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 REPLY IN SUPPORT OF MOTIONS TO STRIKE THE STATUTORY DAMAGES AWARD OR TO DECERTIFY THE CLASS

I. INTRODUCTION

Plaintiffs' Opposition to Defendant's Motion to Strike the Statutory Damages Award or Decertify the Class ("Plaintiffs' Opposition") relies on several faulty premises. First, as to their procedural arguments, Plaintiffs essentially ask the wrong question in order to receive the wrong answer. Contrary to Plaintiffs' assertions, the constitutionality of a statutory damages award is not an affirmative defense, and it does not raise any instructional or evidentiary issue that must be raised at trial. Instead, just as in the case of a punitive damages verdict, a constitutional challenge to a statutory damages verdict raises an issue of law for the court, which ripens after the jury returns its verdict and may be brought for the first time in a post-verdict motion. For that reason, BPWCP neither waived the arguments stated in the Motion, nor is the Motion untimely.

As to their substantive argument, Plaintiffs concede that the Due Process Clause applies to aggregated statutory damages. Thus, the issues are (1) the standard that must be applied to evaluate the constitutionality of a statutory damages award, and (2) whether the

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statutory damages in this case meet that standard. For the reasons outlined below, the controlling standard is not contained in the 100-year-old cases on which Plaintiffs rely, but is in the Supreme Court's more recent due process jurisprudence, which makes clear that any grossly excessive penalty cannot stand.

Evaluating this award against those factors establishes that the statutory damages award must be stricken or, alternatively, the class must be decertified. Importantly, this issue is for the *Court* to decide based on the totality of the record, including the evidence that the parties adduced when litigating Plaintiffs' unsuccessful claim for punitive damages. Based on that record, not disclosing a $.35 debit card fee in the specific manner required by the Oregon Department of Justice administrative rules, when charging the debit fee was part of BPWCP's efforts to recover its costs and to sell gasoline at a lower price, cannot justify—from a due process perspective—a $590 million statutory damages award.

II. BACKGROUND

BPWCP accurately represented the record that the Court must review when determining whether the statutory damages award passes constitutional muster. For example, at least the following facts are not disputed, even by Plaintiffs:

- For 30 years before the jury's verdict in this case, most ARCO gas stations and *am/pm* minimarts in Oregon charged a "per transaction" fee on all purchases made with a debit card, including purchases of gasoline.
- Plaintiffs presented no evidence of any actual or threatened government enforcement during the entire period of time that the fee was charged at ARCO stations.
- The *Dobson* lawsuit was filed by Plaintiffs' counsel in 2000, but was settled without an admission of liability and with an agreement that certain signage at ARCO stations would disclose the debit card fee.

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- Derek Battiest testified 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. The rest of the fee was consumed by the costs associated with providing customers the convenience of using a debit card at ARCO locations.
- The debit card fee was disclosed at numerous locations throughout the stations, including canopy pole signs, pump stickers, stickers on the debit card fee machines, and via electronic prompts. Consumers were informed of and required to accept the debit card fee before each transaction was completed.
- Plaintiffs presented no evidence of how many consumers during the class period had no knowledge of the fee, or did not voluntarily accept the fee because they realized that ARCO gas was consistently 5 to 10 cents cheaper per gallon.
- There was no evidence of intentional or malicious conduct on the part of BPWCP. In fact, when the issue of punitive damages was put to the jury—including, most prominently, Plaintiffs' argument that BPWCP was responsible for failing to preserve documents[1]—the jury rejected Plaintiffs' argument by a vote of 11-1.

Plaintiffs' assertions about what the "facts show" are simply a re-packaging of their *arguments* from the facts or their own contrary facts. With respect to signage, for example, Plaintiffs focus on the undisputed fact that BPWCP did not disclose the debit card fee on street signs. (Pl. Opp. at 4.) That acknowledged fact, however, has nothing to do with the fact that BPWCP did disclose the debit card fee in numerous other locations, and it confuses the question of whether BPWCP violated the UTPA with the question of whether BPWCP's

[1] BPWCP responds to this allegation in detail in its Response to Plaintiffs' Motion for Sanctions.

conduct was sufficiently reprehensible to justify a $590 million statutory damages award. Plaintiffs may reasonably dispute inferences that can be drawn, or provide their own interpretation of the facts and argue from that interpretation. But Plaintiffs do not and cannot show that BPWCP's statements are untrue or misleading.

