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' REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND PLEADING TO ASSERT CLAIM FOR PUNITIVE DAMAGES AND OPPOSITION TO MOTION FOR CONTINUANCE

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiffs are not asking this Court to award punitive damages. They are not asking the Court to find facts, or to decide whether Defendant Bullseye Glass Co. ("Bullseye") has behaved as a model citizen or a brazen corporate scofflaw. A jury will decide those issues, and more, in time. For this Motion, all the Court must decide is whether Plaintiffs have presented *some* evidence—one document, one piece of testimony—from which a jury could find that Bullseye's behavior merits an award of punitive damages. Plaintiffs have done that and more.

Bullseye's Opposition to Plaintiffs' Motion to Amend Pleading to Assert Claim for Punitive Damages ("Opp.") includes some evidence from which a jury could infer that Plaintiffs are *not* entitled to punitive damages. That is one reading of some of that evidence. But much more evidence points to punitive damages being appropriate here. If there is a disputed issue of fact that a jury must decide, this Court should grant Plaintiffs' Motion under the directed verdict standard in ORS 31.725.

At this stage, the record is replete with evidence to support an eventual award of punitive damages. Plaintiffs provided admissible evidence with their Memorandum in Support of Motion for Leave to Amend Pleadings to Assert Claim for Punitive Damages ("Mot.") from which a jury could find that Bullseye knew it was emitting hazardous metals, that Bullseye was aware it could control those emissions but chose not to, that Bullseye opposed rules that would have limited its own emissions, and that Bullseye chose profits over the safety of its neighbors. Taken together, a jury could decide that this conduct demonstrates a culpable indifference or disregard to Bullseye's societal obligations and the public welfare, which punitive damages may deter.

Below, in rebuttal, Plaintiffs confront the flaws in Bullseye's Opposition, namely that punitive damages require knowledge of harm and evidence of that harm. Plaintiffs also offer additional evidence to rebut the new facts Bullseye raises in its Opposition. This rebuttal evidence includes recently obtained deposition testimony from Bullseye owner Dan Schwoerer and sworn written testimony from former Bullseye managers showing that Bullseye knew its furnaces emitted hazardous metals, was not candid with regulators, tried to conceal its worst emissions from the public, and has known for decades that

similar facilities were using emissions control devices. Based on the full record, Plaintiffs respectfully request that this Court grant Plaintiffs leave to amend their Complaint pursuant to ORS 31.725.

II. ARGUMENT

Plaintiffs have presented evidence from which a jury could conclude Bullseye either knew it was emitting hazardous metals, or carelessly ignored that it was, and did nothing about it. Separately and together, these facts show a socially unacceptable disregard for a risk of serious harm to its neighbors' rights. That is the sort of anti-social behavior that punitive damages can deter. This Court should permit Plaintiffs the opportunity to pursue those damages on behalf of themselves and the proposed class. This Court should not defer a decision on this Motion based on Bullseye's improper and ill-conceived "motion" for a continuance. That Motion is not properly before this Court, and granting it would upset the proper procedures for moving this proposed class action toward resolution.

A. *Plaintiffs have presented evidence from which a jury could conclude that Bullseye showed indifference to a high risk of harm, jeopardizing the health and welfare of its neighbors.*

Bullseye's Opposition is based on the false premise that punitive damages are only available when a defendant has "knowledge that its conduct would cause harm[,]" and that Bullseye had no such knowledge. Opp. at 26. At trial, however, Plaintiffs will not need to prove that Bullseye knew it was hurting its neighbors to get an award of punitive damages. "Indifference" to a "*risk* of harm" is the standard the legislature chose: "a reckless and outrageous *indifference* to a highly unreasonable risk of harm" and "a conscious *indifference* to the health, safety, and welfare of others" justifies punitive damages. *See* ORS 31.730(1) (emphases added). Case law fleshes out that standard. Applying that standard to this case, Plaintiffs have already presented sufficient evidence from which a jury could find culpable conduct, and here present additional, recently discovered evidence to bolster such a finding.

Oregon courts describe the level of culpable conduct for punitive damages in many ways. The conduct can potentially be "intentional, unjustifiable infliction of harm with deliberate disregard of the social consequences," *McElwain v. Ga.-Pac. Corp.*, 245 Or 247, 249, 421 P2d 957, 958 (1966); "gross negligence[,]" *Harrell v. Travelers Indem. Co.*, 279 Or 199, 209, 567 P2d 1013, 1018 (1977); "willful or reckless disregard of risk of harm to others[,]" *Schmidt v. Pine Tree Land Dev. Co.*, 291 Or 462, 466,

631 P2d 1373, 1375 (1981); "highly irresponsible indifference" to a risk to others, *Andor by Affatigato v. United Air Lines, Inc.*, 303 Or 505, 517, 739 P2d 18, 26 (1987); "intentional disregard of the plaintiffs' rights[,]" *Senn v. Bunick*, 40 Or App 33, 41, 594 P2d 837, 842 (1979); "aggravated disregard of the rights of others[,]" *Davis v. Ga.-Pac. Corp.*, 251 Or 239, 245, 445 P2d 481, 484 (1968); tortious conduct done so "recklessly as to be in disregard of social obligations," *Johannesen v. Salem Hosp.*, 336 Or 211, 217, 82 P3d 139, 141-42 (2003) (quoting *Linkhart v. Savely*, 190 Or 484, 505-06, 227 P2d 187, 197 (1951); or simply not "giv[ing] a damn." *Orchard View Farms v. Martin Marietta Aluminum, Inc.*, 500 F Supp 984, 988 (D Or 1980). "The conduct at issue may be a single act, or it may be repeated, or continuous, or a failure to act." *Andor*, 303 Or at 511. Ultimately, whether a certain type of conduct justifies "a punitive damages award depends significantly on the type of case at issue[.]" *Williams v. Invenergy, LLC*, No. 2:13-CV-01391-AC, 2016 WL 1725990, at *19 (D Or, Apr 28, 2016).

