IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

RYAN ALLEYNE, ENID V. ALLEYNE, MICHAEL BICETTE, MARCO BLACKMAN, ANISTIA JOHN, GEORGE JOHN, SUSIE SANES and ALICIA SANES, on behalf of themselves and all others similarly situated, Plaintiffs, v. DIAGEO USVI, INC. and CRUZAN VIRIL, LTD., Defendants.	SX-13-CV-143

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS CRUZAN VIRIL, LTD. AND DIAGEO USVI'S JOINT RULE 12(B)(6) MOTION TO DISMISS

INTRODUCTION

Defendants operate rum production and aging facilities on the Island of St. Croix. Their operations release large amounts of ethanol penetrating well beyond the boundaries of their properties onto Plaintiffs' nearby properties. This penetrating ethanol creates an ethanol rich incubator triggering rapid overgrowth of Baudoinia Compniacensis, an unsightly and destructive fungus, on Plaintiffs' property. In this manner, Defendants have negligently operated their facilities trespassing upon Plaintiffs' properties and creating and maintaining a nuisance injuring Plaintiffs' properties and impairing their enjoyment of their property. Plaintiffs filed a class action seeking damages for the harm done and abatement of the nuisance.

On July 26, 2013, Defendants filed a Rule 12(b)(6) Motion to Dismiss asserting two theories claimed to preclude Plaintiffs' Complaint from stating a viable cause of action. First

they claim Plaintiffs' causes of action are preempted by the Clean Air Act ("CAA"). Second, Defendants claim even in the absence of CAA preemption, Plaintiffs' claims must fail because Defendants have no duty to use capture and control technology to prevent or limit the release of ethanol from their operations and Plaintiffs have not plead facts plausibly demonstrating ethanol control technology is reasonably available to capture ethanol prior to release from Defendants' operations. In short, Defendants claim compliance with their Department of Planning and Natural Resources permits, which do not require them to control ethanol emissions in connection with the CAA, is a complete defense. Neither theory supports dismissal.

On August 20, 2013, the Third Circuit reversed one of the primary decisions Defendants rely upon in their preemption argument, and held that the CAA does not preempt state common law tort causes of action based on the law of the state where the Defendants' operations are conducted. Kristie Bell v. Cheswick Generating Station, GenOn Power Midwest, L.P., __ F.3d ___, 2013 WL 4418637, 2013 U.S. App. Lexis 17283 (3rd Cir., Aug. 20, 2013) ("Bell") (attached at Exhibit 1). Just a few days before this motion was filed, the Second Circuit also held the CAA does not preempt state tort law causes of action. In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., __ F.3d ___ , 2013 WL 3863890, 2013 U.S. App. Lexis 15229 (2d Cir. July 26, 2013) ("MTBE") (attached at Exhibit 2). On August 28, 2013, the Franklin Circuit Court in Kentucky rejected a virtually identical preemption defense argument in Mills v. Buffalo Trace Distillery, No. 12-CI-00743 (Franklin Cir. Ct., Ky. Aug. 28, 2013) (attached at Exhibit 3).

Defendants' other arguments raise factual issues not suitable for a motion to dismiss.

ARGUMENT

I. STANDARD OF REVIEW

A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." F.R.C.P. 8(a)(2); Bermudez v. V.I. Tel. Corp., 54 V.I. 174, 178

(Jan. 20, 2011). A court "'may grant the motion to dismiss only if, accepting all factual allegations as true and construing the complaint in the light most favorable to plaintiff, it determines that plaintiff is not entitled to relief under any reasonable reading of the complaint.'" Magras v. De Jongh, 2013 WL 692510, 3 (D.Virgin Islands) (February 26, 2013) (copy attached at Exhibit 4).

Rule 8's pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation," but it does not require "detailed factual allegations." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Id. While legal conclusions will not be treated as factual allegations, allegations of fact must be accepted as true. Id. at 1949-1950; Bermudez, 54 V.I. at 179. A complaint should be dismissed under Rule 12(b)(6) only if the facts plaintiff alleges, if established at trial, would still not entitle the plaintiff to relief. Whether the alleged facts are provable, or whether the plaintiff will ultimately prevail on the merits, is immaterial. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 n.8 (2007). Where an initial complaint fails to contain sufficient facts to satisfy the "plausible on its face" requirement, the plaintiff should be permitted an opportunity to amend the complaint to add the necessary facts unless it is obvious any amendment would be inequitable or futile. Magras, 2013 WL 692510 at 9.

II. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED

The Third Circuit's recent decision in Bell, ___ F.3d ___, 2013 WL 4418637, 2013 U.S. App. Lexis 17283 (3rd Cir., Aug. 20, 2013) refutes Defendants' preemption argument at every

turn. Defendants in their Memorandum prominently rely upon the lower court's opinion in Bell,[1] which was ***reversed*** by on August 20, 2013. Under the Third Circuit's Bell opinion, source state tort claims of nuisance, negligence and recklessness and trespass are ***not preempted*** by the Clean Air Act.

Like the present case, Bell is a class action filed by the defendant's neighbors. The plaintiffs alleged the defendant's releases of malodorous substances and particulates penetrated beyond its property line into the surrounding neighborhood, settling on and causing damage to their neighboring properties. They filed suit seeking compensatory and punitive damages under the state common law tort theories of nuisance, negligence and recklessness and trespass. Bell, 2013 WL 4418637, 4; 2013 U.S. App. Lexis 17283, 11. The Bell complaint alleged the plant operators knew of the harmful discharges of the particulates, yet continued to operate the plant "without proper or best available technology, or any proper air pollution control equipment." Id., 2013 WL 4418637, 3; 2013 U.S. App. Lexis 17283, 10. Like Diageo and Cruzan, the plant argued its emissions were subject to comprehensive regulation under the CAA and it owed no extra duty to the plaintiffs under state tort law. Id., 2013 WL 4418637, 1; 2013 U.S. App. Lexis 17283, 2.

The Third Circuit, like other courts, found there is no meaningful difference between the CAA and the Clean Water Act. Id., 2013 WL 4418637, 6-7; 2013 U.S. App. Lexis 17283, 18-23. Thus, the Supreme Court's decision in International Paper Co. v. Ouellette, 479 U.S. 481 (1987) finding that the federal environmental statute does not preempt tort claims under the law of the source state is controlling. Bell, 2013 WL 4418637, 6-7, 1; 2013 U.S. App. Lexis 17283, 18-23. The Third Circuit held, "[b]ased on the plain language of the Clean Air Act and

[1] Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314 (W.D. Pa. Oct. 12, 2012) (reversed).

controlling Supreme Court precedent, we conclude that such source state common law actions are not preempted." Id., 2013 WL 4418637, 1, 7, 2013 U.S. App. Lexis 17283, 2, 23.

While the CAA does create a comprehensive plan for air pollution, it is one which places primary responsibility for pollution prevention and control on the individual states and local governments. Id, 2013 WL 4418637, 1; 2013 U.S. App. Lexis 17283, 3. It anticipates a parallel track of state pollution law which may impose stricter standards than the federal minimum standards. Id. That parallel track of source state law includes tort causes of action. State tort causes of action including negligence, nuisance and trespass do not conflict with the regulatory process established under the CAA. Id. 2013 WL 4418637, 8; 2013 U.S. App. Lexis 17283, 11, 23. The limited tension with the permit system which may arise from source state tort actions imposing separate standards does not frustrate Congressional intent or goals and cannot support preemption. Id. 2013 WL 4418637, 8; 2013 U.S. App. Lexis 17283, 17, 25-26. The Third Circuit specifically considered American Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011) and held that nothing in the Supreme Court's reasoning altered its analysis applying Ouellette. Bell at 2013 WL 4418637, 9, n. 7; 2013 U.S. App. Lexis 17283, 23-24, n.7.

Accordingly, when the Supreme Court recognized in Ouellette "that the requirements placed on sources of pollution through the 'cooperative federalism' structure of the Clean Water Act served as a regulatory floor, not a ceiling, and expressly held that states are free to impose higher standards on their own sources of pollution, ***and that state tort law is a permissible way of doing so***" that rationale was equally applicable to cases such as Bell, and the present one. Bell, 2013 WL 4418637, 8, 2013 U.S. App. Lexis 17283, 26 (emphasis added).

In addressing the plain language of the Clean Air Act which permits state common law

actions, the Third Circuit pointed to the "citizen suit savings clause" provision, *see* 42 U.S.C. § 7604(e):

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute of common law to seek enforcement of any emission standard or limitation or to see any other relief (including relief against the Administrator or a State agency).

The Third Circuit also pointed to the "Retention of State authority," also referred to as the "states' savings clause," *see* 42 U.S.C. § 7416:

> Except as otherwise provided... nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution...

Comparing these provisions to the Clean Water Act provisions at issue on Ouellette, the Bell court noted that, "[i]f anything, the absence of any language regarding state boundaries in the states' rights savings clause of the Clean Air Act indicates that Congress intended to preserve more rights for the states, rather than less." Bell, 2013 WL 4418637, 6, 2013 U.S. App. Lexis 17283, 19.

The Third Circuit concluded:

> "In all pre-emption cases... we start with the assumption that the... powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Medtronic, Inc., v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). We see nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law tort claims. If Congress intended to eliminate such private causes of action, "its failure even to hint at" this result would be "spectacularly odd." Id. at 491. The Supreme Court's decision in Ouellette confirms this reading of the statute. Accordingly, we hold that the Class's claims are not preempted. We will reverse the decision of the District Court and remand this case for further proceedings.

Bell, 2013 WL 4418637, 9, 2013 U.S. App. Lexis 17283, 27-28.

Defendants also cite as support the lower court's decision in U.S. v. EME Homer City Generation L.P., 823 F.Supp.2d 274 (W.D. Pa. 2011), an opinion that was decided by Judge

Terrence F. McVerry of the Western District of Pennsylvania, the same judge who decided the lower court's Bell decision that was subsequently reversed. Nearly all the preemption discussion in the lower court's EME Homer City decision is repeated virtually verbatim and then greatly expanded upon in the district court's Bell opinion. The reversal of Bell has the effect of overruling EME Homer City *sub silento*. That result is further reinforced by the Third Circuit's decision in United States v. EME Homer City Generation L.P., ___ F.3d. ___, 2013 U.S. App. LEXIS 17477 (3d Cir. Aug. 20, 2013) dismissing the state claims as forfeited rather than preempted.

The Third Circuit is not alone in its holding that the CAA does not preempt state causes of action under the law of the source state. The Third Circuit pointed out the Sixth Circuit applying Ouellette has held in Her Majesty the Queen in Right of the Province of Ontario v. Detroit, 874 F.2d 332, 342-343 (6th Cir. 1989), the CAA "displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute." 2013 U.S. App. Lexis 17283,*20.

The Second Circuit also recently held in MTBE, supra, that the CAA did not preempt tort claims of local property owners, including trespass, negligence and nuisance claims. MTBE, 2013 U.S. App. Lexis 15229, *5-*10, *55-56. In MTBE, the Second Circuit affirmed a jury verdict against Exxon Mobil under state tort law, including claims of negligence, nuisance and trespass, for contaminating city-owned water wells. The plaintiff, a city acting as a property owner, had sued Exxon for contaminating its property with MTBE, a gasoline additive that had been approved for use by the EPA. The Second Circuit made it clear nothing in the CAA creates a right of the operator to use the most cost-effective and practical means of complying with the CAA or absolves an operator from having a duty to use other means to prevent its operations

from damaging others. Id. at *61-63, *67, *70, *72. It upheld a verdict of almost $105 million against Exxon for damages to other property owners resulting from its use of the chemical MTBE, which harmed its neighboring property owners, instead of other alternatives to meet its obligations under the CAA.

Although Defendants submitted as "supplemental authority" a Kentucky Jefferson Circuit state trial court ruling finding preemption,[2] more recently, a Kentucky Franklin Circuit trial court ***rejected*** the preemption argument and ruled that the CAA did not preempt source state common law tort actions of negligence, nuisance and trespass against whiskey distillers based on ethanol emissions not capped by their operating permits. Mills, supra (Ex. 3).

The Jefferson Circuit trial judge who found preemption was not aware of the Second Circuit's MTBE opinion which was decided just four days earlier, on Friday, July 26, 2013, nor did she have the benefit of the Third Circuit's Bell decision, which was issued on August 20, 2013, after her order. The heart of the ruling was her erroneous conclusion that there has been no "authority decided since American Elec. Power that supports the argument that state tort claims are not preempted."[3] However, since American Elec. Power, both the Third Circuit and the Second Circuit have held that state common law claims for, *inter alia*, negligence, nuisance and trespass, are not preempted by the Clean Air Act.

This case law clearly refutes Defendants' claims that recent case law demonstrates the CAA preempts Plaintiffs' state law tort claims.

III. VIRGIN ISLANDS LAW APPLYING TO PLAINTIFFS' TORT CAUSES OF ACTION

As an initial matter, Defendants appear to have misstated the law of the Virgin Islands in regard to the applicability of the Restatement (Third) of Torts. Banks v. International Rental &

[2] See Defendants' "Notice of Supplemental Authority" filed August 2, 2013.
[3] Exhibit 1, p. 3 appended to Defendants' "Notice of Supplemental Authority."

Leasing Corp., 55 V.I. 967, 976 (V.I. 2011) does not hold that the Restatement (Third) of Torts is applicable to all local tort actions in the Virgin Islands. Banks holds 1 V.I.C. § 4 does not mean that the Virgin Islands has necessarily adopted the most recent version of a Restatement approved by the American Law Institute. In particular it does not delegate to the American Law Institute the power to change Virgin Islands law. In areas of the law where the Restatement (Second) of Torts has received widespread acceptance in Virgin Islands courts, it takes a considered decision of the Supreme Court of the Virgin Islands to change Virgin Islands law from the Restatement (Second) of Torts to the Restatement (Third) of Torts. 55 V.I. at 979-981. Banks acknowledged that courts generally do not adopt the Restatement (Third) of Torts as a whole, but typically consider adopting specific sections. In Banks, the Supreme Court of the Virgin Islands, after careful consideration, decided to replace the Restatement (Second) of Torts' products liability rule that lessors of chattels cannot be held strictly liable for defects in the chattels with the Restatement (Third) of Torts' products liability rule that lessors may be held strictly liable for injuries resulting from a defective product. 55 V.I. at 981-984. Banks in no way changes the existing local law of the Virgin Islands applying the Restatement (Second) of Torts to causes of action for negligence, nuisance and trespass. Bermudez v. V.I. Tel. Corp., 54 V.I. 174 (2011); Henry v. St. Croix Alumina, LLC, No. 1999-CV-0036, 2009 U.S. Dist. Lexis 80830 (D.V.I. Aug. 28, 2009); Boyd v. Latalladi, 8 V.I. 173 (1971).

A. Duty To Control Ethanol Emissions

Diageo and Cruzan take the position that the only possible source of a duty on their part to control ethanol emissions from their operations to prevent or limit the harmful effects upon neighboring properties are the requirements imposed by their permits issued in conjunction with the CAA. However, this position is clearly not true under the common law. There has long been

an independent common law duty, even before enactment of the CAA, imposed upon industry to monitor the effects of their operations upon neighboring property and to conduct their operations in a manner which controls emissions to prevent harm to neighboring property. See Renken v. Harvey Aluminum, Inc., 226 F.Supp. 169 (D. Or. 1963) (cited in the Restatement (Second) of Torts §821D comment f) (aluminum plant had duty to prevent fluoride gasses from escaping from its plumes and causing damage to property and trees in nearby orchards); see also Lunda v. Matthews, 46 Ore. App. 701, 705, 613 P.2d 63 (1980) (collecting cases holding that emissions from a neighboring plant directly or indirectly depositing airborne substances on a person's property is an invasion of that person's right to the exclusive possession of land). Very recently, the Franklin Circuit Court in Kentucky, in a very similar case, held that the general common law duty requiring every person to exercise ordinary care in his activities to prevent foreseeable injury is sufficient to impose a duty upon distilled spirits producers to control their ethanol emissions to prevent foreseeable injury to neighboring properties. Mills, Opinion and Order denying Motion to Dismiss, p. 7 (Ex. 3). This duty includes the duty to use technology to capture emissions before they are released into air to travel to neighboring properties. Renken, supra (ordering installation of pollution reduction hoods and issuance of an injunction if the hoods were not installed); Mills, supra at p. 7 (recognizing the availability of such a remedy at the appropriate time); see also Restatement (Second) Torts § 830 and illustrations. This duty has been found sufficient to support liability for both compensatory and punitive damages. Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc., 500 F. Supp. 984 (D. Or. 1980) (connected case to Renken).

The common law duty to take reasonable preventive measures to limit or avoid the negative effects of one's activities on neighbors and their property is recognized in Restatement

(Second) Torts § 830 and its comments:

> Whether a particular invasion could practicably be avoided by the actor is a question of fact and must be determined in each case upon the circumstances of that case. The question is not whether the activity itself is an improper, unsuitable or illegal thing to do in the place where it is being carried on, but whether the actor is carrying it on in a careful manner or at a proper time. The problem is whether the actor could effectively and profitably achieve his main objective in such a way that the harm to others would be substantially reduced or eliminated. If he could, then his failure to avoid the harm deprives his conduct of the utility it might otherwise have, and the interference is unreasonable as a matter of law.

Id. comment c.

Much of Diageo and Cruzan's memorandum is devoted to their argument that no practical means exists for aging their rum which will reduce or eliminate their ethanol emissions without negatively affecting the quality of their product. They cite many documents outside the pleadings in their effort to support this factual argument which should not be considered on a Rule 12(b)(6) motion. What matters on this motion are the facts alleged by the Plaintiffs which must be taken as true at this point. Twombly, 550 U.S. at 570.

The Complaint alleges that reasonable, practical and cost-effective means of abating the harm caused by Defendants' ethanol emissions exist. (Complaint at ¶¶29, 82, 88). It also alleges that the financial burden of providing compensation for the harm caused by Defendants' uncontrolled emissions is not so great as to threaten the continuation of their business. (Id. at ¶82). These are not conclusory allegations. They are supported by the following additional factual allegations:

- Several different ethanol-capture technologies have been developed since 2005 that are 100% efficient in eliminating ethanol releases from aging warehouses. (Id. at ¶136);
- Many of the ethanol-capture technologies developed since 2005 have been determined to be cost-effective, including regenerative thermal oxidizers (RTO).[4]

[4] Contrary to Defendants' arguments (see Defs. Brief, p. 1), Plaintiffs are not asking the Court to

(Id. at ¶136);

- RTO's have no fuel cost because they are fueled by the ethanol they are designed to capture and convert to CO2 and water vapor. (Id. at ¶137);
- RTO's capture 100% of a facility's ethanol emissions. (Id. at ¶139);
- In 2005, Richard Whitford of Adwest Technologies, designed a system which totally captures all ethanol emissions from warehouses where brandy is stored in oak wood barrels for aging. The design process for this system took into consideration and accommodated concerns of four different brandy companies in California without sacrificing the natural aging process of the brandy. (Id. at ¶¶140, 141);
- There have been no ongoing costs to power the RTO's because the RTO's utilize the ethanol emitted from the brandy aging barrels as a source of power. (Id. at ¶142);
- To date, six RTO's are operating without auxiliary fuel (natural gas or propane), collecting 100% of the ethanol emissions and achieving 99% ethanol destruction rate efficiency without sacrificing quality. (Id. at ¶142);
- One brandy maker, Gallo, applied for Emission Reduction Credits based on the ethanol captured and destroyed by its RTO technology. (Id. at ¶143);
- These brandy manufacturers have not reported any diminished product quality following the adoption of technology capturing 100% of ethanol emissions from their warehouses and continue to use this technology today. (Id. at ¶145);
- Any differences between the design of rum and brandy aging warehouses would not impede the application of Adwest's RTO technology to rum aging warehouses and achievement of the same results achieved with the brandy aging warehouses. (Id. at ¶147);
- A similar system could achieve a 100% reduction of ethanol emissions with a 99% destructive rate for Defendants' operations without sacrificing quality which would abate the nuisance and continuing trespass for all Plaintiffs and others similarly situated. (Id. at ¶146).

The Complaint also alleges that despite the existence of reasonable, practical, cost-effective means of controlling their emissions, Defendants have knowingly refused to implement any

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order Defendants to use RTO technology or demanding that RTO technology specifically be used. RTOs are alleged to be only one of several cost-effective ethanol emissions technologies developed in the last eight years which Defendants have refused to even consider trying or testing. (See Complaint ¶136). The successful use of RTOs in the brandy industry is alleged as an example supporting the plausibility of Plaintiffs' allegation that cost-effective efficient ethanol emissions control technology is available which Defendants could use without affecting the quality of their product.

controls despite knowledge of the harm their emissions are causing and despite being notified and asked to control their emissions. (Id. at ¶¶91-92).

For purposes of this motion, these alleged facts must be taken as true including the allegations that several cost-effective methods of controlling ethanol emissions have been developed in the last eight years and that what worked in the brandy industry could work as well in other distilled spirits industries including the rum industry. Defendants clearly intend to try to refute these factual allegations at trial relying on documents published decades ago, but they cannot contest the truth of these facts on a Rule 12(b)(6) motion.[5] If Plaintiffs can prove these facts, they are sufficient to support the existence of a duty on the part of the Defendants under the common law as set forth in the Restatement (Second) of Torts to use some sort of emissions control technology to mitigate or eliminate the harm caused to others by their operations, and to pay compensation for the harm caused by their refusal to do anything to control their ethanol emissions. This is not a new found duty, and it requires no state or federal statute, regulation, or ordinance to support it as claimed by Defendants.

B. Nuisance

Bermudez v. V.I. Tel. Corp., supra, addresses what is required to survive the plausibility standard in pleading a private nuisance claim under Virgin Islands law. 28 V.I.C. § 331 authorizes a private cause of action for damages and a warrant to abate a nuisance where a person's property, or his enjoyment of his property, is affected by a private nuisance. After examining the history of the Virgin Islands nuisance statute, the court concluded the statute is a

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[5] Plaintiffs dispute Defendants' claim that the EPA has consistently taken the position that because of negative effects on product quality and costs there is no duty to implement capture and control technology at distilled spirits aging facilities. (See Defs. Brief, p. 2). But this motion is not the time for that factual dispute. It would be error to require Plaintiffs to plead evidence proving that several different efficient and cost effective ethanol-capture technologies have been developed since 2005. Pitre v. Cain, 131 S. Ct. 8, 9, 178 L. Ed. 2d 342 (2010).

declaration of the common law tort of private nuisance which is to be interpreted in accordance with the Restatement (Second) of Torts. Bermudez, 54 V.I. at 192.

> Under the Restatements, private nuisance is an "invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts § 821D (1977). Use and enjoyment of one's land is defined broadly to include "actual present use of land for residential, agricultural, commercial industrial and other purposes, but also ... the pleasure, comfort, and enjoyment that a person normally derives from the occupancy of land." Id. § 821D cmt. b. The invasion complained of must "cause[] significant harm, of a kind that would be suffered by a normal person in the community ... . " Id. § 821F. That harm must be "of importance, involving more than slight inconvenience or petty annoyance... . [T]here must be a real and appreciable interference ... . " Id. § 821F cmt. c. Noise and offensive smells are two examples of invasions that might affect one's enjoyment of property. See id. § 824 cmt b.
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> In addition to being harmful and interfering, an invasion must also be both intentional and unreasonable. Id. § 822. An invasion is intentional when the person causing it "knows that [the invasion] is resulting or is substantially certain to result from his conduct." Id. § 825(b). An invasion is unreasonable when either "(a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." Id. § 826(a)-(b). An invasion may also be unreasonable "if the harm is significant and it would be practicable for the actor to avoid the harm in whole or in part without undue hardship." Id. § 830.

Id., 54 V.I. at 193. As an alternative to proving the invasion is intentional and unreasonable, nuisance can be established by proving the invasion is "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." Henry v. St. Croix Alumina, LLC, No. 1999-CV-0036, 2009 U.S. Dist. Lexis 80830, *21, (D.V.I. Aug. 28, 2009) (citing Restatement (Second) of Torts § 822).

Defendants argue Plaintiffs' Complaint fails to plead the nuisance element of "unreasonableness" of the invasion. Bermudez and the Restatement (Second) of Torts establish at least three ways of showing an invasion is unreasonable. First, the gravity of the harm may outweigh the utility of the actor's conduct. Bermudez, 54 V.I. at 193 (citing Restatement

(Second) of Torts§ 826(a)). Second, the "harm caused [may be] serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." Id. at 193 (citing Restatement (Second) of Torts § 826(b)). Third, the "harm [may be] significant and it would be practicable for the actor to avoid the harm in whole or in part without undue hardship." Id. (citing Restatement (Second) of Torts§ 830). Plaintiffs' Complaint pleads all three of these alternatives.

First, the Complaint alleges facts showing the harm to neighboring properties caused by Defendants' uncontrolled ethanol releases is serious and seriously interferes with the use and enjoyment of the affected property. Defendants' release of thousands of tons of uncontrolled ethanol emissions from their operations into the surrounding community results in the presence of high concentrations of the gas ethanol on the properties of Plaintiffs and similarly situated property owners. (Complaint at ¶¶25-27, 33-36). This ethanol released by the Defendants is known to combine with condensation on surrounding property causing a fungal spore to rapidly grow into the living organism *Baudoinia compniacensis*, visible to the naked human eye on Plaintiffs' property. (Id. at ¶30). The fungus caused by Defendants' uncontrolled emissions accumulates on real and personal property, including metal, vinyl, concrete, wood, trees, plants, shrubs, vegetables and fruit in the vicinity of Defendants' operations. (Id. at ¶¶ 2, 26, 33-36).

The unnatural accumulation of *Baudoinia compniacensis* is unique to properties surrounding ethanol emitting operations such as the Defendants' rum production. The very visible unsightly fungus appears as a black stain, black dots, black film or soot on homes, businesses, vehicles, trees, plants, fruits, vegetables and anything else left outside. It has also appeared on the inside of Plaintiffs' homes. (Id. at ¶¶3-4, 32, 37, 45, 47). Efforts to remove the fungus accumulations are time-consuming and expensive, requiring the use of caustic chemicals

that damage property. The process of removing the fungus requires the Plaintiffs to work with these caustic chemicals in perilous positions. Even with such extreme measures, the fungus cannot be completely removed from the surfaces on which it accumulates including gutters, siding, roofing, fencing, vehicles and any other surface exposed to the ethanol. Because Defendants' operations are constantly releasing uncontrolled ethanol emissions into the surrounding community causing additional fungal growth, the extreme methods required to remove the fungus must be repeated frequently. Many affected property owners are required to put up with the constant presence of the fungus because they do not have the physical or financial capability and/or equipment necessary to remove the constant accumulations of fungus on their property (Id. at ¶¶3-4, 38-43).

Both the fungus and the measures required to remove it cause early destruction and weathering of surfaces affected by the fungus. (Id. at ¶¶3-5, 38, 43). The fungus accumulates on trees, shrubs and plants, interfering with natural maturation of the plants as well as any fruit or vegetable growing on the plant life, rendering them unsightly, undesirable, inedible and/or unmarketable. Because the fungus cannot be removed from trunks, branches and foliage of plant life, affected plant life must be replaced at great expense. (Id. at ¶¶3-5, 37-39)

The fungus caused by Defendants' uncontrolled releases of ethanol interfere with the normal use, pleasure, comfort, and enjoyment a person normally derives from the occupancy of land in several ways. The sight of the fungus is as offensive as noxious smells or loud noises, and that unsightliness cannot be completely removed even with extreme cleaning measures. Much time and money must be spent on constantly cleaning of anything and everything exposed to the outside air because continuing ethanol emissions cause continuous growth of the fungus.

In evaluating the gravity of the harm to determine unreasonableness, the continuous

nature of the uncontrolled release of ethanol producing a constant state of fungal growth which must be repeatedly removed exacerbates the gravity of the harm. Restatement (Second) Torts § 827 comment c. Where, as here, "the invasion involves physical damage to tangible property, the gravity of the harm is ordinarily regarded as great even though the extent of the harm is relatively small." Id. comment d. The extent of the physical damage alleged to Plaintiffs' property and plants is not relatively small to begin with, and its continuous nature further exacerbates the great physical harm caused. Id.

Next, the Complaint alleges facts showing the harm from the fungus has been intentional because Defendants have known the fungus and damage from the fungus was substantially certain to result from the uncontrolled releases of ethanol from their operations. It is alleged that at some time prior to 2002, Diageo looked into the cause of the accumulation of the black fungus on a variety of real and personal properties in the vicinity of its distilling and aging operations and acknowledged that the fungus was caused by the ethanol produced and released in its operations. Diageo is also alleged to have known the fungus would cause unsightly damage requiring frequent cleaning and maintenance, such as painting, and that the damage would cause neighboring property owners to make claims for compensation. (Id. at ¶¶ 67, 83, 97). Cruzan is alleged to have been aware of the fungus in the vicinity of its operations and that it was caused by its operations. Cruzan is also alleged to have known of scientific research on the problem and the identification of the fungus caused by distilled spirits operations as *Baudoinia compniacensis* no later than 2007. (Id. at ¶¶ 68-69, 83, 98-99). Thus, both Defendants have known their operations were substantially certain to cause the accumulation of the fungus on neighboring properties for many years. Therefore, the Complaint alleges facts establishing the intent element. Restatement (Second) Torts § 825.

The Complaint alleges the harm caused is so serious that Plaintiffs and similarly situated property owners should not be required to bear the harm without compensation. (Id. at ¶ 85). It alleges the cost of compensating Plaintiffs for the harm that Defendants' actions have caused would not create a financial burden for Defendants such as to make continuation of their business infeasible. (Id. at ¶¶ 68). Defendants' own description of their operations in their memorandum in support of this motion demonstrates their operations in St. Croix generate substantial financial benefits. While they claim there is no practical means of controlling their emissions, they have not claimed that compensating neighboring property holders for the damage caused by their operations would make the continuation of their operations on St. Croix financially infeasible. It is unreasonable for a business to expect to be allowed to cause such damage to its neighbors without compensating the neighbors for the damage it is causing. Bermudez, supra; Restatement (Second) Torts § 826(a)-(b); § 829A, Illustration 2; Jost v. Dairyland Power Co-op., 45 Wis.2d 164, 177-178, 172 N.W.2d 647, 653-654 (1969) (no amount of social utility justifies damaging neighboring property through emission of sulfurous gas without paying compensation for the damage). These allegations meet at least one alternative for establishing the unreasonableness element of nuisance law. They are sufficient to plausibly plead an action for damages under a nuisance theory. See Bermudez, supra; see also Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc., 500 F. Supp. 984 (D. Or. 1980) (aluminum plant had duty to use control technology to prevent fluoride gasses from escaping from its plumes and causing damage to property and trees in nearby orchards and to compensate orchard owners for the harm even though these measures were costly).

The Complaint also alleges there are practical ways for Defendants to avoid or reduce the harm without undue hardship. (Id. at ¶¶ 29, 82, 88, 136-147). The more specific allegations

supporting the existence of ways for Defendants to avoid or reduce the harm without undue hardship are described above in the argument on Defendants' duty to avoid or reduce the harm by controlling their emissions. Whether or not Plaintiffs can actually prove these allegations or Defendants can disprove them is not at issue on this motion. Twombly, 550 U.S. at 556. These factual allegations must be taken as true, and when so taken, they plausibly plead the unreasonableness element of nuisance. Bermudez, supra; see also Restatement (Second) Torts § 830, comment c (practicality of avoidance is a question of fact).

Defendants also argue the Plaintiffs' Complaint should be dismissed because all the named Plaintiffs purchased their properties between 1990 and 2007 which they claim is long after the rum aging facilities complained of were operating in Estate Diamond. (Defs. memo at n. 7). They acknowledge Restatement (Second) Torts § 840D states "[t]he fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action," but nevertheless argue the dates Plaintiffs acquired their properties support their motion to dismiss because "rum production and aging operations have been conducted at Cruzan's present location for more than 220 years." (Defs. memo at p. 24). Notably, Defendants do not mention the size of Cruzan's operations over the years and do not mention Diageo's recent move of all its rum aging operations to St. Croix. They do not even mention Diageo's operations in this argument because they would have to admit Diageo's operations started after some of the Plaintiffs acquired their properties.

Even if there had not been recent major increases in the rum operations on St. Croix and there had been no changes in rum operations after the Plaintiffs acquired their properties, the "coming to the nuisance" argument would not provide a basis for dismissing the Complaint at this stage. Most states reject the "coming to the nuisance" doctrine. Parvati Corp. v. City of Oak

Forest, 709 F.3d 678, 682 (7th Cir. 2013) ("Illinois like most states rejects the doctrine of "coming to the nuisance."); see also Restatement (Second) Torts § 840D. Continuing development of surrounding property, including residential development, is a fact of life which businesses must expect and not interfere with.

> The rule generally accepted by the courts is that in itself and without other factors, the "coming to the nuisance" will not bar the plaintiff's recovery. Otherwise the defendant by setting up an activity or a condition that results in the nuisance could condemn all the land in his vicinity to a servitude without paying any compensation, and so could arrogate to himself a good deal of the value of the adjoining land. The defendant is required to contemplate and expect the possibility that the adjoining land may be settled, sold or otherwise transferred and that a condition originally harmless may result in an actionable nuisance when there is later development.

Restatement (Second) Torts § 840D Comment b. A review of the cases cited by the Restatement (Second) Torts § 840D demonstrates the courts are particularly solicitous of residential neighbors who purchase or develop property in areas already occupied by businesses. See e.g., Bly v. Edison Electric Illuminating Co., 172 N.Y. 1, 64 N.E. 745, 747 (1902); Lawrence v. Eastern Air Lines, Inc., 81 So. 2d 632, 634 (Fla. 1955); Oehler v. Levy, 234 Ill. 595, 604-605, 85 N.E. 271 (1908); Bushnell v. Robeson, 62 Iowa 540, 17 N.W. 888 (1883); Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963). Moreover, any recent expansion or change in the manner of the defendant's operations is also likely to eliminate the plaintiff's "coming to the nuisance" as a factor favoring the defense. See e.g., Campbell v. Seaman, 63 N.Y. 568, 20 Am.Rep. 567 (1876) (although brickyard had existed for many years prior to plaintiff's improvements to adjoining lands, use of anthracite coal was a recent change creating a nuisance which harmed a new neighbor's landscaping); Oehler, 234 Ill. at 604-605.

Illustration 3, relied upon by Defendants, is under Comment c to § 840D which focuses upon the requirement of additional factors to bar recovery. In the brewery illustration, the

additional factor which allowed "coming to the nuisance" to be a factor at all was the fact that the area was "a former residential area in which industrial plants are beginning to appear." Illustration 3 is based at least in part on Schott v. Appelton Brewery Co., 205 S.W.2d 917 (Mo. App. 1947). The Appelton Brewery had been operating in the village as long as anyone could remember. The plaintiff bought the adjacent property and built a house six years before filing suit alleging that the brewery's coal fired power plant was dumping fly ash on his property causing an interference with his use and enjoyment of his property. The additional factor which allowed the recent acquisition of the neighboring property to be a factor in barring the claim was the fact that the brewery installed many additional appliances and complied with every suggestion and piece of advice that experts recommended, spending over $10,000 in 1947 dollars in its efforts to reduce the particulate matter released by its smokestacks. See also, Powell v. Superior Portland Cement Co., 15 Wash.2d 14, 129 P.2d 536 (1942) (fact that cement plant had eliminated all dust other than that escaping the smokestacks and had taken measures to substantially reduce releases from the smokestacks combined with fact that sole reason for existence of the town was the plant were additional factors which combined with the fact that plaintiff had moved to his residence next to the plant years after plant was established justified dismissal of plaintiff's nuisance claim).

There is nothing in the Complaint which suggests any change in the residential character of Plaintiffs' neighborhoods prior to their purchases of their properties. Furthermore, instead of taking action to reduce their emissions as the defendants had done in the cases underlying Illustration 3, the present Complaint alleges Defendants have refused to even try any of the technologies developed since 2005 to reduce ethanol emissions from their operations.

Illustration 3 is inapplicable here because there is no additional factor which makes the

time when Plaintiffs' acquired their property particularly relevant. On the other hand, Comment b and the cases underlying it are particularly relevant. The harm Plaintiffs' complain of has a particularly deleterious impact on the residential character of the property affected. Defendants' operations have changed and expanded in recent years making the ethanol load, and the effects of the nuisance, on surrounding neighborhoods much worse than in the past. Additionally, rather than trying every suggestion to reduce harmful emissions from their operations, Defendants have steadfastly refused to try any suggested method for reducing their harmful emissions.

C. Trespass

In their argument for dismissal of Plaintiffs' trespass claims, Defendants again repeat their argument that they have no duty to control their ethanol emissions because there is no practical way to control their ethanol emissions without damaging the quality of their product. As discussed more fully above in Section III.A., Plaintiffs' Complaint sets forth specific factual allegations, which must be taken as true at this stage of the proceedings, that there exists reasonable means to control ethanol emissions such that Defendants' persistent refusal to institute any controls is an unreasonable and intentional intrusion onto Plaintiffs' property.

Defendants also claim the trespass claims necessarily fail because a trespass claim requires physical intrusion of a tangible item and drifting air containing ethanol emissions cannot satisfy that requirement. They argue that based on the definition of tangible in Black's Law Dictionary, airborne ethanol is not tangible because it cannot be seen or touched, and therefore, it cannot satisfy the trespass element of intrusion by a tangible item. However, nothing in Restatement (Second) Torts on trespass or Virgin Islands case law contains any requirement that trespass be accomplished through the intrusion of something tangible or something which can be seen or touched. The Restatement and Virgin Islands case law merely requires intrusion by a

"thing." Hodge v. McGowan, 50 V.I. 296 (2008); Restatement (Second) Torts §§ 158, 165. Nothing in the scope note to Chapter 7 of the Restatement (Second) Torts indicates in any way that intrusion by a substance in its gaseous form is not a physical intrusion. Many cases too numerous to cite hold that airborne pollution, including fumes and other particles which cannot be seen or touched, constitute a "thing" sufficient to support the trespass element of intrusion. See e.g., Public Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377, 390 (Colo. 2001) (intrusion by noise, radiation, electromagnetic fields sufficient to support trespass); Cook v. Rockwell Int'l Corp., 618 F.3d 1127, 1148 (10th Cir. 2010) (same); Smith v. Carbide & Chems. Corp., 507 F.3d 372, 382 (6th Cir. 2007) (invisible airborne plutonium particles sufficient to support trespass); Smith v. Carbide & Chems. Corp., 226 S.W.3d 52 (Ky. 2007) (same); Stevenson v. E.I. DuPont de Nemours & Co., 327 F.3d 400, 406 (5th Cir. 2003) (invisible airborne heavy metal emissions sufficient intrusion for trespass); In re TVA Ash Spill Litig., 805 F. Supp. 2D 468, 483-484 (E.D. Tenn. 2011) (collecting cases holding that entry onto property of intangible particles satisfies the trespass element of physical intrusion); Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979) (smoke emissions sufficient intrusion); McNeill v. Redington, 67 Cal.App.2d 315, 319, 154 P.2d 428 (1944) (noise and vibrations sufficient intrusion).

The production of distilled spirits is a rather localized industry, conducted in only a few areas. Kentucky is one state in which the industry is concentrated. There are at least two cases where Kentucky courts have allowed similar claims to proceed on a common law trespass theory. The very recent Mills decision cited above is one. It does not discuss the type of intrusion required but it did allow discovery to proceed on the trespass claims. In Brockman v. Barton Brands, Ltd., 3:06-CV-332-H, 2009 WL 4252914 (U.S.D.C. W.D.Ky. 2009) (unpublished) (attached as Exhibit 5), the federal court addressed the invasion element of

trespass where the plaintiffs claimed the emissions from a nearby distillery caused the presence of a black mold on their neighboring properties. The Brockman plaintiffs offered several theories for the presence of the black sooty substance.[6] One possible explanation offered by the Brockman plaintiffs was that the particulate matter was "black mold" caused by the prevalence of ethanol produced by the Barton Brands' Bardstown, Kentucky facility. The court concluded that, if proved, the distillers' ethanol production would support plaintiffs' claims for damages for trespass:

> Enviroair President Daniel Maser swabbed forty-one surfaces, including metal street signs and cable and newspaper boxes, within a one-mile radius of Barton Brands to determine whether fungus was present. The laboratory results identified the presence of certain fungal species that thrive in ethanol-rich environments. The results section of Maser's report finds that "Enviroair believes that the A. pullulans and Baudoinia sp. found on the surface swab sampling is present due to the ethanol originating from the Barton Brands Distillery." These two reports, though lacking in some areas, at least connect the particulate matter to substances that could come from the Barton Brands' facility.
>
> Thus, the Court finds that Plaintiffs' ... expert reports do provide enough evidence of causation as to the detected particulate matter.
>
> Brockman, 2009 WL 4252914, *4.

