

**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Law Court Docket No. Fed-09-415

**STEPHEN and KATHY DARNEY,
Personally and on behalf of S. and K. DARNEY,**

Plaintiffs - Appellees

v.

DRAGON PRODUCTS COMPANY, LLC,

Defendant - Appellant

**On Questions of Law Certified by
the United States District Court for the District Of Maine
on August 10, 2009**

**BRIEF OF PLAINTIFFS – APPELLEES
STEPHEN and KATHY DARNEY, and
S. and K. DARNEY**

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INTRODUCTION

The Court's Adoption of the Modern Theory of Trespass is Good Public Policy. It Will Provide Maine Residents of Limited Means, Who Tend to be the Most Vulnerable to Abutters' Dust and Blasting Impacts, Their Day in Court.

Plaintiff-Appellees, Mr. and Mrs. Darney and their two children ("Plaintiffs" or "Darneys"), submit this Brief on the questions certified to this Honorable Court by the United States District Court for the District of Maine. The U.S. District Court has requested instructions on whether Maine law "follows the modern theory of trespass recognizing a cause of action for trespass based on intangible invasions by dust or vibrations", and, if so, whether "the cause of action requires proof of actual or substantial damage".

Plaintiffs request the Law Court advise the U.S. District Court that Maine's common and statutory trespass law includes claims for damage caused by blasting vibrations and fugitive dust that cause actual or substantial damage. Such a holding will provide Maine residents who can't afford to hire experts or attorneys (even on contingency, when damages are limited, and particularly against an international company with exceptional resources, such as the owner of Dragon Products)¹, to have an affordable chance to make their case in court.

In Maine, landowners have typically sought relief or compensation for invasion of dust and blasting vibrations on the grounds of negligence or nuisance.

The difficulty with a negligence claim is that plaintiffs must prove that the defendant was negligent. *Maravell v. R.J. Grondin & Sons*, 2007 ME 1, 914 A.2d 709. The difficulty with a nuisance claim is the same, as plaintiffs must also prove that the defendant was negligent or acted unreasonably. *Charlton v. Town of Oxford*, 2001 ME 104, 774 A.2d 366 (to prove nuisance, the plaintiff must show that the interference was "unreasonable").

¹ Dragon Products, LLC, is a second-tier subsidiary of Giant Cement Holding, Inc., which in turn is owned by Cementos Portland Valderrivas, S.A., a Spanish corporation. (Dragon Products' counsel's 2/6/07 submission to Maine Department of Environmental Protection.)

Maine courts have generally required expert testimony to prove negligent or unreasonable conduct in blasting and in creating fugitive dust. In the 2007 case of *Maravell*, the plaintiff sought redress for damage to her hearing caused by blasting on abutting property. The lower court granted summary judgment to the blasting company because Ms. Maravell failed to produce an expert capable of proving the "standard of care" element of negligence. *Id.* at 711. Although the Law Court vacated and remanded the lower court's ruling, it nevertheless held that "[e]xpert testimony is...necessary to establish the duty of a general contractor", and that Ms. Maravell must prove "the four elements of negligence: duty, breach, causation, and damages"). *Id.* at p. 12.²

Trespass claims, on the other hand, do not require plaintiffs to prove that the abutter's conduct was unreasonable or negligent. They must prove only that the entry onto their land was unauthorized. *State v. Tullo*, 366 A.2d 843 (Me. 1976). *See, e.g., Foley v. H.F. Farnham Co.*, 135 Me. 29 (1936) (every unauthorized entry on another's property is a 'trespass'). Claimants

² Just as in the *Maravell* case, where the Law Court apparently recognized the unfairness of the lower court result for the plaintiff because of stringently applied proof requirements, so did the Law Court appear to have the same concern in 1955, in the case of *Cratty v. Samuel Aceto & Co.*, 151 Me. 126, 116 A.2d 623 (Me. 1955). In *Cratty*, the Law Court also set aside a lower court ruling that precluded the plaintiff from being compensated for cracks in his foundation caused by an abutter's blasting operation. The lower court referee found that the plaintiff "introduced no evidence as to the amount of explosive being used nor as to method or manner of its use, [so] direct evidence of negligence is absent" and that "in Maine in a blasting case there is no absolute liability, and negligence on the part of the defendant must be alleged and proved". The Law Court set aside the dismissal, holding that the doctrine of *res ipsa loquitur* applied, stating: "The rule applies where the accident is unexplained and the instrument causing the injury was under the management and control of the defendant, and the unexplained accident is one which does not ordinarily occur if due care is used." *Id.* at p. 134.

A trespass claim for such injuries as were incurred in *Maravell* and *Cratty* would avoid the struggle to find equity for plaintiffs in the face of having to prove negligence, lack of "due care", unusual damage that would "not ordinarily occur if due care is used" or "unreasonable" conduct, and would provide the plaintiff straightforward proof requirements that the invasion was caused by the defendant, and resulted in actual or substantial harm to the plaintiff. This approach would provide a level playing field for both plaintiffs and defendants.

must still prove that the defendant caused the dust and blasting vibrations to invade their property, but would not be required to prove that such invasion was unreasonable or negligent.

In the instant case, Plaintiffs have testimony from State officials, who are technical staff with the Maine Department of Environmental Protection (DEP), linking the dust on their property to Dragon Products' operation (which expert testimony they did not have to pay for). Plaintiffs do not have, and cannot afford to pay for, a private expert on the issue whether the fugitive dust results from "negligent" or "unreasonable" conduct by Dragon Products, and DEP officials decline to testify on these legal standards. In 2007, however, the DEP agreed to place a dust monitor on the Darneys' property (and on one other property in the neighborhood), at DEP's cost, over a period of months, and to prepare an analysis and report. The DEP agreed to do this when it became clear to the Board of Environmental Protection (the citizen board that oversees the DEP) that Dragon Products would not voluntarily investigate and address abutters' complaints as to private property damage (over which DEP advised that it had no enforcement jurisdiction).³ DEP's dust monitoring resulted in a DEP Report. The Report states that a primary

³ In the course of a citizen initiated hearing (including the Darneys) before the Board of Environmental Protection (BEP) regarding Dragon Products' unlicensed storage of an 800,000 ton/13 acre mountain of cement kiln dust (CKD) stored on its 1100 acre site, and on the thousand yards of yellow, Drano-like leachate from the CKD pile overcoming wetlands (which hearing resulted in the BEP requiring Dragon to cover the CKD mountain with vegetation, and to contain the leachate with concrete and pumping (*see* Board Order in the Matter of Dragon Products Solid Waste (S-02077-WO-B-N & S-020778-WO-C-N) and associated NRPA minor revision (L-4152-TH-T-N), excerpted at Exhibit 5 to U.S. District Court Document No. 44, 11/14/08 Declaration of Peggy McGehee (as listed on the Docket Sheet, App. at 6)), it became clear that Dragon Products would not voluntarily take compensatory or corrective measures for the blasting damage and fugitive dust damage caused to abutting residents, such as cracks in their foundations, and corrosion of paint on their cars.

