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' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND ENTRY OF JUDGMENT

KELLER ROHRBACK L.L.P.
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I. UTCR 5.010 CERTIFICATION

Counsel for Plaintiffs have conferred with Counsel for Defendant on issues requiring conferral under UTCR 5.010. Defendant does not oppose this Motion for Final Approval of Class Action Settlement and Entry of Judgment ("Motion").

II. FAIRNESS HEARING

A Final Fairness hearing is set for this motion on May 10, 2019 at 3:00 p.m. Plaintiffs estimate the hearing will take one hour. Plaintiffs do not request court reporting services.

III. INTRODUCTION

After years of hard-fought litigation, the Parties achieved a settlement on January 16, 2019 ("Settlement").[1] That Settlement provides comprehensive relief to the Parties and the public. After this Court preliminarily approved that Settlement, Class Counsel directed the Court-approved notice to Class Members. Class Member response has been overwhelmingly positive, with a high claims rate and only a handful of objections and exclusions.

Now, pursuant to ORCP 32 D, Plaintiffs request this Court's final approval of the Settlement. Specifically, Plaintiffs request the Court's approval of:

- the Settlement's substantial monetary relief, which as explained below should result in the average Class Members receiving several hundred to several thousand dollars each;
- the unprecedented, neighborhood-wide $1 million air monitoring plan, for which Class Counsel has already issued requests for proposals to several independent engineering firms; and
- reasonable fees and costs for Class Counsel, not to exceed a total of $2.5 million, which covers Class Counsel's work and expenses to date as well as substantial anticipated future work administering the settlement.

Additionally, Plaintiffs request that the Court order the payment of Case Contribution Awards for Class Representatives; approve the Parties' chosen recipient, Friends of Trees, to receive any *cy pres* funds; order the Parties to report to the Court on their selection of the Independent Engineering Firm to handle

[1] Capitalized words and phrases used throughout this Motion carry the definitions set forth in the Class Action Settlement Agreement and Release ("Settlement Agreement") and exhibits, or the declarations filed in support of this Motion.

the air monitoring program; approve the more technical aspects of administering the Settlement, including appointing A.B. Data, Ltd. as the settlement administrator, approving the plan of allocation, approving the processing of late-filed claims, and approval of the disbursement of funds from the Qualified Settlement Fund to administer the Settlement; and enter final judgment while retaining jurisdiction as necessary to effectuate the Settlement. This relief is outlined in Plaintiffs' Proposed Final General Judgment.

As explained in this Motion, the Settlement is more than fair, reasonable, and adequate, and it merits this Court's final approval.

IV. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' Motion for Preliminary Approval explained the background of this case and the Parties' negotiation of the Settlement. The Court granted Plaintiffs' Motion, making a preliminary determination that the Settlement "is sufficiently fair, reasonable, and adequate." Order re: Pls.' Mot. Preliminary Approval, (finding "the proposed Settlement meets the standards for preliminary approval") (citing Manual for Complex Litigation (4th ed 2013) and case law).

Following the Court's preliminary approval of the Settlement, Class Counsel and A.B. Data, Ltd., ("Notice Provider"), completed the Court-ordered Class Notice Program. Declaration of Matthew Preusch in Supp of Pls' Mot. for Final Approval ("Preusch Decl.") ¶ 3; Declaration of Eric Schachter in Supp. or Mot. for Final Approval of Class Settlement ("Schachter Decl.") ¶¶ 6-14. Class Members have responded enthusiastically to the Settlement.

A. *The Parties completed the Court-ordered Class Notice Program.*

Class Counsel and the Notice Provider carried out the three primary prongs of the Court-ordered Class Notice Program: direct mail notice of the long-form notice ("LFN"); publication notice in local newspapers ("Publication Notice"); and creating and hosting a settlement website. *See generally* Schachter Decl. The successful efforts of Class Counsel and the Notice Provider ensured that "some or all [class] members" were notified of their rights, satisfying ORCP 32 F.

Direct Mail Notice: To date, the Notice Provider has mailed "Notice Packets"—including the 7-page LFN, claim form, and exclusion form—to 3,664 names and mailing addresses. Schachter Decl. ¶

12. To mail these packets, A.B. Data used the original Class Mailing List, which it cross-referenced through the National Change of Address database, and additional apartment addresses determined by Class Counsel to be in the class area. A.B. Data also responded to additional Class Member inquiries that it and Class Counsel received on a rolling basis. *Id.* ¶¶ 6-10. The U.S. Postal Service returned only 315 Notice Packets as undeliverable without a forwarding address. *Id.* ¶ 11. The Notice Provider successfully ascertained the current addresses of 96 of these people and re-mailed the Notice Packets accordingly. *Id.*

Publication Notice: On February 19, 2019, the Notice Provider published the Publication Notice in a single one-eighth page Friday advertisement in the Eastern Zone edition of *The Oregonian*. *Id.* ¶ 13, Ex. B (Publication Notices). On March 19, 2019, the Notice Provider published the Publication Notice in a single one-quarter page advertisement in the *Southeast Examiner*. *Id.*

Settlement Website Notice: On January 31, 2019, Class Counsel activated the Court-approved Settlement website, www.BullseyeClassAction.com. This website provided information about the Settlement, a downloadable copy of the LFN (in English and Spanish), a Frequently Asked Questions section, and a link to public court documents. Preusch Decl., Ex. 1 (website home page). Since its activation, the Settlement website has received 3,696 page views, while Keller Rohrback's own Bullseye website has received nearly 1,096 views since January 23, 2019 (the date of the preliminary approval hearing). Preusch Decl. ¶ 5.

Throughout the notice period, Class Counsel also promptly responded to Class Member and non-Class Member inquiries about the Settlement. In total, since the outset of the Class Notice Program, Class Counsel have responded to over 200 email and phone inquiries. Preusch Decl. ¶ 6. The Notice Provider promptly responded to phone inquiries as well. Schachter Decl. ¶ 14.

In addition to those formal notice tools, Class Members received notice through widely-distributed news reports. For example, *The Oregonian* noted that "[t]he settlement allows for owners and residents of each of the estimated 2,200 homes in the neighborhoods surrounding Bullseye, just

southwest of Cleveland High School and Powell Park, to get cash payments."[2] At least one national news outlet also reported on the Settlement, reporting that the "$6.5 million settlement with Bullseye Glass Co. will allow for cash payments for over 2,000 households in southeast Portland neighborhoods surrounding the glass maker."[3]

Along with those traditional media reports about the Settlement, Class Members also received notice of the Settlement through social media. *See, e.g.*, Preusch Decl., Ex. 8, Eastside Portland Air Coalition Facebook post "Update on Bullseye Class Action," (declaring "LAWSUIT SETTLED!").

The Class Notice Program therefore met ORCP 32 F's directive that "some or all" class members received notice.

B. *The Class Notice Program resulted in a high claims rate and very low exclusion and objection percentages.*

The Class responded positively to notice of the Settlement. The claims rate has been high, and very few Class Members objected or excluded themselves, all signs of a fair and reasonable settlement as explained below:

- **High Claims Rate:** Out of 3,664 claim forms mailed to date, Class Members have submitted 809 Claim Forms. Schachter Decl. ¶¶ 12, 17. This equates to a rate of 22% (809 out of 3,664). This is a high claims rate. *See infra*, Part. VI.B.1.

