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

SCOTT MEEKER and ERIN MEEKER, KELLY GOODWIN, BRUCE ELY and KRISTI HAUKE, ELIZABETH BORTE and RINO PASINI, CHRISTIAN MINER, and JUDY SANSERI and HOWARD BANICH; individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BULLSEYE GLASS CO., an Oregon corporation,

Defendant.

CIVIL ACTION NO. 16CV07002

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Plaintiffs Scott and Erin Meeker, Kelly Goodwin, Bruce Ely and Kristi Hauke, Elizabeth Borte and Rino Pasini, Christian Miner, Judy Sanseri, and Howard Banich (collectively, "Plaintiffs") seek to represent two subclasses—one of residents, one of residential real property owners—to pursue trespass, negligence, and nuisance claims against defendant Bullseye Glass Co. ("Bullseye"). Plaintiffs seek injunctive relief and damages on behalf of themselves and similarly situated residents and property owners in part of inner Southeast Portland defined in this Motion as the "Bullseye Plume" or "Plume."

Using common proof, Plaintiffs plan to show at trial how Bullseye's decades of unchecked emissions have polluted properties within the Plume, impaired property values, and caused a loss of use and enjoyment of that property. That trial will be expert-intensive and focus on Bullseye's conduct and its natural consequences, making class wide resolution of Plaintiffs' and Class members' claims efficient, manageable, and superior to any other method.

Plaintiffs support this Motion with the expert opinions of Dr. Andrew Gray, an environmental engineer and atmospheric scientist; Dr. Mark Chernaik, a toxicologist with a Ph.D. in biochemistry; and Dr. John Kilpatrick, a real property appraiser with extensive experience in the valuation of environmentally impaired property. Dr. Gray explains how unfiltered emissions from Bullseye's glass-making furnaces elevated ambient air concentrations of particulate matter in the Bullseye Plume, and uses a commonly-accepted dispersion modeling program to map that Plume. Dr. Chernaik describes how Bullseye's particulate emissions have caused hazardous metals to be deposited on Class members' property and created a lasting public health hazard within the Plume. And Dr. Kilpatrick outlines how Bullseye's pollution has stigmatized Class members' neighborhood, impairing residential property values in the Bullseye Plume. Dr. Kilpatrick further explains that relying on scientifically valid techniques—such as a mass appraisal automated valuation model, a contingent valuation survey, and standard market data—he will be able to determine class wide damages relating to the diminution in real property values and residents' loss of use and enjoyment of their property caused by Bullseye's conduct.

At this stage, however, Plaintiffs do not seek any rulings on the merits; they simply ask this Court to certify the proposed subclasses and Plaintiffs' claims under ORCP 32, appoint Plaintiffs as

class representatives and Plaintiffs' counsel as Lead Counsel to represent those subclasses, and order the Parties to confer on a notice and trial plan.

II. BACKGROUND

A. *The Bullseye Plume area is a predominantly residential neighborhood that became a dumping ground for Bullseye's emissions.*

Bullseye Glass Co. operates an industrial glass-manufacturing facility in a residential and commercial area of Southeast Portland. *See* Def.'s Answer to Second Am. Compl. ¶ 18. In February 2016, neighborhood residents along with the broader Portland community first learned that this neighborhood was a "hotspot" of hazardous air pollution stemming from particulate emissions of cadmium, arsenic, and hexavalent chromium, for which the likely source was Bullseye.[1]

Those revelations resulted in national news coverage,[2] local protests,[3] a series of contentious community meetings,[4] a state-wide clean air initiative,[5] the formation of advocacy groups like the Eastside Portland Air Coalition,[6] and this class action lawsuit. When news about Bullseye's emissions became public, Bullseye received "hundreds of e-mails and phone calls" from concerned people, continuing into at least June and July 2016. Ex. 1[7], Deposition of Jim Jones ("Jones Dep.") 93:10-23. For three weeks, residents within a half-mile of Bullseye were told by the State not to eat produce from their gardens.[8] The State later downgraded that advisory based on preliminary soil sampling results, but

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[1] *See, e.g.*, Ex. 15, Kirk Johnson, *Toxic Moss in Portland, Ore., Shakes City's Green Ideals*, The New York Times (Mar 2, 2016); Ex. 16, Daniel Forbes, *State Finds Alarmingly High Arsenic, Cadmium Levels Near Two SE Portland Schools* The Portland Mercury (Feb 3, 2016, 2:06 pm) (quoting the DEQ's Sarah Armitage as saying, "I can say, yes, we're confident it's Bullseye."); Ex. 17, *Bullseye source test results, DEQ's actions to identify and control the unknown hexavalent chromium source: Question and answers*, Department of Environmental Quality; Geoffrey H. Donovan, Sarah E. Jovan, Demetrios Gatziolis, Igor Burstyn, Yvonne L. Michael, and Vincente J. Monleon, *Using an epiphytic moss to identify previously unknown sources of atmospheric cadmium pollution*, 559 Science of the Total Environment, 84, 89 (2016) ("The evidence that glass-manufacturer #1 [Bullseye] is the source of the observed cadmium hotspot is compelling.").

[2] *E.g.*, Johnson, *supra* note 1.

[3] Ex. 18, *Group protests SE Portland glass company over toxics*, KGW.com (Feb 16, 2016, 11:54 pm).

[4] *E.g.*, Ex. 19, Andrew Dymburt, *SE Portland 'shows solidarity' at air quality meeting*, KOIN 6 (Feb 17, 2016, 5:34 pm).

[5] Ex. 20, Angela Ruffoni, *Gov. Brown Launches Cleaner Air Oregon*, KXL News (Apr 6, 2016, 5:45 pm).

[6] *See generally* Ex. 21, *About*, Eastside Portland Air Coalition.

[7] All exhibit ("Ex.") references refer to exhibits to the Declaration of Matthew Preusch in Support of Motion for Class Certification, filed herewith.

[8] Ex. 22, Lynne Terry, *Don't eat backyard vegetables near Portland glass factories, officials warn*, The Oregonian (Feb 20, 2016). *See also* Ex. 24 (warning sign on community garden).

cautioned that gardeners should wash their hands after working in the soil and wash all produce before consuming it.[9] The state's public health assessment of Bullseye's impact on the community is ongoing.[10]

After Bullseye suspended the use of certain metals and installed its first pollution control baghouse in March 2016, average concentrations of toxic metals in the neighborhood "dropped 98 percent from 2015 levels[.]"[11] Despite the installation of a baghouse, however, Bullseye "continue[s] to get complaints about opacity"[12] from people in the neighborhood. Ex. 1, Jones Dep. 18:2-3, 8-17. Even after Bullseye belatedly came under the close scrutiny of regulators, it continued to violate air quality opacity standards, Ex. 4, and received a State-issued cease and desist order for lead emissions. Ex. 5.

