UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

March 11, 2025

Elizabeth A. Ising
Gibson, Dunn & Crutcher LLP

Re: PepsiCo, Inc. (the "Company")
Incoming letter dated December 30, 2024

Dear Elizabeth A. Ising:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by Michael E. Monteiro 2016 Rev Trust and co-filers for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests the board issue a report describing how the Company could address flexible plastic packaging to reduce its contribution to plastic pollution.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, based on the information you have presented, the Company has not demonstrated that the Proposal relates to its ordinary business operations.

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2024-2025-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Luke Morgan
As You Sow

GIBSON DUNN

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December 30, 2024

VIA ONLINE SUBMISSION
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: *PepsiCo, Inc.*
Shareholder Proposal of Michael E. Monteiro 2016 Rev Trust et al.
Securities Exchange Act of 1934 ("Exchange Act")—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, PepsiCo, Inc. (the "Company"), intends to omit from its proxy statement and form of proxy for its 2025 Annual Meeting of Shareholders (collectively, the "2025 Proxy Materials") a shareholder proposal (the "Proposal") and statements in support thereof (the "Supporting Statement") submitted by As You Sow on behalf of Michael E. Monteiro 2016 Rev Trust, Brian Murray Revocable Trust and Frances L. Bell T/W fbo Patrick de Freitas (collectively, the "Proponents").

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2025 Proxy Materials with the Commission; and

- concurrently sent a copy of this correspondence to the Proponents.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D") provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the "Staff"). Accordingly, we are taking this opportunity to inform the Proponents that if the Proponents elect to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

THE PROPOSAL

The Proposal states, in relevant part:

RESOLVED: Shareholders request that the Board issue a report, at reasonable expense and excluding proprietary information, describing how PepsiCo could address flexible plastic packaging in alignment with the findings of the Pew Report, or other authoritative sources, to reduce its contribution to plastic pollution.

SUPPORTING STATEMENT: The report should, at Board discretion:

- Assess the reputational, financial, and operational risks associated with continuing to use non-recyclable plastic packaging while plastic pollution grows;

- Evaluate actions to achieve fully recyclable packaging including elimination and accelerated research into innovative reusable substitution; and

- Describe opportunities to pre-competitively work with peers to research and develop reusable packaging as an alternative to single-use packaging.

In further support of these requests, and as particularly relevant here, the recitals to the Proposal state, in part (footnotes omitted):

Pew Charitable Trusts' groundbreaking study, *Breaking the Plastic Wave* ("Pew Report"), concluded that improved recycling alone is insufficient to address plastic pollution—instead, recycling must be coupled with reductions in use, materials redesign, and substitution. The Pew Report finds that the greatest opportunity to reduce or eliminate plastic lies with flexible plastic packaging, often used for chips, sweets, and condiments among other uses, and virtually unrecyclable in America.

. . .

The Pew Report finds that reducing plastic use is the most viable solution from environmental, economic, and social perspectives, yet broad corporate and stakeholder alignment on flexible packaging solutions is lacking.

Despite its stated commitments to sustainable packaging, more than 18% of PepsiCo's packaging remains in flexibles. Our Company is behind in its 2025 goals for reusable packaging, recyclable packaging in practice and at scale, and plastic reduction—increasing plastic use by more than 5% since 2020. In the absence of immediate action to eliminate flexibles by robustly engaging in

research and expansion of reusable packaging, PepsiCo is on track to fail to meet its 2025 packaging goals.

A copy of the Proposal and the Supporting Statement, as well as related correspondence with the Proponents, is attached to this letter as Exhibit A.

BASIS FOR EXCLUSION

For the reasons discussed below, we respectfully request that the Staff concur with our view that the Proposal may be excluded from the 2025 Proxy Materials pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because the Proposal relates to the Company's litigation strategy and would affect the conduct of ongoing litigation to which the Company is a party.

Specifically, the Proposal (which advances some of the same allegations made by plaintiffs in pending lawsuits involving the Company) seeks to require the Company to issue a report addressing how the Company could "address flexible plastic packaging"[1] in order to "reduce its contribution to plastic pollution," which would harm its legal defense in multiple pending lawsuits against the Company that involve, among others, public nuisance, products liability and false advertising claims:

- *Earth Island Institute v. Crystal Geyser Water Co., et al.*, No. 20-CIV-01213 (San Mateo Super. Ct.) (the "Earth Island Litigation")[2]
- *People of the State of New York v. PepsiCo, Inc., et al.*, No. 814682-2023 (N.Y. Sup. Ct. Erie Cnty.) (the "Buffalo River Litigation")[3]
- *Mayor and City Council of Baltimore v. PepsiCo, Inc.*, *et al.*, No. C-24-CV-24-001003 (Baltimore City Cir. Ct.) (the "Baltimore Litigation")[4]
- *The People of The State of California v. PepsiCo, Inc.*, *et al.*, No. 2:24-cv-10340 (C.D. Cal.) (the "Los Angeles County Litigation")[5]

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[1] Although it is not defined in the Proposal, the Ellen MacArthur Foundation identifies "flexible packaging" as a "plastic packaging category" that is "almost uniformly single-use." *See Flexible Packaging* (Mar. 15, 2022), available at https://www.ellenmacarthurfoundation.org/flexible-packaging/overview.

[2] *See* Second Amended Complaint (San Mateo Super. Ct. Jul. 26, 2024) (the "Earth Island Complaint").

[3] *See* Complaint, Doc. No. 2 (N.Y. Sup. Ct., Erie Cnty. Nov. 15, 2023) (the "Buffalo River Complaint").

[4] Complaint (Baltimore City Cir. Ct. Jun. 20, 2024) (the "Baltimore Complaint"). A copy of the Baltimore Complaint is attached to this letter as Exhibit B.

[5] *See* Complaint, Doc. 4-3 (C.D. Cal. Dec. 2, 2024) (the "Los Angeles County Complaint").

As demonstrated in the precedent disclosed below, Rule 14a-8(i)(7) permits the exclusion of shareholder proposals like the Proposal that would interfere with the Company's legal strategy and thus relate to the Company's ordinary business operations.

ANALYSIS

The Proposal May Be Excluded Pursuant To Rule 14a-8(i)(7) Because It Deals With Matters Related To The Company's Ordinary Business Operations

A. Overview Of Rule 14a-8(i)(7)

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company's "ordinary business" operations. According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" refers to matters that are not necessarily "ordinary" in the common meaning of the word, but instead the term "is rooted in the corporate law concept of providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release"). In the 1998 Release, the Commission stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. As relevant here, one of these considerations was that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)).

In addition, framing a shareholder proposal in the form of a request for a report does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the issuer. *See* Exchange Release No. 20091 (Aug. 16, 1983). The Staff, likewise, has indicated that "[where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business . . . it may be excluded under rule 14a-8(i)(7)." *Johnson Controls, Inc.* (avail. Oct. 26, 1999). Moreover, in Staff Legal Bulletin 14E (Oct. 27, 2009) ("SLB 14E"), the Staff noted that if a proposal relates to management of risks or liabilities that a company faces as a result of its operations, the Staff will focus on the "subject matter to which the risk pertains or that gives rise to the risk" in making a decision regarding whether a proposal can be properly excluded pursuant to Rule 14a-8(i)(7). Pursuant to SLB 14E, the Staff has consistently permitted exclusion of shareholder proposals under Rule 14a-8(i)(7) requesting an assessment of risks when the underlying subject matter concerns the ordinary business of the company. *See*, *e.g.*, *Netflix, Inc.* (avail. Mar. 14, 2016) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested a report "describing how company management identifies, analyzes and oversees reputational risks related to offensive and inaccurate portrayals of Native Americans, American Indians and other indigenous peoples, how it mitigates these risks and how the company incorporates these risk

assessment results into company policies and decision-making," noting that the proposal related to the ordinary business matter of the "nature, presentation and content of programming and film production"); *The TJX Companies, Inc.* (avail. Mar. 29, 2011) (concurring with exclusion under Rule 14a-8(i)(7) of a proposal requesting an annual assessment of the risks created by the actions the company takes to avoid or minimize U.S. federal, state and local taxes and provide a report to shareholders on the assessment); *Amazon.com, Inc.* (avail. Mar. 21, 2011) (same); *Wal-Mart Stores, Inc.* (avail. Mar. 21, 2011) (same); *Lazard Ltd.* (avail. Feb. 16, 2011) (same); *Pfizer Inc.* (avail. Feb. 16, 2011) (same).

B. The Proposal Is Excludable Because It Relates To The Company's Litigation Strategy And Would Affect The Conduct Of Litigation To Which The Company Is A Party

We believe that the Proposal may be excluded from the 2025 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal relates to the Company's ordinary business operations as it implicates the Company's litigation strategy in multiple pending lawsuits involving the Company and would affect the conduct of that litigation.

The Staff regularly concurs with the exclusion under Rule 14a-8(i)(7) of shareholder proposals that implicate and seek to oversee a company's ordinary business operations, including when the subject matter of the proposal is the same as or similar to the subject matter of litigation in which a company is then involved. For example, in *Deere & Co.* (avail. Dec. 29, 2023), the proposal requested the company's board of directors issue a report "assessing the benefits and drawbacks of opposing Right to Repair regulation, as well as the financial and reputational risks associated with such opposition." The company argued that the proposal's requested report would require the company to "publicly evaluate and critique the reasonableness of the [c]ompany's current business practices that are the subject of ongoing litigation involving the [c]ompany" and would therefore interfere with the company's litigation strategy and impact the conduct of ongoing litigation. The Staff concurred with exclusion of the proposal under Rule 14a-8(i)(7) noting the proposal "relates to, and does not transcend, ordinary business matters." *See also Amazon.com, Inc. (New York City Teachers' Retirement System et al.)* (avail. Apr. 7, 2021) (concurring with the exclusion of a proposal requesting a report on the adequacy of the company's efforts to reduce or mitigate health and safety risks from the COVID-19 pandemic while the company was involved in lawsuits alleging inadequate health and safety measures implemented in response to the COVID-19 pandemic); *Chevron Corp. (Sisters of St. Francis of Philadelphia et al.)* (avail. Mar. 30, 2021) ("*Chevron 2021*") (concurring with the exclusion of a proposal requesting a report analyzing how the company's policies and practices perpetuate racial injustice and inflict harm on communities of color while the company was involved in litigation seeking to hold the company liable for its alleged role in climate change and alleged resulting injuries, including the alleged harmful impacts of climate change on communities of color); *Walmart Inc.* (avail. Apr. 13, 2018) (concurring with the exclusion of a proposal requesting a report on risks associated with emerging public policies on the gender pay gap while the company was involved in numerous pending lawsuits regarding gender-based pay discrimination and related claims before the U.S. Equal Employment Opportunity Commission, as "affect[ing] the conduct of ongoing litigation relating to the subject

matter of the [p]roposal to which the [c]ompany is a party"); *General Electric Co.* (avail. Feb. 3, 2016) (concurring with the exclusion of a proposal requesting a report assessing all potential sources of liability related to PCB discharges in the Hudson River while the company was defending multiple pending lawsuits related to its alleged past release of chemicals into the Hudson River); *Chevron Corp.* (avail. Mar. 19, 2013) (concurring with the exclusion of a proposal requesting that the company review its "legal initiatives against investors" because "[p]roposals that would affect the conduct of ongoing litigation to which the company is a party are generally excludable"); *Johnson & Johnson* (avail. Feb. 14, 2012) (concurring with the exclusion of a proposal where implementation would have required the company to report on any new initiatives instituted by management to address the health and social welfare concerns of people harmed by LEVAQUIN®, thereby taking a position contrary to the company's litigation strategy); *Reynolds American Inc.* (avail. Mar. 7, 2007) (concurring with the exclusion of a proposal requesting that the company provide information on the health hazards of secondhand smoke, including legal options available to minors to ensure their environments are smoke-free, while the company was defending several cases alleging injury as a result of exposure to secondhand smoke and a principal issue concerned the health hazards of secondhand smoke); *AT&T Inc.* (avail. Feb. 9, 2007) (concurring with the exclusion of a proposal requesting that the company issue a report containing specified information regarding the alleged disclosure of customer records to governmental agencies, while the company was defending multiple pending lawsuits alleging unlawful acts related to such disclosures); *Reynolds American Inc.* (avail. Feb. 10, 2006) (concurring with the exclusion of a proposal requesting that the company notify African Americans of the unique health hazards to them associated with smoking menthol cigarettes, which would be inconsistent with the company's pending litigation position of denying such health hazards); *Exxon Mobil Corp.* (avail. Mar. 21, 2000) (concurring with the exclusion of a proposal requesting immediate payment of settlements associated with the Exxon Valdez oil spill as relating to litigation strategy); *Philip Morris Companies Inc.* (avail. Feb. 4, 1997) (concurring with the exclusion of a proposal where the Staff noted that although it "has taken the position that proposals directed at the manufacture and distribution of tobacco-related products by companies involved in making such products raise issues of significance that do not constitute matters of ordinary business," the proposal "primarily addresses the litigation strategy of the [c]ompany, which is viewed as inherently the ordinary business of management to direct").

Consistent with the aforementioned precedent, the Proposal unquestionably involves the same subject matter as, and would directly and negatively impact the Company's litigation strategy in, the four pending lawsuits involving the Company discussed below. Moreover, while the Proposal expressly permits the Company to exclude proprietary information from the requested report, it does not permit the Company to exclude confidential or legally privileged information.

1. Overview Of The Earth Island Litigation

In the Earth Island Litigation, the lawsuit alleges that the Company and nine other defendants are financially liable for plastic pollution in the marine environment and asserts, among other causes of actions, public nuisance and products liability claims based on the Company's use of single-use plastic packaging instead of other materials. *See* Earth Island Complaint ¶ 18 ("Defendants are major food, beverage, and consumer products businesses—some of them are in fact the world's largest—and are responsible for a substantial portion of the total plastic pollution currently present in California's waterways and coasts."); *see also id.* ¶ 19 ("Defendants have created the condition of plastic pollution in California's coasts and waterways 1) by refusing to switch to more sustainable materials in order to reap higher profits from cheap, virgin plastic, 2) engaging in a campaign of misinformation about the true causes of plastic pollution and viable solutions for mitigating its effects, 3) and deceptively maintaining consumer loyalty and demand for Defendants' products by falsely advertising the product's recyclability."); *id.*, Prayer for Relief (seeking "[c]ompensatory damages," an "[o]rder requiring the [d]efendants to disburse the funds and resources necessary to remediate the harm they have caused," "abatement . . . of the nuisance," "that [d]efendants refrain from marketing and promotion" of certain products, "corrective advertising," "attorneys' fees," and "[c]osts of suit").

2. Overview Of The Buffalo River Litigation

In the Buffalo River Litigation, the lawsuit brought by the Attorney General of New York alleges that the Company and two of its subsidiaries are financially liable for plastic waste pollution in the Buffalo River environment and asserts, among other causes of actions, public nuisance and products liability claims based on the Company's use of single-use plastic packaging instead of other materials. *See* Buffalo River Complaint ¶ 10 ("By its continued manufacturing, production, marketing, distribution, and sale of vast quantities of single-use plastic packaging, [the Company] has significantly contributed to, and continues to contribute to, the existence of a public nuisance that injures the community living in the City of Buffalo and surrounding areas."); *see also id.* ¶ 46 ("As a result of [the Company's] persistent manufacturing, production, distribution, and sale of beverages and snack foods in single-use plastic packaging, single-use plastic items have become a dominant form of pollution in urban watersheds such as the Buffalo River."); *id*. ¶ 109 ("[The Company] failed, and continues to fail, to adequately warn its consumers and the public of the known and foreseeable risks that follow from the intended use and foreseeable misuse of its single-use plastic packaging."); *id.* at 34-36 ¶¶ 1-13 (seeking an order that "[d]irects [the Company] . . . to abate the public nuisance," "[e]njoins [the Company] to take reasonable best efforts to prevent further contribution to the plastic pollution," "[e]njoins [the Company] to place an adequate warning on its single-use plastic beverage bottles and snack food wrappers," "[a]wards compensatory damages," "[a]wards [p]laintiff . . . restitution or civil penalties," and "[o]rders disgorgement of all revenues, profits, and gains wrongfully derived by [the Company]").

3. Overview Of The Baltimore Litigation

In the Baltimore Litigation, the lawsuit brought by the Mayor and City Council of Baltimore alleges that the Company and seven other defendants are financially liable for plastic waste pollution in the city of Baltimore, Maryland and its surrounding environment, among other causes of actions, public nuisance and product design defect claims based on the Company's use of single-use plastic packaging instead of alternative packaging materials. *See* Baltimore Complaint at ¶ 12 ("[The Company] controls all packaging and marketing decisions . . . . [The Company] maintains complete control over the manufacture, sale, and distribution of its goods. It specifies the materials used for packaging . . . [and] is responsible for the past and present production and promotion of [the Company's] products in single-use plastic packaging by its own production . . . ."); *see also id.* ¶ 39 ("The plastic pollution contaminating Baltimore and its environs, to which [d]efendants all substantially contribute, causes wide-ranging harm to Baltimore and its citizens."); *id.* ¶ 200 ("Defendants manufactured, distributed, marketed, promoted, and attempted the disposal of plastics in a manner that created or contributed to the creation of public nuisances that unreasonably have obstructed the free use and enjoyment of [Baltimore]'s property."); *id.*, Prayer for Relief (seeking "[c]ompensatory damages," "abatement, remediation, and removal of the nuisances," "disgorgement of all revenues, profits, and gains wrongfully derived by [the Company]," "abate[ment] of the public nuisance," "[c]riminal penalties," "[p]unitive damages," "[i]njunctive relief . . . mandating the immediate and complete abatement and remediation of all [c]ity property befouled or damaged by plastic litter," and "attorneys' fees and costs of suit").

4. Overview Of The Los Angeles County Litigation

In the Los Angeles County Litigation, the lawsuit filed by Los Angeles County alleges that the Company and four other defendants are financially liable for plastic waste pollution that threatens the Los Angeles County environment, wildlife, natural resources, and communities, and asserts, among other causes of action, public nuisance and untrue or misleading advertising claims based on the Company's use of single-use plastic packaging instead of other materials. *See* California Complaint ¶ 1 (alleging the Company and other defendants "have littered the County of Los Angeles . . . with their plastic bottles and engaged in a disinformation campaign to make consumers falsely believe that purchasing their products in single-use plastic bottles is an environmentally responsible choice."); *see also id.* ¶ 10 ("Defendants know, and have known, that the plastic in which their beverages are sold is not, and will not, be recycled at a scale meaningful enough to offset the significant harm associated with single-use plastic."); *id.*, Prayer for Relief (seeking an order to "[d]eclare [d]efendants have created a public nuisance," require the Company "abate the public nuisance," and "[e]njoin" the Company from certain actions related its use and marketing of single-use plastic packaging," and seeking "restitution to all victims" of the claims alleged, payment of "civil penalt[ies]," and "attorney's fees and costs of this case").

5. Impact Of The Proposal's Requested Report On The Company's Litigation Strategy In, And The Conduct Of, The Pending Litigation

The Proposal asks the Company to evaluate and take a public position on whether the Company's use of single-use packaging, like flexible packaging, has "contribut[ed] to plastic pollution" and how the Company can address its use of flexible packaging and other "non-recyclable plastic packaging while plastic pollution grows." Moreover, the recitals to the Proposal allege the Company has yet to take "immediate action to eliminate flexibles by robustly engaging in research and expansion of reusable packaging" and is "on track to fail to meet its 2025 packaging goals." As discussed below, the claims the plaintiffs are asserting against the Company in each of the pending lawsuits will require a determination of these same issues raised by the Proposal.

In each of the Earth Island Litigation, the Buffalo River Litigation, the Baltimore Litigation and the Los Angeles County Litigation, the plaintiff seeks to hold the Company liable under a public nuisance theory, alleging that the Company has created a public nuisance as a result of its use and marketing of single-use plastic packaging. For example, in the Earth Island Litigation, the plaintiff alleges that the Company "created, contributed to, and/or assisted in creating conditions that constitute a nuisance by causing plastic pollution in California waterways and coasts." Earth Island Complaint ¶ 300. Similarly, in the Los Angeles County Litigation, the plaintiff alleges the Company "created, caused, contributed to, and assisted in creating harmful plastic pollution and waste in Los Angeles County, which threatens and harms the environment, wildlife, and communities." Los Angeles County Complaint ¶ 98. Under California law, the "primary test" for determining whether conduct is a public nuisance "is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account." *San Diego Gas & Elec. Co. v. Sup. Ct.*, 13 Cal. 4th 893, 938 (1996) (citing Restatement (Second) of Torts §§ 826–831 (Am. Law. Inst. (1979))). The Earth Island Complaint thus alleges that "[t]he social benefit of plastic packaging associated with Defendants' products is outweighed by the availability of alternative products," and "[i]t was practical for Defendants, in light of their knowledge, to develop alternatives." Earth Island Complaint ¶ 303. *See also* Los Angeles County Complaint ¶¶ 101, 103 ("The plastic-related harms that Defendants created, caused, contributed to, and assisted in the creation of are present in Los Angeles County . . . . The harms caused by Defendants' nuisance-creating conduct are extremely grave, and far outweigh the social utility of that conduct.") The "plastic packaging," "plastic-related harms" and "alternative products" referenced in the complaints include the "single-use plastic (SUP) packaging," "plastic pollution," and the "reusable packaging" (respectively) referenced in the Proposal. The plaintiffs in the Baltimore Litigation and Buffalo River Litigation similarly allege that the Company's use and marketing of single-use plastic packaging has created a public nuisance. *See* Baltimore Complaint ¶ 205 (claiming that the Company and other defendants "specifically created, contributed to, and/or assisted, and/or were a substantial contributing factor in the creation of the public nuisance by . . . [c]ontrolling every step of the plastics supply chain: the design, manufacture, marketing sale, and distribution of those plastics and products in plastic packaging and placement of those products into the stream of commerce in Baltimore"); Buffalo River Complaint ¶ 103 ("[The Company]'s acts and omissions, and its widespread plastic pollution . . . created or contributed, and continue to

create and contribute, to a substantial interference with the exercise of a common right of the people living in the City of Buffalo . . . interfering with the use by the public of public spaces, and/or endangering or injuring the property, health, safety or comfort of a considerable number of persons."). By requiring the Company to publicly report on how it can reduce its use of flexible packaging and thereby "reduce its contribution to plastic pollution," the Proposal would require the Company to publicly address its position on the public nuisance claims asserted by each plaintiff.