The BEP advised the residents that the DEP lacked jurisdiction regarding these private party claims against this "grandfathered" cement plant. At one of the last hearings, a BEP member asked Dragon Products what it would be willing to do to address private residents' complaints. Dragon responded only that the residents should sue it and prove their claims. (Dragon further denied that the dust on residents' property was Dragon dust. Dragon Product's President asserted instead that the dust on residents' property was only dust from road construction and salt. Dragon further denied that the cracks and other

component of the dust that was periodically collected from the monitors was CaO (calcium oxide), which is a high-heat product of kilns, and "probably" came from Dragon Products:

“CaO appears to be the leading contributor to the airborne particulate load ... CaO is produced in a kiln The CaO on the samples came from a process source in the area and not from disturbed soil or gravel fill such as that used in building construction road work. The CaO is probably coming from Dragon Products Company either directly or indirectly. Direct sources would be the cement kiln itself, product crushing, storage, transfer, or waste. Indirect sources would be track-out material onto highways and haul roads, reuse of processed lime containing material such as clinker crushing, or the reuse of waste material containing CaO.”

Report (USDC Doc. No. 44, Exhibit 10) at 11-12 (as listed on the Docket Sheet, App. at 6).

Thus, DEP staff can testify at trial as to the probability that the dust accumulations on the Darney property are from Dragon Products. DEP staff, however, are not available to testify on whether Dragon Products has a "duty" to the Darneys, or that Dragon's conduct is "unreasonable" regardless of the record of repeated citizen complaints, and violations of air emission standards⁴,

damage to structures were due to its blasting concussions, but asserted that such damage was due to the age of the residences, and any cracks in new structures were due to poor construction.)

The BEP member expressed disappointment in Dragon Products' response, and the Board asked the Department head at least to see what the DEP could do for the citizens to provide off-site monitoring information. The DEP thereafter installed two dust monitors (one on the Darney property) and an off-site video camera focused on the Dragon plant. (The video-camera turned out not to be very useful, because its lens kept getting covered with dust.) The DEP did not install its own blast vibration monitors, but admonished the grandfathered Dragon to voluntarily improve its own monitoring. The DEP noted that Dragon's monitors were located at wrong locations, and were inappropriately calibrated (2/27/07 DEP letter to Dragon Products, Exh. H-1 to Plaintiffs' 6/18/08 Expert Designation in U.S. District Court case). Dragon failed to make those changes at any time during the following year (see 3/26/08 DEP letter to Dragon Products, Exh. H-3 to Plaintiffs' 6/18/08 Expert Designation), and it is not known by Plaintiffs whether, even today, Dragon's blasting monitors are correctly located and operated.

⁴ Records indicate that Dragon has continually violated State dust emission regulations, including violation of State fugitive dust "opacity" limits, and identification of toxic metals in the dust, as shown from the following representative dates: March 6, 2005 exceedance; March 21, 2005 exceedance; excerpt from Dragon's April 12, 2005 Albarrie Environmental Services Report about failure of dust bag containment system; "Excess Emissions Tables" of June 1, 2005 to December 31, 2005 and December 21, 2005; Toxic Metals Analytic Results of January 31, 2006; June 8, 2006 exceedance; June 22, 2006 inquiry re exceedance; Fourth Quarter 2006 CO emissions table; NO₂ emissions table, and SO₂ emissions table; October – December 2006 "Excess Events of Emissions and Operational Limitations" Table; "Gaseous and Opacity Excess Emission and Continuous Monitoring System Performance

that led to EPA and DEP fines against Dragon Products in 2008 totaling \$447,432 (\$298,000 by the EPA and \$149,432 by the DEP, none of which was shared with the affected community).

U.S. District Court Document No. 44, Exhibit 9 (as listed on the Docket Sheet, App. at 6).

DEP staff are also unavailable to testify as to Dragon Products' "duty" or reasonableness of its blasting operation that has damaged Plaintiffs' property. Moreover, Dragon Products' blasting operation has long been grandfathered from DEP's newer blasting regulations, and it is allowed to continue blasting ever closer to the Darney property and other residences, with regulatory impunity. Dragon Products conducts its hundreds of annual blasts in "phases". *See*

Summary" from July 1, 2006 to December 31, 2006; January 25, 2007 Dragon Memo re 2006 opacity exceedances; February 16, 2007 Dragon Memo re "opacity violation"; February 18, 2007 Dragon Memo re "opacity violation"; April 27, 2007 Dragon memo re "opacity exceedances"; May 26, 2007 Dragon Memo re "excess emissions"; June 25, 2007 Dragon Memo re "bad opacity event"; July 12, 2007 Dragon Memo re "opacity"; November 15, 2007 Dragon Memo re "opacity exceedance"; January 14, 2008 Dragon Memo re "excess emissions"; **May 9, 2008 Dragon Memo re "failing" the PM stack testing stating: "What do I tell Roy?[DEP supervisor]";** June 12, 2008 Dragon Memo re "fugitive opacity event"; September 24, 2008 Dragon Memo re property owner complaint that "dust is coming over heavy [and] there is no wind today"; November 20, 2008 Dragon Memo re "dust cloud"; February 1, 2009 Dragon Memo re "stack opacity" "in 25% range [and it] may go higher"; February 4, 2009 Dragon Memo re "opacity". App. at 121-122 and Exhibits G, H and I to July 13, 2009 Supplemental McGehee Declaration, U.S. District Court Document No. 87 (as listed on the Docket Sheet, App. at 10).

