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 **PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION** **ORAL ARGUMENT REQUESTED**
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules & Regulations

Miscellaneous

I. UTCR 5.010 CERTIFICATION

The Parties conferred in good faith regarding this Motion and were unable to agree concerning the issue in dispute.

II. ORAL ARGUMENT

Pursuant to UTCR 5.050(1), Plaintiffs estimate oral argument will require one hour, and do not request official court reporting services.

III. MOTION AND INTRODUCTION

Defendants Precision Castparts Corp. and PCC Structurals, Inc. (collectively, "PCC" or "Precision Castparts"), have been polluting Plaintiffs' Southeast Portland neighborhoods for years. PCC's emissions have contaminated Plaintiffs' air, travelled to Plaintiffs' homes, and invaded Plaintiffs' property. To right those legal wrongs, Plaintiffs—Brian Anthony Resendez, Rodica Alina Resendez, and Debra Taevs (collectively, "Plaintiffs" or "Named Plaintiffs")—bring claims of trespass, nuisance, and negligence against PCC.[1] With this Motion, Plaintiffs ask the Court to certify a class in this matter, appoint them as representatives of that class, appoint Plaintiffs' counsel as class counsel, and order the Parties to confer on notice and trial plans.

Class actions addressing widespread environmental injuries serve valuable and well-established purposes for the injured, the alleged torfeasor, and the courts. They allow people who do not have the resources or ability to individually protect their property rights against pollution to do so collectively, in a single action, that resolves all claims with a single result. These collective actions also benefit the courts by conserving judicial resources. They consolidate the complex legal and factual issues in one case before one judge, rather than spreading them across

[1] As explained in the concurrently filed Motion to Withdraw, Plaintiffs Matthew Talbot and Michele Francisco seek leave to withdraw as proposed class representatives.

multiple, overlapping cases.[2] Defendants, too, can benefit from class actions, as they create finality to many potential claims at once. This is one of those cases that is ideally situated for class-wide resolution.[3]

This Motion does not seek any ruling on the merits of Plaintiffs' claims or PCC's defenses. Such a ruling would be improper at this stage. Instead, Plaintiffs simply ask the Court to permit them to present to a jury the common proof summarized below. That common proof will show at trial that PCC's emissions have invaded Plaintiffs' and their neighbors' properties, impaired their exclusive use and enjoyment of their properties, and diminished the value of their properties.

Plaintiffs ask this Court to allow Plaintiffs to seek injunctive relief and damages on behalf of not only themselves, but all their residential neighbors in Southeast Portland contained within the "Precision Plume," which is defined in Part VI of this Motion and in the concurrently proposed Fourth Consolidated Amended Class Action Complaint. That relief is particularly important here in Oregon, where "corporate polluters" often "get their way" by threatening the budgets of environmental regulatory agencies.[4]

Plaintiffs support this Motion with reports from five experts:

(1) **Dr. Ron Sahu** is an environmental, mechanical, and chemical engineer with nearly 30 years of experience designing and evaluating air pollution control equipment, including at steel mills. Using PCC's own data, Dr. Sahu explains the amount, sizes, and character of PCC's emissions, and previews the common evidence that Plaintiffs will present the jury showing PCC did not meet the standard of care.

---

[2] See Ex. 1, Declaration of Professor Alexandra D. Lahav ¶12 ("Lahav Decl.") (discussing purpose and procedural advantages of class actions). Unless otherwise indicated, all Exhibit ("Ex.") references refer to Exhibits to the Declaration of Matthew Preusch in Support of Motion for Class Certification, filed concurrently with this Motion.

[3] Ex. 1, Lahav Decl. ¶14 ("This case is the kind of case that the class action device was intended to enable.").

[4] See Ex. 54, Rob Davis, *Weak Watchdog: Why Oregon regulators backed off on truck pollution and more (Part Three of Four)*, The Oregonian (Mar. 8, 2019), https://projects.oregonlive.com/polluted-by-money/part-3.

(2) **Dr. Andrew Gray** is an atmospheric scientist who has "modeled air quality impacts of thousands of emissions sources," including for industry, government, and environmental organization clients. Dr. Gray uses the widely-accepted, EPA-preferred air modeling program to show the amount of PCC's emissions present on Plaintiffs' properties and other properties within the Precision Plume.

(3) **Dr. Mark Chernaik**, a toxicologist with a Ph.D. in biochemistry and a J.D., describes how PCC's emissions create a significant public health risk due to their associations with increased risks of mortality, neurological disease, cognitive impairment, diabetes, and cancer.

(4) **Dr. John Kilpatrick**, a real property appraiser with extensive experience determining how pollution impacts property value, outlines class-wide methods for measuring the damages caused by PCC's invasion of Class Members' property rights.

(5) **Professor Alexandra Lahav**, a nationally-renowned expert on class actions and aggregate litigation who has produced extensive scholarship on when class actions can and cannot be maintained, explains why, using the common proof summarized in this motion, proceeding as a class action is the fairest and most efficient way to resolve these Class Members' claims.

The availability of the common proof these experts provide explains why courts in Oregon and throughout the country regularly certify similar environmental class actions. *See, e.g.*, Ex. 47, Order Regarding Plaintiffs' Motion for Class Certification, *Meeker v. Bullseye Glass Co.*, No. 16-cv-07002 (Mult Co Cir Ct Feb 28, 2018) (Bushong, J); Ex. 50, Final Approval Order, *Connors v. Amerities West, LLC*, No. 16-cv-25390 (Wasco Co Cir Ct Sept. 7, 2018); Ex. 49, Order Granting Pls' Renewed Mot for Class Certification and Den Defs' Mot to Strike, *Andrews v. Plains All American Pipeline, L.P.*, No. 15-cv-04113 (CD Cal Apr 17, 2018) (Dkt No 454); *Freeman v. Grain Processing Corp.*, 895 NW2d 105 (Iowa 2017).

IV. BACKGROUND

A. *PCC operates a massive metal casting operation from which it emits thousands of tons of metal particles into the air every year.*

Precision Castparts, a Fortune 500 Company, operates two massive metal casting facilities that sit in the middle of several residential communities in Multnomah and Clackamas

counties. Defendant PCC Structurals, Inc. "manufactures steel and titanium investment castings for aerospace, land-based turbine, medical, military armament, and many other applications." Ex. 14, Exhibit to the Deposition of Tyson Terhaar ("Terhaar Dep. Ex.") 30. Investment casting is an industrial process for forming metal parts, such as those used in jet turbine engines. Precision Castparts' Large Parts Campus ("LPC") has two units, a steel casting plant ("LPC-S") and a titanium casting plant ("LPC-T"). The foundry at the Large Parts Campus was originally built in 1956. Ex. 4, Mark Chernaik, Ph.D., *Significance of pollutant levels in the vicinity of the Precision Castparts facility prior to its installation of further air pollution control devices in* 2016 (Mar. 28, 2019) ("Chernaik Report") at 2.

"Because the raw materials it uses contains substantial percentages of nickel and chromium, [Precision Castparts] has consistently reported significant emissions of these metals." *Id.* PCC emits those metals as "particulate matter," or "PM." *Id.* For example, in their report to the Oregon Department of Environmental Quality ("DEQ") for 2016, PCC reported that they cast thousands of tons of metals that, when released into the air, are recognized as hazardous air pollutants, or "HAPs," including nickel and chromium. Ex 44, PCC Structurals Inc. Large Parts Campus Annual Air Report, ACDP 26-1867 For Calendar Year 2016, at 3.

For that same year, PCC reported that they emitted to the ambient air up to 12.8 tons of PM per year at the Large Parts Campus, of which up to 2.6 tons per year was nickel and chromium in particulate form. *Id.* These emissions do not include the nearly 400 tons of particulate dust captured in Precision Castparts' "baghouse" dust collectors. *Id.* PCC concedes that the processes at the Large Parts Campus do create metals emissions; those emissions are in particulate form. *See* Ex. 6, Video Deposition of Tyson Terhaar, Sept. 21, 2018 ("Terhaar 1 Dep.") at 154:8-11 (Q: "What are the processes at LPC-S that would create emissions of nickel?"

A: "Melting metal so air arc, grinding, furnace, so any time you melt metal in a furnace."); Ex. 4, Chernaik Report at 2 (source testing confirms that "emissions of nickel and chromium by the foundry are in particulate form").

Unsurprisingly, given the significant size of PCC's facility, its age, and the significant quantities and character of pollution generated there, PCC is one of the largest sources of air pollution in Portland. In 2013, PCC was cited as one of top 20 worst polluters *in the nation* according to a Political Economy Research Institute "Toxic 100" report based in part on the pollution from the Large Parts Campus. Ex. 55, *Toxic 100 Air Polluters Index: 2013 Report, Based on 2010 Data*, Political Economy Research Institute, https://www.peri.umass.edu/toxic-100-air-polluters-index-2013-report-based-on-2010-data (last visited Mar. 19, 2019).

B. *PCC has Poor or Non-Existent Air Pollution Controls.*

PCC's emissions are significant not only because they are so large, but also because it appears PCC's systems to limit those emissions are ineffective or non-existent.

Many significant sources of particulate pollution at PCC's Large Parts Campus have no emissions controls at all. *See, e.g.*, Ex. 7, Videotaped Deposition of Tyson Terhaar, October 12, 2018 ("Terhaar 2 Dep.") 118:23-120:17 ([redacted]), 120:19-122:18 ([redacted]), 123:13-124:19 ([redacted]), 125:12-127:3 ([redacted]), 132:10-134:23 ([redacted]), 129:19-130:15 ([redacted]), 131:5-132:2 ([redacted]). PCC added emissions control equipment [redacted]. *See, e.g.*, Ex. 6, Terhaar 1 Dep. 111:1-12 ([redacted]); Ex. 10, Videotaped Deposition of Sheryl Uchytil ("Uchytil 1 Dep.") 170:4-19 ([redacted]).

And even when PCC did undertake to control their emissions of air pollutants, they failed to adequately maintain the most crucial aspect of their emissions controls: their baghouses and related air capture system. *See* Ex. 2, Expert Report of Dr. Ranajit (Ron) Sahu ("Sahu Report") at 7, 11-12.

A baghouse is basically a large vacuum cleaner. In a major metal fabrication factory, such as PCC's, a well-designed and operated air pollution system will draw contaminated air from inside the Large Parts Campus facilities into collection ducts that carry the particulate matter to the baghouses. There, the polluted air is pulled through various filters (e.g., "filter cartridges") and bags ("baghouse bags"), which capture some of the pollutants from the air. *See generally* Ex. 2, Sahu Report at 11 (discussing maintenance of baghouses). As the bags and filters become clogged with captured particulate matter, they are often shaken or otherwise cleaned, depositing the captured pollutants in dust collection barrels, bins, or sacks.

Over time, however, like with a vacuum cleaner used at home, the bags and filters will wear out, becoming less efficient at capturing particulates. They may also tear or leak. For this reason, baghouse bags and filters must be regularly inspected and periodically replaced. A properly designed and maintained baghouse should be able to capture sufficient pollutants to limit the emissions of pollutants and protect neighboring properties from pollution. *See generally id.* at 14, 22 n. 13. By contrast, a poorly designed or maintained baghouse system will capture fewer pollutants, ultimately allowing more pollutants to escape the buildings and travel through the ambient air to locations outside the facility and onto neighboring properties. *See id.* at 11.

