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

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

13 Plaintiffs,

14 v.

15 BULLSEYE GLASS CO., an Oregon
16 corporation,

17 Defendant.
18

CIVIL ACTION NO. 16CV07002

**PLAINTIFFS' CORRECTED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

19 I. COMPLIANCE WITH UTCR 5.010

20 Counsel for Plaintiffs have conferred with Counsel for Defendant on issues requiring conferral
21 under UTCR 5.010. This Motion for Preliminary Approval of Class Action Settlement ("Motion") is
22 unopposed.

23 II. INTRODUCTION

24 After nearly three years of hard-fought litigation, the Parties¹ have reached a settlement. They
25 have done so with the assistance of a skilled mediator, and only following multiple in-person mediation
26

27 ¹ Capitalized words and phrases used throughout this Motion carry the definitions set forth in the Class Action Settlement
Agreement and Release.

1 sessions and months of contentious back-and-forth over terms. That settlement provides expansive
2 monetary and prospective relief to the class in this certified environmental class action, avoiding the
3 substantial risk of a trial and appeals that could end in the class getting nothing, Defendant Bullseye
4 Glass Co. (“Bullseye”) declaring bankruptcy, or both. With this Motion, Plaintiffs ask this Court to (1)
5 preliminarily approve the proposed settlement (“Settlement”), (2) direct that notice of the Settlement be
6 given to class members while setting a deadline for those class members to request exclusion or object,
7 and (3) schedule a final fairness hearing and related deadlines.

8 III. FACTUAL AND PROCEDURAL BACKGROUND

9 A. *The Parties have been vigorously litigating this case for years.*

10 Bullseye has operated an industrial art glass manufacturing facility in a residential and
11 commercial area of Southeast Portland since 1974. *See* Def.’s Answer to Third Am. Compl. ¶¶ 3, 19,
12 Feb. 23, 2018. Plaintiffs filed this case in March 2016, a month after the results of a United States Forest
13 Service moss study identifying hazardous metals “hotspots” in Portland became public. *See generally*
14 *The Portland Moss and Air Quality Study*, U.S. Forest Service, Pacific Northwest Research Station,
15 <https://www.fs.fed.us/pnw/research/moss/index.shtml> (last modified June 14, 2017).

16 Since Plaintiffs filed this case, the Parties have engaged in extensive motions practice. First, the
17 Court largely denied Bullseye’s motion to dismiss Plaintiffs’ nuisance, negligence, and trespass claims.
18 Order Granting in Part and Den. in Part Def.’s Mot. to Dismiss, Aug. 8, 2016. Next, the Court granted
19 Plaintiffs’ motion for leave to amend the complaint to add a claim for punitive damages. Order on Pls.’
20 Mot. to Amend to Allege Punitive Damages, Dec. 13, 2017. Soon thereafter, on February 2, 2018—after
21 several rounds of briefing and oral argument related to class issues—the Court certified two subclasses
22 of owners and residents of residential property, appointed Plaintiffs to represent those subclasses, and
23 appointed Plaintiffs’ counsel as Class Counsel. Order Regarding Pls.’ Mot. for Class Certification, Feb.
24 28, 2018. The two subclasses, collectively referred to as the “Class” in this Motion, are defined as:

- 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 [of the Motion for Class Certification].²
- 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 [of the Motion for Class Certification].

In addition to that extensive litigation history, the Parties reached this settlement with the benefit of a thorough factual record. Bullseye has produced 13,309 documents totaling 45,155 pages. Declaration of Matthew Preusch in Support of Plaintiffs' Motion for Preliminary Approval ("Preusch Decl.") ¶ 2³ The Parties have received documents in response to subpoenas and public records requests from over 50 third-party entities. Plaintiffs also took the deposition of nine current or former Bullseye employees and managers, including most recently of Bullseye principals Daniel Schwoerer and Lani McGregor. In addition, the Parties have conducted interviews or depositions with third-party witnesses. Bullseye, likewise, took depositions of the named Plaintiffs, and of numerous third parties. Through this discovery, the Parties created a strong factual record on which to evaluate their claims before trial was set to begin this month.

Bullseye has vigorously contested liability throughout this matter, and the costs of litigation on both sides have been significant. In fact, in a recently published opinion piece in *The Oregonian*, Bullseye's owners said Bullseye is "on track to spend \$4 million in legal fees defending ourselves through trial" against this class action lawsuit.⁴ While Bullseye continues to contest its liability, given the expense of continued litigation and the uncertain outcome of a potential trial, Bullseye has decided to resolve its potential liability to the Class now.

B. *The Parties have engaged in intense, arm's-length settlement discussions.*

Following the Court's order certifying two subclasses, the Parties began discussing a potential negotiated settlement. Preusch Decl. ¶ 4. To aid those discussions, the Parties retained an experienced

² "Appendix A" refers to the list of residential properties in the Class Area submitted with Plaintiffs' Motion for Class Certification.