B. *Bullseye has been melting toxic metals in its furnaces since the 1970s without emissions controls.*

Plaintiffs and the public now know what Bullseye has long known: The company has been melting hazardous air pollutants in uncontrolled furnaces for over four decades. *See, e.g.*, Mem. in Supp. of Mot. for Leave to Amend Pleading to Assert Claim for Punitive Damages 6-8. Shockingly, Bullseye never tested the emissions from its furnaces or sought to measure the impact of those emissions on its neighbors. Ex. 2, Deposition of Dan Schwoerer ("Schwoerer Dep.") 111:14-25. When Bullseye's maintenance supervisor asked to test those emissions to quantify them in the 2000s, Bullseye Controller Eric Durrin said testing should *not* be done, so that Bullseye could have "plausible deniability." Ex. 28, Deposition of Daren Marshall ("Marshall Dep.") 131:11-132:11. Bullseye "didn't want to know the answer to that" and it was "financially expensive to have that done." *Id*.; *see also id.* 121:20-123:3 (Q: Did Mr. Durrin tell you that Bullseye wanted to have plausible deniability? A: Yes.")

While Bullseye disputes whether it knew the emissions from its furnaces contained hazardous metals, no credible source disputes that those emissions did, in fact, contain substantial amounts of toxic

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[9] Ex. 23, Press Release, Oregon Health Authority, *New soil, cancer, urine test data show low risk for Portland residents* (Mar 9, 2016).

[10] Ex. 25, *Environmental Health Assessment: Bullseye Glass Co*., Oregon Health Authority.

[11] Ex. 26, Press Release, Department of Environmental Quality, Cleaner Air Oregon, *Ongoing monitoring at Bullseye Glass shows sustained emissions reductions* (Mar 21, 2017). Bullseye installed a larger baghouse system and resumed the use of heavy metals in its now-filtered furnaces on August 29, 2016. Ex. 27, Fedor Zarkhin, The Oregonian, *Bullseye Glass back in business with new device to control toxic emissions* (Sep 8, 2016).

[12] Plume opacity is "the degree to which the transmission of light is reduced or the degree to which the visibility of a background as viewed through the diameter of a plume is reduced." U.S. EPA, *Visible Emissions Field Manual: EPA Methods 9 and 22* 4 (1993).

metals, including arsenic, cadmium, lead, selenium, and hexavalent chromium. Material cleaned from Bullseye's stacks contain those metals. *See* Declaration of Daniel Mensher in Supp. of Reply in Supp. of Mot. for Leave to Amend Pleading to Assert Claim for Punitive Damages and Opp'n to Mot. for Continuance, Ex. A (confirming same). And Bullseye owner Mr. Schwoerer admits his understanding that metals can "volatilize" off the surface of melting glass in Bullseye's furnaces. Ex. 2, Schwoerer Dep. 79:19-24; 82:24-83:25. Based on what Bullseye Vice President Jones now knows, he concedes he would be concerned about the use of chromium in uncontrolled furnaces if he lived within a half mile of Bullseye. Ex. 1, Jones Dep. 79:24-80:10.

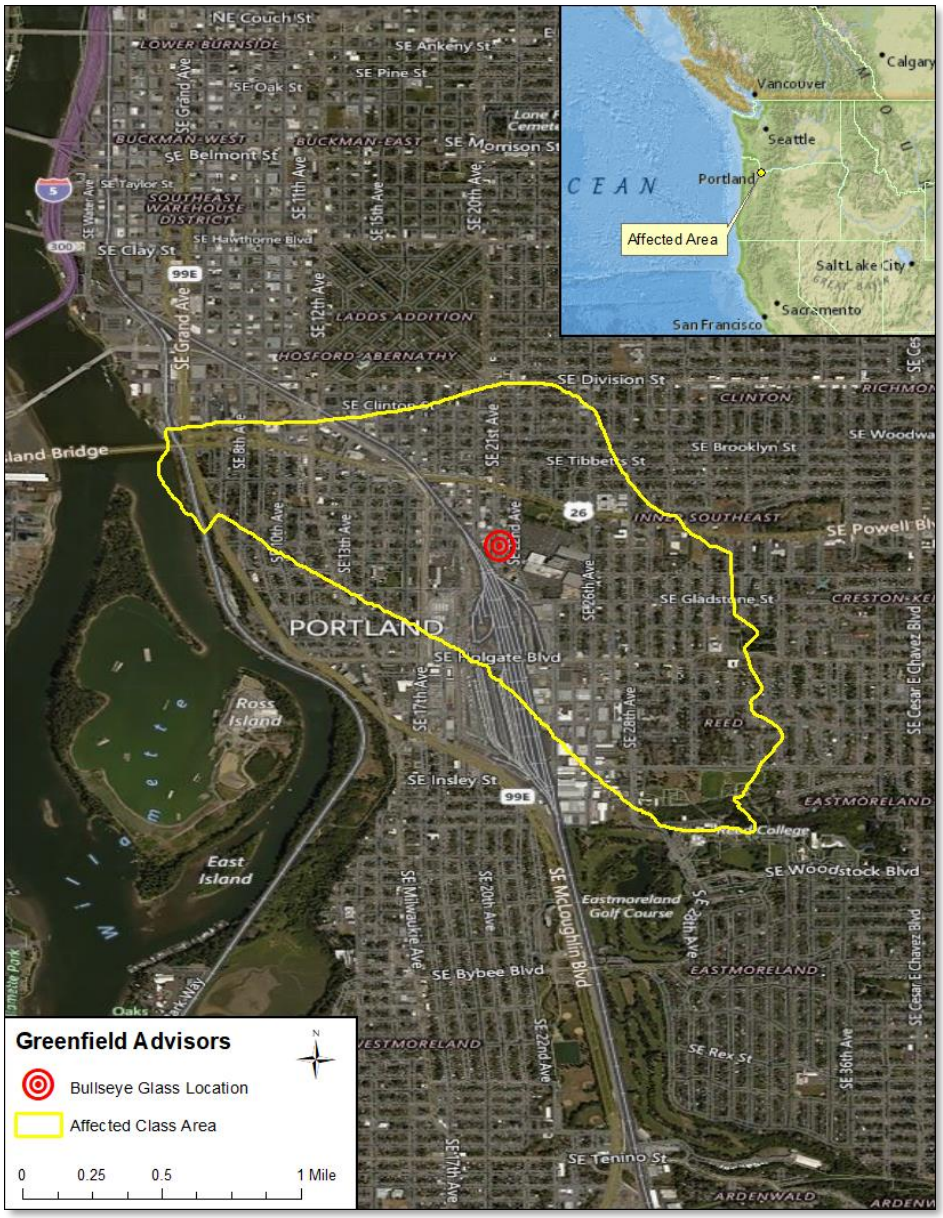
C. *Plaintiffs' experts can show that Bullseye's emissions have polluted a significant portion of Southeast Portland.*

Plaintiffs' expert Dr. Gray has defined the extent and boundaries of Bullseye's air pollution. Dr. Gray is an environmental engineer and atmospheric scientist with 39 years of experience in air modeling. He performed a historical air dispersion analysis of particulate matter (PM_{10}) from Bullseye's furnaces from 2010 through the end of 2015. *See generally* Ex. 6, Report of Dr. Andrew Gray ("Gray Rpt.").[13] Dr. Gray's conclusions reinforce previously disclosed information—including the U.S. Forest Service's peer-reviewed "moss study" and the DEQ air monitoring results discussed herein—that emissions from Bullseye's furnaces "substantially contribute[d] to elevated levels of PM [particulate matter] in the ambient air over a large area surrounding the facility." Ex. 6 at 1.

