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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware, Plaintiff Below/ Appellant, v. MONSANTO COMPANY, SOLUTIA INC., and PHARMACIA LLC, Defendants Below/ Appellees.	)	No. 279,2022 On Appeal from the Superior Court of the State of Delaware C.A. No. N21C-09-179 MMJ CCLD

CORRECTED BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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I. STATEMENT OF INTEREST AND INTRODUCTION

PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] PLAC's members seek to contribute to the improvement and reform of law in the United States and elsewhere, with an emphasis on the law governing the liability of product manufacturers and those in the supply chain. PLAC's perspective is informed by the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as amicus curiae in both state and federal courts on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

The basic facts of this case are straightforward. Monsanto was a manufacturer and bulk seller of polychlorinated biphenyls ("PCBs") for use by third-party manufacturers in a variety of industrial and commercial applications. In response to

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[1] *See https://plac.com/PLAC/About_Us/Amicus/PLAC/Amicus.aspx*. This brief has been revised from the proposed version attached as Exhibit A to the Motion for Leave [D.I. 46] to correct the name of amicus curiae The Product Liability Advisory Council and other non-substantive edits.

concerns about the safety of PCBs, Monsanto voluntarily ended its sale in 1970-71, except for limited use in electrical capacitors and transformers where PCBs were needed for fire safety. Monsanto ceased production for all uses in 1977 after alternatives became available. Monsanto never manufactured any PCBs in Delaware, and never conducted any activities in Delaware that caused PCBs to enter Delaware's public lands or waters.

Notwithstanding Monsanto's lack of PCB-related activities on, or affecting, any property in Delaware, the State's Attorney General urges that Monsanto should be liable under an expansive "public nuisance" theory for Monsanto's purchasers' or other product users' pollution of the State's waters. This extension of public nuisance liability to Monsanto — for third parties' allegedly harmful use and disposal of products lawfully sold decades ago — has no perceptible boundaries, is unprecedented in Delaware law, and has been rejected by courts in Delaware (including the trial court) and elsewhere. Like other states, Delaware has a well-developed body of product liability law that governs the liability of commercial product sellers for unreasonable risks posed by their own product sales. The doctrine of public nuisance, however, has never been part of that body of law and should not be contorted to unsettle the controlling principles. Indeed, such a contortion, if recognized, would create unpredictability in liability exposure and engender

profoundly deleterious effects for companies doing business in the State, and on their employees, shareholders and customers.

Given these threatened adverse effects, PLAC has a keen interest in the issues raised. PLAC is also cognizant of the persuasive weight that Delaware law regarding commercial issues can carry in other jurisdictions. Here, while the Attorney General's desire to address environmental issues is understandable, the path she has chosen is a radical departure from settled legal principles governing the sale of commercial products on the one hand, and public nuisance on the other. If such a departure is to be entertained at all, it should be by the legislative and executive branches, not the courts. The Superior Court's dismissal of the Attorney General's claims thus should be affirmed.

II. ARGUMENT

A. The Delaware Law Of Public Nuisance Is Not Applicable To The Commercial Sale Of Products

Delaware, like every state, has well-developed law applicable to commercial product sellers designed to protect its citizens from harm. And, like most states, Delaware has well-developed public nuisance principles designed to hold property owners and users responsible for their invasion of public rights. The Attorney General combines both here to manufacture her novel public nuisance cause of action. But that effort works serious mischief with settled law.

1. Delaware Law Governing Commercial Sellers Of Products Does Not Invoke Principles Of Public Nuisance

American products liability law applicable to commercial product sellers has developed over the last eighty years into a sophisticated framework for providing remedies to purchasers and other individuals who suffer physical and economic damage from product defects. *See* David G. Owen, *The Evolution of Products Liability Law*, 26 Rev. Litig. 955, 983-85 (2007). The American Law Institute has exhaustively chronicled these products liability law developments in its Restatement Second and Third of Torts.

As these volumes illustrate, every American jurisdiction has a robust body of products liability law, with standards covering product defects, causation, damages and available defenses. *E.g.*, Restatement (Third) of Torts: Products Liability §§ 1, 2, 15, 16, 18 (1998) (and accompanying comments). In essence, "[t]he underlying

principles of products liability balance the interests of consumers, manufacturers and suppliers, and the public at large by facilitating plaintiffs' recovery and providing manufacturers with an incentive to exercise due care in making their products."[2] Schwartz & Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 578 (2006) ("*Rational Boundaries*").

