IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STEVEN SCHARFSTEIN, individually and on behalf of all other similarly situated persons, Plaintiffs, v. BP WEST COAST PRODUCTS, LLC, a Delaware limited liability company, Defendant.	No. 1112-17046 **DEFENDANT'S MOTIONS TO STRIKE THE STATUTORY DAMAGES AWARD OR TO DECERTIFY THE CLASS** **ORAL ARGUMENT REQUESTED**

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MOTIONS

Defendant BP West Coast Products LLC, moves this court for an order as follows:

MOTION 1: Striking the request for statutory damages as unconstitutionally excessive in this case; or, in the alternative,

MOTION 2: Decertifying the class as not "superior to other available methods for the fair and efficient adjudication of the controversy" (ORCP 32 B) because of the risk that ORS 646.638(8)(a) will result in an unconstitutionally excessive award in this case.

Defendant estimates 45 minutes will be required for argument, and requests official court reporting services. UTCR 5.050(1).

MEMORANDUM IN SUPPORT

I. INTRODUCTION

For 30 years before the jury's verdict in this case, most ARCO gas stations and *am/pm* mini marts in Oregon charged a "per transaction" fee on all purchases made with a debit card, including purchases of gasoline. The fee covered the approximate cost of

processing the debit card and was charged separately from the cost of gas or other items. Most recently, the fee was $0.35 cents. The existence of the fee and the amount of the fee were disclosed on numerous signs displayed at each location, and each consumer was expressly informed of and required to accept the fee before it was collected.

This case is not about Defendant BP West Coast Products LLC ("BPWCP") having intentionally or maliciously deceived Oregon consumers. In fact, the signage at ARCO stations were posted exactly as Plaintiffs' counsel had specified when he settled a prior class action involving the same claim over ten (10) years earlier. Instead, this case is about the fact that the locations of the signs disclosing the debit card fee at ARCO stations did not comply with an amended administrative rule regulating gas price advertising. As a result of that rule violation, Plaintiffs' counsel claims that BPWCP should be held liable for statutory damages of more than *$593 million*. Even aside from the additional $59 million Plaintiffs' counsel seeks in attorney fees, that award would be *571 times* greater than the largest amount of actual damages Plaintiffs could have recovered.

In the circumstances of this case, an assessment of $593,000,000 in statutory damages for not disclosing a $0.35 debit fee in the manner required by an administrative rule violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As Supreme Court precedent, lower court precedent, and logic confirm, the Due Process Clause limits a grossly excessive award of statutory damages. The Supreme Court has set clear guideposts for assessing the constitutionality of extra-compensatory civil damages, including the reprehensibility of a defendant's conduct and the relationship between the penalty and the harm. Using those guideposts, an award of this magnitude in the context of this case is unconstitutional in light of at least the following facts:

- Plaintiffs did not allege, and the jury did not find, that BPWCP intended to harm anyone, or that it ignored a risk of physical injury or even severe economic injury. Instead, Plaintiffs' theory of the case was that BPWCP caused each class member to incur a 35-cent charge without the level of disclosure required under the Oregon administrative rule. Plaintiffs argued

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that BPWCP violated the rule "recklessly" only because it relied on the opinion of its government relations employee, Michael Abendhoff, who concluded the rule did not apply to BPWCP after skimming it himself, instead of getting a legal opinion.

- Charging a separate 35-cent debit card fee, rather than building the fee into the price of gasoline, resulted in lower gasoline prices for consumers at ARCO stations, even for debit-paying customers. The named plaintiff, Scharfstein, returned to ARCO stations and bought gasoline with a debit card three more times after his initial purchase, because it was the cheapest gas in town even with the addition of the debit card fee. It is reasonable to conclude that many consumers at ARCO stations, like Mr. Scharfstein, had knowledge of the fee and made the same voluntary choice to accept the fee and pay for gas or other items at ARCO stations with a debit card because it saved them money.[1] There has been no evidence as to how many consumers actually visited an ARCO station for the first time and would not have had actual knowledge of the debit fee before choosing to pay for gasoline using a debit card.

- There was no evidence of any actual or threatened government enforcement during the entire period of time that the fee was charged at ARCO stations. This is not a situation in which BPWCP should have known of a possible violation because a court or the Oregon Department of Justice raised a red flag.

