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IN THE CIRCUIT COURT FOR BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE,	*	
	*	
Plaintiffs,	*	
v.		CASE NO: 24-C-22-004904
	*	
PHILIP MORRIS USA INC. ET AL.,	*	
	*	
Defendants.	*	

* * * * * * * * * * * * *

MEMORANDUM OF LAW IN OPPOSITION TO CERTAIN DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

Defendants' arguments for dismissal all attack potential future hypothetical cases and an imagined caricature of the City's Complaint. The City does not seek to nullify or modify any permit issued under state or federal law; nor to affect any tobacco product regulation or law; and it certainly does not, contrary to Defendants' arguments, seek to challenge regulations concerning tobacco product manufacturing and marketing standards. This case is about holding the Defendant cigarette manufacturers and distributors accountable for their products – products which they knew to be toxic and nonbiodegradable, and knew would be universally littered throughout the City. Defendants' tortious conduct has resulted in millions of cigarette filters littered on City streets, sidewalks, beaches, parks and lawns, all leeching harmful pollutants into the water and soil. Cigarette filter litter threatens the environment and costs the City millions of dollars to clean up. The City accordingly seeks to hold Defendants liable on well-established state tort law theories for the local injuries they have caused.

Part I of this brief shows that the City's claims are preempted by neither state nor federal law; **Part II**, that the City's littering claims are actionable; **Part III**, that the Defendants' general arguments applicable to all tort claims (based on the Master Settlement Agreement, the statute of limitations, and proximate cause) lack merit; and **Part IV**, that Defendants' challenges to individual tort claims lack merit.

STATEMENT OF FACTS

Cigarette filters are the most common form of litter in the world, as an estimated 4.5 trillion cigarette filters are thrown away every year worldwide. Compl. ¶ 1.[1] Cigarette filters litter streets, sidewalks, beaches, parks, and lawns. *Id.* Not only is cigarette litter an unsightly nuisance, but it

[1] Unless otherwise noted, all paragraph symbols (¶) in this Section refer to paragraphs so numbered in the City's Complaint ("Compl.").

is also dangerous to flora, fauna, land, and waterways as cigarettes contain approximately 600 chemical additives. *Id.* When cigarette filters are littered, those filters leach harmful pollutants into the soil and water. *Id.* ¶ 3. These pollutants, which include toxic heavy metals and nicotine, along with other compounds such as hydrogen cyanide, ammonia, formaldehyde, and benzene, contaminate the soil and groundwater, hamper plant growth, pollute waterways, deteriorate critical aquatic habitats, and are acutely toxic to fish. *Id.*

Contrary to popular belief that cigarette filters are made of cotton and are biodegradable, most cigarette filters are actually made of a nonbiodegradable material called cellulose acetate. *Id.* ¶ 2. While cellulose acetate is photodegradable, it is not biodegradable. *Id.* Ultraviolet rays from the sun will eventually break the filter into smaller pieces, but the source material never disappears; it essentially becomes diluted in water and soil. *Id.* Even in its broken-down form, it remains toxic to plants and animals. *Id.*

This toxic cigarette litter is an epidemic in the City. For example, since the inception of Mr. Trash Wheel and the Trash Wheel Family in Baltimore Harbor beginning in May 2014, 13,036,008 cigarette filters have been recovered from Baltimore's waterways alone.[2] Of the litter collected and accounted for by the trash wheel program, cigarette filters are by far the largest number of individual items collected.[3] Cigarette filter litter in Baltimore is a public nuisance that threatens the environment and costs Baltimore City millions of dollars in cleanup. *Id.* ¶ 6. For example, Baltimore City and its stakeholders spend over $32 million to collect upwards of 2,600 tons of litter annually, at an estimated cost of $10,571 per ton of litter generated, a significant portion of which is cigarette filter litter. *Id.* ¶ 5.

[2] Mr. Trash Wheel: Trash Interception. https://www.mrtrashwheel.com/trash-interception. (last visited May 9, 2024).

[3] *Id.*

Defendants in this action consist of the major national cigarette manufacturers and one local Baltimore-based cigarette distributor. Defendants, collectively, manufacture, distribute, and sell virtually all the cigarettes purchased in the United States, including in Baltimore City. *Id.* ¶ 9. The Defendant cigarette manufacturers, who designed the cigarette, the filter, and control the cigarettes and filters' ingredients, manufactured, sold, and profited from the cigarettes, knew of the near universal incidence of their customers' cigarette filter disposal conduct, and did nothing to mitigate the impact of the residue of their product. *Id.* ¶ 6. They contract with cigarette distributors, such as Defendant Falter in Baltimore City, and distribute cigarettes to the city's population of smokers. *Id.* As such, they must bear the responsibility for cleaning up the products they created that both befoul and contaminate Baltimore City's property. *Id.*

Defendants actively chose, and continue to choose, to make cigarette filters nonbiodegradable, despite their awareness of the long-lasting negative impact the components of these filters have on the environment and the rate at which their consumers litter these filters. *Id.* ¶¶ 30-31. Defendants intentionally continue to manufacture environmentally damaging filters and have not established other mitigation of that nuisance. *Id.* Defendants have available to them, and have considered, methods that would make biodegradable filters that would not release harmful chemicals into the environment, but ultimately, they discarded the idea in favor of the enhanced "draw" of the plastic filters preferred by smokers, and the resulting increased profits. *Id.*

Further, Defendants took advantage of the fact that their nonbiodegradable filters appear to be comprised of a paper substance, instead of plastic. *Id.* ¶¶33-35. Acting upon this appearance, consumers continue to operate under the impression that cigarette filters are safe to throw onto the ground because they will naturally decompose. *Id.* Defendants, aware of this public perception and the resulting littering, failed to educate the public about the danger discarded cigarette filters pose

to the environment and misrepresented the environmental toxicity of the filters to the Baltimore City residents. *Id.* Defendants had the ability to remove or redesign their cigarette filters which release toxic chemicals into the environment and to warn the public of the harm, but intentionally chose not to do so in favor or profits over the environment. *Id.* As a result, the City spends millions of dollars on clean-up each year. *Id.* ¶¶40-49.

The City's claims arise from injuries to the City, its environment and infrastructure, all sustained within the City's borders. *Id.* Thus, the City brought suit in this Court, the Baltimore City Circuit Court. The City asserts claims exclusively under Maryland law, including Maryland statutory law, common law, and Baltimore City Code. Specifically, the City's Complaint asserts eleven causes of action, all founded in Maryland law: violations of the Maryland Illegal Dumping and Litter Control Act (Count I); violations of Baltimore City's nuisance ordinance (Count II); violations of Baltimore City's illegal dumping ordinances (Counts III and IV); violations of Baltimore City's littering ordinance (Count V); trespass (Count VI); strict liability for design defect (Count VII); negligent design defect (Count VIII); public nuisance (Count IX); strict liability for failure to warn (Count X); and negligent failure to warn (Count XI). *Id.* ¶¶ 50-169. Pursuant to these claims, the City seeks damages, fines, and costs of abatement—i.e., the costs of mitigation measures within its geographic boundaries—for harms caused by Defendants' conduct. Compl. ¶171.

Defendants removed the case from this Court to federal court, and the City successfully moved to remand. *Mayor & City Council of Baltimore v. Philip Morris USA, Inc. et al.*, No. 1:23-cv-00303-JRR, 2024 U.S. Dist. LEXIS 10488 * (D. Md. January 19, 2024).

LEGAL STANDARD

In reviewing a motion to dismiss for failure to state a claim, the Court "must assume the truth of all relevant and material facts that are well pleaded and all inferences which can reasonably be drawn from those pleadings." *Wheeling v. Selene Fin. LP*, 473 Md. 356, 374 (2021) (cleaned up); *see also Nationstar Mortg. LLC v. Kemp*, 476 Md. 149, 169 (2021). The Court must view the well-pleaded facts and allegations "in a light most favorable to the non-moving party." *Wireless One, Inc. v. Mayor & City Council of Baltimore*, 465 Md. 588, 604 (2019) (cleaned up). "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 614 (2011).

Maryland's pleading requirements serve multiple purposes, including "provid[ing] notice to the parties as to the nature of the claim or defense"; among those purposes, "notice is paramount." *Scott v. Jenkins*, 345 Md. 21, 27-28 (1997); *Tshiani v. Tshiani*, 436 Md. 255, 270 (2013) ("The primary purpose behind our pleading standards is notice.""). Thus, "[i]n determining whether a plaintiff has alleged claims upon which relief can be granted, there is a big difference between that which is necessary to prove the elements, and that which is necessary to merely allege them." *Wheeling*, 473 Md. at 374 (citing *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 121 (2007)).

ARGUMENT

I. The City's Claims Are Not Preempted by State or Federal Law

Defendants first argue that the City's claims are preempted by state and federal law, contending that this case asks the Court to "mandate changes to cigarette design, marketing authorization requirements, and labeling." Mem. of Law in Support of Certain Def.'s Joint Motion to Dismiss for Failure to State a Claim ("Motion"), at 1. But the Maryland Federal District Court

has already rejected this very argument, when it remanded the case back to this Court, recognizing that Plaintiff's claims *do not* seek any change to cigarette labeling, marketing, or design:

> Plaintiff's claims do not seek to challenge, modify, or object to tobacco product standards regarding labeling, design, or marketing. Rather, Plaintiff claims challenge the product itself — namely the cigarette filters. Nothing in the text of the APA or TCA indicates congressional intent that the APA and/or TCA exclusively governs emissions- and environment-based claims arising out of a tobacco product.

Mayor and City Council of Baltimore v. Philip Morris USA, Inc. et al., No. 1:23-cv-00303-JRR, 2024 U.S. Dist. LEXIS 10488, *22 (D. Md. January 19, 2024).

The District Court's holding on this issue is consistent with precedent from across the country. "Numerous [other] courts have [likewise] rejected similar attempts by [] companies to reframe complaints alleging those companies knew about the dangers of their products and failed to warn the public or misled the public about those dangers." *City & Cnty. Of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1201 (Haw. 2023) (affirming denial of motions to dismiss for failure to state a claim and lack of personal jurisdiction).[4] This Court should do so as well. If the City prevails on the merits of its claims in this case, Defendants will not be subject to new and different tobacco product standards regarding labeling, design, or marketing, because this case does not and could not regulate the industry.

[4] *See, e.g., City & Cnty. of Honolulu v. Sunoco LP*, 39 F 4th 1401, 1113 (9th Cir, 2022) ("This case is about whether oil and gas companies misled the public about dangers from fossil fuels. It is not about companies that acted under federal officers, conducted activities on federal enclaves, or operated on the [outer continental shelf]."), *cert. denied*, 143 S. Ct. 1795 (2023); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1264 (10th Cir. 2022) ("The Municipalities' claims do not concern CAA emissions standards or limitations, government orders regarding those standards or limitations, or federal air pollution permits. Indeed, their suit is not brought against emitters."), *cert. denied*, 143 S. Ct. 1795 (2023); *Minnesota v. Am. Petroleum Inst.*, 2021 WL 1215656, at *13 (D. Minn. Mar. 31, 2021) ("[T]he State's action here is far more modest than the caricature Defendants present. States have both the clear authority and primary competence to adjudicate alleged violations of state common law and consumer protection statutes, and a complex injury does not a federal action make."), *aff'd sub nom. Minnesota by Ellison v. Am. Petroleum Inst.*, 63 F.4th 703 (8th Cir. 2023), *cert. petition filed*, No. 23-168 (U.S. Aug 22, 2023); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) ("Contrary to ExxonMobil's caricature of the complaint, the Commonwealth's allegations do not require any forays into foreign relations or national energy policy. It alleges only corporate fraud.").

a. The City's Claims Are Not Preempted by State Law

There are three types of preemption recognized under Maryland law: *express* preemption (i.e., a statute includes specific language prohibiting a particular local action), *conflict* preemption (which can apply in narrow circumstances to bar local action that would conflict with the aim of the state statute), and *implied* preemption (applicable when the Legislature has acted with such force as to support the implication that it intended to occupy the entire field so extensively that it precludes any local action). *Montgomery Cty. v. Complete Lawn Care, Inc.*, 240 Md. App. 664, 685-92 (2019). Defendants have limited their argument to the doctrine of implied preemption.

