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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| CATHERINE BAKER, | ) | No. 393, 2022 |
| | ) | |
| Plaintiff-Appellant, | ) | Certification of Question of Law |
| | ) | from the United States Court of |
| v. | ) | Appeals for the Third Circuit |
| | ) | Appeal Nos. 21-3360 & 22-1333 |
| CRODA INC., f/k/a Croda, Inc. | ) | |
| | ) | **Court below:** |
| Defendant-Appellee. | ) | U.S. District Court, D. Del. |
| | ) | Civil Action No. 1:20-cv-01108-SB |

# APPELLANT'S [CORRECTED] OPENING BRIEF

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Dated: December 16, 2022

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## NATURE OF PROCEEDINGS

Plaintiff/Appellant Catherine Baker ("Plaintiff") filed her class action underlying the certified question against Defendant Croda, Inc. ("Defendant") in the United States District Court for the District of Delaware (the "District Court"). The operative complaint at the time of dismissal of the action by the District Court (the "Complaint") alleged that Defendant's decades-long emission of a dangerous amount of ethylene oxide gas from its Atlas Point facility in New Castle, Delaware—including a catastrophic leak in 2018 that caused a shutdown of the Delaware Memorial Bridge for seven hours, fines by regulatory authorities, and a massive cleanup effort—harmed Plaintiff and members of the Class (defined *infra* at note 14) by exposing them to toxic, mutagenic, and carcinogenic ethylene oxide, which substantially increased their risk of significant disease and necessitated medical monitoring to detect diseases caused by their actual exposure. The Complaint brought claims against Defendant for: (1) Ultrahazardous Activity/Strict Liability, (2) Public Nuisance, (3) Private Nuisance, (4) Negligence, (5) Willful and Wanton Conduct, and (6) Medical Monitoring, and sought damages, declaratory, and injunctive relief for Plaintiff's and Class members' resultant injuries in the form of both an increased risk of disease and the present need to undergo necessary diagnostic testing due to Defendant's tortious conduct in order to detect those

diseases early to minimize, to the extent possible, the worst possible outcomes that may arise as a result of Defendant's conduct.[1]

Following a withdrawn argument in connection with a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1), Defendant filed a renewed Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiff failed to state a claim for relief, *inter alia*, because exposure to and inhalation of toxic ethylene oxide gas without a present manifestation of physical harm is not a cognizable injury under Delaware law.[2] Plaintiff opposed the Motion, arguing, *inter alia*, that Delaware law recognizes as a present, cognizable injury both Plaintiff's and Class members' (1) exposure to ethylene oxide causing increased risk of latent disease and (2) present need for ongoing diagnostic testing for specific diseases linked to ethylene oxide exposure in order to mitigate the harm caused by latent disease.[3]

Following oral argument, the District Court dismissed the Complaint, holding "this class cannot recover damages for the risk of diseases that they do not yet have. And because each tort requires an injury, none of [Plaintiff's] torts survives this

[1] A0034–35.

[2] A0038–69.

[3] A0070–99.

flaw."[4] On February 22, 2022, the District Court entered final judgment dismissing Plaintiff's claims.[5] On February 23, 2022, Plaintiff appealed the District Court's final judgment to the United States Court of Appeals for the Third Circuit (the "Court of Appeals").[6] The appeal was fully briefed when on October 21, 2022, in lieu of ruling on the appeal, the Court of Appeals certified questions of law to the Supreme Court of Delaware.[7]

On October 31, 2022, the Delaware Supreme Court accepted the certified questions in accordance with Article IV, Section 11(8) of the Delaware Constitution and Delaware Supreme Court Rule 41, after careful consideration concluding that there are important and urgent reasons for an immediate determination of the questions certified.[8]

[4] Exhibit B, at 5–6.

[5] Exhibit A, A0104.

[6] A0100–01.

[7] A0109–A0206; Exhibit C.

[8] Exhibit D.

## STATEMENT OF ISSUE PRESENTED FOR REVIEW

The Court of Appeals for the Third Circuit certified the following question for review:

> Whether an increased risk of illness, without present manifestation of a physical harm, is a cognizable injury under Delaware law? Or put another way, does an increased risk of harm only constitute a cognizable injury once it manifests in a physical disease?[9]

[9] Exhibit C, at 8.

## SUMMARY OF ARGUMENT

1. Where an individual has been actually exposed to a toxic substance, Delaware law recognizes the present increased risk of disease and need to undergo medical monitoring as a result of that actual exposure as a cognizable injury.

a. As this Court has indicated, under Delaware law the present, increased risk of latent disease and the resultant, present need to undergo medical monitoring in instances in which an individual has been actually exposed to a toxic substance is a cognizable injury.

b. Delaware Courts have recognized the present need to undergo medical monitoring as a compensable injury in the workers' compensation context, and thus, such injury should also be cognizable in the tort context.

c. Delaware law follows the Restatement (Second) of Torts ("Restatement") Section 7, which recognizes that cognizable injury includes the invasion of any legally protected interest of another, and thus, manifestation of disease is not required to establish a cognizable injury where there has been actual exposure, increased risk of disease, and present need for ongoing medical monitoring.

d. Delaware public policy concerns necessitate a holding recognizing that increased risk of disease and the present need for medical monitoring

due to Defendant's tortious emissions of toxic, mutagenic, and carcinogenic ethylene oxide and exposure is a legally cognizable injury commanded by the need to protect Delaware residents from incurring ongoing costs of medical monitoring.