Dr. Gray's analysis draws from Bullseye internal records, publicly available information, and an EPA-preferred American Meteorological Society/Environmental Protection Agency Regulatory Model ("AERMOD") system, to quantify the average increase in PM_{10} in the Bullseye Plume attributable to Bullseye from 2010 to the end of 2015, shortly before Bullseye suspended the use or arsenic and cadmium and later installed a baghouse system. *Id*. at 3-6. Dr. Gray's modeling results show that, for the 2010-2015 period, Bullseye's emissions increased the long-term average amount of PM_{10} in a more than

[13] Plaintiffs have filed a redacted version of Dr. Gray's report pending this Court's resolution of a motion to file under seal confidential material in that report, which motion Bullseye intends to file.

3-square kilometer area within the Plume by .2 micrograms per meter cubed. *Id.* at 1. That area is represented in Figure 1 of Dr. Gray's report, and Figure 1 of Dr. Kilpatrick's report:



Building on Dr. Gray's work, and drawing further from Bullseye records, testing of Bullseye stack materials, and public health studies, toxicologist Dr. Chernaik concludes that particulate emissions from Bullseye have caused a "highly significant" increase in the risk of mortality for those living in the Bullseye Plume from 2010 to 2015. Ex. 7, Report of Dr. Mark Chernaik ("Chernaik Rpt.") at 5. The metals in those emissions—cadmium, arsenic, and hexavalent chromium—have created an

"unacceptable" cumulative cancer risk of 67 per million people. *Id*. at 6-7. Under Oregon law, the acceptable level of risk for exposure to carcinogens for DEQ hazardous substances cleanups is a "lifetime excess cancer risk of *one* per one million people exposed." ORS 465.315(1)(b)(A) (emphasis added). Dr. Chernaik concludes that the cadmium from those emissions deposited on the Bullseye Plume's residential properties was "highly significant from a public health perspective and, because of the ***persistent nature of toxic metals in house dust***, ***remains today a public health issue***." Ex. 7, Chernaik Rpt. at 9.

D. *Bullseye's emissions have stigmatized the neighborhood around Bullseye as less desirable, suppressing home values.*

Plaintiffs allege the unchecked emissions from Bullseye, and the ongoing public health legacy they have produced, have created a stigma that reduces the desirability of real property in the Plume and that diminishes real property values. Dr. Kilpatrick, the Managing Director of Greenfield Advisors, explains how that diminished value for residential real estate properties can be measured on a class-wide basis using common proof, including widely accepted mass appraisal methodologies. *See generally* Ex. 8, Report of Dr. John Kilpatrick ("Kilpatrick Rpt.") ¶¶ 16-84.

Dr. Kilpatrick's firm has conducted a preliminary contingent value survey, a method used in peer-reviewed research to value property resources, to determine by how much the Bullseye pollution stigma has impaired home values in the Plume. Ex. 8, Kilpatrick Rpt. ¶¶ 66-71. That "study indicated a 25 to 33 percent diminution in property values as a result of the contamination similar to Bullseye." *Id.* ¶ 71. "These results are consistent with my prior experience, case studies, and peer-reviewed literature that demonstrate the existence of stigma surrounding contaminated properties[.]" *Id.*

III. LEGAL STANDARDS

Oregon Rule of Civil Procedure 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). An action may be brought as a class action if the size of the class makes joinder impracticable, the class shares common questions of law or fact, the representative's claims are typical,

the representatives will fairly and adequately represent the class, and a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 A-B. In addition, in damages actions, representative parties must have provided pre-litigation notice. *See* ORCP 32 A(5).

"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, 497 (1992), *aff'd in part, rev'd in part*, 318 Or 33, 862 P2d 95 (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, 802 (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, 336 (2009).

When considering whether to certify a class, Oregon courts may consider federal courts' interpretation of analogous provisions of Federal Rule of Civil Procedure 23 as persuasive authority in the absence of controlling caselaw. *See Froeber v. Liberty Mut. Ins. Co*., 222 Or App 266, 277 n9, 193 P3d 999, 1006 (2008) (because ORCP 32 is "modeled after the federal rules[,]" "decisions by federal courts on class action settlements are persuasive").

IV. CLASS DEFINITION

In Oregon, 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 v. First Nat'l Bank of Oregon*, 275 Or 145, 156, 550 P2d 1203, 1211 (1976). Plaintiffs propose two overlapping subclasses defined by reference to (1) the boundary identified by Dr. Gray's modeling results that show significantly elevated levels of particulate matter contributed by Bullseye—the "Bullseye Plume"; (2) the date the public became aware of the pollution contamination emanating from Bullseye; and (3) the nature of the subclass members' allegedly infringed real property rights as either owners or residents. Such precisely-defined, geographic-based subclasses will facilitate the straightforward management of this action. *See* ORCP 32 G (permitting subclasses).

Plaintiffs' proposed subclasses, the "Resident Subclass" and the "Owner Subclass", are defined as follows:

> All residents of the residential properties within the Bullseye Plume depicted in Figure 1 of the report of Dr. Andrew Gray as of February 3, 2016, which properties are preliminarily listed in Appendix A hereto.
>
> All owners of the residential real properties within the Bullseye Plume depicted in Figure 1 of the report of Dr. Andrew Gray as of February 3, 2016, which properties are preliminarily listed in Appendix A hereto.

Appendix A is a list of 2,185 addresses of residential real property addresses preliminarily identified as fully within or intersected by the boundary of the Plume.[14] *See* Ex. 8, Kilpatrick Rpt. ¶ 14. Collectively, the members of the subclasses are "Class Members."

Excluded from the subclasses are Defendant and any of its subsidiaries, affiliates, owners, offices, or employees; all persons who make a timely election to be excluded from the class; governmental entities; and the judge to whom this case is assigned and that judge's immediate family.

