STATE OF NORTH CAROLINA CUMBERLAND COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 5612
STATE OF NORTH CAROLINA, *ex rel.* JOSHUA H. STEIN, ATTORNEY GENERAL, Plaintiff, v. EIDP, INC., f/k/a E.I. DU PONT DE NEMOURS AND COMPANY; THE CHEMOURS COMPANY; THE CHEMOURS COMPANY FC, LLC; CORTEVA, INC.; DUPONT DE NEMOURS, INC.; and BUSINESS ENTITIES 1-10, Defendants.[1]	**ORDER AND OPINION ON MOTIONS TO DISMISS**

1. **THIS MATTER** is before the Court on two motions to dismiss filed by Defendants on 29 January 2021 pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)").

2. For the reasons set forth herein, the Court **DENIES** the Motions.

Rhine Law Firm, PC by Martin Ramey, Joel R. Rhine, and Ruth Sheehan; North Carolina Department of Justice by Marc Bernstein and Daniel S. Hirschman; Taft Stettinius & Hollister, LLP by Robert A. Bilott and David J. Butler; Douglas & London, PC by Gary J. Douglas, Tate J. Kunkle, Michael A. London, and Rebecca Newman; Levin Papantonio Rafferty by Wesley A. Bowden; and Kelley Drye & Warren, LLP by Melissa Byroade, Kenneth Corley, Steven Humphreys, William J. Jackson, Elizabeth Krasnow, Lauren H. Shah, and David Zalman, for Plaintiff State of North Carolina, ex rel. Joshua H. Stein, Attorney General.

[1] Subsequent to the filing of this action, E.I. du Pont de Nemours and Company changed its name to EIDP, Inc. The Court orally ruled on 13 February 2023 during a hearing on the Motions that the caption of pleadings subsequently filed in this action should show EIDP, Inc. as a party defendant.

Ellis & Winters LLP by Scottie F. Lee, Jonathan D. Sasser, Thomas H. Segars, and Steven Scoggan; Bradley Arant Boult Cummings LLP by C. Bailey King, Jr. and Robert R. Marcus; McCarter & English, LLP by Lanny Steven Kurzweil, Connor Phalon, Ryan Richman, and Candee Wilde; and Bartlit Beck, LLP by Katherine L.I. Hacker, John S. Phillips, and Katharine A. Roin, for Defendant EIDP, Inc.

Robinson, Bradshaw & Hinson by Steven R. DeGeorge; Ellis & Winters LLP by Scottie F. Lee, Jonathan D. Sasser, Thomas H. Segars, and Steven Scoggan; McCarter & English, LLP by Lanny Steven Kurzweil, Connor Phalon, Ryan Richman, and Candee Wilde; Arnold & Porter Kaye Scholer LLP by Joel M. Gross, Allison Rumsey, and Brian D. Israel; and Norris McLaughlin, P.A. by Martha N. Donovan and Margaret Raymond-Flood, for Defendant The Chemours Company.

Robinson, Bradshaw & Hinson by Steven R. DeGeorge; Ellis & Winters LLP by Scottie F. Lee, Jonathan D. Sasser, Thomas H. Segars, and Steven Scoggan; McCarter & English, LLP by Lanny Steven Kurzweil, Connor Phalon, Ryan Richman, and Candee Wilde; and Arnold & Porter Kaye Scholer LLP by Joel M. Gross, Allison Rumsey, and Brian D. Israel, for Defendant The Chemours Company FC, LLC.

Ellis & Winters LLP by Jonathan D. Sasser and Thomas H. Segars; Bradley Arant Boult Cummings LLP by C. Bailey King, Jr. and Robert R. Marcus; and Bartlit Beck, LLP by Katherine L.I. Hacker, John S. Phillips, and Katharine A. Roin, for Defendants Corteva, Inc. and DuPont de Nemours, Inc.

Robinson, Judge.

