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

ALYSSA ISENSTEIN KRUEGER and
ROBERT KRUEGER, SCOTT MEEKER
and ERIN MEEKER, KELLY GOODWIN,
ELIZABETH MARRE and DARRYL
OBEIRNE, BRUCE ELY and KRISTI
HAUKE, ELIZABETH BORTE and RINO
PASINI, and CHRISTIAN MINER;
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

BULLSEYE GLASS CO., an Oregon
corporation,

Defendant.

CIVIL ACTION NO. 16-CV-07002

**FIRST AMENDED CLASS ACTION
COMPLAINT**

**CLAIM NOT SUBJECT TO MANDATORY
ARBITRATION
ORS 21.135(2)(a)**

INTRODUCTION

1.

Plaintiffs, Scott Meeker, Erin Meeker, Kelly Goodwin, Bruce Ely, Kristi Hauke, Elizabeth Borte, Rino Pasini, and Christian Miner (collectively “Plaintiffs”)¹, individually and on behalf of all others similarly situated, allege the following against Bullseye Glass Co. (“Defendant” or “Bullseye”), based, where applicable, on personal knowledge, information and belief, and the investigation and research of counsel. Plaintiffs provided notice and a demand for damages to Defendant pursuant to ORCP 32H at

¹ Plaintiffs Alyssa Isenstein Krueger, Robert Krueger, Elizabeth Marre, and Darryl OBeirne have filed a Notice of Voluntary Dismissal without prejudice pursuant to ORCP 54A.

1 least thirty days prior to filing this Amended Complaint. Defendant has not satisfied the plaintiffs’
2 demand.

3 **NATURE OF THE ACTION**

4 2.

5 Southeast Portland is home to thousands of families, vibrant businesses, and thriving schools.
6 The people who live and work in this neighborhood represent a broad range of ethnic, socio-economic,
7 and age groups. Indeed, this diverse neighborhood is one of the most dynamic in the City, and has been
8 key to shaping Portland and its culture.

9 3.

10 Decades ago, citizens in Southeast Portland were instrumental in preventing the Mount Hood
11 Highway from being built through their neighborhood, an event often noted as being one of the most
12 important decisions in making Portland such a special place today. In fact, in 1974—near the time when
13 the community defeated the ill-conceived highway project—Defendant Bullseye Glass Co. opened its
14 Portland factory just half a mile from where the freeway would have been. Since that time, Bullseye has
15 been using the neighborhood’s air and backyards as its private dumping ground for the arsenic,
16 cadmium, hexavalent chromium, and other toxins it sends up its smokestacks.

17 4.

18 Notwithstanding the fact that Bullseye uses thousands of pounds each year of these toxic heavy
19 metals in its glass furnaces, it decided to not install any pollution control technology to capture these
20 pollutants. For decades, it freely sent waste from its furnaces into the air of Southeast Portland. Once
21 Bullseye emits this toxic pollution, children inhale it, it lands on skin, in yards, and on playgrounds. It is
22 taken up by the vegetables in gardens, and it comes into homes on the soles of people’s feet, on pets’
23 fur, and by other routes. Once inside homes and bodies, these toxins create profound health risks for
24 people, particularly children and those with medical sensitivities.

25 5.

26 Over the past several decades, Bullseye has emitted sufficient amounts of toxic heavy metals to
27 make Southeast Portland a “hotspot” of these pollutants; the Oregon Department of Environmental
28

1 Quality (“DEQ”) measured arsenic in Southeast Portland at over 159 times state-established safety
2 levels, and cadmium at 49 times safety levels. After Bullseye temporarily stopped using arsenic and
3 cadmium in its glass furnaces in February 2016, subsequent monitoring showed that the amount of those
4 toxins in the air around Bullseye dropped in response. In April 2016, Bullseye announced it would
5 resume the use of cadmium.

6 6.

7 Bullseye knew or should have known that it is and has been emitting significant amounts of toxic
8 materials. In fact, Bullseye privately lobbied the United States Environmental Protection Agency to
9 create an exemption in Clean Air Act regulations so that manufacturers like Bullseye would not need to
10 treat or filter the emissions from its smokestacks. As a result, Bullseye has contaminated homes,
11 businesses, and families.

12 7.

13 Plaintiffs bring this action pursuant to Oregon Rules of Civil Procedure (“ORCP”) 32,
14 individually and on behalf of those similarly situated, in order to protect themselves, their families, and
15 their community.

16 JURISDICTION AND VENUE

17 8.

18 All of the claims giving rise to this action accrued in Multnomah County, Oregon. Defendant
19 engages in regular, sustained business in Multnomah County and is a registered Oregon Corporation.
20 Further, Plaintiffs affected by Defendant’s conduct reside in Multnomah County. Defendant’s corporate
21 headquarters are also located in Multnomah County.

22 9.

23 The claims in this case are based solely on State law. Plaintiffs make no federal claims in this
24 case. In addition, all named plaintiffs are Oregon citizens, at least two thirds of the proposed class
25 members are citizens of Oregon, Plaintiffs’ and class members’ injuries occurred in Oregon, and no
26 other class actions have been filed in the last three years with similar factual allegations against the
27 Defendant.

