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, Plaintiff, v. BP WEST COAST PRODUCTS, LLC, a Delaware limited liability company, Defendant.	Case No. 1112-17046 **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE THE STATUTORY DAMAGES AWARD OR DECERTIFY THE CLASS**

INTRODUCTION

Defendant BP West Coast Products, LLC ("BP") moves to strike an award of $200 in statutory damages as unconstitutional because BP claims its behavior has not been sufficiently "reprehensible" and it did not have adequate due process with respect to the potential jury and class award. BP received notice that it was violating the Oregon Gasoline Price Advertising Rules, and continued to violate the rules for 25 months after that notice charging the illegal debit card fee each day to 14,000 consumers. The magnitude of the damages arises because of the number of consumers harmed by BP.

Most of the factual allegations in BP's Motion to Strike are either not true, not part of the record, or an incomplete and misleading portrayal of the evidence.

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

The motion to strike is also untimely. The Oregon Rules of Civil Procedure guide cases through definite steps, and BP did not preserve its constitutional argument. Had the reprehensibility of BP's behavior been an issue, plaintiff would have adduced additional evidence, which would now be before the Court. Regardless, the legislatively enacted statutory damages are constitutional.

STATEMENT OF FACTS: BP'S CLAIMS VERSUS THE ACTUAL RECORD

A. BP Claims 30 Years of Charging the Debit Card Fee with no "Red Flags."

BP States: For 30 years before the jury's verdict in this case, most ARCO stations charged the $0.35 debit fee. (BP's Motion to Strike at p. 1) Because the Oregon Department of Justice (DOJ) did not threaten enforcement action against BP, there were no "red flags." *Id.* at p. 3.

The Facts Show: The issue before the jury and the Court was BP's failure to comply with 2011 amendments to the Gasoline Price Advertising Rules. Plaintiff moved in limine to exclude evidence of the lack of any DOJ investigation (MIL # 13) as well as consumer knowledge of the $0.35 fee (MIL #4), since such evidence is not relevant. Those motions were granted.

BP did charge this fee for 30 years, but during that time, BP was sued for not disclosing the fee, and as a settlement for that case, posted signs disclosing the fees on its pumps. Other "red flags" existed: BP's franchisees complained to BP about the fee, and the Oregon DOJ received numerous complaints about the debit card fee.

Also, in response to increased use of debit cards and complaints, the Oregon DOJ convened a working group, provided public notice and an opportunity to comment, and eventually amended the 1985 Gasoline Price Advertising Rules in 2011. No regulated entity, including BP, challenged those amended rules. After the DOJ adopted the 2011 amendments, consumers notified BP of its failure to comply with the rules and eventually sued BP. DOJ's

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

discretion to prosecute is not relevant to whether BP is liable to a private party for statutory damages.

B. BP Asserts that the Debit Card Fee Covered Actual Costs.

BP States: The debit card fee covered the approximate cost of processing debit cards. (BP's Motion at p. 2) "BP'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." *Id.* at p. 3. "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." *Id.*

The Facts Show: ARCO gasoline pricing structure does not account for the price of accepting cash, and when the price for debit cards is included in the rates, the price is raised only 1-2 cents per gallon. Testimony of Derek Battiest, (Feb 3, 2014) Tr at p. 93-94, explaining Seattle experiment and Testimony of, John Truax, Tr (Jan 23, 2014) at p. 132 (explaining that costs of accepting cash that are not part of the price of gasoline include renting a safe, paying for a monthly security truck and extra security).

Additionally, this Court barred evidence regarding the effect of legal disclosure on the price of gasoline because it was irrelevant and the potential for confusion and prejudice outweighed any probative value. The Gasoline Price Advertising Rules require conspicuous disclosure of the actual price a consumer will pay. Before the jury's verdict in this case, BP's business model was to mislead consumers about the actual price.

C. BP Contends That Every ARCO Station had Numerous Signs Disclosing Fees.

BP States: "The existence of the fee and the amount of the fee were disclosed on numerous signs displayed at *each* location." BP's Motion at p. 2 (emphasis added). "[T]his 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." *Id.* (emphasis

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

added). ARCO stations posted signage "exactly as Plaintiffs' counsel had specified when he settled a prior class action involving the same claim over ten (10) years earlier." *Id.*

The Facts Show: The jury unanimously found that BP's stations did not disclose the debit card fee on its street or gasoline pump signs as required by law.