From those various articulations, however, it's possible to draw some bright lines. First, Plaintiffs are not required to show a knowledge of harm or intent to harm; rather, "conscious disregard of or highly irresponsible indifference" is sufficient to justify punitive damages. *Andor*, 303 Or at 517 (quoted in Opp. at 25); *see also, e.g., Joachim v. Crater Lake Lodge, Inc.*, 48 Or App 379, 386-87 n 3, 617 P2d 632, 636 (1980) (approving instruction where trial court said wanton misconduct was somewhere between negligence and "intentionally hurting somebody"); *Andor*, 303 Or at 509 (same). Under the standards applied in nuisance actions especially, a party does not need to show "an intent to injure[.]" *Williams*, 2016 WL 1725990, at *19. In *McGregor v. Barton Sand & Gravel, Inc.*, for example, the Court of Appeals explained that defendants "miss[ed] the point" when they argued they could not be held liable for punitive damages because "they did not *intend* to dump water and debris on plaintiffs' property." 62 Or App 24, 29, 660 P2d 175, 179 (1983) (emphasis added).

For this reason, Oregon's Uniform Civil Jury Instructions, which echo the statute, allow a jury to impose liability where they find that the defendant acted with "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[.]" UCJI No. 75.02, Punitive Damages—General (emphases added).

Second, in some cases punitive damages are justified by the societal interest of deterring those who engage in "deliberate or *careless* conduct" in disregard of others' rights. *Senn*, 40 Or App at 41 (emphasis added). "A jury may award punitive damages to punish misconduct and deter similar misconduct from occurring in the future." UCJI No. 75.02, *supra*. For that reason, polluting operations may be "wholly impersonal with respect to any victim" and "conducted with the hope that no harm will occur" and may still be subject to punitive damages. *Schmidt*, 291 Or at 466.[1]

With those rules and the directed verdict standard of ORS 31.735 in mind, Plaintiffs have provided more than sufficient evidence for this Court to permit the jury to decide the issue of punitive damages.

B. *Plaintiffs have provided ample evidence from which a jury could conclude Bullseye acted with reckless and outrageous indifference.*

A reasonable jury could conclude that Bullseye's conduct in (i) failing to test its emissions, (ii) concealing its actual emissions, and (iii) choosing not to install pollution control devices has been so recklessly indifferent to the risk its created that punitive damages are justified to deter similar behavior by Bullseye (or others like Bullseye) in the future.

1. *Failing to test emissions shows intentional disregard for the rights of others.*

First, a jury could find Bullseye showed reckless or outrageous indifference to a high risk of harm because for over four decades it never tested its furnace emissions despite awareness that it was using thousands of pounds of hazardous metals in its batches every year.

According to Bullseye owner Dan Schwoerer, before 2016 Bullseye never modeled its emissions, never sampled the air around Bullseye, and never undertook (or considered undertaking) any study to estimate the amount of hazardous emissions from its facility. Reply Ex. 3, Deposition of Daniel Schwoerer

[1] If, after trial, Bullseye believes the remedial measures it has taken since February 2016 justify the reduction of any punitive damages award, it may move the court to reduce the amount of that award pursuant to ORS 31.730(3).

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101

("Schwoerer Dep.") 111:14-25.[2] But it appears that at least one Bullseye manager suggested that Bullseye should test its emissions, and he was told not to do so.

Daren Marshall was the Maintenance Director at Bullseye Glass Co. from 2001 to 2011. Reply Ex. 1, Declaration of Daren Marshall ("Marshall Decl.") ¶ 1; *see also* Reply Ex. 2 (Bullseye organizational chart listing Marshall); Reply Ex. 3, Schwoerer Dep. 147:13-148:5 (discussing Marshall). He oversaw the construction and maintenance of Bullseye's furnaces, managed maintenance personnel, and oversaw Bullseye's project engineering group, all while working closely with Mr. Schwoerer. Reply Ex. 1, Marshall Decl. ¶¶ 2-3. During his time at Bullseye, Mr. Marshall suggested that Bullseye test the materials coming out of its furnace stacks to "quantify what they were, so we could figure out what kind of equipment we would need to clean the stack emissions[.]" *Id.* ¶ 7. He was told he should not do that testing. *Id.*

A few days after testifying under oath that Bullseye never tested its emissions before 2016, Mr. Schwoerer submitted a written affidavit with the Bullseye Opposition stating, without attribution to any source document, that he conducted a test of furnace stack buildup material in the 1980s, which allegedly showed the material did not contain Hazardous Air Pollutants ("HAPs"). Declaration of Carrie Menikoff in Support of Opposition to Motion to Amend Pleading to Assert Damages ("Menikoff Decl.") Ex. A, Affidavit of Dan Schwoerer ("Schwoerer Aff.") ¶ 22. When asked at his deposition, before he signed his affidavit, the bases for his belief that Bullseye emissions of metals were *de minimis*, Mr. Schwoerer did not mention that testing. Reply Ex. 3, Schwoerer Dep. 114:9-24. On September 7, 2017, Plaintiffs' counsel requested the test results supporting Mr. Schwoerer's statement. Preusch Reply Decl. ¶ 17. Counsel for Bullseye responded that no such documents exist. *Id.*

Regardless of what that newly-disclosed, undocumented test found, more recent tests of Bullseye's stack build up material show that the material does, in fact, contain significant quantities of hazardous metals, including cadmium, arsenic, and selenium. On November 8, 2016, Plaintiffs' counsel and a consultant, accompanied by Bullseye's counsel and consultant, took samples of dozens of barrels of

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

materials at Bullseye labeled as hazardous waste. *See generally* Declaration of Daniel Mensher in Support of Plaintiffs' Reply in Support of Motion for Leave to Amend Pleading to Assert Claim for Punitive Damages and Opposition to Motion for Continuance ¶¶ 2-5, 7-8, filed herewith. Among the materials sampled was material cleaned from Bullseye's furnace stacks. *Id.* ¶¶ 5-6; *see also id.* at Ex. B (photo of stack clean out material). Subsequent testing of a composite sample of that stack clean out material showed that it includes HAPs like cadmium in significant quantities. *Id.*¶ 6, Ex. A.

In addition to not testing its emissions for four decades, Bullseye also did not test them after DEQ informed Bullseye it was in a high cadmium area. Bullseye claims "the February 2016 reports of contaminated air near Bullseye caught the company completely by surprise." Opp. at 2. But DEQ contacted Bullseye months before that, in September 2015, to notify them about air sampling for cadmium in the area, and in response heard "a strong level of concern." Reply Ex. 4, Sept. 18, 2015 email from Sarah Armitage; *see also id.* ("Eric [Durrin] said Bullseye definitely uses cadmium[.]"). Even after DEQ notified Bullseye that it was "in a high cadmium area"—a revelation the public would not learn for more than four months—Bullseye performed no testing and did not change any of its processes. Reply Ex. 5, Sept. 17, 2015 email from Eric Durrin; Reply Ex. 3, Schwoerer Dep. 223:15-25. A jury could well view that failure to act as showing a conscious and outrageous indifference to the public's interests.