In a second Brockman opinion, the court was asked to reconsider its decision allowing the trespass claims to go forward, and declined, finding that the plaintiffs "have shown that some physical substance has invaded their property." Brockman v. Barton Brands, Ltd. 2010 WL 231738, 1 (unpublished) (W.D.Ky. 2010). The plaintiffs could point to visible effects of the actual invasion of a physical substance on their property in the form of the black mold which was visible to the untrained human eye. Similarly, in the present case, the damaging results of the invasion of the physical substance ethanol is clearly visible on the Plaintiffs' property. The

[6] The scientific evidence and knowledge available to the general public regarding the composition of the odd black particulate matter that dominated neighborhoods in the vicinity of whiskey operations was only just emerging at the time the Brockman case was pending.

physical substance ethanol is no less physical because it is in a gaseous state, instead of the initial liquid state Defendants' produce and store, when it intrudes upon Plaintiffs' properties. While it might not be visible to the eye in a gaseous state, it is nevertheless physically measurable in the gaseous state and capable of physically intruding and causing physical harm in that state. The fact that it enters Plaintiffs' properties through the air to cause its harm in no way changes the fact that it is a trespass. Restatement (Second) Torts § 159. Thus, its intrusion is sufficient to support an action in trespass.

D. Injunction

Defendants' argument that Plaintiffs' claim for injunctive relief must fail because it rests on the "same speculative and deficient allegation that control technology is reasonably available" is addressed in Section III.A. of this memorandum, and the Court is respectfully referred to that section.

Additionally, Defendants seek dismissal of **Count V – Right to Injunctive Relief** on the theory that injunction is a remedy rather than a separate cause of action. While it is true that injunctive relief is technically a remedy, it is often plead as a separate count because additional elements must be plead for this remedy. See e.g., Beachside Assocs. v. Bayside Resort, Inc., Case No. ST-07-CV-0000626, 2011 V.I. Lexis 68, (Super. Ct. St. Thomas & St. John, Nov. 25, 2011).

The Scope Note to Restatement (Second) Torts Chapter 48 on Injunction states the torts most often giving rise to suits for injunctions include trespass, pollution and nuisance. This Complaint pleads causes of action for both trespass and nuisance in the context of pollution. The allegations of the Complaint clearly assert that the objectionable conduct by the Defendants is of a continuous nature which will result in continuing and repeated damage to Plaintiffs' property if

Defendants are not ordered to stop their uncontrolled releases of tons of ethanol into the atmosphere of the surrounding community. As comment b to Restatement (Second) Torts § 938 demonstrates, injunctive relief is particularly appropriate in the case of such continuing torts.

Because it seeks injunctive relief to prevent the continuation of Defendants' conduct regardless of which counts prove ultimately successful, it is efficient and appropriate to put the claim for this relief in a separate count to satisfy the F.R.C.P. 8 requirement of "a short and plain statement" showing the pleader is entitled to relief.

CONCLUSION

Defendants' Motion to Dismiss boils down to two arguments. First, they assert that the comprehensive nature of the Clean Air Act regulation preempts all of Plaintiffs' claims based on Virgin Islands tort law. That argument is soundly refuted by several decisions within the last two months (Bell, MTBE and Mills, supra), one of which (Bell) reversed a decision Defendants relied upon heavily.

Second, they assert that all the claims must fail because Plaintiffs will not be able to prove that any practical method exists for preventing the ethanol produced in Defendants' operations from reaching Defendants' neighbors without negatively affecting the quality of their product. Whether Plaintiffs can prove that practical methods of reducing or preventing ethanol releases from Defendants' operations exist using today's technology is an issue of fact, evidence and proof. Restatement (Second) Torts § 830 comment c. Such issues are not suitable for decision on a Rule 12(b)(6) motion. Plaintiffs have plead that technology exists for eliminating ethanol releases in the distilled spirits industry, including the rum industry, without harming product quality. To raise the pleading of that fact above the speculative level, Plaintiffs allege that several methods for controlling such releases have been invented in the last eight years and

that one of them is working successfully in the brandy industry, another distilled spirits industry which ages its product in a method virtually identical to that used by the rum industry. Such facts do support a strong inference that the harm Defendants' operations are causing to the Plaintiffs and their property is avoidable by reasonably practical means, and the harm is not such that Plaintiffs should be required to bear the harm without compensation. Plaintiffs are not required to prove their case or even plead facts to the level of probability. Plausibility is enough, and the Complaint more than meets that standard.

For these reasons, Defendants' Motion to Dismiss should be denied.

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By my signature above, I certify that on October 2nd, 2013 a true and correct copy hereof was emailed to:

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Analysis
As of: Sep 03, 2013

KRISTIE BELL; JOAN LUPPE, Appellants v. CHESWICK GENERATING STATION, GENON POWER MIDWEST, L.P.

No. 12-4216

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2013 U.S. App. LEXIS 17283

June 25, 2013, Argued
August 20, 2013, Opinion Filed

PRIOR HISTORY: [*1]

On Appeal from the United States District Court for the Western District of Pennsylvania. (No. 2-12-cv-00929). District Judge: Honorable Terrence F. McVerry.
Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 2012 U.S. Dist. LEXIS 147232 (W.D. Pa., 2012)

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-The Clean Air Act did not preempt state common law claims based on the law of the state where the source of the pollution was located, and thus, the instant action, brought by Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania, was not preempted.

OUTCOME: Decision reversed.

LexisNexis(R) Headnotes

Environmental Law > Air Quality > General Overview

[HN1] The Clean Air Act, *42 U.S.C.S. §§ 7401 et seq.*, enacted in 1970, is a comprehensive federal law that regulates air emissions under the auspices of the United States Environmental Protection Agency. Congress enacted the law in response to evidence of the increasing amount of air pollution created by the industrialization and urbanization of the United States and its threat to public health and welfare. *§ 7401(a)(2).*

Environmental Law > Air Quality > General Overview
Environmental Law > Air Quality > State Implementation Plans

[HN2] The Clean Air Act states that air pollution prevention and control is the primary responsibility of individual states and local governments but that federal financial assistance and leadership is essential to accomplish these goals. *42 U.S.C.S. § 7401(a)(3)-(4).* Thus, it employs a cooperative federalism structure under which the federal government develops baseline standards that the states individually implement and enforce. In so doing, states are expressly allowed to employ standards more stringent than those specified by the federal requirements. *42 U.S.C.S. § 7416.*

Environmental Law > Air Quality > National Ambient Air Quality Standards

[HN3] The Clean Air Act makes the United States Environmental Protection Agency (EPA) responsible for developing acceptable national ambient air quality standards (NAAQS), which are meant to set a uniform level of air quality across the country in order to protect the populace and the environment. *42 U.S.C.S. § 7409(b)(1)*. Before such levels are adopted or modified by the EPA, a reasonable time for interested persons to submit written comments must be provided. *§ 7409(a)(1)(B)*.

Environmental Law > Air Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > State Implementation Plans

[HN4] The United States Environmental Protection Agency (EPA) itself does not typically regulate individual sources of emissions. Instead, decisions regarding how to meet national ambient air quality standards (NAAQS) are left to individual states. *42 U.S.C.S. § 7410(a)(1)*. Pursuant to this goal, each state is required to create and submit to the EPA a State Implementation Plan (SIP) which provides for implementation, maintenance, and enforcement of NAAQS within the state. All SIPs must be submitted to the EPA for approval before they become final, and once a SIP is approved, its requirements become federal law and are fully enforceable in federal court. *42 U.S.C.S. § 7604(a)*.

Environmental Law > Air Quality > State Implementation Plans

[HN5] States are tasked with enforcing the limitations they adopt in their State Implementation Plan (SIP). They must regulate all stationary sources located within the areas covered by the SIPs, *42 U.S.C.S. § 7410(a)(2)(C)*, and implement a mandatory permit program that limits the amounts and types of emissions that each stationary source is allowed to discharge, *42 U.S.C.S. §§ 7661a(d)(1), 7661c(a)*. Each permit is intended to be a source-specific bible for Clean Air Act compliance containing in a single, comprehensive set of documents, all Clean Air Act requirements relevant to the particular polluting source.

Environmental Law > Air Quality > Prevention of Significant Deterioration

[HN6] Pursuant to the federal Prevention of Significant Deterioration of Air Quality program in areas attaining national ambient air quality standards, a covered source must, among other things, install the best available control technology for each pollutant subject to regulation. *42 U.S.C.S. § 7475(a)(4)*.

Environmental Law > Air Quality > Enforcement > Citizen Suits

[HN7] The Clean Air Act contains a citizen suit provision, *42 U.S.C.S. § 7604*, which permits the filing of civil suits in district courts against any person who is alleged to have violated or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a state with respect to such a standard or limitation. *§ 7604(a)(1)*. The statute further grants a cause of action against the United States Environmental Protection Agency (EPA) if it fails to perform any non-discretionary responsibility, *§ 7604(a)(2)*, and also allows suit against any entity that constructs a source of emissions without securing the requisite permits. *§ 7604(a)(3)*. Furthermore, the EPA retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court.

Environmental Law > Air Quality > Enforcement > Citizen Suits

[HN8] The citizen suit provision contains a savings clause which provides, in part: Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a state agency). *42 U.S.C.S. § 7604(e)*. This is the Clean Air Act's citizen suit savings clause.

Environmental Law > Air Quality > Enforcement > Citizen Suits

[HN9] The Clean Air Act also contains a separate savings clause entitled retention of state authority, codified at *42 U.S.C.S. § 7416*. This provision focuses on states' rights, and reads as follows: Except as otherwise provided nothing in this chapter shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting

emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution. *§ 7416*. This is the Clean Air Act's states' rights savings clause.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN10] In reviewing a motion to dismiss, the court must accept as true all well-pleaded facts and allegations, and must draw all reasonable inferences therefrom in favor of the plaintiff.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN11] A district court's order granting a motion to dismiss is given plenary review.

Constitutional Law > Supremacy Clause > Supreme Law of the Land
[HN12] The *Supremacy Clause of the United States Constitution* states: This constitution, and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. *U.S. Const. art. VI, cl. 2*.

Constitutional Law > Supremacy Clause > Federal Preemption
[HN13] The United States Supreme Court has interpreted the *Supremacy Clause* as preempting any state law that interferes with or is contrary to federal law. Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption.

Constitutional Law > Supremacy Clause > Federal Preemption
[HN14] Conflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Environmental Law > Water Quality > Clean Water Act > Enforcement > Citizen Suits > General Overview
[HN15] Like the Clean Air Act, the Clean Water Act contains two savings clauses, one located in the citizen suit provision, and another which focuses on states' rights. Section § 505(e) of the Clean Water Act, which is located in the Act's citizen suit provision, states: Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. *33 U.S.C.S. § 1365(e)*.

Environmental Law > Water Quality > Clean Water Act > Enforcement > Citizen Suits > General Overview
[HN16] Section 510 of the Clean Water Act focuses on states' rights, and provides: Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any state or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters (including boundary waters) of such states. *33 U.S.C.S. § 1370*.

Environmental Law > Water Quality > Clean Water Act > Enforcement > Citizen Suits > General Overview
[HN17] See *33 U.S.C.S. § 1370*.

Environmental Law > Air Quality > Enforcement > Citizen Suits
[HN18] See *42 U.S.C.S. § 7416*.

Environmental Law > Air Quality > Enforcement > Citizen Suits
Environmental Law > Water Quality > Clean Water Act > Enforcement > Citizen Suits > General Overview
[HN19] The only meaningful difference between the two states' rights savings clauses in the Clean Air Act and the Clean Water Act is the portion of the Clean Water Act which refers to the boundary waters of the states. The reason why such language is not included the in Clean Air Act is clear: there are no such jurisdictional boundaries or rights which apply to the air. If anything, the absence of any language regarding state boundaries in the states' rights savings clause of the Clean Air Act

indicates that Congress intended to preserve more rights for the states, rather than less. In no way can this omission be read to preempt all state law tort claims.

Environmental Law > Air Quality > Enforcement > Citizen Suits

[HN20] The Clean Air Act displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute.

Environmental Law > Air Quality > Enforcement > Citizen Suits

[HN21] The plain language of the Clean Air Act's savings clause clearly indicates that Congress did not wish to abolish state control.

Environmental Law > Air Quality > Enforcement > Citizen Suits

Environmental Law > Water Quality > Clean Water Act > Enforcement > Citizen Suits > General Overview

[HN22] There is little basis for distinguishing the Clean Air Act from the Clean Water Act, the two statutes feature nearly identical savings clauses and employ similar cooperative federalism structures. Both Acts establish a regulatory scheme through which source states, and not affected states, play the primary role in developing the regulations by which a particular source will be bound. Both Acts contain citizen suit provisions which allow individuals to bring suit to enforce their terms under certain circumstances, and both Acts contain two savings clauses: one located within the citizen suit provision which focuses on the rights of individuals to sue, and a second independent savings clause which focuses on states' rights.

Environmental Law > Water Quality > Clean Water Act > Enforcement > Citizen Suits > General Overview

[HN23] An action brought under source state nuisance law would not frustrate the goals of the Clean Water Act as would a suit governed by affected state law. First, application of the source state's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source states to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although source state nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, states can be expected to take into account their own nuisance laws in setting permit requirements.

Environmental Law > Water Quality > Clean Water Act > Enforcement > Citizen Suits > General Overview

[HN24] The requirements placed on sources of pollution through the cooperative federalism structure of the Clean Water Act serves as a regulatory floor, not a ceiling, and expressly holds that states are free to impose higher standards on their own sources of pollution, and that state tort law is a permissible way of doing so.

Civil Procedure > Justiciability > Political Questions > Separation of Powers

[HN25] The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. No court has ever held that such a constitutional commitment of authority regarding the redress of individual property rights for pollution exists in the legislative branch.

Constitutional Law > Supremacy Clause > Federal Preemption

[HN26] In all preemption cases, the court starts with the assumption that the powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Environmental Law > Air Quality > Enforcement > Citizen Suits

[HN27] There is nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law tort claims. If Congress intended to eliminate such private causes of action, its failure even to hint at this result would be spectacularly odd.

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JUDGES: Before: FUENTES, FISHER, and CHAGARES, Circuit Judges.

OPINION BY: FUENTES

OPINION

OPINION OF THE COURT

FUENTES, *Circuit Judge*:

Kristie Bell and Joan Luppe are the named plaintiffs in a class action complaint (the "Complaint") filed against Cheswick Generating Station, GenOn Power Midwest, L.P. ("GenOn").[1] The putative class (the "Class") is made up of at least 1,500 individuals who own or inhabit residential property within one mile of GenOn's Cheswick Generating Station, a 570-megawatt coal-fired electrical generation facility in Springdale, Pennsylvania (the "Plant").

1 The Complaint was filed in April 2012 in the Court of Common Pleas [*2] of Allegheny County, Pennsylvania. GenOn is a limited partnership organized under the laws of Delaware with its organizational headquarters and principal place of business in Houston, Texas. According to GenOn, "Cheswick Generating Station, GenOn Power Midwest, L.P." is not a legal entity. However, GenOn admits that it operates the Cheswick Generating Station. *See Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 314 n.1 (W.D. Pa. 2012)*. The error in the caption does not affect our ruling in any way.

Complaining of ash and contaminants settling on their property, the Class brought suit against GenOn under several state law tort theories. GenOn argued that because the Plant was subject to comprehensive regulation under the Clean Air Act, it owed no extra duty to the members of the Class under state tort law. The District Court agreed with GenOn and dismissed the case. On appeal, we are faced with a matter of first impression: whether the Clean Air Act preempts state law tort claims brought by private property owners against a source of pollution located within the state. Based on the plain language of the Clean Air Act and controlling Supreme Court precedent, we conclude that [*3] such source state common law actions are not preempted. Accordingly, we reverse the decision of the District Court and remand the case for further proceedings.

I. REGULATORY FRAMEWORK

A. Environmental Regulation Under the Clean Air Act

[HN1] The Clean Air Act, *42 U.S.C. § 7401 et seq.*, enacted in 1970, is a comprehensive federal law that regulates air emissions under the auspices of the United States Environmental Protection Agency ("EPA"). Congress enacted the law in response to evidence of the increasing amount of air pollution created by the industrialization and urbanization of the United States and its threat to public health and welfare. *42 U.S.C. § 7401(a)(2)*. [HN2] The Clean Air Act states that air pollution prevention and control is the primary responsibility of individual states and local governments but that federal financial assistance and leadership is essential to accomplish these goals. *Id. § 7401(a)(3)-(4)*. Thus, it employs a "cooperative federalism" structure under which the federal government develops baseline standards that the states individually implement and enforce. *GenOn Rema, LLC v. EPA, No. 12-1022, 2013 U.S. App. LEXIS 14122, 2013 WL 3481486, at *1 (3d Cir. July 12, 2013)*. In so doing, states are [*4] expressly allowed to employ standards more stringent than those specified by the federal requirements. *42 U.S.C. § 7416*.

[HN3] The Clean Air Act makes the EPA responsible for developing acceptable national ambient air quality standards ("NAAQS"), which are meant to set a uniform level of air quality across the country in order to protect the populace and the environment. *Id. § 7409(b)(1)*. Before such levels are adopted or modified by the EPA, "a reasonable time for interested persons to submit written comments" must be provided. *Id. § 7409(a)(1)(B)*. [HN4] The EPA itself does not typically regulate individual sources of emissions. Instead, decisions regarding how to meet NAAQS are left to individual states. *Id. § 7410(a)(1)*. Pursuant to this goal, each state is required to create and submit to the EPA a

State Implementation Plan ("SIP") which provides for implementation, maintenance, and enforcement of NAAQS within the state. *Id.* All SIPs must be submitted to the EPA for approval before they become final, and once a SIP is approved, "its requirements become federal law and are fully enforceable in federal court." *Her Majesty the Queen in Right of the Province of Ontario v. Detroit, 874 F.2d 332, 335 (6th Cir. 1989)* [*5] (citing *42 U.S.C. § 7604(a)*).

[HN5] States are tasked with enforcing the limitations they adopt in their SIPs. They must regulate all stationary sources located within the areas covered by the SIPs, *42 U.S.C. § 7410(a)(2)(C)*, and implement a mandatory permit program that limits the amounts and types of emissions that each stationary source is allowed to discharge, *id. §§ 7661a(d)(1), 7661c(a)*. "[E]ach permit is intended to be a source-specific bible for Clean Air Act compliance containing in a single, comprehensive set of documents, all [Clean Air Act] requirements relevant to the particular polluting source." *North Carolina, ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 300 (4th Cir. 2010)* (internal quotation marks omitted). Furthermore, [HN6] pursuant to the federal Prevention of Significant Deterioration of Air Quality program in areas attaining NAAQS, "a covered source must, among other things, install the 'best available control technology [] for each pollutant subject to regulation . . . .'" *Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 133, 401 U.S. App. D.C. 306 (D.C. Cir. 2012)* (quoting *42 U.S.C. §7475(a)(4)*).

B. Modes of Redress Under the CAA

[HN7] The Clean Air Act contains a "citizen suit" [*6] provision, *see 42 U.S.C. § 7604*, which permits the filing of civil suits in district courts "against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." *Id. § 7604(a)(1)*. The statute further grants a cause of action against the EPA if it fails to perform any non-discretionary responsibility, *id. § 7604(a)(2)*, and also allows suit against any entity that constructs a source of emissions without securing the requisite permits. *Id. § 7604(a)(3)*. Furthermore, the EPA "retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court." *Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2538, 180 L. Ed. 2d 435 (2011)*.

[HN8] The citizen suit provision contains a "savings clause" which provides, in pertinent part:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any [*7] other relief (including relief against the Administrator or a State agency).

42 U.S.C. § 7604(e). This is the Clean Air Act's "citizen suit savings clause."

[HN9] The Clean Air Act also contains a separate savings clause entitled "Retention of State authority," codified at *42 U.S.C. § 7416*. This provision focuses on states' rights, and reads as follows:

> Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . .

Id. § 7416. This is the Clean Air Act's "states' rights savings clause."

C. Regulation at the Cheswick Plant

Federal, state, and local authorities extensively regulate and comprehensively oversee the operations of the Cheswick Plant pursuant to their authority under the Clean Air Act. The EPA, the Pennsylvania Department of Environmental Protection, and the Allegheny County Health Department comprise the administrative bodies that are primarily responsible for defining environmental emission standards and policing compliance with the Clean Air [*8] Act at the Plant. As discussed above, at the EPA's direction and with its approval, states issue operating permits for all stationary sources under Subchapter V of the Clean Air Act. *See 42 U.S.C. §§ 7661a-f.* Subchapter V program authority has in this instance been delegated to Allegheny County. GenOn's

Subchapter V permit for Cheswick (the "Permit") imposes limits on the emission of various particulate matter, gasses, chemical, and compounds from coal combustion. *See* App. 91-161.

The Permit collects all the operational requirements that are contained in Subchapter V of the Clean Air Act, and approved by the EPA. It specifically provides that GenOn may not "operate . . . any source in such manner that emissions of malodorous matter from such source are perceptible beyond the property line," App. 106 (§ IV.3); must "take all reasonable actions to prevent fugitive air contaminants from becoming airborne," App. 112 (§ IV.19); may not "conduct . . . any materials handling operation in such manner that emissions from such operation are visible at or beyond the property line," App. 106 (§ IV.4); must ensure that "[a]ll air pollution control equipment" is "properly installed, maintained, and [*9] operated," App. 106 (§ IV.5); and may not "operate any source . . . in such manner that emissions from such source . . . [m]ay reasonably be anticipated to endanger the public health, safety, or welfare." App. 96 (§ III.1).

However, it also provides that "nothing in this permit relieves the permittee from the obligation to comply with all applicable Federal, State and Local Laws and regulations," App. 96 (Declaration of Policy), and contains a savings clause which provides that:

> Nothing in this permit shall be construed as impairing any right or remedy now existing or hereafter created in equity, common law or statutory law with respect to air pollution, nor shall any court be deprived of such jurisdiction for the reason that such air pollution constitutes a violation of this permit.

App. 102 (§ III.31).

II. GENERAL FACTUAL AND PROCEDURAL OVERVIEW

A. The Complaint[2]

> 2 The following factual allegations are taken from the Complaint, and we accept them as true for the purposes of this appeal.

The Complaint alleges that GenOn's operation, maintenance, control, and use of the Plant releases malodorous substances and particulates[3] into the surrounding neighborhood, causing fly ash and unburned coal [*10] combustion byproducts to settle onto the Class members' property as a "black dust/film . . . or white powder" which requires constant cleaning. App. 9. These odors and particulates are harmful and noxious and have caused substantial damage to Class members' property and the loss of their ability to use and enjoy their properties, making them "prisoners in their [own] homes." App. 12. The operation of the Plant has been the subject of numerous and constant complaints by the residents of the surrounding neighborhood and by organizations and interested persons within the area. However, these complaints have not compelled GenOn to cease the improper operation of the Plant or to discontinue the ongoing invasion and trespass of the Class members' properties. The Complaint alleges that GenOn knows of the "improper construction, and operation of the [Plant], which allows discharge" of these particulates, yet "continues to operate the [Plant] without proper or best available technology, or any proper air pollution control equipment." App. 12-13.

> 3 These particulates include arsenic compounds, barium compounds, chromium compounds, copper compounds, dioxin and dioxin-like compounds, hydrochloric [*11] acid, hydrogen fluoride, lead compounds, manganese compounds, mercury compounds, nickel compounds, polycyclic aromatic compounds, sulfuric acid, vanadium compounds, and zinc compounds. App. 10-11.

Based on these allegations, the Class seeks to recover compensatory and punitive damages under three state common law tort theories: (1) nuisance; (2) negligence and recklessness; and (3) trespass.[4] Although the Complaint also seeks injunctive relief on the nuisance and trespass counts, the Class admits that such relief would be limited to an order requiring GenOn to remove the particulate that continuously falls upon the Class members' properties. Oral Arg. at 13:50; *Bell, 903 F. Supp. 2d at 318.*

> 4 The Class also asserted a strict liability claim, but has conceded that it must fail because power generation is not an ultra-hazardous activity. *See Bell, 903 F. Supp. 2d at 317.*

B. The District Court Decision

In July 2012, GenOn removed the case to the Western District of Pennsylvania invoking the District Court's diversity jurisdiction, and promptly moved to dismiss the action on the grounds that the state law tort claims were preempted by the Clean Air Act. It argued that allowing such claims to [*12] go forward "would undermine the [Clean Air Act]'s comprehensive scheme, and make it impossible for regulators to strike their desired balance in implementing emissions standards." App. 84. In October 2012 the District Court granted GenOn's motion, finding that the Clean Air Act preempted all of the Class's state law claims.

The District Court began by summarizing the extensive regulatory framework governing the Plant. It then reviewed the Complaint and determined that "the allegations of Plaintiffs, as pleaded, assert various permit violations and seek a judicial examination of matters governed by the regulating administrative bodies." *Bell, 903 F. Supp. 2d at 320.* Thus, it moved on to examine "whether the Clean Air Act preempts the state common law claims or whether the savings clause in the citizen suit provision allow those claims to survive." *Id. at 321.* After discussing the relevant case law, the District Court concluded that, "[b]ased on the extensive and comprehensive regulations promulgated by the administrative bodies which govern air emissions from electrical generation facilities, the Court finds and rules that to permit the common law claims would be inconsistent with the [*13] dictates of the Clean Air Act." *Id. at 322.* The Court found that the "savings clause of the Clean Air Act does not alter this analysis." *Id.* The Class now appeals this decision.

III. DISCUSSION[5]

5 The District Court had diversity jurisdiction pursuant to *28 U.S.C. § 1332.* We have appellate jurisdiction under *28 U.S.C. § 1291.* [HN10] In reviewing a motion to dismiss, we must accept as true all well-pleaded facts and allegations, and must draw all reasonable inferences therefrom in favor of the plaintiff. *Monroe v. Beard, 536 F.3d 198, 205 (3d Cir. 2008).* [HN11] A district court's order granting a motion to dismiss is given plenary review. *Grier v. Klem, 591 F.3d 672, 676 (3d Cir. 2010).*

A. Preemption Analysis

[HN12] The *Supremacy Clause of the United States Constitution* states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. [HN13] The Supreme Court has interpreted the *Supremacy Clause* as preempting any state law that "interferes with or is contrary to federal law." [*14] *Free v. Bland, 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962).* "Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption." *Farina v. Nokia, 625 F.3d 97, 115 (3d Cir. 2010).* [HN14] "Conflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation marks omitted). GenOn argues that state tort law conflicts with the objectives of the Clean Air Act, because it "would undermine the [Act]'s comprehensive scheme and rival the work of regulators as they strike their desired balance in implementing emissions standards." Appellee Br. at 26.

1. Legal Precedent

While the extent to which the Clean Air Act preempts state law tort claims against an in-state source of pollution is a matter of first impression in this Circuit, the Supreme Court has addressed this issue in the context of a similarly comprehensive environmental statute: the Clean Water Act, *33 U.S.C. § 1251, et seq.* In *International Paper Co. v. Ouellette, 479 U.S. 481, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987),* the Court [*15] was asked to determine whether the Clean Water Act preempted a Vermont common law nuisance suit filed in Vermont state court, where the source of the alleged injury was located in New York. Plaintiffs, a group of property owners who resided on the Vermont ("affected state") shore of Lake Champlain, alleged that the defendant paper company, which operated a pulp and paper mill on the New York ("source state") side of the lake, was discharging "effluents" into the lake, polluting the water and thereby diminishing the value of their

property. *Id. at 484*. Defendants argued that the Clean Water Act preempted the court from applying Vermont state law against a source of pollution located in New York. In response, Plaintiffs argued that the Clean Water Act's savings clauses indicated "that Congress intended to preserve the right to bring suit under the law of any affected State." *Id. at 493*.

[HN15] Like the Clean Air Act, the Clean Water Act contains two savings clauses, one located in the citizen suit provision, and another which focuses on states' rights. Section § 505(e) of the Clean Water Act, which is located in the Act's citizen suit provision, states:

> Nothing in this section shall restrict [*16] any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . .

33 U.S.C. § 1365(e). [HN16] Section 510 of the Clean Water Act focuses on states' rights, and provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; . . . or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Id. § 1370.

The *Ouellette* Court found that the Clean Water Act's savings clauses clearly preserved *some* state law tort actions, but that the text of the clauses did not provide a definitive answer to the question of whether suits based on the law of the *affected* state were preempted. *479 U.S. at 492, 497*. However, it found definitively that "nothing in the [Clean Water Act] bars aggrieved individuals from bringing [*17] a nuisance claim pursuant to the laws of the *source* State." *Id. at 497* (emphasis in original). The Court reasoned that, "[b]y its terms the Clean Water Act allows States . . . to impose higher standards on their own point sources," and "this authority may include the right to impose higher common-law as well as higher statutory restrictions." *Id.* (internal citation omitted). The Court acknowledged that a source state's "nuisance law may impose separate standards and thus create some tension with the permit system," but explained that this "would not frustrate the goals of the Clean Water Act," because "a source only is required to look to a single additional authority, whose rules should be relatively predictable." *Id. at 498-99*.[6] Thus, a suit by Vermont citizens would not be preempted if brought under the law of New York, the source state.

> 6 Ultimately, the *Ouellette* Court concluded that "the [Clean Water Act] precludes a court from applying the law of an affected State against an out-of-state source," *id. at 494*, reasoning that if "affected States were allowed to impose separate discharge standards on a single [out-of-state] point source, the inevitable result would be a serious interference [*18] with the achievement of the full purposes and objectives of Congress," *id. at 493* (internal quotation marks omitted).

GenOn argues that *Ouellette* is distinguishable from this case because the savings clauses of the Clean Water Act are broader than the corresponding provisions in the Clean Air Act. However, a textual comparison of the two savings clauses at issue demonstrates there is no meaningful difference between them.

As the Supreme Court has acknowledged, and GenOn concedes, the citizen suit savings clause of the Clean Water Act is "virtually identical" to its counterpart in the Clean Air Act. *City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 328, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981)*; Appellee Br. at 30. Thus, GenOn's argument hinges on its expansive reading of the Clean Water Act's states' rights savings clause, which again provides:

> [HN17] Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; . . . *or (2) be*

> *construed as impairing or in* [*19] *any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.*

33 U.S.C. § 1370 (emphasis added). By way of comparison, the states' rights savings clause of the Clean Air Act provides:

> [HN18] Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . .

42 U.S.C. § 7416. As a side-by-side comparison of the text indicates, [HN19] the only meaningful difference between the two states' rights savings clauses is the portion of the Clean Water Act italicized above which refers to the boundary waters of the states. The reason why such language is not included the in Clean Air Act is clear: *there are no such jurisdictional boundaries or rights which apply to the air*. If anything, the absence of any language regarding state boundaries in the states' rights savings clause of the Clean Air Act indicates that Congress intended to preserve more rights for the states, rather than less. In no way can this [*20] omission be read to preempt all state law tort claims.

The only other circuit courts to have examined this issue in depth have also found no meaningful distinction between the Clean Water Act and the Clean Air Act. In *Her Majesty the Queen in Right of the Province of Ontario v. Detroit, 874 F.2d 332 (6th Cir. 1989)*, the Sixth Circuit held that the Clean Air Act did not preempt plaintiffs from suing the City of Detroit under the Michigan Environmental Protection Act ("MEPA"), finding that [HN20] "the [Clean Air Act] displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute." *Id. at 342* (emphasis removed from original). The court reasoned that [HN21] "the plain language of the [Clean Air Act's] savings clause . . . clearly indicates that Congress did not wish to abolish state control," *id. at 342-43*, and, relying on *Ouellette*, concluded:

> If the plaintiffs succeed in state court, it will simply be an instance where a state is enacting and enforcing more stringent pollution controls as authorized by the [Clean Air Act]. With MEPA, the State of Michigan has created a mechanism under which more stringent limitations may be imposed than [*21] required by federal law. It is, by its terms, supplemental to other legal and administrative procedures and requirements, and in this case principles of comity and federalism require us to hold these MEPA actions are not preempted by federal law.

Id. at 344.

In *North Carolina ex rel. Cooper v. Tennessee Valley Authority, 615 F.3d 291 (4th Cir. 2010)*, the state of North Carolina brought a state law public nuisance suit against the Tennessee Valley Authority ("TVA"), a federal agency which owned and operated eleven coal-fired power plants located in Tennessee, Alabama, and Kentucky. After a bench trial, the District Court for the Western District of North Carolina issued an injunction against four of the TVA plants, imposing emission standards on the plants that were stricter than what was required by the Clean Air Act. On appeal, the Fourth Circuit reversed, finding that the district court had incorrectly applied the law of the affected state in violation of *Ouellette*, and that the TVA plants' emissions were not a public nuisance under the laws of the source states. In explaining its decision to apply *Ouellette*, the court noted that the savings clauses of the Clean Air Act and the Clean [*22] Water Act are "similar." *Id. at 304*. It also noted that the Clean Water Act is "similarly comprehensive" to the Clean Air Act, and that "[w]hile *Ouellette* involved a nuisance suit against a source regulated under the Clean Water Act, all parties agree its holding is equally applicable to the Clean Air Act." *Id. at 306*.

Ultimately, as commentators have recognized, [HN22] "there is little basis for distinguishing the Clean Air Act from the Clean Water Act--the two statutes feature nearly identical savings clauses and employ similar 'cooperative federalism' structures." Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut, 99 Va. L. Rev. 131, 150 (2013)*. Both Acts establish a regulatory scheme through which source

states, and not affected states, play the primary role in developing the regulations by which a particular source will be bound. Both Acts contain citizen suit provisions which allow individuals to bring suit to enforce their terms under certain circumstances, and both Acts contain two savings clauses: one located within the citizen suit provision which focuses on the rights of individuals to sue, and a second [*23] independent savings clause which focuses on states' rights.

Given that we find no meaningful difference between the Clean Water Act and the Clean Air Act for the purposes of our preemption analysis, we conclude that the Supreme Court's decision in *Ouellette* controls this case, and thus, the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located.[7] Accordingly, the suit here, brought by Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania, is not preempted.

> 7 The Supreme Court's recent decision in *American Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011)*, does nothing to alter our analysis. There, the Court held that the Clean Air Act displaced any federal common law right to seek abatement of carbon-dioxide emissions from power plants. *Id. at 2537*. However, the Court acknowledged that "[l]egislative displacement of federal common law does not require the same sort of evidence of clear and manifest [congressional] purpose demanded for preemption of state law," and explicitly left open the question of whether the Clean Air Act preempted state law. *Id. at 2537, 2540*; [*24] *see* Gallisdorfer, *99 Va. L. Rev. at 139* ("the displacement finding in [*American Electric*] hardly compels--or even presages--a corresponding finding of preemption").

2. Public Policy Considerations

GenOn argues that our holding may undermine the comprehensive regulatory structure established by the Clean Air Act by allowing the jury and the court to set emissions standards. Furthermore, amicus Utility Air Regulatory Group ("UARG") argues that allowing such cases to move forward would open the proverbial floodgates to nuisance claims against sources in full compliance with federal and state environmental standards, creating a patchwork of inconsistent standards across the country that would compromise Congress's carefully constructed cooperative federalism framework. Such inconsistency, it argues, would make it extremely difficult for sources to plan and operate, as they would never be sure of precisely what standards apply to their operations.

However, "[t]he Supreme Court addressed this precise problem" in *Ouellette, Cooper, 615 F.3d at 301*, and rejected the very same concerns that GenOn and UARG now raise. Indeed, while the *Ouellette* Court acknowledged that allowing "a number of different [*25] states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states," *479 U.S. at 496-97* (quoting *Illinois v. City of Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984))*, it found that [HN23] "[a]n action brought . . . under [source state] nuisance law would not frustrate the goals of the [Clean Water Act] as would a suit governed by [affected state] law," *id. at 498*. Its reasoning was straightforward:

> First, application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although [source state] nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. [*26] Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.

Id. at 498-99.

Thus, the Court recognized that [HN24] the requirements placed on sources of pollution through the "cooperative federalism" structure of the Clean Water

Act served as a regulatory floor, not a ceiling, and expressly held that states are free to impose higher standards on their own sources of pollution, and that state tort law is a permissible way of doing so. *Id. at 497-98.* Indeed, courts in other circuits have affirmed decisions granting plaintiffs relief against sources of air pollution under state law nuisance theory. *See e.g., Ellis v. Gallatin Steel Co., 390 F.3d 461 (6th Cir. 2004)* (upholding award of injunctive relief and compensatory and punitive damages for violation of Kentucky nuisance law where "fugitive dust" from defendant's steel plant settled on plaintiffs' property).

B. Political Question Doctrine

GenOn argues in the alternative that the Class's claims should be barred by the political question doctrine based on the existence of the Clean Air Act. [HN25] "The political question doctrine excludes from judicial review those controversies which revolve around policy [*27] choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986).* No court has ever held that such a constitutional commitment of authority regarding the redress of individual property rights for pollution exists in the legislative branch. Indeed, if such a commitment did exist, the Supreme Court would not have decided *Ouellette* in the first place. Accordingly, we reject this argument.

III. CONCLUSION

[HN26] "In all pre-emption cases . . . we start with the assumption that the . . . powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc., v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).* [HN27] We see nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law tort claims. If Congress intended to eliminate such private causes of action, "its failure even to hint at" this result would be "spectacularly odd." *Id. at 491.* The Supreme Court's decision in *Ouellette* confirms this reading of the statute. Accordingly, we hold that the Class's claims are not [*28] preempted. We will reverse the decision of the District Court and remand this case for further proceedings.

Analysis
As of: Aug 01, 2013

IN RE: METHYL TERTIARY BUTYL ETHER ("MTBE") PRODUCTS LIABILITY LITIGATION

Docket Nos. 10-4135-cv (L), 10-4329-cv (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2013 U.S. App. LEXIS 15229*; *43 ELR 20171

May 23, 2012, Argued
July 26, 2013, Decided

PRIOR HISTORY: [*1]

After an eleven-week bellwether trial and years of related litigation, the District Court entered a $104.69 million judgment for the City of New York, the New York City Water Board, and the New York City Municipal Water Finance Authority (collectively, the "City") and against Exxon Mobil Corporation, Exxon Mobil Oil Corporation, and Mobil Corporation (collectively, "Exxon"). The jury found Exxon liable under New York tort law for contaminating City-owned wells in Queens by its release of the chemical methyl tertiary butyl ether ("MTBE"), which Exxon used as a gasoline additive from the mid-1980s through the mid-2000s, and whose use New York State banned as of 2004. On appeal, Exxon challenges the verdict, arguing primarily that the City's common law claims are preempted by the federal Clean Air Act, which, from the mid-1990s through 2004, required use of gasoline oxygenates, such as MTBE, in New York City. Exxon also argues that because (among other reasons) the jury projected MTBE levels equal to the State's maximum contaminant level, the City's injury was not legally cognizable; that the City's action was not ripe for adjudication (or alternatively, that it was barred by the statute [*2] of limitations); that the City failed sufficiently to prove the elements of negligence, trespass, public nuisance, and failure-to-warn; and that the District Court erred in its handling of alleged jury misconduct. On cross-appeal, the City faults the District Court for instructing the jury to offset its damages award by the cost of remediating pre-existing contamination, and for its ruling that, as a matter of law, the City was not entitled to an award of punitive damages. For the reasons set forth below, we AFFIRM the decision of the District Court in its entirety.

In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 2009 U.S. Dist. LEXIS 96469 (S.D.N.Y., 2009)

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-The state law tort verdict against defendants was not preempted by the federal Clean Air Act, *42 U.S.C.S. §§ 7401-7671g*; [2]-The jury's finding that MTBE levels in a system of water wells would peak at 10 parts per billion in 2033 --

the maximum contaminant level for MTBE since 2004 -- was not inconsistent with a conclusion that plaintiffs had been injured; [3]-Plaintiffs' suit was ripe because they demonstrated a present injury, and their suit was not barred by the statute of limitations; [4]-The jury's verdict finding defendants liable under state tort law theories was not precluded by the jury's concurrent conclusion that plaintiffs had not carried its burden, in the design-defect context, of demonstrating a feasible, cost-reasonable alternative to MTBE; [5]-Plaintiffs were not entitled to a jury determination of defendants' liability for punitive damages.

OUTCOME: Judgment affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review
Constitutional Law > Supremacy Clause > Federal Preemption
[HN1] The United States Court of Appeals for the Second Circuit reviews a district court's preemption analysis de novo.

Constitutional Law > Supremacy Clause > Federal Preemption
[HN2] The *Supremacy Clause of the United States Constitution* provides that federal law shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding. *U.S. Const. art. VI, cl. 2.* From this constitutional principle, it follows that Congress has the power to preempt state law. In every preemption case, accordingly, the court asks whether Congress intended to exercise this important and sensitive power: the purpose of Congress is the ultimate touchstone.