- **Low Opt-Out Percentage:** There have been 13 opt outs via Exclusion Request Forms. Preusch Decl. ¶ 8, Ex. 7 (exclusion forms). This means the opt-out percentage is 0.35% (13 out of 3,664). This a low opt-out percentage. *See infra*, Part. VI.B.2.

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[2] Aimee Green, *Bullseye Glass settles air-pollution lawsuit with SE Portland neighbors for $6.5 million*, The Oregonian (Jan. 24, 2019), https://www.oregonlive.com/news/2019/01/bullseye-glass-settles-air-pollution-lawsuit-with-se-portland-neighbors-for-65-million.html (providing link to settlement agreement). Other local news organizations also reported news of the Settlement in favorable terms. *Bullseye Glass settles class action lawsuit for $6.5M over toxic air pollution*, KGW8 (Jan. 25, 2019, 12:29pm), https://www.kgw.com/article/news/health/bullseye-glass-settles-class-action-lawsuit-for-65m-over-toxic-air-pollution/283-f8f37784-fa0d-459e-887a-db4d20b0d417; *Bullseye Glass agrees to class-action lawsuit settlement*, KATU (Jan. 24, 2019), https://katu.com/news/local/bullseye-glass-agrees-to-class-action-lawsuit-settlement (noting that "[t]he money will go toward a fund that will establish better monitoring of dangerous chemicals in the air and soil."); Ericka Cruz Guevarra, *Bullseye Glass reaches $6.5 million class-action settlement*, The Portland Tribune (Jan. 25, 2019), https://pamplinmedia.com/pt/9-news/418104-321330-bullseye-glass-reaches-65-million-class-action-settlement ("Proceeds will fund air quality testing, money to residents for air purifiers and soil testing, and legal fees"); *Bullseye Glass settles air pollution suit for $6.5M*, KOIN (Jan. 25, 2019, 4:43pm) https://www.koin.com/news/civic-affairs/bullseye-glass-settles-air-pollution-suit-for-65m/1725457086.

[3] *Portland Glass Maker Settles Class Action Lawsuit for $6.5M*, U.S. News (Jan. 25, 2019, 8:15am), https://www.usnews.com/news/best-states/oregon/articles/2019-01-25/portland-glass-maker-settles-class-action-lawsuit-for-65m.

- **Low Objection Percentage:** There have been two objections, and three identical critiques of the Settlement from non-Class Members. *Id.* ¶ 8, Exs. 2-6 (objections). This equates to an objection rate of 0.05% (2 out of 3,664). This is a very low objection percentage, particularly in the tort context. *See infra*, Part. VI.B.3.

Of the 809 claims filed, 55 were filed after the April 6 postmark date deadline. Schachter Decl. ¶ 17. In addition, two Exclusion Request Forms were postmarked two days late. *Id.* ¶ 15; Preusch Decl. ¶ 8, Ex. 7 (exclusions). Plaintiffs request—and Bullseye does not oppose—treating as timely any late-filed claims and Exclusion Request Forms received by Class Counsel or the Notice Provider on or before May 2, 2019.

C. *Class Members will recover significant reimbursement and cash payments and other relief from the Settlement.*

In addition to benefitting from the $1 million, two-year air monitoring plan, Class Members can expect to receive reimbursement and cash payments of several hundred to several thousand dollars if the Settlement is approved. Those payments will be based on (1) the reimbursement for Class Members' air-pollution related expenses, and (2) Class Members' *pro rata* share of the remainder of the fund according to the Settlement's plan of allocation.

Reimbursement of Expenses: According to the Notice Provider, of the 809 claims filed, 73 of those have claimed reimbursement for "past expenses" and 397 have claimed reimbursement for potential future expenses; namely, soil testing, soil remediation, and air purifiers. *See* Schachter Decl. ¶ 18 (detailing reimbursement sought). In total, Class Members have requested nearly $2 million—$1,947,583—in reimbursement, which assumes that Class Members who are seeking reimbursement for future expenses will be entitled to the maximum amount in each category. *Id.*; *see also* Settlement Agreement § 4.6 (describing caps for forms of reimbursement).

The bulk of that reimbursement—approximately $1.6 million—is for future soil remediation, which is contingent upon the outcome of soil testing showing elevated levels of chromium, cadmium, or arsenic in soils. Settlement Agreement § 4.6. Thus, reimbursement of expenses will total anywhere from roughly $340,000 to roughly $2 million, depending on how many of the Class Members who are seeking reimbursement qualify for it based on the results of their soil testing.

That leads to the following breakdown of the $6.5 million settlement fund:

Description	Amount
Total Settlement Fund	$6.5 million
Requested Fees & Costs	-$2.5 million
Air Monitoring Program	-$1 million
Requested Reimbursement	-$1.94 million to $340,000
Requested Case Contribution Awards	- $55,000
Initial Notice Costs	-$35,000
Remainder for Plan of Allocation	**$970,000 to $2.57 million**

Allocation of Remainder of Fund: The amounts remaining in the fund after the deductions outlined above, or roughly $970,000 to $2.57 million, will be divided among Class Members according to the plan of allocation's *pro rata* distribution on a per-share basis. Settlement Agreement § 4.7. Under the allocation plan, each claimant is assigned a number of "shares" based on whether they own or rent their property, and the number of people in that household included in the claim. *Id.*

Based on A.B. Data's preliminary analysis of the claims filed, Class Members are claiming a total of 3,325.5 shares among which the $970,000 to $2.57 million fund remainder would be divided. Schachter Decl. ¶ 18. Thus, each share could be worth anywhere from approximately $292 to $772. Under the plan of allocation, the total number of shares allocated to each Claiming Class Member Household = 1 + (1/2 of the number of people living in the household) + 3 (if the Claiming Class Member Household owned the Class Property).

Under that formula and with the estimated per-share value of $292 to $772, a single renter—who is entitled to 1.5 shares—can expect a residual cash payment of anywhere from $438 to $1,158. A Claiming Class Member Household family of four that owned their home, which would be entitled to 6 shares, could get approximately $1,752 to $4,632. And a Claiming Class Member who owned but did not live in a class property, who would be entitled to 4 shares, could receive from $1,168 to $3,088.

Those substantial cash payments for reimbursement and *pro rata* allocation make this settlement more than fair, reasonable, and adequate for Class Members.

V. LEGAL STANDARD

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

VI. ARGUMENT

The Court should grant Final Approval to this Settlement because it provides substantial monetary and non-monetary benefits for Class Members following years of contentious litigation. The result here is fair, reasonable, and adequate for three reasons. First, (A) the Settlement provides comprehensive relief to the Class, particularly considering the trial risks; second, (B) the Settlement has

received a truly positive reaction from the Class; and third, (C) the Settlement was the product of arms-length negotiations, well-informed by extensive discovery.[4]

In conjunction with approving the Settlement, the Court should also: (D) approve Class Counsel's request for reasonable fees and costs; (E) approve reasonable Case Contribution Awards for the Named Plaintiffs; (F) approve the Parties' chosen recipient of any residual funds under ORCP 32 O; and (G) approve the more technical aspects of administering the Settlement.