1 **THE PARTIES**

2 10.

3 Plaintiffs, Scott Meeker, Erin Meeker, Kelly Goodwin, Bruce Ely and Kristi Hauke, Elizabeth
4 Borte and Rino Pasini, and Christian Miner are residents and citizens of Multnomah County, Oregon.

5 11.

6 Defendant Bullseye Glass Co. is a domestic corporation organized under the laws of Oregon,
7 with its principal place of business at 3722 SE 21st Avenue, Portland, Oregon 97202, also known as the
8 facility governed by Air Contaminant Discharge Permit number 26-3125.

9 **FACTS**

10 **A. Southeast Portland’s Air**

11 12.

12 For at least the past decade, state agencies, including the Department of Environmental Quality
13 (“DEQ”), have known that Portland’s air contains high levels of a variety of toxic contaminants. For
14 example, DEQ has known that there are unexpectedly high levels arsenic and cadmium in the City’s air.
15 However, despite knowing about concerning levels of air toxics, DEQ had apparently not been able to
16 locate the sources of the contaminants.

17 13.

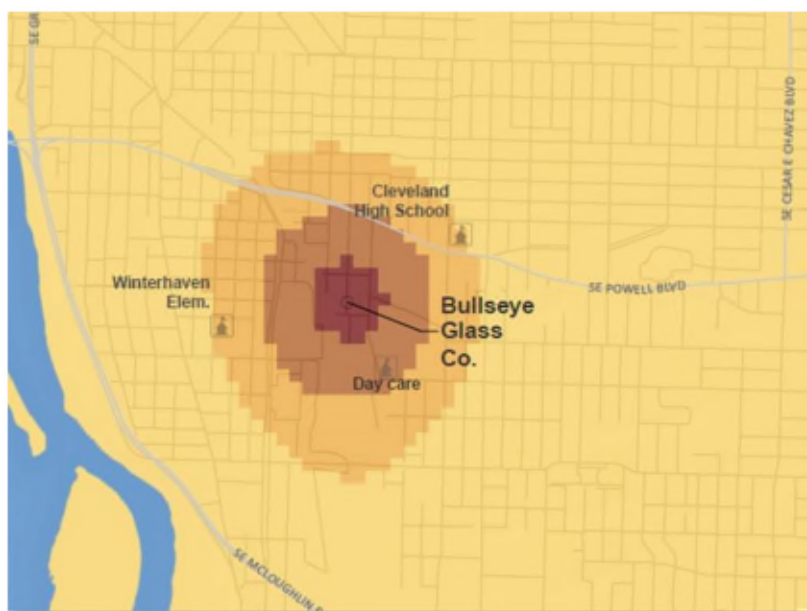
18 In 2012, researchers at the United States Forest Service began collecting moss from trees to track
19 air quality across the City. Because moss grows on trees, which are stationary, it absorbs and stores the
20 nutrients and toxins in the air and water in the tree’s immediate environment. Because moss lacks roots,
21 any contaminants found in moss are derived solely from the air or rain, rather than from the soil.

22 14.

23 By the time the researchers had gathered the moss, analyzed its contents, and then mapped their
24 results, it became apparent that there was something terribly wrong taking place in Southeast Portland.
25 Those maps show dangerously high levels of cadmium and other heavy metals in the air, with a
26 proverbial “bullseye” at the center. That bullseye, in fact, centers on Defendant Bullseye’s glass
27 production facility in Southeast Portland.

15.

For example, this map prepared by Multnomah County, excerpted below and attached as Exhibit 1 to this complaint (and by reference incorporated into this suit), shows elevated levels of cadmium in moss circling Bullseye, with red indicating above 30 nanograms per cubic meter of air, brown indicating 10 to 30 nanograms per cubic meter of air, orange indicating 5 to 10 nanograms per cubic meter of air, and yellow indicating .6 to 5 nanograms per cubic meter of air.



16.

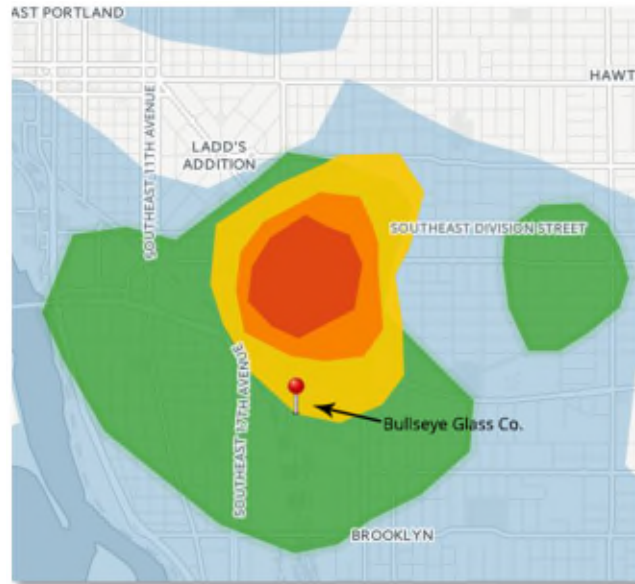
This second map, excerpted below and attached as Exhibit 2 to this complaint (and by reference incorporated into this suit), was prepared by *The Oregonian* and modified by Plaintiffs to identify Bullseye's location. The map shows elevated levels of arsenic in moss immediately adjacent to Bullseye, with red indicating .84 to .94 micrograms per kilogram, orange indicating .72 to .83 micrograms per kilogram, and yellow indicating .60 to .71 micrograms per kilogram.