³ Unless otherwise indicated, all of the factual statements asserted herein are attested to in the Declaration of Matthew Preusch in Support of Plaintiffs' Motion for Preliminary Approval, which is filed with this Motion.

⁴ Daniel Schwoerer and Lani McGregor, *The hypocrisy behind Oregon's new air-quality law (Guest opinion)*, *The Oregonian* (Mar. 24, 2018), http://www.oregonlive.com/opinion/index.ssf/2018/03/the_hypocrisy_behind_oregons_n.html.

1 Portland-based mediator, Chris Kent. Mr. Kent presided over numerous all-day mediation sessions in
2 2018 that included counsel for the Parties as well as counsel for Bullseye’s insurance carriers. Preusch
3 Decl. ¶ 5. The Parties supplemented those in-person mediations with multiple phone calls between the
4 Parties, and separately with the mediator, all subject to the mediation privilege. At several points it
5 seemed a deal would be beyond reach, and that the Parties would proceed to trial. However, with the
6 assistance of Mr. Kent, the Parties were ultimately able to reach the Settlement they now present to the
7 Court for preliminary approval.

8 *C. Plaintiffs’ proposed Settlement provides comprehensive relief to the Class.*

9 The years of litigation and months of negotiations that preceded this Motion have resulted in a
10 proposed Settlement that provides comprehensive relief designed to address the alleged harms at the
11 core of Plaintiffs’ claims. After litigation fees and costs are addressed, the remainder of the \$6.5 million
12 Settlement Cash Payment will be used to fund three broad components: a \$1 million air monitoring plan
13 for the Class Area; reimbursement for expenses related to air emissions, like soil testing and air
14 purifiers; and cash payments to Class Members to address alleged stigma damages, loss of use of
15 property, or both.

16 The \$1 Million Air Monitoring Plan

17 The Parties will select an Independent Engineering Firm to design and implement a \$1 million
18 plan to monitor air quality in the Class Area, and to publicly report the results of that monitoring, for at
19 least two years. *See generally* Preusch Decl., Ex. A, Settlement Agreement ¶ 4.4. The engineering firm
20 will buy equipment to establish six air monitoring stations—two on Bullseye’s property, four throughout
21 the Class Area—that will monitor ambient air concentrations of hazardous metals and emissions
22 associated with diesel pollution. The firm will report the results of that monitoring on a publicly
23 available website. *Id.* At the conclusion of the air monitoring program, the Parties will direct the firm to
24 donate the air monitoring equipment to a local non-profit or academic working on air quality issues in
25 the Portland area. *Id.*

1 Reimbursement for Class Members' Pollution-Related Costs

2 After paying for the air monitoring plan, the Settlement Agreement directs that the Settlement
3 Cash Payment be used to reimburse Class Members for emissions-related expenses they may have
4 incurred between February 3, 2016—when news of Bullseye as a potential hotspot became public—and
5 the date of the filing of this Motion. Specifically, Class Members may submit claims for the following
6 “past expenses”:

- 7 1. testing of soil for particulate cadmium, chromium, hexavalent chromium, and arsenic (the
8 “Contaminants”), capped at \$500 per tax parcel;
9 2. necessary remediation of their soil, capped at \$5,000 per tax parcel; and
10 3. the cost of buying one or more air purifiers for their residence in the Class Area, capped at
11 \$300 per Class Member.

12 In addition to reimbursement for those “past expenses,” Class Members will be eligible to elect
13 to spend money on some of those same categories of expenses *after* final approval, and if valid, those
14 expenditures would be eligible for reimbursement. This will benefit Class Members who may have been
15 hesitant to pay out-of-pocket expenses since February 2016. Those “future expenses” that would be
16 eligible for reimbursement from the Settlement Cash Payment are:

- 17 1. testing of soil for Contaminants, *if* no request was made to reimburse past soil testing, capped
18 at \$500 per tax parcel;
19 2. if soil testing on the property has shown chromium or cadmium above the Oregon
20 Department of Environmental Quality’s (DEQ) Urban Residential Risk Based
21 Concentrations, and/or arsenic or hexavalent chromium above the Agency for Toxic
22 Substances and Disease Registry’s (ATSDR) Screening Levels, Class Members may seek
23 reimbursement for remediation to bring their soil to within those levels, capped at \$5,000 per
24 tax parcel; and
25 3. if the Class Member did not already seek reimbursement for a past purchase of an air
26 purifier, they may purchase one and seek reimbursement, capped at \$300 per eligible
27 household.