A. *The Settlement provides substantial value and comprehensive relief to the Class, particularly considering the trial risks.*

The Settlement provides substantial value and comprehensive relief to the Class, particularly when the potential risks of trial are considered. In reaching this Settlement, Class Counsel and Plaintiffs weighed Class Members' recovery under the Settlement against a potential recovery at trial. *See* 4 William B. Rubenstein, Newberg on Class Actions § 13:15 (5th ed 2014) ("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."); *id.* § 13:49 ("[T]he value of a settlement to the settling plaintiffs is the most important factor in the court's decision to approve or disapprove a settlement."). Based on this evaluation, the Settlement is clearly a win for the Class.

Substantial Value and Comprehensive Relief: The Settlement provides $6.5 million in total relief. This covers a $1 million air monitoring plan, reimbursement for Class Members' pollution-related costs (including soil testing, soil remediation, and air purifiers), cash payments to Class Members, litigation fees and costs, and Case Contribution Awards for the Named Plaintiffs. Settlement Agreement §§ 4.2-4.7

The Settlement is generous compared to another recent neighborhood air pollution class settlement in Oregon. Pl.'s Mot. Final Approval Class Settlement, *Connors v. Amerities West, LLC*, No. 16-cv-25390, at 3-4 (Wasco Cty Cir Ct Aug. 17, 2018) (seeking final approval of $1.25 million

[4] When evaluating the adequacy of a proposed settlement in the class action context, courts often evaluate these and similar factors, none of which are dispositive. *See* 4 William B. Rubenstein, Newberg on Class Actions § 13:48 (5th ed 2014). Additional factors include whether counsel on both sides endorse the settlement and the defendant's ability to withstand a larger judgment. Both these factors also favor finding the Settlement fair and reasonable in this case.

settlement on behalf of potentially more than 5,000 residents). This Settlement is also generous compared to settlements outside of Oregon. *See, e.g.*, *Moulton v. U.S. Steel Corp.*, 581 F3d 344, 351 (6th Cir 2009) (affirming $4.45 million settlement in air pollution nuisance class action, which provided $300 to each class member).

Under the Settlement's reimbursement and allocation scheme, *see supra* Part IV.C., Class Members will receive hundreds or thousands of dollars in cash payments if the Settlement is approved. In addition to those cash payments, Class Members (and the public) will benefit from a robust, two-year air monitoring program in the class area. That is a fantastic outcome, especially after considering the numerous risks presented by trial.

Trial Outcome: The value of this Settlement becomes even more apparent when juxtaposed against the risks associated with any trial. Plaintiffs and Class Counsel evaluated the substantial value and comprehensive relief of the Settlement against three potential negative outcomes:

- **Expert-Intensive Trial:** Trial would be an expert-intensive environmental class action involving complicated legal and factual questions and battles between the experts. Plaintiffs have no guarantee a jury would find in their favor. And while courts routinely certify environmental class actions, Plaintiffs believe this is the first real-property pollution class action certified in Oregon state court, and would have been the first such trial. *Cf. Hurt v. Midrex Div. of Midland Ross Corp.*, 276 Or 925, 556 P2d 1337 (1976) (class action for trespass of pollution on cars).

- **Defendant's Inability to Withstand Larger Judgment:** Even if Plaintiffs prevailed at trial, Bullseye, its insurers, or both may not have been able to pay a judgement for the Class. This risk is one widely recognized by courts around the country as important to consider when evaluating the fairness of a settlement. *See* Newberg § 13:48 (discussing the "capacity for the defendant to withstand larger judgment").

- **Delay and Dilution of Relief:** Even if Plaintiffs won at trial and Bullseye remained solvent, the inevitable delay stemming from numerous anticipated post-trial appeals, actions for declaratory relief with respect to insurance coverage, or both, could postpone and dilute the impact of any payment or injunctive relief. This is particularly important in the context of the Settlement's injunctive relief, which is intended to control and mitigate the impact of Bullseye's pollution.

B. *The Settlement has generated an overwhelmingly positive reaction from the Class.*

The Class's positive reaction to the Settlement "demonstrates that the Settlement Agreement is fair and reasonable." *Arnett v. Bank of Am., N.A.*, No. 3:11-CV-1372-SI, 2014 WL 4672458, at *10 (D Or Sept 18, 2014) (citing cases); *see also* Newberg § 13:54.

A high claims rate coupled with low opt-out and objection percentages indicates a positive reaction to a settlement. *See Arnett*, 2014 WL 4672458, at *10 (citing cases); *accord Hanlon v. Chrysler Corp.*, 150 F3d 1011, 1027 (9th Cir 1998) ("[T]he fact that the overwhelming majority of the class [members] * * * stayed in the class presents at least some objective positive commentary as to its fairness."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir 1995) ("In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors.").

Following news of the Settlement in this case, there has been (1) a high claims rate, (2) a low percentage of opt-outs, and (3) very few objections. Also, (4) the few objections received should be overruled for reasons provided below.

1. *There has been a high claims rate among the Class.*

A claims rate of more than 15% is considered "positive." *See Arnett*, 2014 WL 4672458 at *14. Indeed, "[s]ingle-digit claims rate settlements also are routinely approved." *See Lee v. Ocwen Loan Servicing, LLC*, No. 14-CV-60649, 2015 WL 5449813, at *22 (SD Fla Sept 14, 2015) (approving settlement, citing *In re Online DVD—Rental Antitrust Litig.*, 779 F3d 934, 944–45 (9th Cir 2015) (less than 4% filed claims)); *Sullivan v. DB Invs., Inc.*, 667 F3d 273, 329 n.60 (3d Cir 2011) (claims rates in consumer class settlements "rarely" exceed 7%).

Here, based on the total number of Notice Packets mailed, the Settlement's claim rate is 22% (809 out of 3,664). Schachter Decl. ¶¶ 12, 17. This is a positive reaction from the Class—an indication that the Settlement is fair and reasonable.

2. *There is a low opt-out percentage among the Class.*

An opt-out percentage of around 1% is generally considered low. *Arnett*, 2014 WL 4672458 at *14; *see also In re Nat'l Football League Players Concussion Injury Litig.*, 821 F3d 410, 438 (3d Cir

2016), as amended (May 2, 2016) (noting that "only approximately 1% of class members objected and approximately 1% of class members opted out. We agree with the District Court that these figures weigh in favor of settlement approval."), *cert denied*, 137 S Ct 607 (2016); *In re Processed Egg Prods. Antitrust Litig.*, 284 FRD 249, 269 (ED Pa 2012) (opt-out rate of 1.14 percent of class members was "virtually di minimis" and "weigh[ed] in favor of the proposed settlement's fairness and adequacy"). A 1% opt-out rate is particularly low in the mass tort context. *See* Theodore Eisenberg and Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand L Rev 1529, 1549 (2004) (noting that the average opt-out percentage in mass tort class actions was 4.6% as of 2004).

Here, the opt-out percentage is 0.35% (13 out of 3,664). Preusch Decl. ¶ 8. An opt-out percentage of 0.35% is low generally, and particularly in the context of a property tort class action like this one. This low percentage of opt-outs indicates a positive reaction from the Class—another indication that the Settlement is fair, reasonable, and adequate.