No evidence supports the statement that *all* 55 ARCO and *ampm* stations had "numerous signs" disclosing the fee. BP stipulated that none of the street signs at its 55 ARCO and *ampm* stations disclosed the $0.35 fee, and there is no evidence in the record that *all* 55 stations conspicuously disclose the fee at the pumps. BP implies that it had a "conspicuous" signage. BP knowingly did not disclose the fee on its street signs, in contrast to BP's competitors' signs that disclosed the accurate price of their gasoline in full compliance with the law.

As for signage posted in compliance with *Dobson v. Atlantic Richfield, Co.*, whether any signage comported with *Dobson* settlement was not relevant and was excluded from the case because *Dobson* predated the current rules. (MIL #5).

D. BP Contends that Each Consumer Accepted the Fee.

BP States: "[E]ach consumer was expressly informed of and required to accept the fee before it was collected." BP's Motion at p. 2. "It is reasonable to conclude that many consumers...had knowledge of the fee and made the same voluntary choice to accept the fee and pay for gas at ARCO . . . with a debit card because it saved them money." *Id.* at p. 3. "There has been no evidence as to how many customers actually visited an ARCO station for the first time and would not have actual knowledge of the debit fee before choosing to pay for gasoline with a debit card." *Id.*

The Facts Show: The Gasoline Price Advertising rules require conspicuous disclosure of fees in advance of a consumer's purchase of gas, allowing a consumer to know the true price of gasoline. BP's practice was to inform consumers of the fee *after* the attendant had put gasoline in the car, and *after* the consumer had swiped her debit card inside the station. BP's business

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

model required consumers to exit their car and go into the station. Thus, as the evidence showed, consumers' ability to refuse to pay the fee was limited.

The Court barred evidence or argument of consumer knowledge because it was not relevant to a first-time purchase UTPA claim for violation of the Gasoline Price Advertising Rules.

Additionally, the evidence established that after the 2011 Gasoline Advertising Rules were adopted, 2.9 million consumers visited an ARCO or *ampm* station for the first time. These consumers had a legal right to proper notice of the debit card fee from BP, which they did not receive. They also had a right not to be overcharged.

Finally, it is misleading to suggest that consumers could choose to pay with a debit card at an ARCO station. The undisputed evidence is that most ARCO stations only take cash or debit cards (Mr. Truax accepts credit cards). A consumer without sufficient cash on hand has no choice but to use a debit card and pay the $0.35 fee after the gasoline is in her car. The only option for consumers is to use an ATM machine with a $2.00 to $10.00 transaction fee. Testimony of Mr. Horwedel, Tr (Jan 28, 2014) at p. 31. Additionally, whether adding $0.35 as a fee saved money for consumers has not been factually established and is not relevant to whether BP failed to advertise its gas prices as required by law.

E. BP Claims it Did Not "intentionally" Deceive Consumers.

BP States: "This case is not about BP's …intentionally or maliciously having deceived Oregon consumers." BP's Motion at p. 2. "Plaintiffs argued that BPWCP violated the rule 'recklessly' *only* because it relied on the opinion of government relations employee, Michael Abendhoff, who concluded the rule did not apply to BPWCP after skimming it himself, instead of getting a legal opinion." *Id.* at p. 3 (emphasis added)

The Facts Show: The jury found that BP knowingly and recklessly violated the Unlawful Trade Practices Act (UTPA). BP knew of Plaintiff's contentions for 25 months and

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

BP consciously chose not to comply with the law. Instead, BP continued to do exactly what it had done some 14,000 times a day.

Plaintiffs presented layers of evidence of BP's knowledge and recklessness, not just the fact that BP relied on Mr. Abendhoff, including the following:

- BP claimed it was not in the business of retailing gasoline, although its own annual report described BP as a retailer, and the person listed a most knowledgeable about the rules at issue, Thomas Reeder, held the title for BP as Director of Retail Operations. Mr. Reeder sat through trial but never took the stand.
- BP stipulated that it controlled the street and pump signs and collected the debit card fee, but continued to argue that it did not have a duty to disclose the fee.
- BP continued to charge the fee 14,000 times per day after it received notice of its violation of the Gasoline Price Advertising Rules.
- Before the lawsuit was filed, BP had received complaints from consumers about failure to conspicuously disclose the debit card fee.
- Before the lawsuit was filed, BP had received complaints from its franchisees, including Luke Ozelik, who relayed to BP customer complaints about the debit card fee.
- BP had previously been made aware of problems with inadequate consumer disclosure in the *Dobson* case.

