

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

BRIAN RESENDEZ, RODICA ALINA
RESENDEZ, 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

FIFTH CONSOLIDATED AMENDED
CLASS ACTION COMPLAINT

CLAIM NOT SUBJECT TO MANDATORY
ARBITRATION

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

Filing Fee Under ORS 21.135(2)(a)

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

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

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

8.

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

9.

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

FACTUAL ALLEGATIONS

A. South Portland’s Air

10.

A. South Portland's Air

Scientists with the United States Forest Service and Drexel University’s Dornsife School of Public Health launched a study in 2013 collecting and analyzing samples of moss throughout the Portland area (“Forest Service Study”).

11.

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

12.

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

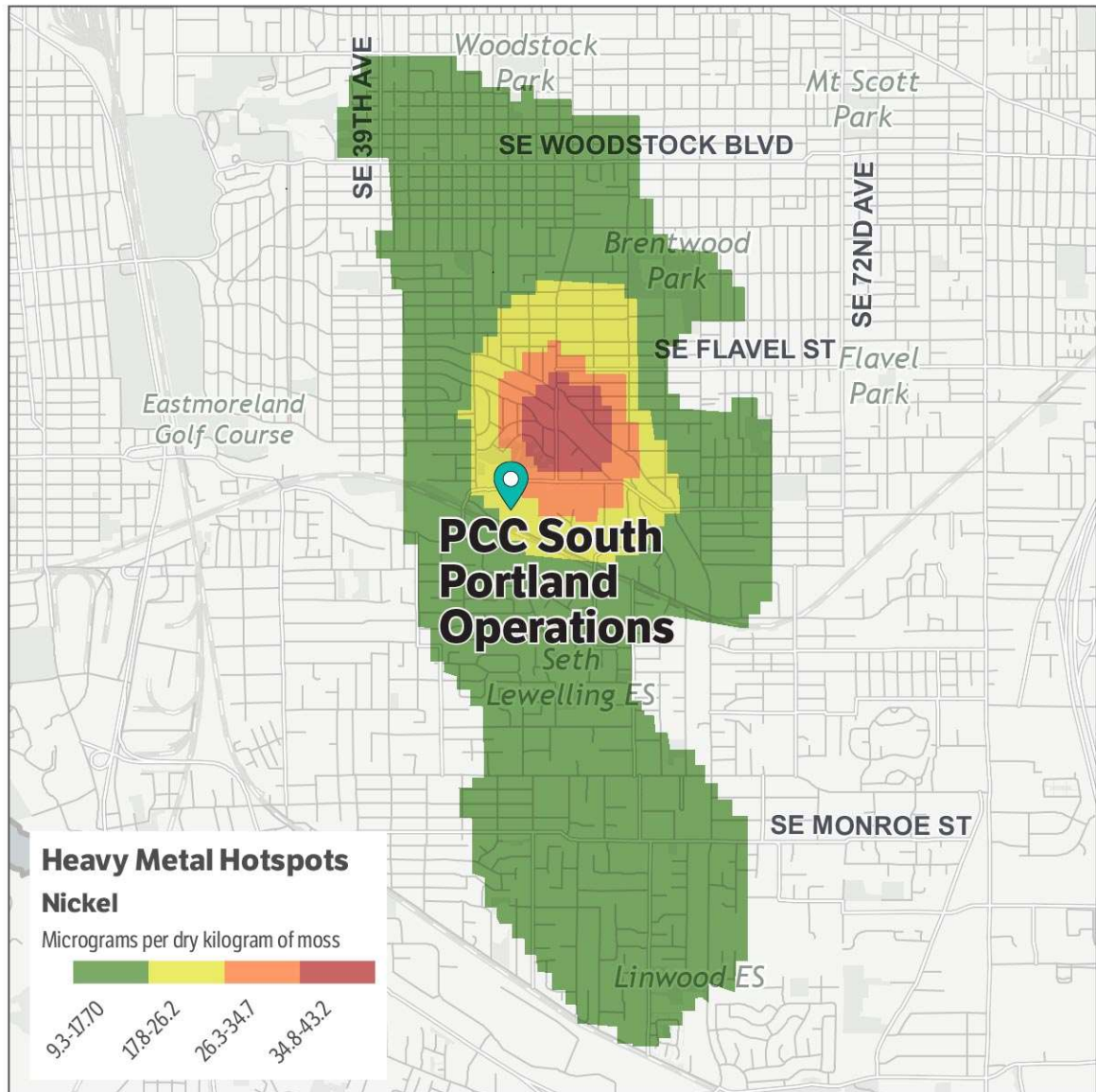
13.