PCC's own records and deposition testimony demonstrate that they have failed to properly maintain their baghouse system, causing increased emissions. *See generally* Sahu Report at 11-12. While PCC's list of baghouse maintenance problems is long, the most

prominent among them are (1) regularly having baghouses operating outside their legally permitted differential pressure, or "DP" ranges; (2) having baghouses develop numerous leaks that were improperly or untimely repaired; and (3) often having overfull dust collection barrels, which causes inefficient baghouse operation. *Id.*

- **(1) Differential Pressure ("DP").** DP is a number that represents the amount of "draw" a baghouse can generate (or suction, like a vacuum). PCC regularly allowed their baghouses' DP to operate outside permitted ranges. This means PCC's baghouses were regularly not drawing in as much dust as they should have been. *See* Ex. 2, Sahu Report 11-12; *see also* Ex. 40, Uchytil Dep. Ex. 151 (PCC's Standard Air Contaminant Discharge Permit with Oregon's DEQ, § 2.2, "Baghouse Operation and Maintenance": "The permittee must investigate and commence correction action measures within 24 hours of an observed excursion of the designed differential pressure range of any fabric filter baghouse."); *see also, e.g.*, Ex. 26, Terhaar Dep. Ex. 108, Ex. 27, Terhaar Dep. Ex. 109 ([redacted]), Ex. 28, Terhaar Dep. Ex. 110 ([redacted]), Ex. 29, Terhaar Dep. Ex. 30, Ex. 30, Terhaar Dep. Ex. 112, Ex. 31, Terhaar Dep. Ex. 113 (high DP for baghouse 9203).

- **(2) Leaks.** Because a baghouse functions like a vacuum, leaks at various places on a baghouse—such as in the ducting—limit how much dust a baghouse can draw at the intake stage. That causes additional fugitive releases of pollution—the less dust that a baghouse draws in, the more dust that is not properly filtered and/or collected and therefore released to the ambient air. PCC's baghouses regularly had leaks that were not properly addressed. In January 2016, a [redacted]

[redacted]

Ex. 25, Terhaar Dep. Ex. 106; *see also*, Ex. 2, Sahu Report at 12; *see also, e.g.*, Ex. 15, Terhaar Dep. Ex. 88 (leaking slide gate), Ex. 32, Terhaar Dep. Ex. 114 ([redacted]), Ex. 33, Terhaar

Dep. Ex. 116 (leaking baghouse door), Ex. 34, Terhaar Dep. Ex. 129 (leaking baghouses), Ex. 35, Terhaar Dep. Ex. 131 ([redacted]), Ex. 37, Terhaar Dep. Ex. 142 ([redacted]).

- **(3) Overfull Dust Collection Containers.** Baghouses have barrels, bins, or sacks to collect filtered baghouse dust. When dust collection containers are overfull, the dust backs up into the baghouse and causes the baghouse filters to clog and fail. When baghouse filters clog and fail, the baghouse both (a) draws less air in and (b) lets more pollution through the filters and out into the air. [redacted] Ex. 8, Videotaped Deposition of Tyson Terhaar, Feb. 8, 2019 ("Terhaar 3 Dep.") 121:19-122:7. As a result, PCC permitted their dust collection barrels to regularly become overfull, causing their filters to fail. *See* Ex. 2, Sahu Report at 12 and 12 n.13; *see also, e.g.*, Ex. 8, Terhaar 3 Dep. 113:2-117:4 ([redacted]), Ex. 19, Terhaar Dep. Ex. 99, Ex. 20, Terhaar Dep. Ex. 100 ([redacted]), Ex. 21, Terhaar Dep. Ex. 101 ([redacted]), Ex. 22, Terhaar Dep. Ex. 102 ([redacted]), Ex. 23, Terhaar Dep. Ex. 103 ([redacted]), Ex. 24, Terhaar Dep. Ex. 105 ([redacted]), Ex. 8, Terhaar 3 Dep. 242:3-243:18 ([redacted]), Ex. 36, Terhaar Dep. Ex. 136 (noting cartridge failure and dust on roof).

Because PCC has not adequately maintained its baghouses, they are far less effective at capturing metal-laden particulate matter pollution. That particulate matter ultimately escapes—unfiltered and untreated—into the outside air. These "fugitive emissions" are unaccounted for in PCC's self-reported annual emissions inventories it provides to DEQ, and yet can account for significant amount of pollutants escaping into the community. *See generally,* Ex. 2, Sahu Report 4.

PCC, through its corporate representative Tyson Terhaar, admits that they have a problem with fugitive emissions. PCC concedes that they emit uncontrolled and untreated fugitive emissions into the neighborhood's ambient air, in part, because of poorly operated and maintained baghouses:

[redacted]

[redacted]

Ex. 8, Terhaar 3 Dep. 235:22-236:16.

The most consistent symptom that PCC's baghouses are not operating properly is PCC's constant need to sweep up particulate dust around the baghouses and on the roof at the Large Parts Campus. If PCC's pollution controls were properly functioning, that metal-laden dust would be collected in baghouses. But, as PCC's environmental employee Zach Rego explained in a December 2016 email to his supervisors, [redacted] Ex. 16, Terhaar Dep. Ex. 93 (emphasis added):

[redacted]

See also, e.g., id. ([redacted]), Ex. 17, Terhaar Dep. Ex. 96 ([redacted]), Ex. 18, Terhaar Dep. Ex. 97 ([redacted]), Ex. 8, Terhaar 3 Dep. 111:21-

22 [redacted]), Ex. 9, Videotaped Deposition of Tyson Terhaar, Mar. 13, 2019 ("Terhaar 4 Dep.") 27:25-28:25, Ex. 38, Terhaar Dep. Ex. 181 ([redacted]).

PCC's poor maintenance of its emissions control equipment means PCC likely underestimates their total emissions as reported to regulators. Ex. 2, Sahu Report at 6, 11-12. As Dr. Sahu states, "in many cases the actual state of [PCC's] dust collection system, including the baghouses themselves[,] were such that they could not possibly have collected or removed PM at the high rates of efficiency assumed by the company in its emission estimates." *Id.* at 7.

C. *Forest Service Study shows metals hotspots around PCC.*

Even though PCC's Large Parts Campus has long been a source of pollution in Southeast Portland, it was not until recently that the public learned that PCC's emissions create a plume of metal-laden particulate matter in the air in the nearby residential neighborhood.

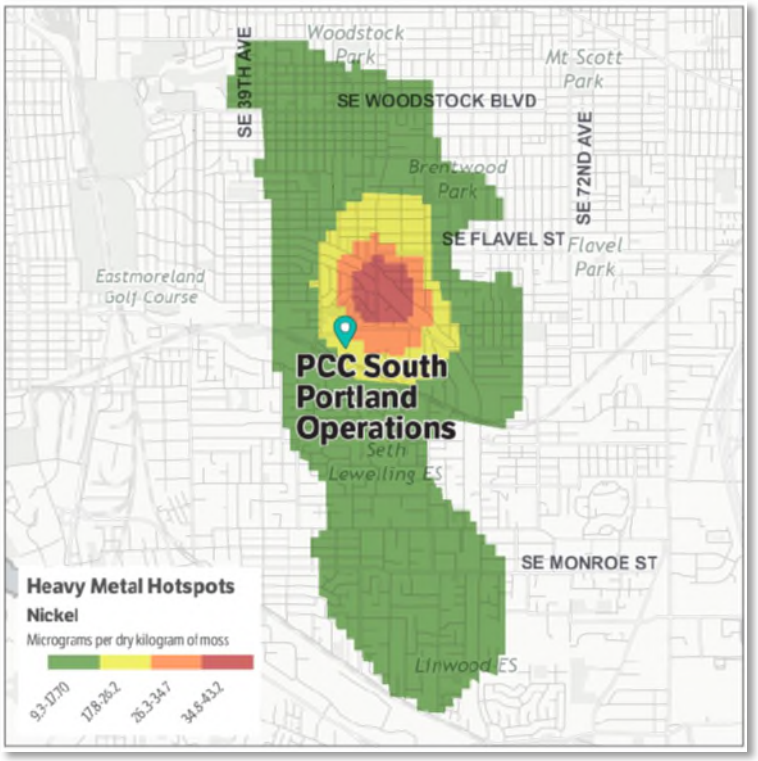
That public awareness was prompted by a study launched in 2013. Scientists with the United States Forest Service and Drexel University's Dornsife School of Public Health to collected and analyzed samples of moss throughout the Portland area. Ex. 52 ("Forest Service Study"). Those scientists were studying moss because it is an affordable means of detecting air pollution. *Id.* As moss does not have roots, it absorbs nutrients and water from the atmosphere, storing in its tissues compounds and contaminants present in the air. *Id.* As such, moss tissue makes a record of pollution levels in the surrounding environment and serves as a "bioindicator" of air pollution. *Id.* at 1.

The Forest Service Study revealed high concentrations or "hotspots" of certain contaminants around the Portland metropolitan area. Relevant to this case, the Forest Service Study found *the highest* concentration of nickel in Portland near PCC's Southeast Portland

facilities, as well as the fourth highest concentration of chromium. *See* Ex. 4, Chernaik Report at 2-3.

The Forest Service Study prompted the creation of widely-published "moss maps," created by the Oregon Department of Environmental Quality and others, showing "alarming levels of carcinogenic metals in tree moss around Portland."[5] Those maps revealed "a sprawling nickel plume centered in Southeast Portland's Brentwood-Darlington neighborhood. * * * The nickel plume stretches north of Precision Castparts, an industrial manufacturer that has been called one of the country's top polluters."[6]

PCC's facilities in Southeast Portland were near the heart of the nickel moss map:



[5] Ex. 58, Rob Davis, *Map shows arsenic pollution in five more Portland neighborhoods*, The Oregonian (Feb. 11, 2016), https://www.oregonlive.com/environment/2016/02/map_shows_arsenic_pollution_in.html.

[6] Ex. 59, Rob Davis, *New maps show heavy metal hot spots in two more Portland neighborhoods*, The Oregonian (Feb. 17, 2016), https://www.oregonlive.com/environment/2016/02/new_maps_show_heavy_metal_hot.html.

Third Consol. Am. Compl. ¶ 13. The Forest Service Study likewise showed a concentration of abnormally high levels of nickel found in the moss around the Large Parts Campus. Ex. 52, Forest Service Study at 20. Air monitors installed near PCC in response that study also showed elevated levels of nickel and chromium in the air. Ex. 4, Chernaik Report at 3 (average nickel levels 5.5 times above standard).

Later, identical analyses of the moss from Plaintiffs' properties likewise showed extremely elevated levels of nickel relative to the rest of Portland. Tellingly, the relative concentrations of metals found on Plaintiffs' properties tracked precisely the ranking of metals that PCC reports that it emits. *Id.* at 5. In other words, PCC reports that it emits more nickel than chromium, more chromium than cobalt, and more cobalt than molybdenum. That same chemical signature is found in the moss at Plaintiffs' homes. *Id*. at 4-5.

D. *Plaintiffs' experts model PCC's emissions, and show that, even with the most conservative estimations of the quantities and qualities of those emissions, PCC has a significant impact on the class area.*

The Forest Service Study, the "moss maps" they generated, and the air monitoring the prompted served as the "the canary in the coal mine," alerting Southeast Portland to the scope of PCC's metal-laden pollution. To more precisely determine the scope of that pollution, Plaintiffs retained experts in the fields of engineering, air modeling, and public health to examine PCC's emissions, model the ambient concentrations of toxic metals in the air, and produce maps that are based upon this information.

Despite the many indicators of levels of particulate metal in the air near PCC, until now, no one—except perhaps PCC—has undertaken to actually model the release and dispersion of PCC's emissions from the Large Parts Campus using PCC's own data. That is the common proof Plaintiffs' experts provide below: a dispersion map that shows how much metal-laden particulate

matter PCC's Large Parts Campus has emitted, the contents of that particulate matter, and where it went.