Constitutional Law > Supremacy Clause > Federal Preemption
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN3] The *Supremacy Clause* and the federal system contemplate a vital underlying system of state law, notwithstanding the periodic superposition of federal statutory law. Thus, as the U.S. Supreme Court has repeatedly instructed, in all preemption cases the Court starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. In light of this assumption, the party asserting that federal law preempts state law bears the burden of establishing preemption.

Governments > State & Territorial Governments > General Overview
Real Property Law > Torts > Nuisance > Types > Public Nuisance
Real Property Law > Torts > Trespass to Real Property
Torts > Negligence > General Overview
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty to Warn
[HN4] Imposing state tort law liability for negligence, trespass, public nuisance, and failure-to-warn falls well within the state's historic powers to protect the health, safety, and property rights of its citizens.

Constitutional Law > Supremacy Clause > Federal Preemption
[HN5] The U.S. Supreme Court has recognized three typical settings in which courts will find that Congress intended to preempt state law. First, when Congress expressly provides that a federal statute overrides state law, courts will find state law preempted if, applying standard tools of statutory construction, the challenged state law falls within the scope of Congress's intent to preempt. Second, when Congress legislates so comprehensively in one area as to "occupy the field," the court may infer from the federal legislation that Congress intended to preempt state law in that entire subject area. Third, when neither of the first two categories applies but state law directly conflicts with the structure and purpose of a federal statute, the court may conclude that Congress intended to preempt the state law. In the latter case, the court will find a conflict with preemptive effect only in two circumstances: first, when compliance with both federal and state regulations is a physical impossibility, and second, when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > Federal

Preemption

[HN6] The U.S. Supreme Court has found the "impossibility" branch of conflict preemption when state law penalizes what federal law requires, or when state law claims directly conflict with federal law. Even understood expansively, impossibility preemption is a demanding defense, and courts will not easily find a conflict that overcomes the presumption against preemption.

Constitutional Law > Supremacy Clause > Federal Preemption

[HN7] The party urging preemption must do more than show that state law precludes its use of the most cost-effective and practical means of complying with federal law -- it must show that federal and state laws directly conflict. If there was any available alternative for complying with both federal and state law -- even if that alternative was not the most practical and cost-effective -- there is no impossibility preemption.

Constitutional Law > Supremacy Clause > Federal Preemption

[HN8] The second branch of conflict preemption -- the obstacle analysis -- is in play when state law is asserted to stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Obstacle analysis -- which appears to us only an intermediate step down the road to impossibility preemption -- precludes state law that poses an "actual conflict" with the overriding federal purpose and objective. Obstacle analysis has been utilized when federal and state laws said to conflict are products of unrelated statutory regimes. What constitutes a "sufficient obstacle" is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. As with the impossibility branch of conflict preemption, the purpose of Congress is the ultimate touchstone, and the conflict between state law and federal policy must be a sharp one. A showing that the federal and state laws serve different purposes cuts against a finding of obstacle preemption.

Constitutional Law > Supremacy Clause > Federal Preemption

[HN9] The burden of establishing obstacle preemption, like that of impossibility preemption, is heavy: the mere fact of "tension" between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power. Indeed, federal law does not preempt state law under obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together. To determine whether a state law (or tort judgment) poses an obstacle to accomplishing a Congressional objective, the court must first ascertain those objectives as they relate to the federal law at issue.

Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements

[HN10] To pursue a claim in federal court, a plaintiff must satisfy the requirements of constitutional standing, a principle established by the case or controversy requirement of U.S. Const. art. III. Constitutional standing makes three demands: First, the plaintiff must have suffered an "injury in fact." Second, there must be a causal connection between the injury and the conduct of which the plaintiff complains. And third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. These demands function to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. The injury-in-fact requirement is satisfied when the plaintiff has suffered an invasion of a legally protected interest, which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. As our prior opinions have explained, however, the injury-in-fact necessary for standing need not be large; an identifiable trifle will suffice.

Civil Procedure > Justiciability > Standing > General Overview

[HN11] Standing is the threshold question in every federal case. Once this threshold is crossed, a plaintiff must still establish the elements of its causes of action to proceed with its case.

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

[HN12] Ripeness is a term that has been used to describe two overlapping threshold criteria for the exercise of a federal court's jurisdiction. The first such requirement -- referred to as "constitutional ripeness" -- is drawn from U.S. Const. Article III limitations on judicial power. The

second such requirement -- referred to as "prudential ripeness" -- is drawn from prudential reasons for refusing to exercise jurisdiction. Both constitutional ripeness and prudential ripeness are concerned with whether a case has been brought prematurely.

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

[HN13] The doctrine of constitutional ripeness prevents a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur. This aspect of the ripeness doctrine overlaps with the standing doctrine, most notably in the shared requirement that the plaintiff's injury be imminent rather than conjectural or hypothetical. In most cases, that a plaintiff has U.S. Const. art. III standing is enough to render its claim constitutionally ripe.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

[HN14] The doctrine of prudential ripeness constitutes an important exception to the usual rule that where jurisdiction exists a federal court must exercise it, and allows a court to determine that the case will be better decided later. Prudential ripeness is a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary. In determining whether a claim is prudentially ripe, the court asks whether the claim is fit for judicial resolution and whether and to what extent the parties will endure hardship if decision is withheld. A district court's ripeness determination is a legal determination subject to de novo review.

Civil Procedure > Remedies > Damages > General Overview

[HN15] When an injury occurs, the injured party has the right to bring suit for all of the damages, past, present and future, caused by the defendant's acts.

Environmental Law > Litigation & Administrative Proceedings > Toxic Torts

Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule

[HN16] Under New York law, a plaintiff asserting a toxic-tort claim must bring suit within three years of discovery (or constructive discovery) of its injury. *N.Y. C.P.L.R. 214-c(2).*

Environmental Law > Litigation & Administrative Proceedings > Toxic Torts

Torts > Procedure > Statutes of Limitations > General Overview

[HN17] The common law "continuing-wrong" doctrine -- pursuant to which a recurring injury is treated as a series of invasions, each one giving rise to a new claim or cause of action -- does not reset the statute of limitations in the toxic-tort context.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Inferences & Presumptions > Inferences

[HN18] The United States Court of Appeals for the Second Circuit reviews a district court's denial of a motion for judgment as a matter of law de novo. In so doing, the Court applies the same standards that are required of the district court. A court may grant a motion for judgment as a matter of law only if it can conclude that, with credibility assessments made against the moving party and all inferences drawn against the moving party, a reasonable juror would have been compelled to accept the view of the moving party.

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

[HN19] A district court ordinarily should not grant a new trial unless it is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.

Civil Procedure > Remedies > Damages > General Overview

[HN20] Where damages are awarded in connection with state law claims, the federal district court is obliged to review the award under state law. Under New York law, a damages award must be reduced if it deviates materially from what would be reasonable compensation. *N.Y. C.P.L.R. § 5501(c).*

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Evidence > Testimony > Experts > General Overview
Evidence > Testimony > Experts > Admissibility
[HN21] The role of an expert is not to displace the jury but rather to provide the groundwork to enable the jury to make its own informed determination. Accordingly, the jury is free to accept or reject expert testimony, and is free to draw its own conclusion. And the United States Court of Appeals for the Second Circuit has consistently held that expert testimony that usurps the role of the jury in applying the law to the facts before it by undertaking to tell the jury what result to reach or attempting to substitute the expert's judgment for the jury's is inadmissible.

Torts > Negligence > Causation > Cause in Fact
Torts > Procedure > Multiple Defendants > Alternative Liability
[HN22] Market share liability provides an exception to the general rule that in common-law negligence actions, a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury. Where the theory of proof called market-share liability is permitted, a defendant may be held liable absent any showing that it caused or contributed to the plaintiff's injury; instead, a defendant may be presumed liable to the extent of its share of the relevant product market.

Torts > Negligence > Causation > Proximate Cause > General Overview
[HN23] Under New York law, an act or omission is regarded as a legal cause of an injury if it was a substantial factor in bringing about the injury. The word "substantial" means that the act or omission had such an effect in producing the injury that reasonable people would regard it as a cause of the injury.

Evidence > Inferences & Presumptions > Inferences
Evidence > Procedural Considerations > Weight & Sufficiency
[HN24] In reviewing the sufficiency of the evidence in support of a jury's verdict, the United States Court of Appeals for the Second Circuit examines the evidence in the light most favorable to the party in whose favor the jury decided, drawing all reasonable inferences in the winning party's favor.

Torts > Negligence > Proof > Elements
[HN25] To prevail on a negligence claim under New York law, a plaintiff must show (1) a duty on the part of the defendant; (2) a breach of that duty by conduct involving an unreasonable risk of harm; (3) damages suffered by the plaintiff; and (4) causation, both in fact and proximate, between the breach and the plaintiff's harm.

Real Property Law > Torts > Trespass to Real Property
[HN26] To prevail on a trespass claim under New York law, a plaintiff must show an interference with its right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner. While the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or what he does so negligently as to amount to willfulness. In a trespass case involving the underground movement of noxious fluids, a plaintiff must show that the defendant had good reason to know or expect that subterranean and other conditions were such that there would be passage of the pollutant from defendant's to plaintiff's land.

Environmental Law > Hazardous Wastes & Toxic Substances > Toxic Substances
[HN27] New York courts have held that a plaintiff may suffer injury from contamination at levels below an applicable regulatory threshold.

Real Property Law > Torts > Nuisance > Types > Public Nuisance
[HN28] A public nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency. To prevail on a public nuisance claim under New York law, a plaintiff must show that the defendant's conduct amounts to a substantial interference with the exercise of a common right of the public, thereby endangering or injuring the property, health, safety or comfort of a considerable number of persons.

Real Property Law > Torts > Nuisance > General Overview
[HN29] Under New York law, every one who creates a

nuisance or participates in the creation or maintenance thereof is liable for it.

Torts > Products Liability > Duty to Warn
Torts > Products Liability > Strict Liability
[HN30] Under New York law, a plaintiff may recover in strict products liability when a manufacturer fails to provide adequate warnings regarding the use of its product. This is because a manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known. The duty to warn extends to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn.

Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Obvious Dangers
[HN31] The open and obvious defense generally should not apply when there are aspects of a hazard which are concealed or not reasonably apparent to the user.

Civil Procedure > Trials > Jury Trials > Jurors > Misconduct
Civil Procedure > Trials > Motions for Mistrial
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN32] The United States Court of Appeals for the Second Circuit reviews a trial judge's handling of alleged jury misconduct for abuse of discretion. In so doing, the Court bears in mind that courts face a delicate and complex task whenever they undertake to investigate reports of juror misconduct during the course of a trial. A trial judge enjoys especially broad flexibility when the allegations of misconduct relate to statements made by the jurors themselves, rather than to outside influences. Even if a party moving for a mistrial shows that the court abused its discretion, however, it must also demonstrate that actual prejudice resulted.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN33] The United States Court of Appeals for the Second Circuit reviews jury instructions de novo to determine whether the jury was misled about the correct legal standard or was otherwise inadequately informed of controlling law.

Civil Procedure > Trials > Jury Trials > General Overview
Civil Procedure > Remedies > Damages > Punitive Damages
Civil Procedure > Appeals > Standards of Review > De Novo Review
Evidence > Inferences & Presumptions > Inferences
[HN34] The United States Court of Appeals for the Second Circuit reviews de novo a district court's determination that the evidence is insufficient to permit a reasonable jury to consider awarding punitive damages. The Court will uphold that determination if, drawing all inferences in the plaintiff's favor, there is no genuine issue of material fact and the defendant is entitled to judgment foreclosing a punitive damages award as a matter of law.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN35] Punitive damages, in contrast to compensatory damages, are awarded to punish a defendant for wanton and reckless or malicious acts and to protect society against similar acts. In New York, the standard for conduct warranting an award of punitive damages has been variously described but, essentially, it is conduct having a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard. Such conduct need not be intentionally harmful but may consist of actions which constitute wilful or wanton negligence or recklessness. Punitive damages are appropriate where the defendant acted with actual malice involving an intentional wrongdoing or where such conduct amounted to a wanton, willful or reckless disregard of the plaintiffs' rights.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN36] The recklessness that will give rise to punitive damages under New York law must be close to criminality. Such recklessness may be found where the

defendant is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The court focuses on the nature and degree of the risk and asks whether disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN37] A punitive damages award cannot be sustained under New York law unless the very high threshold of moral culpability is satisfied, because punitive damages are a social exemplary remedy, not a private compensatory remedy. Accordingly, to warrant imposing punitive damages, the reckless conduct at issue must be sufficiently blameworthy that punishing it advances a strong public policy of the State. To analyze the egregiousness of a tortfeasor's conduct, and the corresponding need for deterrence, courts must take into account the importance of the underlying right or public policy jeopardized by the tortfeasor's conduct. The more important the right at issue, the greater the need to deter its violation.

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JUDGES: Before: PARKER, HALL, and CARNEY, Circuit Judges.

OPINION BY: SUSAN L. CARNEY

OPINION

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I. BACKGROUND

SUSAN L. CARNEY [*5] , Circuit Judge:

Exxon Mobil Corporation, Exxon Mobil Oil Corporation, and Mobil Corporation (collectively, "Exxon") appeal from an amended judgment entered in favor of the City of New York, the New York City Water Board, and the New York City Municipal Water Finance Authority (collectively, "the City") on September 17, 2010, in the United States District Court for the Southern District of New York (Shira A. Scheindlin, Judge), following an eleven-week jury trial and post-trial

proceedings. The case was selected to serve as a bellwether trial in certain long-running multidistrict litigation, consolidated in the District Court, that concerns contamination of groundwater by the organic chemical compound methyl tertiary butyl ether ("MTBE").[1]

1 The path of this litigation is charted in a number of District Court opinions, as well as one opinion of our own Court. See *In re MTBE Prods. Liab. Litig., 175 F. Supp. 2d 593 (S.D.N.Y. 2001)* (MTBE I); *In re MTBE Prods. Liab. Litig., 379 F. Supp. 2d 348 (S.D.N.Y. 2005)* (MTBE II); *In re MTBE Prods. Liab. Litig., 457 F. Supp. 2d 324 (S.D.N.Y. 2006)* (MTBE III); *In re MTBE Prods. Liab. Litig., 458 F. Supp. 2d 149 (S.D.N.Y. 2006)* (MTBE IV); *In re MTBE Prods. Liab. Litig., 488 F.3d 112 (2d Cir. 2007)* [*6] (MTBE V); *In re MTBE Prods. Liab. Litig., 2007 U.S. Dist. LEXIS 40484, 2007 WL 1601491 (S.D.N.Y. June 4, 2007)* (MTBE VI); *In re MTBE Prods. Liab. Litig., 644 F. Supp. 2d 310 (S.D.N.Y. 2009)* (MTBE VII); *In re MTBE Prods. Liab. Litig., 643 F. Supp. 2d 482 (S.D.N.Y. 2009)* (MTBE VIII); *In re MTBE Prods. Liab. Litig., 2009 U.S. Dist. LEXIS 78081, 2009 WL 2634749 (S.D.N.Y. Aug. 25, 2009)* (MTBE IX); *In re MTBE Prods. Liab. Litig., 2009 U.S. Dist. LEXIS 96469, 2009 WL 3347214 (S.D.N.Y. Oct. 19, 2009)* (MTBE X); *In re MTBE Prods. Liab. Litig., 2010 U.S. Dist. LEXIS 34471,2010 WL 1328249 (S.D.N.Y. Apr. 5, 2010)* (MTBE XI); *In re MTBE Prods. Liab. Litig., 739 F. Supp. 2d 576 (S.D.N.Y. 2010)* (MTBE XII).

As described in greater detail below, this extended litigation arose from the intensive use of MTBE as a gasoline additive by Exxon and other gasoline companies in the New York area from the 1980s through the first half of the 2000s, when a state ban on MTBE brought the era to an end. Treatment with MTBE increased the oxygen content of gasoline and mitigated harm to air quality caused by automobile emissions, thereby furthering the goals of the Clean Air Act, *42 U.S.C. §§ 7401-7671q*, as amended from time to time. Because of spillage and leakage from gasoline stored in underground tanks, however, MTBE-treated gasoline [*7] was released into the ground, contaminating groundwater supplies. MTBE causes water to assume a foul smell and taste, and has been identified as an animal carcinogen and a possible human carcinogen. In 1990, Congress identified MTBE as one of several additives that gasoline suppliers might use to satisfy new federal oxygenate requirements set forth in amendments to the Clean Air Act, calling for the creation of a "reformulated gasoline" program. In 2005, however, Congress ended that program.

In this suit, the City sought to recover from Exxon for harm caused by the company's introduction of gasoline containing MTBE into a system of water wells in Queens known as the Station Six Wells. Although not currently operative, the City alleged that the Station Six Wells are a significant component of its overall plan to deliver potable water to its residents without interruption over many years to come. Without significant treatment of the water drawn by those wells, the City would be unable to rely on their eventual use, and it alleged that this inability constituted a serious and compensable harm under various State tort law and other legal theories.

Because of the matter's complexity, the [*8] trial proceeded in several phases. Phase I of the trial addressed whether the City established that it intends in good faith to use the Station Six Wells as a source of drinking water in the future. The jury answered that question in the affirmative. In Phase II, the jury was asked whether MTBE will be in the Station Six Wells when those wells begin operating, and at what peak level MTBE will be found. Again answering in the affirmative, the jury concluded that the concentration of MTBE will peak at 10 parts per billion ("ppb") in 2033.

Phase III addressed questions of liability and damages. In Phase III, the jury found Exxon liable to the City under New York law for negligence, trespass, public nuisance, and failure-to-warn; the jury found that Exxon was not liable, however, on the City's design-defect and private nuisance claims. The jury then calculated a gross compensatory award reflecting its assessment of the damage to the wells caused by MTBE contamination generally. It offset this award by amounts it attributed to the damage caused by the introduction of MTBE by companies other than Exxon and by preexisting contamination by other chemicals. The result was the jury's finding -- [*9] and the court's imposition -- of a damages award of $104.69 million, plus pre-judgment and post-judgment interest, for the City.

After ruling that, as a matter of law, Exxon's conduct provided an inadequate basis for assessing punitive damages in the City's favor, the District Court did not

permit the City to proceed with a proposed Phase IV, in which the jury would have addressed that question. The District Court then entered judgment on the claims submitted to the jury pursuant to *Federal Rule of Civil Procedure 54(b)*, holding in abeyance any proceedings on the City's additional claims under the Toxic Substances Control Act, *15 U.S.C. §§ 2601-2692* (creating liability for, inter alia, failing to inform the EPA of known risks associated with the use of a chemical), and under *New York State Navigation Law § 181(5)* (creating liability for oil spillage).

On appeal, Exxon contends that: (1) the City's claims are preempted by the Clean Air Act; (2) the City has suffered no cognizable injury; (3) the City's claims are not ripe (or, in the alternative, are barred by the statute of limitations); (4) the City failed to prove injury or causation; (5) the City's claims fail as a matter of New York [*10] law; and (6) the District Court abused its discretion by failing to declare a mistrial as a result of alleged juror misconduct. In its cross-appeal, the City contends that the District Court erred by: (1) declining to allow a punitive damages phase to proceed; and (2) requiring the jury to offset its gross damages finding by an amount attributable to preexisting contamination.

For the reasons that follow, we AFFIRM the judgment of the District Court in its entirety.

I. BACKGROUND

We begin by setting forth in some detail the factual background and providing an account of the district court proceedings. We then turn to a discussion of the key legal issues raised by Exxon's appeal: primarily, preemption, legal cognizability of injury, ripeness, and sufficiency of the evidence with regard to injury and causation and as to specific elements of each of the City's New York state law tort claims. We next briefly address Exxon's juror misconduct claim. Finally, we discuss the City's arguments regarding the jury's calculation of its damages and the District Court's denial of its claim for punitive damages.

Unless otherwise noted, the following facts are either undisputed or are viewed in the light [*11] most favorable to the City. See *Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 561 n.1 (2d Cir. 2011)*.

A. MTBE and Its Effects

MTBE is an organic chemical compound derived from methanol and isobutylene. Until the mid-2000s, MTBE was widely used in certain regions of the United States, including in New York State, as a fuel oxygenate, i.e., an additive that reduces harmful tailpipe emissions by increasing the octane level in gasoline. By virtue of its chemical properties, however, spilled MTBE spreads easily into groundwater supplies. The Environmental Protection Agency ("EPA") advises:

> MTBE is capable of traveling through soil rapidly, is very soluble in water . . . and is highly resistant to biodegradation . . . . MTBE that enters groundwater moves at nearly the same velocity as the groundwater itself. As a result, it often travels farther than other gasoline constituents, making it more likely to impact public and private drinking water wells. Due to its affinity for water and its tendency to form large contamination plumes in groundwater, and because MTBE is highly resistant to biodegradation and remediation, gasoline releases with MTBE can be substantially more difficult [*12] and costly to remediate than gasoline releases that do not contain MTBE.

Methyl Tertiary Butyl Ether (MTBE); *Advance Notice of Intent to Initiate Rulemaking Under the Toxic Substances Control Act to Eliminate or Limit the Use of MTBE as a Fuel Additive in Gasoline, 65 Fed. Reg. 16094, 16097* (proposed Mar. 24, 2000) (to be codified at *40 C.F.R. Part 79*).

Contamination of groundwater supplies by MTBE is undesirable because MTBE has a "very unpleasant turpentine-like taste and odor that at low levels of contamination can render drinking water unacceptable for consumption." Id. Further, although MTBE has not been classified as a human carcinogen by either the EPA or the National Toxicology Program, see Testimony of Sandra Mohr ("Mohr Testimony"), Trial Transcript ("Tr.") at 3055:7; id. at 3097:5-6, some toxicological studies "show [that MTBE] can cause [DNA] mutations," Testimony of Kenneth Rudo ("Rudo Testimony"), Tr. at 3262:18-19, which "can possibly lead to cancer," id. at 3267:22-23. But see Mohr Testimony, Tr. at 3104:20-21 (testifying that "MTBE is at best a weak mutagen and may not be

particularly mutagenic at all").

New York law limits the concentration of contaminants permitted [*13] in drinking water. See *N.Y. Comp. Codes R. & Regs. tit. 10, § 5-1.1 (ap)*. If the concentration of a particular contaminant exceeds the relevant "maximum contaminant level" ("MCL"), the water may not be served to the public. See id. *§ 5-1.30*. From 1989 through December 23, 2003, the MCL for MTBE was 50 ppb.[2] *N.Y. Comp. Codes R. & Regs. tit. 10, § 5-1.52* (2002). Effective as of December 24, 2003, the MCL for MTBE was reduced to 10 ppb. Id. *§ 5-1.52* (2003).

2 New York's MCL is denominated in micrograms per liter; this measure is equivalent to parts per billion. See, e.g., Zane Satterfield, What Does ppm or ppb Mean?, Nat'l Envtl. Servs. Ctr., W. Va. Univ., at 1 (2004), http://www.nesc.wvu.edu/ndwc/articles/ot/fa04/q&a.pdf.

Effective January 1, 2004, New York State banned the use of MTBE in gasoline. See *N.Y. Agric. & Mkts. Law § 192-g* (2000).

B. The Clean Air Act and the Reformulated Gasoline Program

The Clean Air Act, *42 U.S.C. §§ 7401-7671g*, first passed in 1955 and amended in 1965 to impose nationwide emission standards for automobiles, establishes a comprehensive regulatory scheme to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare" [*14] and "encourage and assist the development and operation of regional air pollution prevention and control programs." *42 U.S.C. § 7401(b)*. See generally *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State Dep't of Envtl. Conservation, 17 F.3d 521, 524-28 (2d Cir. 1994)* (tracing development of Clean Air Act).

In 1990, Congress amended the Clean Air Act to establish the Reformulated Gasoline Program ("RFG Program"). See Pub. L. No. 101-549, § 219, 104 Stat. 2399, 2492-2500 (1990). The RFG Program mandated the use of "reformulated gasoline" -- gasoline enhanced with certain additives -- in metropolitan areas with significant concentrations of ambient ozone. See *42 U.S.C. § 7545(k) (2000)*. Its goal was to obtain the "greatest reduction [achievable] in emissions of ozone forming volatile organic compounds (during the high ozone season) and emissions of toxic air pollutants (during the entire year)." Id. *§ 7545(k)(1)*.

As relevant here, the RFG Program required that reformulated gasoline consist of at least two percent oxygen by weight. Id. *§ 7545(k)(2)(B)*. Refiners and suppliers met this requirement by adding oxygenates such as MTBE to their gasoline. The Clean Air Act did not mandate the [*15] use of any particular oxygenate. Rather, the EPA identified several additives, including MTBE, that refiners and suppliers could blend into reformulated gasoline and thereby satisfy the requirements of the RFG Program.[3] See, e.g., 40 C.F.R. § 79.56(e)(4)(ii)(A)(1)(i) (2000); id. *§ 80.46(g)(2)(i)*.

3 The additives identified by the EPA included ethanol, MTBE, ethyl tertiary butyl ether, tertiary amyl methyl ether, and diisopropyl ether. See, e.g., *40 C.F.R. § 79.56(e)(4)(ii)(A)(1)(i) (2000)*; see also *MTBE V, 488 F.3d 112, 126 (2d Cir. 2007)*.

Fifteen years later, in 2005, Congress altered its approach and again amended the Clean Air Act -- this time, to eliminate the oxygenate requirement for reformulated gasoline. Energy Policy Act of 2005, § 1504, Pub. L. 109-58, 119 Stat. 594, 1076-77 (amending *42 U.S.C. § 7545*).

C. The City's Water-Supply System

The City's water-supply system provides drinking water to over eight million customers within City limits, and to one million customers in upstate New York. Phase III Joint Pretrial Order ("JPTO") Statement of Undisputed Facts ¶ 41. The City's system relies largely upon water that is drawn from three upland reservoir systems and then transported [*16] into the City through a network of aqueducts and tunnels. Id. ¶¶ 41-43. Major components of the City's system are aging and in need of maintenance and repair. Id. ¶ 44.

In the late 1980s, an intergovernmental task force organized by the City's Mayor (the "Task Force") assessed the City's long-term water supply needs and proposed ways for the City to meet those needs. Id. ¶ 26. Among other things, the Task Force recommended that the City investigate the feasibility of using groundwater from the Brooklyn-Queens Aquifer System -- a thick layer of permeable soil and rock beneath Brooklyn and

Queens through which groundwater moves -- to supplement the City's existing surface-water system. Id. ¶ 27. The investigation led to a report issued in 1999, recommending that the City use local groundwater for "potable drinking water supply" and that the City treat the groundwater at several regional treatment facilities, or "well clusters." Id. ¶¶ 29-30.

One of those well clusters is in Jamaica, Queens, and is known as Station Six (the "Station Six Wells"). The quality of the water at those wells is the subject of this appeal. Purchased by the City in 1996, the Station Six Wells were formerly managed [*17] by the Jamaica Water Supply Company. Most of the Station Six Wells draw from the shallowest aquifer beneath Queens. Id. ¶¶ 11, 15-16, 76, 93.

The City first detected MTBE in the Station Six Wells in April 2000, when readings from untreated water drawn from one well showed MTBE concentrations of 0.73 ppb and readings from another well showed MTBE concentrations of 1.5 ppb. Id. ¶¶ 108, 111. Testing conducted three years later, in January 2003, showed that MTBE levels had reached 350 ppb in one of the wells. Id. ¶ 109.

At no point since acquiring them in 1996 has the City pumped water from any of the Station Six Wells into its drinking water distribution system. Id. ¶ 79. A treatment facility there is in the planning stages, but construction has not begun.

D. The City's Claims

In October 2003, the City sued Exxon and twenty-eight other petroleum companies, complaining of injuries to its water supply from gasoline containing MTBE. Over the following year, the City amended its complaint to include twenty-six additional petroleum company defendants. All defendants except Exxon settled before trial. The City's Fourth Amended Complaint (the "Amended Complaint"), filed March 9, 2007, governed the [*18] claims against Exxon tried during the Station Six bellwether trial.

In the Amended Complaint, the City sought to recover "all costs and damages . . . that it has incurred, is incurring, and will incur from investigating, cleaning, detecting, monitoring, preventing, abating, containing, removing, and remediating" the harm caused by MTBE "to the City's groundwater well system as a result of contamination of the soil and/or the aquifer from which these wells draw water." Am. Compl. ¶ 1. The City alleged that the petroleum company defendants "distributed, sold, manufactured, supplied, marketed, and designed MTBE . . . when they knew or reasonably should have known that MTBE . . . would cause damage to the groundwater" in and around Jamaica, Queens. Id. ¶ 3. In particular, the City asserted that the petroleum company defendants knew at relevant times that MTBE was highly soluble in groundwater, see id. ¶ 100, that MTBE was highly prone to spreading widely from a spill point, see id. ¶¶ 88-89, and that underground gasoline tanks in which reformulated gasoline was stored leaked regularly, see id. ¶¶ 92-94.

The City asserted the following ten causes of action:

o strict liability for defective [*19] design of the gasoline, based on the "unreasonably dangerous and foreseeable risk to groundwater" posed by MTBE, id. ¶ 131;

o strict liability for failure-to-warn, based on defendants' "strict duty to warn against latent dangers resulting from foreseeable uses of [MTBE] that [d]efendants knew or should have known about," id. ¶ 136;

o negligence, based on defendants' breach of their duty "not to place into the stream of commerce a product that was in a defective condition and . . . unreasonably dangerous to groundwater resources," id. ¶ 143;

o civil conspiracy, based on an "industry-wide conspiracy to suppress information regarding the threat that [MTBE] posed to groundwater resources," id. ¶ 150;

o public nuisance, based on "interfere[nce] with and . . . damage to a public or common resource that endangered public property, health, safety and comfort," id. ¶ 161;

o private nuisance, based on "contamination now interfering with the City's rights as property owner," id. ¶ 173;

o trespass, based on the "placement of . . . MTBE on and in property owned by the City without permission or right of entry," id. ¶ 177;

o violation of *Section 181(5) of the New York State Navigation Law*, which proscribes [*20] the "discharge

[of] any kind or any form of petroleum, including wastes or byproducts of petroleum," id. ¶ 182;

o violation of *Section 349 of the New York State General Business Law*, based on defendants' "statements and representations that MTBE was environmentally safe, when in fact they knew or should have known that MTBE posed a substantial threat to groundwater resources," id. ¶ 188; and

o violation of the federal Toxic Substances Control Act, *15 U.S.C. § 2614(3)(B)*, based on defendants' failure to inform the EPA of the risks associated with MTBE, id. ¶¶ 196-202.

The City sought compensatory damages of $300 million and punitive damages in an amount to be determined at trial.

E. The Trial

The City's design-defect, failure-to-warn, negligence, public nuisance, private nuisance, and trespass claims were tried to a jury beginning in August 2009. The trial, which lasted for approximately eleven weeks, culminated in a jury verdict finding Exxon liable on four claims (failure-to-warn, negligence, public nuisance, and trespass), and acquitting Exxon of liability on two (design-defect and private nuisance). Portions of the trial proceedings relevant to this appeal are recounted below.

1. Phase [*21] I: Future Use of the Station Six Wells

Phase I addressed a threshold issue: because the City was not using the Station Six Wells as a source of drinking water at the time of trial (nor is it now), the jury was asked to determine whether the City intended to use those wells for that purpose in the future. The District Court's interrogatories to the jury instructed that, to recover on any theory, the City had to "prove[ ], by a fair preponderance of the credible evidence, that it intends, in good faith, to begin construction of the Station 6 facility within the next fifteen (15) years," and that the City "intends, in good faith, to use the water from the Station 6 wells, within the next fifteen (15) to twenty (20) years, either to supply drinking water to its residents or to serve as a back-up source of drinking water if needed due to shortages in other sources of supply (or both)." Phase I Interrogatory Sheet.

The City's Phase I witnesses included James Roberts, the Deputy Commissioner of the New York City Bureau of Water and Sewer Operations of the New York City Department of Environmental Protection ("DEP"). Roberts testified that although the City was not then using the Station Six [*22] Wells, it had not abandoned them. Testimony of James Roberts ("Roberts Testimony"), Tr. at 339:3-4. To the contrary, Roberts explained, because the wells the City acquired from the Jamaica Water Supply Company are the "the so[le] source of water that lies within the [C]ity's bounds that [the City] controls . . . it's a no-brainer that [the City] would want to be able to utilize that resource when and if necessary." Id. at 340:24 to 341:2. Roberts testified further that the Commissioner of DEP had decided that a treatment facility would be built at Station Six, id. at 358:12-18, and that the City was in the early stages of designing the facility, id. at 357:2-13. According to Roberts, design and construction costs would total approximately $250 million. Id. at 357:16-19.

The jury also heard testimony from Kathryn Garcia, the Assistant Commissioner for Strategic Projects at DEP. Garcia described Station Six as "absolutely a priority matter" for the City. Testimony of Kathryn Garcia ("Garcia Testimony"), Tr. at 436:14. She testified that "Station 6 has always been a decision that has been made and to my knowledge has never been revisited," and that she had "never heard any conversation [*23] about . . . maybe we shouldn't do Station 6." Id. at 439:3-7. According to Garcia, the City had yet to construct a treatment facility at Station Six because "[w]e have been struggling with our capital budget in terms of having enough money for all of our needs." Id. at 435:9-10. In 2008 and 2009, however, the Mayor and City Council approved budgets that included funding for the project. Id. at 440:5-24.

William Meakin, the former Chief of Dependability and Risk Assessment at DEP, also testified about the impact of budget issues on Station Six. Meakin reiterated that the City is "committed to designing and building Station 6." Testimony of William Meakin ("Meakin Testimony"), Tr. at 612:6-7. According to Meakin, the City had yet to do so for only one reason: "money, the funding." Id. at 612:10.

The City also presented the testimony of Steven Lawitts, the Acting Commissioner of DEP. Lawitts confirmed that he had approved the design and construction of a treatment facility at Station Six and that

the Mayor and the City Council had ratified that decision by providing for a facility in the City's budget. Testimony of Steven Lawitts ("Lawitts Testimony"), Tr. at 680:3-11. Lawitts agreed that [*24] "if the City had the money for Station 6, . . . that project [would] go forward." Id. at 681:10-12; see also id. at 683:2-5 (answering "yes" to the question, "From your perspective as [C]ommissioner, is money the only reason Station 6 hasn't been built yet?"). When asked for his view about the importance of Station Six, Lawitts explained that:

> Station 6 will be a critical element in ensuring our ability to continue to deliver adequate quantities of water, because the Station 6 project will allow us to tap an additional source of water that we're not currently tapping, and provide an additional 10 million gallons per day of treated drinking water to be able to be distributed throughout the New York City water system.

Id. at 681:18-24. Lawitts explained that an additional 10 million gallons of water per day "would be enough water to supply on average about 80,000 people." Id. at 682:2-3.

At the conclusion of Phase I, the jury found that the City had proven its good faith intent to begin construction of the Station Six facility within the next fifteen years. The jury also found that the City intends to use the Station Six Wells within the next fifteen to twenty years as a back-up (rather [*25] than primary) source of drinking water.

2. Phase II: Peak MTBE Concentration in the Station Six Wells

In Phase II, the jury was asked whether the City had proven "that MTBE will be in the groundwater of the capture zone of the Station 6 wells when they begin operat[ing]" as a back-up source of drinking water, with "capture zone" defined as "the groundwater that will be drawn into the Station 6 wells when they begin operation." Phase II Interrogatory Sheet. It was also asked "[a]t what peak level will MTBE be found in the combined outflow of the Station 6 wells, and when that will occur," with "combined outflow" defined as "the combination of all the water from all the wells that goes into the treatment facility." Id.

The City's principal witness during Phase II was David Terry, a hydrogeologist who testified about two groundwater models he created to estimate future levels of MTBE contamination in the Station Six Wells. According to Terry, hydrogeologists use groundwater models "to understand the flow of groundwater and how contaminants move through the groundwater system." Testimony of David Terry ("Terry Testimony"), Tr. at 1890:18-20. Terry explained that, in developing a groundwater [*26] model,

> [y]ou have certain inputs that you use, pumping rates of wells, locations of contamination sites and inside the computer there's information sort of like a road network, but instead it tells about how groundwater flows under, where the aquifers are, which direction it's traveling, how fast it moves. Then [it] can run a certain set of situations we want to investigate and get out there, such as where the contamination will move to, what concentration it will be, how long it will last at a certain location.

Id. at 1891:6-14.

The first of Terry's two models was a "groundwater flow model." Id. at 1893:22-1895:15. Terry used this model, which was developed by the United States Geological Survey and shows "where the groundwater flows" and "how fast it moves," id. at 1893:23-24, to predict the likely size and shape of the Station Six capture zone, id. at 1895:21-1896:9. He did so by populating the model with a "proposed pumping scenario" provided by City planners. Id. at 1896:12-20. The "proposed pumping scenario" included information about the location of various wells at and near Station Six, their anticipated activation dates, and the anticipated rates at which they would pump. Id. [*27] at 1901:14-20. Terry explained that in estimating the Station Six capture zone, "[w]e really can't look at Station 6 by itself because there are other wells near Station 6, and when those wells pump they affect the water flow direction at the wells near Station 6." Id. at 1896:16-19. His testimony also made clear that his prediction of the size and shape of the Station Six capture zone was based on the City's proposed pumping scenario, which could change over time. Id. at 1902-12; 2087:17-21; 2210:8-10.

The second of Terry's two models was a "transport model." Terry explained that a transport model

> really rides on top of the flow model. [The transport] model describes how contaminants move through the groundwater system. So the flow model is actually describing the flow of groundwater from place to place and the transport model is sort of describing on top of that how the contamination moves through the system.

Id. at 1894:17-23. Terry used the transport model to make "numerical projections" about "how high of a concentration of MTBE will occur at Station 6 in the future, and how long it will last." Id. at 2013:2-5. Like his flow model, Terry's transport model relied upon specific assumptions [*28] about proposed pumping scenarios that could change over time. Id. at 2013:17-21.

Terry used his flow and transport models to perform two different analyses. His "Analysis 1" was designed to ascertain "future peak concentrations at Station 6." Id. at 2016:9-10. Relying on actual ground water quality information gathered in 2004 for sample locations in the vicinity of Station Six, Analysis 1 predicted that the concentration of MTBE in the combined outflow of the Station Six Wells would peak at 35 ppb in 2024. Id. at 2067:17-19.

Terry's "Analysis 2" was designed to determine how long MTBE contamination at Station Six would last if well usage began in 2016. Id. at 1906:8-18; 2015:9-11. As part of this analysis, Terry identified twenty-two known gasoline release sites in the vicinity of Station Six and assumed different release volumes at each site. Id. at 2073:7-16; 2074:6-8. Analysis 2 predicted that if no more than 50 gallons of gasoline were released at each site, MTBE concentration in the combined outflow of the Station Six Wells would be undetectable. Pl. Ex. 1682. But if 500 gallons of gasoline were released at each site, MTBE concentration would peak at approximately 6 ppb and last [*29] through at least 2040. Id. And if 2,000 gallons of gasoline were released at each site, MTBE concentration would peak at approximately 23 ppb and also last through at least 2040. Pl. Ex. 14862. Terry opined that the 2,000-gallon release scenario was "relatively conservative," Terry Testimony, Tr. at 2075:19-20, but "probably the most realistic of [the] scenarios," id. at 2075:6-8.

Exxon had no affirmative burden to establish an alternative measure of MTBE contamination at Station Six, and it did not proffer a competing model. It did, however, present the testimony of an expert who concluded that Terry's models were "fatal[lly] flaw[ed]," Testimony of Thomas Maguire ("Maguire Testimony"), Tr. at 2432:20-22, and that the methods Terry employed were "scientifically [in]valid," id. at 2444:2-5.

At the conclusion of Phase II, the jury found that the City had proven that "MTBE will be in the groundwater of the capture zone of the Station 6 wells when they begin operation." Phase II Interrogatory Sheet. The jury found further that the concentration of MTBE in the combined outflow of the Station Six Wells will peak at 10 ppb in 2033. Id.

3. Phase III: Liability and Statute of Limitations

Phase [*30] III dealt with liability and statute of limitations issues. As to liability, the jury was asked (1) whether the City "is, or will be, injured by the MTBE that will be in the combined outflow of the Station 6 wells"; (2) whether Exxon "was a cause of the City's injury" as either a "direct spiller" of MTBE gasoline or a "manufacturer, refiner, supplier, or seller" of MTBE gasoline; (3) whether Exxon was liable on the City's design-defect, failure-to-warn, trespass, private nuisance, public nuisance, and negligence claims; and (4) what amount of compensatory damages should be awarded to the City. Phase III Interrogatory Sheet. As to the statute of limitations, the jury was asked whether Exxon had proven "that the City did not bring its claims in a timely manner." Id.

a. Injury

The jury was instructed that, in determining whether the City is or will be injured by MTBE contamination at Station Six, the "question is whether the [C]ity has proven by a fair preponderance of the credible evidence that a reasonable water provider in the [C]ity's position would treat the water to reduce the levels or minimize the effects of the MTBE in the combined outflow of the Station 6 wells in order to use [*31] that water as a back-up source of drinking water." Tr. at 6604:5-10.

