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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

**AIG SPECIALTY INSURANCE COMPANY,** :

*Plaintiff,* :

**v.** :

**THERMO FISHER SCIENTIFIC, INC.** :

*Defendant.* :

Case No. \_\_\_\_\_

**COMPLAINT**

Plaintiff AIG Specialty Insurance Company (“ASIC”), by and through its attorneys, Akerman LLP, as and for its Complaint against defendant Thermo Fisher Scientific, Inc. (“Thermo Fisher”), alleges upon knowledge as to itself and its own actions, and upon information and belief as to all other matters, as follows:

**NATURE OF THE ACTION**

1. This is an insurance coverage dispute concerning Thermo Fisher’s demand for insurance coverage under an ASIC policy to address contamination of groundwater in the Westmoreland Well Field, which supplies drinking water to the Borough of Fair Lawn, New Jersey. Thermo Fisher is not entitled to coverage, however, because it knowingly and voluntarily violated numerous conditions precedent to coverage under the ASIC policy, and failed to disclose

in its application decades of prior regulatory action and known pollution conditions at Thermo Fisher's Fair Lawn facility and Westmoreland Well Field.

2. The ASIC policy imposes certain duties upon Thermo Fisher to provide notice as soon as possible to ASIC of pollution conditions and claims, strict compliance with which is required under the ASIC policy as a condition precedent to coverage. The ASIC policy also imposes certain obligations upon Thermo Fisher that are a condition precedent to coverage, including that Thermo Fisher must: (1) disclose in its policy application pollution conditions existing at the time of policy inception and known by a responsible insured; (2) cooperate with ASIC in the investigation and defense of any claims against Thermo Fisher and allow ASIC the right to control Thermo Fisher's defense; and (3) refrain from voluntarily making any payments or assuming any obligations without ASIC's prior consent, except at Thermo Fisher's own cost.

3. The ASIC policy inceptioned on February 1, 2016 and expired on February 1, 2019. Well before the ASIC policy inceptioned, Thermo Fisher knew or should have known from publicly-available information that there were detections of 1,4-dioxane and certain contaminants in the PFAS (per- and polyfluoroalkyl substances) family of chemicals that regulatory agencies were requiring Thermo Fisher to investigate and, ultimately, remediate. Before the ASIC policy inceptioned, there were also documents in Thermo Fisher's possession demonstrating the presence of these chemicals. Thermo Fisher was required to disclose these pollution conditions in its application for the ASIC policy but failed to do so.

4. Thermo Fisher's failure to disclose these pollution conditions continued unabated after the ASIC policy inceptioned. Thermo Fisher knew by at least March 2016 that it was required to address 1,4-dioxane contamination that exceeded threshold levels set by New Jersey's environmental regulatory agency. Further, Thermo Fisher knew about these pollution conditions

and claims against it by the U.S. Environmental Protection Agency and Borough of Fair Lawn, New Jersey long before Thermo Fisher finally provided notice to ASIC on January 31, 2019—the day before the ASIC policy terminated.

5. Based on the foregoing and the reasons discussed below, Thermo Fisher breached its obligations under the ASIC policy and has forfeited its right to any possible coverage under the ASIC policy. ASIC seeks a judgment declaring it has no obligation to indemnify Thermo Fisher for costs incurred in responding to the contamination and to any associated third-party claims or, in the alternative, a judgment for rescission of the AISC insurance policy issued to Thermo Fisher.

### **PARTIES**

6. ASIC is, and at all relevant times was, an Illinois corporation that maintains its principal place of business in New York, New York.

7. Thermo Fisher is, and at all relevant times was, a Delaware corporation that maintains its principal place of business in Waltham, Massachusetts. Thermo Fisher may be served with process through its registered agent, Capitol Corporate Services Inc., 44 School Street, Suite 505, Boston, Massachusetts 02108.

### **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1332(a)(1) because there is complete diversity of citizenship between ASIC and Thermo Fisher as they are citizens of different States, and the controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

9. This Court has specific personal jurisdiction over Thermo Fisher because it has operated the facility in question in New Jersey for decades. This Court also has general jurisdiction over Thermo Fisher because it has maintained continuous and systematic contacts with the State

of New Jersey through its operations at multiple facilities in the State sufficient to justify the exercise of jurisdiction over Thermo Fisher.

10. Venue in the District of New Jersey is proper under 28 U.S.C. §§ 1391(a)(1) and 1391(b)(2) because the property at issue owned by Thermo Fisher is located in this District, and this Court has personal jurisdiction over Thermo Fisher. Venue also is proper in this District because a substantial part of the events underlying Thermo Fisher's request for insurance coverage occurred in this District.

11. This matter is properly filed pursuant to 28 U.S.C. § 2201 because an actual, ripe, and justiciable controversy exists between ASIC and Thermo Fisher as to the application and interpretation of an insurance policy.