Plaintiffs' expert Dr. Sahu uses PCC's own data to examine the quantity and quality of the pollutants PCC emitted into Plaintiffs' neighborhoods. Dr. Gray used this information to model the ambient concentrations of toxic metals—transmitted as particulates PM10 and smaller—in the air, using AERMOD modeling.

As set forth in Dr. Gray's report, the American Meteorological Society/Environmental Protection Agency Regulatory Model ("AERMOD") is the EPA-preferred method for calculating the airborne dispersion of pollutants. *See* Ex. 3, H. Andrew Gray, *Precision Castparts PM Modeling* ("Gray Report") at 6. AERMOD uses a robust set of data-points to make its calculations, including emissions-source data, "atmospheric dispersion" data, meteorological data, and terrain data. *See id.* at 6-7. Dr. Gray used AERMOD to calculate the "increase in ambient PM concentrations in the area surrounding [PCC's] facility due to [PCC's] emissions," and "estimate * * * the amount of nickel and chromium that was deposited to the surface surrounding the facility due to [PCC's] emissions." *Id.* at 5, 6. These calculations serve as the basis for Dr. Gray's model of PCC's pollution: the "plume" map ("Precision Plume" or "Plume"), included below.

Using these calculations, Dr. Chernaik concludes that PCC's emissions create an objectively unreasonable risk to property owners and residents of the properties within the Plume, thus substantially and unreasonably interfering with Class Members' use and enjoyment of those properties. *See* Ex. 4, Chernaik Report at 10 (discussing increased cancer risk associated with nickel particulate emissions).

Having precisely defined the class using reliable scientific methods, Plaintiffs now ask the Court to certify that class so that notice may be provided and the parties can proceed to trial with common proof. In this Motion, Plaintiffs next review the applicable legal standards, *infra* Part V, explain the proposed class definition, *infra* Part VI, and explain how the proposed class meets the requirements of Oregon Rule of Civil Procedure 32, *infra* Part VII.

V. LEGAL STANDARD

Oregon Rule of Civil Procedure 32 ("ORCP 32") directs courts to, "after the commencement of an action brought as a class action, * * * determine by order whether and with respect to what claims or issues it is to be so maintained and * * * find the facts specially and state separately its conclusions thereon." ORCP 32 C(1). "The question of certification is a legal one that involves issues of both law and fact." *Alsea Veneer, Inc. v. State*, 117 Or App 42, 52, 843 P2d 492 (1992), *aff'd in part, rev'd in part*, 318 Or 33 (1993). Whether to proceed as a class action is largely a decision of judicial administration; trial courts are "customarily granted wide latitude." *Newman v. Tualatin Dev. Co.*, 287 Or 47, 51, 597 P2d 800 (1979). Oregon courts have broad authority to make rulings "tailored to the practical needs of individual cases and to a variety of circumstances." *Green v. Salomon Smith Barney, Inc.*, 228 Or App 379, 386, 209 P3d 333, *rev den* 347 Or 348 (2009).

Under ORCP 32, there are six requirements for certifying a class seeking damages: (1) the size of the proposed class makes joinder impracticable ("numerosity"); (2) the class shares common questions of law or fact ("commonality"); (3) the class representatives' claims are typical ("typicality"); (4) the representatives will fairly and adequately represent the class ("adequacy"); (5) pre-litigation notice was adequate ("notice"); and (6) a class action "is superior to other available methods for the fair and efficient adjudication of the controversy" ("superiority"). *See* ORCP 32.

ORCP 32 has eight factors to weigh when evaluating superiority. ORCP 32 B. "Predominance" is the most prominent factor. It looks at "[t]he extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members." ORCP 32 B(3). "In practical terms, the inquiry is designed to determine if proof as to one class member will be proof as to all, or whether dissimilarities among the class members will require individualized inquiries." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 111, 361 P3d 3 (2015). Unlike class certification under Federal Rule of Civil Procedure 23(b)(3), however, predominance is not required under ORCP 32—it is one factor of eight to consider. *Id.* at 106 ("Neither the 'predominance' factor nor any of the other seven * * * is controlling.").

Oregon courts have not clearly articulated the evidentiary standard for establishing class certification; however, the trend in federal courts is towards a more formal preponderance of the evidence standard. 3 William B. Rubenstein, *Newberg on Class Actions* § 7:21 (5th ed 2014); *see, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F3d 305, 320 (3d Cir 2008), as amended (Jan 16, 2009) (adopting preponderance standard). Plaintiffs have the "affirmative burden" of showing that ORCP 32's requirements are met. *See Pearson*, 358 Or at 107 (citing *Bernard v. First Nat'l Bank of Oregon*, 275 Or 145, 153, 550 P2d 1203 (1976)).

At the class certification stage, it is not necessary to show that the expert evidence will be admissible at trial; that issue is more properly addressed in a motion *in limine* because, if there are disagreements between experts, "[i]n Oregon, we trust juries to be able to find the truth in the classic battle of the experts." *Kennedy v. Eden Advanced Pest Techs.*, 222 Or App 431, 452, 193 P3d 1030 (2008) (quoting *Stoeger v. Burlington Northern Railroad Co.*, 323 Or 569, 577, 919 P2d 39 (1996) ("[I]t is the role of a jury—not a judge acting pretrial—to determine where the truth lies.")); *see also* Ex. 46, Tr. Oral Argument at 64:14-65:1, 70:24-71:1, *Meeker v. Bullseye*

Glass Co., No. 16-cv-07002 (Mult Co Cir Ct Jan 22, 2018) (discussing expert standard for class certification).

Finally, in the absence of controlling case law, Oregon courts evaluating class certification under ORCP 32 may consider federal courts' interpretations of analogous provisions of Federal Rule of Civil Procedure 23 ("Rule 23") as persuasive authority. *See Froeber v. Liberty Mut. Ins.*, 222 Or App 266, 277 n9, 193 P3d 999 (2008) (because ORCP 32 is "modeled after the federal rules[,]" "decisions by federal courts on class action settlements are persuasive").

VI. CLASS DEFINITION

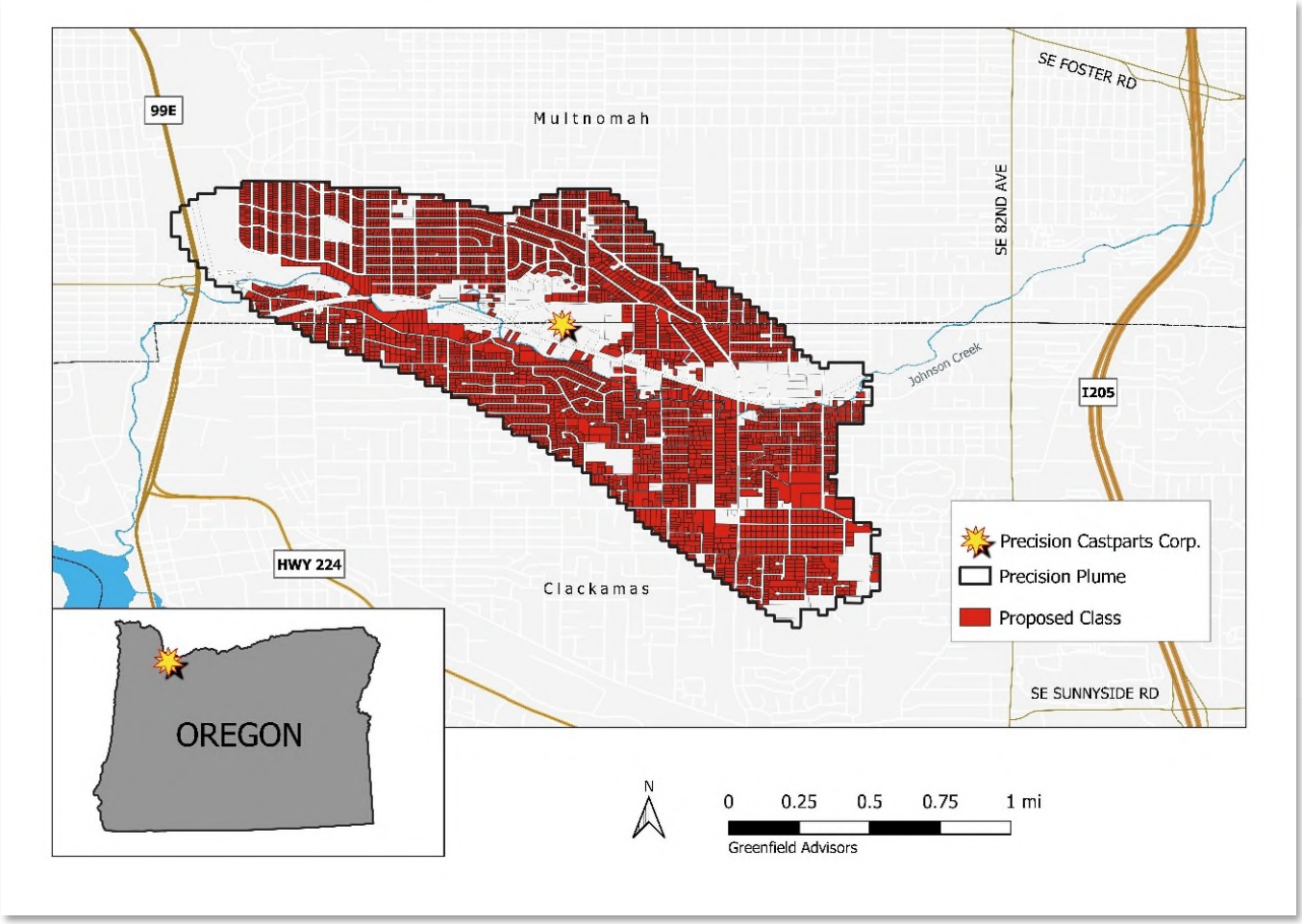
A class must be defined in a way to permit notice "and to facilitate the court's determination on the manageability of the action." *Bernard*, 275 Or at 156.

Plaintiffs propose the following class:

> All residents or owners of residential properties within the Precision Plume as of February 17, 2016.

February 17, 2016 is when the moss-based "nickel plume" surrounding PCC was first-reported.[7] The more accurate Precision Plume, depicted here and in Exhibit 5 to the Preusch Declaration, is defined by Dr. Kilpatrick, based upon Dr. Gray's "AERMOD" modeling results, with the residential properties within the plume identified in red:

[7] *E.g.*, Ex. 53, *Two more toxic hot spots found in Portland*, KGW (Feb. 18, 2016, 8:10pm), https://www.kgw.com/article/news/health/two-more-toxic-hot-spots-found-in-portland/47974818 (depicting moss maps, referencing PCC, noting resident concerns).



Excluded from this Class are: (1) Defendants, any entity or division in which Defendants have a controlling interest, and their legal representatives, officers, directors, employees, assigns and successors; and (2) the judge to whom this case is assigned, the judge's staff, and any member of the judge's immediate family. Plaintiffs reserve the right to amend the class to conform to the evidence.

VII. ARGUMENT

The best—and perhaps only—way to address PCC's pollution of Class Members' properties in the Precision Plume is with Oregon's class action device. *See* Ex. 1, Lahav Decl. ¶¶ 14 & 44-47. The central issues for all Class Members' claims are how much pollution PCC created, why,

and where it went. Oregon's class procedure under ORCP 32 is the superior method to resolve those complex, expert-intensive issues.