F. Mr. Scharfstein Returned To ARCO "Because it Was the Cheapest Gas in Town."

BP States: "The named plaintiff Scharfstein" bought gas three times at other ARCOs "because it was the cheapest gas in town." BP's Motion at p. 3.

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

The Facts Show: This is a false statement. Mr. Scharfstein returned to ARCO stations after his initial purchase because they were convenient. Further, Mr. Scharfstein never testified that ARCO was the "cheapest gas in town."

Mr. Scharfstein first went to an ARCO in Beaverton because it was convenient, and he needed gasoline. Tr (Jan 21, 2014) at p. 32-33. He returned to an ARCO in Hillsboro because he needed gas "pretty badly and it was a convenient location." Tr (Jan 21, 2014) at p. 58.

Evidence of Mr. Scharfstein's return to an ARCO was allowed only as impeachment. (MIL # 15 limited testimony of consumers' return visits to ARCO stations.) Mr. Scharfstein and class members will not receive damages for subsequent visits to the ARCO stations.

Finally whether ARCO gas is the "cheapest" was never relevant to the case and was excluded by motion in limine (MIL # 10).

G. BP Did Not Destroy Any Data.

BP States: BP argues that Plaintiffs' counsel contended that BP destroyed documents that were "actually in possession of a third party, First Data. That allegation is simply untrue." BP's Motion at p. 3. Early in the case, Plaintiffs' counsel was informed that BP did not have the relevant 16-digit data, but First Data had the data. *Id.* at p. 4. Plaintiffs "specifically agreed that First Data would only have to produce data for that nine-month period." *Id.* Plaintiffs' counsel argued that an additional three months of data were in the possession of BP and were destroyed by BP. *Id.*

The Facts Show: The facts now establish that on November 26, 2012, First Data's (FD) Barbara Rappaselli emailed BP's Lisa Freeman confirming that FD no longer needed to "capture" the 16-digit data. "Yes, that is my understanding," Ms. Freeman responded. Thus, on November 26, 2012, BP instructed its contractor First Data (FD) to stop saving the 16-digit debit card numbers of class members. Declaration of David F. Sugerman , Ex. 1, p. 1, ¶ 2. This failure to capture data meant it is now tremendously difficult to recapture those data, such that 2.0 million class members may not receive direct or any notice. At the time of trial, plaintiff and

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

the class of consumers understood that BP had failed to tell First Data to save the relevant debit card numbers. Emails obtained by plaintiff after the verdict show that when FD specifically asked BP whether the data should be "captured," BP agreed that it need not be saved.

It is undisputed that First Data is a contractor of BP. The contract provides that First Data has a legal obligation to provide BP with the 16-digit numbers and that First Data cannot provide outside parties with those 16-digit numbers. The contract provides:

> First Data shall not disclose Confidential Information (i.e., the 16-digit data) to anyone other than BP unless it obtains written authorization from BP. ...
>
> "If either party receives interrogatories...or other compulsory process seeking Confidential Information, the party shall immediately notify the other party. The party receiving discovery requests shall comply with such requests to the extent of its legal obligations" but shall try to secure a protective order for the data. ...
>
> The parties shall comply with each others' reasonable instructions regarding the disposition of confidential information. Including return or destruction of confidential information.
>
> Processing Agreement, pp. 22- 23.

LEGAL ARGUMENT

A. BP Has Waived The Due Process Arguments it Now Seeks to Belatedly Raise Two Years into the Litigation and Months After The Jury Verdict.

