IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

SCOTT MEEKER and ERIN MEEKER, KELLY GOODWIN, BRUCE ELY and KRISTI HAUKE, ELIZABETH BORTE and RINO PASINI, CHRISTIAN MINER, and JUDY SANSERI and HOWARD BANICH; individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BULLSEYE GLASS CO., an Oregon corporation,

Defendant.

CIVIL ACTION NO. 16CV07002

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND PLEADING TO ASSERT CLAIM FOR PUNITIVE DAMAGES

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I. INTRODUCTION

Last year residents of Southeast Portland learned they were living near a factory that, for decades, had been polluting their community with cadmium, arsenic, chromium, and other hazardous metals. That revelation led to widespread concern, spawning a statewide clean air initiative and the present putative class action lawsuit.

Since that time, the Parties have engaged in extensive discovery, which is ongoing. That discovery has revealed evidence that Defendant Bullseye Glass Co. ("Bullseye") knew the metals it used to create colored glass were harmful to human health, knew that emissions from the furnaces in which it melted those metals created toxic emissions, and (until very recently) decided to do nothing about it. In short, Plaintiffs now have evidence that would be sufficient for a jury to conclude that Bullseye has shown intentional disregard for the rights of its neighbors for decades. Because the Parties have been unable to resolve the matter, Plaintiffs are now asking for leave to amend their pleadings to add a claim for punitive damages.

Oregon courts long ago concluded that claims for punitive damages are justified in pollution cases. As explained below, this case falls squarely within that well-established precedent.

II. FACTUAL BACKGROUND

Documents and testimony obtained by Plaintiffs thus far show that Bullseye has known about its pollution problem for decades. Despite that knowledge, Bullseye decided to do nothing to control its dangerous emissions, to the detriment of its neighbors' rights.

A. *Bullseye's operations have relied on toxic metals as a key ingredient for decades.*

Bullseye is a manufacturer of colored art glass in a residential area of Southeast Portland. *See* Plaintiffs' Second Amended Class Action Complaint ("Complaint") ¶¶ 18-19. Founded in 1974 by Dan Schwoerer, Ray Ahlgren, and Boyce Lundstrom,[1] today Bullseye is owned by Schwoerer[2] and his wife,

[1] *History: The Bullseye Story*, Bullseye Glass Co., http://www.bullseyeglass.com/history.html (last visited July 24, 2017).

[2] Bullseye's Amended Annual Report, filed with the Oregon Secretary of State on Jan. 31, 2017, lists Schwoerer as Bullseye's President and Secretary. http://records.sos.state.or.us/webdrawer/webdrawer.dll/webdrawer/rec/5064735/view/SOS%20-%20Corporation%20-%20Business%20Entity%20Filing%20Records%20-%2011364510.PDF

Lani McGregor. Ex.[3] 7, Bullseye Organizational Chart; Ex. 5, Deposition of Jim Jones ("Jones Dep.") 111:17-19; Bullseye Glass Co. Press Kit.[4] Bullseye has about 150 employees, of which approximately 70% are involved in manufacturing. Ex. 5, Jones Dep. 107:24-25, 110:4-11. The management team consists of Schwoerer, McGregor, Eric Durrin, Kurt Barker, Jim Jones, Sam Andreakos, and Gayne Bafus, Ex.7, who all work at Bullseye's 1-block campus at 3722 SE 21st Avenue. Most of Bullseye's managers have worked there for over a decade if not longer, *e.g.*, Ex. 3, Deposition of Eric Durrin ("Durrin Dep.") 5:21-24, 7:13-14; Ex. 5, Jones Dep. 5:12-19; Ex. 1, Deposition of Sam Andreakos ("Andreakos Dep") 9:16-23, and they closely collaborate to develop, market, and sell Bullseye's lines of glass.

Bullseye routinely uses the hazardous chemicals arsenic, cadmium, and chromium as ingredients in its glass-making process.[5] That process is essentially comprised of three steps.

Step 1. Bullseye starts by mixing in a 55-gallon barrel its "batch" of colored glass ingredients. [redacted] Ex. 4, Deposition of Greg Gabel 34:14-18;[6] *see also* Ex. 8 (sample batch ticket). The mixed batch materials often have the consistency of a fine dust or powder. *See* Ex. 4, Gabel Dep. 43:18-25 (describing "dust" escaping batch barrel and falling on screw charger or floor).

Step 2. Next, Bullseye melts these batches, on site at its Southeast Portland facility, in either a "pot" or "tank" furnace. *See* Ex. 4, Gabel Dep. 13:12-25; Ex. 2, Deposition of Kurt Barker 37:3-5; Ex. 9 ([redacted]); Ex. 10 & 11 (furnace drawings); Ex. 12 ([redacted]). Until mid-2016 when it first installed a baghouse capture system, [redacted]

[3] All exhibit ("Ex.") references refer to exhibits to the Declaration of Matthew Preusch in Support of Motion for Leave to Amend Pleading to Assert Claim for Punitive Damages, filed herewith.

[4] http://www.bullseyeglass.com/bullseye-press-kit.html (revised Feb. 2016).

[5] Arsenic is a human carcinogen, the ingestion of which can increase cancer risk, and long-term exposure to cadmium can cause, among other things, kidney disease. Complaint ¶¶ 25-33.

[6] Statements from Bullseye's officers are attributable to the corporation. *See Wilson v. Steel Tank & Pipe Co. of Oregon*, 152 Or 386, 393, 52 P2d 1120, 1123 (1935) (stating general rule that admissions of an officer of a corporation are binding on that corporation).

[redacted] *See* Ex. 9 at 3 ([redacted]).

To melt the recipe batches, Bullseye employees load the mixture of raw materials from the 55-gallon drums into heated furnaces through the use of an auger, or screw charger, in a process called "charging." Ex. 4, Gabel Dep. 42:14-23. While the raw ingredients in the batch are not supposed to escape into the environment during that process, dust from the batch barrels routinely falls from the screw charger onto the floor. *Id*. 43:18-25; Ex. 1, Andreakos Dep. 58:16-25 (describing how glass melters could be exposed to metals by dust escaping from barrel before it's charged into the furnace). Once the batch has been transferred from the barrel to the furnace, but before that batch material—including cadmium, arsenic, and chromium—has a chance to melt, it can escape—or "carryout"—from the open furnace door. Ex. 2, Barker Dep. 142:22-143:19. Vents on the furnaces are designed, however, to prevent those hazardous metals from escaping out of the furnace door and into the facility. Instead, the vents direct the material into the furnace stacks and up "to [the] atmosphere." *Id.* at 143:1-144:21; *see also* Ex. 13 ([redacted]). Once a furnace is charged, the melt process takes about 16 hours for the raw materials to breakdown, mix, and produce molten glass. Ex. 4, Gabel Dep. 47:12-15.