III. ARGUMENT

A. BPWCP Neither Waived the Constitutional Arguments, Nor Is Its Motion Untimely.

Plaintiffs' waiver and timeliness arguments should be rejected. As discussed below, BPWCP was not required to raise its due process arguments until the jury reached a liability finding against BPWCP.

1. Constitutional Review of Damage Awards Occurs Post-Verdict

Plaintiffs misstate the issue presented in Defendant's Motion to Strike. The issue is whether the amount of statutory damages that will result from the jury's liability verdict—an amount that is automatic, is not subject to jury or court discretion, and will be aggregated to result in a judgment potentially exceeding a half billion dollars—is consistent with the Due Process Clause. The de novo review by a court after a jury returns a verdict is designed to ensure that every extra-compensatory damages award "is based on an application of law, rather than a decisionmaker's caprice." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 418 (2003). These are "due process standards that every award must pass." *Exxon Shipping Co. v. Baker*, 554 US 471, 501 (2008). Thus, due process requires this Court to determine independently and as matter of law whether the amount of the resulting award is "grossly excessive." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 US 424, 437 (2001); *State Farm*, 538 US at 418.

Regardless of the standard that the Court applies to answer that question, Defendant's present challenge to the statutory damages award here is no different than a challenge to the constitutionality of the amount of punitive damages, and that issue is clearly a post-verdict,

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legal question. Oregon law recognizes that "a party cannot challenge a verdict for punitive damages as excessive until *after* the jury renders its verdict." *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 558 n 14, 17 P3d 473 (2001) (emphasis in original). Because the excessiveness of a punitive damages award is "a purely legal issue," there is "no reason to present that issue to the jury." *Axen v. American Home Products Corp.*, 158 Or App 292, 314, 974 P2d 224 (1999). For that reason, a party may challenge a jury's punitive damages award as excessive under the Fourteenth Amendment by, among other things, filing a motion for a new trial. *Parrott*, 331 Or at 557.

Here, BPWCP raised the issue of the constitutionality of Plaintiffs' statutory and punitive damage demand when opposing Plaintiffs' Motion to Amend. (*See* Def. Response to Pl. Motion to Amend to Include Claim for Punitive Damages at 7-9.) Until the jury reached its verdict, however, the amount of the aggregate award had not yet been established and will not be established until the claims process is completed. Moreover, until the punitive damages phase of the case was completed and the jury declined to award punitive damages, BPWCP could not know whether its constitutional challenge would be directed at the statutory damages alone or at the statutory damages in combination with a punitive damages award. BPWCP made the motion promptly when it became apparent that the aggregate statutory damages award would almost certainly be unconstitutionally excessive. *Cf. Bednarz v. Bay Area Motors, Inc.*, 95 Or App 159, 768 P2d 422 (1989) (finding an error waived because it occurred *during trial* rather than "when the jury returned a verdict and an award of damages for plaintiff").

Numerous courts have reached this same conclusion, rejecting the argument that defendants "waived their opportunity to challenge the punitive damages verdict on federal constitutional grounds because they failed to raise this issue before the jury rendered its decision." *See, e.g.*, *Seltzer v. Morton*, 2007 MT 62, ¶ 154, 154 P3d 561 (2007) ("[T]he

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1 propriety of the size of a punitive damages verdict is an issue that becomes ripe after the
2 verdict is entered.").[2] Plaintiffs cite no case in Oregon or otherwise to the contrary.

3 **2. Plaintiffs' Procedural Arguments Should Be Rejected.**

4 Plaintiff argues that BPWCP should have raised its constitutional objection to the
5 amount of statutory damages either as an affirmative defense, as a motion against the
6 pleadings or for directed verdict, or with regard to jury instructions. Plaintiff confuses
7 whether BPWCP *could* have raised the issue with whether BPWCP *must* have raised it. The
8 appropriate question is whether, by filing this motion to strike the statutory damages award at
9 this stage of the proceedings, BPWCP raised the issue in an appropriate and timely way. The
10 answer to that question is yes.