BP has waived its due process argument for several reasons. First, BP waived the argument because it failed to raise it as an affirmative defense in any of the responsive pleadings. ORCP 19B requires that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively * * * any * * * matter constituting an avoidance or affirmative defense." ORCP 19B leaves no doubt with respect to BP's arguments because it specifically identifies "unconstitutionality" as an avoidance or affirmative defense in the rule. A trial court may refuse to recognize an affirmative defense that a defendant did not timely raise in a responsive pleading. *Pacificorp v. Union Pacific R.R.*, 118 Or App 712, 717, 848 P2d 1249 (1993). There have been statutory damages alleged in this case from the initial complaint (and such damages have always been set at $200) and BP never responded that those damages violate their due process rights.

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

BP may argue that punitive damage awards are challenged post-verdict because a jury does not set the punitive damage award until verdict. As discussed further below, this is not a punitive damage issue and case law on punitive damages has no application here. As noted, the statutory damages have always been $200 and BP has always been on notice of that amount (legislatively, through an ORCP 32H pre-filing notice, and through the complaints). Further, even if a punitive damage verdict is challenged post-verdict so that the jury or court may consider whether to reduce damages, that does not obviate the requirement to raise unconstitutionality as an affirmative defense under ORCP 19B or take other steps to preserve the argument pre-verdict.

Second, even if BP did not raise the due process argument in a responsive pleading, BP later (again) waived the argument in failing to instruct the jury on the proper standards for awarding statutory damages. In fact, BP objected to instructing the jury that the statutory damages at issue in this case was a "penalty" and has waived the argument.

At its heart, BP contends that the jury should have been instructed and provided with special findings on maliciousness, intent to harm, and reprehensibility to support *the jury's award of statutory damages*. *See* Def's Memo at 2 (jury did not find intent to harm, risk of physical injury or even severe economic injury); *id.* at 11 (arguing that although the jury found recklessness, it did not find maliciousness or reprehensibility). If BP wanted to preserve the argument that the jury could only award statutory damages if it found BP met particular standards, BP should have raised that argument either in proposing similar limiting instructions on statutory damages and in taking exceptions to the jury instructions on statutory damage awards. If BP was concerned about a jury impermissibly awarding statutory damages outside of permissible legal standards, it had to timely raise those instructional issues before. *Williams v. Philip Morris, Inc.*, 344 Or 45, 56, 176 P3d 1255 (2008) ("*Williams III*").

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

Rather than argue for the limiting standards it now raises for the first time, BP argued that the court should *not* instruct the jury that the statutory damages were punitive. BP argued with respect to the instruction on statutory damages (part of plaintiff's overall UTPA instruction):

> [Plaintiff's UTPA instruction] impermissibly labels statutory damages as a "penalty." That term is inaccurate as a matter of law. The UTPA is clear that the $200 awarded to each consumer under the statutory scheme are "statutory damages" or "damages." They are not referred to as a penalty.

Def's Memo in Support of and Objections to Certain Requested Jury Instructions, p. 6. After this objection, there were changes made such that the final UTPA instruction did not refer to any statutory penalty. *See* Final Jury Instruction No. 15 (simply stating that the Court will award $200 per class member if the jury finds the element of a UTPA violation, including a knowing or reckless violation). BP has waived its argument.

BP also never proposed a statutory damage instruction with the standards of law it now advocates. It proposed that the court simply instruct the jury that:

> The type of damages alleged by plaintiff are statutory damages. For each class member to receive statutory damages, you must find that the plaintiff has proven by a preponderance of the evidence that the class members have sustained an ascertainable loss of money or property as a result of a reckless or knowing violation of OAR 137-020-0150 by the defendant.
>
> If you conclude that the plaintiff has met his burden of proof as to these requirements, the court will automatically award $200 in statutory damages to the plaintiff and to each class member.

Def's Requested Jury Instruction No. 22-23 (emphasis in original).[1] Rather than argue that the jury had to be instructed it only could find statutory damages if BP was malicious or intended to harm, BP proposed that plaintiff only had to prove recklessness or knowledge. BP now, when convenient, disavows that standard and complains that a finding of maliciousness is necessary.

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[1] Plaintiff objected to this instruction but only because it was duplicative of the instruction that plaintiff combined into a single UTPA instruction, which was ultimately given with the same basic language proposed by BP above. *See* Final Jury Instruction No. 16.

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

See Def Memo at 11 ("Although the jury found that BPWCP had acted 'recklessly' with respect to the debit card fee disclosures, that finding does not equate * * * to conduct [that] was malicious or reprehensible.")