## STATEMENT OF FACTS

Ethylene oxide is an odorless and colorless toxic, carcinogenic, and mutagenic gas.[10] Heavier than air and with an atmospheric half-life of 211 days, when released into the air, ethylene oxide travels throughout nearby communities and lingers at breathing level for prolonged periods, continually exposing those in those communities to this extremely harmful toxin.[11] Defendant's Atlas Point facility produces up to 30,000 metric tons of ethylene oxide annually, which is used in surfactant production and the creation of ethylene glycol.[12] In connection with this production, Defendant releases and emits substantial and dangerous volumes of ethylene oxide gas every year.[13] The release of ethylene oxide gas into the air surrounding the Class zone has been ongoing since at least 1988.[14] For decades, Defendant's ethylene oxide emissions have poisoned one of Delaware's most populous regions.

In addition to Defendant's harmful, ordinary course, pervasive, and continuous emissions of ethylene oxide into the community surrounding its Atlas Point facility, during the Class period, Defendant has had multiple, substantial

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[10] A0016 at ¶¶29–30.

[11] *Id.* at ¶¶28–29.

[12] A0015 at ¶27.

[13] *Id.*

[14] *Id.*; A0022–23 at ¶62 (defining the class (the "Class").

ethylene oxide leaks. From 2008 through at least 2015, Defendant, at its Atlas Point facility, violated State of Delaware Department of Natural Resources and Environmental Control ("DNREC") regulations including by failing to monitor for and record emissions, failing to comply with best management practices, failing to make timely permit applications, and releasing excess emissions.[15]

In 2015, Defendant announced that it was adding a new facility to the Atlas Point facility that would provide it with the ability to produce ethylene oxide directly on site for use in manufacturing surfactants.[16] It opened the facility in October 2017.[17] On November 25, 2018, Defendant reported a massive, uncontrolled leak at the new Atlas Point ethylene oxide production plant, which resulted in the release of 2,688 pounds of ethylene oxide into the air surrounding the facility.[18] A call was sent out through the Delaware Emergency Notification System to advise residents in the nearby area to seek shelter.[19] The massive release resulted in the closure of the Delaware Memorial Bridge for seven hours.[20] In addition to the tons of ethylene

[15] A0017 at ¶35 (alleging that in 2008, Defendant engaged in a documented, unpermitted release of ethylene oxide).

[16] *Id.* at ¶36.

[17] *Id.*

[18] *Id.* at ¶37.

[19] *Id.*

[20] *Id.*

oxide released into the air, 700,000 gallons of deluge water, used by Defendant to minimize the ambient air concentration of ethylene oxide and to minimize the risk of explosion or ignition of the released ethylene oxide, overflowed the spill sump and discharged onto the ground and into the wooded area behind the plant.[21]

On March 28, 2019, Defendant entered into a settlement agreement with DNREC wherein it was found to have violated, *inter alia,* 7 *Del. C.* § 6003(a)(1), through the unpermitted release of ethylene oxide and 3.38 of Permit APC-2016/0068 - Construction (Amendment 3) by not maintaining and operating its plant in a manner consistent with good air pollution control practices for minimizing emissions, when it used an incorrect gasket that ultimately failed and resulted in the November 25, 2018 uncontrolled emission of ethylene oxide.[22] Through that settlement agreement, it was revealed that Defendant had conducted the conditional operation of its plant without the approval of DNREC during some periods in 2018.[23] The federal Occupational Safety and Health Administration, DNREC, and other state agencies ultimately imposed on Defendant more than $500,000 in fines and penalties for its operation of the plant without proper inspection, failure to train

[21] A0017–18 at ¶37.

[22] A0118 at ¶38.

[23] *Id.*; A0209.

workers adequately, failure to have proper leak-shutdown procedures, and other failures leading up to the 2018 leak.[24]

Throughout the time period during which Defendant exposed Plaintiff and Class members to unsafe ethylene oxide, there has been widespread consensus, including amongst government agencies, scientists, and health organizations, that ethylene oxide gas is a dangerous, carcinogenic, and mutagenic toxin that is readily taken up by the lungs, efficiently absorbed into the blood stream, and easily distributed throughout the human body.[25] As early as 1977, the National Institute of Occupational Safety and Health recommended that ethylene oxide be considered mutagenic and potentially carcinogenic.[26] In 1994, the World Health Organization categorized ethylene oxide as a "Group 1" human carcinogen—its highest risk classification.[27] In 2000, the U.S. Department of Health and Human Services classified ethylene oxide as a "known . . . human carcinogen."[28] In 2016, the EPA likewise classified ethylene oxide as a human carcinogen.[29] In short, ethylene oxide

[24] A0018 at ¶39.

[25] A0013–15.

[26] A0014 at ¶20.

[27] A0015 at ¶24.