1 Equitable Allocation of Cash Payments to Class Members

2 After the Settlement Cash Payment is used to pay for the air monitoring plan and to refund Class
3 Members' emissions-related expenses, the remainder of the Settlement Cash Payment will be distributed
4 to claiming Class Members according to an equitable plan of allocation negotiated by the Parties.

5 That allocation assigns "shares" to each Class Member or "Claiming Class Member Household"
6 based on factors that relate to the types of claims that Class Member likely has against Bullseye. Each
7 valid Claiming Class Member Household will be entitled to the following number of settlement shares:
8 i) one; plus ii) one half the number of persons in the Claiming Class Member Household; plus, iii) if the
9 Class Member owned, or co-owned, a residence in the Class Area on February 3, 2016, three (3)
10 settlement shares for each such residence owned.

11 Stated another way:

- 12 • Number of settlement shares (renter) = $1 + (.5 \times \text{number of persons in household})$;
13 • Number of settlement shares (owner) = $1 + (.5 \times \text{number of persons in household}) + 3$.

14 All owners, or co-owners of a Class Property must join in the Claim Form for that property, and
15 the shares allocated to the owners will belong to them as a group. On the other hand, roommates or
16 housemates who do not own the property in which they resided on February 3, 2016, and who are not
17 part of each other's household, would each file separate Claim Forms. Once the total number of
18 settlement shares is determined, the settlement administrator will divide the remainder of the Settlement
19 Cash Payment by that number to determine the value of each settlement share.

20 Class Counsel cannot predict with certainty what a claimant might receive under the allocation
21 plan. But if the Court assumes, for example, that \$2 million will remain from the Settlement Cash
22 Payment after the air monitoring plan is funded and emissions-related expenses are reimbursed, and that
23 valid Claims totaling 5,000 shares are submitted, the per-share value would be \$400 ($\$2 \text{ million} / 5,000 =$
24 $\$400$). Under the allocation plan, if each share is worth \$400, a renter who lived alone in the Class Area
25 on February 3, 2016, and who has 1.5 shares, would be entitled to \$600 under the plan of allocation: $(1 +$
26 $(.5 \times 1)) \times \$400 = \600 . For comparison, a family of four who owned and lived in their Class Area home
27 on February 3, 2016, and who has 6 shares, would be entitled to \$2,400: $(1 + (.5 \times 4) + 3) \times \$400 =$

\$2,400. And a couple who owned their home as a family of two would have 5 shares and would receive \$2,000: $(1 + (.5 \times 2) + 3) \times \$400 = \$2,000$.⁵

Reminder Funds

If for some reason there are unclaimed funds after all these payments have been made—due to, for example, uncashed checks—and those funds are impractical to distribute to Class Members, that money will be distributed to fund legal aid and a contribution to a non-profit entity that is directly related to and directly benefitting the Class Members. *See* ORCP 32 O (describing procedure for award of remainder funds).

Release

As is standard in class settlements, in exchange for those benefits, Class Members who remain in the Class and do not opt out would agree, upon the Effective Date, to release all claims related to “airborne emissions from the Bullseye Facility.” *See* Preusch Decl., Ex. A, Settlement Agreement ¶ 7.2 (release). Class Members who do not wish to release their claims may opt out. *Id.* If more than five percent of Class Members choose to opt out, Bullseye or its insurers have the option of voiding the settlement. *Id.* ¶ 9.1; *see also* 4 William B. Rubenstein, Newberg on Class Actions § 13:6 (5th ed. 2014) (stating that “courts generally approve settlements” with such provisions).

Fees, Costs, & Service Awards

Class Counsel will petition the Court to pay the attorneys’ fees and costs. That request, which includes the cost of notice and settlement administration, will be capped at \$2.5 million. Plaintiffs currently estimate the cost of notice and settlement administration to be between approximately \$53,000 and \$65,000, but the costs could increase depending on the number of Class Members who opt out, and the number of Class Members who submit claims and elect reimbursement for both past and future expenses. Declaration of Eric Schachter in Support of Plaintiffs’ Motion for Preliminary Approval (“Schachter Decl.”) ¶ 14.

⁵ If \$1 million remains for *pro rata* payments, the same renter would receive \$300, the owner with the family of four \$1,200, and the couple \$1,000.

1 Plaintiffs will also request that the Court award from the Settlement Cash Payment “case
2 contribution awards” to the named Plaintiffs of \$7,500 per person or \$10,000 per married couple or
3 domestic partners to recognize their work on behalf of the Class since filing this case in 2016.