## **FACTUAL BACKGROUND**

### **I. THE SITE AND REGULATORY HISTORY**

#### **A. The Westmoreland Well Field**

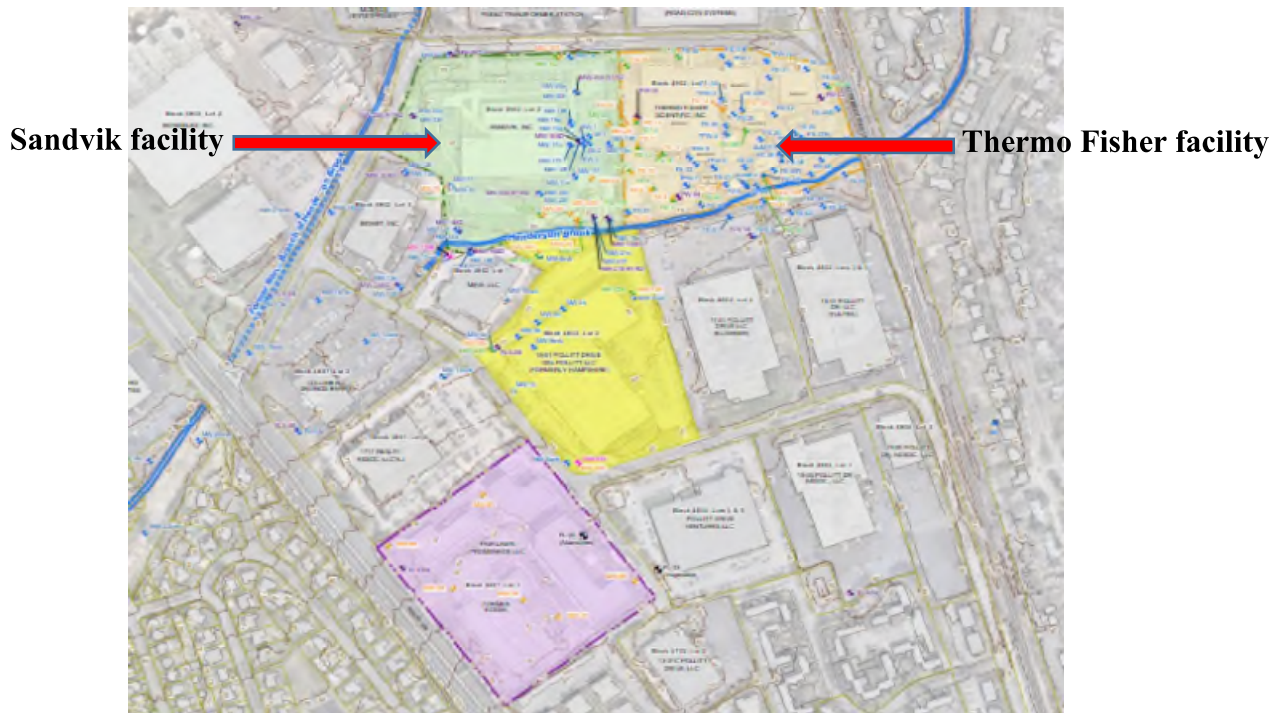
12. The Westmoreland Well Field was first developed in 1948 by the Borough of Fair Lawn, New Jersey (the "Borough") and is generally described as the area in the Fair Lawn Well Field Site (the "Site") located west of Route 208 in Fair Lawn, New Jersey. In or around 1948, the Borough installed well FL-10 in the Westmoreland Well Field. Between 1948 and 1950, wells FL-11, FL-12, and FL-14 were installed in the Westmoreland Well Field. Between 1952 and 1969, the Borough installed non-potable industrial wells FL-23 and FL-24.<sup>1</sup> The location of these wells are depicted in the following figure:<sup>2</sup>

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<sup>1</sup> Wells FL-23 and FL-24 are located in an area more commonly referred to as the Fair Lawn Industrial Park.

<sup>2</sup> Figure 2 from the 2015 Site Characterization Summary Report, discussed more below.





13. Wells FL-10 and FL-14 were originally used to provide drinking water to the residents of the Borough, but are now out of service. Wells FL-11 and FL-12 are still used for monitoring purposes.

#### **B. Thermo Fisher's Operations**

14. The Fisher Scientific Company, LLC ("Fisher Scientific") began operating in 1955 in the Fair Lawn Industrial Park, which is generally described as the area in the Site north of Route 208 in Fair Lawn, New Jersey. The Fair Lawn Industrial Park is adjacent to the Westmoreland Well Field. Fisher Scientific's operations have since included formulating, distilling, repackaging, and distributing various laboratory reagents and solvents.

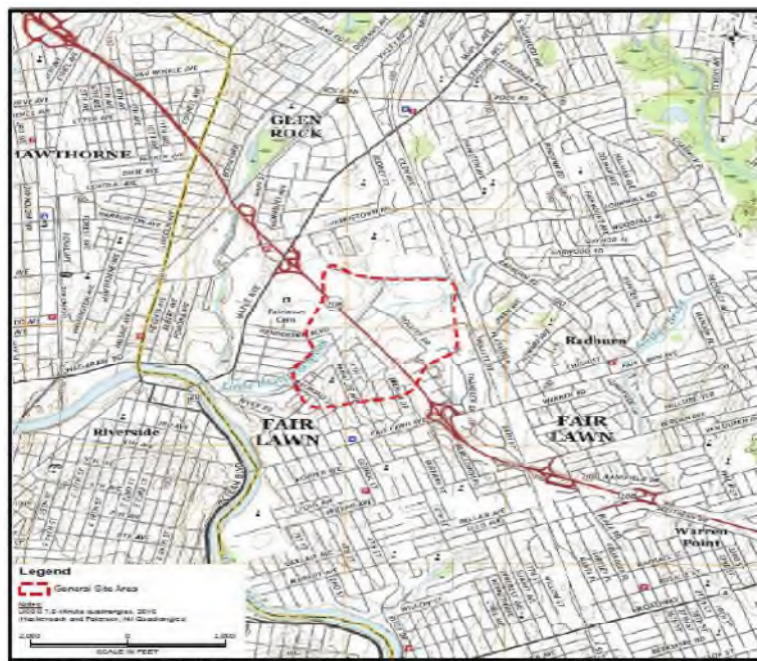
15. Through a 2006 merger by and between Thermo Electron Corporation and Fisher Scientific's parent company, Fisher Scientific operates as a wholly-owned subsidiary of Thermo Fisher.

16. As depicted above, another entity, Sandvik, Inc. ("Sandvik"), owns and has operated its own facility on a nearly identical parcel adjoining the Thermo Fisher facility.