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17.

When presented with information about the Forest Service findings, DEQ deployed its air monitors in Southeast Portland in the area near Bullseye. DEQ’s monitors confirmed that Bullseye is, in fact, a primary source of the unsafe levels of heavy metals in the neighborhood.

18.

Bullseye is an industrial facility in a primarily residential and commercial area. In 2011, the DEQ noted in Bullseye’s proposed air quality permit that there were “no other industrial air sources with permits within ½ mile of Bullseye Glass.”

B. Bullseye Glass Has Been Quietly Emitting Toxic Metals for Decades

19.

Bullseye has at times claimed that it was surprised to learn that it had been polluting the neighborhood. However, it should be no surprise to Bullseye that it is a primary source of cadmium, arsenic, perhaps hexavalent chromium and/or other toxics in Portland’s air. Since 1974, Bullseye Glass has manufactured glass at its Portland facility using a wide variety of chemicals to color or process the glass, many of which are toxic, including arsenic, cadmium, and chromium. Bullseye has grown significantly in the intervening decades and has continued to use large amounts of cadmium and toxic materials, including thousands of pounds of arsenic trioxide.

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11 20.

12 In 2007, the U.S. EPA proposed new National Emissions Standards for Hazardous Air Pollutants
13 (called “NESHAPs”) pursuant to the mandates of the Clean Air Act. EPA recognized that glass facilities
14 were often significant sources of arsenic, cadmium, chromium, lead, manganese, and nickel. Under the
15 new rules, EPA proposed to regulate the emissions of these hazardous air pollutants (known as “HAPs”)
16 from a variety of sources, including glass manufacturers. The final rule EPA adopted required glass
17 manufacturers to “comply with a [particulate matter] emission limit of 0.1 gram per kilogram (g/kg) (0.2
18 pound per ton (lb/ton)) of glass produced or an equivalent metal HAP emission limit of 0.01 g/kg (0.02
19 lb/ton) of glass produced.” The rule also requires factories to do performance testing to demonstrate
20 compliance with the rule, and perform routine monitoring of emissions from the facilities.

21
22
23
24 21.

25 While that rule goes a long way to protecting human health and the environment, it does not
26 apply to Bullseye, because Bullseye privately lobbied EPA to create an exemption for glass makers of
27 its size, in order to avoid complying with the proposed rule. Bullseye also argued that the rule should not
28 apply to its furnaces because those furnaces were not “continuous.” EPA granted Bullseye’s wish. The
final rule exempted facilities that do not operate continuous furnaces, regardless of the amounts of HAPs
they use in their production. In 2009, after the rules were in place, Bullseye again told regulators that its
furnaces were periodic, not continuous, and thus not subject to the HAP rules. As a result Bullseye
continued to emit arsenic, cadmium, and other metals, from roughly 1974 until some point in February
2016, and, it appears that Bullseye recently began or will soon begin using cadmium again in its glass-
melting furnaces. It also now appears that—despite Bullseye’s statements to regulators about the nature
of its furnaces—as least some of those furnaces are and have always been “continuous” and thus should
have complied with rules governing hazardous air pollutants.

29
30
31
32 22.

33 While Bullseye acted behind the scenes to avoid installing emissions controls, Plaintiffs and the
34 class did not know and could not reasonably have discovered the harm Bullseye had caused and
35 continues to cause them and their neighborhood until at least February 2016, when the moss studies
36
37
38

1 revealing the air pollution in the area were made public. State regulators claimed to have been caught off
2 guard by that information. If state regulators did not know of Plaintiffs' and class members' injuries or
3 their source, a reasonable person in Plaintiffs' and class members' position would not have learned or
4 known those facts.

5 23.

6 Bullseye did not warn its neighbors about the harm from its emissions, but it appears that
7 Bullseye did warn employees not to eat fruit from pear trees outside of its facility. That was likely due to
8 the trees' proximity to Bullseye's harmful emissions.

9 **C. Health Impacts of Bullseye's Emissions**

10 24.

11 The health impacts of prolonged exposure to the hazardous pollutants emitted from Bullseye are
12 potentially profound.

13 25.

