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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

CITY OF PORTLAND, a municipal corporation,

Plaintiff

v.

MONSANTO COMPANY, SOLUTIA INC., and PHARMACIA CORPORATION

Defendants.

CASE NO. 3:16-cv-1418-PK

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT [F.R.C.P. 12(b)(6)]

REQUEST FOR ORAL ARGUMENT

[FILED CONCURRENTLY WITH REQUEST FOR JUDICIAL NOTICE]

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 2

II. STATEMENT OF FACTS 4

III. ARGUMENT 9

A. Standard of Review 9

B. The City's Tort Claims Are Time-Barred 10

1. The City's Allegations Fall Squarely Within the Realm of Oregon's Product liability Statute 10

2. The Tort Claims Are Barred by the Two-Year Statute of Limitations 12

3. The City's Claims Also Are Barred by the Eight-Year Statute of Repose 15

C. The City Fails to State a Claim for Public Nuisance (First Claim) 16

1. The City Lacks Standing to Bring a Public Nuisance Claim for the State-Owned Water Bodies 16

2. The City's Public Nuisance Claim Should Be Dismissed Because It Is a Poorly Disguised Product liability Action 19

3. The City Cannot Plead Facts Showing that Defendants Caused or Created a Public Nuisance in the State Waters 21

D. The City's Common Law Indemnity Should Be Dismissed (Second Claim) 24

1. CERCLA Preempts the City's Common Law Indemnity Claim 24

2. The City Fails to State a Common Law Indemnity Claim 25

E. The City Fails to State a Claim for Strict Product liability (Third and Fourth Claims) 27

1. The City Lacks Standing to Assert Product liability Claims 27

2. No Causation for Product liability Claims 28

F. The City Fails to State a Claim for Negligence (Fifth Claim) 29

1. Old Monsanto's Conduct Did Not Create a Foreseeable Risk of Harm 30

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TABLE OF CONTENTS

PAGE

2. Old Monsanto Is Not a "Substantial Factor" in the Alleged City Harm 31

G. The City Fails to State a Claim for Trespass (Sixth Claim) 31

1. The City Lacks Standing to Assert Trespass 31

2. Merely Placing a Product into the Stream of Commerce Does Not Give Rise to a Trespass Claim 32

3. Lawfully-Permitted PCB Discharges Are Not a Trespass by Defendants 33

H. Permit-Related Compliance Costs Are Not Recoverable and Too Remote 33

I. The City's Prayer for Attorney's Fees Should Be Dismissed 35

IV. CONCLUSION 35

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TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

Am. Elec. Power Co. v. Connecticut,
564 U.S. 410 (2011) 23

Arch Chems., Inc. v. Radiator Specialty Co.,
727 F. Supp. 2d 997 (D. Or. 2010) 26

Arkema v. Anderson Roofing Co., Inc. et al.,
Case No. 3:09-cv-00453-PK 7, 8, 25

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 10

Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.,
79 F. Supp. 2d 1219 (W.D. Wash. 1999)
aff'd, 241 F.3d 696 (9th Cir. 2001) 22

Balistreri v. Pacifica Police Dep't,
901 F.2d 696 (9th Cir. 1988) 10

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 10

Benson Tower Condo. Owners Ass'n v. Victaulic Co.,
105 F. Supp. 3d 1184 (D. Or. 2015) 28

Bonney v. Fabio Perini N. Am., Inc.,
U.S. Dist. LEXIS 7097 (D. Or. Jan. 21, 2014) 15

Cal. Dep't of Toxic Substances Control v. Payless Cleaners,
2007 U.S. Dist. LEXIS 60703 (E.D. Cal. Aug. 17, 2007) 27

Caswell v. Olympic Pipeline Co.
2010 U.S. Dist. LEXIS 124954 (W.D. Wash. Nov. 24, 2010) 16

Caswell v. Olympic Pipeline Co.,
2010 U.S. Dist. LEXIS 73955 (W.D. Wash. July 22, 2010) 16

Caswell v. Olympic Pipeline Co.,
2011 U.S. Dist. LEXIS 20963 (W.D. Wash. Mar. 2, 2011)
aff'd, 484 F. App'x 151 (9th Cir. 2012) 16

City of Bloomington v. Westinghouse Elec. Corp.,
891 F.2d 611 (7th Cir. 1989) 23, 24, 33

City of Cincinnati v. Deutsche Bank Nat'l Trust Co.,
897 F.Supp.2d 633 (S.D. Ohio 2012) 27

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TABLE OF AUTHORITIES(CONT'D)

PAGE(S)

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1997 U.S. Dist. LEXIS 23939 (D. Or. July 18, 1997) 14

City of Manchester v. Nat'l Gypsum Co.,
637 F. Supp. 646 (D.R.I. 1986) 23

City of Merced Redevelopment Agency v. Exxon Mobil,
2015 US Dist. LEXIS 13549 (E.D. Cal. 2015) 20

City of Perry v. Proctor & Gamble Co.,
2016 U.S. Dist. LEXIS 66010 (S.D.N.Y. May 19, 2016) 22

City of Philadelphia v. Beretta U.S.A. Corp.,
277 F.3d 415 (3d Cir. 2002) 23

City of Portland v. Boeing Co.,
179 F. Supp. 2d 1190 (D. Or. 2001) 17, 18

Cofield v. Lead Indus. Ass'n Inc.,
2000 U.S. Dist. LEXIS 23405 (D. Md. Aug. 17, 2000) 23

Corrie v. Caterpillar, Inc.,
403 F. Supp. 2d 1019 (W.D. Wash. 2005)
aff'd, 503 F.3d 974 (9th Cir. 2007) 22

Edmons v. Home Depot, U.S.A., Inc.,
2011 U.S. Dist. LEXIS 3811 (D. Or. Jan. 14, 2011) 28

Guttmann v. Nissin Foods (U.S.A.) Co., Inc.,
2015 U.S. Dist. LEXIS 92756 (N.D. Cal. July 15, 2015) 22

Halseth v. B.C. Towing, Inc.,
2006 U.S. Dist. LEXIS 35790 (D. Or. 2006) 29

Hinds Invs., L.P. v. Angioli,
445 F. App'x 917 (9th Cir. 2011) 20, 32

Jacobsen v. Dalles, P. & A. Nav. Co.,
93 F. 975 (D. Or. 1899) 34

Kent v. Shiley Inc.,
1989 WL 88307 (D. Or. Jan. 24, 1989) 27

Monico v. City of Cornelius,
2015 U.S. Dist. LEXIS 44634 (D. Or. Apr. 6, 2015) 15

Monico v. City of Cornelius,
2015 U.S. Dist. LEXIS 46429 (D. Or. Apr. 9, 2015) 15

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TABLE OF AUTHORITIES(CONT'D)

PAGE(S)

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2015 U.S. Dist. LEXIS 30416 (D. Or. Mar. 11, 2015) 11

Papasan v. Allain,
478 U.S. 265 (1986) 10

Pearson v. Reynolds Sch. Dist. No. 7,
998 F. Supp. 2d 1004 (D. Or. 2014) 15

Redevelopment Agency v. BNSF Ry. Co.,
643 F.3d 668 (9th Cir. 2011) 20

Starr v. Dow Agrosciences LLC,
339 F. Supp. 2d 1097 (D. Or. 2004) 13

Team Enters., LLC v. W. Inv. Real Estate Trust,
647 F.3d 901 (9th Cir. 2011) 20

Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.,
984 F.2d 915 (8th Cir. 1993) 23

Town of Lexington v. Pharmacia Corp.,
133 F. Supp. 3d 258 (D. Mass. Sept. 23, 2015) 24

Town of Westport v. Monsanto Co.,
2015 U.S. Dist. LEXIS 36846 (D. Mass. Mar. 24, 2015) 23, 24, 33

Twitty v. North Carolina,
527 F. Supp. 778 (E.D.N.C. 1981) 34

W. Mining Council v. Watt,
643 F.2d 618 (9th Cir. 1981) 10

Whittlestone, Inc. v. Handi-Craft, Co.,
618 F.3d 970 (9th Cir. 2010) 10

Williams v. Invenergy, LLC,
2016 WL 1725990 (D. Or. Apr. 28, 2016) 21

Witt Co. v. RISO, Inc.,
948 F. Supp. 2d 1227 (D. Or. 2013) 13

XDP, Inc. v. Watumull Properties Corp.,
2004 U.S. Dist. LEXIS 12057 (D. Or. May 14, 2004) 24, 25

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TABLE OF AUTHORITIES(CONT'D)

PAGE(S)

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Becker v. Barbur Blvd. Equip. Rentals, Inc.,
81 Or. App. 648 (1986) 30

BoardMaster Corp. v. Jackson Cty.,
224 Or. App. 533 (2008) 14

Border v. Indian Head Indus., Inc.,
101 Or. App. 556 (1990) 15

Bradbury v. Teacher Standards and Practices Comm'n,
328 Or. 391 (1999) 11

City of Chicago v. Am. Cyanamid Co.,
823 N.E.2d 126 (Ill. App. Ct. 2005) 23

City of Modesto Redevelopment Agency v. Superior Court,
119 Cal. App. 4th 28 (Cal. Ct. App. 2004) 19

City of Roseburg v. Abraham,
8 Or. 509 (1880) 17, 18

City of San Diego v. U.S. Gypsum Co.,
30 Cal. App. 4th 575 (Cal. Ct. App. 1994) 23

City of St. Louis v. Benjamin Moore & Co.,
226 S.W.3d 110 (Mo. 2007) 23

Columbia River Fishermen's Protective Union v. City of St. Helens,
160 Or. 654 (1939) 18

Cty. of Santa Clara v. Atl. Richfield Co.,
137 Cal. App. 4th 292 (Cal. Ct. App. 2006) 19, 20, 27

Denham v. Cuddeback,
210 Or. 485 (1957) 31

Diamond v. Gen. Motors Corp.,
20 Cal. App. 3d 374 (Cal. Ct. App. 1971) 23

Domingo v. Anderson,
325 Or. 385 (1997) 35

Drayton v. City of Lincoln City,
244 Or. App. 144 (2011) 17

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TABLE OF AUTHORITIES(CONT'D)

PAGE(S)

Erickson Air-Crane Co. v. United Technologies Corp.,
303 Or. 281 (1987) 15

Fazzolari v. Portland Sch. Dist. No. 1J,
303 Or. 1 (1987) 29, 30

Fortney v. Crawford Door Sales Corp. of Or.,
97 Or. App. 276 (1989) 31

Frady v. Portland GE,
55 Or. App. 344 (1981) 17, 18, 31

Fulton Ins. v. White Motor Corp.,
261 Or. 206, 210 (1972) 25, 26

Gladhart v. Or. Vineyard Supply Co.,
332 Or. 226 (2001) 13

Gronn v. Rogers Constr., Inc.,
221 Or. 226 (1960) 21

Hale v. Groce,
304 Or. 281 (1987) 33

Hefty v. Comprehensive Care Corp.,
307 Or. 247 (1988) 30

In re Firearm Cases,
126 Cal. App. 4th 959 (Cal. Ct. App. 2005) 20

In re Lead Paint Litig.,
924 A.2d 484 (N.J. 2007) 23

Kambury v. DaimlerChrysler Corp.,
185 Or. App. 635 (2003) 11

Loe v. Lenhardt,
227 Or. 242 (1961) 33

Lowe v. Philip Morris USA, Inc.,
344 Or. 403 (2008) 29, 30

Lunsford v. NCH Corp.,
271 Or. App. 564 (2015) 16

Lyons v. Walsh & Sons Trucking Co. Ltd.,
183 Or. App. 76 (2002) 31

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TABLE OF AUTHORITIES(CONT'D)

PAGE(S)