Step 3. After the glass has finished melting, Bullseye workers open the furnace doors, remove the molten glass using a long-handled metal ladle, and roll it into sheets on a rolling mill. The glass is then cooled in an annealing oven, completing the glass-making process. *Id.* at 51:10-52:1.

B. *Bullseye has known for decades that its furnaces emit particulate pollution.*

Bullseye has long known that its raw ingredients include toxic metals, and that melting those metals in its furnaces creates hazardous pollution as a by-product. However, as discussed below, Bullseye did not take reasonable steps to control that known pollution.

Bullseye has knowingly used toxic metals to create colored glass since at least 1984. *See* Ex. 14, John M. Villaume, *Bullseye Glass Takes Pains With Its Panes*, The Business Journal, Aug. 6, 1984, at 9 (describing Bullseye's use of cadmium, among other metals). Congress has identified the toxic metals that Bullseye uses —including chromium, arsenic, and cadmium compounds—as "Hazardous Air

Pollutants" or "HAPs." *See* 42 U.S.C. § 7412(b) (listing HAPs in Section 112 of Clean Air Act). Bullseye has consistently used thousands of pounds of these HAPs every year. *See generally* Ex. 15 (annual reports to DEQ describing pounds of arsenic trioxide used at Bullseye each year). In 2015, Bullseye made [redacted] Ex. 16, BE00036883. [redacted] *See, e.g.*, Ex. 17 (table of HAPs). Indeed, [redacted] Ex. 18. [redacted] *Id.*; Ex. 3, Durrin Dep. 61:16-62:5. [redacted] Ex. 3, Durrin Dep. 64:20-65:2.

Bullseye has known since at least the 1980s that the furnaces in which it burns those toxic metals create emissions. In 1985, DEQ sent Bullseye a "Notice of Violation and Intent to Assess Civil Penalty" after an inspector "observed excessive visible emissions coming from your facility." Ex. 19, DEQ Letter to Bullseye Glass Co. c/o Dan Schwoerer, Jun. 14, 1985.[7] Because visible emissions from Bullseye's facility in excess of the state standard "ha[d] been frequently observed," the DEQ wrote that they had "identified [Bullseye] as an air quality problem source." *Id.* A year later, in 1986, Schwoerer—one of Bullseye's founders and its long-time owner—wrote a letter to DEQ explaining the company's manufacturing process, and how steam created during the melting process would "carry fine particulate up the exhaust stacks causing a plume[.]" Ex. 20, Bullseye Letter to Richard Wixom, DEQ. In 1987, Bullseye submitted a document to DEQ to "better acquaint them with Bullseye Glass Company and its efforts to comply with Oregon's Air Quality Standards." Ex. 21, Bullseye 1987 Memo to DEQ. In a section entitled "Emissions Problem," Bullseye admitted and acknowledged that after its furnaces are "charge[d]" with batch material, a "visible plume" is emitted into the air from the stacks. *Id.* at 2.

At that time, state regulators also received reports about Bullseye's emissions. *See, e.g.*, Ex. 22, DEQ Interoffice Memo, May 7, 1984 (inspector's report of emissions from Bullseye); Ex. 23, DEQ Interoffice Memo, Apr. 26, 1985 (DEQ employee reports "100% opacity plume coming from

[7] Bullseye's DEQ records are official state records produced to Plaintiffs' counsel pursuant to a public records request. Plaintiffs provided a copy of these documents to Bullseye.

[Bullseye's] stack"); Ex. 24, DEQ Interoffice Memo, Apr. 30, 1985 (DEQ employee "observed Bullseye Glass emitting smoke"); Ex. 25, DEQ Interoffice Memo, Oct. 15, 1987 (complaint to DEQ from Bullseye neighbor about "about fine glass fiber falling around her home and getting into her house"). While Bullseye's production processes have changed in minor ways since the mid-1980s, its "Emissions Problem" has remained. *See, e.g.*, Ex. 15 (complaint in 2007 Annual Report to DEQ about a "constant flow of 'blue-grey' smoke" from Bullseye; complaint in 2013 Annual Report to DEQ of Bullseye "expelling powdered glass waste" creating "[c]oncern for exposure to neighboring houses and businesses"); Ex. 26 (2000 Annual Report to DEQ discussing complaint of "hot ash" from facility, resulting in Bullseye determination that "particulate matter could accumulate on the roof" and be redistributed by wind).

In fact, Bullseye's furnaces create so much particulate pollution that Bullseye has had to contend with a constant buildup of "heavy metal" particulate matter in its furnace stacks. To address this thick buildup and prevent it from hampering furnace operations, [redacted] Ex. 2, Barker Dep. 110:19-112:4; *see also* Ex. 27 ([redacted]); Ex. 28 ([redacted]).

Despite the fact that Bullseye routinely cleaned out toxic particulate matter—material that looked "like cotton candy"—from its furnace dampers and stacks, and despite the fact it had no formal capture system for the particulate by-product in place, Bullseye's managers claimed in their testimony that it never occurred to them to be concerned about emissions from its furnaces. Ex. 2, Barker Dep. 115:24-25, 136:2-4; Ex. 1, Andreakos Dep. 59:14-19. However, it is common knowledge that "[p]articulates are a significant pollutant emitted by glass manufacturing facilities."[8] And the reality is that Bullseye's records dating to the 1980s, discussed above, demonstrate that, at a minimum, Bullseye owner Schwoerer was and has been consistently aware of the problems with furnace emissions. And more recently, the minutes from a 2012 Weekly Maintenance Meeting between owner Schwoerer, Controller

[8] *See* Environmental, Health, and Safety Guidelines for Glass Manufacturing, *International Finance Corporation* at 2 (Apr. 30, 2007), *available at* http://www.ifc.org/wps/wcm/connect/384e20804885574ebc0cfe6a6515bb18/Final%2B-%2BGlass%2BManufacturing.pdf?MOD=AJPERES&id=1323152002618.

