**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

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| ARNOLD GOLDSTEIN, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>EXXONMOBIL CORPORATION, et al.,<br><br>Defendants. | No. CV 17-2477 DSF (SKx)<br><br>Order Granting in Part Plaintiffs' Renewed Motion for Class Certification (Dkt. 191) |

Plaintiffs Arnold Goldstein and Hany Youssef move to certify this suit as a class action. The motion is granted in part.

## I. BACKGROUND

This action arises out of the operations of an oil refinery (the Refinery) in Torrance, California formerly operated by Defendant ExxonMobil Corporation and currently operated by Defendant Torrance Refining Company LLC (TRC). On February 18, 2015, an equipment malfunction within the Refinery's Fluid Catalytic Cracking unit caused flammable hydrocarbons to flow unexpectedly into an electrostatic precipitator unit where they ignited. The resulting explosion released spent catalyst and hydrocarbons into the air, and sent ash filled with metals, fiberglass, and glass wool into nearby neighborhoods.

On February 17, 2017, Plaintiffs filed this putative class action against the former and current owners for harms allegedly related to that explosion and other emissions from the Refinery. Plaintiffs allege that Defendants "negligently repaired, operated and/or maintained the Torrance Refinery, which resulted in the release of harmful pollutants, noxious odors, and excessive noise invading [their] land, causing diminished use and enjoyment of their properties, pollution of the land and air in and around [their] properties, and/or caused adverse health effect[s]." Dkt. 115, Second Am. Compl. (SAC) ¶ 39. Based on these allegations, Plaintiffs assert claims for (1) negligence, (2) strict liability for an ultrahazardous activity, (3) private nuisance, (4) public nuisance,[1] and (5) trespass. SAC at 1.

The Court denied Plaintiffs' previous motion for class certification, finding—among other things—that Plaintiffs' proposed class and subclasses had been defined too broadly for proper class treatment. Dkt. 176. Plaintiffs sought—and the Court granted—leave to renew their motion for certification of a more narrowly defined class. That renewed motion is now before the Court.

## II. PROPOSED SUBCLASSES

Plaintiffs seek to certify the following two subclasses:

[1] Plaintiffs asserted each nuisance claim twice—as a continuing nuisance and as a permanent nuisance. The characterization of a nuisance as continuing or permanent does not alter the essential elements of the claim, but merely affects certain defenses and remedial options, so the continuing and permanent nuisance claims will not be treated as independent causes of action in this Order.

### A. Soil and Groundwater Subclass (Ground Subclass)

The Ground Subclass is defined as: "Persons who currently own real property within the boundaries of the plume maps attached to the declaration of W. Richard Laton (Laton Decl. Exs.11a-b), and who occupy or have a possessory interest in said property." Mot. at 8. Plaintiff Hany Youssef seeks to represent this subclass, asserting claims for trespass, negligence, and strict liability. Id.

### B. Operational Emissions Subclass (Air Subclass)

The Air Subclass is defined as: "Persons who currently own or lease real property within the boundaries of the Contaminated Area, and who currently occupy said property. The term 'Contaminated Area' shall mean locations identified in the declaration of James Clark (Clark Decl. ¶¶ 72-73, Ex. 8 Figure 23) where air emissions currently exceed safe levels and/or that are known to register as malodorous." Mot. at 8. Plaintiffs Arnold Goldstein and Hany Youssef seek to represent this subclass, asserting claims for nuisance,[2] negligence, and strict liability. Id. With respect to this prospective subclass's claims, Plaintiffs seek injunctive relief only. Id.

## III. DISCUSSION

Recognizing that "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," Federal Rule of Civil Procedure 23 demands that two requirements be met before a court certifies a class. Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013). A party seeking class certification must first satisfy the four prerequisites

[2] Plaintiffs do not explicitly identify whether they are seeking certification with respect to their private or public nuisance claims, so both will be considered.

of Rule 23(a): numerosity, commonality, typicality, and adequacy. Sandoval v. County of Sonoma, 912 F.3d 509, 517 (9th Cir. 2018). Even if Rule 23(a) is satisfied, certification is not appropriate unless the plaintiff establishes that the proposed class falls within one of Rule 23(b)'s provisions.