11 **a. The Constitutionality of an Aggregated Statutory Damages Award**
12 **Is Not an Affirmative Defense.**

13 Contrary to Plaintiff's assertions otherwise, BPWCP was not required to plead an
14 affirmative defense of unconstitutionality in order to bring the present motion. Plaintiffs
15 mistakenly rely on ORCP 19 B in support of this argument. (Pl. Opp. at 8.) ORCP 19 B
16 requires that a party, in a responsive pleading, "set forth affirmatively * * *
17 unconstitutionality * * * and any other matter constituting an avoidance or affirmative

18 [2] *See also Local Union No. 38, Sheet Metal Workers' Intern. Ass'n, AFL-CIO v.*
19 *Pelella*, 350 F3d 73, 89 (2d Cir 2003) ("Where a party contends that a punitive damages award is excessive, that issue is ripe for legal challenge after a verdict is entered. For that
20 reason, excessive punitive damages that violate the Due Process Clause can be challenged through post-trial motions."); *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1042
21 (9th Cir 2003) ("Even though the jury's decision to award punitive damages was supported by substantial evidence, we must also determine whether the amount of the award is
22 unconstitutionally excessive. * * * Even though the appellants only raised this issue in post-trial motions, the Supreme Court has ruled that the appellate courts should review the district
23 court's denial of remittitur of the award de novo."); *Steel Techs., Inc. v. Congleton*, 234 SW3d 920, 930 (Ky 2007) (providing no due process limitation instruction to the jury "was
24 the correct approach, as the due process analysis requires a review of punitive damages award after the fact"); *Boyd v. Goffoli*, 216 W Va 552, 560 n 6 (2004) (choosing to address
25 the merits of the constitutional challenge to the punitive damage award despite plaintiffs' claim that defendant "waived its challenge to the punitive damages award by * * * making no
26 objections at trial * * * [and] agreeing to the punitive damages instruction").

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1 defense." The text and context of that rule makes plain that the requirement applies to an
2 affirmative defense challenging the constitutionality of a *claim. See* ORCP 19 A ("A party
3 shall state in short and plain terms the party's defenses to each *claim* asserted...") (emphasis
4 added). BPWCP is not arguing that Plaintiffs' UTPA claim is unconstitutional. Rather,
5 BPWCP is arguing that applying the statutory damages provision of the UTPA to the jury's
6 verdict on a class-wide basis results in an unconstitutional outcome. *Cf. American*
7 *Federation of State, County, and Mun. Employees, Council 75 v. City of Albany*, 81 Or App
8 231, 232, 725 P2d 381 (1986) (applicability of federal law to prevent disclosure of social
9 security numbers was question of which law applied to facts of case, not an affirmative
10 defense which defendant was required to plead). This unconstitutional outcome was not
11 apparent until the jury had reached its verdict, and there had been some evidence offered as
12 to the size of the putative class. An affirmative defense or other objection to the
13 constitutionality of the statutory damages award prior to that point would have been
14 meaningless because the Court had no basis upon which it could gauge if any damages were
15 to be awarded, much less the size of the aggregate statutory damages being challenged.

16 Again, Plaintiffs cite no case in support of the proposition that a constitutional
17 challenge to the amount of a punitive damage award must be pleaded as an affirmative
18 defense. Rather, courts considering this argument have rejected it. *Kiswani v. Phoenix*
19 *Security Agency*, 2006 WL 463383, at *5 (ND Ill Feb 22, 2006) ("Assertions that punitive
20 damages are not recoverable or constitutional do not constitute affirmative defenses under
21 Section 8(c)."); *Doe v. Young*, 2009 WL 311163 (ED Mo Feb 6, 2009) (holding that
22 constitutional objections were premature and "assertions that punitive damages are not
23 recoverable or constitutional do not constitute affirmative defenses under Rule 8(c)."); *Fresh*
24 *v. Entertainment U.S.A. of Tennessee*, 340 F Supp 2d 851, 858 (WD Tenn 2003) (rejecting
25 claim that defendant waived defense based on constitutionality of punitive damages award by
26 failing to plead this argument as defense in its answer).