I. INTRODUCTION

3. This action arises out of the alleged contamination of North Carolina's air, land, and water through certain Defendants' operations at a chemical manufacturing facility known as Fayetteville Works located in Bladen and Cumberland Counties in North Carolina. (Orig. Compl. ¶¶ 1, 77, ECF No. 2 ["Compl."].) Plaintiff, the State of North Carolina ("Plaintiff"), alleges that certain Defendants have caused this contamination by using per- and polyfluoroalkyl substances ("PFAS"), which "resist

biodegradation, persist in the environment, and accumulate in people and other living organisms." (Compl. ¶ 1.) Plaintiff alleges that "vast quantities of PFAS" have been discharged by Defendants through their operation of Fayetteville Works into the air, water, sediments, and soils of North Carolina and PFAS "have had and continue to have profoundly negative impacts on the State." (Compl. ¶¶ 1, 3–4.)

4. Plaintiff brings this suit in its *parens patriae* capacity to protect the health, safety, security, and well-being of its residents and its natural resources. (Compl. ¶ 15.) Plaintiff also brings this suit in its capacity as an owner of real property. (Compl. ¶ 15.) Finally, Plaintiff brings fraudulent transfer claims in its capacity as a creditor. (Compl. ¶ 15.)

II. FACTUAL BACKGROUND

5. The Court does not make findings of fact on motions brought pursuant to Rule 12(b)(6) but instead recites only those facts included in the Complaint that are relevant to the Court's determination of the motions.

A. The Parties

6. Defendant EIDP, Inc., formerly known as E.I. du Pont de Nemours and Company ("EIDP"), is a Delaware corporation with its principal place of business in Delaware. EIDP conducts business throughout the United States, including in North Carolina. (Compl. ¶ 16.)

7. Defendant The Chemours Company ("Chemours") is a Delaware corporation with its principal place of business in Delaware. (Compl. ¶ 17.) Defendant Chemours FC, LLC ("Chemours FC" and with Chemours referred to

collectively as the "Chemours Defendants") is a Delaware limited liability company with its principal place of business in Delaware. (Compl. ¶ 19.) Chemours FC is a subsidiary of Chemours. (Compl. ¶ 19.)

8. Defendants Corteva, Inc. ("Corteva") and Du Pont de Nemours, Inc. ("New DuPont") are Delaware corporations. (Compl. ¶¶ 20–21.)

9. In 1969, EIDP purchased property near Fayetteville, North Carolina, and began a manufacturing process at its "Fayetteville Works", a chemical manufacturing facility located within the purchased property, producing PFAS. (Compl. ¶¶ 77–79.) PFAS are chemicals that allegedly pose significant risks to human health and the environment because they resist biodegradation, persist in the environment, and accumulate in people and other living organisms. (Compl. ¶ 1.) EIDP manufactured PFAS at Fayetteville Works beginning in 1980. (Compl. ¶ 82.) EIDP allegedly knew about the dangers posed by PFAS no later than 1984, (Compl. ¶¶ 61–72), and notwithstanding its knowledge of the dangers posed, EIDP continued to manufacture PFAS at Fayetteville Works. (Compl. ¶¶ 61– 72, 82.)

10. On 3 May 2001, EIDP submitted a National Pollutant Discharge Elimination System ("NPDES") permit renewal application to North Carolina's Division of Environmental Quality ("DEQ"), stating that it intended to begin manufacturing PFOA (a type of PFAS) at Fayetteville Works. (Compl. ¶ 89.) During the application process, EIDP represented to the DEQ that: (1) PFOA does not pose a health concern to humans or animals at levels present in the workplace or environment; (2) EIDP used PFOA for 40 years with no observed health effects on

workers; and (3) PFOA is neither a known developmental toxin nor a known carcinogen. (Compl. ¶ 89.)

