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IN THE CIRCUIT COURT FOR 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,
JUDY SANSERI and HOWARD BANICH;
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

BULLSEYE GLASS CO., an Oregon
corporation,

Defendant.

CASE No. 16CV07002

Assigned Judge: Hon. Stephen K. Bushong

**DEFENDANT BULLSEYE GLASS CO.'S
OPPOSITION TO PLAINTIFFS'
MOTION TO AMEND PLEADING TO
ASSERT CLAIM FOR PUNITIVE
DAMAGES**

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**DEFENDANT BULLSEYE GLASS CO.'S
OPPOSITION TO PLAINTIFFS'
MOTION TO AMEND PLEADING TO
ASSERT CLAIM FOR PUNITIVE
DAMAGES**

or in the alternative

**MOTION TO CONTINUE RULING ON
PLAINTIFFS' MOTION TO AMEND**

I. INTRODUCTION

Since its founding more than forty years ago Bullseye has strived to be a conscientious employer, a responsible corporate citizen, and a good neighbor. Bullseye was founded in 1974 by three art school graduates committed to developing glass sheets for the art glass industry. Dan Schwoerer, one of the founders, now owns Bullseye with his spouse, Lani McGregor. Mr. Schwoerer learned about glass making while attending the University of Wisconsin.

Over the past four decades Bullseye has become one of the most innovative colored art glass manufacturers in the world. Today this relatively small, local company employs approximately 144 people. It produces some of the most unique, patented opalescent glass and is

1 a leader in kiln-formed glass.¹ Kiln-glass is especially suited for glass fusing and offers artists a
2 unique medium with which to explore and develop more sophisticated glass art techniques and
3 styles. Bullseye is much more than a colored art glass manufacturer. For many years the
4 company has been an important and significant contributor to the worldwide colored art glass
5 community. Bullseye is strong supporter of the fine arts and a leader in glass art education.²
6 Bullseye has spent many years in collaboration with artists through its artist-in-residence
7 programs; it has sponsored exhibitions, museum partnerships and learning studios; and it has
8 promoted arts education in public schools.³ Through these efforts Bullseye has promoted the
9 exploration and expansion of the creative glass arts both locally and nationally. The company has
10 also long worked to lessen its impact on the environment. Its first products developed more than
11 forty years ago were made with recycled glass and in 2004 Bullseye was honored for its
12 sustainability practices with a BEST (Businesses for an Environmentally Sustainable Tomorrow)
13 award.⁴

14 Bullseye also has demonstrated a commitment to the health of the environment, the safety
15 of its employees, and the welfare of its neighbors. As we will show below, Bullseye has
16 rigorously worked with DEQ to inform the agency about its processes—including that it used
17 hazardous metals in its manufacturing process—and to abide by all EPA and DEQ regulations
18 and requirements. *DEQ repeatedly approved Bullseye’s manufacturing and emissions processes.*
19 Thus, the February 2016 reports of contaminated air near Bullseye caught the company
20 completely by surprise. What ensued was a litany of incomplete, flawed, and ultimately
21 misleading information from the press and from various government agencies about Bullseye’s
22 emissions. This suit arose in the midst of that flurry of misinformation. Plaintiffs and many
23 others in the community rushed to judgment about Bullseye and its owners.

24 ¹<http://www.bullseyeglass.com/about-us/what-is-kiln-glass.html>

25 ²<http://www.bullseyeglass.com/support-for-artists.html>

26 ³<http://www.bullseyeglass.com/about-us/our-mission.html>

⁴<http://www.bullseyeglass.com/values.html>

1 repeatedly told Bullseye that its emissions—even its arsenic emissions—were so small that they
2 did not create a regulatory concern. Plaintiff’s reliance on opacity concerns and a few complaints
3 show the weakness of their argument. None of these issues involved metals. Moreover, all of
4 these issues were resolved to the satisfaction of DEQ, and actually show Bullseye’s
5 conscientious response whenever a problem arose. Plaintiff’s reliance on Bullseye’s worker
6 safety procedures is equally unpersuasive. Bullseye’s concern for employees who are shoveling
7 powdered metals in a confined space has nothing to do with outside air quality. At no time has
8 Bullseye sought to evade or escape its obligations under the law or to its community.