V. ARGUMENT

This case should proceed on behalf of the proposed subclasses, and be led by the proposed class representatives who are typical, adequate, and whose claims share common and factual legal questions with their neighbors within the Bullseye Plume. Proceeding as a representative action is the superior method to resolving those claims, and has been approved in many analogous cases.

A. *The proposed subclasses are of the nature routinely certified by courts in analogous cases.*

Class action proceedings are well suited to resolve complex, expert-intensive tort claims arising from pollution of multiple properties. Because those cases involve common legal and factual issues focused on the defendant's behavior, "the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings," "it makes good sense * * * to resolve those issues in one fell swoop." *Mejdrech v. Met-Coil Sys. Corp.*, 319 F3d 910, 911 (7th Cir 2003).

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.*, *Sterling v. Velsicol Chem. Corp*., 855 F2d 1188, 1197 (6th Cir 1988) (water contamination of nearby residential properties due to chemicals from landfill); *Petrovic v. Amoco Oil Co*., 200 F3d 1140, 1144 (8th Cir

[14] Plaintiffs have filed a redacted version of Appendix A pending this Court's resolution of Plaintiffs' motion to seal, filed concurrently with this Motion.

1999) (property pollution as a result of an underground oil seepage); *Flournoy v. Honeywell Int'l, Inc.*, 239 FRD 696 (SD Ga 2006) (nuisance and trespass from mercury and PCB contamination); *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 arising from cement manufacturing plant); *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); *Wehner v. Syntex Corp*., 117 FRD 641, 643 (ND Cal 1987) (damage resulting from a chemical manufacturer); *Muniz v. Rexnord Corp*., No. 04-CV-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").

Most recently, in similar circumstances to those presented here, the Iowa Supreme Court affirmed class certification in a nuisance, negligence, and trespass case brought by residents living near a grain processing facility. *Freeman v. Grain Processing Corp*., 895 NW2d 105 (Iowa 2017). Reviewing the plaintiffs' claims and the evidence they would require—such as "whether emissions interfered with the residents' exclusive land possession"—the court concluded that a class action would be the most efficient and perhaps only way to resolve the issues involved: "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.

Oregon case law, while limited on this issue, is in accord with that line of cases. In *Hurt v. Midrex Div. of Midland Ross Corp.*, 276 Or 925, 556 P2d 1337 (1976) the plaintiffs brought a class action tort case against their employer for damaging their cars with air pollution emitted from the employer's iron ore reduction plant. *Id.* at 927. In reversing the trial court's denial of certification, the Oregon Supreme Court concluded that "[w]e view this to be a case *typical* of the kind contemplated by the [Oregon] legislature as being proper for a class action." *Id*. at 930 (emphasis added).

Like the cases cited here, this case is paradigmatic for class certification as an environmental injury to real property.

B. *Plaintiffs have satisfied ORCP 32 A's requirements of numerosity, commonality, typicality, adequacy, and pre-litigation notice.*

1. *The proposed class is sufficiently numerous.*

The numerosity threshold 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). Numerosity is met here. The subclasses consist of the owners or residents of 2,185 residential properties. Ex. 8, Kilpatrick Rpt. ¶ 14.

2. *The proposed class shares common factual and legal questions.*

"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." *Pearson v. Philip Morris, Inc*., 358 Or 88, 110, 361 P3d 3, 18-19 (2015) (citing ORCP 32 A) (emphasis in original). Environmental contamination cases generally—and this case in particular—present a host of common issues. Some of those issues are described below.

Liability: Common liability question include (a) whether Bullseye was negligent in the maintenance and operation of its facility, (b) whether Bullseye owed any duties to Class Members and breached those duties, and (c) whether Bullseye'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).

Extent of Contamination: The pattern of dispersion of particulate emissions from Bullseye is based on Bullseye's operations and official meteorological data, both of which 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-CV-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"). Similarly, the nature and toxicity of Bullseye's emissions are common to the proposed class. *See Wehner*, 117 FRD at 644 ("nature of the dioxin" a common question in class case).

Causation and Measure of Damages: Common questions also relate to causation and damages, including whether Bullseye caused interference with Class Members' rights of exclusive possession and enjoyment of their real property, and the proper method to measure and amount of damages resulting from that interference. Even if there are some causation or damages that are individual, "individual issues of causation do not preclude class certification." *Collins*, 248 FRD at 104.[15]

This litigation presents a litany of common questions that can and should be answered using common proof.

3. *Plaintiffs are typical of the proposed subclasses.*

Class representatives are typical if their claim "arises from the same event or practice or course of conduct that gives rise to the claims [of members of the class] and his or her claims are based on the same legal theory." *Newman*, 287 Or at 50. "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.

Here, the named Plaintiffs' claims are based on the same facts—Bullseye's negligent operations and resulting emissions—and the same legal theories as those of absent class members. Each Plaintiff owns and resided in residential property in the Bullseye Plume as of the relevant date. *See* Ex. 9 (map indicating approximate location of Plaintiffs' properties). As the deposition testimony confirms, Plaintiffs are simply "one of the people that are affected[,] just like" their neighbors who also reside in the Bullseye Plume, "not much different than any other southeast Portlander." *See* Ex. 3, Sanseri Dep. 223:21-24; S. Meeker Dep. 148:17-18.

Another factor common to the named Plaintiffs and the members of the proposed class is how they have changed their use and enjoyment of their properties because of Bullseye's emissions, reflecting how a normal person would react to objectively offensive emissions. *See* Ex. 3, Sanseri Dep.

[15] Whether Bullseye's conduct warrants punitive damages is also a common question. *Black v. Rhone-Poulenc, Inc*., 173 FRD 156, 161 (SDW Va 1996).

42:17-25, 44:21-25 (stopped gardening); Banich Dep. 25:24-26:8 (stopped gardening, stopped using yard socially, "shut up our house"); Borte Dep. 97:6-9, 118:1-2, 121:12-15 (children allowed to pay in yard only "very rarely", stopped eating fruit from yard, did less yard work); Ely Dep. 13:19-24, 15:10-13, 35:1-36:18, 37:5-9 (stopped eating vegetables, hosting guests less often, take off shoes when entering home, take precautions in yard); Hauke Dep. 22:1-7, 22:25-23:15, 54:20-55:4, 55:8-16, 32:15-33:9, 88:9-16 (no vegetable garden, additional precautions in garden, decreased entertaining outside); E. Meeker Dep. 31:14-32:9, 35:20-22, 120:18-25, 149:21-150:1 (limited vegetable garden to a few containers with newly purchased dirt, does not take daughter to local park); S. Meeker Dep. 81:20-82:9, 85:9-21, 136:19-137:1 (daughter not using back yard as before, stopped going to nearby park, limited garden); Goodwin Dep. 40:24-41:25, 58:17-24, 95:4-17 (stopped eating produce from yard, spends less time outside, no longer opens windows); Pasini Dep. 59:15-20, 65:4-66:1, 103:20-23 (stopped or reduced eating herbs and fruit from yard, dramatically reduced kids' time in yard); Miner Dep. 89:24-90:21 (did not put in planned garden, not entertaining).