A party seeking class certification "must affirmatively demonstrate his compliance with Rule 23." Behrend, 569 U.S. at 33. Before certifying a class, "the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." Sali v. Corona Regional Medical Center, 909 F.3d 996, 1004 (9th Cir. 2018). This analysis may "entail some overlap with the merits of the plaintiff's underlying claim." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011). But the merits may be considered only to the extent they are "relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 466 (2013).

## A. Rule 23(a)

### 1. Numerosity

Rule 23(a)(1) is met if "the class is so numerous that joinder of all members is impracticable." There is no fixed number that satisfies the numerosity prerequisite; it "requires examination of the specific facts of each case and imposes no absolute limitations." General Tel. Co. of Nw., Inc. v. Equal Emp't Opport. Comm'n, 446 U.S. 318, 330 (1980). "In general[, however], courts find the numerosity requirement satisfied when a class includes at least 40 members." Rannis v. Recchia, 380 F. App'x 646, 651 (9th Cir. 2010).

With respect to the Ground Subclass, Plaintiffs submit evidence that the subclass covers a geographic area encompassing

more than 80 residential properties and more than 10 commercial properties. Dkt. 191-4, Laton Decl. ¶¶ 58-60. Defendants' experts' declarations set forth what they believe to be various flaws in Laton's methodology. E.g. Dkt. 198-2, Proctor Decl.; Dkt. 198-4, Daus Decl. None of these criticisms, however, undermines Laton's opinions to such a degree that the Court cannot meaningfully make a determination as to numerosity, especially in the absence of any meaningful evidence that numerosity is not met. The Court finds the Ground Subclass is so numerous that joinder of all members is impracticable.

With respect to the Air Subclass, Plaintiffs submit evidence that nearly 2,000 residential properties fall within the subclass's geographic area. Dkt. 191-2, Clark Decl. ¶ 73. Again, Defendants' experts criticize the methodology employed by Plaintiffs' expert. E.g. Dkt. 198-2, Proctor Decl.; Dkt. 198-3 Zannetti Decl. But again, Defendants' experts do not seriously contend that the actual number of class members is so small as to make joinder practicable, and their criticisms of Clark's methodology are not sufficient to preclude reliance on his opinions altogether. The Court finds the Air Subclass is so numerous that joinder of all members is impracticable.

**2. Commonality**

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Although "even a single common question will do," Alcantar v. Hobart Serv., 800 F.3d 1047, 1052 (9th Cir. 2015), a question is only common to the class if the answer is as well. "[C]ommonality requires that the class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.'" Mazza v. Am. Honda Motor Co., 666

F.3d 581, 588 (9th Cir. 2012) (quoting Dukes, 564 U.S. at 350) (alterations in original).

The Court finds the commonality requirement is met. Plaintiffs' contentions that (1) each Defendant failed to exercise due care to prevent groundwater contamination in its operation of the Refinery, (2) operating the Refinery is an ultrahazardous activity with respect to the risk of groundwater contamination, and (3) the Refinery's emissions are harmful to health or offensive to the senses, are all questions capable of resolution for the entire class "in one stroke."

Further, none of the proposed subclasses' claims can succeed without prevailing on at least one of these three questions. See, e.g., Lussier v. San Lorenzo Valley Water Dist., 206 Cal. App. 3d 92, 107 (1988) ("[T]respass may be committed by an act which is intentional, reckless or negligent, or the result of ultrahazardous activity."); Ladd v. Cty. of San Mateo, 12 Cal. 4th 913, 917 (1996) ("The elements of a cause of action for negligence are well established. They are '(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury.'") (alterations in original); Pierce v. Pac. Gas & Elec. Co., 166 Cal. App. 3d 68, 85 (1985) ("The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person who is injured as a proximate result of that activity, regardless of the amount of care he uses."); Cal. Civ. Code § 3479 ("Anything which is injurious to health . . . or is indecent or offensive to the senses . . . is a nuisance.").

The Court finds the commonality requirement is met.

