Parties/Attorneys:

Plaintiff	Pence Ranch LLC and Quantum Wines LLC	Bezek Behle & Curtis, LLP Robert A. Curtis Aaron L. Arndt Foley
Defendant	Santa Barbara Westcoast Farms, LLC; Scott Rudolph	Cholakian & Associates Kevin K. Cholakian Ronald Q. Tran Cappello & Noel LLP Lawrence J. Conlan Richard Lloyd

TENTATIVE RULING

For the reasons stated below, plaintiff has failed to demonstrate an ascertainable class, a well-defined community of interest, or that a class action would be superior to other methods of litigation. The motion for class certification is therefore denied.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)

The second amended complaint alleges as follows: Plaintiff Pence Ranch, LLC is a small vineyard located in the Santa Rita Hills AVA in Santa Barbara County at 1909 West Highway 246. Plaintiff Quantum Wines, LLC operates a tasting room that serves, among other things, the wines produced on Pence Ranch. It operates an indoor and outdoor tasting room, both of which are alleged to be affected by a skunky odor that travels from the cannabis operations of defendant Santa Barbara Westcoast Farms, LLC (Westcoast) onto plaintiffs' property. Westcoast is located at 1800 West Highway 246, Buellton, California. Its cannabis grow operation is adjacent to plaintiffs' property. Defendant Scott Rudolph is the principal and managing member of Westcoast.

Defendants' commercial cannabis operation has severely affected the use and enjoyment of Plaintiffs' property. Plaintiffs' property routinely smells of a strong skunky odor emanating from defendants' cannabis operation, in addition to the malodors emanating from chemical deodorants defendants discharge as part of their cannabis cultivation operation. Plaintiffs' property is affected by both the odor and

particulate matter from defendants' cannabis operation. A residential neighborhood is located less than a mile from Westcoast.

Plaintiffs' operative complaint includes the following causes of action: (1) private nuisance; (2) public nuisance; (3) violation of Bus. & Prof. Code, § 17200; and (4) trespass. The remedies requested include damages for diminution of the value of their real property; damages for the impairment of the ability of sell their property; the adverse impact on Plaintiffs' and Class Members' ability to occupy and/or conduct business on their property, and other damages. (See Complaint, ¶¶ 32, 39, 54.) They seek general and special damages, economic and consequential damages, and punitive damages, as well as an order directing defendants to abate the nuisance. (Complaint, Prayer for Relief.) The complaint also includes class action allegations and defines the relevant class as follows:

- "All owner-occupiers of residential and/or commercial real property located within two miles of Defendants' cannabis operations from April 26, 2019 to the present whose property has suffered a diminution of value as a result of Defendants' cannabis operations" (collectively, the "Diminution Class" or "Diminution Class Members").[1]

Defendants contend that this subclass defines an impermissible fail-safe class in which membership cannot be determined without a finding of ultimate liability. It is error to certify a class if that class is defined in terms of ultimate liability questions. A class is properly defined in terms of objective characteristics and common transactional facts, not by identifying the ultimate facts that will establish liability. (*Hicks v. Kaufman & Broad Home Corp*. (2001) 89 Cal.App.4th 908, 915; *Ghazaryan v. Diva Limousine, LTD*. (2008) 169 Cal.App.4th 1524, 1531.)

Defendants argue that the class definition includes the qualifier "whose property has suffered a diminution of value as a result of Defendants' cannabis operations." The inclusion of this parameter plainly implicates liability, as a class member cannot be identified until the trial court determines that he or she has suffered a nuisance or trespass, a pure liability determination.

In reply, plaintiff explains the inclusion of the remedy was used to distinguish this class from the Business Revenue Class (see fn. 1). It asserts that now that it is pursuing just the landowner's claims, the definition could just as easily stand without the qualifier.

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[1] In the SAC, plaintiffs identify another class labeled the "Business Revenue Class." Plaintiffs sought to certify this class in addition to the above class in its original motion filed March 17, 2025. Defendant filed an ex parte motion to continue the hearing on March 26, 2025, noting that it had not yet deposed plaintiff on evidence submitted in support of the class certification of the "Business Revenue Class." The parties ultimately stipulated to plaintiffs' filing of an amended class certification motion that omitted the "Business Revenue Class." The court signed the stipulation into an order on April 1, 2025.

To eliminate the specter of a fail-safe definition and allow for full analysis of this motion, court will consider the class definition to be as follows:

- "All owner-occupiers of residential and/or commercial real property located within two miles of Defendants' cannabis operations from April 26, 2019 to the present."

Legal Background

"Code of Civil Procedure section 382 authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On Drug Stores*).) "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods." (*Id.*)

"On a motion for class certification, the plaintiff has the 'burden to establish that in fact the requisites for continuation of the litigation in that format are present.' " (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 654.) In reviewing a certification order, the court considers "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citations.] 'Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.' " (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 327.) One valid reason for denying certification is sufficient. (*Ibid*; see also *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 143.)

Objections to Evidence

The court will address those objections it deems relevant to its determination. All other objections are overruled as moot.

