

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

BRIAN RESENDEZ, RODICA ALINA
RESENDEZ, MICHELE FRANCISCO, and
MATTHEW TALBOT; individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

PRECISION CASTPARTS CORP., an Oregon
corporation, and PCC STRUCTURALS, INC.,

Defendants.

Case No. 16CV16164

THIRD CONSOLIDATED AMENDED
CLASS ACTION COMPLAINT

CLAIM NOT SUBJECT TO MANDATORY
ARBITRATION

AMOUNT SOUGHT: OVER \$10,000,000
ORS 21.160(1)(E)

Filing Fee Under ORS 21.135(2)(a)

MARK McNAMARA, and DEBRA TAEVS;
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

PRECISION CASTPARTS CORP., an
Oregon corporation, and PCC
STRUCTURALS, INC.,

Defendants.

Case No. 16CV21495

THIRD CONSOLIDATED AMENDED
COMPLAINT

KELLER ROHRBACK L.L.P.
KAMPMEIER & KNUTSEN, PLLC
SMITH & LOWNEY, PLLC

1 **INTRODUCTION**

2 1.

3 Plaintiffs Brian Anthony Resendez, Rodica Alina Resendez, Michele Francisco, Matthew Talbot,
4 Mark McNamara, and Debra Taevs (collectively, “Plaintiffs”), individually and on behalf of a class of
5 similarly situated persons, hereby file this Class Action Complaint against Defendants Precision
6 Castparts Corporation and PCC Structural, Inc. (collectively, “Defendants” or “Precision Castparts”),
7 making the allegations herein upon personal knowledge as to themselves and their own acts, and upon
8 information and belief and based upon investigation of counsel as to all other matters, as set forth herein.

9 2.

10 South Portland is home to thousands of families, vibrant businesses, and thriving schools. The
11 people who live and work in this neighborhood represent a broad range of ethnic, socio-economic, and
12 age groups.

13 3.

14 South Portland is also home to Precision Castparts, where it operates several facilities on
15 Johnson Creek Boulevard, including its Large Structural Steel Operations and its Large Structural
16 Titanium Operations (collectively, “Facility”).

17 4.

18 Aluminum, arsenic, beryllium, cadmium, cobalt, copper, chromium (total), chromium (VI), lead,
19 manganese, mercury, nickel, selenium, titanium, zinc, nitrogen oxides, hydrochloric acid, hydrofluoric
20 acid, and nitric acid, hydrogen sulfide, thorium 232, 2-Methylnaphthalene, 3-Methylchloranthrene,
21 7,12-Dimethylbenz(a)anthracene, Acenaphthene, Acenaphthylene, Anthracene, Benz(a)anthracene,
22 Benzene, Benzo(a)pyrene, Benzo(b)fluoranthene, Benzo(g,h,i)perylene, Benzo(k)fluoranthene, Butane,
23 Chrysene, Dibenzo(a,h)anthracene, Dichlorobenzene, Ethane, Fluoranthene, Fluorene, Fomraldehyde,
24 Hexane, Indeno(1,2,3-cd)pyrene, Naphthalene, Pentane, Phenanthrene, Propane, Pyrene, Styrene,
25 Toluene, PM10, and PM2.5 (hereinafter “toxic pollutants”) released from the Facility have
26 contaminated peoples’ yards, gardens, homes, and business, damaging property and diminishing
27 property values, and posing significant health risks.

1 5.

2 Plaintiffs, each of whom live and/or own real property in South Portland near the Facility, bring
3 this action pursuant to ORCP 32, individually and on behalf of those similarly situated, in order to
4 protect and seek redress for themselves, their families, and their community.

5
6 **JURISDICTION AND VENUE**

7 6.

8 This Court has jurisdiction over the parties and this case. Plaintiffs are citizens and residents of
9 Oregon. Defendants are Oregon corporations, and engage in regular, sustained business in Multnomah
10 County and maintain their principal places of business in Multnomah County. Defendant Precision
11 Castparts Corporation's principal place of business is 4650 SW Macadam Ave., Ste. 300, Portland,
12 Oregon 97239. Defendant PCC Structural, Inc.'s principal place of business is 4600 SE Harney Dr.,
13 Portland, Oregon 97206. All claims alleged herein are based in Oregon law.

14 7.

15 Venue is proper in this Court. Substantial acts in furtherance of the alleged improper conduct
16 occurred within, and had and continue to have a profound effect in, Multnomah County. Plaintiffs
17 reside in Multnomah County and Defendants' principal places of business are in Multnomah County and
18 the Facility lies partly in Multnomah County.

19 **PARTIES**

20 8.

21 At all times material, Plaintiffs were and remain citizens and residents of Oregon and resided and
22 owned real property in Multnomah County, Oregon, near Precision Castparts' Facility.

23 9.

24 At all times material, Defendants owned and/or operated the Facility, a metal casting facility or
25 facilities located at or about 4600 SE Harney Dr., Portland, Oregon 97206.

1 **FACTUAL ALLEGATIONS**

2 **A. South Portland's Air**

3 10.

4 Scientists with the United States Forest Service and Drexel University's Dornsife School of
5 Public Health launched a study in 2013 collecting and analyzing samples of moss throughout the
6 Portland area ("Forest Service Study").
7

8 11.

9 Moss has been used to detect air pollution in forests since the 1960s. Moss does not have roots,
10 but instead absorbs nutrients and water from the atmosphere, thereby also taking up and storing other
11 compounds present in the air. These contaminants are stored in the moss tissue, making a record of
12 pollution levels in the surrounding environment.