The plaintiffs also assert a variety of strict liability and negligence claims, alleging, as relevant here, that the Company's products are defectively designed and that the Company violated its duty to warn its consumers and the public of the known and foreseeable risks of its single-use plastic packaging. In the Baltimore Litigation, for example, the plaintiff asserts that the Company's products are defective because the Company knew that its "plastic and its toxins lack the ability decompose and would persist in the environment perpetually, rendering them defective and unreasonably dangerous to the flora and fauna of Baltimore." Baltimore Complaint ¶ 179. Under Maryland law, the strict liability claim will be evaluated under the standard set forth in Restatement (2d) of Torts § 402A. *See Lloyd v. Gen. Motors Corp*., 397 Md. 108, 132-33, 916 A.2d 257, 271 (2007). Under that standard, a manufacturer or seller of any product is responsible for physical harm resulting from that product if "(1) The product was in a defective condition at the time it left possession or control of the seller; (2) The product was unreasonably dangerous to the user or the user's property; (3) The defect caused the injuries or property damage; and (4) The product was expected to and did reach the user without substantial change in its condition." MPJI-Cv 26:11, Maryland Civil Pattern Jury Instructions (5th ed.). A defendant can be liable "even though all possible care was used." *Id.* Accordingly, the Baltimore Complaint alleges that the Company's "plastic products and packaging were defective at the time of manufacture" and the Company "had actual knowledge that its products were defective and dangerous" and acted with "malice" and "conscious disregard" for the probable impact of the products on Baltimore. Baltimore Complaint ¶¶ 182, 186. Similarly, the plaintiff in the Buffalo River Litigation asserts that "the single-use plastic packaging produced, used, or specified by [the Company] for packaging its beverages and snack food products created a substantial risk of harm to the People of the State of New York" and that the Company's consumers and the general public have not been made "aware of the nature or extent of the harms caused by [the Company's] single-use plastic packaging." Buffalo River Complaint ¶¶ 107, 108. Under New York law, the strict liability failure-to-warn claim will be evaluated under a standard that imposes a duty to warn when a product "is reasonably certain to be harmful" in a manner that "the user of the product ordinarily would not discover." N.Y. Pattern Jury Instr. Civil 2:120 (West 2024). Accordingly, the Buffalo River Complaint alleges that the Company "knew or should have known that the single-use plastic packaging containing its beverage and snack food products . . . would cause harm" and the Company's "failure to warn has injured the People of the State of New York and their public trust resources, including the Buffalo River, its bed and banks, and public parks along the river." Buffalo River Complaint ¶¶ 110, 111.

The plaintiffs in the ongoing lawsuits allege that the Company has failed to pursue and adopt available alternative packaging technologies that would have mitigated the alleged harm. For example, the plaintiff in the Los Angeles County Litigation alleges that the Company has "joined and expanded the plastics industry's deceptive campaigns . . . instead of [emphasizing] tried-and-true solutions like reducing the use of plastic and investing in sustainable materials that can be reused." Los Angeles County Complaint ¶ 61. Similarly, the plaintiff in the Earth Island Litigation alleges that the Company and other defendants "have a wide range of options for eliminating or reducing the amount of plastic in their products [including] switching to materials that are biodegradable or compostable . . ., using materials that are more readily recycled or reused . . ., redesigning the products to use less packaging, and implementing closed-loop systems . . . . However, [the Company and the other defendants] refuse to implement these more sustainable options because virgin plastic is cheap, and therefore results in lower overhead and higher profits." Earth Island Complaint ¶ 124. *See also* Baltimore Complaint ¶ 109 (alleging that the Company "did not utilize alternative programs or materials or even tell the public the truth about the harm, through littering, their plastics would cause."); Buffalo River Complaint ¶ 84 (alleging that "[a]lternatives to single-use plastic packaging are available, but [the Company] has chosen not to deploy these alternatives to any significant degree in the New York market").

Each of the four lawsuits targeting the Company's production, sale, and marketing of products in plastic packaging is ongoing and, to date, there has been no final adverse judgment against the Company. The Company's management has a responsibility to defend the Company's interests against unwarranted litigation, which it is committed to doing in this case. A shareholder proposal that interferes with this obligation is inappropriate, particularly when the company is involved in defending in pending litigation the same business practices on which the Proposal is specifically focused.

As demonstrated above, the report and analysis requested by the Proposal clearly relate to the very same subject matter as the public nuisance and products liability claims asserted in the lawsuit[s]—*i.e.*, that the Company's use of single-use plastic packaging, like flexible packaging, has contributed to plastic pollution and that the Company should take specific actions to reduce its contribution. The Proposal specifically requests that the Company report on how it could "reduce its contribution to plastic pollution" by reducing and/or eliminating flexible plastic packaging. And the Supporting Statement states the Company should, in preparing the requested report: "[a]ssess the reputational, financial, and operational risks associated with continuing to use non-recyclable plastic packaging while plastic pollution grows"; "[e]valuate actions to achieve fully recyclable packaging including elimination and accelerated research into innovative reusable substitution"; and "[d]escribe opportunities to pre-competitively work with peers to research and develop reusable packaging as an alternative to single-use packaging." The Proposal itself also advances the very allegations made by the plaintiffs in the litigation. For example, the Proposal alleges that the Company is "behind in its 2025 goals for reusable packaging, recyclable packaging in practice and at scale, and plastic reduction" and the Company has failed to take "immediate action to eliminate flexibles by robustly engaging in research and expansion of reusable packaging." That allegation directly corresponds to the plaintiff's allegation in the Baltimore Litigation, where the plaintiff alleges that

the Company and the other defendants "publicly claim that they have set long-term goals of sustainability, created effective recycling programs, and are moving towards a 'circular economy' . . . [but] [t]hese representations are knowingly false." Baltimore Complaint ¶ 76. Similarly, the plaintiff in the Earth Island Litigation claims that the Company and the other defendants "have been missing similar goals for decades while undermining sustainability reforms." Earth Island Complaint ¶ 125. *See also* Buffalo River Complaint ¶ 9 (alleging that "[y]ear after year, [the Company] touts ineffective solutions and lofty goals that have repeatedly failed to materialize"). Moreover, the Proposal's request that the report "[d]escribe opportunities to . . . research and develop reusable packaging as an alternative to single-use packaging" directly overlaps with the specific relief requested by the plaintiff in the Buffalo River Litigation, which requests the court "[e]njoin[] [the Company] to take reasonable best efforts to prevent further contribution to the plastic pollution . . ., including *evaluating the efficacy of measures such as use of alternatives to single-use plastic*." Buffalo River Complaint at 35 ¶ 4 (emphasis added).

Requiring the creation and disclosure of the report requested by the Proposal would adversely affect the Company's litigation strategy in the pending lawsuits. The Proposal would obligate the Company to prepare a report directly addressing the subject matter of the litigation, to publicly evaluate and critique the reasonableness of, and risks associated with, its current business practices, and to publicly evaluate and critique the research and development of alternatives to its current use of single-use plastic packaging. In the each of the Earth Island Litigation, the Buffalo River Litigation, the Baltimore Litigation and the Los Angeles County Litigation, the Company is actively *defending* these current practices, and certain of the plaintiffs seek to hold the Company strictly liable based on the very evaluations requested by the Proposal. Moreover, implementation of the Proposal would compel the Company to publicly disclose specific aspects of its plans relating to its "research and develop[ment of] reusable packaging as an alternative to single-use plastic packaging" that are non-public, which may prematurely disclose the Company's litigation strategy to its opposing parties in pending litigation and prejudice the Company's competitive position. Finally, the Proposal's allegations that the Company is "behind in its 2025 goals for reusable packaging, recyclable packaging in practice and at scale, and plastic reduction" and needing to "[a]ssess the reputational, financial, and operational risks associated with continuing to use non-recyclable plastic packaging while plastic pollution grows" demonstrate that the Proposal seeks to have the Company address in the requested report that, contrary to its litigation position, the harms resulting from the Company's use of single-use plastic packaging (harms it disputes) are outweighed by the benefits, given the cost and availability of reasonable alternative packaging.

As demonstrated in precedent like *Deere & Co.*, *Walmart Inc.*, *General Electric Co.*, and *Johnson & Johnson*, it is not proper for Rule 14a-8 to be used to require the Company to commission a report that would harm its legal defenses and increase the likelihood that it will be found liable in pending litigation. Such a proposal harms the Company's legal strategy and thus interferes with the Company's ordinary business operations. Therefore, as explained above, the Staff has consistently concurred with the exclusion under Rule 14a-8(i)(7) of shareholder proposals that, like the Proposal, implicate a company's litigation conduct or litigation strategy.

Further, we note that a proposal relating to ordinary business matters such as ongoing litigation is excludable under Rule 14a-8(i)(7) regardless of whether it touches upon a significant policy issue. Although the Commission has stated in the 1998 Release that "proposals relating to such [ordinary business] matters but focusing on sufficiently significant social policy issues (*e*.g., significant discrimination matters) generally would not be considered to be excludable," the Staff has expressed the view that proposals relating to both ordinary business matters and significant social policy issues may be excluded in their entirety in reliance on Rule 14a-8(i)(7). As an example, although significant discrimination matters are often considered to be significant policy issues, the Staff concurred with the exclusion of a proposal that requested a third-party report analyzing how the company's policies, practices and operations "perpetuate racial injustice and inflict harm on communities of color," because the subject matter of the report was the same as the subject matter at the heart of pending litigation to which the company was party. *See Chevron 2021*. Similarly, although smoking is often considered a significant policy issue, as noted above, the Staff has concurred with the exclusion of proposals that touched upon this issue where the subject matter of the proposal (*e.g.*, the health effects of smoking) was the same as or similar to that which was at the heart of litigation in which the company was then involved. *See*, e.*g*., *Philip Morris Companies* (noting that although the Staff "has taken the position that proposals directed at the manufacture and distribution of tobacco related products by companies involved in making such products raise issues of significance that do not constitute matters of ordinary business," the company could exclude a proposal that "primarily addresses the litigation strategy of the [c]ompany, which is viewed as inherently the ordinary business of management to direct").

Here, the subject matter of the Proposal (*e.g.*, "how [the Company] could address flexible plastic packaging . . . to reduce its contribution to plastic pollution") encompasses the same subject matter at the heart of multiple pending lawsuits in which the Company is currently involved. Thus, consistent with precedent like *Chevron 2021* and *Phillip Morris Companies*, because the Proposal implicates the Company's litigation strategy, which is an ordinary business matter, the Proposal is excludable under Rule 14a-8(i)(7) regardless of whether it touches upon a significant policy issue.

In summary, the Proposal requests that the Company take action that would directly undermine the Company's position in pending litigation against the Company at the same time that the Company is challenging the plaintiffs' allegations on the very issues implicated by the Proposal. The Proposal seeks to substitute the judgment of shareholders for that of the Company by requiring the Company take action that would harm its legal defenses in multiple pending lawsuits. Implementing the Proposal would intrude upon Company management's exercise of its day-to-day business judgment with respect to pending litigation in the ordinary course of its business operations. Accordingly, we believe that the Proposal may be properly excluded from the Company's 2025 Proxy Materials under Rule 14a-8(i)(7) as relating to the Company's ordinary business operations.

CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2025 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8287, or Josh Dell, the Company's Counsel, Securities & Corporate Governance, at (646) 239-1985.

Sincerely,

Elizabeth A. Ising

Enclosures

cc: Josh Dell, PepsiCo, Inc.
Conrad MacKerron, As You Sow

EXHIBIT A

AS YOU SOW
2020 Milvia St. Suite 500
Berkeley, CA 94704
www.asyousow.org
BUILDING A SAFE, JUST, AND SUSTAINABLE WORLD SINCE 1992

VIA FEDEX & EMAIL

November 21, 2024

David Flavell
Executive Vice President, General Counsel
and Corporate Secretary
PepsiCo Inc.
700 Anderson Hill Road
New Purchase, New York 10577
[redacted]

Dear Mr. Flavell,

As You Sow® is filing a shareholder proposal on behalf of Michael E. Monteiro 2016 Rev Trust ("Proponent"), a shareholder of PepsiCo Inc. for inclusion in PepsiCo's 2025 proxy statement and for consideration by shareholders in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934.

A letter from the Proponent authorizing *As You Sow* to act on its behalf is enclosed. A representative of the Proponent will attend the stockholder meeting to move the resolution as required.

We are available to discuss this issue and are optimistic that such a discussion could result in resolution of the Proponent's concerns.

To schedule a dialogue, please contact Kelly McBee, Circular Economy Program Manager at [redacted] iPlease send all correspondence **with a copy to** [redacted].

Sincerely,

Conrad MacKerron
As You Sow, Senior Vice President

Enclosures
- Shareholder Proposal
- Shareholder Authorization

Cc: Ravi Pamnani, Sr, Vice President of Investor Relations, investor@pepsico.com

October 11, 2024

Andrew Behar
CEO
As You Sow
2020 Milvia Street, Suite 500
Berkeley, CA 94704

Re: <u>Authorization to File Shareholder Resolution</u>

Dear Mr. Behar,

In accordance with Rule 14a-8 of the General Rules and Regulations of the Securities and Exchange Act of 1934, the undersigned ("Stockholder") authorizes *As You Sow* to file or co-file a shareholder resolution on Stockholder's behalf with the named Company for inclusion in the Company's 2025 proxy statement. The resolution at issue relates to the below described subject.

Stockholder: Michael E. Monteiro 2016 Rev Trust

Company: PepsiCo Inc

Subject: Sustainable packaging policies for plastics

The Stockholder has continuously owned Company stock, with voting rights, for a duration of time that enables the Stockholder to file a shareholder resolution for inclusion in the Company's proxy statement. The Stockholder intends to hold the required amount of such stock through the date of the Company's annual meeting in 2025.

The Stockholder gives *As You Sow* authority to address, on the Stockholder's behalf, any and all aspects of the shareholder resolution, including drafting and editing the proposal, representing Stockholder in engagements with the Company, entering into any agreement with the Company, designating another entity as lead filer and representative of the shareholder, presenting the proposal at the Company's annual general meeting, and all other forms of representation necessary in moving the proposal. The Stockholder understands that the Stockholder's name may appear on the company's proxy statement as the filer of the aforementioned resolution, and that the media may mention the Stockholder's name in relation to the resolution. The Stockholder supports this proposal.

The Stockholder is available for a meeting with PepsiCo Inc
regarding this shareholder proposal, at the following days/times: [Stockholder to provide 2 dates and 30-minute meeting options within the following time frame: 12/2/2024 - 12/17/2024
Monday - Friday and between the hours of 9:00am and 5:30pm Eastern Time]
Date: 12/2/2024 Time: 10am Date: 12/4/2024 Time: 10am

If the Company would like to meet at one of these dates and times, let the Stockholder and *As You Sow* at, [redacted], know within 2 days of the dates offered in this letter.

If this Authorization is used for a Co-filing role instead of for a Proponent role, then the Stockholder agrees to designate the Proponent to engage on the Stockholder's behalf on the dates and times that the Proponent has provided.

The Stockholder can be contacted at the following email address to schedule a dialogue during one of the above dates: [redacted]

Any correspondence regarding meeting dates must **also be sent to my representative:**

Kelly McBee, Circular Economy Manager at [redacted]

and to [redacted].

The Stockholder also authorizes *As You Sow* to send a letter of support of the resolution on Stockholder's behalf.

Sincerely,

Signed by:
A591E6329E80430...
Michael Monteiro

Trustee

AS YOU SOW
2020 Milvia St. Suite 500
Berkeley, CA 94704
www.asyousow.org
BUILDING A SAFE, JUST, AND SUSTAINABLE WORLD SINCE 1992

VIA FEDEX & EMAIL

November 21, 2024

David Flavell
Executive Vice President, General Counsel
and Corporate Secretary
PepsiCo Inc.
700 Anderson Hill Road
New Purchase, New York 10577
[redacted]

Dear Mr. Flavell,

As You Sow® is co-filing a shareholder proposal on behalf of the following PepsiCo Inc shareholders for action at the next annual meeting of PepsiCo:

- Brian Murray Revocable Trust
- Frances L. Bell T/W fbo Patrick de Freitas

Shareholders are co-filers of the enclosed proposal with Michael E. Monteiro 2016 Rev Trust who is the Proponent of the proposal. *As You Sow* has submitted the enclosed shareholder proposal on behalf of Proponent for inclusion in the 2025 proxy statement in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934. Co-filers will either: (a) be available on the dates and times offered by the Proponent for an initial meeting, or (b) authorize *As You Sow* to engage with the Company on their behalf, within the meaning of Rule 14a-8(b)(iii)(B).

As You Sow is authorized to act on Brian Murray Revocable Trust's or Frances L. Bell T/W fbo Patrick de Freitas's behalf with regard to withdrawal of the proposal. A representative of the lead filer will attend the stockholders' meeting to move the resolution as required.

Letters authorizing *As You Sow* to act on co-filers' behalf are enclosed.

We are hopeful that the issue raised in this proposal can be resolved. To schedule a dialogue, please contact Kelly McBee, Circular Economy Program Manager at [redacted] Please send all correspondence **with a copy to** [redacted].

Sincerely,

Conrad MacKerron
As You Sow, Senior Vice President

Enclosures
- Shareholder Proposal
- Shareholder Authorization

Cc: Ravi Pamnani, Sr, Vice President of Investor Relations, investor@pepsico.com

November 14, 2024

Andrew Behar
CEO
As You Sow
2020 Milvia Street, Suite 500
Berkeley, CA 94704

Re: <u>Authorization to File Shareholder Resolution</u>

Dear Mr. Behar,

In accordance with Rule 14a-8 of the General Rules and Regulations of the Securities and Exchange Act of 1934, the undersigned ("Stockholder") authorizes *As You Sow* to file or co-file a shareholder resolution on Stockholder's behalf with the named Company for inclusion in the Company's 2025 proxy statement. The resolution at issue relates to the below described subject.

Stockholder: Brian Murray Revocable Trust

Company: PepsiCo Inc

Subject: Sustainable packaging policies for plastics

The Stockholder has continuously owned Company stock, with voting rights, for a duration of time that enables the Stockholder to file a shareholder resolution for inclusion in the Company's proxy statement. The Stockholder intends to hold the required amount of such stock through the date of the Company's annual meeting in 2025.

The Stockholder gives *As You Sow* authority to address, on the Stockholder's behalf, any and all aspects of the shareholder resolution, including drafting and editing the proposal, representing Stockholder in engagements with the Company, entering into any agreement with the Company, designating another entity as lead filer and representative of the shareholder, presenting the proposal at the Company's annual general meeting, and all other forms of representation necessary in moving the proposal. The Stockholder understands that the Stockholder's name may appear on the company's proxy statement as the filer of the aforementioned resolution, and that the media may mention the Stockholder's name in relation to the resolution. The Stockholder supports this proposal.

The Stockholder is available to meet with the Company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal. The Stockholder authorizes representative, *As You* Sow, to provide the dates and times.

If the Company would like to meet at one of these dates and times, let the Stockholder and *As You Sow* at, [redacted], know within 2 days of the dates offered in this letter

If this Authorization is used for a Co-filing role instead of for a Proponent role, then the Stockholder agrees to designate the Proponent to engage on the Stockholder's behalf on the dates and times that *As You Sow* has provided.

The Stockholder can be contacted at the following email address to schedule a dialogue:
[redacted]

Any correspondence regarding meeting dates must **also be sent to:**

Kelly McBee, Circular Economy Manager at [redacted]

and to [redacted].

The Stockholder also authorizes *As You Sow* to send a letter of support of the resolution on Stockholder's behalf.

Sincerely,

Signed by:
[redacted]
2C8E114B1781418...

Michelle Murray

Trustee

November 1, 2024

Andrew Behar
CEO
As You Sow
2020 Milvia Street, Suite 500
Berkeley, CA 94704

Re: Authorization to File Shareholder Resolution

Dear Mr. Behar,

In accordance with Rule 14a-8 of the General Rules and Regulations of the Securities and Exchange Act of 1934, the undersigned ("Stockholder") authorizes *As You Sow* to file or co-file a shareholder resolution on Stockholder's behalf with the named Company for inclusion in the Company's 2025 proxy statement. The resolution at issue relates to the below described subject.

Stockholder: Frances L. Bell T/W fbo Patrick de Freitas

Company: PepsiCo Inc

Subject: Sustainable packaging policies for plastics

The Stockholder has continuously owned Company stock, with voting rights, for a duration of time that enables the Stockholder to file a shareholder resolution for inclusion in the Company's proxy statement. The Stockholder intends to hold the required amount of such stock through the date of the Company's annual meeting in 2025.

The Stockholder gives *As You Sow* authority to address, on the Stockholder's behalf, any and all aspects of the shareholder resolution, including drafting and editing the proposal, representing Stockholder in engagements with the Company, entering into any agreement with the Company, designating another entity as lead filer and representative of the shareholder, presenting the proposal at the Company's annual general meeting, and all other forms of representation necessary in moving the proposal. The Stockholder understands that the Stockholder's name may appear on the company's proxy statement as the filer of the aforementioned resolution, and that the media may mention the Stockholder's name in relation to the resolution. The Stockholder supports this proposal.

The Stockholder is available to meet with the Company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal. The Stockholder authorizes representative, *As You Sow*, to provide the dates and times.

If the Company would like to meet at one of these dates and times, let the Stockholder and *As You Sow* (at [redacted]) know within 2 days of the dates offered in this letter.

If this Authorization is used for a Co-filing role instead of for a Proponent role, then the Stockholder agrees to designate the Proponent to engage on the Stockholder's behalf on the dates and times that *As You Sow* has provided.

The Stockholder can be contacted at the following email address to schedule a dialogue: [redacted]

Any correspondence regarding meeting dates must **also be sent to my representative:** [redacted].

The Stockholder also authorizes *As You Sow* to send a letter of support of the resolution on Stockholder's behalf.

Sincerely,

DocuSigned by:
Patrick De Freitas
7EBB24576D2D4A4...

Name: Patrick de Freitas
Title: Co-Trustee

WHEREAS: Without immediate and sustained new commitments throughout the plastics value chain, annual flows of plastics into oceans could nearly triple by 2040.[1]

The growing plastic pollution crisis poses increasing risks to PepsiCo Inc Corporations could face an annual financial risk of approximately $100 billion should governments require them to cover the waste management costs of packaging they produce.[2] Governments around the world are increasingly enacting such policies, including five new state laws that impose fees on corporations for single-use plastic (SUP) packaging.[3] The European Union has banned ten SUP pollutants and taxed some non-recycled plastic packaging.[4] A French law requires 10% of packaging be reusable by 2027 and Portugal requires 30% reusable packaging by 2030.[5] Additionally, consumer demand for sustainable packaging is increasing.[6]

Pew Charitable Trusts' groundbreaking study, *Breaking the Plastic Wave* ("Pew Report"), concluded that improved recycling alone is insufficient to address plastic pollution—instead, recycling must be coupled with reductions in use, materials redesign, and substitution.[7] The Pew Report finds that the greatest opportunity to reduce or eliminate plastic lies with flexible plastic packaging, often used for chips, sweets, and condiments among other uses, and virtually unrecyclable in America. With innovation, redesign, and substitution, 26 million metric tons of flexibles can be avoided globally.[8]

The Pew Report finds that reducing plastic use is the most viable solution from environmental, economic, and social perspectives, yet broad corporate and stakeholder alignment on flexible packaging solutions is lacking.[9]

Despite its stated commitments to sustainable packaging, more than 18% of PepsiCo's packaging remains in flexibles.[10] Our Company is behind in its 2025 goals for reusable packaging, recyclable packaging in practice and at scale, and plastic reduction—increasing plastic use by more than 5% since 2020.[11] In the absence of immediate action to eliminate flexibles by robustly engaging in research and expansion of reusable packaging, PepsiCo is on track to fail to meet its 2025 packaging goals.

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[1] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.4
[2] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.9
[3] https://www.packworld.com/sustainable-packaging/recycling/article/22922253/ameripen-shares-key-lessons-from-early-epr-adopters
[4] https://environment.ec.europa.eu/topics/plastics/single-use-plastics_en
[5] https://www.greenpeace.org/international/story/51843/plastics-reuse-and-refill-laws
[6] https://www.shorr.com/resources/blog/the-2022-sustainable-packaging-consumer-report/
[7] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.9
[8] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.51; https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.51
[9] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.10; https://emf.thirdlight.com/link/pqm3hmtgpwtn-dwj3yc, p.22
[10] https://gc-data.emf.org/2024/detail?cid=pepsico
[11] https://gc-data.emf.org/2024/detail?cid=pepsico

Our Company could avoid regulatory, environmental, and competitive risks by adopting a comprehensive approach to addressing flexible plastic packaging use at scale.

