

*N.J. Dep't of Env'tl. Prot. v. E.I. du Pont de Nemours & Co.*

United States District Court for the District of New Jersey

December 30, 2021, Decided; December 30, 2021, Filed

Civil Action Nos. 19-14766,; 19-14767

**Reporter**

2021 U.S. Dist. LEXIS 247973 \*; 2021 WL 6144081

**NEW JERSEY** DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al., Plaintiffs, v. E.I. DU PONT DE NEMOURS AND COMPANY, et al., Defendants.

**Notice:** NOT FOR PUBLICATION

**Core Terms**

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Site, foreseeability, warn, manufacturer, Spill, hazardous substance, duty to warn, contamination, products, discharged, pled, parens patriae, courts, design defect, environmental, asserts, argues, way responsible, federal court, highest court, common law, state law, outweighed, parties, Reply, motion to dismiss, natural resources, Plaintiffs', allegations, quotation

**Counsel:** [\*1] For **NEW JERSEY** DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE **NEW JERSEY** DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE ADMINISTRATOR OF THE **NEW JERSEY** SPILL COMPENSATION FUND, Plaintiffs (3:19-cv-14767-MAS-ZNQ): GWEN FARLEY, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL, DIVISION OF LAW, TRENTON, NJ; LEONARD Z. KAUFMANN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOFF, LLP, SADDLE BROOK, NJ; CHRISTINA N. STRIPP, COHN LIFLAND PEARLMAN HERMANN & KNOFF LLP, SADDLE BROOK, NJ; DAVID MICHAEL REAP, KELLEY DRYE & WARREN LLP, NEW YORK, NY; JOSEPH A. MAURICE, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOFF, LLP, SADDLE BROOK, NJ.

For E.I. DU PONT DE NEMOURS AND COMPANY, Defendant (3:19-cv-14767-MAS-ZNQ): JEFFREY SCOTT CHIESA, LEAD ATTORNEY, CHIESA SHAHINIAN & GIANTOMASI PC, WEST ORANGE, NJ; ALISON MORRISSEY, MCCARTER & ENGLISH, PHILADELPHIA, PA; AMANDA GRAHAM DUMVILLE, MCCARTER & ENGLISH, FOUR GATEWAY CENTER, NEWARK, NJ; DAVID A. HAWORTH, BALLARD SPAHR LLP, CHERRY HILL, NJ; JOHN J. MCALEESE, III, MCCARTER & ENGLISH, LLP, PHILADELPHIA, PA; NATHAN C. HOWE, LANNY STEVEN KURZWEIL, MCCARTER & ENGLISH LLP, FOUR GATEWAY CENTER, NEWARK, NJ; RONALD LAWRENCE ISRAEL, CHIESA SHAHINIAN & [\*2] GIANTOMASI PC, THE OFFICES AT CRYSTAL LAKE, WEST ORANGE, NJ.

For THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, Defendants (3:19-cv-14767-MAS-ZNQ): LANNY STEVEN KURZWEIL, LEAD ATTORNEY, NATHAN C. HOWE, MCCARTER & ENGLISH, LLP, FOUR GATEWAY CENTER, NEWARK, NJ; MARGARET M. RAYMOND-FLOOD, LEAD ATTORNEY, NORRIS MCLAUGHLIN, P.A., BRIDGEWATER, NJ; MARTHA N. DONOVAN, LEAD ATTORNEY, NORRIS, MCLAUGHLIN & MARCUS, PA,

BRIDGEWATER, NJ; ALISON MORRISSEY, MCCARTER & ENGLISH, PHILADELPHIA, PA; AMANDA GRAHAM DUMVILLE, MCCARTER & ENGLISH, FOUR GATEWAY CENTER, NEWARK, NJ; JOHN J. MCALEESE, III, MCCARTER & ENGLISH, LLP, PHILADELPHIA, PA.

For THE **3M** COMPANY, Defendant (3:19-cv-14767-MAS-ZNQ): DONALD J. CAMERSON, II, LEAD ATTORNEY, BRESSLER, AMERY & ROSS, ESQS., FLORHAM PARK, NJ; RONALD J. CAMPIONE, LEAD ATTORNEY, BRESSLER, AMERY & ROSS, PC, FLORHAM PARK, NJ.

For DUPONT SPECIALITY PRODUCTS USA, LLC, Defendant (3:19-cv-14767-MAS-ZNQ): DAVID A. HAWORTH, BALLARD SPAHR LLP, CHERRY HILL, NJ.

For **NEW JERSEY** DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE **NEW JERSEY** DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE ADMINISTRATOR OF THE **NEW JERSEY** SPILL COMPENSATION FUND, Plaintiffs (1:19-cv-14766-RMB-JBC): [\*3] LEONARD Z. KAUFMANN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ; CHRISTINA N. STRIPP, COHN LIFLAND PEARLMAN HERMANN & KNOPF LLP, SADDLE BROOK, NJ; DAVID MICHAEL REAP, KELLEY DRYE & WARREN LLP, NEW YORK, NY; STEVEN L. HUMPHREYS, KELLEY DRYE & WARREN LLP, PARISPPANY, NJ.

For E.I DUPONT DE NEMOURS AND COMPANY, Defendant (1:19-cv-14766-RMB-JBC): JEFFREY SCOTT CHIESA, LEAD ATTORNEY, CHIESA SHAHINIAN & GIANTOMASI PC, WEST ORANGE, NJ; JUSTIN E. KERNER, LEAD ATTORNEY, BALLARD SPAHR LLP, MOUNT LAUREL, NJ; RYAN A. RICHMAN, LEAD ATTORNEY, AMANDA GRAHAM DUMVILLE, MCCARTER & ENGLISH, four gateway center, newark, nj; ALISON MORRISSEY, MCCARTER & ENGLISH, PHILADELPHIA, PA; CONNOR ERIC PHALON, McCarter & English, LLP, Environmental and Energy, Four Gateway Center, Newark, NJ; DAVID A. HAWORTH, BALLARD SPAHR LLP, MT. LAUREL, NJ; JOHN J. MCALEESE, III, MCCARTER & ENGLISH, LLP, PHILADELPHIA, PA; RONALD LAWRENCE ISRAEL, CHIESA SHAHINIAN & GIANTOMASI PC, THE OFFICES AT CRYSTAL LAKE, WEST ORANGE, NJ; LANNY STEVEN KURZWEIL, MCCARTER & ENGLISH, LLP, FOUR GATEWAY CENTER, NEWARK, NJ.

For THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, Defendants (1:19-cv-14766-RMB-JBC): [\*4] MARGARET M. RAYMOND-FLOOD, LEAD ATTORNEY, NORRIS MCLAUGHLIN, P.A., BRIDGEWATER, NJ; MARTHA N. DONOVAN, LEAD ATTORNEY, NORRIS, MCLAUGHLIN & MARCUS, PA, BRIDGEWATER, NJ; RYAN A. RICHMAN, LEAD ATTORNEY, AMANDA GRAHAM DUMVILLE, MCCARTER & ENGLISH, four gateway center, newark, nj; ALISON MORRISSEY, MCCARTER & ENGLISH, PHILADELPHIA, PA; JOHN J. MCALEESE, III, MCCARTER & ENGLISH, LLP, PHILADELPHIA, PA; KIMBRILEE M. WEBER, Norris McLaughlin, P.A., New York, NY; LANNY STEVEN KURZWEIL, MCCARTER & ENGLISH, LLP, FOUR GATEWAY CENTER, NEWARK, NJ.

For THE **3M** COMPANY, Defendant (1:19-cv-14766-RMB-JBC): DONALD J. CAMERSON, II, LEAD ATTORNEY, BRESSLER, AMERY & ROSS, ESQS., FLORHAM PARK, NJ; JAMES WYLIE CROWDER, IV, RONALD J. CAMPIONE, LEAD ATTORNEYS, BRESSLER AMERY & ROSS PC, FLORHAM PARK, NJ.

For CORTEVA, INC., DUPONT DE NEMOURS INC., Defendants (1:19-cv-14766-RMB-JBC): DAVID A. HAWORTH, LEAD ATTORNEY, BALLARD SPAHR LLP, MT. LAUREL, NJ; JEFFREY SCOTT

CHIESA, LEAD ATTORNEY, JAMES SALVATORE ARRABITO, CHIESA SHAHINIAN & GIANTOMASI PC, WEST ORANGE, NJ; JUSTIN E. KERNER, LEAD ATTORNEY, BALLARD SPAHR LLP, MOUNT LAUREL, NJ; RONALD LAWRENCE ISRAEL, LEAD ATTORNEY, CHIESA SHAHINIAN & GIANTOMASI PC, THE OFFICES [\*5] AT CRYSTAL LAKE, WEST ORANGE, NJ.

For DUPONT SPECIALTY PRODUCTS USA, LLC, Defendant (1:19-cv-14766-RMB-JBC): DAVID A. HAWORTH, LEAD ATTORNEY, BALLARD SPAHR LLP, MT. LAUREL, NJ; JUSTIN E. KERNER, LEAD ATTORNEY, BALLARD SPAHR LLP, MOUNT LAUREL, NJ.

**Judges:** John Michael Vazquez, United States District Judge.

**Opinion by:** John Michael Vazquez

## Opinion

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### John Michael Vazquez, U.S.D.J.

This matter involves four cases, two of which are pertinent here, that have been consolidated before the Court for pretrial proceedings. Currently pending is Defendant **3M** Company's ("**3M**" or "Defendant") partial motion to dismiss, pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), Plaintiffs' Second Amended Complaints ("SACs") Civil Nos. 19-14766 and 19-14767.<sup>1</sup> The Court reviewed all submissions in support of the motion and opposed to it,<sup>2</sup> and considered the motion without oral argument pursuant to [Federal Rule of Civil Procedure 78](#) and *Local Civil Rule 78.1(b)*. For the reasons that follow, Defendant's motion is **DENIED**.

## I. FACTS AND PROCEDURAL HISTORY

### A. FACTS

The consolidated cases arise out of Defendant E.I. du Pont de Nemours and Company's ("Old DuPont") alleged contamination of four different sites in New Jersey, which Plaintiffs refer to as (1) the Chambers Works Site<sup>3</sup> (2) the Parlin Site<sup>4</sup> (3) the Pompton Lakes Works Site<sup>5</sup> and (4) the Repauno [\*6] Site.<sup>6</sup> The instant motions concern the first two. *See* CWSAC ¶ 1; PSAC ¶ 1.

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<sup>1</sup>The SAC in Civil No. 19-14766, D.E. 57, will be referred to as "CWSAC." The SAC in the Civil No. 19-14767, D.E. 73, and will be referred to as "PSAC."

<sup>2</sup>The following are taken from Civil No. 19-14767. Defendant's brief in support of the instant motion, D.E. 93-1 will be referred to as "D. Br."; Plaintiffs' brief in opposition, D.E. 106, will be referred to as "Opp'n"; Defendant's reply to Plaintiffs' opposition, D.E. 116, will be referred to as "D. Reply."

<sup>3</sup>Civ. No. 19-14766.

<sup>4</sup>Civ. No. 19-14767.

<sup>5</sup>Civ. No. 19-14758.

<sup>6</sup>Civ. No. 19-14765.

Plaintiffs allege that for decades, Old DuPont discharged hazardous substances at each location, while knowing for at least for several of those decades that those substances do not naturally degrade and are dangerous to health and to the environment. *See, e.g.*, CWSAC ¶¶ 1-4. More specifically, Plaintiffs allege that Old DuPont released per- and polyfluoroalkyl substances ("**PFAS**") and perfluorooctanoic acid ("PFOA") into the environment since, at the latest, the first half of the twentieth century, *see* PSAC ¶ 3, despite knowing for about fifty years "that[] PFOA, PFNA<sup>7</sup> and other **PFAS** compounds are extremely resistant to degradation, they persist indefinitely in the environment, they bioaccumulate in blood, and they pose a substantial threat to human health and the environment." CWSAC ¶ 4.