1. Defendant's Objection to Plaintiff's Evidence

- Objection No. 1: Defendants object to numerous identified statements in plaintiff's memorandum of points and authorities that were not supported by evidence on the basis that such statements are irrelevant, prejudicial, lack foundation, and are hearsay. The court overrules this objection. "Matters set forth in points and authorities are not evidence." (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 590; see *Brehm Cmtys. v. Superior Court* (2001) 88 Cal.App.4th 730, 735.) Thus, an evidentiary objection is inappropriate. Nor will the court strike the

identified passages. It is not appropriate for the trial court to rely on matters set forth in points and authorities in order to grant plaintiffs' motion. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578 ["The only evidence the trial court should [consider] and which we may consider ... is that contained in the declarations filed in support of ... the motion. The matters set forth in ... memoranda of points and authorities are not evidence and cannot provide the basis for the granting of [a] motion."].)

- Objection No. 2: Defendants object to the evidence of odor complaints attached as Exhibit A to the Arndt Declaration made to the County of Santa Barbara Planning and Development Department complaining of the odor and chemical masking agents being emitted from [Westcoast Farms'][2] facility", on the basis they are irrelevant, prejudicial, are hearsay, lack foundation, and lack authentication. The objection is overruled. The records are clearly relevant and not unduly prejudicial and have been properly authenticated.

- Objection No. 4: Defendants object to plaintiff's reliance on the order from Judge Thomas P. Anderle order granting class certification in *Santa Barbara County Coalition for Responsible Cannabis et al vs Ceres Farms LLC* et al (23CV03885). The objection is sustained. Superior Court rulings are unpublished opinions, and may not be cited, absent circumstances not applicable here. (See *Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360, 399 [unpublished superior court decision has no precedential authority and is not citable authority]; *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [citation of unrelated trial court order improper].)

- Objection No. 6: Defendants object to the Board of Supervisors Agenda Letter, attached as Exhibit E to Declaration of Aaron Arndt on the basis that it is irrelevant and unduly prejudicial. Defendants point out that much of this document refers to cannabis grows in Carpinteria, which are clearly irrelevant to this action and the objection will be sustained to that extent. But the parts of the Letter that do reference defendants remains relevant. Defendants also register a hearsay objection to any out-of-court statements, but do not identify any in particular for the court to examine. This objection is overruled.

[2] In both the Arndt declaration and the objection, this statement identified the relevant facility as the Valley Crest facility. This declaration was clearly recycled from the class certification motion in Case No. 23CV03885. For clarity, the name of the defendant in this action was substituted.

- Objection No. 7: Defendants object to **"**Attachment 4" to the "Briefing on Cannabis Odor Abatement Plan" attached as Exhibit F to Declaration of Aaron Arndt for the same reasons as Objection No. 6. The court reaches the same conclusions as Objection No. 6.

2. Plaintiff's Objections to Evidence

   a. Declaration of Kavaughn Baghbeh, project manager for defendant West Coast Farms. Baghbeh reports having visited "multiple neighboring properties. This included: (1) properties directly surrounding SBWC's property; (2) properties purportedly within the two-mile class radius, and (3) three properties just outside the putative class area." (Baghbeh Decl., ¶¶ 2-3.)

      - Objection 1: Plaintiff objects to the statement "Each of the individuals at the properties I visited reported either no discernable odor, or no issues with any short-term odor experienced from SBWC's operation. Twenty (20) individuals, including neighbors directly to the north, south, east and west of SBWC's operation, agreed to provide signed declarations reporting no discernable or problematic odors and registering no objection to SBWC's operations." The objection is based on relevance, prejudice & probative value. The objection is overruled for reasons discussed below.

      - Objection 2: This objection is to the 20 declarations collected by Baghbeh, attached to his declaration as Exhibits 2-1 – 2-20. They are form declarations, that enable the declarant to identify themselves, describe in their own words their experience with defendant's operation, whether they experienced any alleged odor, and assert generically "I do not support Plaintiffs' lawsuit, and Plaintiffs' apparent desire to shut down West Coast's business and/or seek compensation is not representative of my views, or my interests." (See Baghbeh Decl., Exhibits 2-1 – 2-20.) The objection is based on relevance, prejudice & probative value. The objection is overruled for reasons discussed below, except as to the declarations marked Exhibits 2-17, 2-18, and 2-20, which are outside the two-mile class radius. (Baghbeh Decl., ¶ 3, Exh. 1.) The objection is sustained as to those declarations.

   b. Declaration of Pamela Dalton, Senior Research Scientist and Principal Investigator at the Monell Chemical Senses Center in Philadelphia, Pennsylvania. She has been retained by counsel for Defendant West Coast Farms to provide expert opinions concerning Plaintiff's Motion for Class Certification. She opines as follows:

- Opinion 1: "It is my opinion that the impact of odors in the proposed class area, including of any odors emitted from the SBWCF, cannot be assessed without individual inquiry. Potential exposure to odors is highly variable, and the potential for any impact from odor exposure depends on three types of factors that vary across the population within the 2 mile class boundary: (1) physical and geographic factors, (2) biological factors, and (3) psychological factors."