[28] *Id.*

[29] *Id.* at ¶26.

is an extremely toxic, carcinogenic, and mutagenic substance as to which there is no safe level for human exposure.[30]

At all times relevant to the Complaint, Defendant knew that: (1) its manufacturing plant operated without sufficient pollution control systems necessary to reduce or eliminate releases of toxic ethylene oxide; (2) the release of ethylene oxide spread well beyond the property boundaries of the Atlas Point facility and resulted in exposure to residents in the Class zone; and (3) ongoing exposure to ethylene oxide, a known carcinogen, would result in an increased risk for nearby residents like Plaintiff and Class members that they would develop illnesses or diseases including cancer and would experience other negative health consequences.[31]

As a result of Defendant's ethylene oxide emissions, Plaintiff and Class members have some of the highest cancer risks in the nation.[32] The EPA estimates that Plaintiff and Class members are up to four times more likely to develop cancer than average Americans due to their prolonged, actual exposure to ethylene oxide.[33]

[30] A0013–15.

[31] A0019 at ¶46.

[32] A0011; A0018–19.

[33] A0011 at ¶5.

The increased risk of disease was visited upon Plaintiff and Class members because of Defendant's ethylene oxide emissions at its Atlas Point facility.[34]

Consequently, Plaintiff and Class members have already suffered actual, present injury in the form of exposure to and inhalation of toxic, mutagenic, and carcinogenic ethylene oxide gas emitted by Defendant, as well as the present injury of needing to undergo and pay for reasonably necessary and costly medical testing and monitoring to detect latent cancers and other disease processes, so they might have the opportunity to treat these debilitating conditions early, and, hopefully, allow them to successfully receive appropriate treatment.

[34] A0016–20.

# ARGUMENT

## I. DELAWARE LAW RECOGNIZES THAT A COGNIZABLE INJURY HAS OCCURRED IN THE CIRCUMSTANCES PRESENTED HERE

### A. QUESTIONS PRESENTED

Whether an increased risk of illness, without present manifestation of a physical harm, is a cognizable injury under Delaware law? Or put another way, does an increased risk of harm only constitute a cognizable injury once it manifests in a physical disease? This issue was raised below (A0086–91, A0109–47, A0182–206) and considered by the District Court (Ex. B) and the Court of Appeals (Ex. C).

### B. SCOPE OF REVIEW

Certified questions of law are reviewed *de novo*. *United States v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1123 (Del. 2020).

### C. MERITS OF ARGUMENT

Plaintiff's and Class members' exposure to ethylene oxide, which exposure resulted in an increased risk that Plaintiff and Class members will develop cancer in their lifetimes necessitating ongoing medical monitoring, was caused by Defendant's conduct in purposefully or, at best, negligently, emitting and causing multiple substantial leaks of ethylene oxide throughout the Class period. Plaintiff and Class members should not be forced to shoulder the burden of the expensive medical monitoring required for early detection of diseases caused by those emissions and necessitated by Defendant's negligence.

Delaware law has long recognized that tortfeasors causing harm to individuals should be held accountable for their misfeasance. Under Delaware law, Plaintiff and Class members have already suffered a cognizable injury—exposure to mutagenic, carcinogenic, and toxic ethylene oxide has occurred, resulting in a present increased risk of disease, and, as a result, the present need to pay for medical monitoring, so that when the diseases manifest, they have the best possible prognosis. According to the United States Environmental Protection Agency ("EPA"), as a result of Defendant's emissions of ethylene oxide in and around the Atlas Point facilities, Plaintiff and Class members are ***at least*** four times more likely to develop cancer or other diseases than members of the general population.[35] Exposure to a toxic substance, combined with the increased risk of serious disease and the resultant need to undergo ongoing diagnostic testing, is the type of cognizable injury that Delaware law has long recognized as recoverable in tort and under other theories of recovery. Plaintiff and Class members should not be forced to shoulder the burden of the expensive medical monitoring required for early detection of diseases caused by those emissions and necessitated by Defendant's negligence.

Therefore, the Court should answer the certified questions in the affirmative and hold that where there has been an actual exposure to a toxic substance that causes

[35] A0011 at ¶5.

an increased risk of disease and necessitates ongoing medical monitoring to detect the serious, and potentially deadly, diseases that may manifest as a result, Delaware law recognizes a cognizable injury as to which relief should rightfully be granted.

### 1. This Court Has Repeatedly Indicated that Exposure to a Toxin Resulting in an Increased Risk of Disease Is a Cognizable Injury under Delaware Law

While there is no binding precedent directly on point, Delaware law has long indicated that it recognizes a cognizable injury in the circumstances presented here.[36] Nearly four decades ago, in *Mergenthaler v. Asbestos Corp. of America*, certain plaintiffs brought claims that sought to recover for the fear and mental anguish that they would suffer asbestos-related injuries because they laundered their spouses' work clothes, and their spouses were exposed to asbestos in the course of their work. 480 A.2d 647 (Del. 1984). The Supreme Court upheld dismissal of those claims, not on the basis that physical manifestation of disease is required to state a claim under Delaware law, but because when asserting claims for mental anguish, an element of that claim requires a present physical injury. *Id.* at 651.

In reaching this conclusion, the Court examined, and distinguished, several cases that allowed for recovery where the plaintiffs did not suffer any present

[36] At least one federal court has predicted Delaware law recognizes Plaintiff's claims as compensable. *Guinan v. A.I. Dupont Hosp. for Children*, 597 F. Supp. 2d 517 (E.D. Pa. 2009) (predicting Delaware law does not require present physical disease for medical monitoring).

manifestation of disease on the basis that plaintiffs in those cases alleged an actual exposure to a toxic or dangerous substance.