Marinelli v. Ford Motor Co.,
72 Or. App. 268 (1985) 11, 12, 13

Mark v. Dep't of Fish and Wildlife,
158 Or. App. 355 (1999) 17

Martin v. Reynolds Metals Co.,
221 Or. 86 (1959) 31, 32

McCathern v. Toyota Motor Corp.,
332 Or. 59 (2001) 28

Monroe v. Withycombe,
84 Or. 328 (1917) 18

New York v. Sturm Ruger & Co.,
309 A.D. 2d 91, 96 (N.Y. App. Div. 2003) 23

Onita Pac. Corp. v. Trustees of Bronson,
315 Or. 149 (1992) 29

Or. Steel Mills, Inc. v. Coopers & Lybrand, LLP,
336 Or. 329 (2004) 29, 30

Ore-Ida Foods, Inc. v. Indian Head Cattle Co.,
290 Or. 909 (1981) 33

Parker v. Harris Pine Mills,
206 Or. 187 (1955) 34

Perry v. Hernandez,
265 Or. App. 146, 149 (2014) 35

Raymond v. S. Pac. Co.,
259 Or. 629 (1971) 17

Rivera-Martinez v. Vu,
245 Or. App. 422 (2011) 35

Russell v. Deere & Co.,
186 Or. App. 78 (2003) 27, 28

Safeco Ins. Co. of Am. v. Russell,
170 Or. App. 636 (2000) 26

Savelich Logging Co. v. Preston Mill Co.,
265 Or. 460 (1973) 25

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TABLE OF AUTHORITIES(CONT'D)

PAGE(S)

Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd's of London,
341 Or. 128 (2006) 18

Shasta View Irrigation Dist. v. Amoco Chems. Corp.,
329 Or. 151 (1999) 12, 15

Simonsen v. Ford Motor Co.,
196 Or. App. 460 (2004) 12

Smejkal v. Empire Lite-Rock, Inc.,
274 Or. 571 (1976) 17

State By & Through Dep't of Transp., Highway Div. v. Tolke,
36 Or. App. 751 (1978) 31

Stewart v. Jefferson Plywood Co.,
255 Or. 603 (1970) 30

Towe v. Sacagawea, Inc.,
246 Or. App. 26, 41 (2011)
aff'd, in part, *rev'd* in part, 357 Or. 74 (2015) 31

Weston v. Camp's Lumber & Bldg. Supply, Inc.,
205 Or. App. 347 (2006) 11, 14, 32

Weston v. Camp's Lumber & Bldg. Supply, Inc.,
206 Or. App. 761 (2006) 11

FEDERAL STATUTES AND CODES

40 C.F.R. § 130.7 34

40 C.F.R. § 761.3 5

40 C.F.R. § 761.30 5

F.R.C.P. § 8(a) 1, 10

F.R.C.P. § 9(f) 1, 10

F.R.C.P. § 12(b)(6) ..... passim

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TABLE OF AUTHORITIES(CONT'D)

PAGE(S)

STATE STATUTES AND MUNICIPAL CODES

1977 Or. Laws Ch. 843, § 3 15
1983 Or. Laws Ch. 143, § 1 15
1987 Or. Laws Ch. 4, § 1 15
1993 Or. Laws Ch. 259, § 6 15
2003 Or. Laws Ch. 768, § 1 15
2009 Or. Laws Ch. 485, § 1 15
2009 Or. Laws Ch. 485, § 2 16
Oregon Electrical Specialty Code 450.23 5
Oregon Electrical Specialty Code 450.25 5
Oregon Electrical Specialty Code 450.26 5
ORS 12.250 12
ORS 30.900 ..... 10, 11, 27, 32
ORS 30.905 ..... passim
ORS 30.920 28
ORS 468B.020 17
ORS 537.110 ..... 18, 27
Portland City Code 10.80.010 17
Portland City Code 22.05.010 17
Portland Municipal Code 26.01.030 5

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7-1

In compliance with Local Rule 7-1, counsel for defendants Monsanto Company, Solutia Inc., and Pharmacia LLC (collectively "Defendants") certify that they conferred in good faith by telephone conference on July 26, 2016, with counsel for plaintiff City of Portland ("City"), but the parties are unable to resolve this dispute without the assistance of the Court.

MONSANTO COMPANY'S, SOLUTIA INC.'S, AND PHARMACIA LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT [F.R.C.P. 12(b)(6)]

Pursuant to F.R.C.P. 12(b)(6), Defendants move for an order dismissing with prejudice the City's Complaint. This Motion is made on the grounds that the Complaint's First through Sixth Causes of Action fail to state any basis for relief and fail to comply with the proper pleading standards under F.R.C.P. 8(a), 9(f), and 12(b)(6). This Motion is supported by (i) the accompanying Memorandum of Law, (ii) pleadings and records on file in the case, (iii) matters of which this Court may take judicial notice (including the accompanying Request for Judicial Notice in Support of Defendants' Motion, and exhibits thereto), (iv) the City's Complaint, (v) other documents specifically referenced in or integral to the Complaint, and (vi) such arguments as may be presented to the Court. Defendants request oral argument on this Motion.

Dated: August 4, 2016

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MEMORANDUM OF LAW

I. INTRODUCTION

This action is the eighth in a series of unprecedented West Coast "test cases" filed against alleged successors to the former U.S. manufacturer of polychlorinated biphenyls ("PCBs"). The municipalities, through their common counsel, are collaborating to assert overreaching public nuisance and state law claims regarding water bodies that the municipalities generally do not own, but into which they discharge storm water. Normally, a municipality would call upon the federal CERCLA statute or state cleanup laws to address contamination in the state's harbors, rivers, and sediments for which a city bears responsibility, and it would work with regulators to ensure dischargers are complying with the Clean Water Act. As this Court is well aware, that has been the approach in effect at Portland Harbor since at least 2001.

The original manufacturer of PCBs has been out the marketplace since the late 1970s, and it has never been identified as a discharger of PCBs into Portland Harbor or the Willamette River. The actual dischargers responsible for causing the pollution to Portland Harbor and the Willamette River have already been painstakingly identified by EPA and the State, a process which after fifteen years was finally—until this suit was filed—nearing an end-point. It is no coincidence that this case was filed on the heels of the June 2016 EPA remedy selection, and at a point in time when the dischargers and stakeholders are finally on the verge of action. This lawsuit accomplishes nothing but more delay.

The City has needlessly resorted to litigation against a former product manufacturer that neither owned nor operated a PCB-manufacturing facility anywhere near the relevant water bodies and never deposited PCBs into the affected water bodies at any time—all in an effort to expand liability by circumventing traditional cleanup laws and regulatory tools, which rightfully focus on the *actual dischargers*. The City's action will compel the product manufacturer that has discharged nothing into the water bodies to involve the actual PCB dischargers, including the City itself, in more litigation, which will upend the allocation process that has been ongoing for the past seven years. And because the City will contend its novel theories are not subject to any

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statute of limitations, the timing of this test case is particularly suspect. It could have been filed next year or thereafter under the City's own rationale.

The City now asks this Court to be the first in Oregon history to recognize public nuisance lawsuits against manufacturers that place their legal products into the stream of commerce. This speculative case piles multiple novel (and unfounded) legal propositions atop each other, all of which contravene Oregon law. The City's Complaint should be dismissed in its entirety because of the following irreparable, foundational legal defects:

First, the City's tort claims are time-barred because the gravamen of the City's Complaint, and the basis for each of its claims, is that "Old Monsanto"[1] put a defective product into the stream of commerce from 1935 to 1979. As such, the statute of limitations and the statute of repose for product liability claims bar all of the City's tort claims many times over.

Second, the City lacks standing to assert a public nuisance claim for damages regarding *State-owned water bodies*. Oregon law has *never* sanctioned efforts like the City's here—to bring a public nuisance *damages claim* in the municipality's own capacity against a product manufacturer (a ploy that has been widely condemned by other courts as an improper end-run around product liability laws).

Third, by ignoring causation—an essential element in all tort claims—the City asks this Court to depart from accepted common law tort principles and create a limitless and causation-free "super tort" against a former product manufacturer that is not alleged to have discharged a single PCB molecule into any of the affected water bodies.

Fourth, the City's claim for common law indemnity fails because it conflicts with CERCLA, the City has not discharged a judgment or liability to a third-party, and it does not and cannot allege that the City and Defendants share a common duty to the same third-party.

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[1] "Old Monsanto" allegedly made PCBs commercially from 1935 to 1979 (more correctly 1977), and the three defendants are alleged to be successors or indemnitors of "Old Monsanto." Pharmacia LLC is the successor to "Old Monsanto."

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Fifth, the City's product liability claims fail because the City does not own the affected water bodies, and thus cannot show that it has suffered the requisite physical injury.

Sixth, the City's negligence claim fails because Old Monsanto's conduct through 1979 did not unreasonably create a foreseeable risk of harm to the City today.

Seventh, the City's trespass claim fails because the placement of a product into the stream of commerce through 1979 does not amount to a cognizable intrusion onto City-owned property or the affected water bodies.

Eighth, the City is not entitled to recover permit-related compliance costs under any of the City's purported tort theories, and such costs are too remote to be recoverable.

II. STATEMENT OF FACTS

The Complaint alleges the following: Multiple State-owned water bodies including the Columbia River, the Columbia Slough, the Willamette River, and tributaries including Johnson Creek (hereinafter, the "State Waters," legally misidentified in the Complaint as municipal "Portland Waters") are contaminated with PCBs (Compl., ¶¶ 5, 7); the City operates municipal separate storm sewer systems that discharge urban runoff into the State Waters (Compl., ¶¶ 6, 15, 73); its storm sewer system is subject to certain Clean Water Act ("CWA") permit requirements, including limits on PCB discharges into the State Waters (Compl., ¶¶ 8-9, 15); the City must spend money to comply with its permit requirements (Compl., ¶¶ 16, 88, 93, 100); the City has spent and will spend money to investigate and/or remediate contamination in the State Waters, including the Portland Harbor Superfund Site (Compl., ¶¶ 11, 12, 16, 93, 100); and Defendants should be required to pay for the City's permit compliance costs pursuant to six tort causes of action because they may have inherited the liabilities of "Old Monsanto" (Compl., ¶¶ 20-24)—a company that over four decades ago manufactured PCBs outside of Oregon.

The City argues that Defendants are liable for the costs to investigate, remediate, and control discharges of a wide variety of chemicals into the State Waters, including the Portland Harbor Superfund Site (the "Site"). Compl., ¶¶ 3, 5, 7, 10-12. Moreover, the City attempts to paint a misleading portrait of Old Monsanto's past manufacture of PCBs and ignores the utility

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of PCBs, which were highly valued by the U.S., state and municipal governments, and others for their non-flammability, chemical stability, superior electrical insulating properties, and safety.[2]

During World War II, the U.S. military designated PCBs as important for national defense, consumed millions of pounds of PCBs, and funded the expansion of Old Monsanto's PCB manufacturing capability three-fold.[3] After Old Monsanto voluntarily ceased production of certain PCBs in 1971, the U.S. ordered the company to continue production to support other defense manufacturers' efforts.[4] And the City itself adopted a law in 2014 that promoted the use of PCB-based dielectric fluids to mitigate the risk of fire and explosion attendant with other transformer and capacitor fluids.[5] Today, EPA still authorizes the use of PCBs in certain applications for increased operational safety.[6]

The City argues that Defendants are responsible for the PCB contamination in the State Waters because Old Monsanto "was the sole manufacturer of PCBs in the United States from 1935 to 1979." Compl., ¶ 3. The City omits the fact that roughly half of PCBs were manufactured internationally, not by Old Monsanto.[7] Indeed, the international community did not ban the manufacture of PCBs until 2001.[8] The City also ignores that PCBs continue to be

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[2] *See* U.S. DEP'T OF AGRICULTURE, INTERDEPARTMENTAL TASK FORCE ON PCBS, *[PCBs] and the Environment*, No. 950R72029, at 11-13 (May 1972) ("PCBs and the Environment"), RJN, Ex. 1.