When Bullseye did temporarily stop using cadmium and arsenic in February 2016, the air around Bullseye saw a "precipitous drop in both atmospheric cadmium and arsenic." Reply Ex. 6, Geoffrey H. Donovan, et al., *Using an epiphytic moss to identify previously unknown sources of atmospheric cadmium pollution*, 559 Science of the Total Environment 84, 90 (Mar 24, 2016); *see also id*. at 88 (concluding that moss sample "results confirm that stained-glass manufacturer #1 [Bullseye] is the epicenter of the biggest cadmium hotspot in Portland").

Bullseye's failure to do any emissions testing aligns this case with the facts in *Orchard View Farms*, where the court, after resolving factual disputes, awarded punitive damages against a production plant that failed to adequately ascertain the extent of its emissions, even though the plant had gone so far as to establish a test orchard to analyze crop damage. 500 F Supp at 990. "While the lack of emission

monitoring in itself does not constitute a breach of the company's society obligations, it does show the company's lack of respect for public welfare[.]" *Id.* at 1007. Bullseye's willful ignorance also makes it like the developer in *Senn*, who was liable for punitive damages when it decided that to develop its land, it needed to push fill onto a neighboring property "without making any effort to determine the boundary lines[.]" 40 Or App at 42. *Cf. Hudson v. Peavey Oil Co.*, 279 Or 3, 5, 9, 566 P2d 175, 176, 178 (1977) (punitive damages not warranted in leaking gas tank case, where the defendant routinely checked its tanks for leaks but simply failed to discover one).

Bullseye's argument is that it "simply did not know" about hazardous emissions. Opp. at 29. But society does not sanction a "see no evil, hear no evil" approach by an operator of a factory in a residential area that feeds thousands of pounds of hazardous metals into uncontrolled furnaces each year. "A business enterprise has a societal obligation to determine whether its emissions will result in harm to others." *Orchard View Farms*, 500 F Supp at 990. If anything, a jury could find Bullseye's actions even more deserving of punitive damages because it appears Mr. Marshall had asked to test Bullseye's emissions and Bullseye instructed him not to test for hazardous pollutants. Reply Ex. 1, Marshall Decl. ¶ 7. That instruction suggests both knowledge of hazardous pollutants and conscious disregard of the rights of others.

2. *A jury could conclude that Bullseye attempted to conceal its emissions.*

Second, a jury could conclude from evidence obtained thus far that Bullseye was consciously indifferent to the risk it imposed on its neighbors because Bullseye concealed or attempted to conceal its true emissions from DEQ and the public.

Mr. Marshall reviewed the affidavits of Mr. Schwoerer and Eric Durrin, Reply Ex. 1, Marshall Decl. ¶ 3, in which Mr. Schwoerer states he and Bullseye have been "completely candid with DEQ" throughout Bullseye's existence, Schwoerer Aff. ¶ 12, and Mr. Durrin states that "[i]n all of our dealings with DEQ, Bullseye has been transparent and candid[.]" Menikoff Decl. Ex. D, Affidavit of Eric Durrin ¶ 1. Based on his decade in management at Bullseye, Mr. Marshall does not think Bullseye has been completely candid with DEQ about its furnace emissions. Reply Ex. 1, Marshall Decl. ¶ 4. It appears Bullseye also tried to conceal its emissions from the public, by melting "high-smoke" glasses at night, and

performing "hazmat runs" at night because Bullseye knew they "put a lot of nasty smoke into the air." *Id.* ¶ 5.

Based on Mr. Marshall's testimony alone, a jury could conclude that Bullseye was not playing straight with the public or with regulators, which would justify an award of punitive damages. *Cf. Williams*, 2016 WL 1725900, at *20 (punitive damages justified where evidence showed wind farm operator "engaged in deception," "employed deceptive and manipulative testing methods," and "manipulated reporting of sound-test data").

3. *A jury could find Bullseye acted with intentional indifference by failing to install emissions controls it knew were available.*

Third, a jury could find that Bullseye showed an indifference to the risk to its neighbors because Bullseye was aware of at least the potential for its furnaces to emit harmful emissions, but it decided not to install emission control devices decades ago because it considered them too expensive.

a. A jury could find Bullseye was aware it was emitting hazardous metals.

Testimony from former Bullseye managers and other facts show Bullseye has likely known since at least the 1980s that it could use emission control devices to reduce pollution from its furnaces, but it chose not to because it weighted the cost of such pollution control as more significant than the costs it chose to impose on the community by its harmful action and inaction.

Mr. Schwoerer claims ignorance about the source of the high levels of cadmium detected in the moss and air around Bullseye, though he blames construction at a nearby rail yard as possible culprit. Reply Ex. 3, Schwoerer Dep. 224:12-23. He also still claims that, despite all that has occurred, he "[doesn't] know anything about" the emissions or volatilization of cadmium, arsenic, and lead from Bullseye's processes. *Id.* at 91:20-92:6. Mr. Schwoerer has testified that the first time he became aware that Bullseye may be emitting any hazardous materials from its furnace stacks was February 2016, when the public first learned that fact. *Id.* at 106:18-107:1.[3] Mr. Schwoerer does now acknowledge that some carcinogenic hexavalent chromium can "volatilize" off the surface of a melt, which he says he did not

[3] He later gave a somewhat different answer: that he believed "there were never anything other than very insignificant amounts of hazardous materials" coming from those furnaces. Reply Ex. 3, Schwoerer Dep. 110:10-12.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101

previously think could happen, and he claims to have recently learned that "there's potential for metals to come off the surface of the batch." *Id.* at 82:11-83:10; 143:9-14. Contrary to Mr. Scwhoerer's claimed new-found knowledge, however, rebuttal testimony from Bullseye's first glass chemist submitted with this Reply suggests Mr. Schwoerer knew decades earlier that Bullseye's melting process emitted hazardous metals.