In addition, in responding to a discovery request, Dragon provided a list of some of the community members' complaints about its fugitive dust and blasting vibrations:

"On November 10, 2004, Dragon received a complaint from Phil Leach regarding noise and vibration"; "On or about January 25, 2005, Dragon received a complaint from Dean Shaver, LLC regarding dust, vibration and noise"; "On or about January 25, 2005, Dragon received a complaint from S & D, Inc., which operates Midas in Thomaston, regarding dust, vibration and noise"; "On June 15, 2007, Dragon received a complaint from an unidentified woman regarding dust"; "On June 27, 2007, Dragon received a complaint about vibrations from Gail Cross... Ms. Cross complained about a window being broken by Dragon's blasting"; "On or about June 28, 2007, Dragon became aware of a complaint about noise from Carol Westerveldt"; "Dragon is aware of a complaint made regarding its blasting on July 13, 2007"; "On December 31, 2007, Dragon received a complaint about vibrations from Walter Robertson of Thomaston"; "On May 19, 2008, Dragon received a complaint about its operations from Kaley Haskell"; "On September 24, 2008, Dragon received a complaint about dust from Midas". App. at 121-122 and Exhibits G, H and I to July 13, 2009 Supplemental McGehee Declaration, U.S. District Court Document No. 87 (as listed on the Docket Sheet, App. at 10).

Dragon blasting phase map on page 7-A of this Brief. Its last phase will be the closest yet to the Darney property and other properties on Old County Road. (Thus, the DEP has advised Plaintiffs' counsel that, as bad as the blasting is now, it is going to get worse.) Because its blasting operation is grandfathered, Dragon Products is not required to take any pre- or post-blasting surveys of the residences or other protective measures, including the adoption of more restrictive blasting protocol--such as is typically used around buildings (one example being the buildings next to Boston's Big Dig). Perhaps because Dragon's quarry blasting is grandfathered, the DEP did not agree to evaluate the structural damage to homes on Old County Road, see Google-earth map on page 7-A, to determine the extent to which such damage is caused by Dragon's blasting vibrations.

Recognizing that some expert testimony would be required as to the cause of the structural damage on the Darney property⁵, the Darneys retained a neighbor contractor, Richard Hunt, to serve as an expert on any recent blasting damage, for \$250. *See App.* at page 43 (Mr. Hunt's affidavit). However, Mr. Hunt may be precluded from testifying as to Dragon's duty to Plaintiffs or to the reasonableness of its blasting protocol. Plaintiffs assume his testimony will be limited to an assessment of the damage caused since 2004 by Dragon's blasting vibrations. (Mr. Hunt's estimate is \$80,000 of damage. *App.* at 46 and 110. Dragon's engineering expert's estimate of the damage caused by Dragon's blasting to the Darneys' property is \$18,000. *App.* at 114-115.)

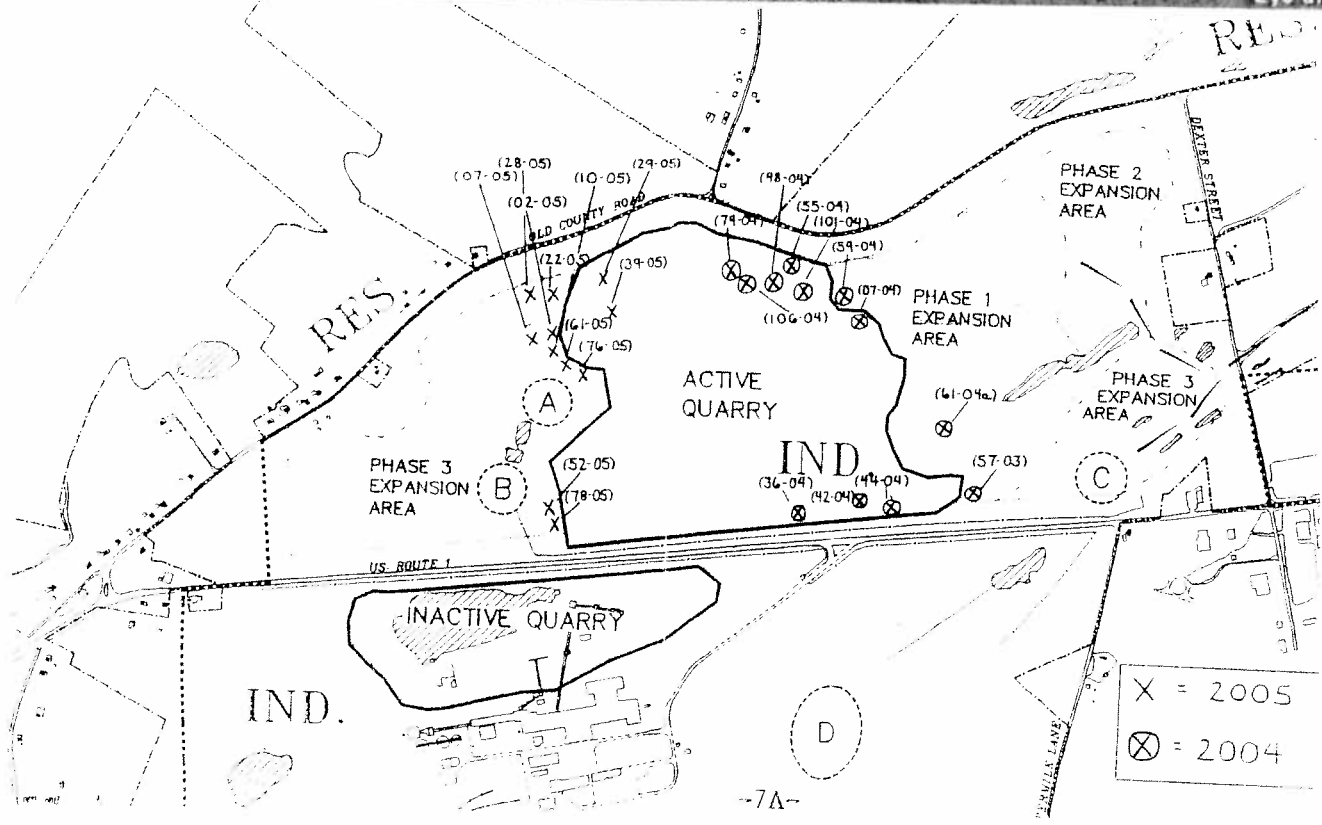
⁵ Such damage includes falling bricks from the chimney that occur with the bigger blast concussions, and cracks in the roof causing leaks and extensive mold in the ceilings on the second floor, widening, lengthening and new cracks in the concrete floor in the barn and in areas within the home, including walls and ceilings, and continuing shifting of the barn off its foundation (despite the rebar/concrete retaining wall built by Mr. Darney) and creation of sink holes in the Darneys' yard.