### 3. Typicality

Rule 23(a)(3) is met if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." This requirement ensures that "the interests of the named representatives align with the interests of the class." Wolin v. Jaguar Land Rover N. Am., 617 F.3d 1168, 1175 (9th Cir. 2010). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" Hanon v. Dataproducts Corp, 976 F.2d 497, 508 (9th Cir. 1992) (quoting Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." Parsons v. Ryan, 754 F.3d 657, 685 (9th Cir. 2014).

a) Negligence and Strict Liability Claims (Both Subclasses)

With respect to Plaintiffs' claims for negligence and strict liability for harm resulting from an ultrahazardous activity, the Court finds that typicality is not met. In analyzing Plaintiffs' original motion for class certification, the Court found Plaintiffs' negligence and strict liability claims were typical of class members who had suffered "personal injury . . . from all three of the Refinery's exposure streams." Dkt. 176 at 6 (ellipsis in original); id. at 11. However, as Plaintiffs recognize, "the Court . . . denied certification of a personal injury class" on other grounds. Dkt. 199 at 9 (citing Dkt. 176 at 13). In order to avoid the pitfalls of a personal injury class, Plaintiffs have abstracted the asserted harm resulting from the Refinery's groundwater and air emissions, from personal injury to the emissions' "concomitant health risks." E.g. Dkt. 191 at 18.

Of course, Plaintiff's change in legal theory is not itself problematic. Plaintiffs can pursue the theory of liability that gives them the greatest chance to prevail. See In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig., 270 F.R.D. 521, 532 (N.D. Cal. 2010). However, in redefining the harm at such an abstract level, Plaintiffs have abstracted away these causes of action entirely. As California courts have recognized in the negligence context,[3] "[i]ncreased risk alone is not actionable." Whiteley v. Philip Morris Inc., 117 Cal. App. 4th 635, 701 (2004), as modified on denial of reh'g (Apr. 29, 2004).

This principle takes on even greater force in the context of strict liability for an ultrahazardous activity. Such a claim requires a showing that the activity involves a high degree of risk of harm and that the harm suffered by the plaintiff "was the kind of harm that would be anticipated as a result of the risk created by [the activity]." Judicial Council of California Civil Jury Instruction (CACI) 460; see also Edwards v. Post Transportation Co., 228 Cal. App. 3d 980, 985 (1991) (citing Restatement 2d Torts § 520). If an increased risk of harm alone were actionable, then every ultrahazardous activity would be actionable per se, because to say that an activity is ultrahazardous is necessarily to say that it causes an increased risk of harm.

Based on Plaintiffs' asserted harm of increased health risks, what the members of the proposed subclasses have in common is not a negligence or strict liability claim, but the potential for such a claim eventually to accrue. The Court finds Plaintiffs' asserted claims of negligence and strict liability for harm resulting from an

[3] This is in contrast to the nuisance context, where risk of harm can be independently actionable. See, e.g., San Diego Cty. v. Carlstrom, 196 Cal. App. 2d 485, 491 (1961) (noting that a fire hazard can constitute a public nuisance).

ultrahazardous activity are not typical of the class. Although these claims, being essentially inchoate future claims, are not appropriate for class-wide treatment, the Court will proceed to consider Plaintiffs' other asserted claims for class certification. See Fed. R. Civ. P. 23(c)(4) (permitting certification of some issues while leaving others to be pursued on an individual basis).

b) Trespass Claim (Ground Subclass)

The Court finds Youssef's trespass claims are typical of class members' claims in Zones A, B, and C[4] of Laton's map. Youssef contends that his property shows elevated levels of certain harmful soil vapors and that the most likely cause is chemicals emitted by the Refinery, which the groundwater then carries onto his property before it dissipates through the soil. Plaintiffs have submitted sufficient evidence that other class members in Zones A, B, and C also experience elevated levels of harmful soil vapors. Defendants contend that Youssef's trespass claim is not typical because he claims an abatable (and therefore continuing) trespass, while some class members may have trespass claims that are not abatable and therefore constitute permanent trespass claims. This argument fails. For purposes of typicality, it is sufficient that Youssef's claims are "reasonably coextensive with those of absent class members; they need not be substantially identical." Parsons, 754 F.3d at 685.

