

**BERKSHIRE COUNTY SUPERIOR COURT
PITTSFIELD, MASSACHUSETTS**

THE TOWN OF LEE, MASSACHUSETTS	CASE NO: 2476CV00044
Plaintiff,	COMPLAINT FOR INTENTIONAL
	INFLECTION OF HARM TO HUMANS
v.	AND THE ENVIRONMENT,
	COMPENSATORY AND UNITIVE
	DAMAGES.
MONSANTO COMPANY, SOLUTIA INC.,	
PHARMACIA LLC., AND GENERAL	JURY TRIAL DEMANDED
ELECTRIC CORPORATION.	
Defendants.	

**PLAINTIFF’S RESPONSE TO GENERAL ELECTRIC’S MOTION
TO REMOVE THIS CASE TO FEDERAL COURT**

The Town of Lee does not oppose General Electric's Motion to Remove the Berkshire Superior Court's case to this Court.

It is counsel's understanding that there is or there was a local rule or practice that this Court required parties to consult on their position before motions are filed. This was not done by General Electric unfortunately as this would have saved judicial time.

General Electric has filed this motion before it was served with the Complaint and exhibits labeled has DJ-1, to DJ-24. The Berkshire Superior Court scheduling order specified June 12, 2024 as the date required for completion of service. The reason GE and the other Defendants are yet to be served is because Plaintiff plans to file a Motion for Partial Summary Judgment on the issue of liability of Defendants that will be served together with the Complaint on all Defendants. That motion is under preparation by counsel but since Material Facts as to Which There is No Issue to be Tried is ready, Plaintiff has attached it to this filing to facilitate this Court's understanding of the issues in Plaintiff's Complaint.

In addition this Court should have been made aware that an identical Motion on the same facts GE filed in a case in Missouri has already been adjudicated by a Federal District Court in Missouri as recently as February 6, 2024. Exhibit-DJ-37. The decision of Judge Autrey has been appealed by General Electric to the 8th Circuit. (Attached also related memorandums from GE and Monsanto (*DJs 35 and 36 as well as the original case that gave rise to the Motions (Exhibit DJ-. 30)*).

s/Cristóbal Bonifaz, Esq.

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Certificate of Service

The Town of Lee served all Defendants's counsel with this document and accompanying exhibits through the Court's CFC system and by Email.

s/ Cristobal Bonifaz, Esq.

Cristobal Bonifaz, Esq.

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JURY TRIAL DEMANDED

**PLAINTIFF’S STATEMENT OF UNDISPUTED MATERIAL FACTS
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

Plaintiff The Town of Lee, Massachusetts submits the following Statement of Undisputed Material Facts as to which there is no issue to be tried in support of its Motion for Partial Summary Judgment on the issue of liability for damages caused by General Electric and Monsanto (including Solutia and Pharmacia) to the Town of Lee.

A. LIABILITY OF GENERAL ELECTRIC

MF-1 The Attorney General of Massachusetts Scott Harshbarger convened a public meeting in Western Massachusetts on February 5, 1998 to discuss with the public “concerns relating PCB contamination in Pittsfield and Western Berkshire County. The Attorney General summarized in his report the concern of the residents of Western Berkshire County with cancers possibly caused by exposure of residents to PCBs. (*DJ-28*).

MF-2 The United States of America on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), the State of Connecticut and the Commonwealth of Massachusetts filed a Complaint in Federal Court against General Electric in 1999 seeking pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) 42 U.S.C §§ 6928 and 6973, Sections 3008 and 7003 of the Resource Conservation and Recovery Act (“RCRA”), 42 U S C §§ 6928 and 6973, and other federal statutes. The

Complaint sought “inter alia (1) reimbursement of costs incurred and to be incurred by EPA and the Department of Justice for response actions with regard to the GE-Pittsfield/Housatonic River Site ("Site"), together with accrued interest, (2) performance of studies and response work by the defendant at the Site and (3) damages for injury to, destruction of, or loss of natural resources, and for costs of assessing natural resource damages together with accrued interest. (DJ-26).

MF-3. In accordance with the National Contingency Plan ("NCP"), 40 C F 300 and Section 121(f)(1)(F) of CERCLA, 42 U S C § 9621(0(1)(F), EPA notified the Commonwealth of Massachusetts and the State of Connecticut "of negotiations with the General Electric Company regarding the implementation of the response actions for the Site, and provided both States an opportunity to participate in such negotiations and be party to a possible consent decree. (Id).

MF-4. The Commonwealth of Massachusetts and the State of Connecticut filed complaints against the defendant in this Court alleging that the defendant is liable to both States under Section 107 of CERCLA, 42 U.S. C. 9607 and M G.L. c. 21E for, inter alia (1) reimbursement of costs incurred and to be incurred by the both States for response actions with regard to the Site, together with accrued interest, (2) performance of studies and response work by the defendant at the Site, and (3) damages for injury to, destruction of, or loss of natural resources, and for costs of assessing natural resource damages, together with accrued interest. The States’ action was consolidated with the United States Action. Civil Action 99-

30225, 30-226 and 30227 actions and were eventually resolved by an agreed Consent Decree in the year 2000. (*Id.*).

MF-5. After 16 years of study and litigation against GE regarding whether and to what extent PCBs could be removed from the Housatonic River and Western Berkshire County EPA entered an Order (“Order 2016”) which according to EPA reduced the presence of the toxic product—polychlorinated biphenyls’ “PCBs” —from a 100-mile portion of the Housatonic River “River” which flows through the City of Pittsfield “City” and the Massachusetts Towns of Lee, Lenox, Stockbridge, Great Barrington, and Sheffield. (Emphasis *DJ-1*).

MF-6 The EPA CERCLA Order of 2016 (*DJ-1*) stated as follows:

*The United States Environmental Protection Agency (“EPA”) is charged with enforcing federal environmental laws to protect human health and the environment. Under this authority, EPA seeks to hold General Electric Company (“GE”) accountable for contaminating over a hundred miles of the Housatonic River system (an area referred to as “Rest of River”) with toxic polychlorinated biphenyls (“PCBs”). From 1998 to 2000, the United States, the Commonwealth of Massachusetts, the State of Connecticut, and GE negotiated a Consent Decree (“the Decree” or “CD”) requiring GE to clean up its contamination. **The Decree was approved by a federal court on October 27, 2000. GE committed to clean-up the Rest of River based upon the remedy selected by EPA through the process outlined in the Decree.** (Statement of Position of EPA, February 29, 2016. (Emphasis here only. Exhibit *DJ-1*. at page-1. Hereinafter *DJ* number at page number.)*

MF-7. EPA used its scientific and technical expertise to issue the 2016 to address the contamination of the Housatonic River as it flows through the City of Pittsfield and the Towns of Lee, Lenox, Great Barrington, Stockbridge and Sheffield stating as follows:

*EPA has followed this exhaustive remedy selection process, which has included over a decade of expert information-gathering and technical analysis, to make its Intended Final Decision for the Rest of River remedy. EPA reached its Intended Final Decision based upon an analysis of the relevant criteria in the Decree and information in the Administrative Record. The remedy EPA selected includes a **combination of excavation and capping of PCB contaminated material, and disposal of that material at a suitable off-site landfill**. In balancing the relevant factors under the Decree, the Intended Final Decision represents the **best alternative to protect human health and the environment** for the Housatonic River. **GE now challenges EPA's Intended Final Decision for one reason – to reduce its costs in cleaning up its PCBs.** (Id. p1. Emphasis here only).*

MF-8. EPA made the substantive decisions on all human health related issues caused by the contamination of the Housatonic River and its floodplains which included burying the PCBs dredged from the River at an **off-site** location. (Id. at pages 15-27).

- a. *The Proposed Remedy Provides Long-term Protection of Human Health and the Environment. (Id. page 15).*
- b. *EPA's toxicity values for PCBs are supported by scientific consensus and were vetted through public comment and peer review. (Id. pages 15-17).*
- c. *The proposed remedy is necessary to reduce human exposure to PCBs through consumption of fish. (Id. pages 17-19).*
- d. *The direct contact exposure assumptions for sediment and floodplain soil in the HHRA [Human Health Risk Assessment |EPA] are reasonable estimates of risks to average and high-end users. (Id. pages 19-20).*
- e. *The proposed remedy is necessary to reduce human health risks due to direct contact exposure to PCBs. (Id. pages 21-23).*
- f. *PCBs pose unacceptable risks to the environment in Rest of River. (Id. pages 21-23).*
- g. *The remedy's long-term benefits to human health and the environment outweigh any short-term ecological impacts which GE is required to mitigate. (Id. ps. 23-26).*

MF-9. The position of the EPA as per was appealed by GE to the Environmental Appeals Board "EAB" who **reversed** the position of EPA on

its restriction that PCBs dredged from the River must be buried at an **off-site** location. (*DJ-1 at pg.-1 Supra MF-6*).

MF-10. GE submitted to EPA a Pre-Design Investigation of a projected PCB dump to be located in the Town of Lee “Lee” where the dredged PCBs would be buried. (*GE’s Document DJ-2*).

MF-11. EPA, forced by EAB’s order to bury PCBs at an **on-site** location adopted GE’s submission and issued a final Order in (“CERCLA Order 2020”) for GE to move forward with the partial clean-up of the Housatonic River, its floodplains and other locations and to bury PCBs at the GE proposed location in Lee. (*EPA Document DJ-3*).

MF-12. EPA was forced to agree to bury the dredged PCBs in Lee merely to lower the costs GE’s clean-up. (*DJ-1 at pg.-1*).

MF-13. EPA, GE, the City and the towns of Lee, Lenox, Stockbridge, Great Barrington, and Sheffield entered into a Settlement Agreement under which the City and towns agreed **only not to appeal** the EPA terms of the 2022 CERCLA Order 2020 to the courts in exchange for GE paying the City and Towns the sum of 62 million dollars to be divided among them. (*DJ-16, DJ-17*).

MF-14. The CERCLA ORDER 2020 was appealed by citizens groups to the District Court and eventually to the First Circuit Court of Appeals. The Court

of Appeals upheld the CERCLA Order 2020. (*Housatonic River Initiative v. United States EPA*, 75 F.4th 248; 2023 U.S. App. Lexis 18977 July 25, 2023).

MF-15. There is nothing in the plain reading of Settlement Agreement that prevents Lee from filing this lawsuit for damages against GE and Monsanto for the common law damages these corporations have inflicted on the Town of Lee and its residents.(DJ-16).

MF-16. This lawsuit filed by the Town of Lee against Monsanto and GE does not, cannot, and will not, interfere in any way with the CERCLA Order 2020 or the Settlement Agreement and GE and EPA can carry out the terms of CERCLA Order 2020 as if this Complaint had never being filed. (Complaint ¶ 14).

MF.17. The EPA CERCLA Order 2020 Order is binding on the Town of Lee regardless of whether Lee agreed or disagreed with the Order, and cannot be overturned by municipal or local actions or by this Court as it has already been approved by the Court of Appeals of the First Circuit. (See legal analysis in accompanying Memorandum in Support of Motion for Partial Summary Judgment.)

MF.-18. The CERCLA Order 2020 includes construction of a PCB dump in Lee the poorest town in the region. (DJ-3).

MF.-19. The PCB dump could have been created within the confines of the other affected towns; Lenox, Great Barrington, Sheffield or Stockbridge, however these towns are wealthy and in the opinion of the Town of Lee it would have been politically impossible for GE to install, and for EPA to approve a PCB dump within the confines of these towns.

MF-20. The moneys paid by GE as per the Settlement Agreement are not compensation for anything other than the towns not appealing the CERCLA Order—as per the content of the agreement—since of the 62 million paid by GE 25 million were allocated to Lee and 25 million were allocated to Lenox. Lenox the wealthy Town north of Lee does not have to suffer damages from a PCB dump like Lee. (*DJ-17 and DJ-16*)

MF-21. The decision by EPA to order the construction of the PCB dump in Lee saves GE the expense of transporting dredged PCBs to an out of state accredited toxic dump as EPA's scientists and engineers recommended in the 2016 CERCLA Order. (*DJ-1 at pg. 1*).

MF-22. The Town of Lee and its residents have suffered and will continue to suffer damages from the contamination of the River and its consequences including the massive PCB dump to be built in Lee to house the dredged PCB mud. (*DJ-15*).

MF-23. The Settlement Agreement does not prevent The Town of Lee from seeking monetary compensation from GE and Monsanto for common law

damages that PCBs have inflicted on the Town and its residents. (DJ-16 and DJ-17).

B. LIABILITY OF MONSANTO, SOLUTIA AND PHARMMACIA

MF-23. Monsanto manufactured all PCBs currently in the River and Western Berkshire County of Massachusetts. (General Electric 1971 Document. (*DJ-29 at pg. 2*).

MF-24. This lawsuit against Monsanto and GE does not, cannot, and will not, interfere with the CERCLA Order or the Settlement Agreement. (*Supra MFs-15 to 22*).

MF-25. General Electric, a customer of Monsanto, used PCBs Aroclors 1254 and 1260 made by Monsanto on electrical transformers it serviced in Pittsfield (“City”) between 1930 and 1979. (General Electric Document. (*DJ-29 at pg. 8*).

MF-26. Aroclors 1254 and 1260 were sold by Monsanto for use in transformers under the trade name of “Askarels” and were marketed to General Electric under the trade name of “Pyranol.” (*Id at pgs. 7 to 9.*)

MF-27. PCBs used in electrical transformers lost its insulating properties after some usage, at which time GE collected and disposed of the PCBs by burying them in the City at various locations or by dumping the PCBs into

the Housatonic River “River” that runs through the City and the towns of Lenox, Lee, Great Barrington, Sheffield and Stockbridge. (*DJ 1 and DJ-2*)

MF-28. EPA and GE have decided under CERCLA to dredge a portion of the PCBs in the Housatonic River depositing 50.5 tons (*AKA 101,100 pounds*) of PCBs in a massive dump within the confines of Lee. (*DJ-2, DJ-3 and DJ- 15.*)

MF.-29. According to EPA the dredging of PCBs imbedded in mud at 25 ppm concentration will require truck transportation of two million tons of mud (*AKA four billion pounds of mud*) through the streets of Lee for the next 13 years. (*DJ-15*).

MF.-30. The PCBs left on the sediments of the river after completion of the dredging of the River —anywhere between 100,000 to 500,000 pounds of PCBs— will be covered by EPA designed covers that will have to be monitored for the next 20 years—after the dredging is completed. (*DJ-24 Fast Facts and DJ-3 pages 18 et seq., as well as samples of EPA type covers. DJ-33 and DJ-34.*).

MF.-31. Monsanto manufactured the 59+ million pounds of PCBs GE purchased from Monsanto between 1972 and 1977. (*DJ-30 at pg.17 also Case: 4:23-cv-00204-HEA Doc. #: 53-2 Filed: 03/21/23 Page: 21 of 75 Page ID #: 3864*)

MF.32. Monsanto knew at all times between the 1930s and 1977 that PCBs were toxic. (*Monsanto's Statement of Material Facts. Document. DJ-4*).

- a. *Polychlorinated biphenyls (PCBs) are a class of 209 nonpolar chlorinated hydrocarbons with a biphenyl nucleus on which one to ten of the hydrogens have been replaced by chlorine. Commercial PCBs were manufactured and sold as complex mixtures containing multiple isomers (congeners) at different degrees of chlorination. Exhibit DJ-4 Monsanto's Statement of Facts in Town of Westport et al., v Monsanto C.A. 14-CV-12041. DJ-4 at p. 1. Citations Omitted).*
- b. *Monsanto Company began the manufacture and sale of PCB mixtures in 1935 when it purchased the Swann Chemical Company. The Monsanto PCB mixtures were sold under the registered trademark of Aroclor. The Monsanto PCB-containing Aroclor numbers included 1016, 1221, 1232, 1242, 1248, 1254, 1260, 1262, and 1268. With the exception of 1016, the last two digits of the Aroclor series number correspond to the percent of chlorine. (Id at p 2 Citations Omitted).*
- c. *Beginning in the 1930s, Monsanto commissioned hundreds of toxicological tests of PCBs from leading institutions such as the Harvard School of Public Health and the Kettering Institute of the University of Cincinnati. Those tests disclosed that PCBs, like all industrial chemicals, were capable of causing systemic toxicity at high doses, but could be safely manufactured, and, if recommended precautions are followed, can be used safely. At all times relevant to this case, Pharmacia [AKA Monsanto] supplied Aroclor product bulletins and warning labels to each of its customers. These bulletins contained then-known toxicological information regarding exposures to PCBs and information on their safe handling. These bulletins also provided physical and chemical characteristics for the Aroclors. Pharmacia also issued warnings on its labeling for barrels and tank cars. Pharmacia warned its customers: "Experimental work in animals shows that prolonged exposure to Aroclor vapors evolved at high temperatures or by repeated oral ingestion will lead to systemic toxic effects. This warning was repeated in a 1943 application data bulletin, in which Pharmacia warned: "Experimental work on animals shows that prolonged exposure to Aroclor vapors evolved at high temperatures or by repeated oral ingestion will lead to systemic toxic effects. Pharmacia provided the following warning: "The vapors emitted by Aroclor 1248 heated to elevated temperatures are injurious to the liver on prolonged exposure and should not be breathed. Pharmacia warned: "If these precautions are neglected*

acne may develop and excessive exposure may cause liver damage. (id. p-9-10.

- d. *PCB production in the United States began in response to the electrical industry's need for improved dielectric insulating fluids which would also provide increased fire resistance when used in transformers and capacitors. **As the unique functional characteristics of these materials became more fully understood additional uses were found. Their non-flammability made them an excellent choice in high pressure hydraulic applications associated with high risk of fire such as die casting and steel production. Their thermal stability and nonflammability were valuable in heat transfer systems.** Their non-flammability, thermal stability and viscosity characteristics made their use desirable in hot melt adhesives and other plasticizer applications. **PCBs therefore evolved as unique class of chemicals which met important needs for both industry and society.** In many instances fire and building codes required PCBs for the protection of life and property. (Id at ps. 4-5 Citations Omitted. Emphasis here only).*
- e. *In 1970, in response to growing information regarding PCB's environmental presence, Monsanto began to voluntarily phase out the sale of PCBs for various applications. Sales of PCBs for use as plasticizers were phased out as of August 1970. Monsanto had ceased the manufacture and sale of PCBs for all uses other than as a dielectric fluid for use in enclosed electrical equipment. Monsanto voluntarily ended the manufacture and sale of PCBs for all uses in 1977.*

MB-33. Monsanto's medical team knew in 1955 that PCBs are toxic and can cause liver disease in humans, yet it halted further evaluation of the limits of exposure. (DJ-5 Monsanto's Document September 20, 1955).

MCC's position can be summarized in this fashion. We know Aroclors are toxic but the actual limit has not been precisely defined. It does not make too much difference, it seems to me, because our main worry is what will happen if an Individual develops any type of liver disease and gives a history of Aroclor exposure. I am sure the Juries would not pay a great deal of attention to MACs.[Minimum Allowed Concentrations](DJ-5 at p.-1).

We, therefore, review every new Aroclor use from this point of view. If it is an industrial application where we can get air concentrations and have some reasonable expectation that the air concentrations will stay the same, we are much

more liberal in the use of Aroclor. If, however, it is distributed to householders where it can be used in almost any shape and form and we are never able to know how much of the concentration they are exposed to, we are much more strict. No amount of toxicity testing will obviate this last dilemma and therefore I do not believe any more testing would be justified. (Id at p-2).

MB-34. The United States Navy rejected in 1956 a PCB (Pydraul 150 (AKA Aroclors 1254 mixture with 1260) marketed by Monsanto for usage as oil in the antenna of nuclear submarines as a toxic product in spite of Monsanto's protestations. (Monsanto's Document DJ-6 May 29, 1956 and Monsanto's Document DJ-7 January 21, 1957).

*f. applications of Pydraul 150 caused death
In all of the rabbits tested , (The amount
Administered was not given.) ...
Vr: Inhalation of 10 milligrams of Pydraul 150 per
Cubic meter or approximately 2 tenths of a part
Of the Aroclor component per million for 24 hours
A day for 50 days caused statistically definite
Liver damage-. **No matter how we discussed the
Situation, it was Impossible to change their minds.**
(Emphasis here only. Exhibits DJ 6 and 7).*

MB-35 Monsanto's had internal dispute in 1957 as to whether Monsanto should recommend the use of Aroclor in agricultural products as an insecticide additive without approval of U.S.D.A-FDA. (Monsanto's Document DJ-8 August 30, 1957).

You may already know that since Aroclor are toxic and, according to your attached reference, may extend the residual life of the pesticide, the Federal Government would require the following before selling for use on food and feed crops:

- (1) Proof of benefits from the application .*
- (2) Data to show whether or not residual Aroclor is present and whether it modifies the residual amount of Lindane or other active ingredient at harvest.*
- (3) If Aroclor is present or if the residual quantity of Lindane*

or other active ingredient has been significantly changed, tolerances for the Aroclor and for the pesticide in question must be developed.

(4) If a toxic quantity of Aroclor is present at harvest in food or feed crops a tolerance cannot be established until after two year chronic toxicity feeding tests have been completed for the Aroclor. (DJ-8).

MB-36. Monsanto discussed internally on March 6, 1969 the actions it could take in response of knowledge spreading around the world that Aroclors were an uncontrollable pollutant spreading widely by air-water. (Monsanto Document DJ-9 March 6, 1969).

Risebrough in a recent paper "Nature", Vol. 220, Dec. 14, 1968, has attacked chlorinated biphenyls in three ways:

(1) a pollutant - widely spread by air-water; therefore an uncontrollable pollutant.

(2) a toxic substance - with no permissible allowable levels causing extinction of peregrine falcon by induced hepatic enzymes which degrade steroids upsetting Ca metabolism leading to reproductive weakness, presumably through thinner egg shells.

3) a toxic substance endangering man himself; implying that the peregrine falcon is a leading indicator of things to come. (Id. at page-1)

Where does this leave us?

Under identification and control of exposure - we will be able to identify and analyze residues as well or better than anyone in the world. We will probably find residues other than BBT and PCB's. We will probably wind up sharing the blame in the ppm to ppb concentration level. We can take steps to minimize pollution from our own chlorinated biphenyl plants, we can work with our larger customers to minimize pollution, we can continue to set up disposal and reclaim operations.

We can work for minimum exposure in manufacture and disposal of capacitors, transformers and heat transfer systems, and minimize losses for large hydraulic users. (Id. p.-2)).

MB-37. Monsanto discussed a report on April 2, 1969 of comments on PCBs conducted at Industrial Biotest Laboratories in Chicago. (*Monsanto's Document DJ-10 March 21, 1969*).

- a. *From the background data presented it appears that something of the order of 80 million pounds of polychlor biphenyls (PC3) are produced annually.(Id. p-1).*
- b. *At first thought it seems unlikely because of the major uses of PC3 in capacitors, transformer oils, heat transfer fluids in closed systems, that these materials could be the source of the substantial degree of environmental contamination reported. (id. p-1).*
- c. *Because of the apparent high stability of PCB, amounts entering the environment would be degraded very slowly and it seems possible that at least 10 million pounds annually may become environmental contaminants. Since the PCBs were introduced commercially in 1929 there have been 40 years of production. If this has averaged 50 million pounds per year, then about [2 billion] pounds have been made and perhaps {200 million pounds} have entered the environment. Because of the apparent stability of these compounds most of this amount nay still be circulating in the global ecosystem and this is suggested by the levels reported by Holmes et al. (1967) and Risebrough et al. (1968) in animal tissues which are quite comparable to those found for DDT.(Id.-p.1)*
- d. *It seems to the writer that the evidence regarding **PCB effects on environmental quality is sufficiently substantial, Oidespread, and alarming to require immediate corrective action on. the part of Monsanto.** (Id. p-2. Emphasis here only).*

MB-38. Monsanto's Plasticizer Group sent a letter to its 661 US customers of Aroclors 1254 and 1260 on February 27, 1970 regarding published articles indicating that PCBs have been discovered at some points in some marine, aquatic and wildlife environments. ... the quantities detected are said to be in the parts per million and parts per billion categories. (*Monsanto's Document and Attachments. DJ-11 January 27, 1970*).

Dear Customer:

Recently several newspaper and magazine articles have been published indicating that polychlorinated Biphenyls (PCBs have been discovered at

some points in some marine, aquatic and wildlife environments. The quantities detected are said to be in the parts per million and parts per billion categories.

It is claimed that the PCBs found strongly resemble chlorinated biphenyls containing 54% and 60% chlorine by weight. Products sold by Monsanto under the trade names of Aroclor 1254 and 1260 containing chlorinated biphenyls.

As your supplier of Aroclor 1254 and 1260, we wish to alert you to the potential problem of environmental contamination is referred to in the newspaper and magazine articles.

We would like to point out the following additional facts.

- 1. Certain Monsanto products which are sold under the Aroclor trade mark, namely Aroclor 5060, 5442, and 5460 are not polychlorinated biphenyls.*
- 2. PCBs with a chlorine content of less than 54% have not been found in the environment and appear to present no potential problem to the environment.*

*We feel that all possible care should be taken in the application, processing and effluent disposal of these products to prevent them becoming environmental contaminants. Of interest to you may be an article in Chemical Week, October 29, 1969 regarding water pollution standards set by each state of the Union. It is attached. **This article reflects the view that good manufacturing practice in the future may require that no products used by any company be lost or discharged in such a manner as to ultimately be found in waterways.** (Id. at ps. 1-2. Emphasis here only).*

MB-39. The warning sent to 661 customers of Aroclors 1254 and 1262 diluted the issue by incorporating the Chemical Week article, listing possible future regulatory work by each state, and stating that the warning was issued because of recent published articles **implying that was all** Monsanto knew about PCBs toxicity and its impact on humans, fish, birds and the environment. (Id.)

The Chemical Week article sent by Monsanto to its customers makes the following points:

- a. "large chemical complexes now in vogue make water-and lots of it- a major site criterion. ... That means locations on or near the big, drought-resistant rivers. ... There are less than 200 rivers in the U.S. with minimum flows over 50 cu. ft per second."
- b. The price tag for pollution control is high. ... A recent WPCA study estimated that water waste treatment facilities can increase installed capital equipment costs 40% or more.
- c. The article makes no suggestion to General Electric or any other customer not to dump PCBs in the Housatonic River, the Hudson River or any other river. Exhibit-DJ-11 Chemical Week Article. Exhibit-DJ-11).

MB-40. Monsanto's Plasticizer Group sent the letter dated February 27, 1970 warning of contamination of the environment to 661 users of Aroclors 1254 and 1260 as plasticizers. (DJ-4)

Three GE facilities received the letter: (DJ-4).

- a. Customer 248 GE Coshocton Ohio.
- b. Customer 249 GE 1430 E. Fairchild St. Danville Ill.
- c. Customer 250 GE 1 Plastic Avenue Pittsfield Mass.

MB.-41. Monsanto's Plasticizer Group failed to notify GE's Transformer's Division of any possible problem with environmental contamination of the River. (DJ-4)

MB-42. Monsanto's letter suggested to its 661 plasticizer's customers "that all possible care should be taken in the application, processing and effluent disposal of these products to prevent environmental contamination." (DJ-4, 2).

MB-43. Monsanto's Plasticizer Group's letter to its plasticizers customers dated February 27, 1970 was nothing more than an attempt to post facto protection of liability as five months later in August of 1970 Monsanto ceased marketing Aroclors 1254 and 1260 as plasticizers. ([**MF-32** at (e).]

MF-44. Monsanto knew much more about PCBs unique problems with PCBs contaminating rivers in 1968. This knowledge was unique to Monsanto. Monsanto kept this information secret to prevent customers' like GE from terminating usage of Aroclors 1254 and 1260 as transformers' fluids which continued for ten more years. *(Counsel has found no evidence among hundreds of Monsanto documents introduced in other lawsuits against Monsanto that Monsanto ever claimed that it did).*

MF-45. Monsanto never told GE or any other of its 661 plasticizer's customers of Aroclors 1254 and 1260 that dumping PCBs into a River resulted in **permanent PCB contamination of the rivers due to the unique properties of PCBs** (See MF-44 and Monsanto Documents that follow).

MF-46. Monsanto established in 1969 an Aroclor "Ad Hoc" Committee to set business objectives for the company and to discuss its current knowledge of the impact of Aroclors on humans, fish, birds and the environment. *(Minutes of Aroclor :Ad Hoc" Committee Monsanto's Document DJ-12 September 5, 1969.)*

*MINUTES OF AROCLOR "AD HOC" COMMITTEE.).
First Meeting*

Date: September 5, 1969

Present: M. W. Farrar

P. B. Hodges, Secretary

E. V. John

W. H. Richard .

E. P. Wheeler, Chairman

Objectives: (Agreed to by the Committee)

Submit recommendations for action which will:

- 1. Permit continued sales and profits, of Aroclors and Terphenyls.*
- 2. Permit continued development of uses and sales.*
- 3. Protect image of Organic Division and of the Corporation. (Id-p-1).*

Background Discussion of Problem:

- 1. Agreed that we should concentrate on Aroclor 1254 and 1260. ... (Id at p-1)*

2. - PCB has been found in:

a. Fish, oysters, shrimp, birds.

b. Along coastlines of industrialized areas such as Great Britain, Sweden, Rhine River, low countries. Lake Michigan, Pensacola Bay, in Western wild life (eagles). It may be a global contaminant.