RESOLVED: Shareholders request that the Board issue a report, at reasonable expense and excluding proprietary information, describing how PepsiCo could address flexible plastic packaging in alignment with the findings of the Pew Report, or other authoritative sources, to reduce its contribution to plastic pollution.

SUPPORTING STATEMENT: The report should, at Board discretion:

- Assess the reputational, financial, and operational risks associated with continuing to use non-recyclable plastic packaging while plastic pollution grows;
- Evaluate actions to achieve fully recyclable packaging including elimination and accelerated research into innovative reusable substitution; and
- Describe opportunities to pre-competitively work with peers to research and develop reusable packaging as an alternative to single-use packaging.

EXHIBIT B

E-FILED; Baltimore City Circuit Court
Docket: 6/20/2024 11:52 AM; Submission: 6/20/2024 11:52 AM
Envelope: 16907732

IN THE CIRCUIT COURT FOR BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE,

City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Plaintiff,

v.

PEPSICO, INC.; FRITO-LAY, INC.; FRITO-LAY NORTH AMERICA, INC.; COCA-COLA, INC.; W.R. GRACE AND COMPANY; MERCURY PLASTICS MD; ADELL PLASTICS, INC.; POLYMERSHAPES BALTIMORE

Defendants.

COMPLAINT

Case No.: C-24-CV-24-001003

Jury Trial Demanded.

Plaintiff, the Mayor and the City Council of Baltimore, Maryland ("the City" or "Plaintiff"), by and through its attorneys, the Milberg Firm, Napoli Shkolnik, PLLC, and Smouse & Mason, LLC, respectfully allege as follows:

NATURE OF THE CASE

1. In the past 75 years, annual production of plastic has grown from under two metric tons in 1950 to 460 metric tons in 2019.[1] Half of all plastic that has ever been produced was made after 2002.[2] By 2060, plastic manufacturing is expected to triple.[3] Because of the rampant production and usage of plastics, it is one of the most common forms of litter in the world.[4] Single-use plastics contribute in particular to litter, given their inherent throwaway nature. Plastic production has increased exponentially, from 2.3 million tons in 1950 to 448 million tons by 2015.[5] The increase in plastic production continues to climb higher each year.[6] As a consequence, the plastic-pollution crisis has created major economic problems for Plaintiff Baltimore City, its citizens, and its environment.

[1] Hannah Ritchie, Veronika Samborska, & Max Roser, *Plastic Pollution*, Our World in Data (Sept. 2018), https://ourworldindata.org/plastic-pollution (https://perma.cc/T558-H5H3); Organisation for Economic Co-operation and Development (OECD), *Global Plastics Outlook: Economic Drivers, Environmental Impacts and Policy Options*, Organisation for Economic Co-operation and Development (2022) (https://doi.org/10.1787/de747aef-en) (https://perma.cc/5453-UPMD).

[2] Organisation for Economic Co-operation and Development (OECD), *Global Plastics Outlook: Economic Drivers, Environmental Impacts and Policy Options*, Organisation for Economic Co-operation and Development (2022) (https://doi.org/10.1787/de747aef-en) (https://perma.cc/9H26-SHJ9).

[3] *Id.*

[4] Hannah Ritchie, Veronika Samborska, & Max Roser, *Plastic Pollution*, Our World in Data (Sept. 2018) (https://ourworldindata.org/plastic-pollution) (https://perma.cc/C9PH-3HGA).

[5] Laura Parker, *The world's plastic pollution crisis explained*, NATIONAL GEOGRAPHIC (June 7, 2019) (https://www.nationalgeographic.com/environment/article/plastic-pollution) (https://perma.cc/4U2Z-J3QP).

[6] *Id.*

2. Plastics litter streets, sidewalks, beaches, parks, and lawns in the City. Plastic litter is not just an unattractive blight on the City, but also a threat to the environment, wildlife, land, waters, and public health. Plastic does not biodegrade in the environment; instead, it fragments into smaller and smaller pieces known as microplastics and nanoplastics, which remain in the environment indefinitely.[7] It takes around 1,000 years for single-use plastic to degrade in a landfill.[8] Bottles, bags and food containers are made of plastic contain toxic chemical additives, known as endocrine disruptors which, research shows, can cause adverse health conditions including cancers, birth defects and immune system suppression in both humans and wildlife.[9]

3. Plastic contaminates the City's harbor and public drinking water supplies. Plastics have significant impacts on the City's public water supply system. In particular, Defendants' plastic litter degrades into microplastics and nanoplastics which then diffuse into the City's public water supply system, causing harm to the water supply and the City's residents accessing it.

4. In all its forms, this plastic pollution interferes with the public's use and enjoyment of the City, and adversely affects the aesthetic value of the City and its waters. Single-use plastic beverage bottles, bottle caps, and snack food wrappers are common types of plastic waste found in the City. These products are produced, distributed, and sold by Defendants, who account for the majority of this waste within the City.

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[7] Yutaka Tokiwa, Buenaventurada P. Calabia, Charles U. Ugwu, & Seiichi Aiba, *Biodegradability of plastics*, Int. J. Mol. Sci. (Aug. 26, 2009) (https://pubmed.ncbi.nlm.nih.gov/19865515) (https://perma.cc/AG2D-U94Q).

[8] *Degradation Rates of Plastics in the Environment*, ACS Publications (2020) (https://pubs.acs.org/doi/10.1021/acssuschemeng.9b06635 (https://archive.is/I4pQF).

[9] *Adverse Health Effects Of Plastics*, Ecology Center (2021) (https://ecologycenter.org/factsheets/adverse-health-effects-of-plastics) (https://perma.cc/N8U2-55BW).

5. Plastics litter is extraordinarily expensive, with the cost externalized to cities and towns. This toxic litter and nuisance epidemic is no different in Baltimore. The City and its stakeholders spend over $32 million to collect upwards of 2,600 tons of litter annually, at an estimated cost of $10,571 per ton of litter generated,[10] a significant portion of which is plastics litter.

6. Plastics litter in Baltimore is a public nuisance that threatens the environment and human health, and costs the City millions of dollars in cleanup expenses. Defendant plastics manufacturers knew of single-use plastics' inability to be recycled and its harmful nature, and have done nothing to mitigate the impact of the disposal of their products. Defendants contract for delivery of their plastics products with distributors in the City, and/or are themselves distributors in the City. As such, Defendants must bear the responsibility for cleaning up the products they created that have and continue to contaminate the City's property.

PARTIES

A. PLAINTIFF

7. Plaintiff, the Mayor and City Council of Baltimore (hereinafter "Baltimore City," "Baltimore," or "the City"), brings this action as an exercise of its police power, which includes, but is not limited to, its power to prevent pollution of Baltimore's property and waters, to prevent and abate nuisances, and to prevent and abate hazards to the environment. It brings this claim under the Illegal Dumping and Litter Control Law, which allows the legislative body of a municipal

[10] Christopher Kelley & Ramya Ambikapathi, *Litter-Free Baltimore: A Trash Collection Policy Framework Based on Spatial Analysis and Social Media*, Abell Foundation (Aug. 2016) (https://abell.org/publication/winner-of-the-2016-abell-award-in-urban-policy) (https://perma.cc/B6XR-BJ58).

corporation to prohibit littering and classify littering as a municipal infraction, such as the public nuisance and litter control law violations described herein.[11]

8. The City has a public governmental interest in its natural resources, lands, and harbor. Its obligation, and right, to ensure the health and well-being of Baltimore's environment, its economy, and its citizens' health are essential public functions to be addressed in this litigation. Moreover, the City has incurred, and will continue to incur, massive costs for the abatement and removal of Defendants' plastic litter.

B. DEFENDANTS

9. Defendants, collectively, manufacture, market, distribute, and sell a majority of single-use plastics and plastic packaging purchased and/or used in the United States, including in Baltimore City, Maryland.

10. Each of Defendants has a substantial share of the plastics market and knew that their products would be littered in the City. Defendants knew that the plastics they manufactured would not break down after they were inevitably discarded by Defendants' customers and would thereby create a nuisance. Defendants, however, chose to manufacture and sell non-reusable, unrecyclable, or limited recyclable products, without any mitigation of the waste material. Defendants created a public nuisance solely to sell more of their products and knew that this decision would result in copious amounts of plastic littering the property both of the City and of its residents and businesses.

11. **Defendant PepsiCo, Inc. ("PepsiCo")** is a North Carolina corporation with its principal place of business at 700 Anderson Hill Road, Purchase, New York 10577. At all times relevant, PepsiCo has manufactured, marketed, and distributed beverages and snack food products

[11] MD. CODE ANN., CRIM. LAW § 10-110.

in plastic packaging including, but not limited to, Gatorade, Pepsi, Aquafina, Mountain Dew, and LifeWTR beverage bottles, as well as Cheetos, Doritos, Frito-Lay, Lay's, Tostitos, Ruffles, and Sun Chips snack food wrappers, throughout the United States, including Baltimore City, Maryland. PepsiCo regularly transacts business in Baltimore City, derives substantial revenue from its business in Maryland, and owns and/or uses real property within Maryland.[12]

12. PepsiCo is a beverage and snack food company that produces, distributes, bottles/packages, sells, and markets beverages and snack foods. PepsiCo controls all packaging and marketing decisions. PepsiCo oversees and manages activities pertaining to its subsidiaries' and franchisees' involvement in the process by which PepsiCo products are packed, marketed, and/or sold to customers through its workers and/or agents. PepsiCo maintains complete control over the manufacture, sale, and distribution of its goods. It specifies the materials used for packaging and uses its own vehicles or independent contractors under contract to transport its goods. PepsiCo is responsible for the past and present production and promotion of PepsiCo products in single-use plastic packaging by its own production, as well as its subsidiaries' and franchisees' production which it controls.

13. **Defendant Frito-Lay, Inc. ("Frito-Lay")** is incorporated in Delaware, with its headquarters at 7701 Legacy Dr., Plano, Texas 75024. Frito Lay is a wholly owned subsidiary of Defendant PepsiCo. At all times relevant, Frito-Lay has manufactured, marketed, and distributed beverages and snack food products in plastic packaging, including, but not limited to, Lay's, Doritos, Cheetos, Fritos, Sun Chips, and Tostitos, throughout the United States, including Baltimore City, Maryland. Frito-Lay regularly transacts business in Baltimore City, MD, derives

[12] Amanda Winters, *Baltimore logistics center gains PepsiCo as tenant*, Maryland.gov (June 6, 2023 (https://business.maryland.gov/blog/baltimore-logistics-center-gains-pepsico-as-tenant) (https://perma.cc/F68R-E7SB).

substantial revenue from its business in Maryland, and owns and/or uses real property within Maryland.

14. **Defendant Frito-Lay North America, Inc. ("Frito-Lay North America")** is incorporated in Delaware, with its headquarters at 7701 Legacy Dr., Plano, Texas 75024. Frito Lay is a wholly owned subsidiary of Defendant PepsiCo. At all times relevant, Frito-Lay has manufactured, marketed, and distributed beverages and snack food products in plastic packaging, including, but not limited to, Lay's, Doritos, Cheetos, Fritos, Sun Chips, and Tostitos, throughout the United States, including Baltimore City, Maryland. Frito-Lay regularly transacts business in Baltimore City, derives substantial revenue from its business in Maryland, and owns and/or uses real property within Maryland.

15. **Defendant Coca-Cola, Inc. ("Coca-Cola")** is a Georgia company with its headquarters at 1 Coca Cola Plaza, NW, Atlanta, GA 30313. At all times relevant, Coca-Cola has manufactured, marketed, and distributed beverages and snack food products in plastic packaging, including, but not limited to, Powerade, Coca-Cola, Diet Coke, Dasani, Sprite, MinuteMaid, Fanta, Vitamin Water, and SmartWater beverage bottles.

16. In overseeing and managing activities pertaining to its subsidiaries' and franchisees' involvement in the process by which Coca-Cola products are packed, marketed, and/or sold to customers through its workers and/or agents, Coca-Cola maintains complete control over the manufacture, sale, and distribution of its goods. It specifies the materials used for packaging and uses its own vehicles, or independent contractors under contract to transport its goods. Coca-Cola is responsible for the past and present production and promotion of Coca-Cola products in single-use plastic packaging by its own production, as well as through its subsidiaries' and franchisees' production.

17. **Defendant W.R. Grace and Company ("W.R. Grace")** is a Maryland corporation with its headquarters at 7500 Grace Dr., Columbia, Maryland 21044. At all relevant times, W.R. Grace has manufactured, advertised, and sold chemicals, additives, and synthetic silicas for manufacturing polypropylene (PP), polyethylene (PE), and Polyethylene Terephthalate (PET) plastics, throughout the United States, including in Baltimore City, Maryland.

18. W.R. Grace is a plastics company that manufactures, distributes, sells, and markets plastic products. W.R. Grace maintains complete control over the manufacture, marketing, sale, and distribution of its products. It specifies the materials used for its products and uses its own vehicles or independent contractors under contract to transport its goods. W.R. Grace is responsible for the past and present production and promotion of plastic products by its own design and production. It sells and distributes plastics products within Baltimore City.

19. **Defendant Mercury Plastics MD ("Mercury")** is a Maryland corporation with its headquarters at 2717 Wilmarco Avenue, Baltimore, Maryland 21223. At all relevant times, Mercury manufactured, advertised, and sold plastics to be used in industries including, but not limited to, consumer package goods, cosmetics, home goods, and personal care, throughout the United States, including in Baltimore City, Maryland. Mercury manufactures, distributes, and sells plastic materials including, but not limited to, PETG, Polypropylene (PP), Polyethylene (PE), polyethylene terephthalate (PET), and High-Density Polyethylene (HDPE).

20. Mercury is a plastics company that manufactures, distributes, sells, and markets plastic products. Mercury maintains complete control over the manufacture, marketing, sale, and distribution of its goods. It specifies the materials used for products and uses its own vehicles or independent contractors under contract to transport its goods. Mercury is responsible for the past

and present production and promotion of plastic products by its own production. It sells and distributes plastics products within Baltimore City.

21. **Defendant Adell Plastics, Inc. ("Adell")** is a Maryland corporation with its headquarters at 4530 Annapolis Rd., Baltimore, Maryland 21227. At all relevant times, Adell has manufactured, advertised, and sold thermoplastics including polypropylene, polyester (both PET and PBT), polycarbonate, and silicone concentrates.

22. Adell is a plastics company that manufactures, distributes, sells, and markets plastic products. Adell maintains complete control over the manufacture, marketing, sale, and distribution of its goods. It specifies the materials used for products and uses its own vehicles or independent contractors under contract to transport its goods. Adell is responsible for the past and present production and promotion of plastic products by its own production. It sells and distributes plastics products within Baltimore City.

23. **Defendant Polymershapes Baltimore ("Polymershapes")** is a Maryland corporation with its headquarters at 7495 Race Road, Hanover, Maryland, 21076. At all relevant times, Adell has manufactured, advertised, and sold plastics such as Acrylic, Polycarbonate, Foam PVC, High Impact Polystyrene, High-Density Polyethylene (HDPE), Nylon, and UHMW.

24. Polymershapes is a plastics company that fabricates, manufactures, sells, and supplies plastic products. Polymershapes maintains complete control over the marketing, sale, and distribution of its goods. It specifies the materials used for products and uses its own vehicles or independent contractors under contract to transport its goods. Polymershapes is responsible for the past and present production and promotion of plastic products by its own production. It sells and distributes plastics products within Baltimore City.

AGENCY/JOINT VENTURE

25. At all times herein mentioned, each of Defendants was the agent, servant, partner, aider and abettor, co-conspirator, and/or joint venturer of each of the remaining Defendants herein, and was at all times operating and acting within the purpose and scope of said agency, service, employment, partnership, conspiracy, and joint venture, and rendered substantial assistance and encouragement to the other Defendants, knowing that their conduct was wrongful and/or constituted the creation of a nuisance within Baltimore City.

STATUTE OF LIMITATIONS

26. No statute of limitations can be pleaded against Plaintiff, both because in general the statute of limitations does not run against Plaintiff given its sovereign status, and also more specifically because Defendants' wrongful conduct and the consequent violations of City ordinances have been continuous, wrongful, and ongoing.

JURISDICTION AND VENUE

27. This Court has subject-matter jurisdiction over this matter under § 1-501 of the Courts and Judicial Proceedings Article of the Maryland Code. There is no federal jurisdiction in this matter because there is an absence of complete diversity of citizenship among the parties and because the claims involve solely violations of the common law of Maryland and various state statutory provisions and local ordinances, to wit, the Maryland Illegal Dumping and Litter Control Law and municipal violations of the Baltimore City Code.

28. This Court has personal jurisdiction over Defendants pursuant to Md. Code Ann., Cts. Jud. Proc. §§ 6-102 and 6-103, and because they either are domiciled in Baltimore City, Maryland; were served with process in Baltimore City, Maryland; are organized under the laws of Maryland; maintain their principal place of business in Baltimore City, Maryland; transact

business in Baltimore City, Maryland; perform work in Baltimore City, Maryland; contract to supply goods, manufactured products, or services in Baltimore City, Maryland; caused tortious injury in Baltimore City, Maryland; engage in persistent courses of conduct in Baltimore City, Maryland; derive substantial revenue from manufactured goods, products, or services used or consumed in Baltimore City within the State of Maryland; and/or have interests in, use, or possess real property in Baltimore City, Maryland.

29. Defendants are all participating manufacturers and/or transact business in Baltimore City, contract to supply goods, manufactured products, or services in Baltimore City, Maryland. Therefore, personal jurisdiction is satisfied.

30. The venue for this Complaint is proper in the Circuit Court for Baltimore City, Maryland pursuant to Md. Code Ann., Cts. & Jud. Proc. §§ 6-201 and 6-202 and because Baltimore City's causes of action arose in Baltimore and because Defendants conduct business in the City.

FACTS

A. THE HARM OF PLASTICS POLLUTION

31. Plastic is an inexpensive, lightweight, adaptable, and durable material with a wide range of applications across several business sectors.[13] Because of plastic's versatility, however, it has become a substantial source of pollution. Throughout its lengthy and intricate life cycle, plastic poses a threat to the environment and to human health. The accumulation of plastics in the environment has long disrupted and harmed both marine and terrestrial ecosystems, as well as negatively affecting the health of humans due to their constant interaction with the substance.

[13] Jefferson Hopewell, Robert Dvorak & Edward Kosior, *Plastics recycling: challenges and opportunities*, 364(1526) PHILOS. TRANS. R. SOC. LOND. B. BIOL. SCI. 2115-26 (July 27, 2009), https://royalsocietypublishing.org/doi/10.1098/rstb.2008.0311 (https://archive.is/oIwXg).

32. In the United States, specifically, plastic is one of the most littered products, with single-use plastics—such as plastic film, food and beverage packaging, bags, and water bottles—the most widespread.[14] For example, in 2022, 5 Gyres, a non-governmental organization, examined 14,237 pieces of waste collected at national parks. Of that total, 81.1% was plastic.[15] Notably, Defendants Coca-Cola's and PepsiCo's packaging were leading contributors to this waste.[16]

33. In another study, the non-governmental organization Break Free From Plastic collected 2,125,415 items of plastic waste from 2,373 separate collections across the United States from 2018 to 2022.[17] The study again documented Defendants Coca-Cola and PepsiCo as the lead producers of branded plastic waste collected across the United States.

34. Because plastic pollution has spread so widely, its impact on ecosystems and humans has been studied extensively, demonstrating that plastic pollutes soil and waters, and harms living organisms, and that the capacity of ecosystems to adapt to climate change is diminished by plastic pollution, which can modify habitats and natural processes.[18] This has a direct impact on the social well-being, food production, and livelihoods of millions of people.

35. Primary sources of oceanic plastic pollution include coastal cities like Baltimore, where plastic debris undergoes continuous fragmentation into microplastics and even smaller

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[14] Chris Dickert, *Top 10 Most Littered Plastic Items in the US*, Visual Capitalist (Feb. 9, 2023), https://www.visualcapitalist.com/sp/top-10-plastic-litter/ (https://perma.cc/5ZNS-GTQU).

[15] *Plastic-Free Parks*, 5 Gyres (2022) at 6, https://eastmetrowater.files.wordpress.com/2022/11/1ee3d-plastic-freeparkstrashblitzreport2022.pdf (https://perma.cc/N2ZU-3TLW).

[16] *Id.*

[17] *Brand Audit Report 2022*, Break Free From Plastic (2022), https://brandaudit.breakfreefromplastic.org/wp-content/uploads/2022/11/BRANDED-brand-audit-report-2022.pdf (https://perma.cc/JG2C-E37E).

[18] UNEP, *Plastic Pollution*, United Nations Environment Program, https://www.unep.org/plastic-pollution#:~:text=Plastic%20pollution%20can%20alter%20habitats,t%20exist%20in%20a%20vacuum (https://perma.cc/9YZW-LHV9).

nanoplastics.[19] The threat to humans is also increased through their ingestion of the pollution by animals and plants that are subsequently consumed as food. Each year, an estimated 4.8 to 12.7 million metric tons of plastic enters the oceans.[20] The ingestion of microplastics and nanoplastics has been observed in several marine organisms, including those used as seafood, suggesting their widespread infiltration into the human population's food sources.[21] Further, plants can absorb nanoplastics through their roots and transfer them to their structures above ground, creating additional risk to humans and animals who subsequently consumer the plant food.[22] Plastic is also found in drinks, such as bottled water and tap water.[23]

36. In 2019, a study confirmed that humans are indeed ingesting plastics.[24] Plastic particles are becoming more frequently discovered in bodily fluids and tissues.[25] In fact,

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[19] Kosuke Tanaka & Hideshige Takada, *Microplastic fragments and microbeads in digestive tracts of planktivorous fish from urban coastal waters*, Nature: SCI. REP. (2016), https://www.nature.com/articles/srep34351 (https://perma.cc/H2Z4-R3CV).

[20] Marcus Haward, *Plastic pollution of the world's seas and oceans as a contemporary challenge in ocean governance*, Nat. Commun (2018), https://pubmed.ncbi.nlm.nih.gov/29445166/ (https://perma.cc/5Q3W-RGRZ).

[21] Luis Gabriel Antao Barboza, et al., *Marine microplastic debris: An emerging issue for food security, food safety and human health*, Mar. Pollut. Bull. (2018) 133, 336–348, https://pubmed.ncbi.nlm.nih.gov/30041323/ (https://perma.cc/LGE8-D9JN); Stephanie L. Wright, et al., *Plastic and human health: a micro issue?*, Environ Sci Technol (2017) 6634–6647, https://pubmed.ncbi.nlm.nih.gov/28531345/ (https://perma.cc/KNS6-FYSY); Madeleine Smith, et al., *Microplastics in seafood and the implications for human health*, Curr. Environ. Health Rep. (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6132564/ (https://perma.cc/G7W3-26WP); Gregory M. Zarus, et al., *A review of data for quantifying human exposures to micro and nanoplastics and potential health risks*, Sci Total Environ (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7775266/ (https://perma.cc/LK3S-BA2W).