Delaware, for its part, is no exception. It has well-developed legal principles applicable to the sale of commercial products within its borders. While Delaware's adoption of the Uniform Commercial Code has displaced common law strict product liability, *see Cline v. Prowler Indus. of Maryland, Inc.*, 418 A.2d 968, 971-74 (Del. 1980) (holding UCC's adoption in Delaware legislatively displaces common law strict product liability principles), claims against product manufacturers can be brought under negligence or warranty theories, *e.g.*, *In Re Asbestos Litig. (Colgain)*, 799 A.2d 1151 (Del. 2002) (failure to warn); *Bell Sports, Inc. v. Yarusso*, 759 A.2d

[2] Apart from the protections established by the applicable statutory or common law, commercial product sellers typically are subject to extensive regulation at the local, state, and federal level, such as under the federal National Traffic and Motor Vehicle Safety Act, Consumer Product Safety Improvement Act, Food, Drug and Cosmetic Act, the Hazardous Substances Act and the Federal Trade Commission Act. The briefing in this case highlights the extensive regulatory schemes governing environmental hazards. Where government regulation is extensive and exclusive, it can displace common law remedies, thereby establishing the standards for public safety. *See, e.g., Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (federal common law public nuisance claim against four private power companies and the federal Tennessee Valley Authority displaced by federal Clean Air Act).

582 (Del. 1999) (express warranty); *Brower v. Metal Indus.*, 719 A.2d 941 (Del. 1998) (negligence); *Nacci v. Volkswagen of America*, 325 A.2d 619 (Del. Super. 1974) (implied warranty).

Further, Delaware's body of product liability law is, as in other jurisdictions, fully self-contained. It covers liability, causation, damages and defenses and thereby establishes the scope of a product seller's liability and liability exposure. *See* Del. P.J.I. Civ. §§ 9.1-9.23 (jury instructions on liability principles). Notably in that regard, Delaware law applies a two-year statute of limitations (10 Del.C. § 8119), holds manufacturers to standards of reasonableness (*Graham v. Pittsburgh Corning Corp.*, 593 A.2d 567, 568-70 (Del. Super. 1990); *In Re Asbestos Litigation*, 542 A.2d 1205, 1208-12 (Del. Super. 1986)), rigorously adheres to tort principles of proximate causation (*Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 828-30 (Del. 1995)), and carefully limits recovery for economic losses (*Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1196-1201 (Del. 1992)).

As for the effect of applicable regulations (*see* n.2 *supra*), where a product seller is compliant with such regulations, principles of preemption likewise may take hold. *See Scanlon v. Medtronic Sofamor Danek USA Inc.*, 61 F. Supp. 3d 403, 410-12 (D. Del. 2014) (emphasizing state law remedies involving certain medical devices may only "parallel, rather than add to federal requirements" regarding manufacturer's responsibilities and finding negligence claim preempted by federal

law); *Fokides v. Norfolk Southern Corp.*, 2006 Del. Super. LEXIS 405, at *17-18 (Super. Ct. Oct. 5, 2006) (holding plaintiff's claim that defendant's train failed to provide adequate warning devices was preempted by standards under Federal Railroad Safety Act). Applicable regulations may also help determine compliance with the relevant standard of care. *Toll Bros v. Considine*, 706 A.2d 493, 498 (Del. 1998) (finding OSHA regulations provide a standard that influences determination of "what is reasonable conduct" under circumstances at issue).

While acting to protect the interests of consumers and users of products, Delaware courts have, at the same time, been very deliberate in developing the law applying to commercial product sellers. In particular, Delaware's courts have been unwilling to invoke expansive liability theories without legislative direction, *Danforth*, 608 A.2d at 1200-01 (declining to recognize exception to economic loss doctrine); *Cline*, 418 A.2d at 971-74, 979-80 (declining to adopt common law strict liability to supplant UCC); *Nutt v. A.C. & S. Co.*, 517 A.2d 690, 694 (Del. Super. 1986) (declining to adopt market share liability), and have been equally wary of expanding the law where the resulting liability exposure would be excessive, *Danforth*, 608 A.2d at 1197-98 (noting that permitting recovery for all foreseeable claims for economic loss "could make a manufacturer liable for vast sums").