3. PCB has been tied to DDT in effects on disappearance of wild birds which have fish diets. Ratio of PCB to ddt has been about 40-50:1 generally. Dr. Reisboro (sic) reported almost 1:1 ratio. PCB may be contributing to or exaggerating the effects of other chlorinated aromatics. (Id.-p-1).

Escambia River Problem:

*For a clearer understanding of the general problem, - the situation at Pensacola was reviewed. **From a relatively negligible discharge of 1-3 gal/day into a large river, 1/5 mile downstream levels of 42 ppb in water and 476 ppm in mud were found.** Although use of Aroclor was halted immediately, **we can expect the water contamination to continue for a lengthy period by leaching from the contaminated mud.** No downstream samples have yet been taken to measure the decrease in contamination (as of 9/3/69). Id. at ps. 1-2. Emphasis here only) .*

MF-47. The “Escambia River Problem was not knew to Monsanto on September 5, 1969. In fact, it was problem that Monsanto understood would have devastating consequences for its 1254 and 1260 Aroclor business as early as 1968 or earlier when the Escambia River problem was discovered by Monsanto. (Monsanto’s **CONFIDENTIAL** Report of Aroclor “ADD HOC” Committee October 2, 1969 DJ-13):

Losses from Monsanto Plants (DJ-13)

*Efforts to reduce the losses of Aroclors in liquid wastes from Anniston and WGK plants are completed or underway. **It is impossible to establish a limit as to what can be discharged “safely”.** Investigation has shown that the waters in receiving streams below the Anniston Plant contain significant (parts per million) concentrations of PCB. More ominous perhaps is the fact that sediment in the bottom of these streams miles below our plants may contain as much as 2% Aroclor. (Exhibit DG-13 at p. 8. Emphasis here only).*

To prepare for the eventual publication in the press of the discharge of PCB’s (sic) in Alabama and to the Mississippi River, a significant an effort must be made to determine the present levels of contamination and more importantly, determine the levels of contamination as “clean up” procedures begin to show an effect. (Id. p. 8 Emphasis here only.).

The incident at the Monsanto plant at Pensacola indicates that all Monsanto Plants using Aroclors should be made aware of the potential problems and efforts made to eliminate any losses. The significance of “any losses” may be related to the one to three gallons per day which was being lost at the Pensacola Plant. (Id. p. 8 Emphasis here only).

Hopefully research efforts will indicate what a “safe level “ of losses would be higher in fresh water streams not adjacent to coastal estuaries. At the present time we know of no claims that the PCB’s (sic) are “destroying” fish. (Id. at p.9. Emphasis here only).

MF-48. The Escambia River drains 425 square miles in Northwest Florida before flowing into Pensacola Bay at an average rate of 9,900 cubic feet per second.¹

MF-49. The Housatonic River flows through Pittsfield, Lenox, Lee, Great Barrington, Sheffield and Stockbridge at an annual average rate of 1,700 cubic feet for second.²

MF-50. Monsanto has apparently failed to introduce any evidence in the myriad of lawsuits it is defending in this country that it never publicized to the world or to any of its customers including GE that Aroclors 1254 and 1260 used in transformers had the unique newly discovered property—as determined by the negligent leak into the Escambia River—of not flowing with rivers to the sea—as did all other chemicals dumped into the rivers by manufacturing industries—but to remain imbedded in the sediments of the rivers. (*Monsanto's DJ-11 Chem. Week Article*).

MG-51. Monsanto did act in August 1970 by suspending production of PCBs for plasticizer usage. (*Monsanto's Statement of Material Facts. Document. DJ-4 at ¶ 7*).

1

<https://www.google.com/search?client=safari&rls=en&q=ESCAMBIA+RIVER+AVERAGE+CFS&ie=UTF-8&oe=UTF-8>

2

<https://www.google.com/search?client=safari&rls=en&q=Housatonic+River+Average+CFS&ie=UTF-8&oe=UTF-8>

MF-52. Monsanto sold PCBs to GE from 1930 to 1977 for use in electrical transformers assembled and/or serviced by GE in Pittsfield Massachusetts. *”(DJ-30 pgs. 34 and 35; ; Document Filed by Monsanto in Monsanto v. GE 4:23-cv-00204 P Page ID # 88 and 89.).(See also DJ-1, DJ-2 and DJ-3). Id.*

MF-53. Monsanto knew that GE’s transformer facility was located in Pittsfield adjacent to the Housatonic River. (*Id*).

MF-54. Monsanto knew or should have known that GE disposed of used PCBs by dumping them into the Housatonic River or by burying them in landfills created by GE in Western Massachusetts. (*DJ-1, DJ-2 and DJ-3*)

MF. 55. This is what Monsanto told its customers in 1970 summarizing the Chemical week Article:

This article reflect the view that good manufacturing practice in the-future may require that no products used by any company be lost or discharged in such a manner as to ultimately be found in waterways.(Monsanto’s Letter to Customers 1970 DJ-11 Emphasis here only).).

MF-56. GE dumped into the Housatonic or buried in landfills more than 1.5 million pounds of PCBs between 1930 and 1979 according to Ed Bates of General Electric. (*See Documentary Good Things to Life: GE, PCBs, and Our Town, Mickey Friedman Director/Producer.* (Open Source You Tube Documentary). EPA’s estimate of the amount on the River sediments is between 100,000 and 600,000 pounds (*DJ-24 Fast Facts*).

MF-57. Monsanto sold General Electric between 1972 and 1977 more than 59 million pounds of PCBS. (DJ-30 at pg. 17. *Monsanto v. General Electric* 4:23-cv-00204 Doc. #. 1-3 Filed 02/20/23 Page ID #.3864).

MF-58. The discrepancy between Bates and EPA estimates and the 59 million pounds GE purchased from Monsanto between 1972 and 1977 are accounted for on a number of facts disclosed by Monsanto:

- a. ***“Approximately five per cent of the transformers in service in this country contain PCBs; most transformers contain mineral oil instead of PCBs.”*** (DJ-32 pg.-4; EPA’s 1976 Document Filed by Monsanto in *Monsanto v. General Electric et al*, 4:23-cv-00204 Page ID# 4362 *Emphasis here only*).
- b. *“General Electric and its products have been a major source of environmental contamination and have released PCBs purchased both before and after the January 31, 1972 into the environment”*(DJ-30 Pg. 34; Document Filed by Monsanto in *Monsanto in v. GE* 4:23-cv-00204 Page ID # 88).
- c. *“General Electric facility in Oakland California served as a transformer manufacturing plant from 1930 to 1975. ... The State of California ... found that the soil and groundwater around General Electric’s transformer manufacturing plant in Oakland California were contaminated with PCBs.”*(*Id*).
- d. *“General Electric cause significant contamination of the Hudson River, now one of the largest superfund sites in the United States. ... “GE facilities, one in Fort Edwards, New York, and one in Hudson Falls New York, used PCBs in the manufacture of electrical capacitors. PCBs from both facilities were discharged into the Hudson River. ...”* (*Id*).
- e. ***“ From 1932 to 1977, General Electric manufactured and serviced transformers containing PCBs at its Pittsfield, Massachusetts Facility. EPA has determined that years of General Electric’s use and disposal of PCBs at this facility caused extensive contamination around Pittsfield as well as down the entire stream of the Housatonic River.”*** ***”(DJ-30 pgs. 34 and 35; ; Document Filed by Monsanto in Monsanto in v. GE 4:23-cv-00204 P Page ID # 8and 89.).(See also DJ-1, DJ-2 and DJ-3). Id.***
- f. *“General Electric is responsible for PCB contamination of Spokane Washington.”* DJ-30 pg. 35 also in *Monsanto v. GE* (*Id*) Page ID# 89.

- g. *“General Electric is responsible for contamination in Oregon. From 1952 until 2010 General Electric owned and operated an electrical equipment service and repair facility and warehouse in Portland Oregon—approximately 3,000 feet from the Williams River. ... In 2003 testing by the City of Portland revealed that PCBs from sediments near the General Electric facility were discharged into the storm water system, and in turn, in the Willamette Riv.” Id. Page ID # 89).*
- h. *“General Electric also stored a variety of transformers and capacitors containing BCBs at a site at 2410 N. Columbia Blvd. in Portland Oregon. Officials subsequently discovered contamination at this site as well.” Id. Page ID# 89.*
- i. *“From 1970 until 1974, General Electric stored drums, transformer casings and other containers at a facility in Eugene Oregon. In 1995, testing revealed PCBs persisted in the subsurface and sludge of water samples from a storm drain at the site.” Id.*
- j. *“From 1974 until 1993, General Electric had another facility in Eugene Oregon where employees washed and cleaned equipment including transformers. Water from these cleaning facilities was directed to tanks and sumps. In 1995, testing of groundwater sludge and water samples from the site revealed PCBs above regulatory levels. Id. Page ID #s 89 and 90*
- k. *“General Electric is also responsible for PCB contamination in East Flat Rock, North Carolina. In 1994 EPA declared the 141-acre Geberaak Electric Shepard Far Site a Superfund Site. EPA placed the site on its National Priority List because of contaminated groundwater and soil.” Id. ID #s 89.*
- l. *“General Electric is also responsible for extensive contamination of the soil and water surrounding its plant and other locations in Schectady New York.” Id.*
- m. *“Upon information and belief, General Electric is also responsible for PCB contamination around certain other facilities, both before and after 1972, including but not limited to facilities in Washington, West Virginia, Shepherdsville, Kentucky, Moreau New York, Rome, Georgia, Brandon, Florida, Anaheim, California.” Id. Page ID#.91.*

MF-59. In the late 1960s, PCBs were found to persist in the environment.

(DJ-30 at pg. 12; Case: 4:23-cv-00204-HEA Doc. #: 1-3 53-2 Filed: 02/20/23 Page: 13 of 463 Page ID# Page ID #: 66).

MF-60. On **January 21-22, 1970**, Old Monsanto representatives met with **General Electric representatives** in St. Louis, Missouri who advised Old Monsanto that without the continued manufacture and sale of PCBs for electrical applications in the United States, the domestic industry **for certain electrical devices** would shut down. (*Id. Emphasis here only*)

MF-61. In **early 1970**, Old Monsanto announced that it would phase out production of PCBs for use as plasticizers and **heat transfer fluids** in food and feed applications. (*Id. Emphasis here only*).

MF-62. On or about **February 18, 1970**, Old Monsanto sent letters to its Aroclor electrical fluid customers calling their attention to recent reports indicating that **molecules resembling the higher chlorinated products had been found in marine and wildlife environments**. The letter urged Aroclor customers to use “all possible care” to prevent Aroclor products from becoming environmental contaminants. The letter also pointed out that **it was possible for PCB-containing electrically insulating liquids to leak out of sealed electrical devices and suggested that the recipients should notify the purchasers of their electrical equipment about the problem**. (*Id. Emphasis here only*).

MF-63. In **March 1970**, General Electric held a full-scale internal review of the PCB situation and concluded that PCBs were a problem for General Electric and that General Electric was on notice from Old Monsanto to work on the problem and to work with its transformer and capacitor customers.

General Electric sent a letter notifying its Pyranol customers about the PCB situation in May 1970. **Despite these actions, General Electric strongly objected to ending the use of Aroclors 1254 and 1260 in electrical equipment and recommended that Old Monsanto Continue to manufacture those products.** (*Id. Emphasis here only*).

MF-64. On or about **April 21, 1970**, Westinghouse representatives met with Old Monsanto representatives in St. Louis, Missouri. At that meeting, the Westinghouse representatives were fully advised by Old Monsanto of the background and events involving the discovery of PCBs in the environment, and received information, *inter alia*, **about the environmental risk of PCBs to certain forms of animal life.** (*Id. DJ-pgs 12 and 13. ...Page ID #s 66 and 67. Emphasis here only*).

MF-65. Starting in or **around April 1970**, Old Monsanto began labeling its Aroclor products, shipping documents, and invoices with a warning that extreme care should be taken to prevent any entry of PCBs into the environment. Old Monsanto also undertook efforts to obtain agreement from General Electric and Westinghouse to place similar environmental warnings on Pyranol and Interteen containers. (*Id. DJ-pgs 13. ...Page ID #s 67. Emphasis here only*).

MF-66. In **May 1971**, the American National Standards Institute (“ANSI”) established a PCB committee, designated as C107. The ANSI C107 Committee was established at the recommendation of Old Monsanto with

the objective of developing guidelines to minimize PCB environmental pollution from electric uses. Representatives from ... General Electric (E. L. Raab) [were] on the ANSI C107 Steering Committee. (*Id.*)

MF.-67. In **June 1971**, Westinghouse and General Electric were instrumental in creating an industry report regarding the use and disposal of PCB dielectric fluids, which, inter alia, described the environmental problems posed by PCB dielectric fluids. (*Id.*)

MF-68. In **September 1971**, the U.S. government convened an Interdepartmental Task Force on PCBs (the “Task Force”). The Task Force “included operating units of five Executive Branch departments,” namely: the Department of Agriculture; Department of Commerce; EPA; Department of Health, Education, and Welfare; and Department of the Interior. Dept. of Agriculture, et al., *Polychlorinated Biphenyls and The Environment* at 1 (May 1972) (“PCBs And In September 1971, the U.S. government convened an Interdepartmental Task Force on PCBs (the “Task Force”). Its purpose was to coordinate the **scientific efforts of the Government aimed at understanding [PCBs], and to strengthen the Government’s ability to protect the public from actual or potential hazards from PCBs.” Id. (abstract).** (*Id.* DJ-30 pg.s 13 and 14; ... Page ID 3s 67-68. *Emphasis here only*).

MF-69. In or around November 1971, ANSI established subcommittees on the use of PCBs in capacitors and transformers. Various representatives of

Defendants were members of these two committees, including ... Dr. A. Pozefsky (GE), E.L. Raab (GE), ... E. L. Raab (GE) was the chairman of the transformer subcommittee and Dr. A Pozefsky (GE) was the chairman of the capacitor subcommittee. These ANSI subcommittees met multiple times in late 1971 and early 1972. (DJ-30 pg 14).

MF-70. On December 16, 1970 Edward Raab Manager of Dielectric Systems, Insulation Systems Laboratory Operations at General Electric Transformer plant in Pittsfield Massachusetts was assigned by Mr., J, F. McAllister, Manager, Product Quality, Central Electric Co, to prepare a report describing the **alleged** essential role that polychlorinated biphenyls play in electrical transformers for submission to Dr. Edward J. Burger, Jr, of the United States Office of Science and Technology. The report was due to be submitted to Dr. Burger by January 3, 1972. (DJ-29 pg. 2, also Case: 4:23-cv-00204 Page ID # 518. *Emphasis here only*).

MF-71. General Electric stated in its report to the United States that **“it was only recently that evidence began to appear that these materials had been widely dispersed throughout the environment.** *Id.* pg-1. *Emphasis here only*).

MF-72. General Electric stated in the same report “ The Monsanto Company has declared, however, that it will continue to sell PCB's for closed-system electrical uses. This decision is a **tacit recognition of the important role that PCB's play in the safe, reliable, and efficient delivery**

of electric power from the generating plant to the user.*(Id.* Emphasis here only).

MF-73. General Electric statement quoted in MF-72 is in direct contradiction to Monsanto's Statement cited on **MFs-62 and 64**.

MF.-74. General Electric stated in the same report. "PCBs are used by the electrical industry as components of certain types of transformers and capacitors. ... and are recognized .. by the term "askarel." "*(Id. pg. 4)*.

MF-75. Monsanto fully aware that PCBs were harmful to humans and the environment agreed to continue selling PCBs to GE **provided that GE indemnify Monsanto for any damages to humans and the environment resulting from GE's continuing usage of PCBs.** *(DJ-20)*.

MF-76. Monsanto as a result of its practices has been found responsible for millions of dollars of Environmental damages. *(DJ-30)*.

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MF-77. Monsanto is currently suing General Electric for recovery of some of the paid-out funds on the basis of the contract entered into between Monsanto and General Electric dated January 31, 1972. *(DJ-30; Monsanto v. General Electric 4:23-cv-00204 Filed 02/20/23 Page ID#s 55 to 125)*.

MF-78. Monsanto in spite of its knowledge about the "Escambia River Problem" continued to sell Aroclors 1254 and 1260 to the electrical

manufacturing industry. (*Monsanto's Statement of Material Facts. Document. DJ-4 at ¶ 8*).

MF-79. Monsanto has advocated standards of foreseeability in a case winning Summary Judgment Motion against Westport a Massachusetts Town in 2017. (*Monsanto's Memorandum of Law in Support of its Motion for Summary Judgment in Town of Westport v. Monsanto et al., C.A. No. 14-CV 12041. DJ-14*).

To establish a failure-to-warn claim, the plaintiff must establish that the product is unreasonably dangerous because foreseeable users were not adequately warned of the foreseeable risks of harm associated with its use. Evans, 465 Mass. at 439. Massachusetts has rejected any hindsight analysis of the duty to warn. Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 23 (1998). The manufacturer's duty is limited to warning of dangers that were reasonably foreseeable at the time of sale, or could have been discovered by way of reasonable testing prior to marketing the product. Id. at 22-23. The failure to warn under breach of warranty is judged by the reasonableness of the defendant's actions under the circumstances. Hoffman v. Houghton Chem. Corp., 434 Mass. 624, 637 (2001). Because the alleged harm at issue in this case was not reasonably foreseeable or discoverable in 1969, no duty to warn of the alleged risk arose as a matter of law. (DJ-14 at p. 6-7.)

MF-80. Monsanto's foreseeability standards establish that as soon as Monsanto learned that PCBs dumped in water ways did not flow with the water to the sea— **as all other chemicals did**— it had the immediate responsibility to notify all users of PCBs—and the entire world—of this unique property of PCBs. (*Id.*).

MF-81. Monsanto is jointly liable with GE for the consequences of PCBs dumped in the River by GE. One consequence of the contamination of the River with PCBs is the massive PCB dump to be built in Lee. The

characteristics of the dump and how it will be constructed in the next 13 years is described by EPA in letter to counsel. (*Letter EPA's General Counsel to Attorney Bonifaz DJ-15 November 8, 2022*):

- i. The landfill ... shall have a footprint of 20 acres. (*Id.*, page 5 hereinafter *Id.*, #)
- ii. *It will have an elevation of "1,099 feet above mean sea level."* (*Id.*, 5)
- iii. "If seasonal high groundwater elevation is determined to be higher than 950 feet above sea level the maximum elevation of the landfill ... may be increased". (*Id.*, 5)
- iv. "The bottom liner of the landfill will be installed at a minimum of 15 feet above ...high groundwater elevation". (*Id.*, 5)
- v. "The Upland Disposal Facility shall have a maximum design of 1.3 million cubic yards" [AKA 1.3 million tons of mud and soil since one cubic yard of soil weights approximately one ton.] (*Id.* 5).
- vi. "The 2020 remedy involves an estimated 47,000 truck trips of excavated materials to the UDF. " (*Id.* 2)
- vii. "The cleanup is estimated to take 13 years, so there will be approximately 3,800 tuck trips per year. ... the above numbers of truck trips do not count trips for importing clean material for capping, backfilling, or the construction of the UDF. They also do not account for return trips to the River after disposal at the UDF or trips taken by trucks to the River for disposal off-site." (*Id.* 2, 3).
- viii. "The primary finding of the Desimone Report confirms what is already known and documented: ... there are permeable soils underlying the UDF location. " (*Id.* 2).
- ix. "The Notice also cites EPA guidance for the proposition that the liner system will eventually leak. 53 Federal Register 33345 (August 30,1988.) This guidance, however, does not recommend against properly designed and monitored landfills with low-permeable cover, double bottom liner, and leachate collection, such as the proposed UDF. The guidance actually recommends double bottom liners and groundwater monitoring longer than 30 years, which is what the permit requires." (*Id.* 4).
- x. "Furthermore, the surface drainage from the UDF is generally away from the water supplies and towards the River. ...**Thus, in sum, groundwater and surface water near the UDF flows towards the River** and away from the Town of Lee's water reservoirs." (*Id.* 4. Emphasis here only.).
- xi. "The total mass of PCBs to be removed from the River is 50,500 pounds of PCBs. (*Id.* 2).

MF-82. Ed Bates of GE has estimated that GE dumped 1,5 million pounds of PCBs into the River between 18930 and 1979. (*supra* ¶ 69). EPA's estimated in a 2020 publication that the River contains 600,000 pounds of PCBs.(DJ-24). EPA in letter to counsel in 2022 estimates that GE will remove 50.5 tons (AKA 101,000 pounds) of PCBs from the River under the CERCLA Order, thus the poundage of PCBs that will be left on the River after GE satisfies the requirements rages from 500,000 to 1.3 million pounds which are damaging to Lee and its residents. Regardless whether PCBs in the River amount to 1.5 million or 600,000 pounds the poundage to be removed from the River is merely 100,100 pounds.(DJ-15 p. 2).

MF-83. Monsanto and GE will remain liable to the Town of Lee for the PCBs left in the River before and after the PCB dump is constructed for the damages that exists now, the damages that will remain after the CERCLA Order is compiled by GE, and the damages the dump will generate to Lee and its residents for years to come. (*See DJ-18 ballot Question, DJ-DJ-19 Decision of the Board of Health of Lee, DJ-21 Monsanto cancer compilation of is employees from 149 to 1970 and DJ-23 Letter from Lee to public officials.*

MF-84. The dump was question 1 on the 2022 town election ballot. The residents rejected the UDF with a 665 Yes, 390 No, 47 Blanks. The ballot question read: "Shall the town require the elect board to rescind the town of Lee's approval of the rest of River Agreement". (DJ-18 Communication Town

of Lee to Counsel). Given the CERCLA Order of 2022 the Town could not comply with the wishes of the majority of Town's residents.

MF-85. The Board of Health of Lee found after an adjudicatory hearing that "By taking these concerns into consideration, The Lee Board of Health thereby considers that the proposed UDF may pose an increased risk to the health of the residents of Lee.(*DJ-19 Decision of the Board of Health of Lee in the matter of the PCB dump*).

MF-86. Monsanto kept track of 608 cancer deaths of its PCB exposed employees between 1949 and the 1970s. This remarkable tabulation is ample proof that Monsanto had concerns of cancers caused by PCBs exposure. (DJ-21)

MF-87. EPA concluded that leaving PCBs in the River or removing 285, 000 cubic yards (AKA tons) of sediments from Woods Pond and 60,000 cubic yards (AKA tons) in the River impoundments and moving them to Lee merely "**decreased risks to the health of Lee's residents**". In contrast it implied by its analysis that moving the PCBs to Lee eliminated the risks of health to the very wealthy residents of Lenox, Stockbridge, Great Barrington and Sheffield. (*Letter EPA to Counsel November 8, 2022 DJ-15*).

MF-88. In 2023 Monsanto filed in a Federal Court a **1976 EPA** document that stated **that only 5% of the transformers in 1976 contain PCBs**. (DJ-29

pg. 4; Monsanto v. General Electric 4:23-cv-00204 Doc. #. 1-3 Filed 02/20/23 Page ID #. 4362. Emphasis here only).

MF-89. EPA admitted in this report dated February 24 1976 that:

Many, but not all, of the facets of the problem are addressed; many of the estimates presented are based on engineering and scientific judgment instead of hard data, simply because hard data in these areas are not available. DJ-29 pg. 3; ... Page ID# 4361”.

MF-90. Monsanto abruptly ceased manufacturing and marketing PCBS for the electrical industry one year later in 1977. (*MF-31 at e*)

MF-91. There is no evidence anywhere that conversion to mineral oil of the 5% PCB transformers manufactured or repaired from 1972 to 1977 in Pittsfield Massachusetts—or anywhere else in the in the United States—disrupted electrical services in the United States.

C. DAMAGES THE TOWN OF LEE will be SEEKING AT TRIAL FROM DEFENDANTS THROUGH THIS LAWSUIT

MF-92. The Town of Lee is seeking from Monsanto and GE adequate compensatory and punitive damages for the harm both companies intentionally caused to Lee by creating profits for their shareholders without justification.

MF-93. Those damages include eliminating the use of the River for all Town’s residents for years to come.

MF-94. In the forthcoming 13 years two billion pounds of PCB contaminated muds and soil will be dredged from the River by GE—as ordered by EPA —transported in eighty-thousand-pound truck loads through the streets of Lee, and deposited within the confines of the Town of Lee in a dump projected to be 150 feet in height on a 20-acre base. Five hundred thousand pounds of PCBs will be left in the sediments of the River by GE under EPA estimates. (DJ-

MF-95. The sediments in the River will then be covered by a tarp with potential leakage of PCBs monitored for twenty years after completion of the partial dredging. (See tarp samples EPA is requiring GE to install under the CERCLA 2022 Order. (See *DJ-33 and DJ-34*).

MF-96. The Town Lee is seeking, as *parens patriae* on behalf of its residents adequate compensatory and punitive damages to be determined by a jury for the catastrophic disaster Monsanto and GE have caused to Lee.

MF-97. The CERCLA Order of 2022 cannot and does not require Monsanto and/or GE to pay damages to the Town for the intentional actions of GE and Monsanto that have caused and will continue to cause harm to humans and the environment.

MF-98. EPA has no jurisdiction over Monsanto as Congress restricted EPA jurisdiction to the immediate actor that contaminated the soil and the River— in this case GE.

MF-99. Monsanto knew as far back as the 1930s that PCBs were toxic to humans and the environment. (*Supra passim*).

MF-100. The Town of Lee upon publication of the contamination of the Housatonic River by GE with PCBs in the 1980s and 1990s relied on EPA to force GE to restore the River and its banks to its original estate.

MF-101. The task imposed on EPA by CERCLA turned out to be impossible given the nature of forever life of PCBs as Monsanto learned in 1968 from an admitted negligent event. (*Supra ¶¶s*).

MF-102. The CERCLA Order of 2022 is at best a weak compromise of what EPA could do under the circumstances to reduce the risks to humans and the environment.

MF-103. In early 2023, cases filed across this country against Monsanto for contamination of water- ways made the Town of Lee aware for the first time that Monsanto was jointly liable with GE for PCB related damages.

MF-104. Cases and settlements for contamination of water-ways mostly filed by attorney generals of states like Oregon and Pennsylvania against Monsanto provided The Town with a flood of internal Monsanto documents available in the dockets of the cases.

2.

3. **MF-105.** On November 10, 2023 the Town in good faith provided documentation to GE that would allow GE to seek compensation from Monsanto for all monies it had spent and was about to spend under CERCLA Orders for the dredging of the Housatonic and Hudson Rivers. (DJ-22).

MF-106. The basis for GE's possible action against Monsanto was Lee's assumption that GE did not know that in 1968 Monsanto learned through a "negligent event"—Monsanto's words—that PCBs in the Hudson and Housatonic River did not flow with water currents to the Atlantic. (*Id.*)

MF-107. GE's lack of response to Lee's generous letter generated the Town's interest and sought from lawyers associated with similar cases further documentation on the matter.

MF-108. On December 15, 2023 the Town was provided with the aforementioned contract (DJ-20) between GE and Monsanto. (DJ-25).

MF-109. The statute of limitation of the Town of Lee against Monsanto and GE for intentional infliction of harm to humans and the environment begins to run on December 15, 2023 the date Lee obtained the Monsanto-GE contract. (*id.*)

**D. THE SETTLEMENT AGREEMENT NOT TO CHALLENGE
THE CERCLA ORDER AND THE CONTRACT BETWEEN
MONSANTO AND GENERAL ELECTRIC**

MF-110. EPA, GE, the City of Pittsfield and the towns of Lee, Lenox, Stockbridge, Great Barrington, Sheffield, the Audubon Society and others entered into an agreement **not to appeal** the CERCLA Order issued by EPA in 2022 in exchange for 62 million dollars to be paid by GE to the participants. (*DJ-16, DJ-17*).

MF-111. There is nothing in the plain reading of Settlement Agreement that prevents Lee from filing this lawsuit for damages against GE and Monsanto for the damages these corporations have inflicted on the Town of Lee and its residents.

MF-112. The afore mentioned Agreement was appealed by citizens groups to the District Court and eventually to the First Circuit Court of Appeals.

MF- 113. The Court of Appeals upheld the CERCLA Order. (*Housatonic River Initiative v. United States EPA*, 75 F.4th 248; 2023 U.S. App. Lexis 18977 July 25, 2023).

MF-114. This action does not, cannot, and will not, interfere with the CERCLA Order or the Settlement Agreement.

MF-115. The Town of Lee and its residents have suffered and will continue to suffer damages from the contamination of the River and its

consequences including the massive PCB dump to be built in Lee to house the dredged PCB mud.