[3] U.S. OFFICE OF PROD. MGMT., *Memorandum to the Council of National Defense Regarding Application for Necessity Certificate No. 4121* (Sept. 5, 1941), RJN, Ex. 2 ("The above facilities are necessary in the interest of national defense.").

[4] Letter from J. Richards, U.S. Dep't of Commerce, to J. Morse, Monsanto Co. (July 24, 1974), RJN, Ex. 3 (ordering Monsanto to ship Aroclor 1242 to Raytheon pursuant to the Defense Production Act).

[5] *See, e.g.*, City of Portland Ordinance No. 186932 (Dec. 12, 2014), RJN, Ex. 4 (unanimously amending Portland Municipal Code 26.01.030 to adopt the 2014 Oregon Electrical Specialty Code, effective Dec. 17, 2014); 2014 Oregon Electrical Specialty Code Article 450.25 (allowing the indoor installation of askarel-filled transformers without vaults). *Compare* Article 450.23, *with* Article 450.26 (requiring use of automatic fire extinguishing systems and fire-resistant vaults for other types of transformers).

[6] *See, e.g.*, 40 C.F.R. § 761.3; 40 C.F.R. § 761.30.

[7] PCBs and the Environment, at 5, RJN, Ex. 1.

[8] Stockholm Convention on Persistent Organic Pollutants (May 22, 2001), http://chm.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232.

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imported and manufactured in the U.S. today by third-parties as by-products of many manufacturing and chemical processes.[9] Washington recently determined that roughly ***half*** of all annual releases of PCBs in that state are actually "current generation" PCBs that were ***not*** manufactured by Old Monsanto or anyone else prior to 1979.[10]

The Complaint is notably silent as to the City's own prominent role in the pollution of the highly industrialized State Waters, including the Site. Contamination of the State Waters by myriad sources and chemicals has been the subject of extensive inquiry by federal, State, and local agencies for at least two decades.[11]

(a) CERCLA Investigations and Cleanups at the Portland Harbor Superfund Site:

In 2000, EPA designated ten industrialized miles of the Willamette River as the Site.[12] EPA has identified 64 contaminants at the Site, with more significant risks associated with polycyclic aromatic hydrocarbons ("PAHs"), dioxins and furans, pesticides, and PCBs.[13]

EPA has identified approximately 150 entities as potentially responsible parties ("PRPs") at the Site.[14] Despite the City's defiant assertion here that it has *no* liability for the Site,[15] it has long acknowledged otherwise. In 2001, the City entered into an Administrative Order on Consent ("AOC"), along with nine other entities (collectively referred to as the "Lower

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[9] *See* "EPA's Plan for Addressing PCBs in the Spokane River," at 3, *Sierra Club v. McLerran*, No. 11-cv-1759-BJR (W.D. Wash. July 14, 2015), RJN, Ex. 5 (estimating that 100,000 pounds of "inadvertently generated" PCBs are produced annually in the U.S.).

[10] WASH. DEP'T OF ECOLOGY ("ECOLOGY"), *PCB Chemical Action Plan*, at 11, 14 (Feb. 2015), RJN, Ex. 6.

[11] The history of industrial discharges to the Portland Harbor, the ongoing CERCLA remedial actions at the Site, and the City's urban runoff and sewage discharges into the State Waters, are included to highlight the broader factual context underlying the Complaint. Dismissal of City's Complaint is proper exclusively on the legal grounds set forth herein, regardless of whether the Court ultimately takes notice of some, or all, of these agency, court, and municipal records.

[12] EPA Region 10, Portland Harbor Superfund Site, Proposed Plan at 4, 7 (June 2016) ("Proposed Plan"), RJN, Ex. 7.

[13] *Id*. at 3, RJN, Ex. 7.

[14] *Id*. at 5, RJN, Ex. 7.

[15] *See City gets ready to battle EPA on Superfund costs, Portland Tribune* (July 7, 2016), RJN, Ex. 8 (quoting the Director of the City's Bureau of Environmental Services as stating that "[t]he city has no liability — we have none. We're not willing to admit that we have any.").

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Willamette Group" ("LWG")). The AOC compelled the LWG to conduct a Remedial Investigation and Feasibility Study ("RI/FS") for the Site.[16] Compl., at ¶ 11. In June 2016—a month before the City filed this suit—the RI/FS process culminated in EPA's release of a Proposed Plan, in which the agency announced its $746 million preferred remedy for the Site.[17] EPA is taking public comments on its Proposed Plan through September 6, 2016.[18] In addition to the City's prominent role in conducting the RI/FS, the City agreed to conduct investigation work as a liable party in areas of the Site with significant PCB contamination.[19]

(b) Portland Harbor Superfund Site Litigation and Allocation:

This action is not the City's first attempt to recoup response costs at the Site (nor even its first in this Court). In 2009, the City, along with other members of the LWG, sued dozens of entities alleging traditional contribution and cost recovery claims under CERCLA and the Oregon Superfund Act.[20] As explained in their 2009 complaint, "[p]laintiffs and 58 other parties who are not defendants have agreed to participate in a voluntary non-judicial allocation process in an effort to settle claims for past and future response or remedial action costs. Another 71 parties who are not defendants have agreed to toll claims pending the outcome of this non-judicial allocation process."[21] The City and other plaintiffs repeatedly alleged in their 2009

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[16] Proposed Plan at 7, RJN, Ex. 7; Administrative Order on Consent, *In re: Portland Harbor Superfund Site*, at 1-3, 5, Dkt. No. CERCLA-10-2001-0240 (Oct. 2001) ("AOC"), RJN, Ex. 9.

[17] Proposed Plan at 1, RJN, Ex. 7.

[18] *See* EPA, Portland Harbor Superfund Site webpage, *https://yosemite.epa.gov/R10/CLEANUP.NSF/ph/Portland+Harbor+Superfund+Site* (last visited Aug. 3, 2016) (comment period extension through Sept. 6, 2016)

[19] Administrative Settlement Agreement and Order on Consent for Supplemental RI/FS Work, *In re: River Mile 11E Project Area within Portland Harbor Superfund Site* at 1, 3, 10, 23-24, RJN, Ex. 10 (the City entered into an agreement with EPA to perform work at River Mile 11E, an area with elevated PCB concentrations).

[20] *See Arkema v. Anderson Roofing Co., Inc. et al.*, Case No. 3:09-cv-00453-PK ("*Arkema*"), Complaint, ¶¶ 1-75 (D. Or. Apr. 23, 2009), RJN, Ex. 11.

[21] *Id.* at ¶ 83, RJN, Ex. 11.

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complaint that many of the defendants in that lawsuit disposed of or released *PCBs* at their facilities "within the [Site]."[22]

Less than six months after the City brought that 2009 suit, the ten plaintiffs of the LWG sought to refer the matter to alternative dispute resolution, specifically, to a "voluntary non-judicial allocation process in an effort to develop a settlement offer to EPA for remedy implementation and to settle claims for RI/FS costs."[23] The LWG plaintiffs informed this Court that they "filed this litigation solely to preserve their claims against the assertion of a statute of limitations defense."[24] A stay of the litigation during the allocation process was thus needed, the LWG plaintiffs explained, because "[s]orting out liability for the [Site] will be an extremely complicated, fact intensive process involving hundreds of parties, as well as EPA, DEQ, and federal, state and Tribal natural resource trustees."[25] This Court agreed and stayed the litigation until one year after EPA issues the Record of Decision ("ROD") for the Site.[26]

The City now proliferates the already staggering volume of litigation in pursuit of recovery of the same costs currently being addressed in the 2009-2016 allocation proceedings. The City reports that, as of 2016, the allocation process now includes 99 "actively participating" parties and an additional 100 parties that have agreed to toll claims pending the allocation.[27] The City has effectively done an about-face from its 2009 litigation position and is now pursuing speculative contingency-fee litigation against non-dischargers. The City's lawsuit threatens the non-judicial allocation proceedings by asking this Court (duplicatively) to determine liability for Site response costs through this action. Moreover, to the extent the City's claims survive

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[22] *E.g.*, *id.* at ¶¶ 89, 94, 95, 104, RJN, Ex. 11.

[23] *See Arkema*, Pls.' Memo. in Support of Mot. for Referral to Alternative Dispute Resolution at 3 (D. Or. Sept. 24, 2009), RJN, Ex. 12.

[24] *Id.* at 4, RJN, Ex. 12.

[25] *Id.* at 5, RJN, Ex. 12.

[26] *See Arkema*, Opinion and Order at 1, 3 (D. Or. May 18, 2010), RJN, Ex. 13; *Arkema*, Proposed Order of Stay at 2 (D. Or. Dec. 30, 2009), RJN, Ex. 14.

[27] *See Arkema*, Pls.' Twelfth Status Report at 1-2 (D. Or. May 19, 2016), RJN, Ex. 15.

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scrutiny under F.R.C.P. 12(b)(6), Defendants will be compelled to bring *actual PCB dischargers* into this litigation, as counterproductive as that may be for the resolution of liability and prompt cleanup of the Site.

(c) The City's Urban Runoff and Sewage Overflows into the River:

The City's historic operation of its vast and aging sewer system has played a key role in the utilization of the Willamette River as "open sewers."[28] From construction of the City's sewer system in the 1880s, until the 1950s, the City disposed of a mixture of untreated storm water and sewage wastes directly into the Willamette River.[29] Even after some of the City's sewer system was separated, combined sewer overflows ("CSOs") have continued to discharge significant amounts of untreated storm water and sewage into the State Waters—in 1972, the City estimated that over 10 billion gallons of combined sewage per year overflowed into the Willamette River and Columbia Slough, and as recently as 1991, the City's CSOs overflowed about 100 times a year.[30] EPA identified sewer outfalls and urban storm runoff as contaminant sources under the 2001 AOC, and the Feasibility Study states that "[s]tormwater input is the most important current source pathway . . . for many contaminants, including PCBs."[31]

III. ARGUMENT

A. Standard of Review

A court should dismiss a complaint as a matter of law under Rule 12(b)(6) for failure to state a claim where there is (1) a lack of a cognizable legal theory, or (2) insufficient facts alleged to sustain a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696,

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[28] EPA, Portland Harbor RI/FS, Remedial Investigation Report at 1-3 (Feb. 8, 2016) ("RI Report"), RJN, Ex. 16; *see also* City of Portland, BES, Sewage release to Fanno Creek tributary in southwest Portland (Apr. 4, 2016) ("Over one-third of Portland's more than 2,500 miles of sewer pipes are over 80 years old. Pipes that fail or become blocked with grease, tree roots and debris can cause sewage overflows."), RJN, Ex. 17.

[29] RI Report at 3-78, 3-79, RJN, Ex. 16.

[30] *Id*. at 3-84, 3-85; *see also id*. at 4-2 ("CSO events are untreated discharges of combined stormwater and sanitary sewage . . . that overflow from the sewer system into the river during heavy rainfall periods . . . ."), RJN, Ex. 16.

[31] *Id*. at ES-15, RJN, Ex. 16; AOC at § V, ¶ 3, RJN, Ex. 9.

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699 (9th Cir. 1988) (as amended), *overruled in part on other grounds*. A court may dismiss prayers for relief under Rule 12(b)(6) where the complaint lacks sufficient factual support for the relief sought or where the relief is otherwise unavailable as a matter of law. *See Whittlestone, Inc. v. Handi-Craft, Co.*, 618 F.3d 970, 974 (9th Cir. 2010).

A complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); F.R.C.P. 8(a), 9(f). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff must include more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." *Id.* (citation omitted). Courts need not accept as true a plaintiff's (1) conclusory allegations, (2) legal conclusions, (3) allegations that contradict matters properly subject to judicial notice, or (4) allegations that contradict documents attached to or incorporated by reference into the complaint. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

B. The City's Tort Claims Are Time-Barred[32]

1. The City's Allegations Fall Squarely Within the Realm of Oregon's Product liability Statute

The City's efforts to evade the limitations on product liability suits through novel legal claims fail. In Oregon, the statute of limitations and statute of repose apply to all "[p]roduct liability civil action[s]."[33] "[T]he definition of a 'product liability civil action' in [ORS 30.900] [is] *not limited to* negligence, strict liability, or breach of implied warranty claims." *Weston v.*

[32] Defendants do not assert that the City's common law indemnity claim is subject to the limitations period set forth in ORS 30.905.

[33] ORS 30.900 defines a "product liability civil action" as a "civil action[s] brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of: (1) Any design, inspection, testing, manufacturing or other defect in a product; (2) Any failure to warn regarding a product; or (3) Any failure to properly instruct in the use of a product." ORS 30.900.

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Camp's Lumber & Bldg. Supply, Inc., 205 Or. App. 347, 356, *opinion adhered to as modified on reconsideration*, 206 Or. App. 761 (2006) (emphasis added). Instead, "the term 'product liability civil action,' as defined by ORS 30.900, embraces *all theories* a plaintiff can claim in an action based on a product defect." *Kambury v. DaimlerChrysler Corp.*, 185 Or. App. 635, 639 (2003) (emphasis added) (citing *Marinelli v. Ford Motor Co.*, 72 Or. App. 268, 273 (1985)).

In determining what limitation period applies to a particular claim, the court must first "look beyond the label of the claim to the operative facts alleged; it is from those facts that we discern the gravamen or predominant characteristic of the claim." *See Weston*, 205 Or. App. at 358; *see also Bradbury v. Teacher Standards and Practices Comm'n*, 328 Or. 391, 398 (1999). "[I]f the gravamen of the claim is in fact one that is based on a product defect or failure as defined by ORS 30.900, ORS 30.905 will apply regardless of the characterization of the theory given to it by the plaintiff." *Weston*, 205 Or. App. at 358.

The gravamen of the City's Complaint, and the basis for each and every one of its tort claims, is that Old Monsanto "was the sole manufacturer of PCBs in the United States from 1935 to 1979[,]" Compl. ¶¶ 3, 20, 29, 84, 101, 117; that PCBs were defective when they left Old Monsanto's hands, Compl. ¶¶ 104, 106, 110; and that Old Monsanto knew of the product's defects but failed to warn users and consumers, Compl. ¶¶ 43-72. These allegations, which sound in product defect and failure to warn, all relate to Old Monsanto's alleged 1935-1979 PCB manufacturing and are incorporated into each of the City's tort claims. There is accordingly no doubt that product liability is the predominant characteristic of the City's public nuisance, product liability, negligence, and trespass claims, and each is subject to Oregon's product liability statute, including its statute of limitations.

Moreover, the City's Complaint is devoid of *any* allegation of tortious conduct by Old Monsanto (or Defendants) after the last molecule of PCB was sold in the late 1970s—further confirming that the City's alleged torts all sound in product liability alone. *See Nat'l Interstate Ins. v. Beall Corp.*, No. 3:14-CV-01245-JE, 2015 U.S. Dist. LEXIS 30416, at *6 (D. Or. Mar. 11, 2015) ("Oregon cases also make clear that if the acts, omissions, or conditions complained of

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existed or occurred before or at the date on which the product was first purchased for use or consumption, the claim is properly considered a product liability civil action, governed by [ORS] 30.900-30.927.").

2. The Tort Claims Are Barred by the Two-Year Statute of Limitations

Oregon courts dismiss claims at the Rule 12(b)(6) stage that run afoul of the limitation periods set forth in ORS 30.905. *See Marinelli*, 72 Or. App. 268; *Simonsen v. Ford Motor Co.*, 196 Or. App. 460 (2004). The limitations period applicable to the City's product liability claims is two years. Governmental entities are not exempt from the statute.[34] The applicable limitations period has now run *multiple* times.

The City's Complaint was filed on July 12, 2016—37 years after the alleged 1979 conclusion of U.S. PCB manufacturing. Compl. ¶¶ 3, 20, 29. Thus, if the city's injury occurred before July 12, 2014 (the "bar date"), the City's claims are time barred by the two-year statute of limitations. *See* ORS 30.905(2) (1977) (amended 1993) (" . . . a product liability civil action shall be commenced not later than two years after the date on which the death, injury or damage complained of occurs."). Seven years ago in 2009, the City filed its *first* PCB cost recovery lawsuit involving the State Waters. That litigation aside, assertions within the 2016 Complaint itself foreclose any possibility that the City's "injury" first occurred after the July 12, 2014 bar date. By 2001, *at the latest*, the City was subject to an AOC, whereby it was required to "investigate, monitor, and analyze PCB contamination in Portland Harbor." Compl., ¶ 11. Because of this, the City cannot credibly argue that its alleged injury occurred after 2001.

The "discovery rule"—enacted by amendments to ORS 30.905 in 2003, and again in 2009—dictates that the statute of limitations begins to run "after the plaintiff discovers, or reasonably should have discovered, the personal injury or property damage and the causal

[34] The express terms of ORS 30.905 do not exempt government entities, and the Oregon Supreme Court has concluded that no such exemption applies. *See Shasta View Irrigation Dist. v. Amoco Chems. Corp.*, 329 Or. 151, 158 (1999) ("the exemption granted to the state, counties and other public corporations by ORS 12.250 does not apply [outside ORS Chapter 12] to the statute of ultimate repose in ORS 30.905(1)").

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relationship between the injury or damage and the product, or the causal relationship between the injury or damage and the conduct of the defendant." ORS 30.905(1). However, the "discovery rule" applies only to injuries occurring after January 1, 2004.[35] Again, because the City's alleged injury had occurred by 2001, *at the latest*, its claims are time-barred. Compl., ¶ 11.

But even if the discovery rule applies, it would make no difference. The City's own allegations establish that its tort claims accrued more than a decade before the 2014 bar date. As pled by the City, the alleged presence of PCBs in the State Waters was publicly known *decades* before the City filed suit in 2016.[36] The City alleges that EPA approved a Total Maximum Daily Load ("TMDL") for PCBs lawfully deposited into the Columbia Slough, which occurred in 1998. Compl., ¶ 8.[37] The City also alleges that it has investigated and remediated PCB contamination in the Columbia Slough and investigated and analyzed such contamination at Johnson Creek—such work began by 1993 at the Columbia Slough and by 1988 at Johnson Creek. Compl. ¶ 12.[38] The City asserts that EPA designated Portland Harbor a Superfund site—

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[35] *See* 2003 Or. Laws. Ch. 768 § 2(1) ("[T]he amendments to ORS 30.905 by section 1 of this 2003 Act apply only to deaths, personal injuries or property damage that occurs on or after the effective date of this 2003 Act [*i.e.*, January 1, 2004]."); *Starr v. Dow Agrosciences LLC*, 339 F. Supp. 2d 1097, 1103 n.3 (D. Or. 2004) (same); *Gladhart v. Or. Vineyard Supply Co.*, 332 Or. 226, 234 (2001) (the two-year period of limitation "begins to run when the death, injury or damage complained of happens, whether or not the plaintiff discovers the harm within the ensuing two years") (internal quotations omitted).

[36] Curiously, the City alleges, without any contemporaneous data, that PCBs have contaminated its own storm water collection systems since before 1976—nearly 40 years before the bar date. Compl., ¶¶ 79-81. The City's allegations appear to be a strategic attempt to avoid the product liability limitation periods. *See Marinelli*, 72 Or. App. at 272 (ORS 30.905(1) applies only to causes of action, claims, rights, or liabilities accruing after December 31, 1977). But the City's conclusory reference to 1976 is otherwise arbitrary, and bears no relation to any allegedly tortious act by Old Monsanto *or* to any actual injury or harm allegedly suffered by the City. The City's cause of action does not accrue simply because the City selects an arbitrary date, unsupported by any plausible allegations of actual injury. *See Witt Co. v. RISO, Inc.*, 948 F. Supp. 2d 1227, 1234 (D. Or. 2013) ("the court need not accept conclusory allegations as truthful").

[37] The City's 2004 permit incorporates the PCB TMDL for the Columbia Slough, and requires the City to "ensure that pollutant discharges for those parameters listed in the TMDL are reduced to the maximum extent practicable." ODEQ, NPDES Permit No. 101314, Municipal Separate Storm Sewer System (MS4) Discharge Permit, at 1, 8-9 (Mar. 8, 2004), RJN, Ex. 18.

[38] Since 1993, the City and ODEQ have studied the Columbia Slough Watershed and have implemented actions to improve sediment quality. City of Portland, *Columbia Slough Watershed*

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this occurred in 2000. Compl., ¶ 11. The City further alleges that in 2001 it became subject to an AOC for Portland Harbor issued by EPA, which identifies PCBs as a Site contaminant.[39] Compl., ¶ 11. Thus, even applying the discovery rule, by 2001 *at the latest*, the City knew that the State Waters had been impacted by PCBs, and it had already begun to address such PCB contamination. All of the City's tort claims are therefore time-barred, regardless of whether the discovery rule applies.

Defendants anticipate the City will try to evade the application of the statute of limitations by invoking the "continuing violation" doctrine. But no such circumvention is possible. Old Monsanto (and Defendants) are not even alleged to have "actively engaged in ongoing tortious conduct up to the [bar date]"; PCB manufacturing ceased, according to the Complaint, by 1979 at the latest. *See City of LaGrande v. Union Pac. R.R. Co.*, No CV-96-115-ST, 1997 U.S. Dist. LEXIS 23939, at *14 (D. Or. July 18, 1997); *see also Weston*, 205 Or. App. at 366-67 ("Plaintiffs cannot avoid the statute of limitations simply by characterizing the harm in this case as multiple injuries to their property when, in fact, all of defendants' actions and any actionable harm giving rise to liability occurred at the time of delivery."). Put differently, an alleged "continuing" harm to the City from manufacturing conducted by Old Monsanto that terminated no later than 1979 does not toll the statute of limitations. *See BoardMaster Corp. v. Jackson Cty.*, 224 Or. App. 533, 554 (2008) ("[A]ny continuing duty that a defendant may have to rectify its alleged negligence does not allow a plaintiff to avoid the statute of limitations when, as here, the defendant takes no further action.") (citations omitted). That the City expects to

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Characterization at B-3 (June 2005), RJN, Ex. 19. The investigation culminated in a 2005 ROD issued by ODEQ for the Columbia Slough, which includes a framework for cleanup of sediment contamination, including PCBs. ODEQ, *Record of Decision Remedial Action Approach for Columbia Slough Sediment* at 4-5 (July 2005), RJN, Ex. 20. At Johnson Creek, in 1988, the City began a multi-step cooperative assessment of water-quality characteristics of Johnson Creek and identified PCBs as a contaminant, and, in 2002, Johnson Creek was identified on the State's "Impaired Waters List" for PCBs. *See* U.S. Geological Survey: Water-Resources Investigations Report 92-4136, *Preliminary Evaluation of Water-Quality Conditions of Johnson Creek, Oregon*, at 1 (1993), RJN, Ex. 21; ODEQ, *Willamette Basin TMDL – Chapter 5: Lower Willamette Subbasin TMDL*, at 5-6 (Sept. 2006), RJN, Ex. 22.

[39] AOC at § V, ¶ 3, RJN, Ex. 9.

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spend significant sums of money in the future to remediate PCB contamination, Compl., ¶¶ 11, 16, is similarly unavailing.[40]

3. The City's Claims Also Are Barred by the Eight-Year Statute of Repose

Oregon's former eight-year statute of repose, in effect through 2009 and thus well beyond when the City's claims accrued, also independently bars the City's tort claims. ORS 30.905(1) (1977) (amended 1983, 1987, 1993, 2003).[41] Oregon's current statute of repose, applicable since January 1, 2010 to product liability civil actions for property damage, states that such an action must be commenced before the later of:

> "(a) Ten years after the date on which the product was first purchased for use or consumption; or (b) The expiration of any statute of repose for an equivalent civil action in the state in which the product was manufactured, or, if the product was manufactured in a foreign country, the expiration of any statute of repose for an equivalent civil action in the state into which the product was imported."