Here, the nuisance theory advanced by the Attorney General is in marked tension with Delaware's governing principles and policies relating to commercial

product sellers. In contrast to settled Delaware case law (*supra* pp. 5-6), the Attorney General's commercial seller theory does not involve any harm to a product user or consumer, and is brought decades after the product was lawfully sold. The theory likewise is not subject to the foreseeability policy limits inherent in proximate causation and does not account for the reasonableness of the manufacturer's conduct or compliance with government regulations. For these reasons, adopting the expansive public nuisance theory carries the risk of imposing excessive liability. Notwithstanding the Attorney General's arguments, moreover, Delaware's existing law relating to product sellers gives no hint of any circumstances where principles relating to the statute of limitations, or standards of reasonableness, or proximate causation, or damage limitations would be abandoned, without supportive legislative direction, by resort to principles of public nuisance.

2. Delaware Law Governing Public Nuisance Does Not Involve The Commercial Sale Of Products

Public nuisance originated in twelfth-century England "as a tort-based crime for infringing on the rights of the Crown." *Rational Boundaries*, 45 Washburn L.J. at 543-44. The earliest nuisance cases involved "purprestures," which were physical encroachments upon royal lands or the public highway. Restatement (Second) of Torts § 821B, cmt. a (1979). By the 14th century, the tort had been extended to other encroachments on public lands, including interference with the operation of a public market or smoke from a lime-pit that inconvenienced residents of a town. *Id*. While

further expansions followed, one thing remained constant: Public nuisance liability was confined to public rights related to the use of land. *See* Handler & Erway, *Tort of Public Nuisance in Public Policy: Return to the Jungle?*, 69 Def. Couns. J. 484, 484-85 (2002) ("Traditional nuisance law had nothing to do with products. Rather, it concerned the abatement of bothersome activities, usually conducted on a defendant's land, that unreasonably interfered either with the rights of other private landowners or, in the case of public nuisance, with the rights of the general public.").

In the 1960s, heightened interest arose in invoking public nuisance theories as a potential means "to combat pollution that was not subject to criminal sanctions, and in fact, was often permitted by federal, state, or local regulatory regimes or zoning regulations." *Rational Boundaries*, 45 Washburn L.J. at 547. When an early draft of the Restatement (Second) of Torts sought to limit public nuisance liability to violations of criminal statutes, backlash followed and the Restatement's drafters ultimately settled on a compromise whereby "conduct need only be an 'unreasonable interference' with a public right" to give rise to nuisance. *Rational Boundaries*, 45 Washburn L.J. at 547-48 (quoting Restatement (Second) of Torts § 821B (1979)).

As the commentary accompanying § 821B reveals, however, the Restatement's focus remained on those who owned or controlled property and the nature of the harm caused by those in ownership and control. *Id*. cmt b. Delaware public nuisance law reflects this same focus. *Cunningham v. Wilmington Ice Mfg.*

Co., 121 A. 654, 654 (1923) (operation of defendant's ice-making plant); *State ex rel. Bove v. Hill*, 167 A.2d 738, 741 (1961) (use of property for "the planning, preparation, perpetration and consummation of criminal acts"); *Georgetown v. Deriemer*, 1990 Del. Ch. LEXIS 70, at *13 (Ch. May 31, 1990) (property creating public health danger and breeding ground for disease); *Leitstein v. Hirt*, 2006 Del. Ch. LEXIS 184, at *5 (Ch. Oct. 12, 2006) ("gaping" hole in the backyard of a vacant house with a corresponding mound of dirt sitting next to the pit).

Nevertheless, starting in the 1990s, plaintiffs seeking to evade statutes of limitations or other defenses began to try to stretch § 821B's language to reach commercial product sellers who were not exercising ownership or control over any property in the particular state. *See People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (2003) (discussed below). This trend has now made its way to this Court.

As the Superior Court observed, however, Delaware courts have declined to extend the public nuisance principles to sellers of commercial products because public nuisance principles do not fit. For example, in *State ex rel. Jennings v. Purdue Pharma L.P.*, the Attorney General sought to hold opioid manufacturers, distributors, and pharmacies liable under a public nuisance theory, in addition to a multitude of other claims. 2019 Del. Super. LEXIS 65 (Super. Ct. Feb. 4, 2019). The court rejected that attempt, observing that products-based public nuisance claims have been disfavored in other jurisdictions, and that the "clear national trend"

is "to limit public nuisance to land use." *Id*. at *33. The court further held that "[a] defendant is not liable for public nuisance unless it exercises control over the instrumentality that caused the nuisance at the time of the nuisance." *Id.* at *34.