MF-116. The compensatory and punitive damages Lee is seeking from Monsanto and GE are a consequence of the intentional tort committed by GE and Monsanto as per GE-Monsanto Contract of January 31, 1972.

MF-117. Monsanto knew that PCBs were **toxic to humans and the environment** and communicated this fact to GE under the terms of the contract executed between GE and Monsanto (DJ-20):

*Buyer [GE] acknowledges that it is aware and has been advised by Monsanto that **PCB's tend to persist in the environment**; that care is required in handling, possession, use and disposition; that tolerance limits have been or are being established for PCBs in various food products.*

Monsanto has therefore adopted certain restrictive policies with respect to its further production, sale and delivery of PCB's (sic) including the receipt of undertakings from its customers as set forth below, and Buyer is willing to agree to such undertakings with respect to sale and/or deliveries of PCB's (sic) by Monsanto to Buyer.

*Accordingly Buyer thereby covenants and agrees that, with respect to any and all PCB's (sic) sold or delivered by or on behalf of Monsanto to Buyer after the date hereof and in consideration of any such sale or delivery, Buyer shall defend, indemnify and hold harmless Monsanto, its present, past and future directors, officers, employees and agents from and against all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of such PCB's (sic) by, through or under Buyer, whether alone or in combination with other substances, including, **without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food, animal feed or the environment by reason of such PCB's (sic).** (DJ-20 Emphasis here only).*

MF-118. Monsanto sold PCBs under the terms of this contract and GE continued to profit from the use of PCBs knowing that PCBs were toxic to humans and the environment. Both companies carried this behavior without justification other than making money.

MF-119. It was less expensive to GE to pay damage claims filed by humans for themselves and their environment than to profit from the sale and use of PCBs.

MF-120. Monsanto might have overreached, however, as evident from claims of fraud made by a customer, in identical position as GE, for Monsanto's lack of total disclosure under the terms of the afore mentioned contracts between Monsanto and Buyers. (DJ- 31. *Magnetek, Inc., v. Monsanto, Pharmacia and Solutia Superior Court of New Jersey Docket No.:BER -LE Complaint and Jury Demand. See also DJ-22 November 10, 2023 Letter of Counsel to GE.*)

MF-121. The Town and its residents have suffered and will continue to suffer damages from their inability to use the Housatonic Rive as specified by EPA. (DJ-24, DJ-3 pages 18 et seq.)

MF-122. The Town and its resident will suffer damages after GE complies with the 2020 CERCLA Order since the River bottom will be covered by a tarp which GE will continue to monitor for leaks for 20 years after the 13 years of dredging have been completed. DJ-3 pgs. 18 et seq., DJ-34 and 35).

MJ-123. The Town and its residents will suffer damages because in the forthcoming 13 years two billion pounds of PCB contaminated muds and soil will be dredged from the River by GE, transported in eighty-thousand-pound truck loads through the streets of Lee, and deposited within the confines of the Town of Lee in a dump projected to be 150 feet in height with a 20-acre base.

MJ-124. The presence of this massive PCB dump in Lee will cause severe damages to the Town and its residents for years to come. Lenox, Great Barrington, Sheffield and Stockbridge with their wealth would have litigated at infinitum any attempt by GE to locate this massive dump within their towns' boundaries. Lee the poorest town in the Berkshires could never have afforded such continuing litigation thus GE picked Lee as a place to dump the dredged mud.

MJ-125. GE's Records provided to Monsanto by General Electric show that between 1956 and 1977 GE purchased from Monsanto 200 million pounds of PCBs. (DJ-36. Monsanto. v Magnetek, GE and Others Memorandum of Law in Support of Plaintiffs Motion to Remand, March 21, 2023 Page 3).

MJ-126. The Town of Lee is seeking, as *parens patriae* on behalf of its residents, compensatory and punitive damages from Defendants. (Lee's Complaint passim)

Respectfully submitted by

s/Cristóbal Bonifaz, Esq.

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DJ-37

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY, et al.,)
)
Plaintiffs,)
)
v.) No. 4:23CV204 HEA
)
MAGNETEK, INC. et al.,)
)
Defendants.)

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Plaintiffs’ Motion to Remand [Doc. No. 52]. Defendants oppose the Motion. For the following reasons, the Court grants the Motion.

Facts and Background

Plaintiffs filed this action in the Circuit Court of the County of St. Louis.

Plaintiffs' First Amended Complaint alleges this is an action to enforce Defendants' written agreements to defend, indemnify, and hold harmless Pharmacia, LLC f/k/a Old Monsanto Company a/k/a Monsanto Chemical Co. ("Old Monsanto") relating to Polychlorinated Biphenyls ("PCBs") that Old Monsanto manufactured and sold to Defendants or their predecessors-in-interest. Defendants have allegedly failed and refused to honor their agreements despite multiple demands from Plaintiffs.

Plaintiffs claim they have incurred defense costs, agreed to and/or paid settlements, and have had judgments entered against them in PCB Lawsuits. Plaintiffs continue to incur substantial costs to defend against certain PCB Lawsuits that should allegedly be borne by Defendants. This lawsuit seeks to recover all of these amounts from Defendants. It also seeks a declaration from the Court that Defendants are required to honor the terms of their agreements and defend, indemnify, and hold harmless Old Monsanto in all currently pending and future PCB Lawsuits.

On February 20, 2023, Defendant GE removed the case to this Court asserting the federal officer removal statute. Section 1442(a)(1) allows “[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States” to remove a case to federal court. 28 U.S.C. § 1442(a)(1). Private entities, such as government contractors, “fall within the terms of the federal officer removal statute . . . when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision.” *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007).

In the notice of removal, Defendant alleges removal was timely removed because it was served with the First Amended Complaint on January 31, 2023.

Plaintiffs move to remand asserting Defendants' removal was untimely for failing to remove the action within 30 days of receiving the pleading because the waiver of service was received at the latest January 6, 2023.

Defendants¹ oppose remand, asserting removal was timely since the removal occurred before January 31, 2023. General Electric argues the parties agreed the "service date of the Amended Complaint was January 31, 2023.

Legal Standard

A defendant may remove to federal court any state court civil action over which the federal court could exercise original jurisdiction. 28 U.S.C. § 1441(a); *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 619 (8th Cir. 2010) (citing *Phipps v. FDIC*, 417 F.3d 1006, 1010 (8th Cir. 2005)).

As the removing party, the defendant bears the burden of establishing federal jurisdiction by a preponderance of the evidence. *In re Prempro*, 591 F.3d at 620. The federal court must remand the case to state court if it appears the federal court lacks subject matter jurisdiction. *Id.*; 28 U.S.C. § 1447(c).

Plaintiffs move to remand arguing Defendant's removal was untimely since Defendant's waiver of service was signed on January 5, 2023 and filed in this

¹ Defendants Paramount Global and Cornell Dubilier Electronics Inc. have also filed oppositions to the Motion to Remand even though they did not join in removal.

Court on January 6, 2023, while the removal notice was not filed until February 20, 2023.

Defendants' removal was not timely under 28 U.S.C. § 1446(b)(3) because it was not filed within 30 days of Defendants' execution of the waiver. Defendants contend their removal was timely because it occurred within 30 days of the parties' agreed upon "service" date, January 31, 202.

Title 28 U.S.C § 1446 governs the timeliness of removal and delineates the time periods for removal of actions to federal court. The first period, applicable here, is governed by 28 U.S.C. § 1446(b)(1), which requires the defendant to file a notice of removal within 30 days of service or receipt of the initial pleading. 28 U.S.C. § 1446(b)(1).

"[A] defendant must file a notice of removal within 30 days of one of the statute's triggering events." *Dalton v. Walgreen Co.*, 721 F.3d 492, 493 (8th Cir. 2013). When a defendant does not remove the action within 30 days of receipt of the complaint, the defendant's "notice of removal is timely only if it was filed within 30 days of [the defendant's] receipt of 'an amended pleading, motion, order or other paper from which it may first be ascertained that the case is ... removable.'" *Id.* quoting 28 U.S.C. § 1446(b)(3). See also *Hinz v. Swisher Hygiene USA Operations, Inc.*, No. 4:13-CV-1183 (JAR), 2014 WL 520457, at *1 (E.D. Mo. Feb. 7, 2014) (holding § 1446(b)(1)'s 30-day time limit is "mandatory" and a timely

motion for remand for failing to observe the time limit will be granted); *Tripp v. Kline*, No. 4:06-CV-01252 (ERW), 2007 WL 844821, at * 3 (E.D. Mo. Mar. 19, 2017) (the § 1446(b) time limits are mandatory and a “defendant's right to remove is foreclosed” if he fails to timely file a notice of removal).

Defendants’ argument is that their removal was timely because the 30-day deadlines began to run on January 31, 2023, the date on which the parties had agreed would be considered the date of “service.” Defendants assert that in their discussions regarding waiver and time for filing a responsive pleading, they had agreed on the date of January 31, 2023. Plaintiffs respond that the January 31, 2023 “service date” was set out for the purposes of determining when the responsive pleading would be due.

Regardless of the parties’ interpretation as to what was intended, January 31, 2023 is not the salient date for removal purposes. Defendants have not provided any authority supporting their assertion that compliance with the 30-day deadlines in § 1446(b)(1) is discretionary and subject to agreement among the parties. Defendants’ argument effectively relegates the statutory deadlines in § 1446(b)(1) to mere suggestions. The Eighth Circuit has made it clear, however, that the provisions are mandatory stating: “a defendant must file a notice of removal within 30 days of one of the statute's triggering events.” *Dalton*, 721 F.3d at 493.

It is equally clear that this did not occur in this case. Defendant GE signed and sent the waiver on January 5, 2023. It was in a controlling position to wait until January 31, 2023 to send the waiver if it intended the removal to be effective January 31, 2023.

Conclusion

Based on the foregoing analysis, the Court concludes Defendant's removal was untimely under 28 U.S.C. § 1446(b)(1). Plaintiffs' Motion to Remand must therefore be granted.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs’ Motion to Remand [Doc. No. 52] is **GRANTED**.

IT IS FURTHER ORDERED that this motion is remanded to the Circuit Court for the County of St. Louis, Missouri.

Dated this 6th day of February, 2024.


HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

DJ-36

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 4:23-CV-00204-HEA
	)	
MAGNETEK, INC., et al.,	)	
	)	
Defendants.	)	

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS’ MOTION TO REMAND**

INTRODUCTION

The Court should promptly remand this action because, first and foremost, Defendant General Electric Co.’s (“GE”) removal was untimely. Under well-established federal law, GE was required to file its Notice of Removal within 30 days from the date it waived service of process. GE executed a written Acknowledgement and Waiver of Service of Process (the “Acknowledgement and Waiver”) on January 5, 2023, which Monsanto¹ filed with the Circuit Court of St. Louis County, Missouri on January 6, 2023. Based on this written waiver, GE had until February 6, 2023 to file its Notice of Removal. GE did not file its Notice of Removal until February 20, 2023, apparently on the mistaken belief that the parties’ agreement regarding the time for responsive pleadings in state court controls the timing of removal under federal law. It does not. Because GE did not file its Notice of Removal within the required 30-day window, its removal is untimely, and this case must be remanded.

¹ For ease of reference, Plaintiffs Monsanto Company, Pharmacia, LLC, and Solutia, Inc. are sometimes collectively referred to as “Monsanto” in this brief.

Given GE's untimely removal, this Court does not need to address GE's basis for removal, the federal officer doctrine, but if it does, the Court should apply that doctrine consistently with the prior precedent within the district and remand this case. In other cases, Monsanto has attempted to establish removal jurisdiction in this Court for lawsuits involving polychlorinated biphenyls ("PCBs") pursuant to the federal officer doctrine. The three different judges in this district who reviewed those removals each found the evidence presented by Monsanto was insufficient to establish the "acted under" and "causal connection" elements of federal officer removal jurisdiction. *See Kelly v. Monsanto Co.*, Case No. 15-CV-1825, 2016 WL 3543050, at *9-*11 (E.D. Mo. June 29, 2016) (Bodenhausen, J.); *Bailey v. Monsanto Co.*, 176 F. Supp. 3d 853, 869-70 (E.D. Mo. 2016) (Fleissig, J.); *Burford v. Monsanto Co.*, Case No. 16CV536, 2017 WL 1315800, at *5-*6 (E.D. Mo. Apr. 10, 2017) (Cohen, J.). Despite this clear precedent, GE does not reference, discuss, or attempt to distinguish those decisions of this Court in its Notice of Removal.

Whether rightly or wrongly decided, the *Kelly*, *Bailey*, and *Burford* decisions should control the result here where GE relies on the same, or less substantial, evidence than Monsanto did to attempt to establish the "acted under" and "causal connection" elements of federal office removal. Any other result would be internally inconsistent and unjust to Monsanto, which is seeking, *inter alia*, to enforce GE's defense and indemnity obligations in multiple PCB lawsuits, including *Kelly*, *Bailey*, and *Burford*.

BACKGROUND

This case is about holding Defendants² accountable under contracts they signed for their use, sale, and release of PCBs. PCBs are a group of man-made organic chemicals that Pharmacia, LLC, f/k/a Monsanto Company (“Old Monsanto”) manufactured and sold in bulk to Defendants and others from 1935 to 1977 under the trade name Aroclor. FAP, (ECF #4), ¶¶ 4, 20-21, 24. Because PCBs are extremely stable, chemically inert, resistant to heat and fire, and highly electrically resistive, they were used by Defendants as a dielectric fluid in many types of electrical equipment, including capacitors and transformers. *Id.*, ¶¶ 22, 26. GE pioneered the use of PCBs in electrical equipment and was one of the largest purchasers and users of PCBs. *Id.*, ¶¶ 23, 52. Records provided to Monsanto by GE reflect that between 1956 and 1977, GE purchased more than 200 million pounds of PCBs from Old Monsanto. *See* Ex. 1 (Summary of Reported Shipments of PCB Products To General Electric 1956-1977).

By November 1971, Old Monsanto had made the decision to phase out sales for all remaining non-electrical applications of PCBs due to growing environmental concerns surrounding PCBs. FAP, (ECF #4), ¶ 49. Old Monsanto agreed to continue supplying PCBs for closed electrical applications until suitable alternatives became available, but only if its customers would agree to defend and indemnify Old Monsanto against future PCB-related claims. *Id.* In 1972, Defendants each entered into substantially similar agreements titled “Special Undertakings by Purchasers of Polychlorinated Biphenyls,” which require them to “defend, indemnify and hold harmless [Old Monsanto], its present, past and future directors, officers, employees and agents, from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and

² The defendants—GE, Magnetek Inc., Paramount Global, Kyocera AVX Components Corporation, Cornell Dubilier Electronics Inc., and the Gillette Company LLC—or their predecessors-in-interest are six of the largest purchasers of PCBs from Old Monsanto between 1972-1977. First Amended Petition (“FAP”), (ECF #4), ¶ 4.

expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of [] PCB's . . . whether alone or in combination with other substances" (the "Special Undertakings"). *Id.*, ¶¶ 50, 54-103; *see also* Ex. 2 to FAP, (ECF #4-2) (GE Special Undertaking Agreement). GE purchased 59.9 million pounds of PCBs between 1972 and 1977. FAP, (ECF #4), ¶ 52.

Since Defendants entered into the Special Undertakings, Monsanto has been sued hundreds of times by plaintiffs seeking to impose liability on Monsanto for injuries or damages allegedly caused by the release of PCBs into the environment or other exposures to PCBs. *Id.*, ¶ 167. These PCB lawsuits have resulted in billions of dollars of liability (defense costs, judgments, and settlements) for Monsanto. In or around 2015, Monsanto began tendering the defense of these PCB cases to GE and demanding that GE indemnify Monsanto pursuant to the Special Undertaking. *Id.*, ¶ 211. Monsanto made similar tenders and demands to the other five Defendants starting in August 2016. *Id.*, ¶¶ 205, 216, 221, 225, 229. GE and other Defendants rejected Monsanto's tenders and demands. *Id.*, ¶¶ 206, 212, 217, 222, 226. So, on August 3, 2022, Monsanto filed the First Amended Petition³ in the Circuit Court of St. Louis County, Missouri, asserting claims against GE and the five other Defendants for breach of contract, negligence, declaratory judgment, and equitable contribution. *See generally id.*

Monsanto did not immediately serve GE with the lawsuit because of ongoing discussions between the parties regarding informal dispute resolution. Instead, Monsanto sent GE's counsel a copy of the FAP by email and worked out an agreement wherein GE agreed to waive formal service of process in exchange for Monsanto's agreement to extend the time for GE to file a response to

³ The FAP is the initial pleading alleging claims against GE. Monsanto's original petition, filed on September 1, 2017, only named Magnetek as a defendant.

the FAP. *See* Ex. 2 (correspondence dated October 3, 2022). On January 5, 2023, GE’s Missouri counsel, Peter Herzog, signed the Acknowledgement and Waiver on behalf of GE, which his colleague then emailed to Monsanto’s counsel. *See* Ex. 3 (correspondence and executed Acknowledgement and Waiver). Monsanto’s counsel filed the Acknowledgement and Waiver with the Circuit Court of St. Louis County on January 6, 2023. Ex. 4 (Notice of Waiver filed with Circuit Court of St. Louis County). GE filed its Notice of Removal with this Court 45 days later on February 20, 2023. *See* Notice of Removal, (ECF #1).

ARGUMENT

I. The Court Should Remand This Case Because GE’s Removal Is Untimely Under 28 U.S.C. § 1446(b)(1).

The timing requirements for removal are well-established and cannot be modified or extended. Under 28 U.S.C. § 1446, GE was required to file its Notice of Removal “within 30 days after the receipt by [GE], through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.” 28 U.S.C. § 1446(b)(1). The 30-day time period in Section 1446(b)(1) begins to run when a defendant is properly served *or* when a defendant waives service. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999);⁴ *Branch Banking & Tr. Co. v. Hunt*, No. 4:14-CV-4352-BHH, 2015 WL 2173047, at *3 (D.S.C. May 8, 2015) (collecting cases for proposition that “removal period for a defendant does not begin to run until that defendant is properly served or *until that defendant*

⁴ The Supreme Court’s interpretation of Section 1446(b)(1) in *Murphy Bros.* was based on the “bedrock principle” that “[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court’s authority, by formal process.” *Murphy Bros.*, 526 U.S. at 347. Although *Murphy Bros.* did not involve a waiver of service, the Supreme Court made clear that a waiver of service would have the same effect as formal service of process. *See id.* at 350-51 (“In the absence of service of process (*or waiver of service by the defendant*), a court ordinarily may not exercise power over a party the complaint names as defendant *Unless a named defendant agrees to waive service*, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.”) (emphasis added).

waives service.”) (emphasis added). GE did not file its Notice of Removal within the 30-day time period provided by Section 1446(b)(1).

The facts relating to GE’s waiver of service cannot be disputed. Plaintiffs filed the FAP on August 3, 2022 (*see* ECF #1-5 at 8) and provided a copy to GE’s counsel via email on October 3, 2022. On January 5, 2023, GE’s counsel, Peter Herzog, executed the Acknowledgement and Waiver on behalf of GE. Ex. 3 at 6. In the Acknowledgement and Waiver, Mr. Herzog states that he (1) is “counsel for Defendant General Electric Co.,” (2) is “authorized to waive formal service of process on behalf of General Electric in this matter;” (3) ***hereby “waive[s] the necessity of personal service of process under Missouri Supreme Court Rule 54.13(c) on behalf of General Electric for this matter;”*** and (4) “waive[s] any and all objections to the form, time, and sufficient of service of process as well as the defenses of insufficiency of process . . . and insufficient of service of process . . . for this matter.” Ex. 3 at 6 (emphasis added). Monsanto filed the Acknowledgement and Waiver in state court on January 6, 2023. Ex. 4 at 8-9.

The 30-day period for GE to remove this case thus began at the latest on January 6, 2023, when Monsanto filed the Acknowledgement and Waiver. *Id.* In Missouri, “a waiver of service is ‘deemed as valid as service’ when a ‘defendant’ waives service in writing.” *Tillman v. BNSF Ry. Co.*, No. 1:20 CV 00178 SNLJ, 2021 WL 842600, at *4 (E.D. Mo. Mar. 5, 2021) (quoting RSMo 506.150.2); Mo. Sup. Ct. R. 54.13(c) (acknowledgement and waiver of service “shall be deemed as valid as service in the manner provided by law.”); *see also Barner v. Thompson/Ctr. Arms Co. Inc.*, 796 F.3d 897, 900 (8th Cir. 2015) (noting state law governs sufficiency of service for removal purposes). At the latest, a written waiver of service “speaks from the time of its filing.” *Shields v. Shields*, 387 S.W.2d 242, 244 (Mo. App. 1965) (enforcing previously executed appearance and

waiver of service from date of filing); *Gardner v. Gilbirds*, 106 S.W.2d 970, 971 (Mo. App. 1937) (same); *see also* Mo. Sup. Ct. R. 54.20 (requiring proof of service).⁵

GE's removal is untimely because the Notice of Removal wasn't filed within 30 days of January 6, 2023. Regardless of whether GE waived service on January 5 or 6, 2023, the removal deadline was February 6, 2023. *See* 28 U.S.C. § 1446(b)(1); Fed. R. Civ. P. 6(a)(1)(C) (when last day of time period is Saturday or Sunday, deadline extended to following business day); *Young v. Mayor of City of St. Louis*, No. 4:21-CV-776 RLW, 2021 WL 5769345, at *2 (E.D. Mo. Dec. 6, 2021) (applying Fed. R. Civ. P. 6 to 28 U.S.C. § 1446). GE did not file its Notice of Removal until February 20, 2023—**45 days after** Monsanto filed the Acknowledgement and Waiver. *See* Notice of Removal, (ECF #1).

This Court’s decision in *Harris v. Monumental Life Ins. Co.*, No. 4:05-CV-2280 CAS, 2006 WL 1663510, at *3 (E.D. Mo. June 15, 2006) (Shaw, J.) is on point. There, the plaintiff moved to remand arguing that the defendants’ removal was untimely under Section 1446(b)(1) because it was filed more than 30-days after the defendant had agreed to waive service. *Id.* at *1. The plaintiff argued that counsel for the defendant had agreed with counsel for the plaintiff that “formal service of the summons and petition was unnecessary and [the defendant’s counsel] would accept service by mail on behalf of [the defendant].” *Id.* This Court found that the statement by the defendant’s counsel regarding service was sufficient to “waive[] [the defendant’s] right to formal service of process, for purposes of removal,” and therefore, the defendant “failed to remove this action in a timely manner under 28 U.S.C. § 1446(b).” *Id.* at *3. The argument for remand is

⁵ Mr. Herzog is a licensed Missouri lawyer. Accordingly, the Acknowledgement and Waiver, which seeks court approval of the parties' agreement to extend the responsive pleading deadline, is also an appearance by GE, which is sufficient to waive service under Missouri law. *KNT Mgmt., LLC v. Flenoid*, 419 S.W.3d 897, 900 (Mo. App. 2014) (if a party takes any act "that recognizes the case as being in court, this amounts to a general appearance"); *see also Germanese v. Champlin*, 540 S.W.2d 109, 112 (Mo. App. 1976) (request for a delay in placing case on court's docket constitutes general appearance and waives challenges regarding proper service).

stronger here than it was in *Harris* because the defendant in *Harris* did not execute a written waiver agreement, whereas counsel for General Electric (who is licensed in Missouri) signed the Acknowledgement and Waiver on behalf of his client and the waiver agreement was filed with the state court on January 6, 2023. *See id.* at *3 (waiver of service supported by affidavit from the plaintiff's counsel and statement in the defendant's notice of removal); *see also* Exs. 3-4 (executed Acknowledgement and Waiver).

Finally, the Court should reject any argument by General Electric that its removal is timely because it filed its Notice of Removal "within 30 days after service." *See* Notice of Removal, (ECF #1), ¶ 6. The portion of the Acknowledgment and Waiver cited by General Electric to support this assertion in its Notice of Removal relates to the parties' agreement as to when service will be deemed effective for purposes of extending General Electric's time to respond to the FAP in state court. *See* Ex. 4 at 7. It is well-established that the time for removal under Section 1446(b)(1) cannot be extended by agreement of the parties or a stipulation filed in state court. *See Rampy v. Sw. Bell Tel. Co.*, 615 F. Supp. 996, 999 (W.D. Mo. 1985) ("It is clear that the time provided for removal in Section 1446(b) could not be extended by any stipulation filed in State court."); *Hinz v. Swisher Hygiene USA Operations, Inc.*, No. 4:13-CV-1183 JAR, 2014 WL 520457, at *1-*2 (E.D. Mo. Feb. 7, 2014) (holding "[t]he time limit is mandatory" and rejecting argument that parties' extension of responsive pleading deadline extended removal period) (quoting *Pender v. Bell Asbestos Mines, Ltd.*, 145 F. Supp. 2d 1107, 1110 (E.D. Mo. 2001)); *see also Vertex Energy Operating, LLC v. Penthol LLC*, No. 4:20-CV-3901, 2021 WL 4538484, at *1-*3 (S.D. Tex. Jan. 29, 2021) (rejecting argument that Rule 11 agreement to extend time to plead in state court also extended the removal deadline in federal court). In short, Monsanto's agreement

to extend General Electric’s responsive pleading deadline in state court did not extend, and could not have extended, General Electric’s time for removal under 28 U.S.C. § 1446(b)(1).

II. The Court Should Remand This Case Because It Lacks Jurisdiction Under The Federal Officer Doctrine Pursuant To This Court’s Prior Decisions.

This Court has ruled on three separate occasions—in *Kelly*, *Bailey*, and *Burford*—that Monsanto cannot establish removal jurisdiction for PCB cases under Section 1442(a). *See Kelly*, 2016 WL 3543050, at *9-*11; *Bailey*, 176 F. Supp. 3d at 869-70; *Burford*, 2017 WL 1315800, at *5-*6. Whether correctly decided or not, those three decisions are on point and should foreclose GE’s attempt to remove this case, which seeks defense and indemnity for *Kelly*, *Bailey*, and *Burford* and other similar PCB lawsuits. In short, GE should not be able to remove this case under Section 1442(a) on the basis that it sold PCBs or PCB-containing equipment to the federal government, when Plaintiffs were unable to remove *Kelly*, *Bailey*, and *Burford* on the same basis and with even stronger evidence.

A. The Requirements For Federal Officer Removal.

“The federal officer removal statute permits a defendant to remove to federal court a state-court action brought against the ‘United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office . . .’” *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 145 (2007) (quoting 28 U.S.C. § 1442(a)(1)) (italics in original). “When the removing party is not itself a federal officer or agency, as in this case, § 1442(a)(1) ‘permits removal only if [GE], in carrying out the acts that are the subject of [Plaintiffs’ First Amended Petition], was acting under any agency or officer of the United States.’” *Graves v. 3M Co.*, 17 F. 4th 764, 768 (8th Cir. 2021) (quoting *Watson*, 551 U.S. at 147). Thus, GE must establish that: (1) it “has acted under the direction of a federal officer, (2) there was a causal connection between

[its] actions and the official authority, (3) [GE] has a colorable federal defense to the plaintiffs' claims, and (4) [GE] is a 'person,' within the meaning of the statute" *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1230 (8th Cir. 2012) *abrogated on other grounds by Buljic v. Tyson Foods, Inc.*, 22 F. 4th 730, 742 (8th Cir. 2021).

B. This Court Should Apply *Kelly*, *Bailey*, And *Burford* To Remand This Case Because GE Relies on the Same Arguments and the Same or Lesser Evidence than Monsanto.

GE's arguments for removal jurisdiction over this case are nearly identical to those made by Monsanto in *Kelly*, *Bailey*, and *Burford*. In those cases, Monsanto argued removal was proper under Section 1442(a) because Monsanto manufactured and sold PCBs at the express direction, supervision, and command of the federal government.⁶ Here, GE argues it is entitled to remove under Section 1442(a) because it sold PCBs and PCB-containing products (capacitors and transformers) to the federal government and did so under the supervision and control of the federal government. *See* Notice of Removal, (ECF #1), ¶¶ 19-33. Similar to what Monsanto relied on, GE relies on invoices showing sales of PCBs to the federal government,⁷ the Interdepartmental

⁶ *See Kelly*, 2016 WL 3543050, at *5 ("Old Monsanto manufactured PCBs directly for use by the federal government to meet the nation's military needs and to maintain the safety of the nation's power grid, and federal OSHA regulations required their use."); *Bailey*, 176 F. Supp. 3d at 862 ("Old Monsanto manufactured PCBs directly for use by the federal government, an executive branch task force determined their use was "necessary" to maintain the safety of the nation's power grid, federal OSHA regulations required their use, and Congress passed legislation expressly permitting their manufacture through 1979"); *Id.* at 864 ("[I]n 1972, the federal government directed Old Monsanto, pursuant to the Defense Production Act of 1950, to sell 3,000 pounds of PCBs to one military contractor, and in 1974 to sell three 55 gallon drums to another military contractor."); *Burford*, 2017 WL 1315800, at *2 (Monsanto argued "(1) Pharmacia produced PCBs for direct sale to the federal government; and (2) the federal government exercised control over Pharmacia's production of PCBs for military use").