### **C. CERCLA Superfund Status**

17. In 1978, the New Jersey Department of Environmental Protection (“NJDEP”) discovered volatile organic compounds (“VOCs”), primarily tetrachloroethylene (“PCE”) and trichloroethylene (“TCE”), above the applicable minimum concentration limits in wells FL-23 and FL-24. Additional testing performed by the Borough revealed elevated levels of VOCs in wells FL-10, FL-11, and FL-14. Following investigations by NJDEP, the source of the VOCs was determined to be in the Fair Lawn Industrial Park.

18. On September 8, 1983, the Site was added to the Superfund National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) by the U.S. Environmental Protection Agency (“EPA”), which is shown below:



### **D. 1984 Consent Order**

19. On February 9, 1984, EPA sent notice letters to Thermo Fisher and Sandvik, advising them of their potential liability for the Site under Section 107 of CERCLA. The following month, in March 1984, Thermo Fisher and Sandvik entered into an Administrative Consent Order

(“1984 Consent Order”) with NJDEP to conduct investigations of the soil and groundwater at their facilities within the Fair Lawn Industrial Park. Under the 1984 Consent Order, Thermo Fisher and Sandvik were to remove and dispose of contaminated soils, perform long-term groundwater quality monitoring, and to pay for the installation and operation of the Borough’s water treatment system in the Westmoreland Well Field.

20. In 1986, the Borough installed an air stripper system on wells FL-10, FL-11, and FL-14 to treat water contaminated with VOCs.

21. Pursuant to the 1984 Consent Order, Thermo Fisher contributed to the cost of the installation and operation of the air stripper system.

22. Between 1984 and 1993, Thermo Fisher completed the investigation and remediation of the soil at its Fair Lawn facility and received No Further Action determinations for six areas of concern in or around its facility. However, under EPA and NJDEP oversight, Thermo Fisher remained under a continuing obligation to monitor and sample the more than 50 groundwater wells it installed pursuant to the 1984 Consent Order to completely delineate the groundwater migrating from and through its facility.

#### **E. 2008 Consent Order**

23. In September 1992, EPA became the lead agency for the Site. In April 1999, EPA entered into an Interagency Agreement with the U.S. Geological Survey (“USGS”) to develop a groundwater flow study for the Site to determine: flow patterns; contributing sources of contamination; contaminant plume boundaries; and the effect of the pump and treat systems on flowpaths at the Westmoreland Well Field and Thermo Fisher’s Fair Lawn facility. The USGS study utilized a digital regional groundwater flow model and found that the Westmoreland Well Field is hydraulically connected to the bedrock underlying Thermo Fisher’s facility. More specifically, the groundwater flow simulations revealed a plume containing VOCs—including, but

not limited to, PCE, 1,1,1-TCA, TCE, cis-2, DCE, 1,1-DCA and 1,1-DCE—was migrating from Thermo Fisher’s facility to Westmoreland Well Field wells FL-11 and FL-14 and came very near well FL-10.

24. As a result of the USGS study, in March 2006, EPA issued notice letters to Thermo Fisher and Sandvik under CERCLA, requesting they perform a Remedial Investigation/Feasibility Study (“RI/FS”) and reimburse EPA for past costs incurred with respect to the Site.

25. On March 25, 2008, EPA and Thermo Fisher entered into an Administrative Settlement Agreement and Order on Consent (“2008 Consent Order”) for an RI/FS (Docket No. 02-2008-2003).

26. The 2008 Consent Order had two stated objectives: (a) determine the nature and extent of the contamination and any threat to the public health, welfare, or the environment caused by the release or threatened release of pollutants at or from the Site by conducting a Remedial Investigation; and (b) to identify and evaluate remedial alternatives to prevent, mitigate, or otherwise respond to or remedy any release or threatened release of pollutants.

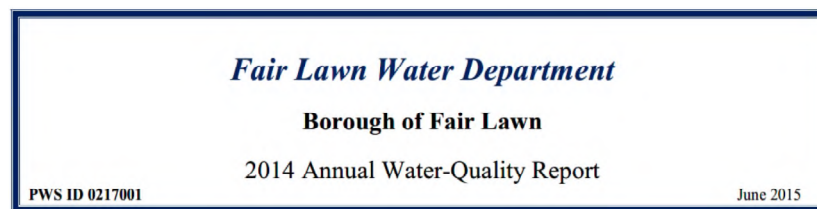
27. To achieve these stated goals, the 2008 Consent Order identified work that needed to be done and assigned tasks to be performed by Thermo Fisher to complete the RI/FS. These tasks included: (1) submitting a detailed RI/FS Work Plan; (2) providing information requested by EPA to prepare a community relations plan; (3) implementing the provisions of the RI/FS Work Plan approved by EPA to characterize the Site; (4) submitting an identification of candidate technologies memorandum to EPA; (5) conducting treatability studies; (6) performing baseline human health risk assessments and ecological risk assessments; (7) submitting a draft RI report to EPA; (8) developing an appropriate range of waste management options to be evaluated through the development and screening of alternative options; and (9) submitting to EPA a draft FS.

**F. 1,4-Dioxane**

28. The RI/FS Work Plan was finalized on January 21, 2009. In September 2009, Thermo Fisher began installing five new monitoring wells within the Site, which were completed in December 2009. Two groundwater and surface water sampling events were conducted in March 2010 and June 2011.

29. Thermo Fisher, through its Licensed Site Remediation Professional (“LSRP”), Langan Engineering and Environmental Services, Inc. (“Langan”), conducted the sampling of the wells from and around the Site and Westmoreland Well Field in 2010 and 2011. At that time, NJDEP’s groundwater quality criterion for 1,4-dioxane was 10 ppb. Thermo Fisher’s sampling in 2010 and 2011 identified instances in which 1,4-dioxane was present.