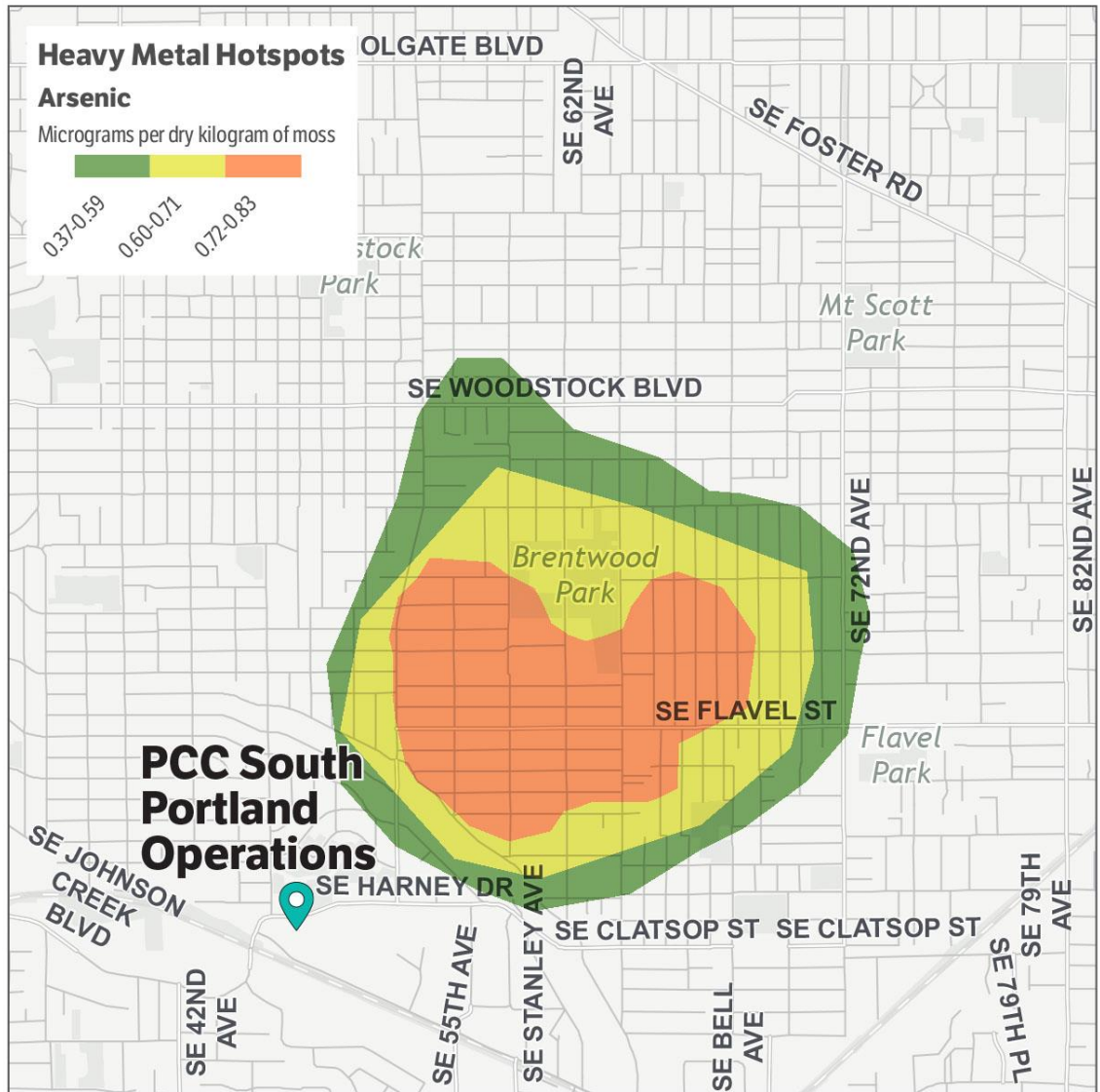
13 12.

14 The Forest Service Study samples were analyzed for heavy metals and polycyclic aromatic
15 hydrocarbons. These efforts revealed high concentrations of certain contaminants in "hotspots" around
16 the Portland metropolitan area.

17 13.

18 The Forest Service Study found high concentrations of arsenic in several hot spots in the
19 Portland area, including one in the vicinity of the Facility. The map below, based on maps *The*
20 *Oregonian* prepared using data from the Forest Service Study, is attached as Exhibit 1 to this complaint
21 (and by reference incorporated into this suit). It shows elevated levels of arsenic in moss adjacent to the
22 Facility. Specifically, levels of arsenic in moss adjacent to the Facility ranging from 0.37 to 0.59
23
24
25
26
27
28

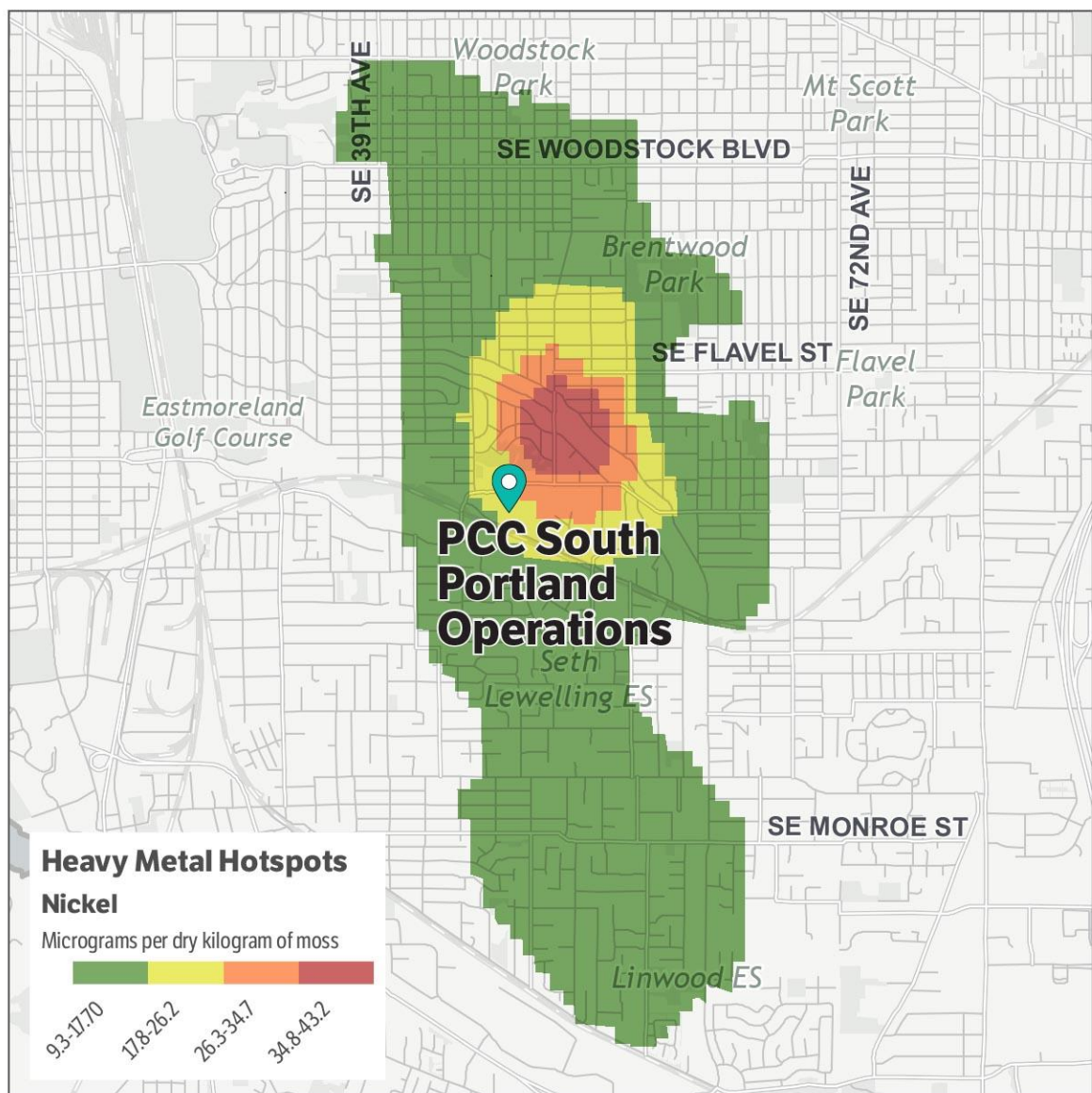
micrograms per kilogram are indicated in green, levels from 0.60 to 0.71 micrograms per kilogram are indicated in yellow, and levels from 0.72 to 0.83 micrograms per kilogram are indicated in orange.



14.