⁷ Notably, GE has not attached any invoices showing that GE sold PCBs or PCBs containing equipment to the federal government. The invoices General Electric relies on are *Monsanto* records and invoices demonstrating that *Monsanto*, not General Electric, sold and shipped PCB formulations to government entities. *See* Ex. M to Notice of Removal, (ECF #1-21) (Monsanto sales records to government); Ex. N to Notice of Removal, (ECF #1-22) (invoice on Monsanto letterhead demonstrating Old Monsanto directly shipped and billed the Navy for a PCB formulation); Ex. O to Notice of Removal, (ECF #1-23) (invoice identifying Monsanto as the government "contractor"). Other records GE attaches to its Notice of Removal fail to demonstrate that it directly sold PCB-containing equipment to the federal government. *See, e.g.*, Ex. G to Notice of Removal, (ECF #1-15) (Database of Transformers Containing Polychlorinated Biphenyls which lists government-owned transformers, but fails to identify the manufacturer or party who sold the transformers

Task Force Report on PCBs, and other regulations and procurement specifications requiring the use of PCBs (e.g., the National Electric Code). *Compare Kelly*, 2016 WL 3543050, at *3, *5; *Bailey*, 176 F. Supp. 3d at 859, 862; *Burford*, 2017 WL 1315800, at *1, with Ex. B to Notice of Removal (ECF #1-2), (Polychlorinated Biphenyls and the Environment, Interdepartmental Task Force Report on PCBs); Ex. T to Notice of Removal, (ECF #1-28) (National Electrical Code 1971). And like Monsanto, GE also relies on the government contractor defense and federal preemption to satisfy the colorable federal defense element. *Compare Kelly*, 2016 WL 3543050, at *11; *Bailey*, 176 F. Supp. 3d at 870; *Burford*, 2017 WL 1315800, at *1, with Notice of Removal, (ECF #1), ¶¶ 40 – 46.

In *Bailey*, *Kelly*, and *Burford*, the court found the evidence and arguments made by Monsanto to be insufficient to support removal under Section 1442(a). In *Bailey*, the court found that Monsanto’s evidence satisfied the “acting under” requirement “with respect to the PCBs that Old Monsanto sold directly to the government, or to others at the direction of the government,” but did not meet the “causal connection requirement” because the amount of PCBs Monsanto sold to the government “is simply too small to satisfy the requirement that there be a causal connection between the conduct that was taken under federal authority and Plaintiff’s claims.” *Bailey*, 176 F. Supp. 3d at 870. The court also found that Monsanto had “not maintained that the [PCB] manufacturing process itself was in any way supervised or controlled by the government.” *Id.* The result in *Kelly* is very similar to *Bailey*. See *Kelly*, 2016 WL 3543050, at *9-*11. In *Burford*, the court found that Monsanto’s evidence was insufficient to meet either the “acting under” or “causal connection” elements for federal officer removal. See *Burford*, 2017 WL 1315800, at *3-*6.

to the federal government); Ex. I to Notice of Removal, (ECF #1-17) (August 1994 Government Accounting Office Report, which fails to identify GE as manufacturer of PCB-containing transformers).

The Court should apply the same standard for federal officer removal to GE that it did to Monsanto in *Bailey*, *Kelly*, and *Burford*. For example, like Monsanto, GE relies on the Interdepartmental Task Force Report (Notice of Removal (ECF #1), ¶ 29), various codes, standards, and regulations (e.g., the National Electric Code) that required or encouraged use of PCBs and PCB-containing equipment in many applications (*id.*, ¶¶ 30-31), and generic government procurement specifications concerning the purchase of PCBs and materials containing PCBs (*id.*, ¶ 32) to try to satisfy the “acted under” element. The court in *Burford* found such evidence fails to demonstrate “that the government supervised or controlled the [PCB] manufacturing process,” “that Pharmacia [Old Monsanto] produced the PCBs to the government’s detailed specifications,” or “that the government compelled Pharmacia [Old Monsanto] to produce PCBs under threat of criminal sanction.” *Burford*, 2017 WL 1315800, at *4.⁸ If the evidence cited by GE is insufficient for this Court to find sufficient government control over the manufacture and sale of PCBs by Monsanto, it should not be deemed sufficient to establish that GE “acted under” a federal officer when it sold PCBs manufactured by Monsanto or PCB-containing equipment (especially when GE has failed to provide any proof of direct government sales).

Furthermore, the “causal connection” element should be dispositive as to GE’s position on removal jurisdiction, as it was to Monsanto’s. The *Kelly*, *Bailey*, and *Burford* decisions hold that Monsanto’s sales to the federal government were *de minimis* and therefore “simply too small to satisfy the requirement that there be a causal connection between the conduct that was taken under federal authority and Plaintiffs’ claims.” *Bailey*, 176 F. Supp. 3d at 870; *see also Kelly*, 2016 WL

⁸ *See also Kelly*, 2016 WL 3543050, at *9 (“Furthermore, the evidence does not show that the manufacturing process was supervised or controlled by the government. . . . Likewise, Defendants have failed to show that the PCBs were produced to the detailed specifications of the government or that Old Monsanto was compelled to produce the PCBs under threat of criminal sanction.”); *Bailey*, 176 F. Supp. 3d at 870 (“Defendants have not maintained that the manufacturing process itself was in any way supervised or controlled by the government.”).

3543050, at *9; *Burford*, 2017 WL 1315800, at *6. The “illustrative examples” of GE’s purported sales of PCBs to the federal government in the Notice of Removal are far fewer by both amount and percentage of total PCB volume than those found to be *de minimis* and insufficient to support removal jurisdiction in *Kelly*, *Bailey*, and *Burford*. Compare Notice of Removal, (ECF #1), ¶¶ 22, 27 (asserting GE sold approximately 15,000 pounds of PCBs to government over three-year period), with *Kelly*, 2016 WL 3543050, at *9 n.15 (finding 282,000 pounds of PCBs (or 0.024 percent of all PCBs Monsanto ever manufactured) to the Government insufficient); *Bailey*, 176 F. Supp. 3d at 870; *Burford*, 2017 WL 1315800, at *5-*6. Indeed, even if the Court were to assume that all of GE’s “illustrative examples” actually represent direct sales to the government by GE (as opposed to sales by Monsanto (*see* n.7, *supra*)), those purported sales represent only 0.0074% of the total PCBs GE purchased from Monsanto between 1956 and 1977. *See* Ex. 1 (showing General Electric purchased at least 204,600,000 pounds of PCBs from Monsanto between 1956 and 1977). GE cannot satisfy the “causal connection” element based on its “illustrative examples” in light of *Kelly*, *Bailey*, and *Burford*.

To conclude, although Monsanto respectfully disagrees with the findings and holdings in *Kelly*, *Bailey*, and *Burford*, those decisions represent a unified view of the law in this district and should be applied to GE’s removal in this case. GE relies on less evidence than Monsanto did to meet the “acted under” and “causal connection” elements for federal officer removal. Accordingly, to the extent the Court finds GE’s removal timely (it is not), the Court should apply the same reasoning and analysis used in *Kelly*, *Bailey*, and *Burford* and remand this case back to the Circuit Court of St. Louis County. Any other result would be unjust to Monsanto, especially

in light of the fact that *Kelly*, *Bailey*, and *Burford* are cases for which Monsanto is seeking defense and indemnity from GE in this case.⁹

CONCLUSION

For the foregoing reasons, Plaintiffs Monsanto Company, Pharmacia, LLC, and Solutia, Inc. respectfully request that the Court grant their Motion to Remand and remand this case back to the Circuit Court of St. Louis County, Missouri.

Respectfully Submitted,

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⁹ The *Kelly*, *Bailey*, and *Burford* decisions did not reach the colorable federal defense element for federal officer removal, and it is not necessary for the Court to do so here either. That said, Monsanto acknowledges that preemption is an affirmative defense, but not one that provides a basis for removal.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been filed with the Court for service on all counsel of record via the Court's CM/ECF system on March 21, 2023.

/s/ Christopher M. Hohn

DJ-35

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

MONSANTO COMPANY, PHARMACIA,
LLC, and SOLUTIA, INC.,

Plaintiffs,

vs.

MAGNETEK, INC.,
GENERAL ELECTRIC CO.,
PARAMOUNT GLOBAL,
KYOCERA AVX COMPONENTS,
CORNELL DUBILIER ELECTRONICS, INC.,
and THE GILLETTE COMPANY, LLC,

Defendants.

CASE NO: 4:23-cv-204

DEFENDANT GENERAL ELECTRIC COMPANY'S NOTICE OF REMOVAL

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1446, Defendant General Electric Co. ("GE") removes this action from the Circuit Court of St. Louis County, Missouri ("State Court") (state court case number 17SL-CC03368) to the United States District Court for the Eastern District of Missouri on the ground that there is jurisdiction under 28 U.S.C. § 1442(a)(1). Namely, removal is appropriate because this action involves a dispute over Polychlorinated Biphenyls ("PCBs"), a chemical compound in electrical products that GE sold in large quantities to the Federal Government, and a compound that the Federal Government *required* manufacturers like GE to use in certain applications because of its fire-retardant properties, until

the Federal Government ultimately banned their use in 1979. GE thus submits that federal officer removal is appropriate, and in support, states as follows:

BACKGROUND

1. PCBs are man-made chemical fluids that the electrical industry widely used, including in transformers and capacitors, from at least the 1930s through 1979, when the Federal Government banned their manufacture and use. Monsanto was the sole and exclusive manufacturer of PCBs in the United States during this time period. Memorandum from R.W. Frahm to Field Sales District Managers (Apr. 18, 1972), Ex. A. PCBs were so widely used because they are “virtually free of fire and explosion hazards.” Interdepartmental Task Force on PCBs, Polychlorinated Biphenyls and the Environment at 12 (May 1972), Ex. B.¹

2. However, in the early 1970s, the scientific community, electric industry, and Federal Government began scrutinizing PCBs in response to reports of their bio-persistence and potential resulting health effects. *See id.* By the early- to mid-1970s, most industrial uses of PCBs ceased. However, PCBs continued to be used, and were even *federally mandated*, in

¹ The complete Interdepartmental Task Force memorandum, including all appendices is available at <https://nepis.epa.gov/Exe/ZyNET.exe/9101IMNO.TXT?ZyActionD=ZyDocument&Client=EPA&Index=Prior+to+1976&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C70thru75%5Ctxt%5C00000022%5C9101IMNO.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL>.

certain electrical applications, such as transformers and capacitors, until the Environmental Protection Agency (“EPA”) ultimately banned their use and manufacture in 1979. *See* Pet. ¶ 22 (“National Electrical Code, other industry codes, and state and federal government regulations required the use of PCBs in certain electrical applications.”), Ex. C; General Electric Company, *The Role of Polychlorinated Biphenyls in Electrical Equipment* at 4-5 (Dec. 16, 1971) (referring to the “various codes, standards, and regulations that now effectively require or encourage the continued use of askarel-insulated equipment in many applications”), Ex. D.

3. In their First Amended Petition, which Plaintiffs Pharmacia, LLC f/k/a Old Monsanto Company a/k/a Monsanto Chemical Co. (“Old Monsanto”), Monsanto Company, and Solutia, Inc. (collectively “Plaintiffs”) filed in the Circuit Court of St. Louis County, Missouri, Plaintiffs allege that Old Monsanto manufactured and sold PCBs to GE for several decades, ceasing in 1977.² Pet. ¶¶ 4, 22-26, Ex. C. Plaintiffs further allege that GE incorporated those PCBs into electrical products, such as capacitors, transformers, and light ballasts, which it sold to customers throughout the United States (*id.* ¶ 4)—including, as critical here, numerous Federal Government agencies and actors.

4. Plaintiffs contend that through GE’s manufacture, sale, and disposal of PCB-containing products, GE (and the other defendants) “released into the environment or permitted the release into the environment” some of the PCBs that it purchased from Old Monsanto. *Id.* Plaintiffs contend that “[m]ultiple lawsuits have been filed against [them] seeking damages

² Plaintiffs originally filed this action in the Circuit Court of St. Louis County, Missouri in 2017, but that action did not name GE as a defendant.

allegedly caused by the release of PCBs into the environment and other exposures to PCBs” and that “[they] have incurred significant defense costs relating to the PCB Lawsuits, have agreed to pay substantial sums to settle various PCB Lawsuits, and have had judgments entered against them in PCB Lawsuits.” *Id.* ¶ 5.

5. Plaintiffs bring five claims for relief against GE, alleging: (1) breach of contract for refusal to defend, (2) breach of contract for refusal to indemnify, (3) declaratory judgment regarding a duty to defend, (4) declaratory judgment regarding a duty to indemnify, and (5) negligence. *Id.* ¶¶ 236-91. Plaintiffs finally bring a claim for equitable contribution in the alternative. *Id.* ¶¶ 303-13.

6. Regarding their breach of contract and declaratory judgment claims, Plaintiffs allege that GE breached a two-page written agreement from 1972, the Special Undertaking by Purchasers of Polychlorinated Biphenyls (“Special Undertaking”), to defend, indemnify, and hold harmless Plaintiffs for personal injury claims related to PCBs. *Id.* ¶ 3. The Special Undertaking stated that Monsanto has “adopted certain restrictive policies with respect to its further production, sale and delivery of PCB’s, including the receipt of undertakings from its customers.” GE Special Undertaking, Ex. 2 to Pet. The Special Undertaking further stated that GE: will “defend, indemnify and hold harmless Monsanto . . . from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of [] PCB’s” “sold or delivered by or on behalf of Monsanto to Buyer on or after the date hereof.” *Id.* Plaintiffs allege they are therefore entitled to all amounts paid to resolve claims, whether by

settlement, verdict, judgment, or otherwise, as well as all “attorneys’ fees, expert fees, and other costs and expenses incurred to defend Old Monsanto in the PCB Lawsuits.” *Id.* ¶¶ 248-49, 261-62.

7. Regarding their negligence claim, Plaintiffs allege GE breached its “duty to possess, handle, use, sell, and dispose of PCBs . . . with reasonable care . . . by allowing PCBs purchased from Old Monsanto . . . to be released into the environment through products manufactured by [GE], . . . disposal of PCB-containing products, leaks, spills, dumping and disposal of industrial wastes, and through other means.” *Id.* ¶¶ 287-88; *see also id.* ¶ 105 (“PCBs have been released into the environment by Defendants and/or their predecessors-in-interest through their release from products they manufactured, disposal of PCB-containing products, leaks, accidental spills, dumping and disposal of industrial wastes, and through other means.”). Similar to their breach of contract claims, Plaintiffs seek all amounts paid to resolve the underlying PCB claims as well as all fees and costs incurred in defending the claims. *Id.* ¶¶ 290-91.

8. Exhibit 8 to Plaintiffs’ First Amended Petition lists the PCB claims for which Plaintiffs allege they are owed damages due to GE’s breaches and/or negligence.

9. Pursuant to 28 U.S.C. § 1446(a) and E.D. Mo. L.R. 2.03, the complete file from the Circuit Court of St. Louis County, Missouri, including copies of all process, pleadings, and orders, is attached to this Notice of Removal as Exhibit E.

10. A Civil Cover Sheet is attached to the Notice of Removal.

11. An Original Filing Form is attached to the Notice of Removal.

12. GE will file a Disclosure of Organizational Interests Certificate within 10 days of the filing of this Notice pursuant to Local Rule 2.09.

GROUND FOR REMOVAL

I. GE TIMELY FILED THIS NOTICE OF REMOVAL

13. GE timely removed this action under 28 U.S.C. § 1446(b)(1). Plaintiffs served GE on January 31, 2023, and GE filed this notice of removal within 30 days after service. *See* Waiver of Service, Ex. F (acknowledging “the date of service of the First Amended Petition on [GE] as January 31, 2023.”).

II. REMOVAL IS PROPER UNDER 28 U.S.C. § 1442(a)(1)

A. 28 U.S.C. § 1442(a)(1) Allows a Company Acting Under Direction of a Federal Officer to Remove Actions to Federal Court

14. Section 1442(a)(1) allows “[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States” to remove a case to federal court. 28 U.S.C. § 1442(a)(1). Private entities, such as government contractors, “fall within the terms of the federal officer removal statute . . . when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision.” *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007).

15. “The federal officer removal statute is to be ‘liberally construed,’ and thus the typical presumption against removal does not apply.” *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 738 (8th Cir. 2021), *rehearing denied*, No. 21-1010, 2022 WL 521355 (8th Cir. Feb. 22, 2022), *cert. pending*; *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014) (“Defendants enjoy much

broader removal rights under the federal officer removal statute than they do under the general removal statute.”).

16. As a private entity, GE must establish four elements to remove under § 1442(a)(1): “(1) [it] has acted under the direction of a federal officer, (2) there was a causal connection between [its] actions and the official authority, (3) [it] has a colorable federal defense to the plaintiff’s claims, and (4) [it] is a ‘person,’ within the meaning of the statute.” *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012), *abrogated on other grounds by BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S.Ct. 1532, 1538 (2021).

17. GE establishes each of these elements.

B. Federal Officer Removal is Appropriate Because GE Acted Under the Federal Government’s Direction

18. In manufacturing the PCB-containing products at issue in this case, GE acted under the ongoing direction, control, and supervision of the Federal Government. Not only did the Federal Government regularly purchase GE’s PCB-containing products, the Federal Government *required* GE to include PCBs in its products.

1. GE Sold PCBs to the Federal Government

19. As a federal defense contractor, GE sold large quantities of PCB-containing products to numerous agencies of the Federal Government. *See generally* Database of Transformers Containing Polychlorinated Biphenyls at 23, Environmental Protection Agency (Sept. 13, 2019) (listing numerous PCB-containing transformers owned by the Department of

Transportation, Federal Aviation Administration, Department of Energy, Department of Veterans Affairs, Department of the Interior, Army, and Navy), Ex. G.³

20. GE sold PCB-containing transformers and/or capacitors directly to the Department of Defense. *See* United States Army, PCB TMDL Action Plan at 23-27 (listing numerous GE transformers as currently in use at the Fort Myer & Henderson Hall installations); Memorandum from Henry Vaness Dobson, Jr. to Judge Advocate General (June 26, 1987) (referring to a General Electric PCB transformer at the Navy’s Piti Power Plant), Ex. H. Indeed, United States military installations included “thousands of electrical transformers and other electric equipment that either contain or are suspected to contain PCBs,” many of which GE manufactured. *See* U.S. Gen. Accounting Office, Environmental Compliance: DOD Needs to Better Identify and Monitor Equipment Containing Polychlorinated Biphenyls (hereinafter “Environmental Compliance”) at 2, Ex. I; *id.* at 2 (“The military services have significant

³ Available at https://www.epa.gov/sites/default/files/201909/documents/pcb_transformer_database.pdf (last visited February 11, 2023). “The rules applicable to federal officer removal provide the court with the discretion to look beyond the complaint and petition to determine whether the action itself should be removed.” *Christensen v. Ward*, 916 F.2d 1462, 1484 (10th Cir. 1990); *see also Guggenberger v. Starkey Labs., Inc.*, No. 16-2021 (JRT/LIB), 2016 WL 7479542, at *5 (D. Minn. Dec. 29, 2016) (“In addition to the notice of removal and its exhibits, to determine whether there is jurisdiction, the court may consider documents submitted after the notice of removal as well as those attached to subsequent motions.”). Courts also regularly take judicial notice of documents available on EPA’s website. *Sierra Club v. EPA*, 964 F.3d 882, 893 n.9 (10th Cir. 2020) (“We take judicial notice of this document, which is published on the EPA’s website.”); *Nebraska v. EPA*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003) (taking judicial notice of information on the EPA’s database).

quantities of PCBs in equipment such as electrical transformers and capacitors on their installations.”).

21. GE’s transformers contained a PCB insulation fluid called Pyranol. Mem. Regarding Polychlorinated Biphenyls, General Electric Company (Aug. 26, 1976) (“General Electric’s askarels are called Pyranol.”), Ex. J; Sales Information Bulletin (Sept. 10, 1973) (referring to Pyranol as a GE product), Ex. K; The Role of Polychlorinated Biphenyls in Electrical Equipment, General Electric Company at 8 (Dec. 16, 1971) (stating that GE exclusively used Pyranol), Ex. D. “Pyranol is the trade-mark of the General Electric Company for cooling and insulating materials which generically are known as askarels”—i.e., PCBs. Pyranol, General Electric, Ex. L. Therefore, the use of Pyranol was specific to GE transformers.

22. In 1970 alone, the General Services Administration, Department of the Interior, United States Army, United States Navy, and other branches of the Federal Government purchased at least **6,750 pounds** of Pyranol, meaning that each of these federal agencies had previously purchased numerous GE PCB-containing transformers that required replacement Pyranol.⁴ Report of Pyranol Sales (Dec. 1971), Ex. M. In 1971, the Federal Government again purchased over 6,000 pounds of Pyranol. *Id.* In a single shipment in December 1971, the United

⁴ While GE did not enter into the Special Undertaking with Monsanto until January 21, 1972, Monsanto broadly alleges entitlement to indemnity for *all* of its alleged PCB liability, including that related to the manufacture, sale, and disposal of PCBs before January 1972. *See* Pet. ¶ 288 (“Defendants and/or their predecessors-in-interest breached their respective duty of care by allowing PCBs purchased from Old Monsanto both before and after signing the Special Undertaking Agreements to be released into the environment through products manufactured by Defendants . . .”), Ex. C.

States Navy purchased over 2,000 pounds of Pyranol. United States Navy Invoice (Dec. 17, 1971), Ex. N. In February 1972, the Naval Supply Center in Oakland, California again purchased over 2,000 pounds of “Pyranol . . . [manufactured] by General Electric Co.” Naval Supply Center Invoice (Feb. 7, 1972), Ex. O.

23. By no later than February 1972, Monsanto discontinued all direct sales of Pyranol to end-users. Letter from T.L. Gossage to A.E. Peltosalo (Feb. 8, 1972), Ex. P. Accordingly, after February 1972, the Federal Government purchased its Pyranol for GE transformers directly from GE. *See generally id.*

24. GE’s sales of PCB-containing products to the Department of Defense was so widespread that it has even been recognized in case law. As the Ninth Circuit noted in a case related to a ruptured electrical transformer, “GE purchased PCBs from Monsanto in order to produce Pyranol, a fire-resistant dielectric fluid, which GE then used as insulation in electrical transformers and other devices. In 1949, ***GE sold one of its transformers to the Navy and delivered it to Guam.***” *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 331 (9th Cir. 1993) (emphasis added).

25. Moreover, the New Jersey Army National Guard, which is federally funded and operated under federal control in certain circumstances, also purchased GE transformers. *See* Excerpts of Final Summary Report: Suspected PCB Containing Electrical Equipment Inventory, at 19, 23, 27, 38-40, 42-45, 49-52 (Feb. 2017) (stating that GE PCB-containing transformers exist at various Army National Guard installations in New Jersey), Ex. Q.

26. GE also sold PCB-containing transformers and capacitors to Amtrak—a federally owned and controlled corporation. Excerpts of U.S. Dep’t of Transp., Polychlorinated Biphenyls (PCBs) in Transit System Electric Equipment at 4-2 (May 1984) (stating that Amtrak has 75 self-propelled cars and 26 locomotives with PCB-containing transformers), Ex. R⁵; *id.* at 4-6 (stating that GE estimates “twenty small [PCB-containing] capacitors and three large [PCB-containing] capacitors are used per rail car”); *id.* at D-2 (referring to GE as a producer of PCB-containing transformers).

27. The above list is not intended to be an exhaustive list of all the times GE sold products containing PCBs to the Federal Government, but rather an illustrative list of the close relationship GE and various Federal Government agencies had over this important chemical compound.

2. The Federal Government Supervised, Controlled, and Required GE’s Production of PCB-Containing Products Until It Banned PCBs in 1979

28. The Federal Government was not just a passive purchaser of PCBs. During the relevant time period of this case, the Federal Government worked hand-in-hand with GE by supervising and controlling GE’s production of PCB-containing products—and for a period of time, *required* that manufacturers like GE continue to use PCBs in certain applications.

29. In May 1972, multiple federal agencies, including the Department of Commerce and the Environmental Protection Agency, issued an interdepartmental task force report on

⁵ The entire Department of Transportation report is available at <https://rosap.ntl.bts.gov/view/dot/11961>.

PCBs. That report found the continued use of PCBs in the products GE manufactured was “*necessary* because of the significantly increased risk of fire and explosion and the disruption of electrical service which would result from a ban on PCB use.” Interdepartmental Task Force on PCBs, Polychlorinated Biphenyls and the Environment at 4 (May 1972) (emphasis added), Ex. B.

30. In light of the necessity of PCBs, the Federal Government mandated that GE use PCBs in the products GE manufactured and the Federal Government purchased. *See* Pet. ¶ 22 (“National Electrical Code, other industry codes, and state and federal government regulations required the use of PCBs in certain electrical applications.”), Ex. C; General Electric Company, The Role of Polychlorinated Biphenyls in Electrical Equipment at 4-5 (Dec. 16, 1971) (referring to the “various codes, standards, and regulations that now effectively require or encourage the continued use of askarel-insulated equipment in many applications”), Ex. D. As the Environmental Protection Agency stated, “[v]arious Federal, state, and local conditions *require[d]* use of askarel [a generic term for PCB-containing fluids] in transformers.” Environmental Protection Agency, Industry Views on the Use of PCBs at 17 (June 1976), Ex. S (emphasis added).

31. As one example, in February 1972, the United States Department of Labor, Occupational Safety & Health Administration adopted portions of the National Electric Code that required GE to use PCBs in a number of applications. *See* 37 Fed. Reg., 3,431 (Feb. 16, 1972) (to be codified at 29 C.F.R., pt. 1910) (“Every new electrical installation and all new utilization equipment installed after March 15, 1972, and every replacement, modification, or

repair or rehabilitation, after March 15, 1972, of any part of any electrical installation or utilization equipment installed before March 15, 1972, shall be installed or made, and maintained, in accordance with the provisions of the 1971 National Electrical Code.”); Excerpts of National Electric Code § 410-82 (“Transformers of other than the askarel-insulated or dry-type shall not be used.”) (1971), Ex. T.

32. The Federal Government also set procurement specifications for the PCB-containing products GE made and sold to the Federal Government. *See* Hearing on Toxic Substances Control Act at 80 (1976) (stating that the “Department of Defense, the General Services Administration, and other agencies” had “procurement specifications . . . concerning the purchase of PCBs and materials containing PCBs.”), Ex. U.

33. Then, in April 1979, the EPA issued final regulations banning the manufacture of PCBs and phasing out most PCB use. Press Release, EPA, EPA Bans PCB Manufacture; Phases Out Uses (Apr. 19, 1979), available at <https://www.epa.gov/archive/epa/aboutepa/epa-bans-pcb-manufacture-phases-out-uses.html>. The EPA also issued final regulations governing PCB disposal. *See* 40 C.F.R. § 761.60. Accordingly, after April 1979, the Federal Government exercised control and direction over the disposal of PCBs as well.

C. Plaintiffs’ Allegations Relate to GE’s Manufacture and Sale of PCBs to the Federal Government

34. Plaintiffs’ claims in this case relate to the actions GE took under the direction and control of the Federal Government.

35. Monsanto seeks indemnity from GE as a result of the specific PCB-containing materials that GE sold to the Federal Government.

36. For instance, Monsanto seeks indemnification for at least three lawsuits related to allegedly contaminated water and other natural resources in the Los Angeles area. List of Indemnification Cases, Ex. 8 to Pet., Ex. C; Compl. in *County of Los Angeles v. Monsanto*, No. 2:19-cv-4694, ECF No. 1 (C.D. Cal. May 30, 2019), Ex. V; Compl. in *California v. Monsanto*, No. 2:22-cv-02399-ODW-SK, ECF No. 1-1 (C.D. Cal. Apr. 8, 2022), Ex. W; Compl. in *City of Long Beach v. Monsanto Co.*, 2:16-cv-03493-FMO-AS, ECF No. 1 (N.D. Cal. May 19, 2016), Ex. 13 to Pet., Ex. C. In 1970 alone, the Federal Government purchased over 2,000 pounds of GE's PCB-containing Pyranol for use in the Los Angeles area. Report of Pyranol Sales (Dec. 1971), Ex. M. In 1971, the United States Marine Corps purchased over 1,000 pounds of Pyranol for use in the Los Angeles area. *Id.* Accordingly, Plaintiffs' defense and indemnification demands relate to actions GE took under the direction and control of the Federal Government—i.e., the sale of Pyranol to multiple federal agencies in the Los Angeles area.

37. Similarly, Monsanto seeks indemnification for *City of Oakland v. Monsanto Company*, which involved claims that PCBs contaminated the water in Oakland, California and the San Francisco Bay. 4:15-cv-05152 (N.D. Cal). *See* Ex. 8 to Pet., Ex. C. In 1971 and 1972, the United States Navy purchased thousands of pounds of GE's PCB-containing Pyranol each year for use in Oakland and San Francisco. Report of Pyranol Sales (Dec. 1971), Ex. M; United States Navy Invoice (Dec. 17, 1971), Ex. N; Naval Supply Center Invoice (Feb. 7, 1972), Ex. O. Here too, Plaintiffs' defense and indemnification demands relate to actions GE took under the

direction and control of the Federal Government—i.e., the sale of Pyranol to the United States Navy in the Bay Area.