- BPWCP's net revenue for the entire class period from the first card swipe by the asserted 2.9 million class members was approximately $58,000. Nearly all of the 35 cent service charge was used to pay fees that BPWCP is required to pay in costs to banks, First Data Merchant Services, ("First Data") and interchange networks in order to make debit card payment an option for customers at ARCO stations.

BPWCP's conduct has none of the characteristics that would warrant this level of punishment. Indeed, the only accusation of intentional misconduct by BPWCP had nothing to do with any violation of the Gas Price Advertising Rules, but rather involved a discovery dispute between the lawyers.[2] In the liability phase, Plaintiffs' counsel contended—through argument and expert testimony alone—that BPWCP somehow destroyed documents that were actually in the possession of a third party, First Data. That allegation is simply untrue, and the jury made no finding that BPWCP was responsible for any document destruction.

[1] Plaintiffs' expert estimated that as many as 90% of customers at ARCO stations were repeat customers.

[2] Plaintiffs' spoliation allegations were irrelevant to the recklessness determination that the jury needed to make and should never have been admitted as evidence.

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Early in the case, Plaintiffs' counsel was specifically informed that BPWCP did not possess any debit card transaction data but rather such information was in the possession of First Data. Further, Plaintiffs' counsel was also aware from his own discussions with First Data that First Data only claimed to have data for a nine-month period. Rather than issue a subpoena to First Data, Plaintiffs' counsel specifically agreed that First Data would only have to produce documents for that nine-month period. Yet Plaintiffs' counsel argued before the jury that First Data gave BPWCP an additional three months of data and implied that BPWCP somehow caused that data to be destroyed, a fact that (i) was false and (ii) was contrary to Plaintiff's own agreement as to what data was relevant in the case. Indeed, when Plaintiffs' counsel made this alleged document destruction a principal theme of his punitive damages case, the jury *rejected* Plaintiffs' argument and declined to award any punitive damages.

Imposing an enormous statutory damages award that is almost 600 times greater than the amount of the actual harm suffered by the class claimants would result in a grossly excessive penalty.[3] The Due Process Clause prohibits such an outcome and therefore ORS 646.638(8)(a), permitting $200 statutory damages to be multiplied by the number of successful class claimants is unconstitutional as applied in this case.

II. THE STATUTORY DAMAGES AWARD IS UNCONSTITUTIONAL

A. The Due Process Clause Prohibits Unconstitutionally Excessive Statutory Damages Awards.

For over 100 years, the U.S. Supreme Court has applied the Due Process Clause to assess whether statutory damages are grossly excessive. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 US 443, 453-54 (1993); *id.* at 478-79 (O'Connor, J. dissenting) (citing statutory damage cases reviewed for excessiveness); *see also Missouri*

[3] The $200 award is 10,000 times the approximate net revenue ($.02) that BPWCP made on the collection of the $0.35 debit card fee.

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Pacific Railway Co. v. Tucker, 230 US 340, 33 S Ct 961 (1913) (overturning statutory damages award). The Supreme Court has never called those cases into doubt. To the contrary, it has cited these precedents in its most recent cases discussing whether extra-compensatory civil damage awards comport with the Due Process Clause. *See BMW v. Gore*, 517 US 559 (1996); *Pacific Mutual Life Insurance v Haslip*, 499 US 1, 12 (1999); *TXO*, 509 US at 453-54. Thus, the Due Process Clause restricts a grossly excessive award of statutory damages, and the only issue is the standard by which the award will be reviewed.

The constitutional limitations stated in *Gore* and reaffirmed in *State Farm v Campbell*, 538 US 408 (2003) supply that standard. In *State Farm*, the Court noted that the American judicial system employs two types of damages: compensatory and punitive. *Id.; see also Cooper Industries v. Leatherman Tool Group, Inc.*, 532 US 424, 432 (2001). The former "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm*, 538 US at 416. The latter "are aimed at deterrence and retribution." *Id.* With that dichotomy in mind, the Court held that the substantive component of the Due Process Clause prohibits awards that are grossly excessive in relation to their purposes. *Id.* (noting that the Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"); *see also Gore*, 517 US at 568 ("[T]he federal excessiveness inquiry begins with an identification of the interests that a punitive award is designed to serve."). To the extent that an award is grossly excessive in relation to its goals, "it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm*, 538 US at 417. In addition, the procedural component of the Due Process Clause requires a court to provide adequate guidance to a jury to ensure that awards are not arbitrary in relation to their goals. *Id.* at 417; *see also Honda Motor Co v. Oberg*, 512 US 415, 430 (holding unconstitutional Oregon courts failure to review the reasonableness of punitive damages because due process requires procedures "to ensure that punitive damages are not imposed in an arbitrary manner").