11. On 26 August 2010, representatives from EIDP met with DEQ staff regarding EIDP's anticipated use of GenX—a different PFAS compound—at Fayetteville Works as a replacement for PFOA. (Compl. ¶ 97.) EIDP indicated that the GenX produced would not be discharged outside the Fayetteville Works property, and that wastewater generated would be shipped off-site for disposal. (Compl. ¶ 100.) On 29 April 2011, EIDP submitted a NPDES permit renewal application confirming that "no process wastewater from [Fayetteville Works] is discharged into . . . the Cape Fear River." (Compl. ¶ 100.)

12. Following a 2016 study identifying the presence of GenX and other PFAS in the Cape Fear River, Chemours informed the DEQ that, for decades, it and EIDP had discharged GenX and other PFAS produced at Fayetteville Works into the Cape Fear River. (Compl. ¶ 103.)

B. <u>The Restructuring of EIDP</u>

13. EIDP has allegedly engaged in a multi-step complex process to restructure its business which rendered EIDP unable to pay billions of dollars of liabilities related to PFAS contamination, including liabilities arising out of the operation of Fayetteville Works. (Compl. ¶¶ 130, 139–43, 150–52.) These corporate transactions, which began in July 2015 and spanned approximately four years, included consolidations, spinoffs, and the creation of new entities. It is alleged that, as a result

of this process, assets and liabilities were reallocated so that they could not be reached by the State and other creditors. (Compl. ¶¶ 145–47, 154–57, 177–86.)

III. PROCEDURAL HISTORY

14. The Court sets forth herein only those portions of the procedural history relevant to its determination of the Motions.

15. Plaintiff initiated this action on 13 October 2020 with the filing of the Original Complaint ("Complaint"). (*See* Compl.)

16. On 29 January 2021, Corteva and New DuPont filed their Consolidated Motion to Dismiss ("Corteva's Motion"), (Consolid. Mot. Dismiss, ECF No. 76), and brief in support. (Br. Supp. Consolid. Mot. Dismiss, ECF No. 77 ["Corteva Br."].) That same day, EIDP, Chemours, and Chemours FC filed the Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can be Granted ("EIDP's Motion" and together with Corteva's Motion, the "Motions"), (ECF No. 78), and brief in support. (Defs.' Br. Supp. Mot. Dismiss, ECF No. 79 ["EIDP Br."].) On 18 February 2021, Plaintiff filed its brief in opposition to Corteva's Motion. (Mem. Opp. Defs.' Mot. Dismiss, ECF No. 89 ["Pl.'s Br. Opp. Corteva"].) Corteva and New DuPont filed their reply on 1 March 2021. (ECF No. 96 ["Corteva's Reply"].) On 22 March 2021, Plaintiff filed its brief in opposition to EIDP's Motion. (Mem. Opp. Defs.' Mot. Dismiss, ECF No. 106 ["Pl.'s Opp. EIDP"].) EIDP, Chemours, and Chemours FC filed their reply brief on 15 April 2021. (ECF No. 130 ["EIDP Reply"].) Plaintiff thereafter filed a supplemental brief in opposition to Corteva's Motion on 21 May

2021. (ECF No. 136.) On 4 June 2021, Corteva and New DuPont filed a supplemental brief in support of Corteva's Motion. (ECF No. 145.)

17. The Court held a hearing on the Motions on 29 June 2021. (*See* ECF No. 135.) On 17 August 2021, the Court entered its Order and Opinion on Consolidated Motion to Dismiss by Defendants Corteva, Inc. and DuPont de Nemours, Inc. (the "17 August Order"). (ECF No. 154 ["17 Aug. Or."].) The 17 August Order limited its ruling to the issue of whether the Court could properly exercise personal jurisdiction over Corteva and New DuPont pursuant to Rule 12(b)(2) and noted that the Court would later enter an order and opinion on the remainder of the motion. (17 Aug. Or. ¶ 2 n.2.) The Court concluded that, by imputing EIDP's liabilities to Corteva and New DuPont, it could properly exercise personal jurisdiction over them. (17 Aug. Or. ¶ 59.)

