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' REPLY 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") submit this Reply to Bullseye Glass Co.' Opposition to Plaintiffs' Motion for Class Certification.

The Court's role at this stage is to "determine by order whether and with respect to what claims or issues" a class action can be maintained. ORCP 32 C. The Court must decide whether Plaintiffs have shown that the prerequisites for ORCP 32 A are satisfied, and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 B. While class certification and merits issues frequently overlap, a "a class certification decision is not a trial of the merits * * * ." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 107, 361 P3d 3, 17 (2015).

Plaintiffs' Motion explains how Plaintiffs intend to prove their nuisance, negligence, and trespass causes of action on behalf of themselves and the putative classes. Plaintiffs provide expert explanations of the common proof that will resolve the central issues in this case. Bullseye may dispute some of those experts' conclusions, but those disputes are merely more common questions for this class action to efficiently resolve.[1]

At the same time, Bullseye does not contest several key points. It does not contest that Plaintiffs can establish a class boundary by air dispersion modelling, that the method Plaintiffs' expert chose to do that modelling is reliable, that Plaintiffs' expert reliably applied it, or that air models can be used to calculate deposition of metal-laden particulates on properties. Nor does Bullseye contest that expert's conclusion that Bullseye historically underreported its emissions of metal-laden particulates. Bullseye also does not appear to seriously dispute that Plaintiffs' negligence and punitive damages claims are suitable for class treatment.

For those reasons and others discussed below, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion.

[1] Bullseye identified an error in Dr. Chernaik's report. As discussed below, *infra* at Section B.2.b., Dr. Chernaik has addressed and rectified the error.

## II. ARGUMENT

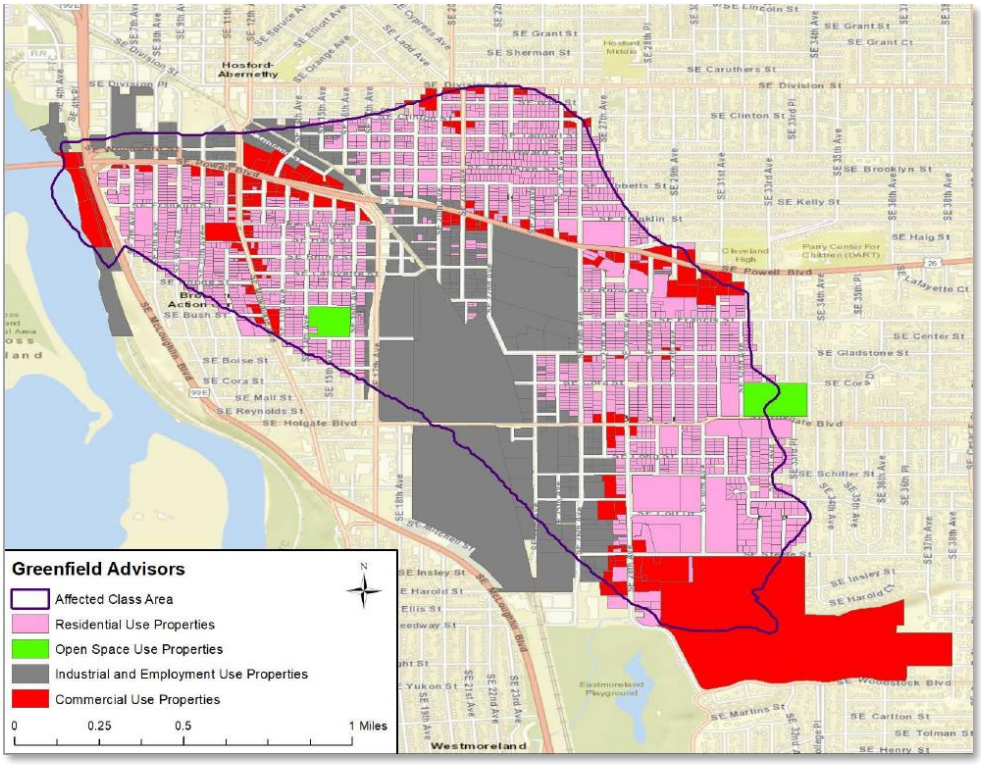
Plaintiffs' Motion asks this Court to permit the Plaintiffs to proceed to trial on behalf of two subclasses, the "Resident Subclass" and "Owner Subclass":

> 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 [to Plaintiffs' Motion].
>
> 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 [to Plaintiffs' Motion].[2]

Those subclasses are defined with a class boundary, the "Bullseye Plume," set by reference to air dispersion modeling of Bullseye's past emissions. In their proposed Third Amended Complaint, Plaintiffs' provided a map indicating the roughly 2,000 residential properties encompassed by the Bullseye Plume. Those properties are shown in pink and the boundary of the Bullseye Plume is delineated in purple on that map, reproduced here:[3]

[2] Collectively, the members of the subclasses are "Class Members," and the subclasses together are the class.

[3] The proposed amended complaint also clarifies that Reed College would be excluded from the class.




For this Motion, the Court's role is to decide whether Plaintiffs have shown the five prerequisites of ORCP 32 A are met, and that a class action is the superior method for resolving Class Members' common claims against Bullseye. In its order, the Court must make findings of fact and conclusions of law. ORCP 32 C. While "not a mere exercise in pleading[,]" a class certification motion is also not "a trial of the merits." *Pearson*, 358 Or at 107; *see also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 US 455, 466, 133 S Ct 1184, 1194-95, 185 L Ed 2d 308 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."). Rather, this Court should resolve only those factual disputes necessary to make the findings and conclusions necessary for ORCP 32 C.[4]

Bullseye's Opposition attempts to divert the Court from its role by prematurely litigating the merits of its defenses. Reduced, Bullseye's Opposition is that Plaintiffs' claims are "based on bad

[4] Bullseye does not cite any Oregon cases to support its proposition that Plaintiffs must demonstrate ORCP 32's requirements by "a preponderance of the evidence." Opp. at 35. Plaintiffs are not aware of any Oregon cases saying so. The standard under ORCP 32 C is that the Court "find facts" necessary to support its class certification order; it does not mandate the same evidentiary burden as trial. *See* 3 William B. Rubenstein, *Newberg on Class Actions* § 7:21 (5th ed 2014) ("Neither Rule 23 nor Supreme Court precedent specifies a particular burden of proof that the plaintiff must meet in showing that the requirements of Rule 23 are satisfied.") (discussing contradictory federal case law).

science and the fears of a misinformed public." Opp. at 1. If Bullseye is so confident in that, it should welcome class certification, which would entitle it to definitively resolve, once and for all, whether Plaintiffs' and Class Members' claims are built only on a "media scare." *Id.* at 32, 76.

In this Reply, Plaintiffs first review the applicable standards for ORCP 32 A's prerequisites and ORCP 32 B's superiority inquiry, and address Bullseye's arguments. Next, Plaintiffs explain the applicable standard for the consideration of expert reports provided in support of class certification, and why Plaintiffs' experts easily meet that standard.

A. *Plaintiffs have shown—with evidence—that the ORCP 32 A factors are met, and that a class action is the superior method to resolve Class Members' claims.*

1. *Plaintiffs have satisfied all of the ORCP 32 A requirements.*[5]

a. The proposed class shares abundant common questions.

Defendant's argument that there are not common issues of fact and law in this case misunderstands the question before the court. "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.*, 358 Or at 110 (citing ORCP 32 A) (emphasis in original).

Plaintiffs have identified ample issues of law and fact are common to the class. *See generally* Motion at 10-11. To recap, this case presents common issues of liability (including whether Bullseye was negligent in the maintenance and operation of its facility), the geographic extent of Bullseye's pollution (*see, e.g.*, *Boggs v. Divested Atomic Corp.*, 141 FRD 58, 64 (SD Ohio 1991) (common question was "how extensive were the emissions")), and causation and damages (for example, whether Bullseye caused interference with Class Members' rights of exclusive possession and enjoyment of their real property, and the proper method to measure those damages). These issues are not only common to the entire class, they are at the heart of this case, as discussed in the predominance section below.

Defendant's sole argument against commonality actually supports the conclusion that this case is dominated by common questions. Bullseye states, for example, that the "most fundamental question in

[5] Bullseye does not dispute that Plaintiffs satisfy ORCP 32's prelitigation notice requirement.

the case * * * is whether the properties belonging to the named plaintiffs and putative class members are contaminated with actionable levels of arsenic, cadmium, or chromium from Bullseye." Opp. at 41. Although Defendant may disagree with how to prove the extent of its pollution, this question—where did Defendant's pollution go?—is common to all. Understanding how far Bullseye has distributed its metal-laden particulate pollution is at the core of the case for every plaintiff, named and absent.

b. The proposed class is sufficiently numerous**.**

The proposed class easily meets the numerosity requirement, which is satisfied when the "class is so numerous that joinder of all members is impracticable." ORCP 32 A(1); *see also Newman v. Tualatin Dev. Co*., 287 Or 47, 50, 597 P2d 800, 802 (1979) (in case involving at least 125 townhomes, "[t]he numbers alone in this case support the trial court's finding of impracticability."). As Plaintiffs showed in their Motion and the map above, there are over 2,000 residential properties in the class area. This is more than enough to satisfy the numerosity standard.

