IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

STATE OF OREGON, Plaintiff, v. MONSANTO COMPANY; SOLUTIA, INC.; PHARMACIA LLC; and DOES 1-10, Defendants.	)	Case No. 18CV00540 ORDER

INTRODUCTION

This case came on for hearing on November 2, 2018, on Defendants' ORCP 21 Motions to Dismiss and to Strike Plaintiff State of Oregon's First Amended Complaint ("FAC").[1]

[1] Defendants have also filed a separate Request for Judicial Notice And Consideration in Support of Rule 21 Motions To Dismiss And To Strike State Of Oregon's First Amended Complaint ("Request"). The Request seeks that the Court take Judicial Notice of seven exhibits. Plaintiff

Plaintiff appeared by and through their counsel Daniel Mensher and Yoona Park. All Defendants appeared by and through their counsel Richard Hansen and Robert Howard.

Defendants seek: (1) an order dismissing each of the FAC's claims for relief pursuant to ORCP 21 A(8); and (2) an order striking the Plaintiff's Prayer for Attorneys' fees pursuant to ORCP 21 E. Plaintiff opposes the motions to dismiss.

PROCEDURAL HISTORY

Plaintiff filed its First Amended Complaint ("FAC") on August 1, 2018. Defendants filed the instant motions on August 31, 2018. Plaintiff filed its Response on September 28, 2018. Defendants' Unopposed Motion To Extend Reply Deadline was granted on October 4, 2018. Defendants filed their Reply on October 16, 2018.

DISCUSSION, ANALYSIS & CONCLUSIONS

1. Background

Plaintiff alleges that Defendants manufactured and sold into Oregon toxic chemicals known as "PCBs," and that these PCBs were eventually, predictably, and inevitably discharged into Oregon's environment. Plaintiff alleges that these chemicals harm, and have harmed, Oregon's natural resources and environment. The FAC asserts six separate claims for relief and a prayer for attorneys' fees.

2. Applicable Legal Standards

ORCP 18 A requires a complaint to contain "[a] plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition." A complaint

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has filed no response to the Request CONFIRMED (1/7/19), and cites from the exhibits attached to the Request in its Response to Defendants' Motions to Dismiss and to Strike. [CITE Def. Response]. Defendants' Request is GRANTED, and the Court takes judicial notice of Exhibits 1-7 in consideration of the remaining motions.

that fails to meet the requirements of ORCP 18 A is subject to a motion to dismiss pursuant to ORCP 21 A(8).

In reviewing an ORCP 21 motion to dismiss, the trial court must "assume the truth of well-pleaded factual allegations in the plaintiff's complaint." *Cannon v. Dept. of Justice*, 261 Or App 680, 682, 322 P3d 601 (2014). The trial court must determine if the complaint "contain[s] factual allegations that, if proved, establish the right to the relief sought." *Moser v. Mark*, 223 Or App 52, 57, 195 P3d 424 (2008). The court must assume that "all well-pleaded facts" in the complaint "are true and give plaintiff[s] the benefit of all favorable inferences that reasonably may be drawn from those factual allegations." *Skill v. Martinez*, 288 Or App 207, 209-10, 406 P3d 126, *adh'd to as modified on recons*, 289 Or App 637, 407 P3d 998 (2017) (internal quotation marks omitted).

3. Defendants' Motions To Dismiss

1. Motion 1

Defendants move to dismiss for failure to state a claim for relief the FAC's Sixth Claim which purports to state a claim pursuant to ORS 468B.060.

ORS 468B.060(1) states, in relevant part:

> Where the injury, death, contamination or destruction of fish or other wildlife or injury or destruction of fish or wildlife habitat results from pollution * * * the person responsible for the injury, death, contamination or destruction shall be strictly liable to the state for the value of the fish or wildlife so injured or destroyed and for all costs of restoring fish and wildlife production in the affected areas, including habitat restoration.

The FAC alleges that Defendants are "responsible for" the pollution that has caused injury, death, contamination, and destruction of fish and other wildlife and habitat, because they manufactured PCB products and sold them into Oregon, knowing that the PCBs would eventually be discharged into, and harm, Oregon's fish and wildlife habitats. (FAC ¶¶ 109-114).

Defendants argue that the FAC fails to state a claim for relief under the statute for two independent reasons: (1) the FAC does not (and cannot) allege that Defendants are "responsible for" the pollution alleged; and (2) ORS 468B.060 applies only prospectively, and Defendants' PCB manufacturing and sales operations in the United States ceased before the enactment of the version of the statute relied on by the FAC.