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Durrin, and glass chemist Andreakos include [redacted] Ex. 29. And Kurt Barker, Bullseye's Maintenance Supervisor, understood that contractors could be exposed to hexavalent chromium "on the roof" because "that's the only place it would exhaust" from the furnaces. Ex. 2, Barker Dep. 134:17-135:3.

Last year, [redacted]

Ex. 30 (Schwoerer's comments (emphasis added)).

C. *Bullseye knew the risk of hazardous metals to human health.*

Bullseye's lack of concern for its emissions into its surrounding neighborhood stands in stark contrast to the apparent care Bullseye took to limit its employees' exposure to toxic metals inside the facility. Bullseye's cautious approach for its employees demonstrates the company knew the hazardous nature of the raw ingredients it melted in its furnaces and released into the surrounding environment.

Bullseye's internal records show it was aware of the hazardous nature of the metals it melted in uncontrolled furnaces. Bullseye maintained a [redacted] Ex. 31; *see also* Ex. 2, Barker Dep. 130:11-135:6 (discussing exhibit). That document explains [redacted] Ex. 31 at BE00008566. It also includes a section describing [redacted] *Id.* [redacted] Bullseye also maintained Material Safety Data Sheets for toxic metals that warned of the risk they posed to human health. *E.g.*, Ex. 32 (MSDS sheet for arsenic warning to "[a]void release to the environment").

Further showing knowledge of the hazardous materials Bullseye uses, the company requires its employees who work in the "batch" room with toxic metals to wear coveralls and full-face respirators. Ex. 6, Deposition of Steve Lechleiter ("Lechleiter Dep.") 70:7-17. Employees charging the furnace also wear coveralls and respirators, to protect themselves from exposure to batch dust. Ex. 4, Gabel Dep. 44:7-12. In addition, Bullseye workers that performed the furnace stack cleaning described above wore protective equipment, including respirators. Ex. 2, Barker Dep. 117:13-18; Ex. 28 at BE00001752.

At the company's direction, Bullseye employees in the "batch" and "melt" departments regularly provide blood and urine samples to be tested for signs of exposure to toxic metals, and visit occupational health doctors at Bullseye's expense. Ex. 4, Gabel Dep. 103:4-20; Ex. 6, Lechleiter Dep. 73:5-14. Bullseye is "extremely" conscientious about testing its employees for metals. Ex. 6, Lechleiter Dep. 74:12-14. Bullseye has also worked frequently with the state worker safety agency to "look at the industrial hygiene and air sampling" inside the Bullseye factory. Ex. 1, Andreakos Dep. 11:1-10.

Notwithstanding those precautions, medical screenings of Bullseye employees have at times shown their bodies carrying high levels of the same toxic metals that Bullseye features in its batch recipes. Tests by Oregon OSHA found elevated levels of cadmium in employees in 2011 and 2012, and Bullseye was "previously cited for excessive amounts" of lead and cadmium inside its facility. Ex. 33, Oregon OSHA file, Nov. 5, 2012, at 3, 5-13. In addition, two employees responsible for cleaning Bullseye's stacks have shown elevated levels of cadmium in their bodies. Ex. 2, Barker Dep. 122:7-23.

D. *Despite knowledge of emissions, Bullseye failed to install emission control systems.*

Bullseye's careful approach to the air inside its factory is in contrast to its blatant lack of concern for the emissions escaping its facility.

In August 2016, five months after Plaintiffs filed this lawsuit, Bullseye began operating a baghouse system, Baghouse West, that was designed to capture emissions from 18 of its 20 pot and tank furnaces. Ex. 3, Durrin Dep. 99:15-16. Bullseye's new baghouse has captured roughly two 55-gallon drums worth of particulate matter—"white fluffy particulate"—*per day*. Ex. 2, Barker Dep. 81:12-21, 89:11. Before 2016, that particulate and others emissions from Bullseye's furnaces went "straight up" through the furnace stacks into the atmosphere. Ex. 4, Gabel Dep. 92:12-19. There was "nothing" on top

of those stacks to prevent it from doing so —just open pipes venting to the neighborhood. *See* Ex. 2, Barker Dep. 63:14-21; *see also* Ex. 34 at 8-13 (1997 Bullseye application for air permit renewal stating "No" in answer to whether sources included pollution control devices). Emissions from those stacks looked like those from "a fireplace." Ex. 2, Barker Dep. 65:10-18. "[I]t look[ed] like smoke." *Id.* 65:21.

Despite a monitoring system to address potential exposure to toxic metals inside the facility, prior to 2016 Bullseye never tested the emissions going up its stacks or the air quality outside its factory. Ex. 1, Andreakos Dep. 47:6-12. Bullseye's long-time Controller can remember no discussions about installing emission control systems at Bullseye before 2016, Ex. 3, Durrin Dep. 73:9-74:1, even though Bullseye was certainly aware of the technology long before 2016, based on its monitoring of its competitors, *Id.* 75:10-13. Under pressure from regulators and Plaintiffs, Bullseye installed a baghouse to capture emissions from its furnaces in 2016, and also signed a Mutual Agreement and Final Order with state regulators. *See* Ex. 35, Lani McGregor email to Cynthia Morgan, Mar. 24, 2016, 9:16 a.m. at BE00022883 ("**Bullseye will sign the agreement that DEQ is demanding tomorrow**. * * * Besides the prohibitive costs of continuing to argue the science, the class action lawsuit essentially forces us to do it.") (emphases in original).

Bullseye had also known for decades that baghouses were an air pollution solution that it could install on its furnaces. In 1987, Bullseye owner Schwoerer represented to DEQ that his new furnaces will "have the capability of attaching a control device if necessary." Ex. 36, DEQ, Interoffice Memo, Mar. 12, 1987. Bullseye even considered "[i]nstallation of an emissions control device such as a scrubber, *bag house*, or an electrostatic precipitator" to address its emissions problem, but ultimately decided to "reformulate" its glass ingredients instead, replacing recycled glass with "raw materials." Ex. 21 at 3 (emphasis added).