18. On 16 September 2021, Corteva and New DuPont timely filed their notice of appeal to the Supreme Court of North Carolina from the Court's 17 August Order. (Not. Appeal, ECF No. 156.) Subsequently, the Court stayed all proceedings in this case, including discovery, until final resolution of the appeal. (Am. Stay Or., ECF No. 161.)

19. On appeal, the Supreme Court of North Carolina affirmed the 17 August Order and remanded this case for additional proceedings. *State ex rel. Stein v. E.I. du Pont de Nemours & Co.*, 382 N.C. 549, 565 (2022).

20. Following remand from the Supreme Court, on 13 February 2023, the Court again heard argument on the Rule 12(b)(6) aspects of the Motions. (*See* ECF No. 168.) The Motions are ripe for resolution.

IV. LEGAL STANDARD

21. "On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Fischer Inv. Capital, Inc. v. Catawba Dev. Corp.*, 200 N.C. App. 644, 649 (2009). "[T]he complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444 (2008).

22. "[W]hen ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001). Furthermore, a court "can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016) (quoting *Laster v. Francis*, 199 N.C. App. 572, 577 (2009)). "The question before us is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Gant v. NCNB Nat. Bank*, 94 N.C. App. 198, 199 (1989).

V. ANALYSIS

23. Defendants[2] move to dismiss the Complaint in its entirety, arguing that four claims—negligence, trespass, public nuisance, and fraud—are barred by application of *res judicata,* the relevant statutes of limitations, and otherwise fail to state a claim upon which relief may be granted pursuant to Rule 12(b)(6).

A. Res Judicata

24. Defendants request that the Court dismiss Plaintiff's first four claims—negligence, trespass, public nuisance, and fraud—because they are barred by application of *res judicata.* Under the doctrine of *res judicata*, "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 15 (2004) (citation omitted). "For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413–14 (1996) (quotation omitted). Further, "[t]he doctrine prevents the relitigation of all matters . . . that

[2] Defendants Corteva and New DuPont's brief does not make independent arguments for dismissal pursuant to Rule 12(b)(6), but instead relies on the arguments made by EIDP, Chemours, and Chemours FC. (*See* Corteva Br. 1 n.1.) Accordingly, the Court considers the arguments in the brief supporting EIDP's Motion as being made by all Defendants. Counsel are reminded that, effective 1 July 2022, after the Motions were filed, the Business Court Rules ("BCRs") were amended to prohibit incorporation by reference in briefing. (*See* BCR 7.8.)

were or should have been adjudicated in the prior action." *Whitacre P'ship*, 358 N.C. at 15 (quotation omitted).

25. Defendants contend that the core factual allegations of the present action were copied from a 2017 suit filed by DEQ against Chemours FC in Bladen County Superior Court, No. 17 CVS 580 ("Bladen Action"). (EIDP Br. 7, 9.) In the Bladen Action, the DEQ alleged that Chemours FC began discharging PFAS into the Cape Fear River in the early 1980s and failed to timely disclose such discharges to North Carolina's Division of Water Resources. (ODP Br. 3–4.) Defendants further contend that Plaintiff could have and should have brought its negligence, trespass, public nuisance and fraud claims in the Bladen Action, and in failing to do so, such claims must be dismissed against both Chemours FC and Chemours. (EIDP Br. 7, 9.) In making this argument, Defendants rely on the consent order approved and entered by the Superior Court in the Bladen Action on 25 February 2019 (the "Consent Order") requiring Chemours FC to abate future discharges of PFAS from Fayetteville Works, to remediate past discharges, and to pay monetary damages. (*See* 17 CVS 580 Consent Or. ¶¶ 10, 12, ECF No. 79.3 ["Consent Or."].)

26. At the Rule 12(b)(6) stage, "the movant has the burden of demonstrating that the action should be dismissed[.]" *Neier v. State*, 151 N.C. App. 228, 233 (2002). Defendants contend that the Consent Order operates as a final judgment on the merits for purposes of *res judicata*. The Court disagrees.