This case is nothing like *Duffin v. Exelon Corp*., No. 06-CV-01382, 2007 WL 845336, (ND Ill Mar 19, 2007), on which Defendant relies. Opp. at 37, 40, 52. In that case, the plaintiffs' own "models [of pollution dispersion] d[id] not coincide with class boundaries," and thus there weren't sufficient members within the class area. *Duffin*, 2007 WL 845336, at *4. Here, Plaintiffs' expert Dr. Gray has provided reliable evidence showing the extent of Bullseye's plume—using a method Bullseye does not seriously dispute—that directly overlaps with the proposed class boundary inside of which reside thousands of Class Members. The proposed class is sufficiently numerous.

For a similar reason, Defendant is wrong to rely on *Brockman v. Barton Brands, Ltd.*, No. 06-CV-332-H, 2007 WL 4162920 (WD Ky Nov 21, 2007) to argue that Plaintiffs have not provided evidence of pollution to support the class area. Opp. at 37-38. *Brockman* is helpful because it explains the standards for defining a class area in pollution cases: "Usually, scientific or objective evidence closely ties the spread of the alleged pollution or contamination to the proposed class boundaries." 2007 WL 4162920 at *2. The district court denied certification in that case *not* because, as Bullseye suggests, the plaintiff did not present "soil samples." Opp. at 38. Rather, it was because the plaintiff did not provide *any* evidence justifying the class boundary, including dispersion modeling: "Nowhere in

Plaintiffs' evidence has the Court found, for example, test results for any substances Plaintiffs allege have fallen onto their property, *or any sort of analysis of where the emissions of Defendant's plant spread once they leave Defendant's smokestack*." 2007 WL 4162920, at *4 (emphasis added). Plaintiffs here have provided exactly what was lacking in *Brockman*: a reliable air dispersion analysis showing "where the emissions of [Bullseye's] plant spread once they leave [Bullseye's] smokestack[s]."

c. Plaintiffs and their counsel will adequately represent the class and Bullseye's allegation of splitting claims is a red herring.

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. v. State*, 117 Or App 42, 53, 843 P2d 492, 498 (1992) *aff'd in part, rev'd in part*, 318 Or 33, 862 P2d 95 (1993).[6]

Defendant's sole argument that Plaintiffs are inadequate class representatives is that Plaintiffs might have claims for personal injuries but have chosen not to bring them. Opp. at 44-50. Bullseye refers to this as "splitting claims," arguing that the class representatives may not make a tactical decision, together with counsel, to strategically control the course of their litigation. Bullseye's splitting claims argument is disingenuous. In one breath Defendant castigates Plaintiffs for not bringing personal injury claims, and in the next vehemently argues Plaintiffs "have presented no evidence of any such injury" and that personal injury claims have "no merit." Opp. 28, 45 n 52.

Plaintiffs' decision to not pursue personal injury claims on behalf of themselves or Class Members from the outset of this case was reasonable. As many courts have explained, adequate named plaintiffs and class counsel must make strategic choices about which claims to pursue. *See, e.g.*, *Todd v. Tempur-Sealy Int'l, Inc.*, No. 13-CV-04984-JST, 2016 WL 5746364, at *5 (ND Cal Sept 30, 2016) ("A strategic decision to pursue those claims a plaintiff believes to be most viable does not render her inadequate as a class representative;" plaintiffs acted reasonably in "declining to pursue claims for personal injuries"); *In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.*, 270 FRD 521, 532 (ND Cal 2010) ("Plaintiffs are permitted to press a theory of * * * liability that affords them the best chance of certification and of success on behalf of the class."); *In re Universal Serv. Fund Tel. Billing*

[6] Bullseye does not appear to dispute that class counsel are competent to represent the class.

*Practices Litig*., 219 FRD 661, 669-70 (D Kan 2004) (holding that plaintiffs reasonably "decided to pursue certain claims while abandoning a fraud claim that probably was not certifiable"). Plaintiffs should not be punished for choosing not to pursue claims that Bullseye says are meritless.

Moreover, courts routinely find that notice and the ability to opt out—even in cases where personal injury claims are at the heart of the case—adequately protects the rights of the class. *See, e.g*., *In re Nat'l Football League Players' Concussion Injury Litig*., 821 F.3d 410, 441 (3d Cir. 2016) (class members' "opportunity to opt out" weighed in favor of finding settlement fair and reasonable). Bullseye is simply wrong to suggest that the ability to opt out of the class is "unfair[]" to the class. Opp. at 49.

Finally, the potential number of Class Members who may opt out does not present any case management or docket concerns. *See* Opp. at 49. In the two years since the Bullseye's pollution became public, Plaintiffs are aware of only one personal injury case filed against Bullseye for its actions at issue here. And the plaintiff in that case—who worked but apparently did not live in the class area—was likely not even part of the proposed class here. Ultimately, Bullseye's argument that Plaintiffs are engaging in splitting claims puts form over function, elevating the potential for future hypothetical recovery in non-existent personal injury cases over the very real relief this case could provide Class Members as compensation for Bullseye's pollution of their homes and land.

d. Plaintiffs are typical of the proposed class.

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. The question is whether a plaintiff is typical vis-a-vis her relationship with the defendant, and not whether she is otherwise identical to the other people in the proposed class.

Plaintiffs easily meet the standard for typicality. Their claims, like those of their neighbors, arise from the same course of conduct: Bullseye's unfiltered emissions of metal-laden particulates. All the Plaintiffs live or own residential property within the class boundary. Like others who live or own

property there, Plaintiffs and their properties were unknowingly exposed to Defendant's negligent emissions and plume of pollution.

Bullseye's argument against typicality is at base a merits argument. Bullseye's concern that Plaintiffs have not shown that their properties "are actually contaminated"—even if true—is irrelevant for this motion. Opp. at 43. At this stage, what Plaintiffs must show is *how* they will demonstrate at trial that Bullseye has violated their and Class Members' rights to exclusive possession and quiet enjoyment of property. As the Oregon Supreme Court has explained, class certification "is not an appropriate time to determine whether plaintiffs are entitled to prevail" on the merits. *Newman*, 287 Or at 51.

On that point, Defendant's repeated reliance on *Henke* is misplaced. There, the court noted the plaintiffs had offered "only conclusory allegations" that the defendants had exposed the class to pollution. *Henke v. ARCO Midcon, L.L.C.*, No 10-CV-00086-HEA, 2014 WL 982777, at *10 (ED Mo Mar 12, 2014). Here, of course, Plaintiffs have provided two expert opinions demonstrating that the pollution coming from Bullseye's facility reaches the entire class area.

Finally, Bullseye's argument that the Meeker Plaintiffs are "irrational[]" outliers from the class, because they decided not to allow their daughter to play in their yard or eat the fruits and vegetables they grow, is both insulting and wrong as a matter of law and fact. Opp. at 43, 53. As a legal matter, as discussed below and in Plaintiffs' Motion, nuisance is judged on an objective standard. It will be up to a jury to decide based on common proof whether Bullseye's nuisance is objectively unreasonable, and for what time period.

As a factual matter, there is nothing irrational about wanting to protect one's family from the dangerous materials Bullseye emits after being told by state officials not to eat produce from one's garden. Bullseye's effort to paint Plaintiffs as outliers cynically ignores the hundreds or thousands of Portlanders who—like Plaintiffs—attended rallies or community meetings, anxiously visited doctors, and otherwise responded as a normal person would to news that Bullseye had been emitting unfiltered hazardous metals into their neighborhood for decades. As a draft Public Health Assessment prepared by the Oregon Health Authority (OHA) explains:

> With schools and parks located less than a half mile from Bullseye Glass, community members shared concerns of health risks to young children

> breathing air emissions of metals while going to school, playing outside, recreating in the neighborhood, playing at parks, and eating vegetables from home and school gardens.