14 Although Bullseye emits or has emitted arsenic, cadmium, hexavalent chromium, and other toxic
15 pollutants to the air, inhalation is not the only route of exposure for people in Southeast Portland. Many
16 of these materials precipitate out of the air, landing on soil or grass in backyards, playgrounds, and
17 gardens. There, children playing may ingest the toxic materials directly and absorb them through their
18 skin. People and pets who come into contact with contaminated soil or dust can bring these hazardous
19 materials into their home on shoes and in clothing, hair, or fur. And, the metals contaminate crops,
20 particularly leafy greens grown in backyard gardens, including kale, lettuce, and broccoli, all of which
21 are favorites of the Portland gardener. As a result, in light of information about Bullseye's pollution, the
22 Oregon Health Authority issued a warning against eating any fruits or vegetables grown within half a
23 mile of Bullseye.

24 26.

25 Because Bullseye's emissions not only contaminate the air, but the soil, grass, plants, and homes
26 throughout the community, people living in this neighborhood continue to be exposed to dangerous
27 levels of hazardous pollutants on a daily basis. Thus, even if Bullseye ceases its operations today, the
28

1 community would remain contaminated, causing harm of various types and posing a serious threat of
2 ongoing and likely mounting problems for the people who live and work there.

3 27.

4 Arsenic is a toxic material that presents a wide range of serious health effects. The United States
5 Department of Health and Human Services (DHHS), the International Agency for Research on Cancer,
6 and the U.S. EPA have all determined that inorganic arsenic is a human carcinogen, and that its
7 ingestion can increase the risk of cancer in the liver, bladder, and lungs. Ingestion of arsenic can also
8 cause irritation of the gut, and lead to decreased production of red and white blood cells, which may
9 cause fatigue, abnormal heart rhythm, blood-vessel damage resulting in bruising, and impaired nerve
10 function. Inhalation of arsenic, too, can cause a host of health problems, including lung irritation and
11 damage, as well as lung cancer. When arsenic comes in contact with skin it can produce circulatory and
12 peripheral nervous disorders.

13 28.

14 The effects of arsenic exposure are likely more pronounced in children. Children who are
15 exposed to inorganic arsenic have many of the same effects as adults, including irritation of the stomach
16 and intestines, blood vessel damage, skin changes, and reduced nerve function. Long-term exposure to
17 inorganic arsenic in children may result in lower IQ scores, and exposure to arsenic in early life
18 (including gestation and early childhood) may increase mortality in young adults.

19 29.

20 Inhaled or ingested inorganic arsenic can injure pregnant women or their unborn babies. Large
21 doses of inorganic arsenic that cause illness in pregnant female animals can also cause low birth weight,
22 fetal malformations, and even fetal death. Arsenic can cross the placenta and has been found in fetal
23 tissues. Arsenic is even traceable in human breast milk.

24 30.

25 Like arsenic, cadmium is a carcinogen that poses a host of health risks and impacts. Exposure to
26 high levels of air-borne cadmium can severely damage the lungs, causing short- and long-term impacts
27
28

1 on breathing and lung function. Eating food or drinking water with high levels of cadmium severely
2 irritates the stomach, leading to vomiting and diarrhea.

3 31.

4 Chronic exposure to cadmium also carries serious health risks. Long-term exposure to lower
5 levels of cadmium in air, food, or water leads to a buildup of cadmium in the kidneys. Not only can this
6 cause serious kidney disease, but it also leads to other risks throughout the body. Long-term effects of
7 even low-levels of exposure to cadmium include lung damage and fragile bones.

8 32.

9 Children are particularly susceptible to suffering serious health impacts from the exposure to
10 cadmium. Children absorb cadmium at higher rates than adults. Not only do children's bodies take up
11 cadmium at increased rates, but they are also more susceptible than adults to a loss of bone and
12 decreased bone strength from exposure to cadmium. Babies of animals exposed to high levels of
13 cadmium during gestation had changes in behavior and learning ability, and high enough exposures to
14 cadmium before birth can reduce body weight and affect the skeleton in developing young animals.

15 33.

16 While Bullseye recently installed one pilot emissions control system, it has resumed the use of
17 cadmium. Bullseye's past and present toxic emissions therefore present a clear threat to the health of
18 people living and working in Southeast Portland. While some of the harms from this exposure are
19 manifest today, others may remain latent or undetected for years, leaving those exposed to Bullseye's
20 waste to deal with health impacts today and into the distant future.

21 **PLAINTIFFS' FACTS**

22 **A. Plaintiffs Scott and Erin Meeker**

23 34.

24 Erin and Scott Meeker live within a half mile of Bullseye Glass, and their young daughter
25 attends a daycare center across the street from the Bullseye factory.

26 ///

27 ///

1 35.

2 The Meekers have lived in their current home since 2006. They bought the home in 2010. They
3 did not know when they bought their home, and could not have known based on reasonably available
4 public information, that it was in the shadow of a major polluter. The Meekers are concerned that the
5 value of their house has declined or will decline now that it is public knowledge that the property is so
6 close to a notorious polluter. Had the Meekers known about the unchecked emissions from Bullseye,
7 including arsenic, cadmium, and chromium, they would not have bought their house or paid as much for
8 it as they did.