[22] Zhiqin Zhang, et al., *A critical review of microplastics in the soil-plant system: Distribution, uptake, phytotoxicity and prevention*, J. Hazard. Mater. (2022), https://pubmed.ncbi.nlm.nih.gov/34838359/ (https://perma.cc/W5AY-HJ5Q).

[23] Evangelos Danopoulos, et al., *Microplastic contamination of drinking water: A systematic review*, PloS one (2020), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0236838 (https://perma.cc/C7KD-LTXU).

[24] Schwabl, et al., *Detection of Various Microplastics in Human Stool*, 173 Annals of Internal Medicine 453-457 (2019), https://pubmed.ncbi.nlm.nih.gov/31476765 (https://perma.cc/97XS-9UNN).

[25] *Id*; Martin J.M. van Velzen, et al., *Discovery and Quantification of Plastic Particle Pollution in Human Blood*, Environ. Int. (2022), https://pubmed.ncbi.nlm.nih.gov/35367073 (https://archive.is/onqTw).

nanoplastics and microplastics have been discovered to be capable of infiltrating every organ, including the brain.[26] It has even been found in human placentas.[27] In one particular study, all placentas tested indeed had microplastics present with concentrations from 6.5 to 790 micrograms per gram of tissue.[28] Besides coming from food and drinks themselves, a major source of plastic contamination comes from plastic packaging in which food and drinks are sold.[29] For example, studies suggest that there are more than 10^5 (100,000) particles of plastic in each liter of bottled water, the majority of which are nanoplastics.[30] So even if a food or drink itself is free of plastics, the packaging in which it is sold is essentially guaranteed to contaminate the product.

37. Microplastics and nanoplastics can enter the body and cross barriers such as the intestinal mucosal barrier and the blood–brain barrier.[31] This gives them the potential to negatively affect various bodily systems, including the digestive, respiratory, endocrine, reproductive, and

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[26] Carly Cassella, *Microplastics Infiltrate Every Organ, Including Brain, Study in Mice Shows*, Science Alert (Sept. 11, 2023), https://www.sciencealert.com/microplastics-infiltrate-every-organ-including-brain-study-in-mice-shows (https://perma.cc/L3CC-H7RB).

[27] Carly Cassella, *Microplastics Found in Every Human Placenta Tested, Study Finds*, Science Alert (Feb. 26, 2024), https://www.sciencealert.com/microplastics-found-in-every-human-placenta-tested-study-finds (https://perma.cc/M25Y-T2ZU); Antonio Ragusa, et al., *Plasticenta: First Evidence of Microplastics in Human Placenta*, Environ. Int. (2021), https://pubmed.ncbi.nlm.nih.gov/33395930 (https://perma.cc/2AW9-P3C8).

[28] Marcus A Garcia, et al., *Quantitation and identification of microplastics accumulation in human placental specimens using pyrolysis gas chromatography mass spectrometry*, TOXICOLOGICAL SCIENCES (Feb. 17, 2024), https://academic.oup.com/toxsci/article/199/1/81/7609801 (https://perma.cc/XP92-RTXM).

[29] Alexandra Seewann-Gaitatzis, *The Plastic Brain: The Potential Neurotoxicity of Microplastics*, Australasian Society of Lifestyle Medicine (2023), https://lifestylemedicine.org.au/content/the-plastic-brain-the-potential-neurotoxicity-of-microplastics/ (https://perma.cc/9VAU-83A8).

[30] Naixin Qian, Xin Gao, Xiaoqi, & Wei Min, *Rapid single-particle chemical imaging of nanoplastics by SRS microscopy*, PNAS (Jan. 11, 2023), https://www.pnas.org/doi/10.1073/pnas.2300582121 (https://archive.is/7j1JX).

[31] Verena Kopatz, et al., *Micro- and Nanoplastics Breach the Blood–Brain Barrier (BBB): Biomolecular Corona's Role Revealed*, Nanomaterials (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10141840/ (https://perma.cc/JJ33-GRPZ).

immune systems.[32] The human body's tissues perceive microplastics and nanoplastics as foreign bodies and can trigger local immunoreactions.[33] Thus, microplastic and nanoplastic ingestion can lead to inflammation or an altered intestinal microbiome in the digestive tract, resulting in an imbalance between beneficial and harmful bacteria and potentially leading to symptoms like abdominal pain, bloating, changes in bowel habits, irritable bowel syndrome, and colon cancer in people under age 50.[34] Individuals with nanoplastics in their body are twice as likely to have a heart attack or stroke, or die from any cause within three years, than individuals who had none present in their body.[35] Plastics often also contain additive chemicals such as harmful carcinogens that, when ingested, can cause serious harm to health, including endocrine disruption, reproductive toxicity, neurotoxicity, hepatotoxicity, and even cancer.[36] Notably, polyethylene, PVC and nylon are the most common plastics detected in the human body.[37] All are forms of plastics produced by Defendants.

38. Current studies show that harm from microplastics and nanoplastics is already present, and establish that it will only increase in magnitude and worsen in severity in the absence

[32] *Id.*

[33] *Id.*

[34] Yuanxiang Jin, et al., *Impacts of polystyrene microplastic on the gut barrier, microbiota and metabolism of mice*, Sci. Total Environ. (2019), https://pubmed.ncbi.nlm.nih.gov/30176444/ (https://perma.cc/ZPD7-EDG9); Marcus A Garcia, et al., *Quantitation and identification of microplastics accumulation in human placental specimens using pyrolysis gas chromatography mass spectrometry*, TOXICOLOGICAL SCIENCES (Feb. 17, 2024), https://doi.org/10.1093/toxsci/kfae021 (https://perma.cc/29MX-JNE5).

[35] Raffaele Marfella, et al., *Microplastics and Nanoplastics in Atheromas and Cardiovascular Events*, N. ENGL. J. MED. (March 7, 2024), https://www.nejm.org/doi/full/10.1056/NEJMoa2309822 (https://archive.is/lh8e6).

[36] *Id.*

[37] *Id.*

of immediate intervention.[38] A study published in 2024 concluded that in the year 2018, the hormone-disrupting effects of plastics present in the U.S.'s food and water led to $249 billion in additional health care costs.[39] Such health effects and costs are endemic in Baltimore.

B. DEFENDANTS' PLASTICS

39. The plastic pollution contaminating Baltimore and its environs, to which Defendants all substantially contribute, causes wide-ranging harm to Baltimore and its citizens. In manufacturing, fabricating, and distributing plastics, Defendants actively chose, and continue to choose, to make plastics which contain toxins and chemicals, which break down into harmful microplastics and nanoplastics and typically can only be used once before disposal, leading to widespread and harmful litter across the City.

i. Single-Use Plastic Packaging

40. For its packaging and for certain plastic products, Defendants depend on the manufacture of single-use plastics. As examples, the majority of the snacks and drinks that Defendants PepsiCo and Coca-Cola produce, manufacture, distribute, and sell are packaged in single-use plastics that are thrown away once consumers finish the snack or beverage. Likewise, the other Defendants actively manufacture and distribute plastics in similar forms, such as plastic films or containers, for sale to consumers.

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[38] *Late Lessons from Early Warnings: The Precautionary Principle 1896–2000*, European Environment Agency (2001), https://www.eea.europa.eu/publications/environmental_issue_report_2001_22/Issue_Report_No_22.pdf (https://perma.cc/WXN7-7BXP).

[39] Leonardo Trasande, Roopa Krithivasan, Kevin Park, Vladislav Obsekov, & Michael Belliveau, *Chemicals Used in Plastic Materials: An Estimate of the Attributable Disease Burden and Costs in the United States*, JOURNAL OF THE ENDOCRINE SOCIETY (Jan. 11, 2024), https://doi.org/10.1210/jendso/bvad163 (https://perma.cc/2QFZ-UJB4).

41. Defendants use plastic polymers in their packaging and products, such as polyethylene terephthalate ("PET" or "PETE"), polypropylene ("PP"), high-density polyethylene ("HDPE"), low-density polyethylene ("LDPE"), and other plastic polymers. Each of these forms of plastics make up a significant portion of the plastic litter found throughout the world, including in Baltimore, whether it be in the form of food and beverage containers, bottles, plastic films, or bags. While most plastic beverage bottles are made of PET, plastic beverage caps are usually made of HDPE or PP, and plastic wraps or sleeves used as labels for the bottles contain LDPE or HDPE.[40] Such plastics are generally not eligible to be recycled, and if they are, each product is unlikely recyclable for more than one cycle before it must be discarded. Further, although often mislabeled as "recyclable," most products are improperly disposed of in any event.

42. Plastic food wrappers are generally composed of multiple layers of combined plastics and metals. For example, a potato chip bag is composed of a combination of biaxially oriented polypropylene ("BOPP"), LDPE, and aluminum.[41] Snack food packaging found in PepsiCo's and Frito-Lay's products is not recyclable. Plastic films manufactured and distributed by Defendants W.R. Grace, Adell, Mercury, and Polymershapes also are not recyclable.

43. As a result of Defendants' persistent manufacturing, production, distribution, and sale of plastic products and/or beverages and snack foods in single-use plastic packaging, plastic litter has become a substantial form of pollution in Baltimore.

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[40] *Different Types of Plastic, Their Applications, and Recycling Codes*, Rajras (Sept. 30, 2019), https://rajras.in/types-of-plastic/ (https://perma.cc/J6PN-7RHE).

[41] *This Common Packaging is a Recycling Nightmare*, EcoEnclose (Mar. 2, 2022), https://www.ecoenclose.com/blog/this-common-packaging-is-a-recycling-nightmare/ (https://perma.cc/ZW8P-EX4K).

ii. Defendants' Plastics in Baltimore City

44. Defendants' products are the primary contributor to the plastic pollution affecting Baltimore, and their single-use plastic packaging is found regularly on its streets and sidewalks, its harbor, and other waterways.

45. According to the City's 2023-2024 Solid Waste Management Plan, plastic makes up at least 18% of the disposed waste that the City must manage.[42] This does not include the littered plastic waste that the City is also required to collect.

46. Since 2014, the City has instituted a trash wheel program which has placed four trash wheels in the Baltimore waterways to collect garbage littered in the City's inner harbor. Four versions of the Mr. Trash Wheel™ are located in Baltimore. From their initiation up to the present, the Trash Wheels have collected approximately 2,800 tons of litter and, specifically, 938,626 plastic bags and 1,812,576 plastic bottles.[43] Non-recyclable materials like single-use plastic bags and beverage containers make up almost half of the litter polluting Baltimore's streets and waterways.[44]

iii. Defendants' Harm to Baltimore City's Environment

47. Plastics continually pollute Plaintiff's natural resources. Single-use plastics wash into rivers, creeks, the Baltimore Harbor, and other water resources. They further migrate into storm and sewer systems. The toxic chemicals from the plastic packaging or products seep into,

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[42] *10-Year Solid Waste Management Plan: 2024-2033*, City of Baltimore, at 62 (Nov. 13, 2023), https://publicworks.baltimorecity.gov/sites/default/files/Baltimore%20SWMP%20Update_Pre-Final_11-13-23_REVISED.pdf (https://perma.cc/E6WJ-UZ54).

[43] *Mr. Trash Wheel*, https://www.mrtrashwheel.com/ (https://perma.cc/48NW-W4LY).

[44] The 2019 Baltimore Sustainability Plan, Baltimore Office of Sustainability (Mar. 2, 2020), https://www.baltimoresustainability.org/wp-content/uploads/2021/04/SustainabilityPlan_03-02-20-Compressed.pdf (https://perma.cc/LC2A-5USK).

pollute, and destroy the City's natural resources. Once plastics are discarded into these public waterways, which includes collection in surface water, runoff, and contamination of the soil, the plastics, or subsequent microplastics, are either eaten or absorbed by fish and further infiltrate other aquatic species' habitats, poisoning, killing, or otherwise harming those animals.

48. As stated in the *Effects of Litter on the Environment and Communities*,[45] litter causes numerous environmental problems.[46] When trash and pollutants wash into storm drains, they flow into the waterways and are distributed into the streams and rivers of every city, including Baltimore, degrading wildlife habitats.[47, 48] Eighty percent of marine pollution can be traced back to sources on land.[49] Organisms are harmed when they ingest plastic products and when marine life is exposed to the plastics' toxins. Death may not be immediate, but the toxins accumulate in the organism over its lifetime.[50, 51]

49. Plastics, particularly when eroded to microplastics, in the perception of marine animals can be perceived to be food.[52] When ingested, the plastics' impact on marine organisms includes disruption to their digestive systems through its ability to absorb and transport endocrine-

[45] *The Effects of Litter on the Environment and Communities*, https://globalconservationforce.org/news-updates/litter-environment-communities/ (https://perma.cc/3CB9-9N24) (Internal citations omitted).

[46] *Id.* (Internal citations omitted).

[47] *Id.* (Internal citations omitted).

[48] *Id.* (Internal citations omitted).

[49] *Id.* (Internal citations omitted).

[50] *Id.* (Internal citations omitted).

[51] *Id.* (Internal citations omitted).

[52] Oliver Bajt, *From plastics to microplastics and organisms*, FEBS Open Bio. (Apr. 11, 2021), https://febs.onlinelibrary.wiley.com/doi/10.1002/2211-5463.13120 (https://archive.is/toJda).

disrupting toxins, the accumulation of plastics in organisms, and the transfer of microplastics through the food web.[53]

iv. Defendants' Harm to Baltimore City's Public Health

50. Because most plastics are thrown away rather than recycled, the City's waste management services have been forced to find other ways to dispose of Defendants' products.

51. A recent report found that only 2.2% of collected plastics are capable of being recycled in Baltimore.[54] Not only are plastics littered throughout the City, but the 97.8% remaining plastics either end up in a landfill or are burned in the Wheelabrator BRESCO trash incinerator in South Baltimore.[55] This incinerator is a huge source of industrial air pollution in Baltimore.

52. Because of the amount of harmful toxins that is present in plastics, especially when burned, the emissions produced by burning these plastics have had serious adverse effects on citizens near the incinerator, disproportionately affecting environmental justice communities. Advocates of Baltimore's citizens have asserted that the BRESCO incinerator imposes approximately $55 million a year in health damages on residents.[56]

53. Further, plastics affect the City's drinking water. The City uses three major water sources for its water supply system: Gunpowder Falls, the Susquehanna River, and the Patapsco

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[53] *Id.*

[54] D. Patel, A. Danovitch, & S. Hubbard, *A Tale of 5 Cities: Plastic Barriers to Zero Waste. Global Alliance for Incinerator Alternatives*, www.doi.org/10.46556/HEOY6222 (https://perma.cc/M579-2P87).

[55] *Id.*

[56] Timothy Dashiell & Fern Shen, *Study finds just 2.2% of Baltimore's trashed plastic is recycled, while 47% is burned*, BALTIMORE BREW (July 30, 2021), https://www.baltimorebrew.com/2021/07/30/study-finds-just-2-2-of-baltimores-trashed-plastic-is-recycled-while-47-is-burned/ (https://perma.cc/YQL9-8Q42).

River.[57] Several studies on the different bodies of water surrounding the City, including those that the City utilizes as its drinking supply, have discovered large amounts of microplastics. For example, the Anacostia Riverkeeper staff pulled samples from the Patapsco River, and discovered high concentrations of microplastics,[58] which means that microplastics and nanoplastics are in the City's drinking water. The Chesapeake Bay and its tributaries also contain microplastics.[59] Baltimore's Inner Harbor has even been tested and found to have the presence of microplastics.[60] With microplastics in the drinking supplies and bodies of water surrounding the City, its citizens are at a much higher risk of ingesting or coming into contact with the hazardous substances and incurring the many medical consequences associated with it.

54. Lastly, living in neighborhoods littered with plastic litter negatively impacts residents' mental and physical health. Studies have shown that just the exposure to littered environments causes mental health issues.[61] Living in areas where litter is present creates an

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[57] *Operations*, Baltimore City Department of Public Works, https://publicworks.baltimorecity.gov/pw-bureaus/water-wastewater/water/operations#:~:text=The%20City%20of%20Baltimore%20water,limits%20collect%20and%20store%20water (https://perma.cc/EVW3-C47X).

[58] Jacob Fenston, *The Anacostia River is Full of Tiny Shards of Plastic*, DCist (June 13, 2019), https://dcist.com/story/19/06/13/the-anacostia-river-is-full-of-tiny-shards-of-plastic/ (https://perma.cc/2XDR-7LWJ).

[59] J. Bikker, et al., *Microplastics and other anthropogenic particles in the surface waters of the Chesapeake Bay*, Marine Pollution Bulletin (July 2020), https://doi.org/10.1016/j.marpolbul.2020.111257 (https://perma.cc/W3BQ-JZD9); NOAA, *Analysis of Microplastics in Chesapeake Bay and Coastal Mid-Atlantic Water Samples*, National Oceanic and Atmospheric Association Marine Debris Program (2011), https://marinedebris.noaa.gov/research/analysis-microplastics-chesapeake-bay-and-coastal-mid-atlantic-water-samples (https://perma.cc/S5UV-Y83R); Lance T. Yonkos, et al., *Microplastics in Four Estuarine Rivers in the Chesapeake Bay, U.S.A.*, Environ. Sci. Technol. (Nov. 12, 2014), https://pubs.acs.org/doi/10.1021/es5036317 (https://archive.is/J5jog).

[60] Ana Sosa, *A Deeper Dive into Baltimore Harbor: Scientists take a closer look at the tiny particles living in the murky waters*, Sea Grant Maryland (Aug. 5, 2019), https://www.mdsg.umd.edu/fellowship-experiences/deeper-dive-baltimore-harbor-scientists-take-closer-look-tiny-particles (https://perma.cc/ZG65-FSXR).

[61] Aaron Curry, Carl Latkin, & Melissa Davey-Rothwell, *Pathways to depression: The impact of neighborhood violent crime on inner-city residents in Baltimore, Maryland, USA,* Social Science & Medicine (2008), https://pubmed.ncbi.nlm.nih.gov/18396366 (https://perma.cc/Q56Q-XUXS).

atmosphere of disorder and an absence of safety, often leading to citizens suffering from a decreased life satisfaction, as well as an actual increased risk of stress, anxiety, and depression.[62] The lack of control over litter, and the never-ending presence of litter, can invoke feelings of hopelessness about the prospects for their city.[63] Due to the present plastic pollution all over Baltimore, Defendants' plastics negatively impact the mental health of its citizens.

C. DEFENDANTS' MISLEADING STATEMENTS, DECEPTIVE PRACTICES, AND FAILURE TO WARN

55. Defendants have long been aware of their plastics' harm to the environment and public health, as well as their individual contributions to the magnitude of that harm. Plastic pollution has been a prominently examined and discussed issue for decades. Indeed, studies began reporting on the accumulation of plastics in rivers, landfills, and sewers and flowing into other water bodies as early as 1972.[64]

56. Some Defendants, as a result of their awareness of the plastics pollution issue, have even ballyhooed initiatives that claimed to curb the harm generated by their plastic waste production, in an effort to appear "climate-conscious."[65] The hollow nature of this public relations effort is revealed by their continued production of single-use plastic products and plastic packaging, plus their lack of follow-through with these initiatives.

57. For example, PepsiCo has characterized the problem as a "plastic pollution crisis," expressly acknowledging that its own plastic packaging often ends up as waste on land or in water

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[62] *Id.*

[63] Tara L. Bennett, *Perceived Health Effects of Litter and Trash by Inner City Residents*, Ohio State University (2012), http://hdl.handle.net/1811/51932 (https://perma.cc/D7AE-XGU2).

[64] Edward J. Carpenter & K.L. Smith, *Plastics on the Sargasso Sea surface*, Science (1972), https://doi.org/10.1126/science.175.4027.1240 (https://archive.is/tOaB3).

[65] *Brand Audit*, Break Free From Plastic (2022), https://brandaudit.breakfreefromplastic.org/wp-content/uploads/2022/11/BRANDED-brand-audit-report-2022.pdf (https://perma.cc/GK6Q-L654).

bodies with, to quote PepsiCo's euphemistic terminology, "potential environmental impacts." PepsiCo's website describes its acknowledgement that "packaging is often improperly disposed of after a product has been consumed, and **we share the concern** that plastics and other wastes **are accumulating in the marine environment and on land**."[66] Coca-Cola has also acknowledged that the world has a "packaging waste problem,"[67] and the company acknowledges that it has a responsibility to help solve the global plastic waste crisis.[68]

58. Obviously, Defendants' affirmation of the plastics crisis, and their acknowledgement of their role in it, establishes their continued knowledge of how their plastic products and packaging are harming the environment, including Baltimore.

59. Even setting aside such public acknowledgements, Defendants have been on notice for decades about the dangers of their products and their effects on the environment and public. They also know how to stop the pollution. They simply refuse to do so.

60. Defendants know, of course, that their consumers continue to discard their plastic packaging after a single use, but Defendants continue to produce millions of metric tons of single-use plastics. None of this plastic packaging is reusable, and only a tiny fraction is recycled. The inevitable result is that most of it is littered, with significant quantities discarded into the environment of American cities, including Baltimore.

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[66] *PepsiCo Recycling and Sustainability Initiatives*, PepsiCo, https://contact.pepsico.com/pepsico/article/pepsico-recycling-and-sustainability-initiatives (emphasis added) (https://archive.is/TG2Hq).

[67] *What is Coca-Cola Doing to Reduce Plastic Waste?*, The Coca-Cola Company, https://www.coca-cola.ca/faqs/coca-cola-faqs-enviroment/what-is-coca-cola-doing-to-reduce-plastic-waste (https://perma.cc/AC7X-UHYL).

[68] *World Without Waste – Sustainable Packaging*, The Coca-Cola Company, https://www.coca-colacompany.com/sustainability/packaging-sustainability (https://perma.cc/9QHV-4MQR).

61. Defendants know that their plastic packaging will be disposed of after a single use, so they intentionally designed and manufactured it to facilitate that use. Defendants knowingly created products that cannot be recycled. Because they are involved in all the manufacturing of their own plastic packaging, they make their plastics in the state in which they are distributed—which is not recyclable. Defendants thus knowingly and intentionally manufactured many of their plastics in forms that are unrecyclable.

i. False Statements

62. Despite Defendants' awareness of the limits of recycling as a solution to the plastic pollution crisis, Defendants have continued to falsely portray recycling as a practical solution. In fact, the plastics industry has known about the growing ocean plastics problem since at least the 1950s, yet has continued to ramp up production, consistently branding plastic as environmentally safe, recyclable, benign to humans, and essential to the modern way of life.[69]

63. Despite their false claims, Defendants know that recycling cannot provide a solution for the disposal of plastic food packaging, because it is made with multiple layers of plastics, metals, and other non-recyclable materials. Further, although plastic bottles manufactured by Defendants are potentially recyclable, the large majority are not, and Defendants know it.