To illustrate why, this Motion explains that (A) Oregon courts have found that air pollution cases are well suited for class certification; (B) Oregon courts are not alone in certifying environmental pollution class actions; and (C) Plaintiffs satisfy ORCP 32's requirements for class certification. Additionally, Plaintiffs propose the Court order the parties to confer on (D) notice and (E) trial plans, which help show that the next steps in this litigation are the same for all involved.

A. *Oregon courts conclude that air pollution cases are well suited for class litigation.*

Courts in Oregon have recently certified classes and approved class action settlements in cases nearly identical to this. In *Meeker v. Bullseye Glass Co.*, No. 16-cv-07002 (Mult Co Cir Ct Feb 28, 2018) (Bushong, J), the court certified classes of home owners and renters alleging that the defendant, Bullseye Glass, had polluted class members' properties with "decades of unchecked emissions" of metal-laden particulate matter. The court certified claims for trespass, negligence, and nuisance. Ex. 47, Order Regarding Plaintiffs' Mot for Class Certification. The Court certified the class despite the defendant's faulty, premature claims that the plaintiffs had "bad science" or had not proved the "actual presence of Bullseye's emissions on their property." Ex. 48, Bullseye's Opp'n to Mot for Class Certification, 1-2 (Mult Co Cir Ct Jan 21, 2018).

Similarly, in *Connors v. Amerities West, LLC*, No. 16-cv-25390 (Wasco Co Cir Ct 2016), another air pollution case, an Oregon court preliminarily approved a settlement and certified a settlement class under ORCP 32. In that case, the plaintiffs claimed that the defendant's release of noxious odors invaded the plaintiffs' properties. The court certified a settlement class for trespass, negligence, and nuisance claims over the defendant's arguments that "Plaintiff does not and cannot demonstrate that common proof will resolve the predominate questions of liability,

causation, or damages on a class-wide basis." Ex. 51, Defs.' Opp'n to Mot for Class Certification, 1 (Wasco Co Cir Ct Sep 29, 2017). At the hearing for final approval of the settlement class, the court noted it was "unlikely that a class member could've obtained the results individually, given what the likely calculation of damages is versus the cost and expense of getting there[. A]nd so [a] class [action] really is the only way to do this[.]"[8]

These recent Oregon decisions align with long-standing Oregon Supreme Court precedent. *See, e.g., Hurt v. Midrex Div. of Midland Ross Corp.*, 276 Or 925, 556 P2d 1337 (1976). In *Hurt*, the plaintiffs brought a class action against their employer, alleging the employer's emissions at an iron-ore reduction plant were damaging the plaintiffs' cars. *Id.* at 927. In reversing the trial court's denial of certification, the Oregon Supreme Court concluded that the case was "*typical* of the kind contemplated by the legislature as being proper for a class action." *Id*. at 930 (emphasis added).

These cases demonstrate that property damage environmental tort cases are well-suited for class treatment, and that the class device has proven useful for class members and the courts (and defendants) in resolving pollution claims. As the court in *Connors* made clear, but for the ability to bring the community's claims as a class, no individual member would have had the financial ability or incentive to bring the case—any individual damages award would be dwarfed by the overwhelming costs of litigation. And, the impact of a slew of individual cases, even if financially feasible, would over-burden the court system.

All these considerations are true in the present case. As Prof. Lahav explains here, "because of [this] class action, all of the [the class members'] claims can be efficiently resolved

[8] *Audio: Amerities lawsuit settlement accepted by Circuit Court,* Gorge Country Media at 30:22-36 (Sept. 7, 2018), https://gorgenewscenter.com/2018/09/07/amerities-lawsuit-settlement-accepted-by-circuit-court/.

in one proceeding, the court can do justice, and the defendants can obtain a complete resolution of all the claims against them." Ex. 1, Lahav Decl. ¶ 14.

B. ***Oregon courts are not alone in certifying environmental pollution class actions.***

Oregon courts are not alone in finding cases like this suitable to class certification. Federal courts generally agree. That is because class actions are well suited to resolve complex, expert-intensive tort claims arising from the pollution of multiple properties. *See id.* ¶ 14.

These cases hinge on common legal and factual issues arising from the defendant's behavior, "the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings." *Mejdrech v. Met-Coil Sys. Corp.*, 319 F3d 910, 911 (7th Cir 2003); *see also, e.g.*, Ex. 49, *Andrews*, Order Granting Pls' Renewed Mot for Class Certification and Den Defs' Mot to Strike (certifying subclasses of residential property owners whose property was affected by oil spill, despite fact that class member properties were spread out over 165 miles of coastline). When the case turns on issues of where a defendant's pollution has gone and how a defendant acted, "it makes good sense * * * to resolve those issues in one fell swoop." *Mejdrech*, 319 F3d at 911.

Accordingly, "[m]any courts have certified classes in situations involving chemical seepage onto adjoining property." *Collins v. Olin Corp.*, 248 FRD 95, 103 (D Conn 2008); *see also, e.g., Flournoy v. Honeywell Int'l, Inc.*, 239 FRD 696 (SD Ga 2006) (nuisance and trespass from mercury and PCB contamination); *Muniz v. Rexnord Corp.*, No. 04 C 2405, 2005 WL 1243428, at *1 (ND Ill Feb 10, 2005) (collecting cases supporting proposition that "class action is superior form of adjudication of case involving contamination of property by a hazardous chemical"); *Bentley v. Honeywell Int'l, Inc.*, 223 FRD 471 (SD Ohio 2004) (contamination of residents' groundwater); *Olden v. LaFarge Corp.*, 203 FRD 254, 271 (ED Mich 2001), *aff'd*, 383 F3d 495, 508-10 (6th Cir 2004) (property damage caused by toxic pollutants and air

contaminants arising from cement manufacturing plant); *Petrovic v. Amoco Oil Co*., 200 F3d 1140, 1144 (8th Cir 1999) (property pollution as a result of an underground oil seepage); *Cook v. Rockwell Int'l Corp*., 151 FRD 378, 388 (D Colo 1993) (damage from leaked radioactive and non-radioactive substances); *Boggs v. Divested Atomic Corp*., 141 FRD 58, 67 (SD Ohio 1991) (property damage in area surrounding uranium plant); *Sterling v. Velsicol Chem. Corp*., 855 F2d 1188, 1197 (6th Cir 1988) (water contamination of nearby residential properties due to chemicals from landfill); *Wehner v. Syntex Corp*., 117 FRD 641, 643 (ND Cal 1987) (damage resulting from a chemical manufacturer).

The Iowa Supreme Court's recent opinion in *Freeman v. Grain Processing Corp*., 895 NW2d 105 (Iowa 2017), is particularly instructive. Like Plaintiffs' case, the plaintiffs in *Freeman* were seeking class certification of nuisance, negligence, and trespass claims against a defendant—a grain processor—whose air emissions contaminated their neighborhoods. For each of the plaintiffs' claims, the court evaluated the relevant legal standard for making out the claim and the evidence plaintiffs planned to offer in support of their claims:

- **Nuisance:** The standard was an "objective, normal-person" standard, which asked whether "normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable." *Id.* at 120 (citation omitted). Because the standard was objective, it "more readily present[ed] common questions than [a] subjective standard[]." *Id.* at 121 (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 US 455, 459, (2013)). The court focused on the factors needed to establish it, which were all "objective, common factors," such that "the factual determination of whether a nuisance exists is capable of being made on a classwide basis." *Id.* at 121-22.

- **Negligence:** The court noted that the plaintiffs would need to produce evidence of the defendant's "course of conduct, its duty of care and corresponding breach, and its knowledge of the harms cause." *Id.* at 123. The court discussed plaintiffs proposed evidence, noting that "[t]he plaintiffs plan to offer evidence that [defendant] could have upgraded its * * * equipment * * * earlier, and had it done so, much of the air pollution would have been avoided," which meant that "[w]hether [defendant] acted unreasonably by delaying that equipment upgrade appears to be a common issue." *Id.*

- **Trespass:** The court found that the claim would involve "similar common evidence, such as whether the harms can be attributed to [defendant] and whether emissions interfered with the residents' exclusive land possession." *Id.* at 123.

After reviewing the plaintiffs' claims and the evidence proposed, the court concluded that a class action would be the most efficient and perhaps only way to resolve the relevant issues in part because "the complexity of these questions may hinder the ability of some class members to get relief due to the expense of expert testimony." *Id.* at 123.

Similarly, in this case, a class action is the most efficient and perhaps only way to resolve the complex issues presented. For example, determining the volume and composition of PCC's emissions and where they have gone is a complex task that requires expert analysis from multiple fields, including engineering, air modeling, and toxicology. Similarly, reviewing and analyzing the myriad problems with PCC's pollution controls and related failure to properly maintain the systems has been a complex task, requiring expert work. The expense of such wide-ranging expert analysis would likely be prohibitively expensive for most class members, and would make little economic sense, in any event; the likely value of any damages for any individual would pale in comparison to these expert costs, alone.

Further, forcing each neighborhood resident to bring his or her own case would add little merit or fairness to this case. "[I]f this court were to hold 1,000 trials for each and every home in the geographic area, it would consider the same evidence to prove liability at each of those trials[.]" Ex. 1, Lahav Decl. ¶ 39. This is why proceeding as a class action is "really is the only way to do this[.]"[9]

[9] *Audio: Amerities, surpra* note 8.

C. ***Plaintiffs satisfy ORCP 32's requirements for class certification.***

Plaintiffs meet ORCP 32's requirements of: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy of representation; (5) adequacy of notice; and (6) superiority, based on an analysis of eight factors, including predominance. As Professor Lahav states, "certifying this case as a class action is consistent with the purpose of the class action rule" because "this suit meets both the threshold requirements * * * and additional requirements." Ex. 1, Lahav Decl. ¶ 11.

1. ***Numerosity***

Under ORCP 32 A(1), the Court must find that "[t]he class is so numerous that joinder is impracticable." This requirement is typically satisfied at 50 or more members. *See Liborio v. Del Monte Fresh Produce N.A.*, No. 0710-11657, 2008 WL 8257750, at *2 (Mult Co Cir Ct Aug 8, 2008) (Bushong, J) (numerosity met where class included more than 50); *Newman*, 287 Or at 50 (class of at least 125 townhouse owners was sufficiently numerous).

Here, the class consists of the owners or residents of approximately 5,000 residential properties. *See* Ex. 5, John A. Kilpatrick, *Report Regarding Class Certification* ("Kilpatrick Report") ¶ 19. The size of Plaintiffs' class would make joinder impracticable. *See* Ex. 1, Lahav Decl. ¶ 20. The numerosity requirement is satisfied.

2. ***Commonality***

Under ORCP 32 A(2), the Court must find that "[t]here are questions of law or fact common to the class." This is generally a relatively low threshold. *See Pearson*, 358 Or at 110 (citing ORCP 32 A) ("Commonality asks only if *there are* questions of law or fact common to the class. It does not test how central the common questions are to the resolution of the action. Nor does it take into account the nature of the proof required to litigate those common issues.") (emphasis in original); *see also* Ex. 1, Lahav Decl. ¶ 22.

For pollution cases, commonality is often even more easily satisfied than it is for non-environmental cases. *See generally id.* at ¶¶ 22-23 (discussing common issues) & 42 (personal injury cases often present more challenging causation issues than environmental property tort cases); *see also, e.g.*, Ex. 49, *Andrews,* Order Granting Pls' Renewed Mot for Class Certification and Den Defs' Mot to Strike, 10 (finding commonality satisfied because "class litigation will produce at least one common answer"); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 910 F Supp 2d 891, 915 (ED La 2012), *aff'd sub nom*, *In re Deepwater Horizon*, 739 F3d 790 (5th Cir 2014) ("the overarching questions of law and fact raised by the *Deepwater Horizon* incident are common, recurring issues as they relate to the liability of BP and/or others * * * commonality is satisfied").