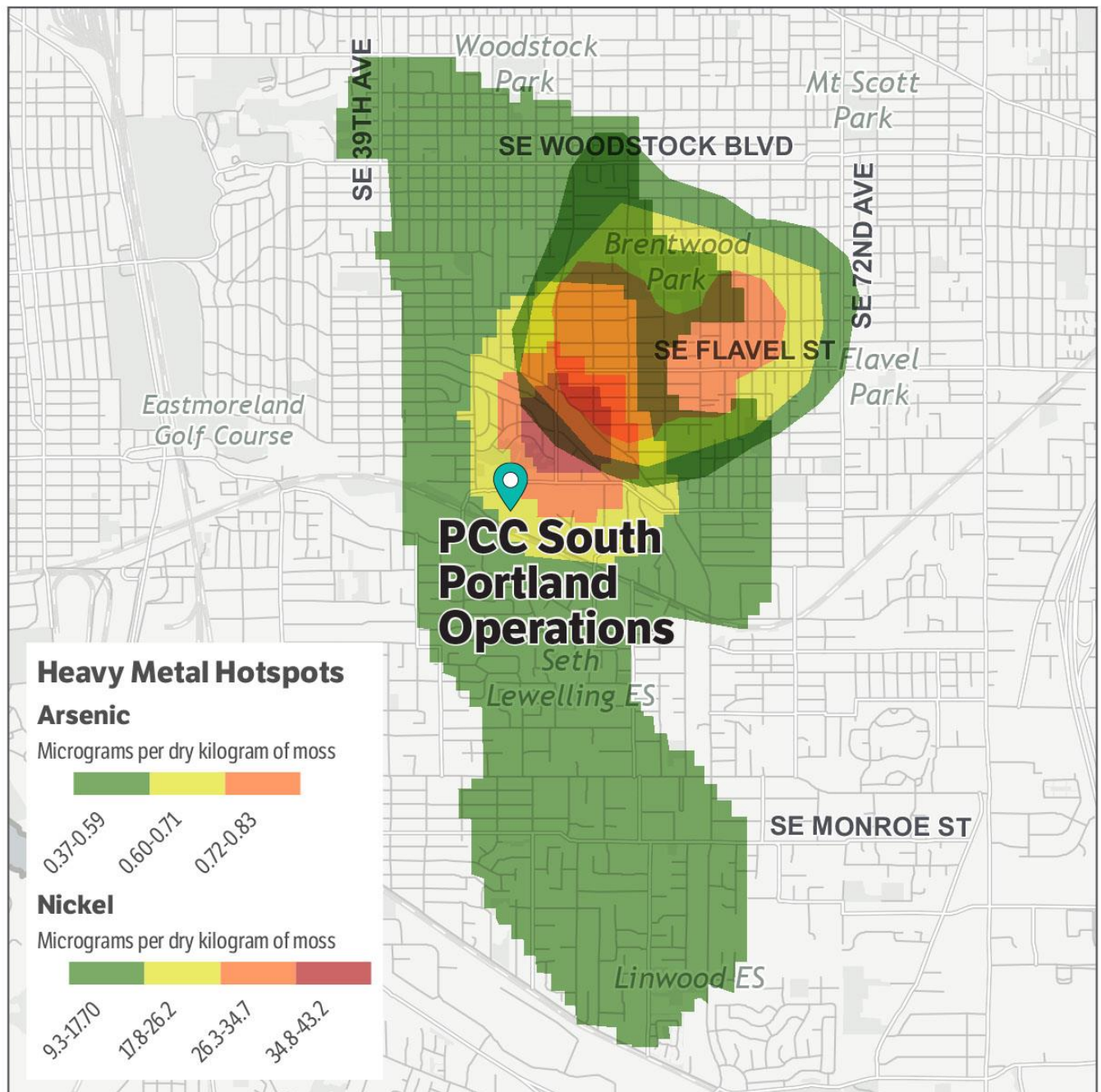
The Forest Service Study also showed higher concentrations of nickel in a large area near the Facility. This was the only significant nickel hot spot identified in the study. The map below, based on maps *The Oregonian* prepared using data from the Forest Service Study, is attached as Exhibit 2 to this complaint (and by reference incorporated into this suit). It shows elevated levels of nickel in moss adjacent to the Facility, with red indicating 34.8 to 43.2 micrograms per kilogram of moss, orange

indicating 26.3 to 34.7 micrograms per kilogram, yellow indicating 17.8 to 26.2 micrograms per kilogram, and green indicating 9.3 to 17.70 micrograms per kilogram.



15.

Together, the red, yellow, orange, and green areas depicted on the map below, which is attached as Exhibit 3 to this complaint (and by reference incorporated into this suit), are defined as the “Affected Area.”



16.

The Facility emits thousands of pounds of toxic pollutants into the air each year according to the Facility's own records and EPA's Toxic Release Inventory.

17.

Plaintiffs expect the evidence will show that the Facility is the primary, if not exclusive, source of the arsenic and nickel hotspots identified in the Forest Service study in the areas shown in Exhibits 1, 2 and 3.

18.

Defendants emit excessive amounts of inorganic arsenic from the Facility into the air.

19.

Defendants have concealed and continue to conceal the nature and extent of their use and emission of arsenic from Plaintiffs, Class Members, regulatory authorities, and the public. However, Defendants have admitted that the Facility emits arsenic into the air.

20.

Defendants emit excessive amounts of nickel from the Facility into the air.

21.

There are no other known users of nickel in the vicinity of the nickel hotspot surrounding the Facility.

22.

In each of the last four years, total nickel releases from the Precision Castparts' Facility to various environmental media - including air - exceeded two million pounds.

23.

Emissions from the Facility are a source of the arsenic hotspot documented by the Forest Service Study.

1 24.

2 Emissions from the Facility are a source of the nickel hotspot documented by the Forest Service
3 Study.

4 25.

5 The Facility emits a variety of other harmful pollutants into the air, including hexavalent and
6 other forms of chromium and other toxins.

7 26.

8 Particles of toxic pollutants from the Facility have entered the air that Plaintiffs and Class
9 Members breathe in their yards and in their homes, and been deposited on the soil and other surfaces on
10 the property owned or rented by Plaintiffs and Class Members. Those particles have caused damage to
11 the property, interfere with Plaintiffs' use and enjoyment of the property, their homes, and their
12 neighborhood, and may present serious risks to the health and well-being of the Plaintiffs and the Class
13 Members. The contaminants found in the moss studies are not the only toxic pollutants PCC has emitted
14 and that now contaminate the neighborhood.

15 **C. Health Impacts of Precision Castparts' Emissions**

16 27.

17 Emissions of toxic pollutants from the Facility have the potential to cause serious adverse health
18 impacts, including increased risk of various cancers. Each of the toxic pollutants identified in paragraph
19 4 can have profound impacts on human health. Some of those impacts are detailed below.

20 28.

21 Plaintiffs and Class Members are exposed to toxic pollutants from the Facility by direct
22 inhalation and inhalation of deposited toxic pollutants that become re-suspended in the air, through
23 contact with soils and surfaces contaminated by toxic pollutants, and through consumption of produce
24 grown in the area.

25 29.

26 Because Precision Castparts' emissions of toxic pollutants not only contaminate the air, but also
27 contaminate the soil, grass, plants, and homes throughout the community, people living in this
28

neighborhood continue to be exposed to dangerous levels of toxic pollutants on a daily basis. Thus, even if Defendants ceased the Facility's emissions of toxic pollutants today, Plaintiffs' and Class Members' properties would remain contaminated and damaged, and Plaintiffs and Class Members will most likely continue to be exposed to Defendants' toxic pollutants.