64. Faced with increasing plastic waste, recycling systems are now overwhelmed and rendered ineffective against Defendants' flood of plastic production. Only 9% of plastic produced

[69] *Fueling plastics: Plastic industry awareness of the ocean plastics problem*, CIEL (2017), https://www.ciel.org/wp-content/uploads/2017/09/Fueling-Plastics-Plastic-Industry-Awareness-of-the-Ocean-Plastics-Problem.pdf (https://perma.cc/3VBH-XGMX); *Why we suddenly have a plastics crisis*, Three Worlds (2017), http://threeworlds.campaignstrategy.org/?p=1764 (https://perma.cc/P7QT-9W7T).

since 1950 has been properly recycled.[70] Even worse, 79% of plastic ends up either in landfills or in the environment, including the streets and waters of Baltimore.[71]

65. Though Defendants have publicly acknowledged the futility of current recycling practices for their plastic packaging and products, Defendants continue to falsely tout recycling as a viable solution to the plastic pollution crisis in Baltimore and elsewhere. All Defendants thus falsely promulgate recycling programs as an efficacious method to curb their contributions to plastic pollution.[72]

66. Defendants' false narrative has a long history. The Center for Climate Integrity released a report in February 2024 called *The Fraud of Plastic Recycling* (**Exhibit A**).[73] The report details the expansive history of lies and deceit engaged in by the oil and plastics industries to cover up the truth about plastics' danger to the environment and to the public health, in order to maintain the ability to manufacture and sell the products to residents of cities like Baltimore.

67. Recycling plastic has never been a viable solution to the plastics crisis. Defendants have known this truth despite stating the exact opposite for decades. The issue stemmed from the facts that what is commonly called "plastics" is in fact a combination of related synthetic polymers, rather than one single material.[74] Two different types of plastic cannot be recycled together.[75] Even

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[70] *Talking Trash: The Corporate Playbook of False Solutions to the Plastic Crisis*, Talking Trash (Sept. 2020), https://talking-trash.com/wp-content/uploads/2020/08/TalkingTrash_ExecutiveSummary.pdf (https://perma.cc/7VPZ-9WM9).

[71] *Id.*

[72] *Brand Audit*, Break Free From Plastic (2022), https://brandaudit.breakfreefromplastic.org/wp-content/uploads/2022/11/BRANDED-brand-audit-report-2022.pdf, (https://perma.cc/LQA7-CCW9) at 18-19.

[73] Davis Allen, et al., *The Fraud of Plastic Recycling*, Center for Climate Integrity (Feb. 2024), https://climateintegrity.org/uploads/media/Fraud-of-Plastic-Recycling-2024.pdf (https://perma.cc/V388-XZKM).

[74] *Id.* at 8.

[75] *Id.*

worse, a single plastic product may include various additives, making it impossible to recycle on its own. For this reason, the plastics industry knew, and even acknowledged, that the economics of plastic recycling were, and are, "virtually hopeless," all the way back in 1969.[76]

68. In 1974, one industry insider wrote: "There is serious doubt that [recycling plastic] can ever be made viable on an economic basis."[77] This is because there are several major challenges associated with recycling: cost, sorting, processing, cleaning, etc. In spite of this knowledge, the plastics industry has chosen to hide these facts, in order to maintain the lie that recycling is an efficient and workable solution for plastic pollution.[78]

69. Plastics companies, including Defendants, adopted this course because they had no incentive to support a recycling scheme that could undercut the demand for their virgin plastics.[79] This lack of incentive continues today, as Defendants' monetary success relies on consumers purchasing new plastic products and not on creating a market for recycled plastics. In the words of a previous industry insider and recycling expert, Defendants regarded recycling as "internal competition. They don't want to see it succeed."[80]

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[76] Thomas B. Becnel, *Wastes from Plastic Packages, in First National Conference on Packaging Wastes: Proceedings*, Sept. 22-24, 1969, 85, 87 (1971) (https://perma.cc/U9G6-JGXH).

[77] Laura Sullivan, *How Big Oil Misled The Public Into Believing Plastic Would Be Recycled*, NPR (Sept. 11, 2020), https://www.npr.org/2020/09/11/897692090/how-big-oil-misled-the-public-into-believing-plastic-would-be-recycled (https://perma.cc/46ES-8MW3).

[78] *Id.*

[79] Davis Allen, et al., *The Fraud of Plastic Recycling*, Center for Climate Integrity (Feb. 2024), https://climateintegrity.org/uploads/media/Fraud-of-Plastic-Recycling-2024.pdf, (https://perma.cc/US8J-CDC2) at 9.

[80] Elisabeth M. Kirschner, Recycling's Rough Adolescence, C&E News 20 (Nov. 4, 1996), https://p2infohouse.org/ref/30/29449.pdf (https://perma.cc/6ZCH-HZDJ).

70. For decades, Defendants have nonetheless claimed to the customers, including the residents of Baltimore, that plastic products are recyclable. But, as they have known since the 1970s, recycling their products is "practically impossible."[81]

71. Each Defendant claimed, and continues to claim, to produce plastic products that are infinitely recyclable. However, not only are most single-use plastics not recyclable at all (food wrappers), but other single-use plastics that Defendants claim to be recyclable (PET bottles) are not recyclable in practical terms. Even if properly recycled, Defendants' plastics get worn down and degraded quickly to a point where they are unusable for their manufactured purpose.[82] This means that Defendants' claims of recyclability are false because their claimed "recyclable" material has a quite limited number of cycles it can be put through before it must be trashed. Simply put, Defendants claim that their plastics are "recyclable" is a fraudulent statement upon which the City relied.

72. Rather than admit this from the beginning, Defendants and the entire Plastics Industry doubled down and publicly advertised that plastics could be recycled over and over again. For example:[83]

[81] Laura Sullivan, *Recycling plastic is practically impossible — and the problem is getting worse*, NPR (Oct. 24, 2022), https://www.npr.org/2022/10/24/1131131088/recycling-plastic-is-practically-impossible-and-the-problem-is-getting-worse (https://perma.cc/292V-BJV5).

[82] *Id.*

[83] National Association for Plastic Container Recovery, A Bottle That Can Come Back for New Year's Eve is a Cause for Thanksgiving, Ladies Home Journal 92 (Dec. 1991) (on file with CCI #4805.1) (advertisement).

73. The Plastics Industry heavily publicized the false viability of recycling, successfully putting the responsibility of plastics pollution on to the consumer and tricking the public into believing plastics would be routinely recycled. However, with an ever-increasing awareness of the dangers of plastic pollution and microplastics, Defendants' lies are coming back to bite them.

74. Defendants have done nothing to change their practice of making and promoting false claims. Even with alternatives to single-use plastic being readily available, Defendants continue to churn out millions of metric tons of plastic each year, rather than implement programs that would dramatically reduce their plastic footprint in Baltimore and end their contamination of its sidewalks, roads, and waterways.

ii. Deceptive Practices

75. Defendants have acknowledged their role in the plastics pollution crisis, and the ever-increasing consumer criticism of Defendants as the source of plastics pollution. In response, each Defendant put forward supposed "initiatives" to combat that pollution, and even advertised themselves as environmentally friendly. However, these initiatives and advertisements do not tell the truth about Defendants.

76. Defendants publicly claim that they have set long-term goals of sustainability, created effective recycling programs, and are moving towards a "circular economy"[84] to minimize waste. These representations are knowingly false.

77. In the 1970s, the plastic industry's impact on the solid waste crisis became apparent to the public. It was at this point that the industry realized it needed to something to alter public perception of their products while maintaining their production and profits.

78. Defendant Pepsi, for example, announced in 2019 that it would reduce the total amount of "virgin" plastic used by 35%, by 2025.[85] Shortly after, however, PepsiCo ceased to publish its progress toward this 2019 beverage bottle objective, and instead substituted a **new** goal for reducing virgin plastic: by 50%, by 2030.[86] By making public declarations for sustainable

[84] A "circular economy" is defined as a system that "is regenerative by design and aims to gradually decouple growth from the consumption of finite resources." *Concept: What is a circular economy? A framework for an economy that is restorative and regenerative by design*, Ellen MacArthur Foundation, https://www.ellenmacarthurfoundation.org/the-circular-economy-in-detail-deep-dive#:~:text=A%20circular%20economy%20is%20a,the%20consumption%20of%20finite%20resources (https://perma.cc/67NQ-NBWZ).

[85] *PepsiCo Accelerates Plastic Waste Reduction Efforts*, PR Newswire (Sept. 13, 2019), https://www.prnewswire.com/news-releases/pepsico-accelerates-plastic-waste-reduction-efforts-300917771.html (https://perma.cc/6QPH-V7K8).

[86] *PepsiCo Introduces New Packaging Goal Doubling Down on Scaling Reusable Packaging*, PepsiCo (Dec. 5, 2022), https://www.pepsico.com/our-stories/press-release/pepsico-introduces-new-packaging-goal-doubling-down-on-scaling-reusable-packagin12052022 (https://archive.is/fI4bL).

initiatives and then failing to actually implement any methods to reach them, PepsiCo intentionally misled the public in Baltimore into believing that its products are "sustainable" and that its business is "environmentally friendly." PepsiCo thereby is able to reap the profits from announcing such initiatives while pushing back the projected completion date, which it never planned to meet in the first place. Meanwhile, the residents of Baltimore have purchased millions of dollars of Defendants' products and the City's public works department has had to spend millions to clean up Defendants' products.

79. Defendant Coca Cola has done the same thing, by claiming it can achieve a "circular economy,"[87] and publishing objectives to curb its contributions to plastic pollution, while simultaneously failing to meet them. Lying the City of Baltimore and its citizens about these products is a marketing strategy designed to boost sales of its products.

80. As would be expected, these Defendants' plastic productions have actually **increased** over the past few years which, of course, directly contradicts their promises to be sustainable[88] or to reduce the production of virgin plastics by 2025 or 2030.[89] Coca-Cola production goes up every year. Coca-Cola produces over 3.2 million metric tons of plastic each

[87] *Moving Toward a Circular Economy*, The Coca-Cola Company (Oct. 9, 2018), https://www.coca-colacompany.com/media-center/moving-toward-a-circular-economy (https://perma.cc/KL9K-DJ77); *World Without Waste – Sustainable Packaging*, The Coca-Cola Company, https://www.coca-colacompany.com/sustainability/packaging-sustainability (https://perma.cc/8356-DF4L).

[88] *Sustainability at Grace*, W.R. Grace, https://grace.com/sustainability/; *Sustainability and Environmental Impact*, Mercury Plastics Inc. in Maryland, https://mercuryplasticsmd.com/about/#values (https://perma.cc/56BM-9MYR); *Sustainability*, Polymershapes Baltimore, https://www.polymershapes.com/sustainability/ (https://perma.cc/84E9-AMSJ).

[89] *Brand Audit*, Break Free From Plastic (2022), https://brandaudit.breakfreefromplastic.org/wp-content/uploads/2022/11/BRANDED-brand-audit-report-2022.pdf (https://perma.cc/4ZB4-YE4X), at 18-19.

year.[90] So does PepsiCo, which produces 2.5 million metric tons of plastic each year.[91] A large quantity of these products ends up in the City.

81. The other Defendants also publicize their environmentally friendly business practices and sustainability values, to deceive the public about the real danger of their plastic production.[92] They continue to supply, distribute, and manufacture single-use plastics and plastic products that negatively impact the environment and health of the City and its citizens, at a cleanup cost to the City running into the millions of dollars each year.

82. Instead of putting actual plans in place to reduce their plastic pollution, Defendants spend their money on advertisements that give the false impression of sustainability, in order to keep their sales and profits high. For example, in 2019, Coca-Cola invested $4.24 billion in advertising and marketing alone.[93] In comparison, Coca-Cola spent $11 million to help fund a river cleanup initiative the same year, [94] less than 0.03% of its marketing budget.

83. Defendants spend millions on "greenwashing" rather than simply making changes to the way their products are packaged or distributed to customers. All Defendants are pursuing the same strategy. Each tells its customers that it is a sustainable company, while doing nothing to

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[90] *Id.* at 18.

[91] *Id.*

[92] *Sustainability at Grace*, W.R. Grace, https://grace.com/sustainability/ (https://perma.cc/Y2PM-TBBQ); *Sustainability and Environmental Impact*, Mercury Plastics Inc. in Maryland, https://mercuryplasticsmd.com/about/#values (https://perma.cc/VN3X-5HWM); *Sustainability*, Polymershapes Baltimore, https://www.polymershapes.com/sustainability/ (https://perma.cc/LVJ5-NYSJ).

[93] *Coca-Cola Spent $4.24bn for Advertising in 2019, $20bn in the Last 5 Years*, Focus on Business (Mar. 5, 2020), https://focusonbusiness.eu/en/news/coca-cola-spent-4-24bn-for-advertising-in-2019-20bn-in-the-last-5-years/3404 (https://perma.cc/3VG5-UNBP).

[94] *Benioff Ocean Initiative and the Coca Cola Foundation Announce $11 Million in Funding to Clean Up River and Stem Flow of Waste to Oceans*, The Coca-Cola Company (Jan. 15, 2020), https://www.coca-colacompany.com/media-center/benioff-ocean-initiative-and-the-coca-cola-foundation-announcement (https://perma.cc/R4CT-32W2).

alter the nature of their production and distribution which continues to harm and pollute the streets and waterways of Baltimore and elsewhere.

iii. Failure to Warn

84. Defendants have also failed to warn the public about the danger that their plastic packaging presents, misrepresenting to Baltimore residents that Defendants' efforts to combat the climate crisis were both real and effective. Defendants have known of the negative effects of plastic pollution as well as the ubiquitous littering of their products in Baltimore for decades. Despite this knowledge, Defendants have done nothing to abate their products' deleterious effects on the public and environmental health through warnings to the public.

85. Defendants failed to warn or give any notice to the City that their plastic packaging was a major source of plastic pollution and would cause serious harm to the health of humans and the environment and that it would cost the City millions of dollars a year to remove their plastics from the City's land and waters. Despite knowing all these dangers, and the farce of their so-called "initiatives," including virtually non-existent recycling, Defendants even failed, at minimum, to warn consumers that their packaging is a source of plastic pollution that causes harm to human health and the environment.

86. Defendants did not make such a warning because they knew that they would lose profits if consumers were aware that the products they purchased contributed to plastic pollution.[95]

[95] *PepsiCo Annual Report 2022*, PepsiCo (2022), https://www.annualreports.com/HostedData/AnnualReportArchive/p/NYSE_PEP_2022.pdf (https://perma.cc/8FM3-2ZJQ) at 12; Coca-Cola https://investors.coca-colacompany.com/filings-reports/annual-filings-10-k/content/0000021344-23-000011/0000021344-23-000011.pdf (https://perma.cc/X3FJ-3XA3), at 12; W.R. Grace Annual Report 2023, W.R. Grace (2023), https://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE_GRA_2020.pdf (https://perma.cc/84F6-VQJ2).

Due to these financial concerns, Defendants actively continue to avoid properly warning the public about the dangerous nature of its products to the environment and human health.

D. THE CITY'S LOSSES AND DEFENDANTS' HARM TO THE CITY'S COMMUNITIES, NATURAL RESOURCES, AND PUBLIC HEALTH

87. Plastic litter interferes with the City's use of its property. An exorbitant amount of plastic packaging and products are littered along the City's sidewalks, streets, waterways, and other public areas. Plastic litter, including in the form of microplastics and nanoplastics, is endemic in Baltimore.[96] The presence of plastics and microplastics negatively impacts the public health of communities and neighborhoods, their environment, and citizens' health. Citizens are continually forced to observe and interact with plastics pollution throughout their daily activities. Plastic pollution is an ugly nuisance and, due to its sheer quantity and ubiquity, is impossible to fully clear from the public areas in Baltimore despite daily, costly litter collection by the City's Public Works Department.

88. In addition, the presence of plastic pollution throughout Baltimore presents an "unclean" appearance to the City. This consequently impacts tourism and the City's tax revenue by tarnishing the aesthetic appeal of Baltimore and thereby substantially reduces the City's income and increases its costs. Littered plastic in front of businesses negatively impacts their profitability and therefore the taxes they pay the City. In a recent study, 98% of businesses surveyed stated that "the presence of litter lowered property values and had a negative impact on business sales."[97] The result is millions of dollars in reduced revenues to the City from property taxes each year.

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[96] Ana Sosa, *A Deeper Dive in Baltimore Harbor: Scientists take a closer look at the tiny particles living in the murky waters*, Sea Grant Maryland (Aug. 5, 2019), https://www.mdsg.umd.edu/fellowship-experiences/deeper-dive-baltimore-harbor-scientists-take-closer-look-tiny-particles (https://perma.cc/Y4AP-QEYS).

[97] John E. Schneider, et al., *Online Simulation Model to Estimate the Total Costs of Tobacco Product Waste in Large U.S. Cities*, Int'l J. of Envi. Research and Public Health 1, 3 (June 30, 2020), https://pubmed.ncbi.nlm.nih.gov/32629929 (https://perma.cc/4M4T-GNL5).

89. Plastics litter costs the City millions of dollars in clean-up expenses each year. Nationwide, the vast majority of plastics is thrown away rather than recycled.[98] Plastics disposal in Baltimore is no exception. Because Defendants have purposely manufactured plastics in ways that either limit or prevent their ability to be reliably recycled, and have also refused to implement reliable recycling mechanisms for their own plastics products, management of plastics waste has become extremely difficult for the City.

90. Trash disposal is provided by the Baltimore City Department of Public Works. Just during the time that Mr. Trash Wheel™ has been in operation, the City has spent more than $32 million on collecting and disposing of litter into landfills.[99]

91. The City has put forth multiple initiatives and methods to reduce plastics pollution and litter generally, including the recent "Clean Corps" initiative which will spend $14.7 million cleaning up Defendants' products in East, West and South Baltimore.[100] The City has, for more than a decade, tried numerous campaigns and community initiatives to reduce plastic waste in the City. They each have a positive effect for a brief time, and then the community is inevitably overwhelmed again by the onslaught of Defendants' plastic products. Most recently, in 2020, the Baltimore City Comprehensive Bag Reduction Act was signed into law.[101] It bans single-use

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[98] Only 9% of plastic waste is recycled. 15% is collected for recycling, but 40% of that amount is disposed as residues. OECD, *Plastic Pollution is growing relentlessly as waste management and recycling fall short, says OECD*, OECD (Feb. 22, 2022), https://www.oecd.org/newsroom/plastic-pollution-is-growing-relentlessly-as-waste-management-and-recycling-fall-short.htm (https://perma.cc/S95X-GBU6).

[99] *Id.*

[100] Adam Willis, *Baltimore kicks off $15 million Clean Corps, paying residents to clean their neighborhoods*, The Baltimore Banner (Feb. 6, 2023), https://www.thebaltimorebanner.com/politics-power/local-government/baltimore-kicks-off-15-million-clean-corps-paying-residents-to-clean-their-neighborhoods-RVMI6KTLDFGCLNYUCXHVTYOGZ4/ (https://perma.cc/HHH2-4APH).

[101] *Comprehensive Bag Reduction*, City of Baltimore Ordinance 20.337, Council Bill 19-0401 (details available here: https://www.baltimoresustainability.org/projects/bringyourbag https://perma.cc/HQ97-ANU8).

plastic bags at the point of sale, pickup, or delivery, and requires a fee for other types of bags. Despite the City's and its citizens' desire for a litter-free City, plastics pollution remains an intractable problem due to Defendants' incessant production and distribution in Baltimore.

92. Due to the sheer quantity of Defendants' plastics production, the City must expend resources on managing disposal receptacles, mechanical street sweeping, manual cleanup, storm drain and sewer clean out, and water treatment processes. These expenditures include the cost of the administration and labor of these clean-up procedures. The City has spent, and continues to spend, millions of dollars, simply to clear sewage and drainage pipes of clogs created by this massive litter of Defendants' products.

93. The City further expends its scarce resources on litter deterrence and abatement that includes posting signs indicating fines for littering, increasing of public awareness through billboards and radio/television broadcasting, plus law enforcement time, energy, and manpower to fine for littering.[102] Instead of spending this money on matters of public safety, i.e., community law enforcement and fire departments, the City must spend its funds cleaning up Defendants' plastic pollution and disposing of the ever-increasing onslaught of Defendants' products.

94. According to past scientific estimates, the annual cost to the City for the partial clean-up of Defendants' products ranges from $5,299,099 to $5,391,325, but the actual cost is now much larger, and increasing rapidly.[103]

95. From 2018 to 2022 the City spent:

a. $62,861,662 of General Funds, Stormwater Utility Funds, and Casino Funds to clean streets and alleys;

[102] Schneider, *supra* note 98, at 4.

[103] *Id*.

b. $1,992,171 on Trash Wheels, including:

i. $16,189 of General Funds on Trash Wheels;

ii. $1,738,958 of Casino Funds on Trash Wheels;

iii. $237,570 of General Funds on Waterfront Partnership Trash Wheel Support;

c. $32,126,030 to clean sidewalks and walkways, including:

i. $9,027,500 of General Funds on Business District cleaning;

ii. $23,098,530 of General Funds and Stormwater Utility Funds on mechanical sweeping operations; and

d. $1,881,572 of Stormwater Utility funds to clean drains; and

e. Tens of millions of dollars to maintain landfills.

96. Thus from 2018 to 2022, the City spent more than $100M on cleaning streets, waterways, alleys, walkways, sidewalks, and drains, 70% of which was spent cleaning up Defendants' products.

97. In addition, from 2023 to 2025, the City will spend approximately $80M on cleaning streets, waterways, alleys, walkways, sidewalks, and drains.

98. Moreover, plastic litter combines with other trash and debris leading to clogged and broken pipes, as well as the ever-more-frequent floods in the City's neighborhoods.[104] This damaged City property must be replaced by the City, at great additional costs that increase every fiscal year.

[104] *The Effects of Litter on the Environment and Communities*, https://globalconservationforce.org/news-updates/litter-environment-communities/ (https://perma.cc/9RTG-Z9TE) (internal citations omitted).

99. The costly cleanup and disposal problem created by Defendants' products is only the tip of Defendants' plastic iceberg. Indeed, there are far more insidious consequences for citizens of Baltimore and its government. The list of additional economic problems caused by Defendants' litter and trash is extensive. Numerous studies have shown that when litter is present, people are more likely to continue littering in that same area.[105] When litter exists, people perceive there to be more crime in that area compared to a place that does not have litter.[106] Researchers have found that the presence of Defendants' littered products actually increases crime.[107] In residential areas, Defendants' litter decreases property values, and in commercial areas it decreases customers and reduces sales.[108] Plastic litter dramatically reduces the value of neighborhoods in Baltimore. The properties of the citizens of Baltimore, whether occupied, vacant, or abandoned, are forced into a cycle of devaluation which has spurred a mass migration from the City.[109] This worsening reduction in the residential and business population has reduced the City's tax base by tens of millions of dollars.[110] Yet Defendants, whose plastic products are a major cause of this abandonment of the City, continue to project ever-increasing sales.

100. Lastly, plastic pollution has devastated Baltimore tourism. The Inner Harbor once attracted tens of thousands of tourists every year. Baltimore and its citizens relied on that tourism

[105] *Id.* (internal citations omitted).

[106] *Id.* (internal citations omitted).

[107] *Id.* (internal citations omitted).

[108] *Id.* (internal citations omitted).

[109] Adam Thompson, Cristina Mendez & Paul Gessler, *Multi-billion dollar plan to solve Baltimore's vacant homes crisis disclosed*, CBS News (Dec. 11, 2023), https://www.cbsnews.com/baltimore/news/baltimore-mayor-to-announcement-partnership-to-combat-vacant-homes-crisis/ (https://perma.cc/ET3E-J73V).