9 36.

10 The Meekers are concerned that the soil their daughter plays in, and in which they grow sugar
11 snap peas, lettuce, and other produce, is tainted by toxic metals. Normally the Meekers would be
12 planting strawberry plants right now, but since health officials told residents in their neighborhood to not
13 eat food from their own gardens, the Meekers have not been able to enjoy gardening or the process of
14 growing their own food.

15 37.

16 Beyond the couple's concerns about the effects on their family from eating the produce that they
17 have grown on their land for years, they are concerned about what they will need to pay for costly health
18 and soil testing. The Meekers are also deeply concerned about their daughter's daily exposure to the air
19 toxins while attending and playing outside at her daycare.

20 **B. Plaintiff Kelly Goodwin**

21 38.

22 Kelly Goodwin has lived near Bullseye for eight years. Between 2008 and 2012 she lived near
23 the intersection of SE Woodward Street and SE 27th Avenue, and then in 2012 she bought a home less
24 than a quarter mile from Bullseye. Ms. Goodwin is concerned that the value of her house has declined
25 or will decline now that it is public knowledge that the property is so close to a notorious polluter. Had
26 Ms. Goodwin known about the unchecked emissions from Bullseye, including arsenic, cadmium, and
27 chromium, she would not have bought her house or paid as much for it as she did.

1 39.

2 In the front yard of that home at this time of year, Ms. Goodwin would normally start planting
3 tomatoes, zucchinis, and other produce. Soon, the perennial strawberries in her garden will start coming
4 up. However, because of Bullseye, Ms. Goodwin is concerned that she cannot safely plant in her garden
5 or eat what it grows.

6 40.

7 Ms. Goodwin is similarly concerned that her family has and/or will be forced to pay for
8 expensive health and soil testing.

9 **C. Plaintiffs Elizabeth Borte and Rino Pasini**

10 41.

11 Elizabeth “Libby” Borte and Rino Pasini bought their home less than a half mile from Bullseye’s
12 glass-making factory in 2010. The couple lives there with their two young children.

13 42.

14 The couple gardens at their home, which also has fruit trees and a grape vine from which they
15 and their children typically eat. The couple is concerned that their family can no longer eat the fruit from
16 their own property.

17 43.

18 Recent testing of the couple’s soil and children disclosed elevated levels of cadmium in both.
19 Bullseye’s emissions have interfered with the quiet enjoyment of the couple’s property, and they are
20 concerned the value of their house has declined or will decline now that it is public knowledge that the
21 property is so close to a notorious polluter. Had they known about the unchecked heavy metal emissions
22 from Bullseye the couple would not have bought their house or paid as much for it as they did.

23 **D. Plaintiff Christian Miner**

24 44.

25 Christian Miner has lived in Portland since 2002 and bought a home last year about four blocks
26 from Bullseye. Before that, he lived in nearby Ladd’s Addition. Like so many of his neighbors, Mr.
27 Miner gardens in his spare time, raising leafy greens and other produce for himself on his property.
28

1 Now, he is concerned that he cannot or should not eat those vegetables, and he is concerned that his soil
2 will need to be replaced or otherwise remediated before he can garden again.

3 45.

4 In addition to paying for sampling of that soil and other parts of his property, like his roof and
5 gutters, to determine the levels of cadmium, arsenic, and other metals, Mr. Miner anticipates incurring
6 expenses for medical testing to determine the levels of those toxins in his own body. Mr. Miner is
7 justifiably concerned that the value of his house has declined or will decline now that it is public
8 knowledge that the property is so close to a notorious polluter. Had he known about the unchecked
9 heavy metal emissions from Bullseye Mr. Miner would not have bought his house or paid as much for it
10 as he did.

11 **E. Plaintiffs Bruce Ely and Kristi Hauke**

12 46.

13 In 2002, Bruce Ely and Kristi Hauke bought a home roughly a third of a mile from Bullseye. Mr.
14 Ely and Ms. Hauke are not growing vegetables at their home this year, as they customarily would be
15 doing, because of the newly disclosed information about heavy metal emissions from Bullseye.

16 47.

17 Normally, Mr. Ely and Ms. Hauke would be planning to start planting tomatoes, green beans,
18 eggplant, kale, lettuce, and other produce. Instead, they are concerned about the harm Bullseye's
19 emission have caused to their property and the plants on that property.

20 48.

21 In addition to not being comfortable gardening, the couple is concerned about the need to pay for
22 expensive metals testing both for themselves and their property, and they are concerned that the value of
23 their home has dropped or will drop because the property is so close to a now notorious polluter. Had
24 they known about Bullseye's emissions of toxic metals the couple would not have bought their home or
25 paid as much for it as they did.

26 ///

27 ///

1 **CLASS ACTION ALLEGATIONS**

2 49.

3 Plaintiffs bring claims pursuant to Oregon Rule of Civil Procedure 32 on behalf of the Class of
4 similarly situated persons. Plaintiffs propose to represent the following Class:

5 Current Oregon citizens who live or own real property near
6 Bullseye Glass Co. in areas where test results show elevated levels
7 of the arsenic, cadmium, chromium, or other toxic constituents in
8 the human, natural, or built environment.