30.

Inorganic arsenic is a known human carcinogen.

31.

Acute arsenic poisoning results in vomiting, abdominal pain and diarrhea, followed by numbness and tingling of the extremities, and muscle cramping. In extreme cases, acute poisoning can be fatal.

32.

Breathing inorganic arsenic over extended periods can cause damage to blood vessels and nerves in the hands and feet. Skin contact with arsenic can result in redness or swelling. Individuals exposed to inorganic arsenic over several years have an increased risk of lung cancer. Chronic exposure to elevated levels of arsenic, such as by consuming produce irrigated with arsenic-containing water is known to result in skin lesions, hyperkeratosis, and cancers of the skin, bladder, and lungs.

33.

Other adverse health effects that may be associated with long-term ingestion of inorganic arsenic include developmental effects, neurotoxicity, diabetes, and cardiovascular disease.

34.

Oregon DEQ established a human health benchmark of 0.0002 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) inorganic arsenic in air.

35.

Due to the serious risks associated with even intermittent exposure to particulate arsenic, the Occupational Safety and Health Administration ("OSHA") established a workplace air exposure limit of 10 $\mu\text{g}/\text{m}^3$ inorganic arsenic, as well as requirements relating to exposure monitoring and control, respiratory protection, protective work clothing and equipment, medical surveillance, and specialized training.

36.

Like arsenic, certain forms of nickel, including nickel refinery dust and nickel subsulfide, are known human carcinogens. EPA has classified nickel carbonyl as a probable human carcinogen.

37.

Nickel inhalation is associated with adverse immune system impacts and respiratory effects including asthma, bronchitis, and decreased lung function. Studies link exposure to nickel refinery dust and nickel subsulfide with increased risk of lung and nasal cancers in humans. Animal studies further link nickel inhalation with lung tumors and decreased sperm count. The California Environmental Protection Agency has calculated a human health chronic inhalation reference exposure level of 0.05 µg/m³ for nickel.

38.

Skin contact with nickel is commonly associated with dermatitis. Animal studies associate oral exposure to nickel with adverse reproductive and developmental effects.

39.

According to EPA, studies “have clearly established that inhaled chromium is a human carcinogen, resulting in an increased risk of lung cancer.” EPA has classified hexavalent chromium as a known human carcinogen and stated that this classification raised a concern for the carcinogenic potential of trivalent chromium. Chronic chromium exposure can also cause bronchitis, pneumonia, nasal itching, soreness, asthma, perforations and ulcerations of the septum, decreased pulmonary function and other lung and respiratory problems. Inhalation or oral exposure may also result in complications during pregnancy and childbirth, and adversely impact the liver, kidney, gastrointestinal and immune systems, and possibly the blood. Skin contact with hexavalent chromium is associated with dermatitis, sensitivity, and ulceration of the skin.

40.

Cadmium has a variety of adverse health impacts. Breathing air with very high levels of cadmium can severely damage the lungs and may cause death, and breathing air with lower levels of cadmium over long periods of time results in a build-up of cadmium in the kidney, which can result in

1 kidney disease. Eating food with even low levels of cadmium can lead to a build-up of cadmium in the
2 kidneys, which can damage the kidneys. Exposure to even low levels of cadmium for a long time can
3 also cause bones to become fragile and break easily. And, the U.S. Department of Health and Human
4 Services (DHHS) has determined that cadmium and cadmium compounds are known human
5 carcinogens. The International Agency for Research on Cancer (IARC) has determined that cadmium is
6 carcinogenic to humans. The EPA has determined that cadmium is a probable human carcinogen.

7 41.

8 Cobalt can present significant risks to human health. People exposed to cobalt suffer serious
9 effects on their lungs, including asthma, pneumonia, and wheezing. Based on the animal data, the
10 International Agency for Research on Cancer (IARC) has determined that cobalt is possibly
11 carcinogenic to humans.

12 42.

13 Lead is a dangerous toxin. The main target for lead toxicity is the nervous system, both in adults
14 and children. Long-term exposure of adults to lead has resulted in decreased performance in some tests
15 that measure functions of the nervous system. Lead exposure may also cause weakness in fingers, wrists,
16 or ankles. Lead exposure also causes small increases in blood pressure, particularly in middle-aged and
17 older people. Lead exposure may also cause anemia. Lead can severely damage the brain and kidneys in
18 adults or children and ultimately cause death. In pregnant women, high levels of exposure to lead may
19 cause miscarriage. High-level exposure in men can damage the organs responsible for sperm production.
20 The Department of Health and Human Services (DHHS) has determined that lead and lead compounds
21 are reasonably anticipated to be human carcinogens based on limited evidence from studies in humans
22 and sufficient evidence from animal studies, and the EPA has determined that lead is a probable human
23 carcinogen. The International Agency for Research on Cancer (IARC) has determined that inorganic
24 lead is probably carcinogenic to humans.

25 43.

26 People exposed to manganese risk damages to their nervous system. These health effects include
27 behavioral changes and other nervous system effects, which include movements that may become slow
28

1 and clumsy. Exposure to high levels of manganese in air can cause lung irritation and reproductive
2 effects. Nervous system and reproductive effects have been observed in animals after oral doses of
3 manganese.

4 44.

5 Titanium presents several risks to human health. Titanium can irritate the skin, eyes, mucous
6 membranes, and the lungs. After short-term exposure respiratory system effects can include coughing
7 and tightness in the chest. More severe effects can include chemical bronchitis or pneumonia, and
8 congestion of the mucous membranes of the upper respiratory tract. These effects can cause long-term
9 effects such as the narrowing of the vocal cords, windpipe, and upper airways.

10 45.

11 Nitrogen oxides (NO_x) can irritate eyes, nose, throat, and lungs, leading to coughing, shortness
12 of breath, tiredness, and nausea. Exposure to low levels can also result in fluid build-up in the lungs one
13 or two days after exposure. Breathing higher levels of nitrogen oxides can cause rapid burning, spasms,
14 and swelling of tissues in the throat and upper respiratory tract, reduced oxygenation of body tissues, a
15 build-up of fluid in your lungs, and death.

16 46.

17 PM₁₀ and PM_{2.5} mean particulate matter of less than 10 micrometers (µm) and 2.5 µm,
18 respectively. These are inhalable particles that are small enough to penetrate the thoracic region of the
19 respiratory system. The health effects of inhalable PM are well documented. Exposure over both the
20 short term (hours, days) and long term (months, years) yield a wide range of human health impacts,
21 including: respiratory and cardiovascular morbidity, such as aggravation of asthma, respiratory
22 symptoms and an increase in hospital admissions. And, particulate matter of these sizes is responsible
23 for mortality from cardiovascular and respiratory diseases and from lung cancer.

24
25 **D. Plaintiffs' Use and Enjoyment of their Property Has Been Impaired By Defendants' Acts and Omissions**

26 *Plaintiffs Brian Anthony Resendez and Rodica Alina Resendez*
27
28

1 47.