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Nothing in *State Farm* or *BMW* states or implies that the Due Process Clause only limits a jury's discretion in awarding punitive damages for violations of common law torts, and not statutory damages awarded pursuant to a statutory scheme. Both logic and case-law confirm the opposite: A jury award made pursuant to a statutory damages scheme, such as ORS 646.638, and then aggregated under the class actions rules, must be consistent with the constitutional prohibition on grossly excessive and arbitrary awards, as the Supreme Court has interpreted that prohibition in its most recent case law.

This conclusion follows from the fact that the goals of statutory damages, at least in part, are the same as those underlying punitive damages: punishment and deterrence. *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 US 228, 233 (1952) (concluding that statutory damages for copyright infringement are not only "restitution of profit and reparation for injury," but are also "designed to discourage wrongful conduct"); *Parker v. Time Warner Entm't Co.*, 331 F3d 13, 26 (2d Cir 2003) (Newman, J. concurring) (noting under Cable Communications Policy Act that statutory damage "are often also motivated in part by a pseudo-punitive intention to 'address and deter public harm'"); *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F3d 1007, 1011 (9th Cir 1994) (noting purpose of statutory damages under Copyright Act was "'to penalize the infringer and to deter future violations"). That is especially the case when the statutory scheme makes statutory damages available (or subject to increase) depending on the *mens rea* of the defendant. Here, for example, ORS 646.638(8) (a) allows recovery of statutory damages in a class action only if the defendant acted knowingly or recklessly. Thus, the availability of statutory damages in a class action under the UTPA turns on the question of the defendant's culpable state of mind. When damages are divorced from harm to the plaintiff and are contingent on the showing of the defendant's wrongful mental state, the statutory damage provision reflects the goals of punishment and deterrence and is extra-compensatory. Therefore, the Court must apply the

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Gore guideposts as a check to ensure that the award is not grossly excessive as compared to these goals.

Numerous courts have suggested that aggregated statutory damage awards are subject to the Due Process limitations of *Gore* and *State Farm*. *E.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F3d 948, 954 (7th Cir 2006) (suggesting that statutory damages awarded under the Fair Credit Reporting Act would be subject to review under *State Farm*); *Parker*, 331 F3d at 22 (recognizing that "statutory damages [can expand] so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages" and that, under *State Farm* and *BMW*, "it may be that in a sufficiently serious case the due process clause might be invoked); *Atl. Recording Corp. v. Brennan*, 534 F Supp 2d 278, 282 (D Conn 2008) (denying motion for default judgment in file-sharing case because defendant might have viable defense as to unconstitutionality of statutory damage award); *UMG Recordings, Inc. v. Lindor*, No. CV-05-1095 (DGT), 2006 WL 3335048, at *5 (EDNY 2006) (granting motion for leave to amend answer to plead unconstitutionality of statutory damage award in peer-to-peer file-sharing case, recognizing that "in a proper case, a court may extend its current due process jurisprudence prohibiting grossly excessive punitive jury awards to prohibit the award of statutory damages mandated under the Copyright Act if they are grossly in excess of the actual damages suffered"); *see also Cohorst v. BRE Props., Inc.*, No. 3:10-CV-2666- JM-BGS, 2011 WL 7061923, at *14 (SD Cal Nov. 19, 2011) (approving class action settlement in part on grounds that statutory damages award would present significant constitutional issues). *But see Capital Records, Inc. v. Thomas-Rasset*, 692 F3d 899 (8th Cir 2012) (affirming award of statutory damages based on standard of review in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 US 63 (1919)).

For the above reasons, the statutory damages award in this case must be reviewed for consistency with the Due Process Clause.

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B. The Statutory Damages Award Violates the Due Process Clause.

The Supreme Court has established three "guideposts" by which extra-compensatory awards are to be reviewed: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 US at 418; *see also BMW*, 517 US at 575-76. Analyzing the statutory damages in this case using these guideposts confirms that the award is unconstitutional.[4]

1. BPWCP's Conduct Was Not Reprehensible.

The most important indicium of the reasonableness of an extra-compensatory damages award is the degree of reprehensibility of the defendant's conduct. *Gore*, 517 US at 575. With regard to reprehensibility, the Supreme Court has said:

> "We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

State Farm, 538 US at 419.