With respect to Zone D, however, the Court finds typicality is not met. Plaintiffs concede that even their own models do not suggest any elevated levels of harmful soil vapor on the properties in Zone D, nor is there any other basis to suggest a current trespass on those properties. Rather, Zone D class members are subject only to the risk of a future trespass, if the plume of

[4] Zone D will be discussed separately below.

contaminated groundwater continues to expand. It is therefore not clear that class members in Zone D have suffered any harm at all, let alone a harm similar to Youssef's. Plaintiffs request that the Court exclude Zone D from its Ground Subclass definition if it finds that any injury to that subclass is distinct. The Court agrees this is appropriate and Plaintiffs' Ground Subclass is limited to Zones A, B, and C.

c) Nuisance Claim (Air Subclass)

The Court also finds Youssef's and Goldstein's nuisance claims are typical of the Air Subclass's claims. Youssef and Goldstein's harms include "exposure to toxic air and loss of use and enjoyment of their property." Dkt. 191, Mot. at 12. As Defendants correctly note, the first harm—exposure to toxic air—sounds more in public nuisance while the second harm—loss of use and enjoyment of property—sounds more in private nuisance. The Court agrees with Defendants that not all class members necessarily suffer lost use and enjoyment of their property as a result of any health risks associated with the Refinery's emissions. For example, those who are unaware of either the emissions or the health risks associated with them continue to make unfettered use of their property, enjoying it as they would in the absence of those health risks.

However, the Court does not agree that this necessarily defeats typicality. As noted above, Plaintiffs' claims need only be reasonably coextensive with those of other class members, not substantially identical. Here, all class members share at least Plaintiffs' asserted public health harms, and there is nothing in the record suggesting that Goldstein and Youssef are unique in experiencing some detriment to the use and enjoyment of their property. While some variety may exist in the exact form this harm takes among class members, and there is some possibility

that some class members lack this particular harm relating to property rights, the Court finds that Goldstein and Youssef's claims are still reasonably coextenstive with those of the Air Subclass. Typicality is met.

**4. Adequacy**

Rule 23(a)(4) permits the certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class." "[U]ncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry." Rodriguez v. West Publishing Corp., 563 F.3d 948, 959 (9th Cir. 2009). "An absence of material conflicts of interest between the named plaintiffs and their counsel with other class members is central to adequacy and, in turn, to due process for absent members of the class." Id. Determining adequacy involves two inquiries: (1) whether the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) whether the representative plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003).

a) Plaintiffs' Adequacy

(1) Youssef

Defendants argue that Youssef will not adequately represent the Air Subclass because he no longer asserts claims for damages. Defendants argue that Youssef's decision to forego damages and seek certification under Rule 23(b)(2) shows he has a conflict of interest with the rest of the class. Specifically, Defendants argue that Youssef's failure to pursue damages on behalf of the Air Subclass will bar all Air Subclass members from ever asserting claims for damages. Defendants' view of the law is incorrect. In

the Ninth Circuit, "the general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events." Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996). Because Youssef's pursuit of only injunctive relief on behalf of the Air Subclass will not bar later damages suits by Air Subclass members, there is no conflict of interest.

Defendants also argue that Youssef's failure to assert damages claims on behalf of the Ground Subclass, despite seeking certification under Rule 23(b)(3), presents a conflict of interest because it will bar subsequent damages claims by members of the Ground Subclass. See, e.g., Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co., 637 F.3d 827, 830-31 (7th Cir. 2011) ("A representative can't throw away what could be a major component of the class's recovery."). The Court agrees with Defendants that, in certain circumstances, "[w]hen [a] class representative proposes waiving some of the class's claims, the decision [could] creat[e] an irreconcilable conflict of interest with the class." Slade v. Progressive Sec. Ins. Co., 856 F.3d 408, 412 (5th Cir. 2017). However, the Court concludes that under these circumstances, any such conflict is imagined rather than real.