Preusch Reply Decl. Ex. 4 at 18. Community members also shared with OHA their concerns about past exposures to Bullseye glass, "that they cannot garden safely," and "community members became very concerned and began asking health care providers to test for cadmium and arsenic." *Id* at 18-19.[7]

Bullseye's argument relies on a statistically insignificant sample of seven form declarations from putative Class Members who were contacted by Bullseye and its lawyers without the presence or knowledge of proposed class counsel. Menikoff Decl. Ex. 20. Although Bullseye claims these putative Class Members "have no stake in helping Bullseye," there is no evidence that they were presented with fair and balanced information about this action, the Plaintiffs' expert evidence, or the legal theories of Bullseye's liability before providing their statements disclaiming injury. *See Camp v. Alexander*, 300 FRD 617, 625 (ND Cal Apr 15, 2014) (defendant's *ex parte* solicitation of opt-outs from putative class members misleading where it "omit[ted] key information, such as plaintiffs' counsel's contact information and a full description of the claims or the complaint"). Under these facts, Bullseye's *ipse dixit* that this handful of statements renders the Plaintiffs and the class atypical is wrong. *See* Opp. at 30.

The test for typicality is not whether every class member holds identical beliefs about a defendant's culpability, but whether every class member's claims arise from the same facts and are based on the same legal theory. *Newman*, 287 Or at 50. Just because a Class Member on her own may not have independently chosen to initiate litigation against Bullseye does not mean that she is atypical of the class or not entitled to recover from any class benefit. If this were the operative rule, there would be no point to class litigation, because every individual member of a class would have to prove their independent violation, rather than rely on the class form under ORCP 32.

The report from Bullseye's investigator is similarly unhelpful. Menikoff Decl. Ex. 24. That investigator did not visit the class area until September 2017, more than a year and a half after news of Bullseye's emissions became public and long after Bullseye finally installed a baghouse. *Id.* ¶ 2. This

[7] Bullseye's dismissal of the Meeker Plaintiffs as "irrational" also ignores its own practices mandating its workers wear complex safety gear to prevent them from being exposed to the very toxic materials it emits from its Facility into the class area. *See generally* Plaintiffs' Motion for Leave to Amend Pleading to Assert Claim for Punitive Damages.

investigator is not qualified as an expert and her statements on immaterial matters during an immaterial time period are beside the point.

2. *Plaintiffs' Motion demonstrates that a class action is the superior method—indeed the only practical method—of resolving Class Members' claims.*

In addition to finding that ORCP 32 A's requirements are met, 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. Eight factors are "pertinent" to assessing superiority. *Id.* None is controlling; "[r]ather, the trial court has considerable discretion in weighing all of the factors that apply in a given case and determining if a class action will be a superior means of litigating the class claims." *Pearson,* 358 Or. 106-07.

Bullseye only disputes four of the eight "superiority factors," conceding that the other four—the risk of inconsistent adjudications or orders, already commenced litigation, desirability of concentration litigation in this forum, and the amount of Class Members' claims "in view of the complexities of the issues and expenses of the litigation—support certification. Opp. at 50. Plaintiffs have shown that the remaining four support certification as well.

a. Common questions predominate.

The predominance inquiry asks, "how central are the common questions, and will common proof resolve them?" *Pearson,* 358 Or at 110. Plaintiffs have provided, with expert support, the common proof they intend to use to resolve the most central common disputes in this case, including the extent of Bullseye's pollution, the significance of that pollution, and whether Bullseye violated its duty to Class Members.

(i) The most important common questions predominate in this case.

Plaintiffs propose reliable methods of common proof to resolve the central common questions in this case. *See generally* Motion at 16-17. Bullseye's Opposition appears to concede that the extent of Bullseye's pollution is the most important common question in this case. *See* Opp. at 41 ("whether the properties belonging to the named plaintiffs and putative class members are contaminated with actionable levels of arsenic, cadmium, or chromium from Bullseye" is the "most fundamental question in this case"). Rather than dispute the importance of that common question, however, Bullseye attacks

Plaintiffs' method for resolving it, or advocates for an alternative method. By doing so, Bullseye, merely raises more expert-intensive common questions for the trier of fact to resolve. Bullseye fails to establish that any question in this case is more important or predominant.

Bullseye does not appear to dispute the reliability of at least one method Plaintiffs propose for resolving that "most fundamental question"—air dispersion modeling. *See infra,* Section B.2.a (discussing Dr. Gray Report). Elsewhere, Bullseye proposes another method: class-wide area soil testing. *E.g.*, Opp. at 55 (showing contamination of class properties "depends entirely on soil testing on each individual property"). But, there is almost always more than one way to skin a cat. At trial, the parties' experts will likely present competing opinions about contamination in the class area. What matters at this stage is that Plaintiffs have proposed a reliable common method to show injury to property throughout the class area—the modelling of deposition rates of metals like cadmium, as explained by Dr. Chernaik. *See infra,* Section B.2.b (discussing Dr. Chernaik Report).

(ii) Plaintiffs propose common proof for each element of their claims.

A closer look at the elements of each of Plaintiffs' claims reinforces that Plaintiffs will answer the most important common questions in this case with common proof.[8]

(1) Nuisance

Oregon has an "objective" standard for evaluating the claim of nuisance. *See Penland v. Redwood Sanitary Sewer Serv. Dist*., 156 Or App 311, 315, 965 P 2d 433, 436 (1998) ("Whether a condition constitutes a nuisance depends on its effect on an ordinarily reasonable [person], a normal person of ordinary habits and sensibilities."). Under this standard, whether Bullseye's actions constitute a nuisance can be decided by the trier of fact on a class wide basis based on common proof. *See generally* Motion at 18-19.

Bullseye's argument that nuisance must be determined person-by-person ignores binding Oregon law and analogous precedent, and leans instead on one unreported case from Michigan, *Henry v. The Dow Chemical Co*., No. 03-47775-NZ, 2011 WL 3269118 (Mich Cir Ct, July 18, 2011). The court in

[8] Bullseye does not appear to dispute that Plaintiffs' punitive damages claim is suitable for class treatment. Plaintiffs will be prepared to address any questions the Court has on that issue at oral argument.

*Henry* simply ignored the fact that Michigan—like Oregon—applies an objective standard to what constitutes nuisance. *See Smith v. W. Wayne Cty. Conservation Ass'n*, 380 Mich 526, 536, 158 NW2d 463, 468 (1968). *Henry* therefore does little to aid the Court's analysis.

Bullseye's argument that some Class Members might respond in different ways to a nuisance only shows that Class Members may be entitled to different *amounts* of damages. But difference concerning "a class member's entitlement to damages," and the need for individual damages showings—if any—does not make a class action inappropriate. *Migis v. Autozone, Inc*., 282 Or App 774, 787, 387 P3d 381, 391 (2016), *adhered to in part on reconsideration*, 286 Or App 357, 396 P3d 309 (2017), *rev. den Migis v. Autozone*, Inc., 362 Or 300 (2017). *See also Freeman v. Grain Processing Corp*., 895 NW2d 105, 121 (Iowa 2017) (under objective standard, "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.").

Following Oregon nuisance law, Plaintiffs have proposed the following methods of common proof for each of the elements of that claim:[9]

| **Nuisance Elements**[10] | **Sources of Proof** |
|---|---|
| Substantial interference with use and enjoyment of property | • Testimony by Dr. Chernaik regarding levels of metals in particulates<br>• Representative testimony from Plaintiffs and other Class Members regarding interference with use of real property |
| Unreasonable interference with use and enjoyment of property | • Testimony by Dr. Chernaik regarding significance of levels of metals in particulates interfering with real property<br>• Representative testimony from Plaintiffs and other Class Members |
| Culpable Conduct | • Bullseye records and testimony of Bullseye officials<br>• Standard of care expert(s) |
| Causation | • Bullseye records and testimony of Bullseye officials<br>• Modelling of Dr. Gray, testimony of Drs. Chernaik and Kilpatrick |
| Damages | • Testimony of Dr. Kilpatrick on loss of use value<br>• Expert, Plaintiff, and Class Member testimony on duration of loss of use |

[9] The examples of common proof provided in the tables in this section are not intended to be definitive. Discovery is ongoing, and Plaintiffs reserve the right to present other lines of evidence at trial.

[10] *Jewett v. Deerhorn Enterprises, Inc*., 281 Or 469, 473, 575 P2d 164, 166 (1978); William Sherlock & Paul Russell Allen, Oregon State Bar, Torts § 22.4 (2012 rev); Oregon State Bar, Committee on Uniform Civil Jury Instructions, UCJI No. 53.02, Common Law—Private Nuisance (Dec. 2015).