  Defendant objects on the basis this is improper expert opinion (Evid. Code, §310.) An expert exceeds the proper bounds of expert testimony when he or she opines the case is not amenable to class treatment because an individualized inquiry will be necessary. (*Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, 513.) The court sustains the objection to the extent it offers such a legal conclusion.

- Opinion 2: "It is my opinion that there is no evidence of a class-wide odor impact and that any odors that may be detected off-site from the SBWCF are weak, infrequent, and limited to a short period of the growing operation."

  Defendant objects to this opinion on the basis that it offers an impermissible legal conclusion and conclusions of fact and on the basis it runs afoul of the rule that the certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–440.) Although the court must resolve threshold legal or factual questions to the extent the propriety of certification depends upon them (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1025), no such issue has been identified for resolution here. Thus, the opinion is legal conclusion regarding the issue that odor created a nuisance, which goes to whether the action is legally meritorious. The court sustains the objection.

Analysis

1. Is the Class Sufficiently Numerous and Ascertainable?

   a. Numerosity

A class is sufficiently numerous if individual joinder of all plaintiffs is impracticable, and "no set number is required as a matter of law for the maintenance of a class action." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934.) Here, plaintiff provides a screen capture of a parcel map obtained online from the County of Santa Barbara's ArcGIS Land Use and Zoning map. Counsel has placed a red dot on the screen capture to indicate the parcel identified as 1800 West

Highway 246. "I have also drawn a red line indicating the area approximately two miles from the borders of Defendant's property based on the scale provided in the corner of the map." (Arndt Decl., ¶ 9, Exh. H.) According to plaintiff, "a rough estimate of the number of properties involves amounts to several dozen potential class members." (Memorandum, p. 18, ll. 18-19.) Although this assertion is not evidence,[3] according to defendants' expert, Jennifer Pitt, there are 218 properties in the proposed class area. (Pitt Decl., ¶ 8.) The class is sufficiently numerous.

b. Ascertainability

An ascertainable class exists after examining "(1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." (*Global Minerals v. Superior Ct*. (2003) 113 Cal.App.4th 836, 849.) In defining an ascertainable class, "the goal is to use terminology that will convey sufficient meaning to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent." (*Global Minerals v. Superior Ct*., *supra*, 113 Cal.App.4th at 858.) A class is not ascertainable when the proposed class definition is so broad that it is impossible to distinguish those class members who have viable claims from those who are not. (*Miller v. Bank of America, N.A.* (2013) 213 Cal.App.4th 1, 7-8; *Sevidal v. Target Corp*. (2010) 189 Cal.App.4th 905, 921 [certification "can be denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be identified from those who should not be included in the class"].)

Defendants observe that where a class comprised of real properties has been certified, the class area is generally defined and supported by expert evidence demonstrating a causal nexus between the class area and a reliably-established plume or migration of contamination. (See, e.g., *Behar v. Northrop Grumman Corp*. (C.D. Cal. July 1, 2024, No. 2:21-CV-03946-HDV-SKx) 2024 WL 4004052 at *1, 15, 16, 17, 21 (certifying class for residents of 3,294 homes with houses above reliable, expert analysis showing a commonly-provable contamination plume); *Andrews v. Plains All American Pipeline, L.P.* (C.D. Cal. 2018 Apr. 17, 2018, No. CV154113PSGJEMX) 2018 WL 2717833, at *10 (real property class certified where reliable expert evidence of oil migration from the ocean onto specific geographically-identifiable class of oiled properties).) Defendants argue that the two-mile proposed radius here is not based on any such admissible evidence.

[3] "Matters set forth in points and authorities are not evidence." (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 590; see *Brehm Cmtys. v. Superior Court* (2001) 88 Cal.App.4th 730, 735.) Nor is it appropriate for the trial court to rely on such statements in order to grant plaintiffs' motion. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578 ["The only evidence the trial court should [consider] and which we may consider ... is that contained in the declarations filed in support of ... the motion. The matters set forth in ... memoranda of points and authorities are not evidence and cannot provide the basis for the granting of [a] motion."].)

In reply, plaintiffs argue that the radius was chosen based on "publicly available documents and has been supported by experts consulted by Plaintiff prior to the filing of the Motion." No expert declarations were submitted with plaintiff's motion. Thus, the only available evidence to support the radius is the referenced publicly available documents. These are attached to the Arndt Declaration as Exhibit A and consist of reports of cannabis odor complaints received by the Santa Barbara County Planning and Development Department between January 1, 2021 and October 17, 2024 for the Third District, which includes the property in question. According to plaintiffs, "several of [the odor complaints] state that the smell from Defendants' operation blow through Buellton: "The wind blows the stench through our city every day and night. It never stops." (See Arndt Decl., ¶ 2, Ex. A.) The center of Buellton is approximately 2 miles from Defendants' property, and this is reflected in the aerial map offered in support of Plaintiff's Motion. (*Id*. at ¶ 9, Ex. H.)" (Reply, p. 9, ll. 6-11.) Plaintiffs contend this evidence is sufficient to establish the proposed radius is not arbitrary. To bolster this conclusion, they point out that a County hired consultant concluded that a considerable amount of odor was coming from defendant's cannabis operation. (Arndt Decl., ¶ 7, Exh. E.) From that, plaintiffs wish the court to conclude that it is therefore not arbitrary to conclude that Defendants' cannabis operation emits odors and that those odors waft at least 2 miles from the center of Defendants' property.