This Court should find that BP waived these arguments. With respect to punitive damage instructions, the United States Supreme Court has held that state courts must "provide assurance that juries are not asking the wrong question[.]" *Philip Morris USA v. Williams*, 549 US 346, 355 (2007). On remand from the Supreme Court, the Oregon Supreme Court refused to vacate a punitive damage award when the defendant had not properly instructed the jury on a due process limitation to punitive damages:

> The effect * * * is to require that a party to litigation take responsibility for the jury instructions that a trial court either gives or refuses to give.

Williams III, 344 Or at 56.

Third, BP should be deemed to have waived its objections to a statutory damage award because it never moved for directed verdict, argued that there was insufficient evidence to support a statutory damage award of $200, or objected to the verdict on the basis that the jury could not award statutory damages as a matter of law in this case. *See* ORCP 60 (providing that any party may move for a directed verdict at the close of evidence); ORCP 59G(4) (providing for opportunity to correct an insufficient verdict prior to discharge of the jury); *Building Structures, Inc. v. Young*, 328 Or 100, 968 P2d 1287 (1998) (failure of party to object to insufficient verdict that awarded punitive damages without a showing of actual damages was waived).

B. BP's Motion to Strike a "Request" for Statutory Damages is Untimely and There is No Procedural Basis for a Motion to Strike a Jury's Award.

In its formal motion, BP asks for an order "striking the *request* for statutory damages." (Emphasis added). As noted above, if the motion is directed at the pleadings, it should have been raised against the complaint long ago and not after verdict. The Oregon Rules of Civil Procedure provide for an opportunity to move to strike a particular pleading as a sham or frivolous, but that

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

motion is due 10 days after service of the pleading. ORCP 21 E. Responsive pleadings and motions to dismiss have similar deadlines. ORCP 15.

In its title and memo, different from its motion, BP argues that the jury's *award*, itself, is improper and asks to strike it but provides no procedural basis to strike part of a jury trial award. BP may claim it has a due process right to challenge a statutory damage award, but it already has had plenty of opportunity, as discussed above, to challenge the statutory damage claim by motion to dismiss, affirmative defense, through directed verdict at trial, or through an attempt to instruct the jury on its proposed standards. It never availed itself of any of those opportunities or preserved the issue for any post-trial motion.

Its failure to do so also prejudiced plaintiff. Plaintiff made the decision not to seek actual damages and only seek UTPA statutory damages. Had defendant directly challenged plaintiff's right to seek statutory damages, plaintiff could have assessed the arguments then and presented both actual and statutory damages to the jury. Plaintiff also would have presented different evidence in the statutory damage case if this Court had been given the opportunity to instruct the parties and jury that a higher standard for statutory damages applied.

C. The Standard for Review of Punitive Damage Awards Does Not Apply Here, and The Statutory Damages are Proper Under the Correct Standard of Review.

BP contends that a statutory damage award is unconstitutional under the standard for review of *punitive damages* found in *Gore* and *State Farm*. *See BMW v. Gore*, 517 US 559 (1996) (reviewing punitive damages award) and *State Farm v. Campbell*, 538 US 408 (2003) (same). Of course, the jury concluded that this is not a punitive damage case and the United States Supreme Court has applied a different test for statutory damages, not the *Gore* and *State Farm* factors. *St. Louis, I.M. & S Ry. Co. v. Williams*, 251 US 63 (1919).[2]

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[2] The UTPA itself distinguishes between statutory and punitive damages. ORS 646.638(8)(a) and (b).

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

In *Williams*, which remains good law and is cited by BP in its memorandum, a railroad company overcharged two sisters riding a railroad home from school. The overcharge amount was 66 cents more each than the ticketed fare. An Arkansas statute, in 1919, provided that a railroad could be assessed a fine of $50 to $300 for "every such" overcharge. The passengers obtained judgments against the railroad for $75 each for the 66 cent overcharges. The Supreme Court upheld the statute and the damages as "not contrary to due process of law." *Id.* at 66. The Court expressly stated that the relationship between the statutory damages and actual economic harm (a ratio test) was *irrelevant* in a case where the statute is intended to enforce a general public policy for the good of all citizens:

> Nor does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state.

Id.