Bullseye's other nuisance arguments are either incorrect or not relevant to the Court's decision on this Motion. That includes Bullseye's argument that Plaintiffs cannot obtain stigma damages—a form of diminution of value damages—because Plaintiffs have not alleged a "permanent" nuisance, which is incorrect. Opp. at 69-71. In Oregon, "permanent" injury to property does not necessarily mean the injury "will last forever." *Hudson v. Peavey Oil Co*., 279 Or 3, 10, 566 P2d 175, 179 (1977). In *Hudson*, a trespass case arising from a leaking gasoline storage tank, the court explained the broad rule that diminution in value damages are generally available in cases of permanent injury to land, and that "injury which is reasonably susceptible of repair, justifies damages measured by the loss of use or rental value during the period of the injury, or the cost of restoration, or both, depending on the circumstances." *Id.* But it clarified that the injury need not be truly "permanent" to obtain diminution in value damages: "It is enough that the injury be of a kind that makes it appropriate to consider the owner's loss in terms of the reduced value of the property rather than in terms of the cost of restoring it to its original condition." *Id*.

The court quoted from Comment a to Section 929 of the Restatement of Torts to illustrate:

> " * * * Thus where a pipe line company has wrongfully allowed oil to escape into a field, thereby destroying the fertility of the field for a number of years until the oil evaporates, the owner is entitled to recover for the lessening of the value of the land. *Such a condition, though not permanent, would affect the offer of a reasonable purchaser*. * * * " 4 Restatement 660, Torts s 929.

*Id.* (emphasis added). In *Hudson*, the court found sufficient evidence for the jury to conclude that the injury from gas seepage on plaintiff's property *was* "permanent" where "Plaintiffs' expert * * * testified to the possibility that it could last from five to ten years." *Id* at 11.

Plaintiffs' expert here has testified of Bullseye causing a similar condition across the Bullseye Plume area: Bullseye's metal-laden emissions, "because of the ***persistent nature of toxic metals in house dust, remains today a public health issue*.**" Preusch Decl. Ex. 7, Chernaik Rpt. at 9. As in *Hudson*, the jury could find that the property injury here is "'permanent' in the sense that it could not be repaired or rectified by any practical means, that it was likely to persist for an undetermined but

significant period of time, and that the property's value to a prospective purchaser would be significantly affected." *Hudson*, 279 Or at 11.

Because the "stigma" of contamination may linger even *after* remediation, it is particularly appropriate to permit that category of diminution in value damages even where the injury doesn't literally last forever. That's what the Third Circuit concluded in *In re Paoli Railroad. Yard PCB Litigation*:

> While the requirement of permanent damage *to property* seems on its face to require permanent physical damage, plaintiffs convincingly argue that the stigma associated with the prior presence of PCBs on their land constitutes permanent, irremediable damage to property under Pennsylvania case law such that they can recover for the diminution of value of their land.

35 F3d 717, 796 (3d Cir 1994) (emphasis in original). *See also Lewis v. Gen. Elec. Co*., 254 F Supp 2d 205, 218 (D Mass 2003) ("Although decisions have gone in various directions regarding common law nuisance claims for diminution in property value caused by nearby contamination, the stronger strand of jurisprudence favors recognizing such claims."); 37 Am Jur Proof of Facts 3d 439 (1996) ("The stigma associated with the location of property in the vicinity of a nearby environmental hazard may form the basis for a property devaluation claim[.]").

Whether there is a stigma to real property stemming from Bullseye's alleged pollution is a common issue that predominates in this case. So is whether that stigma has impaired property values. Plaintiffs' expert Dr. Kilpatrick has provided a reliable method to prove that stigma across the class area, including by using a contingent valuation survey that has preliminarily shown an impairment of property values. *See infra*, Section B.2-4 (discussing Dr. Kilpatrick report). *See also* 37 Am. Jur. Proof of Facts 3d 439 (1996) ("The expert witness must show that the stigma exists in the minds of potential buyers and not be mere personal belief."). The amount of those damages, as applied to individual properties, may be a property-by-property determination, but Dr. Kilpatrick promises a uniform and common methodology through the Greenfield automated valuation model (AVM) to measure it.

(2) Trespass

In *Pearson*, the Supreme Court endorsed its earlier decision to uphold the certification of a trespass claim "based on the predominance of common issues" in an air pollution case involving "particulates". *Pearson*, 358 Or at 113, *citing Hurt v. Midrex Division*, 276 Or 925, 556 P2d 1337 (1976). The Oregon Supreme Court granted certification in 1976 despite the fact that the Plaintiffs in *Hurt* did not have the advantage of widely-accepted air dispersion modeling and means of calculating deposition rates of particulates that Plaintiffs have proposed using to prove their claims here. Nevertheless, the Oregon Supreme Court viewed that case "to be a case typical of the kind contemplated by the legislature as being proper for a class action." *Hurt*, 276 Or at 930.

Bullseye's opposition concedes that the extent of pollution in the class area is the "most fundamental question in the case * * *." Opp. at 41. Bullseye's expert Foster appears to agree that models can be used to resolve that questions by calculate deposition rates of particulates. *See infra*, Section B.2. Bullseye's remaining argument is that Plaintiffs must use soil sampling to resolve that "fundamental" question. But, it is up to the plaintiff to choose the evidence on which it will rely.

Moreover, Bullseye's argument ignores the proof Plaintiffs have proposed to prove the elements of their claim, summarized here:

| **Trespass Elements**[11] | **Sources of Proof** |
|---|---|
| Exclusive possession | • Named Plaintiff records<br>• At claims process, affidavits |
| Unauthorized entry on land | • Dr. Gray's air modelling, and Dr. Chernaik and Dr. Gray testimony on deposition rates of metals |
| Intent | • Bullseye records and testimony of Bullseye personnel |
| Causation | • Dr. Gray's air modelling |
| Damages | • Dr. Kilpatrick's Greenfield AVM |

Bullseye's Opposition also creates a new rule: To prove a trespass, Plaintiffs must show "that the concentration on each property rose to the level of a health risk[.]"[12] Opp. at 54-55. That is not the law

[11] *See Martin v. Union Pac. R. Co.*, 256 Or 563, 565, 474 P2d 739, 740 (1970); William B. Crow, Oregon State Bar, Torts § 7.2 (2012 rev); Oregon State Bar, Committee on Uniform Civil Jury Instructions, UCJI No. 53.01, Trespass to Land (Dec 2015).

[12] Bullseye also creates an equally inappropriate corollary rule—that the only way health risk can be proved is by testing soil at every property—which Plaintiffs address elsewhere.

in Oregon, shown by Bullseye's failure to cite any Oregon cases to support it. *See e.g.*, Oregon State Bar, Committee on Uniform Civil Jury Instructions, UCJI No. 53.01, Trespass to Land (Dec 2015) and cases cited therein.

The parties litigated another variation of this "physical consequence" theory at the Motion to Dismiss stage. This Court rejected that theory, and Bullseye subsequently answered Plaintiffs Second Amended Complaint. *Compare* Def.'s Mot. to Dismiss at 14 ("Although Oregon trespass law no longer requires that a visible, tangible object intrude on a person's property, it still requires a physical consequence to the property."), *with* Opp. at 54 ("Although Oregon trespass law no longer requires a physical object intrude on a person's property, it still requires a physical consequence to the property to support a trespass claim." (quoting *Williams v. Invenergy, LLC*, No. 13-CV-01391-AC, 2014 WL 7186854, at *19 (D Or Dec 16, 2014)).

As Plaintiffs explained at the Motion to Dismiss stage, *Williams* is distinguishable on its facts because the claimed trespass there was by "low-frequency sound waves, vibrations," and light from a wind farm. 2014 WL 7186854, at *18. That separated *Williams* from the long line of Oregon cases establishing that "the deposit of airborne particulates upon another's land constituted a trespass even though the particulates were so small as to be invisible in the atmosphere." *Davis v. Georgia-Pac. Corp.*, 251 Or 239, 243, 445 P2d 481, 483 (1968) (citing *Martin et ux. v. Reynolds Metals Co*., 221 Or 86, 342 P2d 790 (1960)).

Even adopting Bullseye's rule, Plaintiffs have provided a class-wide method of proving "physical consequence." Plaintiffs' expert Dr. Chernaik has explained the significance of Bullseye's trespass, concluding that the "[r]ate at which cadmium emitted from the Bullseye Glass facility fell onto residential properties was highly significant from a public health perspective[.]" Preusch Decl. Ex. 7, Chernaik Rpt. at 9. Bullseye's experts may disagree about the degree of that significance, but that is an expert-driven common question for the fact-finder to resolve.

(3) Negligence

Bullseye does not seriously contest that common questions predominate in Plaintiffs' negligence claim. The issues regarding negligence will be focused largely on Bullseye's conduct, as summarized in this table of elements:

| **Negligence Elements**[13] | **Sources of Proof** |
|---|---|
| Defendant's conduct caused a foreseeable risk of harm | • Bullseye records and testimony<br>• Standard of care expert(s)<br>• Testimony of Dr. Gray and Dr. Chernaik |
| Risk to an interest the law protects | • Dr. Chernaik testimony on significance of emissions. |
| Defendant's conduct was unreasonable in light of the risk. | • Standard of care expert(s) |
| The conduct was a cause of the plaintiff's harm | • Testimony of Drs. Gray and Chernaik |
| Class of persons/type of injury | • Testimony of Dr. Chernaik<br>• Standard of care expert(s) |
| Damages | • Dr. Kilpatrick's Greenfield AVM for real estate diminution in value; contingent valuation study.<br>• Dr. Chernaik testimony on medical monitoring. |

(iii) Individualized damages do not defeat class certification.