The Plaintiffs' experiences reflect the experiences of others in their neighborhood, as documented in news reports, comments made to Bullseye, and comments on public discussion groups. *See, e.g.,* Ex. 10, Lynne Terry, *Portland's toxic air: Will young family have to leave home?* The Oregonian (Feb 26, 2016) (describing family that stopped eating greens from its garden). Because nuisance is judged by an objective standard, slight variations in Plaintiffs' responses and the responses of subclass members to Bullseye's emissions are immaterial except that they help show how a normal person would respond to the circumstances presented. *See Freeman* 895 NW2d at 121 ("Objective standards more readily present common questions than subjective standards.") (citing *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 US 455, 459, 133 S Ct 1184, 1191 (2013)).

4. *Plaintiffs and Plaintiffs' counsel will adequately represent the class.*

The test for adequacy is whether "(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.

As deposition testimony confirms, the named Plaintiffs have invested substantial time prosecuting this case on behalf of the proposed subclasses and are prepared to serve as class representatives. The named representatives have conducted research, attended meetings, met with counsel, missed work to observe court hearings, sat for depositions, and otherwise invested substantial time and resources into working with counsel to prosecute these claims on behalf of the subclasses. *See, e.g.*, Ex. 3, Sanseri Dep. 108:7-109:20; Hauke Dep. 48:19-49:1; Pasini Dep. 70:12-15 (research); Sanseri Dep. 119:1-10; Banich Dep. 21:7-11; Hauke Dep. 62:12-17; E. Meeker Dep. 9:25-10:7; S. Meeker Dep. 59:16-60:14; Goodwin Dep. 91:14-92:12; Pasini Dep. 93:1-11; Miner Dep. 34:9-19 (meetings) ; Borte Dep. 145:4-10; Ely Dep. 43:21-25, 45:17-19; Goodwin Dep. 117:15-17; Pasini Dep. 110:23-111:5; Miner 87:16-18 (invested time and resources). *See also* Sanseri Dep. 222:15-20; Banich Dep. 52:18-24; Borte Dep. 144:9 – 145:3; Ely Dep. 45:4-16; Hauke Dep. 89:21-90:18; E. Meeker Dep. 9:4-11; S. Meeker Dep. 147:19-148:10; Goodwin Dep. 115:21-117:14; Pasini Dep. 98:16-24, 110:16-22; Miner Dep. 87:11-15 (understand obligations of a class representative).

The named Plaintiffs have no "disabling conflicts of interest" with their fellow Class Members. They share the same goal: obtaining appropriate injunctive relief and available damages under tort claims, including diminution in value, loss of use, expenses for testing persons and property, and a medical monitoring fund. Second Am. Class Action Compl. ¶ 79. Some Class Members may wish to pursue personal injury claims—which are not part of the relief Plaintiffs have sought in this case—but those Class Members may still do so individually and, if necessary, opt out to do so. *See 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"); *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."); *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.").

Plaintiffs' counsel is adequate to represent the subclasses. Keller Rohrback L.L.P. is a nationally-recognized class action firm with significant environmental experience and sufficient resources to

prosecute this action on behalf of the subclasses as class counsel, and Karl G. Anuta is an experienced Oregon trial attorney specializing in environmental and toxic tort law. *See generally* Ex. 11 (Keller Rohrback L.L.P. environmental resume), Ex. 12 (Anuta resume); *see also* Def.'s Answer to Second Am. Compl. ¶ 66 ("Bullseye admits that Plaintiffs' counsel are competent.").

5. *Plaintiffs provided notice of their intent to seek damages.*

ORCP 32 A(5) requires that, "[i]n an action for damages, the representative parties" must comply with the rule's pre-litigation notice provisions. Plaintiffs provided that notice. *See* Ex. 13.

C. *A class action is the superior method to resolve this controversy.*

In addition to the prerequisites of ORCP 32 A, to certify a class the court must find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 B. As Oregon courts have explained, single adjudications of common questions are typically "preferable to piecemeal litigation and potentially inconsistent awards" that can arise from multiple individual cases. *Alsea Veneer, Inc.*, 117 Or App at 55.

Rule 32 lists eight factors that are "pertinent" to assessing superiority. ORCP 32 B. "Neither the 'predominance' factor nor any of the other seven [factors] * * * is controlling." *Pearson, supra.*, 358 Or at 106. The 1992 amendments to ORCP 32 "abandoned as unduly rigid" the prior rule's requirement that class issues predominate. Council on Court Procedures, Staff Comment, 1992, *reprinted in* Lisa A. Kloppenberg, *Oregon Rules of Civil Procedure 1997-98 Handbook*, 95 (1997). Today, ORCP 32 does not require "predominance as a *sine qua non* of certification of any class." *Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 207, 990 P2d 912, 917 (1999). Rather, a trial court reviews all the factors to determine if, overall, the class mechanism is superior.

Reviewing those factors in the context of this case shows that a class action is a superior method—the only practical method, in fact—for resolving Class Members' claims against Bullseye.

1. *Common issues predominate in this complex environmental tort case, as in many like it.*

Plaintiffs begin with the often-disputed predominance factor, which focuses on the relationship between common and individual issues. Under the predominance inquiry, courts ask "how central are the common questions, and will common proof resolve them?" *Pearson,* 358 Or at 110. To do so, a trial

court must assess whether it is likely the action will "require separate adjudications to resolve factual or legal questions regarding the individual class members and, if so, how many individual adjudications would be required." *Id*. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." 7AA Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1778 (3d ed 2016).

Even if there are some issues that require individualized attention, as the Ninth Circuit has explained, "more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Torres v. Mercer Canyons Inc.*, 835 F3d 1125, 1134 (9th Cir 2106); *see also Liborio*, 2008 WL 8257750 (even where common questions may not predominate, "[i]t makes little sense to have those common questions decided in a piecemeal fashion in individual lawsuits.").

In the words of the Supreme Court "mass tort cases arising from a common cause or disaster may, depending on the circumstances, satisfy the predominance requirement." *Amchem Products., Inc. v. Windsor*, 521 US 591, 625 (1997). There is no "general rule," as Justice Souter explained while writing for the First Circuit, that pollution and environmental contamination actions "escape class treatment on the ground that the requirements to show injury, cause, and compensatory amount must be sustainable as to specific plaintiffs." *Gintis v. Bouchard Transp. Co*., 596 F3d 64, 66 (1st Cir 2010) (reversing denial of class certification in action arising from a discharge of oil into bay).