27. Upon review of the Consent Order, the Court concludes that Defendants are unable to establish an essential element of *res judicata*—that there was a final

judgment on the merits in the Bladen Action. Paragraph 41 of the Consent Order provides that "[t]his Consent Order . . . is not, and shall not be construed to be, a determination on the merits of any of the factual allegations or legal claims advanced by any party in this action[.]" (Consent Or. ¶ 41.) The plain language of the Consent Order demonstrates that it was not a determination on the merits, and without such a determination, *res judicata* cannot apply. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413–14 (1996) ("For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits[.]"). Accordingly, the Motions are **DENIED** to the extent they seek dismissal of Plaintiff's claims for negligence, trespass, public nuisance, and fraud through application of *res judicata*.

B. <u>Statutes of Limitations</u>

28. Defendants next argue that Plaintiff's claims for negligence, trespass, public nuisance, and fraud are barred by the relevant statutes of limitations. Negligence, trespass, nuisance, and fraud claims are each subject generally to a three-year statute of limitations. N.C.G.S. §§ 1-52(3), (9), (16); s*ee Wilson v. McLeod Oil Co.*, 327 N.C. 491, 511 (1990) ("[An] action for nuisance is governed by the same statute of limitations as [an] action for trespass.").

29. Plaintiff contends that the doctrine of *nullum tempus* prevents the relevant statutes of limitations from running against it. Our Supreme Court has described the doctrine of *nullum tempus* stating that:

> *nullum tempus* survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State. . . . *Nullum tempus* does not, however, apply in every case in which the State is a party. If the

> function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State.

Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co., 332 N.C. 1, 8–9 (1992) (emphasis in original). It is undisputed that the relevant statutes of limitations do not expressly include or exclude the State. Therefore, *nullum tempus* will apply to effectively toll an otherwise applicable statute of limitations if the State is acting in its governmental capacity.

30. Defendants contend that Plaintiff performs a wholly proprietary function in the case at bar. (EIDP Br. 8.) The State acts in a proprietary capacity when engaged in a "pecuniary activity or activity of a type historically performed by private individuals." *Rowan Cty. Bd. of Educ.*, 332 N.C. at 10. In Defendants' view, the present action is precisely the kind that private individuals have brought and continue to bring against Defendants throughout North Carolina. Defendants further argue that *Tillery v. Whiteville Lumber Co.*, 172 N.C. 296, 297–98 (1916) (holding that State ownership of timber rights is a proprietary function), and *Town of Littleton v. Layne Heavy Civil, Inc.*, 261 N.C. App. 88 (2018) (holding that operation and maintenance of a sewer system is a proprietary function), support its contention that the Plaintiff's actions are proprietary in nature.

31. Plaintiff asserts that it acts in its governmental capacity "by seeking to promote and protect the welfare of North Carolina citizens and natural resources from contamination emanating from Fayetteville Works." (Pl.'s Opp. EIDP 18.)

32. Our Supreme Court has held that the State acts in its governmental capacity when "promoting or protecting the health, safety, security, or general welfare of its citizens[.]" *Rhodes v. Asheville*, 230 N.C. 134, 137 (1949). When a state actor sues to recover costs for abatement of a potential public health risk, it likewise does so in its governmental capacity. *See Rowan Cty Bd. of Educ.,* 332 N.C. at 11.

33. For purposes of the Motions, the Court concludes, based on its reading of the Complaint, that Plaintiff acts as *parens patriae* in seeking payment of all past and future costs to "investigate, assess, remediate, restore, and remedy" the effects of PFAS contamination on the health of North Carolina's citizens and natural resources. (Compl. ¶ 12.) Unlike the State-plaintiffs in *Tillery* and *Town of Littleton*, Plaintiff brings this suit to recover costs associated with abatement of PFAS contamination, allegedly a significant risk to public health.