[110] *Id.*

to bring in revenue, boost the local economy, and generate taxes for the City. The ugly presence of Defendants' plastics pollution deters tourism.[111]

CLAIMS FOR RELIEF

COUNT I
VIOLATION OF THE MARYLAND ILLEGAL DUMPING AND LITTER CONTROL LAW

101. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

102. The Maryland Illegal Dumping statute provides criminal penalties and fines against any person who disposes or causes or allows the disposal of litter on public or private property, unless the property is designated by the State, a unit of the State, or a political subdivision of the State, for the disposal of litter, and the person is authorized by the proper public authority to use the property, or the litter is placed into a litter receptacle or container installed on the property. Md. Criminal Law Code Ann. § 10-110. Attached as **Exhibit B**.

103. The Maryland statute further states that "'[l]itter means all rubbish, waste matter, garbage, trash, debris, dead animals, or other discarded materials of every kind and description." *Id.* at § 10-110 (a)(4).

104. Defendants' actions and omissions, including the release and migration of plastic into and onto Baltimore City lands, violate that statute and constitute unlawful littering as defined by, and in violation of, § 10-110.

105. Maryland has a criminal sanction clause for violations of the Illegal Dumping and Litter Control Law within § 10-110(e) that states "[a] person who disposes of litter in violation of

[111] The Trash Wheels and the Public Works Department do their best with resources available to them, but they simply cannot stem the massive incoming tide of Defendants' plastic products.

this section . . . is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding" the following, under subsection (c) below:

a. "[f]or an amount not exceeding 100 pounds or 27 cubic feet and not for commercial gain . . . 30 days or a fine not exceeding $1,500 or both."
b. "[f]or an amount exceeding 100 pounds or 27 cubic feet, and not for commercial gain exceeding 500 pounds or 216 cubic feet, and not for commercial gain . . . 1 year or a fine not exceeding $12,500 or both."
c. "[f]or an amount exceeding 500 pounds or 216 cubic feet or in any amount for commercial gain . . . 5 years or a fine not exceeding $30,000 or both." (Emphasis added). *Id.*

106. Each Defendant has far exceeded this amount and is subject to the cumulative maximum fines since their plastic littering began, and continuing until their violations cease.

107. In addition to the criminal penalties under the statute, the Maryland statute authorizes a court order requiring the violator to "remove or render harmless the litter disposed of, repair or restore any property damaged by, or pay damages for, the disposal of the litter, perform public service relating to the removal of litter disposed of or to the restoration of an area polluted by litter disposed of, or reimburse the state, county, municipal corporation, or by county unit for its costs incurred and removing the litter disposed of in violation of the section." *Id*. (emphasis added).

108. Defendants are responsible for their litter that permeates Baltimore. Under this statute, a person may not, "[d]ispose or **cause or allow** the disposal of litter on public or private property . . . ." *Id*. (emphasis added).[112]

109. Defendants have known for decades the disastrous impact that their massive, unrelenting production of plastic products would have on all American cities, including Baltimore, and, as expected, their products continue to permeate every community in Baltimore. Defendants

[112] *Id.* at § 10-110(c)(2).

did not utilize alternative programs or materials or even tell the public the truth about the harm, through littering, their plastics would cause. Defendants knew for more than forty years that their plastics are disposed of after a single use, and it is impossible to recycle sufficiently to stop plastic accumulation in Baltimore. This knowledge of the obvious pollution caused by discarded plastics put Defendants on notice that their plastics would accumulate on the streets and in the soil and waterways of Baltimore and would have to be cleaned up and disposed of, at great cost, by Plaintiff.

110. Defendants had scienter. They knew when they created and sold their non-recyclable products by the billions that their products would be littered and disposed of in a non-sustainable way. In an attempt to cover up their criminal acts, they lied to the City and its citizens. The unlawful acts and omissions resulting in plastics contaminating the City's lands and waters, have violated, are currently violating, and will continue into the indeterminable future to violate, the Maryland statute and, thus, Defendants are subject to fines for each past, present, and future statute violation until the violations cease.

111. Wherefore, Plaintiff prays for relief as set forth below.

COUNT II
VIOLATION OF THE BALTIMORE CITY CODE §§ 7-606 AND 7-607

112. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

113. The Baltimore City Code prohibits any person from disposing waste or other material except in a receptacle and at a location approved by law for waste disposal, at a licensed landfill, or at any other disposal site authorized by law to receive waste. Baltimore City Revised Code at § 7-606. Attached as **Exhibit C**.

114. The Baltimore City Code defines "person" as "an individual"; "a receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind"; or "a partnership, firm, association, corporation, or other entity of any kind." *Id.* at § 1-108(a).

115. The Baltimore City Code also prohibits disposal of, and does not permit "discharge or flow onto any public or private property, with or without the owner's permission," of "any liquid or solid matter that is or that, after exposure to the atmosphere or otherwise, **is likely to become offensive or otherwise a nuisance**." *Id.* at § 7-607 (emphasis added).

116. The Baltimore City Code defines disposing of "offensive materials" as applying to these, among others: "blood," "refuse coal oil," "dead animal or part of an animal," "domestic or sanitary sewage," "excrement," "filth," "foul or nauseous liquid," "**garbage**," "slaughterhouse or other trade cleanings," "stagnant water," or "other **offensive matter of any kind**." *Id.* at § 5-902(b) (emphasis added).

117. Defendants' actions and omissions, including the release and migration of plastic into and onto City lands, constitute unlawful disposal as defined by, and in violation of, § 7-607.

118. Baltimore City has a criminal sanction clause for violations of the Baltimore City Code within § 7-632, which authorizes a basic penalty of a fine not more than $1,000 and imprisonment for not more than ninety days for any person who violates any provision of this subtitle or who authorizes any employee or agent to violate any provision of the subtitle, and an enhanced penalty of a fine not more than $1,000, imprisonment for not more than twelve months, and revocation of the privilege of seeking a building permit in the City for any violation that entails the disposal, in any twenty-four-hour period, of material that weighs twenty-five or more pounds or material that comprises of ten or more cubic feet. *Id.* at § 5-910.

119. Defendants' unlawful acts and omissions, resulting in the plastic contaminating the City's lands and waters, have violated, are currently violating, and will continue into the indeterminable future to violate the asformentioned Baltimore City Code and, thus, Defendants are subject to fines for each past, present, and future statute violation until the violations cease.

120. Defendants knew that their plastic products would, and still do, violate this section of the Baltimore City Code. Even with this knowledge, Defendants lied to the residents of Baltimore City by claiming that their products were recyclable. The residents of Baltimore relied on Defendants' misrepresentations and continue to purchase their products and dispose of them on the streets and in the waters of the City.

121. Wherefore, Plaintiff prays for relief as set forth below.

COUNT III
VIOLATION OF THE BALTIMORE CITY CODE § 7-608

122. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

123. The Baltimore City Code further prohibits dumping on public property. As to public property, "[n]o person may dump or dispose of any garbage, waste, wire, glass, nails, or any other matter: (1) in or on any gutter, sidewalk, street, open space, wharf, or other public place; or (2) into any public trash receptacle located on or along any sidewalk, street, open space, wharf, or other public place." *Id.* at § 7-608.

124. The Baltimore City Code defines "person" as "an individual"; "a receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind"; or "a partnership, firm, association, corporation, or other entity of any kind." *Id*. at § 1-108(a).

125. The Baltimore City Code defines disposing of "offensive materials" as applying to these, among others: "blood," "refuse coal oil," "dead animal or part of an animal," "domestic or

sanitary sewage," "excrement," "filth," "foul or nauseous liquid," "**garbage**," "slaughterhouse or other trade cleanings," "stagnant water," or "other **offensive matter of any kind**." *Id*. at § 5-902(b) (emphasis added).

126. Defendants' actions and omissions, including the release and migration of plastics into and onto City lands, constitute unlawful disposal as defined by, and in violation of, § 7-608.

127. Baltimore City has a penalty clause for violations of the Baltimore City Code within § 7-628 which states that "[a]ny person who, in violation of section 7–608 of this subtitle or in violation of any other provision of the law, dumps or otherwise disposes of matter in or on property owned, leased, or controlled by the City is liable to the City for the costs of: (1) removing the matter dumped or disposed of; and (2) repairing any damage caused by the dumping or disposal." *Id*. at § 7-628.

128. Defendants' unlawful acts and omissions, resulting in the plastic contaminating the City's lands and waters, have violated, are currently violating, and will continue into the indeterminable future to violate, the asformentioned Baltimore City Code and, thus, Defendants are subject to fines for each past, present, and future statute violation until the violations cease.

129. Defendants knew that their plastic products would, and still do, violate this section of the City Code. Even with this knowledge, Defendants lied to the residents of Baltimore by claiming that their products were recyclable. The residents of Baltimore relied on Defendants' misrepresentations and continue to purchase their products and dispose of them on the streets and in the waters of the City.

130. Wherefore, Plaintiff prays for relief as set forth below.

COUNT IV
VIOLATION OF THE BALTIMORE CITY CODE § 7-609

131. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

132. The Baltimore City Code further prohibits dumping on private property. For private property, "[n]o person may dump or otherwise dispose of any earth, dirt, sand, ashes, gravel, rocks, **garbage, waste**, or any other matter on any private property, including in or near any waste receptacle on the property, without the permission of **the property owner or the owner's agent**." *Id.* at § 7-609 (emphasis added).

133. The Baltimore City Code defines "person" as "an individual"; "a receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind"; or "a partnership, firm, association, corporation, or other entity of any kind." *Id*. at § 1-108(a).

134. The Baltimore City Code defines disposing of "offensive materials" as applying to these, among others: "blood," "refuse coal oil," "dead animal or part of an animal," "domestic or sanitary sewage," "excrement," "filth," "foul or nauseous liquid," "**garbage**," "slaughterhouse or other trade cleanings," "stagnant water," or "other **offensive matter of any kind**." *Id*. at § 5-902(b) (emphasis added).

135. Defendants' actions and omissions, including the release and migration of plastics into and onto the City's lands, constitute unlawful disposal as defined by, and in violation of, § 7-609.

136. Baltimore City has a criminal penalty clause for violations of the Baltimore City Code within § 7-632, which provides for a basic penalty of a fine not more than $1,000 and imprisonment for not more than ninety days for "any person who violates any provision of this subtitle or who authorizes any employee or agent to violate any provision of the subtitle," and an

enhanced penalty of a fine not more than $1,000, imprisonment for not more than twelve months, and revocation of the privilege of seeking a building permit in the City for any violation that entails "the disposal, in any 24-hour period, of material that weighs 25 or more pounds or material that comprises of 10 or more cubic feet . . . ." *Id*. at § 7-632.

137. Defendants' unlawful acts and omissions, resulting in the plastic contaminating the City's lands and waters, have violated, are currently violating, and will continue into the indeterminable future to violate, the asformentioned Baltimore City Code and, thus, Defendants are subject to fines for each past, present, and future statute violation until the violations cease.

138. Defendants knew that their plastic products would, and still do, violate this section of the City Code. Even with this knowledge, Defendants lied to the residents of Baltimore by claiming that their products were recyclable. The residents of Baltimore relied on Defendants' misrepresentations and continue to purchase their products and dispose of them on the streets and in the waters of the City.

139. Wherefore, Plaintiff prays for relief as set forth below.

COUNT V
VIOLATION OF THE BALTIMORE CITY CODE § 7-702

140. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

141. The Baltimore City Code prohibits a person from littering on any public or private property and does not permit the accumulation of litter on any property under that person's control. *Id.* at § 7-702.

142. The Baltimore City Code defines "person" as "an individual"; "a receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind"; or "a partnership, firm, association, corporation, or other entity of any kind." Id. at § 1-108(a).

143. The Baltimore City Code defines littering as: "to discard or otherwise dispose of, in any way other than as authorized by § 7-601 of this title, of **small amounts of paper**, beverage containers, glass, garbage, or other waste that: (1) weight **less than 1 pound**; (2) comprise less than 1 cubic foot; and (3) are **not toxic, noxious, or otherwise a threat** to the public health or safety." *Id.* at § 7-701 (emphasis added).

144. Defendants' actions and omissions, including the release and migration of plastics into and onto the City's lands, constitute unlawful litter as defined, and in violation of, § 7-702.

145. The Baltimore City Code has a penalty section, § 7-706, which states "[a]ny person who violates this subtitle is guilty of a misdemeanor and, on conviction, is subject to a fine of $500 for each offense, and that "**[e]ach day a violation continues is a separate offense**." *Id.* at § 7-706 (emphasis added).

146. Defendants' unlawful acts and omissions resulting in the plastic contaminating the City's lands and waters, have violated, are currently violating, and will continue into the indeterminable future to violate, the asformentioned Baltimore City Code and, thus, Defendants are subject to fines for each past, present, and future statute violation.

147. Defendants knew that their plastic products would, and still do, violate this section of the City Code. Even with this knowledge, Defendants lied to the residents of Baltimore by claiming that their products were recyclable. The residents of Baltimore relied on Defendants' misrepresentations and continue to purchase their products and dispose of them on the streets and in the waters of the City.

148. Wherefore, Plaintiff prays for relief as set forth below.

COUNT VI
VIOLATION OF BALTIMORE CITY ORDINANCE 23-0424

149. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

150. The Baltimore City Ordinance prohibits unfair, abusive, or deceptive trade practices in the sale, or offer for sale, of any consumer good, realty, or service. Baltimore City Ordinance at § 4-2. Attached as **Exhibit D**.

151. The Ordinance establishes civil penalties against persons or entities who violate the ordinance. *Id.* at § 4-3. Penalties include a civil penalty of not more than $1,000. Each violation counts as a separate offense and each day where a violation continues constitutes a separate offense.

152. The Ordinance also establishes criminal penalties against persons or entities who violate the ordinance. *Id.* at § 4-4. A person who violates this ordinance is guilty of a misdemeanor and, upon conviction, is subject to a fine of not more than $1,000. Each violation counts as a separate offense and each day where a violation continues constitutes a separate offense.

153. The Ordinance authorizes the City Solicitor, on behalf of the Mayor and City Council, to take action if there is reason to believe a person or merchant is engaging in practices that violate the ordinance. *Id.* at § 4-5(A).

154. The plastics manufacturers engaged in deceptive practices in the conduct of their business, trade, and/or commerce in the City, in violation of the Ordinance in the course of manufacturing, selling, distributing, promoting, and/or marketing single-use plastics or products packaged in single-use plastic.

155. The plastics manufacturers violated the Ordinance through omissions of warning about known and foreseeable risks of the intended use and foreseeable discarding of their plastic products. The City relied on these manufacturers' lack of a warning to the detriment of the health of the environment and of its citizens.

156. Defendants are presumed to have knowledge of the City's Code. Defendants established operations in, and directly interacted with, the City and knew that their manufacturing, production, and distribution activities would result in plastic pollution on City property.

157. Defendants knew that their plastic products would, and still do, violate this section of the City Code. Even with this knowledge, Defendants lied to the residents of Baltimore by claiming that their products were recyclable. The residents of Baltimore relied on Defendants' misrepresentations and continue to purchase their products and dispose of them on the streets and in the waters of Baltimore.

158. Wherefore, Plaintiff prays for relief as set forth below.

COUNT VII
VIOLATION OF MARYLAND CONSUMER PROTECTION ACT

159. The Maryland Consumer Protection Act ("MCPA"), Annotated Code of Maryland Subtitle 3 § 313-301, prohibits unfair and deceptive trade practices.

160. MCPA § 13-301(1) defines an unfair or deceptive trade practices as a false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers. Md. Code Ann., Com. Law § 13-301(1). Attached as **Exhibit E**.

161. MCPA § 13-301(3) of the MCPA defines an unfair or deceptive trade practice as a failure to state a material fact if the failure deceives or tends to deceive. Md. Code Ann., Com. Law § 13-301(3) (2010).

162. In the process of producing, selling, distributing, promoting, and/or marketing products, such as beverages and snack foods in single-use plastic packaging, Defendants engaged in deceptive practices in the conduct of business, trade, and/or commerce in Baltimore, in violation of MCPA. This included purposely omitting warnings or notice about the known and foreseeable risks that result from the intended use and foreseeable misuse of its plastic products.

163. Defendants used intentionally false and misleading statements and other representations that had the capacity to deceive or mislead consumers concerning the dangers of plastic usage. Defendants also failed to state material facts about the harms of plastic usage in order to deceive or mislead the public and continue profiting from consumers.[113] The City relied on these manufacturers' lack of a warning to the detriment of the health of the environment and of its citizens.

COUNT VIII
CONTINUING TRESPASS

164. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

165. Defendants knew with substantial certainty at the time of their manufacture and sale of plastics, and then with their disposal and littering of these products and wastes, that such activities were likely, if not certainly, to result in contamination of the City's lands and waters.

[113] Md. Code Ann., Com. Law §13-301(1)-(3).

166. Defendants' conduct as described constitutes a continuing trespass upon City property, that is, a continuing invasion in and of the exclusive possession and control of the City's lands and waters.

167. Defendants' conduct caused, and continues to cause, permanent harm to and seriously damage the property values and utility of City property, thereby causing the City to, upon information and belief, lose millions of dollars in sales and property tax for decades.

168. Upon information and belief, the City has incurred, and will incur in the future, massive costs to investigate, monitor, evaluate, abate, clean up, and remediate Defendants' plastic litter.

169. As a result of Defendants' conduct, the City has suffered, is suffering, and will continue to suffer damages to the public interest, economy, lands, and creditors.

170. Wherefore, Plaintiff prays for relief as set forth below.

COUNT IX
STRICT LIABILITY FOR DESIGN DEFECT

171. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

172. Defendants' plastics were unsafe for the environment as designed.

173. The risk of danger to the environment is inherent in the design of Defendants' plastics.

174. Alternatively, Defendants knew their plastics would litter the City's property to an extent beyond that which would be contemplated by an ordinary person.

175. The plastics and their toxins reached the City's lands and water without any substantial change in condition from when they left the control of Defendants.

176. Defendants manufactured plastics and/or placed those plastics into the stream of commerce, and owed a duty not to market and distribute any product which is unreasonably dangerous for its intended or reasonably foreseeable uses.

177. Defendants, and each of them, formulated, designed, manufactured, packaged, distributed, tested, constructed, fabricated, analyzed, recommended, merchandised, advertised, promoted, and/or sold plastics and/or products inside plastic packaging, which were intended by Defendants, and each of them, to be purchased and used in public places within Baltimore and to become litter in Baltimore.

178. Defendants, and each of them, heavily marketed, promoted, and advertised products in plastic packaging, which were sold and used by the general public. Defendants received direct financial benefit from using plastics in their sales. Defendants had control over, and a substantial ability to influence, the manufacturing and distribution processes that led to the plastic littering of the streets of Baltimore. Defendants intentionally misrepresented to the residents of Baltimore that their products were recyclable when they knew that they were not.

179. Defendants, and each of them, knew that their plastic and its toxins lack the ability decompose and would persist in the environment perpetually, rendering them defective and unreasonably dangerous to the flora and fauna of Baltimore.

180. Throughout the time at issue, plastics have not performed as safely as an ordinary consumer would expect them to, and have been unreasonably dangerous for their intended, foreseeable, and ordinary use, because their use damages the environment and costs the City millions of dollars in cleanup costs. In particular, ordinary consumers did not, and do not, expect that plastics would:

a. pollute waterways;

b. contaminate the public water supply;

c. permanently contaminate the soil and groundwater;

d. be ingested by humans; and

e. cost the City millions of dollars in cleanup costs and reduce tax revenue.

181. The above-described defects were beyond the knowledge of an ordinary consumer, and neither the City nor any ordinary consumer could have avoided the harm caused by Defendants' plastic products by the exercise of reasonable care.

182. Defendants' individual and aggregate plastic products and packaging were defective at the time of manufacture and reached the consumer in a condition substantially unchanged from the time of manufacture; were used in the manner in which they were intended to be used, or in a manner foreseeable to Defendants and each of them, by individual consumers; and the result was the addition of millions of plastics into the City's environment with attendant local consequences.

183. Defendants' unreasonably dangerous plastics and toxins caused the permanent and increasing presence of litter in Baltimore and damage to the public interest, including a massive threat to the economic health of Baltimore.

184. As a direct and proximate result of the acts and omission of each Defendant, Plaintiff Mayor and City Council of Baltimore have sustained and will sustain substantial loses and damages as set forth in this Complaint, including damage to publicly owned infrastructure and real property, and injuries to public resources that interfere with the economic viability of the City.

185. On information and belief, each Defendant has substantially contributed to the ongoing massive littering of public and private property in the City according to each Defendants' percentage of the total sales and distribution of plastics and products in plastic packaging in the

City. Accordingly, each Defendant is responsible to reimburse the City for its percentage of the cleanup costs and other losses sustained, and projected to be sustained, by the City as a result of the plastic litter for which each Defendant is responsible.

186. Defendants' wrongful conduct as set forth herein was committed with actual malice. Defendants had actual knowledge that their products were defective and dangerous when used as intended or in a foreseeable manner, in that they were not biodegradable, and acted with conscious disregard for the probable deleterious consequences of their conduct and their products' foreseeable economic impact upon the property of others, including the City of Baltimore.

187. Moreover, Defendants misrepresented to the City and its residents that their plastic products were recyclable when they knew they were not. The City and its residents relied on this information from Defendants. Therefore, the City requests an award of punitive damages in an amount reasonable, appropriate, and sufficient, given each Defendants' net worth and the illicit profits obtained by each Defendant from its misconduct, to punish each Defendant for its acts impacting Baltimore City, for the good of society, and to deter each Defendant, as well as others, from ever committing the same or similar acts.

188. Wherefore, Plaintiff prays for relief as set forth below.

COUNT X
NEGLIGENT DESIGN DEFECT

189. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

190. Defendants' plastics and plastic packaging constituted an unreasonably dangerous design at the time they left their control.

191. Defendants' plastics were unsafe to the environment as designed.

192. The risk of danger to the environment inherent in the design of Defendants' plastics drastically outweighed any perceived benefits of the design of such products when such products were put to reasonably foreseeable uses.

193. Alternatively, Defendants knew their plastic products were unsafe to the environment to an extent beyond that which would be contemplated by an ordinary person.

194. Defendants knew or should have known of the environmental and public health effects inherently caused by the normal use and operation of their plastic products, because they knew the products were nonbiodegradable and unrecyclable, including the likelihood that discarded plastics would contaminate the soil and groundwater, hamper plant growth, pollute waterways, deteriorate critical aquatic habitats such as seagrass and reef ecosystems, poison pets, wildlife and fish if ingested, be ingested by humans, and the associated consequences of those physical and environmental changes, and including injuries to Plaintiff's natural resources, as described herein.

195. Defendants, collectively and individually, had a duty to use due care in developing, designing, testing, inspecting, manufacturing and distributing their plastic products. That duty obligated Defendants collectively and individually to, *inter alia*, prevent the defective products from entering the stream of commerce, and prevent reasonably foreseeable harm that resulted from the ordinary and/or reasonably foreseeable use of Defendants' products.

196. Defendants, and each of them, breached their duty of due care by, *inter alia*:

a. Placing their single-use plastics into the stream of commerce, despite knowing them to be defective due to the fact that they are nonbiodegradable and they inevitably would be discarded into the environment and contaminate the soil and groundwater, hamper plant growth, pollute waterways, deteriorate critical aquatic habitats and

ecosystems, and poison pets, wildlife and fish if ingested, be ingested by humans, and the associated consequences stated in this Complaint of those physical and environmental changes;

b. Failing to act on the information and warnings they received from their own internal research staff, as well as from the international scientific community, that the unabated manufacture, promotion, sale, and distribution of their plastics would result in material dangers to the City and its citizens and destroy natural resources; and

c. Failing to take actions including, but not limited to, designing, manufacturing and selling biodegradable plastics and telling the truth to residents of Baltimore City about the health and safety dangers that would occur from purchase and distribution of their plastic products in Baltimore.