4 IV. LEGAL STANDARD

5 Class actions “shall not be voluntarily dismissed or compromised without the approval of the
6 court, and notice of the proposed dismissal or compromise shall be given to some or all members of the
7 class in such manner as the court directs[.]” ORCP 32 D. While Oregon’s Rules of Civil Procedure do
8 not provide a standard courts should apply in considering whether to approve a class action settlement,
9 ORCP 32 D’s federal counterpart, Federal Rules of Civil Procedure 23(e), requires the court to
10 determine whether a proposed class action settlement is “fair, reasonable and adequate.” *Redican v.*
11 *Horizon Realty Advisors LLC*, No. 16LT01674, 2016 WL 8604452, at *2 (Aug 3, 2016, Or Cir). “It is
12 appropriate for this Court to apply those standards in considering the parties’ proposed settlement.” *Id.*;
13 *see also Froeber v. Liberty Mut. Ins. Co.*, 222 Or App 266, 275, 193 P3d 999, 1005 (2008) (noting that
14 “federal courts evaluating proposed class action settlements under ORCP 32 D’s federal counterpart,
15 FRCP 23(e) * * * have noted that the ‘universally applied standard is whether the settlement is
16 fundamentally fair, adequate and reasonable.’”) (quoting *Class Plaintiffs v. City of Seattle*, 955 F2d
17 1268, 1276 (9th Cir), *cert den*, 506 US 953, 113 SCt 408, 121 LEd2d 333 (1992)); Manual for Complex
18 Litigation § 21.61 (4th ed 2013) (Manual) (“To determine whether a proposed settlement is fair,
19 reasonable, and adequate, the court must examine whether the interests of the class are better served by
20 the settlement than by further litigation.”).

21 The Court’s role at this stage is not, however, to give final sign off to a settlement; rather, it is to
22 “make a preliminary determination on the fairness, reasonableness, and adequacy of the * * * proposed
23 settlement,” and to order that notice be provided to the class. *Id.* § 21.632; *see also* Newberg § 13:10
24 (“Preliminary approval is thus the first stage of the settlement process, and the court’s primary objective
25 at that point is to establish whether to direct notice of the proposed settlement to the class, invite the
26 class’s reaction, and schedule a final fairness hearing.”). Courts typically grant *preliminary* approval if a
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1 settlement is “neither illegal nor collusive and is within the range of possible approval.” Newberg §
2 13:13.

3 V. ARGUMENT

4 Plaintiffs propose this Settlement after years of litigation and months of negotiations. It is a
5 Settlement that will provide broad, tailored relief to the Class, and which eliminates the risk of a trial
6 that could result in Class Members getting nothing. The Settlement should be preliminarily approved,
7 and the Court should direct that notice of it be provided to the Class under the plan described below.

8 A. *The proposed Settlement is a result of informed negotiations, provides substantial relief to Class*
9 *Members, and averts the risk of the Class recovering nothing.*

10 1. *The Settlement is the result of extensive litigation and robust, arm’s-length negotiation.*

11 Courts typically approve settlements where “the proposed settlement was preceded by a lengthy
12 period of adversarial litigation involving substantial discovery” and “when settlement negotiations are
13 conducted by a third-party mediator.” Newberg § 13:14; *see also Ellis v. Les Schwab Tire Ctrs. of*
14 *Portland, Inc.*, No. 0809-12701, 2013 WL 5293976, at *1 (June 18, 2013 Or. Cir.) (approving settlement
15 that was “the product of good faith, arm’s-length negotiations between the parties”); Robert H. Klonoff,
16 *Class Actions and Other Multi-Party Litigation in a Nutshell* § 9.1, at 257 (2007) (“Courts have
17 generally applied a presumption that a settlement negotiated at arms’ length is fair and reasonable.”).

18 Both factors are present here. The Parties reached this Settlement only after years-long, hard-
19 fought litigation. *See supra* Section III (procedural posture). Given that background, the Parties were in
20 a good position to evaluate the value, strengths, and weaknesses of Plaintiffs’ and Class Members’
21 claims, and Bullseye’s defenses, when they began settlement discussions. To further ensure an optimal
22 outcome, however, the Parties engaged an experienced Portland-based mediator, Chris Kent.

23 The Court can thus have confidence that the proposed Settlement is the “product of serious,
24 informed, non-collusive negotiations[.]” *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 FRD. 99, 102
25 (SDNY 1997) (citing Manual § 30.41 (3rd ed 1995)).

1 2. *The Settlement's terms are fair, reasonable, and adequate.*

2 The Settlement's relief is comprehensive and generous. It creates a robust air monitoring
3 program that informs Class Members about the air they breathe; it compensates Class Members for
4 emissions-related expenses; and it distributes the remainder of the Settlement Cash Payment in an
5 equitable, administratively-feasible way. The Settlement is fair, reasonable, and adequate. It merits
6 preliminary approval.