3. *Almost no Class Members objected to this high-profile Settlement.*

"[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of [the] proposed class settlement are favorable to the class members." *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 FRD 523, 529 (CD Cal 2004) (citing cases). Here, there have only been two objections, as well as three identical critiques of the Settlement from *non*-Class Members, who do not have standing to object. Preusch Decl. ¶ 7. This means that, at most, the percentage of objectors is 0.1% (5 out of 3,664); excluding the non-Class Members, the percent is 0.05% (2 out of 3,664). Preusch Decl. ¶ 7. Such a low objection percentage indicates a positive reaction from the Class to the high-value Settlement—yet another indication that it is fair, reasonable, and adequate.

4. *The Court should not reject the Settlement based on objectors' arguments.*

Three non-Class Members and two Class Members critique the Settlement.[5] Their criticisms fall into three categories: First, that the Settlement should compensate for additional forms of injuries, namely health concerns (Preusch Decl., Ex. 3, Watson Objection); second, that the Settlement should have allocated residual funds differently by giving property owners larger shares (Preusch Decl., Ex. 2, Sterner Objection); and third, that the Settlement should compensate non-class members who bought property in the class area after February 3, 2016. (Preusch Decl., Exs. 4, 5, and 6, Bennet, Anderson, and Sun Objections). The Court should not reject the Settlement based on these objections because they lack merit, as explained below. *See DeSantis v. Snap On Tools Co., LLC*, No. 06-cv-2231, 2006 WL 3068584 at *6 (DNJ Oct 27, 2006) ("Additionally, the lack of merit of the objectors' arguments also weighs in favor of approving the Settlement.").

a. The Settlement should not compensate for health concerns because this is not a personal injury case.

Kathleen Watson objects that the Settlement should include reimbursement for "medical testing people may have done or wanted to do" in addition to the "benefits the lawsuit does address." Preusch Decl. Ex. 3.

The Settlement does not compensate for medical testing for two reasons. First, this is not a personal injury case. Pls.' Mem. in Supp. of Mot. for Class Cert. 13, Nov. 28, 2017. Further, as this Court is aware, personal injury claims are rarely, if ever, certifiable as class claims. The fact that this is not a personal injury case is reflected in the Settlement, which is a compromise between the Parties that includes the relief the Class Representatives and Class Counsel deemed most material based on their legal claims and the full factual record as developed in this litigation. *See* 2 Joseph M. McLaughlin, McLaughlin on Class Actions: Law and Practice § 6:23 (15th ed 2018) ("The judgment of competent and experienced class counsel that a settlement and plan of allocation is fair and reasonable is entitled to substantial weight.") (citing cases).

[5] The Long Form Notice advised Class Members who wish to appear at the May 10 Fairness Hearing that they "must file a written notice of intent to do so with the Court no later than April 26, 2019." LFN at 6. No Class Members have done so; however, Mr. Bennett—a non-Class Member—has filed a notice that he wishes to appear. Preusch Decl., Ex. 4. While Mr. Bennett does not have standing to object, Plaintiffs do not object to the Court hearing from Mr. Bennett if it wishes.

Second, Multnomah County has already offered free lead testing "in response to high levels of airborne lead" that state officials linked "to emissions from Bullseye Glass Co."[6] And those lead tests did not show "lead levels that would require medical care or follow up."[7]

For these reasons, this objection should be overruled.

b. The Settlement funds should not be allocated differently because doing so does not promote fairness.

Michael Sterner objects that, under the Settlement's allocation of residual funds, a Class Member who is a non-resident property owner should be entitled to the same compensation as a Class Member who both owns and lives on their property ("maximum possible Payment of Residual Amounts in the Settlement Fund"). Preusch Decl. Ex. 2. Mr. Sterner's proposal might make the ultimate allocation more equal, but it would also make it less fair, because residents would receive no additional compensation for their alleged impacts to their quality of life in the period post-dating February 3, 2016.

"Generally, a plan of allocation that reimburses class members based on the type and extent of their injuries or the strength of their claims on the merits is presumptively reasonable." McLaughlin § 6:23. Here, the Named Plaintiffs and Class Counsel, in negotiations with Bullseye, arrived at an allocation formula they deemed fair and equitable: Class Members who both own and live on Class Properties are provided greater compensation than Class Members who own but do not live on the property. Settlement § 4.7. This decision reflects "[t]he judgment of competent and experienced class counsel," and should be that a "entitled to substantial weight." McLaughlin § 6:23.

Mr. Sterner's proposed allocation, on the contrary, would make everyone's compensation equal even though they suffered different damages. Such an allocation would be far less equitable than the allocation negotiated by Named Plaintiffs, Class Counsel, and Bullseye. And it would be inconsistent with the Plaintiffs' theory of the case, which included allegations about interference with residents' use and enjoyment of their properties. For this reason alone, Mr. Sterner's objection should be overruled.

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[6] *Multnomah County to Offer Free Lead Tests in SE Portland Friday, May 20, 2 to 6 p.m.*, Multnomah County (May 20, 2016) https://multco.us/multnomah-county/news/multnomah-county-offer-free-lead-tests-se-portland-friday-may-20-2-6-pm.

[7] April Baer, *Lead Tests For Bullseye Glass Neighbors Come Back Clean*, OPB (May 25, 2016, 3:14pm), https://www.opb.org/news/series/portland-oregon-air-pollution-glass/may-lead-test-results-bullseye-glass/.

Mr. Sterner's objection is also based on two fallacies. First, that the Parties agree Bullseye caused "compensable harm." Bullseye emphatically does not agree. *See* Settlement Agreement § 8.1 ("Bullseye denies any wrongdoing or liability * * * ."). Second, Mr. Sterner calls the February 3, 2016 cut-off date arbitrary, but that date is publicly significant, because it reflects when news about Bullseye's pollution plume became public knowledge. February 3, 2016 is also a date this Court has endorsed as a factual and legal matter through its approval of that date in the certified class definition.

c. The Settlement should not compensate non-Class Members because non-Class Members are not entitled to relief.

Non-Class Members Blake Bennet, Matt Anderson, and Eric Sun submitted identical "objections" arguing that the Settlement should provide reimbursement for soil testing and remediation for property owners who purchased property in the Class Area *after* the Bullseye hotspot was made public on February 3, 2016. Preusch Decl. Exs. 4, 5, and 6. There are three reasons why this objection should be overruled. First, as a preliminary matter, Mr. Bennett, Mr. Anderson, are Mr. Sun are not Class Members, so they do not have standing to object. *See, e.g., Heller v. Quovadx, Inc.*, 245 F App'x 839, 842 (10th Cir 2007) ("Rule 23(e)(4) of the Federal Rules of Civil Procedure provides only that 'class member[s] may object to a proposed settlement.' As such, 'non-class members have no standing to object * * * .'"); Newberg § 13:22 ("Courts regularly find that nonclass members have no standing to object to a proposed settlement or to the notice thereof."). Second, because they are not Class Members receiving compensation in the Settlement, they are also not releasing any claims they may have against Bullseye. This means they are free to conduct soil testing and remediation on their own, and seek reimbursement from Bullseye if they believe they are entitled to it. Finally, if their concern is that the prior owners of their properties "did not perform any soil testing or soil remediation prior to the sale of the home" to them, they should have raised that concern with the prior owners at the time and required it as a condition of the sale; public information arguably put them on notice of the potential need to do so.[8]

[8] *See, e.g.*, April Baer, *The Global Reach of Bullseye Glass*, OPB (Mar. 15, 2016, 9:15am), https://www.opb.org/news/series/portland-oregon-air-pollution-glass/bullseye-glass-portland-air-pollution-global-impact/ ("Over the past few weeks you've heard us report on the emissions tests that revealed unhealthy levels of heavy metals near the Bullseye and Uroboros glass plants in Portland.").