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1 **b. No Alternative Jury Instructions Were Required.**

2 Post-verdict constitutional review of the size of a damage award, whether by a trial
3 court or an appellate court, is conducted independently by the court. As noted above, the
4 determination whether a punitive award is excessive is a question of law that is reviewed de
5 novo, not a finding of fact. *See Cooper Industries*, 532 US at 437. For that reason, the
6 constitutionality of the statutory damages awarded in this case was not an appropriate subject
7 for instruction. In its motion, BPWCP raises a purely legal issue about the constitutionality
8 of the application of ORS 646.638 in this case. There would be no reason to present that
9 issue to the jury, and it was not a waiver for BPWCP not to ask the Court to do so.

10 Plaintiff asserts that BPWCP should have asked the court to instruct the jury "on the
11 standards for awarding statutory damages." (Pl. Opp. at 9.) But the jury was not asked to
12 award statutory damages and had no discretion to establish the amount of the statutory
13 damages award, and it was not within the province of the jury to do so. The amount of
14 statutory damages to be awarded in a class action was set in ORS 646.638(1). BPWCP's
15 motion asserts that, given the jury's verdict and the size of the putative class, the application
16 of that statute in this case violates BPWCP's due process rights. There was nothing relevant
17 in this regard for the jury instructions to convey.

18 For this reason, *Philip Morris USA v. Williams*, 549 US 346 (2007) and *Williams v.*
19 *Philip Morris*, 344 Or 45, 176 P3d 1255 (2008) are inapposite. *Williams* involves the
20 procedures and instructions that a *jury* uses ex ante to calculate the proper amount of punitive
21 damages. Here, the jury has no such discretion to exercise, and thus, an instruction on the
22 due process requirement that a jury not punish for harm to non-parties (as one example)
23 would be inapposite. By contrast, *Gore* and *State Farm* announce the test that *courts* must
24 apply ex post to ensure that the jury's award does not exceed the constitutional *ceiling*.
25 Determining that ceiling is a question of law, properly reserved for the court, and not an issue
26 for jury instruction.

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1 **c. The Motion to Strike Is Not About the Sufficiency of the Evidence, and No Directed Verdict Motion Was Required**

2

3 Plaintiffs' directed verdict argument confuses two distinct inquiries: first, whether
4 the evidence supported an award of statutory damages at all and, second, whether the amount
5 is unconstitutionally excessive. A party cannot obtain a directed verdict on a punitive
6 damages claim based only on the defendant's yet-unrealized concern that the jury might
7 return an unconstitutionally excessive award. In this case, until the jury returned its verdict
8 and triggered the application of the statutory damages provision in ORS 646.638, it could not
9 be determined whether BPWCP's due process rights would be violated by the aggregate
10 award. That is why courts routinely conduct post-verdict review of punitive damages
11 awards. *See* ORS 31.730 (required post-verdict review of punitive damages award by court).
12 In other words, it is the court which must determine whether the application of ORS 646.638
13 to the jury's verdict is constitutional, which, by definition, can only happen after the jury's
14 verdict is received.

15 *Lakin v. Senco Products, Inc.* confirms this result. 144 Or App 52, 925 P2d 107, 121
16 (1996) *aff'd*, 329 Or 62, 987 P2d 463 (1999) *opinion clarified*, 329 Or 369, 987 P2d 476
17 (1999). In *Lakin*, the plaintiffs argued that the "defendant did not preserve the issue of the
18 alleged excessiveness of a $4 million punitive damages award because it first raised its
19 excessiveness challenge via post-verdict motions." *Id.* at 75 n 19. As here, the plaintiffs
20 contended that a constitutional challenge to the excessiveness of a damage award was
21 "nothing more than a challenge to the sufficiency of the evidence to support [the] award and
22 that, as with any other 'insufficiency of the evidence' challenge, that argument had to be
23 raised by a motion for directed verdict or be forever waived." *Id.* The Court of Appeals
24 rejected that argument, finding that the "defendant's post-trial motions were sufficient to
25 preserve that issue for our review." *Id.* (*citing Oberg v. Honda Motor Co., Ltd.*, 320 Or 544,
26 552 n 9, 888 P2d 8 (1995)). Likewise, here, BPWCP was not required to challenge the

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1 excessiveness of the statutory damage award until the jury made its determination. A post-
2 verdict motion was the appropriate opportunity to do so and is sufficient to preserve the
3 issue.

