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Kim Winkle James

Kim Winkle James, Clerk
Chattooga County, Georgia

**IN THE STATE COURT OF CHATTOOGA COUNTY
STATE OF GEORGIA**

THE TOWN OF LYERLY, GEORGIA,

Plaintiff,

v.

3M COMPANY, et al.,

Defendants.

CIVIL ACTION FILE NO.:
24SCA4052

**THE TOWN OF LYERLY, GEORGIA'S OMNIBUS RESPONSE
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

DAVIS LUCAS CARTER LLP

J. Anderson Davis
Georgia Bar No. 211077
210 East 2nd Ave, Suite 301
Rome, Georgia 30161

**MCCAMY, PHILLIPS, TUGGLE &
FORDHAM, LLP**

Robert H. Smalley, III
Georgia Bar No. 653405
P.O. Box 1105
Dalton, Georgia 30722

FRIEDMAN, DAZZIO & ZULANAS, P.C.

Matt Conn
Lee Patterson
Ethan Wright
Madison Gitschier
Admitted Pro Hac Vice
3800 Corporate Woods Drive
Birmingham, Alabama 35242

Counsel for the Town of Lyerly, Georgia

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COMES NOW, the Town of Lyerly, Georgia (“Lyerly”), and files its Omnibus Response in Opposition to the Defendants’ Motions to Dismiss Lyerly’s Amended Complaint,¹ showing the Court as follows:

I. INTRODUCTION

This case is about PFAS, a group of man-made “forever chemicals” that are considered persistent, bioaccumulative, and toxic (“PBT”) by the U.S. Environmental Protection Agency (“EPA”).² PFOA and PFOS, two of the most notorious types of PFAS, are Hazardous Substances under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), and cannot be present in drinking water at concentrations higher than four (4) parts per trillion.³ Like thousands of other public water systems across the country, Lyerly is being forced to deal with the repercussions of PFAS pollution in its drinking water despite never having produced or used any commercial products containing PFAS.⁴

Put another way, Lyerly and its citizens would not have to deal with the ramifications of PFAS-polluted water, but for: (1) the manufacture and sale of PFAS by the

¹ In the interest of judicial economy and for ease of reference, this Omnibus Response addresses arguments common to all or most of the Motions to Dismiss in this case, including those filed by Defendants 3M Company, Inc. (“3M”); E.I. DuPont de Nemours and Company, DuPont de Nemours, Inc., The Chemours Company, The Chemours Company FC, LLC, and Corteva, Inc. (collectively “DuPont”); Daikin America, Inc. (“Daikin”); and Aladdin Manufacturing Corporation, Mohawk Carpet, LLC, and Mohawk Industries, Inc. (collectively “Mohawk”).

² The Town of Lyerly, Georgia’s Amended Complaint (hereinafter “Pl.’s Am. Compl.”) ¶¶ 3–4.

³ See PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32,532 (April 26, 2024) (to be codified at 40 C.F.R. pts.141 & 142); Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39,124 (May 8, 2024) (to be codified at 40 C.F.R. pt. 302); see also Pl.’s Am. Compl. ¶¶ 90–99.

⁴ Pl.’s Am. Compl. ¶¶ 12–13, 95.

PFAS Manufacturer Defendants and (2) the purchase, use, and discharge of PFAS by the PFAS User Defendants.⁵ This is why the Town of Lyerly filed this lawsuit.

Now, through their Motions to Dismiss, Defendants seek to distort, confuse, and reframe the issues. Despite their efforts, this case is no different from those that have been brought by public water systems across the country. And the Defendants' arguments are no different from those that have been rejected time and again by state and federal courts in Georgia and across the country.

On top of this, the Defendants try to minimize Georgia's well-settled standards for pleadings and motions to dismiss. The touchstone of Georgia's pleading standard is "fair notice"—a short and plain statement of claims that includes enough detail to afford the Defendants fair notice of the nature of the claim and a fair opportunity to frame a responsive pleading. *See* O.C.G.A. § 9-11-8(a)(2)(A); *Atlanta Women's Specialists, LLC v. Trabue*, 310 Ga. 331, 333 (2020) ("Georgia is a notice pleading jurisdiction. . . . It must be remembered that the objective of the [Civil Practice Act] is to avoid technicalities and to require only a short and plain statement of the claim that will give the defendant fair notice.")

With this in mind, Defendants' Motions to Dismiss can only be granted if Lyerly's allegations "disclose with *certainty* that [Lyerly] would not be entitled to relief under *any state* of provable facts asserted in support thereof; and (2) the [Defendants] establish[] that [Lyerly] *could not possibly introduce evidence within the framework of the complaint*"

⁵ *See generally id.* ¶¶ 1–13.

sufficient to state a claim for relief. *See McLeod v. Costco Wholesale Corp.*, 369 Ga. App. 717, 717–18 (2023). Defendants cannot meet that difficult standard.

Lyerly’s Complaint goes well beyond the minimum requirements of “fair notice.” It spans 30 pages and provides detailed factual allegations that support Lyerly’s claims against the Defendants. Among other things, the Complaint chronicles the Defendants’ decades-long knowledge of the harmful effects of PFAS and how these forever chemicals have continuously invaded and damaged Lyerly’s water supply. Defendants will have the opportunity to challenge these allegations—to the extent contrary evidence is developed—at summary judgment or trial. But they cannot stop Lyerly’s claims at the pleading stage when Lyerly has provided more than fair notice to the Defendants of claims viable under Georgia law.

Lyerly, therefore, asks the Court to deny the Defendants’ Motions to Dismiss in full.

II. RELEVANT BACKGROUND⁶

Lyerly’s claims in this case can be boiled down to this: (1) Lyerly’s drinking water contains levels of PFAS far in excess of that which is permitted by EPA regulation⁷; (2) these PFAS are present in Lyerly’s drinking water because of the Defendants’ decades-long manufacture, sale, use, and discharge of products containing or degrading into PFAS⁸; (3) the Defendants knew or should have known that their manufacture, sale, use, and/or

⁶ The following background is based on the pleadings’ allegations and publicly available information that is beyond dispute, including decisions from courts addressing similarly arguments as those presented here. The Court is permitted to take judicial notice of this publicly available information at the motion-to-dismiss stage. *See, e.g., In re D.W.*, 318 Ga. App. 725, 728 (2012).

⁷ Plaintiff’s Amended Complaint ¶ 93, 94, 106-109.

⁸ *Id.* at ¶ 28, 44, 54.

discharge of these products would cause harm to the environment and to Lyerly specifically⁹; and (4) Lyerly does not have the capability to remove Defendants' PFAS from its drinking water with its current conventional treatment methods and will have to spend millions to comply with EPA regulations concerning the levels of PFAS in drinking water.¹⁰

Lyerly's claims are virtually identical to those brought by other public water systems across the country (and in Georgia specifically), often against the same defendants, alleging nearly identical facts, and resulting in settlements that benefit the public, *to wit*:

- *The City of Rome, Georgia v. 3M Company, et al.*, In the Superior Court of Floyd County, Georgia, Case No.: 19-CV-02405 (settlement with 3M, Daikin, DuPont, Mohawk, and others, totaling “roughly \$279 million” to the City of Rome to build and operate a Reverse Osmosis water treatment system capable of removing PFAS from drinking water);¹¹
- *West Morgan-East Lawrence Water and Sewer Authority v. 3M Company, Inc., et al.*, United States District Court for the Northern District of Alabama, Northeastern Division, Case No.: 5:15-cv-01750-MHH (\$35 Million Dollar settlement with 3M and Daikin to build a Reverse Osmosis water treatment and filtration plant for the West Morgan-East Lawrence Water and Sewer Authority to remove PFAS);¹²
- *City of Guin, Alabama Water Works & Sewer Board v. 3M Company, Inc., et al.*, In the Circuit Court of Marion County, Alabama, Case No.: CV-2020-900082 (settlement to “provide state of the art treatment to drinking water supplied to GWWSB's customers, as well as a new wastewater treatment facility.”);¹³

⁹ *Id.* at ¶ 9, 145, 152-154.

¹⁰ *Id.* at ¶ 13, 27, 29, 103.

¹¹ *DuPont, four others paid \$45M to settle Rome 'forever chemicals' water case* (Mar. 29, 2024), <https://www.ajc.com/news/georgia-news/dupont-four-others-paid-45m-to-settle-north-georgia-forever-chemicals-water-case/5OH5TEURMFE5LJZVWJPOTY2KJY/>; *North Georgia Judge Orders Rome 'Forever Chemicals' Settlement Be Made Public* (Nov. 17, 2023), <https://www.timesfreepress.com/news/2023/nov/17/georgia-judge-orders-rome-forever-chemicals-settlement-public-tfp/>.

¹² *Water Treatment Facility Funded With Settlement Money Opens in Lawrence County* (May 28, 2021), <https://whnt.com/news/wmel-announces-opening-of-lawsuit-funded-reverse-osmosis-water-treatment-system/>.

¹³ *3M to Support Drinking Water Treatment Technologies for City of Guin WWSB* (Dec. 30, 2021), https://news.3m.com/GWWSB_Agreement.

- *The Water Works and Sewer Board of the City of Gadsden v. 3M Company, Inc., et al.*, In the Circuit Court of Etowah County, Alabama, Case No.: CV-2016-900676, (multi-million-dollar settlement between Gadsden, Alabama, and 3M, Mohawk, and others to build a Reverse Osmosis water treatment and filtration plan for the Water Works and Sewer Board of the City of Gadsden to remove PFAS);¹⁴ and
- *In re: Aqueous Film-Forming Foams Prod. Liab. Litig.*, United States District Court for the District of South Carolina, Charleston Division, Case No.: 2:18-mn-2873-RMG (\$10.5 billion and \$1.185 billion to be paid by 3M and DuPont, respectively, to settle multi-district litigation claims by public water systems arising out of PFAS contamination of water supplies).¹⁵

In addition to these resolved cases, two federal courts in Georgia are overseeing pending PFAS litigation against several of these same Defendants. *See Johnson v. 3M Company, Inc., et al.*, United States District Court for the Northern District of Georgia, Rome Division, Case No.: 4:20-CV-8-AT (Judge Totenberg); *Parris & City of Summerville, Georgia v. 3M Company, Inc., et al.*, United States District Court for the Northern District of Georgia, Rome Division, Case No.: 4:21-CV-40-TWT (Judge Thrash).

All of these courts—and numerous others across the country overseeing PFAS pollution cases—have one thing in common: they have almost uniformly rejected many of the same arguments that the Defendants now recycle to this Court. Rather than address these prior cases, the Defendants seek to lead this Court into error by simply regurgitating the same tired arguments that have been rejected by courts over and over again. Lyerly asks

¹⁴ *Gadsden Water Works Settles with Carpet, Chemical Companies Over Pollution* (Oct. 6, 2022), <https://www.gadsdentimes.com/story/news/2022/10/05/gadsden-ala-municipal-water-works-companies-accused-of-pollution-settle-lawsuit/69541783007/>.

¹⁵ *Public Water System Settlements*, <https://www.pfaswatersettlement.com/> (last accessed Sept. 30, 2024).

this Court to apply the same legal framework that state and federal courts have applied in lawsuits just like this one and deny the Defendants' Motions to Dismiss in full.¹⁶

III. LEGAL STANDARD

"Georgia is a notice pleading jurisdiction. . . . It must be remembered that the objective of the [Civil Practice Act] is to avoid technicalities and to require only a short and plain statement of the claim that will give the defendant fair notice of what the claim is and a general indication of the type of litigation involved; the discovery process bears the burden of filling in details." *Atlanta Women's Specialists*, 310 Ga. at 333; *see also* O.C.G.A. § 9-11-8(e) ("Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."); O.C.G.A. § 9-11-8(f) ("All pleadings shall be so construed as to do substantial justice.").