The *Mergenthaler* Court discussed in detail *Ayers v. Jackson Township*, 461 A.2d 184 (N.J. Super. Ct. 1983), which was later upheld on appeal in *Ayers v. Jackson Township*, 525 A.2d 287, 312 (N.J. 1987), the seminal New Jersey case on medical monitoring, in which the court held that the cost of medical surveillance is cognizable injury despite the present lack of manifestation of the disease caused by a toxic exposure. The *Ayers* plaintiffs were New Jersey residents who alleged that toxic waste leached through the municipal landfill owned and operated by defendant township and contaminated their well water. *Ayers*, 461 A.2d at 186. The residents alleged that the contamination caused them to suffer bodily injury, emotional distress, impairment of quality of life, and enhancement of risk of cancer. *Id.* Specifically, the *Ayers* plaintiffs alleged that exposure to known carcinogens that they ingested over an extended period of time would require substantial medical surveillance. *Id.* None of the *Ayers* plaintiffs had a present manifestation of physical disease or cancer at the time of litigation, but the court held that the plaintiffs still had a claim for medical costs for future testing, which they alleged was necessitated by exposure to the chemicals. *Id.* at 190. The *Ayers* Court reasoned:

> Damages may be recovered for the prospective consequences of a tortious injury. It is not the reasonable probability of whether plaintiffs will suffer cancer in the future that should determine whether medical surveillance is necessary. Rather, it is whether it is necessary, based on

> medical judgment, that a plaintiff who has been exposed to known carcinogens at various levels should undergo annual medical testing in order to properly diagnose the warning signs of the development of the disease. ***If it is necessary, then the probability of the need for that medical surveillance is cognizable as part of plaintiffs' claim*.**

*Id.* (emphasis added) (internal citation omitted). In examining *Ayers*, the *Mergenthaler* Court specifically noted:

> While at first blush, this case appears to support plaintiffs' contention, it can be distinguished from the instant case in that there the plaintiffs clearly ingested the water that was contaminated. Stated otherwise, in *Ayers* there was a direct contact with the contaminant by the plaintiffs. Here, there was no direct contact by the plaintiff-spouses with the asbestos, and no evidence was presented to show that they actually inhaled asbestos fibers. ***Based on this distinction***, plaintiffs' contention fails.

480 A.2d at 651 (emphasis added). The *Mergenthaler* Court noted that *Ayers* recognized that a claim for monitoring, absent present physical injury, does not seek recovery for an unquantifiable injury, but instead seeks a remedy for harm caused by actual exposure to a toxic substance and asks for specific monetary damages measured by the cost of medical examinations. *Id. Ayers* identifies the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, but not the existence of present physical injury as elements of proof. *Ayers*, 525 A.2d at 312. Like the *Ayers* plaintiffs who ingested contaminated well water without present manifestation of disease, Plaintiff and

Class members have inhaled ethylene oxide-contaminated air and presently suffer from an increased risk of disease that necessitates medical monitoring now.

In making distinctions between *Ayers* and the case before it, *Mergenthaler* indicated that direct exposure to a toxic substance would have resulted in a different outcome. Here, Plaintiff has alleged that she was directly and actually exposed to a toxin and suffers from the present need to undergo medical monitoring as a result of her increased risk of disease; unlike in *Mergenthaler*, Plaintiff and Class members are not simply seeking relief for an apprehension of future injury without any actual exposure.

In *Garrison v. Medical Center of Delaware Inc.*, this Court examined whether the parents of a child born with a genetic disorder have a cause of action against health care providers who failed to timely detect that the child has the disorder. 581 A.2d 288 (Del. 1989). The Court held under a negligence theory, despite the fact that the negligence did not result in any physical harm, the plaintiff-parents had a viable claim and alleged a cognizable injury. *Id.* at 290. The Court noted that the injury to the plaintiff-parents was not physical harm (as there was none), but instead it lay in "their being deprived of the opportunity to make an informed decision to terminate the pregnancy, requiring them to incur extraordinary expenses in the care and education of their child afflicted with a genetic abnormality, not manifestation of physical harm." *Id.*

More recently, in *Brzoska v. Olson*, the Delaware Supreme Court again confronted the question of whether a plaintiff may recover under tort law absent a showing of a resultant physical injury or exposure to disease. 668 A.2d 1355 (Del. 1995). The *Brzoska* plaintiffs sought recovery for their fear associated with receiving treatment from a dentist with AIDS. Plaintiffs were 38 former patients of a Wilmington dentist who died of AIDS in 1991. *Id.* at 1357. Their causes of action against the defendant—the deceased dentist's estate—were for negligence, battery, and misrepresentation. *Id.* The dentist continued to practice after disease diagnosis, and towards the end of 1990 exhibited open lesions, weakness, and memory loss. *Id.* at 1357–58.