The Forest Service Study found high concentrations of arsenic in several hot spots in the Portland area, including one in the vicinity of the Facility. The moss showed elevated levels of arsenic in moss adjacent to the Facility. Specifically, levels of arsenic in moss adjacent to the Facility ranging from 0.37 to 0.59 milligrams per kilogram, levels from 0.60 to 0.71 milligrams per kilogram, and levels from 0.72 to 0.83 milligrams per kilogram were all identified.

14.

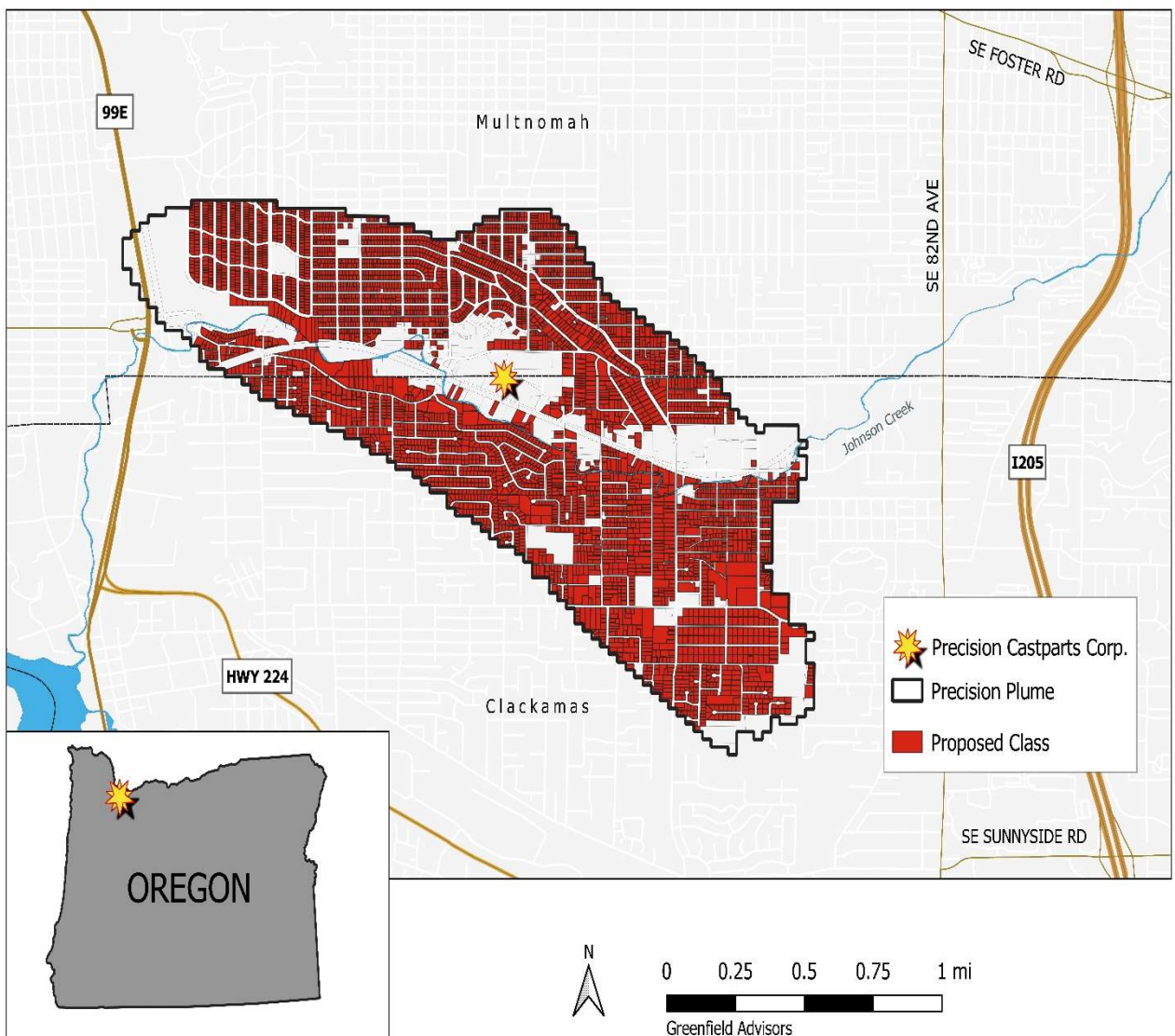
The Forest Service Study also showed higher concentrations of nickel in a large area near the Facility. This was the only significant nickel hot spot identified in the study. The map below, based on maps *The Oregonian*, the Oregon Department of Environmental Quality (DEQ), the Oregon Health Authority (OHA), Multnomah County, and/or KGW News prepared using data from the Forest Service Study. It shows elevated levels of nickel in moss adjacent to the Facility, with red indicating 34.8 to 43.2 milligrams per kilogram of moss, orange indicating 26.3 to 34.7 milligrams per kilogram, yellow indicating 17.8 to 26.2 milligrams per kilogram, and green indicating 9.3 to 17.70 milligrams per kilogram.¹