To prevail on this implied preemption argument, Defendants must demonstrate that the Legislature has so comprehensively regulated every consequence of the sale of cigarettes as to indicate an intent to prevent localities from filing suit to hold companies in this industry accountable for harm done by these products to the environment and municipal finances. *See, e.g.*, *Fogle v. H & G Restaurant*, 337 Md. 441, 463-64 (1995). Yet Defendants can point to nothing of the sort.

Defendants cite only two decisions, both involving state regulation of the *retail sale* of cigarettes. The first, *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279 (1993), addressed the Legislature's comprehensive regulation of cigarette vending machines, which included a provision immunizing vending machine operators from liability for sales to minors provided they included a label on the machine warning that sales to minors are illegal. *Id*. at 288-93. The question the Court confronted was whether localities could, nonetheless, add a requirement that such vending machines could only be placed in areas inaccessible to minors (such as bars or liquor stores). *Id*. at 282-86. Unsurprisingly, the Court held that "the state has pre-empted the field of regulation of the sale of cigarettes through vending machines," *id*. at 301, observing that to uphold the

ordinances at issue "would be tantamount to a ban on cigarette vending machines in locations in which the State has granted the vendors a license to operate those vending machines." *Id*. at 303.

The second decision, *Altadis U.S.A., Inc. v. Prince George's County*, 341 Md. 307 (2013), likewise found implied preemption in the field of the *retail sale* of tobacco, where county ordinances banned the sale of single cigars by generally requiring cigars to be sold in packs of five or more. *Id*. at 309-10. Applying the holding in *Allied Vending*, the Court held that these ordinances were impliedly preempted, *id*. at 313-19, focusing in particular on a statute that "expressly authorizes a sale or distribution to a consumer of up to 20 or more single cigars." *Id*. at 318.

Based on *Allied Vending* and *Altadis*, Defendants assert that "[f]or the same reasons, state law preempts the City's claims here." Motion at 7. But their argument is bereft of reasoning. The Court in *Allied Vending* made clear that the relevant "field" that it held had been occupied by the Legislature, impliedly preempting local action in that field, was the field of *the retail sale of cigarettes*. The City's lawsuit in no sense intrudes on that field. Defendants are free to sell whatever cigarettes they wish to sell, in any retail location authorized by law. The City merely seeks, through this lawsuit, to hold Defendants responsible for the environmental consequences and the drain on the City's finances caused by the materials that happen to be used in their filters and the typical and foreseeable handling of their products by their customers.

Any suggestion that the "field" of tobacco regulation can be defined as broadly as Defendants urge, to mean that *any* local regulation dealing with *any* consequence of the sale of tobacco products is preempted, is contradicted by the Court's decision two years after *Allied Vending*, in *Fogle*. There, the Court held that the fact that the Legislature had "enacted many statutes regulating the use of tobacco products in the workplace," but had declined to institute a flat ban on smoking in offices, did not mean that the Legislature had so dominated the entire field

as to trigger implied preemption. 337 Md. at 463-64. It therefore upheld a regulatory ban on smoking in enclosed workspaces, concluding that the Legislature "has not regulated smoking in so all-encompassing a fashion as to suggest that it meant to reserve to itself for direct legislative action all regulation of smoking." *Id*. at 464. *See also Holiday Point Marina Partners v. Anne Arundel County*, 349 Md. 190, 212-14 (1998) (upholding zoning ordinance regulating the length of piers, despite its *purpose* to protect shellfish, as involving a field distinct from the regulation of shellfish per se).

In contrast to *Fogle*, in which opponents of the smoking ban could point to at least *some* legislative action in the field of workplace smoking, here Defendants have pointed to *no* action by the Legislature in the field of environmental damage caused by tobacco products. The argument against implied preemption is particularly strong here, given the well-recognized authority, indeed duty, of municipalities to act to protect the environment in which their citizens live. The Baltimore City Charter (adopted pursuant to Md. Const., art. IX-A),[5] grants the Mayor and City Council "full power and authority" to "provide for the preservation of the health of all persons within the City . . . and to prevent and remove nuisances." Art. II, § 11(a). *See also* Art. II, § 10 (granting "full power and authority" to, *inter alia*, "prevent any material, refuse or matter of any kind from being . . . deposited in or placed where the same may fall, or be washed, into [the Patapsco] river or tributaries[.]"

Any suggestion that the City's authority to ameliorate the environmental effects of cigarettes is somehow displaced by the authority of the State is negated by Art. II, § 27, which grants the City the right "[t]o have and exercise within the limits of Baltimore City all the power

[5] Available online at: https://legislativereference.baltimorecity.gov/sites/default/files/01%20%20Charter%20(rev%2008DEC22).pdf (last visited May 9, 2024).

commonly known as the Police Power to the same extent as the State has or could exercise that power within the limits of Baltimore City . . . .” That these powers can be exercised by filing a lawsuit is clear from Art. I, §, providing the “Mayor and City Council of Baltimore” with the right “to sue and be sued.”

Apart from ignoring the holding of *Fogle*—that even substantial regulation by the Legislature of a particular field relating to tobacco is not enough to trigger implied preemption if the Legislature stops short of occupying the *entire* field—Defendants have ignored many other appellate decisions declining to find implied preemption despite substantial legislative activity in the field in question. *See, e.g., Cty. Council of Prince George's Cty. v. Chaney Enters., L.P.*, 454 Md. 514, 540-45 (2017) (local regulation of surface mining not preempted, despite substantial state regulation in the field); *Md. Reclamation Assocs. v. Harford County*, 414 Md. 1, 36-44 (2010) (local regulation of rubble landfills not preempted, despite substantial state regulation in the field); *Ad + Soil, Inc. v. County Comm'rs*, 307 Md. 307, 324-38 (1986) (local regulation of sewage sludge facility in full compliance with state permits not preempted, despite substantial state regulation in the field); *Baltimore v. Sitnick*, 254 Md. 303, 322-25 (1969) (local imposition of minimum wage for tavern workers not preempted, despite Legislature's minimum wage law exempting taverns); *Complete Lawn Care*, *supra*, 240 Md. App. at 692-706 (local regulation of pesticide use not preempted, despite substantial state regulation in the field); *County Comm'rs v. Soaring Vista Props.*, 121 Md. App. 140, 148-68 (1998) (local regulation of sewage sludge storage facilities not preempted, despite substantial state regulation in the field). In sum, Defendants have failed to demonstrate any basis for finding implied preemption under Maryland law.

b. The City's Claims Are Not Preempted by Federal Law

Nor is there any merit to Defendants' federal preemption argument. Defendants make three distinct arguments: (1) that the Family Smoking Prevention and Control Act of 2009 ("TCA") expressly preempts the City's claims, Motion at 8-12; (2) that the City's tort claims conflict with the TCA and the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), and thus are preempted, Motion at 12-13; and (3) as a fallback, that implied preemption under *federal* law applies. Motion at 14-15. None of these arguments have merit.

i. The TCA's Preservation and Exception Clauses Bar Any Finding of Preemption

Defendants' first argument depends entirely on what they describe as "a broad express preemption provision" contained in the TCA, set forth in 21 U.S.C. § 387p(a)(2)(A). However, Defendants are deceptively selective in their quotation of language from § 387p, as the language appearing *before* and *after* the Preemption Clause quoted by Defendants is sufficient to bar any finding of preemption of the City's claims.

The Preservation Clause reads:

> Except as provided in paragraph (2)(A), nothing in this chapter [21 USCS §§ 387 et seq.], or rules promulgated under this chapter [21 USCS §§ 387 et seq.], shall be construed to limit the authority of a Federal agency (including the Armed Forces), *a State or political subdivision of a State*, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this chapter [21 USCS §§ 387 et seq.], including a law, rule, regulation, or other measure relating to or *prohibiting the sale, distribution*, possession, *exposure to*, access to, *advertising and promotion of*, or use of tobacco products by individuals of any age . . . .

21 U.S.C. § 387p(a)(1) (emphasis added). By this provision, Congress made clear that the TCA sets a *floor* for tobacco product standards and limitations but does not limit the right of states or their subdivisions to create and enforce stricter standards.

Defendants quote only § 387p(a)(2)(A)—the Preemption Clause—which they claim effectuates sweeping preemption of any state-level activity relating to the composition of cigarette filters. But any such suggestion is negated by the Savings Clause which immediately follows, setting forth an explicit "exception":

> Subparagraph (A) does not apply to requirements relating to the *sale, distribution,* possession, information reporting to the State, exposure to, access to, *the advertising and promotion of,* or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products.[6]

21 U.S.C. § 387p(a)(2)(B) (emphasis added).[6]

Even considering the Preemption Clause considered in isolation, Defendants' claim that the City's lawsuit would somehow ban the *sale* of cigarettes with plastic filters (which is not the case), even if true, would still not run afoul of the Preemption Clause, as to ban the *sale* of a particular product does not set a "tobacco product standard" within the meaning of § 387p(a)(2)(A). *R.J. Reynolds Tobacco Co. v. City of Edina*, 60 F.4th 1170, 2023 U.S. App. LEXIS 4650, *6-*7 (8th Cir. Feb. 27, 2023); *R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles*, 29 F.4th 542, 553-55 (9th Cir. 2022).

This conclusion is further buttressed once one considers the *combined* impact of the Preemption Clause appearing between the Preservation Clause and the Savings Clause. As the Ninth Circuit explaining in rejecting the same sweeping preemption argument advanced here by Defendants:

> [T]he TCA's text sandwiches limited production and marketing categories of preemption between clauses broadly preserving and saving local authority, including any "requirements relating to the sale" of tobacco products. This unique

[6] Defendants also omit to mention the subsequent language in § 387p, an express savings provision which ensures that the City's product liability claims (Counts VI, VIII, X and XI) cannot be preempted. It reads: "No provision of this chapter [21 U.S.C. §§ 387 et seq.] relating to a tobacco product shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State." 21 U.S.C. § 387p(b).

> "preservation sandwich" enveloping the TCA's preemption clause reveals a careful balance of power between federal authority and state, local, and tribal authority, whereby Congress has allowed the federal government to set the standards regarding how a product would be manufactured and marketed, but has left states, localities, and tribal entities the ability to restrict or opt out of that market altogether.
>
> * * *
>
> The TCA effectively *carves out* federal power from a historical body of state and local authority by setting the floor for production and marketing standards, while still preserving states and localities' broad power over regulation of the sales of those products. The County's sales ban fits comfortably within the historical authority of states, localities, and tribal entities that Congress clearly preserved in the TCA's preservation sandwich.

Id. at 555 (emphasis in original).

Numerous other courts have reached the same conclusion: that the language in the TCA selectively emphasized by Defendants here carries no broad preemptive force. *E.g.*, *R.J. Reynolds v. City of Edina*, *supra*, 2023 U.S. App. LEXIS 4650 at *7-*13; *State ex rel. Stein v. Eonsmoke, LLC*, 423 F. Supp. 3d 162, 169-70 (M.D.N.C. 2019); *U.S. Smokeless Tobacco Mfg. Co., L.L.C. v. City of N.Y.*, 2011 U.S. Dist. LEXIS 133018, *3-*8 (S.D.N.Y. Nov. 15, 2011); *U.S. Smokeless Tobacco Mfg. Co., L.L.C. v. City of N.Y.*, 703 F.Supp.2d 329, 343-46 (S.D.N.Y. 2010); *Major v. R.J. Reynolds Tobacco Co.*, 14 Cal.App.5th 1179, 1191-92 (2017); *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So.3d 590, 598-601 (Fla. 2017); *JUUL Labs, Inc.*, 2022 N.Y. Misc. LEXIS 11127, *11-*14 (Sup. Ct. N.Y. Cty. July 5, 2022).

Indeed, as previously noted, this was the holding *in this very case* before the remand from federal court. In *Mayor of Baltimore v. Philip Morris USA, Inc*., 2024 U.S. Dist. LEXIS 10488, *23-*24 (D. Md. Jan. 19, 2024), the federal district judge rejected Defendants' statutory analysis of the TCA's Preemption Clause. *Id*. at *23-*24. The decision also noted that the City's

> claims do not seek to challenge, modify, or object to tobacco product standards regarding labeling, design, or marketing. Rather, Plaintiff claims challenge the product itself—namely the cigarette filters. Nothing in the text of the APA or TCA indicates congressional intent that the APA and/or TCA exclusively governs emissions- and environment-based claims arising out of a tobacco product.