Long before Daren Marshall began working at Bullseye Glass Co., Mr. Schwoerer hired Robert Barber as Bullseye's first glass chemist in the 1980s. Reply Ex. 9, Declaration of Robert Barber ("Barber Decl.") ¶ 1. Mr. Barber understood at that time—and he believes Mr. Schwoerer also understood—that the metals Bullseye used would volatilize in Bullseye's furnaces, "creating emissions of those metals." *Id.* ¶ 3. "The only way to capture those metal emissions is to use a scrubber or some other emissions capture device." *Id.*

Echoing Mr. Barber's testimony, Mr. Marshall believes Mr. Schwoerer must have known Bullseye's furnace particulate emissions included the hazardous metals used to make colored glass. Although Mr. Marshall does not think that Mr. Schwoerer "ever ran Bullseye with the intention of causing anybody or anybody's property any harm," he does think Mr. Schwoerer realized "Bullseye was emitting potentially hazardous materials[.]" Reply Ex. 1, Marshall Decl. ¶¶ 6, 10, 14-15.

Mr. Marshall witnessed other ways besides the furnace melt that Bullseye emitted its batch materials—including raw hazardous metals—into the air outside its facility. A "pot mouth vent" drew excess batch materials and smoke out of the furnace during the charging process, sending it directly into the air. *Id.* ¶ 11. During charging, Bullseye fully opened the stack damper to draw that excess batch material into the furnace stacks. *Id.* ¶ 12. Bullseye also used a "barrel vent" that sucked loose batch material out of the batch barrel during the charging process, also sending that into the atmosphere. *Id.* ¶ 13.

Bullseye's own records support Mr. Marshall's and Mr. Barber's views that Mr. Schwoerer must have been aware of problem emissions, and that those emissions included hazardous metals. [redacted]

[redacted]

Declaration of Matthew Preusch in Support of Motion for Leave to Amend Pleading to Assert Claim for

Punitive Damages ("Preusch Decl."), Ex. 29.[4] When asked at his deposition [redacted]" Mr. Schwoerer said the agenda item was "probably a misuse of the term" and was meant to refer to stack cleaning, even though [redacted] Reply Ex. 3, Schwoerer Dep. 170:5-171:3. Based on that, a jury may not credit Mr. Schwoerer's testimony. Moreover, Bullseye's own records show that the stack cleaning was for heavy metals. [redacted] Preusch Decl. Ex. 27. at 3 (emphasis added); *see also* Mot. at 5 ([redacted]). That means Mr. Schwoerer must have been aware—prior to February 2016—that Bullseye's furnaces were releasing highly toxic metals into the air as a by-product of its daily manufacturing.

Bullseye says it believed "no other colored glass manufacturers believed that glass melting produced harmful emissions" and no scientific literature about harmful emissions from colored glass manufacture exits. Opp. at 5 n. 8, 6. In reality, art glass industry sources of which Bullseye was aware have long discussed the problem of emissions from glass-melting furnaces.

Mr. Marshall says one of the books Mr. Schwoerer kept in his office and referred to was Dr. Fay V. Tooley's *The Handbook of Glass Manufacture*. Reply Ex. 1, Marshall Decl. ¶ 10. A 1984 edition of that book, in a chapter called "Environmental Control in the Glass Industry," explains that where arsenic is used as a raw ingredient for types of art glass, it "has been assayed in small levels in particulate emitted from furnaces producing glass for such ware." Reply Ex. 7, Dr. Fay V. Tooley, 2 *The Handbook of Glass Manufacture* (3d ed 1984), at 1068. While little test data for arsenic emissions was available at the time, one "test show[ed] that about 80 percent of arsenic captured in an emission test was in particulate form." *Id.* at 1094. The same chapter, in a section called "Air Pollution Control Techniques," discusses the use of baghouses, as well as process techniques like reducing furnace temperature, to limit particulate emissions. *Id.* at 1077-1104. The chapter explained that fabric filter baghouse systems have

[4] Portions of this brief that refer to previously filed confidential material are redacted pursuant to this Court's July 27, 2017 Order Granting Bullseye's Unopposed Motion to File Under Seal.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101

been installed on pressed and blown glass furnaces, and could be used to lower emissions for soda-lime formulation glass. *Id.* at 1092.

More recent industry publications of which Mr. Schwoerer was likely aware also discussed emissions of hazardous metals from art-glass furnaces. In his deposition, Mr. Schwoerer mentioned familiarity with the Glass Art Society, estimating he'd attended eight to ten of their conferences. Reply Ex. 3, Schwoerer Dep. 187:10-188:4. Bullseye sponsored the 2008 conference of the Glass Art Society in Portland, during which Bullseye—the "little factory that makes glass at the cutting edge of 17th-century technology"—cooked chicken for guests "to absolute perfection on its 100-foot-long, continuous-belt annealing lehr [oven]." Glass Art Society, *2008 Special Conference Events: Pre-Conference Reception*, https://www.glassart.org/2008Special_Conference_Events.html (last visited Sept 19, 2017) (featuring a photo of Mr. Schwoerer). The next year, that Society's newsletter included an article written by member of the Society's Board of Directors discussing "fumes that are no good for us" from art glass manufacturing, including "fumes from working with heavy metals in glass color melting." Reply Ex. 8, Eddie Bernard, *Technical Issues: Ventilation*, Glass Art Society, GAS News (Jan Feb 2009) at 5. The article cautioned that in regards to "exhausting our indoor pollutants – when it comes to heavy metals, we are not doing our outdoors any favors unless we put a filter inline with the ventilation duct and dispose of the spent filter media responsibly." *Id.* Bullseye must have known about this article; it ran an advertisement on the preceding page of the newsletter. *Id.* at 4.

b. A jury could find that Bullseye was aware it could install baghouses but decided not to because of cost.

Companies have a "societal obligation to adopt and maintain reasonable pollution control measures[.]" *Orchard View Farms*, 500 F Supp at 1002. The record suggests Bullseye was aware of reasonable pollution control measures but did not fulfill its societal obligation to adopt them.

When asked during his deposition when he first became aware that emission control systems could be used on glass-melting furnaces, Mr. Schwoerer answered "I don't recall." Reply Ex. 3, Schwoerer Dep. 32:22-25. He said any awareness he had of such devices "would only be through reading, not through

experience." *Id.* at 39:5-9. He testified that he first time he became aware of a small art glass manufacturer using emissions control devices was March 2016. *Id*. at 64:18-65:5.

