creating language appears only *once* in the Oil Act—in the context of offshore drilling discharges, where Section 143-215.94FF(b) provides that “[a]ny injured party under this Part may bring a civil action for damages.” NC State correctly does not allege that provision applies here.

NC State cites only a single provision—N.C. Gen. Stat. § 143-215.83, which makes it “unlawful” to “discharge” hazardous substances upon the “waters” or “lands within this State.” That sort of general statutory prohibition does not confer a cause of action. *See Daughters of the Confederacy*, 383 N.C. at 638, 881 S.E. 2d at 52. Indeed, the prohibition is expressly enforceable only by specific state agencies: Any person who wishes to discharge hazardous substances on North Carolina lands or waters must first obtain a permit with the North Carolina Environmental Management Commission, on pain of civil and criminal penalties enforceable only by the Attorney

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<sup>7</sup> For example, “the Department shall establish an oil pollution control program”; “the Commission” may require or exempt the removal of prohibited discharges; “the Department . . . shall request payment” from violators; and “the Attorney General” may collect damages if violators do not comply. N.C. Gen. Stat. §§ 143-215.78, 143-215.90(a), 143-215.84(a1), 143-215.90(b).

General. N.C. Gen. Stat. §§ 143-215.83(a), (c), 143-215.88A, 143-215.88B. “The express provision of one method of enforcing a substantive rule suggests that [the legislature] intended to preclude others,” and the provision’s “focus on the person regulated rather than the individuals protected” confirms that Section 143-215.83 affords NC State no right of action for damages. *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001).<sup>8</sup>

*Third*, Section 143-215.83 prohibits only (1) persons “having control over the oil or other hazardous substances” (2) from “discharg[ing], or caus[ing] to be discharged,” hazardous substances on state lands. N.C. Gen. Stat. § 143-215.83(a). NC State alleges neither element.

Old Monsanto did not have “control” over the PCBs at issue at the time of their alleged “discharge.” *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 268, 661 S.E. 2d 1, 9 (2008); *see supra* at 24-25. “Control” under the Act extends only to persons “using, transferring, storing, or transporting oil or other hazardous substances *immediately* prior to a discharge of such oil or other hazardous substances onto the land or into the waters of the State.” N.C. Gen. Stat. § 143-215.77(5) (emphasis added). Old Monsanto was multiple steps removed from the alleged discharge: It merely sold raw PCBs in the stream of commerce to third-party “distributors,” “contractors,” and “other entities in the chain of distribution,” Compl. ¶ 138, who resold or independently incorporated them into PCB-containing products, which in turn were sold to NC State or its contractors, *id.* ¶¶ 65-68. Old Monsanto’s initial sale does not constitute control “immediately prior to discharge.” *See, e.g., AMEC Env’t & Infrastructure, Inc. v. Structural*

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<sup>8</sup> To be sure, North Carolina courts have sometimes entertained claims under a *separate* provision of the Oil Act that NC State does not cite, N.C. Gen. Stat. § 143-215.93. But that provision holds persons “strictly liable” for certain property damage, and NC State does not cite it for good reason: It applies only to discharge of substances that “ente[r] *the waters* of the State.” *Id.* (emphasis added). NC State contends only that PCBs are present in building materials in Poe Hall. Compl. ¶ 220.

*Assocs., Inc.*, 2015 WL 1000766, at \*6 (E.D.N.C. Mar. 5, 2015); *Wilson*, 327 N.C. at 514, 398 S.E. at 598.

NC State’s contention that Old Monsanto “discharge[d]” PCBs onto state lands is equally implausible. A “discharge” is an “emission, spillage, leakage, pumping, pouring, emptying, or dumping.” N.C. Gen. Stat. § 143-215.77(4). A lawful sale of a chemical product in the stream of commerce is none of those things.