Defendant **3M** is a Delaware corporation headquartered in St. Paul, Minnesota. *Id.* ¶ 21. Plaintiffs represent that "for most of the past several decades, **3M** has been the primary manufacturer of PFOA and PFOS." *Id.* ¶ 117. **3M** began producing those substances in the 1940s and phased out production in the early 2000s, allegedly due to [\*7] pressure from the federal Environmental Protection Agency ("EPA"). PSAC ¶¶ 90, 117. Plaintiffs allege that by 1956, **3M** and Old DuPont learned that "**3M's PFAS** compounds" bioaccumulate "in the human body[,] and that "[b]y the 1970s, **3M**" knew that its compounds were hazardous to the general population. *Id.* ¶¶ 93-97. Plaintiffs add that "[i]n 1975, **3M** found there was a 'universal presence' of PFOA in blood serum samples taken from across the United States." *Id.* ¶ 99. Plaintiffs continue that in the late 1970s, **3M** began resisting internal calls to fully study the environmental impact of its compounds. *Id.* ¶¶ 103-04. In 1980, Plaintiffs allege, Old DuPont confirmed that PFOA is toxic, that it accumulates in human tissue, and that "continued exposure is not tolerable." *Id.* ¶ 106. Plaintiffs accuse **3M** of "actively [seeking] to suppress scientific research on the hazards associated those products, and [mounting] a campaign to control the scientific dialogue on the exposure, analytical, fate, effects, human health, and ecological risks of its PFOA and PFOS products." *Id.* ¶ 116.

Plaintiffs allege that, starting in the 1940s, **3M** sold **PFAS** and products with **PFAS** and shipped PFOA and PFOS to manufacturers [\*8] across the United States, including Old DuPont. *Id.* ¶ 90. Old DuPont, in turn, discharged PFOA from the Parlin Site and other sites. *Id.* ¶ 90. Plaintiffs continue that in 1951, Old DuPont first began purchasing PFOA from **3M** for use manufacturing its product Teflon®. CWSAC ¶ 115. Plaintiffs explain that Old DuPont used PFOA to manufacture fluoroelastomers at the Chambers Works Site beginning in the late 1950s, used it to make standard fluoroelastomers until 2001, and used it make perfluoroelastomers and specialty fluoroelastomers until 2013. *Id.* ¶ 150. Old DuPont also used the Chambers Works Site to store waste with PFOA generated at another DuPont site in West Virginia. *Id.* ¶ 154. Plaintiffs report that in 1999, for example, "Old DuPont estimates it transferred 13,400 pounds of PFOA-containing waste from [West Virginia] to Chambers Works; released at least 25,500 pounds of PFOA into water; dumped at least 8,000 pounds of PFOA-containing waste into landfills on-site; and emitted 300 pounds of PFOA-related chemicals into air." *Id.* ¶ 158.

## B. Procedural History

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<sup>7</sup> "PFNA" is short for "perfluorononanoic acid."

Plaintiffs filed Complaints in **New Jersey** state court, D.E. 1-1,<sup>8</sup> which Defendants removed to this Court, D.E. 1. Plaintiffs then [\*9] filed the SACs. CWSAC; PSAC. As noted, there are currently four cases pending, but **3M** is a defendant in only two. Plaintiffs bring several claims against Defendant, including claims under **New Jersey's** Spill Compensation and Control Act (the "Spill Act"), *N.J. Stat. Ann. §§ 58:10-23.11 to -23.24*; under the Brownfield and Contaminated Site Remediation Act (the "Brownfield Act"), *N.J. Stat. Ann. §§ 58:10B-1 to -31*; and under **New Jersey** common law for products liability. Defendant **3M** responded with the instant motions.

## II. STANDARD OF REVIEW

*Federal Rule of Civil Procedure 12(b)(6)* permits a defendant to move to dismiss a count for "failure to state a claim upon which relief can be granted[.]" To withstand a *Rule 12(b)(6)* motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Although the plausibility standard "does not impose a probability requirement, it does require a pleading to show more than a sheer possibility that a defendant has acted unlawfully." *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (internal quotations and citations omitted).

In evaluating the sufficiency of a complaint, district courts must [\*10] separate the factual and legal elements. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-211 (3d Cir. 2009). A court "must accept all of the complaint's well-pleaded facts as true." *Id.* at 210. A court, however, does not credit labels, conclusions, and a formulaic recitation of the elements of a cause of action. *Twombly*, 550 U.S. at 555 (internal quotations omitted); see also *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 224 (3d Cir. 2011). But even if plausibly pled, a complaint will not withstand a motion to dismiss if the facts alleged do not state "a legally cognizable cause of action." *Turner v. J.P. Morgan Chase & Co., No. 14-7148, 2015 U.S. Dist. LEXIS 185621, 2015 WL 12826480, at \*2 (D.N.J. Jan. 23, 2015)*.

## III. ANALYSIS

Defendant raises three arguments as to why certain counts in the CWSAC and PSAC should be dismissed.<sup>9</sup> The Court considers each in turn.

### A. Spill Act and Brownfield Act

<sup>8</sup> Civ. No. 19-14766 was also removed from **New Jersey** state court. Civ. No. 19-14766 D.E. 1.

<sup>9</sup> In a footnote, Defendant argues that Plaintiffs' application for punitive damages should also be dismissed. D. Br. at 13 n.13. Plaintiffs oppose the argument. See Opp'n at 39-40. The Court will not address this argument because it is not properly before the Court. See *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue . . . will not suffice to bring that issue before this court.") (internal citation omitted).

First, Defendant argues that Plaintiffs have not stated a claim under the Spill Act or Brownfield Act. D. Br. at 4. The crux of Defendant's argument is that Plaintiffs have not sufficiently pled under the Spill Act that Defendant is a person responsible for the discharges at the Chambers Works or Parlin Sites. *Id.* at 5. Plaintiffs counter that Defendant is liable under the Spill Act in light of the plain language of the statute, legislative intent, and analogous cases. Opp'n at 10-22.