30. In 2013, pursuant to the Safe Drinking Water Act’s Unregulated Contaminant Monitoring Rule (“UCMR”), the Borough conducted sampling of the Westmoreland Well Field and identified the presence of 1,4-dioxane at a concentration of 3.24 ppb. The Borough’s 2013 testing also showed the presence of perfluorooctanoic acid and perfluorooctane sulfonate (“PFOA/PFOS”) in the Westmoreland Well Field. These sampling results were contained in the Borough’s 2014 Water Quality Report published and publicly available by at least June 2015:

**UCMR – Unregulated Contaminates for which EPA Requires Monitoring**

Contaminant	Range of Results (ug/l)	
1,4 - Dioxane	ND – 3.24	Unregulated contaminants are those for which EPA has not established drinking water standards. The purpose of unregulated contaminate monitoring is to assist EPA in determining the occurrence of unregulated contaminants in the drinking water and whether future regulation is warranted. This testing was performed in 2013.
Chlorate	ND - 331	
Chromium (6)	ND – 0.93	
Chromium (total)	ND – 0.98	
Cobalt	ND – 1.29	
PFOA	ND – 0.031	
PFOS	ND – 0.066	



31. At the request of EPA, Thermo Fisher and Sandvik submitted a draft RI/FS work plan addendum for additional well installation and sampling in September 2013. The approved December 2013 RI/FS Work Plan addendum included the installation of five overburden and seven bedrock monitoring wells, and two rounds of comprehensive groundwater and surface monitoring. From May to July 2014, before installing the monitoring wells, 13 temporary overburden monitoring wells were installed and sampled to delineate shallow groundwater at the Site.

32. In February 2015, Thermo Fisher completed a Final Site Characterization Summary Report (“SCR”), which included the 2010 and 2011 sampling results showing the presence of 1,4-dioxane

33. In November 2015, NJDEP published interim groundwater quality criterion for 1,4-dioxane and lowered the existing criterion to 0.4 ppb.

34. In November and December 2015, Langan conducted sampling of the additional wells EPA had requested to be installed in the Westmoreland Well Field. The results of Langan’s sampling in November and December 2015 showed numerous instances in which the presence of 1,4-dioxane was above the interim groundwater criterion of 0.4 ppb, including in wells Langan designated as potential public water supply wells.

35. On or about January 14, 2016, representatives of Thermo Fisher, including one or more officers and directors of Thermo Fisher, met with NJDEP representatives to discuss the impact of the new 1,4-dioxane groundwater quality criterion on Thermo Fisher and the RI/FS. At the meeting, NJDEP acknowledged 1,4-dioxane would not have to be fully delineated for the RI to be completed, but NJDEP made Thermo Fisher aware both the FS and eventual remedy would need to address 1,4-dioxane.

36. On or around May 3, 2016, the Borough discontinued use of the wells at the Westmoreland Well Field. Immediately following its closure of the Westmoreland Well Field, the Borough began purchasing water from other sources to compensate for the loss of potable water from the Westmoreland Well Fields.

37. On May 4, 2016, Thermo Fisher called the NJDEP hotline to report an Immediate Environmental Concern (“IEC”) with respect to the presence of 1,4-dioxane in groundwater at the Westmoreland Well Field.

38. In May 2016, Thermo Fisher was aware that the Borough had discontinued use of the Westmoreland Well Field for drinking water and that the Borough was incurring expenses to purchase replacement water, for which it would look to Thermo Fisher for reimbursement.

#### **G. RI/FS and Record of Decision**

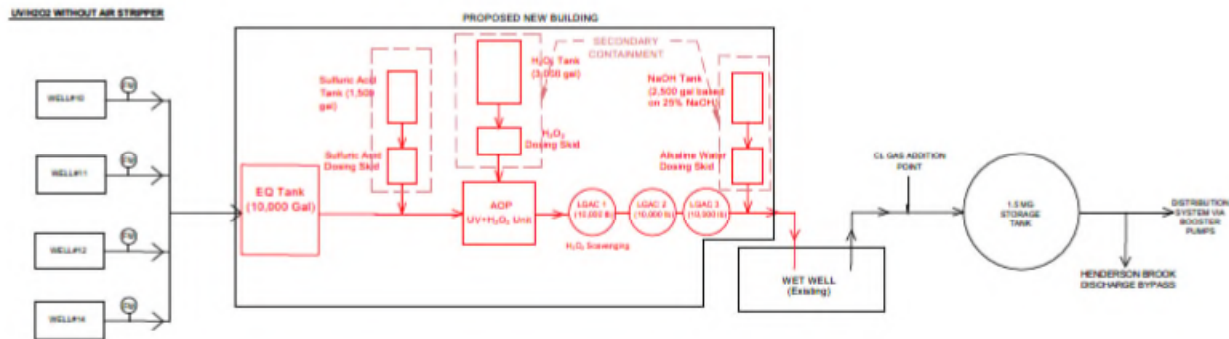
39. In June 2018, pursuant to the 2008 Consent Decree, Thermo Fisher completed the Site RI, which documented the analytical results of groundwater and surface water samples collected from 2010 to 2016 downgradient of Thermo Fisher’s facility and in the Westmoreland Well Field. According to those results, groundwater entering the Borough’s public supply wells contained elevated concentrations of PCE, TCE, CTE, and 1,4-dioxane—the latter in concentrations up to 8.59 µg/L ppb.

40. In July 2018, pursuant to the 2008 Consent Decree, Thermo Fisher completed the FS for the Site and recommended three alternatives to remediate the Westmoreland Well Field: (1) No action (present net cost of \$127,000) (“Alternative Remedy No. 1”); (2) Groundwater Recovery and Ex-Situ Treatment System, Long-Term Monitoring and Institutional Controls (present net cost of \$18.6 million) (“Alternative Remedy No. 2”); and (3) Groundwater Recovery and Ex-Situ Treatment; Air Sparging/Soil Vapor Extraction (AS/SVE); Cometabolic

Bioremediation; Long-Term Monitoring; and Institutional Controls (present net cost of \$29.5 million) (“Alternative Remedy No. 3”).