Because the Court is considering certifying the Ground Subclass only with respect to Youssef's trespass claim, any damages being waived by Youssef are limited to damages for trespass. Further, as the Court noted in its prior order, "[d]ue to the nature of the trespass—subsurface contamination—damages in any individual action are likely to be modest and outweighed by the time or expense of litigating the action, especially in light of the risk that an individual plaintiff might prevail on the merits but recover only minimal damages for failure to prove actual harm." Dkt. 176 at 21. It does not appear that Youssef's waiver of

any claim of actual damages for trespass would relinquish something of true value to the class members.

Defendants also argue that Youssef cannot adequately represent the Ground Subclass because Plaintiffs' expert divides the class geographically into three[5] zones—A, B, and C—for purposes of remedial recommendations, but Youssef owns property only in Zone A. Therefore, Defendants speculate, Youssef "will presumably advocate strongly for Zone A remedies" while failing to advocate strongly for the class members in other Zones. Dkt. 198, Opp'n at 14. This argument, speculative as it is, is wholly unpersuasive. Defendants have presented no authority suggesting that Youssef's interests must be identical to all other class members' interests in order for him to represent those interests adequately, and there is no reason to think he will not be able to do so.

Finally, Defendants argue that Youssef is an inadequate class representative because he lacks Article III standing to pursue claims for trespass. Specifically, Defendants argue that at most Youssef's backyard falls within the contaminated area modeled by Plaintiffs' expert, Laton, and Youssef has submitted no other evidence of a physical intrusion on his property. This argument fails. Laton's model is evidence of a physical intrusion on Youssef's property. That Youssef has not provided more direct evidence of more extensive intrusion is of no Article III consequence.[6]

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[5] Plaintiff's' expert actually identified four zones—A, B, C, and D—but the Court has determined that Zone D should be excluded from the Ground Subclass definition.

[6] Of course, discovery may eventually reveal that there is no contamination on Youssef's property, at which time Defendants may again raise this issue.

(2) Goldstein

Defendants also argue that Goldstein's property falls outside the geographic area of the Air Subclass, and that the property appears to be inside the class zone only because of errors made by Plaintiffs' expert in mapping the zone's boundaries. Specifically, Defendants' expert points to errors made by Clark in calculating the Air Subclass's geographic boundaries, shifting the boundary by about 125 meters. E.g. Dkt. 198-3, Zannetti Decl. ¶¶ 23-30. Plaintiffs concede that these errors exist, but contend that once they are corrected, Goldstein's property will still be within the class's geographic boundaries.

Because the Court has found Youssef to be an adequate class representative for both Subclasses, the Court need not determine at this time whether Plaintiffs' predictions regarding the corrected class boundaries are correct. The Court finds that if Goldstein's property is within the Air Subclass's geographic boundaries after Plaintiffs' expert corrects his calculations, Goldstein will fairly and adequately represent the interests of the class. The Court will not certify Goldstein as a class representative until and unless Plaintiffs submit an updated class map showing Goldstein's property to be within the class's geographic boundaries.

b) Counsel's Adequacy

In its previous order denying class certification, the Court expressed its concerns regarding counsel's ability to prosecute this action vigorously on behalf of the class, specifically with respect to counsel's willingness and ability to keep the case moving forward and meet deadlines, despite any roadblocks created by the opposing parties. Despite their inability to prevail on several of

their claims[7], the Court finds counsel's conduct since that time preliminarily suggests, with the combined efforts of Matern Law Group PC and Sher Edling LLP, counsel are capable of fairly and adequately representing the interests of the class.

**B. Rule 23(b)**

In addition to showing that the prerequisites of Rule 23(a) are met, a party seeking class certification must also demonstrate that at least one of the requirements of Rule 23(b) is met. Plaintiffs rely on Rule 23(b)(3) for the Ground Subclass and on Rule 23(b)(2) for the Air Subclass.

**1. Ground Subclass — Rule 23(b)(3)**

Rule 23(b)(3) permits certification where (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." Certification is therefore appropriate when the interests of the parties are so aligned that the parties are best served by resolving their differences in a single action. Dukes, 564 U.S. at 362.

a) Predominance

"The Rule 23(b)(3) predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized ones." Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1134 (9th Cir. 2016). For purposes of this analysis, "[a]n individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will

[7] Obviously, Defendants have claimed that Plaintiffs should not prevail on any of their claims.

suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (internal quotation marks omitted) (second alteration in original). This is a qualitative, rather than a quantitative, analysis. "[M]ore important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis. . . . It is an assessment of whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Torres, 835 F.3d at 1134.