In relevant part, the Spill Act provides that, with certain unrelated exceptions, "any person [\*11] who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." [N.J. Stat. Ann. § 58:10-23.11g\(c\)\(1\)](#). Plaintiffs allege that Defendant **3M** is a "person who ... is any way responsible for [a] hazardous substance." Opp'n at 11.

Defendant asserts that **New Jersey** courts have interpreted that subsection as requiring a plaintiff to show the "necessary connection between the offending discharge and the discharger and/or owner of the property." D. Br. at 5 (quoting [New Jersey Department of Environmental Protection v. Dimant, 14 A.3d 780, 788, 418 N.J. Super. 530 \(N.J. Super. Ct. App. Div. 2011\)](#), *aff'd*, [212 N.J. 153, 51 A.3d 816 \(N.J. 2012\)](#)). Defendant further argues that such a connection can be shown through "either ownership or control over the property at the time of the damaging discharge, or control over the hazardous substance that caused the contamination." *Id.* (quoting [Dimant, 14 A.3d at 788](#)). Plaintiffs respond that manufacturing and selling **PFAS** to Old DuPont, which was subsequently discharged in **New Jersey**, is enough to make Defendant potentially liable under the Spill Act. Opp'n at 16-17.

The Spill Act does not define the language, "in any way responsible for any hazardous substance[.]" The Act, does, however, instruct that it is to [\*12] "be liberally construed to effect its purposes." [N.J. Stat. Ann. § 58:10-23.11x](#). The **New Jersey** Supreme Court has described [N.J. Stat. Ann. § 58:10-23.11g\(c\)\(1\)](#) as "establish[ing] a broad scope of liability[.]" [Dimant, 51 A.3d at 821](#). The Supreme Court of **New Jersey** has explained that in "an action to obtain damages, authorized costs and other similar relief under the Act there must be shown a reasonable link between the discharge, the putative discharger, and the contamination at the specifically damaged site." [Id. at 834](#). The [Dimant](#) Court stated that "it is not enough for a plaintiff to simply prove that a defendant produced a hazardous substance and that the substance was found at the contaminated site and 'ask the trier of fact to supply the link.'" [Id. at 833-34](#) (quoting [N.J. Tpk. Auth. v. PPG Indus., Inc., 197 F.3d 96, 105 n.9 \(3d Cir. 1999\)](#)).

In [Giordano v. Solvay Specialty Polymers USA, LLC](#), another court in this district considered a motion by **3M** to dismiss a Spill Act claim arising, in part, out of Old DuPont's activities at the Chambers Works Site. [522 F. Supp. 3d 26, 29-30 \(D.N.J. 2021\)](#). The plaintiffs in [Giordano](#) alleged that Old DuPont's activities at the Chambers Works Site, along with the actions of another defendant, had contaminated the plaintiffs' drinking water. [Id. at 29-31](#). In Judge Hillman's published decision, the court summarized Old DuPont's activities at the Chambers Works Site and echoed the [\*13] allegation that "**3M** supplied DuPont with PFOA." [Id. at 30](#). In a footnote, the [Giordano](#) court addressed **3M**'s argument "that as a manufacturer, rather than a discharger, of **PFAS**, it cannot be held liable under the Spill Act because Plaintiffs have not alleged the requisite connection between the manufacturing of a hazardous substance and the other Defendants' discharge of the hazardous substance." [Id. at 35 n.7](#). Relying on [Dimant](#)'s analysis as to the breadth of the Spill Act and the statute's "in any way responsible for any hazardous substance" language, the [Giordano](#) court ruled that the plaintiffs had sufficiently alleged that **3M** was "in

any way responsible for" the "contaminated water supply[]" at issue in that case, without further discussion. *Id.* (quoting [Dimant, 51 A.3d at 821](#)).

The Court finds [Giordano](#) persuasive and finds that Plaintiffs have sufficiently pled that **3M** is "in any way responsible for" the discharge of hazardous substances at both of the Sites at issue in this motion. Plaintiffs plausibly allege that "Old DuPont purchased the PFOA it required for its manufacturing activities" at the Parlin Site "from Defendant **3M**." PSAC ¶ 68. Plaintiffs assert the same as to the Chambers Works Site. *See* CWSAC ¶ 118. Plaintiffs add [\*14] that Old DuPont used the Chambers Works Site as a dumping ground for "PFOA-containing waste generated at" another of Old DuPont's properties in West Virginia. CWSAC ¶¶ 154, 158. The Court finds that these links have been sufficiently pled to satisfy the Spill Act's nexus requirement.

## B. Failure to Warn

Next, Defendant argues that Plaintiff has not adequately pled its common law failure-to-warn claim,<sup>10</sup> because (1) **3M** did not have a duty to warn the State; (2) Plaintiffs have not sufficiently pled that **3M** failed to provide adequate warnings to Old DuPont; and (3) Plaintiffs have not sufficiently pled that **3M**'s failure to warn Old DuPont proximately caused Plaintiffs' injuries. D. Br. at 6, 9, 12. Plaintiffs clarify that this cause of action is limited to Defendant's alleged failure to warn the State and does not concern warnings to Old DuPont. Opp'n at 35 n.8. As a result, the Court does not reach **3M**'s second and third arguments.

The State argues that Defendant owed a duty to warn the State that **3M**'s **PFAS**-containing products could endanger **New Jersey**'s citizens and environment. Opp'n at 23. The State asserts that the duty stemmed from its role as *parens patriae* and as trustee of [\*15] **New Jersey**'s environment and natural resources. *Id.* The State continues that duty arises from **New Jersey** common law. *Id.* at 24-35.

The *parens patriae* doctrine reflects the State of **New Jersey**'s authority to act for those citizens of **New Jersey** who cannot protect or advance their own interests. [Matter of S.L., 94 N.J. 128, 462 A.2d 1252, 1256 \(N.J. 1983\)](#). Courts have also recognized the State's authority under that doctrine to take action to protect **New Jersey**'s citizens from harm caused by environmental pollution. *See, e.g., Howell Twp. v. Waste Disposal, Inc., 207 N.J. Super. 80, 504 A.2d 19, 24-25 (N.J. Super Ct. App. Div. 1986)*. The public trust doctrine provides that the State of **New Jersey** holds the state's natural resources in trust for the benefit of its citizens. [Borough of Neptune City v. Borough of Avon-by-Sea, 294 A.2d 47, 51-53, 61 N.J. 296 \(1974\)](#).