Under that standard, BPWCP's conduct at issue here barely registers on the reprehensibility scale. It certainly was not sufficiently reprehensible to justify a $500+ million aggregate statutory damages award that is 571 times greater than the harm sustained.

[4] In this case, the jury issued a verdict finding BPWCP liable on a class-wide basis. Although the Court has not yet determined precisely which class members or how many class members are entitled to recover, the amount of statutory damages for each class member has been determined. Accordingly, the Court is now in a position to apply the *BMW* guideposts to analyze the excessiveness of the prospective statutory damages to be awarded in this case.

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At its core, this case was about whether ARCO gas stations sufficiently disclosed the 35-cent debit card fee in certain locations specified by OAR 137-020-0150 as amended. Since 1985, Oregon's gas price advertising statute, ORS 646.930, has required gasoline retailers who elect to post gasoline price signs to post the "lowest cash price" on signs visible from the street, and also to post on the street signs and pumps any "conditions" that affect the lowest cash price. Effective 2011, the Oregon Department of Justice amended its administrative rules to change the requirements for those gas price advertising disclosures. In the amended rule, the Attorney General declared it an unlawful trade practice for a gasoline retailer (as defined in the gas price statute) to fail to post "conditions" on the "per gallon" price of gas, and defined "condition" to include, *inter alia*, "any payment method (e.g., credit), service level (e.g., full service or mini service), or any other modifying circumstance affecting the price per unit of measurement of motor vehicle fuel from the lowest cash price." OAR 137-020-0150(1)(b).

Throughout this case, BPWCP asserted that the disclosure requirements in the gas price advertising regulations did not apply to the debit card fee, because the fee was not a "condition" affecting the per-gallon price of gas. Rather, it was a separate convenience fee charged for all debit card purchases of any product at ARCO stations or *am/pm* stores. Although immediately before trial the Court concluded as a matter of law that the debit card fee was a "condition", until that point and for the entire 30 years that the fee had been charged, no court or agency, including the Oregon Department of Justice, had raised any issues with respect to the debit card fee or any disclosures related to the debit card fee. Indeed, when a consumer did complain to the Department of Justice about the debit card fee disclosures at an ARCO station, (i) the Department of Justice never forwarded the complaint to BPWCP and (ii) the Department of Justice responded that "there does not now appear to be a need for an investigation or legal action." (Trial Ex. 474.)

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In addition, BPWCP asserted at trial that it was not a "retailer" as defined in the administrative rule because it did not set retail prices for gasoline, nor was it involved in any way in the delivery of gasoline to retail customers at the station level. See OAR 137-020-0150(1) (n) (defining "retailer" as "person who operates a service station, business or other place for the purpose of retailing and delivering gasoline, diesel or other fuel into the tanks of motor vehicles"). To the extent BPWCP was wrong on both counts, it contended that its interpretation of the rule was reasonable, in light of the rule's lack of clarity, the lack of any government enforcement or complaints, and the fact that the debit card fee was disclosed at a variety of locations in the stations.

Although the Court and the jury ultimately disagreed with BPWCP's defenses, its conduct was not reprehensible. As a threshold matter, under Plaintiffs' theory the economic harm to consumers was the imposition of a separate 35-cent debit card fee that had not been disclosed in certain locations consistent with the amended administrative rule requirements. This is nowhere near a case in which physical harm occurred or was threatened, or a company evinces a reckless disregard for the health, safety, or physical welfare of its consumers. *See Gore*, 517 US at 577 (even causing economic injury "intentionally through affirmative acts of misconduct," or causing such injury to a "financially vulnerable" target, does not "convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages").

In addition, there is no evidence of any malicious intent to gouge consumers with a hidden fee, or take advantage of financially vulnerable parties for its own gain. As Mr. Scharfstein himself acknowledged, the undisputed evidence shows that most ARCO locations had signs posted under the canopies alerting customers to the 35-cent debit card service fee, as well as stickers on the pumps and pin pads and electronic prompts that disclosed the fee and required its acceptance before the transaction was completed. (Tr. 1/17/14 at 22, 26; *id.* 1/23/14 at 173-74.)