Here, as in many environmental cases, "[c]ommon issues of liability, causation, and remedies not only predominate but overwhelm individualized issues." *Boggs*, 141 FRD at 67; *see also Turner v. Murphy Oil USA, Inc*., 234 FRD 597, 606 (ED La 2006) ("[T]he central factual basis for all of Plaintiffs' claims is the leak itself—how it occurred, and where the oil went."); *Freeman*, 895 NW2d at 129 (common proof of polluter's "course of conduct, its emissions during the relevant time period, its knowledge of emissions, and at what level emissions interfere with a normal person in the community's enjoyment of his or her property" "are at the heart of the residents' claims"); *LeClercq v. Lockformer Co.*, No. 00-CV-7164, 2001 WL 199840, at *7 (ND Ill Feb 28, 2001) (proof "would be identical" for

"history of operations, the spillage, the impact on the land, soil, and water, [and] possible remedies" and "[r]epetitive discovery for individual cases on the same core issues would be wasteful").

a. *Proof common to all Class Members will resolve this case's central questions.*

Plaintiffs will provide common proof to resolve the common questions—including Bullseye's conduct, the spread of emissions, and the effects of those emissions—that will drive resolution of this matter.

Bullseye's Conduct: Proof of Bullseye's management of its facility, including its decision to not install pollution control equipment, is the same for each Class Member, and will be central to Plaintiffs' negligence claim. *Cf., e.g.*, *Mejdrech*, 319 F3d at 911-12; *Turner*, 234 FRD at 604.

Air Dispersion Modeling: The dispersal of contaminants—a critical issue for nuisance and trespass claims—will be common to all claimants within the Bullseye Plume. With Dr. Gray's air dispersion analysis, Plaintiffs have provided a reliable common method to resolve that issue. AERMOD is an air dispersal modeling system widely accepted as a method of calculating the airborne dispersion of pollutants. Ex. 6, Gray Rpt. at 5-6. It is the EPA-preferred model for modeling air releases from a large array of industrial sources. *Id*. The accuracy of AERMOD is accepted even when assessing dispersion over diverse terrain, circumstances not present here. *See Adams v. Cooper Indus., Inc*., No. 03-CV-476-JBS, 2007 WL 1805586, at *10 (ED Ky June 21, 2007) (finding in context of *Daubert* challenge that "AERMOD is a reliable methodology").

Property Valuation and Loss of Use: Common proof will model the impairment in value and loss of use and enjoyment of Class Members' property attributable to Bullseye's pollution. *Cf. Berdysz v. Boyas Excavating, Inc*., ___ NE3d ___, 2017 WL 632445, at *6 (Ohio Ct App Feb 16, 2017) (affirming trial court's finding that common issues predominated in air pollution nuisance case seeking diminution in value and loss of use damages). Courts have regularly used common proof to determine the impact pollution has had on class members' home values using well-established models. *E.g.*, *Bates v. Tenco Servs., Inc.*, 132 FRD 160, 163-64 (DSC), *amended*, 132 FRD 165 (DSC 1990) (certifying class for damages, including diminution in value, for residents of subdivision adjacent to a jet fuel storage

facility). Similarly, for loss of use damages, there is no need for class members to testify as to how they actually use their property and how that use has been affected by Bullseye's actions because the unimpaired "right to use" real property has value, regardless of how the property is actually used. *Jarvis v. K2 Inc.*, 486 F3d 526, 533 (9th Cir 2007). And the lost value of this right can be calculated across the class, again using well-established economic models and other common evidence. *See, e.g.*, *id*. at 534 (property owners' states of mind are irrelevant because loss of use damages are based on the objective fair market value); *Cal. v. Kinder Morgan Energy Partners, LP*, 613 F App'x 561, 564 (9th Cir 2015) (finding damages to the class "can be proved through estimates of a property's rental value based on hypothetical assumptions rather than its actual use.").

Here, Plaintiffs' expert on diminished property value explains how real property damages can be measured on a class-wide basis. Dr. Kilpatrick explains the extensive research connecting contamination to an impact on property values, Ex. 8, Kilpatrick Rpt. ¶¶ 39-63, a common factor in the Bullseye Plume. Dr. Kilpatrick's contingent valuation survey shows that real property in the Plume has a "stigma" that depresses home values. *Id.* ¶ 71. *See also Hudson v. Peavey Oil Co*., 279 Or 3, 10, 566 P2d 175, 179 (1977) (discussing damages available in trespass case where contamination meant "the property's value to a prospective purchaser would be significantly affected"); Ex. 3, Sanseri Dep. 52:6-9 (discussing impaired value). Dr. Kilpatrick explains the precise impairment value of properties in the Bullseye Plume are amenable to statistical modeling using data for Multnomah County. *See generally* Ex. 8, Kilpatrick Rpt. ¶¶ 72-78. Likewise, to calculate loss of use damages, Dr. Kilpatrick can use fair market rental values to determine damages for things like "inability to garden or entertain at one's home." *Id.* ¶¶ 64-65. *See also Scott v. Elliott*, 253 Or 168, 182, 451 P2d 474, 480 (1969) (measure of damages for temporary loss of use "is the fair rental value of the property").

Real property damages related to diminished value and loss of use are thus subject to common proof.

b. *Plaintiffs' claims are susceptible to common proof.*

In addition to resolving those specific common issues, Plaintiffs' common proof is generally suitable to resolve Plaintiffs' and Class Members' nuisance, negligence, and trespass claims.

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 area in question, and not on the subjective experiences of each class member. *Penland v. Redwood Sanitary Sewer Serv. Dist*., 156 Or App 311, 315, 965 P2d 433, 436 (1998) (quoting *Jewett v. Deerhorn Enterprises, Inc.*, 281 Or 469, 476, 575 P2d 164, 167-68 (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 this claim turns on an objective measure of how a defendant's conduct affected the class, it lends itself to class treatment. *See O'Connor v. Boeing N. Am., Inc*., 184 FRD 311, 331-32 (CD Cal 1998) (holding that whether defendants' alleged activities constituted a nuisance was common to all members of the property 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."). In short, no individual testimony by class members is probably required to determine whether an invasion by hazardous air pollution is offensive.

The Iowa Supreme Court's decision in *Freeman* is instructive. The court, affirming a lower court's order certifying a class in an air pollution case, noted that because Iowa uses an objective "normal person" standard to determine whether something constitutes a nuisance, "any idiosyncratic sensitivity, physical infirmities, lifestyle choices, preferences for use and enjoyment, or housekeeping habits are immaterial to proving whether defendant's conduct created a nuisance." 895 NW2d at 121.