Id. at *22. If there were any remaining uncertainty about the proper resolution of Defendants' arguments based on the TCA, the fact that Defendants already argued, and lost, on these arguments would appear decisive.[7]

ii. The TCA and Labeling Act Do Not Preempt the City's Tort Claims

Defendants' argument that the City's failure-to-warn claims are preempted relies, first, on the TCA's Preemption Clause, Motion at 12, which fails for the reasons already stated.

Defendants also rely on the Labeling Act, which mandates that "[n]o requirement or prohibition based on smoking and health" shall be imposed under state law if it would require altering labels affixed to cigarette packages which conform to the Labeling Act. 15 U.S.C. § 1334(b). But Defendants have not demonstrated that this statutory provision has any connection to the City's claims. For one thing, this provision constrains only state regulation of "smoking and health," whereas the City's complaint does not address any connection between smoking and illness (or, more pointedly, death). Instead, it concerns purely the impact of cigarettes on the environment and City finances. Indeed, the Complaint specifically states that the City does not allege any human health-related damages. Compl. ¶ 38.

Further, this preemption provision in the Labeling Act only preempts state requirements impacting the *labels* on cigarette packages and does not preclude liability for failure to warn of dangers posed by cigarettes in *other* ways. For example, the Supreme Court has held that state regulation of the location and size of advertisements is permissible:

[7] Hewing to the same result earlier reached by the federal judge, following Defendants' removal of the case, would be appropriate for two reasons: it is proper to apply the doctrine of issue preclusion following a remand from federal court, *see, e.g.*, *Thacker v. City of Hyattsville*, 135 Md. App. 268, 287-88 (2000); and, at minimum as a matter of both comity and judicial efficiency, it is proper to apply the Fourth Circuit's law-of-the-case doctrine to all subsequent proceedings in the case, even after remand to the state court. *E.g., Graves v. Lioi*, 930 F.3d 307, 318 (4th Cir. 2019).

> Although Congress has taken into account the unique concerns about cigarette smoking and health in advertising, there is no indication that Congress intended to displace local community interests in general regulations of the location of billboards or large marquee advertising, or that Congress intended cigarette advertisers to be afforded special treatment in that regard. Restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not "based on smoking and health."

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551-52 (2001). Similarly, the Supreme Court has held that the FCLAA does not preempt claims based on fraud:

> New Jersey's common-law duty to avoid false statements of material fact—as applied to the cigarette companies' behavior—is not "based on smoking and health," the same must be said of New Jersey's common-law duty to warn about a product's dangers. *Each* duty transcends the relationship between the cigarette companies and cigarette smokers; *neither* duty was specifically crafted with an eye toward "smoking and health."

Cipollone v. Liggett Grp., 505 U.S. 504, 552-53 (1992).

In sum, this case is not based on smoking and health. Accordingly, the Labeling Act has no bearing on the adjudication of the City's claims.

iii. Federal Law Does Not Impliedly Preempt the City's Claims

Defendants' final argument, urging this Court to hold that there is *implied* preemption under federal law, fares no better than their argument urging implied preemption under state law.

Two points are decisive. First, the argument is premised on Defendants' constant mischaracterization of the nature of the City's lawsuit: that it supposedly "mandates the use of certain product ingredients and prohibits others, despite FDA's express approval," and thereby "clearly stands as an obstacle to federal law. Motion at 14. But as already explained, the City's lawsuit only seeks to hold Defendants accountable for the environmental damage caused by their products and the cost thereby imposed on the City's finances, under general principles of law applicable to all businesses. It does not seek to have a regulatory effect on cigarette manufacturers

in a way that might countermand federal regulation.

Second, this argument for a finding of *implied* preemption cannot succeed in light of the *express* language included by Congress in the TCA (in the Preservation Clause and the Savings Clause) and in the Labeling Act (as authoritatively construed by the Supreme Court).

II. The City Pleads Actionable Littering Claims

Contrary to Defendants' arguments, the City has not only filed its Complaint correctly under Maryland law but has also properly adhered to the procedural mandates of Maryland Code § 4-107 regarding charging documents for ordinance violations. The Complaint, which invokes the City Court's broad jurisdiction, satisfies all statutory requirements and appropriately navigates among the dual civil and criminal legal frameworks. Furthermore, this Court possesses the requisite authority to effectively manage the proceedings, including the ability to sever matters for trial and properly instruct the jury on the distinct burdens of proof. Therefore, the City's claims are procedurally proper. Finally, the City's Complaint adequately alleges that Defendants caused the disposal of litter. Therefore, the City pleads actionable littering claims.

a. The City Can Seek Penalties Through This Litigation.

It is imperative to address Defendants' reliance on cases such as *Tribble v. Reedy* and *Phair v. Zambrana*, which they argue preclude the City from seeking criminal penalties in a civil litigation context. These cases are fundamentally misplaced within the context of this lawsuit due to the nature of the plaintiffs who brought them. Specifically, the cases cited by Defendants involve private plaintiffs who lack any statutory authority to enforce criminal statutes. This is a crucial distinction from the present case, where the plaintiff is not a private entity but the City itself.

The City, unlike the plaintiffs in the aforementioned cases, is explicitly authorized, and indeed is ***mandated*** by state law, to enforce ordinances, including those imposing penalties for

littering. MD Code, Criminal Law, § 10-110. This enforcement power includes the authority to pursue criminal penalties against violators, a responsibility that falls squarely within the government's role to maintain public order and health. This statutory mandate is provided under Maryland's Illegal Dumping and Litter Control Law and further supported by local ordinances that empower the City to act against infractions impacting the community.

Maryland law clearly delineates the City's authority to enforce its ordinances through both civil and criminal penalties. See MD Code, Criminal Law, § 10-110:

> Enforcement
> (g) A law enforcement unit, officer, or official of the State or a political subdivision of the State, or an enforcement unit, officer, or official of a commission of the State, or a political subdivision of the State, shall enforce compliance with this section.

This statute explicitly states that enforcement of anti-littering provisions is to be carried out by "law enforcement unit, officer, or official of the State or a political subdivision of the State," which unambiguously includes the City of Baltimore. This statutory language not only empowers but also **obligates** municipal authorities to actively pursue those who violate local ordinances. The state legislature authorized municipalities to adopt their own litter ordinances under MD Code, Criminal Law, § 10-110 (j)(1):

> (j)(1) The legislative body of a municipal corporation may:
> (i) prohibit littering; and
> (ii) classify littering as a municipal infraction under Title 6 of the Local Government Article.

The City elected to adopt its own littering codes for which the Defendants have been charged for violating in Counts III, IV, and V of its Complaint. The City is authorized to pursue violations pursuant to §7-606, §7-607, §7-608 and §7-609 of its City Code. Those code provisions are as follows:

> § 7-606. In general. PART II. PROHIBITED ACTIVITIES No person may dispose of any waste or other material except: (1) in a receptacle and at a location approved by law

for waste disposal; (2) at a licensed landfill; or (3) at any other disposal site authorized by law to receive waste. (City Code, 1976/83, art. 11, §§135(c), 220, 222(a), 264(c), art. 23, §13.) (Ord. 99-548; Ord. 08-044.)

§ 7-607. Disposing of offensive materials. (a) In general. No person may dispose of or permit to discharge or flow onto any public or private property, with or without the owner's permission, any liquid or solid matter that is or that, after exposure to the atmosphere or otherwise, is likely to become offensive or otherwise a nuisance. (City Code, 1976/83, art. 11, §119, inter alia.) (Ord. 99-548; Ord. 08-044.)

§ 7-608. Dumping on public property. No person may dump or dispose of any garbage, waste, wire, glass, nails, or any other matter: (1) in or on any gutter, sidewalk, street, open space, wharf, or other public place; or (2) except for litter, as defined in Subtitle 7 of this title, into any public trash receptacle located on or along any sidewalk, street, open space, wharf, or other public place. (City Code, 1976/83, art. 19, §§167, 172.) (Ord. 99-548; Ord. 08-044; Ord. 12-065.)

§ 7-609. Dumping on private property. No person may dump or otherwise dispose of any earth, dirt, sand, ashes, gravel, rocks, garbage, waste, or any other matter on any private property, including in or near any waste receptacle on the property, without the permission of the property owner or the owner's agent. (City Code, 1976/83, art. 11, §§135, 160(1st cl.).) (Ord. 99-548; Ord. 08-044; Ord. 11-478.)

Violations of this section are subject to civil and criminal penalties and remedies, nonexclusive of the other provisions:

§ 7-628. Liability for costs and expenses. Any person who, in violation of § 7-608 {"Dumping on public property"} of this subtitle or in violation of any other provision of law, dumps or otherwise disposes of matter in or on property owned, leased, or controlled by the City is liable to the City for the costs of: (1) removing the matter dumped or disposed of; and 04/05/22-120HEALTH HE § 7-631 (2) repairing any damage caused by the dumping or disposal. (Ord. 11-478; Ord. 12-065.)

§§ 7-629 to 7-630. {Reserved} § 7-631. Enforcement by Environmental or Civil Citation. (a) In general. In addition to any other civil or criminal remedy or enforcement procedure, this subtitle may be enforced by issuance of: (1) an environmental citation under City Code Article 1, Subtitle 40 {"Environmental Control Board"}; or (2) a civil citation under City Code Article 1, Subtitle 41 {"Civil Citations"}. (b) Process not exclusive. The issuance of a citation to enforce this subtitle does not preclude pursuing any other civil or criminal remedy or enforcement action authorized by law. (Ord. 99-548; Ord. 03-595; Ord. 08-044; Ord. 09-202.) § 7-632. Criminal penalties. (a) Basic penalty: $1,000 and 90 days. Except as specified in subsection (b) of this section, any person who violates any provision of this subtitle or who authorizes any employee or agent to violate any provision of this subtitle is guilty of a misdemeanor and, on conviction, is subject to any one or more of the following for each offense: (1) a fine of not more than $1,000; and (2) imprisonment for not more than 90 days. (b) Enhanced penalty: $1,000 and 12 months. If the violation entails the

> disposal, in any 24-hour period, of material that weighs 25 or more pounds or material that comprises 10 or more cubic feet, the penalty for a violation of this subtitle is any one or more of the following for each offense: (1) a fine of not more than $1,000; (2) imprisonment for not more than 12 months; and (3) revocation of the privilege of seeking a building permit in the City. (City Code, 1976/83, art. 11, §136(1st sen.), art. 19, §176.) (Ord. 99-548; Ord. 08-044; Ord. 09-202; Ord. 11-478.)

This procedure is confirmed by Baltimore City Codes §40-13 and §41-2 which provide that the issuance and enforcement of a civil citation under this subtitle does not preclude pursuit of any other remedy or enforcement action authorized by law. (Ord. 03-595., City Code, 1976/83, art. 1, §307.) (Ord. 98-326).

Regarding violation of §7-702 of the Baltimore City Code, the City also allows criminal and civil penalties in this action:

> § 7-705. Enforcement by citation. (a) In general. In addition to any other civil or criminal remedy or enforcement procedure, this subtitle may be enforced by issuance of: (1) an environmental citation under City Code Article 1, Subtitle 40 {"Environmental Control Board"}; or (2) a civil citation under City Code Article 1, Subtitle 41 {"Civil Citations"}. (b) Process not exclusive. The issuance of a citation to enforce this subtitle does not preclude pursuing any other civil or criminal remedy or enforcement action authorized by law. (Ord. 99-548; Ord. 03-595.)

Furthermore, the legal structure allows the City to implement these laws through its own legal mechanisms, which include the pursuit of criminal penalties in this Court. This approach is fully aligned with the dual nature of the Court's jurisdiction over both civil and criminal matters, thereby facilitating a streamlined process that serves the interests of justice and public welfare.

This Court, endowed with general jurisdiction, is fully equipped to handle the complexities of cases that encompass both civil liabilities and criminal penalties. This capability is crucial in ensuring that the City's ordinances are enforced effectively, promoting adherence to public policies aimed at maintaining health and safety standards. The jurisdiction of this Court encompasses a wide array of legal matters, allowing it to address the full scope of issues presented by the City's Complaint against Defendants.