ORS 30.905(2).

The (current and former) statute of repose reflects the Oregon legislature's intent "that manufacturers, distributors, sellers and lessors should have the benefit of a limited and predictable time period during which they would be exposed to liability for defects that existed when the product left a respective party's hands."[42]

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[40] *See Monico v. City of Cornelius*, No. 03:13-CV-02129-HZ, 2015 U.S. Dist. LEXIS 44634, at *52-53 (D. Or. Apr. 6, 2015), *reconsideration denied*, No. 03:13-CV-02129-HZ, 2015 U.S. Dist. LEXIS 46429 (D. Or. Apr. 9, 2015) ("Oregon cases do not recognize 'a series of discrete acts, even if connected in design or intent, as a continuing tort that would allow the statute of limitations to be avoided.'") (*quoting Pearson v. Reynolds Sch. Dist. No. 7*, 998 F. Supp. 2d 1004, 1027 (D. Or. 2014)).

[41] *See* 1977 Or. Laws Ch. 843, § 3; 1983 Or. Laws Ch. 143, § 1; 1987 Or. Laws Ch. 4, § 1; 1993 Or. Laws Ch. 259, § 6; 2003 Or. Laws Ch. 768, § 1; 2009 Or. Laws Ch. 485, § 1, RJN, Ex. 23.

[42] *Erickson Air-Crane Co. v. United Technologies Corp.*, 303 Or. 281, 288 (1987); *see also Shasta View Irrigation Dist.*, 329 Or. at 158 ("Statutes of ultimate repose set maximum times to file a claim, regardless of the date of discovery of an injury or other circumstances that may affect the expiration of a statute of limitations."); *Bonney v. Fabio Perini N. Am., Inc.*, No. 3:13-CV-00547-HZ, 2014 U.S. Dist. LEXIS 7097, at *7 (D. Or. Jan. 21, 2014) (same); *Border v. Indian Head Indus., Inc.*, 101 Or. App. 556, 560 (1990) ("A plaintiff who is injured more than eight years after the first purchase of the product for use or consumption *simply never has a claim*.") (emphasis added).

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Section (b) of ORS 30.905(2) is referred to as a "look away" provision and looks back to the statute of repose in the state in which the product was manufactured, to the extent that is known. However, the pre-2009 statute of repose contains no such "look away" provision and simply states that a product civil liability action must be commenced not later than "*eight years after the date on which the product was first purchased for use or consumption*." ORS 30.905(1) (1977) (amended 1983, 1987, 1993, 2003) (emphasis added). The 2009 amendments expressly state that they "apply only to causes of action that arise on or after the effective date of this 2009 Act [January 1, 2010]," and subsequent case law confirms this legislative intent.[43]

As set forth more fully above, the Complaint attests that by 2001, *at the latest*, the City was aware of PCB contamination in the State Waters and had incurred obligations to address it. Compl., ¶ 11. Since the City's tort claims arose long before the January 1, 2010 effective date of Oregon's amended statute, Oregon's eight-year statute of repose applies.

Under the eight-year statute of repose, the City was required here to commence suit not later than 1987, eight years after the last date on which Old Monsanto is alleged to have manufactured or sold PCBs—1979. Compl., ¶ 3. The 2016 Complaint was filed at least 29 years too late, and the City's tort claims are time-barred.

C. The City Fails to State a Claim for Public Nuisance (First Claim)

1. <u>The City Lacks Standing to Bring a Public Nuisance Claim for the State-Owned Water Bodies</u>

"Generally, only the state can bring a cause of action against the party responsible for the public nuisance." *City of Portland v. Boeing Co.*, 179 F. Supp. 2d 1190, 1195 (D. Or. 2001)

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[43] *See* 2009 Or. Laws Ch. 485, § 2; *see also Caswell v. Olympic Pipeline Co.*, No. C10-5232BHS, 2010 U.S. Dist. LEXIS 73955, at *6 (W.D. Wash. July 22, 2010), *reconsideration granted, order vacated in part*, No. C10-5232BHS, 2010 U.S. Dist. LEXIS 124954 (W.D. Wash. Nov. 24, 2010), *and on reconsideration in part*, No. C10-5232BHS, 2011 U.S. Dist. LEXIS 20963 (W.D. Wash. Mar. 2, 2011), *aff'd*, 484 F. App'x 151 (9th Cir. 2012) (rejecting argument that the "look away" provision applied under Oregon's as-amended statute of repose because plaintiff's cause of action arose before the amendment's effective date); *see also Lunsford v. NCH Corp.*, 271 Or. App. 564, 566 n.1 (2015) ("The 2009 amendments to ORS 30.905 . . . apply only to claims arising after January 1, 2010.").

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(citing *Frady v. Portland GE*, 55 Or. App. 344, 349 (1981)). An exception allows an individual to pursue this type of claim, but *only* where that individual has "suffered an injury of a special character separate and distinct from that suffered by the general public." *Id.*; *see also Raymond v. S. Pac. Co.*, 259 Or. 629, 634 (1971) ("Public nuisances must be vindicated by the state unless an individual can show that he has suffered a special damage over and above the ordinary damage caused to the public at large, in which case he has a private action for damages.").

The City has notably *not* brought a representative claim on behalf of the State or the citizens of Portland to *abate* an alleged public nuisance;[44] instead, it has brought this public nuisance claim for *damages* in its individual capacity. Compl., ¶ 97. As such, the City must show the requisite "special injury," *i.e.*, here, that the City "owns land that is affected with [the alleged] public nuisance." *City of Portland*, 179 F. Supp. 2d at 1195; *see also City of Roseburg v. Abraham*, 8 Or. 509, 512 (1880) (City of Roseburg "can maintain an action for damages to [its] corporate rights, or *property*, only in cases where an individual could for like injuries to his individual rights, or property.") (emphasis added); *Frady*, 55 Or. App. at 349 ("When a public nuisance interferes with an individual's right to use and enjoy *his real property*, the individual suffers special injury and may bring an action.") (citing *Smejkal v. Empire Lite-Rock, Inc.*, 274 Or. 571, 575 (1976)); Restatement (Second) of Torts § 821C, comment e (1979)).[45]

The City alleges that the State Waters are the "properties" that have been "specially injured." *See* Compl., ¶¶ 5, 7, 10, 73-82. But the City has not pled and cannot allege that it has

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[44] Local ordinances authorize the City to *remove or abate* nuisances in certain specified circumstances. *See, e.g.*, PCC 22.05.010 (authorizing Code Hearings Officer to order a party to "abate or remove any nuisance" resulting from a violation of the PCC); PCC 10.80.010 (authorizing "summary abatement" of a nuisance in certain circumstances).

State environmental statutes also do not provide any basis for the City's public nuisance damages claim, as they are enforceable only by the State. *See, e.g.*, ORS 468B.020 (authorizing ODEQ to enforce any provision, rule, permit, or order under the Water Quality Chapter "for the prevention of new pollution and the abatement of existing pollution . . .").

[45] Oregon courts generally follow the public nuisance framework set forth in the Restatement (Second) of Torts §§ 821A, 821B, 821C, and 821D (1979). *See, e.g., Drayton v. City of Lincoln City*, 244 Or. App. 144, 148 (2011); *Mark v. Dep't of Fish and Wildlife*, 158 Or. App. 355, 359-60 (1999).

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ownership rights to them, and it has never taken the position in litigation that it has standing to bring a public nuisance claim regarding the State Waters.[46] Because the State maintains ownership over the State Waters, the public nuisance claim fails for lack of standing. No Oregon case has ever sanctioned a public nuisance claim of this sort absent property ownership.[47]

The City cannot save its public nuisance claim by asserting a "property interest" in its own storm water conveyance systems or (erroneously) in the wastewater and storm water itself,[48] as it is the State Waters—not the conveyance infrastructure—that the Complaint alleges to be injured. Moreover, in the first-filed San Diego Bay case, which the City's common counsel contends is "identical" to the six other previously filed municipal test cases,[49] counsel confirmed that the damages sought "relate [] to the damage that has been done to [San Diego] Bay by PCBs without regard to" whether PCBs "ever went through any pipes that the City [of San Diego] owns." *San Diego Unified Port Dist. v. Monsanto*, No. 15-cv-0578-WQH, Dkt. #31-3, Reporter's Transcript ("RT") at 41:11-42:1, RJN, Ex. 24.

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[46] See *Columbia River Fishermen's Protective Union v. City of St. Helens*, 160 Or. 654, 661-63 (1939) (citing *Monroe v. Withycombe*, 84 Or. 328 (1917)) ("On its admission to the Union, Oregon was vested with the title to the land under navigable waters within the state, subject to the public right of navigation and to the common right of the citizens of the state to fish."); *see also* ORS 537.110 ("All water within the state from all sources of water supply belongs to the public."); *Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd's of London*, 341 Or. 128, 132 (2006) (recognizing State ownership of water via ORS 537.110).

[47] *See, e.g.*, *City of Roseburg*, 8 Or. at 512 (sustaining demurrer where "complaint merely allege[d] that [the City had] been wholly deprived of the public use of [a] street[, as] had every citizen of [the City]"); *Frady*, 55 Or. App. at 348-49 (dismissing public nuisance claims by plaintiffs "who reside[d] on land near the facility, but who [were] not landowners[,]" while allowing such claims by landowner plaintiffs, because the injuries suffered by non-landowner plaintiffs were "not different from those which would be suffered by anyone in the vicinity of the facility"); *City of Portland*, 179 F. Supp. 2d at 1193-94, 1196 (allowing City to pursue a private cause of action explicitly because the City was "an owner of property in near proximity to Defendant's facilities," and the costs incurred by the City to protect its property from the contamination were "unique" to the City as a property owner).

[48] In Oregon, "[a]ll water within the state *from all sources of water supply* belongs to the public." ORS 537.110 (emphasis added). The phrase "from all sources of water supply" unambiguously includes wastewater and storm water.

[49] Plaintiff's counsel repeatedly has identified each of the previous seven lawsuits brought by different municipalities against Monsanto for PCB contamination as "identical." *See, e.g.*, City of Long Beach's Not. of Related Cases at 2, *City of Long Beach v. Monsanto Co., et al.*, Case No. 2:16-cv-03493-FMO-AS (May 24, 2016), RJN Ex. 25.

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In this case, the City cannot state a public nuisance claim by alleging "special injury" in the form of costs it has and will incur to investigate and remediate PCB contamination in the State Waters (which the City does not own). With over 150 entities identified by EPA as potentially responsible for the Portland Harbor contamination, the City's costs are not unique at all—they are shared by hundreds of other parties equally responsible for the contamination—many of which (including the City) have been involved in separate proceedings since 2009 to allocate these costs. *See supra* Section II.

2. The City's Public Nuisance Claim Should Be Dismissed Because It Is a Poorly Disguised Product liability Action

The City's public nuisance claim for damages should also be dismissed because it is nothing more than an ill-disguised product liability action. While Oregon courts have not spoken on this legal issue, other states, including California—where five of the eight "identical" cases filed by the City's counsel are pending—have been vocal that "the law of nuisance is not intended to serve as a surrogate for ordinary products liability." *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28, 39 (Cal. Ct. App. 2004); *Redevelopment Agency v. BNSF Ry. Co.*, 643 F.3d 668, 674, n.2 (9th Cir. 2011) ("[T]he holdings in *Modesto* and [*Santa Clara*] are explained in part by the courts' recognition that manufacturing and distribution activity may be better addressed through the law of products liability."). In fact, any time a California municipality seeks damages for public nuisance from a manufacturer of a defective or non-defective product, it is considered by courts to be a "red flag" and construed as an improper end-run around product liability laws. *See City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575, 586-87 (Cal. Ct. App. 1994); *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 313 (Cal. Ct. App. 2006).