7 A cornerstone of the Settlement is the \$1 million air monitoring plan. The proposed monitoring
8 plan serves two related purposes: to assure residents of the Class Area that Bullseye's installation of
9 baghouse emissions control systems on *all* its furnaces has substantially addressed its alleged emissions
10 of toxic metals, and to provide robust data of the Class Area's consequently improved air quality. If
11 approved, that plan would exceed any monitoring that has been conducted before in the Class Area, both
12 in scope and duration. For example, the DEQ's February 24, 2016 Bullseye Area-Wide Air Sampling
13 Plan involved the use of four particulate matter sampling locations.⁶

14 Also, the proposed air monitoring plan will be provided in addition to the significant facilities
15 improvements Bullseye has made since Plaintiffs filed this lawsuit. Since then, Bullseye has spent an
16 estimated \$2.2 million on air emissions improvements, and in the Settlement, Bullseye agrees to
17 continue to maintain baghouses on each of its furnaces. *See* Preusch Decl., Ex. A, Settlement Agreement
18 ¶¶ 2.10, 4.1 (reciting emissions-related improvements at Bullseye since February 2016).

19 On top of that prospective relief, Class Members will be entitled to the categories of monetary
20 relief described above: reimbursement for certain past and future expenses related to testing and
21 cleaning, and a *pro rata* payment. While the precise amount each Class Member receives is highly-
22 dependent on how many Claims are filed, the types of reimbursements Class Members claim, their
23 status as a renter or owner, and the makeup of their household, each Class Member or Claiming Class
24 Member Household could theoretically be entitled to up to \$5,800⁷ in reimbursements for soil testing,

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⁶ *Bullseye Area-Wide Air Sampling and Analysis Plan*, Oregon Dep't of Env'tl. Quality, at 6-7 (Feb. 24, 2016),
26 <https://www.oregon.gov/deq/FilterDocs/bullseye-sap10.pdf>.

27 ⁷ Whether the Class Member claims reimbursement for past or future expenses, that would include up to \$5,000 for soil
remediation per tax parcel, \$500 per tax parcel for soil testing, and \$300 for an air purifier. Preusch Decl., Ex. B (Claim
Form).

1 soil remediation, and air purifiers. *See id.* ¶¶ 4.5-4.6. However, Class Counsel believe based on
2 discovery to date and prior experience in class settlement administration that not all Class Members will
3 submit Claims, and not all of those that do will be entitled to or claim each category of relief. *See*
4 Newberg § 13:17 (discussing survey finding claims rates from below 5% to up to 82%). That will leave
5 a remainder from the Settlement Cash Payment after reimbursements are calculated, and Class Members
6 will be entitled to additional money through the *pro rata* plan of allocation of that remainder. *See*
7 Preusch Decl., Ex. A, Settlement Agreement ¶ 4.7 (describing allocation plan).

8 Whatever individual Class Members' payments end up being, the relief provided by the proposed
9 Settlement compares favorably to another environmental class action settlement recently approved by
10 the Circuit Court in a factually analogous case in Wasco County. On September 7, 2018, the Wasco
11 County Circuit Court granted final approval to a proposed settlement of an air pollution nuisance case in
12 The Dalles, Oregon. Preusch Decl., Ex. C (Final Approval Order, *Connors v. Amerities West, LLC*, No.
13 16-CV-25390 (Wasco Co. Cir. Ct. Sept 7, 2018)). The plaintiffs in that case, who filed in August 2016,
14 brought claims for nuisance, trespass, negligence, and gross negligence based on allegations of
15 "entrance of * * * noxious odors" from a wood preserving facility in The Dalles. *Id.*, Ex. D (Class
16 Action Allegation Compl., *Connors* (August 8, 2016)).

17 The settlement in that case applied to the owners and renters of approximately 5,472 households
18 in The Dalles, far more than the number of class properties identified in this case. *Id.*, Ex. E (Decl. of
19 Nicholas A. Kahl in Supp. of Pls.' Unopposed Mot. for Prelim. Approval of Class Settlement ¶ 6,
20 *Connors* (June 15, 2018)). Under that settlement, the defendant agreed to pay \$1.25 million, which will
21 be distributed to the class after payment of fees, costs, and service awards. *Id.*, Ex. F (Pls.' Unopposed
22 Mot. for Prelim. Approval at 3-4, *Connors* (June 15, 2018)). The defendant also agreed to spend at least
23 \$250,000 on measures to improve emissions at the plant. *Id.*

24 This \$6.5 million Settlement thus compares highly favorably to the recent *Amerities* settlement,
25 as it does to settlements approved in analogous cases outside of Oregon. *See, e.g., Moulton v. U.S. Steel*
26 *Corp.*, 581 F3d 344, 351 (6th Cir 2009) (affirming \$4.45 million settlement in air pollution nuisance
27 class action, which provided \$300 to each class member). The same factors that counseled the Wasco

County Circuit Court to rule in favor of *final* approval in *Amerities*—where the settlement provided a mix of money payments and assurances to class members about improved air quality—also support the Court granting *preliminary* approval here. Here, a Class Area containing fewer households will benefit from a larger Settlement Cash Payment, tailored relief, and a novel, robust air monitoring plan.