34. Further, our Supreme Court has held that the discharge of pollutants into a state's soil, water and air injures a state's quasi-sovereign interests, and that when acting as *parens patriae*, "the State has an interest independent of and behind the titles of its citizens." *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 326 N.C. 133, 145 (1990) (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)).

35. Private individuals may bring, and have brought, trespass claims against some of the Defendants due to PFAS contamination on their private property. However, the Complaint makes clear that Plaintiff brings this action not only as a landowner, but as trustee charged with "conserv[ing] and protect[ing] [North

Carolina's] lands and waters[,]" and limiting pollution of the same, for the benefit of all North Carolinians. N.C. Const. art. XIV, § 5. As trustee of North Carolina's lands and waters, both public and private, the State has brought a suit that it alone is entitled to bring. *See Fabrikant v. Currituck Cty*, 174 N.C. App. 30, 42 (2005) ("[O]nly the State, acting in its sovereign capacity, may assert rights in land by means of the public trust doctrine.").

36. For the foregoing reasons, the Court concludes that Plaintiff is acting in its governmental capacity. The relevant statutes of limitations are therefore effectively tolled by the doctrine of *nullum tempus*. Accordingly, the Motions are **DENIED** to the extent they seek dismissal of claims under the applicable statutes of limitations.[3]

C. <u>Negligence</u>

37. Next, the Court considers Plaintiff's claim for negligence against EIDP, Chemours, and Chemours FC (the "PFAS Defendants"). "To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. of Educ.,* 360 N.C. 321, 328 (2006). PFAS Defendants contend they owe no common law duties to Plaintiff arising from the manufacture of PFAS, and dismissal is warranted on that basis.

[3] As a result of its conclusion that the State acts, at least to some extent, as a sovereign in bringing its claims, the Motions must be denied. Defendants argue, however, that, even if a portion of the State's claims are timely because of the operation of *nullum tempus*, the Court should nonetheless dismiss as time-barred any claim against Defendants for trespass by allegedly polluting the State's real property. The Court declines to do so, at least at this stage of the proceeding based on the limited record before it, without prejudice to Defendants' renewal of this argument at the summary judgment stage.

38. Plaintiff alleges that PFAS Defendants, as manufacturers of PFAS, have positive duties to: (1) take adequate precautions to prevent PFAS from contaminating the soil, water, and air; (2) remove PFAS they have discharged from the environment; (3) warn authorities and the public of the presence and potential threats posed by PFAS; and (4) handle, treat, store and dispose of PFAS in a way that would not endanger human health and the environment. (Compl. ¶ 202.) PFAS Defendants argue that their duties as producers of PFAS arise under North Carolina's environmental control statutes—not under common law. *See, e.g.*, N.C.G.S. § 143-211 *et seq*. (EIDP Br. 15.)

39. Plaintiff responds that the environmental control statutes at issue here do not abrogate common law claims for negligence, citing *Biddix v. Henredon Furniture Indus.*, 76 N.C. App. 30, 34 (1985). In *Biddix,* the Court of Appeals rejected the contention that the North Carolina Clean Water Act of 1967 ("CWA") as amended, N.C.G.S. §§ 143-211–215.9, abolished common law civil actions, concluding that, because the CWA "does not *specifically* abrogate these common law civil actions[,]" such actions may be maintained. *Id*. at 40 (emphasis added).

40. It is uncontroverted that the relevant environmental control statutes do not specifically abrogate common law actions. *See, e.g.*, N.C.G.S. §§ 143-215.6A–6C. Plaintiff, therefore, may bring a properly-pled claim for common law negligence. "The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a

violation of that duty negligence." *Council v. Dickerson's, Inc.,* 233 N.C. 472, 474 (1951).

41. The Complaint adequately alleges that PFAS Defendants did not exercise ordinary care in manufacturing and discharging PFAS. The Motions are therefore **DENIED** to the extent they seek dismissal of Plaintiff's negligence claim.[4]

D. <u>Public Nuisance</u>

42. PFAS Defendants next seek dismissal of Plaintiff's claim for public nuisance. Without support from North Carolina law, PFAS Defendants characterize nuisance as merely a "tort of last resort" which has no place where, as here, there exists a statutory and regulatory scheme governing emissions. (EIDP Br. 20.)