Defendants' first argument is based on their view of who may be deemed to be "responsible for" pollution that kills or injures wildlife and/or damages habitat. At Hearing, Defendants agreed that the statutory term "the person responsible for" does not mean that there may be only one entity responsible per polluting event. Defendants argue at length, however, that a manufacturer that produced and sold a product that ultimately created a pollution discharge cannot be considered to be "the person responsible" for that pollution under the meaning of the statute. Rather, in such a case, it is only the discharger of the pollutant who qualifies as "the person responsible" under the statute.

Resolution of this portion of Defendants' Motion thus turns on a question of statutory interpretation: can Defendants, as the seller/manufacturer of a product whose discharge by third parties leads to pollution qualify as "the party responsible" for the pollution under ORS 468.060? Contrary to Defendants' position, the Court answers this question in the affirmative.[2] The FAC alleges that Defendants knew that their PCB products would inevitably lead to the discharge of PCBs into the environment simply from their ordinary commercial usage. (FAC ¶ 50). These allegations, if proved, would be sufficient to establish the basis for relief under the statute.

[2] In discerning the Legislature's intended meaning for ORS 468B.060, the Court has considered the statute's text, context, and legislative history, pursuant to the rule set out in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

Importantly, ORS 468B.060 does not by its terms restrict the scope of liability to the person who "discharges" a pollutant. Rather it makes liable "the person responsible for" pollution. In view of the Legislature's use of the term "discharge" elsewhere in the statute, this textual choice appears to be significant. For example, ORS 468B.025(1) prohibits a person from "[c]aus[ing] pollution of any waters of the state or caus[ing] to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state," on the one hand, and "discharg[ing] any wastes into the waters of the state" on the other hand. The Legislature is thus able to distinguish between "causing pollution" and "discharging waste." Its use of the former locution in ORS 468B.060 appears to contemplate a broader view of potentially liable actions beyond mere "discharge."

Moreover, Defendants appear to draw an unsupported conclusion from their understood meaning of the term "the person responsible for" pollution. Defendants read this term as consonant with "the person who is the primary cause of" pollution. Even if Defendants' preferred meaning is correct, the FAC alleges sufficient facts that – if proved – could establish that Defendants were the person who was the "primary cause" of the pollution at issue. Defendants assume that a discharger – even one who, for example, may not know the danger of pollution from a discharge – is the "primary cause" of pollution. Respectfully, the Court cannot see why this must necessarily be so. If Plaintiff is successful in proving Defendants' conduct as recited above, as well as – perhaps – proving that Defendants' customers used Defendants' products properly and with industry-standard care and nonetheless effected the discharge of PCBs, a trier of fact could reasonably conclude that Defendants were the primary cause for the pollution. In short: even accepting Defendants' preferred statutory interpretation of the meaning

of the "the person responsible for," Defendants' resulting legal conclusion does not necessarily follow.

Defendants' second argument is that ORS 468B.060 applies only prospectively, and was not in effect during the time Defendants' were actively involved in the manufacture and sale of PCBs in the United States. Defendants thus submit that the FAC does not state a claim under ORS 468B.060. Defendants also argue that the FAC fails to state a claim under the predecessor version of the statute, which was in effect between 1967-1979, which covers some of the period when Defendants were manufacturing PCBs and selling them into Oregon. Defendants argue that because the FAC does not actually identify any killed fish or wildlife, the FAC also fails to state a claim under the earlier version of the statute.[3]

Plaintiff does not address Defendants' arguments on these points in its filed Response, presumably because Defendants did not present these arguments directly until its Reply. At the Hearing on Defendants' motion, Plaintiff argued that if the harm to Oregon's environment from the PCBs at issue is "ongoing," then the statute is "retroactive" in the sense that it authorizes recovery for present harm, even if the pollution giving rise to that harm occurred before the enactment of the statute. Plaintiff also conceded at Hearing that its Sixth Claim for Relief seeks to state a claim only for ongoing environmental damage.

After considering the ORS 468B.060's text, context, and legislative history, the Court finds that the FAC states a claim for relief under ORS 468B.060. The statute creates a claim for relief for environmental harms that are ongoing, even if the polluting events giving rise to those

[3] Defendants also argue that Plaintiff may not recover for any environmental damages caused by PCBs that Defendants allegedly manufactured and which were discharged prior to 1967, when the first version of ORS 468B.060B was enacted.

harms occurred before the statute was enacted.[4] However, in the Court's view, the statute does not apply "retroactively" in the sense that it does not create a claim for relief for environmental harms suffered before the statute was enacted.

ORS 468B.060(1) uses the present tense in describing environmental harm that "results from pollution." It appears plain from this language that the Legislature did not intend to impose "strict liability" for environmental harms that predated the statute's enactment. At the same time, the statute does not explicitly limit its application to harms occasioned after the statute's enactment by pollution that occurred before enactment. The statute appears to contemplate ongoing environmental damage occurring at the time of the enactment. In the Court's view, the Legislature intended to permit causes of action for post-enactment harm caused by pre-enactment pollution.