The single report identified by plaintiffs was an anonymous reporter indicating the odor was observed at an address near Firestone Brewery. (Arndt Decl., Exh. A, p. 11, 7/7/21 Report.) Exhibit E is a report on cannabis odor abatement plan compliance monitoring in Santa Barbara County that was prepared by the County Executive Officer and the Planning & Development Department and submitted to the Board of Supervisors for its April 23, 2024 agenda. The report states that on November 1, 2022, the Board approved and authorized an Agreement for between the County and Geosyntec Consultants (Geosyntec) to provide on-call professional services of cannabis odor monitoring and abatement for a period of three years to November 1, 2025. With the April 2024 report, Geosyntec Consultants included a diagram indicating that cannabis odor was detected *along the boundary* of defendants' property. (Arndt Decl., Exh. F, p. 6.) Plaintiffs rely on this diagram in support of their assertion that any odors detected on the boundary line of defendants' property likely wafted at least two miles in all directions.

This evidence does not approach the level of that submitted in the cases above and requires extensive presumptions by the court to credit it. While a two-mile radius is a definitive measure, the court is not convinced there is a logical factual reason for using that measure. In *Brooks v. Darling Int'l, Inc.* (E.D. Cal. Mar. 31, 2017) 2017 WL 1198542, [4] plaintiffs asserted a class action nuisance cause

[4] "It is well established that in the absence of relevant state precedents our trial courts are urged to follow the procedures prescribed in rule 23 of the Federal Rules of Civil Procedure for conducting class actions. However, it is only in the absence of relevant state precedent that courts turn to federal law and rule 23 for guidance. As a general rule, California courts are not bound by the federal rules of procedure but may look to them and to the federal cases

of action against a neighboring animal rendering facility based on noxious odors emanating from the facility. They proposed a 1.5 mile radius but submitted no evidence in support. At oral argument, counsel explained that the 1.5 mile radius aspect of the proposed class definition was based upon a "preponderance of the people who have contacted [the] firm either through resident data sheets or otherwise, or who have, I believe, made complaints to a governmental entity." (*Id.* at *7.) The court "construe[d] these representations as essentially indicating that plaintiffs' counsel based the definition of the class now proposed for certification, not upon any preliminary finding made by their experts or upon a thorough analysis of a detailed survey of those possibly impacted areas, but rather upon their own interpretation of the limited information available to them." (*Id.*) The court held "that plaintiffs have failed to adequately define the proposed class here. Plaintiffs argue that, in a literal sense, class members are certainly ascertainable based upon their proposed 1.5–mile radius class definition. The problem is that the 1.5–mile radius aspect of the class definition has no acceptable basis in objective fact and is therefore arbitrary. This failure would appear to be based at least in part upon plaintiffs' decision not to conduct any preliminary scientific testing, or even to undertake a thorough analysis of a detailed survey of those possibly impacted areas, for submission in support of their class certification motion and to rest instead on their argument that testing was relevant only to the merits phase of this litigation." (*Id.* at *8.)

The court is not persuaded that plaintiff has identified any logical reason for drawing the 2-mile radius as the boundary for this lawsuit based on one report of odor blowing through Buellton, as was the case in *Brooks v. Darling Int'l, Inc.* Absent a such evidence, the element of ascertainability is unsupported.

2. Well-Defined Community of Interest

The 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' " (*Fireside Bank, supra*, 40 Cal.4th at p. 1089.) "The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' " (*Sav-On Drug Stores*, at p. 326.)

a. Predominant Questions of Law or Fact

"Predominance is a comparative concept." (*Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99.) It "requires a showing 'that questions of

interpreting them for guidance or where California precedent is lacking. California courts have never adopted Rule 23 as a procedural strait jacket. To the contrary, trial courts are urged to exercise pragmatism and flexibility in dealing with class actions." (*Hefczyc v. Rady Children's Hospital-San Diego* (2017) 17 Cal.App.5th 518, 531 [cleaned up].)

law or fact common to the class predominate over the questions affecting the individual members.' " (*In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 410.) "The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

"To assess predominance, a court 'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.' " (*Brinker, supra*, 53 Cal.4th at p. 1024.) The legal elements of the causes of action must be considered in determining whether common issues predominate. (*Apple Inc. v. Superior Court* (2018) 19 Cal.App.5th 1101, 1116.) The court "must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 537; *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 398.)