This case presents numerous common questions that will produce common answers if litigated as a class action:

Liability: Common liability questions include (a) whether PCC owed any duties to Class Members and breached those duties; (b) whether PCC was negligent in the operation of its facilities; and (c) whether PCC's conduct created a trespass and/or constituted a nuisance. *See Collins*, 248 FRD at 104 (polluter's "entire course of conduct and knowledge of its potential hazards is a common issue to the class"); *Bentley*, 223 FRD at 481 ("[W]hen defendants' conduct towards the proposed class is alleged to be uniform, the commonality requirement is met."); *Boggs*, 141 FRD at 64 (court had "no difficulty in concluding that the commonality requirement has been satisfied" in pollution case).

Nature and Extent of Liability: The questions surrounding the extent and nature of PCC's emissions—*i.e.*, what are they and where do they go?—are common to all Class Members. *Boggs*, 141 FRD at 64 (common question was "how extensive were the emissions"); *Ludwig v.*

Pilkington N. Am., Inc., No. 03 C 1086, 2003 WL 22478842, at *5 (ND Ill 2003) (defendant's "single course of conduct, disposal of arsenic containing waste, * * * created a common nucleus of facts for the class"); *Wehner*, 117 FRD at 644 ("nature of the dioxin" a common question in class case).

Causation and Damages: The common causation question is whether PCC's emissions interfered with Class Members' rights of exclusive possession, use, and enjoyment of their residential properties. For damages, the common question is how much PCC's interference diminished Plaintiffs' property values and impaired the use of those properties. *See, e.g.*, Ex. 5, Kilpatrick Report ¶ 20 ("A common factor in this case is the effect on the local real estate market, and in particular a degree of stigma in market perceptions of the affected properties."); *id.* at ¶ 24 (discussing methodology for determining "value impairment" suffered by properties in the Precision Plume).

Even if there are some causation or damages inquiries that are individual, "individual issues of causation do not preclude class certification," *Collins*, 248 FRD at 104, and "[a] class action is not inappropriate simply because each class member will have to make an individualized showing to recover damages." *Migis v. Autozone, Inc.*, 282 Or App 774, 787, 387 P3d 381 (2016), *adhered to in part on recon*, 286 Or App 357, *rev den* 362 Or 300 (2017).

The commonality requirement is satisfied.

3. *Typicality*

Under ORCP 32 A(3), the Court must find that "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class." This requirement is satisfied if the class representatives' claims "arise[] from the same event or practice or course of conduct that gives rise to the claims [of the other members of the proposed class,] and [their] claims are based on the same legal theory." *Newman*, 287 Or at 50; *see also* Ex. 1, Lahav Decl. ¶

24; *see also Hanlon v. Chrysler Corp.*, 150 F3d 1011, 1020 (9th Cir. 1998) ("representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical").

Here, Plaintiffs' propose to be class representatives for their neighbors. They bring trespass, negligence, and nuisance claims. These claims all arise from PCC's conduct, specifically PCC's emissions—and poor implementation and maintenance of emissions control equipment at their facilities—in Plaintiffs' and Class Members' neighborhoods. Plaintiffs' and Class Members' claims also all arise from the fact that Plaintiffs all own or use residential property in the area affected by PCC's conduct.

As Professor Lahav explains, the typicality requirement underscores the "interest representation" idea at the heart of the class action device. Ex. 1, Lahav Decl. ¶¶ 13 & 26. This idea presumes "that if the class representative has suffered the same injury as the other class members, then he or she will make the same choices that other class members would have made because they share the same interests." *Id.* Here, the Plaintiffs are typical of the proposed Class "because they have all been injured by the defendants' course of conduct. They each have a property interest that has been negatively affected by the alleged pollution." *Id.* ¶ 27.

Plaintiffs are also typical in how they responded to PCC's invasion of their property interests. When Plaintiffs first learned about PCC's emissions, they were concerned. *See, e.g.*, Ex. 11, Videotaped Deposition of Brian Resendez ("B. Resendez Dep.") 45:5 (concerned "about the hotspot"), 65:19-20 (concerned about having his property polluted), 66:18-20 (wanting to "breathe clean air"), and 67:7-9 (worried pollution could be in his soil); Ex. 12, Videotaped Deposition of Debra Kay Taevs ("Taevs Dep.") 41:17-42:19 (concerned about the health impacts of PCC's pollution), 47:22-48:21 (discussed concerns with neighbors). Not surprisingly, these

concerns led Plaintiffs to change how they use their properties. *See, e.g.*, Ex. 11, B. Resendez Dep. 46:22-47:8 (spending less time outside), 49:18-21 (no longer gardening), 50:20-51:3 (limited outdoor socializing), 69:6-8 (stopped planting carrots); Ex. 13, Videotaped Deposition of Rodica Alina Resendez ("R. Resendez Dep.") 22:23-24 and 25:8-9 (stopped having a vegetable garden), 24:5-14 (removed strawberry plants), 32:2-4 (stopped walking as much and reduced time son could play in the yard); Ex. 12, Taevs Dep. 99:20-100:3 (brought in her own soil for her garden, stopped walking or biking near PCC's facilities, started closing the windows in her home), 105:7-18 (reduced time spent gardening and/or outside in 2016), 111:7-113:8 (discussed PCC's pollution with potential tenants, some of whom declined to rent).

Plaintiffs' experiences reflect the experiences of others in their neighborhoods, as documented in news reports, community meetings, PCC's efforts to address community concerns, and comments on public discussion groups. *See, e.g.*, Ex. 60 (South Portland Air Quality Facebook group formed on Feb. 20, 2016, as a "place for community members to discuss and self-organize around toxic air pollution in Brentwood-Darlington, Woodstock, Eastmoreland, Mt. Scott-Arleta, Ardenwald-Johnson Creek, and other Milwaukie neighborhoods."); Ex. 56, Amelia Templeton, *Meet Precision Castparts' Worried Neighbors*, OPB (Apr. 13, 2016, 6:30pm), https://www.opb.org/news/series/portland-oregon-air-pollution-glass/precision-castparts-neighbors/ (describing neighbor concerns about gardening, spending time outside); Ex. 57, Paul Koberstein, *Neighbors Weigh In on Precision Castparts Pollution*, Portland Tribune (Oct. 25, 2016), https://portlandtribune.com/pt/9-news/329030-208283-nei. The Brentwood-Darlington Neighborhood Association sent a letter to PCC on March 12, 2016, stating that "community members and community leaders" found the existence of "multiple toxic hotspots" in their neighborhood "unacceptable." Ex. 42 (letter from Brentwood-Darlington

Neighborhood Association). *See also* Ex. 45, (Jan. 15, 2019 e-mail from Andrew Nemec to Oregon Health Authority).

Plaintiffs' concerns, which mirrored those of others in their community, are well-founded. *But see Restatement (Second) of Torts* § 821F (1979) at comment d ("In determining whether the harm would be suffered by a normal member of the community, fears and other mental reactions common to the community are to be taken into account, *even though they may be without scientific foundation or other support in fact*.") (emphasis added). As Plaintiffs' expert Dr. Chernaik concludes, the metals in PCC's emissions are associated with significant increases in the risks of mortality, neurological disease, cognitive impairment, diabetes, and cancer. *See* Ex. 4, Chernaik Report at 1, 7-12. For example, he concludes that the amounts of nickel PCC emits into the proposed Class Area raises the cancer risk by 6.2 per million for adults. *Id*. at 10. This added cancer risk is more than *six times higher* than allowed under Oregon law. This is precisely the kind of objective standard that ensures Plaintiffs' claims are common across the class.

Even if there are or would be slight variations among Plaintiffs' and class members' responses to PCC's emissions, the claims at issue in this case all involve objective standards, and "[o]bjective standards more readily present common questions than subjective standards." *See Freeman*, 895 NW2d at 121 (citing *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 US 455, 459, 133 S Ct 1184, 1191 (2013)). Additionally, "The fact that damages may differ among individual plaintiffs or that some plaintiffs may have suffered no damages does not render the claims atypical." *Alsea Veneer, Inc.*, 117 Or App at 53; *see also* Lahav Decl. ¶ 27.

Plaintiffs satisfy the Oregon standard for demonstrating typicality.

4. *Adequacy of Representation*

ORCP 32 A(4) requires the Court to find that "[t]he representative parties will fairly and adequately protect the interests of the class." Adequacy is satisfied when "(1) there are no disabling conflicts of interest between the class representatives and the class; and (2) the class is represented by counsel competent to handle such matters." *Alsea Veneer, Inc.*, 117 Or App at 53; *see also* Ex. 1, Lahav Decl. ¶¶ 28-32 (discussing adequacy).

The named Plaintiffs have no "disabling conflicts of interest" with their fellow Class Members. Everyone shares the same goals: obtaining the appropriate injunctive relief and damages for their claims, including damages for the loss of exclusive possession, use, and enjoyment of their properties, whether owned or rented, and a permanent injunction ordering PCC to take all necessary steps to prevent further injury to Plaintiffs and their fellow Class Members. While some Class Members may wish to pursue individual personal injury claims, which are not part of the relief sought in this case, they are free to do so, and may opt out of the proposed class if they deem it necessary to do so. *See Facciola v. Greenberg Traurig LLP*, 281 FRD 363, 370 (D Ariz 2012) ("In some instances, opting not to assert certain claims may be an essential part of adequate representation."); *Muniz*, 2005 WL 1243428, at *4 ("[A] class action suit seeking damages for property damage would not bar and/or prejudice any personal injury claims that the class members may have."); *Bentley*, 223 FRD at 483 (in pollution case claiming injunctive relief and property damages, "*res judicata* would not apply to bar and/or prejudice any personal injury claims that the class members may have").

As deposition testimony confirms, Plaintiffs are also adequate class representatives because they have invested substantial time prosecuting this case on behalf of the proposed class and will continue to do so. While "[c]lass representatives should not be expected to know or understand more about the suit than any other client or lay person[,]" Ex. 1, Lahav Decl. ¶ 32,

Plaintiffs have conducted research, attended meetings, regularly consulted with counsel, responded to requests for production, sat for depositions, and otherwise invested substantial time and resources into working with counsel to prosecute these claims on behalf of the class. *See, e.g.*, Ex. 11, B. Resendez Dep. 22:19-23:2 and 29:5-12 (duty to represent class and absent class members), 59:23-24 (attended community meeting), 212:19-21 (duty to sit for the deposition), 213:9-215:6 (searching for and reviewing documents); Ex. 13, R. Resendez Dep. 12:17-13:8 (duty to "represent the[] households that are affected by air pollution" from PCC, which includes sitting for deposition and providing documents), 29:17-24 (searching e-mail); Ex. 12, Taevs Dep. 41:3-6 (duty to "represent all of the people that are impacted by the toxic pollution coming from PCC in our area"), 51:8-14 (reviewed complaint), 54:19-23 (stay informed about case and share information with her lawyers), 55:1-3 (reviewing documents).

Plaintiffs' counsel are competent to handle this matter. Keller Rohrback L.L.P. is a nationally recognized class action firm with significant experience in environmental class actions and sufficient resources to prosecute this action on behalf of the subclasses and class counsel. Ex. 62 (firm resume). In addition, Kampmeier & Knutsen, PLLC, Smith & Lowney PLLC, and the Law Office of Karl G. Anuta bring additional class action experience, decades of environmental litigation experience, and sufficient resources to prosecute this action. Exs. 63, 64, and 65 (firm resumes/declarations).