197. Defendants' individual and collective acts and omissions were actual, substantial causes of contaminated soil and groundwater, hampered plant growth, polluted waterways, deteriorated critical aquatic habitats, and poison pets, wildlife and fish if ingested, be ingested by humans, and the associated consequences of those physical and environmental changes, including harm and injuries set forth herein to the City and its natural resources, as these damages would not have occurred but for Defendants' introduction of their plastics into the stream of commerce.

198. As a direct and proximate result of the acts and omission of each Defendant, Plaintiff Mayor and City Council of Baltimore has sustained and will sustain substantial expenses and damages as set forth in this Complaint, including damage to publicly owned infrastructure and real property, and injuries to public resources that interfere with the rights of Baltimore City.

199. Wherefore, Plaintiff requests an award of damages against each of Defendants as they are jointly and separately liable for all of its losses sustained prays for relief as set forth below.

COUNT XI
PUBLIC NUISANCE

200. Defendants manufactured, distributed, marketed, promoted, and attempted the disposal of plastics in a manner that created or contributed to the creation of public nuisances that unreasonably have obstructed the free use and enjoyment of the City's property.

201. Defendants, individually and in concert with each other, by their affirmative acts and omissions, have created, contributed to, and/or assisted in creating, conditions that significantly interfere with rights general to the public, including the public safety, the public peace, the public comfort, and the public convenience.

202. An ordinary person would be reasonably annoyed or disturbed by the presence of plastics accumulated on City property.

203. The nuisance created and contributed to by Defendants is substantial and unreasonable. It has caused, continues to cause, and will continue to cause far into the future, significant harm to the environment as alleged herein and that harm outweighs any offsetting benefit. The health and safety of Baltimore's environment is a matter of great public interest and of legitimate concern to the City.

204. Defendants' conduct caused and continues to cause permanent harm and serious damage to the property values and utility of the residential and commercial properties in the City by increasing crime and decreasing the real estate property value and commercial sales, thereby causing the City to, upon information and belief, lose, and spend, millions of dollars in tax revenue for decades.

205. Defendants specifically created, contributed to, and/or assisted, and/or were a substantial contributing factor in the creation of the public nuisance by, *inter alia*:

a. Controlling every step of the plastics supply chain: the design, manufacture, marketing sale, and distribution of those plastics and products in plastic packaging and placement of those products into the stream of commerce in Baltimore; and

b. Affirmatively and knowingly promoting the sale and use of products which Defendants knew to be hazardous to the City's environment and that their product would cost the City millions of dollars in cleanup costs and reduce the City's revenue.

206. Because of their superior knowledge of plastic and their position controlling the design, manufacture, marketing, sale, and distribution of those products, Defendants were in the best position to prevent or abate the nuisance, but failed to do so, by failing to warn customers, retailers, regulators, public officials, or the City of the permanent litter risk posed by their plastics and failing to take any other precautionary measures to prevent or mitigate those known damages.

207. The public nuisance caused, contributed to, maintained, and/or participated in by Defendants has caused and imminently threatens to cause massive losses to the City. The public nuisance has also caused a substantial reduction in value of real property owned by the City for the cultural, historic, and economic benefit of Baltimore's residents.

208. The seriousness of contaminated soil and groundwater, hampered plant growth, polluted waterways, deteriorated critical aquatic habitats, and poisoned pets, wildlife and fish when ingested, was ingested by humans, and the associated consequences of those environmental damages, is grave and outweighs the social utility of Defendants' conduct because, *inter alia*:

a. Interference with the City's rights due to contaminated soil and groundwater, hampered plant growth, polluted waterways, deteriorated critical aquatic habitats, and poisoned pets, wildlife, and fish, ingestion by humans, and the associated consequences of those physical and environmental damages as described above, has caused material deprivation of and/or interference with the use, enjoyment, and value of public and private property in Baltimore;

b. The ultimate nature of the damages is the destruction of real and personal property, loss of public cultural, historic, and economic resources, rather than mere annoyance;

c. The interference borne is the loss of property, infrastructure, and public resources within the City, which is borne by the City's loss of value of public and private property and infrastructure; loss of cultural, historic, and economic resources, and diversion of tax dollars away from other public services to provide mitigation of Defendants' plastic litter;

d. The City's property, which serves myriad uses including residential, infrastructural, commercial, historic, cultural, and ecological, is not suitable for its intended use because it is littered with Defendants' plastics and the associated environmental consequences;

e. The social "benefit" of manufacturing and placing plastics into the stream of commerce, if any, is heavily outweighed by the availability of alternative plastic products or recyclable plastics that could have been placed into the stream of commerce that would not have caused the environmental consequences as described herein;

f. The social "benefit" of manufacturing and placing plastic into the stream of commerce, if any, is outweighed by the ability to manufacture and produce recyclable plastics that could have been placed into the stream of commerce that would not have caused the environmental consequences as described herein;

g. The cost to the City of the plastic littered in its environment is far more harmful and costly than the manufacturing and producing of recyclable plastic; and

h. It was practical for Defendants, and each of them, considering their extensive knowledge of the hazards of manufacturing and placing plastics into the stream of commerce and extensive scientific engineering expertise, to develop technologies and to pursue and adopt known, practical, and available technologies, such as biodegradable or recyclable plastic, that would have avoided the toxic plastic epidemic and the associated environmental consequences on Baltimore City.

209. Defendants' actions are the overwhelming causative factor in the unreasonable violation of the public rights of Baltimore City and its residents as set forth above, because Defendants knew that their conduct would create a continuing litter problem with long-lasting significant negative effects on the rights of Plaintiff, and absent Defendants' conduct the violations of Plaintiff's rights described herein would not have occurred.

210. Defendants misrepresented to the citizens of Baltimore that their plastic products were recyclable, in order to increase sales and profits, despite their knowledge that their products were not recyclable and that they would cause many millions of dollars to the City for cleanup and reduce the City's revenue in the numerous ways alleged in this Complaint.

211. Defendants are under a continuing duty to act to correct, abate, and remediate the public nuisances their plastics have had, and continue to have, caused, and each day on which they fail to do so constitutes a new loss to the City and a violation of its litter laws as set forth above.

212. Defendants' wrongful conduct as set forth herein was committed with actual malice. Defendants knew that their products were defective and dangerous when used as intended or in a foreseeable manner, and yet still acted with conscious disregard for the obvious disastrous consequences of their conduct and their products' imminently foreseeable impact upon the rights of others, including Baltimore City. Therefore, the City requests an award of punitive damages in an amount reasonable, appropriate, and sufficient, given each Defendants' net worth and the illicit profits obtained by each Defendant from its misconduct, to punish each Defendant for its acts impacting Baltimore City, for the good of society, and to deter each Defendant, as well as others, from ever committing the same or similar acts.

213. The City seeks an order that provides for the immediate abatement of the public nuisance Defendants have created, enjoins Defendants from creating future nuisances, through their littering, and awards Baltimore City damages in an amount to be determined at trial. The City pursues these remedies in its sovereign capacity for the benefit of the general public.

214. Wherefore, Plaintiff prays for relief as set forth below.

COUNT XII
STRICT LIABILITY FAILURE TO WARN

215. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

216. Defendants' plastic products were not reasonably safe at the time they left their control because they lacked adequate warnings and/or instructions concerning the dangers and hazards of their plastics.

217. Defendants, and each of them, at all times were required to issue adequate warnings to the City, the public, consumers, and public officials of the reasonably foreseeable or knowable severe risks posed by the inevitable use and litter of their defective and dangerous plastic products when used as intended or in a foreseeable manner.

218. Defendants knew, based on information passed to them and/or from the scientific community, of the environmental consequences inherently caused by the normal use and operation of their plastics, including the likelihood that discarded plastics would contaminate the soil and groundwater, hamper plant growth, pollute waterways, deteriorate critical aquatic habitats and ecosystems, poison pets, wildlife and fish if ingested, be ingested by humans, and the associated consequences of those physical and environmental changes, including the City's losses as described herein.

219. Defendants were required to warn of and instruct Plaintiff about these dangers but failed to do so, and intentionally concealed information in order to maximize profits for decades and externalize the cleanup costs, causing continuing losses to the City.

220. Throughout the period at issue, Defendants failed to adequately warn Plaintiff or Defendants' consumers of the environmental consequences that would inevitably flow from the intended use of their plastics.

221. Defendants continue to conceal the dangers to the environment of plastics after they manufactured, distributed, marketed, promoted, sold, and distributed plastic and products in plastic packaging in Baltimore.

222. Given the grave dangers presented by the environmental consequences that inevitably flow from the expected use of plastics, a reasonable designer, manufacturer, marketer, seller, distributor, or other participant responsible for introducing plastics into the stream of

commerce, including Baltimore, would have warned the City of those known, inevitable environmental consequences.

223. Defendants' conduct was and is a direct and proximate cause of Plaintiff's losses and the primary factor in the damages suffered by Plaintiff as alleged herein.

224. As a direct and proximate result of the acts and omission of each Defendant, Plaintiff Mayor and City Council of Baltimore has sustained and will sustain substantial losses and damages as set forth in this Complaint, including damage to publicly owned infrastructure and real property, and damages to public resources that have, and will continue to, interfere with the rights of the City.

225. Defendants' wrongful conduct as set forth herein was committed with actual malice. Defendants knew that their products were defective and dangerous when used as intended or in a foreseeable manner and yet acted with conscious disregard for the probable disastrous consequences of their conduct and their products' foreseeable impact upon the rights of others, including the City. Therefore, the City requests an award of punitive damages in an amount reasonable, appropriate, and sufficient, given each Defendants' net worth and the illicit profits obtained by each Defendant from its misconduct, to punish each Defendant for its acts impacting Baltimore City, for the good of society, and to deter each Defendant, as well as others, from ever committing the same or similar acts.

226. Wherefore, Plaintiff prays for relief as set forth below.

COUNT XIII
NEGLIGENT FAILURE TO WARN

227. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

228. Defendants, and each of them, at all times had a duty to issue adequate warnings to the City, the public, consumers, and public officials of the reasonably foreseeable or knowable severe risks posed to the environment by the daily use and litter of their plastics.

229. Defendants were required to warn of and instruct the City about these dangers of their products but failed to do so, and negligently failed to timely reveal the information in order to avoid a reduction in profits for decades while causing losses of revenue and increasing cleanup costs to the City.

230. Defendants knew or should have known, based on information passed to them and/or from their scientific community, of the environmental consequences inherently caused by the normal use of their plastic products, including the likelihood that discarded plastic would contaminate the City's soil and groundwater, hamper plant growth, pollute waterways and the public water supply, deteriorate critical aquatic habitats and environments and poison pets, wildlife and fish if ingested, be ingested by humans, plus the associated economic consequences of those environmental impacts, including the City's damages as described herein.

231. Defendants should have known, based on information passed to them and/or from the scientific community, that the environmental consequences described herein rendered their plastic products dangerous, and/or likely to cause damage to the City, when used as intended or in a reasonably foreseeable manner.

232. Throughout the times at issue, Defendants breached their duty of care by failing to adequately warn the City of the environmental consequences that would inevitably flow from the intended use of their plastic products.

233. Given the probable losses presented by the environmental consequences that inevitably flow from the normal use of plastics, a reasonable designer, manufacturer, marketer,

seller, distributor or other participant responsible for introducing plastics into the stream of commerce, would have warned the City of those known, inevitable environmental consequences and financial losses.

234. Defendants' conduct was a direct and proximate cause of Plaintiff's losses and the primary factor in the damages suffered by Plaintiff as alleged herein.

235. As a direct and proximate result of the acts and omission of each Defendant, Plaintiff Mayor and City Council of Baltimore has sustained and will sustain substantial costs and losses as set forth in this Complaint, including damage to publicly owned infrastructure and real property, and damages to public resources that interfere with the property rights of the City.

236. Wherefore, Plaintiff prays for relief as set forth below.

COUNT XIV
NEGLIGENCE

237. Plaintiff realleges each and every allegation contained above, as though set forth in full herein.

238. As reasonable designers, manufacturers, marketers, sellers, and distributors of plastics, Defendants, and each of them, at all times owed a duty of care to the City not to place into the stream of commerce a product that was in a defective condition and unreasonably dangerous to the City's environment, including with reference to the likelihood that discarded plastics would litter the City's streets, sidewalks, parks, and lawns, contaminate the soil and groundwater, and contaminate its waterways, reservoirs, and public water supply.

239. Defendants breached this duty by negligently designing, formulating, manufacturing, distributing, selling, supplying, and/or marketing unreasonably dangerous plastic products into the stream of commerce even when they knew or should have known about the dangers plastics pose to the City's environment, including the likelihood that discarded plastic

would litter the City's streets, sidewalks, parks, and lawns, contaminate the soil and groundwater, and contaminate its waterways, reservoirs, and public water supply.

240. As a direct and proximate result of the acts and omission of each Defendant, the City has incurred and will continue to incur damages due to the plastic contamination caused by Defendants' products.

241. Defendants knew or should have known that the acts and omissions described above would cause injury to the City's environment, including the likelihood that discarded plastics would litter the City's streets, sidewalks, parks, and lawns, contaminate the soil and groundwater, and contaminate its waterways, reservoirs, and public water supply.

242. Defendants' wrongful conduct as set forth herein was committed with actual malice. Defendants knew that their products were defective and dangerous when used as intended or in a foreseeable manner and yet acted with conscious disregard for the probable disastrous consequences of their conduct and their products' foreseeable impact upon the rights of others, including the City. Therefore, the City requests an award of punitive damages in an amount reasonable, appropriate, and sufficient, given each Defendants' net worth and the illicit profits obtained by each Defendant from its misconduct, to punish each Defendant for its acts impacting Baltimore City, for the good of society, and to deter each Defendant, as well as others, from ever committing the same or similar acts.

243. Wherefore, Plaintiff prays for relief as set forth below.

PRAYER FOR RELIEF

243. Wherefore, Plaintiff respectfully requests the Court to award:

a. Compensatory damages in an amount sufficient to pay for the losses, past, present, and future, for damage to Baltimore City's infrastructure, land and natural

resources, including the economic impact to the City from the loss of its environmental health, and other losses resulting from the conduct alleged herein, including, but not limited to, the loss of value in the City's properties, the loss of tax, sales, and licensing revenue to the City resulting from Defendants' actions and omissions, plus the costs to the City of cleaning up and disposing of Defendants' litter, past, present, and future;

b. Equitable relief, including investigation, abatement, remediation, and removal of the nuisances complained of herein;

c. Criminal penalties, including, but not limited to, fines consistent with Maryland law and the Baltimore City Code for each and every separate offense, past, present, and ongoing;

d. Punitive damages in an amount reasonable, appropriate, and sufficient, given each Defendants' net worth and the illicit profits obtained by each Defendant from its misconduct, to punish each Defendant for its acts impacting Baltimore City, for the good of society, and to deter each Defendant, as well as others, from ever committing the same or similar acts;

e. Injunctive relief in the form of Court Orders mandating the immediate and complete abatement and remediation of all City property befouled or damaged by plastic litter;

f. Disgorgement of profits;

g. Plaintiff's attorneys' fees and costs of suit; and

h. For such and other relief as the court may deem proper.

Respectfully submitted,

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DEMAND FOR JURY TRIAL

Plaintiff, the Mayor and City Council of Baltimore, demands a trial by jury on all claims so triable.

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February 3, 2025

VIA ONLINE SUBMISSION

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Email: shareholderproposals@sec.gov

Re: Shareholder Proposal to PepsiCo, Inc. Regarding Plastic Pollution on Behalf of Michael E. Monteiro 2016 Rev Trust and Co-Filers

Ladies and Gentlemen:

Michael Monteiro 2016 Rev Trust (the "Proponent"), a beneficial owner of common stock of PepsiCo, Inc. (the "Company" or "PepsiCo"), has submitted a shareholder proposal (the "Proposal") asking the Company to report on how PepsiCo could address flexible plastic packaging to reduce its contribution to plastic pollution. The Proponent has designated *As You Sow* to act as its representative with respect to the Proposal, including responding to the Company's December 30, 2024 "No Action" letter (the "Company Letter").

The Company Letter contends that the Proposal may be excluded from PepsiCo's 2025 proxy statement under Rule 14a-8(i)(7) because the Proposal relates to the Company's ongoing litigation strategy and therefore would affect the conduct of this litigation. The Company's arguments would expand the limited exclusion for litigation-focused proposals well past its breaking point, effectively allowing issuers to exclude any proposal even tangentially relating to a topic on which an issuer could point to existing or potential litigation. The rule is not so broad, and the Company should not be permitted to exclude this Proposal on a significant policy issue simply because tangentially related litigation exists.

A copy of this letter is being emailed to the Company's counsel concurrently with its submission to the Commission's online shareholder proposal portal.

SUMMARY

The basis of Rule 14a-8(i)(7)'s exclusion for litigation-related proposals is to prevent proposals that seek to intrude upon management's prerogative to control the strategy and conduct of ongoing litigation, either directly or by requiring actions plainly inconsistent with the defense of that litigation, including requesting information that would constitute material admissions of core matters at issue in the litigation.

The Proposal here does not attempt to direct the Company's litigation conduct in any manner whatsoever. Nor does it require the Company to make any admissions that would harm it in litigation. Rather, it seeks a forward-looking assessment of how the Company's use of plastic packaging aligns with the global plastic reduction goals set forth in the Pew Report, or similar authorities, and how the Company can reduce its plastic pollution. The Proposal does not seek to

address past actions at issue in the litigation; does not ask the Company to make disclosures that would impact the litigation; and does not ask for anything that would constitute a material admission in the litigation. The Proposal therefore fits well within the boundaries established by Staff precedent and does not support exclusion of the proposal under these circumstances.

The Company's argument goes well beyond the narrow litigation rule, suggesting that the Proposal is excludable merely because it "relate[s] to the very same subject matter as" lawsuits against the company—plastic packaging. Company Letter at 12. The Company's attempt to rewrite the standard to prevent any proposal that relates to the "same subject matter" of litigation is a vast overreach that would swallow the actual rule and prevent shareholders from addressing most critical issues of future risk that could affect a company's success and value.

THE PROPOSAL

WHEREAS: Without immediate and sustained new commitments throughout the plastics value chain, annual flows of plastics into oceans could nearly triple by 2040.[1]

The growing plastic pollution crisis poses increasing risks to PepsiCo Inc Corporations could face an annual financial risk of approximately $100 billion should governments require them to cover the waste management costs of packaging they produce.[2] Governments around the world are increasingly enacting such policies, including five new state laws that impose fees on corporations for single-use plastic (SUP) packaging.[3] The European Union has banned ten SUP pollutants and taxed some non-recycled plastic packaging.[4] A French law requires 10% of packaging be reusable by 2027 and Portugal requires 30% reusable packaging by 2030.[5] Additionally, consumer demand for sustainable packaging is increasing.[6]

Pew Charitable Trusts' groundbreaking study, *Breaking the Plastic Wave* ("Pew Report"), concluded that improved recycling alone is insufficient to address plastic pollution—instead, recycling must be coupled with reductions in use, materials redesign, and substitution.[7] The Pew Report finds that the greatest opportunity to reduce or eliminate plastic lies with flexible plastic packaging, often used for chips, sweets, and condiments among other uses, and virtually unrecyclable in America. With innovation, redesign, and substitution, 26 million metric tons of flexibles can be avoided globally.[8]

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[1] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.4
[2] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.9
[3] https://www.packworld.com/sustainable-packaging/recycling/article/22922253/ameripen-shares-key-lessons-from-early-epr-adopters
[4] https://environment.ec.europa.eu/topics/plastics/single-use-plastics_en
[5] https://www.greenpeace.org/international/story/51843/plastics-reuse-and-refill-laws
[6] https://www.shorr.com/resources/blog/the-2022-sustainable-packaging-consumer-report/
[7] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.9
[8] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.51; https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.51

The Pew Report finds that reducing plastic use is the most viable solution from environmental, economic, and social perspectives, yet broad corporate and stakeholder alignment on flexible packaging solutions is lacking.[9]

Despite its stated commitments to sustainable packaging, more than 18% of PepsiCo's packaging remains in flexibles.[10] Our Company is behind in its 2025 goals for reusable packaging, recyclable packaging in practice and at scale, and plastic reduction—increasing plastic use by more than 5% since 2020.[11] In the absence of immediate action to eliminate flexibles by robustly engaging in research and expansion of reusable packaging, PepsiCo is on track to fail to meet its 2025 packaging goals.

Our Company could avoid regulatory, environmental, and competitive risks by adopting a comprehensive approach to addressing flexible plastic packaging use at scale.

RESOLVED: Shareholders request that the Board issue a report, at reasonable expense and excluding proprietary information, describing how PepsiCo could address flexible plastic packaging in alignment with the findings of the Pew Report, or other authoritative sources, to reduce its contribution to plastic pollution.

SUPPORTING STATEMENT: The report should, at Board discretion:

- Assess the reputational, financial, and operational risks associated with continuing to use non-recyclable plastic packaging while plastic pollution grows;
- Evaluate actions to achieve fully recyclable packaging including elimination and accelerated research into innovative reusable substitution; and
- Describe opportunities to pre-competitively work with peers to research and develop reusable packaging as an alternative to single-use packaging.

ANALYSIS

I. Rule 14a-8(i)(7) Standard

Rule 14a-8(i)(7) permits the exclusion of proposals based on ongoing litigation only in rare circumstances. The exclusion recognizes that the *conduct* of ongoing litigation is an ordinary business issue, and that attempts to *direct* litigation strategy necessarily micromanage a company, regardless of the social significance of the issue the proposal concerns. Thus, the Staff has consistently upheld a narrow exclusion under Rule 14a-8(i)(7) for proposals that seek to direct litigation strategy.

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[9] https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf, p.10; https://emf.thirdlight.com/link/pqm3hmtgpwtn-dwj3yc, p.22
[10] https://gc-data.emf.org/2024/detail?cid=pepsico
[11] https://gc-data.emf.org/2024/detail?cid=pepsico

Proposals excluded under this Rule include relatively obvious attempts to direct the conduct of the company and its counsel in ongoing litigation. For example, in *Exxon Mobil Corp.* (Mar. 21, 2000), the Staff concurred in the exclusion of a proposal requesting that the company immediately settle legal claims related to an oil spill. Many of the precedents cited by the Company fall into this category of relatively obvious intrusions on strategy and so are irrelevant here. *E.g., Exxon Mobil Corp., supra* (proposal directed company to settle ongoing litigation); Chevron *Corp.* (Mar. 19, 2013) (proposal requested company review "legal initiatives against investors"); *Reynolds American Inc.* (Mar. 7, 2007) (proposal requested company detail legal options available to minors to ensure their environments are secondhand smoke-free); *AT&T Inc.* (Feb. 9, 2007) (proposal requested that company disclose, *inter alia*, its past legal expenditures on litigation related to disclosure of customer data to FBI without warrant); *Philip Morris Cos. Inc.* (Feb. 4, 1997) (proposal requested company voluntarily implement certain FDA regulations while simultaneously challenging the legality of those regulations).