"In deciding whether the common questions 'predominate,' courts must do three things: 'identify the common and individual issues'; 'consider the manageability of those issues'; and 'taking into account the available management tools, weigh the common against the individual issues to determine which of them predominate.' " (See *Ayala, supra*, 59 Cal.4th at p. 530 [the question at the class certification stage is "whether the operative legal principles, as applied to the facts of the case, render the claims susceptible to resolution on a common basis"].) "[T]he focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action." *(Sav-On, supra,* 34 Cal.4th at p. 327.)

i. Nuisance

To prove a cause of action for public nuisance, plaintiff must prove that: (1) defendants, by acting or failing to act, created a condition or permitted a condition to exist that was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) the condition affected a substantial number of people at the same time; (3) an ordinary person would be reasonably annoyed or disturbed by the condition; (4) the seriousness of the harm outweighs the social utility of the defendants' conduct; (5) plaintiff or the class member did not consent to the defendants' conduct; (6) plaintiff or the class member suffered harm that was different from the type of harm suffered by the general public; and (7) the defendants' conduct was a substantial factor in causing plaintiff's or the class member's harm. (See CACI 2020.)

The elements of a private nuisance are the same except there is no requirement that plaintiff prove a substantial number of people were harmed and

the plaintiff suffered harm that was different from that suffered by the general public, but there are additional elements that the plaintiffs owned, leased, occupied, or controlled real property, that the defendants' interfered with plaintiffs' use of their property, and that plaintiffs were harmed thereby. (CACI No. 2021.)

Plaintiffs allege that "Plaintiffs' property routinely smells of a strong skunky odor emanating from Defendants' cannabis operation, in addition to the malodors emanating from chemical deodorants Defendants discharge as part of their cannabis cultivation operation." (SAC, ¶ 11.) The characteristic odor associated with cannabis is attributed to the release of chemical compounds into the air known as volatile organic compounds ("VOCs"). (SAC, ¶ 17.) They also allege that "[s]tudies reveal that exposure to unpleasant odors may affect an individual's quality of life and sense of well-being. Certain forms of terpenes have been shown to cause headaches, irritation, and to worsen allergies and asthma." (SAC, ¶ 18.) "The strong odors produced by Defendant affect nearby properties and interfere with the quiet enjoyment of those landowners." (SAC, ¶ 20.)

The *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, is a useful example of how California courts analyze whether to certify a class for nuisance claims. In that case, real property owners "on behalf of themselves and all real property owners situated in the flight pattern of the San Jose Municipal Airport" sued the City of San Jose (the City) for nuisance, seeking recovery for "diminution in the market value of their property caused by aircraft noise, vapor, dust, and vibration ... on theories of nuisance and inverse condemnation." (*Id.* at pp. 452-453.) The trial court certified the class, but the Supreme Court held that was error because there was "an insufficient community of interest." (*Id.* at p. 458.) The high court explained that the proposed class was diverse and included "industrial plants, public buildings, body shops, warehouses, gas stations, office buildings, multi-unit apartments, single family residences, and vacant land—some being farmed." (*Id.* at p. 461.) It continued, "While landing or departure may be a fact common to all, liability can be established only after extensive examination of the circumstances surrounding each party. Development, use, topography, zoning, physical condition, and relative location are among the many important criteria to be considered. No one factor, not even noise level, will be determinative as to all parcels." (*Ibid*, fn. omitted.) The court continued, "Then, because liability is here predicated on variables like the degree of noise, vapor, and vibration, the problem is compounded by the factors of distance and direction affecting these variables." (*Id.* at p. 462.) The court concluded that the matter could not proceed as a class action due to a lack of commonality. (*Id.* at pp. 458, 462-463.)

The court in *Behar v. Northrop Grumman Corporation* (C.D. Cal., July 1, 2024) 2024 WL 4004052 provides another helpful examination of the issue. The case arose out of contamination allegedly released by defendants Northrop Grumman Corporation and Northrop Grumman Systems Corporation ("Northrop Grumman") from its commercial manufacturing facility in Canoga Park between 1968 and 1970.

The contaminants spread to the groundwater, soil, and soil vapor beyond the facility, forming a toxic groundwater plume approximately 2.4 miles long and 1.8 miles wide. Plaintiffs lived in a home directly above this groundwater plume. They alleged that toxins from the groundwater had the potential to migrate up through the soil as vapor and flow through the foundation and crawlspaces. Plaintiffs also claimed they suffered economic harm in the form of a diminished home value. Plaintiffs brought claims for negligence, trespass, and nuisance on behalf of themselves and all other homeowners with houses directly above the plume. The district court certified the class, finding that common issues predominated on plaintiffs claim for nuisance because it could be established with class wide proof over defendants' argument that impaired use and enjoyment of property was an inherently individualized inquiry, observing:

> "[H]ere, Plaintiffs' theory of harm is more tailored. Plaintiffs do not seek to certify a class based on *experiential* loss of use and enjoyment. In other words, the harm at the center of Plaintiffs' claim is not that Plaintiffs no longer allow their children to play in the backyard or eat fruit off their orange tree. It does not matter under Plaintiffs' theory whether residents inside the plume have changed their behavior because of the contamination. What matters is that—allegedly—their homes will be worth less. Individualized inquiries as to enjoyment simply do not factor in this analysis.
>
> [¶]
>
> Plaintiffs' theory here is different because the harm depends not on the degree of vapor intrusion in a given household, but, instead, on the common exceedance of the environmental screening limit across the PCA. Plaintiffs' claim is that a TCE level exceeding that threshold is a substantial and unreasonable interference resulting in economic harm."
>
> (*Behar v. Northrop Grumman Corporation*, *supra,* at *16.)