"A motion to dismiss for failure to state a claim should not be granted unless: (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." *Mbigi v.*

¹⁶ Lyerly is providing courtesy copies of these various rulings in an Appendix filed herewith. In particular, a courtesy copy of Judge J. Bryant Durham's Order on Defendants' Motions to Dismiss the Second Amended Complaint in the *Rome v. 3M* case is provided as App'x A; a courtesy copy of Mohawk's Motion to Dismiss the City of Rome's Second Amended Complaint is provided as App'x B. Judge Bryan Johnson took over as the trial court judge overseeing the City of Rome's PFAS lawsuit following Judge Durham's retirement and entered two additional orders denying motions to dismiss the City of Rome's claims. Courtesy copies of those orders are provided as App'x C (Order Denying Dalton Utilities' Motion to Dismiss) and App'x D (Order Denying Daikin's Motion to Dismiss). Finally, Judge William Rhea's order denying motions to dismiss the City of Gadsden, Alabama's PFAS lawsuit by 3M and Mohawk, is provided as App'x E.

Wells Fargo Home Mortg., 336 Ga. App. 316, 316 (2016)).¹⁷ “If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.” *Martin v. Brown*, 222 Ga. App. 566, 567 (1996) (citing *Bourn v. Herring*, 225 Ga. 67, 70 (1969)).

“A plaintiff does not have to plead in the complaint facts sufficient to set out the elements of a cause of action so long as the complaint puts the opposite party on reasonable notice of what issues must be defended against; therefore, no matter how poorly a complaint has been drafted, if the complaint sufficiently raises possible theories of recovery, it should not be dismissed.” *Id.* (citing *Dillingham v. Doctors Clinic, P.A.*, 236 Ga. 302 (1976)). At the motion to dismiss stage, “it is immaterial whether a pleading states conclusions or facts as long as fair notice is given, and the statement of claim is short and plain. The true test is whether the pleading gives fair notice and states the elements of the claim plainly and succinctly, and not whether as an abstract matter it states conclusion or facts.” *Carley v. Lewis*, 221 Ga. App. 540, 541 (1996).

IV. ARGUMENT AND CITATION OF AUTHORITY

Nearly every argument that the Defendants have raised in their motions to dismiss has been rejected by other judges in PFAS cases involving many of the same defendants

¹⁷ “Permeating each claim in this case is Georgia’s well-settled law that a motion to dismiss the complaint for failure to state a claim under OCGA § 9-11-12 (b)(6) . . . should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.” *McLeod v. Costco Wholesale Corp.*, 369 Ga. App. 717, 717-18 (2023) (internal quotations omitted).

and nearly identical legal claims. Yet, even without the benefit of predecessor opinions, the Defendants’ arguments fail under Georgia law—especially considering Georgia’s notice-pleading standards.

A. Negligence

Each Defendant argues that Lyerly’s negligence claims should be dismissed due to either a lack of duty or lack of causation. These exact same arguments have been denied at both the pleading stage and the more stringent summary judgment stage in similar cases.¹⁸ They should also be rejected here.

i. Lyerly has sufficiently alleged a duty of care owed by the Defendants to Lyerly.

The Defendants seek to reframe Lyerly’s factual allegations to argue that the Defendants owe no duty of care to Lyerly. In doing so, Defendants advance two, somewhat conflicting arguments. First, Defendants argue that Lyerly’s negligence claim is not bound by principles of foreseeability and instead seeks to impose a “generalized duty to all the world.”¹⁹ Second, Defendants argue that Lyerly relies too heavily on concepts of foreseeability and cannot point to a threshold duty of care imposed by Georgia law.²⁰

¹⁸ See, e.g., *Parris v. 3M Co.*, 595 F. Supp. 3d 1288 (N.D. Ga. 2022) (denying identical arguments raised by 3M and Daikin at pleading stage in 2022); *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, No. 2:18-CV-3487-RMG, 2023 WL 3550505 (D.S.C. May 18, 2023) (denying similar argument raised by DuPont at the summary judgment stage in 2023); App’x A (denying similar argument raised by Mohawk at pleading stage in 2020); App’x E (denying identical argument raised by Daikin at pleading stage in 2022); App’x F (denying similar arguments raised by 3M and Mohawk at the pleading stage in 2018).

¹⁹ See, e.g., 3M Mot. Dismiss, p.11; Daikin Mot. Dismiss, p.4.

²⁰ See, e.g., Daikin Mot. Dismiss, p.6.

Almost every Court hearing these same arguments has rejected them:

- *Parris*, 595 F. Supp. 3d at 1329–30 (“Based on the foregoing authority, the Court concludes that the Plaintiff has identified a specific, established legal duty under Georgia law applicable to the Manufacturing Defendants [including 3M and Daikin].”);
- *The City of Rome, Georgia v. 3M Company, et al.*, In the Superior Court of Floyd County, Georgia, Case No.: 19-CV-02405 (App’x A, D) (denying similar motions to dismiss from Mohawk and Daikin arguing lack of duty);
- *The Water Works and Sewer Board of the City of Gadsden v. 3M Company, Inc., et al.*, In the Circuit Court of Etowah County, Alabama, Case No.: CV-2016-900676 (App’x E) (denying similar motions to dismiss from Mohawk and 3M);
- *Weirton Area Water Board v. 3M Company*, No. 5:20-CV-102, 2020 WL 7479974, at *3–*5 (Dec. 18, 2020) (rejecting argument raised by 3M, DuPont, and Daikin that public water system’s “negligence claims warrant dismissal because the Manufacturing Defendants do not owe Plaintiffs any relevant duty”);
- *Utilities Board of Tuskegee v. 3M Company, Inc.*, No. 2:22-CV-420-WKW, 2023 WL 1870912 (Feb. 9, 2023) (holding that 3M and DuPont had “a duty to exercise reasonable care when supplying chemicals where the foreseeable and normal use of those chemicals, as supplied, causes the dangerous contamination of public drinking water”);
- *Ryan v. Greif, Inc.*, 708 F. Supp. 3d 148, 167–68 (D. Mass. 2023) (citing *Parris v. 3M* for the proposition that “upstream manufacturers of PFAS, like 3M, owe a duty to Plaintiffs who are foreseeable victims of environmental contamination caused by PFAS, and that duty is the duty to warn downstream manufacturers or users, like the Paper Manufacturing Defendants, of the dangers of PFAS when not disposed of properly”);
- *Zimmerman v. 3M Co.*, 542 F. Supp. 3d 673, 681 (W.D. Mich. 2021) (“Because Plaintiffs were foreseeable victims of PFAS contamination, a relationship existed between Plaintiffs and 3M sufficient to impose a duty.”);
- *Weatherford v. E.I. Dupont de Nemours & Co.*, No. 4:22-CV-01427-RBH, 2023 WL 11015357, at *3–4 (D.S.C. Sept. 27, 2023) (finding that plaintiffs plausibly alleged a duty owed by 3M and DuPont where Defendants “knew

(1) the dangers of PFAS to humans and the environment, (2) the chemicals were not biodegradable and persist in the environment and the human body, and (3) without proper storage, the chemicals would inevitably enter water systems as a part of the ordinary textile process,” but “Defendants concealed that information from regulators, the public, and Defendants’ customers . . . which resulted in the wastewater being leached into the river or spread over fields as sludge”); and

- *Menkes v. 3M Co.*, No. CV 17-0573, 2018 WL 2298620, at *5 (E.D. Pa. May 21, 2018) (“Therefore, the Court finds that Plaintiffs have sufficiently pled facts showing that Defendants owed a duty to Plaintiffs.”).

As in these other PFAS cases rejecting the same arguments Defendants regurgitate today, the Defendants in this case owe Lyerly legal duties under Georgia statutes, regulations, and common law. These legal duties are not, as Defendants contend, owed to the world at large; they are simply owed to those that may be foreseeably injured by the Defendants’ failure to adhere to their legal duties, such as downstream public water systems.²¹

3M and Daikin raised these exact same arguments in PFAS litigation before Judge Thrash in the United States District Court for the Northern District of Georgia two years ago. Judge Thrash’s findings—that 3M and Daikin owed a duty to prevent PFAS pollution in drinking water in and around Summerville, Georgia—are noteworthy:

a duty arose where the Manufacturing Defendants [3M and Daikin] continuously supplied PFAS to Mount Vernon with knowledge that the chemicals were unlikely to be made reasonably safe in their regular use and could foreseeably contaminate surface waters and downstream water supplies. The following allegations in the Complaint support the imposition of a legal duty here: the Manufacturing Defendants (1) have known for decades that PFAS are toxic and persistent in humans and other animals (Am.

²¹ Pl.’s Am. Compl. ¶ 115 (emphasis added) (“Defendants owed a duty to Plaintiff, as well as to all persons whom Defendants’ PFAS *might foreseeably harm*, in their handling, control, use, and disposal of PFAS.”); *see also id.* ¶¶ 116–19.

Compl. ¶¶ 54-59, 64-67, 70), (2) have long been aware that conventional wastewater treatment processes are ineffective, resulting in PFAS discharges to surface waters and accumulation in sewage sludge (*id.* ¶ 60-61), and (3) notwithstanding these known risks of harm, have supplied PFAS to Mount Vernon without taking necessary precautions to prevent PFAS from contaminating surface waters such as Raccoon Creek and municipal water supplies. (*Id.* ¶ 163.) ***In the Court’s view, these allegations are not equivalent to a general duty to prevent harm to all the world, but make out a well-established duty under Georgia law with a limited geographic scope.***

Parris, 595 F. Supp. 3d at 1330 (emphasis added).²² Lyerly’s allegations in this case are no different.

1. The Defendants owe Lyerly statutory and common law duties of care.

Under Georgia law, a legal duty can arise from a governmental enactment—such as a statute, ordinance, or regulation—or from a common law principle recognized under the case law. *Rasnick v. Krishna Hosp., Inc.*, 289 Ga. 565, 566–67 (2011); *see also* O.C.G.A. § 51-1-6 (“When the law requires a person to . . . refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may

²² Daikin makes much of the fact that another federal judge found in a different PFAS case that no duty was owed by the chemical manufacturer defendants to the plaintiffs in *Johnson v. 3M*, 563 F. Supp. 3d 1253 (N.D. Ga. 2021). However, the plaintiffs in that case were a putative class of residents drinking polluted water, not a public water system like Lyerly. *See id.* at 1275. Daikin also fails to mention that the public water system that the *Johnson* plaintiffs obtained water from—the City of Rome, Georgia—filed its own lawsuit against Daikin and many of the other defendants in this case. Nor does Daikin mention that it raised these same arguments in the *Rome* case, and they were rejected by Judge Bryan Johnson after *Johnson* was decided. *See* App’x D (Order Denying Daikin’s Motion to Dismiss). Judge Thrash likewise had the opportunity to review the *Johnson* opinion prior to holding that Daikin owed plaintiffs a duty of care in *Parris*. Finally, Daikin skirts around the fact that the *Johnson* Court held that every other claim asserted against Daikin—including nuisance, trespass, and violations of the GWQCA—were legally viable. *Johnson*, 563 F. Supp. 3d at 1268–69. If Daikin is to rely on *Johnson* for one issue, it should accept *Johnson*’s reasoning on every other issue.

recover for the breach of such legal duty if he suffers damage thereby.”). Defendants owe Lyerly a duty of care under Georgia statutes, regulations, and common law.

Defendants’ statutory duties arise under both O.C.G.A. § 12-5-29, *et seq.*, (“Georgia Water Quality Control Act”) and O.C.G.A. § 51-9-7 (“Watercourses; . . . pollution as constituting trespass”). The former imposes a duty on Defendants to not “intentionally or negligently cause[] or permit[] any . . . industrial wastes . . . or other substance or substances to be spilled, discharged, or deposited in the waters of the state, resulting in a condition of pollution” O.C.G.A. § 12-5-51. The latter places a duty on Defendants to avoid “polluting [the City’s water] so as to lessen its value.” O.C.G.A. § 51-9-7.²³

Defendants also have legal duties under the Georgia Department of Natural Resources’ Rules and Regulations. For instance, the Defendants have a duty under Ga. Comp. R. & Regs. § 391-3-6-.03 to:

- keep waters of the State free of “industrial waste or other discharges in amounts sufficient to be unsightly or to interfere with the designated use of the water body,” Ga. Comp. R. & Regs. § 391-3-6-.03(5)(b);
- keep waters of the State free from “industrial or other discharges which . . . interfere with the designated use of the water body,” *id.* § 391-3-6-.03(5)(c); and
- keep waters of the State free from “toxic, corrosive, acidic and caustic substances discharged from municipalities, industries or other sources, such as nonpoint sources, in amounts, concentrations or combinations which are harmful to humans, animals or aquatic life,” *id.* § 391-3-6-03(5)(e).