Old Monsanto also did not “cause” hazardous substances “to be discharged” on state lands. N.C. Gen. Stat. § 143-215.83(a). Under the statutory definition, a “discharge” must be active and direct: Terms like “pumping, pouring . . . or dumping” embrace only direct, “active conduct” by the purported discharger and do not encompass “passive migration.” *In re Deepwater Horizon*, 745 F.3d 157, 171-72 (5th Cir. 2014) (construing similar definition of “discharge” in federal Clean Water Act, 33 U.S.C. § 1321(a)(2)). Construed “with the other [terms], ‘emi[ssion]’ must take on an active cast” as well. *Id.* at 172; *see Happel v. Guilford Cnty. Bd. of Educ.*, 387 N.C. 186, 209, 913 S.E. 2d 174, 193 (2025) (*noscitur a sociis* canon). The alleged “slo[w],” “passive migration” of PCBs—as a result of NC State’s voluntary incorporation of materials containing PCBs into a building decades ago—is thus not a covered “discharge.” Compl. ¶¶ 21, 31.

Nor did Old Monsanto “cause” any such discharge. The statutory term “cause” must be construed in conjunction with the statute’s “control” requirement, which covers only “transferring, storing, or transporting oil or other hazardous substances *immediately prior to*” discharge. N.C. Gen. Stat. § 143-215.77(5) (emphasis added); *see Chaisson v. Simpson*, 195 N.C. App. 463, 479, 673 S.E. 2d 149, 161 (2009) (“statute must be interpreted as a whole” (internal quotation marks omitted)). A defendant may perhaps be said to “cause” a discharge by, for example, storing oil in

a leaking tank. But the statute does not embrace causal chains as attenuated as NC State's, which allegedly involves lawful sales of a product in the stream of commerce decades ago.

**G. NC State cannot seek indemnity for hypothetical future liabilities or for EPA compliance costs (Count 11).**

Because NC State can identify no basis for holding Defendants liable under any common law or statutory cause of action, there is likewise no basis for Defendants to indemnify NC State for potential future liabilities NC State may incur in exposure-based litigation or for the alleged costs of complying with EPA regulations. NC State's contrary arguments fail.

**1. NC State cannot state any indemnity claim based on potential future exposure-based judgments.**

NC State's indemnity claim for workers' compensation expenses and other hypothetical future liabilities in exposure-based suits fails under both North Carolina's workers' compensation statute and common law principles.

*First*, North Carolina's workers' compensation statute bars NC State's claims. This statute specifies all "rights and interests" of an "employer" with respect to any "common-law cause of action against [a] third party" whom the employer claims is responsible for workers' compensation claims. N.C. Gen. Stat. § 97-10.2(a); *see M.B. Haynes Corp. v. Strand Electro Controls, Inc.*, 127 N.C. App. 177, 181, 487 S.E. 2d 819, 821-22 (1997) (noting that an "employer's cause of action" against a third party "cannot be extended beyond what was authorized by the Legislature" in this statute) (internal quotation marks omitted)). But NC State did not follow the statute's mandatory procedures. The statute by its terms "clearly requires" that an employer file a written admission of liability before it can file suit against a third party. *Blair Concrete Servs., Inc. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 219, 566 S.E. 2d 766, 768 (2002); *see* N.C. Gen. Stat. § 97-10.2(c) (employer's right to "enforce the liability of [a] third party" applies only "if [the] employer shall have filed with the Industrial Commission a written admission of liability for the benefits

provided” by the workers’ compensation scheme). Here, NC State does not admit injury to any worker, Compl. ¶¶ 85, 109, 135, much less allege that it has admitted to liability in writing to the Industrial Commission. NC State therefore has no ripe indemnity claim.

*Second*, under the common law, implied indemnity is “an equitable remedy” accorded a party held “derivative[ly] liab[le]” for “an underlying injury sounding in tort.” *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 41, 587 S.E. 2d 470, 475 (2003). But as shown above, NC State cannot establish tort liability against Defendants for alleged PCB contamination at Poe Hall as a matter of law. *See supra* at 8-35. Without the predicate showing that Defendants are tortfeasors, NC State’s indemnity claim fails at the outset.