For these reasons, Plaintiffs are adequate class representatives and satisfy this requirement under ORCP 32.

5. ***Adequacy of Notice***

Under ORCP 32 A(5), "[i]n an action for damages," the Court must find that "the representative parties have complied with the prelitigation notice provisions of Section H of this

rule." Plaintiffs have done so. *See* Ex. 61 (notice letters). Plaintiffs have therefore satisfied the notice requirement.

6. *Superiority*

Under ORCP 32 B, a class action "may be maintained * * * if the prerequisites [above] are satisfied, and in addition, the court finds that a class action is superior to other methods for the fair and efficient adjudication of the controversy." There are eight factors "pertinent" to the Court's superiority analysis, none of which are controlling. *See* ORCP 32 B; *Pearson*, 358 Or at 106; Ex. 1, Lahav Decl. ¶¶ 33 & 44 (grouping the final four into a single discussion). Those factors are: (a) the risk of inconsistent adjudication and/or whether adjudication as a class action would be dispositive of or substantially impair the interests of absent class members; (b) whether the relief sought takes the form of class-wide injunctive relief; (c) whether common questions of law or fact predominate; (d) whether class members have any individual interest in prosecution and control; (e) whether there is any well-developed litigation concerning the case; (f) the desirability of the forum; (g) management difficulties created by the class action; and (h) whether the complexity and expense of the litigation means that the claims of individual class members are not feasible outside of the class mechanism. As explained below, all eight factors favor a finding of superiority here.

a. The risk of inconsistency and potential to impair interests of absent Class Members support finding superiority.

ORCP 32 B(1) directs courts to consider the degree to which separate actions create a risk of inconsistent adjudications and incompatible standards (particularly for defendants). If the Court finds that such a risk exists, it favors finding a class action superior.

That risk exists in cases like this, as the Advisory Committee to Federal Rule of Civil Procedure 23 noted: "individual litigations * * * of landowners' rights and duties respecting a

claimed nuisance could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication." Fed R Civ P 23 advisory committee's note to the 1966 amendment.

The threat of inconsistent adjudication in a series of individual cases is "real" when a proposed class seeks injunctive relief that would likely require "a complex order, addressing [] specific features" of a defendant's operation. *Boggs*, 141 FRD at 67. In *Boggs*, the court certified the plaintiffs' class—property owners within a radius of six miles from defendant's gaseous plant—in part because of the "threat of inconsistent adjudication." *Id.* at 67-68. There, the plaintiffs sought injunctive relief in the form of plant cleanup, medical monitoring, and nuisance abatement. *Id.* at 67. The defendants attempted to "discount the probability of truly inconsistent adjudications" by claiming that "any court order would direct them simply to comply with all applicable laws." *Id.* The court disagreed, concluding that if the plaintiffs could show they were entitled to relief, "it would undoubtedly be in the form of a complex order, addressing many features of plant operation," and that it was "unlikely that two different courts would tailor a remedial order in the same fashion." *Id.* This made it "entirely conceivable that different remedial orders would contain incompatible provisions." *Id.* For these reasons, the court in *Boggs* certified the plaintiffs' class under Rule 23(b)(1)(A).

Similarly, Plaintiffs here seek a permanent injunction ordering PCC to take all necessary steps to prevent further injury to Plaintiffs. These steps include ceasing the emission of toxic pollutants at levels that interfere with any reasonable use of Plaintiffs' and Class Members' properties and the surrounding neighborhoods. Third Consol. Am. Compl. ¶¶ 89 & 106. An injunction that will adequately address these issues will likely require a complicated order that requires PCC to take certain preventative measures regarding their emissions. Were different

individual Plaintiffs or Class Members to bring individual actions, it is very possible that PCC would be ordered to do different and likely incompatible things. The Court implicitly recognized these potential issues when it consolidated the two cases that were initially filed against PCC. Order Granting Unopposed Mot to Consolidate Cases and Captions, No. 16-cv-21495 (Mult Co Cir Ct Sept 9, 2016) ("Consolidation Order").

ORCP 32 B(1) also directs courts to consider "[t]he extent to which the prosecution of separate actions by or against individual members of the class creates a risk of * * * adjudications with respect to members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." If a court finds that adjudicating claims separately would be dispositive of certain absent party interests, it favors finding superiority and certifying a class. This superiority factor parallels Federal Rule 23(b)(1)(B) class actions. *See* Fed. R. Civ. P 23(b)(1)(B). The Supreme Court recently suggested that Rule 23(b)(1)(B) class actions should be confined to "limited fund" actions, in which plaintiffs are all pursuing a finite fund, such as an insurance fund. *See Ortiz v. Fibreboard Corp.*, 527 US 815, 817, 119 S Ct 2295, 144 L Ed 2d 715 (1999).

Here, while Plaintiffs are not pursuing a limited fund action, the prospect that Plaintiffs could pursue punitive damages—as the court in *Meeker v. Bullseye* permitted in analogous circumstances—could as a practical matter diminish PCC's ability to pay all claims. *See State ex rel. Young v. Crookham*, 290 Or 61, 72, 618 P2d 1268 (1980) ("class actions, in appropriate cases, provide for unitary consideration of [punitive] damages"); *In re Northern Dist. of California Dalkon Shield IUD Prods. Liab. Litig.*, 526 F Supp 887, 895-96 (ND Cal 1981)

(defendant moved for punitive damages class to protect from "prejudice caused by the filing of multiple suits" and the possibility of bankruptcy).

For these reasons, this factor favors finding superiority.

b. The relief sought takes the form of class-wide injunctive relief.

ORCP 32 B(2) directs courts to consider "[t]he extent to which the relief sought would take the form of injunctive relief or corresponding declaratory relief with respect to the class as a whole." If a court finds that the relief sought will take the form of such relief, it favors finding a class action superior. *See* Ex. 1, Lahav Decl. ¶ 34.

This factor parallels Federal Rule of Civil Procedure 23(b)(2) class actions. Numerous federal courts have certified classes under Rule 23(b)(2) seeking class-wide injunctive relief in similar circumstances. *See, e.g., O'Connor v. Boeing N. Am., Inc.*, 184 FRD 311, 332 (CD Cal 1998) (certifying class of residents who lived near testing facility seeking injunctive relief under Rule 23(b)(2), and also certifying class seeking damages for diminished value and stigma under 23(b)(3)); *McMillon v. Hawaii*, 261 FRD 536, 547 (D Haw 2009) (certifying plaintiff class of low-income public housing tenants seeking injunctive relief to remedy nuisance conditions in their complexes).

Here, Plaintiffs seek a permanent injunction ordering PCC to take all necessary steps to prevent further injury to Plaintiffs. This includes ceasing the emission of toxic pollutants at levels that interfere with Plaintiffs' and Class Members' possession and reasonable use and enjoyment of their properties and, where necessary, removing the particles of toxic pollutants that PCC deposited on those properties. Third Consol. Am. Compl. ¶¶ 89 & 106. This relief would apply equally to the class as a whole.

This factor therefore supports a finding of superiority.

c. Predominance favors superiority.

ORCP 32 B(3) directs courts to consider "[t]he extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members." As the Oregon Supreme Court explained, "[i]n practical terms, the inquiry is designed to determine if proof as to one class member will be proof as to all[.]" *Pearson*, 358 Or at 111; *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S Ct 1036, 1045, 194 L Ed 2d 124 (2016) (common issues predominate when "the same evidence will suffice for each member [of a class] to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof"); *see also* Ex. 1, Lahav Decl. ¶ 36 (calling it a "pragmatic" inquiry). If a court finds that common issues predominate—even where a case raises multiple individual issues—that favors finding a class action superior.

Here, as explained below, Plaintiffs have common proof that each Class Member could use to prove the central issues in their trespass, nuisance, and negligence claims. Additionally, Plaintiffs offer common proof to establish their rights to damages and injunctive relief.[10]

(i) Plaintiffs' Common Proof of PCC's Trespass

In Oregon, a trespass can be accomplished by either a deposit or an intrusion through the air. *See, e.g., Lunda v. Matthews*, 46 Or App 701, 705, 613 P2d 63 (1980) ("[d]eposit on a person's land of airborne particles emanating from a neighboring plant has been held to be an invasion of that person's right to the exclusive possession of land."); *see also* Oregon State Bar, Committee on Uniform Civil Jury Instructions, UCJI No. 53.01, Trespass to Land, Cmt (Dec 2015) (an "intrusion of fumes, gases, and odors can constitute a trespass"); *see also Davis v.*

[10] Similarly, PCC will be able to present their own substantive evidence to suggest that their emissions did not lead to the deposits and intrusions suggested by Plaintiffs' evidence, with, for example, the DEQ soil tests performed in 2016. Plaintiffs will put forth their chosen evidence, PCC theirs. A jury will decide who to credit.

Georgia-Pac. Corp., 251 Or 239, 242-43, 445 P2d 481 (1968) (Oregon courts have long abandoned the "traditional concept that a trespass must be a direct intrusion by a tangible and visible object."). As the Oregon Supreme said in *Davis*, trespass can be defined "as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist." 251 Or at 243 (quoting and citing *Martin et ux. v. Reynolds Metals Co.*, 221 Or 86, 342 P2d 790 (1960)).

Judge Bushong, based on a similar record, recently certified a trespass claim in the *Bullseye* matter. And courts around nation commonly certify trespass claims in environmental contamination cases like this one. *See, e.g.*, *Turner v. Murphy Oil USA, Inc.*, 234 FRD 597, 609 (ED La 2006) (nuisance and trespass claims "will not require the Court to inquire extensively into individual cases for proof of liability"); *Bentley*, 223 FRD at 488 (certifying trespass claim); *Ludwig*, 2003 WL 22478842, at *1-5 (same). The Oregon Supreme Court is in accord. In *Hurt*, it reversed the lower court's denial of class certification of the plaintiffs' trespass claims in an air pollution case. 276 Or at 925 (certifying class despite defendant's argument that individual defenses would require separate adjudications). In 2015, the Oregon Supreme Court discussed and endorsed *Hurt*. *See Pearson*, 358 Or at 113-14.

Here, Plaintiffs' expert analyses constitute common proof that PCC's emissions invaded property and constituted a trespass for the entire class. Dr. Sahu calculates the amounts of particulate matter emitted from PCC's facilities and what percentages of that particulate matter are nickel and chromium; Dr. Gray's AERMOD modeling shows where that pollution went in the class area, in what amounts it intruded the air in and deposited on Class Members' properties. *See* Ex. 3, Gray Report at 5, 18-21 (modeling PM10 concentrations), 22 (modeling PM

deposition), 23-25 (modeling chromium and nickel deposition). The models shows both the air concentration and rate of deposition for pollutants at each of the thousands of 50 meter by 50 meter "receptors" in the class area for "every hour of the six-year model simulation," *id.* at 13, providing highly detailed results. For example, Dr. Gray found that, on average, PCC deposited .0169 grams of nickel on every meter squared across the class area from 2010 to 2015, or a total of 254 pounds of nickel pollution deposited in the proposed class area. *Id.* at 23.

That common evidence could be used by Plaintiffs or Class Members individually to prove a trespass claim, regardless of factual differences between them, such as where they live, how long they have lived there, whether they own or rent their property, or their other uses of their property.