Sworn declarations for former Bullseye managers suggest Mr. Schwoerer was aware long before then. In the 2000s, Mr. Marshall and Mr. Schwoerer discussed "several times the possibility of installing baghouses to collect particulates and reduce the visible smoke from furnaces." Reply Ex. 1, Marshall Decl. ¶ 8. Mr. Schwoerer even saw firsthand the use of a "wet scrubber" emissions control device when he and Mr. Marshall visited an art glass maker in Georgia in the early 2000s. *Id.* ¶ 9. After that visit, the two discussed the possibility of using a similar device at Bullseye. *Id.*

But Bullseye was likely aware of the use of such devices even before that. Mr. Barber, Bullseye's first glass chemist, "was aware of one small glass manufacturer there that used an emission control device like a baghouse on its furnaces" before he started working at Bullseye in the 1980s. Reply Ex. 9, Barber Decl. ¶ 4; *see also* Reply Ex. 3, Schwoerer Dep. 65:22-25 (discussing hiring Barber).[5]

When Mr. Schwoerer hired Mr. Barber in the 1980s, initially Bullseye's furnaces had no furnace stacks at all; instead, furnace exhaust came out of the front door of the furnaces, was drawn into a "hood," and emitted directly into the atmosphere. Reply Ex. 3, Schwoerer Dep. 69:12-70:4. That exhaust looked like smoke from wood-burning stove. *Id.* at 70:15-21. After Mr. Barber started working at Bullseye in the 1980s, he worked with Mr. Schwoerer to design new a new furnace. Reply Ex. 3, Schwoerer Dep. 68:19-24 (describing working with "Bob Barber" on design). Bullseye designed that furnace "to accommodate the future installation of emission control equipment." Preusch Decl. Ex. 21.

At his deposition, Mr. Schwoerer disputed that Bullseye designed those furnaces for emission control devices, testifying that at the time he was possibly thinking that someone would invent a suitable emission control device that he could add someday. Reply Ex. 3, Schwoerer Dep. 68:1-16. Mr. Schwoerer said he could not recall looking at the cost of emissions control systems or thinking they would be expensive. *Id.* at 96:5-16. However, Mr. Barber says that Bullseye "did not install baghouses in the 1980s because it decided it could not afford to do so." Reply Ex. 9, Barber Decl. ¶ 5. That aligns this case with

[5] There appears to be a factual dispute regarding the date Bullseye hired Mr. Barber, but the Court need not resolve that issue, which in any case is not material.

McElwain, where the Oregon Supreme Court concluded that the trial court erred by withdrawing the question of punitive damages from the jury because the evidence showed, among other things, that "defendant's efforts to control pollution were influenced by the cost factor." 245 Or at 253.

Meanwhile, between the 1980s and 2016, other small art glass manufacturers installed such devices on their furnaces even though Bullseye did not. Aside from the Georgia facility Mr. Marshall says he and Mr. Schwoerer visited, Spectrum Glass Company in Seattle had "long utilized baghouse pollution control equipment on its primary color furnaces" before it closed last year. Reply Ex. 10 (Spectrum pamphlet describing its baghouse). Even assuming for the sake of argument that no off-the-shelf baghouses existed in the 1980s that Bullseye could have bought, Bullseye could have created a solution. It did that with a screw charger, which according to Mr. Schwoerer was "simply a matter of scaling down the design of existing apparatus presently used by the large bottle glass manufacturers[.]" Menikoff Decl, Ex. V at 4. Had Bullseye shown regard for its neighbors' rights, it could have done the same thing with an emissions control device.

C. *Plaintiffs have presented evidence of harm, and Bullseye has access to more.*

Bullseye has the facts and the law wrong when it argues Plaintiffs should not be allowed to pursue punitive damages because they have not presented evidence of harm. Harm is an element of Plaintiffs' substantive claims, not a punitive damages claim. In any case, Plaintiffs have provided at least some evidence of harm, and could provide much more evidence of which Bullseye is already aware.

In this case, Plaintiffs are seeking damages for diminution in the value of their property, testing expenses to determine the levels of heavy metals in their bodies and property, loss of personal property, clean up or remediation expenses, and loss of use of property, among other things. *See* Second Amended Class Action Complaint ¶¶ 70-93. Plaintiffs allege they are entitled to those damages because Bullseye's emissions trespassed on their properties, Bullseye's emissions substantially and unreasonably interfered with the use and enjoyment of those properties, and Bullseye negligently operated its facility, resulting in harm. *Id*.

Now Plaintiffs are asking to add a request that the jury award punitive damages as one form of damages attendant to their three claims for relief. Bullseye argues that Plaintiffs could not survive a

directed verdict because they have offered "no evidence of harm." Opp. at 29. But Plaintiffs will not need to show harm distinct from the harms caused by Bullseye's negligence, trespass, and nuisance to be entitled to punitive damages. Rather, punitive damages would be available if Plaintiffs persuade a jury that the opposing party acted with either 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) (emphasis added). "Harm," "injury," or "damages" is not an element of a punitive damages claim, though when determining the *amount* of those damages juries are directed to consider, among other things, whether there is a "reasonable relationship between the amount of punitive damages and plaintiff's harm." UCJI No. 75.02, Punitive Damages—General.

Harm is not an element of a punitive damages claim because the purpose of punitive damages is to deter, not compensate; "they are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard of or indifference to known or highly probable risk to others." *Andor*, 303 Or at 517. Juries are asked to focus on the conduct of the defendant, because imposing those damages can "deter enterprises from accepting the risks of harming other private or public interests by recklessly substandard methods of operation[,]" operations that "may well be wholly impersonal with respect to any victim, indeed conducted with the hope that no harm will occur[.]" *Schmidt*, 291 Or at 466; *see also Joachim*, 48 Or App at 387-88 (approving instructions stating that "[p]unitive damages are awarded to the Plaintiff in addition to general damage in order to discourage the Defendants and others from engaging in wanton misconduct"); *Andor*, 303 Or at 511 (punitive damages are occasionally imposed "for breach of a public responsibility").