Similarly, in *Sills v. Smith & Wesson Corp.*, the mayor and City of Wilmington sought to apply public nuisance theory to handgun manufacturers and gun trade associations. 2000 Del. Super. LEXIS 444 (Super. Ct. Dec. 1, 2000). In response, the court pointed out that "[w]hile no express authority exists requiring public nuisance claims be restricted to those based on land use, Delaware courts remain hesitant to expand public nuisance." *Id*. at *26. Likewise, "Delaware has yet to recognize a cause of action for public nuisance based upon products." *Id*.

The two Delaware cases that the Attorney General primarily relied upon in the trial court — and which remain central to her argument on this appeal — retain public nuisance law's historical focus on land use, as well as on those who own or control the subject property and cause harm through its use. Thus, in *Artesian Water Co. v. Gov't of New Castle Cty.*, 1983 Del. Ch. LEXIS 496 (Del. Ch. Aug. 4, 1983), plaintiff was a privately-owned public utility that alleged a nuisance claim due to groundwater pollution from a county landfill. The lawsuit was aimed at the landfill's owner, its use of the property as causing the nuisance, the private and public rights impacted by that use, and whether reasonable abatement measures had been taken. Similarly, *Alexander v. Evraz Claymont Steel Holdings Inc.* concerned claims by

local residents against the owners of the Claymont steel plant for air pollution. 2013 Del. Super. LEXIS 623 (Super. Ct. Mar. 31, 2013). In this instance, the lawsuit was aimed at the owners' discharge of toxic chemicals onto neighboring property and the private and public rights impacted by the discharge. *Id*. at *4.

As these cases reveal, the commercial seller theory advanced by the Attorney General also is in marked tension with Delaware's public nuisance precedents. For example, as the cited Delaware cases show, public nuisance liability historically depends on conduct that directly impacts a general public right, not private product sales to specific purchasers from many years ago that had no public connection at all. Similarly, as those cited cases also reveal, public nuisance liability typically requires direct ownership or control over the property as well as the cause of the nuisance at the time the nuisance occurs, but that, too, is absent here.[3] Notably, there again is no hint in the controlling cases supporting this expansion. Neither *Artesian Water* nor *Alexander* involves a product seller who does not own or control the property from which the alleged nuisance emanated, and is not itself responsible for the actual contaminant discharge. Nor does either case employ any reasoning suggesting that nuisance liability could extend to a product seller who is not

[3] The damages remedy sought by the Attorney General is a further break from the equitable principles governing public nuisance cases. The traditional equitable remedies were directed to the land and confined to abatement of the public invasion. *See* Gifford, *Public Nuisance as a Mass Product Liability Tort*, 71 U. Cin. L. Rev. 741, 800-06 (2003).

allegedly causing public harm by activities conducted on property in this State. Finally, the threat of excessive liability exposure is apparent, yet there is no legislative direction supporting the expansion.

B. The Delaware Law Of Public Nuisance Should Not Be Contorted To Impose Extensive and Unpredictable Liability On The Commercial Sale Of Products

The straightforward question here is whether settled law governing product sellers should be abandoned and public nuisance principles contorted to allow the Attorney General to pursue her environmental remediation damage claim as to product sellers rather than actual polluters. The answer to that question should be "no," both as a matter of law and public policy.

1. The Better-Reasoned Cases Nationwide Reject The Expansion Of Public Nuisance And This Court Should Follow Their Holdings

Turning first to the law, this Court is not the first to confront a proposed contortion of public nuisance principles to reach product sellers who are not conducting activities on property in a state and have no direct role in the conduct causing the nuisance. And while some states have permitted the contortion, PLAC submits that the better-reasoned cases have not. That starts with *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, where New York's Appellate Division affirmed the trial court's dismissal of a public nuisance case brought against gun manufacturers, wholesalers, and retailers and alleging that illegally possessed handguns were a common law public nuisance "because they endanger the health and safety of a significant portion of the population" and "interfere with, offend, injure and otherwise cause damage to the public in the exercise of rights common to

all." *Id*. of 194. In affirming, the Appellate Division initially noted that the "legislative and executive branches are better suited to address the societal problems concerning the already heavily regulated commercial activity at issue." *Id*. at 194-95.