In *City of San Diego*, the court rejected the city's public nuisance damages claim for the deterioration of asbestos-containing materials in its buildings, holding it amounted to "a products liability action in the guise of a nuisance action." 30 Cal. App. 4th at 586-88. The court recognized that almost every product liability action could be converted into a nuisance action,

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such that "nuisance 'would become a monster that would devour in one gulp the entire law of tort.'" *Id*. (citation omitted). Here too, the City's "allegations sound in products liability, for which 'the law of nuisance is not intended to serve as a surrogate.'" *Hinds Invs., L.P. v. Angioli*, 445 F. App'x 917, 919 (9th Cir. 2011) (citation omitted).

The City's public nuisance "test case" cannot seek to build upon Oregon precedent because no case has ever addressed the issue. Instead, the City models its case on a single California state court of appeal decision, *Santa Clara*.[50] Yet, *Santa Clara* actually supports dismissal of the City's public nuisance claim for damages. In *Santa Clara*, various California municipalities sued a group of lead-paint manufacturers for public nuisance on behalf of the People of California (the representative claim) and on their own behalf (the non-representative claim) for damages and abatement of hazards caused by lead paint.[51] *Santa Clara* allowed only the representative claim for *abatement* to proceed and dismissed the non-representative claim for *damages* because it was "much more like a product[] liability" action. 137 Cal. App. 4th at 311, 313 (refusing to extend "liability for damages for product-related injuries . . . beyond products liability law to public nuisance law"). Here, the City asserts *only the latter rejected type of claim*—a claim in its individual capacity for damages. Compl., ¶ 97; Prayer for Relief. In a hearing before the Southern District of California on Defendants' pending motion to dismiss in the first-filed and so-called "identical" San Diego action, the court repeatedly asked counsel for the City how their public nuisance claim for damages could survive the constraints imposed by their key California case, *Santa Clara*. RT at 31:4-32:10; 33:19-35:7; 38:7-42:1, RJN Ex. 24. Counsel could offer no clear response. RT at 32:1-32:10; 34:25-35:7; 41:2-41:6, RJN Ex. 24.

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[50] All cases before and after the 2006 *Santa Clara* decision underscore that the decision neither rewrote California law nor has it been extensively followed there since. *See Redevelopment Agency v. BNSF Ry. Co.*, 643 F.3d 668, 674 (9th Cir. 2011); *Team Enters., LLC v. W. Inv. Real Estate Trust*, 647 F.3d 901, 912 (9th Cir. 2011); *Hinds Invs., L.P.*, 445 F. App'x at 920; *City of Merced Redevelopment Agency v. Exxon Mobil*, No. C14-787 RAJ, 2015 US Dist. LEXIS 13549, at *56-69 (E.D. Cal. 2015); *In re Firearm Cases*, 126 Cal. App. 4th 959, 991 (Cal. Ct. App. 2005).

[51] In California, public nuisance claims can be advanced by governmental bodies in certain circumstances, as enumerated by statute.

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Because the Complaint improperly attempts to mask a product liability claim of an allegedly "defective" product as a public nuisance claim for damages, the claim must be dismissed.

3. The City Cannot Plead Facts Showing that Defendants Caused or Created a Public Nuisance in the State Waters

The City's public nuisance claim also fails because the City has not pled causation. No Oregon court—state or federal—has ever indulged a public nuisance action against a product manufacturer for placing a lawful product into the stream of commerce; instead, Oregon precedents strongly support the conclusion that liability cannot attach based merely on Old Monsanto's manufacture of PCBs. *Williams v. Invenergy, LLC*, No. 2:13-CV-01391-AC, 2016 U.S. Dist. LEXIS 57045 at *60 (D. Or. Apr. 28, 2016) ("[A] plaintiff may recover damages only for those injuries which are 'causally linked' to the nuisance.") (citation omitted); *Gronn v. Rogers Constr., Inc.*, 221 Or. 226, 238-39 (1960). The City relies on threadbare and conclusory assertions that "[Old] Monsanto's conduct was a substantial factor in causing the harm to the Plaintiffs," because four to eight decades ago Old Monsanto "manufactured, distributed, marketed, and promoted PCBs in a manner that created or participated in creating a public nuisance." Compl., ¶¶ 84, 95. The City does not (and cannot) allege that Old Monsanto discharged PCBs into the State Waters between 1935 and 1979. And the Complaint is silent regarding the dates of any releases and circumstances of potentially thousands of intervening actors, including the City, who are more closely tied to how PCB-containing materials may have ultimately reached the State Waters.

By wholly ignoring causation, the City asks this Court to be the first to create a "super tort" that is grossly out of step with Oregon law and has never before been recognized here or anywhere else in the country. In Washington, for instance, only two published public nuisance cases have ever been brought in 125 years against product manufacturers for placing products into the stream of commerce, and *both* novel cases were dismissed at the Rule 12(b)(6) stage for lack of causation. No one has even *attempted* the same in Oregon.

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In *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1030 (W.D. Wash. 2005) *aff'd*, 503 F.3d 974 (9th Cir. 2007), family members of a woman killed on the Gaza Strip and Palestinians brought seven claims, including public nuisance, against a U.S. product manufacturer for the demolition of their homes by Israeli Defense Forces using Caterpillar bulldozers. The Washington court concluded there could be no liability for selling a legal, non-defective product and that no causation existed, as the Israeli Defense Forces' conduct with respect to the plaintiffs was too remotely connected to the sale of bulldozers. *Id*. at 1030-31. The Ninth Circuit upheld the dismissal of public nuisance on the pleadings. *See* 503 F.3d 974.

In *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219, 1224 (W.D. Wash. 1999) *aff'd*, 241 F.3d 696 (9th Cir. 2001), Washington public hospital districts (subdivisions of the state) brought a public nuisance claim against tobacco product manufacturers on grounds similar to this action. The manufacturers had allegedly "engaged in deceptive acts and conspired to perpetuate smoking and nicotine addiction in the United States," which as a result, "forced the public hospitals and others to bear [unreimbursed health care costs associated with treating patients with smoking-related injuries]." *Id*. at 1221. The manufacturers moved to dismiss under Rule 12(b)(6), claiming the public hospitals' claims were "too remote and wholly derivative of injuries to unnamed smoker-patients." *Id*. at 1222. The court agreed and dismissed the public nuisance claim for lack of proximate causation. *Id*. at 1224. Specifically, the court found there was "no direct link" between the alleged misconduct of the tobacco product manufacturers and the public hospitals' claimed damages of unpaid medical expenses. *Id*. The Ninth Circuit affirmed. 241 F.3d 696.

Attempts to advance public nuisance theories against manufacturers in numerous other product contexts have similarly been rejected in at least 13 different state and federal jurisdictions at the pleading or summary judgment stage.[52] At least 33 cases have dismissed

[52] *See, e.g.*, (1) *City of Perry v. Proctor & Gamble Co.*, No. 15-cv-8051 (JMF), 2016 U.S. Dist. LEXIS 66010 (S.D.N.Y. May 19, 2016) (flushable wipes alleged to cause damage to municipal sewer facilities); (2) *Guttmann v. Nissin Foods (U.S.A.) Co., Inc.*, No. C15-00567 WHA, 2015 U.S. Dist. LEXIS 92756 (N.D. Cal. July 15, 2015) (trans-fat food); (3) *Town of Westport v.*

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public nuisance claims against product manufacturers at the Rule 12(b)(6) stage. *See* Att. 1, hereto. Courts have consistently rejected these claims, recognizing:

> "[a]ll a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its nondefective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born."

New York v. Sturm Ruger & Co., 309 A.D. 2d 91, 96 (N.Y. App. Div. 2003).

Similar causation-free PCB claims brought against one or more of the Defendants here have already been dismissed outside Oregon on *three occasions* for lack of causation. In *Town of Westport v. Monsanto*, No. 14-12041-DJC, 2015 U.S. Dist. LEXIS 36846 (D. Mass. Mar. 24, 2015), a comparable bare-bones theory was advanced by the City's Texas-based counsel here against the same three Defendants—that the use of PCB-containing building materials by the product manufacturer's customers in town and school buildings created a public nuisance, and Defendants were liable as the successors and/or indemnitors of the "sole manufacturer" of PCBs for commercial uses in the U.S. *Id.* at *3-4. Such allegations proved insufficient to survive a Rule 12(b)(6) motion because Defendants were not liable for the actions of Old Monsanto's customers: "Westport was in control of the instrumentality, the PCB-containing products, following purchase and the Court thus agrees with Defendants that because they 'did not have

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Monsanto Co., No. 14-cv-12041-DJC, 2015 U.S. Dist. LEXIS 36846 (D. Mass. Mar. 24, 2015) (PCBs); (4) *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (climate change, carbon emitters); (5) *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007) (lead-based paints); (6) *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (lead-based paints); (7) *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005) (lead-based paints); (8) *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002) (guns); (9) *Cofield v. Lead Indus. Ass'n Inc.*, No. 99-cv-3277-MJG, 2000 U.S. Dist. LEXIS 23405 (D. Md. Aug. 17, 2000) (lead-based paints); (10) *City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575 (Cal. Ct. App. 1994) (asbestos-containing materials); (11) *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993) (asbestos-containing materials); (12) *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989) (PCBs); (13) *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986) (asbestos products); (14) *Diamond v. Gen. Motors Corp.*, 20 Cal. App. 3d 374 (Cal. Ct. App. 1971) (smog and air pollution).

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the power or authority to maintain or abate these PCB-containing building materials, they cannot be liable for a public nuisance.'" *Id*. at *10 (citation omitted).

Similarly, in *City of Bloomington v. Westinghouse Electric Corp.*, the Seventh Circuit upheld the dismissal of an Indiana city's public nuisance claim seeking damages for the cleanup of PCB wastes that were deposited into a city landfill and the municipal sewer system by one of Old Monsanto's customers. 891 F.2d 611, 614 (7th Cir. 1989). The court determined, "[t]he allegations do not support the proposition that Monsanto participated in carrying on the nuisance. Without such participation, Monsanto cannot be liable." *Id.* Rather, the customer was "solely responsible for the nuisance it created by not safely disposing of the [PCB] product." *Id.* The customer (not the manufacturer) controlled the PCB-containing materials after the sale. *Id.*

The important distinction between a PCB manufacturer and a third-party customer or actor was reaffirmed by a third federal court presiding over another municipality's PCB lawsuit, which again involved the City's counsel here. In that 2015 case, the municipality's lawsuit against the three Defendants for remediation costs for PCB-containing caulk in school windows was dismissed because, like here, the town disregarded the third-party who had incorporated the PCBs into the caulk and, instead, directly sued the successor of the suspected PCB manufacturer. *Town of Lexington v. Pharmacia Corp.*, 133 F. Supp. 3d 258, 273 (D. Mass. Sept. 23, 2015) (Old Monsanto "was at least one step removed" from its customer that used PCBs).

The City does not allege any additional facts that would distinguish its public nuisance claims from those unsuccessfully advanced across the country by so many others. The same result should follow here.

D. The City's Common Law Indemnity Should Be Dismissed (Second Claim)

1. CERCLA Preempts the City's Common Law Indemnity Claim

"State common law claims may be preempted if they interfere with the execution of the purposes and objectives of a federal statute." *XDP, Inc. v. Watumull Properties Corp.*, No. CIV. 99-1703-AS, 2004 U.S. Dist. LEXIS 12057, at *29 (D. Or. May 14, 2004) (citation omitted). The City's common law indemnity claim does precisely that—it interferes with the purposes and

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objectives of an ongoing non-judicial allocation effort to settle claims for past and future CERCLA response costs at the Site, of which the City is an integral part.[53] In *XDP*, the plaintiff brought a claim seeking "recovery for expenses allegedly incurred in remediating environmental contamination from [its] property." *Id.* at *4. The court dismissed the plaintiff's "[c]ommon law claim[] for [] indemnity," finding it to be "in conflict with CERCLA's contribution scheme" and holding that "CERCLA prevents claimants from seeking compensation under state law theories for the same removal costs that are available under CERCLA." *Id.* at *29-30. In light of the City's participation in the non-judicial allocation of Site-related response costs, the City's common law indemnity claim is in direct conflict with CERCLA, and it must be dismissed.