41. In August 2018, EPA issued a Record of Decision (“ROD”), selecting Thermo Fisher’s Alternative Remedy No. 2 as the Site remedy. EPA estimated Alternative Remedy No. 2 had a higher present net cost of \$19.5 million. Alternative Remedy No. 2 consists of the installation and operation of an advanced oxidation process to treat VOCs and 1,4-dioxane and the use of a liquid-phase granular activated carbon to treat VOCs and PFOA/PFOS before chlorination and entry into the water supply, as set forth in the diagram below:

Proposed Upgrade Westmoreland Well Field Treatment Process Flow Diagram



42. On September 27, 2018, EPA sent a letter acknowledging Thermo Fisher had been identified as a CERCLA PRP for the Site since 1984 and “reiterate[d]” Thermo Fisher remains a CERCLA PRP for the Site. In the letter, EPA asked Thermo Fisher if it was interested in funding the remedy selected in the ROD and requested that Thermo Fisher respond to the letter with a “good faith offer” consistent with the ROD, which would be finalized in another Consent Decree pursuant to CERCLA.

43. On October 16, 2018, Thermo Fisher responded to EPA’s letter by agreeing to fund the remedy selected in the ROD, subject to a mutually acceptable Consent Decree.

44. Between them, Thermo Fisher and Sandvik have agreed to fund the ROD remedy on a 60/40 basis, with Thermo Fisher funding 60 percent.



**G. Borough's Replacement Water Costs**

45. On October 23, 2018, the Borough sent a letter to Thermo Fisher requesting reimbursement for past costs associated with purchasing replacement water and future costs for replacement water until the components of Alternative Remedy No. 2 are operational.

46. On October 4, 2019, in conjunction with the ROD remedy, Thermo Fisher and Sandvik entered into a Water Facilities Improvement Agreement (the "Agreement") with the Borough to construct, operate, and maintain a water treatment facility to address the 1,4-dioxane and PFOA/PFOS in the Westmoreland Well Field.

47. The Agreement also provided that Thermo Fisher and Sandvik would pay \$484,112.94 for the Borough's water replacement costs through June 30, 2019, and an additional \$13,076 per month thereafter until the water treatment facilities complete temporary operation. Like with the remedy called for by the ROD, Thermo Fisher and Sandvik agreed to split these costs on a 60/40 basis, with Thermo Fisher assuming the larger share.

**B. THE INSURANCE APPLICATION, POLICY, AND CLAIM**

**A. Thermo Fisher's Policy Application**

48. Thermo Fisher submitted its application for a Pollution Legal Liability Select Policy on January 31, 2016. The application was signed by Robert Fetter, Vice President of Thermo Fisher.

49. Under the terms of the policy application, Thermo Fisher was "responsible for obtaining and reviewing whatever records are available, whether in their possession or in the public domain, which are necessary to answer any of the questions in this application."

50. The policy application also required Thermo Fisher to attach to the application "[a]ny Environmental Site Assessment(s) available."

51. The policy application included questions to Thermo Fisher about pollution conditions and prior pollution claims. Despite its obligations in completing the policy application, Thermo Fisher did not disclose such conditions or claims with respect to its Fair Lawn facility:

11. In the last five years, has the applicant had any reportable releases or spills of hazardous substances, hazardous wastes, or any other pollutants as defined by applicable environmental statutes or regulations?

☐ No ☒ Yes

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13. List all claims made against the applicant during the past five years for cleanup or response action, "toxic tort" or other bodily injury, or property damage, resulting from the release of hazardous substances, hazardous waste, or other pollutants into the environment, from this location or other locations owned or operated by the applicant. Attach a brief description of the claim(s) and their disposition.

☐ None to report.

SUGARLAND, TX RELEASED SOME ALLEGATIONS HAVE BEEN MADE

52. The application also asked whether Thermo Fisher knew of any facts or circumstances that may reasonably be expected to result in a claim for environmental cleanup arising from the release of pollutants. Thermo Fisher identified only its location in Sugarland, Texas:

14. At the time of the signing of this application, do you know of any facts or circumstances which may reasonably be expected to result in a claim or claims being asserted against your company for environmental cleanup, or for bodily injury or property damage arising from the release of pollutants into the environment?

☐ No ☐ Yes

SUGARLAND, TX CASIUM RELEASE AS ALREADY DISCLOSED

53. At no point during the application process did Thermo Fisher disclose anything with respect to the Fair Lawn facility, not the Consent Orders, the RI/FS Work Plan, the known detections of 1,4-dioxane, PFOA/PFOS, or VOCs. Thermo Fisher did not even disclose that its facility was in a CERCLA Superfund site that Thermo Fisher had been investigating and remediating since 1983.

## **B. The Policy**

54. ASIC issued a Pollution Legal Liability Policy bearing policy number PLS 11057730 (the "Policy") to Thermo Fisher with effective dates of February 1, 2016, to February 1, 2019. Although the Policy was effective beginning February 1, 2016, the Policy was not

bound until February 3, 2016 and was not issued until February 19, 2016. A true and correct copy of the Policy is attached as Exhibit A to this Complaint.