38. Further, Plaintiffs allege GE negligently allowed “PCBs purchased from Old Monsanto . . . to be released into the environment *through products manufactured by [GE]*.” Pet. ¶ 288 (emphasis added), Ex. C; *see also id.* ¶ 105 (“PCBs have been released into the environment by Defendants and/or their predecessors-in-interest through their release from products they manufactured.”). In other words, Plaintiffs claim that GE negligently manufactured products containing PCBs, which products then were eventually placed in landfills, releasing PCBs into the environment. *See id.* ¶ 108.

39. Because Plaintiffs’ claims relate to GE’s manufacturing and sale of PCB-containing products, a causal connection exists between GE’s actions taken under federal authority and Plaintiffs’ claims. *See Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017) (“[T]here need be only ‘a *connection or association* between the act in question and the federal office.’”) (quoting *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016)); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (“[A]ny civil action that is connected or associated with an act under color of federal office may be removed.”).

D. GE Has Colorable Federal Defenses

40. “[A] defense is colorable for purposes of determining jurisdiction under Section 1442(a)(1) if the defendant asserting it identifies facts which, viewed in the light most favorable to the defendant, would establish a complete defense at trial.” *Hagen v. Benjamin Foster Co.*,

739 F. Supp. 2d 770, 783 (E.D. Pa. 2010). The defense need not be “clearly sustainable in order to support removal under § 1442(a)(1).” *Jacks*, 701 F.3d at 1235.

41. GE has at least two federal defenses.

42. First, GE has a government contractor defense to Plaintiffs’ negligence claim. GE was acting as a government contractor when it engaged in the actions complained of in this case. Indeed, the Federal Government purchased many of the PCBs at issue in the underlying lawsuits for which Plaintiffs seek indemnity. *See* Ex. 8 to Pet. (stating that Plaintiffs seek defense and indemnity for cases brought by the cities of Oakland and Los Angeles that alleged PCB contamination of the cities’ water and natural resources), Ex. C; Report of Pyranol Sales (Dec. 1971) (indicating that Federal Government agencies in the Los Angeles and Oakland metropolitan areas purchased thousands of pounds of GE’s PCB-containing Pyranol in 1971 and 1972 alone), Ex. M.

43. A government contractor is immune when it establishes: “(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.” *Boyle v. United Tech. Corp.*, 487 U.S. 500, 512 (1988). As explained above, (i) the Federal Government required the use of PCBs in GE’s products and set procurement specifications for those products, (ii) GE’s products conformed to the Federal Government’s requirements and specifications, and (iii) GE informed the Federal Government of any hazards of using PCBs that GE was aware of but the Federal Government was not. Indeed, the Federal Government knew as much, if not more, than GE

regarding the purported dangers in using PCBs. *See* Interdepartmental Task Force on PCBs, Polychlorinated Biphenyls and the Environment at 2 (May 1972) (stating that the government task force completed “a six month review of the chemicals known as PCBs”), Ex. B; Letter from Gerald Barney to Charles Sommer (Jan. 17, 1972) (stating the Navy’s belief that “one of the most serious threats to the marine environment is the class of chemicals known as polychlorinated biphenyls.”), Ex. X; Pet. ¶ 45 (Plaintiffs allege that they worked “hand-in-hand with the EPA to determine when acceptable substitutes [for PCBs] were available.”), Ex. C.

44. Second, federal law preempts Plaintiffs’ negligence claim. As explained above, federal law mandated that GE use PCBs in products it manufactured, and the Federal Government set requirements for GE’s use of PCBs. Pet. ¶ 22, Ex. C; Environmental Protection Agency, Industry Views on the Use of PCBs at 17 (June 1976), Ex. S; Hearing on Toxic Substances Control Act at 80 (1976), Ex. U. Because GE could not have complied with these federal requirements and its purported state law tort duty not to manufacture PCB-containing products that Plaintiffs’ claim negligently caused their release into the environment, federal law preempts Plaintiffs’ state-law negligence claim. *See, e.g., PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011) (“[S]tate and federal law conflict where it is ‘impossible for a private party to comply with both state and federal requirements.’” (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995))).

45. GE’s federal preemption and government contractor defenses constitute “federal defenses under § 1442.” *See Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 138 (2d Cir. 2008) (holding that a government contractor defense qualified as a “colorable federal defense” under

§ 1442(a)(1) and noting that “[c]ourts have imposed few limitations on what qualifies as a colorable federal defense.”); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 364 F. Supp. 2d 329, 336 (S.D.N.Y. 2004) (“[P]reemption is a colorable federal defense for purposes of the federal officer removal statute.”); *Jacks*, 701 F.3d at 1235 (holding that a claim that the Federal Employee Health Benefits Act preempted the plaintiff’s state claim was a colorable federal defense); *Guggenberger*, 2016 WL 7479542, at *11 (“Examples of colorable federal defenses include federal immunity or defenses based on federal statutes or regulations.”).

46. Because GE has federal defenses to at least one of Plaintiffs’ claims, GE can remove this entire action. *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1182 (7th Cir. 2012) (“If [the defendant] has a colorable defense as to either claim, then the entire case is removable.”); *Sawyer*, 860 F.3d at 257 (“[R]emoval need not be justified as to all claims asserted in the plaintiffs’ complaint.”).

E. GE is a “Person” Under § 1442(a)(1)

47. As a corporation, GE constitutes a “person” under § 1442(a)(1). *Jacks*, 701 F.3d at 1230 n.3 (“[T]he ‘person’ contemplated by the federal officer removal statute includes corporations.”).

F. GE Can Remove this Entire Action Without the Consent of its Co-Defendants

48. GE need not notify, or obtain the consent of, any other defendant in this action to remove this entire suit under § 1442(a)(1). *See, e.g., Iowa Pub. Serv. Co. v. Iowa State Com. Comm’n*, 407 F.2d 916, 918 n.3 (8th Cir. 1969) (“[T]he federal officer alone can remove without other defendants joining in the petition, and the entire case is removed to the federal court.”); *see*

also *Citrano v. John Crane-Houdaille, Inc.*, 1 F. Supp. 3d 459, 465 (D. Md. 2014) (“Unlike removal under § 1441, under § 1442(a) the other defendants need not join in or consent for removal to be proper.”).

VENUE

49. Venue is proper in the Eastern District of Missouri because this is the district court “within which such action is pending.” 28 U.S.C. § 1446(a).

NOTICE OF REMOVAL AND JURY DEMAND

50. Pursuant to 28 U.S.C. § 1446, filing a copy of this Notice with the Clerk of the State Court effects the removal of the State Court action. A copy of the Notice of Filing of Notice of Removal filed contemporaneously in the State Court is attached as Exhibit Y.

51. No waiver and no admission of fact, law, or liability, including without limitation the amount of damages, if any, is intended by this Notice of Removal, and all defenses, affirmative defenses, and rights are hereby reserved.

52. GE demands a trial by jury on all claims so triable.

CONCLUSION

53. For the reasons set forth above, GE removes this action to the United States District Court for the Eastern District of Missouri.

Dated: February 20, 2023

Respectfully submitted,

/s/ Peter W. Herzog III

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DJ-30

MONSANTO COMPANY,
and
PHARMACIA, LLC,
and
SOLUTIA, INC.

Plaintiffs,

v.

MAGNETEK, INC.
and
GENERAL ELECTRIC CO.
 Serve: CT Corporation System
 120 S. Central Ave.,
 Clayton, Mo., 63105
and
PARAMOUNT GLOBAL
 Serve: CSC – Lawyers
 Incorporating Service Company,
 221 Bolivar St.,
 Jefferson City, Mo 65101
and
KYOCERA AVX COMPONENTS
CORPORATION
 Serve: Corporation Service Co.
 251 Little Falls Dr.,
 Wilmington, DE 19808
and

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CORNELL DUBILIER ELECTRONICS)
INC.)
 Serve: The Corporation Trust Co.)
 1209 Orange St.,)
 Wilmington, DE 19801)
and)
THE GILLETTE COMPANY LLC)
 Serve: The Corporation Trust Co.)
 1209 Orange St.,)
 Wilmington, DE 19801)
Defendants.)

FIRST AMENDED PETITION

COME NOW Plaintiffs Monsanto Company, Pharmacia, LLC, and Solutia, Inc. (“Plaintiffs”), for their First Amended Petition against Magnetek, Inc., General Electric Co., Paramount Global, KYOCERA AVX Components Corporation, Cornell Dubilier Electronics, Inc., and The Gillette Company LLC (“Defendants”), and allege as follows:

NATURE OF THE CASE

1. This is an action to enforce Defendants’ written agreements to defend, indemnify, and hold harmless Pharmacia, LLC f/k/a Old Monsanto Company a/k/a Monsanto Chemical Co. (“Old Monsanto”) relating to Polychlorinated Biphenyls (“PCBs”) that Old Monsanto manufactured and sold to Defendants or their predecessors-in-interest. Defendants have failed and refused to honor their agreements despite multiple demands from Plaintiffs. As a result, Plaintiffs have incurred defense costs, agreed to and/or paid settlements, and have had judgments entered against them in PCB Lawsuits. Plaintiffs continue to incur substantial costs to defend against certain PCB Lawsuits that should be borne by Defendants. This lawsuit seeks to recover all of these amounts from Defendants. It also seeks a declaration from the Court that Defendants are

required to honor the terms of their agreements and defend, indemnify, and hold harmless Old Monsanto in all currently pending and future PCB Lawsuits.

2. PCBs are a class of unique, chemically inert and heat-resistant, chemicals that were integral to the manufacture of certain products such as transformers and capacitors in the United States. Between approximately 1935 and 1977, Old Monsanto manufactured and sold PCBs in bulk to a number of industrial customers—including Defendants and/or their predecessors-in-interest—who incorporated those PCBs into a wide variety of finished products that were sold throughout the United States. In 1970, in response to growing concern regarding the environmental persistence of PCBs, Old Monsanto announced that it would phase out production of PCBs for non-electrical PCB applications. For electrical applications, because PCBs were the only nonflammable dielectric fluid, Old Monsanto agreed to continue to manufacture and sell PCBs to certain customers for use in closed electrical applications (e.g., transformers and capacitors) until suitable alternatives to PCBs became available, but only if those customers would agree to defend and indemnify Old Monsanto against future PCB-related claims.

3. Defendants or their predecessors-in-interest were members of the U.S. electrical industry and some of the largest purchasers of PCBs from Old Monsanto. In early 1972, each Defendant, or their predecessor-in-interest, negotiated and entered into a written agreement with Old Monsanto titled “Special Undertaking by Purchasers of Polychlorinated Biphenyls” (individually a “Special Undertaking Agreement,” and collectively, the “Special Undertaking Agreements”). The Special Undertaking Agreements are substantially similar and contractually obligate each Defendant to defend, indemnify, and hold Old Monsanto harmless from “any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses . . . arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of such

PCB's by, through, or under [Defendants], whether alone or in combination with other substances, including, without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food, animal feed or the environment by reason of such PCB's." Defendants further acknowledged in the Special Undertaking Agreements that they were aware and had been advised by Old Monsanto that PCBs tend to persist in the environment and that care was required in the handling, possession, use, and disposition of PCBs.

4. Between 1972 and 1977, Old Monsanto manufactured and sold approximately 143 million pounds of PCBs to customers who entered into Special Undertaking Agreements which remain viable today. Defendants or their predecessors-in-interest are the six largest purchasers of PCBs from Old Monsanto between 1972 and 1977. Pursuant to the Special Undertaking Agreements, Defendants or their predecessors-in-interest purchased approximately 133 million pounds of PCBs from Old Monsanto during that time period. Defendants incorporated the PCBs they purchased from Old Monsanto into electrical products—e.g., capacitors, transformers, and light ballasts—that were sold to customers throughout the United States. Defendants and/or their predecessors-in-interest also released into the environment or permitted the release into the environment some of the 133 million pounds of PCBs that they purchased from Old Monsanto between 1972 and 1977.

5. Multiple lawsuits have been filed against Plaintiffs seeking damages allegedly caused by the release of PCBs into the environment and other exposures to PCBs (the "PCB Lawsuits"). The PCB Lawsuits generally predicate Old Monsanto's liability on, *inter alia*, its manufacturing of PCBs for purchase by Defendants. Plaintiffs have incurred significant defense costs relating to the PCB Lawsuits, have agreed to pay substantial sums to settle various PCB Lawsuits, and have had judgments entered against them in PCB Lawsuits. Many PCB Lawsuits

remain pending against Plaintiffs, and Plaintiffs continue to incur substantial costs to defend those actions. The plaintiffs in each of the pending PCB Lawsuits seek recovery of significant damages from Plaintiffs.

6. Defendants individually and collectively have a contractual duty to defend, indemnify, and hold harmless Old Monsanto in the PCB Lawsuits. Plaintiffs have provided Defendants notice of the PCB Lawsuits, tendered the defense of the PCB Lawsuits to Defendants, and demanded indemnification from Defendants. Defendants have failed and refused to honor their agreements. They have failed and refused to provide Old Monsanto with a defense in the PCB Lawsuits and have failed and refused to indemnify Old Monsanto for any of the amounts paid and/or agreed to be paid to resolve the PCB Lawsuits or any of the judgments entered against Old Monsanto in the PCB Lawsuits. Defendants' refusal to defend and indemnify Old Monsanto in the PCB Lawsuits constitutes one or more breaches of the Special Undertaking Agreements. As a result of Defendants' breaches of the Special Undertaking Agreements, Plaintiffs have been damaged. Plaintiffs' damages continue to accrue in that Plaintiffs continue to incur substantial costs to defend the PCB Lawsuits and continue to face significant potential liability in the PCB Lawsuits.

THE PARTIES

7. Old Monsanto is a limited liability company organized and existing under the laws of the State of Delaware. The sole member of Old Monsanto is Wyeth Holdings LLC. The sole member of Wyeth Holdings LLC is Anacor Pharmaceuticals, Inc., which is incorporated under the laws of Delaware and has its principal place of business in New York.

8. Plaintiff Solutia, Inc. ("Solutia") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in St. Louis County, Missouri.

Solutia did not manufacture or sell PCBs. In 1997, Solutia was spun off from Old Monsanto. In connection with the spin off, Old Monsanto assigned certain rights to Solutia, including the rights to enforce the Special Undertaking Agreements. In particular, Old Monsanto assigned its “right, title, and interest . . . in and to all of the Chemical Assets” to Solutia, which were defined to include “all rights under insurance policies and all rights in the nature of insurance, indemnification or contribution.” Solutia has the right to enforce the Special Undertaking Agreements.

9. Plaintiff New Monsanto is a corporation organized and existing under the laws of the State of Delaware with its corporate headquarters and principal place of business in St. Louis County, Missouri. New Monsanto did not manufacture or sell PCBs. New Monsanto was spun off from Old Monsanto in 2000. In 2008, New Monsanto and Solutia entered into the Amended and Restated Settlement Agreement in connection with Solutia’s Chapter 11 reorganization. As part of that Amended and Restated Settlement Agreement, New Monsanto agreed to assume financial responsibility for certain Legacy Tort Claims (which include claims for property damage, personal injury, products liability or premises liability or other damages arising out of or related to exposure to PCBs) and Environmental Liabilities related to Legacy Sites. Old Monsanto executed a Power of Attorney in favor of New Monsanto, which grants New Monsanto authority to take “all actions” over certain claims, including the PCB Lawsuits, and provides that New Monsanto is Old Monsanto’s “true and lawful agent and attorney.” The Amended and Restated Settlement Agreement also obligated Solutia to use commercially reasonable efforts to assert indemnification rights (including the Special Undertaking Agreements) for the benefit of New Monsanto and granted New Monsanto the right to any benefits recovered by Solutia through its enforcement of those indemnification rights. Pursuant to the 2008 Amended and Restated Settlement Agreement and the Power of Attorney, New Monsanto is and has been paying the costs

incurred by Plaintiffs to defend the PCB Lawsuits, and has also paid and/or agreed to pay amounts to settle some of the Food Chain cases and Water Cases, which are referred to herein and defined below, for the benefit of Plaintiffs.

10. Defendant Magnetek, Inc. (“Magnetek”) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York. Magnetek is the successor-in-interest to Universal Manufacturing Corporation (“UMC”). UMC merged into Magnetek (d/b/a Delaware Magnetek, Inc.) on or about July 11, 1986, with Magnetek as the surviving corporation.

11. Defendant General Electric Co. (“General Electric,” or “GE”) is a corporation organized and existing under the laws of the State of New York with its principal place of business in Massachusetts. General Electric is registered to do business in Missouri and can be served through its registered agent, CT Corporation System, 120 South Central Avenue, Clayton, Missouri, 63105.

12. Defendant Paramount Global (“Paramount”) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York. Paramount is the successor-in-interest to Westinghouse Electric Corporation (“Westinghouse”). On or about November 10, 1997, Westinghouse changed its name to CBS Corporation. On or about May 4, 2000, CBS Corporation merged into Viacom Inc. with Viacom Inc. as the surviving corporation. On or about January 1, 2006, Viacom Inc. spun off CBS Corporation. In or around December 2019, Viacom Inc. and CBS Corporation merged once again, with ViacomCBS as the surviving entity. In or around February 2022, Viacom CBS changed its name to Paramount. Paramount is registered to do business in Missouri and can be served through its registered agent, CSC – Lawyers Incorporating Service Company, 221 Bolivar St., Jefferson City, Missouri 65101.

13. Defendant KYOCERA AVX Components Corporation (“KYOCERA AVX”) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in South Carolina. KYOCERA AVX is the successor to Aerovox Corporation (“Aerovox”). On June 4, 1973, Aerovox merged with AVX Ceramics Corporation (“AVX Ceramics”), with AVX Ceramics as the surviving entity. On December 31, 1973, AVX Ceramics changed its name to AVX Corporation. On January 18, 1990 AVX Corporation merged into KC Subsidiary Corporation with KC Subsidiary Corporation as the surviving corporation. KC Subsidiary Corporation then changed its name to AVX Corporation (“AVX”). On or about March 30, 2020, KYOCERA Corporation acquired AVX through a second-step merger of a wholly-owned subsidiary of KYOCERA Corporation with and into AVX. As a result of the merger, AVX became a wholly-owned subsidiary of KYOCERA Corporation. On October 1, 2021, AVX changed its corporate name to KYOCERA AVX Components Corporation. KYOCERA AVX can be served through its registered agent, Corporation Service Company, 251 Little Falls Drive, Wilmington, DE 19808.

14. Defendant Cornell-Dubilier Electronics, Inc. (“CDE”) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in South Carolina. On September 19, 1983, Cornell-Dubilier Electric Corp. changed its name to Cornell Dubilier Electronics, Inc. CDE can be served through its registered agent, The Corporation Trust Company, 1209 Orange St., Wilmington, DE 19801.

15. The Gillette Company LLC (“Gillette”) is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business in Massachusetts. Gillette is the successor-in-interest to P.R. Mallory & Co. Inc. (“P.R. Mallory”). On February 28, 1980, P.R. Mallory changed its name to Duracell International Inc. On June 29,

1989, Duracell International Inc. and Duracell Inc. merged with Duracell Inc. as the surviving company. On December 31, 1998, Duracell Inc. merged into The Gillette Company. On August 25, 2016, The Gillette Company entered into a merger agreement with The Gillette Company LLC, with Gillette as the surviving entity. Gillette is a wholly-owned subsidiary of The Procter & Gamble Company. Gillette can be served through its agent, The Corporation Trust Company, 1209 Orange St., Wilmington, DE 19801.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction over Plaintiffs' breach of contract, negligence, and negligent misrepresentation claims pursuant to Art. 5, § 14 of the Missouri Constitution because circuit courts have original jurisdiction over all civil matters and because Plaintiffs seek recovery of money in excess of \$25,000, so RSMo § 517.011 does not apply. This Court has subject matter jurisdiction over Plaintiffs' declaratory judgment claims pursuant to RSMo §§ 527.010, 527.020, and 527.030.

17. This Court has personal jurisdiction over Defendants. First, Defendants satisfy the Missouri long-arm statute because, as described herein, Defendants transacted business within Missouri, made contracts within Missouri, contracted to insure a person, property, or risk located within Missouri at the time of contracting, and, with regard to Magnetek, it also made negligent misrepresentations in Missouri that have resulted in harm being sustained in Missouri. Some of the Defendants are also registered to do business in Missouri. Second, Defendants have numerous suit-related contacts with Missouri, including but not limited to various visits to Old Monsanto in Missouri regarding PCBs, communicating with Old Monsanto in Missouri, entering into contracts to purchase PCBs from Old Monsanto that were executed in Missouri and contained Missouri choice-of-law provisions, and/or the purchase of approximately 133 million pounds of PCBs from Old Monsanto which was based in Missouri at the time of those purchases. Defendants purchased

PCBs from Old Monsanto by contacting Old Monsanto in Missouri by telephone and by sending purchase orders to Old Monsanto in Missouri.

18. Venue is proper in St. Louis County, Missouri pursuant to RSMo § 508.010 because Plaintiffs allege tort claims against Defendants, and Plaintiffs were first injured by Defendants' tortious conduct in St. Louis County, Missouri.

GENERAL ALLEGATIONS

I. The Manufacture, Sale, Use, and Environmental Persistence of PCBs

19. From 1901 to 1997, Old Monsanto operated as a Missouri corporation manufacturing a variety of chemicals and agricultural products.

20. Old Monsanto manufactured and sold PCBs under the trade name Aroclor between 1935 and 1977.

21. PCBs are a group of man-made organic chemicals consisting of carbon, hydrogen, and chlorine atoms. They are extremely stable, chemically inert, resistant to heat and fire, and highly electrically resistive.

22. For much of the twentieth century, PCBs were recognized as an essential nonflammable fluid in many types of electrical equipment and machinery to mitigate very serious risks, including risk of fatal accidents from fire and explosions. In fact, the National Electrical Code, other industry codes, and state and federal government regulations required the use of PCBs in certain electrical applications.

23. General Electric pioneered the use of PCBs in electrical equipment. By 1936, General Electric's Frank Clark held all initial patents for PCB dielectric applications as well as the transformers and capacitors that use PCBs. The first change in the National Electric Code to permit the use of askarel-filled electrical equipment occurred in 1935 after a significant effort on the part

of General Electric to patent and to obtain an Underwriters' Laboratories "listing" covering four Pyranols, the trade name for General Electric's PCB electrical fluids.

24. Old Monsanto sold PCBs in bulk to a number of industrial customers who incorporated them into a wide variety of finished products that were sold throughout the United States.

25. Defendants and/or their predecessors-in-interest purchased millions of pounds of PCBs from Old Monsanto.

26. Old Monsanto's customers—including Defendants and/or their predecessors-in-interest—incorporated PCBs into finished products, including dielectric fluids used in electrical equipment such as transformers, capacitors, and lighting ballasts. For example, General Electric blended Aroclor manufactured by Old Monsanto with trichlorobenzene made by other manufacturers to create PCB electrical fluid products. General Electric also licensed other electrical equipment manufacturers to use PCB electrical fluids in their equipment. Under this arrangement, General Electric's competitors, such as Westinghouse, bought Aroclor through General Electric rather than directly from Old Monsanto.

27. Westinghouse's trade name for PCB electrical fluid was Interteen. During World War II, Westinghouse's arrangements for buying electrical grade Aroclor through General Electric changed. In late 1942, Westinghouse began purchasing PCBs directly from Old Monsanto.

28. The Environmental Protection Agency ("EPA") has estimated that approximately 75% of all PCBs manufactured in the United States from 1930 – 1975 were used in electrical transformers and capacitors. *See* EPA, PCBs in the United States Industrial Use and Environmental Distribution at 215 (Feb. 25, 1976) ("EPA PCB Report").

29. Old Monsanto itself never sold finished electrical devices containing PCBs.

30. In the late 1960s, PCBs were found to persist in the environment.

31. On January 21-22, 1970, Old Monsanto representatives met with General Electric representatives in St. Louis, Missouri who advised Old Monsanto that without the continued manufacture and sale of PCBs for electrical applications in the United States, the domestic industry for certain electrical devices would shut down.

32. In early 1970, Old Monsanto announced that it would phase out production of PCBs for use as plasticizers and heat transfer fluids in food and feed applications.

33. On or about February 18, 1970, Old Monsanto sent letters to its Aroclor electrical fluid customers calling their attention to recent reports indicating that molecules resembling the higher chlorinated products had been found in marine and wildlife environments. The letter urged Aroclor customers to use “all possible care” to prevent Aroclor products from becoming environmental contaminants. The letter also pointed out that it was possible for PCB-containing electrically insulating liquids to leak out of sealed electrical devices and suggested that the recipients should notify the purchasers of their electrical equipment about the problem.

34. In March 1970, General Electric held a full-scale internal review of the PCB situation and concluded that PCBs were a problem for General Electric and that General Electric was on notice from Old Monsanto to work on the problem and to work with its transformer and capacitor customers. General Electric sent a letter notifying its Pyranol customers about the PCB situation in May 1970. Despite these actions, General Electric strongly objected to ending the use of Aroclors 1254 and 1260 in electrical equipment and recommended that Old Monsanto continue to manufacture those products.

35. On or about April 21, 1970, Westinghouse representatives met with Old Monsanto representatives in St. Louis, Missouri. At that meeting, the Westinghouse representatives were

fully advised by Old Monsanto of the background and events involving the discovery of PCBs in the environment, and received information, *inter alia*, about the environmental risk of PCBs to certain forms of animal life.

36. Starting in or around April 1970, Old Monsanto began labeling its Aroclor products, shipping documents, and invoices with a warning that extreme care should be taken to prevent any entry of PCBs into the environment. Old Monsanto also undertook efforts to obtain agreement from General Electric and Westinghouse to place similar environmental warnings on Pyranol and Interteen containers.

37. In or around June 23, 1970, Old Monsanto representatives visited P.R. Mallory and discussed the PCB environmental situation.

38. In May 1971, the American National Standards Institute (“ANSI”) established a PCB committee, designated as C107. The ANSI C107 Committee was established at the recommendation of Old Monsanto with the objective of developing guidelines to minimize PCB environmental pollution from electric uses. Representatives from UMC (N. Ray Clark) and General Electric (E. L. Raab) were on the ANSI C107 Steering Committee.

39. In June 1971, Westinghouse and General Electric were instrumental in creating an industry report regarding the use and disposal of PCB dielectric fluids, which, *inter alia*, described the environmental problems posed by PCB dielectric fluids.

40. In September 1971, the U.S. government convened an Interdepartmental Task Force on PCBs (the “Task Force”). The Task Force “included operating units of five Executive Branch departments,” namely: the Department of Agriculture; Department of Commerce; EPA; Department of Health, Education, and Welfare; and Department of the Interior. Dept. of Agriculture, et al., *Polychlorinated Biphenyls and The Environment* at 1 (May 1972) (“PCBs And

The Environment”). Its purpose was to “coordinate the scientific efforts of the Government aimed at understanding [PCBs], and to strengthen the Government’s ability to protect the public from actual or potential hazards from PCBs.” *Id.* (abstract).

41. On or about September 14, 1971, Westinghouse representatives (T. K. Sloat and Don McClain) attended a meeting of electrical industry, utility, and government representatives, at which Old Monsanto representatives discussed the PCB situation in depth.

42. In or around November 1971, ANSI established subcommittees on the use of PCBs in capacitors and transformers. Various representatives of Defendants were members of these two committees, including N. Ray Clark (UMC), Dr. A. Pozefsky (GE), E.L. Raab (GE), R. D. McLain (Westinghouse), and T. K. Sloat (Westinghouse). E. L. Raab (GE) was the chairman of the transformer subcommittee and Dr. A. Pozefsky (GE) was the chairman of the capacitor subcommittee. These ANSI subcommittees met multiple times in late 1971 and early 1972.

43. On December 16, 1971, Old Monsanto hosted a meeting of Westinghouse representatives in St. Louis, Missouri. The purpose of the meeting was to acquaint Westinghouse with the latest information concerning PCBs.

44. On December 21, 1971, Old Monsanto sent a letter to dielectric customers advising that policies effective January 15, 1972 would restrict Old Monsanto’s sales of PCBs to those customers who had entered into indemnity agreements with Old Monsanto. A true and accurate copy of the December 21, 1971 letter is attached hereto as **Exhibit 28** and incorporated herein by reference.

45. From 1971 forward, Old Monsanto worked hand-in-hand with the EPA to determine when acceptable substitutes were available and Old Monsanto could stop production of PCBs. *See EPA, Industry Views on the Use of PCBs* at 7 (1976) (Statement of F.J. Fitzgerald,

Vice-President, Monsanto Chemical Company) (Old Monsanto “reaffirm[ing]” its “commitment to continue working with the EPA and the electrical industry in finding solutions to the PCB issue.”).