¹ *The Oregonian* maps appear to have incorrectly reported the units of measurement as micrograms per kilogram. The U.S. Forest Service actually reported the concentration of pollutants in moss in milligrams per kilogram.



15.

The map below depicts the area where the Plaintiffs' expert air dispersion modeling shows that Defendants have caused or contributed to significant levels of hazardous metal-laden particulate matter into south Portland's air:



The area depicted within the Black line on this map is defined as the “Affected Area.”

B. Precision Castparts’ Emissions

16.

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

17.

1 Plaintiffs expect the evidence will show that the Facility is the primary, if not exclusive, source
2 of the metal pollution plume depicted in Paragraph 15.

3 18.

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

5 19.

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

9 20.

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

11 21.

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

14 22.

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

17 23.

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

20 24.

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

23 25.

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

26 26.

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

C. Health Impacts of Precision Castparts' Emissions

27.

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

28.

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

29.

Because Precision Castparts' emissions of toxic pollutants not only contaminate the air, but also contaminate the soil, grass, plants, and homes throughout the community, people living in this neighborhood continue to be exposed to dangerous levels of toxic pollutants on a daily basis. Thus, even if Defendants ceased the Facility's emissions of toxic pollutants today, Plaintiffs' and Class Members' properties would remain contaminated and damaged, and Plaintiffs and Class Members will most likely continue to be exposed to Defendants' toxic pollutants.

30.

Inorganic arsenic is a known human carcinogen.

31.

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

3 32.

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

9 33.

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

12 34.

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

15 35.

16 Due to the serious risks associated with even intermittent exposure to particulate arsenic, the
17 Occupational Safety and Health Administration (“OSHA”) established a workplace air exposure limit of
18 $10 \mu\text{g}/\text{m}^3$ inorganic arsenic, as well as requirements relating to exposure monitoring and control,
19 respiratory protection, protective work clothing and equipment, medical surveillance, and specialized
20 training.

21 36.

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

24 37.

25 Nickel inhalation is associated with adverse immune system impacts and respiratory effects
26 including asthma, bronchitis, and decreased lung function. Studies link exposure to nickel refinery dust
27 and nickel subsulfide with increased risk of lung and nasal cancers in humans. Animal studies further

link nickel inhalation with lung tumors and decreased sperm count. The California Environmental Protection Agency has calculated a human health chronic inhalation reference exposure level of 0.05 µg/m³ for nickel.