The FAC states a claim for relief under ORS 468B.060(1). However, Plaintiff may not recover under this claim for environmental damages that occurred before the present statute's 1979 enactment date (or in theory, before the predecessor's statute's 1967 enactment, although the FAC does not appear to seek to state a claim under the predecessor statute). In view of the Court's ruling on this issue, the Sixth Claim for Relief is not pleaded with sufficient specificity. Plaintiff will be required to amend the FAC to make clear that it is seeking (as it stated at Hearing) relief only for present/ongoing environmental harm.

Defendants' Motion 1 is **DENIED**. The Court sua sponte **ORDERS PLAINTIFF TO AMEND ITS SIXTH CLAIM FOR RELIEF** to make it consistent with the above findings.

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[4] Of course, Defendants' averments around what PCBs-related conduct Defendants undertook and when that conduct began and ended is beyond the scope of what a court may consider when considering a Motion To Dismiss.

2. Motion 2

Defendants move to dismiss the FAC's First (Public Nuisance), Second (Purpresture), Third (Trespass), and Fifth (Unjust Enrichment) claims for relief on the grounds that they are governed by Oregon's product liability statute (ORS 30.900 *et seq.*), and that they each fail to state a claim for relief under that statute.

ORS 30.900 et seq. is generally known as the Oregon Products Liability Statute ("OPLS"). The OPLS provides the exclusive remedy for conduct that falls within the statute's purview. *Kambury v. DaimlerChrysler Corp.*, 185 Or App 635, 639, 60 P3d 1103, 1105 (2003) (noting that Oregon's appellate courts have held "that 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") (citing *Marinelli v. Ford Motor Co.,* 72 Or App 268, 696 P2d 1, *rev. den.,* 299 Or 251, 701 P2d 784 (1985)). That is, if an action subject to the OPLS, that action is governed exclusively by the statute, to the exclusion of alternative causes of action. *See Weston v. Camp's Lumber & Bldg. Supply, Inc.*, 205 Or App 347, 358, 135 P3d 331, 337–38, *opinion adhered to as modified on reconsideration*, 206 Or App 761, 138 P3d 931 (2006) ("[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, [the OPLS] will apply regardless of the characterization of the theory given to it by the plaintiff.")

ORS 30.900 defines a "product liability civil action" as "a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of" any defect in the product, any failure to warn regarding the product, or any failure to properly instruct in the use of the product.

ORS 30.920(1) defines the scope of a manufacturer/seller's liability in a product liability civil action: "One who sells or leases any product in a defective condition unreasonably

dangerous to the user or consumer or to the property of the user or consumer is subject to liability for physical harm or damage to property caused by that condition." ORS 30.920(2)(b)(2) states that the rule stated in subsection (1) applies even if "[t]he user, consumer or injured party has not purchased or leased the product from or entered into contractual relations with the seller or lessor."

Defendants argue that the gravamen of each of the FAC's First, Second, Third, and Fifth claims for relief are assertions that Defendants' PCB-carrying products were defective, and that these claims therefore products liability actions governed exclusively by the OPLS. (Def. Mot. 18-22). Defendants seize upon the inclusion of the term "injured party" in ORS 30.920(2)(b)(2) to argue that the OPLS applies to claims involving defective products brought by any party claiming to be injured by such products. That is, Defendants argue that the inclusion of "injured party" means that *anyone* injured by a defective product – be it a user, a consumer, or any other injured party – must bring a claim pursuant to the OPLS.

Plaintiff counters that the gravamen of each of these claims is not based on a product defect or failure to warn, but instead is grounded on allegations that environmental harm was, and is, caused by the Defendant-manufactured PCBs that have been released in Oregon. Plaintiff argues that notwithstanding the "injured party" language used in ORS 30.920(2)(b)(2), the OPLS only covers claims brought by the consumers of defective products. Plaintiff also argues that these claims accrued before the OPLS' 1978 enactment.

In the Court's view, Plaintiff prevails on its arguments on the scope of the OPLS with respect to claims brought by non-users/non-consumers, although not precisely for the reasons it states. Resolution of the issue is dispositive to the resolution of Motion 2, and the Court therefore will not address the parties' additional arguments on this Motion.