"Considering whether 'questions of law or fact common to the class members predominate' begins, of course, with the elements of the underlying cause of action." Erica P. John Fund, Inc. v. Halliburton, 563 U.S. 804, 809 (2011). The Court is considering the Ground Subclass for certification with respect to Youssef's trespass claim only, and the Court finds that common questions do predominate.

The elements of a claim for trespass are: (1) Plaintiff owned or leased the property; (2) Defendant negligently caused, or was involved in an ultrahazardous activity that caused; (3) something tangible to enter Plaintiff's property; (4) Plaintiff did not give permission for the entry; (5) the entry interfered with Plaintiff's use and enjoyment of the property; and (6) Defendant's conduct was a substantial factor in causing the interference with Plaintiff's use and enjoyment of the property. See Ralphs Grocery Co. v. Victory Consultants, Inc., 17 Cal. App. 5th 245, 261-62 (2017); McBride v. Smith, 18 Cal. App. 5th 1160, 1174 (2018); CACI 2000; CACI 2001.

While the first and fourth elements are individual ones, whether Defendants were negligent and whether Defendants were engaged in an ultrahazardous activity are common questions. Further, Plaintiffs have submitted evidence that the extent of the

soil and groundwater contamination can be proved on a class-wide basis using models prepared by their expert Laton.[8] This "same evidence will suffice for each member to make a prima facie showing" as to the third element without needing "evidence that varies from member to member." Tyson Foods, 136 S. Ct. at 1045. Further, the second and third elements are more "apt to drive the resolution" of this claim than the first and fourth, which are both individual inquiries. Torres, 835 F.3d at 1134.

If the fifth and sixth elements—Plaintiffs' claimed harm and Defendants' proximate causation of that harm—were critical to establishing liability, this might tip the scales in the other direction, because interference with each individual Plaintiff's use and enjoyment of the property would be a highly individualized inquiry that is equally likely to drive the resolution of the litigation. However, because nominal damages are available without showing the last two elements, liability can be established without those two inquiries. Thus, there will be a need for individualized proceedings on those two elements only as to class members who seek compensatory damages, and the inquiry would be coextensive with the damages inquiry itself, which does not defeat class certification. See Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013) ("[T]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3).").

As Defendants correctly note, California recognizes two types of trespass—continuing and permanent—based on whether the trespass can reasonably be "discontinued or abated." Mangini v. Aerojet-General Corp., 12 Cal. 4th 1087, 1097 (1996). Although

[8] Defendants criticize, but do not move to exclude or strike, Plaintiffs' experts' reports. No Daubert motion has been filed. Defendants are, of course, free to do so at a later point in the proceedings.

Defendants raise the specter of individual issues relating to the continuing/permanent trespass distinction predominating in the litigation, the Court finds this unlikely. First, the differences between them relate only to the remedies available and the statute of limitations. Starrh & Starrh Cotton Growers v. Aera Energy LLC, 153 Cal. App. 4th 583, 593 (2007). This issue is therefore unlikely to predominate on a qualitative level. Second, with respect to whether the trespass can be reasonably discontinued or abated, it is likely that the issue can be adjudicated on a class-wide basis, or at least with respect to large portions of the class whose properties share similar characteristics.

The Court finds that questions of law and fact common to the Ground Subclass predominate over questions affecting only individual members.

b) Superiority

To certify a class under Rule 23(b)(3), the Court must also find "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Because the Ground Subclass's claim for trespass is the only claim being considered for certification under Rule 23(b)(3), the Court will address only that claim here.

"The superiority inquiry . . . requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023 (9th Cir. 1998). "While superiority is a separate base to be touched, it is addressed by many of the considerations that inform a trial court's judgment call about how clearly predominant the common issues must be." Gintis v. Bouchard Transp. Co., 596 F.3d 64, 67 (1st Cir. 2010).