Defendant, however, argues that this Court may not decide novel common law duties. D. Br. at 8. Relying on [Leo v. Kerr-McGee Chem. Corp., 37 F.3d 96 \(3d Cir. 1994\)](#), among others, Defendant contends that the Third Circuit has held that federal courts may not act as "judicial pioneers" in the province of state law

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<sup>10</sup>The parties acknowledge that **New Jersey**'s Product Liability Act, [N.J. Stat. Ann. §§ 2A:58C-1, et seq.](#), contains an express carveout for "a civil action seeking damages for harm where the cause of the harm is exposure to toxic chemicals or substances[.]" [N.J. Stat. Ann. § 2A:58C-1\(b\)\(4\)](#); [N.J. Stat. Ann. § 2A:58C-6](#). *See also Macrie v. SDS Biotech Corp., 267 N.J. Super. 34, 630 A.2d 805, 808 n.1 (N.J. Super. Ct. App. Div. 1993)*.

and that federalism requires federal courts to desist from expanding or modifying state common law. *Id.* (quoting [Leo](#), 37 F.3d at 101).

When a federal court applies state law, and the state's highest court has not yet addressed the issue, the federal court must apply the state law as it determines the highest court would. [Ill. Nat'l Ins. Co. v. Wyndham Worldwide Operations, Inc.](#), 653 F.3d 225, 231 (3d Cir. 2011); see also [Klaxon Co. v. Stentor Electric Mfg. Co.](#), 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Indeed, the [\*16] Third Circuit has gone so far as to call it an "abdication" of a federal court's responsibility to not do so. [Jaworowski v. Ciasulli](#), 490 F.3d 331, 332 n.1 (3d Cir. 2007). Of course, a federal court may not modify the ruling of a state's highest court even if a federal judge believes that the state's highest court is moving in that direction. See [Day & Zimmermann, Inc. v. Challoner](#), 423 U.S. 3, 4, 96 S. Ct. 167, 46 L. Ed. 2d 3 (1975).

The Third Circuit has made clear the process a court must follow in determining how a state supreme court will rule on an issue:

In the absence of a controlling decision by the Pennsylvania Supreme Court, we must predict how it would rule if faced with the issue. [Covington v. Cont'l Gen. Tire, Inc.](#), 381 F.3d 216, 218 (3d Cir. 2004). In making such a prediction, "we must look to decisions of state intermediate appellate courts, of federal courts interpreting that state's law, and of other state supreme courts that have addressed the issue," as well as to "analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." [Norfolk S. Ry. Co. \[v. Basell USA Inc.\]](#), 512 F.3d [86, 92 (3d Cir. 2008] (internal quotation marks omitted). We must be mindful that "our duty is to apply state law ... irrespective of what we may regard as its merits," [Krauss v. Greenberg](#), 137 F.2d 569, 571 (3d Cir. 1943); we may not impose our own view of what state law should be, [McKenna v. Pac. Rail Serv.](#), 32 F.3d 820, 825 (3d Cir. 1994), nor "expand state law in ways [\*17] not foreshadowed by state precedent." [City of Philadelphia v. Beretta U.S.A. Corp.](#), 277 F.3d 415, 421 (3d Cir. 2002).

[Spence v. ESAB Grp., Inc.](#), 623 F.3d 212, 216-17 (3d Cir. 2010).

In [Leo](#), the Third Circuit faced a question of successor liability under **New Jersey** law and analyzed the leading **New Jersey** case on that issue, [Ramirez v. Amstead Industries](#), 431 A.2d 811, 86 N.J. 332 (N.J. 1981). 37 F.3d at 97-99. Acknowledging that the facts of [Leo](#) had not been addressed by the **New Jersey** Supreme Court, the Third Circuit characterized its task as "predict[ing] how the Supreme Court of **New Jersey** would resolve the issues in this case." *Id.* at 99-101. The [Leo](#) court then thoroughly analyzed [Ramirez](#)'s three considerations for imposing successor liability. *Id.* at (citing [Ramirez](#), 431 A.2d at 820). After concluding that [Ramirez](#)'s rationales did not support a finding of successor liability on the facts before it, the court in [Leo](#) observed that "[o]ur role is to apply the current law of the jurisdiction, and leave it undisturbed." *Id.* at 101 (quoting [City of Philadelphia v. Lead Indus. Ass'n, Inc.](#), 994 F.2d 112, 123 (3d Cir. 1993)).

The **New Jersey** Supreme Court has not ruled on the issue before the Court. As a result, the Court is not disturbing any binding precedent of **New Jersey**'s highest court. [Leo](#), 37 F.3d at 101. Similarly, **3M** points to no authority indicating that the State asks the Court to expand **New Jersey** law in a manner "not foreshadowed by state precedent." [Spence](#), 623 F.3d at 217 (citation omitted). To the contrary, the **New**



**Jersey** Supreme Court, along with the state's lower courts, have a long history [\*18] of providing detailed guidance as to how a court should analyze whether a duty to warn exists. And, as set forth above, **New Jersey** also recognizes the *parens patriae* and public trust doctrines.

Accordingly, the Court proceeds to analyze whether there is, under **New Jersey** law, a duty to warn as alleged by Plaintiffs. In determining whether a duty exists at common law, the **New Jersey** Supreme Court first asks whether it was foreseeable that a party's conduct was capable of harming another. *J.S. v. R.T.H., 155 N.J. 330, 714 A.2d 924, 928-29 (N.J. 1998)*. Once foreseeability has been established, the **New Jersey** Supreme Court assesses four additional factors: "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." *Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 625 A.2d 1110, 1116 (1993)*; see also *Olivo v. Owens-Illinois, Inc., 186 N.J. 394, 895 A.2d 1143, 1148 (N.J. 2006)*. The Court weighs and balances those factors in the totality of the circumstances and in light of the public policy of **New Jersey**, and ultimately considers the existence of a duty to be a question of fairness. *Hopkins, 625 A.2d at 1116*.