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The evidence further shows that charging the debit fee was part of BPWCP's efforts to offer to sell gasoline at a price lower than its competitors by giving its customers more options. BPWCP showed that charging for the use of debit cards on a per gallon basis, as Plaintiffs claim is required by the administrative rule, leads to an average increase in gas prices of 5 to 10 cents per gallon, and prevents consumers from knowing all of the costs associated with their purchases. (*Id.* at 62-63, 75-76.) Logically, a 5 to 10 cent per gallon surcharge leads to high volume purchasers (e.g., recreational vehicle drivers) paying a greater fee than low volume purchasers (e.g., hybrid sedan drivers), irrespective of the actual cost generated by each debit card swipe. Having a flat debit card fee enabled ARCO stations to offer more choices and better value to customers.

BPWCP derived almost no financial benefit from the debit card service fee. The undisputed evidence was that the first card swipe in the class period by each of the 2.9 million class members resulted in net revenue to BPWCP of at most approximately $58,000. (*Id.* at 70.) The rest of the fee was consumed by the costs associated with providing customers the convenience of using a debit card at ARCO locations. (*Id.* at 67-68.) As the testimony of Fuels Payment Marketing Manager Derek Battiest shows, the primary purpose of the debit card fee was to cover the costs of allowing debit card use, not for BPWCP to make a profit. (*Id.* at 63-70.)

Although the jury found that BPWCP had acted "recklessly" with respect to the debit card fee disclosures, that finding does not equate to a finding that BPWCP's conduct was malicious or reprehensible. As an initial matter, when given the opportunity to do so, the jury declined to find that BPWCP acted with malice. After the Court instructed the jury that it should not award punitive damages unless Plaintiffs showed by clear and convincing evidence that BPWCP acted with malice, and that punitive damages were necessary to punish defendant's misconduct and deter defendant from engaging in future misconduct (2/3/2014 Tr. pp. 160-161), the jury found that Plaintiffs had failed to prove those elements and

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returned a verdict in BPWCP's favor. The jury recognized that the failure to properly disclose the debit card fee was simply not conduct that affected consumer health or safety, nor did BPWCP act maliciously when it failed to interpret the administrative rule consistent with the Court and the jury's findings.

In addition, the reprehensibility of a defendant's conduct must be judged by the character of what the defendant did or failed to do. The fact that conduct is done with a reckless or even knowing state of mind does not, without more, make the conduct reprehensible. To choose an obvious example for illustrative purposes: One can recklessly or knowingly fail to say "please" or "thank you." That state of mind does not make the failure to say those words reprehensible; the conduct still is merely impolite. Here, the jury's finding regarding BPWCP's mental state does not change the fact that its only wrongful conduct was failing to place signs in the specific locations specified in an administrative rule.

The closest Plaintiffs' counsel came to alleging anything approaching intentional misconduct was in the argument that BPWCP had failed to preserve evidence. Specifically, he argued:

> "Destroying data or not preserving data when you know, under your code of conduct, that you're supposed to save all evidence? Yeah, that would be reckless. So the answer there, of course, is yes."

(1/30/2014 Tr. 27:22-25.)

But that allegation essentially related to a discovery dispute , and it has nothing to do with the conduct that was the source of the underlying violation—the disclosure of the debit card fee at ARCO gas stations. In addition, Plaintiffs' allegation had no factual support then or at any time during the trial. It was undisputed that the data to which Plaintiffs' counsel referred was in the possession of a third party—First Data—and that Plaintiffs' counsel was in direct communication with First Data about which evidence in its possession he wanted, and which evidence he did not need. Of course, Plaintiffs' counsel had (and continues to

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have) the right and the power to subpoena that data from First Data if he had deemed it important to his case, but Plaintiffs' counsel has never taken that action. The allegation was simply unsubstantiated.

In fact, the Court did not submit the issue of data preservation to the jury, and the jury never found that BPWCP had destroyed data or that it had breached a duty to preserve it. When Plaintiffs' counsel made alleged spoliation his principal theme during the second phase of the case, the jury rejected his argument and declined to award punitive damages.