Here, Plaintiffs will offer evidence—outlined in Dr. Chernaik's report—to show the types and concentrations of pollutants Bullseye has emitted across the Bullseye Plume are objectively unreasonable to a person of ordinary habits. Oregon, like Iowa, has an "objective" nuisance standard.

See State v. Lang, 273 Or App 113, 122, 359 P3d 349, 354 (2015) ("To cause public inconvenience, annoyance, or alarm, an odor must be objectively offensive—that is, it must be offensive to an ordinary, reasonable person under the circumstances."). Plaintiffs will likely offer their own testimony and the testimony of their neighbors to complement the expert testimony of Dr. Chernaik to establish that Bullseye's emissions have been "objectively offensive" in the whole Bullseye Plume. A jury might in theory find otherwise, but the claim will rise or fall on common proof because "the factual determination of whether a nuisance exists is capable of being made on a classwide basis." *Freeman*, 895 NW2d at 122. Even if there are individual issues—such as "whether the interference was unreasonable or not"—those can "be readily addressed at the damages phase" of a class trial. *Collins*., 248 FRD at 104-05.

Trespass: As with nuisance, trespass claims are commonly certified in contamination cases like the present one. *E.g., Turner*, 234 FRD at 609 (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. It reversed the denial of certification of trespass to personal property claims in an air pollution case in *Hurt*, 276 Or 925. In 2015, it discussed and endorsed *Hurt*. *See Pearson*, *supra* 358 Or 113-14.

Plaintiffs will prove with common evidence that Bullseye's emissions trespassed on Class Members' property. In Oregon, a "[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." *Lunda v. Matthews*, 46 Or App 701, 705, 613 P2d 63, 66 (1980); *see also* UCJI No. 53.01, Trespass to Land, Cmt. (an "intrusion of fumes, gases, and odors can constitute a trespass"). As explained by Dr. Chernaik, deposition rates derived from Dr. Gray's modeling emissions show that substantial amounts of toxic metals such as cadmium in particulate form from Bullseye's furnaces deposited on "each square meter" within the Bullseye Plume. Chernaik Rpt. at 8. Cadmium in particular deposited at a predicted rate of at least 20% above health-based standards that have been adopted by many jurisdictions. *Id.* at 9. That is reliable, common proof that does not require individual inquiry into the circumstances of each property to determine whether Bullseye's emissions have interfered with Class Members' right of exclusive possession of their property.

Negligence: Courts commonly certify negligence claims in environmental 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-CV-74654, 2006 WL 724569, at *4-6 (ED Mich Mar 17, 2006) (same).

Here, the cause of each Class Members' injury can be traced to Bullseye's operations, creating a "common nucleus of facts." *Ludwig*, 2003 WL 22478842, at *5; *see also Collins*, 248 FRD at 104 (although causation may require individual proof, "proof as to the other elements of negligence will be class-wide"); *Bentley*, 223 FRD at 487 (certifying class in pollution case where "cause of action arises out of the same alleged course of conduct by Defendants"). Plaintiffs will present evidence of Bullseye's "course of conduct, its duty of care and corresponding breach, and its knowledge of the harms caused." *Freeman*, 895 NW2d at 123. For example, Plaintiffs will present common evidence that Bullseye had a duty to its neighbors but breached that duty when it was aware the emissions control systems existed but chose not to use them. Plaintiffs' experts will explain how that breach caused harm to every property in the Bullseye Plume. *See Lowe v. Philip Morris USA, Inc*., 344 Or 403, 413, 183 P3d 181, 186 (2008) (distinguishing "purely economic harm" from harm to person or property, citing cases).[16]

Bullseye may attempt to argue that individual inquiries will be necessary to determine the amount of damages, but a "class action is not inappropriate simply because each class member will have to make an individualized showing to recover damages." *Delgado v. Del Monte Fresh Produce, N.A.*, 260 Or App 480, 493, 317 P3d 419, 426 (2014). *See also LeClercq*, 2001 WL 199840, at *7 ("There is

[16] Should the court grant Plaintiffs' Motion to Amend, punitive damages claims are particularly susceptible to common proof because they focus on a defendant's conduct. *See Iorio v. Allianz Life Ins. Co. of N. Am*., No. 05-CV-633-JLS (CAB), 2009 WL 3415703, at *6 (SD Cal Oct 21, 2009) (class treatment of punitive damages appropriate because "[p]unitive damages award will be based largely on the misconduct of the Defendant").

ample support for certifying a class action in a contamination case even though there may be individualized issues of damages.").

Because common issues predominate, a class action is the superior method to resolve Class Members' claims. ORCP 32 B's other factors also support a finding of superiority.

2. *ORCP 32 (B)(1): Separate actions*

ORCP 32 B(1) directs courts to consider whether (1) separate actions by class members "creates a risk of inconsistent or varying adjudications with respect to members of the class which would establish incompatible standards of conduct for the party opposing the class," or whether (2) "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."

Here, individual litigation of Class Members' common issues "would risk disparate results among those seeking redress[,] would exponentially increase the costs of litigation for all, and would be a particularly inefficient use of judicial resources." *Fox v. Cheminova, Inc*., 213 FRD 113, 130 (EDNY 2003) (cleaned up); *accord Mejdrech*, 319 F3d at 911. Plaintiffs are seeking injunctive relief regarding Bullseye's monitoring and reporting of ongoing emissions, and in the form of testing for Class Members' property, and Class Members. Multiple lawsuits could result in multiple, varying requests for how Bullseye should operate to minimize neighborhood impact.[17]

3. *ORCP 32 B(2): Class-wide injunctive or declaratory relief*

Courts next consider the "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." ORCP 32 B(2). As with the prior factor, this one weighs in favor of class treatment in this case because it would benefit both

[17] Likewise resolving any Class Members' punitive damages claims would ensure this matter does not impede others' abilities to protect their rights because multiple, individual claims for punitive damages could as a practical matter drain Bullseye's ability to pay claims. *See State ex rel. Young v. Crookham*, 290 Or 61, 72, 618 P2d 1268, 1274 (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).

Bullseye and the proposed subclasses if Bullseye was subject to only one, uniform injunctive order, such as an order requiring ongoing fence-line monitoring and reporting of emissions. *See* Advisory Committee notes to Federal Rule of Civil Procedure 23 ("[I]ndividual 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.").

4. *ORCP 32 B(4) & ORCB 32 B(5): Interest in individual control of litigation*

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"; relatedly, part B(5) of that rule considers "[t]he extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Here, Plaintiffs are aware of only one other civil case regarding Bullseye's emissions: a personal injury case in federal court that has now been dismissed. *Silva v. Bullseye Glass Co.*, No. 3:16-CV-01078 (D Or). Thus, there is not a strong interest from putative Class Members in filing their own, costly *individual* action, though there is certainly keen interest in the outcome of this aggregate litigation filed on their behalf. *See, e.g.*, Ex. 14 (September 29, 2017 post in "EPAC" Facebook group page by group member providing update on litigation).