Further, any indemnity claim by NC State has not accrued under the common law. “North Carolina follows the general rule that a cause of action on an obligation to indemnify normally accrues when the indemnitee suffers actual loss.” *Safety Mut. Cas. Corp. v. Spears, Barnes, Baker, Wainio, Brown & Whaley*, 104 N.C. App. 467, 471, 409 S.E. 2d 736, 738-39 (1991). Thus, “according to well-established North Carolina law, a separate action for indemnity may not be commenced until after payment and satisfaction of the debt.” *Vogel v. Health Scis. Found., Inc.*, 231 N.C. App., 753 S.E. 2d 742 (2013) (unpublished) (internal quotation marks omitted). Here, again, NC State does not allege that it has paid any workers’ compensation or other exposure-based judgments. Compl. ¶ 227. Pending and threatened claims are not judgments. *Ashby*, 161 N.C. App. at 41, 587 S.E. 2d at 475.<sup>9</sup>

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<sup>9</sup> To the extent the complaint advances distinct claims for “restitution/equitable subrogation,” Compl. ¶ 239, these theories are even flimsier. Restitution provides an equitable remedy to prevent the unjust enrichment of one person at the expense of another in the absence of a contract. *See Hinson v. United Fin. Servs., Inc.*, 123 N.C. App. 469, 473, 473 S.E. 2d 382, 385 (1996). NC State has no claim that Old Monsanto was somehow enriched at NC State’s expense. Equitable subrogation “allows a party who has compensated a creditor under the color of some obligation, to step into the shoes of the creditor, thereby succeeding to the creditor’s rights to

**2. There is no “indemnity” cause of action for the costs of complying with EPA regulations.**

NC State seeks a declaratory judgment requiring Defendants to “indemnify, defend, hold harmless, and reimburse Plaintiff for all losses” arising from “all EPA-directed investigation, . . . regulatory engagement, and compliance costs.” Compl. ¶ 230. That request fares no better. “Indemnity” is not a catch-all cause of action that can be used to obtain these kinds of general damages. Rather, “a party’s rights to indemnity can rest on three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity.” *Ashby*, 161 N.C. App. at 38, 587 S.E. 2d at 474. With no express or implied contract theory, NC State’s references to “equity” and “implied indemnity” make clear that it is pursuing the third option. Compl. ¶¶ 230, 239; *see id.* ¶¶ 226-241.

Here, NC State pleads none of the requisites for implied indemnity.

Implied indemnity allows a “passive tort-feasor” to recover against an “active tortfeasor” after the passive tortfeasor “pays [a] judgment” to the injured party. *Ashby*, 161 N.C. App. at 38, 587 S.E. 2d at 474. NC State parrots the adjectives “passive” and “active,” Compl. ¶ 229, but it alleges none of the required elements: NC State and Old Monsanto are not joint tortfeasors *with respect to the EPA*, and NC State’s costs of complying with EPA regulations are not a “judgment” paid to the agency. There is simply no principle in law or equity to support NC State’s attempt to offload its own compliance costs to Defendants.

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The Court should dismiss the complaint with prejudice. “[T]he Complaint on its face reveals a bar to Plaintiff[’s] claim[s],” *Perryman v. Town of Summerfield*, 293 N.C. App. 116, 128,

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proceed against the debtor for reimbursement.” *In re Declaratory Rul. by N.C. Comm’r of Ins. Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App. 22, 24, 517 S.E. 2d 134, 137 (1999). NC State does not claim to have “compensated” anyone, much less a “creditor” of Defendants.

899 S.E. 2d 884, 894 (2024), and no amount of repleading could revive NC State’s time-barred claims or avoid the other legal defects that afflict those claims. *See Spoor ex rel. JR Int’l Holdings, LLC v. Barth*, 257 N.C. App. 721, 730, 811 S.E. 2d 609, 615 (2018) (affirming dismissal with prejudice where “the applicable limitation periods had expired”). Amendment would thus be “futile.” *Perryman*, 293 N.C. App. at 128, 899 S.E. 2d at 893.

**IV. Alternatively, this Court should abstain from adjudicating this dispute until the EPA exercises its primary jurisdiction.**

If the Court does not outright dismiss this action, it should abstain from adjudicating NC State’s claims until the EPA exercises its primary jurisdiction over the remediation of PCBs and completes its allegedly ongoing investigation and oversight of Poe Hall’s remediation. *See* Compl. ¶ 41 & Ex. A; *id.* ¶¶ 233-34.