Should Plaintiffs' trespass claims be found by this Court to be justiciable, they (and other Maine residents) will have a better chance to obtain relief for damage sustained from dust and blasting vibrations.

Plaintiffs seek, in particular, the right to assert a trespass claim under Maine's trespass statute, Section 7551-B of Title 14 M.R.S.A. The statute broadens the common law on trespass, as was intended by the Legislature ⁶, and provides for double damages and attorneys fees. It is a sad fact that polluting plants like Dragon's tend to be located in communities of residents who don't have the discretionary income to compel a cleaner operation, or redress for damage caused them by the plants' operation. Unless those residents have exceptionally large damage claims with clear causation evidence, they are not likely to persuade an attorney to front costs and fees on a contingency fee basis. Having a justiciable claim under Section 7551-B, and access to its attorneys' fee provision, will help these residents obtain legal representation, and enable them to have their day in court. (Statutory nuisance claims do not provide for attorneys fees recovery.)

For these public policy reasons, and pursuant to the legal arguments made below, Plaintiffs ask this Honorable Court to advise the U.S. District Court that Maine's common and statutory law on trespass includes claims for actual or substantial damage caused by an abutter's blasting vibrations, and fugitive dust.

⁶ The 1996 Maine Legislature enacted Section 7551 of Title 14 M.R.S.A., for the purpose of "expand[ing] current law". See Statement of Fact, L.D. 1708.



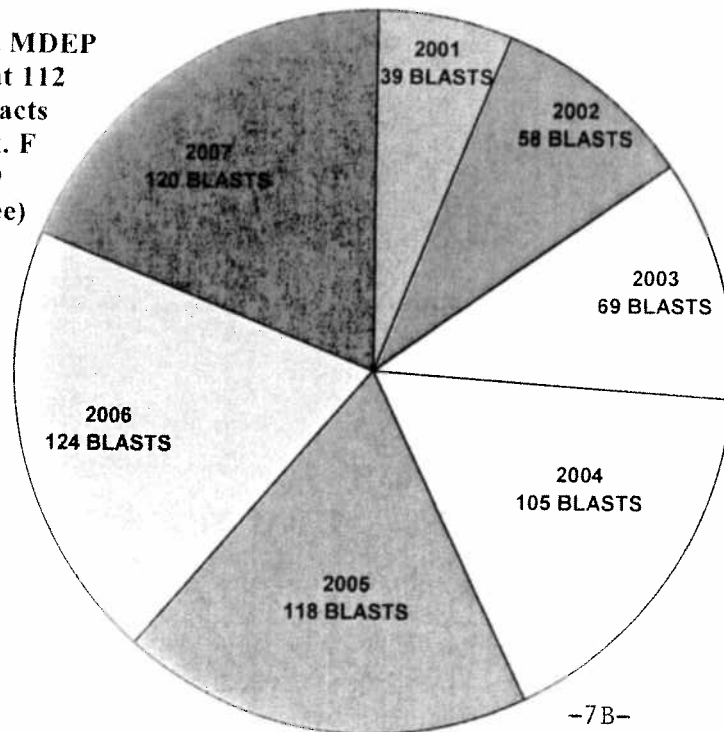
Dragon Products "Expansion Area Map"; App. at 112
 (Pitts' Stmt of Material Facts ¶ 80, USDC Doc. # 75;
 Ex. F to USDC Doc. # 76, 6/1/09 Declaration of
 P. McGehee)



Photo taken 6/23/06 outside Darney residence; App. at 112 (Pltfs' Stmt of Material Facts ¶ 79; USDC Doc. # 75; Ex. E to USDC Doc. # 76, 6/1/09 Declaration of P. McGehee)

BLAST RECORDS IN GIVEN YEAR
DRAGON PRODUCTS - THOMASTON QUARRY
2001-2007

Per Dragon Products and MDEP
blast shot records; App. at 112
(Pltfs' Stmt of Material Facts
¶ 80; USDC Doc. # 75; Ex. F
to USDC Doc. # 76, 6/1/09
Declaration of P. McGehee)



SUMMARY ARGUMENT

Plaintiffs urge the Law Court adopt the modern view of trespass to include invasion of dust and blast vibrations that cause actual or substantial damage, which has been adopted by courts in a number of other states. Modern scientific advances have caused many courts to abandon the notion that an invasion by smoke, dust, particles or forces is not physical. They have instead allowed plaintiffs to claim trespass by invisible contaminants and forces, while at the same time limiting such claims by requiring proof of actual or substantial damage.

Plaintiffs also urge the Court to hold that Maine's statute on trespass, Section 7551-B of Title 14 M.R.S.A., encompasses invasion of dust and blast vibrations that cause actual or substantial damage. Plaintiffs assert a Section 7551-B trespass claim under its subsection 1.A, and a second trespass Section 7551-B claim under its subsection 1.B.

Subsection 1.A creates liability for intentional⁷ entry of land without permission that causes damage to property, including damage to "any structure", which would cover damage to Plaintiffs' structures caused by Dragon's blast vibrations.

Subsection 1.B creates liability for intentional entry of land without permission by "deposit[ing]" "any waste material" (as the term "litter", in subsection 1.B is defined), which would cover the fugitive "waste" dust deposited on Plaintiffs' property, and, Plaintiffs would argue, even the "waste" vibrations from blasting.⁸

⁷ The U.S. District Court found that the facts alleged by Plaintiffs established "intent" for the purposes of Dragon Product's Motion for Summary Judgment. App. at 21.

⁸ Although the definition of "litter" states that it excludes "wastes of the primary processes of mining, logging, sawmilling, farming or manufacturing," this exemption for "mining" and "manufacturing" should only apply to the extent such activities are conducted in conformance with local, state and federal law.

ARGUMENT

I. **Maine Trespass Law Should be Found to Include a Cause of Action for Intangible Invasions by Dust and Blast Vibrations that Result in Actual or Substantial Damage.**

The U.S. District Court's Decision and Certification to the Law Court states:

During the past half-century... some courts have adopted a so-called 'modern' theory of trespass that permits actions based on the invasion of intangible airborne particulates. Under this modern theory, invasions of intangible matter are actionable in trespass only if they cause substantial damage to the plaintiff's property, sufficient to be considered an infringement on the plaintiff's right to exclusive possession of the property." *Id.* (citations and internal punctuation omitted). Other courts and commentators have adhered to the traditional view.