While these complainants may have arguments they can raise with their predecessors-in-interest, or with Bullseye, they do not have valid objections against this Settlement.

In sum, none of the objections are sustainable, and none merit rejecting this Settlement, which would deny considerable relief to Class Members and would put the parties back at square one. *See* LFN at 7 (if court does not approve settlement, it becomes null and void and "the case will proceed as though the Settlement Agreement was never entered into").

C. *The Settlement was the product of arms-length negotiations, well informed by extensive discovery.*

Courts typically approve settlements where "the proposed settlement was preceded by a lengthy period of adversarial litigation involving substantial discovery" and "when settlement negotiations are conducted by a third-party mediator." Newberg § 13:14; *see also Ellis v. Les Schwab Tire Ctrs. of Portland, Inc.*, No. 0809-12701, 2013 WL 5293976, at *1 (Or Cir June 18, 2013) (approving settlement that was "the product of good faith, arm's-length negotiations between the parties"); Robert H. Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* § 9.1, at 257 (3rd ed 2007) ("Courts have generally applied a presumption that a settlement negotiated at arms' length is fair and reasonable."). Both factors are present here. The Parties engaged in years of adversarial litigation before negotiating this Settlement with the oversight of an experienced mediator. Settlement Agreement § 2.9.

The Parties reached this Settlement after nearly three years of litigation. Plaintiffs filed this case in March 2016. Since then, the Parties have spent significant funds to research, develop, and argue this case, engaging in extensive motion practice, including a motion to dismiss, a motion for leave to amend to add a claim for punitive damages, and a motion for class certification. Crucially, the Court granted Plaintiffs' motion for class certification. Order re Pls.' Mot. for Class Certification, Feb. 28, 2018. After the Court granted class certification, the parties engaged a third-party mediator to aid settlement discussions.

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 ¶ 2. The Parties have received documents in response to

subpoenas and public records requests from over 50 third-party entities. *Id.* at ¶ 3. Plaintiffs also took the depositions of nine current or former Bullseye employees and managers, including Bullseye principals Daniel Schwoerer and Lani McGregor. *Id.* In addition, the Parties have conducted numerous interviews and depositions with third-party witnesses. Bullseye, likewise, took depositions of the named Plaintiffs, and of numerous third parties. *See* Settlement Agreement § 2.8 (detailing litigation history). Through this discovery, the Parties created a strong factual record on which to evaluate their claims and inform their negotiations. *See Rodriguez v. W. Publ'g Corp*., 563 F3d 948, 967 (9th Cir 2009) ("Extensive discovery had been conducted * * * . From this the district court could find that counsel had a good grasp on the merits of their case before settlement talks began.").

The Parties reached this Settlement after engaging in "intense mediation efforts between April 2018 and January 2019." *See* Settlement Agreement § 2.9. These efforts involved two mediators, making them at "arms-length," and "included at least three day-long mediation sessions, numerous additional in-person and telephonic conferences, and written exchanges." *Id.* These robust, arms-length negotiations helped the Parties finally achieve this Settlement.

D. *The Court should approve Class Counsel's reasonable fees and costs.*

Class Counsel and Plaintiffs labored for years on this challenging, complicated case. They overcame Bullseye's motion to dismiss and successfully moved this Court to add a claim for punitive damages and to certify a class. That work has resulted in a Settlement that provides genuine, lasting relief for Class Members and the public. Class Counsel's zeal, diligence, and creativity in achieving these results merits granting Class Counsel's request for attorneys' fees and reimbursement of expenses. Notably, no one has objected to the portion of the Settlement Agreement authorizing Class Counsel to request $2.5 million in fees and costs. Settlement Agreement § 4.3.

"Under ORCP 32 M the court has broad authority to award fees in a class action lawsuit." *Scharfstein v BP West Coast Prods., LLC*, No. 1112-17046, 2015 WL 1255571, at *4 (Or Cir Mar 11, 2015). Here, Class Counsel, after years of unpaid, expert-intensive litigation with no guarantee of recovery, is requesting $2.5 million *total* in fees and costs. *See* Settlement Agreement § 4.3. Of that

$2.5 million, $414,015.84 is to reimburse expenses already extended by class counsel or the Notice Provider, Preusch Decl. ¶ 13; Declaration of Karl G. Anuta in Support of Plaintiffs' Motion for Final Approval ("Anuta Decl.") ¶ 11; Schachter Decl. ¶ 20, as well as the future expenses of administering the Settlement, estimated at over $29,000. Schachter Decl. ¶ 20.[9] The remaining $2.08 million to compensate Class Counsel's fees—a reasonable percentage of the $6.5 million fund—represents far less than Class Counsel's total fees based on reasonable rates and hours worked, which total over $3 million. Preusch Decl. ¶¶ 9-10; Anuta Decl. ¶¶ 2-3.

The Court should grant Class Counsel's fees and expenses reimbursement request for two reasons. First, the request is reasonable under the percentage-of-fund approach Oregon courts use to gauge fee requests in the class action context, especially when compared to Class Counsel's "lodestar" of more than $3 million. *See Strawn v. Farmers Ins. Co. of Oregon*, 353 Or 210, 219-20, 297 P3d 439 (2013). Second, this request is reasonable when evaluated under ORCP 32 M's factors.

1. *Plaintiffs' fee request is as a percentage-of-fund.*

Plaintiffs' fee request of $2.08 million—which in addition to covering more than three years of litigation must also cover Class Counsel's future work anticipated over the next two years to administer this Settlement—is a reasonable percentage of the fund Class Counsel recovered for the Class.

A normal percentage in a "complex class action[] * * * tend[s] to be between 20 to 30 percent of the recovered fund," and "circumstances" may even justify an "upward * * * adjustment." *Strawn*, 353 Or at 229-30. Here, the $2.08 million requested in fees—approximately 32% of the $6.5 million fund—is close to the typical range and justified by the facts of this case.

In addition to the percentage-of-fund approach, courts sometimes use the lodestar method to cross-check the reasonableness of a fee request. *See Strawn*, 353 Or at 220-21. Here, when evaluated against Class Counsel's lodestar, the $2.08 million request is similarly reasonable.