5. *ORCP 32 B(6): The desirability of this forum*

ORCB 32 B(6) directs the court to consider the "desirability or undesirability of concentrating the litigation of the claims in the particular forum." Here, concentrating this litigation in Multnomah County, where all Class Members have an interest in real property, is preferable.

6. *ORCP 32 B(7) and B(8): Potential difficulties in management, and amount of claim*

Under ORCP 32 B(7), courts weigh "[t]he 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." Even where a class is large, "a single administration is undoubtedly less difficult" than processing individual claims. *Alsea Veneer, Inc*., 117 Or App at 55. Relatedly, ORCP 32 B(8) asks courts to consider whether "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."

These related factors weigh in favor of class litigation here for two reasons. First, resolving the expensive, expert-intensive issues such as the standard of care and amount of historic emissions in one case, on behalf of a class, is preferable to having to litigate those same issues again and again in individual cases. Second, the alternative to not certifying a class means that many Class Members' harms could go uncompensated. While the Plaintiffs' individual diminution in value claims are potentially significant, they are not so large to justify the expense of hiring the necessary experts—on operation of a glassmaking facility, on emissions, on toxicity—to prosecute individual actions. Addressing those issues in one case saves both the parties and the courts expense. Realistically, given the costs of litigation, it is this case or nothing for most Class Members.

Plaintiffs' subclass definitions also enable manageability. Firstly, the list of addresses in the Bullseye Plume can be used to easily facilitate mailed notice in this case. *See* 3 William B. Rubenstein *Newberg on Class Actions* § 8:28 (5th ed 2014) ("Generally speaking, first class mail is ideal for sending individual notice to class members."). Second, Plaintiffs address potential management concerns by creating two subclasses based on the alleged infringement of the real property right. *See id.* § 7:30 ("subclassing often comes into play at the relief stage when conflicts arise over the distribution of damages"); *Collins,* 248 FRD at 105 (in property pollution case, citing *In re Visa Check/MasterMoney Antitrust Litig*., 280 F3d 124, 138 (2d Cir 2001), for the proposition that creating subclasses is one tool courts can use to address management issues).

Members of the Owner Subclass will be entitled to diminution in value damages and to reimbursement for expenses incurred testing their real property. Members of the Resident Subclass will be entitled to occupancy-related damages, including the loss of use and enjoyment of their real property, compensation for diagnostic and property testing, and any damage to personal property. They would also be able to access the medical monitoring relief fund Plaintiffs seek. Many individuals will be members of both subclasses, as the Plaintiffs are, and would be entitled to all forms of damage.

More generally, a class definition like the one proposed by Plaintiffs here is customary in pollution class actions. *E.g.*, *Collins*., 248 FRD at101 ("Many courts have certified classes defined by geography[.]"); *Cook*, 151 FRD at 382 (certifying class defined by geographic boundaries based on dose or exposure contours of radioactive and non-radioactive materials); *Boggs*, 141 FRD at 60-62 (certifying class defined as persons within six miles of boundaries of plant that released hazardous materials); *Ponca Tribe of Indians of Oklahoma v. Cont'l Carbon Co.*, No. 05-CV-445-C, 2007 WL 28243, at *3 (WD Okla Jan 3, 2007) ("Plaintiffs' experts have established the geographic limits of the class * * * ").

Disputes about the precise spread of Bullseye's contamination, if any, are merits issues that should be resolved by the fact-finder at trial, not at the class certification phase. *Bentley*, 223 FRD at 479 (factual disputes about the area of impact go to the merits and not the propriety of certification); *Turner*, 234 FRD at 606 (certification not threatened by fact that "the oil did not spread uniformly throughout the affected area" and "different homes in the area received differing degrees, if any, of oil contamination."); *Collins*, 248 FRD at 106 (extent of area impacted is a factual issue to be determined on class-wide basis); *Boggs*, 141 FRD at 62 ("amount and effect of" dispersion of pollutants and effect on health and property values are "merits issues").

Plaintiffs' abundant factual and expert evidence submitted in support of class certification demonstrates that uniform, class-wide proof is available to ascertain the physical boundaries of the Bullseye pollution, the magnitude of that pollution, and its resulting economic impacts in diminution in property value as well as loss of use and enjoyment. In sum, balancing all ORCP 32 B factors demonstrates that a class action is the superior method to resolving the proposed Class Members' claim.

D. *Notice Plan*

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 subclasses, 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, and may be

able to determine if they are in the Bullseye Plume by finding their address in an online listing of Appendix A as part of a notice plan.

E. *Trial Plan*

The Court has set a trial date of June 11, 2018. 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*:

Phase 1 - Defendant's course of conduct. This first phase would focus on Bullseye's operations, resolving questions central to Plaintiffs' and Class Members' negligence, nuisance, and, if leave to amend is granted on Plaintiffs' pending motion, punitive damages claims. For example, Plaintiffs will present evidence from which a jury could conclude that Bullseye knew it was emitting hazardous emissions, but did nothing to measure or control them, violating the applicable standard of care.

Phase 2 - Defining the pollution plume. The second phase of the trial would be an expert-intensive presentation of the extent of Bullseye's trespassing emissions, and the substantial and unreasonable interference caused by those emissions. As Plaintiffs have explained above, common proof such as air dispersion modeling and particulate deposition rates can establish class-wide interference with Class Members' rights to exclusive use and possession of their property, and the significance of those intrusions.

Phase 3 – Damages: The final phase of the trial would present Plaintiffs' "formula for calculating damages." *Freeman*., 895 NW2d 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 stigmatized Bullseye Plume, on behalf of two distinct subclasses.

IV. CONCLUSION

The revelation that Bullseye was the cause of a pollution hotspot shook Portland and drew national attention when revealed in February 2016. Owners and residents in the now-ascertained Bullseye Plume are entitled to a class-wide determination of the infringement of their real property rights stemming from this contamination. Plaintiffs respectfully request that this Court permit Plaintiffs to pursue claims to redress those and other harms by Bullseye on a uniform, class-wide basis.

DATED this 28th day of November, 2017.

KELLER ROHRBACK L.L.P.

By *s/ Matthew J. Preusch*

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Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICAION on:

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Kent Robinson
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Attorneys for Defendant

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 electronic transmission of a notice of filing by the electronic filing system provided by the Oregon Judicial Department for the electronic filing and 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.

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DATED: November 28, 2017

Signed: *s/ Matthew J. Preusch*
Matthew J. Preusch, Attorney for Plaintiffs

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APPENDIX A

Appendix A

Meeker, et al. v. Bullseye Glass Co.
Case No. 16CV07002
Multnomah County Circuit Court

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