4 Plaintiffs attempt to shoehorn the rule in *Building Structures, Inc. v. Young*, 328 Or
5 100, 968 P2d 1287 (1998), into the context of a due process challenge. But *Young* says
6 nothing about a constitutional challenge to the excessiveness of a punitive damage award.
7 Rather, it requires that a contemporaneous objection be made to preserve a challenge to a
8 jury's verdict that, perhaps mistakenly, has awarded punitive but no actual damages. It does
9 so because such a rule in that context often minimizes "needless retrial of cases." 328 Or at
10 113. A due process challenge, by contrast, need not require a retrial because it presents only
11 "a question of law" that is properly addressed to the court. *Williams*, 340 Or at 54 (2006);
12 *see also Bisbal-Ramos v. City of Mayaguez*, 467 F3d 16, 27 (1st Cir 2006) (court "may
13 simply ascertain the amount of punitive award that would be appropriate and order the
14 district court to enter judgment in such amount").

15 **d. A Motion to Strike Is Timely and Proper**

16 Plaintiffs' timeliness argument essentially repacks the preservation issue and is
17 therefore merely an argument of form over substance. As noted above, the Court of Appeals,
18 in *Lakin* held that a party could challenge an excessive damage award for the first time in a
19 post-trial motion. *Id.* If that is so, then such a motion cannot be untimely because the
20 essence of the preservation requirement is that issues must be raised in a manner sufficient to
21 allow their consideration by adverse parties and by the trial court. *Peeples v. Lampert,* 245
22 Or 209, 221, 191 P3d 637 (2008). BPWCP's Motion does just that—it presents this
23 constitutional issue to the Court, so the Court can consider and rule on it. BPWCP has not
24 waived its right to ensure that its constitutional rights are acknowledged and observed by this
25 Court, and a finding of waiver here would be inconsistent with the notion that waiver of an
26 important constitutional right cannot be determined from silence. *State v. Phillips*, 235 Or

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1 App 646, 653, 234 P3d 1030 (2010) ("Because courts are reluctant to find that fundamental
2 constitutional rights have been waived, 'a valid waiver will not be presumed from a silent
3 record.'").

4 Plaintiffs have also suffered no prejudice due to the timing of BPWCP's Motion,
5 despite their claims to the contrary. As indicated above, the constitutional question is not one
6 for the jury, but for the Court to determine after the verdict is rendered. And because
7 Plaintiffs were permitted to seek punitive damages, Plaintiffs had a full opportunity to adduce
8 evidence sufficient for the Court to conduct its constitutional analysis, including
9 consideration of the reprehensibility of BPWCP's conduct.

10 **B. The Aggregated Statutory Damages in This Case Violate the Due Process Clause**

11 **1. The *Gore/State Farm* Factors Apply**

12 Plaintiffs concede that the statutory damages award in this case must be evaluated for
13 consistency with the Due Process Clause. Contrary to Plaintiffs' contention, however, that
14 inquiry is governed by the factors articulated in *BMW v. Gore,* 517 US 559 (1996) and *State*
15 *Farm v Campbell*, 538 US 408 (2003).