8 50.

9 The Class members are ascertainable and have a well-defined community of interest of their
10 members. Excluded from the Class are Defendant and its subsidiaries, affiliates, and employees; all
11 persons who make a timely election to be excluded from the Class; governmental entities; and the judge
12 to whom this case is assigned and his/her immediate family. Plaintiffs reserve the right to revise the
13 Class definition based upon information learned through discovery.

14 51.

15 **Numerosity.** The members of the Class are so numerous that joinder of all members would be
16 impracticable. There are approximately 6,000 individuals who live in areas near Bullseye Glass Co. that
17 have shown elevated levels of toxic emissions.

18 52.

19 **Commonality.** There are common questions of law and fact that predominate over any questions
20 affecting only individual members of the Class. Those common factual and legal questions include but
21 are not limited to: whether Defendant was negligent and continues to be negligent in its construction,
22 maintenance, or operation of Bullseye’s facility, whether Bullseye’s facility has created a nuisance,
23 whether Defendant has trespassed on Class members’ property and land enjoyed by Class members,
24 whether Defendant owed any duties to Class members, whether and how Class members have been
25 harmed by Defendant’s conduct, and whether Class members’ personal or real property has been
26 damaged and if so how the values of that property have been affected by emissions from the Facility
27 near where Class members live.

1 53.

2 **Typicality.** The representative Plaintiffs' claims are typical of the claims of the members of the
3 Class. Plaintiffs and all the members of the Class have been injured by the same wrongful acts and
4 omissions of Defendants. Plaintiffs' claims arise from the same practices and course of conduct that give
5 rise to the claims of the members of the Class and are based on the same legal theories.

6 54.

7 **Adequacy.** Plaintiffs are representatives who will fully and adequately assert and protect the
8 interests of the Class, and have retained class counsel who are experienced and qualified in prosecuting
9 class actions. Neither Plaintiffs nor their attorneys have any interests contrary to or in conflict with the
10 Class.

11 55.

12 **Superiority.** A class action is superior to other available methods for the fair and efficient
13 adjudication of this case. The equitable relief and amount of damages available to individual plaintiffs
14 are insufficient to make litigation addressing Defendants' conduct economically feasible in the absence
15 of the class action procedure. Individualized litigation also presents a potential for inconsistent or
16 contradictory judgments, and increases the delay and expense to all parties and the court system
17 presented by the legal and factual issues of the case. By contrast, a class action approach presents far
18 fewer management difficulties and provides the benefits of a single adjudication, economy of scale, and
19 comprehensive supervision by a single court. And, this forum is desirable as Defendant does business
20 here and class members reside here. Finally, no other similar litigation has been commenced, but if
21 commenced, it can be coordinated under ORCP 32 K

22 56.

23 **Notice:** Plaintiffs provided notice and a demand for damages to Defendant pursuant to ORCP
24 32H at least thirty days prior to filing this Amended Complaint seeking damages, and Defendant has not
25 satisfied that demand.

26 57.

27 Plaintiffs will seek fees, costs, and litigation expenses pursuant to ORCP 32M.

1 **FIRST CLAIM FOR RELIEF**

2 (Nuisance)

3 58.

4 Plaintiffs incorporate all prior allegations into this claim.

5 59.

6 The emissions from Bullseye Glass are a nuisance. For at least the last six years metals such as
7 arsenic and cadmium have poured uncontrolled from the stacks of Bullseye’s furnaces.

8 60.

9 Those emissions have substantially and unreasonably interfered with the use and enjoyment of
10 Plaintiffs’ and class members’ property.

11 61.

12 The interference is substantial because, as described already, Plaintiffs and class members now
13 have legitimate concerns about whether they can safely use portions of their land to grow fruits and
14 vegetables to feed themselves and their families, and Plaintiffs and class members now have legitimate
15 concerns about whether they can safely play, or allow their children or pets to play, in their yards
16 without concern that they are putting their health (and that of their children and pets) at risk.

17 62.

18 Plaintiffs and class members’ reactions to this nuisance are ordinary and reasonable reactions to
19 the recent revelation that they live within a previously unknown toxic hotspot.

20 63.

21 Defendant’s interference with Plaintiffs’ and class members’ use and enjoyment of their land is
22 also unreasonable. Knowingly spewing toxic contaminants into a residential area is not a reasonable
23 thing for anyone to do. Also, Bullseye knows or should know that similar facilities in other states and
24 abroad commonly comply with more strict emissions control limitations imposed by those states and
25 jurisdictions, in order to prevent this very type of problem from occurring.

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1 64.

2 The cost of adequately controlling and containing Defendant's emissions is modest, particularly
3 when compared to the harm that Plaintiffs and class members' have been forced to bear as a result of
4 Defendant's decision to try to externalize rather than bear those costs. The costs are far greater than
5 Plaintiffs and class members' should be forced to bear in their predominantly residential neighborhood.