55. Thermo Fisher's Fair Lawn facility is an Insured Property under the Policy, pursuant to Endorsement No. 1.

56. The Policy contains the following insuring agreements applicable to third-party Claims for Clean-Up Costs and Property Damage resulting from Pollution Conditions migrating from an Insured Property:

**COVERAGE C - THIRD-PARTY CLAIMS FOR OFF-SITE CLEAN-UP RESULTING FROM PRE-EXISTING CONDITIONS**

To pay on behalf of the **Insured**, **Loss** that the **Insured** becomes legally obligated to pay as a result of a **Claim** for **Clean-Up Costs** resulting from a **Pollution Condition**, beyond the boundaries of the **Insured Property**, that first commenced prior to the **Continuity Date**, and migrated from or through the **Insured Property**, provided such **Claim** is first made against the **Insured** and reported to the Company in writing during the **Policy Period** in accordance with Section III. of the Policy, or during the **Extended Reporting Period** if applicable.

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**COVERAGE E - THIRD-PARTY CLAIMS FOR BODILY INJURY AND PROPERTY DAMAGE**

To pay on behalf of the **Insured**, **Loss** that the **Insured** becomes legally obligated to pay as a result of a **Claim** for **Bodily Injury** or **Property Damage** resulting from a **Pollution Condition** on, under or migrating from or through the **Insured Property**, provided such **Claim** is first made against the **Insured** and reported to the Company in writing during the **Policy Period** in accordance with Section III. of the Policy, or during the **Extended Reporting Period** if applicable.

57. The Policy contains the following definitions, in relevant part:

**E. Claim** means a written demand received by the **Insured** alleging liability or responsibility and seeking a remedy on the part of the **Insured** for Loss under Coverages A through I....

**F. Clean-Up Costs** means reasonable and necessary expenses, including legal expenses incurred with the Company's written consent which consent shall not be unreasonably withheld or delayed, for the investigation, removal, treatment including in-situ treatment, remediation including associated monitoring, or disposal of soil, surfacewater, groundwater, **Microbial Matter**, Legionella pneumophila, or other contamination:

1. To the extent required by **Environmental Laws** or required to satisfy a **Voluntary Cleanup Program**; or
2. With respect to **Microbial Matter**, in the absence of any applicable **Environmental Laws**, to the extent recommended in writing by a **Certified Industrial Hygienist**; or
3. With respect to *Legionella pneumophila*, in the absence of any applicable Environmental Laws, to the extent required in writing by the Center for Disease Control or local health department; or
4. That have been actually incurred by the government or any political subdivision of the United States of America or any state thereof or Canada or any province thereof, or by third parties.

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**U. Loss** means, under the applicable Coverages:

1. Monetary awards or settlements of compensatory damages; where allowable by law, punitive, exemplary, or multiple damages; and civil fines, penalties, or assessments for **Bodily Injury** or **Property Damage**;
2. Costs, charges and expenses incurred in the defense, investigation or adjustment of **Claims** for such compensatory damages or punitive, exemplary or multiple damages, and civil fines, penalties or assessments, or for **Clean-Up Costs**;
3. **Clean-Up Costs**;
4. **Interruption Expenses**; or
5. **Emergency Response Costs**.

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**CC. Pollution Condition** means:

1. The discharge, dispersal, release or escape; or
2. The illicit abandonment on or after the **Inception Date** by a third party without the **Insured's** consent

of any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hazardous substances, low-level radioactive material, electromagnetic fields, medical waste including infectious and pathological waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the amounts or concentrations discovered. **Pollution Condition** also means *Legionella pneumophila* or **Microbial Matter** in any structure on land and the atmosphere contained within that structure, provided that such Pollution Condition commences on or after

the Indoor Air Quality Retroactive Date shown in Item 7. of the Declarations Page.

58. The Policy's Endorsement No. 3, World-Wide Territory Endorsement, amends the Policy to expressly render strict compliance with the Policy's Notice Requirements and Claim Provisions a condition precedent to coverage, as follows:

1. The following changes are made to Section **VI. CONDITIONS**:

A. The following Paragraph is added:

**Policy Territory** – This Policy shall apply to any **Pollution Condition**, subject to the terms and conditions of the Policy, that arises anywhere in the world, subject to the following conditions:

1. Whether such **Pollution Condition**, to which this Policy applies, takes place within the United States, its territories or possessions or Canada or anywhere else in the world, Section **III. NOTICE REQUIREMENTS AND CLAIM PROVISIONS** are applicable and must be strictly complied with as a condition precedent to coverage.

59. Section III. Notice Requirements and Claim Provisions requires Thermo Fisher to provide notice of Pollution Conditions, Claims, and to provide ASIC with certain information as soon as possible, as follows:

**A. NOTICE OF A POLLUTION CONDITION, EMERGENCY RESPONSE COSTS, CLAIM OR AN INTERRUPTION**

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2. The **Insured** shall give written notice of a **Pollution Condition** or **Interruption** as soon as possible. Notice under all coverages shall include, at a minimum, information sufficient to identify the **Named Insured**, the **Insured Property**, the names of persons with knowledge of the **Pollution Condition** or **Interruption** and all known and reasonably obtainable information regarding the time, place, cause, nature of and other circumstances of the **Pollution Condition** or **Interruption**. With respect to an **Interruption**, the **Insured** must supply the Company with relevant historical revenue and rental data as reasonably requested by the Company.

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4. The **Insured** shall give notice of all **Claims** as soon as possible, but in any event during the **Policy Period** or during the **Extended Reporting Period**, if applicable. The **Insured** shall furnish information at the request of the Company. When a **Claim** has been made, the **Insured** shall, in addition to furnishing other information as requested by the Company, forward the following to the Company as soon as possible:
  - (a) All reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the claimant(s) and available witnesses; and
  - (b) All demands, summonses, notices or other process or papers filed with a court of law, administrative agency or an investigative body; and
  - (c) Other information in the possession of the **Insured** or its hired experts which the Company reasonably deems necessary.