38.

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

39.

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

40.

Cadmium has a variety of adverse health impacts. Breathing air with very high levels of cadmium can severely damage the lungs and may cause death, and breathing air with lower levels of cadmium over long periods of time results in a build-up of cadmium in the kidney, which can result in kidney disease. Eating food with even low levels of cadmium can lead to a build-up of cadmium in the kidneys, which can damage the kidneys. Exposure to even low levels of cadmium for a long time can also cause bones to become fragile and break easily. And, the U.S. Department of Health and Human Services (DHHS) has determined that cadmium and cadmium compounds are known human carcinogens. The International Agency for Research on Cancer (IARC) has determined that cadmium is carcinogenic to humans. The EPA has determined that cadmium is a probable human carcinogen.

1 41.

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

6 42.

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

19 43.

20 People exposed to manganese risk damages to their nervous system. These health effects include
21 behavioral changes and other nervous system effects, which include movements that may become slow
22 and clumsy. Exposure to high levels of manganese in air can cause lung irritation and reproductive
23 effects. Nervous system and reproductive effects have been observed in animals after oral doses of
24 manganese.

25 44.

26 Titanium presents several risks to human health. Titanium can irritate the skin, eyes, mucous
27 membranes, and the lungs. After short-term exposure respiratory system effects can include coughing

1 and tightness in the chest. More severe effects can include chemical bronchitis or pneumonia, and
2 congestion of the mucous membranes of the upper respiratory tract. These effects can cause long-term
3 effects such as the narrowing of the vocal cords, windpipe, and upper airways.

4 45.

5 PM10 and PM2.5 mean particulate matter of less than 10 micrometers (μm) and 2.5 μm ,
6 respectively. These are inhalable particles that are small enough to penetrate the thoracic region of the
7 respiratory system.

8
9 **D. Plaintiffs' Use and Enjoyment of their Property Has Been Impaired By Defendants'**
10 **Acts and Omissions**

11 ***Plaintiffs Brian Anthony Resendez and Rodica Alina Resendez***

12 46.

13 Plaintiffs Brian Anthony Resendez and Rodica Alina Resendez lived in a home they own located
14 less than two-thirds of a mile northeast of the Facility and within the Affected Area. Mr. Resendez had
15 lived there since he purchased his home in 2005, and Mrs. Resendez had lived there since around
16 October, 2006. Mr. Resendez did not know when he purchased his home, nor could he have reasonably
17 known, that this home was located in a hot spot of toxic pollutants. The Resendezes still own the
18 property, but they ultimately moved to another location to get away from the emissions of Defendants'
19 Facility.

20 47.

21 The Resendezes have an active five-year old boy who liked to play outside. Emissions of toxic
22 pollutants from Defendants' Facility in the air and on their property caused the plaintiffs to reduce their
23 child's playtime in their own yard and they had to instead travel to parks just to try to ensure that they
24 are allowing their son to play in a safe environment.

25 48.

26 The Resendezes are worried about adverse near-term and long term health effects that emissions
27 of toxic pollutants from the Facility may have on them, their son, their eighty-one year old mother that
28 lived with them for much of the year, and their two dogs. They are concerned that spending too much

1 time at their own home could poison them and cause terminal illnesses. This harmed their use and
2 enjoyment of their home.

3 49.

4 The Resendezes liked to garden and planted their vegetable garden for several years prior to
5 2016. While they had cleared the garden for planting in 2016, they did not plant anything, nor did they
6 plan to plant anything, because they were worried that emissions of toxic pollutants from the Facility
7 may make their vegetables unsafe to eat. This interference with their use and enjoyment of their
8 property is a result of the Defendants emissions.

9 50.

10 Emissions of toxic pollutants from the Facility have and will reduce the value of the Resendezes'
11 home and undermine the efforts they have made over the years to improve the value of their property.
12 The Resendezes have now turned this home into a rental property. It will potentially be more difficult to
13 rent the home, and the Resendezes may suffer reduced rent payments due to Defendants' emissions, as
14 the Resendezes feel morally obligated to disclose the known issues to any potential renters.