It is undisputed that BPWCP charged the fee millions of times throughout the 30-year history of its imposition. As the Supreme Court explained in *Gore*, however, repeated - even nationwide - conduct alone is not sufficient to find conduct reprehensible, especially when the conduct has never been adjudicated unlawful and was stopped immediately. 517 US at 577, 579. The same is true in this case: No court had even interpreted ORS 646.930 or OAR 137-020-0150, much less adjudged the signage at ARCO stations unlawful until this case. In addition, despite the fact that BPWCP charged the fee for 30 years, the Oregon Department of Justice never communicated to BPWCP that its conduct violated the UTPA or was otherwise unlawful. When the jury returned its verdict of liability and BPWCP learned for the first time that its conduct had been deemed unlawful, however, BPWCP immediately stopped charging the debit card fee. For these reasons, the evidence shows that the award of statutory damages is not needed to deter repetition of the conduct.

2. The Ratio Between the Statutory Damages Award and Actual Harm Exceeds Constitutionally Permissible Requirements.

In deciding whether the Due Process Clause's prohibition against "grossly excessive" punishment has been violated, the Supreme Court has focused in part on the proportionality of the ratio between the punishment and the harm to the plaintiff caused by the defendant's actions. *State Farm*, 538 US at 425. In *Gore*, the Court reversed as unconstitutionally excessive a judgment awarding punitive damages of $2 million where the award was 35

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times greater than the total damages of all 14 Alabama consumers who purchased repainted BMWs without being informed that the cars had been repainted. *BMW*, 517 US at 582, n. 35. In 2003, the Court further refined its guidelines for evaluating proportionality, stating that, although it has "decline[d] to impose a bright-line ratio" for excessiveness:

> "[o]ur jurisprudence and the principles it has now established demonstrate * * * that, in practice, few awards exceeding a single-digit ratio between punitive damages and compensatory damages, to a significant degree, will satisfy due process."

State Farm, 538 US at 425. Moreover, the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 US at 427.

Here, Plaintiffs sued for statutory damages for the harm caused to first-time debit card users within the class period. Plaintiffs abandoned their claim for actual damages, and thus did not base their theory on the total number of times each class member used his or her debit card at an ARCO station during the class period—nor would the facts have supported such a theory. Although Mr. Scharfstein testified that the first time he used a debit card to buy gas at an ARCO or *am/pm* station, he had not realized that he would be charged a fee for using the card until he paid, he continued to use his debit card to buy gas three more times because the ARCO station charged less for gas than its competitors. (Tr. 1/21/14 at 34-37.) Mr. Scharfstein's experience shows that people base their decisions on where to buy gasoline—and whether to use a debit card to pay for it—on a variety of factors, including price, convenience, and need for fuel. (*Id.* at 32.) In other words, the evidence shows that BPWCP's non-compliance with the particular requirements of OAR 137-020-0150 gave rise to a loss of, at most, 35 cents per class member, which was incurred the first time that the customer purchased gas using his or her debit card during the class period of January 2011 to August 2013. Each class member's subsequent use of a debit card at an ARCO station necessarily reflects an informed decision to pay the fee, irrespective of whether the fee was posted on the street signs and the pumps.

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Assuming for these purposes the accuracy of Plaintiffs' estimate of 2.9 million class members (which was never the subject of any finding)[5], one swipe per class member would total $1,015,000, in debit card fees. In light of the low level of reprehensibility of BPWCP's conduct and the jury's finding that Plaintiffs failed to prove an entitlement to any punitive damages, the U.S. Supreme Court would likely view an award exceeding a single-digit ratio, much less an award exceeding $590,000,000, as unconstitutional.[6] Based upon Plaintiffs' theory of damages, every successful class claimant incurred damages of 35 cents, but is entitled to an award of statutory damages of $200—an amount 571 times greater than the claimant's actual damages. When the statutory damages are awarded to a class of customers in this case, the enormous aggregate penalty is so vastly disproportionate to the aggregate harm that it shocks the conscience, serves no legitimate government purpose, and violates due process.

III. REMEDY

There can be no doubt that, when multiplied hundreds of thousands or millions of times by virtue of the class action mechanism, the aggregated statutory damages are unconstitutionally excessive. Therefore:

1. The Court should enter an order striking the request/award of statutory damages as unconstitutionally excessive. As explained above, ORS 646.638(8) is

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[5] Given the evidence developed by Plaintiffs regarding the high percentage of repeat customers, BPWCP continues to believe that the class is improperly defined. There is no evidence as to how many consumers exist who truly visited an ARCO station for the first time and would not have had actual knowledge of the debit fee before choosing to go to ARCO. Likewise, there is no distinction between class members who purchased only gasoline and those who purchased gasoline and other items during their visits at ARCO stations.