ORS 30.920(1) limits the scope of the liability imposed by the OPLS to "[o]ne who sells or leases any product in a defective condition unreasonably dangerous to the *user* or *consumer*." (emphasis added). The meaning of text appears to be unambiguous, and plainly places limits on which products fall within the ambit of the OPLS: those that because of a defective condition are unreasonably dangerous to the consumer who purchased the product or to anyone who uses the product. [5]

The mistake in Defendants' reasoning is that it focuses only on "who" the statute covers, to the exclusion of considering the equally important "what" the statute covers. Defendant appears to be correct that the inclusion of the term "other party" means that a non-user/non-consumer may well have a claim arising from an injury caused by a defective product controlled by the OPLS. But whether such a claim does or does not fall within the scope of the OPLS turns on whether that claim is one recognized by ORS 30.900 and ORS 30.920(1). As noted above, ORS 30.920(1) limits the scope of OPLS liability to circumstances in which the product was because of a defect rendered "unreasonably dangerous to the user or consumer." And ORS 30.900 limits the scope of the OPLS' scope to harms "arising out of" the defect rendering the product unreasonably dangerous to users or consumers. The result of reading these statutes together is that the OPLS applies to non-users/consumers in limited circumstances: if a product that is defectively dangerous to a consumer or a user injures a non-user/consumer as a result of the defect, then that "injured party's" claim is covered by the OPLS. If a product harms a non-user/non-consumer in a way not arising out of the defective condition that render the product

[5] In determining the Legislature's intent as to the meaning of the OPLS, the Court has considered the statute's text, context, and legislative history, pursuant to the rule set out in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

dangerous to users and consumers, a claim by such non-user/non-consumer for such harm is *not* covered by the OPLS.[6]

Defendants' citation to *Weston v. Camp's Lumber & Bldg. Supply, Inc.*, 205 Or App 347, 360, 135 P3d 331, 339, *opinion adhered to as modified on reconsideration*, 206 Or App 761, 138 P3d 931 (2006) is unavailing. In *Weston*, the plaintiff purchased lumber from the defendant, and later complained that the lumber was infested by beetles which caused enormous damage to their home. *Id.* at 360. The *Weston* court held that plaintiff's claim was one for product liability, because it alleged harm from a defect in the lumber that the plaintiff had purchased from the defendant. *Id.* The plaintiff in *Weston*, then, was a customer who brought a claim based on a product defect; his claim was therefore governed by the OPLS.

Here, Plaintiff alleges that PCBs were defective in a way that made them dangerous to those who purchased or used them. (FAC ¶ 60 and n. 21). However, Plaintiff's claims in this case are independent from the alleged dangers the PCBs' alleged defects posed to those who purchased or used them.[7] They are environmental claims that allege that PCBs cause significant damage to Oregon's fish and wildlife, as well as to related habitats. These allegations do not

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[6] A hypothetical may help clarify the Court's reasoning on how these statutory provisions are to be read together. Consider a glass bottle of a generic cola that is defective because it is prone to explode upon opening. A consumer purchases a defective bottle and sits down at a table with a non-cola-consuming friend. The consumer opens his bottle, and it explodes. Glass shards fly everywhere, and injure both the consumer and his friend. Both the consumer's claims and the friend's claims fall within the OPLS, because the bottle was defective in a way that made it unreasonably dangerous for the consumer, and because both were injured by dint of that defect. Now consider a landfill owner who seeks to bring a claim against the same cola bottle manufacturer for environmental harm to the landfill caused by the leeching of carcinogenic chemicals from the cola bottles' labels into the landfill. The landfill owner's claim does not fall within the ambit of the OPLS, because his claim is not brought on the basis of the defect that rendered the bottles dangerous to the cola's consumers and/or users.

[7] Because Plaintiff's claims do not arise from the harms allegedly suffered by Defendants' PCB customers, it not clear why Plaintiff elected to include allegations relating to customer complaints in FAC.

allege that Plaintiff (a non-user/non-consumer) was injured by the defect that caused the PCBs to be dangerous to consumers or users. The gravamen of Plaintiff's claims thus do not sound in product liability, because they do not "arise out of" a defect that rendered the PCBs dangerous to their users or consumers.

Defendants' Motion 2 is **DENIED**.

3. Motion 3

Defendants move to dismiss the FAC's First, Second, Third, and Fifth Claims for relief on the grounds that they are governed by the OPLS, and that the statute of limitations and the statute of repose for each of those claims has run.

For the reasons stated above with respect to Motion 2, the Court finds that the FAC's First, Second, Third, and Fifth Claims for relief are not governed by the OPLS, and therefore are not subject to the statute of limitations or statute of repose applicable to claims brought pursuant to that statute.

Defendants' Motion 3 is **DENIED**.

4. Motion 4

Defendants move to dismiss for failure to state a claim the FAC's First Claim for Relief, which purports to state a claim for public nuisance.

Under Oregon law, there are two ways to establish a claim for a nuisance: (1) as a nuisance per se, occasioned by a defendant's violation of a statute that defines such a violation as a public nuisance; and (2) as a public nuisance, which requires the plaintiff to plead and prove four elements (substantial interference; unreasonable interference; culpable conduct; and causation). *Hay v. Stevens,* 271 Or 16, 20–21, 530 P2d 37 (1975); *Jacobson v. Crown Zellerbach*

Corp., 273 Or 15, 19, 539 P2d 641 (1975); R*aymond v. Southern Pacific Co.*, 259 Or 629, 634, 488 P2d 460 (1971); *Gronn v. Rogers Constr., Inc.*, 221 Or 226, 239, 350 P2d 1086 (1960).