2 Plaintiffs Brian Anthony Resendez and Rodica Alina Resendez live in a home they own located
3 less than two-thirds of a mile northeast of the Facility and within the Affected Area. Mr. Resendez has
4 lived there since he purchased his home in 2005, and Mrs. Resendez has lived there since around
5 October, 2006. Mr. Resendez did not know when he purchased his home, nor could he have reasonably
6 known, that this home was located in a hot spot of toxic pollutants.

7 48.

8 The Resendezes have an active five-year old boy who likes to play outside. Emissions of toxic
9 pollutants from Defendants' Facility in the air and on their property have caused them to reduce their
10 child's playtime in their own yard and they have instead traveled to parks just to try to ensure that they
11 are allowing their son to play in a safe environment.

12 49.

13 The Resendezes are worried about adverse near-term and long term health effects that emissions
14 of toxic pollutants from the Facility may have on them, their son, their eighty-one year old mother that
15 lives with them for much of the year, and their two dogs. They are concerned that spending too much
16 time at their own home could poison them and cause terminal illnesses. This had harmed their use and
17 enjoyment of their home.

18 50.

19 The Resendezes like to garden and have planted their vegetable garden for the last several years.
20 While they have cleared the garden for planting this year, they have not planted anything, nor do they
21 plan to plant anything, because they are worried that emissions of toxic pollutants from the Facility may
22 make their vegetables unsafe to eat. This interference with their use and enjoyment of their property is a
23 result of the Defendants emissions.

24 51.

25 Emissions of toxic pollutants from the Facility have and will reduce the value of the Resendezes'
26 home and undermine the efforts they have made over the years to improve the value of their property.
27 The Resendezes are considering turning this home into a rental property. It will be more difficult to rent
28

1 the home, and the Resendezes may suffer reduced rent payments due to Defendants' emissions, as the
2 Resendezes feel morally obligated to disclose the known issues to any potential renters.

3 52.

4 Emissions of toxic pollutants have travelled from Defendants' facility and landed on and remain
5 on the Resendezes' real and personal property without their consent.

6 ***Plaintiffs Michele Francisco and Matthew Talbot***

7 53.

8 Plaintiffs Michele Francisco and Matthew Talbot live in a home Ms. Francisco owns located less
9 than 2,000 feet northeast of the Facility and in the Affected Area. Ms. Francisco and Mr. Talbot have
10 lived there since Ms. Francisco purchased the home in December 2015. Ms. Francisco and Mr. Talbot
11 did not know when Ms. Francisco purchased her home, nor could they have reasonably known, that this
12 home was located in a hot spot of toxic pollutants. Had Ms. Francisco known about the emissions of
13 toxic pollutants from the Facility, she would not have purchased her home, nor would she and Mr.
14 Talbot have looked for a home in the area. Known emissions of toxic pollutants from the Facility have
15 and will reduce the value of Ms. Francisco's home.

16 54.

17 After they learned of Defendants' dangerous air pollution, Ms. Francisco's and Mr. Talbot's use
18 and enjoyment of the property declined significantly. Without knowledge of the emissions of toxic
19 pollutants originating from Defendants' Facility, Ms. Francisco purchased her home, in part, because of
20 the wonderful outdoor space and good sunlight it receives. Ms. Francisco and Mr. Talbot intended to
21 use the outdoor spaces around their home for vegetable gardening and entertaining guests, but since
22 learning about the emissions of toxic pollutants from Defendants' Facility, they have abandoned those
23 plans. Just before learning about the emissions of toxic pollutants, Ms. Francisco and Mr. Talbot
24 planted several grape vines that they planned to use for wine-making. However, now they no longer
25 plan to use the grapes due to concerns about their health and the health of their friends and family with
26 whom they planned to share the wine due to the emissions of toxic pollutants from Defendants' Facility.
27 Ms. Francisco also has a blackberry patch on her property that she had hoped to harvest, eat and share,
28

1 but her concern about potential heavy metal poisoning of herself and others from toxic pollutants from
2 the Facility has caused her to refrain. Mr. Talbot is also legitimately concerned about possibly breathing
3 toxic pollutants from Defendants' Facility when he maintains these blackberry bushes, mows the lawn,
4 and does other yardwork.

5 55.

6 Simply being outside on their property concerns Ms. Francisco and Mr. Talbot because of
7 Defendants' emissions of toxic pollutants. Before purchasing the home, Ms. Francisco and Mr. Talbot
8 lived in a duplex with only a small patio for outdoor space, so abundant outdoor space where they could
9 spend time was something that drew them to their current home. However, because of their concerns
10 over air quality due to Defendants' emissions of toxic pollutants, Ms. Francisco and Mr. Talbot now do
11 not spend as much time outside on the property as they otherwise would, decreasing their use and
12 enjoyment.

13 56.

14 Ms. Francisco suffers from allergies for which she gets shots two or three times per week. Ms.
15 Francisco's allergies have progressively worsened since moving into her home. Ms. Francisco has
16 ripped out the carpeting in her house and replaced it with wood floors and used air purifiers in her home
17 to reduce the presence of allergens. Ms. Francisco is concerned about whether Defendants' air
18 emissions of toxic pollutants may be exacerbating or effecting her allergies, and that concern has
19 caused substantial interference with her use and enjoyment of her home.

20 57.

21 Ms. Francisco and Mr. Talbot have three cats that live with them, one of which has developed
22 asthma. Despite Ms. Francisco's efforts to reduce allergens and air contamination in her home, the cat's
23 asthma continues to worsen. Since moving into her home, the cat has started requiring an inhaler to treat
24 its asthma. Over the summer, it has been very warm in Ms. Francisco's home and Ms. Francisco would
25 prefer to have all her windows open at night to control the temperature, but Ms. Francisco has noticed
26 that her asthmatic cat does better with the windows closed. Thus, Ms. Francisco occasionally keeps the
27

windows closed in the cat's room when she otherwise would not, due to concern that the emissions of toxic pollutants from Defendants' Facility might irritate the cat's asthma.

58.

Ms. Francisco and Mr. Talbot are worried about adverse near and long-term health effects that emissions of toxic pollutants from the Facility may have on them, their cats, and guests. That concern has caused substantial interference with their use and enjoyment of their home.

59.

Emissions of toxic pollutants have travelled from Defendants' Facility and landed on and remain on Ms. Francisco's and Mr. Talbot's home, yard, and personal property without their consent.

Plaintiff Mark McNamara

60.

Plaintiff Mark McNamara lives within half a mile of the Facility. His home is within the Affected Area. He purchased his home in 2012. He did not know when he bought his home, and could not have reasonably known, that it was located in a hotspot of toxic pollutants emitted from the Facility.

61.

Because the Facility has emitted toxic pollutants that have entered onto and currently remain on his property, the value of the Mr. McNamara's property has declined. His property is also worth less now that it is public knowledge that the property is so close to a notorious polluter and located within the known hot spot of toxic pollutants created by the Facility.

62.

Had Plaintiff McNamara known about the emissions of toxic pollutants from the Facility, he would not have bought his house or paid as much for it as he did.

63.