²³ Violations of O.C.G.A. § 12-5-51 and O.C.G.A. § 51-9-7 also create standalone causes of action, which Lyerly has also pled in this case. (See Pl.’s Am. Compl. ¶¶ 142–47, 159–65; Sections C & D, *infra*.)

See also Parris, 595 F. Supp. 3d at 1335 (finding legal duties owed under Ga. Comp. R. & Regs. § 391-3-6-.03(5)(e)).²⁴

In addition to these specific statutory duties, the Defendants also owe Lyerly a general common law duty of ordinary diligence or care. *See Hand v. Harrison*, 99 Ga. App. 429, 429 (1959) (“Every person owes a duty to exercise ordinary care not to injure others, whether they stand in a contractual relationship to him or not.”). “[O]rdinary diligence is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances.” O.C.G.A. § 51-1-2. “As applied to the preservation of property, the term ‘ordinary diligence’ means that care which every prudent man takes of his own property of a similar nature.” *Id.* “The absence of such diligence is termed ordinary negligence.” *Id.*

This general principle of law—that even multinational corporations must act reasonably—has even been applied specifically in the context of the manufacture and supply of dangerous products, the very basis of Lyerly’s claims against the PFAS Manufacturing Defendants. The Restatement (Second) of Torts § 389, which Georgia appellate courts have adopted,²⁵ states as follows:

²⁴ Mohawk also has specific duties imposed by its National Pollutant Discharge Elimination Permit, which Mohawk has itself put into the record. (*See* Mohawk Am. Answer Ex. A; Mohawk Mot. Dismiss, p.4, n.2.) Among other things, Mohawk’s permit imposes duties (1) to “take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment,” (2) to avoid causing “any injury to private property or any invasion of person rights,” and (3) to “not discharge toxic pollutants in concentrations or combinations that are harmful to humans, animals, or aquatic life.” (*See* Mohawk Am. Answer Ex. A, at 15, 19, 21.)

²⁵ *See, e.g., Greenway v. Peabody Int’l Corp.*, 163 Ga. App. 698, 703 (1982); *Ogletree v. Navistar International Transportation Corp.*, 194 Ga. App. 41 (1989), *overruled on other grounds by Weatherby v. Honda Motor Co., Ltd.*, 195 Ga. App. 169 (1990)).

One who supplies directly or through a third person a chattel for another's use, knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, is subject to liability for physical harm²⁶ caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has informed the other for whose use the chattel is supplied of its dangerous character.

This very standard has been relied upon by federal courts—including in Georgia—in finding that PFAS manufacturers owe a duty of care to reasonably foreseeable plaintiffs. *See Parris*, 595 F. Supp. 3d at 1328–30 (citing *Ogletree v. Navistar International Transportation Corp.*, 194 Ga. App. 41 (1989), *overruled on other grounds by Weatherby v. Honda Motor Co., Ltd.*, 195 Ga. App. 169 (1990); *Dupree v. Keller Industries, Inc.*, 199 Ga. App. 138 (1991)); *Utilities Bd. of Tuskegee*, 2023 WL 1870912, at *9 n.17 (finding that 3M and DuPont owed duties of care as PFAS suppliers, and noting that “Section 389 is simply a statement of basic negligence principles of foreseeability and fault in the supplier context”).

Lyerly’s Complaint alleges that the Defendants owed duties to comply with applicable law and to exercise ordinary care in accordance with these basic legal principles:

As manufacturers, refiners, formulators, distributors, suppliers, sellers, marketers, shippers, users, disposers, and/or handlers of PFAS, products containing and/or degrading into PFAS, products manufactured using PFAS, and/or waste containing and/or degrading into PFAS, Defendants owed a duty to Plaintiff, as well as to all persons whom Defendants’ PFAS might foreseeably harm, in their handling, control, use, and disposal of PFAS.

²⁶ The term “physical harm” here includes damage to property. *Parris*, 595 F. Supp. 3d at 1328 (citing *Johnson v. Ford Motor Co.*, 281 Ga. App. 166, 173 (2006), *overruled on other grounds by Campbell v. Altec Indus., Inc.*, 288 Ga. 535 (2011)).

The Georgia Water Quality Control Act regulations specify that all waters of the State of Georgia shall be free from: “industrial waste or other discharges in amounts sufficient to be unsightly or to interfere with the designated use of the water body” Ga. Comp. R. & Regs. § 391-3-6-.03(5)(b); “industrial or other discharges which produce turbidity, color, odor or other objectionable conditions which interfere with the designated use of the water body” Ga. Comp. R. & Regs. § 391-3-6-.03(5)(c); “toxic, corrosive, acidic and caustic substances discharged from . . . industries or other sources, such as nonpoint sources, in amounts, concentrations or combinations which are harmful to humans, animals or aquatic life” Ga. Comp. R. & Regs. § 391-3-6-.03(5)(e).

Pursuant to O.C.G.A. § 12-5-51, Defendants owed a duty Plaintiff, as well as to all persons whom Defendants’ PFAS might foreseeably harm, to avoid intentionally or negligently causing or permitting any sewage, industrial wastes, other wastes, or other substance or substances to be discharged or deposited in the waters of the State of Georgia.

Defendants owed a duty to Plaintiff, as well as to all persons whom Defendants’ PFAS might foreseeably harm, to exercise reasonable care in their manufacturing procedures and waste-handling and disposal operations to prevent the discharge of toxic PFAS chemicals into the Plaintiff’s water supply, water treatment plant, and related property.

Defendants owed a duty to Plaintiff, as well as to all persons whom Defendants’ PFAS might foreseeably harm, to comply with permits, to comply with state and local laws and regulations, and to prevent the discharge of PFAS into the Plaintiff’s water supply and related property.²⁷

2. Lyerly’s injuries were reasonably foreseeable to all of the Defendants.

The Defendants generally protest that, regardless of the foregoing principles of law, Lyerly is trying to thrust upon the Defendants a “general legal duty to all the world not to subject others to an unreasonable risk of harm.”²⁸ This is not what Lyerly is arguing. Rather than seeking to impose these statutory and common law duties on the world at large, as

²⁷ Pl.’s Am. Compl. ¶ 115-119.

²⁸ See, e.g., Daikin Mot. Dismiss, p.4 (quoting *Dep’t of Labor v. McConnell*, 305 Ga. 812, 816 (2019); 3M Mot. Dismiss, p. 11; Mohawk Mot. Dismiss, p.10.

Defendants have incorrectly framed the claims, Lyerly asserts that the Defendants owe these duties *specifically to Lyerly* due to the foreseeability of Lyerly's injuries to the Defendants. *Cf. Amos v. City of Butler*, 242 Ga. App. 505, 506 (2000) (“[T]he legal duty to exercise ordinary care arises from the foreseeable, unreasonable risk of harm from such conduct.”); *Love v. Morehouse Coll., Inc.*, 287 Ga. App. 743, 744 (2007) (“Duty cannot be divorced from foreseeability.”).

Because of the Defendants' extensive knowledge concerning the persistence, bioaccumulation, and toxicity of PFAS, it was foreseeable to the Defendants that a failure to adhere to their statutory and common law duties of ordinary care would pollute Lyerly's drinking water, thereby causing it harm.²⁹ It was not simply foreseeable, but in fact *known*, to all of the Defendants that: (1) PFAS are Persistent, Bioaccumulative, and Toxic,³⁰ (2) PFAS would be discharged at dangerously high concentrations to the environment through the PFAS Users' everyday manufacturing processes,³¹ (3) these highly mobile “forever chemicals” would enter Lyerly's drinking water supply via direct discharges into groundwater, the environment,³² and (4) Lyerly's conventional drinking water treatment system would be incapable of effectively treating or removing these toxins from finished drinking water.³³

²⁹ See generally Pl.'s Am. Compl. ¶¶ 53, 56, 63–84, 88, 115–20.

³⁰ *Id.* ¶¶ 53, 56, 63–84, 120.

³¹ *Id.* ¶¶ 43, 52–53, 68, 80–84, 103.

³² *Id.* ¶¶ 8, 10, 43, 53, 56–57, 68, 103–04.

³³ *Id.* ¶¶ 43, 65, 81, 82, 88, 103, 127.

In short, the allegations in this case are not, as Defendants suggest, analogous to *CSX Transp., Inc. v. Williams*, in which the plaintiff sought “to extend on the basis of foreseeability the employer’s duty beyond the workplace to encompass all who might come into contact with an employee or an employee’s clothing outside the workplace.” 278 Ga. 888, 890–91 (2005). Such a duty would stretch foreseeability to its limits. Rather, this case is no different than the numerous aforementioned cases in which courts have correctly found a legal duty owed by PFAS Manufacturers and PFAS Users due to the foreseeability of harm to the *specific* plaintiffs. *See, e.g. Parris*, 595 F. Supp. 3d at 1330 (explaining that legal duties were owed by defendants because water contamination was not caused by “*intentional misuse* of PFAS but as a *predictable consequence* of the chemicals’ normal use”).

ii. Lyerly has sufficiently alleged that 3M breached its duties to Lyerly.

3M argues—in a single paragraph and without any supporting law—that, even if it owed a duty to Lyerly, it did not breach that duty as a matter of law.³⁴ First, breach of duty is almost always a question of fact for the jury to decide. *See Leo v. Waffle House, Inc.*, 298 Ga. App. 838, 840 (2009) (noting that breach of duty “is usually a question to be referred to the jury, and should always be so referred, unless the allegations (or evidence) show beyond controversy that there was no such breach of duty.”). Second, Lyerly’s Complaint dedicates numerous paragraphs detailing 3M’s extensive knowledge and attempts to cover up the human and environmental hazards caused by its PFAS products.³⁵ 3M cannot “show

³⁴ 3M Mot. Dismiss, p.11–12.

³⁵ *See generally* Pl.’s Am. Compl. ¶¶ 8, 60–74, 85, 88.

beyond controversy that there was no such breach of duty,” *see Leo*, 298 Ga. App. at 840, and its Motion to Dismiss should be denied.

- iii. **Lyerly has sufficiently alleged that it has suffered—and will continue to suffer—injuries as a direct and proximate result of the Defendants’ breach of their legal duties.**

The PFAS Manufacturing Defendants next argue that Lyerly has not sufficiently alleged either “but for” or proximate causation.³⁶ Notably, Mohawk does not even attempt to advance this argument. And there is a reason why one group of Defendants backs away from these arguments: they have been repeatedly rejected at both the pleading and summary judgment stage.³⁷

Georgia courts consistently refuse to rule as a matter of law on questions of causation and foreseeability at both the pleading and summary judgment stage. This is because causation and foreseeability involve issues of fact left to the jury’s sole discretion. *See Layfield v. Dep’t of Transp.*, 280 Ga. 848, 849 (2006) (internal quotations omitted) (“[I]t is axiomatic that questions regarding proximate cause are undeniably a jury question and may only be determined by the courts in plain and undisputed cases.”); *Ogletree v. Navistar Int’l Transp. Corp.*, 245 Ga. App. 1, 3 (2000) (“As a general rule, issues of

³⁶ See, e.g., 3M Mot. Dismiss, p.6–9; Daikin Mot. Dismiss, p.2, n.2.