For each of those claims, the critical common issues predominate, supporting a finding of superiority. Bullseye's Opposition loses sight of that standard, arguing essentially that for common issues to predominate, all the litigation's questions must be common.

But Oregon's class jurisprudence establishes that individualized issues, especially damages, do not defeat predominance. 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). Rather, "the need for an individualized showing on the part of the class members arises only after the jury makes the central determination of defendant's liability to the class as a whole." *Id.*; *see also Migis*, 282 Or App at 786-87 ("differences concern[ing] a class member's entitlement to damages" do not defeat certification).

[13] *See Son v. Ashland Cmty. Healthcare Servs.*, 239 Or App 495, 506, 244 P3d 835, 841 (2010) (quoting *Solberg v. Johnson*, 306 Or 484, 490-491, 760 P2d 867 (1988))

In short, even in the presence of some individualized issues, the "fundamental" questions that will drive this case can and will be resolved with common proof.

b. The management of this litigation weights in favor of superiority.

Bullseye argues Plaintiffs' claims would "result in an unmanageable series of min-trials [*sic*]" about each Class Members' property. Opp. at 62. If differences in Class Members and their property precluded class certification, real property pollution cases would never be certified. What separates those cases suitable for class treatment and those that are not is how Plaintiffs have proposed to manage those differences using common proof.

Bullseye's argument that identifying members of this relatively small, geographically-defined class would present "an enormous logistical and financial burden" is not supported. Opp. at 63. Ownership and residence records from February 2016—the critical date for class definition—are readily available from public sources. Plaintiffs' expert has already obtained the names and contact information for *all* owners of residential property in the Bullseye Plume area as of that date, and a robust notice program will reach the remaining Class Members. *See* Motion, Appendix A (list of addresses in class area).

Similarly, Bullseye's argument that certification would "deprive class members * * * of an opportunity to pursue or to defend individual claims" is without merit. Opp. at 64. Adequate notice and the right to opt out preserve that right. *See* ORCP 32 F (notice requirements); ORCP 32 E (court may require notice of right "to be excluded from the class").

c. An order would provide meaningful, class-wide injunctive relief.

An order from this Court would provide meaningful common relief to all Class Members. Bullseye cherry-picks some forms of relief it says weigh against certification, ignoring others, but it errs when it argues remediation would not provide relief to the class as a whole. Opp. at 58. It is true that the need for remediation or the extent of remediation needed may vary across the Bullseye Plume, but the *common* relief would be an order requiring testing to determine *whether* remediation is required. The amount of remediation could vary, but that sort of individualized remedy does not defeat class certification.

Similarly, Bullseye's argument that named plaintiffs "disavow suffering from any physical injury" or "admit they are not suffering from such injury" is an argument against personal injury claims, not medical monitoring—the purpose of which is, of course, to monitor for a future injury. In making its argument, Bullseye misconstrues the "physical injury" that *Lowe* requires. Opp. at 55, 59. Bullseye takes that to mean present *bodily* injury. But the holding of *Lowe* is not so narrow. *Lowe v. Phillip Morris USA, Inc.*, 344 Or 403, 183 P3d 181 (2008).

In *Lowe*, the plaintiff—a smoker—brought a claim for medical monitoring, arguing her use of cigarettes had increased her risk of cancer. *Id.* at 407. The trial court dismissed the plaintiff's complaint because she had not alleged a present physical injury, so could not state a claim for negligence. *Id.* In affirming, the Supreme Court noted *Lowe* was not a case where the plaintiff had "alleged an injury to her person *or property*." *Id.* at 413 (emphasis added). The plaintiff's claim therefor ran afoul of the rule that "'[o]ne ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property.'" *Id.* (quoting *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or 329, 341, 83 P3d 322 (2004)).

This case, of course, is nothing like *Lowe*: Plaintiffs have alleged—and provided a method of common proof to show—physical injury to property for all Class Members. That is why this Court granted Plaintiffs leave to amend their negligence claim early in this case. *See* Menikoff Decl. Ex. 9, 21:18-23:23 (colloquy between Court and Plaintiffs' counsel about alleging "some sort of physical impact on their property" for negligence claim). This Court should reject Bullseye's attempt to relitigate that issue based on a misreading of *Lowe*.

Bullseye also relies on *Wal–Mart, Inc. v. Dukes*, 564 US 338, 131 S Ct 2541, 180 LEd.2d 374 (2011), but that case is not controlling: "we fail to see[] how *Wal–Mart* controls in this case, which resolves state claims and applies state class-certification procedures." *Migis*, 282 Or App at 784.

d. There has been no indication that Class Members want individual control of this litigation.

Bullseye gets this factor upside down, focusing on "theoretic rather than practical" interests of Class Members in individually controlling this litigation. Amendments to Rules of Civil Procedure

Supplemental Rules for Certain Admiralty and Maritime Claims Rules of Criminal Procedure, Advisory Committee Note, 39 FRD 69, 104 (1966). The proper question under this prong of the superiority inquiry is "whether individuals really would want to control their own litigation in the given situation or whether that ideal is more fiction than reality." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:69 (5th ed 2014).

Here, as Plaintiffs' Motion explains, Plaintiffs are not aware of any other economic damages cases arising from the same facts as this case, only a voluntarily dismissed personal injury case.[14] *See id.* (it's "especially true of personal injury cases as opposed to those involving purely economic damages" that "plaintiffs are likely to have more interest in controlling their own individual litigation"). Because concerns about individual control are purely "theoretical" here, this factor weighs in favor of a superiority finding.

In sum, all eight ORCP 32 B factors—the four Bullseye contests and the four it does not—weigh in favor of finding that a class action is the superior method to resolve Class Members' claims.

B. *Plaintiffs' experts have proposed reliable, common methods for proving class-wide pollution of the Bullseye Plume area, which is what ORCP 32 requires.*

1. *Plaintiffs' experts are qualified and their methodologies are reliable.*

Plaintiffs may provide expert opinion to meet their burden of proof with respect to the required elements for class certification under ORCP 32 A and 32 B. *See Pearson*, 358 Or at 106 (concluding plaintiff has the affirmative burden to demonstrate satisfaction with ORCP 32 and noting plaintiffs' failure to provide any expert evidence in support of class certification).

Here – unlike in *Pearson* – Plaintiffs submit three expert reports, from Drs. Gray, Chernaik, and Kilpatrick, to support their motion for class certification.[15] These expert reports provide context, describe scientific models, and provide quantifiable, replicable scientific evidence that can be applied to determine at least three key common issues in the case:

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[14] Bullseye's argument only addresses so-called negative value cases in the context of this factor, "but even in large claim situations, class actions will be a superior form of litigation if aggregation serves efficiency goals and/or pretermits inconsistent outcomes." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:67 (5th ed 2014).

[15] *See generally* Preusch Decl. Exs. 6,7, 8; Preusch Reply Decl. Exs. 1, 2, 3.

- Dr. Gray's air dispersion modeling demonstrates the extent of the heavy particulate pollution plume emanating from the Bullseye facility, Preusch Decl. Ex. 6;

- Dr. Chernaik's report explains the metal content of Bullseye's particulate pollution, and includes a deposition analysis demonstrating the nature of heavy metal contamination that is deposited from that plume onto real property within the proposed class area, Preusch Decl. Ex. 7;[16] and

- Dr. Kilpatrick's contingent valuation survey demonstrates whether there is a stigma associated with the real property within the modeled plume that is attributable to Bullseye's alleged pollution, and the approximate magnitude of that stigma as reflected by its impact on the value of real property. Preusch Decl. Ex. 8, Kilpatrick Rpt. ¶ 71.

In addition, Dr. Kilpatrick's report opines that: 1) the precise magnitude of the diminution in property value experienced by members of the Owner Subclass can be determined in a uniform manner on a class wide basis, property-by-property, by using a statistically-reliable and widely-accepted mass appraisal technique; and 2) loss-of-use damages experienced by members of the Residents Subclass can be determined in a uniform manner on a class wide basis by reliance on fair market value rental rates. Preusch Decl. Ex. 8, Kilpatrick Rpt. ¶ 7.