Shortly after the dentist's death, the Delaware Division of Public Health (the "Division") evaluated the dentist's practice and records, in part to determine whether patients potentially had been placed at risk of exposure to HIV through their treatment by the dentist. *Id.* The Division determined that the practice's "equipment, sterilization procedures, and precautionary methods were better than average," and that the dentist "ceased doing surgery after being diagnosed as HIV-positive." *Id.* Although the Division determined that the risk of patient exposure was "very small," it notified all patients from 1989 until the time of death that their dentist had died from AIDS and that there was a possibility that they were exposed to HIV. *Id.* at 1358–59. None of the plaintiffs tested positive for HIV. *Id.* at 1359. Further, the

plaintiffs alleged no injuries from, and no actual exposure to, HIV or AIDS. *Id.* at 1362. Instead, the plaintiffs alleged "injuries" for mental anguish that arose solely out of their "***fear*** that they ***might have been*** exposed to HIV." *Id.* (emphasis added).

This Court recognized that the *Brzoska* plaintiffs were seeking a recovery for the alleged injury of the *fear* of contracting AIDS, as opposed to actual exposure to the human immunodeficiency virus. *Id.* In the context of a claim for battery, this Court found those plaintiffs' fear to be unreasonable as there was *no evidence of actual exposure* to HIV or AIDS—only evidence that the plaintiffs were treated by a dentist with AIDS. *Id.* at 1363. *Brzoska* recognized that without proof of actual exposure (in contrast to this case), any fear of contracting disease is *per se* unreasonable. *Id. Brzoska* reinforced the "actual exposure" test for claims based upon fear of contracting disease, meaning that fear of disease alone is insufficient to obtain relief. *Id.* at 1363–64.

Consistent with Delaware law established in *Mergenthaler* and reinforced in *Brzoska*, the facts presented in this case satisfy the "actual exposure" test because Plaintiff has alleged continuous and actual exposure to Defendant's ethylene oxide while residing near the Atlas Point facility. Under Delaware law, as recognized in *Mergenthaler* and *Brzoska*, neither of which suggest that a present manifestation of disease is necessary to establish a cognizable injury, this actual exposure, combined

with the increased risk of disease and present need to undergo medical monitoring, is a clearly defined mechanism of injury.

Plaintiff's present injuries caused by Defendant's release of, and her actual exposure to, toxic ethylene oxide are identifiable, appreciable, and cognizable, and are not speculative or mere fear or apprehension.

As alleged, ethylene oxide is a carcinogen and powerful mutagen rendering exposure unsafe at any level. Plaintiff was actually exposed to this carcinogenic, disease-causing agent, and this actual inhalation caused present, increased risk of illness and disease. Plaintiff and Class members are injured by the increased risk of developing future illness and disease and the resulting medically necessarily need to incur the cost of diagnostic testing caused by significant exposure to toxic ethylene oxide. In these circumstances, as this Court alluded to in both *Mergenthaler* and *Brzoska*, Plaintiff's pleaded injury is cognizable under Delaware law.

### 2. Delaware Courts Recognize Medical Monitoring Claims in the Workers' Compensation Context

In *McCracken v. Wilson Beverage*, the Delaware Superior Court considered an appeal from the Industrial Accident Board relating to a claim under the workers' compensation laws. 1992 WL 301985, at *1 (Del. Super. Ct. Oct. 15, 1992). The *McCracken* claimant was driving an automobile in the course of his sales job, when the vehicle he was driving ran head-on into another automobile. *Id.* The claimant executed a settlement agreement with his employer and its insurer for neck and back

injuries, but later sought additional compensation for certain unpaid medical bills through a petition to the Board. *Id.* The Board found that the unpaid medical bills concerned treatment that was part of a medical monitoring schedule imposed by the claimant's physician and not related to treatment for his already realized injuries. *Id.* Accordingly, the Board found that the treatments and accompanying monitoring schedule was not compensable. *Id.* at *2. On appeal of the Board's determination, the Delaware Superior Court held that, while relatedness of injuries was a finding of fact by the Board not to be overturned absent clear error, whether medical monitoring is compensable is a question of law. *Id.* The *McCracken* court reversed the Board's decision on the basis of this question of law, expressly holding that medical monitoring was compensable under the statute allowing claimants to recover their medical costs, and, thus, recognizing that medical monitoring is compensable injury. *Id.* at *3 (holding that "insofar as the Board decision is based on the legal premise that 'monitoring services' are not compensable under § 2322(a), it is hereby reversed" and citing 19 *Del. C.* § 2322(a)).

### 3. Medical Monitoring Is Compensable under Delaware Law Regardless of the Present Manifestation Physical Illness or Disease Pursuant to the Restatement

The Restatement Section 7 separately defines "injury," "harm," and "physical harm" as follows.

> (1) The word "injury" is used throughout the Restatement of this Subject to denote the invasion of any legally protected interest of another.
>
> (2) The word "harm" is used throughout the Restatement of this Subject to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause.
>
> (3) The words "physical harm" are used throughout the Restatement of this Subject to denote the physical impairment of the human body, or of land or chattels.