10 In summary, plaintiffs’ motion fails because they provide no evidence on the two
11 essential elements for a punitive damage award, and would not survive a motion for directed
12 verdict. First, plaintiffs’ offer no evidence establishing that that Bullseye knew it was emitting
13 harmful pollutants. In fact, the evidence shows that Bullseye had an honest, good faith belief that
14 it was not encroaching on the rights of others. *See Senn v. Bunick*, 40 Or App 33, 42 (1979).
16 Second, as shown in Section IV(C), below, plaintiffs’ offer no evidence of harm or damages.
17 “Proof of an intentional, unjustifiable infliction of harm with deliberate disregard of the social
18 consequences” of one’s actions is necessary for a punitive damages award. *See McElwain v.*
19 *Georgia-Pacific Corp.*, 245 Or. 247, 249 (Or. 1966). There is no such proof offered among the
20 many pages of plaintiffs’ brief or the numerous exhibits cited. Instead, as shown below plaintiffs’
21 argument rests on innuendo and speculation. Because there is *no evidence* of intent or harm,

23 //
24 //
25 //

1 plaintiffs’ motion to amend the pleading fails under the directed verdict standard, and should be
2 denied.⁷

3 III. BACKGROUND

4 A. Bullseye Did Not Believe It Was Emitting Hazardous Air Pollutants

5 Plaintiff’s false narrative begins with the assertion that Bullseye “*burns* those toxic
6 metals [that] create emissions.” (Memo at 4) (emphasis added). This implies that the metals are
7 oxidized and emitted in vapors. But in fact, Bullseye *never* burns raw materials in its furnaces,
8 which implies that the raw materials are completely oxidized into vapors that are emitted into the
9 atmosphere with only a small amount of ash remaining. (Ex. A: Schwoerer Affidavit at ¶¶1-2).
10 Instead, the glass-making process involves melting raw materials. It combines raw materials by
11 changing their molecular structure so they form a new compound—colored glass. (Ex. A:
12 Schwoerer Affidavit at ¶2). For example, if cobalt carbonate is melted together with silicon
13 dioxide, the cobalt compound releases carbon dioxide, leaving it with only one oxygen molecule,
14 which it shares with the silicon dioxide. *Id.* This sharing of oxygen binds the cobalt to the silicon
15 forming a blue-colored glass. *Id.* This does not generate metal vapors; it captures the metals into
16 a new compound, or “glassifies” the metal. *Id.*

17
18
19 Bullseye’s decades of experience creating colored glass reinforced its understanding that
20 the melting process did not produce any dangerous or harmful metal emissions. *Id.* at ¶3.⁸ The
21 glass batch has always been primarily comprised of non-hazardous materials such as sand and
22

23
24 ⁷In the alternative, for the reasons set for in Section V, below, the Court should grant Bullseye a
continuation as permitted under ORS 31.725(4).

25 ⁸Bullseye knows of no emissions study involving the colored art glass manufacturing industry.
26 Further, it is Bullseye’s belief that no other colored glass manufacturers believed that glass melting
produced harmful emissions. (Ex. A: Schwoerer Aff. at ¶8).

1 soda ash. *Id.* Indeed, on average a Bullseye batch melt contains only one-half of one percent
2 (0.5%) of metals. *Id.* Thus, Bullseye believed that the melting process could not produce
3 anything more than an insignificantly small amount of metal emissions. *Id.* at ¶5.