46. In 1972, the Task Force issued a major report on PCBs, which “reflect[ed] the position of the operating agencies of the Federal Government which have major responsibilities concerning such chemicals as PCBs in food and in the environment.” PCBs And The Environment at 1. The report found that PCBs had certain “essential or non-replaceable uses.” *Id.* at 3. After reviewing “all of the available scientific information on various aspects of the PCB problem,” *id.* at 2, the Task Force agreed on nine separate conclusions relating to PCBs, including the following:

The use of PCBs should not be banned entirely. *Their continued use for transformers and capacitors in the near future is considered necessary* because of the significantly increased risk of fire and explosion and the disruption of electrical service which would result from a ban on PCB use. Also, continued use of PCBs in transformers and capacitors presents a minimal risk of environmental contamination.

Id. at 4 (emphasis added).

47. The Task Force further explained that continued use of PCBs was essential, because there were no present substitutes for the use of PCBs, and that purchasers and users of PCBs understood the need for unusual protective measures to prevent their release into the environment:

The advantages to the public in terms of safe, reliable, and efficient electrical equipment made possible by the use of PCBs have been documented in the body of, and especially Appendix B to, this report. It is also clear that there are no present or prospective substitutes for these materials, and that the functions they perform are essential. Thus the continuing need for PCBs in closed electrical system applications is conclusive. The electrical industry well understands, however, that continued use of these materials requires unusual protective measures.

Id. at 81.

48. In 1976, Congress enacted the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2601 *et seq.*, which required that the EPA promulgate rules governing continued use of PCBs.

Pursuant to the TSCA, the EPA promulgated a comprehensive regulatory scheme governing the manufacture, use, distribution, disposal, and remediation of PCBs and, in 1979, banned the intentional manufacture of PCBs without specific authorization from the agency. *See* 40 C.F.R. § 761.1 *et seq.*

II. The Special Undertaking Agreements

49. By November 1971, Old Monsanto had made the decision to phase out sales for all remaining, non-electrical applications of PCBs. Because the continued viability of the U.S. electric industry depended upon a domestic source for PCBs, Old Monsanto agreed to continue to supply PCBs for closed electrical applications until suitable alternatives became available, but only if customers would agree to defend and indemnify Old Monsanto against future PCB-related claims.

50. Each of the Defendants or their predecessors-in-interest entered into substantially similar Special Undertaking Agreements with Old Monsanto whereby Defendants or their predecessors-in-interest each agreed to defend, indemnify, and hold harmless Old Monsanto from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with Defendants' (or their predecessors-in-interest's) receipt, purchase, possession, handling, use, sale, or disposition of PCBs, whether alone or in combination with other substances. In reliance on these Special Undertaking Agreements, Old Monsanto continued to manufacture and sell PCBs to Defendants until 1977. True and accurate copies of the Special Undertaking Agreements entered into by Defendants or their predecessors-in-interest are attached hereto as **Exhibits 1-6**.

51. Based on available sales records, between 1972 and 1977, Old Monsanto sold approximately 142,971,731 pounds of PCBs to customers who signed Special Undertaking

Agreements that remain viable today. Defendants were the top six purchasers of those PCBs, purchasing 133,406,342 pounds or 93% of those PCBs.

52. Based on available sales records, Defendants purchased the following amounts of PCBs from Old Monsanto between 1972 and 1977:

PCB Purchaser	Successor (if applicable)	Pounds of PCBs Purchased
Aerovox Corporation	KYOCERA AVX	9,395,500
Cornell Dubilier Electronics, Inc.		7,446,200
General Electric Company		59,910,405
P.R. Mallory & Co. Inc.	The Gillette Company LLC	7,060,700
Universal Manufacturing Corporation	Magnetek, Inc.	11,918,600
Westinghouse Electric Corporation	Paramount	37,674,937
TOTAL		133,406,342

53. Defendants purchased these PCBs by calling Old Monsanto employees in Missouri or sending purchase orders to Old Monsanto's principal place of business in Missouri. Old Monsanto accepted these purchase orders in Missouri.

A. The Magnetek Special Undertaking Agreement

54. On January 7, 1972, UMC and Old Monsanto executed a written agreement entitled "Special Undertaking by Purchasers of Polychlorinated Biphenyls" (the "Magnetek Special Undertaking Agreement"). The final act creating the Magnetek Special Undertaking Agreement—Old Monsanto's execution of the agreement—occurred in Missouri. A true and correct copy of the Magnetek Special Undertaking Agreement is attached hereto as **Exhibit 1** and incorporated herein by reference.

55. Prior to signing the Magnetek Special Undertaking Agreement, Old Monsanto sent

letters to UMC and met in-person with UMC employees, including its Executive Vice President N. Ray Clark, to discuss PCB environmental pollution. For example, in 1969, Old Monsanto advised UMC to keep PCBs well-contained and to exercise the highest degree of control in its storage of PCBs.

56. Magnetek is the successor-in-interest to UMC's obligations under the Magnetek Special Undertaking Agreement.

57. The Magnetek Special Undertaking Agreement identifies UMC as the "Buyer" and states:

While Buyer desires to purchase PCB's because of certain desirable flame resistant and insulator properties, Buyer acknowledges that it is aware and has been advised by Monsanto that PCB's tend to persist in the environment; that care is required in their handling, possession, use and disposition; that tolerance limits have been or are being established for PCB's in various food products.

Monsanto has therefore adopted certain restrictive policies with respect to its further production, sale and delivery of PCB's, including the receipt of undertakings from its customers as set forth below, and Buyer is willing to agree to such undertakings with respect to sales and/or deliveries of PCB's by Monsanto to Buyer.

Exhibit 1 at 1.

58. The Magnetek Special Undertaking Agreement further states that UMC will defend, indemnify, and hold Monsanto harmless against future PCB-related claims as follows:

Accordingly, Buyer hereby covenants and agrees that, with respect to any and all PCB's sold or delivered by or on behalf of Monsanto to Buyer on or after the date hereof and in consideration of any such sale or delivery, Buyer shall defend, indemnify and hold harmless Monsanto, its present, past and future directors, officers, employees and agents, from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses (except to the extent arising from failure of PCB to conform to specifications) arising out of or in connection with the receipt, purchase, possession, handling, use, sale, or disposition of such PCB's by, through or under Buyer, whether alone or in combination with other substances, including, without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food, animal feed or the environment by reason of such PCB's.

Exhibit 1 at 1.

59. Further, the Magnetek Special Undertaking Agreement states that “[a]ll existing contracts for the sale of PCB’s by Monsanto to Buyer are hereby amended to contain the provision set forth above.” Exhibit 1 at 1.

60. As shown, the Magnetek Special Undertaking Agreement broadly covers all claims “arising out of” or having any “connection with” the receipt or purchase of PCBs by Magnetek after January 7, 1972.

61. The Magnetek Special Undertaking Agreement is not limited to claims connected only to PCBs purchased by Magnetek after January 7, 1972, but also applies to claims connected to those PCBs “in combination with other substances.”

62. On January 7, 1972, the President of UMC sent a letter to Old Monsanto in Missouri stating that the Special Undertaking Agreement is covered by a blanket liability policy with Travelers Insurance Company having limits of \$10 million dollars. On January 17, 1972 the insurance manager for UMC’s then parent company, Northwest Industries, Inc., sent a letter to Old Monsanto *in Missouri* providing a “Certificate of Insurance” “[i]n furtherance of the undertaking between [Old Monsanto] and our Universal Manufacturing Corporation.” A true and accurate copy of the January 7, 1972 letter is attached hereto as **Exhibit 7** and incorporated herein by reference.

63. In the following years, UMC and its parent company sent additional correspondence and certificates of insurance to Old Monsanto in Missouri including at least three letters sent by UMC to Old Monsanto in Missouri, three letters sent by Northwest Industries, Inc. to Old Monsanto in Missouri, and various Certificates of Insurance issued to Old Monsanto every

year from 1972 to 1977. Old Monsanto received and processed the letters from UMC and Northwest Industries, Inc., and the Certificates of Insurance, in Missouri.

64. Representatives from UMC visited Old Monsanto in Missouri on multiple occasions to attend meetings regarding PCBs. For example, in 1974, the vice president of Magnetek’s predecessor, N. Ray Clark, attended two meetings at Old Monsanto’s headquarters in St. Louis regarding PCBs—a meeting on Proposed PCB Effluent Standards and an International Dielectrics Symposium presented by Old Monsanto.

B. The General Electric Special Undertaking Agreement

65. On January 21, 1972, General Electric and Old Monsanto executed a written agreement entitled “Special Undertaking by Purchasers of Polychlorinated Biphenyls” (the “GE Special Undertaking Agreement”). The final act creating the GE Special Undertaking Agreement—Old Monsanto’s execution of the agreement—occurred in Missouri.

66. On February 3, 1972, Canadian General Electric Company Limited (a GE affiliate), Old Monsanto, and Monsanto Canada Limited executed a “Special Undertaking By Purchasers Of Polychlorinated Biphenyls” (the “Canadian GE Special Undertaking Agreement”). The final act creating the Canadian GE Special Undertaking Agreement—Old Monsanto’s execution of the agreement—occurred in Missouri. The Canadian GE Special Undertaking Agreement is substantially similar to the GE Special Undertaking Agreement (collectively referred to as the “GE Special Undertaking Agreements”). True and correct copies of the GE Special Undertaking Agreement, an addendum thereto, and the Canadian GE Special Undertaking Agreement are attached hereto as **Exhibit 2** and incorporated herein by reference.

67. Prior to entering into the GE Special Undertaking Agreements, Old Monsanto advised GE to keep PCBs well-contained and to exercise the highest degree of control in its storage

of PCBs. For example, in February 1970, Old Monsanto sent a letter to GE alerting GE to potential problems of environmental contamination relating to PCBs. In addition, in January 1970, Old Monsanto representatives met with GE representatives in St. Louis for a discussion of environmental safety aspects associated with the use of PCBs. Old Monsanto representatives met with GE representatives again in December 1971 to discuss environmental issues with regard to PCBs and the Special Undertaking Agreements. Old Monsanto sent another letter to GE on or about January 3, 1972 reiterating that PCBs “are not readily biodegradable” and that GE should “take every precaution to prevent any entry of polychlorinated biphenyls into the environment through spills, usage, leakage, disposal, vaporization or otherwise.”

68. The Sales Contract for PCBs between Old Monsanto and GE for the period July 1, 1971 to June 30, 1972 included the following statement:

It is understood that the products sold hereunder contain polychlorinated biphenyls, which some studies have shown may be an environmental contaminant. Buyer agrees to use its best efforts to prevent such products from entering into the environment through spills, leakage, use, disposal, vaporization or otherwise.

69. The GE Special Undertaking Agreement identifies General Electric as the “Buyer” and states:

While Buyer desires to purchase PCB’s because of certain desirable flame resistant and insulator properties, Buyer acknowledges that it is aware and has been advised by Monsanto that PCB’s tend to persist in the environment; that care is required in their handling, possession, use and disposition; that tolerance limits have been or are being established for PCB’s in various food products.

Monsanto has therefore adopted certain restrictive policies with respect to its further production, sale and delivery of PCB’s, including the receipt of undertakings from its customers as set forth below, and Buyer is willing to agree to such undertakings with respect to sales and/or deliveries of PCB’s by Monsanto to Buyer.

Exhibit 2 at 1.

70. The GE Special Undertaking Agreement further states that General Electric will defend, indemnify, and hold Monsanto harmless against future PCB-related claims as follows:

Accordingly, Buyer hereby covenants and agrees that, with respect to any and all PCB's sold or delivered by or on behalf of Monsanto to Buyer on or after the date hereof and in consideration of any such sale or delivery, Buyer shall defend, indemnify and hold harmless Monsanto, its present, past and future directors, officers, employee[s] and agents, from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale, or disposition of such PCB's by, through or under Buyer, whether alone or in combination with other substances, including, without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food, animal feed or the environment by reason of such PCB's.

Exhibit 2 at 1.

71. Further, the GE Special Undertaking Agreement states that “[a]ll existing contracts for the sale of PCB's by Monsanto to Buyer are hereby amended to contain the provision set forth above.” Exhibit 2 at 2.

72. As shown, the GE Special Undertaking Agreement broadly covers all claims “arising out of” or having any “connection with” the receipt or purchase of PCBs by GE after January 21, 1972.

73. The GE Special Undertaking Agreement is not limited to claims connected only to PCBs purchased by GE after January 21, 1972, but also applies to claims connected to those PCBs “in combination with other substances.”

C. The Paramount Special Undertaking Agreement

74. On January 15, 1972, Westinghouse and Old Monsanto executed a written agreement entitled “Special Undertaking by Purchasers of Polychlorinated Biphenyls” (the “Paramount Special Undertaking Agreement”). The Paramount Special Undertaking Agreement was negotiated by the legal departments of Old Monsanto and Westinghouse from December 4,

1971 until January 15, 1972. The final act creating the Paramount Special Undertaking Agreement—Old Monsanto’s execution of the agreement—occurred in Missouri. A true and correct copy of the Paramount Special Undertaking Agreement is attached hereto as **Exhibit 3** and incorporated herein by reference.

75. Prior to signing the Paramount Special Undertaking Agreement, Old Monsanto advised Westinghouse to keep PCBs well-contained and to exercise the highest degree of control in its storage of PCBs. For example, in February 1970, Old Monsanto sent a letter to Westinghouse alerting Westinghouse to potential problems of environmental contamination relating to PCBs. In April 1970, Old Monsanto hosted a full day meeting with Westinghouse representatives in Missouri to discuss, *inter alia*, PCB toxicity and methods of disposal. Old Monsanto also recommended to Westinghouse that its Inerteen labels be changed to include an environmental warning stating in part that “some studies have shown [PCBs] may be an environmental contaminant” and that “[e]xtreme care should be taken to prevent any entry into the environment through spills, leakage, use disposal, vaporization or otherwise.” Westinghouse representatives also visited Old Monsanto in Missouri to discuss PCBs, including information regarding the toxicity of PCBs.

76. Paramount is the successor-in-interest to Westinghouse’s obligations under the Paramount Special Undertaking Agreement.

77. The Paramount Special Undertaking Agreement identifies Westinghouse as the “Buyer” and states:

While Buyer desires to purchase PCB’s because of certain desirable flame resistant and insulator properties, Buyer acknowledges that it is aware and has been advised by Monsanto that PCB’s tend to persist in the environment; that care is required in their handling, possession, use and disposition; that tolerance limits have been or are being established for PCB’s in various food products.

Monsanto has therefore adopted certain restrictive policies with respect to its further production, sale and delivery of PCB's, including the receipt of undertakings from its customers as set forth below, and Buyer is willing to agree to such undertakings with respect to sales and/or deliveries of PCB's by Monsanto to Buyer.

Exhibit 3 at 1.

78. The Paramount Special Undertaking Agreement further states that Westinghouse will defend, indemnify, and hold Monsanto harmless against future PCB-related claims as follows:

Accordingly, Buyer hereby covenants and agrees that, with respect to any and all PCB's sold or delivered by or on behalf of Monsanto to Buyer on or after the date hereof and in consideration of any such sale or delivery, Buyer shall defend, indemnify and hold harmless Monsanto, its present, past and future directors, officers, employee[s] and agents, from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale, or disposition of such PCB's by, through or under Buyer, whether alone or in combination with other substances, including, without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food, animal feed or the environment by reason of such PCB's.

Exhibit 3 at 1-2.

79. Further, the Paramount Special Undertaking Agreement states that “[a]ll existing contracts for the sale of PCB's by Monsanto to Buyer for delivery in the future are hereby amended to contain the provision set forth herein.” Exhibit 3 at 3.

80. As shown, the Paramount Special Undertaking Agreement broadly covers all claims “arising out of” or having any “connection with” the receipt or purchase of PCBs by Paramount after January 15, 1972.

81. The Paramount Special Undertaking Agreement is not limited to claims connected only to PCBs purchased by Paramount after January 15, 1972, but also applies to claims connected to those PCBs “in combination with other substances.”

82. The Paramount Agreement states that it “shall be governed by and be construed according to the laws of the State of Missouri.” Exhibit 3 at 3.

D. KYOCERA AVX Special Undertaking Agreements

83. On February 7, 1972, Aerovox, Aerovox Canada Limited, and Old Monsanto executed a written agreement entitled “Special Undertaking by Purchasers of Polychlorinated Biphenyls” (the “KYOCERA AVX Special Undertaking Agreement”). The final act creating the KYOCERA AVX Special Undertaking Agreement—Old Monsanto’s execution of the agreement—occurred in Missouri.

84. On March 20, 1972, Aerovox, Aerovox Canada Limited, Old Monsanto, and Monsanto Canada Limited executed a written agreement entitled “Special Undertaking by Purchasers of Polychlorinated Biphenyls” (the “Canadian KYOCERA AVX Special Undertaking Agreement”). The Canadian KYOCERA AVX Special Undertaking Agreement is substantially similar to the KYOCERA AVX Special Undertaking Agreement (collectively referred to as the “KYOCERA AVX Special Undertaking Agreements”). The final act creating the KYOCERA AVX Special Undertaking Agreement—Old Monsanto’s execution of the agreement—occurred in Missouri. True and correct copies of the KYOCERA AVX Special Undertaking Agreements are attached hereto as **Exhibit 4** and incorporated herein by reference.

85. KYOCERA AVX is the successor-in-interest to Aerovox’s obligations under the KYOCERA AVX Special Undertaking Agreements.

86. The KYOCERA AVX Special Undertaking Agreements identify Aerovox as a “Buyer” and state:

While Buyer desires to purchase PCB’s because of certain desirable flame resistant and insulator properties, Buyer acknowledges that it is aware and has been advised by Monsanto that PCB’s tend to persist in the environment; that care is required in

their handling, possession, use and disposition; that tolerance limits have been or are being established for PCB's in various food products.

Monsanto has therefore adopted certain restrictive policies with respect to its further production, sale and delivery of PCB's, including the receipt of undertakings from its customers as set forth below, and Buyer is willing to agree to such undertakings with respect to sales and/or deliveries of PCB's by Monsanto to Buyer.

Exhibit 4 at 1, 3.

87. The KYOCERA AVX Special Undertaking Agreements further state that Aerovox will defend, indemnify, and hold Monsanto harmless against future PCB-related claims as follows:

Accordingly, Buyer hereby covenants and agrees that, with respect to any and all PCB's sold or delivered by or on behalf of Monsanto to Buyer on or after the date hereof and in consideration of any such sale or delivery, Buyer shall defend, indemnify and hold harmless Monsanto, its present, past and future directors, officers, employee[s] and agents, from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale, or disposition of such PCB's by, through or under Buyer, whether alone or in combination with other substances, including, without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food, animal feed or the environment by reason of such PCB's.

Exhibit 4 at 1; *see also id.* at 3 (substantially similar provision in Canadian KYOCERA AVX Special Undertaking Agreement).

88. Further, the KYOCERA AVX Special Undertaking Agreements state that “[a]ll existing contracts for the sale of PCB's by Monsanto to Buyer are hereby amended to contain the provision set forth above.” Exhibit 4 at 2, 4.

89. As shown, the KYOCERA AVX Special Undertaking Agreements broadly cover all claims “arising out of” or having any “connection with” the receipt or purchase of PCBs by AVX after February 7, 1972.

90. The KYOCERA AVX Special Undertaking Agreements are not limited to claims connected only to PCBs purchased by KYOCERA AVX's predecessors-in-interest after February 7, 1972, but also apply to claims connected to those PCBs "in combination with other substances."

E. The CDE Special Undertaking Agreement

91. On January 26, 1972, CDE and Old Monsanto executed a written agreement entitled "Special Undertaking by Purchasers of Polychlorinated Biphenyls" (the "CDE Special Undertaking Agreement"). The final act creating the CDE Special Undertaking Agreement—Old Monsanto's execution of the agreement—occurred in Missouri. A true and correct copy of the CDE Special Undertaking Agreement is attached hereto as **Exhibit 5** and incorporated herein by reference.

92. The CDE Special Undertaking Agreement identifies CDE as the "Buyer" and states:

While Buyer desires to purchase PCB's because of certain desirable flame resistant and insulator properties, Buyer acknowledges that it is aware and has been advised by Monsanto that PCB's tend to persist in the environment; that care is required in their handling, possession, use and disposition; that tolerance limits have been or are being established for PCB's in various food products.

Monsanto has therefore adopted certain restrictive policies with respect to its further production, sale and delivery of PCB's, including the receipt of undertakings from its customers as set forth below, and Buyer is willing to agree to such undertakings with respect to sales and/or deliveries of PCB's by Monsanto to Buyer.

Exhibit 5 at 1.

93. The CDE Special Undertaking Agreement further states that CDE will defend, indemnify, and hold Monsanto harmless against future PCB-related claims as follows:

Accordingly, Buyer hereby covenants and agrees that, with respect to any and all PCB's sold or delivered by or on behalf of Monsanto to Buyer on or after the date hereof and in consideration of any such sale or delivery, Buyer shall defend, indemnify and hold harmless Monsanto, its present, past and future directors,

officers, employee[s] and agents, from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale, or disposition of such PCB's by, through or under Buyer, whether alone or in combination with other substances, including, without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food, animal feed or the environment by reason of such PCB's.

Exhibit 5 at 1.

94. Further, the CDE Special Undertaking Agreement states that “[a]ll existing contracts for the sale of PCB's by Monsanto to Buyer are hereby amended to contain the provision set forth above.” Exhibit 5 at 2.

95. As shown, the CDE Special Undertaking Agreement broadly covers all claims “arising out of” or having any “connection with” the receipt or purchase of PCBs by CDE after January 26, 1972.

96. The CDE Special Undertaking Agreement is not limited to claims connected only to PCBs purchased by CDE after January 26, 1972, but also applies to claims connected to those PCBs “in combination with other substances.”

F. The Gillette Special Undertaking Agreement

97. On February 4, 1972, P.R. Mallory and Old Monsanto executed a written agreement entitled “Special Undertaking by Purchasers of Polychlorinated Biphenyls” (the “Gillette Special Undertaking Agreement”). The final act creating the Gillette Special Undertaking Agreement—Old Monsanto's execution of the agreement—occurred in Missouri. A true and correct copy of the Gillette Special Undertaking Agreement is attached hereto as **Exhibit 6** and incorporated herein by reference.

98. Gillette is the successor-in-interest to PR Mallory's obligations under the Magnetek Special Undertaking Agreement.

99. The Gillette Special Undertaking Agreement identifies P.R. Mallory as the “Buyer” and states:

While Buyer desires to purchase PCB’s because of certain desirable flame resistant and insulator properties, Buyer acknowledges that it is aware and has been advised by Monsanto that PCB’s tend to persist in the environment; that care is required in their handling, possession, use and disposition; that tolerance limits have been or are being established for PCB’s in various food products.

Monsanto has therefore adopted certain restrictive policies with respect to its further production, sale and delivery of PCB’s, including the receipt of undertakings from its customers as set forth below, and Buyer is willing to agree to such undertakings with respect to sales and/or deliveries of PCB’s by Monsanto to Buyer.

Exhibit 6 at 1.

100. The Gillette Special Undertaking Agreement further states that P.R. Mallory will defend, indemnify, and hold Monsanto harmless against future PCB-related claims as follows:

Accordingly, Buyer hereby covenants and agrees that, with respect to any and all PCB’s sold or delivered by or on behalf of Monsanto to Buyer on or after the date hereof and in consideration of any such sale or delivery, Buyer shall defend, indemnify and hold harmless Monsanto, its present, past and future directors, officers, employee[s] and agents, from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses (except to the extent arising from the failure of PCB’s to conform with specifications) arising out of or in connection with the receipt, purchase, possession, handling, use, sale, or disposition of such PCB’s by, through or under Buyer, whether alone or in combination with other substances, including, without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food, animal feed or the environment by reason of such PCB’s.

Exhibit 6 at 1.

101. Further, the Gillette Special Undertaking Agreement states that “[a]ll existing contracts for the sale of PCB’s by Monsanto to Buyer are hereby amended to contain the provision set forth above.” Exhibit 6 at 1.

102. As shown, the Gillette Special Undertaking Agreement broadly covers all claims “arising out of” or having any “connection with” the receipt or purchase of PCBs by Gillette after February 4, 1972.

103. The Gillette Agreement is not limited to claims connected only to PCBs purchased by Gillette after February 4, 1972, but also applies to claims connected to those PCBs “in combination with other substances.”

III. Defendants Released PCBs into the Environment.

104. Defendants were aware of the potential for PCBs to persist in the environment and of the need to use care in the use and handling of PCBs. Nevertheless, Defendants and their products have been a major source of environmental PCB contamination, and Defendants have released PCBs purchased both before and after signing the Special Undertaking Agreements into the environment.

105. PCBs have been released into the environment by Defendants and/or their predecessors-in-interest through their release from products they manufactured, disposal of PCB-containing products, leaks, accidental spills, dumping and disposal of industrial wastes, and through other means.

106. Some PCBs, once released into the environment, do not break down readily and may persist for long periods of time.

107. PCBs cycle between air, water, and soil and can be carried long distances from the site of original release.

108. In 1976, EPA estimated that, of the 440 million pounds of PCBs that were estimated to be “in the environment,” at least 190 million pounds (or 43%) came from capacitor and

transformer production wastes and obsolete electrical equipment in landfills and dumps. *See* EPA PCB Report at 5, 7, Table 1.2-1.

109. The EPA also reported that 9.6 million pounds of PCBs were “land-disposed” each year as a result of the production and use of PCBs in transformers and capacitors. *See id.* at 292 (Ex. A). The EPA estimated that 2.4 million pounds of PCBs were land disposed annually as a result of PCB production and transformer and capacitor use, another 4.5 million pounds of PCBs enter landfills each year due to failure of PCB-impregnated capacitors, and another 2.7 million pounds enter landfills each year from capacitors that have not failed but are contained in obsolete equipment. As the EPA explained: “[T]he current estimated yearly rate of PCBs entering land disposal sites is about 12 million pounds. The largest source of this material is capacitors which have failed or become obsolete, or which are contained in obsolete equipment.” *Id.* at 8.

110. Defendants used PCBs in the manufacture of electrical equipment—e.g., capacitors, transformers, and light ballasts—that were sold throughout the United States. In 1976, General Electric was the leading industrial user of PCBs in the manufacture of capacitor and transformer products. EPA 560/4-76-003, Industry Views on the Use of Polychlorinated Biphenyls in Transformers and Capacitors at 9 (June 1976) (Statement of John F. Welch, Vice-President, General Electric Company). The EPA reported in 1976 that General Electric used more PCBs than any other company in the U.S. capacitor manufacturing industry. Westinghouse, Aerovox, UMC, CDE, and P.R. Mallory, respectively, used the second, third, fourth, fifth, and sixth most PCBs in the U.S. capacitor manufacturing industry. EPA PCB Report at 69, Table 3.1.1-1.

111. The capacitor industry alone generated over 3 million pounds of PCB waste annually, much of which previously “was not disposed of properly and thus entered the

environment directly.” *Id.* at 11. The percentage of the total amount of PCBs currently in the environment that were released from transformers and capacitors is predicted to be even higher now, due to the cessation of PCB production for other uses in 1971, and the longer product lifetime for transformers and capacitors. *See, e.g.,* Breivik, K., et al., *Toward a global historical emission inventory for selected PCB congeners – a mass balance approach 2. Emissions*. *The Science of the Total Environment* 290: 199-224, 216 (2002) (“[T]here has been a shift in the relative importance of emissions attributed to usage, from open sources to closed systems. This is caused by the cessation of open usage and longer product lifetime for closed systems.”).

A. Magnetek Released PCBs into the Environment

112. Magnetek and/or its predecessor-in-interest and their products have been a major source of environmental PCB contamination and have released PCBs purchased both before and after January 1972 into the environment.

113. UMC released thousands of gallons of PCBs into the environment through spills, leaks, and disposal and dumping.

114. From the mid-1950s until the late 1970s, UMC manufactured electrical capacitors in a facility in Bridgeport, Connecticut. UMC impregnated capacitors with PCBs at this facility. UMC used as many as 2,000 gallons of PCBs per week prior to February 1978. Upon information and belief, UMC released PCBs into the environment near its Bridgeport facility through spills, leaks, and disposal of materials, including pouring PCBs into sewer drains.

115. In 1976, the EPA and Connecticut Department of Environmental Protection found UMC likely caused PCB contamination of state waters.

116. In 1981, the EPA cited UMC for improper disposal and storage of PCBs.

117. Upon information and belief, Magnetek discovered PCB contamination at the Bridgeport facility after it acquired the property in 1986.

118. Upon information and belief, Magnetek and/or UMC entered into a consent decree to clean up pollution in the Passaic River.

119. UMC also manufactured capacitors in its plant in Totowa, New Jersey.

120. At least one light ballast containing PCBs that was manufactured by UMC has been recovered from the Sky Valley Education Center in Monroe, Washington. Testing of this light ballast determined that the light ballast contained Aroclor 1016, which indicates that it was manufactured by UMC after UMC entered into the Magnetek Special Undertaking Agreement.