The Court, therefore, begins by assessing whether it was foreseeable to **3M** that its products could harm the State of **New Jersey's** citizens and natural resources. The **New Jersey** Supreme Court has explained that "the [\*19] defendant's knowledge of the risk of injury" is at the heart of the foreseeability analysis. *J.S., 714 A.2d at 928*. Indeed, that court has gone so far as describe foreseeability as being of "paramount importance[.]" *Schwartz v. Accuratus Corp., 225 N.J. 517, 139 A.3d 84, 91 (N.J. 2016)*, and explained that whether a duty exists "devolves to a question of foreseeability of the risk of harm to that individual or identifiable class of individuals[.]" *Olivo, 895 A.2d at 1148*. In other words, foreseeability is a "primary" and "foundational" element. *J.S., 714 A.2d at 928, 929*. Further "special knowledge" on the defendant's part that a particular plaintiff may be harmed can swing a close case. *Id. at 928*.

Because the Court confronts the question in the context of a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the Court takes as true Plaintiffs' well-pled factual allegations and all reasonable inferences therefrom. *Fowler, 578 F.3d at 210*.<sup>11</sup> In the SACs, Plaintiffs allege that by 1956, **3M** had actual knowledge that **PFAS** accumulates in the human body and, by 1963, knew that **PFAS** can seep into the environmental surroundings of industrial facilities, where it would not naturally degrade. CWSAC ¶¶ 121-24; PSAC ¶¶ 93-96. As years passed, **3M**, according to the SACs, uncovered further proof that its products could, would, or was causing harm in the precise manner complained of in the [\*20] SACs. In the 1970s, **3M** was concerned that the general population could be endangered by exposure to fluorochemicals, and in 1978, animal experimentation showed that **PFAS** ingestion was lethal. PSAC ¶¶ 97, 101; CWSAC ¶¶ 125, 129. In the late 1970s, **3M** also uncovered proof that effluent containing its substances was poisoning a river near one of its plants in Alabama. PSAC ¶ 103; CWSAC ¶ 131.

**3M**—the moving party—does not address the key, indispensable element of foreseeability as to its duty to warn. D. Br. at 6-9. But Plaintiffs do. Plaintiffs assert that **3M** designed and manufactured **PFAS** and sold the chemicals to Old DuPont for use and disposal at the two **New Jersey** sites. Opp'n. at 26 (citations omitted). The State continues that **3M** knew "for decades that **PFAS** presented a significant threat to the environment and human health based on its own experience and scientific research confirmed these dangers." *Id.* (citations omitted). The State next asserts that not only did **3M** not warn of these dangers, it

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<sup>11</sup> Defendant appears to argue that the facts as pled collectively do not support the imposition of a common law duty. Accordingly, the Court likewise considers the facts in the aggregate.

took active steps to hide its knowledge and the dangerousness of **PFAS**. *Id.* at 27 (citations omitted). In its reply, **3M** merely addresses foreseeability in the context of certain cases, asserting [\*21] that the **New Jersey** Supreme Court has "declined to adopt an open-ended duty to warn based on mere foreseeability." D. Reply at 8. Defendant's reply misses the mark; foreseeability is the "paramount concern" in deciding whether a duty exists. *Schwartz, 139 A.3d at 91*. **3M** implicitly concedes the foreseeability of the harm. To the extent that it does not, the Court finds that Plaintiff has adequately established foreseeability of the harm.

Having determined that the harm suffered by Plaintiffs was foreseeable, the Court proceeds to analyze the fairness factors. *Olivo, 895 A.2d at 1148*. As noted, those factors are "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." *Hopkins, 625 A.2d at 1116*. **3M**'s moving brief only addresses two issues: the relationship of the parties and its duty to warn vis-à-vis Old DuPont. D. Br. at 6-12. The latter is not in issue, meaning that **3M** effectively concedes that three of the factors—the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution—weigh in favor of finding a duty exists. Nevertheless, the Court reviews each factor.

As to the first factor, [\*22] **3M** asserts that under "under **New Jersey** law, the existence of a duty presupposes some relationship between the parties." D. Br. at 7 (citing *Hopkins, 625 A.2d at 1116*). As noted, the relationship of the parties is one factor to consider. *Hopkins, 625 A.2d at 1116*. To the extent **3M** is implicitly asserting that it is only accountable to Old DuPont, with whom it had a direct relationship, the Court again disagrees. First, returning to the crucial foreseeability inquiry, the Court again notes that the **New Jersey** Supreme Court has instructed that whether a duty exists "devolves to a question of foreseeability of *the risk of harm to that individual or identifiable class of individuals*." *Olivo, 895 A.2d at 1148* (emphasis added). The **New Jersey** Supreme Court did not limit its inquiry to those with whom a defendant had a relationship.

More importantly, **New Jersey** courts have not limited the duty to warn to those with whom a defendant has a direct relationship. In *Macrie*, the court rejected the defendant's "contention that as a matter of law it had no obligation warn plaintiffs because they were not 'users' of its products." *Macrie, 630 A.2d at 809*. In that case, the defendant manufactured a fungicide that it sold with a six-page brochure pursuant to federal regulations that outlined the product's [\*23] potential harmful effects. *Id. at 807*. That exhaustive warning appears to have been sufficient. A purchaser of the fungicide, however, used it and then sold treated vegetables to a third-party, whose workers were seriously injured by exposure to the fungicide. *Id. at 807-08*. The *Macrie* court found that a jury could reasonably find that the manufacturer failed to warn the downstream employees. *Id. at 808-11*. Similarly, in *Olivo*, the **New Jersey** Supreme Court held that the defendant, a company at which the plaintiff worked as a welder and was exposed to asbestos, owed a duty to the plaintiff's wife, who was injured by inhaling the asbestos on her husband's clothes when she laundered them. *895 A.2d at 1146*. This was so even though the wife had never actually entered onto the defendant's premises—it was enough that the harm that befell the plaintiff's wife was foreseeable, in the *Olivo* court's view, to make it fair to foist a duty upon the defendant. *Id. at 1146, 1149*. Later, in *Schwartz*, the **New Jersey** Supreme Court determined that the duty could extend to other members of the household. *139 A.3d at 85-86, 92*. The *Schwartz* court noted that a "chance contact with a worker transporting home a toxic substance from another's premises should not suffice to create a duty of care[.]" *Id. at 92*. The court continued that the [\*24] relationship between the parties was "of necessity, relevant and weighty[.]" and speaks to both the existence and contours of a duty. *Id.*