Restatement (Second) of Torts § 7 (1965). Delaware generally follows the Restatement, and recognizes that a cognizable injury occurs when there has been an invasion of any legally protected interest and does not require physical manifestation of disease or injury. *BTIG, LLC v. Palantir Techs., Inc.*, 2020 WL 95660, at *4, n.51 (Del. Super. Ct. Jan. 3, 2020) (citing with approval Section 7 and noting that it defines "injury" as "the invasion of any legally protected interest of another"); *see also Dambro v. Meyer*, 974 A.2d 121, 136 (Del. 2009) (injury to a plaintiff alleging a failure to diagnose her breast cancer occurred on the date of the failure to diagnose, as the failure to diagnose put the patient at "very high risk" that her cancer would advance, not on the date that the failure to diagnose manifested by the cancer metastasizing and the physical harm manifested, as the plaintiff alleged); *Brzoska*, 668 A.2d at 1360 (noting that as to claims for the tort of battery, "[p]roof of the technical invasion of the integrity of the plaintiff's person by even an entirely harmless, yet offensive, contact entitles the plaintiff to vindication of the legal right by the award of nominal damages" (citation omitted)); *Lawrence v. Shade*, 2002 WL

35638, *1 & n.2 (Del. Super. Ct. Feb. 26, 2002) (citing *Brzoska*, and holding "technically the jury did not have to find damages (other than the actual invasion)" in the context of a claim for assault and battery).

Other states that follow the Restatement have consistently applied Restatement Section 7 to find that in substantially identical factual circumstances to those presented here, plaintiffs have pleaded a cognizable injury. The Nevada Supreme Court, in overruling prior decisions that required a manifestation of disease or physical harm to state a "cognizable injury," found that "injury" is not limited to physical harm. *Sadler v. PacifiCare of Nev.*, 340 P.3d 1264, 1270–71 (Nev. 2014). The court held that a plaintiff may state a cause of action for negligence with medical monitoring as a remedy without asserting that he or she has suffered a present physical injury, reasoning this was the proper result as a plaintiff requiring ongoing medical monitoring has suffered from the invasion of his or her "legally protected interest in avoiding expensive diagnostic examinations," which was accompanied by the injury of "increased risk in contracting latent disease and need to undergo medical testing . . . ." *Id.* at 1271. In rejecting a requirement for proof of present physical injury, it reasoned that "the Restatement separately defines 'physical harm,' indicating that physical harm is not necessarily implicated by the term 'injury.'" *Id.* at 1270–71.

In *Bower v. Westinghouse Elec. Corp.*, the Supreme Court of Appeals of West Virginia, applying Section 7, likewise rejected an argument by the defendant there that a plaintiff needed to prove present physical injury in a toxic exposure case. 522 S.E.2d 424, 430 (W. Va. 1999). It explained "[t]he 'injury' that underlies a claim for medical monitoring . . . is 'the invasion of any legally protected interest'" *Id.* (quoting Restatement (Second) of Torts § 7(1) (1964)).

In *Exxon Mobil Corp. v. Albright*, the Maryland Court of Appeals overruled a prior decision that held that manifested physical injury is required to establish a cognizable injury, holding "as have the majority of our sister jurisdictions, that evidence of physical injury is not required to support costs for medical surveillance" and that "[w]e agree now with other jurisdictions that recognize that 'exposure itself and the concomitant need for medical testing' is the compensable injury for which recovery of damages for medical monitoring is permitted . . . because such exposure constitutes an 'invasion of a legally protected interest.'" 71 A.3d 30, 75–76, 80 (Md. 2013); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 822–24 (Cal. 1993) (analyzing the Restatement Section 7(1) and approving recovery for medical monitoring damages without present physical injury); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976–77 (Utah 1993) (noting that Restatement (Section 7 is consistent with its ruling that a physical injury resulting from exposure to toxic

substances may not appear for years and the exposure itself, along with the need for medical testing, constitute the injury).

Federal decisions have likewise recognized that the Restatement Section 7 stands for the proposition that with regard to claims relating to toxic exposure, physical manifestation of disease is not required. In *Friends for All Children v. Lockheed Aircraft Corp.*, the United States Court of Appeals for the District of Columbia Circuit relied on the Restatement Section 7(1) in holding that a person has suffered a cognizable injury when he or she must undergo diagnostic examinations as a result of a defendant's negligence. 746 F.2d 816, 825–26 (D.C. Cir. 1984). The court demonstrated the tort principle supporting recovery with a compelling hypothetical:

> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force . . . Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.

*Id.* at 825. It concluded:

> [I]t is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action . . . . The motorbike rider, through his negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services—a cost that is neither inconsequential nor of a kind the community generally accepts as part of the wear and tear of daily life.

*Id.*

Further, without specifically referring to the Restatement, courts in many other states have recognized as cognizable claims for, or damages resulting from, the need for medical monitoring caused by a defendant's negligence without the physical manifestation of disease or physical injury—including courts in Arizona, Colorado, Connecticut, Florida, Illinois, Indiana, Ohio, Pennsylvania, Massachusetts, Missouri, Montana, Nevada, New Jersey, New York, and Vermont. *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Az. App. 1987) (holding that despite the absence of physical manifestation of disease, plaintiffs should be entitled to medical testing and evaluation as is reasonably necessary . . . in the diagnosis and treatment of these types of injuries); *Bell v. 3M Company*, 344 F. Supp. 3d 1207, 1224 (D. Colo. 2018) (holding that Colorado Supreme Court would likely recognize a claim for medical monitoring absent present physical injury); *Dougan v. Sikorsky Aircraft Corp.*, 251 A.3d 583, 593–94 (Conn. 2020) (assuming without deciding that Connecticut recognized a claim for subclinical [undetectable] cellular injury which increased risk of asbestos related diseases but finding plaintiffs failed to meet the standard of a medical monitoring claim as proposed based on elements of Massachusetts law recognizing medical monitoring); *Petito v. A.H. Robins Co. Inc.*, 750 So. 2d 103, 106–07 (Fla. Dist. Ct. App. 1999) (allowing a cause of action for medical monitoring absent physical injury when the specified elements are met); *Leib v. Rex Energy Operating Corp.*, 2008 WL 5377792, at **12–13 (S.D. Ill. Dec.