Significantly, the *Behar* court observed: "It is this distinction that separates this case from several of those in which nuisance claims have not been certified." (*Id.*)

In *In re Delta Air Lines, Inc*. (C.D. Cal. Feb. 8, 2023) 2023 WL 2347074*,* the court declined to certify plaintiffs' private nuisance claim "premised on the contention that the release of liquid jet fuel onto the property of each of the class members caused a foul odor that prevented them from the full use and enjoyment of their properties for several days. (*In re Delta Air Lines, Inc.*, *supra*, at *14.) Plaintiffs' nuisance theory there depended on how long and to what extent the class members experienced the foul odor. The court also found that to determine whether the presence of the fuel constituted a health risk, the trier of fact would need to know the amount of fuel on a given property. (*Id.* at *15.) Because there was

significant variation in the amount of jet fuel dumped on each property, the court found this was an individualized inquiry. The court concluded: "Plaintiffs have not offered sufficient evidence at this time to show that there is a common method for determining liability on a class-wide basis with respect to the nuisance claim. Predominance is not met as to this cause of action." (*Id.*)

Here, there are no allegations that there has been a "common exceedance" of any acceptable limits that impacts all class members equally. Moreover, plaintiffs do claim the adverse impact on their ability to occupy and/or conduct business on their property (see Complaint), which amounts to an experiential loss of use and enjoyment. As observed by the *Behar* court, this is an individualized inquiry, which is not assessable on a common basis. Plaintiffs do not explain how they plan to show, with common proof, that the presence of the strong odors allegedly produced by defendants interfered with each of the class members' use of their respective properties. Plaintiffs' evidence does not establish how the VOCs traveled to any given property, the strength, or any form of measure. Instead, they contend that "Through the testimony of Plaintiff's expert witnesses, they will show not only the extent of the odor and particulate deposition on individual parcels (the harm), but also class damages, offering an analysis establishing the diminution of value for the affected parcels." (Reply, p. 12, ll. 11-14.) Without the benefit of testimony that describes that methodology, the court is not convinced that common proof will prevail. Moreover, like *Delta Airlines,* it appears that to determine whether the odor from defendants' operation constitutes a nuisance would require individualized determinations regarding the strength and duration of the odor on each of the properties, as well the variation in Plaintiffs' alleged injuries and preexisting conditions. Individuality rather than generality will be required,

Plaintiffs point out that courts have affirmed class certification in numerous cases involving contaminants. (Reply, p. 13.) But the existence of cases in which class certification has been affirmed is not, by itself, dispositive. The details matter. Here, each case is factually distinguishable.

In *Mejdrech v. Met-Coil Systems Corp*. (7th Cir. 2003) 319 F.3d 910, the district judge limited class treatment to what he described as "the core questions, i.e., whether or not and to what extent [Met–Coil] caused contamination of the area in question [by leaking a noxious solvent into the soil and groundwater]." Whether a particular class member suffered any legally compensable harm and if so in what dollar amount were questions that the judge reserved for individual hearings if Met–Coil was determined to have contaminated the soil and water under the class members' homes in violation of federal or state law. (*Id.* at 911.) The appellate court affirmed, observing: "If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the

remaining, claimant-specific issues to individual follow-on proceedings." (*Id.* at 912.) No such treatment has been proposed here.

In *Sterling v. Velsicol Chemical Corp*. (6th Cir. 1988) 855 F.2d 1188, 1197, the court observed that "each class member lived in the vicinity of the landfill and allegedly suffered damages as a result of ingesting or otherwise using the contaminated water. Almost identical evidence would be required to establish the level and duration of chemical contamination, the causal connection, if any, between the plaintiffs' consumption of the contaminated water and the type of injuries allegedly suffered, and the defendant's liability." This court has no basis for making a finding that "almost identical evidence would be required to establish the level and duration" of the noxious odor alleged to be the nuisance in this case.

In *Olden v. LaFarge Corp*. (E.D. Mich. 2001) 203 F.R.D. 254, 269, defendant did not dispute that commonality was satisfied, but did argue that a class could not be maintained because of "the great variance in damages sought by the named class members." The court did not find that feature to be fatal. Whether there were common issues of liability was not discussed in any detail, undermining this case's usefulness.

In *Josephat v. St. Croix Alumina, LLC* (D.V.I., 2000) 2000 WL 1679502, the court considered whether to certify a negligence action against defendant for failing to properly store and contain the red bauxite dust and red mud by-products of its product. The court held the issue of whether defendants failed to secure red bauxite dust and whether that failure resulted in a hazardous substance permeating plaintiff class' neighborhoods predominates over individual issues of the amount and duration of individual exposure, extent of actual injury manifested by any particular plaintiff, and diverse individual medical history that will be material to any causation analysis. (*Id.,* at *9.) This case, however, was based on a negligence cause of action, which focuses on defendant's conduct, e.g., whether defendant had a duty to secure the red dust and whether it breached such duty. In contrast here, the nuisance causes of action focus on plaintiff's perception of the intrusion, namely, the comfortable enjoyment of life. This case is thus distinguishable.