Defendants argue that the FAC fails to identify any statutorily-defined "prohibited activity" that would support a claim for nuisance per se. Defendants posit that ORS 468B.025 cannot serve as the statutory basis for this claim because Defendants did not "cause pollution" of Oregon's waters (ORS 468B.025(1)(a)) and did not "discharge any wastes into Oregon's waters (ORS 468B.025(1)(b)).

Defendants argue, similarly, that Plaintiff has not pleaded (and cannot plead) facts sufficient to establish the causation element of a public nuisance claim. Defendants reason that proof that a defendant manufactured a product and placed it into the stream of commerce is insufficient to establish causation for a public nuisance claim. This is because, in Defendants' view, the manufacturer cannot be fairly said to have "caused" the alleged public nuisance; the product will have passed through the hands of and/or been used by one or more third parties by the time of the conduct that occasions the nuisance complaint.

The court finds that the FAC sufficiently states a claim for nuisance per se. The FAC alleges (several times over) that Defendants distributed PCBs that it knew were likely to escape into Oregon's environment, and that the PCBs did in fact escape and pollute Oregon's waters. (FAC ¶¶108-10, 145-48). This is sufficient to allege that Defendants "caused" the pollution, as that term is used in ORS 468B.025(1)(a). ORS 468B.025(3) states that "[v]iolation of subsection (1) * * * of this section is a public nuisance."[8]

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[8] *Cf. State v. Murray*, 343 Or. 48, 52, 162 P3d 255, 257 (2007) (Noting that the word "cause" is "a word of common usage," which the Oregon Supreme Court "presume[s] the legislature intended to be given its plain, natural, and ordinary meaning. The dictionary defines the verb 'cause' as follows: '1: to serve as a cause or occasion of: bring into existence: MAKE (careless

The FAC also alleges facts sufficient to state a claim on each of the elements of a public nuisance. To the extent Defendants argue that these allegations are "threadbare" (Mot. At 27), such an argument is not germane to a motion to dismiss under ORCP 21 A.[9] The FAC's well-pleaded allegations do more than allege that Defendants merely produced and sold the PCBs at issue. They allege that Defendants knew that the PCBs would inevitably wind up polluting Oregon's waters through the normal, ordinary use of Defendants' customers. That is, the allegations are that it was Defendants' sale of these products into Oregon that inexorably led to the pollution giving rise to the claimed public nuisance. These allegations, if proven, would be sufficient to prove causation, as well as the other required elements for a public nuisance claim.

Defendants' Motion 4 is **DENIED**.

5. Motion 5

Defendants move to dismiss for failure to state a claim the FAC's Second Claim for Relief, which purports to state a claim for purpresture.

The parties in their papers cite numerous (and largely different) cases in their efforts to define the elements of ancient common law claim of purpresture. All parties appear to agree, at a minimum, that an equitable claim for purpresture must allege – as relevant to this case – that a defendant has appropriated a public right for a private use, without authorization from the State. *State v. Norris*, 182 Or App 547, 552 (2002).

The FAC alleges that Defendants' manufacture and distribution of PCBs has caused those PCBs to encroach on lands and waters to which Oregon holds title. Plaintiff's theory on this

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driving~s accidents) * * * 2: to effect by command, authority or force.' *Webster's Third New Int'l Dictionary* 356 (unabridged ed. 2002)." (citation omitted)).

[9] As discussed above, a court considering a motion to dismiss must assume the truth of all allegations in the relevant pleading, and must view those allegations, as well as all reasonable inferences, in the light most favorable to the non-moving party. *Strizver v. Wilsey*, 210 Or App 33, 35, 150 P3d 10, 11 (2006).

claim is that "[b]y that encroachment, Monsanto has appropriated those lands and waters for its private use – *i.e.* as a *de facto* dump for PCBs it knew would escape into the environment." (*Id.*) Defendants argue that even if these allegations were proved, the existence of microscopic PCBs do not represent the kind of private structure erected on public waters/lands that can support a claim present a purpresture. (Def Mot 28-30).