Even though as a matter of law Plaintiffs need not show harm at this stage, Plaintiffs have presented at least some evidence from which a jury could infer that Bullseye's reckless indifference has resulted in harm. Plaintiffs, using DEQ records, explained that the high levels of hazardous air pollution near the facility dropped after Bullseye temporarily stopped using hazardous metals. Mot. at 12. Plaintiffs also cited a peer-reviewed study identifying Bullseye as the source of a "cadmium hotspot" in Southeast Portland. *Id*. at 11-12. As that study and DEQ's air records explain, air monitoring near Bullseye found a "monthly average atmospheric cadmium concentration [of] 29.4 ng/m3, which is 49

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101

times higher than Oregon's benchmark of 0.6 ng/m3, and *high enough to pose a health risk from even-short term exposure*." Reply Ex. 6 at 84-85 (emphasis added). That health risk is a natural result of Bullseye's location in a residential and commercial area, *near a day care center.*[6] *See* Defendant's Answer to Second Amended Complaint at ¶ 18 (admitting allegation that Bullseye is in a residential and commercial area); *Orchard View Farms*, 500 F Supp at 1003 ("One must not be blind * * * as to the choice of location when evaluating the responsibility of the company to society to avoid damage, if possible, to its neighbors.")

While Plaintiffs have provided sufficient evidence of Bullseye's behavior to survive a directed verdict on the issue of punitive damages, the Court may also consider rebuttal evidence of harm elicited at Plaintiffs' depositions, evidence of which Bullseye has long been aware but has chosen to ignore in its arguments to the Court. At those depositions, taken by Bullseye's counsel, Plaintiffs testified about how they have lost the use and enjoyment of their homes. *See, e.g*., Reply Ex. 13 at 2-5, Sanseri Dep. 42:17-43:1, 44:21-45:2 (stopped gardening); *id.* at 9-10, Banich Dep. 25:24-26:8 (stopped gardening, stopped using yard socially, "shut up our house"); *id.* at 13-15, Borte Dep. 97:6-9, 118:1-2, 121:12-15 (children allowed to play in yard only "very rarely", stopped eating fruit from yard, did less yard work); *id.* at 18-23, Ely Dep. 13:19-24, 15:10-13, 34:25-36:23, 37:5-9 (stopped eating vegetables, hosting guests less often, take off shoes when entering home, take precautions in yard); *id.* at 26-31, 34, Hauke Dep. 22:1-7, 22:25-23:15, 54:18-55:4, 55:8-16, 32:15-33:9, 88:9-16 (no vegetable garden, additional precautions in garden, decreased entertaining outside); *id.* at 37-40, 42-43, E. Meeker Dep. 31:14-32:9, 35:20-22, 120:18-25, 149:17-150:1 (limited vegetable garden to a few containers with newly purchased dirt, does not take daughter to local park); *id.* at 46-50, S. Meeker Dep. 81:20-82:9, 85:7-21, 136:19-137:1 (daughter not using back yard as before, stopped going to nearby park, limited garden); *id.* at 53-55, 57, Goodwin Dep. 40:24-41:25, 58:17-24, 95:4-17 (stopped eating produce from yard, spends less time

[6] *See DEQ confirms second straight day of unsafe lead exposure levels from Bullseye Glass*, Oregon DEQ (May 20, 2016) http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=1116 (describing cease and desist order issued after DEQ determined that Bullseye "created a second consecutive day of potentially dangerous lead exposure in its manufacturing process" based on air monitor readings at the Children's Creative Learning Center near Bullseye).

outside, no longer opens windows); *id.* at 60-62, 65, Pasini Dep. 59:15-20, 65:4-66:1, 103:20-23 (stopped or reduced eating herbs and fruit from yard, dramatically reduced kids' time in yard); *id.* at 68-69, Miner Dep. 89:24-90:21 (did not plant planned garden, not entertaining). They also gave admissible testimony that their homes are worth less because a reasonable person would pay less for a home that is within Bullseye's widely-published zone of impact. *See id.* at 32-33, Hauke Dep. 81:22-82:16; *id.* at 41, E. Meeker Dep. 139:3-12; *id.* at 56, Goodwin Dep. 78:10-18; *id.* at 63-64, Pasini Dep. 83:23-84:10 (A company "close to our house has been putting heavy metals into the air for – since 1974 and that would – I think that would definitely give me pause if I was to buy a house with children that close to a place like that."). Some Plaintiffs also testified about elevated levels of metals detected in their bodies or their children's bodies. *See, e.g., id.* at 6, Sanseri Dep. 173:3-25 (high cadmium). Those are all harms that a jury could conclude are attributable to Bullseye's reckless indifference to its neighbors' rights.

D. *Compliance with DEQ regulations is not dispositive.*

Bullseye argues it cannot be liable for the intentional disregard of its neighbors' rights because it was "completely candid with DEQ about its processes," Opp. at 7, and that DEQ condoned its behavior. Bullseye cannot use a regulator's inaction to excuse its own behavior. First, under Oregon law, compliance with regulations is not a "get out of jail free" card for nuisance or punitive damages claims. Second, even if it were, Plaintiffs have presented evidence from which a jury could conclude that Bullseye was not candid with DEQ, that Bullseye fought reasonable regulations to protect the public, and that the DEQ standards were not adequate to protect the public in any case.

As a matter of law, regulatory compliance does not preclude recovery under common-law theories. *See, e.g.*, *Lunda v. Matthews*, 46 Or App 701, 707, 613 P2d 63 (1980) ("Conformance with pollution standards does not preclude a suit in private nuisance."); *Penland v. Redwood Sanitary Sewer Service Dist.*, 156 Or App 311, 319, 965 P2d 433 (1998) (concluding that compliance with applicable regulations and permits does not preclude determination that operation constitutes nuisance); *Koos v. Roth*, 293 Or 670, 687, 652 P2d 1255 (1982) (possession of required permit to burn does not absolve defendant of potential liability for abnormally dangerous activity).

Similarly, whether a plaintiff is entitled to punitive damages "depends not on whether Defendants maliciously and recklessly violated the DEQ regulations, but whether they maliciously and recklessly interfered with [plaintiffs'] right to enjoy his property." *Williams*, 2016 WL 1725900, at *20. Bullseye's permits reflect this rule. They expressly say they do not "authorize any injury to private property or any invasion of personal rights[.]" Menikoff Decl., Ex. C at 4; *see also id*., Ex. F at 10 (same); Ex. G at 10 (same); Ex. I at 4 (same). In *Williams*, that meant the defendant's wind farm could still be subject to punitive damages for wind farm noise even though the Land Use Board of Appeals determined that the farm's conditional use permit should not be revoked, and plaintiff could prove "only *de minimis* violations of the DEQ noise regulations." 2016 WL 1725900, at *2, 20.