6 65.

7 Defendant's conduct in creating the nuisance was and/or is negligent, reckless, intentional,
8 and/or abnormally dangerous. As described in this complaint, Defendant's conduct directly caused the
9 nuisance.

10 66.

11 Any compliance by Defendant with applicable laws or permit conditions does not excuse
12 Defendants' nuisance or any other tort.

13 67.

14 As a result of Defendant's conduct, Plaintiffs and members of the class have each suffered or
15 will each have suffered:

- 16 (i) Testing expenses to determine the level of heavy metals in plaintiffs' and class
17 members' and their family member's bodies, in a sum the jury determines to be
18 fair but in no event to exceed \$3,000 per person;
- 19 (ii) Testing expenses to determine the level of heavy metals on the plaintiffs' and
20 class members' property, in a sum the jury determines to be fair but in no event to
21 exceed \$5,000 per lot;
- 22 (iii) Damage to or the loss of personal property, including but not limited to produce
23 or other edible plants or fruit from the trees or bushes cultivated by plaintiffs and
24 class members', in a sum the jury determines to be fair but in no event to exceed
25 \$5,000 per household;
- 26
27
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- 1 (iv) Clean up or remediation expenses to remove or contain and make safe the levels
2 of heavy metals found on the plaintiffs' and class members' property, in a sum the
3 jury determines to be fair but in no event to exceed \$100,000 per lot;
- 4 (v) Diminution in value of property that the plaintiffs and class members own that is
5 within the known plume of the Defendant's toxic emissions, in a sum the jury
6 determines to be fair but in no event to exceed \$125,000 per lot;
- 7 (vi) The expense of future medical monitoring of the plaintiffs and/or their family
8 members, to determine the nature of the long term harm created by exposure to
9 the Defendant's toxic emissions, in a sum the jury determines to be fair but in no
10 event to exceed \$150,000 per person; and
- 11 (vii) The loss of use of the funds expended to test and/or clean up plaintiffs' and class
12 members' property, in a sum to be calculated using prejudgment interest at the
13 highest allowable rate – which is currently 9% per annum;

14 all to Plaintiffs' economic damages in a sum to be proven at trial.

15 68.

16 As a result of Defendant's conduct, Plaintiffs and members of the Class have each suffered or
17 will each have suffered mental anguish, distress, annoyance, inconvenience, and/or interference with
18 their normal daily activities and the use of their property, all to Plaintiffs' non-economic damages in a
19 sum the jury determines to be fair but in no event to exceed \$50,000 per class member.

20 69.

21 Plaintiffs seek an injunction ordering Bullseye to only resume the use of arsenic, cadmium, and
22 chromium if it has first installed adequate emissions controls equipment.

23 70.

24 Any hardship allegedly caused to the Defendant by such an injunction is greatly outweighed by
25 the benefits resulting to Plaintiffs and the class members: the ability to live secure in the knowledge that
26 the air they breathe, and the land that they live on and enjoy and rely on for food, are safe.

27 ///

1 **SECOND CLAIM FOR RELIEF**

2 (Common Law Trespass)

3 71.

4 Plaintiffs re-allege paragraphs 1-57, paragraphs 67-70, and further allege:

5 72.

6 By emitting particulate emissions onto the land possessed by Plaintiffs and the class, Defendant
7 disturbed Plaintiffs’ and class members’ rights to exclusive possession of that land.

8 73.

9 Bullseye directly or indirectly allows particles from its furnaces to enter on to and remain on
10 Plaintiffs’ and class members’ land.

11 74.

12 Defendant’s conduct that allowed and/or created a trespass was and is negligent, reckless,
13 intentional, and/or abnormally dangerous.

14 75.

15 Defendant had no license or other authorization to enter on to or to leave contaminants on land
16 possessed by Plaintiffs and the class members. Any compliance by Defendant with applicable laws or
17 permit conditions does not excuse Defendants’ trespass.

18 76.

19 Plaintiffs seek an injunction also ordering Bullseye to remove the particles it has caused to be
20 deposited on plaintiffs’ and all other class members’ property.

21 **THIRD CLAIM FOR RELIEF**

22 (Negligence)

23 77.

24 Plaintiffs re-allege paragraphs 1-57, paragraph 67, and further allege:

25 78.