Williams then noted that while the due process clause applies some outer limit to statutory damages, state legislatures have "a wide latitude of discretion in the matter" and only statutory damages that are "so severe and oppressive as to be wholly disproportioned to the offence and obviously unreasonable" limit legislative discretion. Id. at 66. Applying both of these principles, the Court held:

> When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

Id. at 67.

As discussed in the facts above, a $200 statutory damage award for a UTPA violation today, which is less than the $300 maximum damages (*in 1919 dollars*) approved by the

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

Supreme Court 100 years ago,[3] is not so "severe and oppressive" as to be wholly disproportionate to the offence of misleading and overcharging each of the millions of Oregon consumers. Applying the *Williams* factors, the UTPA is a consumer statute intended to protect the interests of the public; there are "numberless opportunities" for BP to commit the offense as to the millions of class members (and a jury has found BP has done so), and the Oregon legislature has made a policy decision to protect consumers and secure adherence to the UTPA by providing for $200 in statutory damages. The legislature did not delegate to this Court, nor could it, the legislative function to assess statutory damages in the public good. More to the point, the damages the legislature approved are well within the constitutional limits.

Indeed, much higher statutory damages (with far greater ratios) have been consistently upheld in other state and federal courts. *See Vanderbilt Mortg. and Finance, Inc. v. Flores*, 692 F3d 358, 374 (5th Cir 2012) (upholding $10,000 per-violation statutory damages for filing fraudulent liens and $120,000 in total statutory damages award where there was no proven economic loss); *Sony BMG Music Entertainment v. Tenenbaum,* 719 F3d 67,79 (1st Cir 2013) (upholding statutory damages of $675,000 for claimed loss of $450 for copyright infringement); *Doores v. Intercontinental Engineering-Manuf. Corp.*, 670 SW2d 65, 67 & n 1 (Mo App 1984) (awarding $10.20 in unpaid wages and $3,264 in penalties, and explaining that penalties are not discretionary, "[n]or does the statute require any minimum amount of unpaid wages to trigger the penalty"); *Kilton v. Richard G. Nadler & Assoc.,* 447 NW2d 468, 471 (Minn App 1989) (assessing, under Minn Stat § 181.14, penalties of $1,197 for failure to pay $31.93 in wages, and holding that "the statute requires no minimum amount of wages to be owing before a penalty can

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[3] The present day value of a $50 to $300 statutory penalty in 1919 is $685 to $4,111 in today's dollars using inflation based on the United States Government's consumer price index. *See* http://www.bls.gov/data/inflation_calculator.htm. The present day value of the specific $75 statutory damages judgment upheld in *Williams* is $1,028 in today's dollars. A 66 cent overcharge in 1919 is still only a $9 overcharge in today's dollars.

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

be assessed"). Further, when the State of Oregon chooses to enforce the UTPA, it may seek damages of up to $25,000 per violation, far greater than those sought here. ORS 646.642(3).

BP is incorrect that *Gore* applies to statutory damages. The United State Supreme Court applies the factors in *Williams*. The Supreme Court has never used the *Gore* guideposts to evaluate the constitutionality of a statutory penalty award. *See Capitol Records, Inc. v. Thomas-Rasset*, 692 F3d 899, 907 (8th Cir 2012) (so observing in a case involving statutory damages under the Copyright Act, and noting that "*Williams* is still good law"); *see Sony BMG Music Entertainment,* 719 F3d at 79 (stating same). There is no basis for doing so.

Gore itself proves this point. In *Gore*, the Court is concerned with the following due process issue:

> *Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice* not only of the conduct that will subject him to the punishment, but also *of the severity of the penalty that a State may impose.* Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the non-disclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of the reprehensibility of the non-disclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Gore, 517 US at 574-75. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499, 128 S. Ct. 2605, 2625, 171 L. Ed. 2d 570 (2008) (commenting that "[t]he real problem ... is the stark unpredictability of punitive awards[.]")[4] The Supreme Court is concerned with fairness when a defendant does not know in advance the potential outer bonds of the penalty it might be exposed to by a runaway jury awarding overly excessive punitive damages after the fact. *See Capitol*

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[4] *See also Williams v. Philip Morris Inc.,* 344 Or 45, 49, 176 P3d 1255 (2008) (stating that the Supreme Court "also has held that the amount of punitive damages that a jury awards cannot be arbitrary; the jury's discretion must be limited. Otherwise, defendants will not have adequate notice of potential sanctions, the punishments may be arbitrary, and large punitive damage awards may force one state's policy choices onto other states.")