The Court finds that the relationship between **3M** and the State does not foreclose imposing a duty to warn. Clearly, **3M** and the State did not have a direct business relationship. Nevertheless, the State is duty-bound to protect its citizens and its environment, both of which were harmed by **3M**'s conduct, accepting the State's allegations as true. See [New Hampshire v. Exxon Mobil Corp., 168 N.H. 211, 126 A.3d 266, 289-90 \(N.H. 2015\)](#) (noting that a state, as *parens patriae*, has an active interest in its citizen's health and its environment's wellbeing; is not a mere spectator to the transactions that go on within its borders). The relationship here does not bespeak of the "chance encounter" warned of by the **New Jersey** Supreme Court in [Schwartz](#).

Next, the nature of the attendant risk was great. The State describes in detail how **3M**'s products allegedly polluted the State of **New Jersey**'s environment and endangered its people. *E.g.*, CWSAC ¶¶ 109, 111; PSAC ¶¶ 81, 83. The nature of the harm, in terms of both its gravity and its breadth, is great and permanent. This factor weighs strongly in imposing a duty. Likewise, **3M** had the opportunity to exercise [\*25] care or provide the State a warning. According to the SACs, **3M** began produce **PFAS**-containing materials in the 1940s and phased out production in the early 2000s. The State plausibly alleges that **3M** had actual notice of a potential problem with **PFAS** starting in 1956 and goes on to provide additional specific allegations as to **3M**'s increasing knowledge over the next several decades. Additionally, as the manufacturer of those products, **3M** had a special opportunity to know of the dangerous properties of chemicals. Finally, while **3M** protests that any potential duty to warn would be "amorphous," D. Reply at 10, the Court is confident that if **3M** had desired to report an environmental hazard in **New Jersey**, it would have located the correct agency or agencies in short order. Accordingly, the Court finds that this factor also weighs in favor of imposing a duty to warn.

Finally, the Court finds that the public interest similarly favors the finding of a duty. Indeed, the prevention of far-reaching environmental and human harm is of paramount public concern. [Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442-43, 80 S. Ct. 813, 4 L. Ed. 2d 852 \(1960\)](#).

In sum, the Court finds that imposing a duty to warn on **3M** is consistent with the foreseeability of the harm and a balancing of the fairness [\*26] factors. **3M** asserts the following:

[T]he consequences of recognizing such a duty are especially acute here, where the at-issue product(s) sold by **3M** to Old DuPont were not designated as hazardous substances by the State until years after they allegedly were discharged into the environment by Old DuPont and after **3M**'s last sale to Old DuPont.

D. Reply at 9. Assuming the State's plausible allegations as true, it would appear this is the precise reason why a duty should be imposed. The State did not have timely knowledge or information necessary to protect its citizens and resources, but **3M** did.

In addition, as Plaintiffs point out, both the Supreme Court of New Hampshire and the District of Maryland have held that the common law of those states required manufacturers to warn the states of the dangerous propensities of their products. See [Maryland v. Exxon Mobil Corp., 406 F. Supp. 3d 420 \(D. Md. 2019\)](#); [New Hampshire v. Exxon Mobil Corp., 168 N.H. 211, 126 A.3d 266 \(N.H. 2015\)](#). Obviously, both matters were decided pursuant to the law of other states, but the cases are otherwise analogous.

In [Maryland](#), the state sued sixty-five defendants because its waters were polluted with methyl tertiary butyl ether ("MTBE"). [406 F. Supp. 3d at 432](#). MTBE was an oxygenate additive that was blended into

gasoline in the 1980s and 1990s. *Id.* MTBE was added to the gasoline [\*27] at the refineries or at terminals. *Id.* at 434. MTBE reached the environment in numerous ways, including through disposals, spills, evaporative releases, and in underground storage tanks during delivery. *Id.* Once released, MTBE was highly soluble in ground water, spread rapidly, did not naturally degrade, and was resistant to removal and treatment in ground water. *Id.* MTBE was then found in different public water systems and private drinking-water wells in the state. *Id.* Maryland sued as *parens patriae*, as trustee for its natural resources, and pursuant to state statute, alleging that the defendants knew as early as 1980 that MTBE was harmful and could contaminate groundwater but failed to warn or use a safer alternative. *Id.* at 436. The defendants instead defended and promoted MTBE. *Id.* The defendants included manufacturers, distributors, and sellers. *Id.* at 465. The court in *Maryland* found that the state had plausibly alleged that the defendants had a duty to warn the state of the dangers associated with MTBE because, among other things, Maryland sufficiently alleged that the harm it suffered was foreseeable as a result of the defendants' placement of MTBE gasoline into the state's market. *Id.* at 463.