The City's Complaint aligns with the requirements of Maryland Code § 4-107, which governs the sufficiency of charging documents for ordinance violations. *See* Md. Criminal Procedure Code Ann. § 4-107(a). According to this statute, it is unnecessary to include a copy of the ordinance or a section of the ordinance in the charging document. *Id.* A charging document is deemed sufficient if it cites the ordinance violated by date of passage or by article and section number, conforms to the laws governing the framing of charging documents for a violation of an act of the General Assembly, and concludes with the traditional proclamation against the peace, government, and dignity of the State (§ 4-107(b)), which the City has provided in great detail. The City's Complaint meticulously satisfies these criteria, ensuring that all procedural requirements are fulfilled, thereby legitimizing the charges brought under various anti-littering provisions.

This Court's capability to sever matters for trial provides a flexible legal framework that can adapt to the complexities of cases that straddle civil and criminal jurisdictions. This procedural flexibility is essential for cases like the present one, where different aspects of the law are at play. The Court's authority to instruct the jury on the respective burdens of proof further underscores its capacity to ensure that all legal standards are accurately communicated and upheld throughout the trial process.

Defendants' contention that the City lacks the authority to seek remedies set forth in the criminal law through civil litigation overlooks the unique statutory role that the City and its court system play in enforcing municipal laws. The cases cited by Defendants are not applicable here, as they involve non-governmental plaintiffs who lack statutory enforcement powers. Unlike those plaintiffs, the City is explicitly empowered by state law and its own ordinances to seek both civil and criminal remedies, a critical distinction that legitimizes its actions within this legal action.

The City has correctly initiated this action in this Court, which possesses comprehensive jurisdiction over the matters at issue. The City's Complaint adheres to the statutory requirements set forth in § 4-107 and is fully supported by this Court's procedural capabilities to handle such complex cases. Defendants' motion to dismiss based on an alleged lack of authority should be denied, as it fundamentally misinterprets the scope of the City's legal powers and the procedural safeguards provided by the court system.

Defendants' reliance on legal precedents involving private plaintiffs is inappropriate and irrelevant to the current case. The City's statutory authority to enforce littering penalties through criminal sanctions is well-established and critical to its role in maintaining public spaces free of litter. This Court, therefore, not only has the jurisdiction to hear this case but is also the appropriate venue for resolving such matters according to the law. The motion to dismiss, based on the erroneous application of inapplicable case law, should be denied, affirming the City's rightful actions to uphold the law and protect the community.

b. The City Pleads Actionable Littering Claims

Contrary to Defendants' assertions, the City's littering claims fall under the laws' plain language. *Contra* Motion at 17. The City has alleged that Defendants caused the disposal of litter on its property by, among other conduct, designing, manufacturing, distributing, and selling cigarettes and their toxic filters which they knew to be hazardous, and by concealing those hazards to maximize profits. Compl. ¶¶ 6, 10, 30-35. While Defendants considered and made biodegradable filters, they intentionally continued to design, manufacture, and sell nonbiodegradable cellulose acetate filters to maximize profits at the expense of the City's environment. *Id.* ¶ 31. Defendants further knew that plastic filters gave the appearance of biodegradability and took advantage of that ruse. *Id.* ¶ 33. They knew that smokers litter cigarette

filters on the ground because smokes are under the impression that the paper wrappers and filters will decompose in the environment because they appear as though they are made of a paper substance, instead of their true plastic nature. *Id.* Consequently, smokers continue to be deceived that cigarette filters will naturally decompose and that they are safe to throw on the ground. *Id.* As a result of Defendants' tortious conduct, millions of nonbiodegradable, toxic cigarette filters are littered on Baltimore City property, contaminating the soil and groundwater, hampering plant growth, polluting waterways, deteriorating critical habitat, killing fish and other sea creatures, and causing a blight by increasing crime, impacting tourism, reducing commerce, and impacting property values for residents and businesses. *Id.* ⁋⁋ 3-6, 24-27.

That conduct, contrary to Defendants' assertion, falls squarely within the laws' plain language. The City has alleged, consistent with applicable law, that Defendants caused the disposal of cigarette filters by bringing it about through others. Indeed, as previously discussed, the City has alleged that Defendants knew that plastic filters gave the appearance of biodegradability and took advantage of that ruse. *Id.* ⁋ 33. They knew that smokers litter cigarette filters on the ground because smokes are under the impression that the paper wrappers and filters will decompose in the environment because they appear as though they are made of a paper substance, instead of their true plastic nature. *Id.* Consequently, smokers continue to be deceived that cigarette filters will naturally decompose and that they are safe to throw on the ground. *Id.* As Defendants recognize, Motion at 18, causing the disposal of litter states a valid claim against Defendants under these provisions. While Defendants attempt to invent additional requirements concerning how one causes littering through others, no such language exists in the statutory provisions. Therefore, the City's littering claims must be resolved by the trier of fact.

III. The City's Tort Claims Are Meritorious

Defendants offer three reasons why they contend that all of the City's tort claims must be dismissed as a matter of law. Defendants argue, first, that the City is barred from pursuing this lawsuit for environmental damage because back in 1998 the Attorney General of Maryland signed a consent judgment (resolving a lawsuit brought against the major cigarette companies, asserting claims based on smoking and health[8]), which Defendant erroneously contends binds the City to a release of any claims it might conceivably bring in the future. Motion at 21-25. Second, Defendants argue that all the claims are barred by the statute of limitations. *Id.* at 25-27. Third, Defendants assert that all the claims must fail for lack of proximate cause. *Id.* at 27-29. Not one of these arguments has merit.

a. The City's Tort Claims Are Not Barred by the Master Settlement Agreement

In the lead-up to their argument that the Master Settlement Agreement ("MSA") signed by the Attorney General of Maryland in 1998 somehow released claims that would not accrue and be brought by the City until 25 years later, Defendants portray this as an agreement in which the settling States extracted many billions of dollars from the major tobacco companies, earmarked to fund various worthy causes. Motion at 21-22. This account is both misleading and irrelevant.

It is misleading because the MSA *was not*, in substance, a victory won by the States that forced the major tobacco companies to part with a large chunk of their net worth to atone for past wrongdoing. Rather, it was essentially a clever scheme cooked up by the companies by which they used the settlement of the litigation to *increase* their profits. The settlement enabled the companies to arrange a coordinated increase in the price of cigarettes without the fear of losing market share

[8] A copy of the complaint is archived here: https://web.archive.org/web/20000917041435/http://stic.neu.edu/Md/3MARYL~1.HTM (last visited May 6, 2024).

(with the extra profits split between the companies and the States)—an arrangement that would have violated the antitrust laws absent the participation of the Attorneys General. Even attorneys who have worked on behalf of the tobacco companies have conceded that this was the actual scheme behind the MSA.[9]

Defendants' attempt to spin the MSA as a massive defeat for the tobacco industry is also irrelevant. A determination of whether or not the MSA somehow released, and thereby extinguished, the City's claims even before they came into existence depends not on the *end result* lauded by Defendants, but on *the text* of the MSA. Defendants' apparent implication that the MSA did a wonderful job of extracting vast sums from the Defendants, and therefore it would be unfair to now subject them to the City's claims, is therefore beside the point. For it is well settled that the legal effect of a consent judgment such as the MSA is interpreted under ordinary principles of contract interpretation. *See, e.g.*, *Dennis v. Fire & Police Emps. Ret. Sys.*, 390 Md. 639, 655-56 (2006); *Long v. State*, 371 Md. 72, 82-83 (2002); *Chernick v. Chernick*, 327 Md. 470, 478 (1992). One such rule of contract interpretation is that a party to a contract arguing that another party has released a claim against it must demonstrate "clear and unambiguous" language to that effect.

[9] For example, Dr. Kip Viscusi, a leading economist and law professor (formerly at Harvard, now at Vanderbilt) who has testified on behalf of Philip Morris in past trials, noted in a book on the MSA that the payments made by the tobacco companies under it merely involve, in effect, excise taxes on future cigarette sales, tied to the number of cigarettes sold and various other factors, in an arrangement designed mainly to cartelize the tobacco industry at the expense of smokers. W. Kip Viscusi, *Smoke-Filled Rooms: A Postmortem on the Tobacco Deal* 17-18, 33-42 (2002) (excerpts attached as Exhibit 1 hereto). One of the attorneys who represented Philip Morris in litigation leading to the MSA similarly observed that the MSA basically imposes a tax, as the payments owed by the tobacco companies depend on how many packs they sell in the future. Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 Conn. L. Rev. 1143, 1177 & n.162 (2001). *See also id.* at 1143 (cost "financed almost exclusively by smokers"); *id*. at 1144, 1174-75 (summarizing scholarship suggesting that MSA is little more than a clever arrangement by which tobacco companies entered into a lucrative price-fixing cartel but avoided criminal sanctions by buying from the States a license to restrain trade, structuring the arrangement to force smokers "to pay for the whole thing"). As part of the cartel arrangement, the MSA contained an intricate set of provisions designed to maintain the market share of the participating defendants by forcing competitors, who had never been sued, to make payments similar to those owed by the signatories, to ensure that they could not undercut the signatories in price. *See generally Star Scientific Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002).

Golub v. Cohen, 138 Md. App. 508, 517-18 (2001). *See also Kaufmann Park II, LLC v. KCC Props., LLC*, 2018 Md. App. LEXIS 488, *28-*29 (2018).

Defendants have made no such demonstration. They merely quote select language from the MSA, failing to address the relevant textual provisions in logical order. Motion at 23-24. Reading the MSA in a straightforward fashion, it is plain that Defendants cannot meet their burden.

Begin with the provision that actually releases claims: "Upon the occurrence of State-Specific Finality in a Settling State, such Settling State shall absolutely and unconditionally release and forever discharge all Released Parties from all **Released Claims** that the **Releasing Parties** directly, indirectly, derivatively or in any other capacity ever had, now have, or hereafter can, shall or may have." MSA, ¶ XII(a)(1) (emphasis added).

This paragraph makes clear that for the City's claims to be barred, Defendants must show two things: (1) the City is one of the "Releasing Parties," and (2) the tort claims in the City's complaints are among the "Released Claims." But there is nothing in the MSA, construed with reference to background legal principles governing contract interpretation, that suggests any basis for finding that the MSA clearly and unambiguously establishes either point.

i. Releasing Parties.

The City, of course, was not a signatory to the MSA. The only Maryland official who did sign is the Attorney General. So, the question is whether the MSA validly included the City as among the "Releasing Parties," which in turn depends on whether the Attorney General had the clear and unambiguous authority to bind the City by his signature, without its individual consent.

MSA, ¶ II(pp), reads in full as follows (emphasis added):

> "Releasing Parties" means each Settling State and any of its past, present and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions and divisions; and also means, **to the full extent of the power of the signatories hereto** to release past, present and future

> claims, the following: (1) any Settling State's subdivisions (political or otherwise, including, but not limited to, municipalities, counties, parishes, villages, unincorporated districts and hospital districts), public entities, public instrumentalities and public educational institutions; and (2) persons or entities acting in a parens patriae, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or any other capacity, whether or not any of them participate in this settlement, (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries, or (B) to the extent that any such entity (as opposed to an individual) is seeking recovery of health-care expenses (other than premium or capitation payments for the benefit of present or retired state employees) paid or reimbursed, directly or indirectly, by a Settling State.

Under ¶ II(pp) the City falls within the definition of "Releasing Parties" if, but only if, the Attorney General of Maryland had the power to release the claims of Maryland municipalities. In other words, the result here depends on background legal principles concerning "the full extent of the power" of the Attorney General of each State signing the MSA, consistent with "the principle of contract law that reads into agreements all existing and applicable laws and regulations." *Hearn v. Hearn*, 177 Md. App. 525, 535 (2007).

It appears that with regard to some States that are party to the MSA, the municipalities in those States arguably fall within the definition of "Releasing Parties," because the powers of the Attorneys General of those States extend to the full range recognized at common law—including the power to file litigation on behalf of political subdivisions. As the Fourth Circuit summarized in holding that the Attorney General of North Carolina had the power to bind school districts to the result of a lawsuit, without their consent:

> At common law, an attorney general, in the absence of some restriction on his powers by statute or constitution, has complete authority as the representative of the State or any of its political subdivisions "to recover damages (whether under state or federal law) alleged to have been sustained by any such agency or political subdivisions," even though those subdivisions may not have "affirmatively authorized suit."