2. The City Fails to State a Common Law Indemnity Claim[54]

In Oregon, a party claiming common law indemnity "must plead and prove that (1) it has discharged a legal obligation owed to a third-party; (2) the defendant was also liable to the third-party; and (3) as between the claimant and the defendant, the obligation ought to be discharged by the latter." *Fulton Ins. v. White Motor Corp.*, 261 Or. 206, 210 (1972) (relying on rule stated in Restatement of the Law of Restitution § 76, at 331 (1937)). The City has not pled any of the three required elements, and thus its claim fails.

First, a plaintiff must show that it has discharged an obligation owed to a third-party "so as to extinguish both its own and defendants' liability." *Savelich Logging Co. v. Preston Mill Co.*, 265 Or. 460, 509 (1973). At most, the City alleges that it has incurred costs under a cleanup order, an intergovernmental agreement, and its own permits. *See, e.g.*, Compl., ¶¶ 11, 16, 88,

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[53] *See Arkema*, Pls.' Memo. in Support of Mot. for Referral to Alternative Dispute Resolution at 3 (D. Or. Sept. 24, 2009), RJN, Ex. 12.

[54] It is unclear whether Oregon law would even permit the City's claim for common law indemnity based on the imprecise allegations in the Complaint. *See Eclectic Inv., LLC v. Patterson*, 357 Or. 25, 36-38 (2015) (claim of common law indemnity is unnecessary and unjustified in comparative-fault cases pursuant to ORS 31.605); *but see Wyland v. W.W. Grainger, Inc.*, No. 3:13-CV-00863-AA, 2015 U.S. Dist. LEXIS 76156, at*5-6 (D. Or. June 11, 2015) (finding it "inappropriate [ ] to extend the holding in *Eclectic* to [ ] claim for common-law indemnity for plaintiff's claim of strict liability"). Assuming, Oregon law would even recognize common law indemnity under the theories asserted here, the City fails to plead the requisite elements of a viable indemnity claim.

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100. But such obligations are not the equivalent of a judgment or liability *owed to a third-party*. *See Arch Chems., Inc. v. Radiator Specialty Co.*, 727 F. Supp. 2d 997, 1000 (D. Or. 2010) ("*[P]robable* liability is not enough for an indemnity claim; an indemnity claimant's liability must be established by a *judgment* or by pleading and proving *facts establishing liability*.") (emphasis added); *see also Fulton Ins.*, 261 Or. at 212 ("Probable liability is not enough."). Moreover, the City does not allege, nor could it, that by incurring permit compliance costs or entering into agreements to investigate contamination in the Portland Harbor, it has somehow extinguished Defendants' liability (if any).

Second, common law indemnity "requires that a common duty be mutually owed to a third-party." *Safeco Ins. Co. of Am. v. Russell*, 170 Or. App. 636, 639 (2000) (citations omitted). The City does not and cannot allege that the City and Defendants share a common duty *or* that they owe a duty to the same person. Defendants simply do not share the City's obligation to comply with the AOC, its NPDES permit requirements, or any other City agreement related to the State Waters.

Third, the City gives lip service to the requirement that "as between the claimant and defendant, the obligation ought to be discharged by the latter." *Fulton Ins.*, 261 Or. at 210. The Complaint alleges, "[b]etween Monsanto and the Plaintiff, Monsanto should be responsible for the costs to address PCB contamination, as the conduct of Plaintiff did not contribute in any way to the creation of the public nuisance." Compl., ¶ 102. But in order to meet this requirement, the claimants' [*i.e.*, City's] "liability must have been 'secondary' or his fault merely 'passive,' while that of the defendant must have been 'active' or 'primary.'" *Eclectic Inv.*, 357 Or. at 35 (citing *Fulton Ins.*, 261 Or. at 210). The facts alleged are insufficient, as the City pleads that it (*and not Defendants*) operates a storm water system that discharges contaminants, including PCBs, into the State Waters, and that it (*and not Defendants*) is a CERCLA PRP that has entered into various agreements and orders to investigate and remediate PCB contamination. Compl., ¶¶ 11-12, 15. In contrast, Old Monsanto is a former out-of-state PCB manufacturer that terminated production decades ago, and it is not alleged to have ever discharged a single molecule of PCB to

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the State Waters. Compl., ¶ 3. The Complaint fails to show that any legal obligation owed by the City should be discharged by Defendants.

E. The City Fails to State a Claim for Strict Product liability (Third and Fourth Claims)

1. The City Lacks Standing to Assert Product liability Claims

In Oregon, a "'product liability civil action' means a civil action . . . for damages for personal injury, death or *property damage* . . . ." ORS 30.900 (emphasis added). But the City does not allege damage to property that it actually owns. Nor could it—the State, not the City, owns the property, including the storm water, which allegedly is harmed by PCBs. Compl., ¶¶ 5, 7, 10, 73-82.[55] The City's product liability claims thus fail for lack of standing.

Applying product liability law, the City seeks to recover its permit compliance and other costs it has incurred or will incur to limit PCBs in storm water discharges and to "remediate, reduce, and monitor PCBs" in the State Waters. Compl., ¶¶ 11, 12, 16, 93, 97, 100. Such costs constitute *purely economic losses*.[56] Oregon courts have rejected strict product liability recovery absent *physical harm* to the plaintiff—"[m]ere economic loss unaccompanied by physical injury to property will not suffice for a product liability claim." *See Russell v. Deere & Co.*, 186 Or. App. 78, 84 (2003); *see also Kent v. Shiley Inc.*, No. CIV. 87-6554-E, 1989 U.S. Dist. LEXIS 8962, at *1-2 (D. Or. Jan. 24, 1989)

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[55] At best, the City alleges that the storm water passing through Portland's storm water collection systems has been damaged by PCB contamination. *See* Compl., ¶¶ 79-81. But the City does not own the storm water either. *See* ORS 537.110 ("All water within the state *from all sources of water supply* belongs to the public.") (emphasis added).

[56] While no Oregon court has squarely addressed the issue, courts in other states have held that the costs to investigate or remediate environmental contamination are purely economic. *See, e.g.*, *Cty. of Santa Clara*, 137 Cal. App. 4th at 320-21 (Costs incurred for "abatement, removal, replacement and/or remediation" of lead paint are non-recoverable economic losses); *Cal. Dep't of Toxic Substances Control v. Payless Cleaners*, No. CIV02–2389 LKK/DAD, 2007 U.S. Dist. LEXIS 60703, at *22 (E.D. Cal. Aug. 17, 2007) ("[C]ost of removing hazardous substances and their remediation are economic costs—not physical injuries to property."); *City of Cincinnati v. Deutsche Bank Nat'l Trust Co.*, 897 F. Supp. 2d 633, 641-42 (S.D. Ohio 2012) (characterizing remediation cost as purely economic).

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Separately, the City does not allege that it was a "user" or "consumer" of any Old Monsanto PCBs. *See Benson Tower Condo. Owners Ass'n v. Victaulic Co.*, 105 F. Supp. 3d 1184, 1199 (D. Or. 2015) (citing *McCathern v. Toyota Motor Corp.*, 332 Or. 59, 77 n.15 (2001)) (plaintiff must show product was "in a defective condition unreasonably dangerous to the *user or consumer*" and "injury to the *user or consumer, or damage to his or her property*") (emphasis added). While Oregon product liability law does extend to certain "injured parties" beyond "users" or "consumers," *see* ORS 30.920(2)(b), the scope of bystander protection is not so broad as to encompass intangible entities such as an entire city, and no Oregon court has ever extended product liability protection to a bystander absent *physical injury*.

The City cannot allege that its person *or* property has been physically injured. Instead, the City alleges purely economic damages arising from the property of others—money to investigate, monitor, analyze, remediate, and reduce PCB contamination pursuant to its own permit requirements, and as a signatory to the AOC. Compl., ¶¶11, 12, 16, 100. However, "a defective product that merely . . . subjects the user to economic loss is not unreasonably dangerous." *Russell*, 186 Or. App. at 83.

The Complaint contains no facts demonstrating that the City owns and controls the State Waters, or that it was *physically* harmed by a single molecule of Old Monsanto's PCBs. Accordingly, the City's product liability claims fail.

2. No Causation for Product liability Claims

Causation is a required element of any strict product liability claim. *See, e.g., McCathern v. Toyota Motor Corp.*, 332 Or. 59, 77 n.15 (2001). This requires a showing that "the conduct of the defendant was a substantial factor in the result. A mere possibility of such causation is not enough." *Edmons v. Home Depot, U.S.A., Inc.*, No. CIV. 09-987-AC, 2011 U.S. Dist. LEXIS 3811, at *21 (D. Or. Jan. 14, 2011). For the same reasons the City cannot articulate public nuisance causation, the City's two product liability claims also fail. *See supra* Section III(C)(3).

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F. The City Fails to State a Claim for Negligence (Fifth Claim)

Oregon law provides two separate bases for common law negligence. *E.g.*, *Halseth v. B.C. Towing, Inc.*, Civil No. 04-795-JE, 2006 U.S. Dist. LEXIS 35790, *6-12 (D. Or. 2006). First, courts analyze whether there existed "'a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty,' the breach of which is actionable." *Id.* at *6 (quoting *Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or. 1, 17 (1987)). Second, if no special status or relationship exists, courts evaluate whether the defendant's conduct "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff" (known as the "general foreseeability standard"). *Id.* Additionally, "liability for purely economic harm 'must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm.'" *Or. Steel Mills, Inc.*, 336 Or. at 341 (quoting *Onita Pac. Corp. v. Trustees of Bronson*, 315 Or. 149, 159 (1992)).

The City does not allege that it has ever had any special relationship with Defendants or Old Monsanto, such that there would be any duty owed to the City; nor does the City allege physical injury to municipal property it actually owns. The City's negligence claim should be dismissed on this basis alone. In *Lowe v. Philip Morris USA, Inc.*, 344 Or. 403 (2008), for example, a cigarette smoker filed an action against tobacco companies alleging that her accumulated exposure to cigarette smoke had increased her risk of contracting lung cancer in the future, and she sought damages for medical monitoring. The Oregon Supreme Court rejected this claim, stating in relevant part:

> The question … is whether the other harm that plaintiff has identified—having to undergo periodic medical monitoring—is sufficient…. This court repeatedly has recognized that '[o]ne ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property.' Instead, "liability for purely economic harm 'must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm.'" … Under *Oregon Steel Mills* and a long line of this court's cases, the present economic harm that defendants' actions allegedly have caused—the cost of medical monitoring—is not sufficient to give rise to a negligence claim.

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Id. at 413-14 (citations omitted).

But even if the "general foreseeability standard" applies, for the reasons set forth below, the City cannot allege that Defendants or Old Monsanto "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the [City]." *Fazzolari,* 303 Or. at 17.