15 51.

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

18 ***Plaintiff Debra Taevs***

19 52.

20 Plaintiff Debra Taevs lived within one block of The Facility. Her home is within the Affected
21 Area. Plaintiff Taevs lived in her Home since buying it in January 2007. She did not know when she
22 bought her home, and could not have reasonably known, that it was located in a hotspot of emissions of
23 toxic pollutants from the Facility. Ms. Taevs has subsequently moved out of the home, due to concerns
24 about defendant's emissions.

25 ////

26 ////

27 53.

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

5 54.

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

8 55.

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

21 56.

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

27 57.

1 Plaintiff Taevs once gardened avidly, deriving significant pleasure from growing flowers and
2 vegetables in her large yard. After she learned that she might have been putting herself and her guests in
3 danger by contact with soil or the ingestion of produce that have been contaminated by Defendants'
4 emissions of toxic pollutants, Plaintiff Taevs seriously curtailed her use of her garden and yard, and
5 ultimately imported soil in which to garden.

6 58.

7 Plaintiff Taevs used to enjoy opening the windows of her home when the weather was warm, and
8 listening to birds in the nearby trees. However, after learning of defendant's emissions she kept her
9 windows closed whenever possible and she has obtained an in-home air filter to try to reduce her
10 exposure to the toxic pollutants generated by the Facility.

11 **CLASS ALLEGATIONS**

12 59.

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

15 60.

16 Plaintiffs bring this class action and seek certification of the claims and certain issues in this
17 action on behalf of a Class of individuals defined as: All residents or owners of residential properties
18 within the Affected Area as of February 17, 2016. Excluded from the class are: (1) Defendants, any
19 entity or division in which Defendants have a controlling interest, and their legal representatives,
20 officers, directors, assigns, and successors; and (2) the judge to whom this case is assigned and the
21 judge's staff.

22 61.

23 Plaintiffs reserve the right to amend the Class definition.

24 62.

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

A. Numerosity

63.

Because there are estimated to be thousands of people that reside within the Affected Area, the number of individuals in the Class is so large as to make joinder impracticable. Class Members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or published notice.

B. Common Questions of Law and Fact Predominate

64.

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

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

C. Typicality

65.

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

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67.

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

F. Declaratory and Injunctive Relief

68.

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

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69.

KELLER ROHRBACK L.L.P.
KAMPMEIER & KNUTSEN, PLLC
SMITH & LOWNEY, PLLC
LAW OFFICE OF KARL G. ANUTA, PC

1 **FIRST CLAIM FOR RELIEF**

2 (Trespass)

3 70.

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

5 71.

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

10 72.

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

13 73.

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

16 74.

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

19 75.

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

24 76.

25 Unless Defendants are enjoined from further conduct of the type alleged, Plaintiffs and Class
26 Members will continue to suffer significant and irreparable injury. Plaintiffs and Class Members have
27 no adequate remedy at law to prevent such ongoing conduct. Plaintiffs and Class Members are entitled

1 to a permanent injunction and an Order directing Defendants to take all necessary steps to prevent
2 further injury to Plaintiffs, including removing the particles of toxic pollutants that Defendants have
3 caused to be deposited on Plaintiffs' and other Class Members' property.

4 77.

5 The requested injunction is in the public interest.

6 78.

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

9 79.

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

14 80.

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

18 81.

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

- 21 a. Testing expenses to determine the level of toxic pollutants on the Plaintiffs' and Class
22 Members' property, in a sum the jury determines to be fair but in no event to exceed
23 \$8,000 per lot;
- 24 b. Damage to or the loss of personal property, including but not limited to produce or other
25 edible plants or fruit from the trees or bushes cultivated by Plaintiffs and Class Members,
26 in a sum the jury determines to be fair but in no event to exceed \$5,000 per household;
- 27

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

SECOND CLAIM FOR RELIEF

(Nuisance)

82.