In support of its claim that a reasonable water provider in its position would treat the water in the

Station Six Wells, the City presented a number of witnesses, including Dr. Kathleen Burns, who testified about the toxicological characteristics of MTBE. In Dr. Burns's opinion, MTBE "is an animal carcinogen," "a probable human carcinogen," and "a probable human mutagen." Testimony of Kathleen Burns ("Burns Testimony"), Tr. at 2809:10-22. Describing mutagenicity, Dr. Burns advised, "It only takes one molecule . . . of MTBE interacting with DNA[ ] to start to initiate the sequence that will give us an abnormal reproducing cell line and ultimately lead to cancer." Id. at 2829:12-14.

Similarly, Dr. Kenneth Rudo, a toxicologist, testified that MTBE is both "mutagenic" and a "probable human carcinogen." Testimony of Kenneth Rudo ("Rudo Testimony"), Tr. at 3265:23-3266:2. As a mutagen, MTBE can change the way human DNA is expressed. Id. at 3266:3-18. According to Dr. Rudo, at even the lowest levels of exposure in drinking water, MTBE can cause mutations that lead to cancer. Id. at 3267:21-24.

The City also presented expert [*32] testimony about the taste and odor characteristics of MTBE. Harry Lawless, a professor in Cornell University's food science department, testified about his review of the scientific literature regarding the proportion of the population that is sensitive to the taste and smell of MTBE in drinking water at various concentration levels. Testimony of Harry Lawless ("Lawless Testimony"), Tr. at 2888:20-25. Based on his review, Lawless opined that 50 percent of the population would detect MTBE in drinking water at 14 to 15 ppb; 25 percent of the population would detect MTBE in drinking water at 3 to 4 ppb; and 10 percent of the population would detect MTBE in drinking water at 1 to 2 ppb. Id. at 2889:18-22. Lawless also testified that "if [he] was in a consumer products company and 10 percent of the population noticed a change in the product, that would be a problem." Id. at 2890:3-5.

In addition, the City called Steven Schindler, Director of Water Quality for the City's Bureau of Water Supply, whose responsibilities include monitoring the City's water supply for quality issues and investigating consumer complaints relating to water quality. Testimony of Steven Schindler ("Schindler Testimony"), [*33] Tr. at 2927:19-22; id. at 2938:17-20. Schindler testified that consumers "expect[ ] their water to be relatively free of taste and odor" and that "there is a very close link between how the water tastes and smells [and] public confidence." Id. at 2942:13-19. According to Schindler, if "10 percent of the population . . . detect[ed] taste and odor in their water. . . that's going to undermine ultimately the public con[fidence] in our water supply." Id. at 2943:9-13.

For its part, Exxon presented the testimony of Dr. Sandra Mohr, who disputed Drs. Burns's and Rudo's account of MTBE's effects on human health. Dr. Mohr testified that neither the EPA nor the National Toxicology Program has classified MTBE as a human carcinogen. Mohr Testimony, Tr. at 3055:7; id. at 3097:5-6. According to Dr. Mohr, "[t]here is no human data that MTBE is a carcinogen, and there is very limited animal data." Id. at 3055:14-15. Indeed, in Dr. Mohr's opinion, "MTBE is not carcinogenic in humans." Id. at 3087:1; see also id. at 3056:3 ("I don't think that it's a carcinogen at all."). As for MTBE's mutagenic properties, Dr. Mohr testified that the scientific literature shows "that MTBE is at best a weak mutagen [*34] and may not be particularly mutagenic at all." Id. at 3104:20-21.

b. Causation

The City advanced three theories of causation, each of which was tied to its theories of liability. First, it alleged that Exxon caused damage to the City as a "direct spiller" of gasoline containing MTBE. In this vein, the City asserted that Exxon owned or controlled underground storage tank systems at six gasoline stations in Queens, and that MTBE leaked from these tanks into the groundwater. Tr. at 6605:1-8. The jury was instructed that it should find that Exxon was a cause of the City's injury as a "direct spiller" if the City showed by a preponderance of the evidence that (1) "[a]t the time that [Exxon] owned or controlled some or all of these underground storage systems, they leaked gasoline containing MTBE" and (2) "these leaks caused or will cause an injury to the [C]ity's Station 6 wells." Id. at 6605:8-15. The jury was also instructed that "[a]n act or omission is regarded as a cause of an injury if it is a substantial factor in bringing about the injury; that is, if it has such an effect in producing the injury that reasonable people would regard it as a cause of the injury." Id.

Second, the City [*35] alleged that Exxon caused damage to the Station Six water supply as a "manufacturer, refiner, supplier, or seller" of gasoline containing MTBE. Under this theory, Exxon could be held liable for manufacturing, refining, supplying, or selling MTBE-treated gasoline that leaked or spilled from service stations not owned or controlled by Exxon. Thus,

the jury was instructed that it should find that Exxon was a cause of the City's injury as a "manufacturer, refiner, supplier or seller" of MTBE gasoline if the City showed by a preponderance of the evidence that Exxon's "conduct in manufacturing, refining, supplying or selling gasoline containing MTBE was a substantial factor in causing the [C]ity's injury."[4] Id. at 6606:2-11. The jury was further instructed that, "[i]n making this decision, you should consider how much, if any, of the gasoline containing MTBE that was delivered to the locations that are the sources of the MTBE that injured or will injure the Station 6 wells came from gasoline containing MTBE that was manufactured, refined, supplied or sold by [Exxon]." Id. at 6606:12-17. And it was informed that, in deciding whether Exxon's conduct was a significant factor in bringing about [*36] the City's injury, it could "consider as circumstantial evidence [Exxon's] percentage share of the retail and/or supply market for gasoline containing MTBE in Queens or [in] any other region that [it] determine[d] is relevant." Id. at 6606:17-20.

> 4 None of the parties have objected to this formulation, which varied from time to time in the district court proceedings, but which we take to address Exxon's liability as wholesale "seller" of MTBE-treated gasoline, as distinct from its liability for direct spills occurring as a retail "seller."

Third, the City alleged that Exxon could be liable as a "contributor" to the City's injury pursuant to an alternative theory -- known as the "commingled product theory" or "manufacturer or refiner contribution" -- developed by the District Court for purposes of the underlying MDL. Pursuant to this theory, which the jury would consider only if it rejected the City's other two theories of liability:

> when a plaintiff can prove that certain gaseous or liquid products (e.g., gasoline, liquid propane, alcohol) of many refiners and manufacturers were present in a completely commingled or blended state at the time and place that the harm or risk of harm occurred, [*37] and the commingled product caused plaintiff's injury, each refiner or manufacturer is deemed to have caused the harm. A defendant [can] exculpate itself by proving that its product was not present at the relevant time or in the relevant place, and therefore could not be part of the commingled or blended product.[5]

Thus, the District Court instructed that jury that it "will find that [Exxon] contributed to the [C]ity's injury in its capacity as a manufacturer or refiner" if the City showed by a preponderance of the evidence that:

> [1] the MTBE that injured or will injure the [C]ity comes from many refiners and manufacturers, whether because the gasoline from any source is co-mingled at the source and includes [Exxon] MTBE product, or because the MTBE product in the ground came from multiple sources[ ] [o]ne of which is an [Exxon] source and is now co-mingled in the groundwater; [2] that the combined co-mingled MTBE product of many refiners and manufacturers injured or will injure the [C]ity; and [3] that when the co-mingled MTBE product injured or will injure the [C]ity, it included or will include some MTBE from gasoline containing MTBE that was manufactured or refined by [Exxon].

Id. at [*38] 6607:15-6608:6.

> 5 *MTBE VII, 644 F. Supp. 2d at 314* (internal quotation marks omitted).

c. Damages

The jury was instructed that if it found Exxon liable on any of the City's causes of action, "then [it] must award the [C]ity sufficient damages to compensate the [C]ity for losses caused by [Exxon's] conduct." Tr. at 6634:20-22. This damages determination took place in four stages. First, the jury was instructed to determine the "sum of money that compensates [the City] for all actual losses the [C]ity proves, by a fair preponderance of the credible evidence, that it has sustained, or will sustain in the future, as a result of MTBE in the Station 6 wells." Id. at 6635:8-13. Next, in view of Exxon's contention that the water in the Station Six capture zone was also polluted with non-MTBE contaminants such as perchloroethylene,[6] the jury was instructed to reduce the City's damage award by any amount attributable to the

"cost of treating [the] other contaminants [at Station Six] in isolation." Id. at 6637:11-15. Next, the jury was provided a list of the petroleum companies that had settled with the City prior to trial and instructed to "decide the percentage of the total fault borne by these [*39] other companies as compared to [Exxon's] fault."[7] Id. at 6638:1-4. Finally, the jury was asked to determine whether "the [C]ity was negligent in its use of gasoline containing MTBE and, if so, whether the [C]ity's negligent conduct was a substantial factor in causing its own injury." Id. at 6638:17-20. If the jury found that the City's negligence was a substantial factor in causing its own injury, then it was instructed to "apportion the fault between the [C]ity, [Exxon], and any other companies [it found] liable." Id. at 6639:7-10.

6 Perchloroethylene (also known as "PCE," "perc," or tetrachloroethylene) is a solvent used in the dry cleaning and textile processing industries. When the City purchased the Station Six Wells, they were contaminated with PCE. Historically, the concentration of PCE in the Station Six Wells has exceeded the MCL for PCE, rendering the water non-potable.

7 It appears as though, in proving the percentage of fault attributable to the settling defendants, Exxon relied principally on evidence of each defendant's share of the New York gasoline market during the relevant period.

In an effort to quantify its damages, the City called Marnie Bell, a groundwater treatment [*40] expert who testified about the cost of treating the MTBE at Station Six. Bell explained that it is "standard engineering practice to design a treatment system to treat the water to below an MCL" because "[d]esigning a treatment system to treat the water to just below an MCL would place a water utility at risk for violating the MCL and possibly delivering contaminated water to its customers." Testimony of Marnie Bell ("Bell Testimony"), Tr. at 5881:14-18. In addition, Bell explained, New York State "require[s] that treatment systems for the removal of organic contamination [such as MTBE] be designed to remove the contaminant to the lowest practical level." Id. at 5881:19-22.

Bell identified two "proven and reliable technologies" for removing MTBE from groundwater: granular-activated carbon ("GAC") and air-stripping.[8] Id. at 5861:5-7. She estimated that, assuming the concentration of MTBE at Station Six peaked at 10 ppb, as the jury concluded during Phase II, building and operating a GAC facility would cost approximately $250 million in 2009 dollars, id. at 5886:9-10, while building and operating an air-stripping facility would cost approximately $127 million in 2009 dollars, id. at 5896:5-8. [*41] According to Bell, however, "[t]here are a number of factors that may make [air-stripping] less desirable," including noise and the size of the necessary equipment. Id. at 6044:4-9.

8 GAC is a type of charcoal the "extreme[ ] poro[sity]" of which "allows it to remove certain types of contaminants from water." Id. at 5861:15-19. Air-stripping is a process that uses blowing air to remove contaminants from water. Id. at 5921:21-22.

In arriving at her estimates, Bell projected the costs of a treatment facility over a forty-year timeframe because "Terry's modeling . . . showed MTBE concentration sustaining at significant levels out to 2040. And we projected those trends outwards to try and identify the entire timeframe in which Station 6 would need to provide MTBE treatment." Id. at 5885:16-20. In addition, Bell testified that, although she understood Station Six would be used as a back-up source of drinking water (as the jury concluded during Phase I), the "only reasonable assumption to make [in projecting the cost of a treatment facility] was that the facility would need to operate continuously." Id. at 5886:21-22. As Bell explained, "[t]he [C]ity has a number of planned repairs on its tunnels [*42] and aqueducts. There is the potential for a failure of that supply. And when the system needs to operate, it needs to operate continuously for as long as it is needed."[9] Id. at 5886:22-5887:1.

9 Bell also testified that if one of the less-contaminated wells at Station Six were taken offline, the concentration of MTBE in the combined outflow of the remaining wells would reach 15 ppb. Bell Testimony, Tr. at 5860:10-20.

d. Statute of Limitations

The jury was also asked to consider Exxon's contention that the City had failed to bring its claims within the applicable three-year statute of limitations.[10] As to this issue, the jury was instructed that Exxon bore the burden of showing by a preponderance of the evidence that, at some time before October 31, 2000, i.e.,

more than three years before the City filed suit, (1) "there was a sufficient level of MTBE in the capture zone of the Station 6 wells such that if the wells were turned on, the level of MTBE in the combined outflow of the Station 6 wells would have injured the [C]ity at that time," and (2) "the [C]ity knew at that time or reasonably should have known that there was a sufficient level of MTBE in the capture zone of the Station 6 [*43] wells . . . to cause an injury." Tr. at 6631:16-6632:2.

> 10 New York law imposes a three-year statute of limitations for toxic tort actions. *N.Y. C.P.L.R. 214-c(2).*

In support of its contention that the City's claims were time-barred, Exxon relied principally on the testimony of William Yulinsky, the Director of Environmental Health and Safety in DEP's Bureau of Waste Water Treatment. Yulinsky testified that, as early as September 1999, he received a memorandum from a City consultant who noted that, "considering that numerous potential sources of MTBE exist within [one] mile of Station 6, the need to treat for MTBE should be anticipated, particularly in conjunction with the high concentrations of PCE reported nearby." Testimony of William Yulinsky ("Yulinsky Testimony"), Tr. at 5781:24-5782:8. Yulinsky also testified that by August 2000, the City was "looking at station modifications for Station 6 to treat a variety of things," including MTBE. Id. at 5768:1-9. Yulinsky explained, however, that in 1999 and 2000 "it was way too soon to determine what we were going to need to treat for." Id. at 5772:6-8.

e. Phase III Jury Verdict

At the close of Phase III, the jury found that the City "is, [*44] or will be injured" by the MTBE that will be in the combined outflow of the Station Six Wells. Phase III Interrogatory Sheet. It also found that Exxon was a cause of the City's injury as both a direct spiller of gasoline containing MTBE and as a manufacturer, refiner, or seller of such gasoline. Id. In view of these findings, it did not consider whether Exxon could be held liable as a "contributor" to the City's injury pursuant to a "commingled product theory" of liability. Id. As for the City's substantive claims, the jury found that the City had proven Exxon's liability for failure-to-warn, trespass, public nuisance, and negligence, but not design-defect or private nuisance. Id.

After concluding that Exxon had failed to prove that the City's claims were untimely, the jury turned to the question of damages. Id. First, the jury concluded that the City would be fairly and reasonably compensated by an award of $250.5 million. Id. Next, it determined that the cost associated with reducing levels of non-MTBE contaminants in the Station Six Wells was $70 million. Id. Finally, it attributed 42 percent of the fault for the City's injury to petroleum companies other than Exxon. Id. The jury's [*45] final award to the City was therefore $104.69 million.

F. Punitive Damages

As previously noted, the City also sought punitive damages based on Exxon's allegedly reckless disregard of the risks and dangers inherent in supplying gasoline containing MTBE. In support of its claim for punitive damages, the City pointed to certain evidence it had adduced during Phase III, as well as other evidence it proffered and intended to adduce during a punitive-damages phase of the trial. The City's evidence fell into six general categories.[11]

> 11 The summary provided here is drawn from the District Court's discussion of the evidence presented during Phase III and proffered for the punitive phase, see *MTBE X, 2009 U.S. Dist. LEXIS 96469, 2009 WL 3347214, at *1-3*, as well as from the City's letter brief in support of a punitive phase, see Letter of Victor M. Sher, Oct. 8, 2009.

The first category of evidence pertained to Exxon's knowledge of the effect of MTBE on the taste and odor of drinking water. The City argued that its evidence raised an inference that Exxon knew, as early as the mid-1980s, that the presence of MTBE might render water undrinkable. For example, Robert Scala, former director of the Research and Environmental Health [*46] Division at Exxon, testified that in 1984 he drafted a paper for Exxon and the American Petroleum Institute in which he raised concerns about the taste and odor of MTBE and other gasoline-associated compounds, and that others at Exxon shared his concerns. Testimony of Robert Scala ("Scala Testimony"), Tr. at 3239:11-3239:20. The City also pointed to an internal memorandum prepared by Exxon employee Barbara Mickelson in 1984, in which Mickelson concluded that "low, non-hazardous, analytically non-detectable levels of MTBE continue to be a source of odor and taste complaints in affected drinking water." Pl. Ex. 272. In

addition, the City cited a memorandum prepared by Exxon employee Jack Spell in 1984, in which Spell described to his Exxon supervisors a Shell Oil report concluding that "approximately 5 parts per billion (in water) is the lower level of detectability" for MTBE. Pl. Ex. 5506.

The second category of evidence pertained to Exxon's knowledge of the health effects of MTBE. Although the parties disagree about the impact of MTBE on human health, the City presented evidence that, construed in its favor, raised an inference that as early as the 1980s, Exxon knew that MTBE posed [*47] potential health risks. For example, the City cited a memorandum Spell forwarded to his Exxon supervisors in early 1987, which advised that "MTBE has been identified as a health concern at the state and federal level when it is a contaminate [sic] in either ground water or air." Pl. Ex. 5506. The City also highlighted a slideshow prepared by Exxon in 1995, in which Exxon stated that its strategy was to "continue to monitor data on MTBE in groundwater" and to participate in ongoing studies of MTBE's toxicity. Pl. Ex. 477. In addition, the City introduced a 1999 Exxon study that observed, "With uncertain human health and environmental potential effects, public concerns about the need for control or elimination of MTBE in gasoline has accelerated." Pl. Ex. 580.

The third category of evidence pertained to Exxon's knowledge of the difficulties of remediating MTBE spills. For example, in the same 1984 memorandum in which she remarked upon MTBE's taste and odor characteristics, Barbara Mickelson also noted that "MTBE, when dissolved in ground water, will migrate farther than BTX [another petrochemical] before soil attenuation processes stop the migration." Pl. Ex. 272. In a memorandum prepared [*48] the following year, Mickelson explained that "the inclusion of MTBE in Exxon gasoline is of concern as an incremental environmental risk" in part because "MTBE has a much higher aqueous solubility than other soluble gasoline components," "MTBE has a higher differential transport rate than other soluble gasoline components," and "MTBE . . . cannot be removed from solution to below detectable levels by carbon adsorption and must be treated by more complicated and expensive air stripping columns." Pl. Ex. 292. Based on these considerations, in the 1985 memorandum Mickelson "recommend[ed] that from an environmental risk point of view[,] MTBE not be considered as an additive to Exxon gasolines on a blanket basis throughout the United States." Id.

The fourth category of evidence pertained to Exxon's knowledge that its own underground storage tanks leaked gasoline. For example, in a 1984 memorandum to his supervisors, Jack Spell identified a series of "ethical and environmental concerns that are not too well defined at this point," including the "possible leakage of SS [service station] tanks into underground water systems of a gasoline component that is soluble in water to a much greater [*49] extent." Pl. Ex. 247. Similarly, Barbara Mickelson noted in another 1984 memorandum that Exxon had "62 ground water clean up activities underway." Pl. Ex. 271. The following year, in a memorandum in which she "reviewed the environmental risks from retail service station underground storage systems associated with the addition of MTBE," Mickelson noted that MTBE's elevated aqueous solubility "can be a factor in instances where underground storage tanks develop a leak which ultimately may find its way to the underground aquifer." Pl. Ex. 283. For his part, Robert Scala testified that he was aware by the 1980s that Exxon had begun to replace underground storage tanks "[p]resumably because they either leaked or had a potential to leak." Scala Testimony, Tr. at 3229:5-8; see also Pl. Ex. 228 (Underground Tank Failure Report 1982 Year-End Summary); Pl. Ex. 782 (Underground Tank Program). These tank problems extended well into the 1990s. In March 1998, for example, Exxon prepared a slide show in which it noted that "268 UST [underground storage tank] system releases occurred between 1993-1996." Pl. Ex. 1026. The slides reflect both Exxon's belief that future MTBE releases were likely through [*50] tank failure, and that the company had plans and training in place to minimize the risk of releases.

The fifth category of evidence pertained to Exxon's knowledge of MTBE contamination in New York. On this score, the City offered a 1998 survey, completed by Exxon employee Mike Meola, of MTBE contamination levels at potable and monitor wells near 98 retail sites in the state. Pl. Ex. 3074. The survey showed average MTBE concentrations of 50,000 to 100,000 ppb, with peak concentrations reaching 1,000,000 ppb in some monitor wells. Id. The survey did not suggest, however, that Exxon understood precisely how MTBE contamination would affect groundwater located some distance away from a leaking tank. Indeed, a 1987 Exxon memorandum introduced by the City suggests that at that

time Exxon theorized that MTBE's "apparent faster migration . . . is mitigated by the rapid dilution of the material and its faster disappearance from a site." Pl. Ex. 2636. Nor did the City present evidence suggesting that, before 1998, Exxon knew that MTBE contamination in New York State occurred at significant levels.

The final category of evidence pertained to Exxon's candor about its knowledge regarding MTBE. The [*51] City presented disputed evidence that, construed in the City's favor, suggested Exxon hid its knowledge of MTBE's deleterious characteristics from regulators, gas station owners and operators, and others. For example, when asked in deposition whether Exxon informed independent station owners that its gasoline contained MTBE, Robert Larkins, the Exxon executive who approved MTBE's use in the mid-1980s, responded that Exxon "didn't uninform them." Deposition of Robert P. Larkins, 467:23-468:04, Mar. 6, 2008 (emphasis added). The City also offered evidence suggesting that Exxon minimized MTBE's dangers in public statements. For example, in 1987, the Oxygenated Fuels Association's MTBE Committee, acting on behalf of Exxon and others, told the EPA that "there is no evidence that MTBE poses any significant risk of harm to health or the environment." Pl. Ex. 5507.

At the close of Phase III of the trial, Exxon moved to preclude the jury from considering an award of punitive damages, arguing that the City's evidence was insufficient as a matter of law to establish the requisite degree of malice, recklessness, or wantonness. The District Court granted Exxon's motion, reasoning that the City had [*52] not shown that Exxon's conduct "created either significant actual harm or a substantial risk of severe harm to the Station Six wells."[12]

> 12 See *MTBE X, 2009 U.S. Dist. LEXIS 96469, 2009 WL 3347214, at *8.*

G. Juror Misconduct

During the jury's Phase III deliberations, the District Court received a telephone call from Juror No. 2, who reported that Juror No. 1 had "cursed," "insulted," and threatened to "cut" her. Tr. at 6994:10-13. Juror No. 2 also reported that "[e]verybody is afraid of" Juror No. 1 and "[n]obody is willing to stand up to her." Id. at 6995:1-2. The next day, Exxon moved to excuse Juror No. 1 from further service, and requested that the District Court ask the remaining jurors whether, in Juror No. 1's absence, they felt "they [could] reach a decision based on their own views, own conscientious views, rather than on threats, coercion or duress." Id. at 6992:11-22.

After observing that Juror No. 1 "has been a worrisome juror for a long time" and suggesting that "she is the juror whose voice we can hear through the doors as being loud and being abusive," the District Court proceeded to ask each juror individually whether he or she felt able to deliberate without fear of duress or threat. Id. at 6993:1-7. [*53] After several jurors denied feeling threatened and responded unequivocally that they could reach their own verdicts, the District Court stated that it had "occurred" to the court "that Juror No. 2 is very fragile and that rather than excusing Juror No. 1, it might be Juror No. 2 has an overblown view of what's occurring," recalling a prior occasion when Juror No. 2 had cried in court. Id. at 7007:13-24. The District Court then questioned Juror No. 2, who stated, "I can't make my own decision." Id. at 7011:2.

After completing the interviews, the District Court concluded that it was "absolutely confident that nobody feels threatened other than Juror No. 2, [who] says she no longer feels she can reach her own verdict[,] [s]o it strikes me that she ought to be excused." Id. at 7013:2-5. Counsel for Exxon agreed that "if [Juror No. 2] cannot go forward, then she needs to be excused," id. at 7013:24-25, but moved for the dismissal of Juror No. 1 "for threatening [Juror No. 2] with physical violence," id. at 7014:3-4. The District Court denied the motion, expressing its view that the "violence"

> may partly be in [Juror No. 2's] mind. There were ten people deliberating and nobody felt threatened [*54] at all. I watched their demeanor. They seemed calm. They seemed reasonable. They really thought it was, you know, just almost surprising that I was talking to them. I sensed no concern on any other juror's part.

Id. at 7014:5-10; see also id. at 7015:15-17 ("If there had been a threat of violence, somebody else would have reported it. Nobody did.").

At defense counsel's request, the District Court then agreed to re-interview Juror No. 2 so that the contents of the previous night's telephone call could be placed on the

record. During this second interview, Juror No. 2 recounted that the previous day the other members of the jury "said I was stupid, I can't form my own opinion because it doesn't match the rest of them. And I feel -- I feel that I'm not safe." Id. at 7017:9-12. She also stated that she had been "threatened to be cut" earlier in the week, and "threatened with a fork" one to two weeks earlier. Id. at 7017:17-7018:21.

After formally dismissing Juror No. 2, the District Court summoned the other jurors for a "talk about civility" during which it instructed them to "[m]ake every attempt . . . to reach a verdict, and to do so without . . . shouting, without cursing, without any [*55] threatening, if that has happened, and I can't know that, I wasn't there." Id. at 7020:11-7022:9. After the jury resumed its deliberations, counsel for Exxon moved for a mistrial "based on the further developing facts that in fact there wasn't a threat of violence but an actual instrument was used in the jury room, at least in the mind of [Juror No. 2]." Id. at 7022:14-17. The District Court denied the motion. Defense counsel then observed that the court had never asked Juror No. 1 if she had in fact threatened violence, to which the District Court responded, "That's true. [Juror No. 1] is going to deny that. People usually don't admit to crimes." Id. at 7023:2-3.

H. Post-Trial Motions

Following the conclusion of Phase III, Exxon moved for judgment as a matter of law and in the alternative for a new trial or remittitur. The District Court denied the motion.[13] As relevant here, the District Court held that the City's claims were not preempted and were ripe for adjudication; that the City's claimed injury was legally cognizable; that the jury's verdicts as to injury and damages were supported by sufficient evidence; that it was not unreasonable for the jury to reject Exxon's statute of [*56] limitations defense; and that the incident of alleged juror misconduct did not warrant a new trial. Exxon renews these arguments on appeal, and we turn to them now.

13 See *MTBE XII, 739 F. Supp. 2d at 614.*

II. DISCUSSION

A. Preemption

Exxon contends that, in light of the jury's verdict in its favor with regard to the City's design-defect claim, the City's remaining state law tort claims conflict with and are therefore preempted by the Reformulated Gasoline Program established by the Clean Air Act Amendments of 1990 (the "RFG Program" or the "1990 Amendments"). Its argument proceeds in three main parts. First, Exxon emphasizes that federal law required it to add an oxygenate to its gasoline. Second, Exxon proposes that the jury's rejection of the City's strict liability, design-defect claim amounts to an affirmative finding that no safer, feasible alternative to MTBE existed as a means to comply with the RFG Program. Finally, because adding MTBE to its gasoline was, Exxon argues, the "safest feasible means" of complying with the federal oxygenate requirement, the jury's $104.6 million verdict impermissibly penalized the company for merely following federal law, and runs contrary to the Congressional [*57] purpose and objective of the 1990 Amendments to improve air quality while remaining sensitive to costs.

We are not persuaded. In the Clean Air Act Amendments of 1990, Congress did not require Exxon to use MTBE in its gasoline. The jury's rejection of the City's design-defect claim in this litigation is not equivalent to an affirmative finding that MTBE was the safest feasible oxygenate -- much less that MTBE was the only available oxygenate. But even if Exxon had no safer, feasible alternative to MTBE as a means of complying with the RFG Program's oxygenate requirement, the jury did not impose liability solely because of Exxon's use of MTBE in its gasoline. Rather, to hold Exxon liable on every claim other than design-defect, the jury was required to find not only that the company used MTBE, but that it engaged in additional tortious conduct, such as failing to exercise ordinary care in preventing and cleaning up gasoline spills. For these reasons, and as detailed further below, we reject Exxon's argument that the jury's verdict conflicts with and is therefore preempted by the Clean Air Act Amendments of 1990.

1. Federal Preemption of State Law

[HN1] We review a district court's preemption analysis [*58] de novo. *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 612 F.3d 97, 103 (2d Cir. 2010).*

[HN2] The *Supremacy Clause of the United States Constitution* provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S.*

Const. art. VI, cl. 2. From this constitutional principle, it follows that "Congress has the power to preempt state law." *Arizona v. United States, 132 S. Ct. 2492, 2500, 183 L. Ed. 2d 351 (2012).* In every preemption case, accordingly, we ask whether Congress intended to exercise this important and sensitive power: "the purpose of Congress is the ultimate touchstone." *Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)* (internal quotation marks omitted).

[HN3] The *Supremacy Clause* and our federal system contemplate, of course, a vital underlying system of state law, notwithstanding the periodic superposition of federal statutory law. Thus, as the Supreme Court has repeatedly instructed, "in all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest [*59] purpose of Congress." Id. (internal quotation marks and alterations omitted). In light of this assumption, the party asserting that federal law preempts state law bears the burden of establishing preemption. See *id. at 569*; *Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984).* [HN4] Imposing state tort law liability for negligence, trespass, public nuisance, and failure-to-warn -- as the jury did here -- falls well within the state's historic powers to protect the health, safety, and property rights of its citizens. In this case, therefore, the presumption that Congress did not intend to preempt state law tort verdicts is particularly strong. See, e.g., *U.S. Smokeless Tobacco Mfg. Co. v. City of N.Y., 708 F.3d 428, 432-33 (2d Cir. 2013).*

[HN5] The Supreme Court has recognized three typical settings in which courts will find that Congress intended to preempt state law. First, when Congress expressly provides that a federal statute overrides state law, courts will find state law preempted if, applying standard tools of statutory construction, the challenged state law falls within the scope of Congress's intent to preempt. See, e.g., *Medtronic, Inc. v. Lohr, 518 U.S. 470, 484, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).* Second, when [*60] Congress legislates so comprehensively in one area as to "occupy the field," we may infer from the federal legislation that Congress intended to preempt state law in that entire subject area. *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)* (internal quotation marks omitted). Third, when neither of the first two categories applies but state law directly conflicts with the structure and purpose of a federal statute, we may conclude that Congress intended to preempt the state law. In the latter case, we will find a conflict with preemptive effect only in two circumstances: first, when "compliance with both federal and state regulations is a physical impossibility," and second, when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona, 132 S. Ct. at 2501* (internal quotation marks omitted).

The parties agree that the Clean Air Act and its 1990 Amendments contain no explicit preemption directive expressing a Congressional intent to override state tort law, and Exxon does not argue that Congress intended to occupy any field relevant here.[14] Rather, Exxon relies on the third form of preemption analysis [*61] -- conflict preemption -- to sustain its preemption argument. Accordingly, we address the two branches of conflict preemption in turn.

> 14 The Clean Air Act (apart from the now-repealed 1990 Amendments) does speak to related state law in one subsection, which provides (with certain exceptions) that "no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine." *42 U.S.C. § 7545(c)(4)(A).* Exxon does not argue that this provision has any bearing on this case; nor do we see it as relevant to our analysis.

2. Conflict Preemption: the Impossibility Branch

The Supreme Court has adopted various formulations of the "impossibility" branch of conflict preemption. In an early expression of the doctrine, the Court endorsed a narrow view: that federal law will preempt state law on this theory only when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963).* In recent years, the Court has applied a [*62] more expansive analysis and [HN6] found "impossibility" when "state law penalizes what federal law requires," *Geier v. American Honda Motor Co., 529 U.S. 861, 873, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000),* or when state law claims "directly conflict" with federal law, *American Telephone & Telegraph Co. v. Central Office Telephone,*

Inc., 524 U.S. 214, 227, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998) ("AT&T"). See generally *Wyeth, 555 U.S. at 589-90* (Thomas, J., concurring) (tracing the Court's use of the impossibility doctrine). Even understood expansively, "[i]mpossibility preemption is a demanding defense," *Wyeth, 555 U.S. at 573*, and we will not easily find a conflict that overcomes the presumption against preemption.

Exxon argues that the 1990 Amendments effectively required it to use MTBE, yet the jury's verdict in effect prohibits the use of MTBE and consequently subjects Exxon to requirements with which it is impossible to comply. This argument is unavailing. State law here neither "penalizes what federal law requires" nor "directly conflicts" with federal law.

As an initial matter, the 1990 Amendments did not require, either expressly or implicitly, that Exxon use MTBE. Although the 1990 Amendments required that gasoline in certain geographic areas contain [*63] a minimum level of oxygen, see *42 U.S.C. § 7545(k)(2)(B) (2000)*, they did not prescribe a means by which manufacturers were to comply with this requirement. The EPA identified MTBE as one additive that could be used to "certify" gasoline, see *MTBE V, 488 F.3d at 114*, but certification of a fuel meant only that it satisfied certain conditions in reducing air pollution, see *42 U.S.C. § 7545(k)(4)(B)*. Neither the statute nor the regulations required Exxon to use MTBE, rather than other oxygenates, such as ethanol, in its gasoline.[15]

> 15 This case is therefore distinguishable from *Geier, 529 U.S. at 865*, on which Exxon relies. In Geier, the Court concluded that federal motor vehicle safety standards preempted a tort suit against a car manufacturer based on the car's lack of a driver's side airbag. The federal regulation there at issue "deliberately provided the manufacturer with a range of choices among different passive restraint devices." *Id. at 875*. Here, the choice of oxygenate options is a means towards improving air quality, and the existence of the choice itself is not critical to furthering that goal. See *Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 1131, 1137, 179 L. Ed. 2d 75 (2011)* ("[U]nlike [*64] Geier, we do not believe here that choice is a significant regulatory objective.").

Conceding, as it must, that federal law did not explicitly mandate its use of MTBE, Exxon contends that, as a practical matter, it had no choice but to use MTBE to comply with the federal oxygenate requirement, because MTBE was in fact the "safest, feasible" oxygenate available to satisfy its federal obligation. Appellants' Br. at 27. In support, it relies on the jury's rejection of the City's design-defect claim.

a. The Import of the Jury's Finding on the City's Design-Defect Claim

As noted above, the City's design-defect theory was that Exxon bore strict liability for the City's damages because of the "unreasonably dangerous and foreseeable risk to groundwater" posed by Exxon's treatment of its gasoline with MTBE. Am. Compl. ¶ 131. Thus, the jury was asked the following on a special verdict form: "Has the City proven, by a fair preponderance of the credible evidence, that there was a safer, feasible alternative design at the time [Exxon's] gasoline containing MTBE was marketed?" Phase III Interrogatory Sheet. The jury responded by checking the box labeled, "No." Id. Exxon would have us construe this [*65] finding as an affirmative determination that the company could not comply with federal law without using MTBE. This argument is flawed for two reasons.

First, Exxon commits a logical fallacy in assuming that the jury's rejection of the City's design-defect claim amounted to an affirmative finding that MTBE was the safest, feasible oxygenate. To prevail on its design-defect claim, the City bore the burden of proving, by a preponderance of the evidence, the existence of a safer, feasible alternative to MTBE. In rejecting the City's claim, the jury found only that the evidence was not sufficient to meet the City's burden. It did not also find, affirmatively, that MTBE was the safest feasible oxygenate available to satisfy the federal oxygenate requirement.[16]

> 16 Indeed, had neither party introduced any evidence regarding oxygenates other than MTBE, the jury would have had no choice but to arrive at the same verdict. Carried to its logical conclusion, Exxon's argument implies that even in such a case -- that is, even in the total absence of evidence one way or the other -- a jury verdict against the City on this count would be equivalent to an affirmative finding that in fact there was no safer, [*66] feasible alternative to MTBE. This cannot be so. The jury's verdict simply does not stretch

that far.

Second, the standard for establishing the absence of a "safer, feasible design" and thereby defeating strict liability in tort is different from, and less demanding than, the standard for establishing impossibility preemption. The District Court instructed the jury that in evaluating the City's design-defect claim, it was to consider "the risks, usefulness, and costs of the alternative design as compared to the product the defendant did market." Tr. at 6611:23-6612:2. This instruction correctly stated New York law, which requires jurors to consider the costs of alternative designs when assessing a products liability claim. See, e.g., *Cover v. Cohen, 61 N.Y.2d 261, 266-67, 461 N.E.2d 864, 473 N.Y.S.2d 378 (1984)* (holding that liability in a design-defect case requires a balancing of "the product's risks against its utility and costs and against the risks, utility and cost of the alternatives"); *Lancaster Silo & Block Co. v. Northern Propane Gas Co., 75 A.D.2d 55, 427 N.Y.S.2d 1009, 1014 (4th Dep't 1980)* ("In a design defect case the court is concerned with the balancing of the alternative designs available against the existing risk [*67] while taking into account the cost of the proposed alternative.").

The standard for establishing impossibility preemption is different. See *Wyeth, 555 U.S. at 573*. [HN7] The party urging preemption must do more than show that state law precludes its use of the most cost-effective and practical means of complying with federal law -- it must show that federal and state laws "directly conflict." *AT&T, 524 U.S. at 227*. If there was any available alternative for complying with both federal and state law -- even if that alternative was not the most practical and cost-effective -- there is no impossibility preemption. Thus, the District Court correctly held that "[i]mpossibility does not depend on whether events in the physical world would have made it difficult to comply with both standards, but on whether the two standards are expressly incompatible."[17] The jury's rejection of the City's design-defect claim, without more, does not satisfy the impossibility standard for conflict preemption.

17 *MTBE III, 457 F. Supp. 2d at 335*.

Exxon responds that it could have met the heightened impossibility standard had the jury been properly instructed. The company sought the following instruction: "If you find that [*68] [Exxon] has shown, by a preponderance of the credible evidence, that ethanol was not a safer or feasible alternative to MTBE at the time that [Exxon] was deciding what oxygenate to use to comply with the federal Clean Air Act Amendments, then you will find that the City's defective design product liability claim is preempted by federal law and that the City cannot recover on that claim against [Exxon]." Supp. App. 82. The District Court declined to give this instruction, citing its concerns about explaining the concept of preemption to the jury. The court also noted that preemption was partially a legal issue, and concluded that the design-defect interrogatory -- which asked whether the City had proven the existence of a safer, feasible alternative -- would resolve any relevant factual questions.

Exxon was not entitled to its proposed instruction because that instruction misstated the law. See *PRL USA Holdings, Inc. v. U.S. Polo Ass'n, Inc., 520 F.3d 109, 117 (2d Cir. 2008)*. The proposed instruction borrowed the "safer or feasible alternative" language from the design-defect instruction. But, as we have explained, the design-defect standard -- which required the jury to balance the costs [*69] and utility of alternative designs as they compared to MTBE -- is different from the standard for impossibility preemption.[18]

18 Exxon also argues that the District Court "flip-flop[ped]," by initially agreeing that preemption was a question of fact, but then reversing course once the jury found in Exxon's favor on the design-defect claim. We do not read the transcript of the charging conference in this way. Nowhere did the District Court suggest that a jury finding of "no safer, feasible alternative" would establish preemption. Quite the contrary: the court was justifiably skeptical that "feasibility" was the appropriate standard to establish a conflict sufficient to find that state law was preempted. Similarly, the District Court reasonably questioned the significance (for preemption purposes) of a jury finding that Exxon had "no safer, feasible alternative." See Tr. at 5513:7-9 (explaining that, by asking the jury whether the City has proven the existence of a safer, feasible alternative, Exxon "will have at least preserved the factual finding of this jury, for what it is worth"); id. at 5515:9-11 ("[M]y leaning is to have the fact issue preserved, not the legal issue, so to speak.").

b. [*70] Considering Ethanol as a Possible Alternative to

MTBE

To meet its burden with respect to the impossibility branch of conflict preemption, Exxon needed to demonstrate that it could not comply with the federal oxygenate requirement by using a compound other than MTBE. At trial, the City argued that Exxon could have used ethanol to comply with federal law. On appeal, Exxon offers three reasons to support its position that it could not have used ethanol in its gasoline: the supply of ethanol was insufficient; suppliers could not ship ethanol through pipelines; and ethanol-containing gasoline could not be mixed with other manufacturers' MTBE-containing gasoline. Even when viewed in the light most favorable to Exxon, however, the evidence adduced at trial was insufficient to support these proffered reasons for finding impossibility preemption.