³⁷ See *Parris*, 595 F. Supp. 3d at 1331–33 (denying 3M, DuPont, and Daikin motions to dismiss); *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2023 WL 3550505, at *1–2 (denying DuPont motion for summary judgment); App’x A (denying Mohawk motions to dismiss); App’x D (denying Daikin motion to dismiss); App’x E, at 13–14 (denying 3M motion to dismiss); *Ryan*, 708 F. Supp. 3d at 168 (denying 3M motion to dismiss); *Utilities Bd. of Tuskegee*, 2023 WL 1870912, at *11–12 (denying 3M motion to dismiss); *Lonsk v. Middlesex Water Co.*, No. 21CV19808 (EP) (ESK), 2022 WL 16552921, at *5–6 (D.N.J. Oct. 31, 2022) (denying 3M’s motion to dismiss); *Middlesex Water Co. v. 3M Co.*, No. 18CV15366 (EP) (ESK), 2022 WL 16552920, at *6 (D.N.J. Oct. 31, 2022) (denying 3M motion for summary judgment).

causation are for the jury to resolve and should not be determined by a trial court as a matter of law except in plain and undisputed cases.”). For this reason alone, Defendants’ arguments related to lack of causation or foreseeability should be rejected.

Yet, the merits of these arguments fail as well. A close review of the Defendants’ arguments reveals that they rely entirely upon disputed issues of fact and misinterpretations of case law. Not a single court hearing claims related to PFAS pollution has adopted the causation and foreseeability arguments that Defendants are recycling once again. Lyerly asks this Court to do the same and deny Defendants’ Motions to Dismiss.

1. “But for” the PFAS Manufacturing Defendants’ production and sale of PFAS to the PFAS Users, Lyerly’s water would not be polluted.

This case involves an open-and-shut “but for” causation analysis, which is why the Defendants try to reframe that analysis. Lyerly alleges that 3M, DuPont, and Daikin manufactured and sold PFAS or PFAS-containing products to the PFAS Users in and around Chattooga County.³⁸ Lyerly alleges that the PFAS Users applied these same products during their own manufacturing processes—sometimes at the direction of the PFAS Manufacturers—and then discharged PFAS-contaminated wastewater into the environment, thereby contaminating Lyerly’s drinking water supply.³⁹ It is axiomatic that,

³⁸ Pl.’s Am. Compl. ¶¶ 9, 42, 45–51.

³⁹ *Id.* ¶ 42 (“PFAS, and products that contain or degrade into PFAS, are manufactured and sold by the PFAS Manufacturers to the PFAS Users. These products are subsequently discharged both directly and indirectly into the environment and surrounding areas from where Plaintiff collects its drinking water in Chattooga County. Defendants’ discharges of PFAS have infiltrated the groundwater where Plaintiff obtains its drinking water. As a direct result, Plaintiff’s water supply has been contaminated.”).

“but for” the actions of the PFAS suppliers—3M, DuPont, and Daikin—the PFAS in Lyerly’s drinking water would not be there.

2. Lyerly has sufficiently alleged that the PFAS Manufacturing Defendants proximately caused Lyerly’s damages.

The PFAS Manufacturers next argue, as they have in nearly every case they have been sued in over PFAS contamination, that proximate causation cannot be established as a matter of law. As an initial matter, this argument faces an uphill battle under Georgia law: “it is axiomatic that questions regarding proximate cause are undeniably a jury question and may only be determined by the courts in plain and undisputed cases.” *Ontario Sewing Mach. Co. v. Smith*, 275 Ga. 683, 687 (2002); *see also Walker v. Giles*, 276 Ga. App. 632, 646 (2005) (“[T]he ultimate resolution of whether a subsequent act was foreseeable for proximate cause purposes involves a public policy determination that is best left to a jury except in rare cases.”).

Because of this tall hurdle, courts have routinely rejected these same arguments— from some of these same defendants—in PFAS pollution cases:

The Plaintiff claims that the Manufacturing Defendants sold PFAS to Mount Vernon for decades with knowledge that the chemicals are toxic and persistent and would not be properly treated at the Trion WPCP. Indeed, 3M discovered that PFOA would not biodegrade in water treatment plants in 1978, and 3M and Daikin have been aware of PFAS contamination in their own wastewater effluent and sludge since at least 2000. Under these circumstances, the Court cannot say that it was necessarily unforeseeable for third parties to use and dispose of PFAS in a manner that would contaminate surface waters like Raccoon Creek. For these reasons, the Court denies the Manufacturing Defendants’ and Mount Vernon’s Motions on causation grounds.

Parris, 595 F. Supp. 3d at 1333 (emphasis added) (internal citations omitted).

Undeterred, 3M argues that proximate cause cannot exist because of “intervening acts” by the PFAS Users.⁴⁰ The problem for 3M and its co-defendants is that a “proximate cause is not necessarily the last act or cause, or the nearest act to the injury.” *Id.* at 1331 (quoting *Sprayberry Crossing P’ship v. Phenix Supply Co.*, 274 Ga. App. 364, 365 (2005)). Rather, proximate cause encompasses “all of the *natural and probable consequences* of the tortfeasor’s negligence, unless there is a sufficient and independent intervening cause.” *Cowart v. Widener*, 287 Ga. 622, 627–28 (2010) (emphasis added).

Moreover, the only way that an “intervening act” by the PFAS Users or anyone else would prevent liability against the PFAS Manufacturers, is if three requirements are met: (1) “the intervening act must not have been foreseeable by [the PFAS Manufacturers],” (2) the intervening act “must not have been triggered by [the PFAS Manufacturers’] act,” and (3) the intervening act “must have been sufficient by itself to cause [Lyerly’s] injury.” *See Ontario Sewing*, 275 Ga. at 686. The Defendants fail on all three accounts.

First, it was foreseeable to the PFAS Manufacturers—and in fact known in some cases—that: (1) the products they supplied to the PFAS Users contained persistent, bioaccumulative, and toxic PFAS,⁴¹ (2) the PFAS they supplied to the PFAS Users would be discharged via wastewater into the environment through standard manufacturing processes,⁴² (3) the well-known mobility and resistance to degradation characterized by these “forever chemicals” would cause them to continue entering and polluting Lyerly’s

⁴⁰ *See* 3M Mot. Dismiss, p.7–9.

⁴¹ *See, e.g.*, Pl.’s Am. Compl. ¶¶ 8, 79, 88.

⁴² *Id.* ¶¶ 8, 43, 80.

drinking water for years to come.⁴³ In short, the PFAS supplied to the PFAS Users by 3M, Daikin, and DuPont did not end up in Lyerly's drinking water through unforeseeable actions or downstream misuses, but through the "predictable consequence of the chemicals' normal use." *See Parris*, 595 F. Supp. 3d at 1330 ("Plaintiff here does not allege that Raccoon Creek was contaminated due to Mount Vernon's or any other Defendant's *intentional misuse* of PFAS but as a predictable consequence of the chemicals' normal use.").

Second, any subsequent actions by the PFAS Users were "triggered by" the PFAS Manufacturers' initial production and sale of products containing PFAS. Any PFAS products utilized by Mohawk and disposed via wastewater to the environment, which are currently contaminating Lyerly's drinking water, had to begin with the manufacturers of those products—3M, DuPont, and Daikin. It is axiomatic that, without the PFAS suppliers, the PFAS in the Town's water would not be there. The allegations in Lyerly's Complaint—and plain logic—indicate that any subsequent acts by the Mohawk were initially "triggered by" the PFAS Manufacturers.⁴⁴ *See Ontario Sewing*, 275 Ga. at 686. As a result, there are no intervening actions breaking the proximate cause chain from the Chemical Manufacturers to the Town of Lyerly.

Finally, it is at most a question of fact whether any events that occurred after the PFAS Manufacturer Defendants sold their products—including the PFAS Users'

⁴³ *Id.* ¶¶ 56, 63, 65, 78, 111, 120.

⁴⁴ *See generally id.* ¶ 9 (alleging that "[t]he PFAS User Defendants purchased PFAS from the PFAS Manufacturer Defendants"); *see also id.* ¶ 102.

supposedly “intervening acts”—were “sufficient by [themselves] to cause the injury” to Lyerly. *See Ontario Sewing*, 275 Ga. at 686. But the allegations in Lyerly’s Complaint make clear that Lyerly’s injury could not have occurred without the PFAS Manufacturers’ initial negligence. The PFAS Users would not be able to use PFAS products in their manufacturing processes—and generate PFAS-contaminated wastewater—if 3M, Daikin, and DuPont did not first supply them.⁴⁵ And Lyerly would not have the levels of PFAS that it does in its drinking water if the PFAS Users’ wastewater did not contain the PFAS that 3M, Daikin, and DuPont first supplied.⁴⁶ Put differently, if 3M, Daikin, and DuPont were never part of the equation, Lyerly would not be in the situation that it is in today. The Defendants’ Motions to Dismiss based on lack of causation should therefore be denied.

B. Nuisance

The Defendants raise three main arguments for why Lyerly’s nuisance claims should be dismissed. First, Daikin argues that it cannot be held liable under nuisance because there are no allegations of unlawful conduct or lawful conduct in an inappropriate location.⁴⁷ Second, every Defendant argues that they cannot be held liable as a matter of law because they lacked the requisite control over the nuisance.⁴⁸ Finally, 3M, DuPont, and Daikin argue that Lyerly cannot pursue claims for both public and private nuisance.⁴⁹ Numerous courts

⁴⁵ *See id.*

⁴⁶ *Id.* ¶¶ 104–11.

⁴⁷ Daikin Mot. Dismiss, p.12–14.

⁴⁸ *See, e.g., id.* at 8–12; 3M Mot. Dismiss, p.12–14.

⁴⁹ 3M Mot. Dismiss, p. 14–15; Daikin Mot. Dismiss, p.14, n.7; DuPont Mot. Dismiss, p.4.

have rejected these exact arguments at both the pleading and summary judgment stages.⁵⁰ Because no new facts change the analysis, Defendants’ motions to dismiss Lyerly’s nuisance claims should be denied.

i. Whether the Defendants’ actions were unlawful is both irrelevant and a question of fact for the jury to determine.

According to Daikin, Lyerly’s nuisance claims should be dismissed because Lyerly did not allege that Daikin’s actions “were in any way unlawful” or “unsuitable” for the relevant location.⁵¹ This argument is both irrelevant and incorrect.

First, under Georgia law, “[a] nuisance is anything that causes hurt, inconvenience, or damage to another and *the fact that the act done may otherwise be lawful shall not keep it from being a nuisance.*” O.C.G.A. § 41-1-1 (emphasis added); *see also Georgia-Pac. Consumer Prod., LP v. Ratner*, 345 Ga. App. 434, 443–44 (2018) (physical precedent only) (“A nuisance . . . may result from an act that is itself legal, but which nevertheless causes damage to the property of another.”).

Daikin tries to sidestep this authority by citing to cases like *Effingham Cnty. Bd. Of Comm’rs v. Shuler Bros.*, 265 Ga. App. 754, 755 (2004) and *McBrayer v. Governors Ridge Office Park Ass’n, Inc.*, 359 Ga. App. 741, 744 (2021), which state, “[t]hat which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance.” This is an

⁵⁰ *See* App’x A (denying identical arguments raised by Mohawk at the motion to dismiss stage); *Parris*, 595 F. Supp. 3d at 1339–43 (denying identical arguments raised by 3M and Daikin at motion to dismiss stage); *Johnson*, 563 F. Supp. 3d at 1335–39 (denying identical arguments raised by Mohawk at motion to dismiss stage); App’x E, at 14–16 (denying similar arguments raised by 3M at motion to dismiss stage).