After he learned of Defendants' air emission of toxic pollutants, Plaintiff McNamara's use and enjoyment of his property declined significantly. For example, he has always enjoyed being in his yard, has been an avid gardener, and maintained a vegetable garden in his yard. Since Mr. McNamara learned

1 that his property is within the hot spot of Defendants' nickel and arsenic emissions identified in Exhibit
2 3, he has significantly curtailed his use of his yard, stopped gardening there, and not eaten produce from
3 his yard, in an attempt to limit his exposure to Defendants' emissions.

4 64.

5 Plaintiff McNamara is also suffering economic harm as a result of Defendants' air emissions of
6 toxic pollutants. Mr. McNamara rents rooms in his house, both on a long-term basis, and on a short-term
7 basis via AirBNB. After learning about Defendants' emissions of toxic pollutants, one of Mr.
8 McNamara's long-term tenants gave notice that he would not renew his lease because he did not wish to
9 live in a house located in the toxic hotspot created by Defendants. Additionally, Mr. McNamara has had
10 fewer bookings via AirBNB for his short-term rentals since the news about Defendants' emissions of
11 toxic pollutants became publically known.

12 ***Plaintiff Debra Taevs***

13 65.

14 Plaintiff Debra Taevs lives within one block of The Facility. Her home is within the Affected
15 Area. Plaintiff Taevs has lived in her current home since buying it in January 2007. She did not know
16 when she bought her home, and could not have reasonably known, that it was located in a hotspot of
17 emissions of toxic pollutants from the Facility.

18 66.

19 The Facility has emitted toxic pollutants that have entered into and currently remain on Plaintiff
20 Taevs's property. As a result, the value of her property has declined. Plaintiff Taevs's property is also
21 worth less now that it is public knowledge that the property is so close to a notorious polluter and
22 located within the known hotspot of toxic pollutants created by Defendants.

23 67.

24 Had Plaintiff Taevs known about the dangerous emissions of toxic pollutants from the Facility,
25 she would not have bought her house or paid as much for it as she did.

68.

After learning of Defendants' dangerous emissions of toxic pollutants and that she was living within the hotspot of arsenic and nickel emitted by the Facility, identified in Exhibit 3, Plaintiff Taevs's use and enjoyment of her property declined significantly. Initially after buying her home in 2007, Plaintiff Taevs and her husband invested substantially in remodeling their home and gardens, turning their "fixer house" into the cozy and charming home they had hoped to live in permanently. They transformed the barren yard into a seemingly vibrant one, with fruit trees, berries, flowers, bushes, a large chicken coop, shed, flowered archway, raised garden beds, rain barrels, and more. Now, Plaintiff Taevs's dreams and her ability to use and enjoy her property have been dashed by Defendants' contamination of the property with toxic pollutants and the legitimate concerns she has about health impacts from that pollution. The pleasure that Plaintiff Taevs had in creating and maintaining a beautiful and bountiful home has been reduced, and she has ceased engaging in outdoor gardening. She now derives considerably less enjoyment of her home's vegetation and other outdoor amenities.

69.

Plaintiff Taevs has also changed other habits as a direct result of having learned of Defendants' air emissions of toxic pollutants. She spends less time outside, and if walking or biking she leaves the neighborhood, rather than spending time in her own neighborhood with its contaminated air. She routinely drives away from her neighborhood to try to avoid breathing in the toxic pollutants the Facility emits. She no longer bikes near the Facility nor along the bike path adjacent to the Facility.

70.

Plaintiff Taevs once gardened avidly, deriving significant pleasure from growing flowers and vegetables in her large yard. Now that she has learned that she may have been putting herself and her guests in danger by contact with soil or the ingestion of produce that have been contaminated by Defendants' emissions of toxic pollutants, Plaintiff Taevs has seriously curtailed her use of her garden and yard.

71.

Plaintiff Taevs used to enjoy opening the windows of her home when the weather was warm, and listening to birds in the nearby trees. However, now she keeps her windows closed whenever possible and she has purchased an in-home air filter to try to reduce her exposure to the toxic pollutants generated by the Facility.

CLASS ALLEGATIONS

72.

This action is maintainable as a class action under Oregon Rule of Civil Procedure 32(A) and (B).

73.

The class definition(s) may depend on the information obtained through discovery. Notwithstanding, at this time, Plaintiffs bring this class action and seek certification of the claims and certain issues in this action on behalf of a Class of individuals defined as: All persons who (a) currently own property in the Affected Area or (b) currently reside in the Affected Area. Excluded from the class are: (1) Defendants, any entity or division in which Defendants have a controlling interest, and their legal representatives, officers, directors, assigns, and successors; and (2) the judge to whom this case is assigned and the judge's staff.

74.

Plaintiffs reserve the right to amend the Class definition.

75.

All members of the Class were and are similarly affected by Defendants' wrongful conduct and emissions of toxic pollutants from the Facility

A. Numerosity

76.

Because there are estimated to be thousands of people that reside within the Affected Area, the number of individuals in the Class is so large as to make joinder impracticable. Class Members may be

1 notified of the pendency of this action by recognized, Court-approved notice dissemination methods,
2 which may include U.S. Mail, electronic mail, Internet postings, and/or published notice.

3 **B. Common Questions of Law and Fact Predominate**

4 77.

5 There are numerous questions of law and fact common to Plaintiffs and Class Members that
6 predominate over questions affecting only individual members, including:

- 7 a. Whether Defendants trespassed onto Class Members' property and land enjoyed by Class
8 Members;
- 9 b. Whether Defendants' operations, including emissions of toxic pollutants from the
10 Facility, constitute a public and/or private nuisance;
- 11 c. Whether Defendants owed any duties to Class Members;
- 12 d. Whether and how Defendants' conduct harmed Class Members;
- 13 e. Whether Defendants interfered with Class Members' use and enjoyment of their
14 property;
- 15 f. Whether Class Members' personal or real property has been damaged; and
- 16 g. Whether Class Members are entitled to injunctive relief;

17 **C. Typicality**

18 78.

19 The claims asserted by Plaintiffs in this action are typical of the claims of the Class Members, as
20 the claims arise from the same course of conduct by Defendants, are based on the same legal theories,
21 and the relief sought within the Class is common to the Class Members. Further, there are no defenses
22 available to Defendants that are unique to Plaintiffs.

23 **D. Adequacy**

24 79.

25 Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs are
26 adequate representatives of the Class because their interests do not conflict with the interests of the Class
27 members they seek to represent, and they have retained counsel competent and experienced in both
28

environmental and class action litigation. Plaintiffs and Plaintiff's counsel will fairly and adequately protect Class Members' interests. Undersigned counsel have represented persons in a variety of actions where they have sought to protect individuals, property, and public health from industrial pollution.

E. Predominance and Superiority of Class Action

80.

The prerequisites to maintaining a class action pursuant to Rule 32(A) and (B) are met because questions of law and fact common to each Class Member predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Individual litigation would be economically impracticable for individual Class Members and would risk inconsistent judgments, whereas class action litigation will be economical and efficient for all parties and the courts.

F. Declaratory and Injunctive Relief

81.

Certification also is appropriate because Defendants acted, or refused to act, on grounds generally applicable to the Class, thereby making the injunctive relief sought on behalf of the Class appropriate under Rule 32(B)(2).

G. Notice

82.

Plaintiffs provided notice and a demand for damages to Defendants pursuant to ORCP 32H at least thirty days prior to filing this Second Amended Complaint seeking damages, and no Defendant has satisfied that demand.