The court finds that based on this record plaintiff has not shown the elements necessary to establish liability are susceptible of common proof.

ii. Trespass

"Trespass is an unlawful interference with possession of property." *Staples v. Hoefke* (1987)189 Cal. App. 3d 1397, 1406.) "The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm." (*Ralphs Grocery Co. v. Victory Consultants,*

Inc. (2017) 17 Cal.App.5th 245, 262.) For the entry of an imperceptible substance to be a trespass, the substance "must either (1) 'deposit ... particulate matter upon the plaintiffs' property' or (2) cause 'actual physical damage thereto'...." (*Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 233.)

In this case, plaintiffs allege: "Defendants intentionally or negligently allowed noxious-smelling terpenes and other particulate matter to enter, intrude on, or invade Plaintiffs' and Class Members' property." (SAC, ¶ 59.)

In *Behar,* defendants argued there was no classwide proof that could show soil vapor intrusion deposited particulate matter on plaintiffs' property or caused physical damage. But plaintiffs put forward expert testimony on the presence of TCE contamination in the groundwater, soil, and soil vapor of the PCA. The court held this was sufficient, noting: "Defendants are free to contest this evidence, but under these experts' models, the location and extent of TCE contamination and whether it reaches the homes above the plume are subject to common proof." (Behar, supra, 2024 WL 4004052, at *17.) The court found that common issues predominated as to plaintiff's trespass claim.

No such similar evidence has been presented here.

iii. Bus. & Prof. 17200

Plaintiffs allege that defendants have committed an unlawful business practice of violating the ban imposed by the State Water Resources Control Board (the "Board") on the use of water from subterranean surface flows of the Santa Ynez River for cannabis cultivation between April 1 and October 31. The Board adopted the Cannabis Cultivation Policy on February 5, 2019. Part of that policy sets forth the "Surface Water Dry Season Forbearance Period," which prohibits cannabis cultivators such as Westcoast from diverting surface water or groundwater supplies during the "dry season" from April 1 and October 31 of each year. Plaintiffs allege that Westcoast is violating the Board's Cannabis Cultivation Policy by performing groundwater extractions during the "Surface Water Dry Season Forbearance Period." The wells being drilled and operated by Westcoast in this unlawful manner have had, and continue to have, a substantial effect on the local instream flows to the detriment of existing agricultural operations that neighbor Westcoast's property, including Plaintiffs. (SAC, ¶¶ 52-54.)

Plaintiffs include little discussion of this cause of action in their memorandum, other than to assert that there is a well-defined community of interest in the questions of law and fact involved affecting the class, which includes "whether Defendants' conduct violates California statutes such as Section 17200 of the California Business Professions Code and the Health and Safety Code." The court declines to take up the oar and analyze whether there are predominant questions of law and fact regarding this cause of action. (*Quantum Cooking*

Concepts, Inc. v. LV Assocs., Inc. (2011) 197 Cal. App. 4th 927, 934—"Rule 3.1113 rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the moving party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide.")

iv. Conclusion

In sum, this case involves individualized inquiries that would dominate resolution of the key issues in the case. Common issues of law and fact do not predominate in this matter.

b. Typicality

Although the questions whether a plaintiff has claims typical of the class and will be able to adequately represent the class members are related, they are not synonymous. The typicality requirement's purpose is to assure that the interest of the named representative aligns with the interests of the class. Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose, or the relief sought. 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. (*Seastrom v. Neways, Inc*. (2007) 149 Cal.App.4th 1496, 1502.)

Defendants argue that Pence Ranch does not have similar claims, nor is it similarly situated to other putative class members because its main claim is that its own property has been stigmatized by its location across Highway 246 from defendants' farm. (Pence Depo.at p. 53:16-17.) While the court agrees this would be a distinct claim particular to Pence Ranch, it is not particularly relevant to the class sought to be certified. Here, plaintiff's claims are based on the trespass and nuisance of noxious-smelling terpenes and other particulate onto the class members' property and the interference with the quiet enjoyment of that property due to odor (see Complaint) and the loss of property value resulting therefrom, claims which do not involve stigma. Pence Ranch's position on whether stigma attaches to its property is thus irrelevant and does not undermine its claims for nuisance and trespass. The argument is not persuasive.

c. Adequacy

Also part of the "community of interest" requirement for class certification is that plaintiff show that plaintiff can adequately represent the class. (*Lockheed Martin Corp. v. Sup.Ct. (Carrillo)* (2003) 29 Cal.4th 1096, 1104.) The class representative, through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.) The prospective class representative must file a

declaration stating that the person desires to represent the class and understands the fiduciary obligations of serving as class representative. Counsel's declaration to that effect will not suffice. (*Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 998; *Imperial County Sheriff's Ass'n v. County of Imperial* (2023) 87 Cal.App.5th 898, 919-920.) J. Blair Pence has submitted a declaration to that effect. (Pence Decl., ¶¶ 6-8.)