Plaintiffs' evidence offered in support of class certification is merely a partial showing of Plaintiffs intend to present and prove at trial.[17] At this procedural posture, the Court's task in evaluating Plaintiffs' expert evidence is fairly limited. The Court is not presented with the question of whether the Plaintiffs' proffered expert evidence is or is not admissible. That is a matter for trial. Rather, the Court simply must determine whether Plaintiffs' experts are qualified, and whether the methodologies used to support their opinions are reliable. *See Beltran v. Interexchange, Inc.*, No. 14-CV-03074-CMA-KMT, 2018 WL 526907, *5 (D Colo Jan. 24, 2018) (explaining standard for expert testimony under FRE 702 in class certification context); *Tait v. BSH Home Appliances Corp*., 289 FRD 466, 495 (relevance and reliability are the guideposts for evaluating expert evidence on class certification). If the Court finds that Plaintiffs' experts are qualified and that their methodologies are reliable, then the Court should consider Plaintiffs' experts' opinions to inform its understanding of how the case is likely to proceed at trial and whether class certification is appropriate under ORCP 32.

[16] Dr. Chernaik's report also opines on the public health significance of the volume of heavy metals in the Bullseye Plume as modeled by Dr. Gray and estimated by his deposition analysis.

[17] This court denied Bullseye's earlier-filed Motion to Strike Plaintiffs' Motion for Class Certification in its entirety, but Bullseye has not moved to strike any evidence.

To the extent that Bullseye's experts do not challenge Plaintiffs' experts' methodology, but only offer alternatives, those opinions are insufficient to defeat class certification. As detailed below, Bullseye's experts' opinions and their related arguments either bolster Plaintiffs' evidence that common issues predominate, or otherwise fail to disturb Plaintiffs' demonstration that common factual and scientific proof will predominate over any individual issues at trial.

2. *Bullseye's challenges to Plaintiffs' experts fall short.*

a. Dr. Gray is qualified and his methodologies are reliable.

Dr. Gray is an environmental engineer and atmospheric scientists with 39 years of experience modeling air emissions from sources like Bullseye. Preusch Decl. Ex. 6, Gray Rpt. at 2. Using a widely accepted air dispersion model, AERMOD, Dr. Gray has modelled the historic contribution of particulate matter from Bullseye to the Bullseye Plume area. *See generally* Preusch Decl. Ex. 6, Gray Rpt.

Bullseye does not contest Dr. Gray's use of AERMOD, his use of a source test at Bullseye's furnaces, or his conclusion that Bullseye has historically been underestimating its emissions of metal-laden particulates in material it provided to DEQ. In fact, Bullseye's own expert appears to endorse AERMOD's usefulness. Menikoff Decl. Ex. 2, Foster Rpt. at 6. Stephen Foster explains that "[a]ir quality models, such as AERMOD, estimate air concentrations at receptors over a selected grid." *Id.* Bullseye's expert also explains that AERMOD can be used to calculate *deposition rates* of metal-laden particulates in the class area, conceding that a common method can be used to prove Plaintiffs' trespass claims. *See id*. (discussing AERMOD, opining that "[d]eposition at specific receptors is calculated at specific receptors directly out of the air quality model * * * ."). In sum, Bullseye does not and could not seriously contest Dr. Gray's methods.

Bullseye does quibble, however, with the threshold used to formulate the class boundary. Opp. at 7 n. 4. Bullseye's argument is that a National Ambient Air Quality Standard (NAAQS) should be the standard against which the significance of Bullseye's emissions are measured. As Dr. Gray explains in his rebuttal, that position lacks merit. That NAAQS standard is for the cumulative emissions of all man-made sources—every car, fireplace, factory, and so on—*as well as* regional background levels. *See*

Preusch Reply Decl. Ex. 1, Gray Rebuttal Report at 3.[18] Of course, one facility's contribution would not be expected to be anywhere near a cumulative community threshold. "In fact, there is no single point source in the US, no matter how large, that on its own would be shown to violate the annual or 24-hr $PM_{2.5}$ NAAQS (for example, by performing a dispersion modeling analysis)." *Id.* The proper standard for evaluating a single source is the significant impact limit (SIL), and "the recommended annual $PM_{2.5}$ NAAQS SIL concentration is 0.2 µg/m3 for impacts in Class II (urban) areas." *Id.* at 3-4.

Even if Bullseye's argument did have merit, the significance of the class boundary threshold would be a common question for the jury to resolve. It is not an issue that defeats certification.

b. Dr. Chernaik is qualified and his methodologies are reliable.

Dr. Chernaik is a Johns Hopkins University-trained Ph.D. toxicologist with a J.D. in environmental law from the University of Oregon. Preusch Decl. Ex. 7 at 1. Courts around the world and here in the United States have relied on his opinions, including the European Court of Human Rights and a federal district court in Indiana in class action litigation. *Id.* at 1-2. In this case, relying on Dr. Gray, Bullseye records, and samples of Bullseye waste materials, Dr. Chernaik opines on the metals content of Bullseye's particulate emissions, the deposition of metals in the Bullseye Plume area, and the significance of each.

Bullseye's primary argument against Dr. Chernaik is that he relied on the wrong lab test result to estimate the metals content of Bullseye's particulate emissions. Opp. at 8-14. Bullseye is correct. In a concurrently-filed rebuttal report, Dr. Chernaik concedes he used the wrong sample in his initial report. Preusch Reply Decl. Ex. 2, Chernaik Rebuttal Report at 1.

As he explains in his rebuttal report, Dr. Chernaik has corrected for this error and has re-run his analysis using samples of baghouse waste material collected from Bullseye—the material Bullseye says he should have used in the first place. Opp. at 11 (test not representative of Bullseye's emissions because "the test was not * * * done on baghouse material"). Preusch Reply Decl. Ex. 2, Chernaik

[18] Foster is also incorrect that "The National Ambient Air Quality Standard (NAAQS) for particulate matter (*$PM_{10}$*) is 12 micrograms per cubic meter of air (µg/m3)." Preusch Reply Decl. Ex. 1, Gray Rebuttal Report at 3 (emphasis added). That is the standard from *$PM_{2.5}$*. *Id.* "There is no current annual $PM_{10}$ NAAQS." *Id.*


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Rebuttal Report at 2-3. Having done so, Dr. Chernaik concludes that the metal content of Bullseye's particulate emissions and the deposition rates for cadmium are likely *even higher* than he previously estimated. *Compare id.* at 5 (estimating cadmium deposition rate of "at least" 1 microgram per square meter per day or 3.1 microgram per square meter per day depending on baghouse "pre-coat" used) *with* Preusch Decl. Ex. 7, Chernaik Rpt. at 8 (estimating rate of 2.4 micrograms per square meter based on sample of waste and stack cleanout material). Aside from correcting that calculation, Dr. Chernaik affirms and adopts his prior opinion. *Id.*

In a rebuttal report, Dr. Gray confirms that the method Dr. Chernaik has chosen to calculate those deposition rates is reasonable. Preusch Reply Decl. Ex. 1, Gray Rebuttal Report at 2-3. Dr. Gray also explains that, as Bullseye's expert suggests, he could use AERMOD or an alternative model—CALPUFF—to calculate deposition rates in this case to supplement Dr. Chernaik's work. *Id*. at 2.

c. Dr. Kilpatrick is qualified and his methodologies are reliable; neither Marchitelli nor Holzhauer are qualified to opine on contingent valuation or AVMs.

Plaintiffs proffer Dr. Kilpatrick as a real estate appraisal expert who is qualified in ascertaining stigma damages through both contingent valuation surveys (CVS)[19] and the application of automated valuation models, or AVMs. Preusch Decl. Ex. 8, Kilpatrick Rpt. at 1-7 (detailing experience, expertise, and listing prior accepted expert testimony in these fields). Dr. Kilpatrick has completed a CVS in this matter that determines whether there is a stigma associated with the Bullseye pollution (yes), and if so, the approximate magnitude of that stigma as reflected in real property values. Dr. Kilpatrick's CVS shows stigma damages reflecting a diminution in the value of real property for properties impacted by the Bullseye pollution in the range of 25-33 percent. *Id*. ¶ 71.

Dr. Kilpatrick also concludes that calculating damages reflecting the diminished values of the residential properties can be done systematically throughout the proposed class area, on a property-by-

[19]Contingent valuation is a survey-based technique to directly measure individuals' stated preferences and values for environmental goods. The technique is used to analyze market participants' willingness to pay for a positive amenity or to accept a negative amenity, such as environmental contamination, through compensation. Applying standard methodologies, this type of survey research is widely endorsed and accepted by the courts, including for appraisals of contaminated properties. *See* Preusch Decl. Ex. 8, Kilpatrick Rpt. ¶ 69 & n 57, citing to Diamond, Shari S., "Reference Guide on Survey Research" in *Reference Manual on Scientific Evidence*, Third Ed, Federal Judicial Center (2011).

property basis, using an AVM as a component of a mass appraisal. From a real estate appraisal perspective, mass appraisals provide an unbiased and efficient means of valuing individual properties within a commonly affected area such as the Bullseye Plume. *Id*. ¶¶ 7, 17.