Dragon urges the Court to follow the traditional view and restrict the tort of trespass to tangible invasions. '[R]ecognizing a trespass claim based on dust and intangible intrusions,' it warns, 'would inappropriately blur the line between trespass and nuisance.' The Darneys prefer the modern theory. They encourage the Court to abandon 'an outdated interpretation of trespass law' that contradicts 'decades of scientific advancement and legal development,' and to recognize that intangible dust and vibrations may unlawfully invade a plaintiff's interest in the exclusive possession of her property.

Despite this rather fundamental opposition, both parties agree that the Supreme Judicial Court of Maine ("SJC") has not answered the question at hand...

[A] federal court may certify "determinative" questions of state law when "there are no clear controlling precedents in the decision of the [SJC]." ... [A]lthough all agree that the "gist of [a trespass] action is unlawful entry," few sources consider the more elaborate question of whether an intangible invasion constitutes such an entry. ... Finally, and most importantly, the modern theory modifies the traditional doctrine of trespass in significant ways: in addition to permitting actions based on intangible invasions, the modern theory grafts onto the law of trespass a requirement of "substantial damage." *Marceau*, 959 A.2d at 554; *see also Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d 735, 742-43 (W.D. Ky. 1998) (rejecting requirement of "substantial damage" in favor of simple "actual damage"). This

Plaintiffs maintain the Dragon's blasting and cement making activity has been in continual and repeated violation of state and federal law during the period of time at issue in Plaintiffs' suit, for which Dragon has been fined nearly half a million dollars collectively by the EPA and the DEP, during the period of time at issue in this suit. *See* footnote 4, pages 4-5 *supra* and App. at 122-123 (and Exhibit I to 7/13/09 Supplemental Declaration of Peggy McGehee). Although Dragon Products asserts this exemption in its Brief on the two questions certified to the Court, this issue is a factual issue for determination by the U.S. District Court.

enhanced burden of proof contradicts the bedrock principle that trespass is complete upon any “invasion of a plaintiff’s property, however, slight.” Bradley, 709 P.2d at 787; see also Medeika, 957 A.2d at 982 (holding that because “some damage is presumed to flow from a legal injury to a real property right,” injured party entitled to nominal damages) (citation and internal punctuation omitted); Prosser and Keeton § 13, at 70 (“Any intentional use of another’s real property, without authorization and without a privilege by law to do so, is actionable as a trespass without regard to harm.”). Thus, the modern theory works fundamental changes to the doctrine of trespass, which changes extend beyond the principal question here regarding tangible versus intangible invasions. These are changes best made by the SJC, if at all. Cf. Bradley, 709 P.2d at 784 (addressing viability of trespass claim for intangible invasions on certification from federal district court).

App. at 11-14.

A definition of trespass that categorically excludes dust and vibrations runs contrary to decades of scientific advancement and legal development. *See Bradley v. American Smelting and Refining Company*, 104 Wash.2d at 686-87. Maine courts have consistently defined trespass as “an invasion of the plaintiff’s interest in the exclusive possession of his land.” *Jacques v. Pioneer Plastics, Inc.*, 676 A.2d 504, 505 (Me. 1996) (citing Prosser and Keeton on the Law of Torts §87 at 622 (5th ed. 1984)). To the extent that airborne pollutants, such as dust and vibration, are an invasion of the plaintiff’s exclusive possession of land and cause actual or substantial damage to the plaintiff’s property, the invasion should be considered a trespass. *Maddy v. Vulcan Materials Co.*, 737 F.Supp. 1528, 1539 (D.Kan. 1990); *Borland v. Sanders Lead Co., Inc.*, 369 So.2d 523, 529 (Ala. 1979).

Plaintiffs ask the Court to adopt the modern test for trespass regarding intangible airborne pollutants because the distinction between tangible and intangible pollutants is no longer relevant. *Borland*, 369 So.2d at 529. Numerous other courts have taken the approach that intangible intrusions of dust and particulate matter constitute trespass when the intruding agent invades the plaintiff’s exclusive possession of property and causes substantial damage. *Shepard*

Envelope Co. v. Arcade Malleable Iron Co., 335 Mass. 180, 187 (1956) (deposits of cinders from an iron works manufacturer into neighboring property constituted trespass because it was an invasion of the neighbor's property which caused special damage to the plaintiff); *Martin v. Reynolds Metals Co.*, 221 Or. 86, 94, 98 (1959) (fluoride compounds in the form of particles released by aluminum manufacturing company that settled on plaintiff's property constituted trespass because the harm on the plaintiff's interfered with the their exclusive possession of the premises); *Roberts v. Permanente Corp.*, 188 Cal.App.2d 526, 528-29 (1961) (operation of cement plant and quarry in such a manner that dust and other substances escaped and settled on home and property physically damaging the property constituted trespass); *Bradley, supra*, 104 Wash.2d at 688 (microscopic airborne particles from a copper smelting plant deposited on plaintiff's property fulfilled all the requirements under the law of trespass), and cases cited *infra*.

Trespass and nuisance are not mutually exclusive. The same conduct by a defendant often invades both the plaintiff's interest in the exclusive possession of his land (trespass) and the plaintiff's interest with the use and enjoyment of his land (nuisance).

Martin, supra, 221 Or. at 90.

Below are extended quotes from six courts in different jurisdictions that are among those that have adopted the "modern" view of trespass.

1. In the 1985 Missouri case of *Maryland Heights Leasing, Inc. v. Mallinckrodt, Inc.*, 706 S.W.2d 218; 1985 Mo. App. LEXIS 3799, the Missouri Appellate Court states that:

Historically, an invasion by smoke, dust or invisible particles was not considered trespass because this type of invasion was not considered a 'physical' invasion 'in the primitive society where trespass had its roots. Invasions of particulates or smoke were typically seen to infringe on a plaintiff's use and enjoyment of the land and thus were heard as nuisances, rather than trespasses. Modern scientific advances have caused many courts to abandon the notion that an invasion by smoke, dust, or particles is not 'physical.' Courts have instead allowed plaintiffs to claim trespass by invisible contaminants; while at the same time limiting such claims, for example, by requiring proof of substantial damage.

Thus, nuisance and trespass law have slowly begun to 'coalesce.' A modern explanation of the difference between nuisance law and trespass is instructive:

If the smoke or polluting substance emitting from a defendant's operation causes discomfort and annoyance to the plaintiff in his use and enjoyment of the property, then the plaintiff's remedy is for nuisance; but if, as a result of the defendant's operation, the polluting substance is deposited upon the plaintiff's property, thus interfering with his exclusive possessory interest by causing substantial damage to the *res*, then the plaintiff may seek his remedy in trespass, though his alternative remedy in nuisance may co-exist.