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

Records, 692 F3d at 907 ("This concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute."); *Vanderbilt Mortg.*, 692 F3d at 374 (finding *Gore* and *State* Farm inapplicable to the determination of the constitutionality of statutory damages and rejecting ratio as factor).

Lack of fairness and advance notice is not an issue here. BP has always had fair, advanced, public notice of the legislature's statutory damages of $200 prior to its illegal conduct here. Indeed, the UTPA has had $200 statutory damages since it was introduced over 40 years ago. *See* HB 1088 (1971) (proposing actual damages or statutory damages of $200, whichever is greater). BP also was given advanced notice of this lawsuit under ORCP 32H, which requires that plaintiff give notice of the wrong to the defendant and provide the defendant an opportunity to fix the problem. Declaration of David F. Sugerman, Ex. 2, p. 2, ¶ 3. BP could have rectified this situation at the outset by voluntarily paying actual damages under ORCP 32I and preventing any class action. BP ignored that opportunity.

Further, the third *Gore* factor (mysteriously dropped from BP's otherwise complete application of the *Gore* factors to this case) seeks to test the constitutionality of punitive damages based on a comparison to the amount of a legislature's comparable *statutory damages*. Clearly the Supreme Court did not intend *Gore*'s test to apply to statutory damages or it would not have used those damages as a comparator in testing the constitutionality of punitive damages.

Even assuming for argument that *Gore* applied, the facts discussed above support a $200 statutory damage award and that award is entirely consistent with -- indeed, identical to -- the statutory damages approved by the legislature. The jury found that BP acted knowingly and recklessly. The facts showed that BP ignored a 2011 rule, and that BP's lobbyist put the new rules in the drawer. BP ignored complaints from its franchisees that consumers were misled about the price. When BP received notice that it was not complying with the 2011 law, it purposely and knowingly did not change its signs.

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

D. The Court Should Not Decertify the Class and the Aggregation of Damages Does Not Provide a Basis to Do So.

BP now moves to decertify the class for at least the third time in this litigation. As in the past, this Court should reject those attempts. BP argues that a class action is no longer superior simply because it may face large aggregate damages. BP's argument, in effect, is that it should be protected from class certification because it violated the law as to millions of consumers, instead as to few.

The resulting size of aggregate class action damages is not a factor for certification mentioned in ORCP 32. Indeed, BP cites to no relevant ORCP 32B sub-factors to support decertification. BP also never raised this issue in its initial opposition to the motion to certify the class. This is another issue that BP has never challenged before and it could have from the outset as this case has always involved a proposed class and a request for statutory damages.

The fact that the resulting aggregate damages may be large does not make the litigation of this case as a class action any less superior than the litigation of individual claims. In fact, the one relevant factor, ORCP 32B(8), makes the litigation of this case as a class action far *more* superior. ORCP 32B(8) asks whether the "claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class." Individuals could not afford to take on BP for separate $200 claims and a class action is superior precisely *because* it is only through a class action that consumers can enforce the law against BP and get meaningful relief.

BP relies on an early class certification case, *Ratner v. Chemical Bank of New York Trust*, 54 FRD 412 (SDNY 1972). Judge Frankel in *Ratner* was careful to say that he had no intention of making "sweeping pronouncements," but was speaking "only upon the specific case at hand" and "for this molecular purpose." *Id.* at 413. Further, as BP concedes, *Ratner* requires proof that the resulting class damages must be "a horrendous, possibly annihilating punishment." *Id.* BP

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presents no evidence, and could present no evidence at this stage, that whether this is a $50 million or $590 million case (presuming a 100% claim rate), it would suffer annihilating punishment. BP West Coast Products and related BP entities recently sold some of BP's assets to Tesoro during the class period for $2.4 billion.[5]