121. UMC ultimately released thousands of pounds of PCBs into the environment through spills, leaks, disposal, and dumping. For example, in *Fruit of the Loom, Inc. v. Travelers Indem. Co.*, the Court summarized testimony from a UMC foreman who stated that UMC “poured PCBs into sewer drains,” “pumped probably 3 or 400 gallons right out an exhaust port of a vacuum pump out onto the driveway and down the street and [it] ran into sewer drains and [it] ran into the railroad viaducts on more than one occasions,” and that he “poured PCBs into the external drains in the plant.” 672 N.E.2d 278, 281 (Ill. App. 1996). “PCBs escaped from the [UMC] capacitor impregnation room through the wood and steel flooring, down into the underlying oil reclamation room where it leached into the concrete slab beneath the plant and leached through the concrete into the soil and groundwater beneath the oil reclamation room.” *Id.* There were also “pipe leaks and overflows continually occur[ing] in the impregnation area” with “[a] Monsanto report indicat[ing] that [UMC] was losing about 6^{1/2} lbs. [of PCBs] per week out of vent lines” and “conclud[ing] that [UMC] was losing approximately one tank car of [PCBs] per year.” *Id.*

B. General Electric Released PCBs into the Environment

122. General Electric and its products have been a major source of environmental PCB contamination and have released PCBs purchased both before and after January 1972 into the environment.

123. For example, the General Electric facility in Oakland, California served as a transformer manufacturing plant from 1927 to 1975. The dielectric fluid in the transformers contained PCBs. In or around 1980, the State of California Health and Welfare Agency, Department of Health Services, Toxic Substances Control Division found that the soil and groundwater around General Electric's transformer manufacturing plant in Oakland, California were contaminated with PCBs.

124. General Electric also caused significant PCB contamination of the Hudson River, now one of the largest Superfund sites in the United States. According to the EPA, "[d]uring an approximate 30-year period ending in 1977, manufacturing processes at two GE facilities, one in Fort Edwards, New York, and the other in Hudson Falls, New York, used [PCBs] in the manufacture of electrical capacitors. PCBs from both facilities were discharged into the Hudson River." *See In the Matter of Hudson River PCBs Superfund Site*, Administrative Settlement Agreement and Order on Consent from Remedial Investigation and Feasibility Study, at 6 (Sept. 30, 2014). The EPA estimates that General Electric discharged approximately 1.3 million pounds of PCBs into the Hudson River from two General Electric capacitor manufacturing plants located in the towns of Fort Edwards and Hudson Falls, New York.

125. From 1932 to 1977, General Electric manufactured and serviced electrical transformers containing PCBs at its Pittsfield, Massachusetts facility. The EPA has determined that years of General Electric's use and disposal of PCBs at this facility caused extensive

contamination around Pittsfield, Massachusetts as well as down the entire length of the Housatonic River.

126. General Electric also is responsible for PCB contamination in Spokane, Washington. The site was used by General Electric to operate a transformer service shop from 1961 to 1980. After the shop closed, PCBs were found in the groundwater, surface soils, dry wells, and other drainage features.

127. General Electric is responsible for PCB contamination in Oregon. From 1952 until 2010, General Electric owned and operated an electrical equipment service and repair facility and warehouse in Portland, Oregon — approximately 3,000 feet from the shore of the Willamette River. At this facility, General Electric used dielectric fluids likely containing more than 500 parts per million (“ppm”) of PCBs from 1972 until 1976, and continued to use dielectric fluids with a PCB concentration greater than 50 ppm until 1978. In 2003, testing by the City of Portland revealed that PCBs from sediments near the General Electric facility were discharged into the City’s stormwater system and, in turn, the Willamette River.

128. General Electric also stored a variety of transformers and capacitors containing PCBs at a site at 2410 N. Columbia Blvd. in Portland, Oregon. Officials subsequently discovered PCB contamination at this site as well.

129. From 1970 until 1974, General Electric stored drums, transformer casings, and other containers at a facility in Eugene, Oregon. In 1995, testing revealed PCBs persisted in subsurface soils and sludge and water samples from a storm drain on the site.

130. From 1974 until 1993, General Electric had another facility in Portland, Oregon where GE employees pressure washed and cleaned equipment including transformers. Water from

these cleaning activities was directed to tanks and sumps. In 1995, testing of groundwater, sludge and water samples from the site revealed PCBs above regulatory levels.

131. General Electric also is responsible for PCB contamination in Milford, New Hampshire. The EPA found hundreds of drums of scrap PCB-containing fluids and several had leaked. The scrap PCBs originated from General Electric which failed to arrange for proper disposal.

132. General Electric also is responsible for PCB contamination in East Flat Rock, North Carolina. In 1994, EPA declared the 141-acre General Electric/Shepard Farm Site a Superfund Site. EPA placed the site on its Superfund National Priority List because of contaminated groundwater and soil.

133. General Electric is also responsible for extensive PCB contamination of the soil and water surrounding its plant and other locations in Schenectady, New York. In March 2005, The New York State Department of Environmental Conservation issued a Record of Decision for the General Electric Main Plant State Superfund site in the City of Schenectady/Town of Rotterdam, Schenectady County, New York. *See Record of Decision, General Electric Main Plant Site*, New York State Department of Environmental Conservation (March 2005), *available at* https://www.dec.ny.gov/data/DecDocs/447004/ROD.HW.447004.2005-03-30.ge_main_plant_ou3_ou4.pdf; *see also Documentation of Environmental Indicator Determination, General Electric Main Plant*, Environmental Protection Agency (Sept. 29, 2004), *available at* <https://www3.epa.gov/region02/waste/geriv750.pdf>. General Electric's studies at the site found soils containing high levels of PCBs in various areas of the manufacturing plant and on-site landfills. *Id.*

134. Upon information and belief, General Electric also is responsible for PCB contamination around certain of its other facilities, both before and after January 1972, including, but not limited to facilities in: Washington, West Virginia; Shepherdsville, Kentucky; Moreau, New York; Rome, Georgia; Brandon, Florida; and Anaheim, California. *National Union Fire Ins. Co. of Pittsburgh, PA, et al. v. Arkwright Mut. Ins. Co.*, 1993 WL 1448 (S.D.N.Y. Jan. 11, 1993) (noting PCB contamination in General Electric's Brandon, Florida facility and Woodmar Manufacturing Facility in Washington, West Virginia); *GE: Decades of Misdeeds and Wrongdoing*, 22 Multinational Monitor 7/8 (July/August 2001), available at <http://www.multinationalmonitor.org/mm2001/01july-august/julyaug01corp4.html> (noting PCB contamination in and around Shepherdsville, Kentucky); *Jensen v. General Elec. Co.*, 182 A.D.2d 903, 903 (N.Y. Super. 1992) (noting PCBs in groundwater near Morneau, New York); *General Elec. Co. v. Lowe's Home Centers, Inc.*, 608 S.E.2d 636, 637 (Ga. 2005) (noting PCB property contamination in Rome, Georgia); Marla Cone, *GE Plant Investigated for Chemical Hazards*, Los Angeles Times (Feb. 2, 1992), available at http://articles.latimes.com/1992-02-02/news/mn-2080_1_pcb-exposure (noting groundwater contamination at plant in Brandon, Florida and that plant in Anaheim, California handled 2 million pounds of PCB waste per year).

C. Paramount Released PCBs Into the Environment

135. Paramount and/or its predecessors-in-interest and their products have been a major source of environmental PCB contamination and have released PCBs purchased both before and after January 1972 into the environment.

136. In September 1974, 265 gallons of PCBs were directly released into the Duwamish Waterway in Washington when a transformer manufactured by Westinghouse was dropped while being loaded onto a commercial barge.

137. Paramount is responsible for PCB contamination in Oregon. From 1943 until 1978, Westinghouse conducted electrical equipment repair, maintenance, cleaning and storage activities at multiple properties in the vicinity of the Willamette River, including the Portland Apparatus Service Plant at 614 N. Tillamook St., Portland, Oregon. At the Portland Apparatus Service Plant, Westinghouse stored transformer oil in multiple underground storage tanks, including a 10,000-gallon tank. The site also had a designated PCB handling area and catch basins and pits used to collect PCB-containing fluids. Upon information and belief, PCBs were released into the east bank of the Willamette River, subsurface soils, and surrounding environment through cracks in the building floor and floor drains. Also, as part of its operations, Westinghouse may have poured old oil from transformers directly onto the ground at the site. The Oregon Department of Environmental Quality has concluded significant environmental releases, including the release of PCBs, occurred at the Portland Apparatus Service Plant. Testing in 1999, 2000, and 2005 revealed high levels of PCB contamination in the building materials and soils. In 2013, Westinghouse entered into an administrative settlement agreement with the EPA and the City of Portland to pay for testing and remedial work on a portion of the Willamette River.

138. Westinghouse also repaired, maintained, and stored electrical transformers at two other locations in Portland, Oregon during the 1970's and 1980's — a site on Ramsey Blvd. and an additional site on Kirby Avenue.

139. From the late 1950s until the 1990s, Westinghouse owned and operated an electrical transmission equipment maintenance and repair plant in Los Angeles, California. This plant discharged PCB-laden wastewater (containing as much as 38,000 pounds of PCBs) into the San Pedro Channel, the Palo Verdes Peninsula, and Los Angeles Harbor.

140. From 1958 until 1977, Westinghouse operated a plant in Bloomington, Indiana. Westinghouse disposed of defective capacitors containing PCBs in six local dumps and landfills, contaminating the landfills with PCBs. Westinghouse also discharged PCBs into the local sewer system, releasing even more PCBs into the environment. During subsequent investigations, the Center for Disease Control detected elevated PCB levels in Bloomington residents. The City of Bloomington filed a lawsuit against Westinghouse and Old Monsanto regarding the PCB contamination. On appeal, the Seventh Circuit Court of Appeals held that Westinghouse—not Monsanto—engaged in abnormally dangerous activity. *City of Bloomington, Ind. v. Westinghouse, Elec. Corp.*, 891 F.2d 611, 615 (7th Cir. 1989).

141. From the 1950s until 1974, Westinghouse used PCBs in an electrical transformer manufacturing facility in Sunnyvale, California. Westinghouse caused soil and groundwater contamination around this facility by allowing a storage tank to leak, permitting localized spills of PCBs, and applying PCBs as a herbicide around the facility.

142. PCBs were found in the soil around a site in Emeryville, California where Westinghouse manufactured and repaired electrical components including transformers from 1924 until 1992.

143. PCBs were found in the soil and groundwater around an electrical transformer repair facility in Minneapolis, Minnesota owned by Westinghouse from the 1920s until 1980.

144. From 1961 until 1989, Westinghouse used PCB fluids as a heat transfer fluid when manufacturing and repairing transformers in Muncie, Indiana, which produced PCB contamination in the soil and sewer system at the plant.

145. From 1932 until 1976, Westinghouse used PCBs while manufacturing transformers in Sharon, Pennsylvania. In addition to occasional spills and PCBs surfacing, Westinghouse was

investigated for a spill that released more than 6,000 gallons of PCB-contaminated oil. PCBs have been found in the soil and groundwater near the site.

146. In 1992, Westinghouse spilled approximately 55 gallons of PCBs in Washington D.C. when removing old transformers from an underground vault.

147. Upon information and belief, Westinghouse also is responsible for PCB contamination around certain of its other facilities, both before and after January 1972, including, but not limited to facilities in: Cleveland, Ohio; Union City, Indiana; Utica, New York; Yorkville, New York; Horseheads, New York; and Needham, Massachusetts.

D. KYOCERA AVX Released PCBs into the Environment

148. KYOCERA AVX and/or its predecessors-in-interest and their products have been a major source of environmental PCB contamination and have released PCBs purchased both before and after February 1972 into the environment.

149. From the 1940s until 1973, Aerovox and then AVX Ceramics used PCBs while manufacturing capacitors at a plant in New Bedford, Massachusetts on the shore of the New Bedford Harbor.

150. During this time, disposal practices and operations at the plant caused contamination of soils, groundwater, surface water, and building materials and equipment at the plant. For example, PCBs were spilled upon receipt of large drums of PCBs at rail yards. Employees dumped defective capacitors containing PCBs outside the facility, and over time, the capacitors corroded and released PCBs into the environment. Upon information and belief, PCBs were also dispersed into the municipal sewer system. PCB vapor leached onto structures at the facility and waste that left the facility. PCBs were disposed of at local landfills and were also discharged into the New Bedford Harbor and contaminated the Acushnet River and Buzzards Bay.

151. After this contamination, the EPA detected PCB levels well above the safe levels for consumption in fish near the harbor.

152. In 1983, the New Bedford plant and surrounding area was listed on the EPA's Superfund National Priorities list. Also, in 1983, the Department of Justice and Commonwealth of Massachusetts filed lawsuits against AVX, seeking injunctive relief and recovery of cleanup costs resulting from Aerovox's and AVX Ceramics' release of PCBs. In 1989, AVX agreed to pay \$2 million to settle these claims. In 2012, AVX agreed to pay \$366 million in a supplemental settlement agreement for continued restoration work.

153. After the operations at the New Bedford Plant ceased, it lay vacant for years. While the building was vacant, PCB-contaminated wood and other building parts caused runoff contamination in the environment. In 2013, AVX demolished remaining parts of the building and attempted to cap the site.

154. From the 1940's until 1972, Aerovox's Canadian affiliate manufactured capacitors in Hamilton, Ontario. Upon information and belief, activities at this facility resulted in the discharge of PCBs into the Hamilton Harbor.

E. CDE Released PCBs into the Environment

155. CDE and its products have been a major source of environmental PCB contamination and have released PCBs purchased both before and after January 1972 into the environment.

156. CDE operated plants, which used PCBs (Aroclor 1015, 1242, 1254) in the manufacture of capacitors, among other places, in New Bedford, Massachusetts. Between January 1971 and 1976, CDE used more than 3.1 million pounds of Aroclor products. CDE used PCBs at its New Bedford facility until 1977. Tests at CDE's New Bedford facility revealed PCB sediment

at 99,000 ppm. CDE released PCBs into the environment by, among other things, discharging contaminated wastewater, disposing of materials containing PCBs in local landfills, and releasing waste oil containing PCBs.

157. In 1983, the Department of Justice and Commonwealth of Massachusetts sued CDE regarding PCB contamination in the New Bedford Harbor. In 1992, CDE entered into a consent decree, which required payment of \$10 million for contamination of the Acushnet River Estuary, the New Bedford Harbor, Buzzards Bay, and the Rhode Island and Vineyard Sounds. Consent Decree with Defendants Federal Pacific Electric Company And Cornell Dubilier Electronics, Inc., *United States v. AVX Corporation, et al.*, Docket # 83-3882-Y (D. Mass 1992), available at <https://semspub.epa.gov/work/01/61973.pdf>.

158. In 1996, CDE settled PCB-related litigation by agreeing to undertake millions of dollars in cleanup work in Norwood, Massachusetts.

159. In 1997, the EPA oversaw the removal of 1147 tons of PCB-contaminated soil and several thousand capacitors from property in Fairhaven, Massachusetts. The EPA identified CDE as the manufacturer of the capacitors at the site.

160. In 2009, CDE's PCB-laden capacitors were found at three privately-owned properties near a middle school in New Bedford, Massachusetts.

F. Gillette Released PCBs into the Environment

161. Gillette and/or its predecessors-in-interest and their products have been a major source of environmental PCB contamination and have released PCBs purchased both before and after February 1972 into the environment.

162. From 1969 until 1978, P.R. Mallory manufactured PCB-impregnated electrostatic AC capacitors at a facility in Waynesboro, Tennessee. The use of PCBs at this facility (primarily

Aroclors 1242 and 1248) led to widespread contamination. For example, an underground storage tank containing PCBs leaked. PCBs were also released into the environment when oil containing PCBs was dumped on the ground outside, and PCBs spills also occurred inside the plant. P.R. Mallory also used impregnation chambers, which released super-saturated clouds of PCB vapor throughout the Waynesboro plant. Moreover, in or around 1979, more than 100 drums of waste containing PCBs were discovered at the Waynesboro plant. These drums were leaking PCB-containing liquids into drains that emptied into the Green River.

163. After P.R. Mallory sold the Waynesboro facility, the building had to be abandoned due to the extensive and persistent PCB contamination. PCB levels as high as 100,000 ppm were detected at the facility and in the surrounding environment.

164. In a 1987 lawsuit, Gillette's predecessor-in-interest stipulated that the use of PCBs by P.R. Mallory at the Waynesboro facility led to the contamination on the floor, roof, and ground. *Emhart Indus. Inc. v. Duracell Int'l*, 665 F.Supp. 549, 555 (M.D. Tenn 1989). The court decision in that case notes that experts concluded that PCB contamination at the Waynesboro facility was surprisingly widespread with very high levels and that PCB contamination was found at other former P.R. Mallory sites. *Id.* at 560.

165. P.R. Mallory also operated facilities in Glasgow, Kentucky; Greencastle, Indiana; and Indianapolis, Indiana. During the 1980s, PCB contamination was discovered at each of these facilities. For example, PCB (Aroclor 1254) contamination was discovered at P.R. Mallory's Indianapolis plant as a result of its manufacture of radio batteries and capacitors.

166. P.R. Mallory also released PCBs into the environment when its capacitors were placed in household products. For example, P.R. Mallory's capacitors were used in air

conditioning units and there was a reported incident of a capacitor rupturing, burning, and releasing PCBs into the environment in Louisiana.

IV. The PCB Lawsuits.

167. Multiple lawsuits have been filed against Plaintiffs seeking to impose liability on the Plaintiffs for injuries or damages allegedly caused by the release of PCBs into the environment or other exposures to PCBs. A list of the PCB Lawsuits that have been, or are being, tendered to Defendants is attached hereto as **Exhibit 8** and incorporated herein by reference.

168. The PCB Lawsuits can generally be grouped into four categories: (1) The Food Chain Cases; (2) The Water Cases; (3) The School Cases; and (4) The Occupational Cases.

A. The Food Chain Cases

169. Plaintiffs were named as defendants in a series of personal injury cases in which the plaintiffs contended that they suffered from various types of Non-Hodgkin's lymphoma as a result of non-employment, environmental and food chain exposure to PCBs (the "Food Chain Cases").

170. Plaintiffs in the Food Chain Cases alleged that PCBs are now ubiquitous in the environment because, *inter alia*, the products into which PCBs were incorporated by Old Monsanto's customers permitted their release into the environment. Plaintiffs also alleged that PCBs were dumped into the environment by Old Monsanto's customers and the end-users of various PCB-containing products.

171. Plaintiffs in the Food Chain Cases alleged that it is impossible to "disaggregate" the environmental PCBs to which they were exposed and which they alleged caused their injuries or determine their more particular source. Accordingly, the Food Chain Plaintiffs alleged

generally that their injuries were caused by their exposure to the combination of PCBs released into the environment.

172. The Food Chain Plaintiffs sought to impose liability on Plaintiffs for manufacturing any and all PCBs, including those purchased by Defendants and their predecessors before and after they signed the Special Undertaking Agreements.

173. Thus, the Food Chain Cases present “liabilities, claims, damages, penalties, actions, suits, losses, costs [or] expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of ... PCBs [purchased on or after the date Defendants, or their predecessors, entered into the Special Undertaking Agreements] by, through or under [Defendants, or their predecessors,] ... alone or in combination with other substances,” within the meaning of the Special Undertaking Agreements.

174. The Food Chain Cases included approximately 700 plaintiffs.

175. The Food Chain Cases were filed in state court in Los Angeles County, California, and in state and federal courts in St. Louis, Missouri.

176. In September 2016, Monsanto agreed to pay a significant amount to settle all of then-pending Food Chain Cases.

177. The full set of complaints filed in the Food Chain Cases is voluminous and attachment of all such pleadings to this Complaint is impracticable for filing purposes, but examples of complaints filed in the Food Chain Cases are attached hereto as **Exhibits 9 and 10**.¹

¹ **Exhibit 9** is a true and accurate copy of the complaint in *Bailey, et al. v. Monsanto Co., et al.*, Case 4:15-cv-00844-AGF, United States District Court for the Eastern District of Missouri, Eastern Division and incorporated herein by reference. **Exhibit 10** is a true and accurate copy of the complaint in *Kelly, et al. v. Monsanto Co., et al.*, Case 4:15-cv-01825-JMB, United States District Court for the Eastern District of Missouri and incorporated herein by reference.

B. The Water Cases

178. Plaintiffs have been named as defendants in a series of lawsuits in which cities and various municipal agencies are alleging that the Plaintiffs should bear some cost for water cleanup and wastewater permit costs due to PCB contamination (the “Water Cases”).

179. Plaintiffs in the Water Cases allege generally that PCBs have entered the subject body of water through various sources, including improper disposal by Old Monsanto’s customers, PCB releases from products manufactured by Old Monsanto’s customers, and leaching from landfills.

180. Plaintiffs in the Water Cases allege that PCBs easily migrate or leach out of their original source material or enclosure and that “PCBs can also escape from totally-enclosed materials (such as light ballasts) and ... escape into the environment.” *See San Diego Unified Port District, et al. v. Monsanto Company, et al.*, Case 3:15-cv-00578-WQH-JLB, Complaint, ¶ 22 (S.D. Cal. 2015) (the “San Diego Case”).

181. Plaintiffs in the Water Cases specifically allege that Old Monsanto sold PCBs for use in electric transformers and capacitors and that PCBs escape from such products and cause environmental contamination. Plaintiffs in the Water Cases do not identify more specifically the sources of the PCBs found in the water.

182. PCBs purchased by Defendants—both before and after the Special Undertaking Agreements were executed—are part of the combined environmental load of PCBs alleged to have contaminated the waterways at issue in the Water Cases.

183. The Water Cases seek to impose liability on Plaintiffs for manufacturing any and all PCBs, including those purchased by Defendants or their predecessors before and after they signed the Special Undertaking Agreements.

184. Thus, the Water Cases present “liabilities, claims, damages, penalties, actions, suits, losses, costs [or] expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of ... PCBs [purchased on or after the date Defendants, or their predecessors, entered into the Special Undertaking Agreements] by, through or under [Defendants, or their predecessors,] ... alone or in combination with other substances,” within the meaning of the Special Undertaking Agreements.

185. The majority of the Water Cases were filed in California, Washington, and Oregon—states where Defendants or their predecessors used PCBs and caused PCB-related contaminations.

186. For example, Westinghouse’s release of PCBs into the Duwamish Waterway, San Pedro Channel, Palo Verdes Peninsula, Los Angeles Harbor, and Willamette River are all at issue in Water Cases. *City of Seattle v. Monsanto, et al.*, 2:16-cv-00107 United States District Court for the Western District of Washington (the “Seattle Case”); *City of Long Beach v. Monsanto Co., et al.*, 2:16-cv-03493-FMO-AS United States District Court for the Central District of California (the “Long Beach Case”); *City of Portland v. Monsanto Co., et al.*, 3:16-cv-1418-PK United States District Court for the District of Oregon (the “Portland Case”).

187. In June 2020, Plaintiffs agreed to pay substantial sums to settle Water Cases brought by certain municipal entities. Plaintiffs entered into separate agreements with the Attorneys General of New Hampshire, New Mexico, Ohio, Washington, D.C., and Washington to resolve Water Cases brought by those states.

188. The full set of complaints filed in the Water Cases is voluminous and attachment of all such pleadings to this Complaint is impracticable for filing purposes, but examples of complaints filed in the Water Cases are attached hereto as **Exhibits 11, 12, 13, 14, and 15.**²

C. The School Cases

189. Plaintiffs have been named as defendants in numerous cases, including multiple cases filed after August 2018, in which it is alleged that the Plaintiffs should bear some cost of cleanup and/or rebuilding of schools due to alleged PCB contamination (the “School Cases”).

190. Plaintiffs in the School Cases allege that PCBs were used in building products such as electrical equipment, lighting ballasts and other materials that were used in the construction of school buildings.

191. Defendants, or their predecessors, manufactured PCB-containing lighting ballasts and other electrical equipment using PCBs purchased both before and after they signed the Special Undertaking Agreements.

192. The PCBs at issue in the School Cases include PCBs Defendants or their predecessors purchased after signing the Special Undertaking Agreements.

193. The Sky Valley School Cases consist of multiple lawsuits, involving hundreds of plaintiffs’ claims of personal injuries resulting from PCB exposure at the Sky Valley Education Center in Monroe, Washington (the “Sky Valley School Cases”). At least one PCB-containing light ballast manufactured and sold by UMC was found in the Sky Valley Education Center. Testing revealed that the capacitor in this UMC light ballast contained Aroclors 1016, which

² **Exhibit 11** is a true and correct copy of the First Amended Complaint in the San Diego Case and incorporated herein by reference. **Exhibit 12** is a true and correct copy of the Complaint in the Seattle Case and incorporated herein by reference. **Exhibit 13** is a true and correct copy of the Complaint in the Long Beach Case and incorporated herein by reference. **Exhibit 14** is a true and correct copy of the Complaint in the Portland Case and incorporated herein by reference. **Exhibit 15** is a true and accurate copy of the complaint in *City of Oakland v. Monsanto Company, et al.*, 4:15-cv-05152, United States District Court for the Northern District of California and incorporated herein by reference.

indicates that UMC manufactured and sold the PCB-containing ballast after it entered into the Magnetek Special Undertaking Agreement.

194. In separate trials ending in June and November 2021 and June 2022, juries in Seattle awarded substantial damages to three groups of plaintiffs in the Sky Valley School Cases against Old Monsanto. During at least one of the trials, plaintiffs introduced evidence that a source of PCBs at the Sky Valley Education Center were light ballasts manufactured by UMC.

195. Thus, the School Cases present “liabilities, claims, damages, penalties, actions, suits, losses, costs [or] expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of ... PCBs [purchased on or after the date Defendants, or their predecessors, entered into the Special Undertaking Agreements] by, through or under [Defendants, or their predecessors,] ... alone or in combination with other substances,” within the meaning of the Special Undertaking Agreements.

196. The full set of complaints filed in the School Cases is voluminous and attachment of all such pleadings to this Complaint is impracticable for filing purposes, but an example of a School Case complaint is attached hereto as **Exhibit 16**. Exhibit 16 is a true and accurate copy of the complaint in *Heit, et al., v Monsanto Company, et al.*, Case No. 18-2-11915-4, Superior Court of the State of Washington, King County and incorporated herein by reference.

D. The Occupational Cases

197. Plaintiffs have been named as defendants in several occupational exposure cases (the “Occupational Cases”).

198. The plaintiffs in the Occupational Cases allege that they were exposed to PCBs manufactured by Plaintiffs during the course of their employment through various means,

including leaks from light ballasts. The plaintiffs further allege that, as a result of this exposure, they suffered from various illnesses and personal injuries.

199. In *Lamkin, et al. v. Monsanto Company, et al.*, the plaintiff alleged that he developed cancer as a result of his exposure to PCBs. Case 16-0563, Suffolk County Superior Court, Massachusetts. Plaintiff alleged that he was exposed to PCBs during the course of his employment, from 1992 through 2008, working with power transformers and other electrical equipment.

200. In or around December 2021, the parties to *Lamkin* entered into a settlement agreement.

201. Thus, the Occupational Cases present “liabilities, claims, damages, penalties, actions, suits, losses, costs [or] expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of ... PCBs [purchased on or after the date Defendants, or their predecessors, entered into the Special Undertaking Agreements] by, through or under [Defendants, or their predecessors,] ... alone or in combination with other substances,” within the meaning of the Special Undertaking Agreements.

202. A copy of the complaint filed in the *Lamkin* — an example of one of the occupational Occupational Cases — is attached hereto as **Exhibit 17**. Exhibit 17 is a true and accurate copy of the complaint in *Lamkin, et al. v. Monsanto Company, et al.*, Case 16-0563, Suffolk County Superior Court, Massachusetts and incorporated herein by reference.

V. Defendants’ Refusal to Defend and Indemnify

203. Counsel for Plaintiffs have repeatedly notified Defendants of the PCB Lawsuits, informed Defendants that the PCB Lawsuits are within the scope of the Special Undertaking

Agreements, and demanded that Defendants defend and indemnify Old Monsanto in the PCB Lawsuits.

204. Defendants have failed and refused to honor their agreements to defend or indemnify Plaintiffs.

A. Magnetek's Refusal to Defend And Indemnify

205. On August 29, 2016, counsel for Plaintiffs sent a letter to counsel for Magnetek. The letter notified Magnetek of the PCB Lawsuits, included a description, list, and docket information for the PCB Lawsuits pending at that time, informed Magnetek that the Special Undertaking Agreement applied to the PCB Lawsuits, and demanded that Magnetek defend and indemnify Plaintiffs in the litigation. A true and accurate copy of the August 29, 2016 letter to Magnetek is attached hereto as **Exhibit 18** and incorporated herein by reference.