16 In the early 20th century, the Supreme Court both upheld and struck down civil
17 damage awards that were challenged as unconstitutional. *See St. Louis, I.M. & S. Ry. Co. v.*
18 *Williams*, 251 US 63 (1919) (upholding constitutionality of Arkansas jury award within
19 statutory range and 114 times actual damages); *Missouri Pacific Railway Co. v. Tucker*, 230
20 US 340, 33 S Ct 961 (1913) (overturning statutory damages award). Those cases expressly
21 recognize that extra-compensatory civil damages may in some instances be so excessive as to
22 violate the Constitution. In *Gore* and its progeny, the Supreme Court cited those cases in
23 developing a test for whether certain damage awards are consistent with the Due Process
24 Clause. In doing so, the Court emphasized that due process protections apply to civil
25 penalties generally, and not just to those expressly styled as punitive damage awards. *See*
26

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1 *State Farm*, 538 US at 416 (due process "prohibits the imposition of grossly excessive or
2 arbitrary *punishments* on a tortfeasor") (emphasis added).)

3 Applying the analysis of *Gore* and *State Farm* to statutory damages is required in this
4 case for at least two main reasons. First, the Supreme Court's principal concern was whether
5 an award "can fairly be categorized as 'grossly excessive' in relation to" the state's interests
6 in punishment and deterrence. *Gore*, 517 US at 568. To the extent that an award is grossly
7 excessive in relation to those goals, "it furthers no legitimate purpose and constitutes an
8 arbitrary deprivation of property." *State Farm*, 538 US at 417. The *Gore* guideposts—the
9 reprehensibility of defendant's conduct, the relationship between the punitive damages and
10 the harm, and the comparability of state law penalties—are animated by that concern, and
11 they contemplate a highly substantive review of an extra-compensatory damage award. *See*
12 *Cooper Industries*, 532 US at 432 (stating that the Due Process Clause "imposes substantive
13 limits" on discretion to impose criminal penalties and punitive damages and "also prohibits
14 the States from imposing 'grossly excessive' punishments on tortfeasors"). The language
15 and analysis in *Gore* and *State Farm* reflect that the Court questioned not only the procedures
16 employed in assessing punitive damages, but also the size of that award, its relationship to
17 the state's interests in punishment and deterrence, and whether similar conduct would be
18 treated the same. That substantive concern becomes particularly acute when plaintiffs seek
19 enormous statutory damage awards on behalf of a class, and the awards are vastly
20 disproportionate to the amount of harm inflicted.

21 Second, for purposes of the Due Process inquiry, there is no material distinction
22 between a statutory damage award that serves extra-compensatory purposes and a punitive
23 damage award. *See State Farm*, 538 US at 416, 417, 419 (stating that due process limit
24 applied to "punishments" and "award[s]"). As several courts have recognized, unlike purely
25 compensatory damages, statutory damages raise the same concerns about the relationship
26 between a remedy intended to punish and deter and the underlying harm. *E.g., Parker v.*

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1 *Time Warner Entm't Co.*, 331 F3d 13, 26 (2d Cir 2003) (Newman, J. concurring) (noting
2 under Cable Communications Policy Act that statutory damage "are often also motivated in
3 part by a pseudo-punitive intention to 'address and deter public harm'"). That is especially
4 the case when the statutory scheme such as the one at issue here makes statutory damages
5 available only when they exceed actual damages, and depending on the defendant's culpable
6 state of mind. When damages are divorced from harm to the plaintiff and are contingent on
7 the showing of the defendant's wrongful mental state, the statutory damage provision reflects
8 the goals of punishment and deterrence, and the amount of that award must be evaluated
9 pursuant to the standards articulated in *Gore* and *State Farm.*

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10 Plaintiffs' principal argument for *Gore*'s inapplicability is that the Supreme Court is
11 only concerned whether a defendant has received notice of the potential extra-compensatory
12 award. That assertion misreads *Gore* and its progeny. As outlined above, the *Gore*
13 guideposts themselves contemplate a substantive, *post hoc* review of a jury's damages award,
14 and are not solely geared to determining the notice a defendant had as to the amount of the
15 award. *See Gore*, 517 US at 587 (Breyer, J. concurring) ("Requiring the application of law,
16 rather than a decisionmaker's caprice, does more than simply provide citizens notice of what
17 actions may subject them to punishment; it also helps to assure the uniform general treatment
18 of similarly situated persons that is the essence of law itself."). In fact, in *Gore* the Supreme
19 Court only referred to "fair notice" when introducing the guideposts. Other than that
20 reference, the Court did not invoke the concept of notice when explaining why the Due
21 Process Clause imposes substantive limits on grossly excessive awards.