FIRST CLAIM FOR RELIEF

(Trespass)

83.

Plaintiffs re-allege all the foregoing paragraphs and further allege:

1 84.

2 Defendants' conduct has caused, either negligently, willfully, recklessly, or intentionally, one or
3 more trespasses onto land possessed by Plaintiffs and Class Members, including by emitting particles of
4 toxic pollutants onto such land, and this conduct disturbs Plaintiffs' and Class Member's rights to
5 exclusive use and possession of such land.

6 85.

7 Plaintiffs and Class Members, have not given Defendants permission to emit particles of toxic
8 pollutants onto the land that Plaintiffs and Class Members possess.

9 86.

10 Defendants' conduct that resulted in trespasses was and is either negligent, reckless, intentional,
11 and/or abnormally dangerous.

12 87.

13 As a result of Defendants' conduct, Plaintiffs' home and personal property have been
14 contaminated with toxic pollutants.

15 88.

16 By trespassing on Plaintiffs' and Class Members' properties, Defendants have significantly
17 injured Plaintiffs and Class Members, their property, the plants and landscaping on their land, and the
18 value of the property. By depositing toxic pollutants on the properties of Plaintiffs and Class Members,
19 Defendants have also been the proximate cause of the diminished value of those properties.

20 89.

21 Unless Defendants are enjoined from further conduct of the type alleged, Plaintiffs and Class
22 Members will continue to suffer significant and irreparable injury. Plaintiffs and Class Members have
23 no adequate remedy at law to prevent such ongoing conduct. Plaintiffs and Class Members are entitled
24 to a permanent injunction and an Order directing Defendants to take all necessary steps to prevent
25 further injury to Plaintiffs, including removing the particles of toxic pollutants that Defendants have
26 caused to be deposited on Plaintiffs' and other Class Members' property.

90.

The requested injunction is in the public interest.

91.

Any compliance by Defendants with applicable laws or permit conditions does not excuse Defendants' trespass or any other tort.

92.

Any hardship allegedly caused to the Defendants by such an injunction is greatly outweighed by the benefits resulting to Plaintiffs and the Class Members: including, but not limited to, the ability to live secure in the knowledge that the air they breathe, and the land they live on and enjoy and rely on for food, are safe.

93.

Any hardship allegedly caused to the Defendants by such an injunction is far outweighed by the benefits resulting to Plaintiffs and the Class Members: the ability to live secure in the knowledge that the air they breathe and the land they live on and enjoy are safe.

94.

As a result of Defendants' conduct, Plaintiffs and Members of the Class have each suffered or will each have suffered:

- a. Testing expenses to determine the level of toxic pollutants in Plaintiffs' and Class Members' and their family member's bodies, in a sum the jury determines to be fair but in no event to exceed \$3,000 per person;
- b. Testing expenses to determine the level of toxic pollutants on the Plaintiffs' and Class Members' property, in a sum the jury determines to be fair but in no event to exceed \$8,000 per lot;
- c. Damage to or the loss of personal property, including but not limited to produce or other edible plants or fruit from the trees or bushes cultivated by Plaintiffs and Class Members, in a sum the jury determines to be fair but in no event to exceed \$5,000 per household;

- d. Clean up or remediation expenses to remove or contain and make safe the levels of toxic pollutants found on the Plaintiffs' and Class Members' property, in a sum the jury determines to be fair but in no event to exceed \$100,000 per lot;
- e. Diminution in value of property that the Plaintiffs and Class Members own that is within the known plume of the Defendants' emissions of toxic pollutants, in a sum the jury determines to be fair but in no event to exceed \$125,000 per lot;
- f. The loss of use and enjoyment of property Plaintiffs and Class Members have suffered as a result of Defendants' emissions of toxic pollutants, in a sum the jury determines to be fair but in no event to exceed \$150,000 per person;
- g. The expense of future medical monitoring of the Plaintiffs and/or their family members, and Class Members to determine the nature of the long term harm created by exposure to the Defendants' emissions of toxic pollutants, in a sum the jury determines to be fair but in no event to exceed \$150,000 per person; and
- h. The loss of use of the funds expended to test and/or clean up Plaintiffs' and Class Members' property, in a sum to be calculated using prejudgment interest at the highest allowable rate – which is currently 9% per annum; all to Plaintiffs' economic damages in a sum to be proven at trial.

SECOND CLAIM FOR RELIEF

(Nuisance)

95.

Plaintiffs re-allege the paragraphs 1 through 80 and 92, and further allege:

96.

Defendants' emissions of toxic pollutants from its Facility constitute a nuisance.

97.

Defendants' emissions of toxic pollutants spread across Portland and Milwaukie, affecting people who live, work, and travel through the region.

1 98.

2 Defendants' emissions of toxic pollutants have substantially and unreasonably interfered with the
3 use and enjoyment of Plaintiffs' and Class Members' property, and have harmed their property and/or
4 the vegetation on their property, and have caused permanent injury to their real property.

5 99.

6 As a result of Defendants' emissions of toxic pollutants, Plaintiffs have changed their habits and
7 practices to avoid activities and rights attendant to property ownership in which they used to partake –
8 such as gardening, enjoying the immediate physical environment outside their homes, or enjoying the
9 movement of air near, by, and through their homes. Plaintiffs' and Class Members' reasonable concerns
10 about the contamination of their property and/or their persons by Defendants' toxic pollutants, and their
11 concerns about whether they and their family and their guests can safely play in or use their yards
12 without putting their health (and that of their children and pets) at risk, has reduced their enjoyment of
13 their property.

14 100.

15 Plaintiffs and the Class Members are harmed based on this interference with the use and
16 enjoyment of their property, and by the nature of the injury Defendants' emissions of toxic pollutants
17 have caused to their real property.

18 101.

19 Those emissions and Defendants' ongoing operations have also depressed or diminished the
20 value of Plaintiffs' and Class Members' property.

21 102.

22 Defendants' interference with Plaintiffs' and Class Members' use and enjoyment of their land is
23 unreasonable. It is not reasonable of Defendants to knowingly emit thousands of pounds of toxic
24 pollutants into a residential area where schools and children are present and where families garden. It is
25 also not reasonable to expect Plaintiffs and Class Members to bear the burden or suffer the harm that
26 Defendants have caused and continue to cause them.

103.

While remediation of the permanent injury Defendants have caused may not be reasonably attainable, the cost of adequately controlling and containing Defendants' emissions of toxic pollutants is modest, particularly when compared to the harm that Plaintiffs and Class Members have been forced to bear as a result of Defendants' decision to try to externalize rather than bear those costs. The concrete and ongoing harms Plaintiffs and Class Members have suffered are far greater than they should be forced to bear in their predominantly residential neighborhood.

104.

Defendants' conduct in creating a nuisance was and/or is negligent, reckless, intentional, and/or abnormally dangerous.

105.

Any alleged compliance by Defendants with applicable laws or permit conditions does not excuse Defendants' creation of a nuisance, or Defendants' causing harm or damages to Plaintiffs or other Class Members or their property.

106.

Plaintiffs seek an injunction ordering Defendants to abate, insofar as it is possible, the nuisance of Defendants' emissions of toxic pollutants by cleaning up the toxic pollutants on and around Plaintiffs' and Class Members' homes and also compensating them for the diminished value of those homes, and by ceasing the emission of toxic pollutants at levels that interfere with any reasonable use of the surrounding properties and neighborhood.