19, 2008) (noting several federal courts have predicted that Illinois law allowed for recovery for medical monitoring without a manifested physical injury); *Allgood v. Gen. Motors Corp.*, 2005 WL 2218371, at *1 (S.D. Ind. Sept. 12, 2005) (finding Indiana likely recognized claims for medical monitoring relief absent physical injury); *Donovan v. Phillip Morris USA, Inc.*, 914 N.E.2d 891, 901 (Mass. 2009) (finding where competent medical testimony establishes that monitoring is needed to detect the potential onset of serious illness or disease, the elements of injury and damage have been satisfied and establish a cause of action); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717–18 (Mo. 2007) (recognizing claims for medical monitoring absent a present physical injury under tor theories of recovery); *Lamping v. American Home Products, Inc.*, 2000 WL 3575402 (D. Mont. Feb. 2, 2000) (concluding Montana would recognize an independent cause of action for medical monitoring under the specific facts of the case, which involved the statistically high risk of developing disease from the use of particular drugs); *Sadler*, 340 P.3d at 1270–72 (recognizing an injury for increased costs of medical care and also for increased risk of disease and allowing medical monitoring as a remedy for negligence without a showing of present physical injury); *Ayers*, 461 A.2d at 190 (holding that necessary medical surveillance to properly diagnose the warning signs of disease was cognizable injury); *Baker v. St.-Gobain Performance Plastics Corp.*, 232 F. Supp. 3d 233, 252 (N.D.N.Y. 2017), *aff'd in part*, 959 F.3d 70 (2d Cir. 2020)

(noting the "absurdity" of "requiring plaintiffs to manifest physical symptoms before receiving medical monitoring would defeat the purpose of that remedy. The entire point of medical monitoring is to provide testing that would detect a patient's disease *before* she manifests an obvious symptomatic illness, thus allowing earlier treatment that carries a better chance of success." (emphasis in original)); *Elmer v. S.H. Bell Co.*, 127 F. Supp. 3d 812, 825 (N.D. Ohio 2015) ("[M]edical monitoring . . . is a form of damages for an underlying tort claim . . . [a] plaintiff is not required to demonstrate physical injuries in order to obtain medical monitoring relief, but must 'show by expert medical testimony [an] increased risk of disease which would warrant a reasonable physician to order monitoring.'"); *Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def. of the United States*, 696 A.2d 137, 145 (Pa. 1997) (recognizing the non-speculative need for medical monitoring as a cognizable injury without the need for manifestation of disease); *Sullivan v. Saint-Gobain Performance Plastics Corp.*, 431 F. Supp. 3d 448, 466 (D. Vt. 2019) (predicting that Vermont would allow medical monitoring because of the presence of an objective test for exposure and the class was of a defined people within an affected area).

As in these cases that evaluated whether plaintiffs have suffered injuries despite their failure to allege a present physical injury, Plaintiff has alleged a cognizable injury. She has alleged that she requires ongoing medical monitoring to

detect latent diseases—the costs of which are "not inconsequential" and they are above and beyond what the community "generally accepts as part of the wear and tear of daily life." *Friends*, 46 F.2d at 825. Plaintiff's injury was caused by Defendant's toxic emissions of ethylene oxide and her actual exposure to those emissions. Plaintiff has therefore alleged a cognizable injury.

### 4. Public Policy Supports Plaintiff's Assertions

Delaware residents are highly concerned about the risks they are facing given their exposure to ethylene oxide at the hands of Defendant.[37] Ensuring that the residents of Delaware have a remedy for this exposure would comport with existing Delaware public policy. In each of Delaware's border states, courts have recognized the important public policy concerns requiring recognition of a cognizable injury where a defendant's negligence has resulted in an increased risk of disease necessitating ongoing medical surveillance.[38] The Pennsylvania Supreme Court in

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[37] *See* A0233–35, *Notice of Public Meeting*, Delaware Department of Natural Resources (Mar. 13, 2022), dnrec.alpha.delaware.gov/public-notices/notice-of-public-meeting/ (last visited Dec. 14, 2022); A0236–39, Sophia Schmidt, *Troubled Croda chemical plant to restart amid community outcry*, Del. Pub. Media (Mar. 4, 2021), https://www.delawarepublic.org/science-health-tech/2021-03-04/troubled-croda-chemical-plant-to-restart-amid-community-outcry (last visited Dec. 14, 2022).