Nash County Bd. of Education v. Biltmore Co., 640 F.2d 484, 494 (4th Cir. 1981) (citations omitted).[10]

However, in sharp contrast, the Attorney General of Maryland "possesses no common law powers." *State v. Burning Tree Club*, 301 Md. 9, 33 (1984). The Attorney General "has only such powers as are vested in him by the Constitution of Maryland and the various enactments of the General Assembly of Maryland." *Id*. at 32. *See generally Murphy v. Yales*, 276 Md. 475, 480-96 (1975).

The Maryland Constitution does not grant any authority for the Attorney General to litigate on behalf of political subdivisions. The only authority granted by the Maryland Constitution itself is the authority to handle all state appellate litigation, and all federal litigation, "by or against the State, or in which *the State* may be interested . . . ." Art. V, §3(a)(1) (emphasis added). The only way the Attorney General could obtain the authority to litigate on behalf of, and bind, political subdivisions would therefore be pursuant to Art. V, §3(a)(2), in the event that "the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended."

Confirmation that the Constitution conveys no authority on the Attorney General to represent a political subdivision is contained in Md. Code Ann. § 6-107, setting forth the General Assembly's narrow grants of authority to represent political subdivisions. There is no general grant of authority regarding political subdivisions as a whole. To the contrary: the *only* instance in which

[10] *See also State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-70 (5th Cir. 1976); *Ex parte King*, 59 So. 3d 21, 26-27 & n.4 (Ala. 2010); *Lyons v. Ryan*, 780 N.E.2d 1098, 1105-06 (Ill. 2002); *People ex rel. Devine v. Time Consumer Mktg.*, 782 N.E.2d 761, 767-68 (Ill. App. 2002); *State ex rel. Inman v. Brock*, 622 S.W.2d 36, 41-42 (Tenn. 1981). Regarding the MSA specifically, Michigan is one State that has vested in its Attorney General the full range of common-law powers. *In re Lewis' Estate*, 287 Mich. 179, 194 (1938). On that basis, the Michigan Supreme Court held that the MSA was binding on Michigan counties. *In re Certified Question from the United States Dist. Court for the E. Dist. of Mich. v. Philip Morris*, 638 N.W.2d 409, 413-15 (Mich. 2002).

"[t]he Attorney General may advise or represent a political subdivision of the State" is regarding "a matter that relates to State or federal antitrust law." *Id*. § 6-107(b)(1). Nor is there any general grant of authority regarding Baltimore; rather, the Attorney General serves as "the legal advisor and shall represent and otherwise perform all of the legal work for" *only* for Baltimore's Board of Supervisors of Elections, Board of Liquor Commissioners, and Sheriff. *Id*. § 6-107(a).

All of this has been ignored by Defendants. Because the Attorney General had no authority to litigate on behalf of the City, plainly the City cannot be regarded as a "Releasing Party" under the MSA.

ii. Released Claims

Second, even if the Attorney General did have authority to bind the City as a "Releasing Party" in the MSA, there is nothing in the definition of "Released Claims" to support the conclusion that the claims in the City's complaints are released by the MSA.

Para. II(nn) of the MSA reads in full (emphasis added):

(**nn) "Released Claims" means:**

> **(1) for past conduct**, acts or omissions (including any damages incurred in the future arising from such past conduct, acts or omissions), **those Claims directly or indirectly based on, arising out of or in any way related, in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding, Tobacco Products** (including, but not limited to, the Claims asserted in the actions identified in Exhibit D, or any comparable Claims that were, could be or could have been asserted now or in the future in those actions or in any comparable action in federal, state or local court brought by a Settling State or a Releasing Party (whether or not such Settling State or Releasing Party has brought such action)), except for claims not asserted in the actions identified in Exhibit D for outstanding liability under existing licensing (or similar) fee laws or existing tax laws (but not excepting claims for any tax liability of the Tobacco Related Organizations or of any Released Party with respect to such Tobacco Related Organizations, which claims are covered by the release and covenants set forth in this Agreement);

> **(2) for future conduct**, acts or omissions, **only those monetary Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products** manufactured in the ordinary course of business, including without limitation any future Claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products.

Defendants assert that this language released the tort claims advanced by the City in this lawsuit. Motion at 23-24. But with a single exception, there is nothing in this text that clearly and unambiguously releases the City's claims of *environmental* damages that are caused by the *disposal* of *already used* tobacco products. This provision releases claims related to twelve distinct activities related to tobacco products, namely, their (1) use, (2) sale, (3) distribution, (4) manufacture, (5) development, (6) advertising, (7) marketing, (8) health effects, (9) exposure to them, (10) research concerning them, (11) statements concerning them, and (12) warnings concerning them. None of these items relate to environmental damages.

The one exception is that the reference to "statements" and "warnings" might cover the City's failure-to-warn claim. None of the City's other tort claims are clearly and unambiguously covered by the language of ¶ II(nn), which contains no reference to the disposal of tobacco products, or to their environmental effects (only their health effects).

But even as to the failure-to-warn claim, provided the City limits that claim to post-1998 conduct, there is no basis for claiming it was released, as ¶ II(nn)(2) makes clear that the only post-1998 claims purportedly released by the MSA are those related to "the use of or exposure to Tobacco Products"—with no reference to claims based on statements or warnings.

Defendants' argument faces an independent obstacle, even if one were to accept their interpretation of the MSA's language. Even if the text of the MSA is expansive enough to cover some (or even all) of the City's tort claims, that reading of the MSA would be impermissible given background law that informs contract interpretation and rules out a finding that the Attorney

General, by signing the MSA in 1998, had the power to release the claims of municipalities that *would not even accrue* until many years thereafter. For this Court to hold that the Attorney General extinguished the City's tort claims years before they even came into existence would entail a trip to "topsy-turvy land," famously described by Judge Jerome Frank as the land in which you can "die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad." *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) (explaining the rationale, "as a sort of legal 'axiom'," for the traditional rule "that a statute of limitations does not begin to run against a cause of action before that cause of action exists").

This Court can avoid visiting such exotic realms by simply applying the settled rule applicable to the interpretation of releases, that "[i]njured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves." *Spangler v. McQuitty*, 449 Md. 33, 63-64 (2016) (quoting *Thompson v. Wing*, 637 N.E.2d 917, 922 (Ohio 1994)). *See also In re Collins*, 468 Md. 672, 699-700 (2020). Adhering to this settled rule will also permit this Court to avoid the serious constitutional issues raised by Defendants' approach. The City, as a municipal corporation, is a "person" within the meaning of the Fourth Amendment, and thereby receives the protection of its Due Process Clause. Once its tort claims accrued, they became a species of property which is constitutionally protected against arbitrary deprivation. *E.g.*, *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-37 (1982); *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 632-33 (2002).

b. The City's Tort Claims Are Not Barred by the Statute of Limitations

Defendants make a brief effort to argue that the City's claims are barred by the statute of limitations or, at minimum, are limited to the past three years (under the "continuing harm" doctrine). Motion at 25-27. The simple answer is that the subject matter of this lawsuit obviously involves a strictly governmental function (the City's obligation and core government function to safeguard the environment, and in particular address the litter problem), and it is well established that the statute of limitations does not run against the state, nor its agencies, nor political subdivisions or municipalities exercising strictly governmental functions. *Spaw, LLC v. City of Annapolis*, 452 Md. 314, 358-60 (2017); *Goldberg v. Howard Co. Welfare Board*, 260 Md. 351, 356 (1971).

c. The City Has Adequately Pled Proximate Causation in its Tort Claims

Defendants argue that the City has failed to plead proximate cause because the harm arises out of a third party's conduct and is thus supposedly too remote from Defendants' culpability. Motion at 27-29. Three points are decisive. First, the argument is premised on Defendants' constant mischaracterization of the nature of the City's lawsuit: that it supposedly seeks to have Defendants "modif[y] their lawful products" or challenge tobacco product standards regarding labeling. Motion at 29. But as already explained, the City's lawsuit only seeks to hold Defendants accountable for the environmental damage caused by their products and the cost thereby imposed on the City's finances, under general principles of law applicable to all businesses. And the District Court confirmed as much: "Plaintiff's claims do not seek to challenge, modify, or object to tobacco product standards regarding labeling, design, or marketing. Rather, Plaintiff claims challenge the product itself—namely the cigarette filters." *Mayor and City Council of Baltimore v. Philip Morris*

USA, Inc. et al., No. 1:23-cv-00303-JRR, 2024 U.S. Dist. LEXIS 10488, *22 (D. Md. January 19, 2024).

Second, based on this faulty premise, Defendants liken the City's allegations to the facts in cases that are inapposite because they lack the key requirement of proximate causation—foreseeability.

Third, Defendants concede that the harm the City has alleged *was* foreseeable. Motion at 28 (prefacing case law cite with "Even where a harm is foreseeable," and acknowledging that the third party's response was "perhaps foreseeable"). Under Maryland law, Defendants cannot be relieved of liability when they should have foreseen the danger that the City has alleged.

Proximate cause is proved if the negligence is (1) a cause in fact of the injury, and (2) a legally cognizable cause. *Yonce v. SmithKline Beecham Clinical Labs., Inc.*, 111 Md. App. 124, *cert. denied*, 344 Md. 118 (1996). For proximate cause to exist, the "general field of danger" must be foreseeable. *Stone v. Chi. Title Ins. Co. of Md.*, 330 Md. 329 (1993) (quoting *Henley v. Prince George's Cnty.*, 305 Md. 320 (1986) and RESTATEMENT (SECOND) OF TORTS § 435); *Sindler v. Litman*, 166 Md. App. 90 (2005)). If causation in fact exists, the defendant will not be relieved from liability for an injury if, at the time of the defendant's negligent act, the defendant should have foreseen the "general field of danger," not necessarily the specific kind of harm to which the injured party would have been subjected as a result of the defendant's negligence. *Sindler v. Litman, supra*; *Yonce v. Smith- Kline Beecham Clinical Labs., Inc., supra*.

The City has properly alleged that the environmental contamination would not have occurred in the absence of Defendants' conduct. *See, e.g.*, Compl. ⁋ 10 ("Defendants [] knew that the filter they selected would not break down after they were inevitably discarded by Defendants' customers and would thus create a nuisance."). Additionally, the City has alleged that Defendants'

conduct was a substantial factor in bringing about the City's damages. *See id.* ("Defendants created a public nuisance solely to sell more cigarettes and knew that this decision would result in millions of cigarette filters being dropped on Baltimore City property, and on the property of Baltimore City's residences and businesses."); *See id.* ¶ 140 ("Defendants' actions are the overwhelming causative factor in the unreasonable violation of the public rights of Baltimore City and its residents as set forth above because Defendants knew that their conduct would create a continuing litter problem with long-lasting negative effects on the rights of the Plaintiff, and absent Defendants' conduct the violations of the Plaintiff's rights described herein would not have occurred."). Finally, the City has alleged that the danger was foreseeable. *See id.* ¶ 30 ("Defendants actively chose and continue to choose to make cigarettes non-biodegradable. They were, and are aware, of both the long-lasting negative impact the components of these filters have on the environment and the rate at which their consumers litter these filters."). Thus, the City has adequately alleged that causation in fact exists, and that Defendants should have foreseen the "general field of danger." Accordingly, Defendants' motion must be denied.

To the extent that Defendants assert that an intervening force constitutes a superseding cause which cuts off Defendants' liability, that analysis also hinges on foreseeability. *See Pittway Corp. v. Collins*, 409 Md. 218 (2009) (citing RESTATEMENT (SECOND) OF TORTS § 442). If an intervening act is one the defendant might have foreseen and the defendant's negligence was an essential link in the chain of causation, the defendant is not relieved from the harm caused by the intervening act. *Sindler v. Litman*, 166 Md. App. 90 (2005) (quoting *State ex rel. Schiller v. Hecht Co.*, 165 Md. 415 (1933)); *see also Atl. Mut. Ins. Co. v. Kenney*, 323 Md. 116 (1991); *State ex rel. Schiler v. Hecht Co.*, 165 Md. 415 (1933). But if the intervening cause is not foreseeable, the defendant's negligence is not a proximate cause of the injury. *Copsey v. Park*, 453 Md. 141, 160

A.3d 623 (2017); *Torbit v. Balt. City Police Dep't*, 231 Md. App. 573, *cert. denied*, 453 Md. 30 (2017); *State ex rel. Schiller v. Hecht Co., supra*; *see also Gen. Motors Corp. v. Lahocki*, 286 Md. 714 (1980).