Those "raw materials" cited in Bullseye's 1987 Memo to DEQ included a form of chromium that has the potential to convert to highly toxic chromium VI.[9] Prior to 2016, Bullseye apparently never tested whether the chromium it used converted to chromium VI, [redacted]

[9] "Human studies have clearly established that inhaled chromium (VI) is a human carcinogen, resulting in an increased risk of lung cancer." *Chromium Compounds Hazard Summary*, U.S. EPA (last updated Jan. 2000), https://www.epa.gov/sites/production/files/2016-09/documents/chromium-compounds.pdf.

[redacted] Ex. 5, Jones Dep. 55:23-56:3. Bullseye has represented to the public that its furnaces would not convert chromium III to chromium VI—that its "manufacturing process includes steps to keep the chromium in its safe trivalent state"[10]—but [redacted] *Id*. 65:4-10. Based on that source test, Bullseye's Controller readily concedes there is a possibility for HAPs to "to be emitted in the production of glass that includes those [HAPs] as a raw material." Ex. 3, Durrin Dep. 176:15-24. *See also* Ex. 37 (source test results for chromium). Although it engaged in the practice for years, [redacted] Ex. 5, Jones Dep. at 79:15-19. Indeed, based on what he now knows about the use of chromium in Bullseye's uncontrolled furnaces, Bullseye's Vice President Jim Jones said [redacted] *Id.* 79:24-80:10.

E. *Bullseye actively opposed rules requiring it to install emission control systems.*

Bullseye not only failed to take reasonable steps to control pollution from its furnaces, but over the decades it also actively fought against rules that would have required it to control its emissions.

In 2007, Bullseye became aware of a proposed federal rule that would have applied to some of its furnaces, requiring emission controls. *See* Ex. 3, Durrin Dep. 52:6-10, 53:9-14. Durrin, Bullseye's Controller, provided comments to the Environmental Protection Agency opposing the rule, arguing "[t]he economic impacts of the rule as written would be severe for colored art glass manufacturers." Ex. 38 at 1. Durrin wrote that he understood "the goal of dealing with HAP chemicals[,]" but he advocated for a "general exclusion for small businesses" like Bullseye and for an exclusion for periodic furnaces—the type he said Bullseye used—in the rule. *Id.* at 1-2.

According to EPA records, one of Bullseye's competitors was alarmed that Bullseye was seeking an exemption for periodic furnaces, which Bullseye said it used. A representative of Spectrum Glass from Seattle emailed the EPA on October 17, 2007, recounting a conversation he had with Durrin. Ex.

[10] *FAQs*, Bullseye Glass Co., http://www.bullseyeglass.com/about-us/faqs.html (last visited July 24, 2017) (providing answer to question, "Does trivalent chromium convert to hexavalent chromium in a glass furnace?").

39 at 4. The Spectrum employee said he was "shocked" to hear the rule might carve out an exception for furnaces like the kind Bullseye used. *Id.* "Periodic furnaces, in our experience, actually emit much more particulate and contamination into the atmosphere than continuous furnaces." *Id.* State regulators in Washington had already required Spectrum Glass to install a baghouse on its periodic furnaces, the commenter wrote. *Id.*[11] As mentioned above, Bullseye itself later admitted that [redacted] Ex. 30 at 8 (Schwoerer's comments).

Despite Bullseye's efforts to create an exception to the rule, Bullseye did not research the cost of installing emission control systems in 2007. Ex. 3, Durrin Dep. 73:6-12. At the same time, Durrin assured the EPA that "[c]olored art glass manufacturers use a variety of management procedures and methods to control the release of HAP chemicals," Ex. 38 at 2, though the letter did not describe those "procedures and methods." When asked at his deposition which of those procedures would have related to emissions outside the facility, Durrin answered, "I don't know." Ex. 3, Durrin Dep. 53:20-55:11.

F. *Bullseye's handling of material wastes showed an intentional disregard for its neighbors' rights.*

Until February 2016, Bullseye essentially used the surrounding community as its personal hazardous waste site.

Currently, material that spills from "batch" drums of raw ingredients for glass is swept or vacuumed, labelled as hazardous waste, and sent out for treatment and disposal. Ex. 4, Gabel Dep. 62:12-19; 115:5-6; *see also* Ex. 40 ([redacted]). Prior to February 2016, however, that hazardous waste material was collected into a barrel along with material chiseled out from inside of the furnaces and melted yet again in another uncontrolled furnace. Ex. 4, Gabel Dep. 62:24-25, 89:2-11; *see also* Ex. 6, Lechleiter Dep. 20:21-23:20; 28:2-29:10 (describing how material from batch room filter system, which is now sent for disposal, used to be "put into a furnace, turned into glass, then pulled out, and put in a Dumpster," and how dust material that's now labelled and stored as hazardous waste was

[11] During his deposition, Durrin testified that he did not remember the specific conversation referenced by the Spectrum Glass commenter, but he did recall contacting Spectrum Glass to discuss the proposed rule, and he testified that the e-mail from Durrin that the Spectrum Glass employee quoted to the EPA was consistent with his writing style. Ex. 3, Durrin Dep. 78:16-79:3; 81:9-14.

also "glassified"). One former employee says employees referred to this disposal of waste in furnaces as "hazmat runs," which were "a regular practice that Bullseye directed its employees to conduct." *See* Ex. 41, Affidavit of Patrick O'Neal, at ¶¶ 3-9. During these "hazmat runs," the furnace dampers were opened, allowing emissions from the waste batch melt to carry directly into the air. *Id.* ¶ 7. "Bullseye was aware that it did not have any emissions controls on those furnaces, allowing the burned material to go directly into the neighborhood around Bullseye." *Id.* ¶ 8.

Bullseye's cavalier waste management attitude is reflected in recent tests of a "drywell" outside the facility, which collected water discharged from two roof drains. Ex. 42 at BE00027245, Bridgewater Group memorandum to Eric Durrin, Drywell #1 Sediment and Stormwater Sample Results. Those tests showed elevated levels of arsenic, cadmium, chromium, and other metals. *Id.*, Tables 3, 4, 5; *see also* Press Release, DEQ, *Bullseye Glass signs agreement with DEQ to clean up contaminated stormwater runoff found in onsite drywells* (Oct. 10, 2016) (investigation found "approximately two feet of sediment at the bottom of the drywell that contained highly elevated levels of these metals").[12] That sampling of the collected runoff from Bullseye corroborates a July 14, 2006 complaint to DEQ from Fred Creswell of Seaview Art Glass: "THERE IS SOMETHING BAD GOING ON THERE. I have personally seen the[m] wash down [the] batch material directly into the city sewer system and know that the releases of lead are large. The worst part is they claim to be environmentally friendly. There are no scrubbers on the stacks and if monitored you would be shocked." Ex. 43.