(ii) Plaintiffs' Common Proof that PCC's Operations Constitute a Public and/or Private Nuisance

In Oregon, nuisance is governed by an objective standard: Whether a condition constitutes a nuisance depends on its effect on "a normal person of ordinary habits and sensibilities" in the community and his or her use and enjoyment of their land, not on the subjective experiences of one person or another. *Penland v. Redwood Sanitary Sewer Serv. Dist.*, 156 Or App 311, 315, 965 P2d 433 (1998) (quoting *Jewett v. Deerhorn Enterprises, Inc.*, 281 Or 469, 476, 575 P2d 164 (1978)); *see also Restatement (Second) of Torts* § 821F (1979) at comment d ("If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant.").

Because Plaintiffs' nuisance claim turns on this objective standard, it is susceptible to common proof. *See O'Connor*, 184 FRD at 331-32 (holding that whether defendants' alleged activities constituted a nuisance was common to all members of proposed class, even if damages may vary for each individual class member); *Rowe v. E.I. DuPont De Nemours & Co.*, 262 FRD

451, 462 (DNJ 2009) ("Plaintiff's private nuisance claim is appropriate for class treatment. The issues relating to this claim turn on the conduct of Defendant and the objective perception of a 'normal person' in the community rather than the conduct and perceptions of the individual class members."). "[R]egulatory compliance does not preclude a determination * * * [of] nuisance." *Penland,* 156 Or App at 319 (citing case law).

Whether it would be reasonable for a normal person of ordinary habits and sensibilities in the community to have his or her use and enjoyment of their land affected is a question for the jury. At this stage, Plaintiffs need not show how a jury will rule, merely that Plaintiffs will offer common proof so that the jury can make "the factual determination of whether a nuisance exists * * * on a classwide basis." *Freeman,* 895 NW2d at 122.

Here, Plaintiffs offer expert reports from Dr. Sahu to show the amount of PCC's emissions over the class period, Dr. Gray to show the average air concentrations in the class area, and Dr. Chernaik to show the public health issues raised by the content and concentration of PCC's emissions. Dr. Chernaik concludes that PCC's emissions are associated with significantly increased risks of mortality, neurological disease, cognitive impairment, diabetes, and cancer. *See* Ex. 4, Chernaik Report at 1 & 7-12.

Dr. Chernaik concludes, for example, that the levels of nickel PCC introduces into the class area "yields ***a cancer risk of 6.2 per million for adults***." Ex. 4, Chernaik Report at 10. As Dr. Chernaik explains, "the cancer risk of exposure to these estimated levels of nickel * * * would be unacceptable as a matter of [Oregon] state law," which declares the cancer risk of just one per one million people to be an unacceptable level of risk. *Id.* at 11 (quoting ORS 465.315 (1)(b)(A)). As PCC's emissions of nickel alone raise the cancer risk of people in the class area more than six time above the State's acceptable risk level, the common evidence shows PCC has

objectively and unreasonably interfered with Plaintiffs' and the proposed Class's properties, their values, and their uses thereof.

The reactions of Plaintiffs and their neighbors reflect how an objective person would respond to learning they are living in a pollution "plume." That reasonable concern manifests in several ways:

- **DEQ Complaints.** People in the community reported issues and concerns regarding PCC's emissions to DEQ. *See, e.g.*, Ex. 41, DEQ spreadsheet detailing various complaints in Multnomah county, including a 2016 complaint from Abigail Q. Spring stating "I live within 1/4 mile of the countries [sic] worst industrial polluter. If this area is showing up in the new EPA moss test, I would like to know what is being required of PCC * * * .";

- **Community Organizations.** Various community organizations, such as the Brentwood-Darlington Neighborhood Association, were aware of the "toxic hotspots" in their neighborhood, and requested PCC take numerous corrective measures, including "[c]omplete air pollutants dispersion modeling from all facilities tested in" in the relevant neighborhood. Ex. 42 (letter from Brentwood-Darlington Neighborhood Association);

- **News Reports.** Local news articles detailed Plaintiffs' and their neighbors' concerns with PCC's emissions. *See* Ex. 56, Templeton, *Meet Precision Castparts' Worried Neighbors*; and

- **PCC.** PCC themselves were aware that their emissions presented a concern to Plaintiffs and their neighbors. *See, e.g.*, Ex. 43, April 12, 2016 letter from PCC to their "neighbors" addressing "specific concerns in the media".

Plaintiffs' proposed evidence from their experts, as well as their own experiences and those of other potential Class Members regarding their concerns, could be used by any Plaintiff or any Class Member on an individual basis to show that PCC's conduct interfered with the reasonable use and enjoyment of his or her property under Oregon's objective standard. This is true despite any factual differences between Plaintiffs—where in the Precision Plume they live, whether they rent or own, and even whether they subjectively experienced loss of enjoyment. That is true because the question a jury will answer is whether a "normal person of ordinary habits and sensibilities" in the community would have the use and enjoyment of their land

affected by PCC's emissions. *See Restatement (Second) of Torts* § 821F (1979) at comment d; *Freeman*, 895 NW2d at 122. At this juncture, Plaintiffs' burden is merely to provide common proof that could be evaluated by a jury in making its decision.

Common issues therefore predominate in Plaintiffs' nuisance claim.

(iii) Plaintiffs' Common Proof of PCC's Negligence

Courts commonly certify negligence claims in environmental pollution cases because common questions going to liability predominate over individualized questions regarding damages. *See Turner*, 234 FRD at 607 (extent of contamination on particular property "do[es] not require the type of extensive individualized proof that would preclude class treatment of the negligence claim."); *Collins*, 248 FRD at 104 (negligence arising from contamination certified where defendant's "entire course of conduct and knowledge of its potential hazards is a common issue to the class"); *Wehner*, 117 FRD at 645 (certifying negligence claim); *Stanley v. U.S. Steel Co.*, 04-74654, 2006 WL 724569, at *4-6 (ED Mich Mar 17, 2006) (same).

Here, using the expert reports of Dr. Sahu, Dr. Gray, and Dr. Chernaik, Plaintiffs offer common proof that PCC's conduct fell short of the standard of care, causing foreseeable harms to Class Members. *See generally* Ex. 2, Sahu Report at 6-12, Ex. 4 Chernaik Report at 2-12. For example, Plaintiffs will use PCC's documents and deposition testimony to offer common proof that PCC fails to properly control their emissions, whether by not bothering to use baghouses to contain their emissions, by failing to maintain their baghouses, *supra* Part IV.B., failing to maintain the devices that collect baghouse dust, *id.*, and failing—until after the "moss studies" emerged—to include any emissions controls on some of their largest sources of metal-laden particulate matter. *See, e.g.*, Ex. 10, Uchytil 1 Dep. 170:4-19 ([redacted]); Ex. 6, Terhaar 1 Dep. 111:1-12 ([redacted]

[redacted]).

That common proof also includes the fact that other significant sources of particulate pollution at PCC's Large Parts Campus continue to have no emissions controls at all, *see supra* Part IV.B, and that still other processes' emissions escape as "fugitive emissions." A fugitive emission [redacted] Ex. 9, Terhaar 4 Dep. 50:7-10. When asked about the "sources of fugitive emissions of particulate matter at the large parts campus," PCC's Corporate representative Tyson Terhaar responded, "[redacted]" most of which have "[redacted]." *Id.* at 49:5-13. However, PCC's air casting operation is "[redacted]" fugitive emissions. *Id.* at 49:14-19. PCC appears to have implemented no system to collect pollution from that process. And PCC is aware that [redacted]. Ex. 10, Uchytil 1 Dep. 264:11-265:19; Ex. 39, Uchytil Ex. 80.

Any individual plaintiff in the class area could use this evidence to establish that PCC's conduct created a foreseeable and unreasonable risk that PCC's emissions would be dispersed over and throughout the plaintiff's neighborhoods, contaminating his or her property. Any individual plaintiff could also use this evidence to show that PCC's conduct risked causing the plaintiff to lose exclusive possession, use, and enjoyment of his or her property and suffer property damage. These are all legally cognizable harms created by the risk of PCC's conduct. *See Lunda v. Matthews*, 46 Or App at 705 (loss of exclusive possession); *Penland*, 156 Or App at 315 (loss of use and enjoyment).

Common issues therefore predominate over individual ones in Plaintiffs' negligence claim.

(iv) Class Members' Common Proof of Damages

Plaintiffs have common proof to establish Class Members' damages caused by PCC's invasion of their rights.

The proper measure of damages for trespass and nuisance is usually determined in reference to the value of the property invaded. *See, e.g., Hudson v. Peavey Oil Co.*, 279 Or 3, 11, 566 P2d 175 (1977) ("For [an injury like trespass], the measure of damages is frequently stated to be the difference between the value of the property immediately before the injury and its value immediately afterward. The proper formulation may differ, however, depending upon the circumstances."); *see also Berdysz v. Boyas Excavating, Inc.*, 85 NE3d 288, 292 (Ct App Ohio Feb 16, 2017) (affirming trial court certification of class alleging nuisance and diminished value related to noxious odors in neighborhood).

Here, Plaintiffs' expert Dr. Kilpatrick explains the common proof used to establish property-related damages in environmental contamination cases like this one. *See generally* Ex. 5, Kilpatrick Report. Damages for all Class Members—owners and renters—can be established using the widely accepted methods Dr. Kilpatrick details. As Dr Kilpatrick states "damages reflecting diminished values can be analyzed systematically [for residential property owners,] and * * * damages for loss of use and enjoyment for tenants can be efficiently and commonly assessed by using market rental values." *See id.* ¶ 10.

To calculate damages for Class Members who owned residential property in the Precision Plume, Dr. Kilpatrick uses a widely accepted mass appraisal methodology that incorporates an Automated Valuation Model ("AVM"), as well as a contingent valuation survey. *See id.* ¶¶ 10, 21-113 (AVM), 114-126 (contingent valuation). Dr. Kilpatrick's preliminary contingent

valuation survey in this case "indicated a diminution between 23.62% and 30.33%[,]" which is well within the range of diminished values reported in the academic literature regarding similar situations: 18% to 53%. *See id.* ¶ 160.

To calculate damages for Class Members who rented residential property in the Precision Plume, Dr. Kilpatrick proposes three possible rental-value approaches, which he has used in other environmental contamination cases: (1) a daily approach, based on the median-daily rent for the area multiplied by an appropriate discount rate and the number of days the property was affected; (2) a monthly approach, based on the median-monthly rent for the area multiplied by an appropriate discount rate and the number of months the property was affected; and (3) an annual approach, based on median-annual rent for the area multiplied by an appropriate discount rate and the number of years the property was affected. *Id.* ¶¶ 157-159. The appropriate discount rate is based on factors like interviews with market participants and any "averting expenditures" incurred by the renters. *Id.* These three approaches allow Plaintiffs to calculate damages for any Class Member who rented property in the class area during the Class Period, regardless of how long he or she did so.

In sum, while any individual plaintiff in the class area could use Dr. Kilpatrick's methods to prove his or her individual damages, those methods can also be used by the class to prove damages classwide. Even if some individual calculation of damages become necessary, that does not mean a class action is not superior. In Oregon, as in federal courts, individual damages inquiries do not defeat class certification. *See Migis*, 282 Or App at 787 ("A class action is not inappropriate simply because each class member will have to make an individualized showing to recover damages.") (quoting *Delgado v. Del Monte Fresh Produce, N.A., Inc.*, 260 Or App 480, 493, 317 P3d 419, *rev den* 355 Or 380 (2014)).