A less obvious exclusion involves proposals that seek disclosures which will constitute retroactive admissions of past conduct directly related to claims in ongoing lawsuits. Such proposals are excludable because they, too, effectively constitute efforts to direct a company's litigation strategy by requiring a company to admit to liability in ongoing litigation. For example, in *Amazon.com, Inc. (N.Y. City Teachers' Ret. Sys.)* (Apr. 7, 2021), cited in the Company Letter, the proposal requested that the company report on the adequacy of its COVID safety precautions at the same time as the company was defending the adequacy of those precautions in court. The vast majority of the precedents cited in the Company Letter fall into this category. *E.g., Chevron Corp. (Sisters of St. Francis of Philadelphia)* (Mar. 30, 2021) (proposal requested, *inter alia*, that company "assess [its] long-term cumulative contributions to climate change and disparate impacts on the health of communities of color" while company was defending against lawsuits seeking to assign it liability for climate harm to communities of color); *Walmart Inc.* (Apr. 13, 2018) (proposal requested, *inter alia*, that company assess risks to it associated with public policies relating to equal pay, *i.e.*, that the company assess and admit to legal liability, while company was defending against numerous equal pay-related lawsuits); *General Elec. Co.* (Feb. 3, 2016) (proposal requested that company assess all potential sources of liability related to discharges in Hudson River while company was defending lawsuits related to discharges in Hudson River); *Johnson & Johnson (Strausberg)* (Feb. 14, 2012) (proposal requested that company disclose initiatives undertaken specifically to address injuries of "people harmed by adverse effects from" one of company's products while company was denying existence of adverse effects in ongoing litigation); *Reynolds American Inc.* (Feb. 10, 2006) (proposal requested that company notify Black Americans of unique health risks to them associated with menthol cigarettes, while company was denying said health risks in pending litigation).

The "admissions"-related exclusion is necessarily extremely limited. Public companies, especially large ones, are always under the threat of litigation concerning any topic on which shareholders might seek to have input. While every disclosure a company makes concerning such a topic might prove tenuously useful for plaintiffs in any such litigation, the Staff has been careful to limit its precedents involving such requests to situations like those cited above, in which: (a) litigation on the *specific* subject matter of the proposal already exists in which the

company is a defendant,[1] and (b) the proposal would "require[e] the company to do something that is pointedly inconsistent with defense of litigation, including reporting undisclosed information that is at the heart or crux of the litigation, such as admitting to liability or fault." *Johnson & Johnson (Ritter)* (Mar. 3, 2022) (Proponent's Letter at 3). By contrast, if the proposal does not seek to force the company to admit liability, it does not seek to *direct the company's litigation strategy*, and it is not excludable, even if the company argues that the disclosure might in some way tangentially relate to the ongoing litigation or "potentially make some non-core admission or information available for plaintiffs." *Id.*

For example, in *Johnson & Johnson (Ritter), supra*, the proposal requested that the company "discontinue global sales of its talc-based Baby Powder" in part due to "recognition of the social justice and public health issues" associated with the product. At the time the proposal was submitted, the company was "involved in thousands of personal injury claims alleging that talc causes cancer arising out of the use of body powders containing talc, primarily Johnson & Johnson's Baby Powder," and that "whether such Baby Powder caused certain alleged injuries" was at issue in the various lawsuits. *Id.* (Company Letter at 4). The proposal mentioned the lawsuits. The company argued that the proposal "would . . . affect [its] litigation strategy and intrude upon management's exercise of its day-to-day business judgment with respect to pending litigation." *Id.* However, Staff found that the proposal was not excludable because it did not "require[e the] company to make an admission or concession of a *core contested fact in litigation*." *Id.* (Proponent Letter at 3) (emphasis in original). The Proposal's request for prospective action did not seek to dictate litigation strategy and, indeed, was necessarily excluded from constituting an admission by **Federal Rule of Evidence 407,** which states that *"[w]hen measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or design; or a need for a warning or instruction*."

The same principle dictated the same result in *The Dow Chemical Co.* (Feb. 11, 2004), in which the proposal was even more directly related to ongoing litigation, requesting a report to address the specific health, environmental, and social concerns of the survivors of the Bhopal tragedy. This tragic event formed the basis of an ongoing civil suit in the United States and criminal action in India. While the company argued that the proposal was excludable because it was asking it to "effect an action that is precisely what the Company's subsidiary is arguing in the pending litigation that it has no obligation to do," the Staff disagreed. The forward-looking request was held by Staff to not constitute an attempt to direct litigation strategy.

Additionally, the Staff routinely rejects no-action requests based on adverse litigation impact where the proposal involves a significant public policy issue, requests disclosure of information that would not constitute a core admission, and the company relies on the essentially omnipresent threat of litigation against it to seek exclusion. In both *The Travelers Cos., Inc.* (Mar. 30, 2022) and *McDonald's Corp.* (Apr. 5, 2022), the proposals requested racial equity

[1] Not relevant here, but the litigation must be live at the time of the no-action request. *See The Travelers Cos., Inc.* (Mar. 30, 2022) (denying no-action request based on interference with litigation where the litigation the company pointed to was resolved, even though the company argued that "the threat of similar litigation remains ongoing").

audits which included: (1) a request for retroactive assessments of the companies' contributions to social and economic inequality and (2) prospective recommendations. In *Travelers*, the company conceded that it was not currently a defendant in any relevant lawsuit, but that as one of the nation's largest insurers, "the threat of similar litigation remains ongoing." (Company Letter at 18). In *McDonald's*, the company argued that implementing the proposal would require it "to take action that would harm its legal defense in multiple pending lawsuits" alleging racial discrimination. (Company Letter at 3). The proposal, however, specifically directed that the Company audit focus on matters "above and beyond legal and regulatory matters," meaning that any admissions made in the report would not be core admissions in litigation. In each case, the Staff concluded that the proposal transcended the company's ordinary business.

The focus on *core* admissions in pending litigation also explains the result in *Amazon.com, Inc. (CtW Investment Grp.)* (Apr. 9, 2021). There, the proposal requested that the board "report to shareholders on how it oversees risks related to anticompetitive practices, including whether the full board or board committee has oversight responsibility, whether and how consideration of such risks is incorporated into board deliberations regarding strategy, and the board's role in Amazon's public policy activities related to such risks." As the company's no-action request noted, it was at the time a defendant in numerous private lawsuits and government investigations related to alleged anticompetitive activity. But, as the proponent responded, the proposal did not "request disclosure about anticompetitive practices" which could constitute an admission. Certainly, information about a board's oversight into risks related to anticompetitive activity *could* be *relevant* to a lawsuit or government investigation, but it would not admit fault or liability in any pending litigation. Thus, the Staff declined to concur in the exclusion of the proposal.

The precedents in the Company Letter and here flesh out a consistent rule: Where a proposal directly attempts to manage a company's strategy in ongoing litigation—such as by directing admission of critical information or a settlement—it is excludable. But the mere existence of litigation on the general subject matter of a proposal does not, alone, constitute a basis for exclusion. Rather, the onus is on the company to demonstrate that implementation of the proposal would meaningfully interfere with its ordinary business prerogative to manage the litigation. To meet that burden, the company must demonstrate more than mere inconvenience, particularly where the proposal touches on a significant social policy issue.

To run afoul of the Rule, a proposal seeking disclosure must direct the company's litigation strategy by, in effect, asking the company to make material admissions on a core matter at issue in existing litigation, such as fault or liability. Proposals requesting that the company assess its strategy related to a subject matter touched upon by litigation; seeking disclosures of what the company can do above-and-beyond legal or regulatory requirements; and those seeking prospective action or disclosure of potential future plans generally do not clear this high bar.

II. PepsiCo has not met its high burden to demonstrate that the Proposal would effectively seek to direct its litigation strategy. The Proposal does not require it to make material admissions on core, contested issues; is forward-looking; and is not inconsistent with its defense of the pending litigation.

A. The Proposal

The Proposal requests that PepsiCo issue a report "describing how PepsiCo could address flexible plastic packaging in alignment with the findings of the Pew Report, or other authoritative sources, to reduce its contribution to plastic pollution."

The Proposal further recommends in its Supporting Statement, that at "Board discretion," the report should:

- Assess the reputational, financial, and operational risks associated with continuing to use non-recyclable plastic packaging while plastic pollution grows;
- Evaluate actions to achieve fully recyclable packaging including elimination and accelerated research into innovative reusable substitution; and
- Describe opportunities to pre-competitively work with peers to research and develop reusable packaging as an alternative to single-use packaging.

B. The Litigation

The Company points to four lawsuits in which it is a defendant. Without belaboring the point, Proponent does not object to the characterization of the lawsuits in the Company Letter at pages 7-8. Three of the lawsuits are brought by public officials and one by a nonprofit. Each alleges, *inter alia*, public nuisance and unfair or deceptive business practice claims stemming from the Company's (a) continued use of single-use plastic packaging, and (b) promotion of recycling as a solution to the plastic pollution crisis rather than exploration of alternative packaging options. Notably, the lawsuits identify PepsiCo as the largest contributor to what each describes as a plastic pollution crisis in their respective areas of concern. The *Earth Island Institute* litigation commenced in February 2020, and the *Los Angeles* lawsuit was filed in October 2024. Not one of the lawsuits has advanced beyond the motion to dismiss stage.[2]

Notably, in the litigation, PepsiCo has confirmed the significance of the social policy issue of plastic pollution by admonishing the court to be "careful in imposing novel theories of tort

[2] The *Earth Island Institute* litigation was removed to federal court then remanded to state court. An initial demurrer was filed, denied, and appealed to the California Supreme Court. A Second Amended Complaint was then filed, which the defendants have now moved, again, to dismiss and to strike. Defendants have requested a trial date in July 2026.

The *Buffalo River Litigation* is on appeal from defendant's successful motion to dismiss, which was granted in November 2024 and appealed in December 2024.

liability that . . . are the focus of a national policy debate." *See People v. PepsiCo, Inc.*, 2024 NY Slip Op 24280 (N.Y. Supr. Ct. Oct. 31, 2024).

C. The Proposal does not interfere with the Company's ordinary business of directing its litigation conduct.

The Company Letter relies on arguments that have been rejected time and again by Staff. The litigation conduct exclusion under Rule 14a-8(i)(7) requires a careful analysis of what implementation of the Proposal would actually entail. The Company Letter does not do so. Instead, it suggests that the Proposal is excludable simply because it "relate[s] to the very same subject matter as the public nuisance and products liability claims asserted in the lawsuit[s]." Company Letter at 12. That is not the standard under Rule 14a-8(i)(7), and the Company has not met its burden of demonstrating that implementing the proposal would be plainly inconsistent with defending the litigation against it.

First, and most importantly, nothing in implementing the Proposal would require the Company to make any statement that would constitute an admission of liability or fault. The Proposal asks the Company to report on "*how* [it] *could* address flexible plastic packaging . . . to reduce its contribution to plastic pollution." (emphasis added). This is a prospective request, and places the Proposal squarely within the parameters of those deemed permissible in *Johnson & Johnson* and *The Dow Chemical Company, supra*. Each proposal requested prospective action or disclosure to address harms associated with conduct that was at issue in pending litigation. Even though the companies were denying fault, liability, causation, and/or the necessity of taking remedial action in the litigation, the proposals' forward-looking requests necessarily compelled the conclusion that they were not seeking to direct the companies' litigation conduct or strategy. So too here. Proposals that merely involve "the very same subject matter" as existing litigation—but which do not compel that management act in a certain way with respect to that litigation or which are not plainly inconsistent with the defense of that litigation—are not excludable.[3]

The Company Letter does not actually claim at any point that implementing the Proposal would require it to admit fault or liability, or to make *any* material admission. The closest it comes is in making an argument that because certain of the lawsuits have alleged a claim based on strict liability, any discussion of the feasibility of alternatives would necessarily constitute some sort of

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Motion to dismiss briefing in the *Baltimore* litigation is ongoing.

Defendants removed the *Los Angeles* litigation to federal court, and plaintiffs have moved to remand. A hearing is scheduled on that motion for the end of February.

[3] With the exception of the risk analysis request, each of the additional requests in the Supporting Statement are prospective and therefore not a basis for exclusion. The requested analysis of the risks associated with continuing to use non-recyclable plastic packaging while plastic pollution grows, however, *notably does not include legal risk*, and therefore is not a basis for exclusion. *See McDonald's, supra* (denying no-action request where proposal sought analysis of company's impact "above and beyond legal and regulatory" matters on racial equity). In any event, the entirety of the Supporting Statement is "at Board discretion," and the Board would presumably exercise its discretion not to adversely impact its own litigation strategy. Therefore, nothing in the Supporting Statement should constitute a basis for exclusion.

relevant admission. The Company claims that the Proposal requires it "to publicly evaluate and critique the reasonableness of, and risks associated with, its current business practices, and to publicly evaluate and critique the research and development of alternatives to its current use of single-use plastic packaging." Company Letter at 12. It then asserts that "the plaintiffs seek to hold the Company strictly liable based on the very evaluations requested by the Proposal." *Id.* This is not an accurate description of the Proposal or of the strict liability claims as the Company itself describes them. *First*, the elements of the strict liability claims against the Company, detailed on page 10 of the Company Letter, do not turn in any way on the feasibility of alternatives. Therefore, an analysis into the feasibility of alternatives is not an admission.

Second, the Proposal does not request that the Company "publicly evaluate and critique the reasonableness of . . . its current business practices." It is not clear from where the Company draws this description of the Proposal, but it is not from the Proposal's text. All the Proposal asks is that the Company "issue a report describing how PepsiCo could address flexible plastic packaging in alignment with the findings of the Pew Report, or other authoritative sources, to reduce its contribution to plastic pollution." While the Supporting Statement asks the Company to evaluate, "at Board discretion" the "reputational, financial, and operational risks" associated with its current business practices, this does not require the Company to make any relevant admission about the alleged dangers of its packaging. Further, to the extent the Company concludes that any portion of such analysis is inconsistent with its litigation strategy, the Board may exercise its discretion not to undertake such analysis.

Further, FRE Rule 407 (and its state analogues in Maryland, New York, and California) makes implementation of the Proposal inadmissible as evidence of any material element of the claims against PepsiCo in the ongoing litigation, because **subsequent remedial measures (such as the evaluation of alternative packaging options) cannot be introduced as evidence of negligence, culpability, defect, or a need for a warning, which effectively covers the claims against the Company in the ongoing litigation.** *See Johnson & Johnson (Ritter), supra*. Once more, *The Dow Chemical Company, supra*, is directly on point. There, the proposal went so far as to reference a specific incident giving rise to ongoing litigation, and requested that the Company issue a "report to address the specific health, environmental, and social concerns of the survivors of the Bhopal tragedy." Dow's argument was identical to the Company's here—that doing so would "effect an action that is precisely what the Company's subsidiary is arguing in the pending litigation that it has no obligation to do." The no-action request was correctly denied, because implementation of the proposal alone was not inconsistent with the company's litigation strategy. Even if the company's litigation strategy was to argue that it was under no *legal obligation* to take remedial action, issuing a report addressing the survivors' concerns did not either seek to direct or change the company's legal strategy or constitute a material admission on a core, contested issue..

The Proposal here is more like those in *Dow* and *Johnson & Johnson (Ritter)* than the one in *Johnson & Johnson (Strausberg)*, on which the Company Letter relies. In *Johnson & Johnson (Strausberg)*, the Proposal requested that the company disclose the actions it was taking to address the injuries of persons harmed by one of its products. Any response would necessarily

admit that people *were harmed* by the product, which the company was contesting. Here, the Proposal requests that the Company assess how it could address the contribution to plastic pollution from its flexible plastic packaging. The issue of *whether* the Company's packaging is contributing *at all* to plastic pollution is not at issue in any PepsiCo litigation. Implementing the Proposal thus will not make any predicate admission such as was at issue in *Strausberg*.

Third, implementation of the Proposal is not inconsistent with the Company's strategy in the ongoing litigation. A review of the briefing and opinions in the ongoing litigation demonstrates that the gravamen of PepsiCo's argument is that it cannot be held responsible for the decision of third parties (*i.e.*, its customers) to litter or otherwise not recycle its packaging. The court in New York summarized PepsiCo's defense:

> Defendants insist they should not be held liable for the acts of third parties. Further, they maintain that they have not misled anyone regarding the composition of their plastic packaging. . . . Pepsi/Frito Lay argue that the disposal of the waste is not in their control and, as such, cannot be construed as a public nuisance created or caused by them. . . . Further, Pepsi/Frito Lay state that there is no law or duty to limit the use of plastic packaging and insist that this is a legislative prerogative and not the province of the Attorney General.

People v. PepsiCo, Inc. 2024 NY Slip Op 24280 (Oct. 31, 2024). Nothing in the Proposal is contradictory to these defenses.

Finally, the Company Letter's other arguments are unpersuasive, and the precedents it relies upon are wholly distinguishable.

- The Company Letter suggests that the Proposal is excludable because "while [it] expressly permits the Company to exclude proprietary information from the requested report, it does not permit the Company to exclude confidential or legally privileged information." Company Letter at 6. The idea that a shareholder proposal needs to explicitly instruct an issuer that it need not waive legal privileges to implement the proposal, particularly when the proposal itself has nothing to do with litigation, and is wholly precatory, is implausible. In no other context is a general public disclosure request understood to include privileged material, and the Proposal is no different.

- The Company Letter notes that certain recitations in the Proposal's "Whereas" section mirror some of the claims made in the litigation against it. *See* Company Letter at 11. This is irrelevant; publishing a shareholder proposal does not constitute an admission of the statements in the proposal. Shareholders do not have the legal authority to make admissions on behalf of a company. This is not a basis to exclude.

- The Company Letter asserts that implementing a proposal will "have the Company address in the requested report that, contrary to its litigation position, the harms resulting from the Company's use of single-use plastic packaging (harms it disputes) are

> outweighed by the benefits, given the cost and availability of reasonable alternative packaging." Company Letter at 12. The Proposal does not ask the Company to make a conclusion about its packaging—and certainly does not demand that the Company make a *specific* conclusion in one direction. Its prospective request asks the Company to report on how it might address plastic pollution associated with its single-use packaging. The Proponent's concern that the Company's contributions to plastic pollution harm the planet and the Company are irrelevant.

Indeed, it is unclear *how* a shareholder could ever bring a plastic pollution proposal at PepsiCo if this Proposal is excludable. So long as the Company continues to rely on single-use plastic packaging, PepsiCo will likely continue to be under the threat of investigation and litigation, whether by governments or private parties. At this point, it has been in active litigation for half a decade, with no sign of the litigation ending any time soon. This Proposal asks the Company to do nothing more than report on how it can address plastic packaging to reduce its contribution to plastic pollution (a result which may in turn reduce litigation against the Company). It is as generic and prospective as a proposal could possibly be on the topic of plastic pollution. There is no basis to exclude it.

The precedents upon which the Company relies are inapposite. The Company Letter points with particularity to:

- *Deere & Co.* (Dec. 29, 2023), in which the proposal requested the company "issue a report assessing the benefits and drawbacks of opposing 'Right to Repair' regulation, as well as the financial and reputational risk associated with such opposition." The company was at the time defending against a class-action lawsuit alleging that Deere was restricting the repair service market for its products. The basis of the company's argument for exclusion was that the proposal took as a given that Deere *was opposing* right-to-repair, and that issuing a report—even one that concluded that the benefits of opposing right-to-repair outweighed the risks—would be incompatible with its litigation strategy of denying that it was against right-to-repair. In this sense, *Deere & Co.* is indistinguishable from *Johnson & Johnson (Strausberg), see supra*. As described above, the Proposal here would not constitute any such admission, unless the Company was planning on making the, frankly, frivolous argument that its packaging does not contribute to plastic pollution at all.[4]

- *Walmart, Inc., supra*. As described above, the proposal in *Walmart* requested that the company assess the risks to it associated with policies related to equal pay. The proposal

[4] Notably, while the Company Letter in *Deere & Co.* relied entirely on the litigation conduct exclusion, the Staff's response did not mention litigation, instead merely saying that the proposal "relates to, and does not transcend, ordinary business matters." This distinguishes the response from that typically made by the Staff when agreeing with a litigation-related ordinary business exclusion request. *E.g., Johnson & Johnson (Strausberg), supra* ("[W]e note that the company is presently involved in litigation relating to the subject matter of the proposal. Proposals that would affect the conduct of ongoing litigation to which the company is a party are generally excludable under rule 14a-8(i)(7)."); *Walmart, supra* (We note the Company's representation that the Proposal would affect the conduct of

referred repeatedly to a gender pay gap at Walmart, which was, at the time, defending multiple lawsuits in which it was denying the existence of any such gap. In this case, the various plaintiffs' legal theories against PepsiCo. do not turn on *whether* the company's packaging contributes to plastic pollution, they turn on whether PepsiCo is legally responsible for such pollution. PepsiCo is not in a position to make a nonfrivolous argument that its packaging does not contribute *at all* to plastic pollution. Unlike in *Walmart*, implementation of the Proposal would not constitute an admission of a core issue in ongoing litigation since the only fact assumed by the Proposal is that the company's products contribute in some way to plastic pollution.

- *General Electric Co., supra*, could not be further afield. That proposal requested a literal admission of liability—that the company "assess all potential sources of liability related to its PCB discharges in the Hudson River" while the company was actively defending lawsuits related to its discharges into the Hudson River. Assessing its liability related to those discharges would potentially result in admissions of liability, fault, causation, and/or damages. For the reasons explained herein, implementation of the Proposal would not result in any material admission.

- Same with *Chevron Corp. (Sisters of St. Francis of Philadelphia), supra*, in which the proposal requested that the company "assess [its] long-term cumulative contributions to climate change and disparate impacts on the health of communities of color" while the company was defending against lawsuits seeking to assign it liability for climate harm to communities of color. Implementation of the *Chevron* proposal would have effectively ended the litigation against Chevron in the plaintiffs' favor. The Company has failed to demonstrate that such is the case here.

- *Philip Morris Cos. Inc., supra*, involved a proposal literally directing the Company's litigation strategy by requiring the company to voluntarily comply with certain FDA regulations while simultaneously challenging them in court. The Proposal does not seek to direct the Company's litigation strategy for the reasons discussed herein.

CONCLUSION

PepsiCo has been involved in litigation involving its plastic packaging since 2020, with no end in sight. The Company has conceded that plastic pollution is a significant policy issue on which there is significant national debate. The issue has only grown in importance since 2020. Yet the Company seeks to silence investor input on this significant issue of plastic packaging pollution which continues to be a source of risk to the Company. If the Proposal sought to direct the Company's litigation strategy or demanded that the Company make material admissions as to core contested issues in litigation, such as fault or liability, exclusion would be appropriate. But

ongoing litigation relating to the subject matter of the Proposal to which the Company is a party."). Given the actual text of the proposal and other Staff precedent, it seems more likely than not that the Staff agreed with the exclusion of the proposal under Rule 14a-8(i)(7) but for a different reason: because the proposal sought to interfere with the ordinary business of the company's lobbying activity.

this Proposal does neither. The Company itself does not argue that it does. Instead, the Company's argument relies on the fact that the Proposal merely "*relate*[*s*] to the very same subject matter as the public nuisance and products liability claims asserted in the lawsuit[s]." Company Letter at 12 (emphasis added). That is not the standard under Rule 14a-8(i)(7).

Consistent with Staff precedent, this prospective proposal does not interfere with management's ability to manage the ordinary business of litigation and cannot be excluded from the 2025 proxy statement pursuant to Rule 14a-8. We urge the Staff to deny the no action request.

Sincerely,

Luke Morgan
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CC:

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