Assuming for the sake of argument that Bullseye could use its compliance with DEQ regulations as a complete shield—and the law says it cannot—Plaintiffs have presented evidence from which a jury could find Bullseye is not entitled to that defense.

For ten years—from 1974 to 1984—Bullseye operated with no DEQ permit at all, and it did not apply for one until DEQ asked it to. Reply Ex. 3, Schwoerer Dep. 103:25-104:16. Even after Bullseye belatedly applied for a permit, DEQ identified it as "an air quality problem source" because "visible emissions from your facility have been frequently observed in excess" of opacity rules. Preusch Decl. Ex. 19 at 1. Once Bullseye did get a permit, a jury could find that Bullseye was not candid with DEQ in complying with that permit and attempted to hide its emissions, based on the testimony of a former Bullseye manager. *See* Reply Ex. 1, Marshall Decl. ¶ 4.

Likewise, a jury could infer indifference to public health and safety from Bullseye's successful avoidance of new EPA regulations under the National Emission Standards for Hazardous Pollutants ("NESHAP") program. Bullseye spins its response to those proposed rules in 2007 as "what any reasonable corporate citizen would do[.]" Opp. at 19. But a jury might disagree. A jury might instead view Bullseye's successful advocacy to exclude its furnaces, which it represented were "periodic," as a

successful effort to pull the wool over the eyes of regulators and avoid installing costly emissions controls.[7]

Bullseye represented to EPA in 2007 that its furnaces were "periodic." *See generally* Preusch Decl. Exs. 38, 39 (Bullseye communications to EPA regarding proposed glass manufacturer regulations). After DEQ provided EPA more information about Bullseye's furnaces last year, EPA provided a regulatory interpretation that those furnaces were "continuous," not periodic, and were therefore subject to the NESHAP for Glass Manufacturing Areas Sources, 40 CFR, Part 63, Subpart SSSSS. Reply Ex. 11; *see also* Reply Ex. 12 (DEQ letter seeking interpretation, explaining that inside Bullseye' furnaces there is "volatilization of raw materials" off surface of melting glass). The EPA explained that its original exemption for glass manufacturers like Bullseye was based on information they provided indicating they "operate 'small periodic furnaces'," but that revision was meant to address "small operators or artisanal shops which may turn kilns/furnaces on and off regularly," unlike Bullseye's furnaces. Reply Ex. 11. In short, a jury could conclude that Bullseye escaped being regulated a decade ago because it led EPA to believe its furnaces were something that they were not.

Even assuming Bullseye met all regulatory requirements, Mr. Schwoerer himself admits those regulations were not adequate. He thinks the "State of Oregon should have passed air toxic standards that specifically said how much of any metal can be used or emitted. And from that standpoint, DEQ wasn't doing their job." Reply Ex. 3, Schwoerer Dep. 203:1-17. As Mr. Schwoerer concedes, doing more than what the strict letter of the law requires is sometimes "the right thing to do." *Id*. at 149:18-25.

Evidence presented by Bullseye supports that view. After DEQ concluded it was "unknown" what amount of hazardous metals "is bound within the glass as opposed to being emitted," there's no evidence Bullseye or DEQ took additional steps to find out. *See* Menikoff Decl., Ex. E at 1. Even today,

[7] Bullseye's argument that it was correct to conclude the rule would not apply to it because it was not a "major source," Opp. at 19, is puzzle. EPA promulgates regulations under the Clean Air Act for "Major Sources" and smaller "Area Sources"; EPA's 2007 proposed rule was meant to regulate Area Sources—including smaller glass manufacturers—because air toxics from such sources are "known or suspected to cause cancer and other health problems[.]" Menikoff Decl., Ex. P at 1. The rule would have included "emission limits for glass manufacturing furnaces" in those smaller sources, including Bullseye. *Id.*at 2. As DEQ explained to Bullseye at the time, "[t]his is an area source standard, meant to deal with small businesses." Menikoff Decl., Ex. S at 1 (emphasis in original).

Bullseye and DEQ might not have taken those additional steps had researchers from the U.S. Forest Service not decided to collect moss samples from Portland's trees and test them for air toxics.

In sum, Plaintiffs have presented at least *some* evidence from which a jury could find that Bullseye acted with indifference or disregard for its neighbors' rights. Of course, the jury may also hear evidence from the Defendant from which they could conclude that Bullseye did not so act. But the jury might not credit such testimony from Bullseye, and issues of which evidence or testimony is credible are for the fact finder to resolve. *See Taal v. Union Pac. R.R. Co*., 106 Or App 488, 494, 809 P2d 104, 107 (1991) ("Credibility questions are for the fact finder; they are not for the court to resolve in dealing with contradictory evidence in a summary judgment setting."); *Soliz v. Jimenez*, 222 Or App 251, 257-58, 193 P3d 34, 38 (2008) (citing *Taal* with approval, and reversing summary judgment for plaintiff, where trial court chose to believe plaintiff's evidence over defendant's); *Cooper v. North Coast Power Co*., 117 Or 652, 657, 244 P 665, 667 (1926) (in resolution of a directed verdict, "the court does not weigh the evidence nor determine the credibility of the witnesses").

E. *Bullseye's Motion for a Continuance is not a proper "Motion" and is not justified.*

Bullseye's "Motion for a Continuance" is a procedurally-improper delaying tactic. Bullseye has had full discovery from Plaintiffs, and does not explain what additional discovery it would need to respond to a Motion focused on Bullseye's own behavior. Plaintiffs ask that this Court proceed with the parties agreed-to schedule for Plaintiffs' Motion.

Bullseye's "Motion" is a surprise to Plaintiffs, contradicts Bullseye's earlier agreement to a schedule for this Motion, and not properly before this Court. Counsel for Bullseye has never conferred with Plaintiffs' counsel on this "Motion," which is not accompanied by a UTCR 5.010 certification. Moreover, Bullseye had previously agreed to a briefing and hearing schedule on this Motion *after* seeing Plaintiffs' Motion. Preusch Reply Decl. ¶ 16. Nor is Bullseye's justification for delay compelling. Bullseye has deposed every named Plaintiff in this action, and has not requested any additional discovery since Plaintiffs filed their Motion. *Id*. ¶ 15.