(v) Plaintiffs' Common Proof that They Are Entitled to Injunctive Relief

Plaintiffs seek a permanent injunction ordering PCC to take all necessary steps to prevent further injury to Plaintiffs and their neighbors. These steps include ceasing the emission of toxic pollutants at levels that interfere with Plaintiffs' and Class Members' exclusive possessory rights or any reasonable use or enjoyment of their properties and the surrounding neighborhoods; and, where necessary, removing the particles of toxic pollutants that PCC deposited on the same. Third Consol. Am. Compl ¶¶ 89 & 106. Plaintiffs will use the same common proof they proposed above for their trespass, nuisance, and negligence claims to show that they are also entitled to this injunctive relief. For this reason, Plaintiffs' common proof that they are entitled to injunctive relief supports a finding of predominance.

d. The lack of individual interest in controlling separate actions favors superiority.

ORCP 32 B(4) directs courts to consider the "interest of members of the class in individually controlling the prosecution or defense of separate actions." If the Court finds that there is no such interest, it favors finding superiority and certifying the class. *See* Ex. 1, Lahav Decl. ¶¶ 41-43.

Here, there is no evidence of such an interest. Further, the Court already implicitly recognized that even if there were such an interest, it is outweighed by the need for judicial economy and consistency of judgment. There were initially two separate cases filed against PCC related to their pollution of Southeast Portland, but the Court consolidated them into this proceeding. Consolidation Order. This means that even if any individual Class Members did wish to proceed separately, the Court has already found that such an interest is not substantial enough to win out over other concerns. Additionally, should any Class Member be interested in pursuing personal injury claims, he or she is free to do so.

This factor favors superiority.

e. The lack of existing litigation favors superiority.

ORCP 32 B(5) directs courts to consider the "extent and nature of any litigation concerning the controversy already commenced by or against members of the class." There is a paucity of case law on this factor in Oregon. However, one court has cited this factor as a basis for denying certification when the attorneys involved were pursuing "essentially the same claim" against the same defendants in numerous other cases. *Lowdermilk v U.S. Bank National Ass'n*, No. A0603-03335, 2008 WL 4281960 (Mult Co Cir Aug. 04, 2008). Unlike the situation in *Lowdermilk*, Plaintiffs and their attorneys here are not pursuing "essentially the same claim" against PCC in other cases. For this reason, this factor favors finding a class action superior.

f. The desirability of the forum favors superiority.

Under ORCP 32 B(6), courts evaluate superiority based on the "desirability or undesirability of concentrating the litigation of the claims in the particular forum." Oregon courts recognize that a "single adjudication * * * is preferable to piecemeal litigation and potentially inconsistent awards." *See generally, Alsea Veneer*, 117 Or App at 55 (discussing this preference in the context of predominance analysis).

Here, the Plaintiffs, the proposed Class Members, PCC, and most of the relevant witnesses and evidence are located in Multnomah County and Clackamas County. The relevant law for Plaintiffs' claims and proposed class certification is almost entirely Oregon law. And resolving Plaintiffs' claims in a single adjudication is preferable to piecemeal litigation, potentially inconsistent awards, and inconsistent standards for PCC. This forum is desirable and weighs in favor of finding superiority.

g. Manageability favors superiority.

ORCP 32 B(7) asks courts to analyze superiority by looking at the "difficulties likely to be encountered in the management of a class action that will be eliminated or significantly reduced if the controversy is adjudicated by other available means." This inquiry is often referred to as "manageability." The manageability inquiry balances, on the one hand, the potential efficiencies gained from aggregation against the need to adhere to substantive and procedural law. *See Hurt*, 276 Or at 930 (manageability looks to whether trying the class action as proposed would "impede the usual business of the courts"); *Alsea Veneer, Inc.*, 117 Or App at 55 (even where a class is large, "a single administration is undoubtedly less difficult" than processing individual claims); *Bernard*, 275 Or at 160 n5 ("We cannot imply from the mere enactment of the class action statute * * * that the legislature intended to abrogate settled principles of substantive and procedural law simply to make the class action manageable"). Both the potential efficiencies and the need to adhere to substantive and procedural law favor finding this class action manageable.

On the side of efficiency, aggregating Plaintiffs' claims in this forum is more efficient than addressing them piecemeal: Plaintiffs propose to deal with potentially thousands of Class Members' claims against PCC in one proceeding, using the same theories, supported by the same expert evidence, using almost exclusively Oregon law, and common proof. Should the Court certify Plaintiffs' class, class counsel will be able to quickly facilitate proper notice in this case, as discussed below. Also below, to show how Plaintiffs' claims would proceed at trial, Plaintiffs offer a trial plan. The simple clarity of Plaintiffs' trial plan demonstrates the efficiency to be gained by proceeding as a class action.

In the interests of adhering to substantive and procedural law, Plaintiffs have shown that they offer common evidence to prove their substantive claims for trespass, nuisance, and

negligence, and that they satisfy ORCP 32's other procedural requirements by a preponderance of the evidence.

The efficiencies gained from aggregation coupled with Plaintiffs' adherence to the substantive and procedural requirements for certifying their class claims shows that this class action is manageable and, therefore, superior to other methods of adjudicating Plaintiffs' claims.

h. The complexity and expense of the litigation favors superiority.

ORCP 32 B(8) asks "[w]hether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class." This factor focuses primarily on whether the wrong is so slight, the recovery for class members so small, that the only true benefactors of the litigation are the attorneys. *See generally, Bernard*, 275 Or at 151-52 (discussing history of class actions in Oregon, focusing on relationship between Oregon's rules and the American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972)).

Plaintiffs' case presents numerous complex issues of law and fact. These complexities require the use of multiple experts, which would be prohibitively expensive for any Plaintiff or Class Member to employ on an individual basis. This case is similar to the case in *Connors*, where, at the hearing for final approval of the settlement class, the court declared "[i]t's unlikely that a class member could've obtained the results individually, given what the likely calculation of damages is versus the cost and expense of getting there[. A]nd so [a] class [action] really is the only way to do this[.]"[11]

[11] *Audio: Amerities, surpra* note 8.

Further, the wrongs Plaintiffs allege—trespass, nuisance, and negligence that impacts their possession, use, and enjoyment of their property—are far from slight. If Plaintiffs' proposed class is certified, and they win at trial, they stand to recover financially. But equally important to Plaintiffs' potential financial recovery is the potential impact that Plaintiffs' injunctive relief will have on restoring their rights to own and use their property without PCC's continued interference.

In the United States, the importance of protecting individual property rights is long enshrined in our Constitution. *See* US Const amend III (protecting people's property from needing to quarter soldiers during times of peace); amend IV (protecting people's property from unreasonable searches and seizures); amend V (protecting people's property from takings without just compensation); amend XIV (protecting people's property from being deprived of their rights by states without due process). Not surprisingly, the Oregon Constitution is in accord. *See* Or Const art I, § 10 (providing every person shall have legal remedy for injuries done to his or her property); art I, § 18 (takings clause); art IX, § 4 (compensation for corporate takings).

For these reasons, this final superiority factor also favors finding superiority satisfied. Because all the superiority factors favor class certification, and because Plaintiffs' satisfy the various threshold requirements, the Court should certify Plaintiffs' class and give Plaintiffs an opportunity to represent their neighbors against PCC.

D. ***Notice***

When a court certifies a class, it must "direct that notice be given to some or all members of the class under [ORCP 32 E(2)]," determine the time and form of notice, and determine the requirements for opting out of the class. ORCP 32 F(1). Plaintiffs request that, if this Court certifies the class, it order the parties to confer on a notice plan to present to the Court within 30 days of its class certification order. Providing notice should be straightforward and relatively

inexpensive in this case given the precise, geographically-defined class. For example, Class Members may receive direct mail through addresses obtained through publicly-available databases.

E. ***Trial Plan***

The Court has set a trial date for June 13, 2020. As with notice, Plaintiffs propose that the Court order the parties to confer on devising a trial plan after a ruling on class certification.

Plaintiffs preliminarily envision a three-phase trial, like the procedure employed in *Freeman*, 895 NW2d at 109-11:

Phase 1 – PCC's course of conduct: This first phase would focus on PCC's operations, resolving questions central to Plaintiffs' and Class Members' negligence claims. For example, Plaintiffs will present evidence, detailed above, from which a jury could conclude that PCC failed to install and/or properly maintain their emissions controls and otherwise mitigate their emissions for years, thereby creating an unreasonable risk of the harms Plaintiffs' allege, including the harms of trespass and nuisance.

Phase 2 - Defining the Class Area: The second phase of the trial would be an expert-intensive presentation on the quality and quantity of PCC's emissions, using air dispersion modeling. This evidence will be used to prove Plaintiffs' trespass and nuisance claims by establishing that PCC interfered with Plaintiffs' exclusive possession and reasonable use and enjoyment of their properties. This phase will also include evidence proving that a normal person in the community, who learns about PCC's emissions and presence of them in the air on his or her property, would suffer a loss of the use and enjoyment of his or her property. All the proof Plaintiffs will offer will be common proof that any individual Plaintiff or Class Member could use to make out his or her individual claims.

Phase 3 – Damages: The final phase of the trial would present Plaintiffs' "formula for calculating damages." *Id.* at 111. This would be a simpler proposition than in *Freeman* because Plaintiffs are seeking diminution in value and loss of use that are uniform across the Precision Plume.

VIII. CONCLUSION

Plaintiffs satisfy ORCP 32's requirements—including all eight superiority factors—by a preponderance of the evidence. Plaintiffs respectfully ask the Court to certify their proposed class to give them a chance to represent themselves and their neighbors against PCC, who have been polluting Plaintiffs' and their fellow Class Members' neighborhoods for years.

DATED this 29th day of March, 2019.

SMITH & LOWNEY, PLLC

By: *s/ Claire E. Tonry*

Claire E. Tonry (Bar No. 095696)
clairet@smithandlowney.com
Knoll D. Lowney (*pro hac vice*)
knoll@smithandlowney.com
SMITH & LOWNEY, PLLC
2317 E. John St.
Seattle, WA 98112
Telephone: (206) 860-2883
Facsimile: (206) 860-4187

KAMPMEIER & KNUTSEN PLLC
Brian A. Knutsen (Bar No. 112266)
brian@kampmeierknutsen.com
833 S.E. Main Street
Mail Box No. 318; Suite 327
Portland, OR 97214
Telephone: (503) 841-6515

Attorneys for Plaintiffs and the Proposed Class

KELLER ROHRBACK L.L.P.

By: *s/ Daniel Mensher*

Daniel Mensher (Bar No. 074636)
dmensher@kellerrohrback.com
Amy Williams-Derry (*pro hac vice*)
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 and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing PLAINTIFFS' MOTION FOR CLASS CERTIFICATION on:

David H. Angeli
Kristin L. Tranetzki
Colin Hunter
Angeli Law Group, LLC
121 SW Morrison Street, Suite 400
Portland, OR 97294
david@angelilaw.com
kristen@angelilaw.com
colin@angelilaw.com

by the following indicated method or methods:

☐ by faxing full, true, and correct copies thereof to the attorneys at the fax numbers shown above, which are the last-known fax numbers for the attorneys' offices, on the date set forth below. The receiving fax machines were operating at the time of service and the transmissions were properly completed, according to the confirmation reports on file.

☐ by mailing full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.

☐ by sending full, true, and correct copies thereof via overnight courier in sealed, prepared envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, on the date set forth below.

☐ by causing full, true, and correct copies thereof to be hand-delivered to the attorneys in person or at the attorneys' last-known office addresses listed above on the date set forth below.

☒ by the electronic service of a document via the Internet to the electronic mail (email) address of a party who has consented to electronic service under UTCR 21.100(1).

I hereby declare that the above is true to the best of my knowledge and belief. I understand that this document is made for use as evidence in court and is subject to penalty of perjury.

DATED: March 29, 2019

Signed: *s/ Daniel Mensher*
Daniel Mensher, Attorney for Plaintiffs