26 Bullseye Glass was unreasonable in the operation of its facility, in one or more of the following
27 ways:

- 1 (a) Defendant failed or neglected, and continues to fail or neglect, to install appropriate
2 emissions control equipment on each of their furnaces, when Defendant knew or
3 should have known that failure to do so could result in emission of pollutants that
4 would likely travel to and land on neighboring properties;
- 5 (b) Defendant failed or neglected, and continues to fail or neglect, to monitor its furnace
6 emissions on a regular basis to determine if heavy metals were escaping from its
7 facilities, when Defendant knew or should have known that failure to do so could
8 result in emission of pollutants that would likely travel to and land on neighboring
9 properties;
- 10 (c) Defendant failed or neglected, and continues to fail or neglect, to install appropriate
11 emissions control equipment on the other portions of its facility where fugitive
12 emissions might escape, when Defendant knew or should have known that failure to
13 do so could result in emission of pollutants that would likely travel to and land on
14 neighboring properties;
- 15 (d) Defendant failed or neglected, and continues to fail or neglect, to monitor its
16 facilities' fugitive emissions on a regular basis to determine if heavy metals were
17 escaping, when Defendant knew or should have known that failure to do so could
18 result in emission of pollutants that would likely travel to and land on neighboring
19 properties;
- 20 (e) Defendant failed or neglected, and continues to fail or neglect, to properly train its
21 employees to operate the facilities' in a way that would not allow furnace or fugitive
22 emissions, when Defendant knew or should have known that failure to do so could
23 result in emission of pollutants that would likely travel to and land on neighboring
24 properties;
- 25 (f) Defendant failed or neglected, and continues to fail or neglect, to construct its
26 furnaces in a way that would preclude emissions, when Defendant knew or should
27
28

1 have known that failure to do so could result in emission of pollutants that would
2 likely travel to and land on neighboring properties;

3 (g) Defendant failed or neglected, and continues to fail or neglect, to maintain its
4 furnaces in a way that would preclude emissions, when Defendant knew or should
5 have known that failure to do so could result in emission of pollutants that would
6 likely travel to and land on neighboring properties;

7 (h) Defendant failed or neglected, and continues to fail or neglect, to maintain its facility
8 in a way that would preclude fugitive emissions, when Defendant knew or should
9 have known that failure to do so could result in emission of pollutants that would
10 likely travel to and land on neighboring properties;

11 (i) Defendant operated or operates its furnaces or facility in a way that created emissions
12 of hexavalent chromium, when Defendant knew or should have known that burning
13 glass constituents, waste, or both in such a manner could result in emission of
14 pollutants that would likely travel to and land on neighboring properties; or

15 (j) Defendant failed or neglected to warn the neighbors that its furnaces or facility was
16 emitting heavy metals, when Defendant knew or should have known that failure to do
17 so could result in damage to the neighbors, their children, their guests, and/or to
18 neighboring properties.

19 79.

20 Defendant Bullseye knew or should have known that its conduct was causing a foreseeable risk
21 of harm because: (i) it knew that it was using toxic metals in its glass furnaces; (ii) it knew or should
22 have known that as a matter of basic chemistry not all of the toxic metals it was putting into its glass
23 manufacturing would be bound up in the glass; (iii) it knew that emissions from similar furnaces were
24 regulated at similar facilities in nearby States and elsewhere; (iv) it knew that EPA had been sufficiently
25 worried about the emissions from glass furnaces that EPA created and proposed regulations for such
26 furnaces; (v) it knew that it was providing personal protective gear to employees working with those
27 same glass constituents; (vi) it knew that it was located in a primarily residential neighborhood; (vii) it
28

1 knew that material filtered from its emissions in the future would need to be disposed of as hazardous
2 materials; and (viii) it could foresee that by emitting toxic metals unchecked it could damage the health,
3 property, or both of those living near its facility.

4 **REQUEST FOR RELIEF**

5 Plaintiffs request a judgment for and seek the following economic and non-economic damages as
6 well as equitable relief:

7 A. An Order certifying this matter as a class action pursuant to ORCP 32;

8 B. An Order directing Defendant to preserve documents and other information related to
9 Plaintiffs' current claims, including claims for damages;

10 C. An Order directing Defendant to permanently cease the use of arsenic, cadmium, and
11 chromium and any other toxins in its glass production processes unless and until it installs adequate
12 emissions control;

13 D. An Order requiring Bullseye to pay for all residents living within 1.5 miles of Bullseye to
14 have urine and/or blood testing performed for the presence of arsenic, cadmium, and chromium;

15 E. An Order requiring Bullseye to remove all particulate matter Bullseye has deposited or
16 allowed to be deposited on the property of Plaintiffs and Class members;

17 F. An Order requiring Bullseye to pay economic and/or non-economic damages to Plaintiffs
18 and the class;

19 G. An Order requiring Bullseye to establish a fund to cover the costs of ongoing diagnostic
20 testing of Plaintiffs and the class for the heavy metals emitted by Bullseye, to determine if there are any
21 long term health effects of those exposures;

22 H. An Order directing Bullseye to pay attorneys' fees and costs;

23 I. An Order awarding prejudgment interest at the highest allowable rate on the economic
24 damages; and

25 J. Such other relief that the Court may deem just.

26 ///

27 ///

DATED this 14th day of April, 2016.

KELLER ROHRBACK L.L.P.

By /s/Matthew J. Preusch

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Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing **FIRST AMENDED CLASS ACTION COMPLAINT** on:

Sarah J. Crooks
Courtney R. Peck
PERKINS COIE LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
Attorneys for Defendant

by the following indicated method or methods:

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

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

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

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

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

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

DATED: April 14, 2016

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