*Id.*⁹

⁹ *Citing Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529 (Ala. 1979) (allowing liability for invasion by invisible particulates); *Maryland Heights Leasing v. Mallinckrodt, Inc.*, 706 S.W.2d 218, 225-26 (Mo. 1985) (intrusion by "radioactive emissions" may constitute trespass if it interferes with plaintiffs' exclusive possessory interest in the land); *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 342 P.2d 790, 793 (Or. 1959) ("It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a direct invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released."); *Baltimore B. R. Co. v. Sattler*, 100 Md. 306, 59 A. 654 (Md. 1905) (allowing recovery for damage by noise, smoke, and vapors without specifying whether plaintiffs could proceed under theory of trespass or nuisance); *Northern C. R. Co. v. Oldenburg & Kelley, Inc.*, 122 Md. 236, 89 A. 601 (Md. 1914); *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1539 (D. Kan. 1990) ("The modern trend departs from the traditional rule by finding that intangible invasions of the plaintiff's property may constitute a trespass. However, the modern trend also departs from traditional trespass rules by refusing to infer damage as a matter of law, thereby eliminating the right to nominal damages. The plaintiff claiming trespass must prove that the intangible invasion resulted in substantial damages to the plaintiff's land."); and *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 185 Cal. Rptr. 280, 649 P.2d 922, 924 (Cal. 1982) (noting that recovery for trespass based on an invasion of noise, gas emissions, or vibration was predicated on "the deposit of particulate matter upon the plaintiffs' property or on actual physical damage thereto").

For further citations to authority, see the 2009 Tennessee case of *Stephens v. Koch Foods, LLC v. Morristown*, 2009 U.S. Dist. LEXIS 95411 (2009), in which the U.S. District Court for the District of Tennessee, in adopting the "modern" view of trespass "to allow an action based on intangible entries", and in the gas before it "odorous gases", cites the following authority: *H.E. Stevenson v. E.I. Dupont De Nemours & Co.*, 327 F.3d 400 (5th Cir. 2003) (interpreting Texas law to allow for recovery in trespass for airborne particulates); *Mercer v. Rockwell Int'l Corp.*, 24 F.Supp.2d 735 (W.D. Ken. 1998) (invisible PCBs); *Williams v. Oeder*, 103 Ohio App. 3d 333, 659 N.E.2d 379 (Ohio App. 1995) (airborne particulates); *Borland v. Sanders*, 369 So.2d 523 (Ala. 1979) (lead particulates and sulfoxide deposits); *Garner v. Walker*, 577 So.2d 1276 (Ala. 1991) (noise and dust); *Ream v. Keen*, 112 Ore. App. 197, 828 P.2d 1038, 1040 (Or. App. 1992) (smoke); and *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 342 P.2d 790 (Or. 1959), *cert denied*, 362 U.S. 918, 80 S. Ct. 672, 4 L. Ed. 2d 739 (1959) (fluoride compounds in the form of gases and particulates)..

2. In the 1985 Washington State case of *Bradley v. American Smelting and Refining Company*, 709 P.2d 782 (Wash. 1985), the plaintiffs owned property on Vashon Island near a copper smelter at Ruston, Washington. They claimed that the smelter deposited microscopic airborne heavy metal particles on their property. The Washington Supreme Court distinguished between transitory or dissipating particles and those that accumulate without passing away, classifying the former as nuisances and latter as trespasses. It stated that, in order to assert an action in trespass, a landowner must show that particles have accumulated to the extent that they have caused actual and substantial damages. It held that a trespass occurs “when the actions of a defendant have (1) invaded the plaintiff’s interest in the exclusive possession of his property, (2) been committed intentionally, (3) been done with the knowledge and reasonable foreseeability that the act would disturb the plaintiffs’ possession, and (4) caused actual and substantial damages.”

3. In the 1963 Indiana case of *Enos Coal Mining Co. v. Schuchart*, 243 Ind. 692, 188 N.E. 2d 406 (Ind. 1963), the Indiana Supreme Court held that the common law principle of liability as in trespass applies to cases where damage is caused only by vibration or concussion. The court noted “that the better reasoned rule is... that there is in fact a trespass under the law, whether caused by falling debris or by a vibration or concussion as a result of an explosion on nearby land. *Id.* at 700.

4. In the 1959 case of *Martin v. Reynolds Metals Co.*, *supra*, 221 Or. 86, 342 P.2d 790 *cert. denied*, 362 U.S. 918 (1959), the Oregon Supreme Court held that the plaintiff could assert a trespass claim against an aluminum company for trespass of flouride compounds in the form of gases and particulates, invisible to the naked eye, to become airborne and settle on Plaintiffs’ property. The *Martin* court stated:

...the defendant asks us to take account of the difference in size of the physical agency through which the intrusion occurs and relegate entirely to the field of nuisance law certain invasions which do not meet the dimensional test, whatever that is...It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released...these observations...become very practical and real to the possessor of land when the unseen force cracks the foundation of his house...

If, then, we must look to the character of the instrumentality which is used in making an intrusion upon another's land we prefer to emphasize the object's energy or force rather than its size....We are of the opinion, therefore, that the intrusion of the fluoride particulates in the present case constituted a trespass.

Id. at 528.

5. In the 1979 Alabama case of *Borland v. Sanders Lead Company, Inc, supra*, 369 So.2d 523 (Ala. 1979) the Alabama Supreme Court found a justiciable claim of trespass for pollution from fugitive lead particulates and sulfoxide gases of a plaintiffs' property from a nearby smelter. Its extensive and thoughtful analysis concludes:

Whether an invasion of a property interest is a trespass or a nuisance does not depend upon whether the intruding agent is 'tangible' or 'intangible'. Instead, an analysis must be made to determine the interest interfered with. If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies. As previously observed, however, the remedies of trespass and nuisance are not necessarily mutually exclusive...If the intrusion is direct, then, under our present law, actual damages need not be shown...Under the modern theory of trespass, the law presently allows an action to be maintained in trespass for invasions that, at one time, were considered indirect and, hence, only a nuisance...For an indirect invasion to amount to an actionable trespass, there must be an interference with plaintiff's exclusive possessory interest...For example...if, as a result of the defendant's operation, the polluting substance is deposited upon the plaintiff's property, thus interfering with his exclusive possessory interest by causing substantial damage to the *res*, then the plaintiff may seek his remedy in trespass, though his alternative remedy in nuisance may co-exist.