The City has alleged that the intervening act of a smoker discarding cigarettes onto Baltimore City property was foreseeable. *See, e.g.*, Compl. ⁋ 34 ("Defendants, of course, knew that their customers would regularly dispose of their filtered cigarettes on the sidewalks, streets, waterways, and in the toilets in Baltimore City."); *see also id.* ⁋ 37 ("Defendants knew for more than a century that cigarettes were disposed of by their end users directly onto the ground, pavement, or into waterways."). The City has alleged that Defendants' conduct was an essential link in the chain of causation. *See id.* ⁋ 136. Thus, the City has alleged that any intervening act is one Defendants should have foreseen and their conduct was an essential link in the chain of causation. Accordingly, Defendants' motion must be denied.

Defendants cite only two decisions, both involving conduct that was, unsurprisingly, not the cause of plaintiffs' injuries. In the first, *Modisette v. Apple, Inc.*, the California appellate court upheld the district court's dismissal of a claim involving a driver distracted by his/her FaceTime application. 30 Cal. App. 5th 136, 140 (2018). The questions the court confronted was whether Apple owed a duty of care to plaintiffs who were seriously injured when their car was struck by a motorist distracted by his Apple FaceTime application, and whether Apple's failure to include lockout technology caused the plaintiffs' injuries when the distracted driver crashed into them. *Id.* Unsurprisingly, the court held that the plaintiffs' injuries were not the result of Apple's conduct, but rather the distracted driver. *Id.* at 154.[11]

[11] Unlike the California decision cited by Defendants, the City does not assert a pure negligence cause of action. As such, unlike *Modisette*, there is no analysis of the duty of care owed by Defendants to exercise reasonable care for the safety of others, including the City. Additionally, as stated in *Modisette*, the existence of duty is a pure question of law, whereas Defendants concede that the trier of fact ordinarily determines proximate cause. Motion at

The second decision, *Ashley County v. Pfizer, Inc.*, 552 F.3d 659 (8th Cir. 2009), held that a pharmaceutical company was not liable to counties for the subsequent use of cold medicine to manufacture methamphetamine. *Id.* at 309-10. Again, not unsurprisingly, the court held that Arkansas law would not support that causation between manufacturers selling cold medicine and the methamphetamine epidemic resulting in increased government services. *Id.* at 671.

Based on *Modisette* and *Ashley County*, Defendants assert that Defendants do not proximately cause cigarette littering. Motion at 29. But their argument is bereft of reasoning. The courts in those cases made clear that the injuries and damages were not reasonably foreseen to the Defendants as probable. The City's lawsuit, on the other hand, is distinct. The City has adequately alleged that Defendants chose to make toxic, non-biodegradable cellulose acetate cigarette filters knowing that their customers, who are unaware of the content and danger of the filters, would typically and foreseeably dispose of their filtered cigarettes on the sidewalks, streets, waterways, and in the toilets in Baltimore City.

In *Moran v. Faberge, Inc.*, 273 Md. 538, 544-50 (1975), the Court of Appeals determined what is contemplated by the foreseeability requirement in products liability cases. The Court decided that "in the products liability domain a duty to warn is imposed on a manufacturer if the item it produces has an inherent and hidden danger about which the producer knows, or should know, could be a substantial factor in bringing injury to an individual or his property when the manufacturer's product comes near to or in contact with the elements which are present normally in the environment where the product can reasonably be expected to be brought or used." *Id.* at

28. Finally, the *Modisette* case recognizes that "there are numerous circumstances … in which a given injury may be 'foreseeable' in the fact-specific sense in which we allow juries to consider that question, but … the 'foreseeability' examination called for under a duty analysis [] is a very different and normative inquiry." The City does not present a foreseeability examination called for under a duty analysis, which is a very different and normative inquiry. Instead, the City presents the circumstance in which its injury is foreseeable in the fact-specific sense, such that, as Defendants concede, it must be resolved by the trier of fact.

552. In that case, plaintiff sued a cologne manufacturer for injuries sustained when the plaintiff's companion poured cologne on a lit candle in an attempt to make the candle scented. *Id.* at 539. The cologne bore no flammability label but was highly flammable and the defendant was aware of this. *Id.* at 541. The Court held that it was not necessary that the manufacturer foresaw or should have foreseen that its cologne would be used in the manner which caused the injuries; rather, it was only necessary that the evidence be sufficient to support the conclusion that the manufacturer, knowing or deemed to know that its cologne was a potentially dangerous flammable product, could reasonably foresee that in the environment of its use, this cologne might come close enough to a flame to cause an explosion of sufficient intensity to burn property or injure bystanders. *Id.* at 554. Thus, the Court held that the issue of the manufacturer's failure to warn based on foreseeability was for the jury.

The City's allegations are above and beyond those which the Court found sufficient in *Moran*. The City has alleged that Defendants were aware of the magnitude of the cigarette filter litter problem and that cellulose acetate filters not only leach harmful chemicals into the environment but prevent filters from degrading. Compl. ⁋10; ⁋32. Defendants have been and continue to be well aware of the vast majority of smokers who toss cigarettes on the ground, thinking that paper wrappers and "cotton" filters quickly degrade in the environment, yet they have failed to educate the public about the content and dangers of cigarette filters. *Id.* ⁋⁋33-34. By including cellulose acetate filters, even though they serve no health purpose and in fact deceive the smoker into thinking filters are protecting smokers from inhaling fewer dangerous chemicals, Defendants are the cause in fact of the cigarette filter litter nuisance in Baltimore City. Disposal of the cigarette in the customary way (stomping it out and leaving it on the ground) is a foreseeable use of the product and smokers themselves have no control over the toxic components in the filter;

accordingly, Defendants are the proximate cause of the harm. Therefore, Defendants' motion to dismiss must be denied.

IV. The City Has Plausibly Pled its Tort Claims

a. The City Has Stated a Claim for Continuing Trespass (Count V)

Under Maryland law, when a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land, a trespass occurs. *See Rockland, Inc. v. H. J. Williams*, 242 Md. 375, 385 (1965). Thus, recovery for trespass requires that the defendant must have entered or caused something harmful or noxious to enter onto the plaintiff's land. *See, e.g., Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 205-06 (1939).

The Court of Special Appeals discussed trespass to land in *Bittner v. Huth*, 162 Md. App. 745 (2005), *cert. denied*, 389 Md. 125 (2005), as follows:

> [T]respass is defined as an intentional or negligent intrusion upon or to the possessory interest in property of another. *Patapsco Loan Co. v. Hobbs*, 129 Md. 9, 15-16, 98 A. 239 (1916) (citations omitted). 'Every unauthorized entry upon the land of another is a trespass, and whether the owner suffers substantial injury or not, [the owner] at least sustains a legal injury, which entitles [the owner] to a verdict for some damages; though they may, under some circumstances, be so small as to be merely nominal.' *Tyler v. Cedar Island Club, Inc.*, 143 Md. 214, 219, 122 A. 38 (1923) (quoting *Balt. & Ohio R.R. v. Boyd*, 67 Md. 32, 40, 10 A. 315 (1887)).

Bittner, 162 Md. App. at 752-53.

Maryland courts have relied on the Second Restatement of Torts concerning the nature of a trespass. *See JBG/Twinbrook Metro Ltd. Pshp. v. Wheeler*, 346 Md. 601, 628 (1997). Section 158 provides one is subject to liability for trespass if he "(a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." RESTATEMENT (SECOND) OF TORTS § 158 (1965). Section 161 provides that: "A trespass may be committed by the continued

presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there." RESTATEMENT (SECOND) OF TORTS § 161 (1965).

i. The City Has Properly Alleged Defendants Caused Cigarette Filters to Enter Its Property

Defendants argue that the City has not alleged that they "caused" consumers to litter cigarette filters onto City property. Motion at 31. Defendants ignore the City's allegations. The City has alleged that Defendants make cigarettes with plastic filters inserted into paper wrappers, giving the appearance to smokers and nonsmokers alike that the butt is merely harmless paper and cotton that will easily degrade in the environment. *Id.* ¶30-34. Defendants have been and continue to be well aware of the vast majority of smokers who toss cigarettes on the ground, thinking that paper wrappers and "cotton" filters quickly degrade in the environment. *Id.* Instead of educating the public about the content and dangers of cigarette filters, Defendants took advantage of that ruse in order to sell more cigarettes and maximize profits at the expense of the City's environment and finances. *Id.* The City alleged that when cigarette filters are littered onto City property, they leach harmful pollutants, including toxic heavy metals and other contaminants, into the soil and groundwater thereby damaging the City's environment. *Id.* ¶3. Thus, contrary to Defendants' assertions, and consistent with the elements of a trespass claim under Maryland common law, the City has appropriately alleged that Defendants caused something harmful or noxious to enter onto its land.

Additionally, this same argument was rejected in *Mayor of Baltimore v. Monsanto Co.*, 2020 U.S. Dist. LEXIS 55265, *34-*35 (D. Md. Mar. 31, 2020). There, the thrust of Monsanto's argument was that the City cannot state a claim for trespass because Defendants lacked control over the PCBs that caused the trespass. *Id.* Judge Bennett analyzed the Court's holding in *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467 (D. Md. 2019). *Id.* In *Exxon*, the State's assertion of

a trespass claim based on the widespread contamination of its waters, and Judge Hollander determined that the State was proceeding in "its *parens patriae* capacity," representing all of its citizens. 406 F. Supp. 3d at 470. Judge Hollander found that the State plausibly alleged a claim for trespass to the extent it is based on properties within its exclusive possession, but not "to the extent that it is based on properties outside of its exclusive possession—*i.e.*, its natural waters and the properties of its citizens." *Id.* Accordingly, in *Mayor of Baltimore v. Monsanto Co.*, Judge Bennett determined that the City was proceeding in *parens patriae* for the City's public water system, which the City operates and maintains; thus, the concern over the extent of the trespass in *Exxon* was inapplicable, and the City sufficiently alleged a cause of action for trespass. 2020 U.S. Dist. LEXIS 55265, *34-*35.

Here, too, the City is proceeding in its *parens patriae* capacity alleging trespass only to those City properties in its exclusive possession which are littered with toxic, nonbiodegradable cigarette filters. Compl. ¶ 6 (seeking to hold Defendants accountable cleaning up the products that they created that befoul and contaminate "Baltimore City's property"). Accordingly, the City has sufficiently alleged a cause of action for trespass. *See Mayor of Baltimore v. Monsanto,* 2020 U.S. Dist. LEXIS 55265, *34-*35*; Exxon*, 406 F. Supp. 3d at 471.

ii. The City Has Adequately Alleged Exclusive Possession

Defendants next argue that the City does not plead exclusive possession. Motion at 32-33. They argue generally about certain categories of properties that the City alleged are contaminated with their products in order to argue that some of them may not be City property. *Id.* From their argument that *some* general categories of property may not be City property, Defendants make an analytical leap in order to argue that the City has failed to plead that *any* City property is contaminated, so that they can argue the City has failed to plead the required element of exclusive

possession. Such an argument defies logic. Even if certain categories of properties are not City property, that does not equate to the fact that none are City property.

Trespass only requires that the City plead that it has a possessory interest in property upon which Defendants have interfered. The City has certainly pled as much, and Defendants inherently concede that point in their premature attempt to parse out certain general categories of property that they think may not be owned by the City, or that they think in which the City may not have a proprietary interest.

One of the categories of properties, for example, Defendants assert the City has no ownership of its water bodies. Motion at 33. However, this same argument was rejected in *Mayor of Baltimore v. Monsanto Co.*, 2020 U.S. Dist. LEXIS 55265, *24 (D. Md. Mar. 31, 2020). There, the thrust of Monsanto's public nuisance standing argument was that the City had no ownership or proprietary interest in the water bodies and that the City had not alleged any special harm. *Id.* As here, the City provided its City Charter (see note 5, *supra*), adopted pursuant to the Constitution of Maryland, which adequately alleges its authority over its waters. Specifically, the Charter grants the City "full power and authority" to "prevent any material, refuse or matter of any kind from being . . . deposited in or placed where the same may fall, or be washed into [the Patapsco] river or tributaries." *Id.* at Article II, § 10. The Charter also grants the City "full power and authority" to "provide for the preservation of the health of all persons within the City . . . and to prevent and remove nuisances." *Id.* at Article II, § 11(a). Thus, not only does Defendants' argument defy logic, but it is also factually incorrect.