Under the lodestar method, an attorney is awarded a "fee based on a reasonable hourly rate, multiplied by a reasonable number of hours devoted to work on the case." *Id.* at 217 (also discussing

[9] This total does not include the $35,000 Bullseye's insurers have already deposited into the QSF to fund initial notice costs. Settlement Agreement §§ 5.2-5.5.

possible adjustments). As of April 30, 2019, Class Counsel has dedicated over 6,700 hours to this litigation. Preusch Decl. ¶¶ 9-10; Anuta Decl. ¶¶ 2-3. At Class Counsel's usual and customary hourly rates, Class Counsel could claim over $3.1 million in fees, Preusch Decl. ¶¶ 9-10; Anuta Decl. ¶ 3, nearly 50 percent *more* than the $2.08 million Class Counsel is requesting.

And this lodestar calculation does not even include an estimate of future work, which should be taken into account. *Cf. Reyes v. Bakery & Confectionary Union & Indus. Int'l Pension Fund*, No. 14-CV-05596-JST, 2017 WL 6623031, at *14 (ND Cal Dec 28, 2017) (including estimated hours for "future work" related to, inter alia, "managing class members' claims"). A sample of the future work that Class Counsel must perform or oversee following Final Approval includes:

- coordinating with A.B. Data to design and distribute a second round of notice to Class Members claiming reimbursement for future expenses, Settlement Agreement § 4.6;
- overseeing A.B. Data's review of Class Member claim forms, including following up with Class Members as necessary for additional information, and in general assisting with the claims administration process, *id.* § 6.2;
- reviewing bids from qualified engineering firms seeking to perform the two-year air monitoring program, overseeing that firm for the duration of the program, and facilitating the disposition of equipment used in the monitoring, *id.* § 4.4;
- working with Class Members and Bullseye as necessary to comply with any requirements of the Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b), *id.* §§ 4.7, 14.3;
- after claims are paid, providing a report to this Court confirming the purpose of the Settlement fund has been fulfilled and seeking an order that the fund be closed, *id.* § 10; and
- more generally, "undertak[ing] the necessary steps to support and effectuate the terms of this Settlement Agreement if it is approved by the Court." *Id.* § 14.3.

This has been a complex case that Class Counsel has efficiently litigated, and more work remains to be done for which Class Counsel will not receive any additional compensation or cost reimbursement.

Nonetheless, Class Counsel is asking for fees far less than Class Counsel's lodestar. On those facts, Class Counsel's $2.05 million request is a reasonable percentage of the fund.

2. *Class Counsel's fee and expenses are reasonable under ORCP 32 M's factors.*

The $2.5 million Plaintiffs seek in fees *and* costs is also reasonable when evaluated under ORCP 32 M's five factors for evaluating fee requests in the class action context. These factors, none of which are controlling, include: (a) time and effort spent by Class Counsel on the litigation, coupled with quality of service; (b) results achieved and benefits conferred on the class; (c) magnitude, complexity, and uniqueness of the litigation; (d) contingent nature of success; and (e) whether the fees are "excessive" under Oregon Rule of Professional Conduct 1.5. *See Scharfstein*, 2015 WL 1255571, at *4. Notably, many of these factors overlap with considerations that support finding the Settlement itself fair, reasonable, and adequate, particularly the substantial relief secured for the Class considering the trial risks.

a. Class Counsel spent significant time and effort on this litigation, providing highly specialized, extensive, and high-quality service to the Class.

Under ORCP 32 M(1)(e)(i), when deciding the reasonableness of a request for fees and costs, courts should evaluate the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered. Here, Class Counsel have spent a great deal of time and effort on this case and provided excellent service to the class.

Time and Effort: As of April 30, 2019, Class Counsel have spent a combined 6,793.05 hours on this litigation. Preusch Decl. ¶ 9; Anuta Decl. ¶ 2. These hours were dedicated to: intensive fact discovery; site inspections of the Bullseye Facility and Plaintiffs' homes; soil, dust, and bodily testing of certain Class Members; responding to Class Member inquiries; over 20 depositions; and numerous, vigorously contested motions, including Plaintiffs' motions for punitive damages and class certification, the latter of which was accompanied by three initial and three rebuttal expert reports. Settlement Agreement § 2.9; Preusch Decl. ¶ 12; Anuta Decl. ¶ 10.

The time and effort Class Counsel invested in this case support a finding that the request for fees and costs is reasonable. This request's reasonableness is further sustained by the quality of the work

done, and Class Counsel's ability to apply complex legal and scientific theories to this property-based environmental class action.

Nature, Extent, and Quality of Service: The environmental issues at the heart of this class action were what initially made it compelling and necessary, but also complicated and challenging. Similar to the situation in *Connors v. Amerities*, here it was "unlikely that a class member could've obtained the results individually, given what the likely calculation of damages is versus the cost and expense of getting there[.] [A]nd so [a] class [action] really is the only way to do this[.]"[10] From day one, this case presented numerous challenges, and complicated factual, scientific, and legal issues. Class Counsel rose to every challenge. *See* Tr. Class Cert. Hearing at 103:10-11 (comment by Court that case has been "vigorously litigated").

On the factual and scientific front, Class Counsel identified the proper methodology for determining the extent of Bullseye's pollution, using AERMOD modeling. On the legal front, Class Counsel determined how best to calculate and fix the damage Bullseye wrought. Class Counsel's efforts led this Court to certify what we believe is the first real property pollution class action in Oregon state court, and, ultimately, culminated in this Settlement.

The time, effort, and quality of service provided by Class Counsel support finding the requested fees and costs reasonable.

b. The Settlement achieves a substantial result and confers numerous benefits upon the Class.

Under ORCP 32 M(1)(e)(ii), when determining whether fees and costs are appropriate, courts should evaluate the "results achieved and benefits conferred upon the class." Here, the results achieved are found in the substantial relief provided by the Settlement, including $4 million in total relief that confers numerous benefits upon the Class.

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

These benefits include the $1 million, two-year air monitoring plan, Bulleye's commitment to filter emissions, reimbursement for Class Members' pollution-related costs (including soil testing, soil remediation, and air purifiers), and cash payments to Class Members. Settlement Agreement §§ 4.2-4.7.

These benefits do not just benefit the Class, however, but also the "public at large," an additional factor to consider when deciding whether a proposed fee award is reasonable. *See Strawn v. Farmers Exchange*, No. 9908-09080, 2004 WL 5308664 (Or Cir Dec 22, 2004) (noting that it is important to provide a large fee award when there are benefits conferred on the "public at large"). Thousands of Class Members, their neighbors, and Portlanders will reap the reward of having a $1 million air monitoring plan and better Bullseye filtration in place.

The Settlement's substantial Class Member and public benefits justify Class Counsel's modest fee request.

c. This litigation was complex, involving complicated legal and scientific issues.

Under ORCP 32 M(1)(e)(iii), courts should consider the magnitude, complexity, and uniqueness of the litigation when deciding whether to award fees and costs. Here, there is no question that this case was complex: The litigation has lasted over three years, it involved thousands of Class Members spread out over multiple neighborhoods; there were numerous complicated factual, scientific, and legal questions; it applied innovative real estate appraisal methodology to determine damages; and it appears to be the first real property-pollution class action certified in Oregon state court.