The doctrine of primary jurisdiction counsels that a court stay its hand when the “enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956). In such cases, “the judicial process is suspended pending referral of such issues to the administrative body for its views.” *Id.* at 64. The doctrine thus recommends that courts “refer a matter extending beyond the ‘conventional experiences of judges’ or ‘falling within the realm of administrative discretion’ to an administrative agency with more specialized experience, expertise, and insight,” *In re StarNet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004) (some quotation marks omitted), thereby promoting the “proper relationshi[p] between the courts and administrative agencies charged with particular regulatory duties,” *W. Pac.*, 352 U.S. at 63. North Carolina courts recognize the same principle. *See N.C. Chiropractic Ass’n v. Aetna Cas. & Sur. Co.*, 89 N.C. App. 1, 9, 365 S.E. 2d 312, 317 (1988) (requiring stay of action under primary-jurisdiction doctrine where “rulings by the [agency] on matters within its jurisdiction will

clarify the issues to be resolved in superior court”); *Johnson v. First Union Corp.*, 128 N.C. App. 450, 460-61, 496 S.E. 2d 1, 7-8 (1998) (similar).

This Court should, at a minimum, stay the case and abstain from adjudicating NC State’s claims related to PCB abatement and remediation at Poe Hall until the EPA exercises its primary jurisdiction. These issues fall squarely within the EPA’s authority under TSCA, 15 U.S.C. § 2601 *et seq.*, which “set in place a comprehensive national scheme to protect humans and the environment from the dangers of toxic substances.” *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 686 (5th Cir. 2000). And the EPA has implemented TSCA by developing a highly reticulated regulatory scheme governing the manufacturing, processing, distribution in commerce, storage, use, and disposal and remediation of PCBs. *See* 40 C.F.R. pt. 761; *Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations*, 88 Fed. Reg. 59,662 (Aug. 29, 2023).

Here, NC State acknowledges the EPA is actively involved in investigating and overseeing the remediation of alleged PCB contamination at Poe Hall. NC State alleges that it has “submitted investigation reports to [the] EPA,” and that the EPA has “directed” that NC State “remediat[e] and dispos[e] of . . . PCB waste in accordance with applicable federal regulations.” Compl. ¶ 233. NC State is engaged in “planning and preparatory work to submit and carry out remediation in consultation with and under the oversight of [the] EPA,” *id.* ¶ 234, and it specifically seeks an award of any “EPA-directed compliance costs,” *id.* at 59.

The EPA could well make decisions affecting the propriety of NC State’s requested relief. For instance, NC State asserts that “the PCB contamination is so extensive” that it “must essentially demolish Poe Hall and replace it with an entirely new building.” Compl. ¶ 42. Yet it remains to be seen whether the EPA requires a solution so drastic. So far, the EPA has recommended only

that NC State “develop a plan to schedule for the removal of building materials and products containing PCBs [greater than] 50 ppm and any PCB-contaminated substrates (e.g., concrete, brick, metal) for disposal.” *Id.* Ex. A. Before ruling on what “EPA-directed compliance costs” Defendants must cover, this Court should permit the EPA to determine the extent to which PCB remediation is necessary in the first place.

### **CONCLUSION**

For the foregoing reasons, the amended complaint should be dismissed with prejudice. Alternatively, this action should be stayed pending the exercise of the Environmental Protection Agency’s primary jurisdiction.

Respectfully submitted the 15th day of January, 2026.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was electronically filed with the Wake County Clerk of Superior Court via Odyssey file and serve, as well as by email in accordance with Rule 5(b)(1) on the following:

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## **INDEX OF EXHIBITS**

EXHIBIT A – Geosyntec Consultants’ Indoor Environmental Investigation Report – Second Phase North Carolina State University Poe Hall, Raleigh, North Carolina

EXHIBIT B – *Milwaukee Metro. Sewerage Dist. v. Monsanto Co.*, No. 2023CV007313, Dkt. 86 (Wis. Cir. Ct. June 17, 2024) Transcript Excerpt

EXHIBIT C – Monsanto Co., *The Aroclor Compounds* (1960)