G. *Bullseye has balked at taking responsibility for the effects of its emissions.*

While Bullseye has long been aware of emissions from its furnaces, the general public was shocked in February 2016 when it learned of a "hotspot" for cadmium and other metals in Southeast Portland, based on an analysis of metals in moss and confirmatory air monitoring by DEQ. A recent peer reviewed study of metal levels in moss in Portland concluded that "evidence that glass-manufacturer #1 [i.e., Bullseye] is the source of the observed cadmium hotspot [in Southeast Portland] is compelling." Geoffrey H. Donovan, et al., *Using an epiphytic moss to identify previously unknown sources of*

[12] http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=1391

atmospheric cadmium pollution, Science of the Total Environment, Vol. 559 at 84-93 (Mar. 24, 2016).[13] In fact, after Bullseye temporarily suspended the use of some heavy metals, air quality readings near the facility showed a dramatic reduction in the levels of those pollutants. *Compare* Ex. 44, DEQ, Air Quality Data in the air near Powell and SE 22nd Ave in Portland (Oct. 2015) (showing, *e.g.*, average cadmium concentration of 29.4 ng/m3, or 49 times the benchmark of .6 ng/m3), *with* Ex. 45, DEQ, Air Quality Data in the air near Powell and SE 22nd Ave in Portland (Mar. 2016 to Feb. 2017) (showing average cadmium concentration of .328 ng/m3).

When Bullseye installed its first baghouse in August 2016, it cost only $626,000. Ex. 3, Durrin Dep. 179:8-9. The installation of that baghouse has not affected Bullseye's production capacity or levels. *Id*. 97:14-23. In fact, [redacted] Ex. 5, Jones Dep. 78:10-14. According to a March 23, 2016 email from Bullseye co-owner Lani McGregor that is highly probative of Bullseye's knowledge of its toxic emissions, Bullseye's owner "secretly bought a couple of baghouses on eBay ages ago" because he thought they "MIGHT be useful at some time in the factory's future." Ex. 46, Lani McGregor email to Bob Heath, Mar. 23, 2016, 5:05 a.m., BE00023383 (capitalization in original).

Discovery is not complete. But Plaintiffs already have ample evidence to show that, for decades, Bullseye has been aware of its toxic emissions and yet has acted with wanton or intentional disregard for the rights of its neighbors. For that reason, Plaintiffs should be permitted to amend their complaint to add a claim for punitive damages.

III. LEGAL STANDARD

A. *Amendments to add punitive damages claims must be granted if plaintiffs can present even some evidence on which a jury could base a punitive damages award.*

At any time after a party files a pleading, "a party may move the court to allow the party to amend the pleading to assert a claim for punitive damages." ORS 31.725(2). A court must deny the party's motion if the timing of the motion prejudices the other party, or the court determines the facts submitted in support of the motion "fail to set forth specific facts supported by admissible evidence

[13] https://www.fs.fed.us/pnw/pubs/journals/pnw_2016_donovan002.pdf

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adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion on the issue of punitive damages in a trial of the matter[.]" *Id.* 31.725(3). Under the "directed verdict" standard of ORS 31.725(3) (formerly ORS 18.535(3)), a court must deny a motion to amend a pleading to add a claim for punitive damages '"only if the evidence submitted is not adequate to overcome an opposing motion for a directed verdict—*i.e.*, only if there is "no evidence" from which the jury could find the facts necessary to establish an element of [the] plaintiffs' claim.'" *Perry v. Rein*, 215 Or App 113, 132, 168 P3d 1163, 1174 (2007) (quoting *Bolt v. Influence, Inc.*, 333 Or 572, 580, 43 P3d 425, 429 (2002)). If plaintiffs present *some* evidence supporting a claim for punitive damages, a Court should permit the claim.

B. *At trial, plaintiffs must present clear and convincing evidence of behavior justifying a punitive damages award.*

To recover punitive damages at trial, the party seeking them must prove "by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730(1). A plaintiff can recover punitive damages in cases "in which 'the violation of societal interests is sufficiently great and the conduct involved is of a kind that sanctions would tend to prevent.'" *Harrell v. Travelers Indem. Co.*, 279 Or 199, 209, 567 P2d 1013, 1017-18 (1977) (quoting *Starkweather v. Shaffer*, 262 Or 198, 207, 497 P2d 358, 362 (1972)). Even gross negligence "may provide a proper basis for an award of punitive damages." *Harrell*, 279 Or at 209.

Under ORCP 23 A, a party may amend its pleadings by leave of court, and that "leave shall be freely given when justice so requires." The law favors permitting amendment of pleadings. *Holmes v. Oregon Ass'n Credit Mgmt.*, 52 Or App 551, 558, 628 P2d 1264, 1268 (1981).

IV. ARGUMENT

Bullseye has been operating furnaces with no pollution control equipment for decades in a residential neighborhood while knowingly melting highly toxic metals and emitting particulate by-product into the air and surrounding community. A reasonable juror, confronting that simple fact, could

easily find that punitive damages are warranted. More specifically, a reasonable juror could find that Bullseye showed an intentional disregard for Plaintiffs' rights because (1) Bullseye knew that the metals it has been using for decades are harmful to human health, (2) Bullseye knew it was emitting those metals in particulate form into Southeast Portland's air, and (3) Bullseye failed to take reasonable steps to ascertain, limit, or protect residents from those emissions.

Those facts bring this case in line with those where courts have awarded punitive damages or allowed plaintiffs to proceed with a claim for those damages against polluting defendants. Applying the movant-friendly "directed verdict" standard of ORS 31.725, those facts leads to a straightforward conclusion: This Court should allow Plaintiffs to amend their pleading to assert a claim for punitive damages.