22 Indeed, a defendant could be found to have actual notice of an award, and a court can
23 still find that award excessive. A grossly excessive penalty does not satisfy due process
24 merely because the defendant can see it coming. No court has suggested, for example, that a
25 punitive damage award is insulated from constitutional review simply because it might be
26 subject to a legislative cap that informs a defendant of a maximum amount. Even if a

1 defendant receives fair notice of the size of a punitive award, the three *Gore* guideposts
2 would still be applied to ensure that the award's size is not grossly excessive.
3 Plaintiffs also argue that the Court should ignore *Gore*, *State Farm*, and any other
4 recent due process, punitive damages cases, and should only look to *St. Louis, I.M. & S Ry.*
5 *Co. v. Williams*, 251 US 63 (1919) as supplying the constitutional standard of review in this
6 case. Plaintiffs' reliance on *Williams*, to the exclusion of the Court's more recent case law, is
7 misplaced. *Williams* held that the Due Process Clause "places a limitation upon the power of
8 the states to prescribe penalties for violations of their laws" and that the Clause is violated
9 "where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to
10 the offense and obviously unreasonable." *Id.* at 66, 67. Thus, the Supreme Court
11 incorporated both the concepts of gross excessiveness and proportionality as substantive
12 limitations on statutory damages awards. The Supreme Court's recent cases have elaborated
13 and expanded on this holding and devised a framework for analyzing when a civil remedy
14 comports with those restrictions. Thus, whether a specified award exceeds due process
15 bounds is precisely the question the framework articulated in *Gore* is designed to answer.
16 *See Gore*, 517 US at 575 (citing *Williams*); *id.* at 576 ("punitive damages may not be 'grossly
17 out of proportion to the severity of the offense'"); *State Farm*, 538 US at 426 ("In sum,
18 courts must ensure that the measure of punishment is both reasonable and proportionate to
19 the amount of harm to the plaintiff and to the general damages recovered."). Regardless of
20 whether a court is measuring the constitutionality of statutory or punitive damages, the
21 yardstick remains the same. That yardstick is the excessiveness doctrine and, from 1919 to
22 present, the excessiveness doctrine has evolved from *Williams* to *Gore* and *State Farm.*
23 In addition, the Supreme Court observed in *Cooper Industries* that it "focuse[s] on the
24 same general criteria" [essentially the *Gore* framework] to evaluate the excessiveness under
25 the Eighth Amendment of criminal fines imposed by Congress, see *U.S. v. Bajakajian*, 524
26 U.S. 321 (1998), and punitive damage awards authorized by state legislatures. In doing so,

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1 the Court emphasized that although legislatures have "broad discretion" to authorize and
2 limit the penalties to be assessed for statutory violations, the due process clause nevertheless
3 "imposes substantive limits on that discretion." *Cooper*, 532 US at 433; *Bajakajian*, 524 US
4 at 330-31. Logically, it should make no constitutional difference whether a grossly excessive
5 damage award emanates from a jury determination or a legislative action. In light of the
6 Court's due process jurisprudence, including its origin in statutory damages and broad
7 application to penalties imposed by Congress, there is no principled reason why the same
8 excessiveness criteria should not also apply to civil statutory damages that have a punitive
9 and deterrent function.

10 **2. Awarding $200 per Class Member for a $0.35 Harm Violates Due**
11 **Process.**

12 Applying the *Gore* guideposts demonstrates that the award of potentially $590
13 million (by Plaintiffs' calculation) violates due process. Plaintiffs devote just a single
14 paragraph to this issue. (Pl. Opp. at 16.) For the reasons explained in the Motion, however,
15 BPWCP's conduct was not sufficiently reprehensible to support a $590 million aggregate
16 statutory damages award that is 571 times greater than the harm sustained. In light of the low
17 level of reprehensibility of BPWCP's conduct and the jury's finding that Plaintiffs failed to
18 prove an entitlement to any punitive damages, the U.S. Supreme Court would likely view an
19 award exceeding a one-to-one ratio, much less an award exceeding $590,000,000, as
20 unconstitutional.