The FAC fails to state a claim for purpresture. The FAC does not allege that any Defendant discharged any PCBs in Oregon. Rather, the FAC alleges that all of the Defendant-manufactured PCBs in Oregon's environment were sold by Defendants to third parties, and that Defendants "knew" that those consumers' use of such PCBs would eventually lead to PCBs being discharged into Oregon's waterways. These allegations may be sufficient to state claims for alternative causes of action, but not for purpresture. Plaintiff argues that Defendants "appropriated" Oregon's lands and waters for the "private purpose" of serving as a "de facto dump" for PCBs (Pl Resp. 26). Taking all of the FAC's allegations as true, at the time the PCBs were "dumped," they did not belong to Defendants, but to third parties. Defendants are not alleged to have actually "dumped" the PCBs. Even if the placement of PCBs in a public waterway for a private use could in theory support a claim for purpresture, the FAC does not allege that Defendants placed PCBs in any public waterway for any private use (or, for that matter, at all). And indeed, were Plaintiffs to add such an allegation, that allegation would be fatally inconsistent with the FAC's detailed factual allegations relating to the way that PCBs are discharged. The FAC therefore fails to allege facts that would if proved establish that Defendants appropriate a public right for a private purpose.[10]

[10] To the extent the FAC may be read consistently with a view that Defendants' customers (who possessed the PCBs at the time they were allegedly released) required a place to "dump" them, and thus to suggest that Defendants sought to appropriate Oregon's lands and waters to service

The FAC's Second Claim for Relief fails to state a claim for purpresture, and it appears to the Court that any attempted amendment to state such a claim would be futile.

Defendants' Motion 5 is **GRANTED**, and the FAC's Second Claim for Relief is **DISMISSED WITH PREJUDICE**.

6. Motion 6

Defendants move to dismiss for failure to state a claim the FAC's Third Claim for Relief, which purports to state a claim for trespass.

Defendants ground their motion in two separate theories: (1) that Plaintiff lacks standing to bring a claim for trespass because it lacks the exclusive right to possess public trust lands; and (2) that the allegation that Defendants placed PCBs into the stream of commerce is insufficient to state a claim for trespass.

Defendants argue first that because Plaintiff does not enjoy "exclusive possession" of "public trust resources," it cannot state a claim for trespass. Defendants note that a trespass under Oregon law is "an actionable invasion of a possessor's interest in the exclusive possession of land." *Martin et ux. v. Reynolds Metals Co.*, 221 Or 86, 90, 342 P2d 790 (1959). Defendants cite several out-of-state cases for the proposition that a State does not enjoy a possessory interest in lands that it holds in public trust.

Plaintiff argues that it owns all of the lands and waterways in question, and that it also simultaneously holds some portion of those lands and waterways in public trust. Plaintiff cites *Brusco Towboat Co. v. State, By & Through Straub*, 30 Or App 509, 515, 567 P2d 1037, 1042 (1977), *aff'd in part, rev'd in part*, 284 Or 627, 589 P2d 712 (1978) for the proposition that "upon

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Defendants' customers' need for a "PCB dumping ground," the FAC contains no factual allegations that would support such a theory. Indeed, the FAC is clear in its allegations that PCBs are released through their normal commercial usage, and that users of PCB products do not need to "dump" them, but rather effect their discharge through normal commercial use.

its admission in 1859, title to submerged and submersible lands underlying navigable waters devolved upon the state as sovereign." Plaintiff relies further on *Brusco* for the proposition that "[a]s sovereign, the state holds full proprietary rights in such land; it is invested with a fee simple title." *Id.* at 516. Plaintiff acknowledges the *jus publicum* quality of the State's ownership, which provides that some of these lands and waterways are held in public trust that provides inalienable usage rights to the public. *Id. at* 517. Plaintiff argues, however, that the fact that "the State has public trust rights and obligations overlaying its ownership interest in its beds and banks does not change the fact that Oregon, as landowner, has exclusive possession of such lands." (Pl Resp at 32).

Plaintiff has the better of this argument. It is true that the State of Oregon must allow some use of public trust lands and waterways. It is also true that the State enjoys the right to exclude other uses, and to bring actions to recover for such trespasses. *E.g.*, ORS 273.241(1) ("Removal of material from any property of the State of Oregon under the control of the Department of State Lands by any person without lawful authority is a trespass for which the state, in addition to any action commenced under ORS 273.990, may also commence an action for damages."); ORS 273.231 ("The establishment or placing of a dredging or digging outfit on any waters, the submersible or submerged lands of which belong to the State of Oregon, and the removal of material from the submersible or submerged lands thereof for commercial uses, without having applied for and received a lease * * * is a continuing trespass."). Indeed, the Oregon Legislature has gone so far as to criminalize some such trespasses. ORS 273.990 ("Violation of ORS 273.231 is a misdemeanor.")

Defendants' second argument is that the manufacturer of a product cannot be liable for a trespass on the basis that the manufacturer placed that product into the stream of commerce. The

Court cannot find any legal basis for this position, beyond Defendants' theory (rejected above) that Plaintiff's trespass claim is really a product liability civil action. Under Oregon law, "[a] trespass * * * requires that the intrusion be intentional, negligent or the result of ultra-hazardous activity." *Ward v. Jarnport*, 114 Or App 466, 470, 835 P.2d 944, 946 (1992) (quoting *Frady v. Portland General Electric,* 55 Or App 344, 347, 637 P.2d 1345 (1981)); see also Uniform Civil Jury Instruction 53.01 (citing cases). [11]

Defendants cite no authority for the proposition that the general elements of trespass do not apply to a party whose relevant actions were in the context of manufacturing a product and/or placing that product into a stream of commerce. The FAC sufficiently pleads those elements and thus states a claim for trespass. (FAC ¶¶ 122-128).

Defendants' Motion 6 is **DENIED**.

7. Motion 7

Defendants move to dismiss for failure to state a claim the FAC's Fourth Claim for Relief, which purports to state a claim for common law indemnity.

The three required elements for a claim for common law indemnity under Oregon law are well-established: "(1) The person bringing the action must be liable to a third party; (2) the person from whom indemnity is sought also must be liable to that third party; and (3), as between the two contestants, the defendant ought to pay." *Star Mountain Ranch v. Paramore*, 98 Or App 606, 609 at n. 1, 780 P2d 758, 759 (1989) (citing *Fulton Ins. v. White Motor Corp.,* 261 Or 206, 493 P2d 138 (1972).

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[11] "Intentional is used in this context to mean that the acts setting in motion the invasion were done with knowledge that a trespass would result and not that the acts were done for the specific purpose of causing a trespass or injury." *Ream v. Keen*, 112 Or App 197, 199, 828 P2d 1038, 1039, *aff'd*, 314 Or 370, 838 P.2d 1073 (1992) (quoting *Lunda v. Matthews,* 46 Or App 701, 705, 613 P2d 63 (1980)).

The FAC alleges that Plaintiff has incurred and will continue to incur significant costs related to monitoring, investigating, and remediating PCBs manufactured by Defendants and now located in Oregon's environment. (FAC ¶¶129-135). In particular, the FAC alleges that it has incurred costs: (1) remediating PCBs at so-called "Orphan Sites" (FAC ¶130); (2) for "source control actions" at "various Portland Harbor upland sites and as support agency for EPA's in-water cleanup in areas throughout the Portland Harbor" (FAC ¶ 132); (3) as a potentially Responsible Party related to the Portland Harbor Superfund site (FAC ¶132); and (4) developing and ministering the Department of Environmental Quality's toxic monitoring program and developing Total Maximum Daily Load estimates for certain State-owned waterways." (FAC ¶133). The FAC alleges further that "Defendants, not Plaintiff, are responsible for the presence of PCBs," and that therefore "Defendants, and not Plaintiff, are liable for associated damages arising from the presence of Defendants' PCBs" on State lands and waterways. (FAC ¶134).

Defendants argue that the FAC fails to state a claim for common law indemnity for three reasons. Defendants argue: (1) that the FAC fails to identify a legal obligation Plaintiff owed to a third party; (2) that the FAC fails to allege that Plaintiff and Defendants shared a common duty or a duty to any same third party; and (3) that the FAC insufficiently pleads that Defendants "ought" to pay for the State's legal obligations.

Defendants are correct on at least one dispositive point: the FAC fails to allege that Defendants and Plaintiff are both liable to the same third party. *Star Mountain Ranch*, 98 Or App at 609 n.1. Plaintiff's Response argues that Defendants are "responsible for the presence of PCBs at [contaminated] locations, and the contamination, trespass, and nuisance resulting from that contamination." (Pl Resp at 36). Plaintiff may be able to prove this allegation at trial, and

in doing so may establish some alternative entitlement to relief. But that allegation – even if proved – is insufficient to state a claim for common law indemnity under Oregon law, because there is no allegation that Plaintiff and Defendants share a liability to any third party.

It is reasonable to expect that if such a mutual liability had existed, Plaintiff would have pleaded it in the FAC, or at the least would have identified it in its Response to Defendants' Motion To Dismiss. It therefore appears to the Court that any attempt to amend this claim would be futile.

Defendants' Motion 7 is **GRANTED**, and the FAC's Fourth Claim for Relief is **DISMISSED WITH PREJUDICE**.

8. Motion 8

Defendants move to dismiss for failure to state a claim the FAC's Fifth Claim for Relief, which purports to state a claim for unjust enrichment.

Plaintiff's unjust enrichment claim alleges that Defendants "owed a duty" to the State of Oregon and to the public to "prevent its PCBs from interfering with the use and/or possession of property it does not own and form causing harm to human health and the environment." (FAC ¶137). The FAC alleges further that because the State of Oregon has undertaken remedial actions necessitated by the presence of PCBs in her public waters and on her public lands, "certain economic benefits * * * have been conferred upon or acquired by Defendants." (FAC ¶141). These benefits are alleged to include the costs that Defendants would have incurred to monitor and investigate the damages caused by PCBs to Oregon's environment, as well of the costs of remediating those damages. (FAC ¶140-142).

Defendants argue that the FAC fails to allege any source of a duty that required them to undertake any of the costs that Plaintiff claims to have borne in Defendants' stead. (Def Mot

34). In Defendants' view, if there was no duty (for example) that required Defendants to remediate any PCBs-related environmental harm, then Defendants cannot have been unjustly enriched – or enriched at all – by the State engaging in such remediation efforts.

In *Larisa's Home Care, LLC v. Nichols-Shields*, 362 Or 115, 127–28, 404 P3d 912, 919 (2017) the Oregon Supreme Court described Oregon's unjust enrichment jurisprudence as an "incremental rule develop[ed] on a case-by-case basis, based on recognized grounds for imposing liability. *Id.* It is axiomatic that for there to be any imposition of liability for unjust enrichment, the defendant must have obtained some "enrichment." *Id.* (directing courts evaluating unjust enrichment claims to "determine whether any particular enrichment is unjust by examining whether the case type matches already recognized forms of unjust enrichment.")

Plaintiff argues that the FAC adequately alleges that Defendants enjoyed an (unjust) enrichment from the State's PCB-related remediation efforts, under two theories. First, Plaintiff cites the Restatement (Third) of Restitution and Unjust Enrichment § 40 for the proposition that a person "who obtains a benefit by an act of trespass * * * is liable in restitution to the victim of the wrong." Second, Plaintiff cites to the same Restatement at § 20 for the proposition that a person "who performs another's duty to a third person or to the public * * * is entitled to restitution from the party whose duties were thus performed.

Plaintiff's arguments appear to miss the critical point: the complaint must allege (among other things) that Defendants enjoyed some enrichment, either from their alleged trespass or by having the State perform duties that Defendants owed to the State or to the public. The FAC fails to allege facts that – if proved – would establish either: (1) that Defendants enjoyed a benefit from the presence of PCBs in Oregon's waters or on Oregon's lands (that is, from their

alleged trespass)[12] or (2) that Defendants were relieved of duties relating to remediation or environmental monitoring because those duties have been performed by the State. The FAC's bare assertion of the legal conclusion that Defendants bear some legal responsibility for PCB remediation and monitoring, does not allege any facts that support this conclusion. This is insufficient for a pleading to state a claim under Oregon law. *See, e.g.*, *Fearing v. Bucher*, 328 Or 367, 371, 977 P2d 1163, 1165 (1999) ("In determining the sufficiency of plaintiff's complaint, we accept all well-pleaded allegations of the complaint as true and give plaintiff the benefit of all favorable inferences that may be drawn from the facts alleged. Conclusions of law alone, however, are insufficient.") (citation omitted).

The FAC's Second Claim for Relief fails to state a claim for unjust enrichment. It is not obvious to the Court that an attempt by Plaintiff to cure this failure by pleading additional facts would necessarily be futile.

Defendants' Motion 8 is **GRANTED IN PART**, and the FAC's Second Claim for Relief is **DISMISSED WITHOUT PREJUDICE**.

9. Motion 9

Defendants move pursuant to ORCP 21 E to strike the FAC's prayer for attorney fees. Defendants argue that the prayer is legally insufficient because attorney fees are permitted only if "the award is authorized by statute or a specific contractual provision." *Domingo v. Anderson*, 325 OR 285, 288 (1997). Defendants aver that no statute authorizes attorney fees in this case. Plaintiff has not responded to the Motion To Strike, and the Court cannot find any statute that would authorize the payment of attorney fees in this case, even if Plaintiff were to prevail on all of its claims.

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[12] For purposes of this Motion, the Court assumes that the presence of such PCBs would be sufficient to establish a claim for trespass against Defendants.

Motion 9 is **GRANTED**, and the FAC's prayer for attorney fees is **STRICKEN**.

CONCLUSION

Defendants' Motions 1, 2, 3, 4, and 6 are DENIED. Defendants' Motions 5 and 7 are GRANTED, and the FAC's Second and Fourth Claims for Relief are DISMISSED WITH PREJUDCE. Defendants' Motion 8 is GRANTED IN PART, and the FAC's Second Claim for Relief is DISMISSED WITHOUT PREJUDICE. Defendant's Motion 9 is GRANTED, and the FAC's prayer for attorney fees is STRICKEN. The Court sua sponte orders Plaintiff to amend its Sixth Claim for Relief to make it consistent with this Order.

Pursuant to ORCP 21 A, the Court grants Plaintiff leave to file a Second Amended Complaint within 21 days of the filing of this Order. The parties may adjust this deadline by mutual agreement and without seeking further leave of the Court, but are to provide written notice of any such adjustment to the Court.

Dated this 9th day of January, 2019.

Benjamin Souede
Circuit Court Judge