As Dr. Kilpatrick opines, mass appraisal is appropriate in this case to assemble, analyze, and interpret a large body of data for credible and unbiased valuations. Unlike an individual appraisal methodology, such as that urged by defendant's experts, which would pull property comparisons, or "comparables," from a smaller data set and rely on a high degree of potential bias, the mass appraisal technique eliminates such bias by utilizing computing power to draw on large data sets, uses statistically valid methods to eliminate traditional judgment-based methods, and results in statistically reliable assessments of pre- and post-contamination values for each impacted property. Dr. Kilpatrick's approach to determining damages to the Owner Subclass thus uses a common model to produce individual damages results.

Bullseye submits two appraisal reports in opposition to Dr. Kilpatrick. Although both Mr. Marchitelli and Mr. Holzhauer are real estate appraisers, neither has any experience or expertise in either contingent valuation surveys or automated valuation models. *See generally* Menikoff Decl. Ex. 21, Marchitelli CV, and Ex. 23, Holzhauer CV (listing relevant experience and omitting any references to CVS or AVM). Accordingly, neither is qualified to opine on either of these methodologies. Because they are not qualified as experts on these issues, their statements regarding the use or requirements of an AVM to measure damages for the members of the putative Owner Subclass are without basis and are likely inadmissible.[20] *See Beltran*, 2018 WL 526907 at *5. In any event, the weight (or lack thereof) and admissibility of these opinions is yet one more common issue for trial.

As Dr. Kilpatrick's Rebuttal Report makes clear, Messrs. Marchitelli's and Holzhauer's assumption that the Greenfield AVM that Dr. Kilpatrick would apply here would require inter-neighborhood homogeneity is incorrect. The Greenfield AVM is designed to achieve statistically reliable results even when there is a high degree of neighborhood heterogeneity. Preusch Reply Decl. Ex. 3, Kilpatrick Rebuttal Report ¶ 2-4.

[20] The unsigned "memos" of Bullseye's proffered experts Foster, Kurtz, and Norville, *see* Menikoff Decl. Exs. 2, 5, and 6, are not competent evidence and should be stricken as unverified hearsay.

3. *Bullseye's Eleventh Circuit case law does not diminish Dr. Kilpatrick's qualifications or the reliability of his methods.*

Bullseye also seeks to discredit Dr. Kilpatrick's opinion regarding the reliability of a mass appraisal to assess Class Member damages in this action by citing to inapposite case examples in Florida and the Eleventh Circuit. Each of Bullseye's critiques falls short.

Bullseye's reliance on *The St. Joe Co. v. Leslie*, 912 So 2d 21 (Fla Dist Ct App 2005) which was subsequently rejected by the Eleventh Circuit in *Adinolfe v. United Technologies Corp.*, 768 F3d 1161, 1177 (11th Cir 2014), is misplaced. In *St. Joe*, the Florida court found that the concept of stigma damages was inapplicable because "none of the class representatives testified that dumping occurred on their property, much less that their property was contaminated. Nor did the class representatives testify that their property had been physically harmed or that their property values had decreased * * * ." 912 So 2d at 24. By contrast here, the Plaintiffs do assert contamination and diminution in property value. *See, e.g.*, Preusch Reply Decl. Ex. 8, Goodwin Dep. 77:14-25 ("It's worth less because of the emissions."). Moreover, the expert reports of Drs. Gray and Chernaik establish the extent of the Bullseye Plume and the deposition of cadmium onto real property within the class boundary, and Dr. Kilpatrick's expert report demonstrates by the results of its contingent valuation study that Plaintiffs' assertion of diminished property values is justifiable. Unlike *St. Joe*, Plaintiffs here have ample proof of trespass and diminution in property value, as well as common methodologies of establishing both.

Bullseye's "summary" of *Sher v. Raytheon Co.*, 419 F App'x 887 (11th Cir. 2011) misleads by omission. Bullseye selectively quotes language from this unpublished decision[21] that "there is not enough evidence to support a class at this stage of the litigation. The Plaintiffs have failed to carry their burden of proof." Opp. at 66, quoting *Sher*, 419 F App'x at 891. However, Bullseye omits the key language of that same paragraph, where the court stated that it "express[ed] no opinion as to whether class certification is or is not appropriate in this case." *Id.* at 891. The court remanded to the district court for further analysis because the district court did not "weigh the evidence presented and engage in

[21] *Sher v. Raytheon* is an unpublished decision, and Bullseye's citation to it was improper. Unpublished opinions should neither be cited to nor relied on as binding precedent. *See In re Conduct of Davenport*, 335 Or 67, 70, 57 P3d 897, 898 (2002) (applying comity to withdraw reliance on unpublished opinion under Ninth Circuit Rule that does not allow citation to unpublished decisions). A similar Eleventh Circuit rule applies to Sher, as well.

a *Daubert* style critique of the proffered experts' qualifications. *Id*. at 889. Bullseye's contention that the proposed expert analysis must actually be "performed" prior to class certification, Opp. at 66, is not true. There is no such requirement at the class certification stage.[22] *See In re ConAgra Foods, Inc*., 90 F Supp 3d 919, 947 (CD Cal 2015).

Similarly, Bullseye's reliance on *Lee-Bolton v. Koppers, Inc*., 319 FRD 346 (ND Fla 2017) is misplaced. Bullseye relies on *Lee-Bolton* to argue (again) that Dr. Kilpatrick's AVM is invalid to support class certification if he has not yet run the model. However, class certification in *Lee-Bolton* was denied under the federal court's predominance standard, not whether the model had been run. The court's criticism in *Lee-Bolton* was primarily concerned with a misunderstanding of the AVM's ability to account for neighborhood heterogeneity and what it believed was a need to account for individual characteristics of the homes and surrounding neighborhoods, rather than a failure to have run the model. *Id.* at 386. Not only did the *Lee-Bolton* court misunderstand the AVM at issue, but such plaintiff-by-plaintiff review which it describes is not a basis to deny class certification in Oregon. *See Delgado* 260 Or App at 493 (individualized damages showings do not defeat class certification).

Finally, Bullseye's analysis stemming from *Henry v. St. Croix Alumina, LLC*, No. 99-CV-0036, 2008 WL 2329223 (DVI June 3, 2008), misapprehends the nature of stigma damages. As reflected in the literature on which Dr. Kilpatrick relies in his expert report, stigma as a result of environmental contamination is a binary concept that is triggered by contamination.[23] Hypothetical variations in levels of contamination between properties within the zone of contamination does not create a "swiss-cheese" stigma effect, as Bullseye seeks to imply by its misplaced reliance on *Henry*. Moreover, the contingent valuation study Dr. Kilpatrick has already performed here indicates an approximate stigma diminution in real property value of 25-33 percent as a result of Bullseye's pollution. Dr. Kilpatrick's mass appraisal

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[22] Plaintiffs need not respond to Bullseye's unsubstantiated, raw speculation in footnote 61 of its Opposition regarding the circumstances of the settlement and dismissal in *Sher*, or future events in this case.

[23] *See* Lipscomb et al., "Contingent Valuation and Real Estate Damage Estimation." *Journal of Real Estate Literature* 19(2):286 (indicating that environmental stigma is a binary decision because households typically will avoid real estate in areas where environmental contamination is present), cited in Kilpatrick Rpt. ¶ 67 n 50 (Preusch Decl. Ex. 8).

will then calculate the actual diminution for each member of the Owner Subclass using a common model that will calculate individual damages for each residential property in the class.

4. *Plaintiffs have provided—and will provide—common proof of pollution in the Bullseye Plume area.*

Plaintiffs have proposed a reliable method to set the Bullseye Plume class boundary, a boundary Bullseye apparently does not dispute "at this juncture." Opp. at 37 n 49. As explained above, *supra* Section B.1., Plaintiffs also propose common proof to establish the elements of their claims for Class Members in the Bullseye Plume.

Bullseye's response is that Plaintiffs must prove their claims through soil testing, *e.g.*, Opp. at 55 (trespass "depends entirely on soil testing"), which it claims shows no harm to Class Members' property.[24] "Plaintiffs' sole evidence of * * * contamination," Bullseye argues, "is Dr. Chernaik's report." Opp. at 51. While this Court does not need to resolve these merits issue now, Plaintiffs merely point out that Bullseye's own exhibits, and information Bullseye has had for several months, provide other examples of common proof Plaintiffs could use beyond what Plaintiffs have already proposed.