3. *Plaintiffs faced significant risk if they proceeded to trial.*

In reaching this Settlement, Class Counsel and Plaintiffs weighed Class Members’ recovery under the Settlement against a potential recovery at trial. *See* Newberg § 13:15 (“In ascertaining whether a settlement falls ‘within the range of possible approval,’ courts will compare the settlement amount to the relief the class could expect to recover at trial.”). Plaintiffs and Class Counsel understand that a jury could award far more than \$6.5 million to the Class at trial, but “it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 FRD 523, 527 (CD Cal 2004). Plaintiffs and Class Counsel weighed a *theoretical* future recovery against three substantial risks: that this expert-intensive environmental class action trial could result in an adverse judgment; that even if Plaintiffs prevailed at trial, Bullseye, its insurers, or both would not be able to pay a judgement for the Class; and that even if Bullseye or its insurers remained solvent after trial, the inevitable delay stemming from numerous anticipated post-trial appeals, actions for declaratory relief with respect to insurance coverage, or both would both postpone and dilute the impact of any payment or injunctive relief.

Courts routinely certify environmental class actions, but Plaintiffs believe this is the first *real property* pollution class action case certified in Oregon state court. *Cf. Hurt v. Midrex*, 276 Or 925, 556 P2d 1337 (1976) (class action for trespass of pollution on cars). While Plaintiffs are confident in the strength of their claims, they would face significant risk by taking this first-of-its-kind case to a jury. Any trial would involve significant additional expense for all Parties—creating additional expenses for Plaintiffs and the Class that would ultimately be deducted from any judgment awarded at trial. Indeed, at the September 6, 2018 final approval hearing for the settlement in *Connors v. Amerities*, the Wasco County Circuit Court noted “the difficulty and the expense associated with litigating these types of

1 [nuisance odor] claims individually, * * * it's unlikely that any class member could have obtained the
2 results individually given what the likely calculation of damages is versus the cost and expense of
3 getting there.”⁸ For these reasons, this class-wide Settlement is the most effective way to get relief to
4 Class Members.

5 Had the Parties proceeded to trial, Plaintiffs faced a not insubstantial risk that—even if a jury
6 returned a verdict in their favor—they would not be able to completely collect on the resulting
7 judgment. Following the Court’s order permitting Plaintiffs to add a claim for punitive damages,
8 Plaintiffs received significant discovery on the financial status of Bullseye. Preusch Decl. ¶ 6. While
9 Bullseye is a successful enterprise, Plaintiffs’ review of those records, as well as documents received in
10 response to a subpoena served on Bullseye’s bank, suggest the Class could face difficulties collecting on
11 any large judgment in its favor.

12 Plaintiffs also considered the potential insurance resources available to meet a judgment for
13 Plaintiffs. A senior partner at Keller Rohrback L.L.P. specializing in insurance coverage issues
14 extensively analyzed Bullseye’s insurance records obtained in discovery. Preusch Decl. ¶ 7. As a result
15 of that analysis, Class Counsel had a complete and realistic view of the potential insurance funds
16 possibly available to cover a judgment at trial. In considering those potential funds, Plaintiffs were
17 cognizant of the many potential arguments that Bullseye’s insurers would likely raise to avoid paying on
18 a successful judgment for Plaintiffs at trial. *See, e.g., St. Paul Fire & Marine Ins. Co. v. McCormick &*
19 *Baxter Creosoting Co.*, 324 Or 184, 923 P2d 1200 (1996) (discussing issues related to insurance
20 coverage in environmental setting); *Redwen v. Sino Clean Energy, Inc.*, No. CV 11-3936 PA (SSx),
21 2013 WL 12303367, at * 6 (CD Cal, July 9, 2013) (on final approval, finding settlement amount “well
22 within the range of possible approval” in securities class action “considering the limited insurance funds
23 available”).

24 In addition to those risks, Class Members faced the added risk, present in every case, that a trial
25 and subsequent post-trial actions and appeals could delay any relief for years. *Uppal v. CVS Pharmacy*,

26 ⁸ Audio of hearing available at *Audio: Amerities lawsuit settlement accepted by Circuit Court*, Gorge Country Media (Sept.
27 7, 2018), <https://gorgenewscenter.com/2018/09/07/amerities-lawsuit-settlement-accepted-by-circuit-court/> (cited portion
begins at 30:06).