60. The Policy also provides ASIC certain rights. For example, ASIC has “the right to defend, including but not limited to the right to appoint counsel, and the duty to defend such **Claim**.” ASIC also has “the right but not the duty to clean up or mitigate a **Pollution Condition** upon receiving notice as provided in Section III. of this Policy,” as well as the right but not the duty to participate in decisions regarding Clean-Up Costs and to assume direct control over all aspects of the cleanup and the adjustment of any **Claim**.”

61. Consistent with ASIC’s rights and Thermo Fisher’s duties under the Policy, Condition K. Cooperation requires Thermo Fisher to cooperate with ASIC, as follows:

**K. Cooperation** – The **Insured** shall cooperate with the Company and offer all reasonable assistance in the investigation and defense of **Claims** and the clean up and mitigation of a **Pollution Condition**. The Company may require that the **Insured** submit to an examination under oath, and attend hearings, depositions and trials. In the course of investigation or defense, the Company may require written statements or the **Insured’s** attendance at meetings with the Company. The **Insured** must assist the Company in effecting settlement, securing and providing evidence and obtaining the attendance of witnesses.

62. Condition S., Voluntary Payments, prohibits Thermo Fisher from voluntarily entering into any settlement or assuming any obligation, except at its own cost:

**S. Voluntary Payments** – No **Insured** shall voluntarily enter into any settlement, or make any payment or assume any obligation, without the Company's consent which shall not be unreasonably withheld, except at the **Insured's** own cost. This Condition shall not apply if such payment or obligation is an **Emergency Response Costs** [sic] or is pursuant to **Environmental Laws** that require immediate remediation of a **Pollution Condition**.

63. The Policy contains certain exclusions, including Exclusion J. Prior Knowledge/Non-Disclosure, which provides as follows:

This Policy does not apply to **Claims** or **Loss**:

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**J. PRIOR KNOWLEDGE/NON-DISCLOSURE:**

Arising from a **Pollution Condition** existing prior to the **Inception Date** and known by a **Responsible Insured** and not disclosed in the application for this Policy, or any previous policy for which this Policy is a renewal thereof.

**C. Thermo Fisher's Claim**

64. On January 31, 2019, the day before the Policy expired, Thermo Fisher submitted a Notice of Claim to ASIC. In its entirety, Thermo Fisher's notice provided:

On May 4, 2016, results of groundwater sampling, as requirement [sic] by the New Jersey Department of Environmental Protection (NJDEP) IRSA and RCRA 2020 Site program, Thermo Fisher Scientific was directed by NJDEP to call in an Immediate Environmental Condition (IEC) for the presence of 1,4-Dioxane, which was above the new groundwater standard of 0.4ug/L at the Westmoreland Treatment Facility (Westmoreland Well Fields). On May 3, 2016, before the IEC was reported, the Borough of Fairlawn [sic] agreed to shut down the Westmoreland facility because the air stripping equipment at the treatment facility was not equipped to remove 1,4-dioxane from the drinking water supply. They immediately began to purchase its water from another municipality until the current system is upgraded with new equipment to treat 1,4-dioxane. During 2018, the U.S. EPA has included 1,4-dioxane in its Proposed Plan and Record of Decision (ROD) as a contaminate [sic] that must be remediated under the Westmoreland Well Field Superfund Site. The Borough of [sic] has made a \$400K claim for reimbursement of its purchased water to date and until the treatment system is upgraded at no cost to them and put back online.

After shutting the Westmoreland Well Field Treatment Facility in May 2016, Thermo Fisher's environmental consultant (Langan Engineering) provided the draft



NPDES Permit application to Ken Garrison at the Borough on May 17, 2017 allowing the discharge treated GW to Henderson [B]rook to provide hydraulic containment of the Superfund GW plume until upgrades to address 1,4-dioxane are designed and installed. NJDEP sent a letter to the Borough of [sic] that surface discharge to Henderson Brook must remove PFOS/PFOA to 70ppt and 40ppt respectively, requiring Thermo Fisher to design and install a Granular Activate Carbon filtration system, which must be sampled and reported to NJDEP on a monthly basis. Since then, the U.S. EPA has now included PFOA and PFOS in its Proposed Plan and Record of Decision (ROD) as contaminants [sic] that must be remediated under the Westmoreland Well Field Superfund Site

65. Before Thermo Fisher's Notice of Claim in January 2019, Thermo Fisher had not provided notice of any Pollution Conditions in the Westmoreland Well Field, including, but not limited to 1,4-dioxane and PFOA/PFOS, any resulting Claims, or copies of any demands, notices, or other process or papers filed with EPA or NJDEP.

66. Before Thermo Fisher's Notice of Claim in January 2019, ASIC was unaware Thermo Fisher had prepared and completed the RI/FS and agreed to fund the ROD remedy, or that the Borough had demanded Thermo Fisher pay the past and future costs associated with providing replacement water pending completion of the ROD remedy.

**COUNT I**  
**DECLARATORY RELIEF**

67. ASIC repeats and realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

68. An actual and justiciable controversy exists between ASIC and Thermo Fisher regarding their legal rights and obligations under the Policy with respect to coverage available to Thermo Fisher.