Dr. Kurtz, for example, does not appear to contest that Bullseye's emissions have affected the soil in the neighborhood around Bullseye. He just disputes how much they have done so. His own analysis of DEQ and U.S. Forest Service soil sampling data shows soil impacts to a distance of approximately 2,000 feet. E.g., Menikoff Decl. Ex. 5, Kurtz Report, Fig. 4:

[24]Indeed, Dr. Chernaik explains that soil levels in cadmium are "a poor metric for determining the significance of uncontrolled emissions from Bullseye Glass." Preusch Decl. Ex. 7, Chernaik Rpt. at 9 n 28.

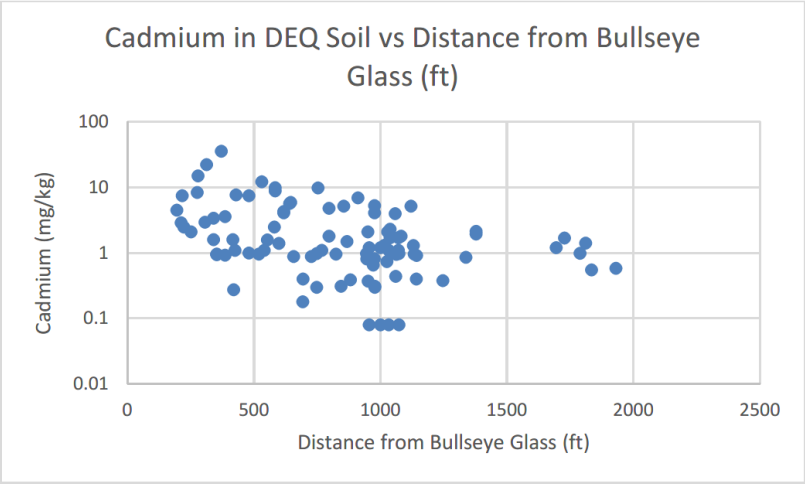



**Figure 4. Cadmium in DEQ Phase 1&2 Soils versus distance from Bullseye Glass. Note log scale for concentrations and apparent exponential decay of concentration with distance.**

Dr. Kurtz also references unpublished U.S. Forest Service soil sampling data. *Id.* at 1. He does not mention, however, that when the U.S. Forest Service provided that data to DEQ it said "[p]reliminarily, it looks like some of our [cadmium] values are high enough to trigger clean up – depending on what soil thresholds you use." Preusch Reply Decl. Ex. 6. (email transmitting soil data); *see also id.* Ex. 7 (USFS email transmitting moss maps that Bullseye ridicules as "cartoonish", Opp. at 1).

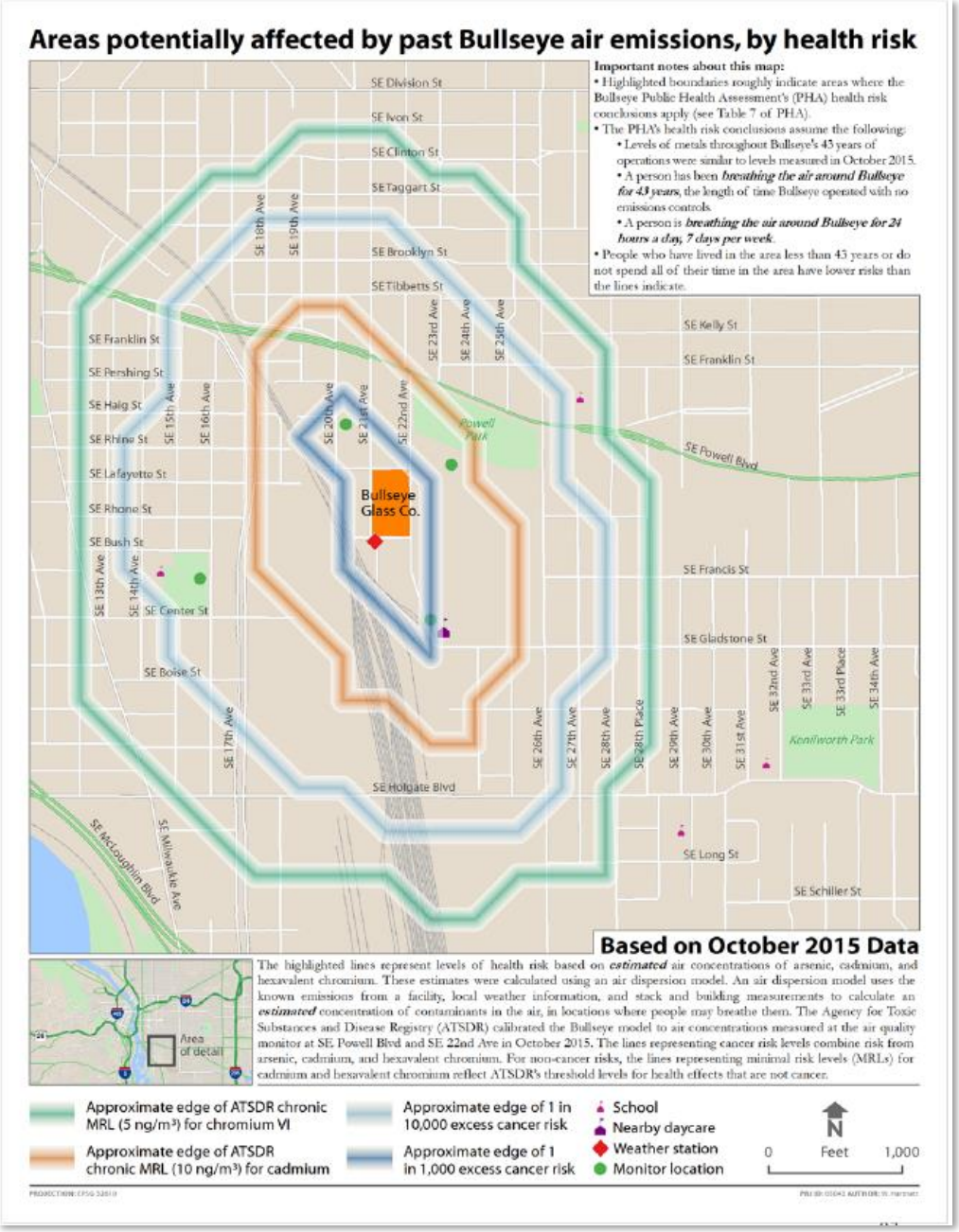
The DEQ reports appended to the Declaration of Carrie Menikoff provide another example, concluding that an air source has "enriched" the soil near Bullseye with a variety of metals used as glass colorants, Menikoff Decl. Ex. 8:

**Overall Interpretation**

Overall, the data present a pattern for manganese, cadmium, cobalt, and possibly selenium, suggesting that the concentrations of these metals in soil are related to distance from the Bullseye facility, with relatively closer samples having higher concentrations. In each of the plots, the metals concentration appears to decline to a baseline level by approximately 1,000 feet from the facility. To the extent that these metals are also used as glass colorants, the evidence supports an air deposition source has enriched the soil nearby to the Bullseye Glass facility with these metals. The significance of these findings to public health will be addressed elsewhere.

There is more. A draft Public Health Assessment of the Bullseye facility prepared by OHA and the federal Agency for Toxic Substances and Disease Registry—which is still in draft form and subject to revisions, as its watermark indicates—concludes that Bullseye's airborne emissions have, at a minimum, impacted some part of the class area, creating a public health risk. That draft report, which Plaintiffs only recently obtained, Preusch Reply Decl. Ex. 5 (cover letter), concludes that "[c]oncentrations of metals measured in air around Bullseye Glass before February 2016 were **high enough to potentially harm the health** of **long-term residents and daycare children** within approximately .6 miles of the Bullseye Glass facility." Preusch Reply Decl. Ex. 5 at 8.[25] (emphases in original). The state and federal health authorities that prepared the report relied, like Plaintiffs' expert Dr. Gray, on the AERMOD air modeling tool to estimate the impact of Bullseye's emissions. Though more simplistic than Dr. Gray's modelling in some respects, the agencies' modelling also resulted in a map of Bullseye's zone of impact:

[25] The draft report also preliminarily concludes that the metal levels in soil around Bullseye are not high enough to harm the health of long-term residents and daycare children, Preusch Reply Decl. Ex. 4 at 9, a disputed fact that is subject to revision in the final report.




*Id.* at 92.

Plaintiffs point to Bullseye's own evidence of pollution and this preliminary report, which is subject to revisions, not because this Court should convert this Motion to a trial on the merits. Rather, it is to show that complex, expert-intensive issues must be resolved in this case, and they are best done so on a class-wide basis.

## V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the Motion.

DATED this 29th day of January, 2018.

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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' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION upon the following:

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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: January 29, 2018

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