1 *Inc.*, No. 3:14-CV-02629-VC, 2015 WL 10890652, at *1 (ND Cal Sept 11, 2015) (preliminarily
2 approving settlement where it appeared settlement would avoid “substantial costs, delay and risks that
3 would be presented by the further prosecution of the litigation”). Similarly, Plaintiffs and Class
4 Members likely would have needed to wait until the resolution of any declaratory judgement action
5 brought by Bullseye against its insurers to collect on a judgment or to enforce any behavioral changes
6 imposed on Bullseye at trial.

7 In sum, the Settlement is procedurally rigorous and substantively comprehensive. It provides
8 both monetary and meaningful on-the-ground relief. It merits this Court’s preliminary approval.

9 B. *Plaintiffs’ Robust Proposed Notice Plan*

10 In addition to preliminarily approving the Settlement, the Court should direct that notice be sent
11 to the Class about the Settlement’s terms and the rights, options, and deadlines for Class Members to
12 respond to the Settlement. Working with a respected national notice provider, Plaintiffs have developed
13 a proposed notice plan that mimics the class certification notice plan this Court previously approved at a
14 hearing in October 2018.

15 1. *The Legal Standard for Notice*

16 When a court certifies a class, it “shall direct that notice be given to some or all members of the
17 class under subsection E(2) of this rule[.]” ORCP 32 F(1). ORCP 32 E says, in pertinent part, that the
18 court may make an order requiring that notice be given “of the proposed extent of the judgment; of the
19 opportunity of members to signify whether they consider the representation fair and adequate, to
20 intervene and present claims or defenses or otherwise to come into the action, or to be excluded from the
21 class[.]”

22 2. *Plaintiffs Propose a Robust, Multimedia Notice Plan*

23 Plaintiffs have retained the national class action notice provider A.B. Data, Ltd. (the “Notice
24 Provider”) to help design and implement a robust, cost-effective notice plan. *See generally* Schachter
25 Declaration. Mr. Schachter’s declaration addresses the “where and when” of how notice will be given.
26 Details regarding the “whether, when, how, and under what conditions putative members may elect to be
27

1 excluded from the class,” ORCP 32 F(1), are clearly set forth in the proposed notice itself. Preusch
2 Decl., Ex. A, Settlement Agreement, Ex. 2 (Long Form Notice, or “LFN”).

3 The notice plan consists of three prongs: direct mail notice of the LFN; a Publication Notice in
4 local newspapers; and a settlement website, www.BullseyeClassAction.com.

5 Direct Mail: The Notice Provider will mail a 15-page LFN to the addresses of the known owners
6 of residential properties in the Class Area as of February 3, 2016, based on ownership information
7 obtained by Plaintiffs’ expert Greenfield Advisors, as well as to all known addresses for current
8 residents. Schachter Decl. ¶ 5. Before the initial mailing of the notice, the Notice Provider will run the
9 addresses of the intended recipients through the United States Postal Service (“USPS”) National Change
10 of Address database, a routine practice to verify and update addresses of intended recipients before any
11 notice mailing. *Id.* ¶ 6. For any notices that USPS returns as undeliverable as addressed, the Notice
12 Provider will attempt to ascertain the current addresses of the intended recipients using a number of
13 vendors specializing in such services. *Id.* ¶ 7.

14 If any Class Member, regardless of whether they received direct mail notice, contacts Class
15 Counsel or the Notice Provider and appears to be in the Class, either Class Counsel or the Notice
16 Provider will provide a copy of the notice. The LFN will also be publicly available on the settlement
17 website in English and Spanish.

18 Publication Notice: The Notice Provider has prepared a Publication Notice that it will publish via
19 a single one-eighth-page Friday advertisement in the Eastern Zone edition of *The Oregonian* and a
20 single one-quarter page advertisement in the *Southeast Examiner*. *Id.* ¶ 8; Preusch Decl., Ex. A,
21 Settlement Agreement, Ex. 3.

22 Website: Class Counsel has designed and will host a Court-approved website—
23 www.BullseyeClassAction.com—that will also provide a downloadable copy of the LFN, a Frequently
24 Asked Questions section based on that notice, and a link to public court documents.

25 Plaintiffs propose the following notice and opt out timeline:

- 26 • No later than twenty-eight (28) calendar days after entry of an Order granting Plaintiffs’

27 Motion for Preliminary Approval: Notice Provider mails LFN (the “Notice Date”) and

causes Publication Notice to be published in *The Oregonian* and *Southeast Examiner*, subject to publication schedule; Class Counsel publishes notice website.

- Forty-five (45) calendar days after the Notice Date: Deadline for opting out or objecting to the Settlement, as reflected by the postmark date.

Taken together, that multi-prong notice plan will be more than adequate to inform “some or all members” of this geographically coherent class of its rights. ORCP 32 F.