1. Old Monsanto's Conduct Did Not Create a Foreseeable Risk of Harm

Old Monsanto's conduct did not create a foreseeable risk of harm to any protected interest of which the City now complains. The City's injury—the "inconvenience and annoyance" it endures by having to reduce and monitor PCBs in order to comply with its own permit requirements, Compl., ¶ 89, and the money it has spent and expects to spend to investigate and remediate PCB contamination in the State Waters, Compl., ¶¶ 11, 12, 16, 93, 100—is not a reasonably foreseeable consequence of Old Monsanto's manufacture and sale of PCBs between 1935 and 1979. It is simply implausible that Old Monsanto should or could have anticipated that the City would suffer the harm of which it now complains at the hands of intervening actors *four decades* after it stopped manufacturing PCBs, not to mention as a result of yet-to-be enacted statutes, regulations, and permits.[57]

To the extent the City asserts that the foreseeable risk of harm is toxicity of PCBs to human beings and the environment, this is not the same kind of harm *to the City* that is alleged in the Complaint. Rather, the City complains of purely economic harm to State property. PCB toxicity does not threaten the City itself.[58]

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[57] *See Oregon Steel Mills*, 336 Or. at 343-45 ("the risk of a decline in plaintiff's stock price in June 1996 was not a reasonably foreseeable consequence of defendant's negligent [accounting] acts in 1994 and early 1995," which resulted in a delayed stock sale at a lower share price, because "the intervening action of market forces on the price of plaintiff's stock was the 'harm-producing force.").

[58] *See Becker v. Barbur Blvd. Equip. Rentals, Inc.*, 81 Or. App. 648, 652 (1986), *opinion adhered to as modified on reconsideration*, 84 Or. App. 367 (1987) ("[I]f a plaintiff's injury is not of the general kind to be anticipated from a defendant's conduct, or if a plaintiff is not one of the general class foreseeably threatened, a court must rule that the defendant is not negligent as a matter of law.") (citing *Stewart v. Jefferson Plywood Co.*, 255 Or. 603, 609 (1970)); *see also Hefty v. Comprehensive Care Corp.*, 307 Or. 247, 251-53 (1988).

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2. Old Monsanto Is Not a "Substantial Factor" in the Alleged City Harm

"[A] party is liable in negligence only if its conduct was a substantial factor in causing the plaintiff's injury."[59] Here, the City cannot allege any involvement by Old Monsanto in the discharges that led to PCB contamination in the State Waters, alluding generally to Old Monsanto's former domestic manufacturing and ignoring the countless actions of third-party dischargers, including the City itself, that have a direct causal connection to PCB contamination in the State Waters. *See Fortney v. Crawford Door Sales Corp. of Or.*, 97 Or. App. 276, 280 (1989) (complaint must credibly allege that the defendant had "*some* responsible involvement with an event in order to be found negligent for its occurrence") (emphasis in original). For the same reasons the City cannot articulate public nuisance causation, the City's negligence claim fails. *See supra* Section III(C)(3).

G. The City Fails to State a Claim for Trespass (Sixth Claim)

1. The City Lacks Standing to Assert Trespass

A trespass is defined as "any *intrusion* which invades the possessor's protected interest in *exclusive possession* [of land]." *Martin v. Reynolds Metals Co.*, 221 Or. 86, 94 (1959) (emphasis added). To establish actionable trespass, the City must allege a "substantial interference with [its] *possessory interest* [in] property[.]" *Frady*, 55 Or. App. at 350 (emphasis added). Because the City has no ownership over the State Waters, the City cannot plead a viable trespass claim. *See Denham v. Cuddeback*, 210 Or. 485, 490 (1957) ("Plaintiffs' allegation of ownership . . . was not only a material, but an essential, allegation [of trespass]."); *see also State By & Through Dep't of Transp., Highway Div. v. Tolke*, 36 Or. App. 751, 766 (1978) (rejecting State's trespass claim because "State is not the owner of the real property").

[59] *See Towe v. Sacagawea, Inc.*, 246 Or. App. 26, 41 (2011), *aff'd*, in part, *rev'd* in part, 357 Or. 74 (2015); *Lyons v. Walsh & Sons Trucking Co. Ltd.*, 183 Or. App. 76, 83 (2002) ("[T]he determination of whether a particular actor's conduct is a 'substantial factor' in causing a particular result cannot be made in isolation," but "must be made with reference to *the totality of potentially causative circumstances*.") (emphasis added).

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2. Merely Placing a Product into the Stream of Commerce Does Not Give Rise to a Trespass Claim

The City has not—and cannot—allege that Old Monsanto or Defendants discharged a single PCB molecule into the State Waters. The City relies instead upon allegations that Old Monsanto was the sole domestic manufacturer of PCBs from 1935 to 1979, and PCBs from "multiple" unspecified "sources and industries" entered into the State Waters via runoff and storm water that the City "lawfully discharges" through municipal storm water and wastewater systems. Compl., ¶¶ 5, 6, 73, 78. The City's trespass claim is thus premised entirely upon the theory that Old Monsanto placed PCBs into the stream of commerce four to eight decades ago.[60]

That unprecedented theory of trespass finds no support in Oregon law. The Supreme Court of Oregon has allowed trespass actions *only* where the intrusion upon a plaintiff's land is *direct*. *See, e.g.*, *Martin*, 221 Or. at 101 (1959) (manufacturing operation caused "the deposit of the particulates upon the plaintiff's land," which constituted a "*direct*" "intrusion within the definition of trespass") (emphasis added). In the only reported Oregon decision addressing a trespass claim based on the production or sale of a defective product, the court explained: "Plaintiffs' trespass claim, at its core, is based on one predominant fact: that the [defendants] delivered a defective product to plaintiffs without warning plaintiffs of the defect." *Weston*, 205 Or. App. at 360. As such, the alleged trespass claim was held not to be a trespass at all, but rather a product liability claim under ORS 30.900. *Id.* at 360-61. The City's allegations here are even one step further removed—Old Monsanto did not sell or deliver PCBs *to the City*.

[60] The City alleges that "Monsanto acted negligently and/or recklessly in manufacturing PCBs and marketing and selling them for widespread use. This negligent and/or reckless conduct caused the PCBs to trespass upon Plaintiff's property." Compl., ¶ 117. Quite aside from the fact that the City's trespass allegations fall squarely within the ambit of Oregon's product liability statute, ORS 30.900, *et seq.*, *see* Section III(B) (citing *Weston*, 205 Or. App. at 364), courts do not accept such "platitudes" where, as here, the Complaint is entirely devoid of the necessary supporting factual averments. *Hinds Invs., L.P. v. Team Enters.*, No. CV F 07-0703 LJO GSA, 2010 U.S. Dist. LEXIS 141410, at *12, *40 (E.D. Cal. 2010) (granting motion to dismiss in light of "the absence of factual content to support plaintiffs' conclusions").

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Courts outside of Oregon have used the same rationale in *Weston* to reject indirect trespass claims against Defendants. *See City of Bloomington*, 891 F.2d at 615 ("[C]ourts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers."); *Town of Westport*, 2015 U.S. Dist. LEXIS 36846, at *15 ("That Defendants sold PCBs with the knowledge they would be used in building materials is not analogous to the entry required even for negligent trespass.").

3. Lawfully-Permitted PCB Discharges Are Not a Trespass by Defendants

The foundation of any trespass claim is the "*unauthorized* entry upon the [land] of another." *Loe v. Lenhardt*, 227 Or. 242, 248 (1961) (emphasis added) (citing Prosser and Keeton, Law of Torts 75, § 13 (5th ed. 1984)). Yet the City alleges that it "lawfully discharges" PCB-impacted storm water into the State Waters by permit. Compl., ¶¶ 6, 73. Because lawful discharges cannot equate to an "unauthorized" entry, the City's trespass claim fails for this additional reason.

H. Permit-Related Compliance Costs Are Not Recoverable and Too Remote

Economic losses premised upon harm to property owned by third-parties are not recoverable.[61] The City's alleged losses—permit compliance costs and past and future remediation costs—are based solely upon PCB contamination to the State Waters, which it does not own. Oregon law prohibits recovery in these circumstances, and the City's tort claims must be dismissed on this independent ground.

Even if the City could in theory recover permit-related compliance costs in the absence of any physical injury to property it actually owns, the City's damages theory fails for an additional reason: the costs are far too remote. *See Jacobsen v. Dalles, P. & A. Nav. Co.*, 93 F. 975, 976

[61] *See Ore-Ida Foods, Inc. v. Indian Head Cattle Co.*, 290 Or. 909, 917 (1981) (denial "of claims for economic loss arising from injury to third persons, although phrased in terms of lack of foreseeability, duty and proximate cause, actually reflects their policy decision to limit recovery of such damages. The number of economic interests which could be damaged from an act are, in some cases, practically limitless[.]"); *Hale v. Groce*, 304 Or. 281, 284 (1987) (Oregon law does not impose liability for "negligently causing a stranger's purely economic loss without injuring his person or property.").

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(D. Or. 1899) (where "damages are not the natural and probable consequence of the act complained of, . . . there can by *[sic]* no recovery"); *Parker v. Harris Pine Mills*, 206 Or. 187, 197 (1955) ("Speculative damages are never allowed."). The remedial actions at both the Columbia Slough and the Site address "a range of contaminants," only one of which is PCBs and, likewise, the City is required to comply with many TMDLs, not solely the PCB TMDL for the Columbia Slough.[62] For this additional reason, the City's "damages" with respect to Old Monsanto's PCBs alone are far too speculative and remote to support its state law claims.

Finally, no federal or state court has ever addressed or authorized an attempt to shift CWA permit compliance costs from the local dischargers actually utilizing city's infrastructure to individual product manufacturers that do not use any city sewer systems at all. The purpose of CWA permit limits (and the TMDLs incorporated therein) is to regulate the amount of *lawful discharges* of specific pollutants. *See, e.g.*, 40 C.F.R. § 130.7(a). But the State has never named Old Monsanto or Defendants as PCB dischargers. As such, Defendants cannot be regulated under the CWA permits or TMDLs directly, or held responsible for the City's implementation costs. The City is engaging in a form of "back door" judicial regulation that contravenes existing legal frameworks and would require an extraordinary expansion of Oregon tort law.[63]

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[62] Oregon DEQ, *Record of Decision: Remedial Action Approach for Columbia Slough Sediment, Portland, Oregon*, Section 1.2 (July 2005), RJN, Ex. 20; EPA, 2001 AOC at § V, ¶ 3 (2001), RJN Ex. 9 (including a long list of Site contaminants); City of Portland, *TMDL Implementation Plan for the Willamette River and Tributaries*, Table 1 (Feb. 28, 2014), RJN, Ex 26 (listing various TMDL parameters for specific sub-basins).

[63] PCBs are just one of many chemicals regulated by the City's CWA permits. Allowing the City's claim to proceed opens the door to a proliferation of public nuisance claims by municipal dischargers against product manufacturers, with potentially far-reaching unintended consequences. Moreover, by imposing permit compliance costs onto a private entity that the State has chosen not to regulate under its federally delegated CWA programs, the Court risks delving into uncharted and complicated preemption issues. *See Twitty v. North Carolina*, 527 F. Supp. 778, 781 (E.D.N.C. 1981) (dismissing state law nuisance claim involving disposal of PCBs consistent with federal law "because courts will not enjoin as a nuisance an action authorized by valid legislative authority").

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I. The City's Prayer for Attorney's Fees Should Be Dismissed

In Oregon, attorney fees are not permitted "unless the award is authorized by statute or a specific contractual provision." *Rivera-Martinez v. Vu*, 245 Or. App. 422, 429 (2011) (citing *Domingo v. Anderson*, 325 Or. 385, 388 (1997)). The City is not authorized by any statute to collect attorney's fees for its common law or product liability claims. *See Perry v. Hernandez*, 265 Or. App. 146, 149 (2014) (attorney fees not authorized for tenant's negligence, nuisance, and negligent trespass claims); ORS 30.900, *et seq.* (product liability statute does not authorize attorney's fees). Accordingly, the City's prayer for attorney's fees must be dismissed.

IV. CONCLUSION

The Complaint should be dismissed in its entirety with prejudice.

Dated: August 4, 2016

Respectfully submitted,

By: s/Richard K. Hansen

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Oregon, that the following is true and correct:

That on the 4th day of August, 2016, I arranged for service of the foregoing DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT to the parties to this action as follows:

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