206. On September 14, 2016, counsel for Magnetek sent a letter to counsel for Plaintiffs rejecting their tender of defense and demand for indemnification of the PCB Lawsuits under the Special Undertaking Agreement. A true and accurate copy of the September 14, 2016 letter is attached hereto as **Exhibit 19** and incorporated herein by reference.

207. On September 7, 2016, Magnetek provided notice of Plaintiffs' tender and demand to Travelers Insurance Company ("Travelers") and Transportation Insurance Company ("TIC") and requested that Travelers and TIC defend and indemnify Magnetek pursuant to insurance policies purchased by the parent company of Magnetek's predecessor. After receiving Magnetek's demand, Travelers tendered a demand on Velsicol Chemical, LLC ("Velsicol") pursuant to prior confidential settlement agreements. Travelers did not accept Magnetek's demand. Thereafter, Magnetek, Travelers, and Velsicol filed a series of lawsuits against each other in state and federal court in Chicago, Illinois, including a case filed by Magnetek against Travelers in the United States

District Court for the Northern District of Illinois (Case No. 1:17-CV-03173) (Case No. 1:17-CV-03173) (the “Travelers Litigation”).

208. On May 12, 2017, Magnetek filed an eight-count placeholder declaratory judgment Complaint against Plaintiffs in the Superior Court of New Jersey, Case No. BER-L-3362-17. That case has since been dismissed.

209. Counsel for Plaintiffs sent counsel for Magnetek additional correspondence tendering defense and demanding indemnification regarding PCB Lawsuits on the following dates: December 23, 2016, June 1, 2018, November 19, 2018, May 6, 2019, July 23, 2019, October 14, 2019, and April 29, 2022.

210. Magnetek has refused each of Plaintiffs’ demands that Magnetek assume the defense of the PCB Lawsuits and provide indemnification for amounts expended to resolve certain PCB Lawsuits, including in letters dated May 10, 2019 and July 24, 2019.

B. General Electric’s Refusal To Defend And Indemnify

211. Plaintiffs notified GE of the PCB Lawsuits, informed GE that the Special Undertaking Agreement applied to the PCB Lawsuits, and demanded that GE defend and indemnify Plaintiffs in the PCB Lawsuits through meetings and correspondence on or about June 17, 2015, October 27, 2015, September 9, 2015, April 21, 2016, August 18, 2016, and August 29, 2016. As part of these meetings and correspondence, Plaintiffs provided GE with a complete list of all PCB Lawsuits, including case number, court, and date of filing.

212. On October 19, 2016, counsel for General Electric sent counsel for Plaintiffs a Letter rejecting Plaintiffs’ demand for indemnity and defense. A true and correct copy of the October 19, 2016 letter is attached hereto as **Exhibit 20** and incorporated herein by reference.

213. Plaintiffs sent GE tenders of defense and demands for indemnification for additional PCB Lawsuits on or about November 29, 2016, January 4, 2017, and June 4, 2018. General Electric denied these tenders on July 18, 2018.

214. On April 29, 2022, counsel for Plaintiffs sent counsel for General Electric a letter recounting the parties' prior correspondence and discussions regarding the GE Special Undertaking Agreement, summarizing the PCB Lawsuits, and tendering the defense and demanding indemnification of an additional Water Case. This letter emphasized that "time is of the essence."

215. General Electric has refused Plaintiffs' demands that General Electric assume the defense of the PCB Lawsuits and provide indemnification for amounts expended to resolve certain PCB Lawsuits.

C. Paramount's Refusal To Defend And Indemnify

216. On August 29, 2016, counsel for Plaintiffs sent a letter to counsel for Paramount. The letter notified Paramount of the PCB Lawsuits, included a description, list, and docket information for the PCB Lawsuits pending at that time, informed Paramount that the Paramount Special Undertaking Agreement applied to the PCB Lawsuits, and demanded that Paramount defend and indemnify Old Monsanto in the PCB Lawsuits. A true and accurate copy of the August 29, 2016 letter to Paramount is attached hereto as **Exhibit 21** and incorporated herein by reference.

217. On September 22, 2016, counsel for Paramount rejected Plaintiffs' tender of defense and demand for indemnity "completely as to each and every case." A true and accurate copy of the September 22, 2016 letter is attached hereto as **Exhibit 22** and incorporated herein by reference.

218. Counsel for Plaintiffs sent counsel for Paramount additional correspondence tendering defense and demanding indemnification regarding PCB Lawsuits on the following dates: December 23, 2016, January 12, 2018, June 6, 2018, February 20, 2019, October 14, 2019, and April 29, 2022. In response to the letters, Paramount refused Plaintiffs' tenders of defense and demands for indemnity and asserted that Paramount did not have a duty to defend and indemnify Plaintiffs.

219. Representatives for Plaintiffs and Paramount met to discuss the PCB Lawsuits and the Paramount Special Undertaking Agreement on October 23, 2017 and October 14, 2019.

220. Paramount has refused Plaintiffs' demands that Paramount assume the defense of the PCB Lawsuits and provide indemnification for amounts expended to resolve certain PCB Lawsuits.

D. KYOCERA AVX's Refusal to Defend And Indemnify

221. On August 29, 2016, counsel for Plaintiffs sent a letter to counsel for KYOCERA AVX. The letter notified KYOCERA AVX of the PCB Lawsuits, included a description, list, and docket information for the PCB Lawsuits pending at that time, informed KYOCERA AVX that the KYOCERA AVX Special Undertaking Agreements applied to the PCB Lawsuits, and demanded that KYOCERA AVX defend and indemnify Plaintiffs in the PCB Lawsuits. A true and accurate copy of the August 29, 2016 letter to KYOCERA AVX is attached hereto as **Exhibit 23** and incorporated herein by reference.

222. On September 1, 2016, counsel for KYOCERA AVX rejected Plaintiffs' tender of defense and demand for indemnity. A true and accurate copy of the September 1, 2016 letter is attached hereto as **Exhibit 24** and incorporated herein by reference.

223. Counsel for Plaintiffs sent counsel for KYOCERA AVX additional correspondence tendering defense and demanding indemnification regarding PCB Lawsuits on the following dates: December 23, 2016, June 4, 2018, March 26, 2019, October 14, 2019, and May 3, 2022.

224. KYOCERA AVX has refused Plaintiffs' demands that KYOCERA AVX assume the defense of the PCB Lawsuits and provide indemnification for amounts expended to resolve certain PCB Lawsuits.

E. CDE's Refusal to Defend And Indemnify

225. On August 29, 2016, counsel for Plaintiffs sent a letter to counsel for CDE. The letter notified CDE of the PCB Lawsuits, included a description, list, and docket information for the PCB Lawsuits pending at that time, informed CDE that the CDE Special Undertaking Agreement applied to the PCB Lawsuits, and demanded that CDE defend and indemnify Plaintiffs in the PCB Lawsuits. A true and accurate copy of the August 29, 2016 letter to CDE is attached hereto as **Exhibit 25** and incorporated herein by reference.

226. On May 18, 2017, counsel for CDE refused Plaintiffs' tender of defense and demand for indemnity. A true and accurate copy of the May 18, 2017 letter is attached hereto as **Exhibit 26** and incorporated herein by reference.

227. Counsel for Plaintiffs sent counsel for CDE additional correspondence tendering defense and demanding indemnification regarding PCB Lawsuits filed after August 29, 2016 on the following dates: December 23, 2016, June 4, 2018, March 26, 2019, October 14, 2019, and May 3, 2022.

228. CDE has refused Plaintiffs' demands that CDE assume the defense of the PCB Lawsuits and provide indemnification for amounts expended to resolve certain PCB Lawsuits.

F. Gillette's Refusal to Defend And Indemnify

229. On May 13, 2022, counsel for Plaintiffs sent a letter to counsel for Gillette. The letter notified Gillette of the PCB Lawsuits, included a description, list, and docket information for the PCB Lawsuits pending at that time, informed Gillette that the Gillette Special Undertaking Agreement applies to the PCB Lawsuits, and demanded that Gillette defend and indemnify Plaintiffs in the PCB Lawsuits. A true and accurate copy of the May 13, 2022 letter to Gillette is attached hereto as **Exhibit 27** and incorporated herein by reference.

230. Gillette did not respond to Plaintiffs' letter.

VI. Defendants' Individual, Joint, And/Or Collective Liability

231. Plaintiffs have incurred significant costs in defending the Food Chain Cases, Water Cases, School Cases, and the Occupational Cases, and will continue to incur significant costs defending the PCB Lawsuits in the foreseeable future. These costs include but are not limited to attorneys' fees, expert witness fees, fees paid to other consultants and/or experts, and costs of litigation (e.g., deposition costs).

232. Plaintiffs also have paid and/or agreed to pay significant amounts to resolve certain claims premised on environmental exposure to PCBs, including settlements in the Food Chain Cases and Water Cases.

233. Three judgments have been entered against Plaintiffs in the Sky Valley School Cases.

234. Many of the PCB Lawsuits remain pending. These cases include Water Cases filed by the Attorneys General of Oregon, Pennsylvania, Delaware, and Maryland, a new Water Case filed by the City of Los Angeles on March 4, 2022, and the Sky Valley School Cases (which involve more than 200 plaintiffs). The plaintiffs in each of the pending PCB Lawsuits seek significant damages from Plaintiffs.

235. Defendants individually and collectively have a contractual duty to defend, indemnify, and hold harmless Old Monsanto in the PCB Lawsuits. Although each Defendants' defense and indemnification obligations arise under separate Special Undertaking Agreements, those agreements are substantially similar, and, more importantly, each Defendant's contractual obligations to defend, indemnify, and hold harmless Old Monsanto are nearly identical. Defendants have separately and individually agreed to insure the same risk and/or same liability or loss under nearly identical terms. Thus, each Defendant is individually, jointly, and/or collectively liable for the full amount of the defense costs incurred by Old Monsanto in the PCB Lawsuits, all amounts paid and/or agreed to be paid by Plaintiffs to resolve and/or settle the PCB Lawsuits, and the full amount of all judgments entered against Plaintiffs in the PCB Lawsuits.

**COUNT I: Breach of Contract against all Defendants
(Refusal to Defend)**

236. Paragraphs 1 through 235 above are incorporated herein by reference.

237. Old Monsanto provided valuable consideration to Defendants, or their predecessors-in-interest, in exchange for their agreement to defend Old Monsanto in the PCB Lawsuits. For example, Old Monsanto agreed to continue, and did continue, to manufacture and sell PCBs to Defendants or their predecessors-in-interest until 1977.

238. Plaintiffs have performed all obligations and responsibilities required of them under the Special Undertaking Agreements.

239. The Special Undertaking Agreements are valid contracts that are enforceable against Defendants.

240. The PCB Lawsuits fall within the scope of claims against which Defendants or their predecessors-in-interest agreed to defend Old Monsanto and its present, past, and future directors, officers, employees and agents.

241. Under the Special Undertaking Agreements, Defendants are obligated to provide a defense for Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits, including, but not limited to, payment of attorneys' fees, expert fees, and all other costs and expenses incurred to defend Old Monsanto in the PCB Lawsuits.

242. New Monsanto and Solutia are entitled to enforce Old Monsanto's rights under the Special Undertaking Agreements.

243. New Monsanto is a "future . . . agent" of Old Monsanto and a third-party beneficiary of the Special Undertaking Agreements.

244. New Monsanto is indemnifying and defending Old Monsanto and Solutia in the PCB Lawsuits.

245. Plaintiffs notified Defendants of the PCB Lawsuits, tendered the defense of the PCB Lawsuits to Defendants, and demanded that Defendants defend Old Monsanto in the PCB Lawsuits.

246. Defendants have failed and refused to defend Old Monsanto in the PCB Lawsuits.

247. Defendants have breached the Special Undertaking Agreements by failing and refusing to defend Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits.

248. As a result of Defendants' breaches of their contractual obligation to defend Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits, Plaintiffs have been damaged in an amount exceeding \$25,000.00. Plaintiffs' damages include, but are not limited to, all of the attorneys' fees, expert fees, and other costs and expenses incurred to defend Old Monsanto in the PCB Lawsuits, foreseeable consequential damages, pre-

judgment interest for such liquidated sums, and attorneys' fees and costs in this action, all to be proven at the time of trial.

249. Plaintiffs continue to incur attorneys' fees, expert fees, and other costs and expenses in defense of the PCB Lawsuits that constitute part of their damages resulting from Defendants' breaches and as such, expressly reserve their rights to seek damages in excess of the amounts referenced in the foregoing paragraph.

**COUNT II: Breach of Contract against all Defendants
(Refusal to Indemnify)**

250. Paragraphs 1 through 235 above are incorporated herein by reference.

251. Old Monsanto provided valuable consideration to Defendants, or their predecessors-in-interest, in exchange for their agreement to indemnify Old Monsanto in the PCB Lawsuits. For example, Old Monsanto agreed to continue, and did continue, to manufacture and sell PCBs to Defendants, or their predecessors-in-interest, until 1977.

252. Plaintiffs have performed all obligations and responsibilities required of them under the Special Undertaking Agreements.

253. The Special Undertaking Agreements are valid contracts that are enforceable against Defendants.

254. The PCB Lawsuits fall within the scope of claims against which Defendants or their predecessors-in-interest agreed to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents.

255. Under the Special Undertaking Agreements, Defendants are contractually obligated to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents for all amounts paid and/or agreed to be paid to resolve the PCB Lawsuits (whether through settlement, verdict, judgment, or otherwise), and for all judgments entered against Old Monsanto

in the PCB Lawsuits. These amounts include, but are not limited to, the amounts paid to settle some of the Food Chain Cases, the amounts paid and/or agreed to be paid to settle some of the Water Cases, and the judgments entered in the Sky Valley School Cases.

256. New Monsanto and Solutia are entitled to enforce the Special Undertaking Agreements with Defendants as the assignees of those rights.

257. New Monsanto is indemnifying and defending Old Monsanto and Solutia in the PCB Lawsuits.

258. Plaintiffs notified Defendants of the PCB Lawsuits, the potential settlement of some of the Food Chain Cases, the settlement of some of the Water Cases, the judgments entered in the Sky Valley School Cases, and has demanded that Defendants indemnify Old Monsanto in the PCB Lawsuits.

259. Defendants have failed and refused to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents.

260. Defendants have breached the Special Undertaking Agreements by failing and refusing to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents for all amounts paid and/or agreed to be paid to resolve the PCB Lawsuits (whether through settlement, verdict, judgment, or otherwise), and for all judgments entered against Old Monsanto in the PCB Lawsuits.

261. As a result of Defendants' breaches of their contractual obligations to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents, Plaintiffs have been damaged in an amount exceeding \$25,000.00. Plaintiffs' damages include, but are not limited to, the amounts paid to settle some of the Food Chain Cases, the amounts paid and/or agreed to be paid to settle some of the Water Cases, the judgments entered in the Sky Valley School

Cases, and all other amounts Plaintiffs have reasonably paid to resolve claims (whether through settlement, verdict, judgment, or otherwise) covered by the Special Undertaking Agreements, plus foreseeable consequential damages, pre-judgment interest for such liquidated sums, and attorneys' fees and costs in this action, all to be proven at the time of trial.

262. Plaintiffs continue to be subject to significant potential liability in the pending PCB Lawsuits. Any amounts paid and/or agreed to be paid to resolve any of the PCB Lawsuits or any judgment entered against Old Monsanto in any of the PCB Lawsuits constitutes part of Plaintiffs' damages resulting from Defendants' breaches and as such, Plaintiffs expressly reserve their rights to seek damages in excess of the amounts referenced in the foregoing paragraph.

**COUNT III: Declaratory Judgment against all Defendants
(Contractual Duty to Defend)**

263. Paragraphs 1 through 235 above are incorporated herein by reference.

264. This Court has the power to grant a declaratory judgment concerning the rights and obligations of Plaintiffs and Defendants, pursuant to RSMo §§ 527.010, 527.020, and 527.030, because an actual controversy exists between Plaintiffs and Defendants concerning the parties' respective rights and obligations under their respective Special Undertaking Agreements, including Defendants' duty to defend Old Monsanto in the PCB Lawsuits.

265. The Special Undertaking Agreements require Defendants to defend Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits and any future PCB Lawsuits filed against Old Monsanto or its present, past, and future directors, officers, employees and agents.

266. Defendants' refusal to satisfy their obligations to defend Old Monsanto and its present, past, and future directors, officers, employees and agents or pay the costs to defend Old

Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits is contrary to the Special Undertaking Agreements and the law.

267. New Monsanto and Solutia are entitled to enforce the Special Undertaking Agreements.

268. New Monsanto is indemnifying and defending Old Monsanto and Solutia in the PCB Lawsuits.

269. Justiciable controversies have arisen between Plaintiffs and Defendants concerning interpretation of the Special Undertaking Agreements and Defendants' obligation to defend Old Monsanto in the PCB Lawsuits.

270. This actual controversy is definite and concrete, in that the parties' positions are adverse and Defendants' refusal to defend Old Monsanto and its present, past, and future directors, officers, employees and agents pursuant to the Special Undertaking Agreements causes direct legal injury to Plaintiffs.

271. This controversy is real and substantial, and ripe for adjudication. A judicial declaration as to Defendants' obligation to defend Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits under the Special Undertaking Agreements will resolve the present controversy, and provide conclusive relief.

272. The harm to Plaintiffs if Defendants are allowed to avoid their obligation to defend Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits is sufficiently real and imminent to warrant the issuance of a conclusive declaratory judgment clarifying the legal relations of the parties. Without a declaration of rights, Plaintiffs will continue to incur attorney's fees, expert fees and other costs and expenses in the PCB Lawsuits.

273. Plaintiffs therefore require a declaratory judgment declaring that Defendants have a duty to defend Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits, and any future PCB Lawsuits, under the Special Undertaking Agreements.

**COUNT IV: Declaratory Judgment against all Defendants
(Duty to Indemnify)**

274. Paragraphs 1 through 235 above are incorporated herein by reference.

275. This Court has the power to grant a declaratory judgment concerning the rights and obligations of Plaintiffs and Defendants, pursuant to RSMo §§ 527.010, 527.020, and 527.030, because an actual controversy exists between Plaintiffs and Defendants concerning the parties' respective rights and obligations under Defendants' respective Special Undertaking Agreements, including Defendants' obligation to indemnify Old Monsanto in the PCB Lawsuits.

276. The Special Undertaking Agreements require Defendants to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits and any future PCB Lawsuits filed against Old Monsanto or and its present, past, and future directors, officers, employees and agents.

277. Defendants' denial of its obligations to indemnify Old Monsanto in the PCB Lawsuits is contrary to the Special Undertaking Agreements and the law.

278. Justiciable controversies have arisen between Plaintiffs and Defendants concerning interpretation of the Special Undertaking Agreements and Defendants' obligation to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits.

279. New Monsanto and Solutia are entitled to enforce the Special Undertaking Agreement.

280. New Monsanto is indemnifying and defending Pharmacia and Solutia in the PCB Lawsuits.

281. This actual controversy is definite and concrete, in that the parties' positions are adverse and Defendants' refusal to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents pursuant to the Special Undertaking Agreements causes direct legal injury to Plaintiffs.

282. This controversy is real and substantial, and ripe for adjudication. A judicial declaration as to Defendants' obligation to defend Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits under the Special Undertaking Agreements will resolve the present controversy, and provide conclusive relief.

283. The harm to Plaintiffs if Defendants are allowed to avoid their obligation to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits is sufficiently real and imminent to warrant the issuance of a conclusive declaratory judgment clarifying the legal relations of the parties. Without a declaration of rights, Plaintiffs will continue to incur expenses in resolving the PCB Lawsuits.

284. Plaintiffs therefore require a declaratory judgment declaring that Defendants have a duty to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents for all amounts Plaintiffs have paid, or will pay, to resolve the PCB Lawsuits or future PCB Lawsuits (whether through settlement, verdict, judgment, or otherwise), under the Special Undertaking Agreements. Specifically, Plaintiffs request and are entitled to a declaration that Defendants have a duty to indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents in all of the PCB Lawsuits, including but not limited to the

settlement of some of the Food Chain Cases, the settlement of some of the Water Cases, and the judgments entered in the Sky Valley School Cases.

COUNT V: Negligence against all Defendants

285. Paragraphs 1 through 235 above are incorporated herein by reference.

286. Defendants and/or their predecessors-in-interest were aware of the potential for PCBs to persist in the environment and of the need to use care in the use and handling of PCBs when they purchased PCBs from Old Monsanto.

287. Defendants and/or their predecessors-in-interest had a duty to possess, handle, use, sell, and dispose of PCBs purchased from Old Monsanto with reasonable care so that they would not be released into the environment.

288. Defendants and/or their predecessors-in-interest breached their respective duty of care by allowing PCBs purchased from Old Monsanto both before and after signing the Special Undertaking Agreements to be released into the environment through products manufactured by Defendants and/or their predecessors-in-interest, disposal of PCB-containing products, leaks, spills, dumping and disposal of industrial wastes, and through other means.

289. The PCB Lawsuits have been filed against Plaintiffs as a result of Defendants' and/or their predecessors-in-interests' breaches and release of PCBs into the environment.

290. As a result of the foregoing breaches by Defendants and/or their predecessors-in-interest, Plaintiffs have been damaged in an amount exceeding \$25,000.00. Plaintiffs' damages include, but are not limited to, the costs of defending the PCB Lawsuits (attorneys' fees, expert witness fees, and other costs and expenses), the amounts paid to settle some of the Food Chain Cases, the amounts paid and/or agreed to be paid to settle some of the Water Cases, the judgments entered in the Sky Valley School Cases, and all other amounts Plaintiffs have reasonably paid

and/or agreed to pay to resolve claims (whether through settlement, verdict, judgment, or otherwise) covered by the Special Undertaking Agreements prior to the date of this filing.

291. Plaintiffs continue to incur attorneys' fees, expert fees, and other litigation costs and expenses in the PCB Lawsuits that constitute part of its damages resulting from Defendants' and/or their predecessors' breaches. Plaintiffs may also incur additional costs to settle or otherwise resolve PCB Lawsuits after the date of filing of this Amended Petition. As such, Plaintiffs expressly reserve their right to seek damages in excess of the amounts referenced in the foregoing paragraph.

COUNT VI: Negligent Misrepresentation against Magnetek

292. Paragraphs 1 through 235 above are incorporated herein by reference.

293. Prior to signing the Magnetek Special Undertaking Agreement, UMC supplied Old Monsanto with certain information regarding UMC's intended use of the PCBs and coverage of the Magnetek Special Undertaking Agreement by insurance.

294. Specifically, UMC told Monsanto that it only intended to use PCBs purchased from Monsanto for closed uses such that PCBs would not escape its products and enter the environment, and that the Magnetek Special Undertaking Agreement was "covered by a blanket liability policy with the Travelers Insurance Company."

295. The information supplied by UMC to Old Monsanto was false due to UMC's and/or Magnetek's failure to exercise reasonable care.

296. UMC and/or Magnetek released or permitted the release of some or all of the PCBs purchased from Old Monsanto into the environment after execution of the Magnetek Special Undertaking Agreement.

297. Magnetek's insurer has also alleged in a lawsuit against Magnetek that the

Magnetek Special Undertaking Agreement is not covered by any insurance policy, or the insurance policy has been released. *See Velsicol Chemical LLC et al. v. Magnetek, Inc.*, Case No. 2017 CH 02118, Complaint (Cook County, Ill. Cir. Court Feb. 14, 2017).

298. UMC intentionally supplied the false information regarding its use of the PCBs and the insurance coverage to Old Monsanto to induce Old Monsanto to sell its PCBs to UMC after Old Monsanto had decided to limit production of PCBs.

299. Old Monsanto justifiably relied on the false information supplied by UMC when it decided to sell PCBs to UMC pursuant to the Magnetek Special Undertaking Agreement.

300. Old Monsanto would not have sold PCBs to UMC if it had not provided the false information regarding its intended use of the PCBs and the insurance coverage for the Magnetek Special Undertaking Agreement.

301. Magnetek is the successor-in-interest to UMC.

302. Plaintiffs have suffered loss in the form of attorneys' fees, costs, settlement amounts, judgments, and other damages in an amount in excess of \$25,000 as a result of UMC's and/or Magnetek's negligent misrepresentations. Plaintiffs may also incur additional costs to settle or otherwise resolve PCB Lawsuits after the date of filing of this Amended Petition. As such, Plaintiffs expressly reserve their right to seek damages in excess of the amounts referenced in the foregoing paragraph.

**COUNT VII: Equitable Contribution against all Defendants
(Pleaded In The Alternative)**

303. Paragraphs 1 through 235 above are incorporated herein by reference.

304. This claim for equitable contribution is alleged in the alternative to Counts II and IV and only to the extent that Defendants are not contractually obligated under the Special

Undertaking Agreements to indemnify and/or hold harmless Old Monsanto in one or more of the PCB Lawsuits.

305. The PCB Lawsuits premise liability, *inter alia*, on Old Monsanto's manufacture and sale of PCBs.

306. Old Monsanto manufactured and sold PCBs in bulk to a number of industrial customers, including Defendants or their predecessors-in-interest, who incorporated those PCBs into a wide variety of finished products. Old Monsanto itself never sold finished products containing PCBs to individuals or consumers. Old Monsanto never controlled how products incorporating PCBs would be used, serviced, or disposed of by its customers.

307. The finished products into which Old Monsanto's customers incorporated PCBs included dielectric fluids used in electrical equipment such as transformers, capacitors, and lighting ballasts.

308. Defendants and/or their predecessors-in-interest purchased PCBs from Old Monsanto and incorporated these PCBs purchased from Old Monsanto into products (e.g., transformers and capacitors) that were sold to customers throughout the United States.

309. Defendants and/or their predecessors-in-interest released into the environment or permitted the release into the environment some or all of the PCBs that they purchased from Old Monsanto.

310. Thus, to the extent Plaintiffs are or were liable in the PCB Lawsuits or have or will pay amounts to settle or resolve the PCB Lawsuits, Defendants are jointly liable for those same alleged indivisible injuries.

311. For example, Plaintiffs' settlement of some of the Food Chain Cases and some of the Water Cases extinguished Defendants' liabilities for those alleged injuries.

312. The amount Monsanto paid and/or has agreed to pay in settlement of some of the Food Chain Cases and some of the Water Cases was reasonable.

313. To the extent Defendants are not contractually obligated to indemnify and/or hold harmless Old Monsanto in the PCB Lawsuits, Defendants are liable to Plaintiffs for their equitable shares of the amounts paid and/or agreed to be paid by Plaintiffs to settle and/or resolve the PCB Lawsuits. This includes Defendants' equitable share of the amounts paid and/or agreed to be paid by Plaintiffs to settle some of the Food Chain Cases and resolve certain Water Cases. It also includes Defendants' equitable share of the judgments entered against Plaintiffs in the Sky Valley School Cases.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter an order and judgment granting the following relief in Plaintiff's favor and against Defendants:

A. Awarding Plaintiffs a sum greater than Twenty-Five Thousand Dollars (\$25,000.00) reflective of the damages incurred by Plaintiffs and to be proven prior to the time of such judgment, including such damages Plaintiffs incurred in defending and resolving the PCB Lawsuits;

B. A declaration that the Special Undertaking Agreements individually and collectively apply to the PCB Lawsuits and impose on Defendants individually and collectively a duty to defend Old Monsanto and its present, past, and future directors, officers, employees and agents in the PCB Lawsuits and any future PCB Lawsuits;

C. A declaration that Defendants individually and collectively shall bear responsibility for any and all of the defense costs (including attorneys' fees, costs, and expenses) of Old Monsanto and its present, past, and future directors, officers, employees and agents in the

PCB Lawsuits and any future PCB Lawsuits, which are being paid and/or have agreed to be paid by New Monsanto;

D. A declaration that Defendants shall individually and collectively indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents for any and all judgments, settlements, and all other amounts Old Monsanto is required to pay and/or has agreed to pay to resolve the PCB Lawsuits and any future PCB Lawsuits;

E. A declaration that Defendants shall individually and collectively indemnify Old Monsanto and its present, past, and future directors, officers, employees and agents for the total amount of the settlement of some of the Food Chain Cases, the total amount of the settlement of certain Water Cases, and the total amount of the judgments entered in the Sky Valley School Cases;

F. A declaration that Defendants, respectively, shall honor all of their obligations and responsibilities set forth in their respective Special Undertaking Agreements regarding the PCB Lawsuits and any future PCB Lawsuits;

G. Awarding Plaintiffs pre-judgment interest with respect to their damages;

H. Awarding Plaintiffs post-judgment interest with respect to their damages;

I. Awarding Plaintiffs their attorneys' fees and costs for prosecution of this lawsuit;

J. Alternatively, Plaintiffs request that the Court enter a judgment requiring Defendants to pay their equitable share of liability incurred by Plaintiffs in the PCB Lawsuits, including but not limited to Defendants' equitable share of the amounts Plaintiffs has paid and/or has agreed to pay to settle some of the Food Chain Cases and the Water Cases, and the judgments entered against Plaintiffs in the Sky Valley School Cases.

K. Such other and further relief as the Court deems just and proper.