⁵¹ Daikin Mot. Dismiss, p.13.

incomplete picture of the law. As explained in *Sumitomo Corp. of Am. v. Deal*, “an act, though lawful in itself, becomes a nuisance when conducted in an illegal manner to the hurt, inconvenience, or damage of another.” 256 Ga. App. 703, 708 (2002). Yet, “illegal” here does not necessarily mean criminal or unlawful. Nor does it mean “in an inappropriate location,” as Daikin contends.⁵² Rather, for purposes of nuisance, “[a] condition may be illegal when it is objectionable only on grounds of causing ‘hurt or inconvenience,’ *i.e.*, when it is a nuisance.” *Id.* (“[T]hough [defendant’s] construction of the detention pond was arguably done in a lawful manner, that fact did not prevent the pond from becoming a nuisance when the increased water flow caused hurt and inconvenience to [plaintiffs].”). This is why the nuisance statute itself defines a “nuisance” as “anything that causes hurt, inconvenience, or damage to another.” O.C.G.A. § 41-1-1. As a result, it is irrelevant whether Daikin acted “unlawfully,” because Lyerly’s Complaint clearly alleges that Daikin’s nuisance caused Lyerly hurt and inconvenience.⁵³ This is all that is required for a nuisance claim under Georgia law. *See id.*

Second, Daikin’s assertion that Lyerly did not allege unlawful conduct is simply incorrect. Lyerly’s Complaint alleges that Daikin violated the Georgia Water Quality Control Act (“GWQCA”) by “intentionally or negligently causing or permitting . . . industrial wastes . . . or other substance or substances to be spilled, discharged, or deposited in the waters of the state, resulting in a condition of pollution. . . .”⁵⁴ *See* O.C.G.A. § 12-

⁵² *See id.*

⁵³ Pl.’s Am. Compl. ¶¶ 124, 132.

⁵⁴ *See id.* ¶¶ 159–65.

5-51; *see also* O.C.G.A. § 12-5-29 (“Water pollution unlawful”); O.C.G.A. §§ 12-5-52, 12-5-53 (establishing civil and criminal penalties for violation of GWQCA). Because the lawfulness of Daikin’s conduct is both irrelevant and disputed, Daikin cannot escape liability based solely on their unilateral assertion that its conduct was “lawful.”

ii. Each Defendant controlled the cause of the nuisance.

Each Defendant argues that Lyerly’s nuisance claim should also fail because the Defendants did not exercise “control” over the nuisance. To advance this argument, Defendants offer an inaccurately narrow interpretation of Georgia law.

According to Defendants, the “control” element of a nuisance claim requires control over the land itself where the nuisance was created.⁵⁵ Despite Defendants’ contentions otherwise, the “control” element of a nuisance claim is not so narrow. Instead, it simply requires “that “[t]he tortfeasor must be either the cause or a concurrent cause of the creation, continuance, or maintenance of the nuisance.” *Sumitomo Corp.*, 256 Ga. App. at 707. Put another way, a defendant need not physically control real property in order to be liable for nuisance; instead, “**control over the cause** of the harm”—i.e., the ability to put an end to or “abate” the nuisance—is all that is required. *Grinold v. Farist*, 284 Ga. App. 120, 122 (2007).

Here, each Defendant was and is a “concurrent cause of the creation, continuance, or maintenance of the nuisance” claimed by Lyerly. *See Sumitomo Corp.*, 256 Ga. App. at 707. As explained in Section A.iii, *supra*, the nuisance at the heart of this case—PFAS

⁵⁵ *See, e.g.*, Daikin Mot. Dismiss, p.9 (arguing that nuisance claim requires “action or condition . . . on land the defendant controls”).

polluting the Town of Lyerly's drinking water—would not exist without (1) the PFAS Manufacturing Defendants' continuous sale of products containing PFAS, with full knowledge that these compounds would impact downstream water systems' drinking water in violation of water quality standards,⁵⁶ and (2) the PFAS User Defendants' continuous use and discharge of products containing PFAS, with full knowledge that these compounds would impact Lyerly's drinking water in violation of permits and water quality standards.⁵⁷

That each Defendant “controlled the cause of the nuisance” is further demonstrated by the fact that each Defendant had the right to abate their contribution to the alleged nuisance: they could stop selling, using, accepting, or discharging PFAS-containing products; they could implement or require the installation of treatment systems sufficient to remove PFAS from wastewater; or they could even warn downstream users and provide funding for treatment systems capable of removing PFAS.

Two federal courts applying Georgia law have reached the same conclusion on nearly identical facts:

Based on the allegations in the Complaint, ***Plaintiff has adequately pled that the Supplier Defendants' actions in continuously selling and supplying the***

⁵⁶ See generally Pl.'s Compl. ¶ 8 (“The PFAS Manufacturer Defendants created and sold these chemicals to industries throughout the State of Georgia, with full knowledge of their products' pernicious effects and likelihood of causing pollution to Plaintiff's water supply. Rather than making efforts to warn or prevent this pollution, these Defendants actively concealed and withheld information from regulatory agencies, customers, and the general public, all the while causing these chemicals to continuously damage Plaintiff.”).

⁵⁷ See, e.g., *id.* ¶ 9 (“The PFAS User Defendants purchased PFAS from the PFAS Manufacturer Defendants and used PFAS and products containing or degrading into PFAS in their industrial processes. These Defendants have continuously caused and permitted PFAS-contaminated waste to be discharged into the environment and surrounding areas from where Plaintiff collects its drinking water. These Defendants do not have authorization to discharge PFAS, and they knew or should have known that their use and discharge of PFAS would pollute Plaintiff's water and cause Plaintiff injury.”).

PFAS chemicals, while knowing of the downstream contamination, were a “cause or concurrent cause” of the creation and continuance of the nuisance. Fielder, 522 S.E.2d at 16

Additionally, while only at the state trial court level, the Court finds persuasive that the Gwinnett County Business Court recently determined that the State of Georgia stated a claim for public nuisance against the suppliers of opioid drugs. There, the court determined that the State “adequately alleged Defendants controlled the cause of the nuisance (the Opioid Crisis) because they controlled the opioids themselves before they were distributed and diverted.” *State of Georgia v. Teva Pharmaceutical Indus. Ltd., et al.*, 19-A-00060-4, at 23 (Gwinnett Cnty. Sup. Ct. Oct. 9, 2019). In that case, the complaint specifically alleged that the supplying defendants had the power to shut off the supply (of opioids) or control their flow to lessen or prevent the harm that was occurring. *Id.* at n. 10. Likewise here, Plaintiff has asserted a slew of allegations related to the Supplier Defendants superior knowledge of the hazards of PFAS chemicals, as well as how the chemicals were in fact contaminating the Rome and Floyd County water supplies for years. . . .

[H]ere, the [Supplier Defendants] clearly had a legal right to abate the nuisance—for example, by refusing to sell their chemicals to manufacturers until those manufacturers established and complied with proper disposal methods.

Johnson, 563 F. Supp. 3d at 1343–44.

[T]he Plaintiff here alleges that the Manufacturing Defendants and Mount Vernon have exercised control over the cause or a concurrent cause of the nuisance. According to the Complaint, the Manufacturing Defendants have for decades sold PFAS to Mount Vernon “without adequate warnings of their dangers when they knew or should have known [the PFAS] would be improperly disposed of and discharged into the Trion WPCP.” Similarly, the Plaintiff alleges that Mount Vernon has discharged wastewater containing PFAS into the Trion WPCP in a manner that it knew or should have known would result in environmental contamination. ***The Manufacturing Defendants and Mount Vernon could thus be liable, at a minimum, for continuing or maintaining the nuisance given that they have a legal right to abate the PFAS pollution but have failed to take appropriate remedial steps in the Plaintiff’s view.*** For example, as the *Johnson* court proposed, the Manufacturing Defendants could refuse to sell PFAS except to customers that have established and complied with proper disposal methods, while Mount Vernon could find alternative means to dispose of its wastewater or eliminate the use of PFAS in its mill altogether. 563 F.Supp.3d at 1338–39, 1343–44.

For these reasons, the *Court denies the Manufacturing Defendants' and Mount Vernon's Motions to Dismiss on the grounds that they have no control over the cause of harm.*

Parris, 595 F. Supp. 3d at 1342–43 (internal citations omitted) (emphasis added).

Meanwhile, even if the “control” element of a nuisance claim requires actual hands-on control over the nuisance-causing instrumentality, which in this case is PFAS, this still presents factual questions inappropriate for resolution at the pleading stage. For example, Lyerly may be able to establish, through discovery, that the PFAS Manufacturers exercised some level of control or direction over the PFAS Users’ manufacturing and disposal processes. But at present, Defendants cannot show that Lyerly has not met its pleading standards under Georgia law. *See Atlanta Women’s Specialists*, 310 Ga. at 333 (“Georgia is a notice pleading jurisdiction. . . . It must be remembered that the objective of the [Civil Practice Act] is to avoid technicalities and to require only a short and plain statement of the claim that will give the defendant fair notice of what the claim is and a general indication of the type of litigation involved; the discovery process bears the burden of filling in details.”).

Finally, it is telling that, across four different motions to dismiss, not a single Defendant has cited a Georgia case where a nuisance claim was dismissed at the pleading stage for “lack of control.” Ironically, those motions to dismiss instead rely on summary judgment cases that provide even further support for Lyerly’s nuisance claim. *See, e.g., Citizens & S. Tr. Co. v. Phillips Petroleum Co.*, 192 Ga. App. 499, 500 (1989) (reversing summary judgment in favor of gas supplier on continuing nuisance claim, despite no control or ownership of property, where supplier had “actual knowledge . . . of the defective

and dangerous condition” of the gas it supplied); *Fielder v. Rice Const. Co.*, 239 Ga. App. 362, 365, 522 S.E.2d 13, 16 (1999) (reversing summary judgment in favor of Health Department and rejecting argument “that its conduct . . . [did] not come within the meaning of a nuisance, because it [did] not own or control the [plaintiffs’] property.”). For all of these reasons, the Defendants’ Motions to Dismiss on the grounds of “lack of control” should be denied.

iii. Lyerly is permitted to bring both public and private nuisance claims.

3M, DuPont and Daikin all argue that Lyerly cannot maintain a claim for private nuisance under O.C.G.A. § 41-1-2. Defendants argue that if there is a nuisance in this case, it is a public nuisance, rather than a private nuisance.⁵⁸

Although O.C.G.A. § 41-1-2 states that “[n]uisances are either public or private,” it does not require Plaintiff to elect whether the nuisance is public or private at this time: “[I]f the complaint sufficiently raises possible theories of recovery, it should not be dismissed.” *Martin v. Brown*, 222 Ga. App. 566, 567, 474 S.E.2d 742, 744 (1996) (citing *Dillingham v. Doctors Clinic, P.A.*, 236 Ga. 302, 223 S.E.2d 625 (1976)); *see also Osprey Cove Real Estate, LLC v. Towerview Construction, LLC*, 343 Ga. App. 436, 442–43 (2017) (“Georgia law permits a plaintiff to proceed to trial on alternative theories of recovery.”). In fact, even summary judgment is not proper solely on the basis that a plaintiff seeks alternative, or even inconsistent, claims. *See Reid v. Reid*, 246 Ga. 592, 592 (1980)

⁵⁸ 3M Mot. Dismiss, p.14–15; Daikin Mot. Dismiss, p.14, n.7; DuPont Mot. Dismiss, p.4.

("[Defendant] is not entitled to summary judgment because [Plaintiff] has . . . set up inconsistent claims. Such pleading is permitted under the Civil Practice Act.")).

Here, Lyerly's Complaint sufficiently raises two possible theories of recovery for nuisance: public nuisance and private nuisance. Under Lyerly's public nuisance theory, Lyerly alleges that Defendants have caused contamination in the environment surrounding Lyerly and Chattooga County, which in turn has caused Lyerly "special damages."⁵⁹ Under Lyerly's private nuisance claim, Lyerly alleges that Defendants have caused contamination to intrude upon and cause damage to Lyerly's own property and property rights—allegations that are "limited in [their] injurious effects" to the Town of Lyerly alone as a public water provider.⁶⁰ *See* O.C.G.A. § 41-1-2. Based upon these allegations, Lyerly has sufficiently stated a claim for both public and private nuisance. *See id.* That Lyerly seeks alternative forms of relief makes no difference at this stage and is not a valid grounds for dismissal. *See* O.C.G.A. § 9-11-8(e) ("A party may . . . state as many separate claims . . . as he has, regardless of consistency and whether based on legal or on equitable grounds or on both.")).

C. Trespass

DuPont, Daikin, and Mohawk argue that Lyerly's trespass claim should be dismissed because DuPont, Daikin, and Mohawk did not "directly" infringe Plaintiff's property rights.⁶¹ Mohawk contends that Mohawk did not have a duty to terminate its

⁵⁹ *See* Pl.'s Am. Compl. ¶¶ 123–28.