43. The Court is not persuaded by Defendants' argument to disregard the established law of this State. North Carolina recognizes claims for public nuisance where "acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights." *State v. Everhardt*, 203 N.C. 610, 617 (1932). "A public nuisance affects the local community generally and its maintenance constitutes an offense against the State." *Id.*

44. The Court has already determined, in section V. C., *supra*, that the relevant statutory scheme does not prohibit common law causes of action from being brought here. The Court determines that, at this preliminary stage, Plaintiff has met its burden by alleging that the PFAS contamination from Fayetteville Works is

[4] The Court does not reach PFAS Defendants' arguments regarding negligence *per se* because Plaintiff states that it "does not assert [negligence *per se*] as a separate claim[.]" (Pl.'s Opp. EIDP 21–22.)

subversive of public order and affects the citizens of North Carolina at large. Accordingly, to the extent they seek dismissal of Plaintiff's claim for public nuisance, the Motions are **DENIED**.

E. Trespass

45. The Court next considers Plaintiff's trespass claim against PFAS Defendants. "A claim of trespass requires: (1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff." *Fordham v. Eason*, 351 N.C. 151, 153 (1999). Defendants argue that Plaintiff does not have an *exclusive* possessory interest in all of the resources alleged, mandating dismissal of the claim. (EIDP Br. 20.) The cases Defendants cite in support, *Hayes v. Williamson-Brown Land & Lumber Co.*, 180 N.C. 252 (1920), and *Simmons v. Defiance Box Co.*, 153 N.C. 257 (1910), are inapposite, as they discuss exclusive possession in the context of an adverse possessor. *See, e.g*, *Jernigan v. Herring*, 179 N.C. App. 390, 394 (2006) (discussing exclusivity as an element of adverse possession).

46. Plaintiff correctly asserts that *exclusive* possession is not a requirement for trespass claims in North Carolina. *See Godette v. Godette*, 146 N.C. App. 737, 740 (2001) ("It is well-established that one tenant in common may maintain an action for trespass upon the lands."). Plaintiff has alleged, pursuant to the public trust doctrine, that it possesses and holds in trust certain land, water, and air for the benefit of the public. (Compl. ¶¶ 7–8.) *See Town of Nags Head v. Richardson*, 260 N.C. App. 325, 334 (2018). Use by North Carolina's citizens of the land, water, and

air held in trust by the State for that purpose does not, as a matter of law, deprive Plaintiff of its sovereign possession. Plaintiff has sufficiently alleged trespass, and the Motions are **DENIED** to the extent they seek dismissal of that claim.

F. Fraudulent Concealment

47. Next, Defendants seek to dismiss Plaintiff's claim of fraudulent concealment.[5] Defendants contend that PFAS Defendants had no duty to disclose the information they allegedly concealed. (EIDP Br. 23.)

48. A fraudulent concealment claim requires a showing that the defendant "had a duty to disclose material information." *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC LEXIS 20, at *8 (N.C. Super. Ct. June 18, 2007) (citing *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 198 (1976)). A duty to disclose arises when one party "has taken affirmative steps to conceal material facts from the other[.]" *Harton v. Harton*, 81 N.C. App. 295, 297–98 (1986).

49. The Complaint alleges that in 2001, as part of the NPDES permitting process, EIDP made affirmative representations to the State regarding the health effects of PFAS which EIDP knew were false at the time they were made and upon which the State relied in issuing permits. (Compl. ¶¶ 89, 63–67, 225.) Specifically, Plaintiff alleges that:

> On May 3, 2001, Old DuPont submitted a National Pollutant Discharge Elimination System ("NPDES") permit renewal application to North Carolina's Division of Water Quality, subsequently renamed the Division of Water Resources (the "DWR"), a division of DEQ, stating that

[5] In their briefs, Defendants only address dismissal of Plaintiff's allegations regarding fraudulent concealment, even though the Complaint alleges both fraud and fraudulent concealment. (*See* Compl. ¶¶ 224–230.) The Court addresses only the arguments actually raised by Defendants.