First, Exxon's expert conceded that the supply of ethanol could adjust to meet increased demand. O'Brien Testimony, Tr. at 4467:4-13, 4484:7-10. Second, he testified that ethanol could be transported using trains, trucks, or barges, and that, at the time of trial, producers were using trains to ship ethanol across the country. Id. at 4458:19-24, 4484:22-25. [*71] Another Exxon witness testified that in early 1995, the company began using ethanol to meet its Clean Air Act obligations at gas stations in the Midwest; until that time, the company had been using MTBE in that region.[19] Testimony of Raymond McGraw ("McGraw Testimony"), Tr. at 4799:14-23. Finally, although Exxon points to no part of the record in which it offered evidence quantifying the costs of using ethanol, the City introduced evidence regarding a 1993 study performed by an industry trade group, at the behest of the federal government, to determine the cost of using ethanol as an oxygenate. The study concluded that using ethanol instead of MTBE during the relevant time period would increase the cost of manufacturing gasoline by 6.2 cents per gallon; a similar study by the EPA put the cost at 1.9 cents per gallon, and the City's expert estimated the cost as 3.5 cents per gallon.[20] Tallett Testimony, Tr. at 4274:13-18; id. at 4275:15-4276:2; id. at 4276:16-4277:3.

19 In addition, since New York banned MTBE in 2004, Exxon has used ethanol rather than MTBE in the state. Eizemberg Testimony, Tr. at 5624:16-5625:24.

20 The City's expert also testified that the "national average cost of the [*72] type of gasoline which was supplied into the Northeast in 1995" was $1.22 per gallon. Tallett Testimony, Tr. at 4274.

One can imagine a case in which a state law imposes such enormous costs on a party that compliance with a related federal mandate is effectively impossible. But this is not such a case. At most, the evidence adduced at trial showed that using ethanol instead of MTBE would have increased Exxon's production costs to an extent that was far from prohibitive.[21] Exxon has not shown that economic and logistical hurdles rendered compliance with the federal mandate by using ethanol instead of MTBE impossible for the purposes of preemption analysis.[22]

21 The Supreme Court's recent decision in *Mutual Pharmaceutical Co. v. Bartlett, 133 S.Ct. 2466, 186 L. Ed. 2d 607 (2013)*, is therefore distinguishable. In that case, the Court held that the plaintiff's New Hampshire-law design-defect claim against a drug manufacturer was preempted by federal laws that prohibited the manufacturer from modifying the chemical composition or labeling of the allegedly defective drug. In so holding, the Court rejected the notion that the drug manufacturer could avoid the impossibility of complying with both federal and state [*73] law "by simply leaving the market" for the drug at issue. *Id. at 2478*. In this case, by contrast, we specifically conclude that Exxon could have used compounds other than MTBE to oxygenate its gasoline in compliance with federal law. Exxon thus was not required to leave the relevant market in order to comply with both federal and state law.

22 Of course, as we have already noted and as we explain further in the text, Exxon incurred tort liability not for the mere use of MTBE, but because it engaged in additional tortious conduct, such as failing to exercise reasonable care in storing gasoline at service stations it owned or controlled. The jury's verdict is not equivalent to a state law prohibition on the use of MTBE.

3. Conflict Preemption: the Obstacle Branch

[HN8] The second branch of conflict preemption -- the obstacle analysis -- is in play when state law is asserted to "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States, 132 S. Ct. 2492,*

2505, 183 L. Ed. 2d 351 (2012) (internal quotation marks omitted).

Obstacle analysis -- which appears to us only an intermediate step down the road to impossibility preemption -- precludes state [*74] law that poses an "actual conflict" with the overriding federal purpose and objective. *Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 162 (2d Cir. 2013)*. Obstacle analysis has been utilized when federal and state laws said to conflict are products of unrelated statutory regimes. What constitutes a "sufficient obstacle" is "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." Id. (internal quotation marks omitted). As with the impossibility branch of conflict preemption, "the purpose of Congress is the ultimate touchstone," *Wyeth, 555 U.S. at 565* (internal quotation marks omitted), and "the conflict between state law and federal policy must be a sharp one," *Marsh v. Rosenbloom, 499 F.3d 165, 178 (2d Cir. 2007)* (internal quotation marks omitted). A showing that the federal and state laws serve different purposes cuts against a finding of obstacle preemption. See *id. at 180* ("On a fundamental level, [the federal law] and [state law] serve different purposes, reinforcing our conclusion that they do not actually conflict.").

[HN9] The burden of establishing obstacle preemption, like that of impossibility [*75] preemption, is heavy: "[t]he mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." *Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 241 (2d Cir. 2006)*. Indeed, federal law does not preempt state law under obstacle preemption analysis unless "the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." Id. (internal quotation marks omitted and emphasis added).

To determine whether a state law (or tort judgment) poses an obstacle to accomplishing a Congressional objective, we must first ascertain those objectives as they relate to the federal law at issue. The Supreme Court's decision in *Wyeth* is instructive in this regard. In holding that FDA approval of a prescription drug's label did not preempt a failure-to-warn claim asserted under state law, the Court relied in large part on the legislative history of the relevant federal law. The Court noted, for instance, that Congress declined to enact an express preemption provision for prescription drugs, although it had [*76] enacted such a provision for medical devices in the same statute. The Court also explained that it was appropriate to give "some weight to an agency's views about the impact of tort law on federal objectives when the subject matter is technical and the relevant history and background are complex and extensive." *555 U.S. at 576* (internal quotation marks and alteration omitted).

The purpose of the 1990 Amendments was to achieve a "significant reduction in carbon monoxide levels." S. Rep. No. 101-228, at 3503 (1989). Exxon agrees but asserts that "Congress made clear that feasibility mattered," and that the 1990 Amendments sought to reduce air pollution without imposing economic burdens on gasoline manufacturers. Appellants' Br. at 29. Through its verdict, Exxon argues, the jury effectively concluded that Exxon should have used ethanol rather than MTBE.[23] But ethanol was costly. By -- in effect -- mandating its use retrospectively, the State (speaking through the jury's verdict) has imposed substantial financial burdens on Exxon, a result that conflicts with Congress's purpose in passing the Amendments. Ergo, the jury's verdict under state tort law is preempted by the 1990 Amendments to [*77] the Clean Air Act.

23 The record does not appear to demonstrate why Exxon could not have used any of the other additives identified in the RFG Program Amendments, but the parties do not dispute that ethanol was the primary available alternative to MTBE as an oxygenate.

In support of its argument, Exxon cites two statutory provisions reflective of Congressional concern about the costs of complying with the Amendments. First, Exxon emphasizes that, in the statute, Congress instructed the EPA to take "into consideration the cost of achieving . . . emissions reductions" when drafting regulations under the Clean Air Act Amendments at issue in this case. *42 U.S.C. § 7545(k)(1) (2000)*. Immediately following this language, however, Congress also instructed the EPA to consider "any nonair-quality and other air-quality related health and environmental impacts." Id. At the heart of the City's suit is the claim that Exxon's use of MTBE caused adverse "health and environmental impacts" on the City. That Congress instructed the EPA to take into account "nonair-quality" effects on the environment suggests a Congressional intent to permit -- not preempt -- suits like

this one.

Second, Exxon cites a provision [*78] of the Amendments that authorized the EPA to waive the oxygenate requirement if the Administrator determined it would be "technically infeasible" to manufacture gasoline that also met the emission standard for a different pollutant, oxides of nitrogen, or "NO_X."[24] *42 U.S.C. § 7545(k)(2)(A) (2000)*. But, as already described, Exxon has not shown that use of an oxygenate other than MTBE would have been "technically infeasible" as opposed to simply somewhat more expensive. And in any event, Exxon offers nothing to suggest that by using the phrase "technically infeasible," Congress really meant "more expensive."

24 The provision to which Exxon cites reads in full as follows:

> (A) NO_X emissions
>
> The emissions of oxides of nitrogen (NO_X) from baseline vehicles when using the reformulated gasoline shall be no greater than the level of such emissions from such vehicles when using baseline gasoline. If the Administrator determines that compliance with the limitation on emissions of oxides of nitrogen under the preceding sentence is technically infeasible, considering the other requirements applicable under this subsection to such gasoline, the Administrator may, as appropriate to ensure compliance [*79] with this subparagraph, adjust (or waive entirely), any other requirements of this paragraph (including the oxygen content requirement contained in subparagraph (B)) or any requirements applicable under paragraph (3)(A).

42 U.S.C. § 7545(k)(2)(A) (2000) (emphases added).

We also note that in 1999, the EPA concluded that a Nevada proposal effectively banning MTBE did not conflict with the Clean Air Act. See *EPA, Approval and Promulgation of Implementation Plans; Nevada State Implementation Plan Revision, Clark County, 64 Fed. Reg. 29573, 29578-79 (June 2, 1999)*. Additionally, in the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified at *42 U.S.C. § 13389*), Congress considered including a safe harbor provision that would have immunized MTBE producers and distributors from state tort liability, but ultimately chose not to do so. See 149 Cong. Rec. S15212 (daily ed. Nov. 20, 2003) (statement of Sen. Dianne Feinstein); 151 Cong. Rec. H6949 (daily ed. July 28, 2005) (statement of Rep. Bart Stupak) ("I am happy that the 'safe harbor' provisions for manufacturers of MTBE that were in the House bill were dropped."). Of course, neither of these actions necessarily reflects the [*80] intent of Congress as a whole when it amended the Clean Air Act in 1990. But this evidence provides further circumstantial support for our conclusion that Exxon has not established Congressional objectives sufficiently at odds with state law to require that state law be set aside under the doctrine of conflict preemption. See *Wyeth, 555 U.S. at 567, 576-77* (considering subsequent federal legislative history, as well as the relevant agency's views, in analyzing whether state law was subject to conflict preemption). In sum, although these legislative materials demonstrate that Congress was sensitive to the magnitude of the economic burdens it might be imposing by virtue of the Reformulated Gasoline Program and perhaps sought to limit them, they hardly establish that Congress had a "clear and manifest intent" to preempt state tort judgments that might be premised on the use of one approved oxygenate over a slightly more expensive one. *Madeira, 469 F.3d at 249* (internal quotation marks omitted).

4. Tortious Conduct Beyond Mere Use of MTBE

Even were we to accept Exxon's argument that the 1990 Amendments preclude imposition of a post hoc state law penalty based on its use of MTBE, the judgment [*81] of the District Court would not be preempted because the jury's verdict did not rest solely on the company's use of MTBE in its gasoline. Rather, all of the City's successful claims required the jury to find that Exxon both used MTBE and committed related tortious acts, such as failing to exercise reasonable care when storing gasoline that contained MTBE. We agree with the City that "Exxon could have complied with federal and state law by using MTBE without engaging in tortious acts." Appellees' Br. at 38.

As we have observed, the jury considered six claims: direct-spiller negligence, failure-to-warn, trespass, public nuisance, private nuisance, and design-defect. Five of these claims (all but design-defect) required the jury to find that Exxon engaged in additional tortious conduct; as to these claims, the mere use of MTBE would not have caused the company to incur liability. See Tr. at 6629:18-20 (direct-spiller negligence); id. at 6615:18-24 (failure-to-warn); id. at 6618:7-11 (trespass); id. at 6628:5-9 (public nuisance); id. at 6621:5-6 (private nuisance).[25]

25 Only on the remaining claim, design-defect, could Exxon have been held liable solely for its use of MTBE. But the jury found [*82] that Exxon was not liable under a design-defect theory.

Tellingly, Exxon adopted this view earlier in the litigation. Indeed, the company's proposed jury instructions stated that if the jury found that "ethanol was not a safer or feasible alternative to MTBE," then it "will find that the City's defective design product liability claim is preempted by federal law and that the City cannot recover on that claim against [Exxon]." Deferred Joint Supp. App. at 82 (emphasis added). And Exxon initially argued to the District Court that "Congress and EPA preempted only in the narrow area of fuel design, while preserving participation in the federal administrative process and state remedies against those who spill gasoline."[26] Although Exxon has since reversed course, we think the company had it right the first time.

26 *MTBE V, 488 F.3d at 135* (quoting Opp'n to Remand 29).

For these reasons, we affirm the District Court's determination that the claims on which the jury returned a verdict for the City are not preempted by federal law.

B. Legal Cognizability of Injury

Exxon contends that, as a matter of law, the presence of MTBE at levels below the MCL cannot constitute cognizable injury. According [*83] to Exxon, because the jury found at the conclusion of Phase II that MTBE concentrations in the Station Six outflows will peak at 10 ppb -- a level equal to the current MCL -- the City has not been injured.[27] It is not entirely clear whether Exxon's argument is that the City therefore lacks standing or that the City therefore fails to state a claim under New York law. Framed either way, however, we find the argument unpersuasive.

27 The jury's 10 ppb finding in Phase II informed its conclusion in Phase III that a reasonable water provider in the City's position would remediate the MTBE contamination at Station Six.

[HN10] To pursue a claim in federal court, a plaintiff must satisfy the requirements of constitutional standing, a principle established by the "case or controversy" requirement of Article III of our Constitution. See *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Constitutional standing makes three demands: First, "the plaintiff must have suffered an 'injury in fact.'" Id. Second, "there must be a causal connection between the injury and the conduct" of which the plaintiff complains. Id. And third, "it must be likely, as opposed to merely speculative, that the injury will [*84] be redressed by a favorable decision." *Id. at 561* (internal quotation marks omitted). These demands "function[ ] to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*.

The injury-in-fact requirement is satisfied when the plaintiff has suffered "an invasion of a legally protected interest, which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan, 504 U.S. at 560* (internal footnote, citations, and quotation marks omitted). As our prior opinions have explained, however, "[t]he injury-in-fact necessary for standing need not be large[;] an identifiable trifle will suffice." *LaFleur v. Whitman, 300 F.3d 256, 270 (2d Cir. 2002)* (internal quotation marks omitted).

[HN11] Standing is "the threshold question in every federal case." *Disability Advocates, Inc. v. N.Y. Coalition for Quality Assisted Living, Inc., 675 F.3d 149, 156 (2d Cir. 2012)* (internal quotation marks omitted). Once this threshold is crossed, a plaintiff must still establish the elements of its causes [*85] of action to proceed with its case. Cf. *Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006)* ("[A]n injury-in-fact need not be capable of sustaining a valid cause of action under applicable tort law."). To prevail on most of its claims, the City was required to show that it suffered an injury

actionable under New York law. See *Akins v. Glens Falls City Sch. Dist., 53 N.Y.2d 325, 333, 424 N.E.2d 531, 441 N.Y.S.2d 644 (1981)* (noting that injury is an element of a negligence claim); *Copart Indus. v. Consolidated Edison Co. of N.Y., 41 N.Y.2d 564, 568-70, 362 N.E.2d 968, 394 N.Y.S.2d 169 (1977)* (same as to public nuisance claim); *Howard v. Poseidon Pools, Inc., 72 N.Y.2d 972, 974, 530 N.E.2d 1280, 534 N.Y.S.2d 360 (1988)* (same as to failure-to-warn claim); cf. *Hill v. Raziano, 63 A.D.3d 682, 880 N.Y.S.2d 173, 175 (2d Dep't 2009)* (noting that "nominal damages are presumed from a trespass even where the property owner has suffered no actual injury").

Whether a plaintiff has standing to sue is a question of law, and accordingly we review the District Court's ruling de novo. *Disability Advocates, 675 F.3d at 156.* Whether contamination at levels below the applicable MCL is actionable under New York law also presents a question of law accorded de novo review. See *Ins. Co. of N. America v. Pub. Serv. Mut. Ins. Co., 609 F.3d 122, 127 (2d Cir. 2010).*

1. [*86] Standing

Before trial, the District Court concluded that the City had standing to bring its claims even if the alleged contamination did not exceed the MCL. The court reasoned that, "while the MCL may serve as a convenient guidepost in determining that a particular level of contamination has likely caused an injury, the MCL does not define whether an injury has occurred."[28]

28 *MTBE IV, 458 F. Supp. 2d at 158.*

We agree with the District Court that, for standing purposes, the MCL does not define whether injury has occurred. It strikes us as illogical to conclude that a water provider suffers no injury-in-fact -- and therefore cannot bring suit -- until pollution becomes "so severe that it would be illegal to serve the water to the public." Appellees' Br. at 54. This is especially so in view of a New York water provider's statutory duty and commonsense obligation to protect or remediate groundwater before contamination reaches the applicable MCL. See 10 *N.Y. Comp. Codes R. & Regs. tit. 10 § 5-1.12(a)* (requiring water suppliers to take certain remedial actions after determining that one or more MCLs "are or may be exceeded" or that "any deleterious changes in raw water quality have occurred" [*87] (emphases added)); see also id. at *§ 5-1.71(a)* (requiring water suppliers to exercise "due care and diligence in the maintenance and supervision of all sources of the public water systems to prevent, so far as possible, their pollution and depletion"). We decline to hold that the MCL constitutes a bar beneath which a water provider can never suffer injury-in-fact.

That the MCL does not define whether a water provider has suffered injury for standing purposes is confirmed by the City's identification of several specific, deleterious effects of MTBE at below-MCL levels. For example, the City offered testimony from a toxicologist, who opined that "even at the lowest levels of exposure . . . in drinking water," MTBE is a mutagen "that can cause a mutation which can possibly lead to cancer." Rudo Testimony, Tr. at 3267:21-24. It also offered testimony from a taste and odor expert, who opined that "25 percent of the population would detect [MTBE] at 3 to 4 parts per billion, and that 10 percent of the population would detect it down at 1 or 2 parts per billion." Lawless Testimony, Tr. at 2889:20-22. And it presented testimony from the City's Director of Water Quality, who noted that "the [*88] public [is] accustomed to receiving water that is . . . free of taste," and that, if it served water at MTBE levels as low as 1 or 2 ppb, the City would be adversely affected by consumer complaints from the "10 percent of the population that can detect taste and odor in their water" at those levels, thereby undermining public confidence in the City's water supply. Schindler Testimony, Tr. at 2943:9-13.

Our conclusion as to the proper lens through which to view the MCL as it relates to the question of standing finds further support in *LaFleur v. Whitman, 300 F.3d 256 (2d Cir. 2002)*, where we held that a plaintiff may suffer injury-in-fact from air pollution that falls below federal regulatory pollution thresholds. In LaFleur, a private plaintiff brought suit under the Clean Air Act, seeking review of the EPA's decision not to object to the state's issuance of an operating permit to a facility that converted municipal waste and sewage sludge into ethanol and carbon dioxide. *Id. at 259.* The facility operator challenged plaintiff's standing on the ground that "the ambient level of the regulated air pollutant to be released by the facility . . . would be well below" the applicable regulatory [*89] standards. *Id. at 269.* We rejected the challenge, concluding that the plaintiff, who worked in an adjacent shopping center and was likely to be exposed to the facility's emissions, had sufficiently alleged an injury-in-fact. *Id. at 270.* This was so, we held, "even if the ambient level of air pollution does not

exceed" the relevant regulatory standards. *Id. at 271*.

The standing cases cited by Exxon neither bind nor persuade us. For example, Exxon cites *City of Greenville, Ill. v. Syngenta Crop Protection, Inc., 756 F. Supp. 2d 1001 (S.D. Ill. 2010)*, for the proposition that "the city's claimed remediation costs did not establish standing because they were unnecessary to meet the city's statutory obligation to provide clean water." Appellants' Br. at 44. But Exxon's gloss on City of Greenville is inaccurate. In fact, the City of Greenville court held that "a water provider may demonstrate an injury in fact even if its finished water does not exceed an MCL if its use of the water to meet its statutory obligations to the public [to provide clean water] becomes more costly because of a defendant's conduct." *756 F. Supp. 2d at 1007* (expressing "agree[ment]" with MTBE IV). As the City of [*90] Greenville court aptly explained, "it seems an extremely bad rule to require a public water supplier to provide overly contaminated water to the public before it can seek redress from one responsible for the contamination." Id. Although the court later mused that it might be difficult to establish injury where the cost to remediate drinking water is not tied to a "specific, imminent threat of [contamination] in excess of the MCL," it did not establish the bar that Exxon urges us to adopt. *Id. at 1008*.

Exxon's reliance on *Iberville Parish Waterworks District No. 3 v. Novartis Crop Protection, Inc., 45 F. Supp. 2d 934 (S.D. Ala. 1999)*, is also unavailing. In Iberville, two public water providers sued a producer of herbicide for contamination allegedly caused by the herbicide's chemical component, atrazine. *Id. at 936*. In finding that the public water providers lacked constitutional standing, the Iberville court asserted that "[b]ecause both [water providers] are in compliance with [the applicable] drinking water standards, it cannot be said that either has suffered any actual invasion of a legally protected interest." *Id. at 941-42*. But this conclusion was unsupported by any discussion [*91] or analysis, so we find it unpersuasive. Indeed, it is doubly unpersuasive in view of the factual differences between that case and this one. Although the plaintiffs in Iberville sought recovery for costs associated with monitoring and remediating atrazine contamination, the evidence showed that a significant proportion of those costs were unrelated to the alleged contamination. *Id. at 939-42*. For example, one of the plaintiffs had installed a filtration system, not to remove atrazine, but rather "to improve the taste and clarity of [the] water and, in [so] doing, to maintain [its] competitive edge over bottled water manufacturers." *Id. at 941*. Here, by contrast, the costs incurred and projected by the City to treat the water at Station Six are directly related to MTBE contamination.

2. Injury As a Matter of New York Law

Of course, to recover on most of its state-law claims, the City was required to do more than establish standing -- it was required to show, among other things, that it suffered actual injury as a matter of New York tort law. See *Akins, 53 N.Y.2d at 333* (negligence); *Copart Indus., 41 N.Y.2d at 568-70* (public nuisance); *Howard, 72 N.Y.2d at 974* (failure-to-warn); cf. *Hill, 880 N.Y.S.2d at 174* [*92] (no injury requirement for trespass claim). To the extent Exxon argues that New York law (as distinguished from the doctrine of constitutional standing) bars recovery where the alleged contamination does not exceed the MCL, that argument, too, fails.

We agree with the District Court that, in determining whether the City had established injury as a matter of New York law, the relevant question for the jury was whether "a reasonable water provider in the [C]ity's position would treat the water to reduce the levels or minimize the effects of the MTBE in the combined outflow of the Station 6 wells in order to use that water as a back-up source of drinking water." Tr. at 6604:5-10. This standard strikes a proper balance. On the one hand, it recognizes that "even clear, good-tasting water contains dozens of contaminants at low levels," and therefore demands more than de minimis contamination before a water provider may establish injury.[29] The standard requires that plaintiffs adduce evidence demonstrating that the contamination rose to a level requiring treatment for various reasons pertaining both to the City's general water supply needs and the specific water well in question. On the other [*93] hand, it recognizes that, as the City showed at trial, a public water provider may be injured by contamination at levels below the applicable MCL.

> 29 *MTBE VI, 2007 U.S. Dist. LEXIS 40484, 2007 WL 1601491, at *6* ("On its journey through the water cycle as rain, surface water, and groundwater in an aquifer, water collects many contaminants of various types: bacteria, parasites, heavy metals, organic compounds (including MTBE), inorganic compounds, and even radioactive substances. This water is eventually

pumped from a well to a treatment facility, where many of these contaminants are removed or reduced in concentration before the water is pumped to a consumer's home.").

Several New York state-court decisions in the lead-paint context support this conclusion by holding that whether a plaintiff has suffered injury from contamination at levels below an applicable regulatory threshold is a question of fact for the jury. In *Cunningham v. Spitz, 218 A.D.2d 639, 630 N.Y.S.2d 341, 341 (2d Dep't 1995)*, for example, the court found "triable issues of fact as to whether the plaintiff . . . was injured as a result of his exposure to lead, notwithstanding the fact that his blood-lead level did not fall within scientifically accepted definitions [*94] of lead poisoning." Likewise, in *Singer v. Morris Avenue Equities, 27 Misc. 3d 311, 895 N.Y.S.2d 629, 631 (N.Y. Sup. Ct. Jan. 5, 2010)*, the court rejected the contention that the plaintiff had not been injured as a matter of law where her blood-lead level was lower than the level defined by the New York City Health Code as constituting lead poisoning.[30] See also *Peri v. City of New York, 8 Misc. 3d 369, 798 N.Y.S.2d 332, 339-40 (N.Y. Sup. Ct. Mar. 28, 2005)* (same), aff'd, *44 A.D.3d 526, 843 N.Y.S.2d 618 (1st Dep't 2007)*, aff'd, *11 N.Y.3d 756, 894 N.E.2d 1192, 864 N.Y.S.2d 802 (2008)*. Here, too, it was for the jury to determine whether for New York law purposes the City had been injured by MTBE contamination.

30 We reject Exxon's suggestion that Cunningham and its progeny are no longer good law in New York. The two cases upon which Exxon relies for this proposition -- *Santiago v. New York City Board of Health, 8 A.D.3d 179, 779 N.Y.S.2d 474 (1st Dep't 2004)*, and *Arce v. New York City Housing Authority, 696 N.Y.S.2d 67, 265 A.D.2d 281 (2d Dep't 1999)* -- do not overrule Cunningham. The Santiago court never dealt with the merits of the claim presented there, and instead dismissed it on res judicata grounds. *779 N.Y.S.2d at 476*. And in Arce, the court set aside a verdict where the record contained no [*95] reliable evidence showing that plaintiff's blood-lead level was actually elevated at all. *696 N.Y.S.2d at 68-69*.

The state-law injury cases to which Exxon cites do not alter our conclusion. For example, in *City of Moses Lake v. United States, 430 F. Supp. 2d 1164 (E.D. Wash. 2006)*, the court granted summary judgment to defendants on tort claims arising out of their alleged contamination of Moses Lake's drinking wells with the chemical trichloroethylene. *Id. at 1167*. In holding that, under Washington law, Moses Lake had not been injured, the court observed that the contamination giving rise to suit fell below the applicable MCL. *Id. at 1185*. But in Moses Lake, the MCL served as simply one factor in the court's analysis. The court also noted that the level of trichloroethylene in the affected aquifers was "imperceptible to human senses" and that Moses Lake "continue[d] to supply drinking water via its [allegedly affected] wells." *Id. at 1184*. In addition, Moses Lake failed to adduce "any evidence of an actual existing danger" posed by the contamination. *Id.* Here, by contrast, the City presented extensive evidence showing that a reasonable water provider in the City's position would treat [*96] the Station Six Wells before using them as a back-up water supply.

Exxon's reliance on *Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011)*, is similarly infirm. In Rhodes, private plaintiffs sought recovery for du Pont's alleged contamination of the municipal water supply with perfluorooctanoic acid and "the resulting presence of [the chemical] in their blood." *Id. at 93*. In affirming the district court's grant of summary judgment to du Pont on plaintiffs' negligence claim, the Fourth Circuit held that "[t]he presence of [the chemical] in the public water supply or in the plaintiffs' blood does not, standing alone, establish harm or injury for purposes of proving a negligence claim under West Virginia law." *Id. at 95*. "In such situations," according to the Fourth Circuit, "a plaintiff also must produce evidence of a detrimental effect to the plaintiffs' health that actually has occurred or is reasonably certain to occur due to a present harm." *Id.* Here, by contrast, the City has adduced evidence showing the specific injuries it suffered as a result of MTBE contamination at Station Six: that MTBE is a probable human carcinogen, that it can be detected at 1-2 ppb by ten [*97] percent of the population, and that even if only ten percent of the population taste it, the confidence of the public in the water supply would be undermined. And, based on this evidence, a jury could easily determine that a reasonable water provider in the City's position would treat the water in the Station Six Wells to reduce the levels or minimize the effects of MTBE in order to use the water as a back-up source of drinking water.

In sum, we reject Exxon's contention that the New York MCL for MTBE determines whether the City has been injured either for standing purposes or for purposes of establishing injury as a matter of New York tort law. We decline Exxon's invitation to adopt a bright-line rule that would prevent a water provider from either bringing suit or prevailing at trial until its water is so contaminated that it may not be served to the public. The MCL does not convey a license to pollute up to that threshold.

C. Ripeness and Statute of Limitations

Exxon contends that the City's claims are unripe because "it is deeply uncertain whether the City's usufructuary interest in Station 6 will ever suffer an injury."[31] Appellants' Br. at 34. Exxon points out that Station Six is [*98] not currently being used, and in fact cannot be used until the City builds a facility to treat preexisting PCE contamination. According to Exxon, the City's case "thus requires proof of a series of contingent and factually intensive predictions about the distant future" that render the City's injury unripe for resolution. Id. We disagree, principally because Exxon's argument conflates the City's injury with its damages.

> 31 Under New York law, the City does not actually own the water in Station Six; it simply owns the right to use that water. See *Sweet v. City of Syracuse, 129 N.Y. 316, 335, 27 N.E. 1081, 29 N.E. 289 (1891)*. This is referred to as a "usufructuary" interest. Id.

[HN12] "'Ripeness' is a term that has been used to describe two overlapping threshold criteria for the exercise of a federal court's jurisdiction." *Simmonds v. INS, 326 F.3d 351, 356-57 (2d Cir. 2003)*. The first such requirement -- which we refer to as "constitutional ripeness" -- is drawn from Article III limitations on judicial power. *Id. at 357*; see also *Reno v. Catholic Social Servs., Inc., 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993)*. The second such requirement -- which we refer to as "prudential ripeness" -- is drawn from prudential reasons for refusing to exercise [*99] jurisdiction. *Simmonds, 326 F.3d at 357*; see also *Reno, 509 U.S. at 43 n.18*. Both constitutional ripeness and prudential ripeness "are concerned with whether a case has been brought prematurely." *Simmonds, 326 F.3d at 357*.

[HN13] The doctrine of constitutional ripeness "prevents a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur." *Ross v. Bank of America, N.A. (USA), 524 F.3d 217, 226 (2d Cir. 2008)* (internal quotation marks omitted). This aspect of the ripeness doctrine overlaps with the standing doctrine, "most notably in the shared requirement that the plaintiff's injury be imminent rather than conjectural or hypothetical." Id. (internal quotation marks and alterations omitted). In most cases, that a plaintiff has Article III standing is enough to render its claim constitutionally ripe. See *Simmonds, 326 F.3d at 358*; *Ross, 524 F.3d at 226*. Here, our determination above that the City has satisfied the requirements of Article III standing leads us easily to conclude that its claims are constitutionally ripe; we therefore focus only on prudential ripeness. *Ross, 524 F.3d at 226*.

[HN14] The [*100] doctrine of prudential ripeness "constitutes an important exception to the usual rule that where jurisdiction exists a federal court must exercise it," and allows a court to determine "that the case will be better decided later." *Simmonds, 326 F.3d at 357* (emphasis omitted). Prudential ripeness is "a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary." Id. In determining whether a claim is prudentially ripe, we ask "whether [the claim] is fit for judicial resolution" and "whether and to what extent the parties will endure hardship if decision is withheld." *Id. at 359*; see also *Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985)*. A district court's "ripeness determination is . . . a legal determination subject to de novo review." *Conn. v. Duncan, 612 F.3d 107, 112 (2d Cir. 2010)*.

According to Exxon, the District Court effectively "asked the jury to peer into a crystal ball and make myriad predictions about what might or might not occur decades from now depending on how the [City] uses a facility that it has not yet started to build and that it might never complete." [*101] Appellants' Br. at 35. The speculative nature of the jury's task demonstrates, Exxon says, that the claims are prudentially unripe for adjudication. As we observed above, however, this argument mistakenly conflates the nature of the City's claimed damages with its injury.

The City's theory of its legal injury is that, by contaminating the water in the Station Six Wells with

MTBE, Exxon interfered with the City's right to use that water. Exxon's extensive discussion of the current disuse of the Station Six Wells and the future steps required to use them addresses the scope of the damages flowing from the injury, not whether there is an injury at all. The City's claims are prudentially ripe. It brought suit only after testing showed the presence of MTBE in the Station Six Wells. The Amended Complaint therefore alleged a present injury -- namely, that Station Six had already been contaminated with MTBE. As we have explained, whether that injury was significant enough for the City to prevail on its claims under New York law was a question for the jury.

In addition, although in bringing suit the City sought to recover past, present, and future damages flowing from Exxon's conduct, there is [*102] nothing unusual about such a claim. See, e.g., *Davis v. Blige, 505 F.3d 90, 103 (2d Cir. 2007)* ([HN15] "When [an] injury occurs, the injured party has the right to bring suit for all of the damages, past, present and future, caused by the defendant's acts." (internal quotation marks omitted)). Nor is the City's claim rendered prudentially unripe by the possibility that its damages may prove too speculative to support recovery.[32] Whether a particular damages model is supported by competent evidence sufficient to render it non-speculative is analytically distinct from whether the underlying claim is ripe for adjudication.

> 32 To the extent Exxon argues that the City's claims are unripe because the City has yet to use the Station Six Wells, we note the jury's finding in Phase I that the City has a good faith intent to use those wells within the next fifteen to twenty years. Phase I Interrogatory Sheet. Exxon, which had ample opportunity to convince the jury otherwise, does not challenge this finding on appeal.

We also note that dismissing the City's claims as unripe would work a "palpable and considerable hardship." *Thomas, 473 U.S. at 581* (internal quotation marks omitted). [HN16] Under New York law, [*103] a plaintiff asserting a toxic-tort claim must bring suit within three years of discovery (or constructive discovery) of its injury. See *N.Y. C.P.L.R. 214-c(2)*. In *Jensen v. General Electric Co., 82 N.Y.2d 77, 623 N.E.2d 547, 603 N.Y.S.2d 420 (1993)*, the New York Court of Appeals held that [HN17] the common law "continuing-wrong" doctrine -- pursuant to which a recurring injury is treated as "a series of invasions, each one giving rise to a new claim or cause of action" -- does not reset the statute of limitations in the toxic-tort context. *Id. at 85* (internal quotation marks omitted). As the District Court observed, "the City brings a traditional recurring injury claim" in the sense that its injury is continuing: MTBE is in the Station Six Wells and will be for the foreseeable future.[33] Under Jensen, the statute of limitations began to run as to all of the City's claims arising out of its continuing injury -- past, present, and future -- when the City first discovered that it had been injured. *Id. at 82-83*. In light of this single trigger for the statute of limitations, dismissing the City's claims as unripe would effectively foreclose the possibility of relief -- a hardship and inequity of the highest order.

> 33 *MTBE IX, 2009 U.S. Dist. LEXIS 78081, 2009 WL 2634749, at *4.*

Exxon [*104] responds that even if the City's claims are ripe, they are barred by the statute of limitations because the City first discovered that it had been injured more than three years before bringing suit. See *N.Y. C.P.L.R. 214-c(2)*. As we have explained, the City contends that it was injured when the concentration of MTBE at Station Six rose to a level at which a reasonable water provider would have treated the water. At trial, Exxon bore the burden of establishing that the City knew or should have known before October 31, 2000 -- i.e., three years before the City filed suit -- that it had been injured. See id.; *Bano v. Union Carbide Corp., 361 F.3d 696, 709-10 (2d Cir. 2004)*. Ultimately, the jury rejected Exxon's statute-of-limitations argument, concluding at the end of Phase III that Exxon failed to prove "that the City did not bring its claims in a timely manner." Phase III Interrogatory Sheet. On appeal, we understand Exxon to contend that no reasonable juror could have reached such a conclusion.

In support of this contention, Exxon draws our attention to two pieces of evidence which, it says, establish that the City's suit was time-barred. The first piece of evidence came from William [*105] Yulinsky, Director of Environmental Health and Safety in DEP's Bureau of Waste Water Treatment, who testified that as early as 1999 the City recognized that because "numerous potential sources of MTBE exist[ed] within [one] mile of Station 6, the need to treat for MTBE should be anticipated." Yulinsky Testimony, Tr. at 5781:17-5782:15. But Yulinsky's testimony that the City anticipated a future need to remediate MTBE does not

prove that the City knew in 1999 that Station Six had already been contaminated or that the contamination was significant enough to justify an immediate or specific remediation effort.

The second piece of evidence to which Exxon points is the City's April 2000 discovery that one of the Station Six Wells had experienced "some exposure" to MTBE. Specifically, the City conceded that "MTBE was first detected in raw water drawn from Well 6D on April 18, 2000 at a concentration of 1.5 [ppb]" and that "MTBE was first detected in raw water drawn from Well 33 on April 18, 2000 at a concentration of 0.73 [ppb]." Phase III JPTO, Statement of Undisputed Facts ¶¶ 108, 111. But Exxon has not identified sufficient evidence to establish that, in a case such as this involving a [*106] core municipal function and implicating an unusually compelling public interest, a reasonable juror was required to find that a reasonable water provider would have treated groundwater containing MTBE at these concentrations. We therefore conclude that a reasonable juror could have found that Exxon failed to show that the City learned of its injury before October 31, 2000.

D. Sufficiency of the Evidence as to Injury and Causation

We turn now to Exxon's challenge to the sufficiency of the evidence underlying the jury's verdict as to injury and causation. Exxon argues that the jury's peak MTBE finding and its damages calculation are based on speculation, and that the District Court erred in permitting the jury to consider "market share evidence" as circumstantial proof of Exxon's role in causing the City's injury. For these reasons, according to Exxon, the District Court should have granted its motion for judgment as a matter of law. As discussed below, we reject these challenges.

[HN18] "We review a district court's denial of a motion for judgment as a matter of law de novo." *Manganiello v. City of New York, 612 F.3d 149, 161 (2d Cir. 2010)*. "In so doing, we apply the same standards that are [*107] required of the district court." Id. (internal quotation marks and brackets omitted). A court may grant a motion for judgment as a matter of law "only if it can conclude that, with credibility assessments made against the moving party and all inferences drawn against the moving party, a reasonable juror would have been compelled to accept the view of the moving party."[34] *Piesco v. Koch, 12 F.3d 332, 343 (2d Cir. 1993)*.

34 Exxon also moved in the District Court for a new trial or remittur. The District Court denied the motions, and we review its decision for abuse of discretion. See *Leibovitz v. New York City Transit Auth., 252 F.3d 179, 184 (2d Cir. 2001)* (new trial); *Cross v. New York City Transit Auth., 417 F.3d 241, 258 (2d Cir. 2005)* (remittitur). [HN19] A district court "ordinarily should not grant a new trial unless it is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Hygh v. Jacobs, 961 F.2d 359, 365 (2d Cir. 1992)* (internal quotation marks omitted). As for remittitur, [HN20] where, as here, the damages at issue are awarded in connection with state law claims, the district court is "obliged to review the award under [state] [*108] law." *Cross, 417 F.3d at 258*. Under New York law, a damages award must be reduced if it "deviates materially from what would be reasonable compensation." *N.Y. C.P.L.R. § 5501(c)*; see also *Cross, 417 F.3d at 258*. As we explain in the text, we reject Exxon's challenge to the sufficiency of the evidence underlying the jury's verdict. For the same reasons, we also reject Exxon's new-trial and remittitur arguments.

1. The Jury's 10 ppb MTBE Peak Concentration Finding

The only expert witness to quantify the amount of MTBE that will be in the Station Six outflow was hydrogeologist David Terry, who employed multiple analyses to do so, as described above. Using one analysis -- Analysis 1 -- Terry opined that MTBE concentration would peak at 35 ppb in 2024. Using a different analysis -- Analysis 2 -- Terry opined that, depending on spill volume, the peak concentration could range from de minimis levels to approximately 23 ppb, and could last through at least 2040. For its part, the jury concluded in Phase II that the concentration of MTBE at Station Six will peak at 10 ppb in 2033.

On appeal, Exxon challenges the jury's conclusion on two grounds. First, it notes that, notwithstanding the jury's Phase [*109] I finding that the City will use Station Six as a back-up source of drinking water, Terry based his models on the assumption that Station Six will operate on a continuous basis. According to Exxon, this allegedly erroneous assumption renders Terry's models fatally flawed and the jury's verdict without any

evidentiary basis. Second, Exxon argues that because Terry's expert opinion and the jury's verdict differ, the latter must have been based on impermissible speculation.