The argument also misunderstands the legal standard at this stage in the litigation. Obviously, what properties of the City are contaminated with Defendants' cigarette filters is a distinctly factual inquiry that cannot be decided on a motion to dismiss. *Mayor of Baltimore v.*

Monsanto Co., 2020 U.S. Dist. LEXIS 55265, *25 ("Defendants' attempt to parse the City's authority over the stormwater 'within the limits of Baltimore City' and its apparent lack of authority over the water quality of the surrounding water bodies is a distinction with no difference at this procedural stage."). In discovery, the City will produce evidence of what property is contaminated by Defendants' products, as in the usual course of litigation. Until then, the City pleaded that Defendants' products interfere with its possession, as is required at this stage. Accordingly, Defendants' motion must be denied.

b. The City Has Stated a Claim for Design Defect (Counts VII and VIII)

Under Maryland law, the elements of a strict liability design defect claim are: "(1) the product was in a defective condition at the time that it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition." *Phipps v. General Motors Corp.*, 278 Md. 337, 344 (1976); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

"In an action founded on strict liability in tort, as opposed to a traditional negligence action, the plaintiff need not prove any specific act of negligence on the part of the seller. The relevant inquiry in a strict liability action focuses not on the conduct of the manufacturer but rather on the product itself." *Id.* (citing Weinstein, Twerski, Piehler, Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQUESNE L. REV. 425, 429 (1974)). In order to prevail in a strict liability defective design action, a plaintiff must prove that the product was "both in a 'defective condition' and 'unreasonably dangerous' at the time that it [was] placed on the market by the seller." *Id.*

Whether the claim is rooted in a theory of negligence or strict liability, a design defect plaintiff must establish "that the product was defective when it left the hands of the manufacturer, and that the defective condition was the proximate cause of the injuries or damages of which plaintiff complains." *Ford Motor Co. v. General Accident Ins. Co.*, 365 Md. 321, 335 (2001) (quoting Robert E. Powell & M. King Hill, Jr., *Proof of a Defect or Defectiveness*, 5 U. BALT. L. REV. 77 (1975)).

As the District Court recognized, "Plaintiff's defective design claims hinge on allegations that Defendants' cigarette filters, regardless of federal regulation compliance, are defective and unreasonably dangerous to the environment, and Defendants placed them in the market aware of their defective condition." *Mayor & City Council of Baltimore v. Philip Morris USA, Inc. et al.*, 2024 U.S. Dist. LEXIS *12-*13. The District Court recognized that the City has pled the first two required elements of its design defect claim, that (1) the product was in a defective condition at the time that it left the possession or control of the seller, and (2) it was unreasonably dangerous.

An "unreasonably dangerous" product is defined in Second Restatement as one which is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A, Comment *i*. The City has appropriately pled that element. *See* Compl. ⁋ 2 ("Contrary to the belief that cigarette filters are made of cotton and biodegradable, most cigarette filters are made of a nonbiodegradable material called cellulose acetate."); *id.* ⁋ 32 ("Defendants further knew that the plastic filter gave the appearance of biodegradability and took advantage of that ruse."); *id.* ⁋ 108 ("The [] defects were beyond the knowledge of an ordinary consumer, and neither Baltimore City nor an ordinary consumer could

have avoided the harm caused by Defendants' filtered cigarettes by the exercise of reasonable care.").

In addition, the City has appropriately alleged that the third and fourth elements of the Restatement test, that: (3) the defect was a cause of the injuries, and (4) the product was expected to and did reach the consumer without substantial change in its condition. *See, e.g.,* Compl. ⁋ 32 ("Defendants currently use cellulose acetate-based filters which are not biodegradable. The filters not only contain toxic chemicals, but they stall a cigarette filter's decomposition, which lengthens the amount of time a cigarette filter will remain on a sidewalk, street, in a park, or on a beach. It further lengthens the number of pollutants that can seep into the environment over time."); *see id.* ⁋ 102 ("The filtered cigarettes and their toxins reached Baltimore City lands and water without any substantial change in condition from when they left the control of the Defendants."). Thus, the City has appropriately pleaded its strict liability defective design claim.

Further, the City has appropriately pled its negligent design claim. The City alleged that "Defendants had a duty to use due care in developing, designing, testing, inspecting, manufacturing and distributing their filtered cigarette products." *Id.* ⁋ 122. The City alleged that "[t]hat duty obligated Defendants, collectively and individually to, inter alia, prevent the defective products from entering the stream of commerce, and prevent reasonably foreseeable harm that resulted from the ordinary and/or reasonably foreseeable use of Defendants' products." *Id.* Thus, the City has appropriately pled its negligent defective design claim.

Defendants argue that the City has failed to plead physical harm to the ultimate user. Motion at 34 (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)). First, Defendants ignore that the "public safety exception for plaintiffs bringing claims alleging only economic loss," so that "[e]ven if the City 's harm alleged was purely economic, the City has sufficiently pled that the

public safety exception would apply to preclude the application of the economic loss doctrine." *Mayor of Baltimore v. Monsanto Co.*, 2020 U.S. Dist. LEXIS 55265, at *18, *20.

Second, "Maryland courts have never limited recovery in strict liability for design defect to ultimate users of the product." *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467 (D. Md. 2019). In *Exxon*, Judge Hollander noted that "the majority of courts that have addressed the issue have allowed bystanders to recover in strict liability against sellers for foreseeable injuries caused by defective products." *Id.* at 462 (citing *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 54 & n.25 (3d Cir. 2009); *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 16 (Iowa 1977); *Embs v. Pepsi-Cola Bottling Co.*, 528 S.W.2d 703, 706 (Ky. 1975); *Howes v. Hansen*, 56 Wis.2d 247, 201 N.W.2d 825, 831-32 (1972)). Moreover, the Court noted that allowing such claims is supported by policy considerations because it "places the risk of harm on the entity most capable of controlling the risk." *Id.; see also Mayor of Baltimore v. Monsanto Co.*, 2020 U.S. Dist. LEXIS 55265, at *32-*34.

Defendants also argue that the City has not pled that Defendants owed a duty to the City. Motion at 35. However, consistent with the City's allegation concerning Defendants' duty to use due care in developing, designing, testing, inspecting, manufacturing and distributing their filtered cigarette products, Maryland courts have consistently cited to *Moran v. Faberge, supra*, 273 Md. 538 at 543-44:

> To begin with we note that a manufacturer's duty to produce a safe product, with appropriate warnings and instructions when necessary, is no different from the responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others . . . . Whether any such unreasonable risk exists in a given situation depends on balancing the probability and seriousness of harm, if care is not exercised, against the cost of taking appropriate precautions . . . .

See also Frericks v. General Motors Corp., 247 Md. 288 (1975) (manufacturer was liable for a design defect which it could have reasonably foreseen would cause or enhance injuries on impact,

which was not patent or obvious to user, and which lead to or enhanced the injuries); and *Volkswagen of America, Inc. v. Young*, 272 Md. 201 (1974) (manufacturer was liable for a defect in design, which the manufacturer could have reasonably foreseen would cause injuries on impact that was not obvious to the user and that enhanced the injuries).

Maryland courts have imposed liability upon manufacturers for injuries caused by the unsafe designs of their products. *See Babylon v. Scruton*, 215 Md. 299 (1958); *see also* RESTATEMENT (SECOND) OF TORTS § 398. The cases in Maryland which have held manufacturers and suppliers not liable for allegedly unsafe designs of their products, have not done so on the theory that a design defect does not give rise to a cause of action in negligence; instead, the denial of liability in each case was based on the fact that the danger in the design was patent or obvious to the user. *Patten v. Logemann Bros. Co.*, 263 Md. 364 (1971); *Blankenship v. Morrison Mach. Co.*, 255 Md. 241 (1969); *Myers v. Montgomery Ward & Co.*, 253 Md. 282 (1969). Where the unsafe design was not obvious to the user, the manufacturer was held responsible, *Babylon v. Scruton, supra*.

The City has plainly alleged that the danger was not patent or obvious to the user. *See* Compl. ⁋ 33 ("Defendants further knew that plastic filters gave the appearance of biodegradability and took advantage of that ruse. They knew that smokers litter cigarette filters on the ground because smokes are under the impression that the paper wrappers and filters will decompose in the environment because they appear as though they are made of a paper substance, instead of their true plastic nature."). The City has also plainly alleged that Defendants could have reasonably foreseen the danger to Baltimore City. *See id.* ⁋ 30 ("Defendants actively chose and continue to choose to make cigarettes non-biodegradable. They were, and are aware, of both the long-lasting negative impact the components of these filters have on the environment and the rate at which their

consumers litter these filters."). Thus, the City has adequately pled its defective design claims and the motion to dismiss must be denied. *See Exxon*, 406 F. Supp. 3d at 462.

c. The City Has Stated a Claim for Failure to Warn (Counts X and XI)

Under Maryland law, "[i]n a product liability claim for strict liability failure to warn, the plaintiff must prove that the defendant's product was unreasonably dangerous as a result of the defendant's failure to warn and that the plaintiff was injured as a proximate result of the failure to warn." *Mack Trucks, Inc. v. Coates*, No. 2709 Sept. Term 2016, 2018 Md. App. LEXIS 458, 2018 WL 2175932 *20 (Md. App. May 11, 2018). In order to recover under a negligent failure to warn claim, a plaintiff must prove the same elements required for a strict liability failure to warn claim, plus "proof of an additional element—that the defendant had a duty to warn of dangers known to it or dangers that, in the exercise of reasonable care, should have been known to it, and breached that duty." *Id.* (citing AM. LAW OF PROD. LIABILITY 3d § 32:25 ("generally, a manufacturer or seller of a product is negligent if it fails to warn of those dangers of which it knows or reasonably should know."))

As the District Court recognized in opinion remanding this case, "in these claims, Plaintiff attacks Defendants' awareness that their cigarette filters were hazardous when they 'left their control' and they failed to tell anybody about it — including Plaintiff." *Mayor & City Council of Baltimore v. Philip Morris USA, Inc. et al.*, 2024 U.S. Dist. LEXIS *19-*20. And, as did Philip Morris before the District Court, in the instant Motion, Defendants "misapprehend[] both the scope of Plaintiff's failure to warn claims (subjectively) and the required elements of same (objectively)." *Id.*

Indeed, Defendants again assert that that the City has not pled that Defendants owed a duty to City. Motion at 36-37. As was explained in *Exxon*, "there is no duty to 'warn the world,'" but

the duty does extend "to third persons whom the supplier should expect to be endangered by its use." 406 F. Supp. 3d at 463. Consequently, Judge Hollander found that Exxon "had a duty to warn the State of dangers associated with MTBE because they created and controlled a market for products in the State that posed unique, substantial harms to its resources." *Id.* Similarly, here, the City alleges that the Defendants, as the sole manufacturer of cigarettes, knew and expected that toxic, nonbiodegradable cellulose acetate-based filters would be widely littered and failed to provide any warnings. Compl. ¶ 33. Accordingly, the City has sufficiently pled a claim for product liability of failure to warn based on Defendants' duty to warn the general public, including the City, whom they allegedly knew and expected would be endangered by toxic cigarette filter litter. *See* 406 F. Supp. 3d at 463.

Defendants cite *Gourdine v. Crews*, 405 Md. 722, 955 A.2d 769 (2008)) to support their argument. The City's case is distinguishable from *Gourdine*, in which the Court of Appeals held that a manufacturer of insulin medications did not owe a legal duty to warn of the dangers of the medication to non-users. There, a non-user driver was killed in an automobile accident when his car was struck by a user driver who, reacting to the medications, "blacked out" and lost control of her vehicle. The decedent's wife sued the drug manufacturer for negligence, strict liability, and fraud.

The Court determined that the drug manufacturer did not owe a legal duty to the decedent non-user of the medications under any of the theories alleged. Observing that "[d]uty requires a close or direct effect of the tortfeasor's conduct on the injured party," the Court reasoned:

> [T]here was no direct connection between [the manufacturer's] warnings, or the alleged lack thereof, and [the decedent's] injury. In fact, there was no contact between [the manufacturer] and [the decedent] whatsoever. To impose the requested duty . . . would expand traditional tort concepts beyond manageable bounds, because such duty could apply to all individuals who could have been affected by [the user driver] after her ingestion of the drugs. Essentially, [the

> manufacturer] would owe a duty to the world, an indeterminate class of people, for which we have 'resisted the establishment of duties of care.'