A. *Oregon courts approve of allowing juries to consider punitive damages in pollution cases.*

Oregon's courts have a well-established standard for the award of punitive damages in trespass and pollution cases: such damages "may be awarded when there is proof of 'an intentional, unjustifiable infliction of harm with deliberate disregard of the social consequences * * * .'" *Hager v. Tire Recyclers, Inc.*, 136 Or App 439, 446, 901 P2d 948, 952 (1995) (quoting *McElwain v. Ga.-Pac. Corp.*, 245 Or 247, 249, 421 P2d 957, 958 (1966)). Here, although Plaintiffs are not aware of any published cases applying ORS 31.725(2) in the pollution context, pollution cases in which appellate courts reversed a trial court's withdrawal of punitive damages from the jury, or awarded punitive damages after trial, demonstrate that Plaintiffs here allege sufficient facts even at this early stage to permit a punitive damages claim.

Under the standard of proof for punitive damages in pollution cases, "[i]t is not necessary to show actual malice or ill will." *Hager*, 136 Or App at 446; *see also Reynolds Metals Co. v. Lampert*, 316 F2d 272, 275 (9th Cir), *on rehg*, 324 F2d 465 (9th Cir 1963) (not "necessary that the act have been done maliciously or with bad motive"). Rather, "[i]t is enough if the evidence is sufficient to permit the jury to conclude the defendants' conduct amounted to an intentional disregard of the plaintiffs' rights." *Senn v. Bunick*, 40 Or App 33, 41, 594 P.2d 837, 842 (1979). Punitive damages are available even if the operations of the defendant are "wholly impersonal with respect to any victim," so long as the

operations evidence a high degree of social irresponsibility. *Schmidt v. Pine Tree Land Dev. Co.*, 291 Or 462, 466, 631 P2d 1373, 1375 (1981).

In *Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*, Chief Judge Burns of the District of Oregon, in awarding punitive damages, surveyed Oregon law and synthesized the standard for those damages in pollution cases this way: "punitive damage awards may be imposed for business activities, harmful to others, carried out in disregard of the corporation's societal obligations. In brief, the issue is whether the defendant has damaged the property of plaintiff by conduct evidencing an 'I don't give a damn' attitude." 500 F Supp 984, 988 (D Or 1980).

Under that standard, a person operating a plant that "emits smoke, fumes or 'particulates'" may be liable for punitive damages "even in the absence of any 'wanton' or 'fraudulent' conduct, upon the ground that he has 'intentionally' permitted fumes, smoke or particles to be released and blown by the wind upon another's property, for the reason that '[t]he intentional disregard of the interest of another is the legal equivalent of legal malice and justifies punitive damages for trespass.'" *Harrell*, 279 Or at 210-11 (quoting *McElwain*, 245 Or at 249); *see also Davis v. Ga-Pac. Corp.*, 251 Or 239, 249, 445 P2d 481, 486 (1968) (en banc) (affirming *McElwain* in case involving same plant/defendant but different plaintiff); *Faber v. Asplundh Tree Expert Co.*, 106 Or App 601, 604, 810 P2d 384, 386 (1991) (punitives available in trespass and negligence case involving application of herbicides).

The failure to install pollution controls that "could have minimized or eliminated the damage" to a plaintiff's property is "evidence of intentional disregard of plaintiffs' rights," justifying punitive damages. *Hager*, 136 Or App at 446. However,

> "an award of punitive damages does not require the plaintiff to provide detailed analyses of alternative emission control strategies and their costs. Instead, the plaintiff need only show, by a preponderance of the evidence, the existence of pollution reduction measures that **could have been** adopted and reasonably might have been expected to efficiently decrease the plant's emissions."

Orchard View Farms, 500 F Supp at 1002 (emphasis added).

At this stage, Plaintiffs have sufficient facts to justify an award of punitive damages, which is far more than is necessary to justify granting leave to add a claim for those damages under the directed verdict standard of ORS 31.725.

B. *A reasonable juror could find Bullseye acted with knowledge that the metals it used were harmful.*

Abundant evidence shows Bullseye was aware the metals it used as raw materials to create colored glass were potentially harmful to its neighbors. Oregon caselaw shows that such awareness put Bullseye on notice of the need to protect its neighbors' interests.

A defendant's knowledge that it is using harmful materials supports an award of punitive damages. In *Faber*, the Court of Appeals found that plaintiffs had presented a *prima facie* case for an award of punitive damages where defendant applied herbicides whose labels "contained detailed warnings about the risk of 'drift' and resulting damage to nearby vegetation." 106 Or App at 604. Similarly, here, Bullseye had the requisite knowledge that its raw ingredients were toxic and that by-product from its batch recipes were escaping the facility and being discharged into the surrounding community. Under *Faber*, allowing an amendment to assert punitive damages is appropriate.

C. *A reasonable jury could find that Bullseye knew its emissions of harmful metals affected the neighborhood.*

A jury here could also reasonably conclude that Bullseye knew it was emitting pollutants that were harmful to its neighbors. The Supreme Court's decision in *McElwain* addresses this issue. In that case, the plaintiffs owned land east of the defendant's paper mill. 245 Or at 248. "[N]oxious and toxic gases, fumes and smoke and particles" from the defendant's mill damaged the property of the plaintiff, who also alleged mill effluent had killed trees and vegetation and "otherwise depreciated the value of the property." *Id.* The trial court "withdrew the issue of punitive damages" from the jury, and the plaintiff appealed that issue. *Id.*

On appeal, the Supreme Court reversed the trial court. It found that when the defendant built the mill, it knew "there was danger, if not a probability that the mill would cause damage to adjoining property" because the defendant's plans for the mill included "air pollution control devices designed to minimize the damage caused by the mill to surrounding property." *Id.* at 250. The record in that case

also showed that state regulators were concerned with pollution from the mill, and required the defendant to keep records regarding the effects of pollution. *Id.* And after the lawsuit was filed, the defendant installed "or was in [the] process of installing" additional pollution control equipment. *Id.* at 252. On those facts, the Supreme Court said the trial court erred in withdrawing the issue of punitive damages from the jury, and that there "was an abundance of evidence *sufficient by any standard to support and award* of punitive damages." *Id.* at 253 (emphasis added).