Plaintiffs re-allege the paragraphs 1 through 69 and 81, and further allege:

83.

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

84.

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

85.

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

86.

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

9 87.

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

13 88.

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

16 89.

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

22 90.

23 While remediation of the permanent injury Defendants have caused may not be reasonably
24 attainable, the cost of adequately controlling and containing Defendants' emissions of toxic pollutants is
25 modest, particularly when compared to the harm that Plaintiffs and Class Members have been forced to
26 bear as a result of Defendants' decision to try to externalize rather than bear those costs. The concrete
27

1 and ongoing harms Plaintiffs and Class Members have suffered are far greater than they should be
2 forced to bear in their predominantly residential neighborhood.

3 91.

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

6 92.

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

10 93.

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

16 94.

17 As a result of Defendants' conduct, Plaintiffs and Members of the Class have each suffered or
18 will each have suffered the harms as detailed in paragraph 81, and incorporated herein by reference.

19 **THIRD CLAIM FOR RELIEF**

20 (Negligence)

21 95.

22 Plaintiffs re-allege the paragraphs 1 through 69 and 81 and further allege:

23 96.

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

27 97.

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

3 98.

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

- 6 a. Defendants failed or neglected, and continue to fail or neglect, to install appropriate
7 emissions control equipment on each of their furnaces, when Defendants knew or should
8 have known that failure to do so could result in emission of toxic pollutants that would
9 likely travel to and land on neighboring properties;
- 10 b. Defendants failed or neglected, and continue to fail or neglect, to monitor their emissions
11 on a regular basis to determine if toxic pollutants were escaping from the Facility, when
12 Defendants knew or should have known that failure to do so could result in emission of
13 toxic pollutants that would likely travel to and land on neighboring properties;
- 14 c. Defendants failed or neglected, and continue to fail or neglect, to install appropriate
15 emissions control equipment on the portions of the Facility where fugitive emissions
16 might escape, when Defendants knew or should have known that failure to do so could
17 result in emission of toxic pollutants that would likely travel to and land on neighboring
18 properties;
- 19 d. Defendants failed or neglected, and continue to fail or neglect, to monitor the Facility's
20 fugitive emissions on a regular basis to determine if toxic pollutants were escaping, when
21 Defendants knew or should have known that failure to do so could result in emission of
22 toxic pollutants that would likely travel to and land on neighboring properties;
- 23 e. Defendants failed or neglected, and continue to fail or neglect, to properly train their
24 employees to operate the Facility in a way that would not allow emissions of toxic
25 pollutants, when Defendants knew or should have known that failure to do so could result
26 in emission of toxic pollutants that would likely travel to and land on neighboring
27 properties;

- 1 f. Defendants failed or neglected, and continue to fail or neglect, to construct the Facility in
2 a way that would preclude emissions of toxic pollutants, when Defendants knew or
3 should have known that failure to do so could result in emission of toxic pollutants that
4 would likely travel to and land on neighboring properties;
- 5 g. Defendants failed or neglected, and continue to fail or neglect, to maintain the Facility in
6 a way that would prevent emissions of toxic pollutants, when Defendants knew or should
7 have known that failure to do so could result in emission of toxic pollutants that would
8 likely travel to and land on neighboring properties;
- 9 h. Defendants failed or neglected, and continue to fail or neglect, to maintain the Facility in
10 a way that would prevent fugitive emissions, when Defendants knew or should have
11 known that failure to do so could result in emission of toxic pollutants that would likely
12 travel to and land on neighboring properties;
- 13 i. Defendants failed or neglected to warn the neighbors that the Facility was emitting
14 dangerous toxic pollutants, when Defendants knew or should have known that failure to
15 do so could result in damage to the neighbors, and the neighbors' children, guests, and/or
16 properties.
- 17 j. Defendants knew or should have known that their conduct was causing a foreseeable risk
18 of harm because:
- 19 i. they knew that they used and generated dangerous toxic pollutants at the Facility;
- 20 ii. they knew that they were obligated under state and federal laws to monitor and
21 report on emissions from the Facility;
- 22 iii. they knew that they were providing personal protective gear to employees
23 working with the same materials and toxic pollutants as those that escaped the
24 Facility;
- 25 iv. they knew that the Facility was located in a primarily residential neighborhood;
- 26 v. they knew that material filtered from the Facility's emissions were required to be
27 disposed of as hazardous materials; and

vi. they could foresee that by emitting toxic pollutants they could damage the health, property, or both of those living near the Facility.