Id. at 750.

In the case at bar, unlike *Gourdine*, the class of people to whom the duty was owed was not indeterminate; rather, it was especially foreseeable to Defendants that cigarette filters would be littered on the property of the City, as a member of a limited and defined class of people. The facts alleged are that Defendants knew that its failure to warn would result in customers littering cigarette filters onto public property, such as the City's. Indeed, the class of people—municipalities—Defendants would have reason to expect would be harmed by the concealment is small in comparison to the class of people – everyone and anyone—the Court held were owed no duty in *Gourdine*.

In sum, the actual harm inflicted on the City falls within the general field of danger which should have been anticipated, and Defendants owed the City a duty to warn of the latent dangers associated with its products. *See Exxon*, 406 F. Supp. 3d at 463 ("there is no duty to 'warn the world,'" but the duty does extend "to third persons whom the supplier should expect to be endangered by its use."). Thus, the City has adequately pled its negligent failure to warn claim. And, Defendants concede, *sub silencio*, that Plaintiff has appropriately pled its strict liability failure to warn claim. Accordingly, Defendants' motion must be denied.

d. The City Has Stated a Claim for Public Nuisance (Count IX)

Under Maryland law, a "public nuisance is an injury to the public at large or to all persons who come in contact with it[.]" *Adams v. Commissioners of Town of Trappe*, 204 Md. 165, 170 (1954). To recover under a public nuisance claim, a plaintiff must demonstrate "unreasonable interference with a right in common to the general public." *Tadjer v. Montgomery County*, 300 Md. 539, 552 (1984) (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1)). A public nuisance

may be enforced by a private cause of action when the plaintiff has "authority as a public official or public agency to represent the state or a political subdivision in the matter[.]" RESTATEMENT (SECOND) OF TORTS § 821C(2)(b).

Public nuisance involves an unreasonable interference with the public's rights. Pursuant to the Second Restatement of Torts § 821B(2):

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The Fourth Circuit offers the following guidance:

> Claimants can point to any or all of those three circumstances when attempting to prove the 'unreasonable-interference' element of a public nuisance. They can avoid federal law entirely, for example, if they show harmful conduct either involving a 'significant interference' with the public's safety *or* producing a 'permanent or long-lasting effect.' Neither of those avenues require federal law as a 'necessary element.'
>
> It is true that the Second Restatement of Torts indicates that the 'unreasonable-interference' question may be fulfilled by showing the conduct at issue is proscribed by "*a* statute, ordinance or administrative regulation." So claimants *may* invoke a federal law or regulation to show that there is an "unreasonable interference" with the public's rights. But that is discretionary and not a "necessary element." Without resorting to any federal law, Plaintiffs can also utilize a state law or regulation when showing an "unreasonable interference" with the public's rights. Maryland courts agree.

Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178, 211 (4th Cir. 2022).

As the District recognized in its opinion remanding this case, Plaintiff's nuisance claim is based on Defendants' use of nonbiodegradable cigarette filters. *Mayor & City Council of Baltimore v. Philip Morris USA, Inc. et al.*, 2024 U.S. Dist. LEXIS *14-*15. And, as did Philip

Morris before the District Court, in the instant motion, Defendants "misapprehend[] the elements of a public nuisance claim." *Id.*

i. The City Has Adequately Alleged that Defendants Created and Contributed to a Public Nuisance

The City alleges that Defendants created or contributed to a public nuisance by, among other conduct, designing, manufacturing, distributing, and selling cigarettes and their toxic filters which they knew to be hazardous, and by concealing those hazards to maximize profits. Compl. ¶¶ 6, 10, 30-35. That conduct has caused millions of nonbiodegradable, toxic cigarette filters to be littered on City property, contaminating the soil and groundwater, hampering plant growth, polluting waterways, deteriorating critical habitat, killing fish and other sea creatures, and causing a blight by increasing crime, impacting tourism, reducing commerce, and impacting property values for residents and businesses – each of which interferes with fundamental public rights including public health, safety, comfort, and convenience. Compl. ¶¶ 3-6, 24-27.

Courts in Maryland have recognized that nuisance liability under Maryland law applies to a defendant who misleadingly manufactures and markets products that the defendant knows will likely cause environmental or health hazards and those nuisance conditions arise. *See State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467-69 (D. Md. 2019) (denying motion to dismiss public nuisance claim against manufacturers over groundwater contamination from gasoline additive); *Mayor of Baltimore v. Monsanto Co.*, 2020 U.S. Dist. LEXIS 55265, at *25-*29 (same as to nuisance claim against manufacturer for PCB contamination of stormwater infrastructure). In *State v. Exxon*, Judge Hollander held the State adequately pleaded a nuisance claim "premised on [the defendants'] manufacture, marketing, and supply of MTBE gasoline" with "extensive knowledge of the environmental hazards associated with MTBE." 406 F. Supp. 3d at 67-69. Judge Bennett came to a similar conclusion in *Baltimore v. Monsanto*, finding that the City sufficiently alleged

the defendants substantially participated in creating a public nuisance by manufacturing, marketing and promoting PCBs while withholding their "extensive knowledge about PCB's harmful effects" from consumers and the public. 2020 WL 1529014, at *9-*10. Defendants here likewise had extensive knowledge of the harms that would arise from their products' typical use but concealed that knowledge while manufacturing and selling their products.

ii. The City's Public Nuisance Claim Implicates a Public Right

Defendants argue that the City has failed to allege a public right. Motion at 39. In so arguing, Defendants misconstrue the City's allegations and misappropriate the legal standard on a motion to dismiss. As discussed above, as a result of Defendants' tortious conduct, millions of nonbiodegradable, toxic cigarette filters are littered on City property, contaminating the soil and groundwater, hampering plant growth, polluting waterways, deteriorating critical habitat, killing fish and other sea creatures, and causing a blight by increasing crime, impacting tourism, reducing commerce, and impacting property values for residents and businesses. Compl. ¶¶ 3-6, 24-27. Each of these injuries interferes with fundamental public rights including public health, safety, comfort, and convenience. *Tadjer*, 300 Md. At 552 (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1)).

Certainly, Baltimore City has a community interest in its environment, including its soil and groundwater, plant growth, waterways, critical habitat, fish and other sea creatures, as well as crime, tourism, commerce, and property values for residents and businesses. Defendants, in a blatant misunderstanding of the legal stage of the proceedings, argue that the City has not alleged the *extent* of these injuries. Motion at 39 (emphasis in original). Obviously, the extent of the City's injuries is a distinctly factual inquiry that cannot be decided on a motion to dismiss. *Mayor of Baltimore v. Monsanto Co.*, 2020 U.S. Dist. LEXIS 55265 at *25 ("Defendants' attempt . . . is a distinction with no difference at this procedural stage."). In discovery, the City will produce

evidence of the extent of these injuries, as in the usual course of litigation. In the interim, Defendants' motion must be denied.

iii. The City Has Adequately Alleged that Defendants Unreasonably Interfered with a Public Right

As has the City adequately pled that its nuisance has implicated a public right, the City has also adequately pled unreasonable interference with those public rights. The City has pled that Defendants designed, manufactured, distributed, and sold cigarettes and their toxic filters which they knew to be hazardous and concealed those hazards to maximize profits. Compl. ⁋⁋ 6, 10, 30-35. While Defendants considered and made biodegradable filters, they intentionally continued to design, manufacture, and sell nonbiodegradable cellulose acetate filters to maximize profits at the expense of the City's environment. *Id.* ⁋ 31. Defendants further knew that plastic filters gave the appearance of biodegradability and took advantage of that ruse. *Id.* ⁋ 33. They knew that smokers litter cigarette filters on the ground because smokes are under the impression that the paper wrappers and filters will decompose in the environment because they appear as though they are made of a paper substance, instead of their true plastic nature. *Id.* Consequently, smokers continue to be deceived that cigarette filters will naturally decompose and that they are safe to throw on the ground. *Id.* As a result of Defendants' tortious conduct, millions of nonbiodegradable, toxic cigarette filters are littered on Baltimore City property, contaminating the soil and groundwater, hampering plant growth, polluting waterways, deteriorating critical habitat, killing fish and other sea creatures, and causing a blight by increasing crime, impacting tourism, reducing commerce, and impacting property values for residents and businesses. *Id.* ⁋⁋ 3-6, 24-27. That conduct, contrary to Defendants' assertion, is obviously unreasonable.

iv. The City's Complaint Satisfies Any Control Requirement

Despite Defendants' assertion that the City has failed to plead Defendants' control over the alleged nuisance, control is not a required element to plead public nuisance under Maryland law. In *Exxon*, Judge Hollander distinguished the case upon which Defendants principally rely, *Cofield v. Lead Indus. Ass'n, Inc.*, No. MJG-99-3277, 2000 U.S. Dist. LEXIS 23405, 2000 WL 34292671 (D. Md. Aug. 17, 2000). Judge Hollander explained that "Maryland courts have never adopted the 'exclusive control' rule for public nuisance liability outlined by the court in *Cofield*." 406 F. Supp. 3d at 468. Instead, "Maryland courts have found that a defendant who created or substantially participated in the creation of the nuisance may be held liable even though he (or it) no longer has control over the nuisance-causing instrumentality." *Id.* (citing *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 256-57 (D. Md. 2000); *E. Coast Freight Lines v. Consol. Gas. Elec. Light & Power Co. of Balt.*, 187 Md. 385, 397-98 (1946); *Gorman v. Sabo*, 210 Md. 155, 161 (1956); *Maenner v. Carroll*, 46 Md. 193, 215 (1877)).

The City has sufficiently alleged that Defendants created or substantially participated in the creation of cigarettes and their filters, even though Defendants may not have maintained control over the filters once disseminated. The City has alleged that Defendants designed, manufactured, distributed, and sold cigarettes and their toxic filters, resulting in the creation of a public nuisance that has damaged the City's environment and caused the City to expend resources to clean up the damage. The City further alleges that Defendants had extensive knowledge about cigarette filters' harmful effects; intentionally withheld this information; and manufactured and distributed cigarette filters throughout Baltimore, causing harm to the harm to the City's environment.

Just as the plaintiffs in *Exxon* plausibly alleged that defendants manufactured and distributed the toxic chemicals at issue which substantially contributed to the creation of a public

nuisance, so too has the City plausibly alleged that Defendants manufactured and distributed toxic cigarette filters which have contaminated the City's property, creating a public nuisance. *See* 406 F. Supp. 3d at 469.

Even if Maryland law did impose a control requirement, the Complaint would satisfy it. Defendants exercised control over the instrumentality of the nuisance at every step because they designed the cigarette and the filter, including the ingredients, manufactured, sold and profited from the cigarettes and their toxic filters which they knew to be hazardous, and knew would be littered, but concealed those hazards to maximize profits. Compl. ⁋⁋ 6, 10, 30-35; *see Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d at 142-43 (finding MTBE manufacturers exercised sufficient control by controlling "every step of the supply chain" and contamination through "releases, leaks, overfills, and spills" was foreseeable). Thus, their motion to dismiss must be denied.

CONCLUSION

The Court should deny Defendants' Motion in its entirety.[12]

[12] In the alternative, to the extent the Court finds the Complaint deficient in any regard, the City respectfully requests dismissal without prejudice with leave to amend so that it may amend to cure any deficiencies. In Maryland, "it is well-established that leave to amend complaints should be granted freely to serve the ends of justice and that it is the rare situation in which a court should not grant leave to amend." *RRC Ne., LLC v. BAA Md, Inc.*, 413 Md. 638, 673 (2010); *see also* Md. Rule 2-341 ("Amendments shall be freely allowed when justice so permits."); *Asphalt & Concrete Servs., Inc. v. Perry*, 221 Md. App. 235, 269 (2015) ("[L]eave to amend should be generously granted." (quotation omitted)), *aff'd*, 447 Md. 31 (2016).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2024, a copy of the forgoingOpposition was served on counsel of record through filing and service by Maryland Electronic Courts ("MDEC") and a courtesy copy was transmitted via electronic mail:

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