Id. at 530.

6. In the 2003 U.S. District for the District of Colorado case of *Cook v. Rockwell International Corporation and the Dow Chemical Company*, 273 F.Supp. 2d 1175 (D.Co.2003), the Colorado District Court held that an intangible intrusion onto another's property, such as releases of plutonium and other hazardous substances, may constitute a trespass, but only upon proof that the intangible intrusion caused physical damage to the property. It stated further: "Plaintiffs need not demonstrate that plutonium and other Plant-derived contaminants are present on their properties at levels of toxicological concern or are otherwise causing damage to their properties in order to prevail on their trespass claim". *Id.* at 1201.

II. Maine Statute on Trespass, 14 M.R.S.A. Section 7551-B, Provides for Claims of Any Waste, Including Waste Dust, and for Damage Caused by Blast Concussions

Section 7551-B of Title 14 M.R.S.A. states in its entirety as follows:

§ 7551-B. Trespass damages

1. PROHIBITION. A person who intentionally enters the land of another without permission and causes damage to property is liable to the owner in a civil action if the person:

A. Damages or throws down any fence, bar or gate; leaves a gate open; breaks glass; damages any road, drainage ditch, culvert, bridge, sign or paint marking; or does other damage to any structure on property not that person's own; or

B. Throws, drops, deposits, discards, dumps or otherwise disposes of litter, as defined in Title 17, section 2263, subsection 2, in any manner or amount, on property not that person's own.

2. LIABILITY. If the damage to the property is caused intentionally, the person is liable to the owner for 2 times the owner's actual damages plus any additional costs recoverable under subsection 3, paragraphs B and C. If the damage to the property is not caused intentionally, the person is liable to the owner for the owner's actual damages plus any additional costs recoverable under subsection 3, paragraphs B and C.

3. DAMAGES RECOVERABLE. The owner's damages include:

A. Actual damages, as measured by subsection 4;

B. Costs the owner may incur if the damage results in a violation of any federal, state or local law or ordinance and, as a result, the owner becomes the subject of an enforcement proceeding. These costs include attorney's fees, costs and the value of the owner's time spent on involvement in the enforcement proceeding; and

C. Reasonable attorney's fees for preparing the claim and bringing

the court action under this section plus costs.

4. MEASURE OF DAMAGES. For damage to property under subsection 1, paragraph A, the owner's damages may be measured either by the replacement value of the damaged property or by the cost of repairing the damaged property. For damages for disposing of litter, the owner's damages include the direct costs associated with properly disposing of the litter, including obtaining permits, and the costs associated with any site remediation work undertaken as a result of the litter.

5. OTHER ACTIONS BARRED. A recovery from a defendant under this section bars an action to recover damages under section 7552 from that defendant for the same specific damage.

Section 7551-B of Title 14 M.R.S.A. expands the common law on trespass. Plaintiffs assert a Section 7551-B trespass claim under its subsection 1.A, and they assert a second trespass claim under its subsection 1.B.

To restate the points made in the Summary Argument of this Brief, Plaintiffs urge the Court hold that 7551-B includes claims of invasion of dust and blast vibrations that cause actual or substantial damage. Plaintiffs assert a Section 7551-B trespass claim under its subsection 1.A, and a second trespass Section 7551-B claim under its subsection 1.B.

Subsection 1.A creates liability for intentional entry of land without permission that causes damage to property, including damage to "any structure", which would cover damage to Plaintiffs' structures caused by Dragon's blast vibrations.

Subsection 1.B creates liability for entry of land without permission by "deposit[ing]" "any waste material" (as the term "litter", in subsection 1.B is defined), which would cover "waste" dust, and, Plaintiffs would argue, even "waste" vibrations from blasting.

Moreover, Section 1.B states that the litter/waste material may occur "in any manner or amount", which would include "any amount" of deposited dust that causes damage. The damage considered in a Section 1.B claim is also not limited to structures but to any "property", which Plaintiffs would maintain would extend to damage to such things as Plaintiffs' vehicles (paint

pitted by Dragon dust), doors (paint pitted by Dragon dust), computer (clogged with Dragon dust), and bushes (coated and yellowed from Dragon dust).

Contrary to Dragon Products' contention, the question whether Dragon Products qualifies for the subsection 1.B exemption for “wastes of the primary processes of mining, logging, sawmilling, farming or manufacturing”, is a question for the U.S. District Court, and is not one of the certified issues. In any case, such an exemption would apply only to the extent the named are conducted in conformance with local, state and federal law. Dragon Products' repeated dust and blast violations, and the significant fines imposed on it by the EPA and the DEP are evidence of Dragon Product's failure to conform to state and federal law. *See* pages 4-5 *supra*.

III. Response to Assertions Made by Dragon Products in its Brief

On page 3 of its Brief, Dragon Products asserts that cement has been manufactured at the Thomaston facility since 1928. What it does not note is that the operation in 1928 was a fraction of the size of Dragon plant's current operation and output, including its \$50 million / 40% expansion in its plant operation in 2003-2004 (U.S. District Court Document No. 44, Exhibit 9), its increase in the amount and number of blasts, and its recent migration of its blasting towards residences on Old County Road. (App. at 112, U.S. District Court Document No. 76, McGehee Declaration of June 1, 2009, Exhibit F.) *See also* the illustrative piechart showing the yearly increase on the number of blasts on page 7-B of this Brief. Dragon Products plans to continue to migrate its blasting even closer to abutting residences, pursuant to its grandfathered blasting phase plan shown on page 7-A of this Brief.

On page 4 of its Brief, Dragon Products itemizes the Darneys' allegations of the damage to them caused by the Dragon Products' invasion of dust and blast concussions. It failed to

include in that list, however, the Darneys' assertions that they believe the caustic dust causes them to have sore throats, red, crusty eyes and rashes. The U.S. District Court granted Dragon Products' motion for summary judgment on the Darneys' claims of personal injuries on the grounds that they did not have expert testimony proving that their rashes, red eyes and sore throats were caused by Dragon Products' fugitive limestone and CaO dust, and thus the Darneys may not seek damages for these ailments. However, these allegations of personal ailments and fear of future adverse health effects are still pertinent to the Darneys' claims of nuisance and trespass, given the medical literature about the effects of exposure to cement kiln dust and ambient caustic dust ¹⁰, which disturb their peace of mind. Thus, in reciting the Darneys'

¹⁰ From Dragon's Answer to Interrogatory No. 12: "... Dragon also advises employees and others that if their skin is exposed to CKD or clinker then they should wash exposed skin with soap and water and apply sterile dressings, if necessary; if eyes are exposed to CKD or clinker then they should irrigate their eyes with water; and if necessary, individuals should seek medical attention. Dragon also advises employees and others to avoid breathing CKD or any dust; to wear goggles in dusty environments; to wear gloves and other protective clothing to prevent exposure of skin to CKD or clinker. Dragon also advises employees and others to avoid exposure to limestone dust by wearing a dust mask, and if skin is exposed to limestone dust, to flush it with water."