> it intended to begin manufacturing PFOA at the Fayetteville Works. During the application process, Old DuPont represented that: (1) PFOA does not pose a health concern to humans or animals at levels present in the workplace or environment; (2) Old DuPont had used PFOA for 40 years with no observed health effects on workers; and (3) PFOA is neither a known developmental toxin nor a known carcinogen. Old DuPont knew or should have known its representations were false.

(Compl. ¶ 89.)

50. The Complaint further represents that, on 26 August 2010, EIDP representatives met with DEQ staff regarding the company's anticipated use of GenX technology at the Fayetteville Works property as a replacement for PFOA. Plaintiff alleges EIDP represented to the DEQ that "GenX would be produced in a closed-loop system that would not result in the discharge of those compounds outside the Fayetteville Works, particularly not directly into the Cape Fear River" and that "wastewater generated from the manufacture of GenX would be collected and shipped off-site for disposal, and therefore, this wastewater would not be discharged into the Fayetteville Works' wastewater treatment plant or into the Cape Fear River." (Compl. ¶¶ 97–99.)

51. Both the statements made in the permit renewal application and those allegedly made to the DEQ constitute affirmative actions by EIDP allegedly taken to conceal material facts from the State. These actions give rise to a duty to disclose. Accordingly, at the Rule 12(b)(6) stage, Plaintiff has sufficiently alleged such a duty.

52. Defendants next argue that Plaintiff has not alleged reasonable reliance. (EIDP Br. 24–25.) To support allegations of fraud, an injured party's reliance on a misrepresentation or concealment must be reasonable. Reliance is not reasonable

when the party "could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Sullivan v. Mebane Packaging Grp.*, 158 N.C. App. 19, 26 (2003). However, according to the Complaint, the studies that put Defendants on notice that PFAS threatened human health were *internal* studies to which Plaintiff did not have access until at least 2016, when Chemours provided them to the DEQ after news became public that the Cape Fear River was contaminated with PFAS. (Compl. ¶¶ 103–04.) The Court determines that Plaintiff has sufficiently alleged reasonable reliance.

53. Defendants next argue that the Complaint fails to allege fraudulent concealment with particularity because the Complaint groups the PFAS Defendants together despite each PFAS Defendant having responsibility for the Fayetteville Works facility at different times. (EIDP Br. 25.) The Court disagrees. The Complaint expressly details the ownership of Fayetteville Works and the PFAS product lines produced there, and it alleges with specificity the transfer of ownership between each of the PFAS Defendants. (Compl. ¶¶ 9, 81, 157–59, 162.) The Court determines that the allegations are sufficiently particular to state a claim.

54. Accordingly, the Motions are **DENIED** to the extent they seek dismissal of Plaintiff's claim for fraudulent concealment.

G. <u>Fraudulent Transfer</u>

55. Last, the Court considers Plaintiff's claims for actual and constructive fraudulent transfer against EIDP, Chemours, Corteva, and New DuPont. Defendants' sole argument for dismissal is that Plaintiff's fraudulent transfer claims

have no independent basis for liability and are wholly dependent on the viability of Plaintiff's claims for negligence, trespass, nuisance, and fraud. (EIDP Br. 26.) The Court has allowed Plaintiff's claims for negligence, trespass, nuisance and fraud to proceed. As a result, Defendants' argument is unavailing, and Plaintiff's fraudulent transfer claims may proceed as well. Accordingly, the Motions are **DENIED** to the extent they seek dismissal of Plaintiff's claims for fraudulent transfer.

VI. CONCLUSION

56. For the foregoing reasons, the Motions are hereby **DENIED**.

SO ORDERED, this the 2nd day of March, 2023.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases