UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TOWN OF WESTPORT and WESTPORT COMMUNITY SCHOOLS, Plaintiffs, vs. MONSANTO COMPANY, SOLUTIA INC., and PHARMACIA CORPORATION, Defendants.	Case No. 14-CV-12041

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs Town of Westport and Westport Community Schools ("plaintiffs") respectfully submit this Memorandum of Law in opposition to the Partial Motion to Dismiss filed by Monsanto Company, Solutia Inc. and Pharmacia Corporation (collectively, "defendants").

Defendants' argument regarding public nuisance ignores the only Massachusetts case on point, as well as highly persuasive authority from other state supreme courts, which have held that manufacturers can be liable in public nuisance where they create and supply a product that injures public health or safety regardless of whether they "controlled" their products after sale. The limited authority cited by defendants deals primarily with private nuisance claims, and it is not persuasive regarding – or even applicable to – plaintiffs' public nuisance claims here. Likewise, case law and the allegations within plaintiffs' Complaint confirm that plaintiffs have adequately pled a claim for trespass and another claim sounding in the Massachusetts Oil and Hazardous Material Release Prevention and Response Act.

ALLEGATIONS IN THE COMPLAINT

Plaintiffs operate public schools in Westport, Massachusetts, and they have the obligation to maintain the school buildings, including investigating and remediating environmental hazards in those buildings. Complaint, ¶¶ 1, 6-7. The original Monsanto Company ("Old Monsanto") manufactured polychlorinated biphenyl congeners ("PCBs") for commercial use, and from 1935 to 1979, Old Monsanto was the sole manufacturer of PCBs in the United States. *Id.* at ¶ 21. Defendants Monsanto Company, Solutia Inc. and Pharmacia LLC are successors to Monsanto Company and are each liable for the injuries caused by PCBs alleged in the Complaint. *Id.* at ¶¶ 13-16.

Monsanto manufactured PCBs for use in many applications, including for products used

in construction and renovation of buildings, including plaintiffs' school buildings. *Id.* at ¶¶ 22, 25. Some of these applications were fully enclosed, but many, such as caulks, paints and sealants, were not enclosed, which allowed PCBs to escape into the surrounding environment. *Id.* at ¶¶ 23-24. As a result, where PCBs were used in construction, including in plaintiffs' school buildings, they contaminated those buildings by coating the physical structures (*e.g.*, masonry, drywall, and soil) and surrounding air. *Id.* at ¶¶ 28-30.

Once released into the environment, PCBs impact the children, teachers, employees and any visitors to plaintiffs' schools through ingestion, inhalation, and dermal contact. *Id.* at ¶¶ 31-32. PCBs are extraordinarily toxic to humans and are associated with a wide range of adverse health effects. PCBs are probable human carcinogens and are associated with toxic effects on the immune, reproductive, nervous and endocrine systems. *Id.* at ¶¶ 34-39. Further, PCBs are associated with other health effects, such as dermal and ocular effects, liver toxicity and elevated blood pressure, serum triglyceride, and serum cholesterol. *Id.* at ¶ 40. Children, such as students in plaintiffs' school buildings, are particularly at risk. *Id.* at ¶ 41.

These health risks were well known to Monsanto throughout the time that Monsanto was producing PCBs for use in buildings such as plaintiffs' schools. *Id.* at ¶¶ 42-49. Nevertheless, Monsanto continued producing PCBs knowing that they were exposing an untold number of people to these toxins, deciding that "there is too much customer/market need and selfishly too much Monsanto profit to go out" of the PCBs market. *Id.* at ¶ 50. Indeed, the peak of the PCBs market was in 1970 – long after the risks of PCBs were well known to Monsanto, and nine years before Monsanto was forced to stop production following enactment of the Toxic Substances Control Act in 1979, which banned PCBs due to the health and environmental hazards. *Id.* at ¶¶ 54-55.

As a direct result of Monsanto's creation and supply of the market for PCBs, plaintiffs' schools are now contaminated with PCBs. *Id.* at ¶ 60. This contamination has resulted in, and will continue to cause, damages, including, *inter alia*, costs of investigating, sampling, testing and assessing the extent of this contamination; costs of removing PCBs and PCB-containing materials from plaintiffs' school buildings; and costs of informing parents and communities about the efforts to remove PCBs from the schools. *Id.* at p. 23 (Prayer for Relief).

ARGUMENT

I. STANDARD OF REVIEW

Defendants have failed to demonstrate a legal basis that supports their motion to dismiss.[1] On a motion to dismiss, the Court shall accept as true the allegations in the Complaint, construe all reasonable inferences therefrom in favor of the plaintiff and determine whether the Complaint contains facts sufficient to justify recovery on any cognizable theory of the case. *See Beddall v. State Street Bank and Trust Co.*, 137 F.3d 12, 16 (1998). Dismissal is proper only if it appears beyond doubt that plaintiff can prove no set of facts entitling it to relief. *See Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 16 (1st Cir.1989); *Lessler v. Little,* 857 F.2d 866, 867 (1st Cir.1988), *cert. denied,* 489 U.S. 1016 (1989). The Court applies a liberal approach to assess the sufficiency of the Complaint, wherein the plaintiffs "need only state a set of facts giving rise to the claim . . . sufficient to place defendant on notice as to the type of claim alleged and the grounds upon which it rests." *American Glue & Resin, Inc. v. Air Products & Chemicals, Inc.*, 835 F. Supp. 36, 40 (D. Mass. 1993) (authority omitted).

With the exception of private nuisance, each of defendants' arguments ignores contrary and persuasive authority.

[1] As noted below in the text, plaintiffs do not contest defendants' motion with respect to private nuisance.

II. DEFENDANTS' ARGUMENT THAT THEY LACKED SUFFICIENT "CONTROL" OVER THEIR PRODUCTS TO WARRANT A PUBLIC NUISANCE CLAIM IGNORES APPLICABLE AUTHORITY IN MASSACHUSETTES AND OTHER STATES.

Although defendants cite to numerous elements that they argue are necessary to state a claim for public nuisance, their motion to dismiss rests entirely on the contention that defendants did not sufficiently "control" their product (the PCBs) to hold them liable for the nuisance they created. *See* "Memorandum of Law in Support of Defendants Pharmacia, Corporation, Solutia, Inc., and Monsanto Company's Partial Motion to Dismiss," dated July 3, 2014 ("Def. Mem.") at 7. They further contend that this lack of control meant that they could not abate the nuisance; thus, they cannot be liable for it. *Id.* But these contentions are without merit and ignore authority from other states' highest courts and the only Massachusetts case on point.

Massachusetts courts, as well as other state courts, have addressed the issue of whether a manufacturer can be liable when its products create a public nuisance after those products leave the manufacturer's control. Notably, defendants cite to, but then ignore, *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Super. July 13, 2000). In *City of Boston*, the Massachusetts Superior Court let stand a public nuisance claim against gun manufacturers, rejecting the manufacturers' argument that they could not be liable because they no longer owned or controlled the instrumentality that caused the harm. *Id.* at *14. In so doing, the court held that it was sufficient that plaintiffs allege that the gun manufacturers "created and supplied" the market that interfered with "public rights," including "public safety, health, or peace." *Id.*

Just so here, as plaintiffs allege that Monsanto was the only manufacturer in the United States to produce PCBs for commercial use, Complaint, ¶ 21; that Monsanto produced those PCBs for both "enclosed" and "unenclosed" products, *id.* ¶¶ 23-24; and that Monsanto knew for

decades that these PCBs were highly toxic, "uncontrollable," and endangered public health, *id.* ¶¶ 42-54. Thus, Monsanto created and supplied the market for PCBs, which it knew to be hazardous long before those products were banned. Thus, under the only applicable Massachusetts authority, plaintiffs' public nuisance claim is properly stated.

Defendants' cited authority to the contrary is unconvincing or inapposite. Initially, defendants' first citation on the issue of "control" is to a footnote in *Belanger v. Com.*, 678 N.E.2d 56, 41 Mass. App. Ct. 668 (Mass. App. Ct. 1996). *See* Def. Mem. at 5. But *City of Boston* specifically rejected reliance on *Belanger* – indeed, it rejected reliance on the very footnote cited by defendants – in seeking to dismiss a *public* nuisance claim, because *Belanger* involved private, not public, nuisance claims. *City of Boston*, 2004 WL 1473568, *14. The two other Massachusetts cases cited by defendants have nothing to do with the issue of "control" of the instrumentality and thus do not support defendants' sole argument. *See Sullivan v. Chief Justice for Admin. And Mgmt. of the Trial Court*, 448 Mass. 15, 35-36, 858 N.E.2d 699 (2006) (dismissing nuisance claim because no "special harm" alleged); *Board of Health of Wareham v. Marine By-Products Co.*, 329 Mass. 174, 107 N.E.2d 11 (1952) (upholding claim against fish processor for odors).

Thus, at its core, defendants' argument relies solely on out-of-state cases and ignores established Massachusetts authority. Even if the Court were to look to additional authority in other states, the law is not as one-sided as defendants claim in their memorandum. Rather, beyond defendants' reliance on several older cases, pre-dating 2002, two more recent state supreme courts have held that plaintiffs may assert nuisance claims against a manufacturer. First, the Ohio Supreme Court decided *City of Cincinatti v. Baretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002), holding that gun manufacturers could be liable in public nuisance for the

harms to a municipality, including increased cost of policing, health care costs, and corrections costs. *Id.* at 1140. Like *City of Boston*, the court rejected the argument that a public nuisance claim cannot be stated against a manufacturer of a product:

> Instead, we find that under the Restatement's broad definition, a public nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public.

Id. at 1142. The *City of Cincinnati* court also rejected the specific "control" argument, that defendants raised here, holding that it was sufficient that plaintiff alleged the "creation and supply" of the market that caused the injury, even if the defendant lacked control over the actual use of the products themselves. *Id.* at 1143.

Likewise, in 2003, the Supreme Court of Indiana reached the same conclusions in *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003). Like Massachusetts and Ohio, the *City of Gary* court looked to the Restatements and found the definition of public nuisance therein sufficiently broad to cover manufacturers of products that harm the public health or safety:

> But a nuisance claim may be predicated on a lawful activity conducted in a manner that it imposes costs on others. This is the case whether the actor intends the adverse consequences or merely is charged with knowledge of the reasonably predictable harm to others. In either case, the law of public nuisance is best viewed as shifting the resulting cost from the general public to the party who creates it.

Id. at 1234; *see also James v. Arms Technology, Incorporated*, 820 A.2d 27, 52-53 (N.J. Super. 2003) (holding that "control" of the products after sale was not necessary to state a claim in public nuisance against gun manufacturer); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1213 (9th Cir. 2003) (rejecting "control" argument and allowing public nuisance claim against manufacturer to stand).

The earlier decisions by the Seventh and Eighth Circuits, that defendants relied upon, do

not stand up to these directly applicable cases. Initially, the Seventh Circuit's opinion in *Tioga Public School Dist. v. United States Gypsum Co.*, 984 F.2d 915 (7th Cir. 1993) concerned a *private* nuisance case that turned on specific aspects of North Dakota law. *Id.* at 920-21. It sheds no light on plaintiffs' Massachusetts public nuisance claims here. Similarly, although the Eighth Circuit cited to both private and public nuisance principles in *City of Bloomington, Ind. v. Westinghouse Elec. Corp.*, 891 F.2d 611 (8th Cir. 1989), the court did not try to distinguish the public and private nuisance claims and relied principally on the defendant's efforts to remedy or avoid the nuisance. *Id.* at 614.[2] As alleged in the Complaint, defendants took the opposite approach here, continuing to supply the market even after knowing of the public nuisance they were creating. *See supra*, pp. 2-3. Thus, these cases do not support defendants' contention that their lack of "control" over the PCBs after production and marketing forecloses a public nuisance claim.

For these reasons, the weight of authority, and certainly the only Massachusetts authority, supports plaintiffs' claims for public nuisance here. Defendants created and supplied the market for PCBs for decades, all the while knowing the public health and safety hazards posed by their products. This injury to public health and safety is sufficient to hold them liable in public nuisance, and the law requires that they, not the Massachusetts public, bear the costs of remedying the injury caused by their nuisance.

In light of this authority, and the authorities cited by defendants in their papers regarding private nuisance, plaintiffs concede that these claims are better stated in public nuisance. Accordingly, plaintiffs do not oppose defendants' motion to dismiss plaintiffs' private nuisance claims.

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[2] Similarly, the district court in *Cofield v. Lead Indus. Ass'n, Inc.*, No. Civ.A. MJG-99-3277, 2000 WL 34292681 (D. Maryland Aug. 17, 2000) failed to separately discuss public and private nuisances, and seemed to apply the same reasoning to both. *Id.* at *7.

III. PLAINTIFFS HAVE PROPERLY PLED A CAUSE OF ACTION FOR TRESPASS BECAUSE DEFENDANTS CAUSED PCBs TO ENTER UPON PLAINTIFFS' PROPERTY.

Plaintiffs properly pled their cause of action for trespass. Trespass liability may be premised upon a negligent mistake or mishap upon a showing of harm. *See American Glue & Resin, Inc. v. Air Products & Chemicals, Inc.*, 835 F. Supp. 36, 48 (D. Mass. 1993) (citing RESTATEMENT (SECOND) TORTS § 165). Massachusetts generally follows the Restatements, *id.*, and section 165 states:

> One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.

RESTATEMENT (SECOND) OF TORTS § 165. Here, plaintiffs have alleged within the Complaint that defendants acted "recklessly or negligently, or as a result of an abnormally dangerous activity," *see* Complaint at ¶¶ 73, 74, 84-85, 103, that defendants' activities caused PCBs to enter plaintiffs' property, *see id.* at ¶¶ 24-25, 28, 69, 72, 74, 104, and that harm arose as a result. *Id.* at ¶ 60, 104. Plaintiffs, accordingly, have pled the necessary elements of a trespass cause of action in their Complaint, and the Court should deny the instant motion.

The District Court's decision in *American Glue & Resin, Inc.*, provides the appropriate and reasonable analytical parallel to this case. In that case, American Glue & Resin ("American") operated a business that manufactured and sold adhesives. *American Glue & Resin*, 835 F. Supp. at 39. Defendants were two suppliers of chemicals used in American's production process and a transporter of the chemicals. *Id.* In the process of delivering the chemicals, American alleged that chemicals were spilled causing environmental contamination on American's property and a neighboring property. American commenced an action for, *inter*

alia, trespass. *Id.* The defendants then moved to dismiss the various causes of action, including American's trespass and Chapter 21E claims. In denying the motion and permitting American to maintain its trespass claim, the Court noted that "trespass liability may be premised upon a negligent mistake or mishap under section 165 [of the RESTATEMENT (SECOND)] upon a showing of harm." *Id.* at 48. The Court continued that it could not adequately evaluate the nature of the spills on defendants' motion, as they involved questions of fact, and denied the dismissal of the trespass cause of action.

The instant action reasonably tracks *American Glue & Resin, Inc.* Here, Westport and the Westport Community Schools brought in products that contained PCBs, a component that Monsanto alone manufactured and which Monsanto knew were toxic and easily migrated into the immediate environment. *See* Complaint at ¶¶ 28, 31-34 (noting that PCBs, a probable carcinogen, are emitted into the air where they can be readily inhaled or, through contact, ingested, and present a serious health risk). Like *American Glue & Resin, Inc.*, plaintiffs allege that defendants are responsible for the release of the PCBs into the environment through defendants' negligence, recklessness or intentional actions, *see id.* at ¶¶ 42-54, 103, and that the release of the contaminants injured plaintiffs. *See Id.* at ¶¶ 60, 104. Again, these pleadings are sufficient to allege the elements of a trespass cause of action and provide defendant sufficient notice of the basis for the claim. Accordingly, the Court should deny the defendants' attempt to dismiss the trespass claim.

Defendants' trespass analysis is fundamentally unsound and misrepresents the law. Defendants argue that "[t]respass requires an intentional and illegal entry onto land" and then assert that plaintiffs' claim should be dismissed because "no illegal entry" is alleged. Def. Mem. at 9, 10. This misstates the standard. The Massachusetts Supreme Judicial Court, in a case that

defendants cited, noted that "[t]here are many instances where a man acts honestly and in good faith, only to find that he was mistaken and had committed a trespass upon his neighbor's land." *United Elec. Light Co. v. Deliso Const. Co.*, 52 N.E.2d 553, 315 Mass. 313, 319 (1943). Indeed, in *United Elec. Light Co.*, the Court noted that the defendant did not intentionally and knowingly trespass on the plaintiff's property, but continued that the defendant's act was the knowing release of cement dust into the environment with the knowledge that it "might lodge anywhere that the pressure at which it was discharged would carry it." *Id.* The Court, accordingly, reversed the trial judge's entry of a directed verdict dismissing the trespass claim. *See id.* at 323.

Defendants' remaining analysis simply disregards the allegations of the Complaint. Defendant cites to *Wellesley Hills Realty Trust v. Mobil Oil Corp.,* 747 F. Supp. 93 (D. Mass. 1990) ("*Wellesley Hills*"), and *One Wheeler Rd. Assocs. v. Foxboro Co.,* 843 F. Supp. 792 (D. Mass. 1994) ("*Wheeler Road*"), for the argument that trespass requires the intrusion of another onto plaintiff's property. *See* Def. Mem. at 10. Plaintiffs expressly allege in the Complaint, however, that defendants intruded onto their property through the introduction of PCBs, when Monsanto knew that the chemical would readily separate and contaminate the environment in the area where the PCB-containing material was used. *See, e.g.,* Complaint at ¶¶ 102-04. In alleging that Monsanto trespassed onto the property of the plaintiffs, the Complaint satisfies the pleading requirement for trespass.

No rational basis exists for defendants' reliance on *Wellesley Hills* or *Wheeler Road*. Both cases involve the property owner directly discharging chemicals onto its own property. As this Court observed in *Wheeler Road*, "In a society where toxic chemicals are generated daily, some landowners deposit such materials on their own property. Instead of removing the materials, they remove themselves, leaving subsequent owners to contend with the

contamination." *One Wheeler Rd. Assocs.*, 843 F. Supp. at 793. In that case, which did not even involve a trespass claim, *see id.*, the defendant was a prior owner of the property and, in the process of manufacturing electronic instruments and systems, it had "released hazardous substances and materials at the site from interior sinks which discharged through a roof drainage network into an on-site leaching system." *Id.* Similarly, in *Wellesley Hills*, plaintiff was the subsequent owner of the property at issue and alleged that the prior owner, Mobil Oil Corp., had "contaminated the property by releasing oil and hazardous materials during its ownership [of the property] from August 21, 1926 to January 29, 1987[,] when it operated a gasoline service station on the property." *Wellesley Hills Realty Trust,* 747 F. Supp. at 94. Neither fact scenario applies to the instant facts in plaintiffs' Complaint. Plaintiffs allege that defendant Monsanto trespassed on its property causing injury, not that plaintiffs themselves or some prior owner of the same property is responsible for the PCB contamination at the schools. Contrary to defendants' assertion, *see* Def. Mem. at 10, plaintiffs do allege that a third party, expressly the various Monsanto entities, are responsible for the intrusion of PCBs onto school property. Accordingly, the Court should deny the instant motion and permit the plaintiffs to move forward with their trespass claim.

IV. PLAINTIFFS MAY RECOVER UNDER THE MASSACHUSETTS OIL AND HAZARDOUS MATERIAL RELEASE PREVENTION AND RESPONSE ACT BECAUSE DEFENDANTS ARE RESPONSIBLE FOR THE CONTAMINATION.

The Court should deny the defendants' attempt to dismiss plaintiffs' claim under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act ("Chapter 21E"). Chapter 21E creates a private right of action: "Any person who undertakes assessment, containment, or removal action regarding the release or threat of release of oil or hazardous material shall be entitled to reimbursement from any other person liable for such release or threat

of release for the reasonable costs of such assessment, containment and removal." MASS. GEN. LAWS ch. 21E, § 4. Chapter 21E additionally permits any person to recover damages resulting from the release or threat of release of hazardous material from "any person" who caused or is legally responsible for the release or threat of release of the hazardous material. *Id.* at § 5(a)(iii).

Plaintiffs have properly pled a cause of action under Chapter 21E. Under the statutory provision, those liable include "any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or site." *Id.* at § 5(a)(5). This fifth provision does not exist within CERCLA, *compare* 42 U.S.C. § 9607, and reflects the Commonwealth's determination to provide broad, sweeping language to insure that those responsible for environmental contamination shall be liable and required to pay for all reasonable costs associated with the contamination from hazardous material. *See* MASS. GEN. LAWS ch. 21E, § 4. The statute further defines "release" as "any spilling, leaking, pumping, pouring, emitting, discharging, injecting, escaping, leaching, dumping or disposing into the environment," and defines "site" as "any building, structure, installation, equipment …or any other place or area, where oil or hazardous material has been deposited, stored, disposed of or placed or otherwise come to be located." *Id.* at § 2.

Here, plaintiffs Town of Westport and the Westport Community Schools seek to recover from defendants all costs incurred as a result of the PCBs that Monsanto knowingly manufactured and marketed in a way such that the PCBs would necessarily and inevitably be released into the environment, including into the buildings and properties such as plaintiffs' schools. *See* Complaint at ¶¶ 60, 72, 74, 104. These releases have resulted in damages to the plaintiffs, and plaintiffs shall incur additional costs and damages in the future from their efforts to investigate, contain or to remove the PCBs. *Id.* at ¶¶ 60, 104. As reflected here, plaintiffs

have pled within their Complaint the allegations necessary to move forward on a claim under Chapter 21E.

Defendants have attempted to circumvent and to dismiss the claim through the creation of a proof element that neither the statute nor the case law contain. Defendants suggest that the application of liability to "any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or site" requires the plaintiff to have a "special relationship or a contractual relationship with the defendant." Def. Mem. at 15. No such requirement exists under Chapter 21E, nor is it found in either case upon which defendants rely. Rather, as defendants' own authority confirms, liability exists if the defendants simply "'caused' a release or threat of a release of [the hazardous material] from the site." *Griffith v. New England Tel. & Tel. Co.*, 414 Mass. 824, 830, 610 N.E.2d 944, (1993).

Defendants' argument that plaintiffs have not pled sufficient facts is also inaccurate. Plaintiffs' obligation is to plead "adequate facts, directly or by reasonable inference, concerning the material elements of [the claim] … to put [defendant] on notice of [their] claim." *American Glue & Resin, Inc. v. Air Products & Chemicals, Inc.*, 835 F. Supp. at 41. While defendants argue that plaintiffs failed to plead sufficient facts to establish that they "'caused' the release of PCBs from the PCB-containing building products in Westport school buildings," Def. Mem. at 15, a review of the Complaint undermines this assertion.

The Complaint alleges that Monsanto was the only U.S. manufacturer of PCBs for decades. Complaint at ¶ 21. Plaintiffs further allege that Monsanto commercially sold PCBs and that PCBs were widely used in construction. *Id.* at ¶ 22. Further, it is alleged that Monsanto's PCBs were widely found in non-fully-enclosed products used in construction and renovation of commercial buildings and schools, *id.* at ¶¶ 23-24, and that Monsanto knew that PCBs were

toxic, *see id.* at ¶¶ 34-49, 51-52, and would be readily released into the environment. *Id.* at ¶¶ 28-30. The Complaint then alleges that this general pattern of conduct happened in the Westport Community Schools. *See id.* at ¶ 60. More specifically, the Complaint alleges that Monsanto knew in the 1950s that PCBs migrated into the environment from the products containing them, and, for example, the U.S. Navy refused to use PCB-containing Aroclors in submarines due to the release of PCBs. *See* Complaint, ¶46. Nevertheless, defendants produced and sold PCBs despite knowing that PCBs were "uncontrollable pollutant[s]" (*id.* at ¶47) that were being released into the environment (*id.* at ¶¶ 51-52). These allegations are sufficient to allow a "'reasonable inference that the defendant is liable for the alleged misconduct.'" *A.G. ex rel. Maddux v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013). This collection of facts provides the defendants with sufficient details to put them on notice of the claim against them sounding in Chapter 21E and the factual foundation underlying that cause of action.[3]