*New Hampshire* likewise concerned MTBE. *126 A.3d at 274* [\*28]. New Hampshire sued gasoline suppliers, refiners, and chemical manufacturers for damage to its groundwater caused by MTBE. *Id.* As to the duty warn, defendant Exxon Mobil argued on appeal that "it did not have a duty to warn the government as sovereign, rather than as end user or consumer[.]" *Id.* at 289. The Supreme Court of New Hampshire rejected this argument, reasoning as follows:

In *State v. City of Dover, 153 N.H. 181, 891 A.2d 524 (2006)*, we determined that the State was the proper party to bring suit against the MTBE defendants, because it "has a quasi-sovereign interest in protecting the health and well-being, both physical and economic, of its residents with respect to the statewide water supply." *City of Dover, 891 A.2d at 529*. In addition, we concluded that the State satisfied the requirements of *parens patriae* standing because it asserted an injury to a quasi-sovereign interest, and alleged injury to a substantial segment of its population. *Id.* at 530. "[A] state may act as the representative of its citizens where the injury alleged affects the general population of a State in a substantial way." [*New Hampshire v. Hess [Corp.]*, 161 N.H. 426, 20 A.3d 212, 218 [(N.H. 2011)]] (quotation omitted). Accordingly, we held that the State has *parens patriae* standing to bring suit against the MTBE defendants on behalf of the residents of New Hampshire. *City of Dover, 891 A.2d at 530*.

*Id.* at 290 (first alteration in original).

Like certain defendants in both *Maryland* and *New Hampshire*, **3M** was an out-of-state manufacturer whose allegedly harmful product was used in conjunction with another product. Similarly, **3M** allegedly knew of the harmful nature of its product but did [\*29] not warn **New Jersey**, resulting in harm to the state's environment and population. And in both *Maryland* and *New Hampshire*, the courts determined that the defendants' duty to warn extended to the state as *parens patriae* and as trustee for the natural resources.

For the foregoing reasons, the Court finds that Plaintiffs have plausibly alleged a failure to warn and denies **3M**'s motion on this ground.

### C. Design Defect

Finally, Defendant argues that Plaintiffs have not plausibly pled a design defect claim. D. Br. at 12. To state a claim for design defect under New Jersey law, "[a] 'plaintiff must plead either that the product's risk outweighs its harm, or that an alternate design exists[.]'" Mendez v. Shah, 28 F. Supp. 3d 282, 297-98 (D.N.J. 2014). Plaintiffs do not assert that an alternate design exists. Opp'n at 37. Defendant argues that Plaintiffs have not sustained their pleading burden because they alleged "only that 'the foreseeable risk to public health and welfare ... outweighed the cost to **3M** of reducing or eliminating such risk.'" D. Br. at 12 (emphasis deleted) (quoting CWSAC ¶ 434; PSAC ¶ 388). Plaintiffs reply that **3M** is "seek[ing] to elevate form over substance, by arguing that, because the State did not explicitly recite in its Complaints that **3M's PFAS's** [\*30] dangers outweighed their utility, its claim fails as a matter of law." Opp'n at 37-38.

In support, Plaintiffs cite to Fabricant v. Intamin Amusement Rides International Corp., No. 19-12900, 2020 U.S. Dist. LEXIS 11280, 2020 WL 373348 (D.N.J. Jan. 23, 2020). In that case, the plaintiffs were injured on a roller coaster and sued its manufacturer, claiming that the ride had been defectively designed because its component parts' risk outweighed their utility. 2020 U.S. Dist. LEXIS 11280, [WL] at \*\*1-4. The defendants sought to dismiss the claim as inadequately pled. 2020 U.S. Dist. LEXIS 11280, [WL] at \*4. The Fabricant court noted that the plaintiffs had "not explicitly weigh[ed]" the parts' "utility and risks[.]" but observed that the plaintiffs did "weigh the utility and risks when describing the 'unreasonable risk of whiplash injury to the vertebrae of [riders'] necks and spines' associated with [the roller coaster]." *Id.* (first alteration in original). The court concluded that the plaintiffs had sufficiently stated a claim. *Id.*

Here, Plaintiffs allege that "PFOA and PFOS have characteristics that cause extensive and persistent environmental contamination,[]" PSAC ¶ 80; CWAS ¶ 108, and that "PFOA and PFOS contamination presents a serious threat to public health through drinking water." PSAC ¶ 83; CWAC ¶ 111. Plaintiffs detail that **PFAS** exposure "has been linked to several diseases, including kidney and testicular [\*31] cancer, thyroid disease, ulcerative colitis, high cholesterol, and pregnancy-induced hypertension and low birth weight." PSAC ¶ 82; CWSAC ¶ 110. Plaintiffs further allege that the **PFAS** used at the sites "were defective in design and unreasonably dangerous" for similar reasons. PSAC ¶ 386; CWSAC ¶ 432. And Plaintiffs say that "the foreseeable risk to public health and welfare posed by **3M's PFAS** outweighed the cost to **3M** of reducing or eliminating such risk." PSAC ¶ 388; CWSAC ¶ 434.

The Court finds that Plaintiffs have "managed to plead enough facts to eke out a claim for a design defect." Barrett v. Tri-Coast Pharmacy, Inc., 518 F. Supp. 3d 810, 826 (D.N.J. 2021). In Barrett, the court ruled that where the plaintiffs alleged that a "pharmaceutical was defectively designed because it was developed, mixed and/or created in an insanitary and unsafe environment that contained or promoted the development of harmful organisms such as bacteria, which was ... unreasonably dangerous[,]", "[the] allegation [was] sufficient to constitute an assertion that the risk of using the contaminated pharmaceutical outweighs its utility." *Id.* (first alteration in original) (internal quotation marks omitted). Likewise, here, Plaintiffs provide detail as to the products' risks and allege [\*32] that products were "unreasonably dangerous."

The Court finds that Plaintiffs have sufficiently stated a claim for design defect.

#### IV. CONCLUSION

For the foregoing reasons, Defendant's motion is denied. An appropriate order accompanies this Opinion.

Dated: December 30, 2021

/s/ John Michael Vazquez

John Michael Vazquez, U.S.D.J.

**ORDER**

**John Michael Vazquez, U.S.D.J.**

For the reasons discussed in the accompanying Opinion, and for good cause shown,

**IT IS** on this 30th day of December, 2021,

**ORDERED** that Defendant's motion to dismiss, D.E. 93, certain portions of Plaintiffs' Second Amended Complaints is **DENIED**. And it is further

**ORDERED** that this Order and the accompanying Opinion shall be filed on the following dockets: Civil Action Nos. 19-14766, and 19-14767.

/s/ John Michael Vazquez

John Michael Vazquez, U.S.D.J.

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