[38] *Redland*, 696 A.2d at 142–45; *Ayers*, 525 A.2d at 311; *Exxon Mobil*, 71 A.3d at 76, 79. Accordingly, if this Court were to hold that under Delaware law Plaintiff has not suffered a cognizable injury, it would create a situation where, for example, New Jersey, Maryland, or Pennsylvania residents, such as those new Jersey residents on the other side of the Delaware Memorial Bridge from Defendant's Atlas Point

*Redland Soccer Club* discussed the "important reasons" to recognize medical monitoring:

> [M]edical surveillance damages promote early diagnosis and treatment of disease or illness resulting from exposure to toxic substances caused by a tortfeasor's negligence…[it] avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence [and allows access to] potentially life-saving treatment.

*Redland Soccer Club*, 696 A.2d at 145 (internal citations omitted) (citing *Hansen*, 858 P.2d at 976–77).

In New Jersey, the Supreme Court reasoned that a tortfeasor should bear the costs of early detection of latent disease as a matter of public policy. *Ayers*, 525 A.2d at 311. It held:

> Although some individuals exposed to hazardous chemicals may seek regular medical surveillance whether or not the cost is reimbursed, the lack of reimbursement will undoubtedly deter others from doing so. An application of tort law that allows post-injury, pre-symptom recovery in toxic tort litigation for reasonable medical surveillance costs is manifestly consistent with the public interest in early detection and treatment of disease.

*Id.* at 311–12. Maryland also allows recovery of medical monitoring damages from exposure to toxic substances, resulting from tortious conduct, where plaintiffs have not developed any sign of the disease, citing the "important public health interest in

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facilities, who are harmed by a Delaware defendant's toxic emissions potentially would be able to recover for the costs of medical monitoring, while Delaware residents, likely in most cases, the most affected, would not be protected from Defendant's misfeasance.

fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease." *Exxon Mobil Corp.*, 71 A.3d at 75 (citing *Ayers*, 525 A.2d at 311–12).

As discussed in detail *supra*, Plaintiff's claims in this case concern her actual and documented exposure to ethylene oxide that was sustained by her and a well-defined and limited class of persons, who reside or resided in the communities surrounding Defendant's Atlas Point facilities. The harms suffered by Plaintiff and those in her community—a scientifically studied fourfold increase in the risk of certain cancers and the need to pay for a medical monitoring program—are cognizable injuries that are quantifiable and not speculative. Recognition of these injuries would not open a parade of horribles, allowing a multitude of claims for exposure to chemically processed foods, toxic fumes, genetically modified fruits and vegetables, mercury-laden fish, and hormonally treated chicken and beef, because without a demonstrated and scientifically provable objective increased risk of harm and demonstration and proof of necessary medical monitoring and diagnostic testing, necessitated by a defendant's negligence, it would remain the law in Delaware that such claims are not cognizable.

In *United States v. Anderson*, 669 A.2d 73, 74 (Del. 1995), a case decided two months after *Brzoska*, this Court directed these important public policy considerations head-on. In evaluating whether an increased risk of recurrence of an

injury or loss of chance is one for which a plaintiff may seek a remedy, the Court observed that "[i]f the injury is the increased risk or lost chance . . . it makes little sense to force plaintiffs to wait for the unfavorable result." *Id.* at 76. The Court further held that:

> Increased risk can be viewed . . . as merely one element of damages when negligence has caused harm.
>
> * * *
>
> Compensating a tort victim for an increase in risk which results from some harm caused by a tortfeasor fits comfortably within traditional damage calculation methods . . . Plaintiff's life expectancy has been shortened because he has a higher risk of death from testicular cancer. Accordingly, he should be compensated.

*Id.* at 78 (internal citations omitted). *Anderson* found that a plaintiff should be compensated for a future increased risk of harm caused by a tortfeasor's conduct; we posit that this Court should find the same for a toxic tort victim where the exposure and causal relationship of the harm has been established.[39]

[39] A single sentence in *Anderson* discusses Connecticut law and observes that Connecticut's approach to medical monitoring "prohibits plaintiffs from claiming that exposure to toxic substances, for instance, has created an increased risk of harm not yet manifested in a physical disease." *Anderson*, 669 A.2d at 77. While this observation is certainly not controlling, the Court noted that Connecticut's then-approach eliminated the risk that a plaintiff could bring a claim for "speculative" harm. *Id.* Not only is this observation stale, given that Connecticut has implicitly rejected a requirement that there be a manifestation of disease to assert a claim for medical monitoring, but these concerns are otherwise addressed by the necessary proof needed to establish a claim for medical monitoring, including, as is the standard in Delaware's neighboring states, that a plaintiff must prove plaintiff has

an increased risk of contracting a latent disease. *Redland*, 696 A.2d at 145; *Exxon Mobil*, 71 A.3d at 79; *Ayers*, 525 A.2d at 308; *see also Doe v. City of Stamford*, 699 A.2d 52, 55 (Conn. 1997); *Dougan*, 251 A.3d at 593–94 (Conn. 2020).

## II. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court answer the Certified Questions in the affirmative, and affirm that Delaware law recognizes that where there has been an actual exposure to a toxic substance, and as a result, a plaintiff suffers from a present increased risk of disease and the present need to incur the cost of medical monitoring or surveillance, a cognizable injury has occurred, regardless of whether physical illness or disease has manifested.

Respectfully submitted,

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