In any event, *Ratner* is not persuasive and its reasoning has been rejected by many courts. Numerous courts have held that they will not protect defendants from their own violation of the substantive law by denying class certification merely because use of the class action procedural device may result in substantial damages. *Murray v. GMAC Mortg. Corp.*, 434 F3d 948, 953-54 (7th Cir 2006) (holding that it is inappropriate to deny certification simply because the aggregated statutory damages are high and courts should not use a procedural device to attack statutory damages they disapprove of); *Ashby v. Farmers Ins. Co. of Oregon*, 2004 WL 2359968, *8 (D Or) (Judge Brown concluded that "this Court * * * is not persuaded it should follow a policy to protect defendants from potentially serious financial consequences based on their substantive violation of consumer protection statutes enacted by Congress); *Chevalier v. Baird Sav. Ass'n*, 72 FRD 140, 150 (ED Pa 1976) (stating that "[t]he class action device merely provides a procedure for adjudicating the respective rights of the parties. If defendants' liability shocks the conscience, it is the fault of the substantive law ... not the class action"); *ESI Ergonomic Solutions, LLC v. United Artists Theater Circuit, Inc.*, 50 P3d 844, 850 (Ariz Ct App 2002) (stating that Congress sets the statutory penalty and the resulting liability is not a factor in class certification).

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[5] http://www.sec.gov/Archives/edgar/data/50104/000005010412000066/exhibit21purchaseandsaleag.htm (SEC-filed purchase and sale agreement from June 2012 showing cash sale of $1.18 billion plus substantial gas and refinery inventory assets ultimately valued at over $1 billion) and http://www.bp.com/en/global/corporate/press/press-releases/bp-completes-sale-of-carson-refinery-and-southwest-u-s--retail-a.html (BP's explanation of June 2013 closing on the prior $2.4 billion sale)

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As one court has observed, quoting a prominent class action commentator,

> A rule that would exempt a defendant from liability in a class action merely because the damages are large would invite defendants to violate the law on a grand scale, with the knowledge that they could avoid liability by claiming that if they were forced to account for their wrongful conduct, they would be put out of business.

Labrador v. Seattle Mortgage Co., 08-2270 SC, 2010 WL 3768378 (ND Cal Sept 22, 2010), quoting Newberg on Class Actions, § 4:43. Of course, BP will not be put out of business by this case, however the aggregate damages resolve.

CONCLUSION

The Court should deny the motion.

DATED this 23rd day of May, 2014.

DAVID F. SUGERMAN, ATTORNEY PC

By: _____
David F. Sugerman, OSB No. 862984

707 SW Washington Street, Suite 600
Portland, Oregon 97205
Phone: (503) 228-6474
Fax: (503) 228-2556
E-Mail: david@davidsugerman.com

Amy Johnson
Amy Johnson Attorney-at-Law
2523 SE 30th Avenue
Portland, OR 97202
Phone: 503-939-2996
E-mail: amy@savagejohnson.com

Tim Alan Quenelle
Tim Quenelle, PC
4248 Galewood Street
Lake Oswego, OR 97035
Email: timquenelle@aol.com

Scott A. Shorr, OSB No. 961873
Joshua L. Ross, OSB No. 034387
STOLL STOLL BERNE LOKTING & SHLACHTER PC
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: sshorr@stollberne.com
jross@stollberne.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE THE STATUTORY DAMAGES AWARD OR DECERTIFY THE CLASS** on the following persons on this same day:

☒ by electronic mail and enclosing a copy in an envelope, properly addressed and with first-class postage, and placing in the mail in Portland, Oregon

David Harris, *Pro Hac Vice*
Abby Risner, *Pro Hac Vice*
Greensfelder, Hemker & Gale PC
10 South Broadway, Suite 2000
St. Louis MO 63102

☒ by electronic mail and hand delivery

Brad S. Daniels, OSB No. 025178
Stoel Rives, LLP
900 SW Fifth Ave, Suite 2600
Portland OR 97204
Phone: (503) 224-3380
Fax: (503) 220-2480
E-Mail: bsdaniels@stoel.com

Attorneys for Defendant

DATED this 23rd day of May, 2014.

By: _____
David F. Sugerman, OSB No. 86298
DAVID F. SUGERMAN, ATTORNEY PC
707 SW Washington Street, Suite 600
Portland, Oregon 97205
Phone: (503) 228-6474
Fax: (503) 228-2556
E-Mail: david@davidsugerman.com
Attorney for Plaintiffs