[6] Although the precise number of class member claims that will be allowed cannot be known until the claims process is completed, any substantial aggregate award will still be grossly disproportionate to the aggregate actual harm suffered by all successful claimants.

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unconstitutional as applied in this case because it would result in an unconstitutionally excessive award of statutory damages.

2. In the alternative, the Court should enter an order decertifying the class as not "superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 B.

As to this alternative remedy, a class action is not a superior method of adjudication where the defendant's liability "would be enormous and completely out of any proportion to any harm suffered by the plaintiff." *London v. Wal-Mart Stores, Inc.*, 340 F3d 1246, 1255 n.5 (11th Cir 2003) (citing cases). Aggregation of such statutory damages "distort[s] the underlying remedial scheme" by providing for a degree of punishment not contemplated by the legislature. Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1878 (2006). Because of this distorting effect, courts have declined to certify class actions in statutory damages cases. *See, e.g., In re Trans Union Corp. Privacy Litig.*, 211 FRD 328, 351 (ND Ill 2002) (class action not a superior method for adjudicating Fair Credit Reporting Act claims). The rationale for such holdings is simple: "[C]lass litigation is not superior to ordinary litigation because it threatens defendants with insolvency, equips plaintiffs with excessive settlement leverage, encourages litigation too strongly, raises significant due-process concerns, and distorts the remedial scheme of the statute." American Law Institute, *Principles of the Law: Aggregate Litigation* § 1.03 cmt. e (2010).

The early, seminal case on the subject was *Ratner v. Chemical Bank New York Trust Co.*, 54 FRD 412 (SDNY 1972), written by Judge Frankel (the primary architect of Federal Rule 23). In *Ratner*, the court denied the plaintiff's motion to maintain a class under the Truth in Lending Act ("TILA") where the aggregation of statutory penalties would have resulted in liability of $13 million. *Id.* at 414. Judge Frankel found that the aggregation of thousands of statutory damage claims "would carry to an absurd and stultifying extreme the

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specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement." *Id.* After considering the practical advantages and disadvantages of class certification, the court found that the recovery "would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant." *Id.* at 416. Given that result, Judge Frankel found that a class action was not a superior method of adjudication. *Id.*

Various other courts have adopted that approach. *E.g., In re Toys "R" Us – Delaware, Inc. FACTA Litigation*, 2010 WL 5071073 (CD Cal 2010) (denying class certification; citing cases); *see also Stillmock v. Weis Markets, Inc.*, 385 Fed Appx 267, 277 (4th Cir 2010) (Wilkinson, J. concurring) (explaining why due process issues related to statutory damages should be considered at class certification stage). To the extent the Court does not strike the statutory damages count altogether, this Court should enter an order decertifying the class in order to cure the unconstitutional statutory damages award in this case.[7]

IV. CONCLUSION

The procedural posture of this case is such that the Court no longer must speculate in order to determine that the statutory damages award will be unconstitutionally excessive. The Court, therefore, is obliged to take such steps as are necessary in order to avoid entry of a judgment that violates BPWCP's rights under the Due Process Clause. Either of the approaches described above will address that problem and defendant therefore moves for an order implementing one of them, as the court deems appropriate.

[7] Some courts, however, have suggested that remittitur could be an appropriate remedy. *See, e.g., Bateman v. American MultiCinema Inc.*, 623 F3d 708, 723 (9th Cir 2010) (reserving judgment as to whether, if the plaintiff were to prevail at trial, the district court "may be entitled to reduce the award if it is unconstitutionally excessive") and *Murray v.GMAC Mort. Corp.*, 434 F3d 948, 954 (7th Cir 2006) ("An award that would be unconstitutionally excessive may be reduced, see *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 US 408, 123 S Ct. 1513, 155 L3d 2d 585 (2003), but constitutional limits are best applied after a class has been certified.").

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DATED: April 24, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT'S MOTIONS TO STRIKE THE STATUTORY DAMAGES AWARD OR TO DECERTIFY THE CLASS** on the following named person(s) on the date indicated below, to said person(s) a true copy thereof, contained in a sealed envelope if by mail, addressed to said person(s) at his or her last-known address(es) indicated below.

(Via Messenger & Email)

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The Honorable Jerome LaBarre
Circuit Court Judge
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Portland, OR 97204
Judge Assigned to this Case

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