⁶⁰ *See id.* ¶¶ 130–37.

⁶¹ Daikin Mot. Dismiss, p.14; DuPont Mot. Dismiss, p.4-5; Mohawk Mot. Dismiss, p.12-13.

wastewater discharges and/or any trespass.⁶² 3M and DuPont contend that Lyerly's trespass claim should be dismissed as duplicative and inadequately pleaded.⁶³ 3M and Daikin contend Lyerly's allegations do not sufficiently identify any intentional act by 3M and/or Daikin to trespass on Lyerly's property.⁶⁴ Daikin contends that Lyerly fails to allege any act by Daikin "unlawful in and of itself."⁶⁵

i. Direct Infringement

All of the Defendants argue that Lyerly's trespass claim should be dismissed because Rome has not alleged that Defendants "directly infringed" upon Rome's property rights.⁶⁶ But Defendants ignore Lyerly's property rights in its water supply: "Running water belongs to the owner of the land on which it runs." O.C.G.A. § 44-8-1. As stated in the amended complaint: "Plaintiff owns and operates multiple wells that draw water from the Conasauga Aquifer." (Pl.'s Am. Compl. ¶ 26.) "Plaintiff owns these wells and the property surrounding the wells and enjoys rights to the water from these wells, as well as property rights over the water which it draws, treats, and sells to its customers." (Pl.'s Am. Compl. ¶ 26.) "Plaintiff owns and occupies property used to serve its water customers, including a water intake site, water distribution system, water treatment plant, offices, and associated facilities and equipment." (Pl.'s Am. Compl. ¶ 130.) "Plaintiff owns land and

⁶² Mohawk Mot. Dismiss, p.13.

⁶³ 3M Mot. Dismiss, p.15-17; DuPont Mot. Dismiss, p.4-5.

⁶⁴ 3M Mot. Dismiss, p.16; Daikin Mot. Dismiss, p.15-16.

⁶⁵ Daikin Mot. Dismiss, p.14-15.

⁶⁶ DuPont Mot. Dismiss, p.4-5; Daikin Mot. Dismiss, p.22; Mohawk Mot. Dismiss, p.12-13. While 3M does not entitle its argument as "direct infringement," 3M makes the same argument by claiming that Plaintiff did not plead trespass correctly. (3M Mot. Dismiss, p.15-17).

water rights which permits it to draw water from the Conasauga Aquifer to provide drinking water to its customers.” (Pl.’s Am. Compl. ¶ 131.)

Under O.C.G.A. § 51-9-7, the pollution of Lyerly’s water supply constitutes “a trespass upon the property.” O.C.G.A. § 51-9-7; (*see also* Am. Compl. ¶ 142). The Amended Complaint further alleges: “As landowner of property through which non-navigable watercourses flow, Plaintiff is entitled to water that is clean, safe, and free of Defendants’ pollution and toxic contamination.” (Am. Compl. ¶ 143.) “Defendants’ intentional acts in manufacturing, supplying, using, and/or discharging PFAS and/or products and waste containing or degrading into PFAS, with full knowledge that would contaminate Plaintiff’s water supply, caused an invasion of Plaintiff’s possessory interest in its property by Defendants’ chemicals, which has affected and is affecting Plaintiff’s interest in the exclusive possession of its property.” (Am. Compl. ¶ 141.) Further, this issue has already been decided in the *Rome* case.⁶⁷

These allegations, in addition to the other allegations in the Complaint, adequately put Defendants on notice that Rome’s trespass claim is based on the entry of Defendants’

⁶⁷ See App’x C, at 7 (“Georgia is a riparian rights state, where landowners have a right to reasonable use of riparian water. See *Stewart v. Bridges*, 249 Ga. 626 (1982). As recognized by the district court in *Johnson v. 3M Company*, 563 F. Supp. 3d 1253, 1307 n.12 (N.D. Ga. 2021), Georgia courts have treated water taken into lawful possession and control as personal property. This is particularly true in the utility context, where water theft has been held to be larceny. See *Reynolds v. State*, 101 Ga. App. 715, 716 (1960) (holding water stolen from city pipes to be larceny and finding “[o]wnership properly laid in the city”). Georgia courts have also held water and electricity sold to customers by utilities to be, respectively, “goods” under the Georgia Commercial Code and “personal property” under Georgia’s products liability statute. See *Zepp v. Mayor & Council of Athens*, 180 Ga. App. 72, 73–77 (1986); *Monroe v. Savannah Elec. and Power Co.*, 267 Ga. 26, 27 (1996). **As such, the Court finds that water drawn by the City for distribution to its customers is the City’s property while in its possession, all the way to its customers’ meters, where it becomes the customers’ property.”**)

chemicals into water owned by Lyerly and resulting pollution and contamination. As such, Lyerly's trespass claim is pleaded sufficiently to survive Defendants' Motions.

ii. No Duty to Terminate

Mohawk contends that Mohawk did not have a duty to terminate its wastewater discharges and/or any trespass.⁶⁸ This is nothing more than a "permit shield" argument, which is discussed in more detail, below, in Section D.iii. Lyerly adopts and incorporates these arguments here, as well as its other arguments related to duty.

Also, Mohawk's own NPDES permit, attached as Exhibit A to its Complaint,⁶⁹ contradicts this argument. Not only does Mohawk have a legal right to stop discharging PFAS in its wastewater, it also has a duty under common law and its own NPDES permit to do so. Mohawk's NPDES permit specifically states as follows: "**Adverse Impact:** The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge."⁷⁰ Mohawk cannot hide behind this permit with respect to liability for trespass or any of Plaintiff's other allegations.⁷¹

⁶⁸ Mohawk Mot. Dismiss, p.13.

⁶⁹ Mohawk attaches, as Exhibit A to its Complaint, its NPDES permit for its Lyerly facility, as well as an Industrial User Permit issued by the City of Summerville. At this time, Plaintiff has made no allegations as it relates to Summerville, Georgia and/or its wastewater treatment plant and, therefore, the Industrial User Permit is irrelevant.

⁷⁰ *Id.* at NPDES Permit pp. 14-15, ¶ A.4.

⁷¹ *Id.* at NPDES Permit p. 18, ¶ B.6.

iii. Duplicative Claim

3M and DuPont contend that Lyerly's trespass claim should be dismissed as duplicative and inadequately pleaded.⁷² As a general concept, "Georgia law permits a plaintiff to proceed to trial on alternative theories of recovery." *Osprey Cove Real Estate, LLC v. Towerview Construction, LLC*, 343 Ga. App. 436, 442–43 (2017); *D.H. Overmyer Co. v. Kapplin*, 122 Ga. App. 51, 53 (1970) (internal citation omitted) ("Inconsistent remedies may be pursued until satisfaction is obtained. This means after, not before, verdict."); O.C.G.A. § 9-11-8(a) ("Relief in the alternative or of several different types may be demanded."). More specifically, "Georgia law allows a plaintiff to seek damages for both trespass and nuisance." *State of Ga. v. City of East Ridge, Tenn.*, 949 F. Supp. 1571, 1583 (1996) (citing *Brand v. Montega Corp.*, 209 S.E.2d 581, 582 (1974) (court allowed both trespass and nuisance claims to go to the jury)). Furthermore, a plaintiff "may properly seek damages for the trespass claim and the nuisance claim." *Id.* (citing *Ellis v. Gallof*, 469 S.E.2d 288, 289 (1996) (affirming jury verdict in favor of plaintiff for both nuisance and trespass claims in a water damage case)).

Therefore, Plaintiff may claim damages for past trespass, continuing trespass and continuing nuisance. *Id.* It is also important to note that Defendants' trespasses are not only ongoing and continuous, but are occurring every single day in the form of a new trespass each and every time PFAS migrates to its water supply. *See* O.C.G.A. § 51-9-7.

⁷² 3M Mot. Dismiss, p.15-17; DuPont Mot. Dismiss, p.4-5.

Defendants 3M and DuPont also incorrectly argue that Plaintiff has “not plead a trespass claim” due to their assertion that Plaintiff has not identified “any intentional act by” the chemical manufacturers to trespass on Plaintiff’s property and/or did not “direct” the PFAS Users’ actions.⁷³ This is nothing more than a “direct infringement” argument that has already been briefed, above. *See* Section IV., C., i., *supra*. Plaintiff adopts and incorporates those arguments here.

iv. Intentional Act

3M and Daikin contend Lyerly’s allegations do not sufficiently identify any intentional act by 3M and/or Daikin to trespass on Lyerly’s property.⁷⁴ However, Lyerly has plead numerous intentional acts, with specificity, related to Defendants’ trespass and the actions of Defendants that have led to such trespass, throughout its Complaint.⁷⁵ Defendants not only intended to manufacture, sell and use PFAS, but Defendants also intentionally concealed the risks to the public, regulators and their customers.⁷⁶ Even after Defendants knew of the risks, they continued this conduct.⁷⁷

v. Lawfulness of Defendants’ Actions

Daikin contends that Lyerly fails to allege any act by Daikin “unlawful in and of itself.”⁷⁸ As with Lyerly’s nuisance claim, the alleged “lawfulness” of Daikin’s actions is irrelevant to whether Lyerly has sufficiently stated a claim for trespass. This is because

⁷³ 3M Mot. Dismiss, p.15-17.

⁷⁴ 3M Mot. Dismiss, p.16; Daikin Mot. Dismiss, p.15-16.

⁷⁵ Pl. Am. Compl. ¶¶ 55-88, 141.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Daikin Mot. Dismiss, p.14-15.

Georgia law does not require that a person act unlawfully—or even wrongfully—to be deemed a trespasser.

Rather, to state a trespass claim, all Lyerly must show is that Defendants acted voluntarily and intentionally, and that their acts caused a wrongful invasion of Lyerly’s property rights. *See Lanier v. Burnette*, 245 Ga. App. 566, 570 (2000). This is why, under Georgia law, a trespasser includes anyone “who, though peacefully or by mistake, wrongfully enters upon property owned or occupied by another.” *Woodstone Townhouses, LLC v. S. Fiber Worx, LLC*, 358 Ga. App. 516, 521–22 (2021).

Daikin’s reliance on *Georgia-Pac. Consumer Prod., LP v. Ratner*, 345 Ga. App. 434 (2018), a summary judgment case, does not change the analysis. In that case, which is physical precedent only, the court found that “[t]here [wa]s no question of fact in this case that the act [of the defendant] was not wrongful.” *Id.* at 444, n.30.

Here, on the other hand, Lyerly has asserted numerous allegations of Defendants’ “wrongful” conduct. For instance, unlike the defendant in *Ratner*, who “undertook numerous efforts to remediate,” *id.* at 441, Lyerly has alleged that the PFAS Manufacturers in this case continued to manufacture and sell PFAS-containing products even after learning of their persistence, bioaccumulation, and mobility in the environment, as well as their toxicity in humans.⁷⁹ Meanwhile, as explained in Section B.i, *supra*, Lyerly *has* alleged that Defendants’ conduct is “unlawful” under the GWQCA. Daikin cannot avoid these well-pleaded allegations simply because it disagrees with them.

⁷⁹ *See* Pl.’s Am. Compl. ¶¶ 75, 78.

D. The Georgia Water Quality Control Act

As they have in previous PFAS litigation in Georgia, the Defendants make a series of attacks on Lyerly's claims under the Georgia Water Quality Control Act ("GWQCA"). Nearly every one of these arguments was considered and rejected by the Floyd County Superior Court in litigation brought by the City of Rome, Georgia, which alleged nearly identical claims of PFAS pollution against many of these same Defendants.⁸⁰

As in that case, Defendants go to extraordinary lengths to read around the plain language of the GWQCA. Defendants cannot, however, escape the conclusion that the court reached in denying Daikin's Motion to Dismiss in the *Rome* case: that "the Georgia Water Quality Act . . . specifically authorize[s] this type of action."⁸¹

i. The GWQCA provides a private right of action to political subdivisions of the State, like the Town of Lyerly.