The information contained in the notice materials clearly informs Class Members of their rights and options, permitting them to make an informed decision about whether to opt out, take some other action, or do nothing at all. *See* Manual § 21.311 (notice should include “[s]ufficient information about the case * * * to enable class members to make an informed decision about their participation”).

The LFN includes the information suggested by ORCP 32 E(2): “the proposed extent of the judgment,” *see* Preusch Decl., Ex. A, Settlement Agreement Ex. 2 (LFN) at 10 (class member may not be able to sue regarding claims based on same underlying allegations if they do not opt out); “the opportunity of members to signify whether they consider the representation fair and adequate,” *see id.* at 11-12 (class members may appear in the case); and the opportunity to “intervene and present claims or defenses or otherwise to come into the action, or to be excluded from the class[.]” *id.*

Beyond that, ORCP 32 “does not specify any particular information that must be included in the notice to class members.” Oregon Civil Pleading and Practice §16.8-3(a) (2012 rev.). Plaintiffs’ proposed notice therefore includes the relevant items suggested by the Oregon State Bar’s Civil Pleading and Practice treatise, including a “general description” of the action and the relief sought, Preusch Decl., Ex. A, Settlement Agreement, Ex. 2 (LFN) at 4-5, the names of the representative parties, *id.* at 5, the names and contact info for Class Counsel, *id.* at 14, a “statement that a member may request exclusion from the class by submitting the request by a specified date and that, if a class member does not so request exclusion, the class member will be bound by the judgment,” *id.* at 10-11, a statement that the member may appear personally or through a lawyer, *id.* at 12, the address where the class member can direct inquiries (in this case, Class Counsel), *id.* at 14, and a statement that the class members should send notification of a new address, *id.* at 5. The detail provided by that notice is consistent with notices

1 this Court has approved in other matters. *Cf.* Declaration of Matthew Preusch in Support of Plaintiffs’
2 Motion for Approval of Class Notice, Ex. 3 (notice approved in *Liborio, et al. v. Del Monte Fresh*
3 *Produce, N.A., Inc., et. al.*, No. 0710-11657, Case Management Order at 2 (Or Cir, Jan 15, 2009)
4 (Bushong, J.)). And like the notice this court approved in *Liborio*, the LFN includes a simple opt out
5 form that class members may fill out and return to the Notice Provider. Preusch Decl., Ex. A, Settlement
6 Agreement, Ex. 2 (LFN) at 16; *see also* 3 William B. Rubenstein, *Newberg on Class Actions* § 9:46 (5th
7 ed 2014) (“The *Manual for Complex Litigation* states that for both notice accompanying class
8 certification and notice accompanying a proposed settlement, a form should be provided to class
9 members so that they may, by executing it, simply exclude themselves from the class.”).

10 VI. CONCLUSION

11 The Settlement provides broad relief to a Class that has waited nearly three years for a resolution
12 of their claims with Bullseye. Absent this Settlement, the Class would likely have to wait years more for
13 potential resolution of their claims at trial and on appeal, determination of insurance coverage and
14 subsequent appeals, and potential pursuit of a judgment after a possibly insolvent judgment debtor, with
15 no assurance of monetary or injunctive relief even if their claims succeeded. For all these reasons, and
16 because of the substantial relief provided by the Settlement, this court should:

- 17 • preliminarily approve the Settlement;
- 18 • approve the proposed plan and form of notice, and set the date by which notice must be
19 provided;
- 20 • set dates by which Class Members must act to exclude themselves from the Settlement,
21 object to the Settlement, or notify the Court that they intend to appear and speak at the
22 final approval hearing;
- 23 • set a date for the final approval hearing and a deadline for Plaintiffs to file a motion for
24 final approval; and
- 25 • set a date for Class Counsel to file a motion for fees and costs and service awards, with a
26 hearing to coincide with the Court’s final approval hearing.

1 DATED this 23rd day of January, 2019.

KELLER ROHRBACK L.L.P.

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3 By: s/ Matthew J. Preusch

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Facsimile: (503) 228-6551

Attorneys for Plaintiffs and the Class

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served a true copy of the foregoing PLAINTIFFS' CORRECTED
3 MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT upon the
4 following:

5 Allan M. Garten
6 Carrie Menikoff
7 Kent Robinson
8 GRM LAW GROUP
5285 Meadows Road, Suite 330
Lake Oswego, OR 97035

9 Attorneys for Defendant

10 by the following indicated method or methods:

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

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

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

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

23 ☒ by electronic transmission of a notice of filing by the electronic filing system provided by
24 the Oregon Judicial Department for the electronic filing and the electronic service of a document via the
25 Internet to the electronic mail (email) address of a party who has consented to electronic service under
26 UTCR 21.100(1).

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

3 DATED: January 23, 2019

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