All those factors are present here. First, Bullseye has long known about the potential for emissions from its facility to damage neighbors. Over thirty years ago, owner Schwoerer vividly described to DEQ how his furnaces would "carry fine particulate up the exhaust stacks causing a plume." *See generally supra* Part II.A, B (discussing history of "emissions issue"). That matches the facts in *McElwain, supra,* and also in *Hager,* where the Court of Appeals concluded the trial court erred in withdrawing the plaintiff's punitive damages claim where there was evidence that the defendant knew its activity "would cause silt to flow downstream to plaintiff's property." 136 Or App at 446; *see also Reynolds Metals*, 316 F2d at 275 (error to withdraw punitive damages claim against aluminum plant where defendant "had known for several years that fluorides from their plant were settling on [plaintiff's] crops"). *Cf. Hudson v. Peavey Oil Co*., 279 Or 3, 9, 566 P2d 175, 178 (1977) (punitive damages not justified in case involving seepage from underground gasoline tank where defendant's records "indicated that its tanks were not leaking"). More recently, in response to complaints about particulate emissions, Bullseye installed a baghouse to collect emissions from its batch-mixing room. *See* Ex. 26.

Second, state regulators have long warned Bullseye about its emission problems and the complaints they have caused. *See generally supra* Part II.B. In 1987, DEQ officials met with owner Schwoerer regarding "the opacity plume from his glass melting furnace[.]" Ex. 47, DEQ, Interoffice Memo, Apr. 24, 1987. Like the defendant's mill effluents in *McElwain*, Bullseye's emissions "were a source of concern" to state regulators from very early in its operations. *See* 245 Or at 250.

Third, after Plaintiffs filed this lawsuit, Bullseye installed pollution control equipment that reportedly has reduced particulate emissions from certain furnaces by 99%. *See* Bullseye Glass Co.,

Title 5 Air Operation Permit Application at 17 (May 30, 2017) (noting efficiency of Baghouse West).[14] That tracks the series of events in *McElwain*.

In summary, on facts comparable to the present case, the Supreme Court concluded that, under "any standard[,]" plaintiffs had presented sufficient evidence to support a punitive damages claim. *McElwain*, 242 Or at 253. This Court should draw the same conclusion now.

D. *A reasonable juror could conclude Bullseye failed to take reasonable steps to control its emissions.*

Despite Bullseye's knowledge that (a) it was using thousands of pounds of toxic metals and (b) that emissions from its furnaces were uncontrolled, Bullseye took no reasonable steps to control its emissions. This conduct violated Bullseye's "societal obligation to determine whether its emissions will result in harm to others." *Orchard View Farms*, 500 F Supp at 990.

The federal district court's application of Oregon law in *Orchard View Farms* is instructive. In that case, Chief Judge Burns awarded punitive damages against an aluminum plant for harm done to pear orchards because the plant's owners did not sufficiently ascertain the harm from the plant's emissions, control those emissions, or compensate those harmed by the emissions. *Id.* at 989-90.

Prior to 2016, Bullseye took no affirmative steps, beyond submitting basic permit information to DEQ, to determine whether its furnaces were discharging pollution into the neighborhood and onto neighborhood properties. Such conduct, or lack of conduct, demonstrates intentional disregard to the rights of its neighbors:

> "Because the damage from pollution can be difficult to perceive due to its subtle or incremental nature, and because it can be difficult to trace to its cause, the obligation of the enterprise extends not only to observation of property in the surrounding region but also to initiation and completion of unbiased scientific studies designed to detect the potential adverse effects of the substances emitted."

Id. at 990.

Nor did Bullseye take any steps to install reasonably-available technology to control its harmful emissions prior to 2016. A "company ha[s] a societal obligation to adopt and maintain reasonable

[14] http://www.oregon.gov/deq/FilterDocs/bullseyeTitleVapp.pdf. Bullseye may argue evidence of subsequent remedial measures is not admissible; however, it is well established in Oregon law that such evidence is admissible—with a proper limiting instruction—to prove, among other things, "feasibility of precautionary measures[.]" ORS 40.185.

pollution control measures, at least those capable of reducing the harm at a cost less than the damage caused by the emissions," and that obligation is elevated in populated areas. *Id.* at 1002. A defendant who knows that mitigation measures would eliminate or minimize the damage its activities cause, but doesn't adopt those measures, demonstrates an intentional disregard for a plaintiff's rights. *Hager*, 136 Or App at 446. Even a defendant who installs a "state-of-the-art system" to reduce a nuisance may not avoid an award of punitive damages. *See Williams v. Invenergy, LLC*, No. 2:13-CV-01391-AC, 2016 WL 1725990, at *21 (D Or Apr 28, 2016) (denying wind farm defendant's motion for summary judgment regarding punitive damages where defendant argued it had made "good faith efforts to mitigate the noise").

As discussed above, Bullseye has been aware since 1987 that baghouses could be used on its furnaces, and since at least 2007 that one of its competitors had installed baghouses on comparable furnaces; however, it apparently made no investigation about what type of furnaces its competitor's baghouse was connected to, or whether this technology would be appropriate for its own facility. *See* Ex. 3, Durrin Dep. 76:19-77:19. Bullseye's inaction is analogous to the defendant's in *Hager*, who knew that erosion control measures would minimize the siltation from its tire removal work, but failed to install them. 136 Or App at 446. In both cases, that "is evidence of intentional disregard of plaintiffs' rights." *Id.*

Bullseye may try to argue that, even before 2016, it took reasonable precautions to minimize its impact on its neighbors. *McElwain* forecloses that argument. The defendant in that case also argued "it should not be liable for punitive damages if it did everything reasonably possible to eliminate or minimize the damage caused by its mill[.]" 242 Or at 251. The Supreme Court rejected that standard: "It is sufficient to call attention to the substantial evidence from which the jury could have found" defendant did not take all reasonable steps. *Id.* at 251-52. The Supreme Court also noted that "there is no contention that the additional controls could not have been installed either (a) when the mill was built, or (b) as soon as it became apparent that the mill pollution was damaging adjoining properties." *Id.* at 253.

So too here. A jury could find that Bullseye's lack of action or inadequate action showed an intentional disregard for plaintiffs' rights. *See Hager*, 136 Or App at 446 (evidence that defendant knew

erosion control measures could have "minimized or eliminated the damage to plaintiffs' property" was "evidence of intentional disregard for plaintiffs' rights," justifying punitive damages); *McGregor v. Barton Sand & Gravel, Inc*., 62 Or App 24, 29, 660 P2d 175, 179 (1983) (stating that issue for punitive damages is whether defendants, with knowledge of conditions causing damage, "did 'everything reasonably possible to eliminate or minimize the damage[.]'" (quoting *McElwain*, 245 Or at 251-52).