3M and DuPont—standing apart from their co-Defendants—argue that Lyerly cannot bring a claim under the GWQCA because it is not a "political subdivision of the State."⁸² To make this argument the Defendants rely solely on two sentences from a concurring opinion of the Georgia Supreme Court.⁸³ Of course, concurring opinions are not binding authority, but *Spence v. Rowell* is, and it holds that "[a] municipal corporation is a political division of the State." 213 Ga. 145, 148 (1957); *see also Citizens' Bank of Moultrie v. Rockdale Cnty.*, 156 Ga. 500 (1923) (discussing "a political subdivision, such

⁸⁰ See App'x A.

⁸¹ App'x D, at 4.

⁸² 3M Mot. Dismiss, p.17; DuPont Mot. Dismiss, p.6.

⁸³ *Id.* (citing *City of Thomaston v. Bridges*, 264 Ga. 4, 8 (1994) (Carley, J., concurring specially)).

as a town, township, or county”); *Beazley v. De Kalb Cnty.*, 210 Ga. 41, 42 (1953) (noting “the powers and duties of public officials of every political subdivision of the State, such as counties, cities, and towns”); O.C.G.A. § 23-3-120(3) (defining “[l]ocal government” as “any Georgia county, municipal corporation, . . . town, . . . or other political subdivision of the state . . .”).

Simply put, “political subdivisions of the State” may sue for damages arising out of water pollution under O.C.G.A. § 12-5-51. Because the Town of Lyerly is a “political subdivision of the State,” *see id.*, its claims under the GWQCA are proper.

ii. The PFAS Manufacturers are not immune from liability under the GWQCA simply because they did not directly discharge PFAS.

The PFAS Manufacturing Defendants next argue that they cannot be held liable under the GWQCA because there are no allegations that they themselves “spilled, discharged, or deposited any PFAS into Georgia waters.”⁸⁴ The court in *Parris v. 3M* heard—and rejected—similar arguments. 595 F. Supp. 3d at 1334 (emphasis in original) (refusing to read the GWQCA “so narrowly [as] to cover only *direct* discharges into state waters”).

Moreover, the plain language of the GWQCA defeats this argument. The GWQCA states, in pertinent part, that:

Any person who intentionally or negligently causes or permits any sewage, industrial wastes, or other wastes, oil, scum, floating debris, or other substance or substances to be spilled, discharged, or deposited in the waters of the state . . . shall be liable in damages to the state and any political subdivision thereof . . .

⁸⁴ 3M Mot. Dismiss, p.18; Daikin Mot. Dismiss, p.16; DuPont Mot. Dismiss, p.6.

O.C.G.A. § 12-5-51(a) (emphasis added).

As plainly stated in the statutory text, a defendant violates the GWQCA when it “intentionally or negligently ***causes or permits*** . . . industrial wastes . . . or substances to be . . . discharged . . . in the waters of the state.” *Id.* By narrowly construing the statute to encompass direct discharges only, the Defendants would read the language in bold right out of the text.⁸⁵

Here, Lyerly has alleged that 3M, DuPont, and Daikin intentionally or negligently caused PFAS to be discharged into waters of the State through their manufacture and sale of PFAS and PFAS-containing products to the PFAS User Defendants, with full knowledge that these chemicals would resist degradation and enter the environment through the PFAS Users’ standard manufacturing processes, thereby harming Lyerly.⁸⁶ Furthermore, the Defendants knew that conventional drinking water treatment systems, such as those utilized by the Town of Lyerly, were incapable of treating PFAS.⁸⁷ Despite this knowledge, the Defendants took no steps to prevent these discharges of PFAS.⁸⁸ Based on these allegations, Lyerly has sufficiently stated that a claim under the GWQCA.

⁸⁵ If Defendants’ narrow reading were correct, O.C.G.A. § 12-5-51(a) could simply read: “Any person who intentionally or negligently spills, discharges, or deposits” The Georgia Supreme Court has warned against such attempts to render statutory text superfluous through revisionist interpretations. *See McIver v. State*, 314 Ga. 109, 119 (2022) (emphasis added) (internal citations and quotations omitted) (“*In interpreting statutes, we presume that the General Assembly meant what it said and said what it meant.* . . . [W]e apply the fundamental rules of statutory construction that require us to construe the statute according to its terms, to give words their plain and ordinary meaning, and to *avoid a construction that makes some language mere surplusage.*”).

⁸⁶ Pl.’s Am. Compl. ¶¶ 8, 11, 28, 41–44, 161

⁸⁷ *Id.* ¶¶ 43, 65, 81, 82, 88, 103, 127.

⁸⁸ *Id.* ¶¶ 11, 82–83, 88.

iii. A validly issued permit is not a bar to recovery under the GWQCA when pollutants are discharged in violation of that permit.

Mohawk alone asserts that it could not have violated the GWQCA because it “[c]omplied with its [p]ermits” issued under the GWQCA.⁸⁹ This is, in effect, a “permit shield” defense, which has been rejected time and again by courts overseeing PFAS pollution cases.⁹⁰ Moreover, this “permit shield” argument is premised entirely on Mohawk’s unilateral assumption that it is, in fact, complying with its permits by discharging water contaminated with PFAS. This argument creates two problems for Mohawk.

First, by claiming that it is complying with its operative permits by discharging PFAS in wastewater and stormwater, Mohawk directly contradicts the allegations of Lyerly’s Complaint. For instance, Lyerly alleges that Mohawk has “known or should have known that the release of PFAS into the environment through wastewater, stormwater, and other discharges is prohibited by [its] permits and applicable state and local laws and regulations.”⁹¹ Mohawk seeks to contradict these allegations based on nothing more than its word, and in doing so ask the Court to make factual determinations about permit conditions at the pleading stage. This alone warrants a rejection of Mohawk’s argument.

⁸⁹ Mohawk Mot. Dismiss, p.13.

⁹⁰ *See, e.g., Johnson*, 563 F. Supp. 3d at 1290 (holding that a defendant “cannot make a permit shield argument” when it does not hold a “permit for the point source discharges of PFAS”); *Parris*, 595 F. Supp. 3d at 1319–20.

⁹¹ Pl.’s Am. Compl. ¶ 53.

Second, Mohawk has actually put one of its operative permits into the record as an exhibit to its Answer.⁹² That permit makes clear that “**Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation.**”⁹³ Mohawk’s own permit defeats its “permit shield” argument.

Mohawk actually makes Lyerly’s point for it: *PFAS are not identified in the Defendants’ permits*.⁹⁴ Therefore, when Mohawk discharges PFAS into the environment, it is not acting “pursuant to” or “operating under” its permits, as Mohawk contends. Rather, any discharge of PFAS by Mohawk is made without, or in violation of, a valid permit. And, as Mohawk readily concedes, the GWQCA “prohibits the discharge of harmful or toxic materials in Georgia waters without a permit.” *Save Am. ’s Vital Env’t, Inc. (SAVE) v. Butz*, 347 F. Supp. 521 (N.D. Ga. 1972) (quoted by Mohawk).

Mohawk’s “permit shield” defense depends entirely on whether Mohawk acted in compliance with its permits. This question, in turn, contests the allegations in Lyerly’s Complaint and depends on factual determinations that only a jury can resolve through proper evidence. As a result, Mohawk’s Motion to Dismiss Lyerly’s GWQCA claims should be denied.

⁹² Mohawk Am. Answer Ex. A.

⁹³ Mohawk Am. Answer Ex. A, at 18.

⁹⁴ Mohawk Mot. Dismiss, pp. 1-2, 4, 11-14, 16.

iv. Lyerly's damages are recoverable under the GWQCA.

Mohawk advances one more argument in support of its motion to dismiss Lyerly's claims under the GWQCA. Mohawk asserts that Lyerly cannot seek damages under the GWQCA because Lyerly's damages are not related to cleaning up substances from "waters of the state."⁹⁵ According to Mohawk, because Lyerly "seeks damages associated with the removal of PFAS *from its own water*," the "damages it seeks are not the kind of pollution cleanup costs contemplated by the GWQCA."⁹⁶

The main problem with this argument is that the GWQCA does not, as Mohawk contends, limit damages to cleaning up "waters of the state." The GWQCA states that a violator of the Act:

shall be liable in damages to . . . any political subdivision [of the State] for any and all costs, expenses, and injuries occasioned by such spills, discharges, or deposits. The amount of the damages assessed pursuant to this Code section shall include, but *shall not be limited to*, any costs and expenses reasonably incurred by . . . any political subdivision . . . in cleaning up and abating such spills, discharges, or deposits.

O.C.G.A. § 12-5-51 (emphasis added). In other words, the GWQCA allows recovery of damages for "*any and all* costs, expenses, and injuries occasioned by . . . spills, discharges, or deposits" of pollutants. *Id.* There is no limitation to this category of recoverable damages within the GWQCA. While Lyerly is surely entitled to recover "costs and expenses reasonably incurred . . . in cleaning up and abating such spills, discharges, or deposits" from waters of the state, Lyerly's recoverable damages are explicitly "*not [to] be limited*

⁹⁵ Mohawk Mot. Dismiss, p.14-15.

⁹⁶ *Id.*

to” just this category of damages. *See id.* Because Lyerly’s damages⁹⁷ were “occasioned by [Mohawk’s] . . . discharges or deposits” of PFAS into waters of the state, they are recoverable under the GWQCA. *See id.*

E. The Free Public Services Doctrine

Mohawk makes the standalone argument that Lyerly’s claims should be dismissed under Georgia’s Free Public Services doctrine. It is unsurprising that Mohawk’s co-Defendants opted not to raise this argument: this same argument was rejected not once, not twice, but three separate times in the *Rome* case.⁹⁸ This case should be no different.

Under the Free Public Services doctrine, local governments “cannot recover the costs of carrying out public services from a tortfeasor whose conduct caused the need for the services” unless there is “specific statutory authorization or damage to government-owned property.” *Walker Cnty. v. Tri-State Crematory*, 284 Ga. App. 34, 37 (2007). “The primary rationale behind the doctrine is ‘that state legislatures establish local governments to provide core services for the public and pay for these services by spreading the costs to all citizens through taxation.’” *Id.* (emphasis added) (quoting *Baker v. Smith & Wesson*

⁹⁷ Lyerly’s claimed damages include, but are not limited to: “past and future expenses associated with the testing and monitoring of PFAS contamination levels in Plaintiff’s raw water and drinking water; past and future expenses associated with testing, monitoring, and installing temporary emergency filtration and pumping systems; pilot program costs associated with permanent filtration systems capable of removing Defendants’ PFAS from Plaintiff’s drinking water; past and future costs associated with the purchase, installation, and operation of permanent filtration systems capable of removing Defendants’ PFAS from Plaintiff’s drinking water; costs associated with remediating Plaintiff’s existing treatment and pumping facilities; damage to goodwill and reputation; and lost revenue and sales. In addition, Plaintiff seeks past, present, and future engineering, operating, and maintenance costs. (Pl.’s Am. Compl. ¶ 29.)

⁹⁸ *See* App’x A; App’x C; App’x D.

Corp., No. Civ. A. 99C–09–283–FS, 2002 WL 31741522, at *5 (Del. Super. Ct. Nov. 27, 2002))

Mohawk’s argument should be discarded because (i) Lyerly is not performing a “free public service” (at least not within the meaning of the Free Public Services doctrine) when providing drinking water to its residents or accepting wastewater from customers; and (ii) even if these actions are considered “public services,” the doctrine does not bar Lyerly’s claims because at least two exceptions apply.

- i. Lyerly’s provision of drinking water and treatment of wastewater are neither “free” nor “public services” within the meaning of the Free Public Services doctrine.**

It is well-established under Georgia law that “the supplying of water by a city to its inhabitants for compensation is not an act in its governmental capacity but it does so in a private capacity.” *McCrary Eng’g Corp. v. City of Bowdon*, 170 Ga. App. 462, 465 (1984) (citing *City of Griffin v. Griffin Chero-Cola Bottling Co.*, 35 Ga. App. 779 (1926)). “It has also been held that a water works system for its residents (for domestic and commercial purposes) and charging therefor is engagement by the city in a private, nongovernmental business.” *Id.* (citations omitted); *see also City of Atlanta v. Harbor Grove Apartments, LLC*, 308 Ga. App. 57, 59 (2011) (citation omitted) (“Further, it is well settled that by operating a waterworks, the City is engaged in a private nongovernmental business.”).