99.

As a result of Defendants' conduct, Plaintiffs and Members of the Class have each suffered or will each have suffered the harms as detailed in paragraph 81, and incorporated herein by reference.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs individually and on behalf of the Class, request the following relief:

A. An Order certifying that this action is properly brought and may be maintained as a class action pursuant to Rule 32, that Plaintiffs be appointed the class representative, and that Plaintiffs' counsel be appointed counsel for the Class;

B. An Order directing Defendants to preserve documents and other information related to Plaintiffs' current claims and any future damages claims;

C. An Order declaring that Defendants' conduct violates the trespass, nuisance, and/or negligence provisions of Oregon law;

D. An Order requiring Defendants to cease any ongoing or active trespass of Plaintiffs' properties;

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

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

G. Require Defendants to develop and implement a plan for providing environmental monitoring, investigation, and remediation, including (i) monitoring Facility emissions of toxic pollutants; (ii) ambient air monitoring of toxic pollutants; (iii) prompt testing and identification of

deposits of toxic pollutants on land within the Affected Area; and (iv) remediation of deposits of toxic pollutants on land; and allow Plaintiffs and Class Members to participate in development of that plan;

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

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

J. Require Defendants to pay attorneys' fees and costs; and

K. Provide such other relief as the Court deems just.

DATED this 1st day of October, 2019.

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Attorneys for Plaintiffs

Attorneys for Plaintiffs

1 **CERTIFICATE OF READINESS**

2
3 Pursuant to UTCR 5.100(2), I hereby certify that I have complied with UTCR 5.100 by serving a
4 copy of the proposed form of Order on attorneys for defendants no less than 3 days prior to submission
5 to the court.

6 This proposed order or judgment is ready for judicial signature because:

7 ☐ 1. Each party affected by this order or judgment has stipulated to the order or judgment,
8 as shown by each party's signature on the document being submitted.

9 ☒ 2. Each party affected by this order or judgment has approved the order or judgment, as
10 shown by each party's signature on the document being submitted or by written confirmation of
11 approval sent to me.

12 ☐ 3. I have served a copy of this order or judgment on each party entitled to service and:

13 ☐ a. No objection has been served on me.

14 ☐ b. I received objections that I could not resolve with a party despite
15 reasonable efforts to do so. I have filed a copy of the objections I received
16 and indicated which objections remain unresolved.

17 ☐ c. After conferring about objections, Defendants agreed to submit any
18 remaining objection by way of competing proposed order.

19 ☐ 4. Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or
20 otherwise.

21 ☐ 5. This is a proposed judgment that includes an award of punitive damages and notice has
22 been served on the Director of the Crime Victims' Assistance Section as required by subsection (5) of
23 this rule.

24 ☐ 6. Other: _____

25 **CERTIFICATE OF SERVICE**

26 I hereby certify that I served a true copy of the foregoing Fifth'Eqpuqkf cvgf Amended
27 Complaint by email and electronic transmission of a notice of filing by the electronic filing system
28 provided by Oregon Judicial Department for the electronic filing and the electronic service of a
document via the Internet to the email address of the following, who have consented to electronic
service under UTCR 21.100(1).

David H. Angeli (david@angelilaw.com)
Kristen L. Tranetzki (kristen@angelilaw.com)
Colin Hunter (colin@angelilaw.com)

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 thiuv day of Qexqber, 2019.

s/ Karl G. Anuta
Attorney for Plaintiffs