The New York Appellate Division also cautioned that "giving a green light to a common-law public nuisance cause of action" would "likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities." *Id*. at 196. "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its nondefective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Id*.; *see Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) ("Nuisance thus would become a monster that would devour in one gulp the entire law of tort."). The Appellate Division went on to make clear the difference between the Attorney General's expansive theory and traditional claims for nuisance under New York common law. There, as here, the two New York nuisance cases relied on by the Attorney General were both distinguishable because, in both, the complained-of

activity took place on neighboring or adjacent land and involved no intervening parties' acts. *See id*. at 197.

Five years later, Rhode Island's Supreme Court, in *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008), addressed that state's Attorney General's effort to expand public nuisance principles to pigment manufacturers for harms posed to children from lead paint used on residential properties. In rejecting the theory, the Court emphasized that because defendants were not in control of the lead pigment at the time of the alleged harm, defendants were "unable to abate the alleged nuisance, the standard remedy in a public nuisance action." *Id*. at 435. Citing existing case law, the Court further explained that "*control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*" is a "prerequisite to the imposition of liability for public nuisance." *Id*. at 449 (emphasis in original). Again with settled law in mind, the Court further emphasized the role of third parties in the alleged harms, observing that "the General Assembly has recognized defendants' lack of control and inability to abate the alleged nuisance because it has placed the burden on landlords and property owners to make their properties lead-safe." *Id*. at 435-36. This control element connects with the further requirement that a plaintiff demonstrate causation — "a basic requirement in any public nuisance action" that is "consistent with the law of torts generally." *Id*. at 451 ("Although it is true that public nuisance is characterized by an unreasonable interference with a public right,

basic fairness dictates that a defendant must have caused the interference to be held liable for its abatement.").

The Rhode Island Supreme Court was not blind to the seriousness of lead poisoning as a public health concern. But it cautioned that "the creation of new causes of action is a legislative function." *Id*. (quotation, citation omitted). In contrast, the duty of the judiciary "is to determine the law, not to make the law," and "[t]o do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of Rhode Island government." *Id*. at 436 (quotation, citations omitted); *see also In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007) (New Jersey Supreme Court reversing lower court's judgement against lead paint manufacturer); *City of Chicago v. Am. Cyanamid Co.*, 355 Ill. App. 3d 209 (2005) (Illinois Appellate Court affirming dismissal of public nuisance claim against lead pigment/paint makers).

Most recently, in *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (2021), Oklahoma's Supreme Court addressed that state's Attorney General's effort to hold opioid manufacturers liable under a public nuisance theory for the opioid epidemic in the state. In reversing the trial court's failure to dismiss the claims, the Supreme Court traced the origins and history of public nuisance, noting that by the time it "evolved into a common law tort," public nuisance was understood to apply

to "conduct, performed in a location within the actor's control, which harmed those common rights of the general public." *Id.* at 724 (citing Restatement (Second) of Torts § 821B cmt. b). The Court further explained that nuisance "has historically been linked to the use of land by the one creating the nuisance," such that "[c]ourts have limited public nuisance claims to these traditional bounds." *Id.*

In comparison, the Oklahoma Supreme Court pointed out that the central focus of the Attorney General's complaints — on J&J's alleged failure to warn of the dangers of opioid abuse — sounds in products liability, not nuisance. *Id*. at 725. But products liability and nuisance are "two distinct causes of action, each with boundaries that are not intended to overlap." *Id*. (citing *State v. Lead Indus. Ass'n*, 951 A.2d at 456). In particular, the Court explained that the "product manufacturer's responsibility is to put a lawful, non-defective product into the market. There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold." *Id*. at 728. Nor should a manufacturer be held perpetually liable for its products, more than 20 years or more after the products entered the stream of commerce. *Id*. at 729.

The effort to stretch Restatement § 821B's language failed as a matter of law in all these cases. For the reasons given by these courts, this Court likewise should reject the Attorney General's proposal to manufacture an expansion by extracting language out of context from the Section. In this regard, the recently completed

Restatement Third of Torts: Liability for Economic Harm § 8 (2020), points out that public nuisance does *not* encompass claims for injury caused by products, and that the broad language from § 821B should not be misused to say that it does. As § 8 explains, while "problems caused by dangerous products might once have seemed to be matters for the law of public nuisance because the term 'public nuisance' has sometimes been defined in broad language that can be read to encompass anything injurious to public health and safety," the "traditional office of the tort . . . has been narrower." *Id*. § 8 cmt. As the drafters also correctly note, liability for public nuisance based on the sale of products "has been rejected by most courts, and is excluded by [the current Restatement], because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue." *Id*. Rather, "[m]ass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake." *Id*. That legal result should follow here, too.