In other words, Lyerly’s drinking water and wastewater services are not provided for free to the public at large “by spreading the costs to all citizens through taxation”—the hallmark of the Free Public Services Doctrine. *See Walker Cnty.*, 284 Ga. App. at 37. Rather, Lyerly’s drinking water and wastewater services are provided only to those

customers who pay a fee in exchange for the service, *i.e.*, “the [town] is engaged in a private nongovernmental business.” *City of Atlanta*, 308 Ga. App. at 59. As a result, the Free Public Services doctrine does not apply in this case because the Town of Lyerly’s drinking water and wastewater treatment services are neither “free” nor performed in a “public” capacity.

ii. Even if Lyerly’s provision of drinking water and treatment of wastewater are considered public services within the meaning of the Free Public Services doctrine, at least two exceptions apply.

Even when a local government seeks to recover the costs of carrying out a public service, the Free Public Services doctrine does not apply when one of two exceptions are present: (1) “specific statutory authorization,” and (2) “damage to government-owned property.” *Walker Cnty.*, 284 Ga. App. at 37.

Here, Lyerly’s claims fall within both exceptions: the damages Lyerly seeks to recover are (1) specifically authorized by at least three different statutes, and (2) for damage to government-owned property.

1. The Georgia Code specifically authorizes the recovery that Lyerly seeks.

There are at least three statutes that specifically authorize the damages that Lyerly claims against the Defendants: (1) the GWQCA, *see* O.C.G.A. § 12-5-51; (2) Georgia’s public nuisance abatement statutes, *see* O.C.G.A. §§ 41-2-1, 41-2-2; and (3) Georgia’s trespass statutes, *see* O.C.G.A. § 51-9-7. Lyerly’s claims under these statutory frameworks have already been addressed above. *See* Sections C & D, *supra*. They each provide a statutory basis for Lyerly’s claims and thus the Free Public Services doctrine does not apply.

2. Lyerly alleges damage to government-owned property.

Even where statutory authorization is lacking, the Free Public Services doctrine does not prevent a government from recovering for damage to public property. *See Walker Cnty.*, 284 Ga. App. at 37. In the seminal case for the Free Public Services doctrine, *Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, the Ninth Circuit recognized that “[r]ecovery is permitted . . . where the government incurs expenses to protect its own property” because “[t]hese cases fall into [a] distinct, well-defined category unrelated to the normal provision of police, fire, and emergency services.” *Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 324 (9th Cir. 1983).

Here, Mohawk completely ignores the fact that Lyerly alleges damages to town-owned property, including Lyerly’s water treatment plants and the water itself that Lyerly sells to the public as drinking water.⁹⁹ As recognized by both state and federal courts in PFAS litigation just like this case, a core tenant of Georgia law holds that water providers have an ownership interest in the water that they treat and sell to the public:

Georgia is a riparian rights state, where landowners have a right to reasonable use of riparian water. *See Stewart v. Bridges*, 249 Ga. 626 (1982). As recognized by the district court in *Johnson v. 3M Company*, 563 F. Supp. 3d 1253, 1307 n.12 (N.D. Ga. 2021), **Georgia courts have treated water taken into lawful possession and control as personal property**. This is particularly true in the utility context, where water theft has been held to be larceny. *See Reynolds v. State*, 101 Ga. App. 715, 716 (1960) (holding water stolen from city pipes to be larceny and finding “[o]wnership properly laid in the city”). Georgia courts have also held water and electricity sold to

⁹⁹ *See, e.g.*, Pl.’s Am. Compl. ¶ 140 (“Plaintiff owns land and water rights which permit it to draw water from the Conasauga Aquifer to provide drinking water to its customers. Plaintiff has a possessory interest in the water it withdraws from the Conasauga Aquifer in order to treat and sell to its customers.”); ¶ 141 (alleging “an invasion of Plaintiff’s possessory interest in its property by Defendants’ chemicals”).

customers by utilities to be, respectively, “goods” under the Georgia Commercial Code and “personal property” under Georgia’s products liability statute. *See Zepp v. Mayor & Council of Athens*, 180 Ga. App. 72, 73–77 (1986); *Monroe v. Savannah Elec. and Power Co.*, 267 Ga. 26, 27 (1996). As such, **the Court finds that water drawn by the City for distribution to its customers is the City’s property while in its possession, all the way to its customers’ meters, where it becomes the customers’ property.**¹⁰⁰

Because Lyerly is seeking to recover for damage to government-owned property the Free Public Services doctrine cannot apply.

F. State Preemption

Mohawk alone argues that Lyerly is preempted from asserting its claims in this case because the State of Georgia already regulates Mohawk’s discharge of pollutants under the GWQCA.¹⁰¹ Mohawk’s argument is built on the premise that Lyerly’s lawsuit is somehow in conflict with the State of Georgia’s regulatory authority under the GWQCA.¹⁰² Yet, Mohawk does not cite a single case where a lawsuit filed by a municipality was found to be in conflict with the State’s regulatory authority under the GWQCA. And there is a very simple reason why Mohawk is unable to cite a single case on point. The GWQCA plainly states that common law rights of action are ***not*** preempted:

Nothing in this article shall be construed to alter or abridge any right of action existing in law or equity, civil or criminal, nor shall any provision of this article be construed to prevent any person, as a riparian owner or otherwise, from exercising his rights to suppress nuisances or to abate any pollution.

¹⁰⁰ App’x C, at 7 (emphasis added).

¹⁰¹ Mohawk Mot. Dismiss, p.7-9.

¹⁰² *Id.*

O.C.G.A. § 12-5-46. Not only does the GWQCA not preempt common law rights of action, it actually goes much further and expressly *authorizes* political subdivisions of the State, like the Town of Lyerly, to bring claims just like those asserted in this case:

Any person who intentionally or negligently causes or permits any sewage, industrial wastes, or other wastes . . . or substances to be spilled, discharged, or deposited in the waters of the state, resulting in a condition of pollution as defined by this article, ***shall be liable in damages to the state and any political subdivision thereof*** for any and all costs, expenses, and injuries occasioned by such spills, discharges, or deposits. . . . ***Damages to a political subdivision shall be recoverable in a civil action instituted by such subdivision.***

O.C.G.A. § 12-5-51(a) (emphasis added).

Mohawk's Motion to Dismiss on state preemption grounds should therefore be denied.

G. Punitive Damages and Attorneys' Fees

Each Defendant argues that Lyerly is not entitled to attorneys' fees or punitive damages because its underlying claims fail as a matter of law. However, the inverse is true. Because Lyerly has stated a claim for its underlying tort claims, its request for attorneys' fees and punitive damages should also survive. *See Parris*, 595 F. Supp. 3d at 1339 (“[B]ecause the Court has declined to dismiss the Plaintiff's tort claims as to [a PFAS User defendant], his claims for punitive damages and attorney's fees also survive dismissal.”).

Mohawk also seeks to dismiss Lyerly's request for attorneys' fees and punitive damages by their own account. With regard to attorneys' fees, Mohawk argues that Lyerly has failed to show that Mohawk “has acted in bad faith, has been stubbornly litigious, or

has caused the plaintiff unnecessary trouble and expense.”¹⁰³ With regard to punitive damages, Mohawk similarly argues that Lyerly has not demonstrated that Mohawk “showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.”¹⁰⁴

Under Georgia law, it is the “rare case” that even summary judgment should be granted on issues such as attorneys’ fees and punitive damages, much less a motion to dismiss. *See Brito v. Gomez L. Grp., LLC*, 289 Ga. App. 625, 628 (2008); *Whitaker Farms, LLC v. Fitzgerald Fruit Farms, LLC*, 347 Ga. App. 381, 387, 389 (2018). It is no surprise then that the only case Mohawk cites in support involved a post-trial motion for judgment n.o.v., not a motion to dismiss. *See Stone Man, Inc. v. Green*, 263 Ga. 470 (1993). Under Georgia’s notice pleading standards, Lyerly has more than set forth claims for attorneys’ fees and punitive damages.¹⁰⁵ *Cf. Parris*, 595 F. Supp. 3d at 1339 (“Mount Vernon’s industrial user permit does not shield it from liability for punitive damages since, as explained above, its compliance with that permit is a disputed factual question. Nor can the Court say at this preliminary stage whether Mount Vernon’s conduct falls outside the scope of O.C.G.A. § 13-6-11 . . . In general, the jury should be allowed to decide whether a party has displayed such conduct in the course of the litigation.”).¹⁰⁶

¹⁰³ Mohawk Mot. Dismiss, p. 16.

¹⁰⁴ *Id.* at 15.

¹⁰⁵ Pl.’s Am. Compl. ¶¶ 53-54, 76, 149-155.

¹⁰⁶ 3M and DuPont separately argue that “Plaintiff’s claim for attorney fees and expenses under O.C.G.A. § 13-6-11 should also be dismissed because” that section only applies to plaintiffs “asserting contract claims—not tort claims.” (*See* 3M Mot. Dismiss, p.19, n.4; DuPont Mot. Dismiss p.5, n.4.) In support, 3M and DuPont cite a federal case that *denied summary judgment* on this very argument. *See Willis v. Blunt*, No. 1:21-CV-03334-ELR, 2022 WL 1714857, at *4–5 (N.D. Ga. May 4, 2022). The Defendants’ case simply does not say what the Defendants wish it

V. CONCLUSION

Despite the litany of arguments that Defendants fling at Lyerly's Complaint, Georgia's motion-to-dismiss standard is a bar that Defendants cannot overcome. Lyerly's Complaint provides more than fair notice to the Defendants as to the claims that are asserted against each of them; the factual allegations exceeds the plain statement requirements of O.C.G.A. § 9-11-8; and the legal claims within the Complaint are viable under Georgia law. Lyerly, therefore, asks the Court to deny the Defendants' Motions to Dismiss in full.

Respectfully submitted this 7th day of October, 2024.

DAVIS LUCAS CARTER, LLP

210 East 2nd Ave., Suite 301
Rome, GA 30161
Phone No.: 706-842-7555
adavis@davislucascarter.com

/s/ J. Anderson Davis
J. Anderson Davis
Georgia Bar No. 211077
Counsel for the Town of Lyerly, Georgia

MCCAMY, PHILLIPS, TUGGLE & FORDHAM, LLP

P.O. Box 1105
Dalton, GA 30722
Phone No.: 706-278-4499
rsmalley@mccamylaw.com

/s/ Robert H. Smalley, III
Robert H. Smalley, III
Georgia Bar No. 653405
Counsel for the Town of Lyerly, Georgia

did. In fact, it says virtually the exact opposite, noting that "Georgia's appellate courts have applied O.C.G.A. § 13-6-11 and its predecessors to both contract *and* tort actions since at least 1873." *Id.* at *3.

FRIEDMAN, DAZZIO & ZULANAS, P.C.

3800 Corporate Woods Drive
Birmingham, AL 35242
Phone No.: 205-278-7000
mconn@friedman-lawyers.com
lpatterson@friedman-lawyers.com
ewright@friedman-lawyers.com
mgitschier@friedman-lawyers.com

/s/ Matt Conn
Matt Conn
Admitted pro hac vice
Lee Patterson
Admitted pro hac vice
Ethan Wright
Admitted pro hac vice
Madison M. Gitschier
Admitted pro hac vice

**IN THE STATE COURT OF CHATTOOGA COUNTY
STATE OF GEORGIA**

THE TOWN OF LYERLY, GEORGIA,

Plaintiff,

v.

3M COMPANY, et al.,

Defendants.

CIVIL ACTION FILE NO.:
24SCA4052

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served the foregoing **OMNIBUS RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS** via eService using the Odyssey eFileGA system.

This 7th day of October, 2024.

DAVIS LUCAS CARTER, LLP

210 East 2nd Ave., Suite 301
Rome, GA 30161
Phone No.: 706-842-7555

/s/ J. Anderson Davis
J. Anderson Davis
Georgia Bar No. 211077