Defendants argue that Pence has a subjective bias against cannabis in general and defendants in particular, as demonstrated by his repeated misidentification of it as the largest cannabis grow in Santa Barbara County. (Mot. at 10:21-22, 11:26, 19:28-20:1.) Defendant submits evidence that there are multiple larger operations within Santa Barbara County. (Bagbeh Decl. ¶ 31 [identifying multiple larger operations within Santa Barbara County].) Defendants also argue Mr. Pence has an overt media presence as president of Santa Barbara Coalition for Responsible Cannabis, has actively publicized unsupported with cannabis farms (thus serving as a principal contributor to the very "stigma" of which he complains), and he and his Coalition have planned to sue, have sued, and are suing, numerous cannabis operations to further their overly anticannabis agenda. (Pence Depo. at pp. 43:23-44:4, 31:11-23, 98:6-15.) It accordingly asserts that Pence's bias puts his credibility at issue and thus renders him inadequate as a class representative.

Case law suggests that a plaintiff may not be an "adequate" class representative where he or she has serious credibility issues. (See *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1307.) In *Jaimez, supra*, 181 Cal.App.4th 1286, the trial court found that the named plaintiff "was not an adequate class representative because he lied on his . . . employment application about his felony conviction and incarceration, he admitted his view that it is acceptable to lie in order to obtain or maintain employment, questions surrounded his purported falsification of time records and other documents (notably, manifests), and his declaration may be contradicted by his deposition testimony." (*Id.* at p. 1296.) The Court of Appeal concluded that the finding of inadequacy based on such "credibility issues" was proper. (*Id.* at p. 1307.)

Here, the potential bias identified by defendant differs in kind from the actual falsification found by the *Jaimez* court to be dispositive. While Pence's credibility will be explored by defendant at trial, it does not disqualify Pence as a class representative.

"The adequacy of representation component of the community of interest requirement for class certification comes into play when the party opposing certification brings forth evidence indicating widespread antagonism to the class suit." (*Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 696–697.) Defendant asserts there is substantial antagonism to the class suit as demonstrated by twenty neighbors who submitted declarations indicating they have not been affected by the odor. These declarations are attached

to the declaration of Kavaughn Baghbeh, who is the project manager for Defendants. He reports having visited "multiple neighboring properties" and collected 20 declarations They are form declarations, that enable the declarant to identify themselves, describe in their own words their experience with defendant's operation and any alleged odor, and assert by language included in the form: "I do not support Plaintiffs' lawsuit, and Plaintiffs' apparent desire to shut down West Coast's business and/or seek compensation is not representative of my views, or my interests." (See Baghbeh Decl., Exhibits 2-1 – 2-20.) Plaintiffs object to these declarations on the basis they are irrelevant, prejudicial, and lack probative value. The court finds that they are relevant and probative to whether there is widespread antagonism to the lawsuit.

As noted earlier, defendant's own expert states there are 218 properties in the proposed class area. (Pitt Decl., ¶ 8.) Assuming the court omits the declarations that plaintiffs' themselves admit were from neighbors outside the relevant radius, these objectors amount to less than 10% of the class. In numerical terms, this is a relatively small percentage. In *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, the court rejected the argument that antagonism per se by members of a class automatically precludes class certification. There, the results of a questionnaire showed that no more than approximately 6 percent of some 4,000 persons were antagonistic to a class suit against a developer for fraud and statutory violations, and the court held "[t]his small number should not be sufficient to defeat the motion for certification." (*Id*. at p. 475.) The court finds the objections here to be sufficiently small to overcome an antagonism objection.[5]

More to the point, " '[i]t is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent. But only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.' " (*Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 470.) For example, if the named representative sought to retain profits their complaint describes as illegal, he or she would have a conflict that goes to the very subject matter of the litigation. (*Id.* at p. 470.) The neighbor declarations identified no such conflict.

The adequacy requirement is satisfied.

d. Superiority

[5] This is particularly true if, as plaintiffs assert, the declarations of six of the individuals are not signed by owner-occupiers, which would render them irrelevant as not falling within the defined class.

In addition to demonstrating there is a sufficiently numerous, ascertainable class and a well-defined community of interest, plaintiffs seeking class certification must demonstrate that certification will provide substantial benefits to the litigants and the court, that is, that proceeding as a class is superior to other methods. (*Fireside Bank, supra*, 40 Cal.4th at p. 1089.)

As discussed earlier, determining plaintiffs' claim will necessarily require individualized inquiries. "Most cases will have both individual and common issues, and much of the trial judge's work at the certification stage is to determine which predominate. Generally, the analysis requires a highly practical evaluation of whether the individual issues can reasonably be managed at trial. A carefully drafted trial management plan may be essential to convincing the trial judge that the case can be certified. Counter plans from defendants may convince the judge to the contrary." (Weil & Brown, Civ. Proc. Before Trial (The Rutter Group 2023) ¶ 14:98a.) No such trial plan was presented here.

A class action is not a superior method of resolving inherently individualized claims. (*Newell v. State Farm General Insurance Company* (2004) 118 Cal.App.4th 1094, 1101.) Plaintiffs have not shown that a class action is a superior method of resolving the disputes in this case.

Conclusion

Plaintiff has failed to demonstrate an ascertainable class, a well-defined community of interest, or that a class action would be superior to other methods of litigation. The motion for class certification is denied.