Bullseye claims it needs time for "investigation and scientific study" to "rebut [P]laintiffs' claim that Bullseye was a material source * * * of the elevated levels of metals[.]" Opp. at 35. If such rebuttal

evidence exists, it would need to be submitted at a trial on the merits, not in opposition to a Motion to Amend. At this juncture, the only question before the Court is whether there is "some" evidence on which a jury could base an award of punitive damages. The Court's role is not to find facts based on competing evidence. Bullseye's desired inchoate rebuttal evidence is immaterial, and Bullseye's other proffered explanations for the sources of elevated metals in Southeast Portland, like nearby railyards or diesel buses, are "amorphous and speculative[.]" *Faber v. Asplundh Tree Expert Co*., 106 Or App 601, 606, 810 P2d 384, 387 (1991).

Finally, Bullseye would have this Court put the cart before the horse by deferring ruling on Plaintiffs' Motion until after class certification. ORCP 32 directs this Court to determine whether Plaintiffs' claims may be maintained as a class action "[a]s soon as practicable[.]" ORCP 32 C(1). To make that determination, the Court will need to make findings of facts and conclusions of law as to which "claims or issues" are suitable for class treatment. *Id.* This Court should permit Plaintiffs to add a punitive damages claim now, so Plaintiffs can explain in their class certification motion why that claim is suitable for class treatment. For example, Plaintiffs might explain why that claim is "typical" of the class's claims. *See* ORCP 32 A(3) (typicality requirement); *see also State ex rel. Young v. Crookham*, 290 Or 61, 72, 618 P2d 1268, 1274 (1980) ("class actions, in appropriate cases, provide for unitary consideration of [punitive] damages"); *Iorio v. Allianz Life Ins. Co. of N. Am.*, No. 05-CV-633-JLS (CAB), 2009 WL 3415703, at *6 (SD Cal Oct 21, 2009) (class treatment of punitive damages appropriate because "[p]unitive damages award will be based largely on the misconduct of the Defendant"); *Perez-Farias v. Glob. Horizons, Inc*., No. 05-CV-3061-MWL, 2006 WL 2129295, at *13 (ED Wash July 28, 2006) (granting certification where plaintiffs argued "punitive damages may be awarded based on evidence of conduct that is directed to the class"). Plaintiffs might also explain why including that claim favors class-wide resolution of these disputes. For example, if a class is not certified and multiple individual plaintiffs seek punitive damages, such an approach risks exhausting Bullseye's funds, which "would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]" ORCP 32 B(1)(b).

Moreover, if the Court certifies Plaintiffs' proposed class, the Court must promptly direct adequate notice to the class explaining the litigation, so that class members may decide to participate or opt out. *See* ORCP 32 E, F(1). To adequately inform class members, that notice should describe the claims of the representative plaintiffs. *See* FRCP 23(c)(2)(B) (under federal rule, notice must include claims, issues, and defenses for which class has been certified). Waiting to resolve this issue until after certification would delay that notice, or possibly require a second, costly notice. *See* Manual for Complex Litigation (4th) § 21.311 (2014) ("Ordinarily, notice to class members should be given promptly after the certification order is issued.").

In short, ruling on this Motion now will help efficiently move this case forward. Additional, unjustified delay will not.

III. CONCLUSION

Bullseye has, even now, continued to exhibit a reckless indifference or disregard for what its own conduct has wrought. Bullseye does not acknowledge that Bullseye has done anything wrong, even though Bullseye's Vice President has testified that, [redacted] Preusch Decl., Ex. 5, Jones Dep. 79:24-80:10. Instead, Bullseye accuses Plaintiffs of a "misinformation campaign," Opp. at 3, while issuing a press release touting its Opposition and "40 Year Commitment to the Health of the Environment, Safety of Its Employees and The Welfare of Its Neighbors" and citing its "close and transparent work with DEQ[.]"[8]

Bullseye—under threat of this lawsuit and newly intense scrutiny of regulators—has installed a baghouse system on most of its furnaces since February 2016. But a jury could find that based on its practices before then—and even some of its behavior since—that is has not shown a commitment to its neighbors' safety and welfare. A jury could instead find that Bullseye has shown a reckless indifference

[8] News Release, *Bullseye Glass Answers Lawsuit with Evidence of 40 Year Commitment to the Health of the Environment, Safety of Its Employees and The Welfare of Its Neighbors*, Bullseye Glass Co., (Sept 5, 2017) http://www.bullseyeglass.com/news/bullseye-glass-answers-lawsuit-with-evidence-of-40-year-commitment-to-the-health-of-the-environment-safety-of-its-employees-and-the-welfare-of-its-neighbors.html.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101

to its neighbors' rights. Because Plaintiffs have presented ample evidence that supports such a finding, this Court should grant Plaintiffs' Motion.

DATED this 22nd day of September, 2017.

KELLER ROHRBACK L.L.P.

By *s/ Matthew J. Preusch*

Matthew J. Preusch (Bar No. 134610)
mpreusch@kellerrohrback.com
KELLER ROHRBACK L.L.P.
801 Garden Street, Suite 301
Santa Barbara, CA 93101
Telephone: (805) 456-1496
Facsimile: (805) 456-1497

Daniel Mensher (Bar No. 074636)
dmensher@kellerrohrback.com
Amy Williams-Derry (*Admitted Pro Hac Vice*)
awilliams-derry@kellerrohrback.com
KELLER ROHRBACK L.L.P.
1201 Third Ave., Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900
Facsimile: (206) 623-3384

Karl G. Anuta (Bar No. 861423)
kga@integra.net
LAW OFFICE OF KARL G. ANUTA, P.C.
735 S.W. First Avenue
Strowbridge Bldg, Second Floor
Portland, Oregon 97204
Telephone: (503) 827-0320
Facsimile: (503) 228-6551

Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND PLEADING TO ASSERT CLAIM FOR PUNITIVE DAMAGES AND OPPOSITION TO MOTION FOR CONTINUANCE on:

Allan M. Garten
Carrie Menikoff
Kent Robinson
GRM LAW GROUP
5285 Meadows Road, Suite 330
Lake Oswego, OR 97035

Attorneys for Defendant

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: September 22, 2017

Signed: *s/ Matthew J. Preusch*
Matthew J. Preusch, Attorney for Plaintiffs

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101