Plaintiffs filed three expert reports in support of class certification and three more rebuttal reports in response to Bullseye's own expert reports and challenges. The Court itself implicitly recognized the complexity of this case towards the end of the class certification hearing:

> So this is, obviously, a very important case for the Plaintiffs, potential class members, and for Bullseye Glass; and it's been vigorously – vigorously litigated up until this juncture, and we're at the point where the Plaintiffs are asking for class certification. They're doing so in the context of fairly recent changes in Oregon law, as announced by the – or maybe not changes, but further refinements in developments of Oregon class action law, as defined by the Oregon Supreme Court in the *Pearson* case, a very lengthy opinion from the Oregon Supreme Court * * *.

Tr. Class Cert Hearing at 103:8-104:2.

Considering the nature of this case, the requested fee award is reasonable. *See Strawn*, 2004 WL 5308664 (declaring that where "the challenge was great, the risks were many * * * the reward now must be meaningful. It must reflect reasonable compensation to Plaintiff's counsel in this case.").

d. The outcome of this case was never assured.

Under ORCP 32 M(1)(e)(iv), courts must evaluate the "contingent nature of success" when deciding whether fees and costs are warranted. When a case is particularly risky, but also significant to the public and/or community at large, it is important to incentivize plaintiffs and lawyers to take the risk and pursue the case. *See generally, e.g.*, *State ex rel Young v. Crookham*, 290 Or 61, 68, 618 P2d 1268 (1980) (acknowledging "the desirability of inducing citizens to act as private attorneys general" in certain cases and noting "it is far from certain that compensatory awards alone serve a serious deterrent function even in mass litigation.").

The initial willingness to assume risk associated with complex legal theories must also be compensated, both to encourage plaintiffs to act as private attorneys general, and also to act as an effective deterrent to misconduct. *See, e.g.*, *Bower v. Cycle Gear, Inc.*, No. 14-CV-02712-HSG, 2016 WL 4439875, at *6-7 (ND Cal Aug 23, 2016) (awarding 30% of common fund for fees and noting that counsel had litigated the action for almost two years with no payment and no guarantee of recovery).

This litigation was particularly challenging and risky in the early stages. "Every case is different. Some cases have low risk and the fee award should reflect that. But, in this case, there was high risk from all perspectives." *Strawn*, 2004 WL 5308664. Class Counsel took on such a risk here, and were able to reach an excellent recovery for the Class and the community at large.

The constant challenges, riskiness, and significance of this case warrant Class Counsel's modest fee award. Such an award will both simultaneously compensate Class Counsel for their work on this matter, incentivize future citizens and lawyers to pursue similar litigation, and, hopefully, deter similar misconduct as that alleged against Bullseye.

e. The fees and costs are reasonable under ORPC 1.5.

Under ORCP 32 M(1)(e)(v), courts should consider appropriate criteria under Oregon Rule of Professional Conduct 1.5 ("ORPC 1.5"). ORPC 1.5's overriding concern is that fees not be "excessive," which is to be evaluated under the following individual considerations, many of which substantially overlap with the first four Rule 32 M factors discussed above:

- **ORPC 1.5(b)(1):** Focuses on the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. These considerations substantially overlap with Rule 32 M(1)(e)(i), which focused on the "time and effort expended" and the "nature, extent, and quality of the services rendered." Under the same arguments advanced above, this factor favors finding the fees and costs are not excessive.

- **ORPC 1.5(b)(3):** Looks at "the fee customarily charged in the locality for similar legal services." This consideration is properly addressed by the percentage-of-fund and lodestar cross-check calculations, which are performed above. *See infra*. These calculations demonstrate that the fees and costs are not excessive.

- **ORPC 1.5(b)(4):** Focuses on the "amount involved and the results obtained." This consideration is addressed under Rule 32 M(1)(e)(ii) and (iii), which looks at the results achieved and the magnitude of the litigation. Pursuant to the same arguments advanced above in support of finding the Settlement fair and reasonable, this factor favors finding the fees and costs are not excessive.

- **ORPC 1.5(b)(7):** Looks at the "experience, reputation, and ability of the lawyer or lawyers performing the services." This consideration is already addressed by a combination of Rule 32 M(1)(e)(i), which looks at the "nature, extent, and quality of the services rendered" and Rule 32 A's adequacy requirement, which evaluates the adequacy of class counsel. The former is addressed above, while the latter has implicitly been recognized by the Court, which has already found Class Counsel adequate. *See* Tr. Class Cert. Hearing at 106:18-21; Declaration of Matthew Preusch in Support of Motion for Class Certification, Exs.11 (Keller Rohrback environmental resume), 12 (Karl Anuta resume). Following those arguments, this factor also favors finding the fees and costs are not excessive.[11]

[11] The Additional ORPC 1.5 considerations either support approving fees and costs or are not relevant in the class action context:

- **ORPC 1.5(b)(2):** Looks at the "likelihood, if apparent, that the acceptance of the particular employment will preclude other employment by the lawyer." This factor favors approving fees because it required Class Counsel to commit time and resources that they necessarily could not commit to other cases;
- **ORPC 1.5(b)(5):** Focuses on "the time limitations imposed by the client or by the circumstances." It is not clear how this factor is relevant in the class action context;

The requested fee here is less than the fees incurred, for complex and novel legal work with an excellent outcome. Under these circumstances, there is no concern that Class Counsel's fee request is "excessive."

Because that fee request is more than reasonable, Class Counsel asks this Court to approve it.

E. ***The Court should approve Case Contribution Awards for Class Representatives.***

Case Contribution Awards for the Class Representatives are warranted in this case. "Incentive fees [or 'Contribution Awards'] are intended to address a cost burden that class actions disproportionately impose on the class representative. * * * [T]hose representatives incur costs—monetary and otherwise—that the other members of the class do not. Those costs may include spending time learning about the case; being subject to the time, expense, and intrusiveness of discovery[.]" *Strawn*, 353 Or. at 242 (citing Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L Rev 1303, 1305 (2006)).

These awards to the class representatives—whether called incentive, contribution, or service awards—"aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function." Newberg § 17:1. *See also id.* § 17:7 (noting that as of 2011, incentive awards are awarded in over 80% of class actions). This is particularly true in the case of class actions involving common funds. *Cf.* Op. re Pet. Att'ys Fees, Costs and Incentive Awards, *Liborio v. Del Monte Fresh Produce N.A., Inc.*, No. 0710-11657, at 11 (Mult Cty Cir Ct Jan 1, 2018) (Bushong, J.) (declining to award Contribution Awards because "[t]his case does not involve a common fund" and there was no statute requiring the award).

This class action involved years of effort from the Class Representatives and resulted in a common fund, warranting Case Contribution Awards for Class Representatives Erin and Scott Meeker, Kelly Goodwin, Bruce Ely and Kristi Hauke, Elizabeth Borte and Rino Pasini, Christian Miner, and Judy Sanseri and Howard Banich. Plaintiffs request awards of $7,500 for single plaintiffs and $10,000 per couple. These amounts are "warranted" in this case based on Plaintiffs' contributions to the

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- **ORPC 1.5(b)(6):** Looks at the "nature and length of the professional relationship with the client." It is not clear how this factor is relevant in the class action context, where most attorney-client relationships do not pre-exist or continue beyond the particular litigation;
- **ORPC 1.5(b)(8):** Asks whether the fee is "fixed or contingent." It is not clear that this factor is relevant in a class action, where the fee will always be contingent.

litigation. *See Dyer v. Wells Fargo Bank, N.A.*, 303 FRD 326 (ND Cal 2014); *see also Strawn*, 353 Or at 242 (adding additional $5,000 award on top of $20,000 already awarded).