The Court finds that a class action is superior to other available methods for adjudicating the Ground Subclass's trespass claims. Due to the nature of the trespass—subsurface contamination—damages, or the value of remedial measures, in any individual action are likely to be modest and outweighed by the time or expense of litigating the action, especially in light of the risk that an individual plaintiff might prevail on the merits but recover only nominal damages for failure to prove actual harm. This makes a class action a superior method of adjudicating this controversy. The Court finds the Ground Subclass proper for class certification with respect to its claim for trespass only.

**2. Air Subclass — Rule 23(b)(2)**

Plaintiffs seek certification under Rule 23(b)(2) of their claim for injunctive relief against TRC. Certification of a class under Rule 23(b)(2) is appropriate where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

One of TRC's bases for refusing to reduce or remediate its operational emissions is that the appropriate balance between the community's health interests and the social utility of the Refinery's operation has already been struck by the complex regulatory scheme within which the Refinery already structures its operations. See, e.g., Dkt. 198, Opp'n at 1-2. Another is that "[m]easured against . . . carefully studied health risks, the Refinery does not pose an unacceptable risk to the surrounding community, [because] it operates within the limits set by [applicable regulators]." Id. In short, TRC's position is that individuals from the surrounding community have no right to seek revision of the pollution or safety standards that must be met by

the Refinery because those standards have already been finely calibrated by agencies expressly tasked with weighing all the interests at stake.

Viewed in this light, it is clear certification under Rule 23(b)(2) is appropriate. If TRC's contention fails, the interest of the community in seeing the Refinery's operational emissions reduced can be vindicated by a single injunction. Indeed, any order requiring TRC to reduce its operational emissions will necessarily implicate the interests of the class, as it is impossible to order TRC to reduce its air pollutants with respect to one residence while permitting it to continue its emissions unabated with respect to all the surrounding residences. See Dukes, 564 U.S. at 360 ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.") (internal quotation marks omitted).

The overall advantage of a Rule 23(b)(2) class becomes even more apparent when considering the possibility that TRC may prevail. In the absence of class certification, the individual Plaintiffs will be denied their injunctive remedy, but nothing will prevent each other member of the community from instituting his or her own suit and seeking similar injunctive relief, each one relying on the same basic evidence and legal contentions. And if any one of those community members succeeds in obtaining an injunction requiring TRC to reduce its emissions, TRC's success in all the other suits will be of little benefit to it. Certification of a Rule 23(b)(2) class permits resolution of the dispute once and for all.

The Court finds certification of the Ground Subclass appropriate under Rule 23(b)(2).

## IV. CONCLUSION

Plaintiffs' motion for class certification is granted in part. Pursuant to Rule 23(c)(4), the Court certifies the following Ground Subclass with respect to its claims for trespass only:

> Persons who currently own real property within the boundaries of Zones A, B, and C of the plume maps attached to the declaration of W. Richard Laton (Dkt. 191-5, ECF pp. 24-25 (Laton Decl. Exs. 11a-b)), and who occupy or have a possessory interest in that property.

This class will be represented by Plaintiff Hany Youssef. Sher Edling LLP and Matern Law Group, PC are appointed class counsel for the Ground Subclass.

Also pursuant to Rule 23(c)(4), the Court certifies the following Air Subclass with respect to its claims for public and private nuisance only and against TRC only:

> Persons who currently own or lease real property within the boundaries of the Contaminated Area, and who currently occupy said property. The term "Contaminated Area" shall mean locations where air emissions currently exceed safe levels or that are known to register as malodorous, which locations shall be identified in a corrected declaration by James Clark.

This class will be represented by Plaintiff Hany Youssef, subject to the addition of Plaintiff Arnold Goldstein, conditioned on James Clark's corrected class maps showing that Goldstein is indeed a class member. Sher Edling LLP and Matern Law Group, PC are appointed class counsel for the Air Subclass.

The parties are ordered to meet and confer and provide to the Court a stipulation concerning the date by which the corrected map must be provided to defense counsel. If the parties are

unable to agree whether Goldstein is within the relevant subclass, the parties are to provide a joint statement containing their respective positions.

IT IS SO ORDERED.

Date: October 15, 2019

Dale S. Fischer
United States District Judge