69. ASIC seeks a judicial declaration that it has no obligation to defend or indemnify Thermo Fisher in connection with any Claims made by EPA or the Borough arising out of contamination in the Westmoreland Well Field, including the costs associated with funding the



ROD or Consent Decree, and the Borough's past and future costs for obtaining replacement water, for at least following reasons, individually or collectively:

- 1) **Late Notice**: As a condition precedent to coverage under the Policy, Thermo Fisher was required to strictly comply with the Policy's notice requirements. The Policy required Thermo Fisher to give ASIC notice of any Claim against Thermo Fisher, any Pollution Condition, and to forward to ASIC all reasonably obtainable information regarding Claims and all demands, notices, or other process or papers filed with an administrative agency or investigative body "as soon as possible." Thermo Fisher failed to comply with each of these conditions precedent to coverage, which precludes coverage for the Claims by EPA and the Borough.
- 2) **Prior Knowledge/Non-Disclosure Exclusion**: The Prior Knowledge/Non-Disclosure Exclusion bars coverage for Claims or Loss Arising from a Pollution Condition existing before the Policy's Inception Date and known by a Responsible Insured and not disclosed in the application for this Policy. In the Policy application, Thermo Fisher was "responsible for obtaining and reviewing whatever records are available, whether in their possession or in the public domain, which are necessary to answer any of the questions" and required to attach to the application "[a]ny Environmental Site Assessment(s) available." Thermo Fisher also was required to disclose to ASIC, reportable releases of pollutants and claims for cleanup or response actions. Finally, Thermo Fisher was required to disclose facts and circumstances that may reasonably be expected to result in a claim for environmental cleanup or property damage. Thermo Fisher's own sampling results in 2010 and 2011 identified various releases of 1,4-dioxane, among other contaminants. The Borough's UCMR sampling resulting in

2013, which were publicly available, also identified the presence of 1,4-dioxane and PFOA/PFOS. With respect to its Fair Lawn facility and the Westmoreland Well Field, as set forth above, Thermo Fisher failed to: (i) use publicly available information to respond to the questions in the application; (ii) attach available Environmental Site Assessments; (iii) disclose releases of pollutants and prior claims; and (iv) disclose facts and circumstances that could reasonably be expected to result in a claim for bodily injury or property damage. As a result, coverage under the Policy for EPA's and the Borough's Claims is excluded under the Prior Knowledge/Non-Disclosure exclusion.

- 3) **ASIC's Right to Control the Defense/Thermo Fisher's Duty of Cooperation:** As set forth above, ASIC had the right under the Policy to control the defense of any Claim, control the cleanup of any Pollution Conditions, and the right to review and approve all aspects of any clean-up undertaken by Thermo Fisher. Relatedly, Thermo Fisher owed ASIC a duty to cooperate in the investigation and defense of Claims and the cleanup and mitigation of any Pollution Conditions. By incurring clean-up costs and defending Claims by EPA and the Borough without ASIC's knowledge, Thermo Fisher violated ASIC's rights under the Policy and breached its duty of cooperation. Thermo Fisher's conduct precludes coverage under the Policy.
- 4) **Voluntary Payments:** The Policy provides that Thermo Fisher shall not voluntarily enter into any settlement, or make any payment or assume any obligation, without ASIC's consent, except at Thermo Fisher's own cost. Before Thermo Fisher's January 2019 Notice of Claim to ASIC, Thermo Fisher already had agreed to pay for the costs associated with funding the ROD or Consent Decree, as well as for the Borough's past and future costs for obtaining replacement water. Thermo Fisher's failure to seek

ASIC's consent before agreeing to pay such sums limits or precludes coverage under the Policy under the Policy's Voluntary Payments condition.

- 5) **Known Loss/Loss-in-Progress Doctrine**: The "known loss/loss-in-progress" doctrine bars coverage when the legal liability of the insured has been determined, is certain to occur, or the loss is already in progress. As set out above, Thermo Fisher was identified as a PRP in 1983 and again in 2008 under CERCLA for contaminating wells within the Westmoreland Well Field and was held responsible for characterizing and delineating the scope of the contamination, as well as proposing the appropriate remedy, years before the Policy inception. Thermo Fisher's liability for the ROD had occurred, was certain to occur, or was in progress as a result of at least the 2008 Consent Order pursuant to which Thermo Fisher was legally obligated to, among other things, complete the RI/FS that resulted in the ROD remedy selected by EPA. Thermo Fisher was legally obligated to pay Clean-Up Costs, as defined by the Policy, as a result of Claims by at least NJDEP and EPA before Policy inception, which continued throughout the Policy Period. Because Thermo Fisher's loss occurred prior to Policy inception or was a loss in Progress when the Policy inceptioned, the known loss/loss-in-progress doctrine bars coverage under the Policy.

70. For any or all of these reasons, ASIC requests a judicial declaration there is no coverage under the Policy for the Claims against Thermo Fisher arising out of the Westmoreland Well Field contamination.

## **COUNT II**

### **RESCISSION FOR EQUITABLE FRAUD**

71. ASIC repeats and realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

72. Thermo Fisher made material misrepresentations and/or omissions in its Policy application, including by failing to: (i) use publicly available information to respond to the questions in the application; (ii) attach available Environmental Site Assessments; (iii) disclose releases of pollutants and prior claims; and (iv) disclose facts and circumstances that could reasonably be expected to result in a claim for bodily injury or property damage.

73. Thermo Fisher submitted its Policy application knowing and intending that ASIC would rely on the statements and/or omissions in Thermo Fisher's Policy application.

74. ASIC relied on Thermo Fisher's Policy application to issue the Policy to ASIC's detriment, without knowledge Thermo Fisher had been subject to the 1984 and 2008 Consent Orders and that Thermo Fisher was actively completing the RI/FS for the Site, including contamination migrating from Thermo Fisher's Fair Lawn facility to the Westmoreland Well Field.

75. As a result of Thermo Fisher's equitable fraud, ASIC seeks rescission of the Policy to void the Policy *ab initio*.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, ASIC respectfully asks the Court to enter judgment in ASIC's favor against Thermo Fisher:

- (1) Declaring there is no coverage under the Policy for the Claims by EPA and the Borough arising out of the contamination of the Westmoreland Well Field;
- (2) Alternatively, rescinding the Policy such that it is void *ab initio*; and
- (3) Awarding ASIC such other and further relief as the court deems just, proper, and equitable, or to which ASIC may otherwise be legally entitled.

Date: September 22, 2020

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