As for Exxon's first argument, it is true that the jury concluded during Phase I that the City would use the water from the Station Six Wells "as a back-up source of drinking water if needed due to shortages in other sources of supply." It is also true that Terry's analyses assumed that Station Six would run on a continuous basis for twenty-four years. Terry Testimony, Tr. at 2155-:11-25; id. at 2212:22-2213:13. But that assumption is not necessarily inconsistent with the jury's back-up source finding. Indeed, several City witnesses testified that, given the unpredictability of water emergencies and the need to repair existing infrastructure periodically, water providers customarily plan, as a matter of prudent practice, [*110] for continuous use of back-up water facilities. For example, Terry himself testified that it is the "normal[ ]" practice to assume continuous use when planning for back-up wells "because no one really knows at the outside how they're going to use the well. They might think it's a standby well or something and something happens and they need to use the well, so in that case you want to have enough treatment for that scenario." Id. at 2213:8-13. Steven Schindler, Director of Water Quality for the City's Bureau of Water Supply, testified that "[y]ou never know how long a backup supply is going to be needed," especially given the City's plans to "tak[e] components of [its] system off line for long periods of time, meaning years." Schindler Testimony, Tr. at 2945:7-19. And Marnie Bell, called by the City to describe the costs of designing a treatment facility at Station Six, testified that the "[p]lanned replacement of tunnels, aqueducts, emergencies, [and] failure of these facilities" required the City "to plan for the worst case in designing and costing a treatment plant." Bell Testimony, Tr. at 6017:16-6018:4. Given this evidence, a rational juror could conclude that Terry's analyses [*111] were probative of peak-MTBE concentrations at Station Six -- even though the analyses assumed a continuous-pumping scenario.[35]

> 35 For the same reason, we reject Exxon's contention that the City's proof of its damages was somehow faulty because, in calculating the cost of a treatment facility, Bell assumed that Station Six would operate continuously. The jury was entitled to credit Bell's testimony that in designing and building such a facility, a prudent water provider would assume continuous use, even if Station Six is to serve as a back-up source of drinking water. Bell Testimony, Tr. at 6017:16-6018:4. Further, the jury's measure of damages -- $250.5 million, before the offsets for proportional liability for other tortfeasors and damage attributable to preexisting contamination -- was consistent with the City's evidence that the net present value of maintaining and operating a treatment system at Station Six to remove MTBE present at 10 ppb was approximately $250 million. See, e.g., id. at 5886:9-10 ("For the 10 ppb [scenario], the total cost would be approximately $250 million."). The District Court therefore did not abuse its discretion in denying Exxon's motion for a new trial on [*112] damages or, in the alternative, remittitur.

Exxon's second argument is that the jury's peak-MTBE verdict was "irrational," and must be set aside, because it did not mirror Terry's peak-MTBE prediction. Appellants' Br. at 55. We disagree. [HN21] The role of an expert is not to displace the jury but rather to "provid[e] the groundwork . . . to enable the jury to make its own informed determination." *United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994)*. Accordingly, the jury is "free to accept or reject expert testimony, and [is] free to draw [its] own conclusion." *Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1121, 335 U.S. App. D.C. 179 (D.C. Cir. 1999)*; see also *Schroeder v. The Tug Montauk, 358 F.2d 485, 488 (2d Cir. 1966)* ("[I]t was within the province of the [trier of fact] to weigh [conflicting expert evidence] and accept or reject the whole or a part of each [expert's] testimony."). And we have consistently held that expert testimony that "usurps . . . the role of the jury in applying [the] law to the facts before it" by "undertak[ing] to tell the jury what result to reach" or "attempt[ing] to substitute the expert's judgment for the jury's" is inadmissible. *Nimely v. City of New York, 414 F.3d 381, 397 (2d Cir. 2005)* [*113] (internal quotation marks and alteration omitted).

As an initial matter, we note, as did the District Court, that the jury's peak-MTBE finding fell within the range of possible outcomes predicted by Terry's analyses. Terry testified that because he lacked perfect information about the amount of gasoline spilled in the vicinity of Station Six, he based his analyses on a range of variables. For example, in Analysis 1, Terry predicted future MTBE

concentrations using groundwater quality information taken in 2004 for sample locations near Station Six. And in Analysis 2, he predicted future MTBE concentrations and the duration of such concentrations by identifying known spill sites and assuming spill volumes of 50 gallons, 500 gallons, and 2,000 gallons. Analysis 1 suggested peak MTBE concentrations of 35 ppb, while Analysis 2 suggested peak MTBE concentrations ranging from de minimis levels (assuming spill volumes of 50 gallons) to approximately 23 ppb (assuming spill volumes of 2,000 gallons).[36] The jury's finding that the concentration of MTBE at Station Six would peak at 10 ppb falls squarely within Terry's range. This strikes us as highly persuasive evidence that the jury's finding [*114] was not irrational. Cf. *Robinson v. Shapiro, 646 F.2d 734, 744 (2d Cir. 1981)* (upholding damage award greater than figure calculated by plaintiff's expert).

> 36 Although Terry explained that the principal purpose of Analysis 2 was to estimate "how long the MTBE concentrations will be present [at Station Six] in the future," Terry Testimony, Tr. at 2015:14-15, nothing in his testimony suggests that he meant for the jury to disregard Analysis 2's peak-MTBE figures.

Further, Terry's models only predicted future MTBE concentrations at Station Six. These predictions were based on a set of assumptions about a number of factors, including spill volume, timing, and the uses to which Station Six would be put. The jury evidently accepted some of Terry's assumptions and rejected others, which it was entitled to do. Exxon's contrary argument would threaten to "denigrate[ ] the historic and practical abilities of the jury," *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc., 106 F.3d 1388, 1398 (7th Cir. 1997)*, by forcing upon it a binary choice: either accept Terry's testimony in whole or reject it in whole. This is not the law. See *Berger, 170 F.3d at 1121*; *Schroeder, 358 F.2d at 488*.

For these [*115] reasons, we reject Exxon's contention that the jury's peak MTBE finding was based on impermissible speculation.

2. The Jury's Consideration of Market Share Evidence

According to Exxon, the jury's Phase III verdict as to Exxon's liability as a manufacturer, refiner, supplier, or seller of gasoline containing MTBE must also be reversed because it was impermissibly based on a market-share theory of liability.[37]

> 37 As explained above, the jury ultimately considered two theories of causation. Under the first theory -- which the District Court called "direct spiller causation" -- the jury was asked to consider whether Exxon-owned underground storage tanks located in the vicinity of Station Six leaked gasoline containing MTBE and, if so, whether these leaks injured the City. Under the second theory -- which the District Court called "manufacturer, refiner, supplier, or seller causation" -- the jury was asked to consider whether MTBE from gasoline that was manufactured, refined, supplied, or sold by Exxon was a cause of the City's injury. The jury found that the City had proven by a fair preponderance of the evidence that Exxon was a cause of the City's injury as a direct spiller and as a manufacturer, [*116] refiner, supplier, or seller. Phase III Interrogatory Sheet.

[HN22] "Market share liability provides an exception to the general rule that in common-law negligence actions, a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury." *Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 240, 750 N.E.2d 1055, 727 N.Y.S.2d 7 (2001)*. Where the theory of proof called market-share liability is permitted, a defendant may be held liable absent any showing that it caused or contributed to the plaintiff's injury; instead, a defendant may be presumed liable to the extent of its share of the relevant product market. *Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 511-12, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989)*.

According to Exxon, the District Court permitted the imposition of market-share liability in contravention of New York law when it instructed the jury that in evaluating whether Exxon's conduct in manufacturing, refining, supplying or selling gasoline containing MTBE was a substantial factor in causing the City's injury, the jury could "consider as circumstantial evidence [Exxon's] percentage share of the retail and/or supply market for gasoline containing MTBE in Queens or [in] any other region that you determine is relevant." Tr. at 6606:17-20. [*117] We disagree with Exxon and conclude that the instruction appropriately applied New York law. The District Court did not impose market-share liability upon Exxon; it simply permitted the jury to draw upon

market-share data as one piece of circumstantial evidence that Exxon caused the City's injury.

As an initial matter, we note that the City did not rely on a market-share theory of liability. To the contrary, it identified the "exact defendant whose product injured" it -- Exxon. Cf. *Hymowitz, 73 N.Y.2d at 504* (allowing recovery notwithstanding plaintiffs' inability to identify the manufacturer of injurious product). Indeed, as explained below, the City adduced testimony establishing that Exxon gasoline found its way into every underground storage tank in Queens during the relevant period. This is a case in which a defendant faces liability because of evidence linking its own product to the plaintiff's injury.

[HN23] Under New York law, an act or omission is regarded as a legal cause of an injury "if it was a substantial factor in bringing about the injury." *Schneider v. Diallo, 14 A.D.3d 445, 788 N.Y.S.2d 366, 367 (1st Dep't 2005)*. The word "substantial" means that the act or omission "had such an effect in [*118] producing the injury that reasonable people would regard it as a cause of the injury." *Rojas v. City of New York, 208 A.D.2d 416, 617 N.Y.S.2d 302, 305 (1st Dep't 1994)* (internal quotation marks omitted). In endeavoring to prove that Exxon's conduct as a manufacturer, refiner, supplier, or seller of gasoline was a "substantial factor" in bringing about its injury, the City adduced three principal pieces of evidence. First, the City presented expert testimony that, because gasoline from different manufacturers was commingled before distribution, Exxon gasoline "ended up in each of the retail gas stations in Queens and in their underground storage tanks" between 1985 and 2003. Testimony of Bruce Burke ("Burke Testimony"), Tr. at 4103:7-10. As a result, when "there were leaks from those tanks and MTBE gasoline came through those leaks . . . there was some Exxon MTBE gasoline in the tanks [that] presumably went into the leaks." Id. at 4104:14-20. Second, the City presented expert testimony that Exxon supplied approximately twenty-five percent of the gasoline sold in Queens between 1986 and 2003. Testimony of Martin Tallett, Tr. at 4278:9-10; id. at 4281:8-11. And third, the City presented expert testimony [*119] that "[l]eaks happen at gas stations . . . on a fairly routine basis." Testimony of Marcel Moreau ("Moreau Testimony"), Tr. at 1115:15-16.

Viewed in context, the market share data adduced by the City served merely as some proof that sufficient quantities of Exxon gasoline were delivered to gas stations in the vicinity of Station Six to make it more likely than not that Exxon gasoline played a substantial role in bringing about the City's injury. Like the District Court, we perceive a difference between employing market-share data in this fashion and imposing liability based solely on a defendant's share of the market for a dangerous product, absent any evidence that the defendant's own product directly caused some of the harm alleged. Here, the City did not use market share data as a substitute for showing that Exxon contributed to the contamination of Station Six. Cf. *Hymowitz, 73 N.Y.2d at 504*. Instead, it used such data to help quantify the scope of that contribution.[38]

38 For its part, Exxon appears to have relied on market share evidence to prove the percentage of fault attributable to other tortfeasors.

The cases upon which Exxon relies are distinguishable. In *Tidler v. Eli Lilly & Co., 851 F.2d 418, 271 U.S. App. D.C. 163 (D.C. Cir. 1988)*, [*120] the D.C. Circuit declined to allow plaintiffs to employ a market-share theory of liability in connection with their state-law claims for DES exposure where the relevant state courts had not squarely addressed the availability of market-share liability. *Id. at 425*. In *City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 115-16 (Mo. 2007)*, the Supreme Court of Missouri held that, under Missouri law, a plaintiff may not employ a market-share theory of liability in lieu of identifying the precise defendant whose product injured it. And in *Martinez v. Skirmish, U.S.A., Inc., No. 07-5003, 2009 U.S. Dist. LEXIS 43837, 2009 WL 1437624 (E.D. Pa. May 21, 2009)*, the court reached a similar result under Pennsylvania law. *2009 U.S. Dist. LEXIS 43837, [WL] at *4*. Neither Tidler, City of St. Louis, nor Martinez deal with the different question presented here: whether market-share data can serve as part of the mosaic of circumstantial evidence that helps the jury determine the scope of the defendant's contribution to the plaintiff's injury.

Under the circumstances of this case, we find that the District Court's instruction was not improper. We also find that, based on the evidence described above, a reasonable jury could conclude that Exxon's conduct [*121] as a manufacturer, refiner, supplier, or seller of gasoline containing MTBE was indeed a substantial factor in bringing about the City's injury.[39]

39 We need not address Exxon's challenge to what it describes as the District Court's "novel 'commingled product 'alternative liability theory." Appellants' Br. at 61. That independent, alternative theory dispensed with the substantial-factor requirement and would have permitted the City to establish causation based on evidence that Exxon manufactured or refined any amount of commingled MTBE gasoline contaminating Station Six. See, e.g., *MTBE XII, 739 F. Supp. 2d at 608-09*; *MTBE VII, 644 F. Supp. 2d at 314-15, 318-19*; *MTBE II, 379 F. Supp. 2d at 377-79*. Because the jury never rendered a verdict on the commingled product theory, it is not at issue here.

E. New York Law Claims

Exxon contends that even if we reject its arguments as to preemption, legal cognizability, and ripeness, and its challenge to the sufficiency of the evidence of injury and causation, the judgment below must be reversed because the jury's verdicts as to the City's claims of negligence, trespass, nuisance, and failure-to-warn are unsupported by the evidence. We disagree and [*122] conclude that, viewed in the light most favorable to the City, the evidence supported the jury's verdict. See *Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 150-51 (2d Cir. 2012)* ([HN24] "In reviewing the sufficiency of the evidence in support of a jury's verdict, we examine the evidence in the light most favorable to the party in whose favor the jury decided, drawing all reasonable inferences in the winning party's favor." (internal quotation marks omitted)).

1. Negligence

[HN25] To prevail on a negligence claim under New York law, a plaintiff must show "[1] a duty on the part of the defendant; [2] a breach of that duty by conduct involving an unreasonable risk of harm; [3] damages suffered by the plaintiff; and [4] causation, both in fact and proximate, between the breach and the plaintiff's harm." *McCarthy v. Olin Corp., 119 F.3d 148, 161 (2d Cir. 1997)* (internal quotation marks and citations omitted).

At trial, the City argued that Exxon was negligent as a "direct spiller" of gasoline containing MTBE because Exxon failed to ensure that such gasoline was properly stored and dispensed at service stations it owned or controlled. According to the City, gasoline leaked from Exxon's underground storage [*123] tanks, causing MTBE to enter the soil, the groundwater, and the Station Six Wells. Exxon argues that the evidence was insufficient to show that it breached its duty of care. In Exxon's view, the evidence showed that the technology it used to prevent leaks and contain spills was consistent with measures that other station owners used. Additionally, Exxon asserts, gasoline stations inevitably spill gasoline into the surrounding environment, even when employees exercise great care. Because the City failed to distinguish between negligent and non-negligent spills, Exxon argues, the jury's verdict is unsupported by the evidence.

Viewed in the light most favorable to the City, the evidence supported the jury's negligence verdict. The record provided ample evidence of gasoline spills and leaks at Exxon-controlled stations, and the jury could have concluded that these releases were negligent. For example, the jury heard testimony about a series of gasoline releases from an Exxon service station located at 113-21 Merrick Boulevard in Queens, within the "capture zone" of the Station Six Wells. In 1996, an inexperienced employee caused a gasoline leak when changing filters on a gasoline dispenser. [*124] Three years later, one of the station's tanks failed a "vacuum" test, meaning that the tank was leaking and required repairs. And in 2001, employees encountered gasoline-contaminated soil when working on the station's piping system; upon further exploration, they discovered six 550-gallon storage tanks buried under the station -- tanks that were unregistered, and that the station owner did not know existed. An earlier test of the groundwater underneath the station revealed an MTBE concentration of 1,500 ppb -- thirty times the then-current MCL.

The jury also heard testimony about steps Exxon could have taken to prevent, or at least mitigate the damage from, these contamination incidents. Marcel Moreau, the City's expert on underground gasoline storage, explained that Exxon could have implemented "vapor monitoring," which would have permitted station operators to detect leaks more quickly. Moreau Testimony, Tr. at 3378:22. He also explained that Exxon could have installed remediation systems at its stations, which would have permitted station operators to begin the clean-up process as soon they detected a gasoline leak. Id. at 3379:3-10. Moreau testified that, to his knowledge, Exxon did [*125] not implement either of

these measures at its stations. Id. at 3380:15-17. In addition, according to Moreau, after the 1996 leak at the Merrick Boulevard station from an improperly-installed filter, Exxon employees did not perform a "chemical analysis or anything else to determine what was contaminated and what was not. They just went by nose." Id. at 1270:16-19.

The jury was entitled to credit this testimony and conclude that the exercise of reasonable care required Exxon to implement the measures identified by Moreau. Contrary to Exxon's argument, these devices were not simply a "wish list." Moreau testified that vapor detection technology was available in the 1980s, and that, in a 1986 paper recognized by at least one petroleum trade group, he and others warned about the dangers of MTBE and emphasized the importance of effective leak-detection systems. Id. at 3345:2-14. An internal Exxon memorandum from 1984 explained that MTBE migrated farther in groundwater than other contaminants and had lower "odor and taste thresholds." Pl. Ex. 272. A memorandum dated two years later observed that federal and state authorities had identified MTBE as a health concern. Pl. Ex. 5506. Evidence of [*126] Exxon's timely knowledge of the particular dangers of MTBE, combined with evidence about remedial measures available as early as the 1980s, was sufficient to allow the jury to determine that Exxon breached the standard of ordinary care.

2. Trespass

[HN26] To prevail on a trespass claim under New York law, a plaintiff must show an "interference with [its] right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner." *New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1361 (2d Cir. 1989)* (citing *Ivancic v. Olmstead, 66 N.Y.2d 349, 352, 488 N.E.2d 72, 497 N.Y.S.2d 326 (1985))*. "[W]hile the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or [what] he does so negligently as to amount to willfulness." *Phillips v. Sun Oil Co., 307 N.Y. 328, 331, 121 N.E.2d 249 (1954)*. In a trespass case involving the "underground movement of noxious fluids," a plaintiff must show that the defendant "had good reason to know or expect that subterranean and other conditions were such that [*127] there would be passage [of the pollutant] from defendant's to plaintiff's land." Id.

Exxon asserts that the City failed to establish the first element of trespass -- an interference with its water rights. We address this assertion only briefly because it simply repackages two arguments we have already rejected. First, Exxon contends that an interference has not occurred because, according to the jury, the peak MTBE concentration in the Station Six Wells will not exceed 10 ppb. But as already explained, [HN27] New York courts have held that a plaintiff may suffer injury from contamination at levels below an applicable regulatory threshold. See *Cunningham v. Spitz, 218 A.D.2d 639, 630 N.Y.S.2d 341, 341 (2d Dep't 1995)*; *Peri v. City of New York, 8 Misc. 3d 369, 798 N.Y.S.2d 332, 339-40 (N.Y. Sup. Ct. Mar. 28, 2005)*, aff'd, *44 A.D.3d 526, 843 N.Y.S.2d 618 (1st Dep't 2007)*, aff'd, *11 N.Y.3d 756, 894 N.E.2d 1192, 864 N.Y.S.2d 802 (2008)*. Here, the jury found that a reasonable water provider would have treated the MTBE-contaminated water at Station Six. And the record contains sufficient evidence to support this conclusion.

Second, Exxon contends that it did not interfere with the City's water rights because the City has never actually used Station Six. Again, however, Exxon conflates [*128] the City's injury with its damages. The City alleged, and proved to the jury's satisfaction, that the City intends to use the Station Six Wells, that MTBE will be within the capture zone of those wells when they begin operation, and that a reasonable water provider would treat the water to remove the MTBE. An interference has occurred. Whether the City actually uses Station Six goes to the calculation of its damages. Cf. *Hill v. Raziano, 63 A.D.3d 682, 880 N.Y.S.2d 173, 175 (2d Dep't 2009)* ("[N]ominal damages are presumed from a trespass even where the property owner has suffered no actual injury to his or her possessory interest.").

Exxon also contends that the District Court erred by failing to instruct the jury that a defendant is liable for trespass only if it "'had good reason to know or expect that subterranean and other conditions were such that there would be passage [of the pollutant] from defendant's to plaintiff's land.'" Appellees' Br. at 73 (quoting *Phillips, 307 N.Y. at 331*) (alteration in original). In fact, the District Court's instruction conveyed this element of trespass. The relevant portion of the that

instruction, which is set out in the margin,[40] required the jury to find that [*129] Exxon knew (1) "the gasoline containing MTBE that it manufactured, refined, sold and/or supplied would be spilled," (2) "the propert[ies] of MTBE would cause it to spread widely and rapidly in groundwater," and (3) as a result, it was "substantially certain that [Exxon's] gasoline containing MTBE would leak from the gasoline distribution system and enter groundwater, including the groundwater in the capture zone of the Station 6 wells." Tr. at 6620:1-15. These instructions, particularly the third requirement, satisfy *Phillips*.

> 40 After explaining the element of causation and then defining "intent," the District Court gave the following instruction:
>
> > In this case, if you find that [Exxon] did not know that the gasoline containing MTBE that it manufactured, refined, sold and/or supplied would be spilled, and that the property of MTBE would cause it to spread widely and rapidly in groundwater, or that although [Exxon] knew these things, these things did not make it substantially certain that its gasoline containing MTBE would leak from the gasoline distribution system and enter groundwater, including the groundwater in the capture zone of the Station 6 wells, then [Exxon] did not commit a [*130] trespass.
> >
> > If you find, however, that [Exxon] acted with the requisite intent; namely, [Exxon] knew that its conduct made it substantially certain that MTBE would enter the groundwater, including the groundwater in the capture zone of the Station 6 wells, then [Exxon] did commit a trespass.
>
> Tr. at 6620:1-15.

Finally, we reject Exxon's argument that its actions as a "mere refiner and supplier" of gasoline were "too remote from any actual spills or leaks to be deemed an 'immediate or inevitable' cause of any trespass." Appellants' Br. at 73-74 (quoting *Phillips, 307 N.Y. at 331*). In *State v. Fermenta ASC Corp., 238 A.D.2d 400, 656 N.Y.S. 2d 342 (2d Dep't 1997)*, plaintiff Suffolk County Water Authority determined that several of its wells had been contaminated by a chemical known as TCPA, a natural byproduct of a widely-used herbicide called Dacthal. The water authority sued the exclusive manufacturer and distributor of Dacthal on several legal theories, including trespass. In affirming the trial court's denial of summary judgment to the manufacturer on the trespass claim, the Second Department explained that "it is enough that the defendants' actions in directing consumers to apply Dacthal to the soil [were] [*131] substantially certain to result in the entry of TCPA into [Suffolk County Water Authority] wells." *Id. at 346*.

Fermenta is squarely on point. Just as the manufacturer in Fermenta knew that consumers would apply its product to the soil, here the jury concluded that Exxon "knew that the gasoline containing MTBE that it manufactured, refined, sold and/or supplied would be spilled." Tr. at 6620:2-3. And just as the actions of the manufacturer in Fermenta were substantially certain to cause contamination, here the jury concluded that it was "substantially certain that [Exxon's] gasoline containing MTBE would leak from the gasoline distribution system and enter groundwater, including the groundwater in the capture zone of the Station 6 wells."[41] Id. at 6620:7-9.

> 41 Exxon cites *Abbatiello v. Monsanto Co., 522 F. Supp. 2d 524, 542 (S.D.N.Y. 2007)*, which 41 summarily dismissed a trespass claim against a manufacturer of products containing harmful chemicals, even though the complaint alleged that the manufacturer knew its products would enter plaintiffs' land. Relying on Phillips, the court in Abbatiello concluded without explanation that the contamination was not the "immediate [*132] or inevitable consequence" of the manufacturer's actions. Id. (quoting *Phillips, 307 N.Y. at 331*). Here, as we have already explained, the jury's finding that Exxon was "substantially certain that its gasoline containing MTBE would leak from the gasoline distribution system and enter groundwater," Tr. at 6620:6-8, satisfied the requirements set forth in Phillips.

3. Public Nuisance

[HN28] A public nuisance "is an offense against the

State and is subject to abatement or prosecution on application of the proper governmental agency." *Copart Indus. v. Consolidated Edison Co. of N.Y., 41 N.Y.2d 564, 568, 362 N.E.2d 968, 394 N.Y.S.2d 169 (1977)*. To prevail on a public nuisance claim under New York law, a plaintiff must show that the defendant's conduct "amounts to a substantial interference with the exercise of a common right of the public," thereby "endangering or injuring the property, health, safety or comfort of a considerable number of persons." *532 Madison Ave. Gourmet Foods v. Finlandia Ctr., 96 N.Y.2d 280, 292, 750 N.E.2d 1097, 727 N.Y.S.2d 49 (2001)*.

Exxon argues that the jury's rejection of the City's design-defect claim forecloses the City's public-nuisance claim because it establishes that Exxon acted in the safest feasible way, and that Exxon therefore [*133] did not "substantially" interfere with a public right.[42] Again, however, Exxon overreads the jury's design-defect verdict. The jury concluded that the City failed to establish that a safer, feasible alternative design existed -- a determination, which, as we have explained, required the jury to balance the costs of using MTBE against the alternatives. Exxon overreaches insofar as it construes this verdict as an affirmative finding that MTBE was the safest available oxygenate.

> 42 Exxon also argues that the jury's finding that MTBE concentrations in Station Six will never exceed the MCL establishes as a matter of law that Exxon's "interference" was not "substantial." Here, Exxon simply reiterates its earlier argument about the legal significance of the MCL. We are unpersuaded for the reasons already discussed.

We also reject Exxon's contention that its conduct as a supplier of gasoline was too "remote from Station 6" to support the jury's public nuisance verdict. Appellants' Br. at 74. [HN29] Under New York law, "[e]very one who creates a nuisance or participates in the creation or maintenance thereof is liable for it." *Penn Cent. Transp. Co. v. Singer Warehouse & Trucking Corp., 86 A.D.2d 826, 447 N.Y.S.2d 265, 267 (1st Dep't 1982)* [*134] (internal quotation marks omitted); see also *Restatement (Second) of Torts § 834* ("One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on."). As we have explained, the City adduced evidence showing that Exxon manufactured gasoline containing MTBE and supplied that gasoline to service stations in Queens. In addition, the City offered testimony that Exxon knew station owners would store this gasoline in underground tanks that leaked, and introduced evidence that Exxon knew specifically that tanks in the New York City area leaked. The record also shows that Exxon was aware of MTBE's tendency to spread quickly once released into groundwater. In sum, the evidence supports a finding that Exxon knew that MTBE gasoline it manufactured would make its way into Queens, where it was likely to be spilled, and once spilled, would likely infiltrate the property of others.

Despite this evidence, Exxon argues that the City failed to show that Exxon's operations occurred "near the relative geographic areas of the plaintiffs' wells." Appellants' Br. at 74 (internal quotation marks [*135] omitted). In support of this position, Exxon relies on *In re Nassau County Consolidated MTBE (Methyl Tertiary Butyl Ether) Products Liability Litigation, 29 Misc. 3d 1219[A], 918 N.Y.S.2d 399, 2010 NY Slip Op 51892[U], 2010 WL 4400075 [N.Y. Sup. Ct. Nassau County 2010]* (unpublished table decision) ("Nassau County"), a decision also addressing MTBE contamination in public water supplies by various gasoline suppliers. In Nassau County, the trial court concluded that to be liable for a public nuisance, the defendant (or its agent) must have participated in the nuisance-causing activity while on land that was "neighboring or contiguous" with the plaintiff's property. *29 Misc. 3d 1219[A], 918 N.Y.S.2d 399, 2010 NY Slip Op 51892[U]Id. at *9*. The court therefore held that only those defendants who "conduct[ed] . . . operations near the relative geographic areas of the plaintiffs' wells" could be liable for public nuisance and dismissed public nuisance claims against defendants whose "operations terminate before reaching Nassau County or Suffolk County (where the alleged contamination has taken place), and [whose] link to the plaintiffs' injury is that they supplied most of the gasoline that was eventually transported near the plaintiffs' wells." *29 Misc. 3d 1219[A], 918 N.Y.S.2d 399, 2010 NY Slip Op 51892[U]Id. at *8, 10*.

Nassau County has not been subjected [*136] to the scrutiny of any higher state court, and we question whether, on further review, New York law will be found to support liability for public nuisance only if the defendant engaged in the nuisance-causing conduct from land that directly adjoins the plaintiff's land.[43] But even assuming the trial court's interpretation of public nuisance

doctrine is correct, Nassau County does not undermine the jury's verdict.

> 43 Our sister Circuits have reached differing conclusions when presented with common law nuisance claims against a manufacturer who was not in geographic proximity to the plaintiff. Compare *Tioga Pub. School Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993)* (holding that, under North Dakota law, "nuisance . . . does not afford a remedy against the manufacturer of an asbestos-containing product to an owner whose building has been contaminated by asbestos following the installation of the product in the building"), and *City of Bloomington, Ind. v. Westinghouse Elec. Corp., 891 F.2d 611, 614 (7th Cir. 1989)* (holding that, under Indiana law, a manufacturer of electrical equipment was not liable for nuisance when third parties disposed of its products incorrectly, [*137] causing contamination); with *Team Enters., LLC v. W. Inv. Real Estate Trust, 647 F.3d 901, 912 (9th Cir. 2011)* ("A defendant may be liable [under California law] for assisting in the creation of a nuisance if he either (1) affirmatively instructs the polluting entity to dispose of hazardous substances in an improper or unlawful manner, or (2) manufactures or installs the disposal system." (citations omitted)). These cases turn in large part, however, not on the geographic proximity of the defendant to the nuisance but on whether the defendant knew that its product would endanger public health, and whether the defendant took steps to mitigate the risks associated with its product. See *City of Bloomington, 891 F.2d at 614* ("The uncontested record shows that when alerted to the risks associated with PCBs, [the defendant] made every effort to have [the third party] dispose of the chemicals safely."); cf. *Tioga, 984 F.2d at 920* ("[L]iability for damage caused by a nuisance thus turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance."). As we have explained, in this case the jury could [*138] have concluded (and evidently did conclude) that Exxon knew of the dangers of MTBE and failed to take actions to mitigate MTBE contamination.

We note, as an initial matter, that the City sought to hold Exxon liable as both a direct spiller of MTBE gasoline and as a manufacturer, refiner, supplier, and seller of MTBE gasoline, and that the jury's verdict on public nuisance did not distinguish between these theories of causation. Nassau County's discussion of geographic proximity is relevant only to the extent that the jury held Exxon liable for public nuisance as a manufacturer of MTBE gasoline; Nassau County permitted claims to go forward against direct-spiller defendants, i.e., defendants who "had gasoline discharges near the plaintiff[']s wells." *29 Misc. 3d 1219[A], 918 N.Y.S.2d 399, 2010 NY Slip Op 51892[U]Id. at *10.*

But even if we assume the jury held Exxon liable only as a manufacturer of MTBE, Nassau County is distinguishable. Here, unlike in *Nassau County*, the evidence showed that Exxon conducted "operations near the relative geographic areas" of the Station Six Wells. Exxon owned or controlled multiple service stations near Station Six; Exxon's gasoline "ended up in each of the retail gas stations in Queens and in their underground storage [*139] tanks" between 1985 and 2003, Burke Testimony, Tr. at 4103:7-10; and, based on that activity alone, the jury could have found that Exxon marketed gasoline to retail customers in Queens. Exxon's extensive involvement in the Queens gasoline market belies any claim that its conduct was too geographically remote to sustain liability for public nuisance.

4. Failure to Warn

[HN30] Under New York law, a plaintiff may recover in strict products liability "when a manufacturer fails to provide adequate warnings regarding the use of its product." *Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 297, 591 N.E.2d 222, 582 N.Y.S.2d 373 (1992).* This is because a manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known." Id. The duty to warn extends "to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn." *McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 68-69, 181 N.E.2d 430, 226 N.Y.S.2d 407 (1962).*

Exxon argues that the District Court erred when it "instructed the jury that [Exxon] had a duty to warn, inter alia, 'the city water providers and the public' of dangers arising from the addition of MTBE into gasoline."[44] Appellants' Br. at 67-68. [*140] We reject Exxon's

suggestion that, as a categorical matter, neither the City nor the public are reasonably foreseeable users of gasoline containing MTBE, and therefore that Exxon owed the City and the gasoline-using public no duty to advise them of the hazards of use. Cf. Moreau Testimony, Tr. at 3380:3-17 (testifying that "a public education campaign," informing "everybody who was pumping gas" about the dangers of MTBE, was necessary to reduce MTBE contamination).

> 44 We note that Exxon mischaracterizes the District Court's instruction. The District Court did not instruct the jury that Exxon owed a duty to warn; it merely noted that "[t]he [C]ity . . . contends that" Exxon failed to warn "distributors, customers, station owners, its employees, gasoline truck drivers, and the city water providers and the public" of the dangers of gasoline containing MTBE. Tr. at 6613:24-14:3 (emphasis added). In more general instructions on the duty to warn, the District Court properly instructed the jury that the "manufacturer of a product that is reasonably certain to be harmful if used in a way that the manufacturer should reasonably foresee, is under a duty to use reasonable care to give adequate [*141] warnings to foreseeable users of the product of any danger known to it or which in the use of reasonable care it should have known and which the reasonable user of the product ordinarily would not discover." Tr. at 6615:4-10.

In any event, the focus of the City's evidence on its failure-to-warn claim pertained not to warnings Exxon gave the City or the general public but rather to warnings it gave to gas station operators. Although Exxon disputes whether a warning to station operators would have reduced MTBE contamination, a contention we address below, nowhere does Exxon argue that it lacked a duty to warn station operators of the special dangers of its product. And the evidence showed that although operators were warned generally about the risks of spilling gasoline, they were not warned about the special risks associated with gasoline containing MTBE. For example, Michael J. Roman, an Exxon employee at the time of his testimony, said that Exxon did not advise its customers to test for the presence of MTBE when they discovered gasoline contamination at a spill site; nor did Exxon provide any information to operators about the environmental problems associated with MTBE in particular. [*142] Testimony of Michael J. Roman ("Roman Testimony"), Tr. at 3496:17-3497:3. Roman explained that Exxon "did not want to confuse our customers" and that "the real issue is gasoline, that we do not want it leaking or spilled into the ground." Id. at 3494:16-3495:20.

We are also unpersuaded by Exxon's argument that it had no duty to warn anyone because the dangers of spilling gasoline are common knowledge. The City's claim is not that it was injured by spilled gasoline but rather that it was injured by spilled gasoline containing MTBE. The evidence at trial showed that MTBE has an unusual propensity to spread widely in groundwater if spilled, and that it is especially difficult to clean up. The harmful effects of spilling gasoline containing MTBE are therefore different (and more severe) than the effects of spilling untreated gasoline. Given the unique properties of MTBE, we reject the suggestion that a gasoline supplier complies with its duty to warn of the dangers of gasoline containing MTBE by complying with its duty to warn of the dangers of gasoline that does not contain MTBE. See *Liriano v. Hobart Corp., 92 N.Y.2d 232, 242, 700 N.E.2d 303, 677 N.Y.S.2d 764 (1998)* ([HN31] "[T]he open and obvious defense generally should not [*143] apply when there are aspects of the hazard which are concealed or not reasonably apparent to the user.").[45]

> 45 We also reject Exxon's argument that it had no duty to warn the City about the dangers of MTBE because, by 1997, the City was aware of these dangers. Exxon began using MTBE in its gasoline long before 1997, and the City's eventual knowledge did not relieve Exxon of its duty to provide adequate warnings before 1997 (to say nothing of its continuing duty to warn gas station owners).

Finally, Exxon argues that the jury's failure-to-warn verdict must be rejected because the City did not establish that gas station operators and other foreseeable users would have changed their behavior had they been warned of the dangers of MTBE. To the contrary, the record contains ample evidence from which the jury could have concluded that warnings about MTBE would have reduced contamination in the Station Six Wells. For example, the jury heard testimony that gas stations chose not to replace leaky underground storage systems in the 1980s and 1990s because they believed that doing so would be more costly than paying for the consequences of continued leakage. We think the jury could have

inferred [*144] that station owners would have acted differently had they been warned specifically about the dangers of MTBE. As one City expert testified: "Without MTBE, a-gallon-a-day leak most of the time isn't going to get you in very big trouble. But a-gallon-a-day leak with MTBE is a whole different animal; it changes the game. You are now in a whole different ballpark. You need to pay attention to those kinds of releases, and no one was really paying attention on that scale in the 1980s and through most of the 1990s."[46] Moreau Testimony, Tr. at 3350:22-51:3. It is not surprising that the jury credited this evidence; indeed, the testimony accords with common sense.

> 46 The court in *In re Nassau County, 29 Misc. 3d 1219[A], 918 N.Y.S.2d 399, 2010 NY Slip Op 51892[U], 2010 WL 4400075, at *16*, dismissed the plaintiffs' failure-to-warn claim after concluding that (1) the defendants "did not manufacture the product or have any superior knowledge regarding the risk of harm," (2) "there is no duty to warn generally of public dangers or a duty to warn public officials," and (3) "it is unlikely that additional warnings to end-users regarding the specific characteristics of MTBE would have been effectual in preventing injury to the plaintiff water districts." Here, the [*145] evidence was sufficient for the jury to find that Exxon manufactured the gasoline, that Exxon had superior knowledge regarding the risk of harm, and that additional warnings would have been effective in preventing harm. To the extent that *In re Nassau County* suggests a different conclusion, we find its reasoning unpersuasive.

F. Juror Misconduct

Finally, Exxon argues that it is entitled to a new trial because the District Court failed to dismiss Juror No. 1. According to Exxon, after the District Court dismissed the threatened juror (Juror No. 2), it was "incumbent" upon it "to dismiss the threatener" or, at a minimum, to ask Juror No. 1 whether she had actually threatened Juror No. 2. Appellants' Br. at 75-76. The District Court's failure to dismiss Juror No. 1 was prejudicial, Exxon contends, because Juror No. 2 was, it alleges, "a holdout juror and it is inconceivable that another juror would dare disagree with Juror [No.] 1 after seeing the fate of Juror [No.] 2." Id. at 75.

[HN32] We "review a trial judge's handling of alleged jury misconduct for abuse of discretion." *United States v. Gaskin, 364 F.3d 438, 463 (2d Cir. 2004)*. In so doing, we bear in mind that "[c]ourts face a delicate and [*146] complex task whenever they undertake to investigate reports of juror misconduct . . . during the course of a trial." *United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1997)*. A trial judge enjoys especially "broad flexibility" when the allegations of misconduct "relate to statements made by the jurors themselves, rather than to outside influences." *United States v. Sabhnani, 599 F.3d 215, 250 (2d Cir. 2010)* (internal quotation marks omitted). Even if a party moving for a mistrial shows that the court abused its discretion, however, it must also demonstrate that "actual prejudice" resulted. *United States v. Abrams, 137 F.3d 704, 709 (2d Cir. 1998)* (per curiam).

We see no abuse of discretion in the District Court's decision to dismiss Juror No. 2 and not Juror No. 1, and certainly no prejudice. After diligently and exhaustively inquiring of each juror individually whether he or she felt under any threat, pressure, or coercion to render a verdict in either party's favor, the District Court, relying on its observations of the jurors' demeanors as well as their responses to its careful questioning, concluded with "absolute[ ] confiden[ce] that nobody feels threatened other than Juror No. [*147] 2." Tr. at 7013:2-3. The record amply supports that conclusion, and there is no cause for us to second-guess it. Moreover, given the District Court's dismissal -- with the agreement of both sides -- of Juror No. 2, its decision not to ask Juror No. 1 whether she actually threatened Juror No. 2 was reasonable. After all, the court had not only ensured that each remaining juror felt capable of rendering an independent decision, but also had instructed each to vote his or her own conscience. In any event, the District Court's conclusion that none of the remaining jurors felt he or she was deliberating under threat, pressure, or coercion is fatal to Exxon's argument that "it is inconceivable that another juror would dare disagree with Juror [No.] 1 after seeing the fate of [holdout] Juror [No.] 2" -- and, with it, Exxon's theory of prejudice. Appellants' Br. at 75. With this established, we easily conclude that the relief Exxon sought -- removal of Juror No. 1 -- would have done nothing to change the outcome of the case; it would simply have left an eight-rather than nine-person verdict. For these reasons, we affirm the judgment of the District Court denying Exxon's motion for a mistrial.

G. [*148] The City's Cross-Appeals for Further Damages

We turn now to the City's arguments on cross-appeal. The City first argues that the jury should not have been instructed to reduce its compensatory damages award to account for the cost to the City of treating pre-existing contamination at Station Six. It further contends that the court erred in ruling that, as a matter of law, the City was not entitled to recover punitive damages from Exxon.

1. Compensatory Damages Offset

At trial, Exxon argued that any compensatory damages awarded to the City should be reduced by the necessary cost of remediating the other contaminants, such as PCE, present in the Station Six capture zone. The District Court agreed, and instructed the jury:

> [i]f you find that [Exxon] has shown, by a fair preponderance of the credible evidence, that the costs of treating the other contaminants in isolation can be fairly estimated, then you must reduce the [C]ity's damage award for treating MTBE by the cost of treating these other contaminants in isolation.

Tr. at 6637:11-15. The jury found that the cost of removing pre-existing contamination -- namely, PCE -- was $70 million, and reduced its $250.5 million compensatory damages [*149] award accordingly.

The City argues that the District Court's instruction to the jury to reduce any compensatory damages award to account for the pre-existing PCE contamination was a legal error that "unfairly rewarded Exxon and penalized the City for a mere fortuity."[47] Appellees' Br. at 90. Because the wells in which Exxon caused MTBE contamination happened also to be contaminated with PCE, the City asserts, the $70 million damages reduction results in a windfall for Exxon which, as the tortfeasor, should bear the entire cost of decontamination as a matter of principle. Moreover, the City argues, no offset should be available because the MTBE treatment costs are costs to "remedy a trespass," and permitting an offset "sanctions continuation of the trespass." Id. at 93.