107.

As a result of Defendants' conduct, Plaintiffs and Members of the Class have each suffered or will each have suffered the harms as detailed in paragraph 92, and incorporated herein by reference.

108.

THIRD CLAIM FOR RELIEF

(Negligence)

109.

Plaintiffs re-allege the paragraphs 1 through 80 and 92 and further allege:

110.

By emitting particulates of toxic pollutants onto the land possessed by Plaintiffs and the Class, Defendants disturbed Plaintiffs' and Class members' rights to exclusive possession of that land and physically harmed that property.

111.

Defendants directly or indirectly allow particles of toxic pollutants from the Facility to enter on to and remain on Plaintiffs' and Class Members' land.

112.

Defendants were unreasonable in the operation of the Facility, in one or more of the following ways:

- a. Defendants failed or neglected, and continue to fail or neglect, to install appropriate emissions control equipment on each of their furnaces, when Defendants knew or should have known that failure to do so could result in emission of toxic pollutants that would likely travel to and land on neighboring properties;
- b. Defendants failed or neglected, and continue to fail or neglect, to monitor their emissions on a regular basis to determine if toxic pollutants were escaping from the Facility, when Defendants knew or should have known that failure to do so could result in emission of toxic pollutants that would likely travel to and land on neighboring properties;
- c. Defendants failed or neglected, and continue to fail or neglect, to install appropriate emissions control equipment on the portions of the Facility where fugitive emissions might escape, when Defendants knew or should have known that failure to do so could result in emission of toxic pollutants that would likely travel to and land on neighboring properties;
- d. Defendants failed or neglected, and continue to fail or neglect, to monitor the Facility's fugitive emissions on a regular basis to determine if toxic pollutants were escaping, when

1 Defendants knew or should have known that failure to do so could result in emission of
2 toxic pollutants that would likely travel to and land on neighboring properties;

3 e. Defendants failed or neglected, and continue to fail or neglect, to properly train their
4 employees to operate the Facility in a way that would not allow emissions of toxic
5 pollutants, when Defendants knew or should have known that failure to do so could result
6 in emission of toxic pollutants that would likely travel to and land on neighboring
7 properties;

8 f. Defendants failed or neglected, and continue to fail or neglect, to construct the Facility in
9 a way that would preclude emissions of toxic pollutants, when Defendants knew or
10 should have known that failure to do so could result in emission of toxic pollutants that
11 would likely travel to and land on neighboring properties;

12 g. Defendants failed or neglected, and continue to fail or neglect, to maintain the Facility in
13 a way that would prevent emissions of toxic pollutants, when Defendants knew or should
14 have known that failure to do so could result in emission of toxic pollutants that would
15 likely travel to and land on neighboring properties;

16 h. Defendants failed or neglected, and continue to fail or neglect, to maintain the Facility in
17 a way that would prevent fugitive emissions, when Defendants knew or should have
18 known that failure to do so could result in emission of toxic pollutants that would likely
19 travel to and land on neighboring properties;

20 i. Defendants failed or neglected to warn the neighbors that the Facility was emitting
21 dangerous toxic pollutants, when Defendants knew or should have known that failure to
22 do so could result in damage to the neighbors, and the neighbors' children, guests, and/or
23 properties.

24 j. Defendants knew or should have known that their conduct was causing a foreseeable risk
25 of harm because:

26 i. they knew that they used and generated dangerous toxic pollutants at the Facility;
27
28

1 E. An Order enjoining Defendants from releasing nickel, arsenic, and other toxic pollutants
2 into the air at levels that interfere with any reasonable use of the surrounding properties and
3 neighborhood;

4 F. Require Defendants to provide notice to the Class informing Class Members of the
5 pendency of this action and providing notice of the toxic pollutants released from the Facility and
6 appropriate measures that Class Members may take to protect themselves, their families, and guests
7 from exposure;

8 G. Require Defendants to develop and implement a plan for providing environmental
9 monitoring, investigation, and remediation, including (i) monitoring Facility emissions of toxic
10 pollutants; (ii) ambient air monitoring of toxic pollutants; (iii) prompt testing and identification of
11 deposits of toxic pollutants on land within the Impacted Area; and (iv) remediation of deposits of toxic
12 pollutants on land; and allow Plaintiffs and Class Members to participate in development of that plan;

13 H. Require Defendants to develop and implement a plan for providing medical monitoring
14 services and information to Plaintiffs and Class Members concerning the health impacts of Defendants'
15 emissions of toxic pollutants on Plaintiffs and Class Members and allow Plaintiffs and Class Members
16 to participate in development of that plan;

17 I. Require Defendants to pay for all residents living in the Affected Area to have urine
18 and/or blood testing performed for the presence of toxic pollutants in their bodies;

19 J. Require Defendants to pay economic and/or non-economic damages to Plaintiffs and the
20 class;

21 K. Require Defendants to establish a fund to cover the costs of ongoing diagnostic testing of
22 Plaintiffs and the class for the toxic pollutants emitted by the Facility to determine if there are any long
23 term health effects of those exposures;

24 L. Award prejudgment interest at the highest allowable rate on the economic damages;

25 M. Require Defendants to pay attorneys' fees and costs; and

26 N. Provide such other relief as the Court deems just.
27
28

1 DATED this 31st day of July, 2017.

2 SMITH & LOWNEY, PLLC

3 By: s/ Claire E. Tonry

4 Claire E. Tonry (OSB No. 095696)
5 claret@igc.org

6 Knoll D. Lowney (WSBA No. 23457)
7 knoll@igc.org

8 **SMITH & LOWNEY, PLLC**
9 2317 E. John St.
10 Seattle, WA 98112
11 Telephone: (206) 860-2883
12 Facsimile: (206) 860-4187

13 **KAMPMEIER & KNUTSEN PLLC**

14 Brian A. Knutsen (OSB No. 112266)
15 brian@kampmeierknutsen.com
16 833 S.E. Main Street
17 Mail Box No. 318; Suite 327
18 Portland, OR 97214
19 Telephone: (503) 841-6515

20 *Attorneys for Plaintiffs*

KELLER ROHRBACK L.L.P.

By s/ Daniel Mensher

Daniel Mensher (Bar No. 074636)
dmensher@kellerrohrback.com

Amy Williams-Derry (*pro hac vice forthcoming*)
awilliams-derry@kellerrohrback.com

KELLER ROHRBACK L.L.P.
1201 Third Ave., Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900
Facsimile: (206) 623-3384

Matthew J. Preusch (Bar No. 134610)
mpreusch@kellerrohrback.com

KELLER ROHRBACK L.L.P.
1129 State Street, Suite 8
Santa Barbara, CA 93101
Telephone: (805) 456-1496
Facsimile: (805) 456-1497

Karl G. Anuta (Bar No. 861423)
kga@integra.net

LAW OFFICE OF KARL G. ANUTA, P.C.
735 S.W. First Avenue
Strowbridge Bldg, Second Floor
Portland, Oregon 97204
Telephone: (503) 827-0320
Facsimile: (503) 228-6551

Attorneys for Plaintiffs