From Dragon's Answer to Interrogatory No. 17: "In addition to the grievances, complaints, notices or other communications relating to allegedly dusty, unhealthy or other hazardous environmental conditions at its facility or in the surrounding community relating to Dragon that are described elsewhere in these answers, Dragon is aware of the following:

- Dragon is aware of employees, who, from time to time have experienced reactions to clinker dust and to cement. Generally, these persons have either exhibited allergic reactions to clinker dust or to cement or have not taken the proper precautions to protect themselves from clinker dust and cement while working."

From Dragon's Answer to Interrogatory No. 20: "Dragon is aware of some workers' compensation claims relating to dust. ..."

From Dragon's Answer to Interrogatory No. 21: "To the extent Dragon's Facility may produce dust that does migrate from its Facility to off-site, it would likely come from roads inside the Facility, from stockpiles, from handling materials, from the stacks and other emission points, or from the occasional malfunction that may occurs in its cement kiln. Dragon has no data that would permit it to calculate an "approximate percentage" for each source of fugitive dust." The chemical constituents of each source of fugitive dust are the same as the underlying material producing the fugitive dust. No chemical analysis of dust migrating from Dragon's facility has been conducted."

From Dragon's Answer to Interrogatory No. 23: "Dragon is aware that a person who does not have the proper skin or eye protection, if exposed to CKD or clinker, may experience dry and/or irritated skin and eyes. Dragon is also aware that CKD and wet cement can cause caustic burns to the eyes or skin and that inhalation of CKD or cement can irritate the upper respiratory system. Dragon is also aware that exposure to limestone dust may irritate eyes, noses, throats and skin."

allegations in their trespass claims, Dragon Products should recite all their allegations, including those related to the disturbance of their peace of mind because of their immediate and long-term concerns about their health..

On pages 6- 9 of its Brief, Dragon Products asserts principles of law with which Plaintiffs do not disagree, but which Plaintiffs maintain are not inconsistent with trespass claims for dust and blast concussions. Those principles are, as stated by Dragon Products in its Brief, that "the common law of trespass protects the exclusive possession of land" "from one who 'intentionally enters land in the possession of the other, or causes a thing or a third person to do so'" and that the "gist of a trespass action is unlawful entry"; that "even where no actual harm is caused by a trespass, the injured party is still entitled to nominal damages"; and that nuisance "is designed to protect a possessor's use and enjoyment of his or her land" and that "proof of harm" is required. None of these principles is inconsistent with allowing fugitive dust and blast vibration trespass claims.

On page 11 of its Brief, Dragon Products asserts that the Darneys do not allege that "dust or vibrations have ousted them from their property" or that they "have been forced to leave their property". Dragon Products goes on to assert that "without being able to make that allegation, the Darneys may not recover for trespass based on intangible dust or vibrations." The Darneys do not need to have been "ousted" from their property to have been trespassed upon and Dragon Products cites no authority for this assertion. Indeed, many, if not all, successful trespass actions

From Dragon's Answer to Interrogatory No. 26:"... Dragon has no fence-line monitors to detect how much dust may leave the Facility. ..."
App. at 122-123, and Exhibit I to 7/13/09 Supplemental Declaration of Peggy McGehee.

in Maine courts, were based on facts that did not involve the plaintiffs being "ousted" or otherwise having had to leave their property.

On page 12 of its brief, Dragon Products asserts that "to support a trespass claim Maine law requires a physical entry by a person or thing onto real estate", and that dust is not "tangible" Ambient dust may be tactilely intangible but as it settles and accumulates, it is certainly is tangible, as shown in the photograph of dust on the Darneys' vehicle, on page 7-B of this Brief, and at App. 40-41. As other courts have held, such accumulations of dust do constitute a physical invasion, as discussed in Section II.

On page 13 of its Brief, Dragon Products, in like regard, asserts that "a vibration cannot physically enter and result in a physical presence on the Darneys' land." That is not true either. The vibrations are physically felt by Plaintiffs as they pass from the front corner of the house and out through the back corner, shaking glasses and lamps as they go, cracking and shifting the foundation of the barn, causing bricks from the chimney in the house to fall, and causing sink holes in the yard, among other impacts. As the Oregon Supreme Court has stated, such concussive force "become[s] very practical and real to the possessor of land when the unseen force cracks the foundation of his house". *Martin v. Reynolds Metals Co.*, *supra*, 342 P.2d 790.


On page 13 of its Brief, Dragon Products quotes *Prosser & Keeton* at § 13 at 71 in support of its assertion that "intangible intrusions of dust and vibrations cannot serve as the basis for a common law trespass claim." *Prosser & Keeton* qualifies this comment, however, by noting that it is not the mere projection of light, noise or vibrations that gives rise to trespass, but that such projections in of themselves would not be sufficient "without reference to the amount thereof or other factors...". *Id.* (emphasis supplied). The amount and other factors of vibrations

are considered in requiring actual or substantial damage from the trespass, which is the issue raised by the U.S. District Court's second certified question.

For all these reasons, Plaintiffs request this Honorable Court advise the U.S. District Court that Maine's common and statutory trespass law includes claims for damage caused by blasting vibrations and fugitive dust that cause actual or substantial damage.

Dated: November 23, 2009

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CERTIFICATE OF SERVICE

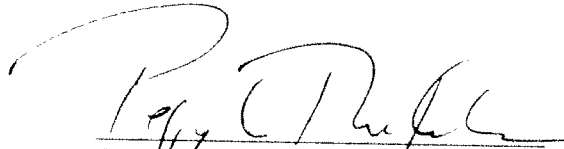
Supreme Judicial Court
Law Docket No. FED-09-415

I hereby certify that I have caused to be served on this date two (2) copies of the Brief of Appellees upon the party listed below, by U.S. Mail, postage prepaid, addressed as follows:

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