2. The Proposed Expansion Of Public Nuisance Law Will Create Unsettling And Unpredictable Consequences For Delaware Businesses And An Unsuitable Role For Its Courts

As for public policy, Delaware law regarding product liability, product regulation, environmental regulation, and public nuisance is well-settled in its application and scope. Companies who do business in Delaware can make judgments about potential liability exposures and regulatory responsibilities in light

of the established law and regulations and manage their affairs accordingly. These existing legal principles and regulatory guidelines provide a measure of predictability for corporate conduct related to commercial product sales. By comparison, the expansion of public nuisance liability principles proposed by the Attorney General abandons the predictability the existing law currently provides.

Yet, efficiency and predictability have long been hallmarks of Delaware corporate and commercial law and policy. *E.g.*, *Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 (Del. 2020) (Delaware General Assembly has recognized "the need to maintain balance, efficiency, fairness, and predictability in protecting the legitimate interests of all stakeholders, and to ensure that the laws do not impose unnecessary costs on Delaware entities"); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 353 (Del. 2022) (declining to adopt proposed corporate governance principle that "would foster uncertainty and potential inconsistency in a context where predictability is crucial for corporations that have availed themselves of Delaware law"). If the expansive liability principles advocated by the Attorney General are embraced, companies who do business in Delaware will be singled out and subjected to a remedial construct that is foreign to existing law, void of any limiting principles, and a prelude to open-ended and uncertain liability. That is not a goal of the tort

system. And if adopted, it will force companies to make hard choices about doing business in this State.[4]

Perhaps more fundamentally, as other courts have observed, the Attorney General's proposed nuisance theory thrusts the courts into a regulatory role over a broad-based societal problem for which they are ill-suited. And this comes at the expense of the executive and legislative branches who are better able to balance the competing public and private interests involved. The political branches—and regulatory bodies that implement statutorily granted authority—have better and wider access to information and data, and are best equipped to set societally optimal standards for the conduct involved. *See Am. Elec. Power Co.*, 564 U.S. at 428; *State ex rel. Hunter*, 499 P.3d at 731. This Court previously has expressed its reluctance to use the common law to get ahead of the legislature or impose what might be crippling liability. *See* Cases cited *supra* at pp. 6-7; *see Shea v. Matassa*, 918 A.2d 1090, 1092 (Del. 2007) (concluding that "the General Assembly, not this Court, should decide whether to create a cause of action for dram shop liability or social

[4] It is hard to imagine that insurance would be obtainable to cover the unpredictable and unforeseeable risks engendered by the public nuisance theory the Attorney General advances. Even if it were, the cost would most certainly be prohibitive. Such costs would have to be passed on to consumers or absorbed by the company's employees and shareholders, potentially threatening the company's competitiveness or even viability. *See* Priest, *Market Share Liability in Personal Injury and Public Nuisance Litigation: An Economic Analysis*, Supreme Court Economic Review 18(1), 109 (2010).

host liability [for harms cause by alcohol consumption]"). That reluctance is particularly warranted where a proposed liability theory, as here, abandons the principles that keep tort damage exposure within reasonable bounds.

Moreover, there is robust law in place in Delaware for holding manufacturers liable for harms caused by their products and to address any public nuisance that occurs. Property owners and users — those who actually create and cause public nuisance — are responsible under Delaware law and can answer for any alleged harm caused, just as product sellers must do when a defective product harms a consumer or user. Similarly, there is equally robust regulation of product manufacture, use, and disposal, serving the avowed goal of protecting the environment and citizens of this State. There is no sound reason to displace the predictability inherent in this body of law and regulation with the uncertainty and potentially devastating economic consequences the Attorney General proposes. This Court should not take that step.

III. CONCLUSION

For all the foregoing reasons, this Court should reject the unwarranted expansion of public nuisance law proposed by the Attorney General and affirm the result reached by the trial court, adhering to settled law.

Dated: November 28, 2022

Respectfully submitted,

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