When deciding whether a Case Contribution Award is appropriate, courts often focus on two factors: the time and effort the class representatives dedicated to protecting the interests of the class and the degree to which the class benefited from those efforts. *See* Ann K. Wooster, J.D., *Propriety of Incentive Awards or Incentive Agreements in Class Actions*, 60 ALR 6th 295 (Originally published in 2010) (collecting cases, such as *In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litigation*, 851 F Supp 2d 1040 (SD Tex 2012), *Tuten v. United Airlines, Inc.*, 41 F Supp 3d 1003 (D Colo 2014), *Torchia v. W.W. Grainger, Inc.*, 304 FRD 256 (ED Cal 2014), *Good v. Nationwide Credit, Inc.*, 314 FRD 141 (ED Pa 2016)). Both factors support approving Case Contribution Awards for the Class Representatives.

1. *Class Representatives dedicated significant time and effort to protecting the interests of the Class.*

As the record confirms, the Class Representatives have dedicated significant time and effort to protecting the interests of the Class. Class Representatives conducted research, attended meetings, met with counsel, missed work to observe court hearings, sat for depositions, and otherwise invested substantial time and effort to work with counsel to prosecute these claims on behalf of the Class. *See, e.g.*, Declaration of Matthew Preusch in Support of Motion for Class Certification, Ex. 3, Sanseri Dep. 108:7-109:20; Hauke Dep. 48:19-49:1; Pasini Dep. 70:12-15 (research); Sanseri Dep. 119:1-10; Banich Dep. 21:7-11; Hauke Dep. 62:12-17; E. Meeker Dep. 9:25-10:7; S. Meeker Dep. 59:16-60:14; Goodwin Dep. 91:14-92:12; Pasini Dep. 93:1-11; Miner Dep. 34:9-19 (meetings) ; Borte Dep. 145:4-10; Ely Dep. 43:21-25, 45:17-19; Goodwin Dep. 117:15-17; Pasini Dep. 110:23-111:5; Miner 87:16-18 (invested time and resources); *see also* Sanseri Dep. 222:15-20; Banich Dep. 52:18-24; Borte Dep. 144:9-145:3; Ely Dep. 45:4-16; Hauke Dep. 89:21-90:18; E. Meeker Dep. 9:4-11; S. Meeker Dep. 147:19-148:10; Goodwin Dep. 115:21-117:14; Pasini Dep. 98:16-24, 110:16-22; Miner Dep. 87:11-15 (understand obligations of a class representative).

In addition to those considerable duties that Class Representatives must normally shoulder, the Class Representatives in this case also endured Bullseye's experts entering their properties and homes for additional testing, sampling, and analysis. Preusch Decl. ¶ 2. Allowing a litigation opponent to physically intrude one's private home for examination is a considerable stress that is above and beyond the type of imposition normally imposed on a class representative. *Id.* The Class Representatives here, however, endured this stress to secure a good result in this action for the benefit of all Class Members.

This extraordinary generosity and effort of the Class Representatives should be recognized and rewarded by Case Contribution Awards.

2. *The Class benefited significantly from Class Representatives' efforts.*

The Settlement provides $6.5 million in total relief for the Class. This covers a $1 million air monitoring plan, reimbursement for Class Members' pollution-related costs (including soil testing, soil remediation, and air purifiers), estimated cash payments ranging from several hundred to several thousands of dollars for Class Members, and litigation fees and costs. Settlement Agreement §§ 4.2-4.7. These are all significant benefits. Compared to the settlements of similar cases, these benefits are quite generous. *See supra*, Part VI.A.. The Class would not have received any of these benefits without Class Representatives' efforts. This favors Case Contribution Awards.

F. *The Court should approve the Parties' chosen recipient of residual funds.*

Under ORCP 32 O, "[i]f any amount awarded as damages is not claimed * * * , the court shall order that (1) At least 50 percent of the amount not paid to class members be paid or delivered to the Oregon State Bar for the funding of legal services provided through the Legal Services Program established under ORS 9.572; and (2) The remainder of the amount not paid to class members be paid to any entity for purposes that the court determines are directly related to the class action or directly beneficial to the interests of class members." The Parties have agreed to Friends of Trees,[12] an Oregon non-profit, as the recipient of residual funds—if any—after Class Members are paid. *See* Settlement Agreement § 4.7(e).

[12] Friends of Trees has planted over 750,000 trees and native plants in neighborhoods throughout Oregon and Washington. This work helps "create significant improvements to our region's air and water quality." *About*, Friends of Trees, https://friendsoftrees.org/about/ (last visited May 2, 2019).

G. *The Court should approve the technical aspects of the Settlement's administration.*

The Court should also approve the more technical aspects of administering the Settlement. These include appointing A.B. Data as the settlement administrator, approving the plan of allocation, and approving the disbursement of funds from the Qualified Settlement Fund ("QSF") to Class Counsel and A.B. Data for allocation among the Class Members.

A.B. Data: Class Counsel retained A.B. Data, Ltd. to provide settlement notice and administer claims in this Action. A.B. Data has been appointed as "Notice, Claims, and/or Settlement Administrator in hundreds of class actions, administering some of the largest and most complex notice and settlement programs of all time." Schachter Decl. ¶ 2.

Plan of Allocation: Section 4.7 of the Settlement lays out the plan for allocating Settlement funds among the Class Members, based on the number of "settlement shares" per household, distributed on a *pro rata* basis among the total number of claiming households. Settlement § 4.7(c) & (d). Plaintiffs request that the Court formally approve that allocation plan.

Disbursement of Funds: Under the terms of the Settlement Agreement, all funds—whether for the $1 million air monitoring program, various cash awards for Class Members, Case Contribution Awards for Class Representatives, and attorney fees and costs—are to be dispersed from the Qualified Settlement Fund or "QSF." Settlement Agreement §§ 4.2-4.7 and 5. Plaintiffs ask the Court to approve disbursement of these funds from the QSF under the terms of the Settlement Agreement, including those laid out in Section 5.

VII. CONCLUSION

For the foregoing reasons, the Court should approve the Settlement as fair, reasonable, and adequate, including approving the substantial relief afforded to the Class; the fees and costs for Class Counsel; and the Case Contribution Awards for Class Representative. The Court should also approve the more technical aspects of administering the Settlement, including appointing A.B. Data as the Settlement Administrator, approving the plan of allocation, approving the ORCP 32 O residual recipient, approving the processing of late-filed claims and exclusion forms, and approving the disbursement of funds from the QSF to administer the Settlement.

Finally, the Court should enter final judgment and order the Parties to report to the Court on their selection of the Independent Engineering Firm under section 4.4 of the Settlement, to begin implementing the air monitoring plan, and for Class Counsel to report to the Court on the status of the QSF following the payment of claims.

DATED this 3rd day of May, 2019.

KELLER ROHRBACK L.L.P.

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Attorneys for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT upon the following:

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

Attorneys for Defendant

by the following indicated method or methods:

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

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

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

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

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

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

DATED: May 3, 2019

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

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