Bullseye may also try to argue that their alleged compliance with DEQ regulations forecloses the imposition of punitive damages. The court in *Williams* explained why that argument fails: "Whether [the plaintiff] is entitled to punitive damages depends not on whether Defendant[] maliciously and recklessly violated the DEQ [regulations], but whether they maliciously and recklessly interfered with [plaintiffs'] right to enjoy [their] property." 2016 WL 1725990 at *20. (citing *Lunda v. Matthews*, 46 Or App, 701, 707, 613 P2d 63, 67 (1980)).

Finally, like the defendant in *Orchard View Farms*, Bullseye has not compensated residents of Southeast Portland. It has not, for example, offered to pay for soil or home testing, or to reimburse individuals who have paid to have their blood or urine tested. To the contrary, Bullseye has criticized its neighbors as alarmists, or worse. *E.g.*, Ex. 30 at BE00010153 ([redacted]); Ex. 48, McGregor Email to Karl Seitz, Aug. 21, 2016, 1:36 p.m. ("The neighbors are still lusting for more blood, but we actually had the best sales quarter in company history[.]"). Incredibly, in an email to a friend about the litigation, Ms. McGregor described her continued profitable business enterprise at the neighborhood's expense, exclaiming, "Living well, best revenge[.]" *Id.*

"At the heart of all the punitive damages cases is the idea that in some instances deliberate or careless conduct is so much in disregard of the rights of another that it should lay the actor open to monetary punishment that would tend to deter that sort of conduct in the future." *Senn*, 40 Or App at 41. Bullseye's cavalier attitude—which prioritized profit and expediency over the protectable interests of its neighbors, resulting in the intentional distribution of toxic metals into Southeast Portland—is precisely the kind of behavior punitive damages were designed to address.

E. *Amendment is warranted under ORCP 23 A.*

Justice requires that this Court grant leave to amend the complaint to add a claim for punitive damages. *See* ORCP 23 A (stating standard). When reviewing a trial court's exercise if its discretion under ORCP 23 A, appellate courts "balance four factors: '(1) the nature of the proposed amendments and their relationship to the existing pleadings; (2) the prejudice, if any, to the opposing party; (3) the timing of the proposed amendments and related docketing concerns; and (4) the colorable merit of the proposed amendment.'" *Herinckx v. Sanelle*, 281 Or App 869, 879, 385 P3d 1190, 1198 (2016) (quoting *Ramsey v. Thompson*, 162 Or App 139, 145, 986 P2d 54, 57 (1999), *rev den*, 329 Or 589, 994 P2d 130 (2000)). Balancing those factors with the facts and posture of this case show this Court should allow amendment.

Nature of the proposed amendment and its relationship to the existing pleadings: With this proposed amendment, Plaintiffs do not seek to fundamentally alter the case. Plaintiffs are merely asking for the opportunity to seek a new type of damages pursuant to the statutory process for adding a claim for those damages. Plaintiffs' Second Amended Class Action Complaint described in detail the gravity of Bullseye's alleged behavior, and put Bullseye on notice that Plaintiffs would seek "economic and/or non-economic damages[.]" Complaint ¶ 25. This factor therefore weighs in favor of amendment.

Prejudice to the opposing party: Bullseye cannot show any prejudice from permitting amendment at this stage. *See Herinckx*, 281 Or App at 880 (finding no prejudice where amendment "came early in the litigation" and citing similar cases). This factor weighs in favor of amendment.

Timing of the proposed amendments: Courts have granted punitive damages amendments up to four or 17 days before trial. *Howmar Materials, Inc. v. Peterson*, 171 Or App 52, 14 P3d 631 (2000), *opinion adhered to as modified on reconsideration* 174 Or App 55, 23 P3d 409 (2001), *rev den* 334 Or 260, 47 P3d 486 (2002); *Ramsey*, 162 Or App at 148. With this case still in discovery, this factor weighs in favor of amendment.

Colorable merit of the proposed amendment: Plaintiffs allege detailed facts above that more than sufficiently demonstrate they have a claim for punitive damages that is at least colorable. *See White v. Walgreen Co.*, No. 1209-12223, 2013 WL 8338977 at *2 (Mult Co Cir Ct, Sep 23, 2013) (applying

fourth factor and granting motion to add claim for punitive damages where "plaintiffs have presented 'some evidence' to support the claim for punitive damages"). This factor weighs in favor of amendment.

The timing of this motion and its factual support tip the scales far in favor of this Court using its discretion to grant Plaintiffs' amendment under ORCP 23.

IV. CONCLUSION

Bullseye knew that the metals it melts in its furnaces were toxic, it knew that those furnaces created pollution, it knew that the by-product of its industrial processes were escaping its furnaces and facility, and it knew that there were reasonable steps it could take to limit the impact of that pollution outside its facility. Bullseye took protective action for its employees inside the facility, but wholly failed, despite its knowledge of toxic emissions, to take action to protect the surrounding community. That evidence of intentional disregard for Plaintiffs' rights justifies permitting Plaintiffs to add a claim for punitive damages. Plaintiffs respectfully request the Court grant this motion.

DATED this 26th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing PLAINTIFFS' MOTION FOR LEAVE TO AMEND PLEADING TO ASSERT CLAIM FOR PUNITIVE DAMAGES on:

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by the following indicated method or methods:

☐ by faxing full, true, and correct copies thereof to the attorneys at the fax numbers shown above, which are the last-known fax numbers for the attorneys' offices, on the date set forth below. The receiving fax machines were operating at the time of service and the transmissions were properly completed, according to the confirmation reports on file.

☐ by mailing full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.

☐ by sending full, true, and correct copies thereof via overnight courier in sealed, prepared envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, on the date set forth below.

☐ by causing full, true, and correct copies thereof to be hand-delivered to the attorneys in person or at the attorneys' last-known office addresses listed above on the date set forth below.

☒ by electronic transmission of a notice of filing by the electronic filing system provided by the Oregon Judicial Department for the electronic filing and the electronic service of a document via the

Internet to the electronic mail (email) address of a party who has consented to electronic service under UTCR 21.100(1).

I hereby declare that the above is true to the best of my knowledge and belief. I understand that this document is made for use as evidence in court and is subject to penalty of perjury.

DATED: July 26, 2017

Signed: *s/ Matthew J. Preusch*
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