Defendants' reliance on *Domestic Loan & Inv. Bank v. Ernst*, No. 961274B, 1998 WL 1284185 (Mass. Super. Apr. 17, 1998) is misplaced. The defendant in *Ernst* owned underground storage tanks at a property up until 1976. *Id.* at *3. Fifteen years later, in 1991, a bank came into ownership of the property through foreclosure, and a subsequent owner discovered in 1993, that one tank was leaking. *Id.* at *4. The court held, on summary judgment, that the defendant could not be liable because she had not owned the tanks when they leaked, did not act unreasonably in maintaining the tanks, had done nothing improper that led the tanks to leak and had breached no duty making her culpable. *Id.* at *5. Not only is this case not at the summary judgment stage, the foregoing allegations indicate exactly why defendants here should be liable – they knowingly

[3] Defendants' argument that the Complaint does not allege how defendants "caused the PCBs to volatilize or to migrate from the building products," Def. Mem. at 16, is inaccurate. The Complaint provides, as indicated above, that this migration has occurred (*see* pp. 14-15 *supra*) and plaintiffs' pleading burden does not require a series of numbered paragraphs providing the chemical process that details the fate and transport of the PCBs.

produced and sold a product that they knew to be toxic for uses they knew would result in releases of that toxic chemical into the environment. This is entirely different from the reasonable and diligent conduct of the former owner in *Ernst.*

Finally, Defendants' statement that they "cannot be held liable for the natural chemical changes which occur over time," Def. Mem. 16, is wishful thinking. Indeed, taken to its logical conclusion, defendants' argument would excuse all liability for contamination because the polluter cannot control how their contaminants volatilize, move through air, soil or water, or how they are consumed by animals or humans. Fortunately, the law does not grant that license to pollute.

CONCLUSION

For the reasons stated above, plaintiffs Town of Westport and Westport Community Schools respectfully request that the Court deny the defendants' Motion to Dismiss as to all counts except private nuisance, together with such other relief as the Court deems just and proper.

Dated: July 17, 2014

Respectfully submitted,

By: /s/ Richard M Sandman
Richard M Sandman, Esq.
RODMAN, RODMAN & SANDMAN, P.C.
442 Main Street, Suite 300
Malden, MA 02148-5122
Tel. (781) 322-3720

Carla Burke, Esq.
Scott Summy, Esq.
BARON & BUDD, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, Texas 75219-4281
Tel. (214) 521-3605

Robert Gordon, Esq.
Robin Greenwald, Esq.
WEITZ & LUXENBERG, P.C.
700 Broadway, 5th Floor
New York, NY 10003
Phone: 212-558-5500

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of July 2014, the foregoing document and its attachments were filed electronically. Notice of this filing will be sent by e-mail to the following parties by operation of the Court's electronic filing system:

Richard P. Campbell, Esq.
CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.
One Constitution Center, 3rd Floor
Boston, MA 02129

Richard L. Campbell, Esq.
CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.
One Constitution Center, 3rd Floor
Boston, MA 02129

Brandon L. Arbor, Esq.
CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.
One Constitution Center, 3rd Floor
Boston, MA 02129

Diana A. Chang, Esq.
CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.
One Constitution Center, 3rd Floor
Boston, MA 02129

Robyn D. Buck, Esq. (*pro hac vice*)
HUSCH BLACKWELL, LLP
The Plaza in Clayton
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105

Carol A. Rutter, Esq. (*pro hac vice*)
HUSCH BLACKWELL, LLP
The Plaza in Clayton
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105

/s/ *Richard M. Sandman*