> 47 [HN33] "We review jury instructions de novo to determine whether the jury was misled about the correct legal standard or was otherwise inadequately informed of controlling law." *Crigger v. Fahnestock & Co., Inc., 443 F.3d 230, 235 (2d Cir. 2006)* (internal quotation marks omitted).

We disagree. The City's argument misapprehends the nature of compensatory damages, which are designed not to punish the wrongdoer, but to compensate [*150] the victim for injuries actually suffered or expected to be suffered. See *McDougald v. Garber, 73 N.Y.2d 246, 253-54, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989)* ("The goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred."). Here, it is undisputed that the PCE that is present at Station Six precludes the City from serving the water, even absent any MTBE contamination. Indeed, the City purchased the Station Six Wells from the Jamaica Water Supply Company in response to complaints about the quality of Company-supplied water, intending to use the wells as a back-up water supply. The pre-existing contamination of that source required the City to build a treatment plant before it could effectuate its purpose in purchasing the wells -- i.e., serving potable water in the future. Thus, the City expected to incur the cost of PCE decontamination.[48] The jury fixed that cost at $70 million. Awarding $250.5 million in "compensatory" damages to the City (before apportioning liability to other parties responsible for the MTBE contamination) would therefore result in a windfall to the City, not to Exxon. On these facts, we have little trouble concluding that [*151] the District Court's instruction to the jury to reduce the City's damages award by the cost of treating other pre-existing contaminants was correct.

> 48 Indeed, were drinking water wells purchased in fully efficient markets, one would expect the price at which the City purchased the wells to be discounted by the cost a reasonable water supplier could expect to incur when later decontaminating the water.

2. Punitive Damages

[HN34] We review de novo a district court's determination that the evidence is insufficient to permit a reasonable jury to consider awarding punitive damages. *Farias v. Instructional Sys., Inc., 259 F.3d 91, 101 (2d Cir. 2001)*. We will uphold that determination if, drawing all inferences in the plaintiff's favor, there is no genuine issue of material fact and the defendant is entitled to judgment foreclosing a punitive damages award as a

matter of law. See *Schonfeld v. Hilliard, 218 F.3d 164, 172 (2d Cir. 2000).*

[HN35] "Punitive damages, in contrast to compensatory damages, are awarded to punish a defendant for wanton and reckless or malicious acts and to protect society against similar acts." *Rivera v. City of New York, 40 A.D.3d 334, 836 N.Y.S.2d 108, 117 (1st Dep't 2007).* In New York, the standard [*152] for conduct warranting an award of punitive damages "has been variously described but, essentially, it is conduct having a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." *Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d 196, 203, 550 N.E.2d 930, 551 N.Y.S.2d 481 (1990)* (internal quotation marks and citations omitted). Such conduct "need not be intentionally harmful but may consist of actions which constitute wilful or wanton negligence or recklessness." *Id. at 204.* Punitive damages are appropriate where the defendant "acted with actual malice involving an intentional wrongdoing" or where such conduct amounted to a "wanton, willful or reckless disregard of plaintiffs' rights." *Ligo v. Gerould, 244 A.D.2d 852, 665 N.Y.S.2d 223, 224 (4th Dep't 1997).*[49]

> 49 The Appellate Divisions in New York are divided over whether punitive damages must be shown by clear and convincing evidence or a preponderance of the evidence. Compare *Randi A. J. v. Long Island Surgi-Ctr., 46 A.D.3d 74, 842 N.Y.S.2d 558, 568 (2d Dep't 2007)*, and *Munoz v. Puretz, 301 A.D.2d 382, 753 N.Y.S.2d 463, 466 (1st Dep't 2003)* (requiring clear and convincing evidence), with *In re Seventh Judicial Dist. Asbestos Litig., 190 A.D.2d 1068, 593 N.Y.S.2d 685, 686-87 (4th Dep't 1993)* [*153] (requiring preponderance of the evidence). The standard of proof does not affect our disposition of the City's cross-appeal.

Our Court has observed that [HN36] "the recklessness that will give rise to punitive damages [under New York law] must be close to criminality." *Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 843 (2d Cir. 1967)* (Friendly, J.); accord *Home Ins. Co., 75 N.Y.2d at 203* (referring to punitive damages as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine" (internal quotation marks omitted)). Such recklessness may be found where the defendant "is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists." *Roginsky, 378 F.2d at 843* (internal quotation marks omitted). We focus on the "nature and degree" of the risk and ask whether "disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Id. (internal quotation marks omitted).

[HN37] A punitive damages award cannot be sustained under New York law unless "the very high threshold of moral culpability is satisfied," *Giblin v. Murphy, 73 N.Y.2d 769, 772, 532 N.E.2d 1282, 536 N.Y.S.2d 54 (1988)*, [*154] because punitive damages are "a social exemplary remedy, not a private compensatory remedy," *Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 358, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976)* (internal quotation marks omitted). See also *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)* (observing that punitive damages "are aimed at deterrence and retribution"). Accordingly, to warrant imposing punitive damages, the reckless conduct at issue must be "sufficiently blameworthy" that punishing it "advance[s] a strong public policy of the State." *Randi A. J. v. Long Island Surgi-Ctr., 46 A.D.3d 74, 842 N.Y.S.2d 558, 564 (2d Dep't 2007)* (internal quotation marks omitted). To analyze "the egregiousness of a tortfeasor's conduct, and the corresponding need for deterrence," courts must "take into account the importance of the underlying right or public policy jeopardized by the tortfeasor's conduct." *Id. at 565.* "[T]he more important the right at issue, the greater the need to deter its violation." Id.

At the close of Phase III of the trial, Exxon moved to preclude the jury from considering an award of punitive damages, arguing that the City's evidence was insufficient as a matter of law to establish the requisite degree of malice, [*155] recklessness, or wantonness. The District Court granted the motion, concluding that the City had not shown that Exxon's conduct created either severe actual harm or a severe risk of potential harm to the Station Six Wells. Throughout its analysis, the court discounted the City's evidence of Exxon's "general awareness of the dangers of MTBE" because "the narrow question presented by this motion is whether the City has produced or proffered sufficient evidence to allow a reasonable jury to conclude that [Exxon's] conduct with respect to Station Six" warranted the

imposition of punitive damages.[50] The court observed that "the vast majority of the conduct that produced the City's injury led to persistent levels of MTBE in the capture zone of Station Six that are well below the MCL in place at the time the conduct occurred."[51] This fact was relevant because, although a reasonable jury could conclude that the City was injured by MTBE levels below the MCL, "punishing [Exxon] for its contribution to this injury would not advance a strong public policy of the State or protect against a severe risk to the public."[52] The District Court also noted the lack of "credible evidence from which a jury [*156] could conclude that the risk of harm to the City, resulting from [Exxon's] conduct, significantly outstripped the actual harm caused by that conduct."[53]

50 *MTBE X, 2009 U.S. Dist. LEXIS 96469, 2009 WL 3347214, at *5.*

51 *2009 U.S. Dist. LEXIS 96469, [WL] at *6.*

52 Id.

53 *2009 U.S. Dist. LEXIS 96469, [WL] at *7.*

The City offers a number of reasons in support of its contention that the District Court erred in ruling on its punitive damages claim as a matter of law instead of submitting it to the jury. The City contends that "[t]he fact that Exxon's conduct also had nationwide effects does not eliminate its status as conduct 'with respect to Station Six'" and that the court was wrong "to consider only the ultimate outcome of Exxon's conduct" given that the jury "clearly could have viewed Exxon's conduct as meriting punishment and deterrence." Appellees' Br. at 87-88. The City further argues that the jury's finding that the combined outflow of the wells will not exceed the MCL is irrelevant because that "outcome" was "fortuitous," and the inactivity of the Station Six Wells "does nothing to mitigate Exxon's harmful conduct." Id. at 88-89 (emphasis added). Finally, the City contends that whether a jury could conclude that the risk of harm significantly exceeded the actual harm caused [*157] was irrelevant because "the actual harm that Exxon caused was severe." Id. at 89.

In response, Exxon argues that punitive damages must be precluded because, at all relevant times, its use of MTBE in gasoline was authorized by law; the jury found that there was no "safer, feasible alternative" to MTBE (an assertion we have already rejected); and, in any event, the City offered no evidence that any member of the public has ever been harmed by MTBE in the Station Six Wells. Exxon observes that there is no "genuine dispute" that the presence of MTBE in Station Six's capture zone was well below the 50 ppb MCL in place until December 2003, and that "New York's public policy, as expressed in its regulations, permits the presence of MTBE in drinking water at the level found by the jury." Appellants' Reply Br. at 54. Exxon further argues that there is no need to deter further conduct specifically relating to the use of MTBE in New York because New York banned MTBE in 2004 and Congress repealed the oxygenate requirement in 2005. Finally, in response to the City's evidence of Exxon's "general awareness that exposure to high concentrations of MTBE over long periods of time could cause injury," [*158] Exxon argues that such general awareness "cannot prove that [Exxon] knew years earlier, when it was making the decision to use MTBE, that its MTBE gasoline would cause some still-future injury to Station 6." Appellants' Reply Br. at 56.

We believe that Exxon has the better of this argument and that the District Court properly held that no reasonable jury could conclude, by at least a preponderance of the evidence, that Exxon was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that a reasonable water provider would, as a result of Exxon's manufacture and supply of MTBE-containing gasoline in New York, be forced to treat its water supply for MTBE contamination. *Roginsky, 378 F.2d at 843* (internal quotation marks omitted) (emphasis added). Exxon was required by law to use an oxygenate in the gasoline it manufactured and supplied. The vast majority of the evidence marshaled by the City related to Exxon's knowledge of the potential effects of MTBE on the odor and taste of water and on the health of those consuming it, as well as MTBE's tendency to spread quickly upon leakage through underground storage tanks or spills. But there is no evidence demonstrating [*159] that Exxon understood precisely how MTBE contamination at spill sites -- including the contamination it discovered in New York in 1998 -- would affect groundwater located some distance away from those sites. In fact, the City's evidence suggests that Exxon originally believed MTBE would dissipate to extremely low contaminant levels in groundwater. On these facts, no reasonable jury could conclude that Exxon recklessly disregarded a known risk that its conduct in the vicinity of Station Six, taken alone, would result in contaminant levels exceeding those that a reasonable water provider would tolerate -- the relevant risk to be considered in determining whether Exxon's conduct

constituted "a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Id.

What is especially telling on this issue is the jury's projection that the concentration of MTBE at Station Six would peak at 10 ppb in 2033. This projection speaks not only to the "ultimate outcome of Exxon's conduct," Appellees' Br. at 89, but also to the substantiality of the risk, inherent in supplying and distributing MTBE-containing gasoline, that a reasonable water provider would one day [*160] be required to decontaminate its water of MTBE. In light of this projection, we do not believe that a reasonable jury could also find that Exxon's conduct created a substantial and unjustifiable risk that the persistent levels of MTBE in Station Six would exceed a reasonable water provider's tolerable MCL, thereby risking substantial injury to the interest of New York residents in potable drinking water. This is particularly so in the context of Congress's mandate to use an oxygenate and the City's tolerance of a 50-ppb concentration of MTBE in its drinking water during the time when most of Exxon's allegedly reckless conduct occurred.[54] For these reasons, we affirm the District Court's determination that the evidence was insufficient as a matter of law to permit the jury to consider an award of punitive damages.

> 54 We express no view on and do not consider the propriety of penalizing Exxon for its conduct at other sites in other states, for a New York jury may punish only the acts giving rise to plaintiff's injury. *Frankson, 886 N.Y.S.2d at 721-22*. Nor does our conclusion as to the availability of punitive damages in this bellwether case on this particular record foreclose the availability [*161] of punitive damages in other MTBE cases before the District Court.

III. CONCLUSION

To summarize: We conclude that the state law tort verdict against Exxon is not preempted by the federal Clean Air Act. We conclude that the jury's finding that the MTBE levels in Station Six Wells will peak at 10 ppb in 2033 -- the MCL for MTBE since 2004 -- is not inconsistent with a conclusion that the City has been injured. We conclude that the City's suit was ripe because the City demonstrated a present injury, and that the City's suit was not barred by the statute of limitations. We conclude that the jury's verdict finding Exxon liable under state tort law theories is not precluded by the jury's concurrent conclusion that the City had not carried its burden, in the design-defect context, of demonstrating a feasible, cost-reasonable alternative to MTBE available to satisfy the standards of the now-repealed Reformulated Gasoline Program. We conclude that Exxon's demand for a retrial because of an incident of juror misconduct is unavailing. And we conclude that the jury properly offset the gross damages award by amounts it reasonably attributed to cleanup of contaminants other than MTBE, and that the City [*162] was not entitled to a jury determination of Exxon's liability for punitive damages.

For the foregoing reasons, we AFFIRM the judgment of the District Court in its entirety.

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 12-CI-00743

MICHAEL R. MILLS, et al. **PLAINTIFFS**

V.

BUFFALO TRACE DISTILLERY, INC., et al. **DEFENDANTS**

OPINION AND ORDER

This matter is before the Court upon Defendants' *Joint Motion to Dismiss*. The Court heard oral argument on Defendants' *Motion* on February 13, 2013. Both parties were represented by counsel, and Plaintiffs adamantly objected to Defendants' *Motion*. Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court hereby **DENIES** Defendants' *Motion* and **ORDERS** the parties to proceed with discovery.

STATEMENT OF FACTS

This action involves Plaintiffs'[1] claims that byproducts, in the form of excessive ethanol emissions, of the whiskey aging process carried out in the course of business by Defendant, Buffalo Trace Distillery, Inc. (hereinafter "Buffalo Trace")[2], and Defendant, Beam, Inc. (hereinafter "Beam")[3], has damaged Plaintiffs' real and personal property. Specifically, Plaintiffs allege that the accumulation of *Baudoinia compniacensis*, colloquially referred to as

[1] Plaintiffs are a class of real and personal property owning individuals residing in Franklin County, Kentucky. All Plaintiffs own or lease real and/or personal property in the form of motorized vehicles which are situated in neighborhoods in the vicinity of Defendants' Kentucky operations. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to CR 23.
[2] Buffalo Trace is a Kentucky corporation with its principal place of business in Kentucky. Buffalo Trace operates an alcoholic beverage distillery and alcoholic beverage warehouse in, among other places, Frankfort, Kentucky.
[3] Beam is a Delaware corporation doing business in the Commonwealth of Kentucky. Beam operates an alcoholic beverage distillery and alcoholic beverage warehouse in, among other places, Frankfort, Kentucky.

whiskey fungus, has caused damage to their real and personal property, creating an unsightly condition which requires abnormal and costly cleaning and maintenance, causes early weathering and diminishes the value and use of the property at issue. Plaintiffs allege that, during the fermenting, distilling, aging and bottling stages of Defendants' alcoholic beverage production, Defendants' businesses emit significant amounts of ethanol. As a result, thousands of tons of ethanol are discharged into the atmosphere of Defendants' surrounding community. The emitted ethanol then combines with condensation on Plaintiffs' property and causes the germination of an invisible fungal spore, culminating in visible and pervasive black whiskey fungus. The fungus accumulates on metal, vinyl, concrete and wood, among other surfaces. Plaintiffs are able to remove the fungus through extreme cleaning measures like high-pressure washing or through the use of chlorine bleach.

Plaintiffs' Second Amended Complaint contains five counts. The first four counts contain common law tort allegations, and the fifth count is a request for permanent injunctive relief. Count I, Negligence and Gross Negligence, alleges a knowing or negligent violation of Defendants' duty to avoid harming Plaintiffs' property. Plaintiffs maintain that Defendants were grossly negligent or wanton, willful and reckless in their disregard of Plaintiffs' rights. Count II, Temporary Nuisance, alleges that Defendants' ethanol emissions unreasonably interfere with the private use and enjoyment of Plaintiffs' property, making Defendants' actions a temporary nuisance as defined by KRS 411.540[4]. Plaintiffs further allege that Defendants have a duty to minimize and prevent the accumulation of whiskey fungus on Plaintiffs' property and that remedial abatement measures exist for Defendants to implement to minimize their ethanol

[4] KRS 411.540(1) provides that "[a]ny private nuisance that is not a permanent nuisance shall be a temporary nuisance." KRS 411.540(2) states that "[a] temporary nuisance shall exist if and only if a defendant's use of property causes unreasonable and substantial annoyance to the occupants of the claimant's property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the value of use or the rental value of the claimant's property to be reduced."

emissions. Count III, Permanent Nuisances, alleges, in the alterative, that Defendants' business operations constitute a permanent nuisance as defined in KRS 411.530[5]. Count IV, Trespass, alleges that Defendants' business operations, Defendants' ethanol emissions have entered and accumulated upon and physically invaded Plaintiffs' property without consent. Lastly, Count V, Right to Injunctive Relief, contains a skeletal pleading for permanent injunctive relief requiring Defendants to abate their excessive ethanol emissions. To remedy the excessive emissions, Plaintiffs suggest that this Court order Defendants to adopt emissions capture or control technology to reduce the ethanol emitted during the alcoholic beverage production.

In response to Plaintiffs' Second Amended Complaint, Defendants Buffalo Trace and Beam have moved jointly to dismiss Plaintiffs' claims as being preempted by the Clean Air Act (hereinafter "CAA"), 42 U.S.C. § 7600, *et seq*. Defendants insist that the CAA's comprehensive state-federal regulatory partnership preempt Plaintiffs' claims, as Defendants' ethanol emissions are governed by the CAA. Both Defendants hold Title V Operating Permits issued through the Commonwealth of Kentucky, Energy and Environment Cabinet, Department of Environmental Protection, Division of Air Quality. These permits authorize and regulate Defendants' ethanol emissions, and Defendants maintain that they have not violated the terms of their permits or any regulation governing emissions control.

After a thorough analysis of this issues presented in this case, the Court rejects Defendants' argument that the CAA preempts Plaintiffs' common law tort claims contained in Counts I-IV of Plaintiffs' Second Amended Complaint. Accordingly, for the reasons discussed

[5] KRS 411.530(1) provides that "[a] permanent nuisance shall be any private nuisance that: (a) Cannot be corrected or abated at reasonable expense to the owner; and (b) Is relatively enduring and not likely to be abated voluntarily or by court order. KRS 411.530(2) states that "[a] permanent nuisance shall exist if and only if a defendant's use of property causes unreasonable and substantial annoyance to the occupants of the claimant's property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the fair market value of the claimant's property to be materially reduced."

below, this Court hereby **DENIES** Defendants' *Motion* and **ORDERS** the parties to proceed with discovery.

ANALYSIS

I. Standard of Review

Under Kentucky law, when a court is considering a motion to dismiss under Civil Rule 12.02, "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. Ct. App. 1987) *citing Ewell v. Central City,* 340 S.W.2d 479 (Ky. 1960). "The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Mims v. W.-S. Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. Ct. App. 2007) *quoting James v. Wilson,* 95 S.W.3d 875, 883-84 (Ky. Ct. App. 2002). In *D.F.Bailey, Inc. v. GRW Engineers Inc.,* 350 S.W.3d 818 (Ky. App. 2011), the Kentucky Court of Appeals discussed a trial court's standard of review when ruling on a motion to dismiss. "[T]he question is purely a matter of law. [...] Further, it is true that in reviewing a motion to dismiss, the trial court is not required to make any factual findings, and it may properly consider matters outside of the pleadings in making its decision." *Id.* at 820 (internal citations omitted).

II. Argument

a. Plaintiffs' Common Law Tort Claims Are Not Preempted By The Clean Air Act

Defendants' primary defense to Plaintiffs' Second Amended Complaint is that the claims made therein are preempted by the Clean Air Act. Such an argument necessitates a brief discussion of the preemption doctrine as applied to this case. The Supremacy Clause of the United States Constitution dictates that constitutionally formed laws shall be the law of the land.

U.S. CONST. art. VI, cl. 2. Thus, federal law preempts state law when a state's law interferes with federal law. *Free v. Bland*, 369 U.S. 663, 666 (1962). Federal law can preempt state law in three ways: 1) express preemption, where the law expressly overrides state law, 2) field preemption, where the federal government has legislated in an area so pervasively as to occupy the field, and 3) conflict preemption, where state law directly or indirectly conflicts with federal law or where compliance with both is impossible.

The United States Supreme Court held in *American Electric Power Co., Inc. v. Connecticut* that federal common law nuisance claims seeking to curb power plant emissions are displaced by the CAA. *American Electric Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 2537 (2011). Since that ruling, several federal district courts have held that the CAA also displaces state tort claims. *See Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) aff'd, 718 F.3d 460 (5th Cir. 2013); *N. Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291 (4th Cir. 2010). There is a split among the federal appeals court circuits, though, and several federal district courts have held that the CAA does not displace state tort claims. *See Bell v. Cheswick Generating Station*, 12-4216, 2013 WL 4418637 (3d Cir. Aug. 20, 2013)[6]; *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 10-4135-CV L, 2013 WL 3863890 (2d Cir. July 26, 2013).

Enacted in 1970, the CAA is a comprehensive federal law that regulates air emissions. The Act's stated purpose is to prevent and control air pollution, which the Act envisions as being the "primary responsibility of individual states and local governments but that federal financial assistance and leadership is essential to accomplish these goals." *Bell*, 2013 WL 4418637 *citing* § 7401(a)(3)-(4). Under the Act's "cooperative federalism," the federal government develops

[6] Defendants relied heavily in their joint motion on *Bell v. Cheswick Generating Station*, 903 F. Supp. 2d 314 (W.D. Pa. 2012) for the proposition that Plaintiffs' state tort claims are preempted by the Clean Air Act. That case was reversed and remanded on August 20, 2013.

minimum standards which the states then implement and enforce.[7] *Id. citing GenOn Rema, LLC v. EPA,* No. 12–1022, 2013 WL 3481486, at *1 (3d Cir. July 12, 2013). "In so doing, states are expressly allowed to employ standards more stringent than those specified by the federal requirements." *Bell*, 2013 WL 4418637; 42 U.S.C. § 7412(d)(7); *see also Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 336 (6th Cir. 1989).

Like the Clean Water Act, the CAA contains two savings clause. The citizen suit savings clause of the Clean Water Act, as interpreted by the Court in *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, (1987) is virtually identical to the savings clause contained in §7604(e) of the CAA. §7604(e) provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard of limitation or to seek any other relief [. . .]." The CAA also contains a separate savings clause in §7614, entitled "Retention of State Authority" which provides that "[e]xcept as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution ...." Quoting *Ouellette*, the Sixth Circuit in *Her Majesty the Queen* held that the CAA intended to and does preserve "'state causes of action . . . and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *Her Majesty the Queen*, 874 F.2d at 343 *quoting Ouellette*, 479 US at 496 (emphasis in *Ouellette*). Accordingly, this Court **HOLDS** that Plaintiffs' state law tort claims are not preempted by the CAA.

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[7] The CAA is an extensive regulatory scheme which requires each state to adopt an implantation plan. If a state implantation plan (hereinafter "SIP") is approved by the Federal Environmental Protection Agency. Once approved by the EPA, a state's SIP becomes federal law enforceable in federal court. *See* 42 U.S.C § 7604. Kentucky's SIP has been approved by the EPA. Ethanol is an air pollutant regulated under the CAA and regulations promulgated by the Commonwealth of Kentucky. *See* 401 KAR 50:010(135).

b. Plaintiffs' Second Amended Complaint Passes Muster Prior to Discovery

Kentucky courts have held that a lawful business operated with due care can still be a nuisance. *See Valley Poultry Farms, Inc. v. Calip Preece*, 406 S.W.2d 413, 415 (Ky. Ct. App. 1966). Also, duty is a question of law for the Court to determine, and such a finding is premised on the foreseeability of injury. *See Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). "The rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328, 332 (Ky. 1987) *quoting M & T Chemicals, Inc. v. Westrick,* Ky., 525 S.W.2d 740 (1974); *Greyhound Corp. v. White,* Ky., 323 S.W.2d 578 (1959).

Presently, the Court believes that Plaintiffs have pled sufficient allegations to withstand dismissal and urges the parties to move forward with discovery. If Plaintiffs' case appears weak following discovery, the Court will re-evaluate the viability of Plaintiffs' claims at that point. Concerning Plaintiffs' request for the injunctive remedy of abatement, the Court declines to grant Plaintiffs' request of abatement at this time. The Court recognizes that such a remedy could be available at a future time following discovery.

WHEREFORE, the Defendants' *Motion* is **DENIED**, and the parties are directed to proceed with discovery.

SO ORDERED, this 27th day of August, 2013.

THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 18 day August, 2013 to the following:

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Sally Jump, Franklin County Circuit Court Clerk

Slip Copy, 2013 WL 692510 (D.Virgin Islands)
(Cite as: 2013 WL 692510 (D.Virgin Islands))

District Court of the Virgin Islands, Division of St. Croix
Barbara MAGRAS, Plaintiff,
v.
Governor John P. DE JONGH, Jr., Lieutenant Governor Gregory Francis, in their official and individual capacities, Executive Security Unit and The Government of the United States Virgin Islands, Defendants.

Civil Action No. 2010–091
1:10–cv–00091February 26, 2013

Rachel E. Morrison, Esq., St. Croix, U.S.V.I., For the Plaintiff

Melvin H. Evans, Jr., Esq., St. Croix, U.S.V.I., For the Defendants

MEMORANDUM OPINION

Lewis, District Judge

***1** THIS MATTER is before the Court on Defendants' Motion for Judgment on the Pleadings (Dkt. No. 34), Plaintiff's Opposition to the Motion (Dkt. No. 36), and Defendants' Reply. (Dkt. No. 42). For the reasons discussed below, the Court will grant in part and deny in part Defendants' Motion, and will grant Plaintiff's request for leave to amend the Complaint.

I. *BACKGROUND*

A. Procedural History

This case stems from the March 24, 2009 removal of Plaintiff Barbara Magras from her position as a Dignitary Security Officer with the Executive Security Unit ("ESU") of the Virgin Islands Police Department.

On September 7, 2010, Plaintiff filed a Complaint (Dkt. No. 1) seeking declaratory relief, compensatory damages, and punitive damages from Governor John P. de Jongh, Jr. and Lieutenant Governor Gregory Francis (in both their individual and official capacities), ESU, and the Government of the United States Virgin Islands (collectively, "Defendants") pursuant to 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et. seq.*), and Virgin Islands law. Specifically, Plaintiff contends that Defendants: (1) violated her rights under the Fourteenth Amendment by removing her from ESU without due process (Count I); (2) violated her rights under the Equal Protection Clause (Count I); (3) breached the terms of her employment contract and the implied covenant of good faith and fair dealing (Counts II & IV); (4) impermissibly discriminated against her on the basis of gender (Count III); and (5) intentionally inflicted emotional distress upon her (Count V). (Dkt. No. 1 at ¶¶ 42–66).

Defendants filed an Answer (Dkt. No. 13), and a discovery schedule was established. (Dkt. No. 14). The Court granted multiple requests from the parties to extend these deadlines (*see* Dkt. Nos. 20; 25; 29), before ultimately setting May 18, 2012 as the close of discovery and the deadline for filing dispositive motions. (Dkt. No. 30).

Pursuant to Federal Rule of Civil Procedure 12(c), Defendants filed the instant Motion for Judgment on the Pleadings (Dkt. No. 34) and Supporting Memorandum (Dkt. No. 34–1) on May 18, 2012, contending that the Complaint fails to state a claim upon which relief can be granted. Plaintiff filed her Opposition to the Motion (Dkt. No. 36), and Defendants filed a Reply. (Dkt. No. 42).[FN1] The matter is ripe for consideration.

FN1. Defendants' original Motion is not signed by counsel for Defendants, although the certificate of service is signed. (Dkt. No. 34). Plaintiff did not initially identify or ob-

Exhibit 4

ject to this procedural error; rather, she filed her Opposition to the Motion. (Dkt. No. 36). Two months later, Defendants filed a second Motion for Judgment on the Pleadings (Dkt. No. 41) correcting the signature error, together with a Reply (Dkt. No. 42) to Plaintiff's Opposition—apparently unaware that Local Rule 12.1(a)(2) sets a fourteen-day deadline for filing replies. (*See* Dkt. No. 42 at 1) (asserting that "[t]he Court did not specify a reply deadline" even though LCRi 12.1(a)(2) provides that "[a]ny reply from the movant shall be filed within fourteen (14) days of the filing of an opposition from an adverse party"). Thereafter, Plaintiff filed Motions (Dkt. Nos. 45; 46) seeking to strike Defendants' signed Motion and the Reply from the record as untimely. Defendants responded with two motions (Dkt. Nos. 47; 48) requesting that the Court deny Plaintiff's Motions to Strike.

The Court will deny Plaintiff's Motions to Strike and instead address the merits of Defendants' Motion for Judgment on the Pleadings. No prejudice has resulted from the initial omission of the signature, and counsel for Defendant represented that he attempted to remedy the omission by filing the signed Motion as soon as he realized his own error. (*See* Dkt. No. 47). Consideration of Defendants' untimely Reply also does not harm Plaintiff, as no new arguments are advanced in the filing.

B. Factual Background

***2** In view of the applicable legal standard, *see infra,* Part II, the following facts alleged in the Complaint are accepted as true for purposes of Defendants' Motion.[FN2]

FN2. The facts as alleged in the complaint are taken as true for purposes of a motion for judgment on the pleadings. *Allah v. Al-Hafeez,* 226 F.3d 247, 249–50 (3d Cir.2000).

In January of 2007, Plaintiff was employed as a Conservation Enforcement Officer with the Department of Planning and Natural Resources, earning an annual salary of $29,344. (Dkt. No. 1 at ¶ 9). By notification of personal action dated January 22, 2007, Plaintiff was given a "change of class and position," thereby becoming a Dignitary Security Officer ("DSO") with ESU. (*Id.*). ESU is an instrumentality of the Executive Branch of the Government of the Virgin Islands, and is under the jurisdiction, control, and direction of the Commissioner of the Virgin Islands Police Department and Governor de Jongh. (*Id.* at ¶ 6). As a DSO, Plaintiff earned a base salary of $70,000 per year. (*Id.* at ¶ 9). Additionally, Lt. Governor Francis and ESU Director Henry Thomas represented to Plaintiff and other ESU agents that they would earn "compensatory time" for hours worked in excess of forty hours per week. (*Id.* at ¶ 22).

Plaintiff was the only female DSO on St. Croix, and was assigned to protect Lt. Governor Francis' wife and their official residence—Sion Farm Mansion. (*Id.* at ¶¶ 16; 18). Unlike her male ESU counterparts, Plaintiff was required to perform menial tasks including running personal errands for the Lt. Governor's wife and non-profit organizations, and chauffeuring the housekeeper for Sion Farm Mansion to and from work regardless of whether Plaintiff was on duty. (*Id.* at ¶¶ 17; 24–25; 27). Again unlike her male counterparts, Plaintiff was not allowed to take compensatory time when Lt. Governor Francis and his family were "off island." (*Id.* at ¶¶ 26–27). From 2007–2008, Plaintiff accrued 2245 hours of compensatory time, which is the equivalent of seven months leave with pay. (*Id.* at ¶ 29).

In April, October, and December of 2008, Plaintiff met with Lt. Governor Francis regarding the compensatory time she was accruing and when she

would be permitted to utilize it. (*Id.* at ¶¶ 30–32). Lt. Governor Francis and Director Thomas indicated that "until they could 'figure out' a way to honor their promise of compensatory time, [Plaintiff] was to continue [working] as directed...." (*Id.* at ¶ 33).

In or around February 2009, Lt. Governor Francis indicated that he no longer wanted Plaintiff assigned to his security detail. (*Id.* at ¶ 35). He further explained that Plaintiff was not being fired; instead, she was being reassigned to Governor de Jongh's detail. On March 24, 2009, Plaintiff received a memorandum signed by Director Thomas dismissing her from ESU. (*Id.* at ¶ 37). She was replaced with a male agent. (*Id.* at ¶ 40).

II. *APPLICABLE LEGAL PRINCIPLES*

"A motion for judgment on the pleadings based on the defense that the plaintiff has failed to state a claim is analyzed under the same standards that apply to a Rule 12(b)(6) motion." *Revell v. Port Auth. of N.Y. & N.J.*, 598 F.3d 128, 134 (3d Cir.2010) (citing *Turbe v. Gov't of the V.I.*, 938 F.2d 427, 428 (3d Cir.1991)). Under the Supreme Court decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), when presented with a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6):

> ***3** [D]istrict courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief."

Fowler v. UPMC Shadyside, 578 F.3d 203, 210–11 (3d Cir.2009) (quoting *Iqbal*, 129 S.Ct. at 1950); *Acosta v. Hovensa, LLC*, 53 V.I. 762, 770 (D.V.I.2010). "A district court may grant the motion to dismiss only if, accepting all factual allegations as true and construing the complaint in the light most favorable to plaintiff, it determines that plaintiff is not entitled to relief under any reasonable reading of the complaint." *Acosta*, 53 V.I. at 771 (citing *Capogrosso v. Supreme Court of N.J.*, 588 F.3d 180, 184 (3d Cir.2009) (internal quotations and brackets omitted)).

"Determining whether a complaint states a plausible claim for relief ... [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *McTernan v. City of York*, 577 F.3d 521, 531 (3d Cir.2009) (citing *Iqbal*, 129 S.Ct. at 1950). While the Court must determine whether the facts as pleaded state a plausible claim for relief, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable and that a recovery is very remote and unlikely." *Fowler*, 578 F.3d at 213 (quoting *Twombly*, 550 U.S. at 556).

"On a motion to dismiss, the Court 'may consider documents that are attached to or submitted with the complaint and any matters incorporated by reference or integral to the claim, [and] items subject to judicial notice.' " *Acosta*, 53 V.I. at 768 n.1 (quoting *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir.2006)); *see also Delaware Nation v. Pennsylvania*, 446 F.3d 410, 413 (3d Cir.2006) ("Courts may consider matters of public record, exhibits attached to the complaint, and undisputedly authentic documents attached to a motion to dismiss.").

III. *DISCUSSION*

In their Motion, Defendants raise a variety of arguments attacking the sufficiency of Plaintiff's due process, equal protection, gender discrimination, breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress claims. The Court will examine each claim in turn before addressing Plaintiff's contention that she is entitled to amend her Complaint

should any of her claims fail.

A. Due Process

Seeking redress under 42 U.S.C. § 1983, Plaintiff alleges in Count I of her Complaint that Defendants violated her rights under the Fourteenth Amendment—as applied to the Virgin Islands through 48 U.S.C. § 1561—by depriving her of her "constitutional property right in her employment" without due process. (Dkt. No. 1 at ¶¶ 43–44).[FN3] Defendants contend that the due process claim must fail because Plaintiff did not have a property right in her employment under Virgin Islands law. (*See* Dkt. No. 34–1 at 5–7). The Court agrees that Plaintiff has not stated a plausible due process claim.

> FN3. In *Boyd–Richards v. De Jongh, Jr.*, No. 11–45, 2012 U.S. Dist. LEXIS 1077 (D.V.I. Jan. 4, 2012), the Court explained the interplay of the Fourteenth Amendment and 48 U.S.C. § 1561:
>
> > As a resident of the Virgin Islands, an unincorporated territory, [Plaintiff's] civil rights are defined by the Bill of Rights set forth in 48 U.S.C. § 1561. Nevertheless, § 1561 expresses the congressional intention to make the federal Constitution applicable to the Virgin Islands to the fullest extent possible consistent with its status as a territory. Section 1561 contains provisions that mirror the First Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States.
>
> *Id.*, 2012 U.S. Dist. LEXIS 1077 at *6 (internal citations and quotation marks omitted).

***4** In an examination of due process claims in the context of public employees of the Virgin Islands, the Third Circuit explained that "to establish a procedural due process claim, a plaintiff must demonstrate that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty, or property, and (2) the procedures available to him did not provide due process of law." *Iles v. de Jongh,* 638 F.3d 169, 173 (3d Cir.2011) (citations and internal quotations omitted). Further, "[t]he question of whether an employee has a property right in continued employment is a question of state [or territorial] law." *Id.* (citations omitted). Thus, Virgin Islands law governs whether Plaintiff had a property right in her position with ESU. *Id.*; *McIntosh–Luis v. DeJongh,* No. 09–22, 2012 U.S. Dist. LEXIS 45362, *14 (D.V.I. Mar. 30, 2012), *aff'd,* No. 12–2256, 2012 U.S.App. LEXIS 25469 (3d Cir. Dec. 13, 2012).

Virgin Islands law establishes three categories of public employees—exempt service, "regular" career service, and "not regular" career service. *Iles,* 638 F.3d at 173; *McIntosh–Luis,* 2012 U.S. Dist. LEXIS 45362 at *15; *Noorhasan v. De Jongh,* No. 11–cv–2011, 2012 U.S. Dist. LEXIS 45368, *8–9 (D.V.I. Mar. 31, 2012). Of these three categories, only those who meet the definition of "regular" career service employees enjoy due process protection. *Iles,* 638 F.3d at 174; *McIntosh–Luis,* 2012 U.S. Dist. LEXIS 45362 at *16; *Noorhasan,* 2012 U.S. Dist. LEXIS 45368 at *8–9. As the Third Circuit explained:

> To be a "regular" employee and thus gain a property interest in employment, an employee must have been "appointed to a position in the [career] service in accordance with this chapter after completing his working test period." 3 V.I.C. § 451. "[T]his chapter" refers to Title 3, Chapter 25 of the Virgin Islands Code, which in addition to §§ 451 and 451a, also includes Sections 521 through 535. These sections set forth the standards and requirements for "tests, appointments, promotions, and dismissals" of "regular" public employees. Under Section 521, to have been "appointed to a position in the [career]

service in accordance with this chapter" requires that an employee have been appointed "on the basis of merit and fitness, to be ascertained by competitive examinations." 3 V.I.C. § 521.

Iles, 638 F.3d at 175–76.[FN4]

FN4. As the Third Circuit noted, the definition of "regular" employee was amended in 2010. *Iles*, 638 F.3d at 176. However, the amendment is not retroactive, and this Court is required to apply the definition of "regular" employee that existed at the time Plaintiff's lawsuit arose. *Id.* at 177. Accordingly, this Court will apply the pre-amendment definition discussed above because Plaintiff's due process claim arose on March 24, 2009, the date of her removal from ESU. (Dkt. No. 1 at ¶ 37).

In the instant case, Plaintiff's Complaint does not describe the nature of her appointment so as to plausibly show that she was a "regular" career service employee entitled to due process protections. *Iqbal*, 129 S.Ct. at 1950 ("where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show [n]'—'that the pleader is entitled to relief' ") (quoting Fed.R.Civ.P. 8(a)(2)). To the contrary, Plaintiff asserts that the position of DSO was classified as an "unclassified/exempt" position, but then alleges, in conclusory fashion, that the "exempt" or "unclassified" status is an "erroneous classification." (Dkt. No. 1 at ¶¶ 9–10). The Court will disregard such unsupported legal conclusions. *Ethypharm S.A. France v. Abbott Labs.*, No. 11–3602, 2013 U.S.App. LEXIS 1567, *21 n.14 (3d Cir. Jan. 23, 2013) (noting that courts "disregard legal conclusions and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements") (citations and internal quotation marks omitted).

***5** Further, even assuming that Plaintiff was in a career service position and not classified as exempt service, Plaintiff's Complaint contains no factual allegations demonstrating that she meets the definition of a "regular" career service employee. The Complaint is silent on the crucial issue of whether Plaintiff was appointed to the position in accordance with Title 3, Chapter 25 of the Virgin Islands Code, including whether she was "appointed on the basis of merit and fitness ... [as] ascertained by competitive examinations" after "completing [her] working test period." *Iles* at 176. Rather, the Complaint states simply that Plaintiff was given a "change of class and position" to become Dignitary Security Officer with ESU. (Dkt. No. 1 at ¶ 9). As the Third Circuit noted in *Iles*, "merely because a Virgin Islands public employee is part of the 'career service' does not necessarily mean that he is also a 'regular' employee with a property interest entitled to due process protection." *Id.* at 175.

In sum, Plaintiff has not alleged facts sufficient to state a plausible due process claim. *Id.* at 173 (noting that a plaintiff must first demonstrate that he or she "was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty, or property"); *McIntosh–Luis*, 2012 U.S. Dist. LEXIS 45362 at *20 (finding, in the summary judgment context, that "Plaintiff did not have a protected property interest in her position, and therefore, her Fourteenth Amendment due process claims must fail"). As the Supreme Court has concluded, facts that allow the Court to infer nothing more than "the mere possibility of misconduct" are not sufficient to survive a motion to dismiss. *Iqbal*, 129 S.Ct. 1937.