21 The third *Gore* guidepost does not justify the award in this case. The purpose of this
22 guidepost is not to raise the constitutional ceiling, but to determine whether the legislature
23 has chosen an amount *below* the maximum constitutional penalty and to ensure that an award
24 does not negate that policy choice. That concern is not implicated when the statutory remedy
25 itself is at issue.

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1 And in any event, none of the factors that the Court in *St. Louis, I.M. & S Ry. Co. v.*
2 *Williams* identified as favoring the constitutionality of a large statutory-damages award exist
3 in this case. The first factor was "the interests of the public." In all the early cases sustaining
4 large awards, the defendant was a company charged with performing a public function (a
5 railroad sued for overcharging passengers in *Williams* and a utility sued for discriminating
6 between its customers in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 US 482
7 (1915)) or the suit vindicated a right of the public as a whole (an antitrust suit against a large
8 oil monopoly in *Waters-Pierce Oil Co. v. State of Texas*, 212 US 86 (1909)). Here, the suit is
9 a class action, which is no more than an aggregation of all class members' individual UTPA
10 claims. Plaintiffs argue, of course, that the UTPA was designed to vindicate the public
11 interest. But that is the case with respect to any legislative enactment that provides for a civil
12 remedy.

13 The second factor was "the numberless opportunities for committing the offense,"
14 which refers not a uniform course of conduct that affected numerous people (as here), but the
15 opportunity for numerous discretionary decisions to overcharge passengers. The third factor
16 was "the need for securing uniform adherence to established passenger rates." Again, at
17 issue in *Williams* was a railroad charging more than authorized rates to its passengers, rates
18 that had been legislatively established in a ratemaking proceeding. The signage at issue here
19 is clearly distinguishable. In light of these differences, the statutory damages in this case
20 significantly exceed what was at issue in *Williams* and do not pass muster under that case.

21 **C. Decertification Is an Appropriate Alternative Remedy**

22 A court has the discretion to decertify a class at any time in response to changed
23 circumstances. *See, e.g., Barnes v. American Tobacco Co.*, 161 F3d 127, 140 (3d Cir 1998)
24 (decertifying class after summary judgment); *Clark v. Pfizer Inc.*, 990 A2d 17 (Pa 2010)
25 (court could reconsider certification in light of changed circumstances); *Farmers Ins. Exch.*
26 *v. Benzing*, 206 P3d 812 (Colo 2009) (courts authorized to consider decertification in

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response to changed circumstances); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F3d 124, 139 (2d Cir 2001) (stating that case management tools after liability trial may include decertification). Under Oregon law, superiority is the *sine qua non* of class treatment. And, as several courts have recognized, a class action is not a superior method of resolving a statutory damages claim when it would produce an unconstitutional result. (*See* Def. Motion at 16-17.)

Even the cases cited by Plaintiffs, which deal with certification decisions that occurred *before* any finding of liability or determination of damages, recognize that some remedy following verdict is required. In *Murray v. GMAC Mortgage Corp.*, for example, the court explained that at the pre-liability, certification phase it was not appropriate to consider the potential unconstitutional result that would occur if statutory damages were awarded. 434 F3d 948, 954 (7th Cir 2006). The court expressly acknowledged, however, that "[a]n award that would be unconstitutionally excessive may be reduced [pursuant to Due Process Clause]." *Id.* Here, decertification is an appropriate alternative remedy to striking the statutory damages demand.

IV. CONCLUSION

For the reasons stated in Defendant's Motion and herein, Defendant's Motion to Strike or, in the Alternative, to Decertify should be granted.

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1 DATED: June 6, 2014.

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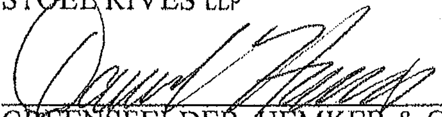
3 

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT'S REPLY IN SUPPORT OF 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.

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