Defendants raise two additional challenges to Plaintiff's due process claim: (1) that the Government of the Virgin Islands and its officers acting in their official capacity are not persons within the meaning of § 1983; and (2) that Plaintiff did not allege sufficient facts to establish individual liability of Governor de Jongh. (Dkt. No. 34–1 at 4–5). As to the first argu-

ment, it is well established that "[n]either the Territory of the Virgin Islands nor its officers acting in their official capacities are 'persons' under 42 U.S.C. § 1983." *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 240 (3d Cir.2010) (quoting *Brow v. Farrelly*, 994 F.2d 1027, 1037 (3d Cir.1993)). Thus, they may not be sued for money damages. *Iles*, 638 F.3d at 177 (citations omitted). However, because they *may* be sued for prospective injunctive relief, *id.* at 177–78, the due process claim against the Government of the Virgin Islands and its officers is not subject to dismissal in its entirety on the ground that they are not persons under the meaning of § 1983.

Defendants' second argument, however, is meritorious. The Court agrees that the Complaint does not contain sufficient facts to plausibly show that Governor de Jongh was personally engaged in, directed, or acquiesced in conduct that violated Plaintiff's due process rights. *See Boyd–Richards*, 2012 U.S. Dist. LEXIS 1077 at *7 (dismissing due process claim where the complaint did not allege that defendant "personally engaged in, directed, or acquiesced in conduct that violated plaintiff's rights"). Thus, as pleaded, the claim against Governor de Jongh in his individual capacity does not state a plausible claim for relief. This pleading deficiency provides an independent basis—apart from Plaintiff's failure to establish a protected property interest in her employment—to dismiss the due process claim against Governor de Jongh in his individual capacity.

B. Gender Discrimination

In Count III of her Complaint, Plaintiff claims that Defendants impermissibly discriminated against her on the basis of gender in violation of Title VII and 3 V.I.C. § 531. To establish a *prima facie* case of gender discrimination, Plaintiff must show that: (1) she is a member of a protected class; (2) she is qualified for the position in question; (3) defendant took an adverse employment action; and (4) circumstances surrounding the adverse action support an inference of discrimination based on Plaintiff's protected class. *Moore v. Shinseke*, No. 11–4234, 2012 U.S.App. LEXIS 13553, *3–4 (3d Cir. July 3, 2012) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981)).

***6** Defendants contend that Plaintiff has failed to state a gender discrimination claim, but they challenge only the fourth element of the *prima facie* case. (*See* Dkt. No. 42 at 11) ("[R]eadily admit[ing]" the first elements but "categorically deny[ing] that nonmembers of the protected class were treated more favorably"). The Court finds, however, that the Complaint contains factual allegations—that this Court must accept as true—from which to support an inference of discrimination sufficient to withstand a motion for judgment on the pleadings. Specifically, Plaintiff contends that unlike her male counterparts at the ESU, she was assigned to menial tasks including "run [ning] personal errands" for Lt. Governor Francis's wife and nonprofit organizations (Dkt. No. 1 at ¶¶ 17; 44), and "chauffeur[ing]" the Lt. Governor's housekeeper to work whether Plaintiff was on duty or not. (*Id.* at ¶¶ 25; 27). Additionally, Plaintiff alleges that male ESU agents were permitted to take compensatory time when Lt. Governor Francis and his family were "off island," but she was not. (*Id.* at ¶ 26). Finally, Plaintiff contends that when she was removed from her position, she was replaced by a male agent. (*Id.* at ¶¶ 16; 40).

These allegations are sufficient to survive Defendant's motion seeking the dismissal of Plaintiff's claim that she was subject to discrimination based on her gender. Thus, the Court will deny Defendants' Motion for Judgment on the Pleadings to the extent it seeks dismissal of Plaintiff's gender discrimination claim.

C. Equal Protection

In Count I of the Complaint, Plaintiff claims that "Defendants, acting under color of law, have, by and through their actions intentionally deprived [Plaintiff] of the rights guaranteed by the ... equal protection

clause[ ] of the Constitution." (Dkt. No. 1 at ¶ 45).

"To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against him because of his membership in a protected class." *Lande v. City of Bethlehem*, 457 F. App'x 188, 192 (3d Cir.2012) (citing *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 196 (3d Cir.2009)). The Court finds that Plaintiff has stated a plausible claim for relief under the Equal Protection Clause of the Fourteenth Amendment. The same facts that support Plaintiff's gender discrimination claim also support her equal protection claim, given that the individuals alleged to have discriminated in this instance are state actors. Thus, the Court will deny Defendants' Motion for Judgment on the Pleadings as it relates to Plaintiff's equal protection claim to the extent that the claim pertains to allegations of gender discrimination.

D. Contract

Plaintiff's Complaint also contains three contract claims: (1) breach of contract on the grounds that Defendants allegedly failed to comply with the "procedures and policies" incorporated into Plaintiff's employment contract in demoting and discharging her; (2) breach of contract with regard to Lt. Governor Francis' alleged promise that Plaintiff would earn compensatory time for overtime hours worked as an ESU agent; and (3) breach of the implied covenant of good faith and fair dealing with regard to compensatory time. (Dkt. No. 1 at ¶¶ 48; 59–62). Defendants contend that Plaintiff has failed to establish the essential elements of these claims. (Dkt. 34–1 at 11).

"To state a claim for breach of contract under Virgin Islands law, a plaintiff must allege: (1) the existence of a contract, including its essential terms; (2) the breach of a duty imposed by the contract; and (3) damages resulted from the breach." *Speaks v. Gov't of the V.I.*, No.2006–168, 2009 U.S. Dist. LEXIS 3565, *12 (D.V.I. Jan. 14, 2009) (citations omitted); *see also* *Rainey v. Hermon*, 55 V.I. 875, 881 (V.I.2011) ("Under Virgin Islands law, to prove a breach of contract, a plaintiff must establish (1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages.") (citation and internal quotation marks omitted).

Turning first to Plaintiff's "procedures and policies" breach of contract claim, Plaintiff avers as follows:

> 1. "Defendants represented the ESU Standard Operating Procedural Manual ("SOPM") as [Plaintiff's] employment contract."
>
> *7 2. "The SOPM describes the administration's guidelines and procedures for demotion and/or discharge of all ESU employees, in addition to the ESU's employee's right to appeal a demotion or discharge."
>
> 3. "Defendants did not adhere to the SOPM when they demoted and/or discharged [Plaintiff] without cause or due process thereby breaching her employment contract."
>
> 4. "The actions of Defendants are clearly a breach of its procedures and policies set forth in the Virgin Islands Government Department of Personnel Rules and Regulations, 3 VIC 530 and the ESU Standard Operating Procedures Manual which form the basis of the contract."

(Dkt. No. 1 at ¶¶ 11–13; 48). Even if this Court were to assume that these allegations suffice to support a claim for the existence of a contract, Plaintiff has failed to state a claim because she has not identified a specific duty imposed by the agreement and breached by Defendants. *Rainey*, 55 V.I. at 881 (requiring plaintiff to establish a duty created by the contract and a breach of *that* duty); *see also Speaks*, 2009 U.S. Dist. LEXIS 3565 at *13–14 ("[E]ven assuming that these statements allege a contract between

[plaintiff] and [defendant], [plaintiff] did not include any of the contract's 'essential terms.' "). In particular, Plaintiff does not identify what policies or procedures actually govern the removal of employees. Plaintiff further failed to allege any facts plausibly showing that Defendant breached these unidentified removal policies and procedures.

In short, Plaintiff's allegations amount to nothing more than the assertion that a contract existed and Defendants breached unidentified terms of this contract. As the Third Circuit explained, district courts may disregard such bare legal conclusions. *Fowler,* 578 F.3d at 210–11. Accordingly, Plaintiff's "policies and procedures" breach of contract claim cannot survive Defendant's Motion for Judgment on the Pleadings.

In stark contrast to her "policies and procedures" claim, Plaintiff has sufficiently alleged a breach of contract claim with respect to the promise of compensatory time for overtime hours worked. In particular, the Complaint alleges that:

> 1. "Lieutenant Governor Francis and Director Thomas specifically represented to [Plaintiff] and other ESU agents that they would earn compensatory time for the hours worked in excess of 40 hrs/week."
>
> 2. "[A]t no time did Defendants have the intention or means to honor its [sic] promise of compensatory time."
>
> 3. "[Plaintiff] relied to her detriment on the Defendants' representations of remuneration for working virtually around the clock."
>
> 4. "From 2007–2008 [Plaintiff] accrued 2245 hours of compensatory time, the equivalent of 7 months leave with pay."
>
> 5. Plaintiff was removed from her position with ESU so that Defendants could "avoid [their] obligation of remuneration."
>
> (Dkt. No. 1 at ¶¶ 22–23; 29; 31; 39).

These allegations are sufficient to support a claim for: (1) the existence of a contract and the specific duty created thereby (the alleged promise to award Plaintiff compensatory time for hours worked in excess of forty hours per week); (2) the alleged breach of that contract (Defendants' failure to award Plaintiff compensatory time); and (3) damages resulting from this breach (lost compensation and removal from her position). Plaintiff has, therefore, stated a plausible claim for breach of contract with respect to compensatory time. *See Rainey,* 55 V.I. at 881; *Speaks,* 2009 U.S. Dist. LEXIS 3565 at *12. Accordingly, the Court will deny Defendant's Motion for Judgment on the Pleadings as it relates to Plaintiff's claim for breach of contract for compensatory time earned.

***8** Plaintiff also contends that Defendants breached the implied covenant of good faith and fair dealing with respect to the promise of awarding compensatory time. (Dkt. No. 1 at ¶¶ 59–62). As this Court has explained:

> The implied covenant of good faith and fair dealing states that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
>
> To succeed on a cause of action for breach of the covenant of good faith and fair dealing, a plaintiff must prove acts by the defendant that amount to fraud, deceit, or misrepresentation. To successfully allege an act of fraud or misrepresentation, a complainant must demonstrate: (1) a knowing misrepresentation of a material fact, (2) intent by the defendant that the plaintiff would rely on the false statement, (3) actual reliance, and (4) detriment as a

result of that reliance.

Galloway v. Islands Mech. Contractor, Inc., No.2008–071, 2012 U.S. Dist. LEXIS 129014, *57 (D.V.I. Sept. 11, 2012) (citations and internal quotation marks omitted); *see also Desir v. Hovensa, LLC*, No. 2007/97, 2012 U.S. Dist. LEXIS 30476, *25 (D.V.I. Mar. 7, 2012); RESTATMENT (SECOND) OF CONTRACTS § 205 (1981).

Here, Plaintiff has alleged sufficient facts to survive a motion for judgment on the pleadings. The Complaint alleges that Defendants promised Plaintiff that she would earn compensatory time for hours worked in excess of forty hours per week; Defendants never intended to fulfill this promise; and Plaintiff detrimentally relied by accruing 2245 hours of compensatory time without remuneration. (*See* Dkt. No. 1 at ¶¶ 22–23; 29; 31; 39). One could reasonably infer from the allegations in the Complaint—which must be accepted as true—that Defendants intended for Plaintiff to rely on the promise of compensatory time, but had no plan of honoring the promise. Such an inference could be drawn from Plaintiff's allegations that, after multiple meetings on the subject (and many hundreds of hours of compensatory time accrued), Defendants instructed Plaintiff to continue working until Defendants could "figure out" a way to honor their promise, and then subsequently removed Plaintiff from the DSO position without honoring the promise. (*Id.* at ¶¶ 30–33; 35; 37; 39). Therefore, the Court will deny Defendants' Motion for Judgment on the Pleadings to the extent it seeks dismissal of Plaintiff's claim for breach of the implied covenant of good faith and fair dealing.

E. Intentional Infliction of Emotional Distress

In Count V of the Complaint, Plaintiff seeks to recover for intentional infliction of emotional distress on the grounds that "Defendants' actions have affected her to such as [sic] extent that it appears [their] intent was to humiliate, embarrass and inflict emotional and financial harm upon Plaintiff [.]" (Dkt. No. 1 at ¶ 64). Plaintiff further asserts that "such actions were extreme and outrageous and executed with reckless disregard to Plaintiff's rights[,]" and that she "has suffered emotional distress and harm all to her detriment[.]" (*Id.* at ¶¶ 64–65). One can infer from the allegations in the Complaint that the "actions" to which Plaintiff refers are the same actions which form the basis of Plaintiff's other claims—that Defendants allegedly required Plaintiff to perform menial tasks, treated her less favorably than male ESU employees, and ultimately removed her from ESU illegally and without honoring the compensatory time accrued.

***9** Defendants contend that these actions do not rise to the level necessary to support a claim for intentional infliction of emotional distress. (Dkt. No. 34–1 at 12). The Court agrees.

This Court previously addressed claims of intentional infliction of emotional distress in the employment context in *Glasgow v. Veolia Water North America, Operating Services, LLC*, No.2009–019, 2010 U.S. Dist. LEXIS 99570 (D.V.I. Sept. 21, 2010). In *Glasgow*, the Court explained the "high bar to meet" to state a claim for intentional infliction of emotional distress:

> [Intentional infliction of emotional distress] occurs when one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. In order to be liable for [intentional infliction of emotional distress], a defendant's conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.

Id. at *28–29. The Court continued, noting that "[i]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." *Id.*

at *29 (emphasis added) (quoting *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 940 (3d Cir.1997)). "Whether the defendant's conduct is so extreme or outrageous as to permit recovery is initially a matter to be decided by the court." *Speaks*, 2009 U.S. Dist. LEXIS 3565 at *21 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. h).

The Court finds that the allegations in Plaintiff's Complaint do not rise to the level of conduct so outrageous and extreme "as to go beyond all bounds of decency" and which should be "regarded as atrocious and utterly intolerable in civilized society." *See id.* at *29–30 (finding, in the motion to dismiss context, that plaintiff's allegations of pervasive discrimination and employer's preferential treatment of Caucasian workers was not sufficiently outrageous to support intentional infliction of emotional distress claim). Accordingly, the Court will grant Defendant's Motion for Judgment on the Pleadings on Count V of Plaintiff's Complaint.

F. Leave to Amend

Having concluded that Plaintiff has not sufficiently pleaded a number of claims, the Court must address Plaintiff's request for leave to amend her Complaint. In her Opposition to Defendants' Motion, Plaintiff asserts that "in the event the complaint fails to state a claim, unless amendment would be futile, the District Court *must* give a plaintiff the opportunity to amend her complaint." (Doc. No. 36 at 4–5) (emphasis added). Plaintiff cites two cases for this proposition: *Shane v. Fauver*, 213 F.3d 113 (3d Cir.2000), and ***Phillips v. County of Allegheny*, 515 F. 3d 224 (3d Cir. 2008)**. Neither case restricts the denial of leave to amend solely to futility of amendment. [FN5] In any event, none of the various grounds for denying leave to amend (undue delay, bad faith, dilatory motive, prejudice, futility) is present in this case. Moreover, "[t]he court should freely give leave [to amend] when justice so requires." Fed.R.Civ.P. 15(a)(2); *Shane*, 213 F.3d at 115. And here, justice so requires.

FN5. In *Shane*, the Third Circuit noted that "[a]mong the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." *Id.*, 213 F.3d at 115 (citations omitted). Similarly, the Third Circuit stated in ***Phillips*** that **"if a complaint is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be *inequitable or futile*."** ***Id.*, 515 F. 3d at 236** (emphasis added) (citing *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir.2002), in turn citing *Shane*, 213 F.3d at 116).

***10** As discussed above at length, Plaintiff failed to sufficiently *plead* the due process claim; the "policies and procedures" contract claim; and the intentional infliction of emotional distress claim. However, Defendants should not gain a tactical advantage by waiting until the close of discovery to file a motion for judgment on the pleadings, possibly capitalizing on what may turn out to be technical pleading deficiencies that could be cured by amendment. Thus, the Court will not—by denying an amendment to the pleadings—permit the defeat of potentially meritorious claims by means of post-discovery identification of potentially curable pleading defects. At the same time, discovery has been conducted on the claims asserted by Plaintiff in her initial Complaint, and opening discovery to new claims at this juncture would further delay the proceedings. Accordingly, the Court will grant Plaintiff leave to amend her Complaint—if she so chooses—to address the pleading defects identified in this Memorandum Opinion, and Defendants will be permitted to respond in accordance with the applicable Rules of Civil Procedure. However, Plaintiff will not be permitted to allege any new claims in an Amended Complaint.

IV. *CONCLUSION*

For the reasons stated above, Defendants' Motion for Judgment on the Pleadings (Dkt. No. 34) is granted with respect to Plaintiff's due process, breach of contract (for violating unidentified "policies and procedures"), and intentional infliction of emotional distress claims. The Motion is denied with respect to Plaintiff's gender discrimination and equal protection claims, contract claims regarding compensatory time, and alleged breach of the implied covenant of good faith and fair dealing. An appropriate Order accompanies this Memorandum Opinion.

D.Virgin Islands, 2013
Magras v. De Jongh
Slip Copy, 2013 WL 692510 (D.Virgin Islands)

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Not Reported in F.Supp.2d, 2009 WL 4252914 (W.D.Ky.)
(Cite as: 2009 WL 4252914 (W.D.Ky.))

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Only the Westlaw citation is currently available.

United States District Court, W.D. Kentucky, Louisville Division.
James **BROCKMAN**, et al., Plaintiffs
v.
BARTON BRANDS, LTD., Defendant.

No. 3:06CV–332–H.
Nov. 25, 2009.

Mark K. Gray, Matthew L. White, Franklin Gray & White, Louisville, KY, Peter W. Macuga, II, Steven D. Liddle, Phillip G. Bazzo, Macuga & Liddle, PC, Detroit, MI, for Plaintiffs.

MEMORANDUM OPINION

JOHN G. HEYBURN, II, District Judge.

***1** Thirty-five residents of Bardstown, Kentucky ("Plaintiffs") [FN1] bring this lawsuit alleging nuisance, trespass and negligence by Defendant **Barton Brands**, LTD., (**"Barton Brands"**), a distilled spirits producer that operates a coal-fired production facility in the vicinity of Plaintiffs' homes. Plaintiffs request injunctive and monetary relief based on the presence of particles and odors on their property that are allegedly the result of various emissions by Defendant. The matter is before the Court on Defendant's Motion for Summary Judgment and Defendant's Motion to Exclude Plaintiffs' Expert Report of Stephen Paul and Daniel C. Maser. For the reasons set forth below, the Court will partially grant Defendant's summary judgment motion and deny Defendant's motion to exclude the expert report.

FN1. The original Plaintiffs were Dallas R. Armstrong, Debbie Atwell, David Bobbitt, James Brockman (the individual whose name appears in the style of this case), Phyllis A. Brockman and Irma Livers. All of these individuals have been dismissed from the case by Agreed Order.

I.

Plaintiffs, originally five residents living near Defendant's Bardstown, Ky. plant, filed this lawsuit as a putative class action in July 2006, alleging that more than 2,000 residents near the Barton Brands facility were potentially affected by odors and "particulate matter" originating from Defendant's liquor distillery.[FN2] Because this Court's previous decision related to Plaintiffs' class action status is relevant to the present opinion, a brief review of the class certification issue is helpful.

FN2. In the last five years, this Court has presided over more than a half dozen similar cases involving plant emissions, a handful of which remain pending. Though the cases all raised similar claims of nuisance, trespass and negligence, each one has presented unique factual issues—possibly this one more than others. The Court's analysis here is somewhat different from *Dickens v. OxyVinyls*, 631 F.Supp.2d 859 (W.D.Ky.2009), and *Bell v. DuPont*, 640 F.Supp.2d 890 (W.D.Ky.2009), because of the presence of actual particles, and not just odors, on Plaintiffs' properties. Also, the expert reports on particles distinguished this opinion from the Court's opinions on class certification in *Burkhead v. Louisville Gas & Electric* (06–CV–282–H) and *Cox v. American Synthetic Rubber* (06–CV–422). The brief discussions of trespass in *Burkhead* and *Cox* were also different from this one in that they were made in the context of class certification, rather than a motion for summary

Exhibit 5

judgment, as here. Last, the close proximity of the many factories in Louisville's Rubbertown neighborhood further complicated the causation issues in many of the Court's previous related opinions.

A.

Early in the case, after Plaintiffs indicated they would seek class certification, this Court issued a Scheduling Order bifurcating the class certification issues from the merits issues and allowing the parties six months to proceed with class discovery. At the close of that period, Plaintiffs submitted a memorandum supporting their motion to certify the class; Defendant objected. On November 5, 2007, this Court held a hearing to determine whether the Plaintiffs could meet the Rule 23 requirements for Class Certification. Fed.R.Civ.P. 23(b)(2)-(3).

The Court subsequently denied class certification, based in part on the absence of any verifiable connection between the scope of the class and Defendant's alleged emissions. Our opinion noted the many "evidentiary shortcomings" in the case, including the complete failure of Plaintiffs' then expert, Robert L. Wabeke, to create a causal link between the relevant odors and particles and Barton Brands' emissions. The Court also found that Plaintiffs' "improper class definition" was fatal to their ability to meet the requirements of class certification. Following that opinion, the Court granted Plaintiffs leave to file an Amended Complaint adding more than one hundred new Plaintiffs to the case, though all but 35 have now been dismissed through a series of Agreed Orders. Discovery proceeded on the merits of the case and is now complete; trial is scheduled for February 2010.

B.

Plaintiffs are all residents living within a two-mile radius of the Barton Brands facility at 300 Barton Road in Bardstown. They allege that various chemicals Defendant uses in its distillation process create unpleasant odors. Descriptions of the odors vary, but they have been characterized as a sweet smell, pungent sulfur, yeast, foul and disgusting, raw sewage,[FN3] rotten eggs, liquor, sour mash and fruity. Plaintiffs further allege that Defendant's coal-fired boiler emits "fallout" particles that blanket their homes, vehicles and yards. Descriptions of the particles are similarly varied and include black soot, black ash, black particles, black rain, black mold, black mud, black fungus and a black oily substance. Some Plaintiffs described the substance as growing. Though the **Barton Brands** facility has been operating near Plaintiffs' homes for many years, they assert that the problems began around 1999, when **Barton Brands** was acquired by Constellation **Brands**.

FN3. Plaintiffs have since asserted that they are not making claims against **Barton Brands** for any sewage or sewer-type odors.

*2 To support their case that the particles and odors originate at Defendant's plant, Plaintiffs offer various agency and public reports that identify chemicals Defendant releases as part of its distillation process. Plaintiffs have also produced four expert reports, in addition to the report they relied upon in the class certification phase, to analyze the composition of the offending odors and substances. Additionally, Plaintiffs offer documentation of individual accounts of how the odors and particles have impacted them [FN4] and their properties.

FN4. All claims of personal injury were dismissed by Agreed Order in 2007.

Defendant Barton Brands is a liquor distiller selling such brands as Very Old Barton Bourbon Whiskey, Ten High Bourbon, Paul Masson Brandy and others. It has operated the Bardstown distillery at issue since 1879, except for a brief period during prohibition. When it first opened, the distillery was located in a rural area, but over time, the city of Bardstown grew up around it. Today, the distillery is

located near other manufacturing and industrial plants including Bardstown Mill, Heaven Hill Distillery and the City of Bardstown's wastewater treatment plan and lift stations.

Barton Brands asserts, and Plaintiffs do not appear to dispute,[FN5] that the distillery generally meets or exceeds all relevant legal standards relating to air and odor emissions, including state and federal laws and regulations. [FN6] Furthermore, Barton Brands offers evidence that it uses various systems and equipment, including a "hammer mill" designed to reduce emissions.

> FN5. Plaintiffs assert that Defendant's plant emits "thousands of tons of chemical products per year," but does not specifically allege that such emissions violate any legal standards. Rather it simply alleges that Plaintiffs complain to various governments and agencies about the fallout and odors. For its part, Defendant argues that it employs "state of the art" air emission control features, but does not appear to assert that its plant emits no odors or particles. It points to a Kentucky Division of Air Quality report that investigated some of the black particles in the area and found the particles were mold, but were likely not harmful or related to **Barton Brands**.

> FN6. Defendant does acknowledge one $1,500 fine by the City of Bardstown in May 2006 of an accidental release of brandy into **Barton Brands**' pretreatment lagoon, but notes that that incident is not relevant to the claims in this case. Furthermore, it acknowledges a self-reported incident in May 2002 where excess sulfur dioxide was emitted. No sanctions were imposed.

Barton Brands argues that multiple failures in Plaintiffs' evidence make this case ripe for summary judgment. Specifically, Defendant complains that Plaintiffs' expert reports fail to establish that **Barton Brands** is the cause of either the odors or fallout at issue and that Plaintiffs have not produced legally sufficient evidence of damages. Alternatively, **Barton Brands** seeks to exclude a December 2008 expert report by Stephen Paul and Daniel Maser on the basis that it presents an entirely new claim and theory of damages.

II.

Summary Judgment is appropriate where no genuine issue of material fact exists, thus entitling the moving party to judgment as a matter of law. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party initially bears the burden of demonstrating that an essential element of the non-moving party's case is lacking. *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 171 F.3d 1065, 1068 (6th Cir.1999). The non-moving party may respond by showing that a genuine issue exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine dispute exists where, "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III.

Plaintiffs claim that Barton Brands' odors and particles constitute nuisance. Under Kentucky law, a nuisance "arises from the unreasonable, unwarranted, or unlawful use by a person of his own property and produces such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage." *Smith v. Carbide & Chems. Corp.*, 507 F.3d 372, 379 (6th Cir.2007) (quoting *City of Somerset v. Sears*, 313 Ky. 784, 233 S.W.2d 530, 532 (Ky.1950)) (internal quotations omitted). Its essence is the interference with the use and enjoyment of land. *Id.* Nuisance does not require proof of negligence.

Lynn Min. Co. v. Kelly, 394 S.W.2d 755, 758 (Ky.1965). Kentucky consistently treats odor and noise complaints as nuisance claims. *See, e.g., J.R. Curry v. Farmers Livestock Mkt.*, 343 S.W.2d 134 (Ky.1961) (odors and noise from livestock business); *C. Rice Co. v. Ballinger*, 311 Ky. 38, 223 S.W.2d 356 (Ky.1949) (odors from slaughterhouse); *Hall v. Budde*, 293 Ky. 436, 169 S.W.2d 33 (Ky.1943) (odors from hog farm).

***3** A nuisance claim has two elements: "(1) the reasonableness of the defendant's use of his property, and (2) the gravity of harm to the complainant." *Louisville Ref. Co. v. Mudd*, 339 S.W.2d 181, 186 (Ky.1960). In Kentucky, there are two types of nuisance: private and public. *W.G. Duncan Coal Co. v. Jones*, 254 S.W.2d 720, 723 (Ky.1953). A private nuisance affects an individual or a limited number of individuals, while a public nuisance affects the public at large. *Id.* Kentucky codified the definition of private nuisance as existing "if and only if a defendant's use of property causes unreasonable and substantial annoyance to the occupants of the claimant's property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the fair market value of the claimant's property to be materially reduced." KRS §§ 411.530(2), 411.540(2). Diminution in value of the property is the only proper measure of damages for private nuisance. KRS § 411.560(1). Here, Plaintiffs' nuisance claims are plagued with causation and damages issues.

A.

Plaintiffs rely upon a series of expert reports by Enviroair Consultants, Inc., and its Vice President, Stephen D. Paul, to show causation. Mr. Paul authored or co-authored four reports relating to Plaintiffs' claims, two of which address the odors allegedly produced by the distillery. The odor reports, dated December 2, 2008 and January 6, 2009, tested air samples downwind of the Barton Brands distillery to determine the presence of odor-causing agents such as ethanol and acetone (through air samples) and nitrogen dioxide and sulfur dioxide (through direct-reading air measurements). Over the course of three or four days in November and December 2008, Mr. Paul collected 21 samples from various locations downwind of Barton Brands where "the odor was apparent." However, those reports did not detect any nitrogen dioxide or sulfur dioxide. Though the testing did show some level of ethanol and acetone, *none* of the concentrations found in any of the samples were high enough to meet the odor threshold for ethanol or acetone. Despite these findings, Mr. Paul's first report concludes that it is the combination of assessed and unassessed substances in the air that produces the objectionable smells. The second report comes to a similar conclusion, further asserting that there "continues to be a scientific basis for the nuisance odor complaints near the Distillery."

Other than Mr. Paul's conclusory paragraphs about the origin of the odors, nothing in his report definitively links the odors of which Plaintiffs complain to Barton Brands, or even a distillery in general. They do not even establish what substances are creating the odors. In fact, Mr. Paul's reports come closer to disproving Plaintiffs' theories than proving them, because the suspected substances Plaintiffs assert are coming from the facility are either not present or are not present in high enough concentrations to meet the odor thresholds. Thus, Mr. Paul's expert reports do not prove causation as to the odors that **Barton Brands** allegedly creates.

***4** Plaintiffs other two reports, relating to the alleged "particles" created by **Barton Brands**, provide slightly more evidence of causation. In an October 13, 2008 report, Mr. Paul collected and tested black particulate matter from various points near the **Barton Brands** facility. The subsequent particle testing revealed, among other things, coal dust in each of the 25 samples, soot in 24 samples and fly ash in seven samples. Mr. Paul concluded that the "composition and morphology of the analyzed settled particulate collected near the Barton Brands Distillery was con-

sistent with settled particulate matter collected near other coal-fired power plants." In the December 31, 2008 report, [FN7] Enviroair President Daniel Maser swabbed forty-one surfaces, including metal street signs and cable and newspaper boxes, within a one-mile radius of Barton Brands to determine whether fungus was present. The laboratory results identified the presence of certain fungal species that thrive in ethanol-rich environments. The results section of Maser's report finds that "Enviroair believes that the *A. pullulans* and *Baudoinia sp.* found on the surface swab sampling is present due to the ethanol originating from the Barton Brands Distillery." These two reports, though lacking in some areas,[FN8] at least connect the particulate matter to substances that could come from the Barton Brands' facility.

FN7. Defendant objects to the December 31, 2008 report, on the grounds that it injects a new theory of recovery into the case. For the reasons stated below, the Court will deny Defendant's motion to exclude the report.

FN8. Defendant makes much of the fact that only one of the samples taken by Enviroair came from the property of a current Plaintiff. Though there is some merit to this argument, the Court believes that the results of the sampling, all within the vicinity of the Barton Brands (and all but one of which were closer to it than to the Heaven Hill Distillery), are enough to create an inference that the substances found would be similar to those on Plaintiffs' property.

Thus, the Court finds that Plaintiffs' expert reports fail to provide sufficient evidence of causation as to odor. Though it is a close call, the expert reports do provide enough evidence of causation as to the detected particulate matter. However, even these reports cannot save Plaintiffs' nuisance claim if the evidence of damages is insufficient.

B.

Kentucky law requires that damages in a nuisance case be measured by a material reduction in fair market value or rental value.[FN9] KRS § 411.560(1). Plaintiff must introduce a "tangible figure from which the value of the use can be deduced," otherwise the valuation is pure speculation. *Adams Constr. Co., Inc. v. Bentley*, 335 S.W.2d 912, 914 (Ky.1960). The likely purpose of this requirement is to impose an objective criteria upon an otherwise rather subjective tort. Determination of fair market value ordinarily necessitates expert opinion. *See Jones v. Jones*, 245 S.W.3d 815, 820 (Ky.App.2008). To express such an opinion, the witness "must possess 'some basis for a knowledge of market values.' " *Id.*

FN9. The measure of damages is slightly different for temporary nuisance than permanent nuisance. See KRS 411.560(1)(a)-(b). However, Plaintiffs' allegations suggest that they complain of a permanent nuisance.

Here, Plaintiffs offer no expert testimony [FN10] related to the decreased fair market value of their homes. They have produced no data or report that would assist a fact finder in quantifying the property damage caused by the alleged odors and particles. Rather, the *only* evidence Plaintiffs offer of damages consists of their own testimony that the emissions have negatively impacted their property. Even then, none of the proffered testimony goes so far as to quantify the harm to the property. Such blanket statements are not sufficient under Kentucky law to meet Plaintiffs' burden of proving damages. *See Adams*, 335 S.W.2d at 914 (without tangible figures "the court and jury are left to draw entirely on their experience aliunde, or upon naked speculation."). Though Plaintiffs argue that their individual testimony about home values is admissible,[FN11] the question here is not whether the testimony is admissible but whether such vague, non-expert testimony is sufficient evidence of

damages. The Court finds that it is not.[FN12] Thus, Plaintiffs, having failed to offer quantifiable proof of harm to their properties, cannot support their claim for nuisance.

FN10. Plaintiffs claim in their brief that they have produced "sound, credible expert testimony supporting their claim for both liability and damages." However, the brief cites no expert testimony related to damages, and the Court can find no evidence of any in the record.

FN11. Specifically, Plaintiffs cite *Vaughn v. Corbin*, 170 Ky. 426, 427, 186 S.W. 131 (Ky.1916), which is a negligent construction and maintenance case, rather than a nuisance case. *Vaughn* is both legally and factually distinguishable from the case at hand and does not support the proposition that testimony from property owners alone is sufficient to prove damages in a nuisance case.

FN12. In fact, this Court has recently rejected even more substantial evidence of damages in a nuisance case. *See Dickens v. Oxy Vinyls*, 631 F.Supp.2d 859 (W.D.Ky.2009)(rejecting testimony of a licensed assessor who based his opinion that the relevant properties were "worthless" on a one-day tour of the neighborhood and his personal opinions).

IV.

***5** Plaintiffs also bring a trespass claim. Trespass is an intended or negligent encroachment onto another's property that is not privileged. *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 619–20 (Ky.App.2003). Kentucky law allows recovery for trespass in three instances: "(1) the defendant was engaged in an ultra-hazardous activity, (2) the defendant committed an intentional trespass or (3) the defendant committed a negligent trespass." *Id.* at 620. Here, Plaintiffs appear to assert intentional trespass,[FN13] in that Barton Brands knowingly emits some substances in the process of distilling spirits.

FN13. Plaintiffs do bring a general negligence claim. To the extent that Plaintiffs' Complaint could be interpreted to assert a negligent trespass claim, it is resolved in Section V, where the Court deals with Plaintiff's general negligence claim.

As noted above, Plaintiffs' complaint alleges two types of harm: an unpleasant odor and the presence of black particles. The odors alleged in Plaintiffs' Complaint, which are visibly undetectable and transient, are not sufficient to state a claim for trespass, because a trespass only occurs when an object or thing enters a person's property and interferes with his or her possession or control. *Bartman v. Shobe*, 353 S.W.2d 550, 555 (Ky.1962) (stating that a trespass is "more visible and tangible" than a nuisance). However, the black particles alleged in Plaintiffs' Complaint—if caused by Defendant—could constitute trespass, because they have a visible and tangible presence on the property. *Id.* As noted in Section III A, Enviroair's expert reports related to the particulate matter, even though weak in some areas, are sufficient proof of causation to allow Plaintiff's trespass claim to go forward.

The damages required for trespass are different than those for nuisance. While diminution in fair market value is always the appropriate measure of damages for nuisance, a court can award nominal damages in an intentional trespass case for the mere invasion of plaintiffs' property. *See Smith v. Carbide & Chems. Corp.*, 226 S.W.3d 52, 55 (Ky.2007) (citations omitted) ("where a trespass has been committed upon the property of another, he is entitled at least to nominal damages for the violation of his rights"); *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66 (Ky.2000) ("even if the plaintiff suffered no actual damages as a result of the trespass, the plaintiff is entitled to nominal damages ."). However, to recover

compensatory damages, or more than nominal damages, for intentional trespass, property owners must prove actual injury. *Smith*, 226 S.W.3d at 55 (*citing Hughett v. Caldwell*, 313 Ky. 85, 90, 230 S.W.2d 92 (Ky.1950). Diminution in value is one way to measure damages once an actual injury has been shown. *Smith v. Carbide & Chems. Corp*, 507 F.3d 372, 377–78 (6th Cir.2007). The Kentucky Supreme Court further explained "actual injury" when answering questions certified to it by the Sixth Circuit:

> Property owners are not required to prove contamination that is an actual and verifiable health risk, nor are they required to wait until government action is taken. An intrusion (or encroachment) which is an unreasonable interference with the property owner's possessory use of his/her property is sufficient evidence of actual injury.... The amount of harm, if any, to the individual parcels, and the corresponding measure of actual or compensatory damages will depend upon the proof introduced at trial—an issue of fact.

***6** *Smith*, 226 S.W.3d at 56–7.

Thus, with or without evidence of actual damages,[FN14] Plaintiffs' claim for trespass can go forward.

> FN14. The Court does not decide at this time whether Plaintiffs evidence is sufficient to prove anything more than nominal damages. To the extent there is any evidence of damages, the measure of actual or compensatory damages will depend on the proof introduced at trial.

V.

Plaintiffs also bring a general negligence claim. Negligence requires the defendant owe the plaintiff a duty of care, breach that duty, and that the breach causes the plaintiff's injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky.2003). In Kentucky, "actions for damages to real property caused by another's negligence sound in trespass," not negligence. *Wimmer v. City of Ft. Thomas*, 733 S.W.2d 759, 760 (Ky.Ct.App.1987) (citing *Commonwealth, Dep't of Highways v. Ratliff*, 392 S.W.2d 913 (Ky.1965)). That said, Kentucky courts have recognized negligent trespass. *Rockwell*, 143 S.W.3d at 620. There are three basic elements of negligent trespass "(1) the defendant must have breached its duty of care (negligence); (2) the defendant caused a thing to enter the land of the plaintiff, and (3) the thing's presence causes harm to the land." *Id.* (citing Restatement (Second) of Torts § 165 cmt. b).

Plaintiffs' negligence claims fail under either theory, general negligence or negligent trespass, because Plaintiffs have not shown that Defendant breached a duty. Though Plaintiffs' brief alleges that Defendant's distillery emits tons of chemicals into the air each year, they have not produced any evidence that those levels are harmful or exceed what is allowed under federal and state environmental statutes or regulations. The limited instances of problem emissions by Barton Brands, namely a $1,500 fine by the City of Bardstown for an accidental release of brandy into a pre-treatment lagoon and a self-reported incident in 2002 where excess sulfur dioxide was emitted, are not enough to constitute a breach of duty. For these reasons, Plaintiffs' negligence claim cannot proceed.

VI.

Barton Brands has moved to exclude Plaintiffs' December 31, 2008 expert report by Enviroair on the basis that it belatedly attempts to inject new claims into the lawsuit. The purpose of the report, co-authored by Stephen Paul and Daniel Maser, was to determine whether some of the black particles Plaintiffs complain of are actually fungi associated with the distillery. The authors swabbed 41 surfaces near the Defendant's plant and tested for various types of mold. The results section of the report identify two kinds of molds that thrive in ethanol-rich environments.

Defendant asserts that prior to this report, which it first learned of in January 2009, Plaintiffs had never claimed that their complaints related to mold growth. Instead, Defendant says that whenever Plaintiffs complained of particulate matter, they specifically followed up with a reference to "fallout" emitted from Defendant's coal-fired boiler. Defendant asserts that use of the mold report amounts to an attempt to amend the Complaint, and further argues that such a maneuver at this point would be highly prejudicial. Specifically, Defendant argues that by January 2009, when it received the report, it had completed written discovery, consulted with potential experts based on Plaintiffs' assertion that the coal-fired boiler was creating "fallout," and had taken the deposition of most Plaintiffs. Therefore, to admit the report, according to Defendant, would be to "fundamentally change the entire scope and face of this litigation at the eleventh hour."

***7** Plaintiffs, on the other hand, argue that the expert report focusing on black mold is simply a continuation of previous tests rather than a new theory of recovery. Plaintiffs also assert that mold claims have been part of the case for years because early Plaintiff surveys complain of "black mold."

The evidence here shows that Plaintiffs have consistently alleged problems related to both particulate matter and ethanol-related odors, though the Court agrees they have not been crystal clear in specifically alleging a marriage of the two—that the ethanol emitted by Barton Brands had some relationship with the particulate matter of which Plaintiffs complained. That said, at least a few of the Plaintiffs have described the particulate matter as "black mold ." In fact, in its November 2007 Order denying class certification, this Court included the "black mold" allegation in its recitation of the facts of the case. *See* Dkt. No. 83.

It is important to note that despite Defendant's protestations, the expert report at issue was submitted before the close of fact discovery. The purpose of discovery is for the parties to discover facts that are relevant to their case, including the makeup of the particles Plaintiffs claim originate from Barton Brands. Here, Plaintiffs' mold report served that purpose. Though it came near the close of fact discovery and focused on a different source of particulate matter than previous reports, it still remains within the realm of arguments that Plaintiffs have made from the beginning of this case.

For these reasons, the Court finds that the Defendant was on notice that black mold could be one of the theories of the case and declines to treat the December 2009 expert report as an amendment to the Complaint, as Defendant requests. Nonetheless, to the extent that Defendant may have been prejudiced by Plaintiffs continued focus on "fallout" and relatively late admission of the mold report, the Court will give Defendant until January 10, 2010, to supplement its expert reports to address the issue of mold.

The Court will enter an order consistent with this Memorandum Opinion.

W.D.Ky.,2009.
Brockman v. Barton Brands, Ltd.
Not Reported in F.Supp.2d, 2009 WL 4252914 (W.D.Ky.)

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