4 Plaintiffs erroneously suggest that simply because Bullseye addressed emissions plume
5 opacity problems early in its history, the company knew it was emitting HAPs. This is simply not
6 true. As will be discussed in detail below, Bullseye’s opacity issues had nothing to do with its
7 use of hazardous materials. Bullseye reduced opacity by adjusting the amount of non-hazardous
8 borax in the glass mix. *Id.* at ¶3. Bullseye discovered early on that adding or reducing the amount
9 of metals changes the color of glass, not the opacity of the emissions. *Id.* Even very small
10 adjustments in the percentage of metals used produced a different color. This fact simply
11 confirmed Bullseye’s long-held belief that essentially all the metal was being glassified. *Id.*⁹

12 It is notable that Plaintiff’s fail to cite any industry standards or scientific literature in
13 support of their argument that manufacturing colored glass creates harmful emissions. That is
14 because none exist. There are very few manufacturers of colored art glass. *Id.* at ¶7. When
15 Bullseye opened, it was the first new colored art glass manufacturer in the United States in over
16 80 years. *Id.* While there are much larger companies that make colored glass for beverage bottles
17 and other purposes, the colored art glass industry is quite small and has no connection to the
18 much larger container glass industry. Moreover, there is no trade or industry group for colored
19 glass manufacturers nor is there any collaboration among manufacturers about trade or
20
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24 ⁹The other raw materials in the batch behave very differently from the metals when heated. Borax
25 and sodium can volatilize or evaporate in the process, and can be emitted from the furnaces. When those
26 materials condense in the atmosphere they might create a visible plume. Bullseye, of course, knew it had
emissions, and sometimes visible emissions, but the company believed these emissions were the
byproduct of other non-hazardous materials in the batch, not the metals. (Ex. A: Schwoerer Aff. at ¶4).

1 production practices. *Id.* As a result, no one has ever established industry standards or production
2 practices for art glass manufacturers. *Id.* This is not a case where Bullseye was acting in defiance
3 of any standards or known science. On the contrary, it relied on the same body of information
4 that DEQ did.

5 **B. DEQ Knowingly Permitted Bullseye’s Use of HAPs, Its Emissions and Its Emission**
6 **Control Processes**

7 Plaintiffs’ motion supports its false narrative by largely ignoring Bullseye’s
8 communications with DEQ and the resulting permits. A fair reading of these records shows that
9 Bullseye (1) was completely candid with DEQ about its processes; (2) acted reasonably and in
10 conformance with DEQ’s guidance and requirements and (3) was assured its emissions would
11 not produce concerning levels of HAPs emissions.

12
13 From DEQ’s first interaction with Bullseye more than 30 years ago, the department was
14 fully aware that Bullseye (1) had emissions from its facility and (2) used a proportionately small
15 amount of hazardous materials in its processes. In 1984, following an observed visible emission
16 (i.e., an opaque plume) from Bullseye, DEQ met with Bullseye to address the opacity problem.
17 Bullseye provided DEQ with a list of all materials, including the thirteen hazardous materials
18 used in its glass-making process. (Ex. A: Schworer Aff. at ¶12). DEQ learned that Bullseye
19 melted arsenic, chrome, cadmium and selenium in its processes. *Id.* Specifically, as shown
20 below, Bullseye also informed DEQ that in a “worst case scenario,” Bullseye *might* emit less
21 than half a gram per day of arsenic and approximately two grams per day of cadmium:
22
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Hazardous Emissions
see OAR 340-22-102 for definition of terms

1983 Data:

CONFIDENTIAL BUSINESS INFORMATION

Types of Hazardous Materials:	Amount purchased lbs/yr	Estimated amount *	exhausted from stack
Arsenic Trioxide	1200 lbs	.4 lbs	
Cadmium Oxide	50 lbs	*	
Cadmium Sulphide	900 lbs	1.8 lbs	
Selenium	400 lbs	.7 lbs	
Silver	40 lbs	.024 lbs	

(Ex. B: 07/10/84 Registration of Air Contaminant Sources). Significantly, no one at DEQ expressed any concerns about the information Bullseye disclosed or that the use of such metals would present a health problem. (Ex. A: Schwoerer Aff. at ¶12). Knowing full well the scope of Bullseye’s production processes and the materials used, DEQ issued Bullseye an Air Contaminate Discharge Permit allowing it to emit one ton of particulate matter (PM) from its uncontrolled furnaces. (Ex. C: 1984 Air Contaminant Discharge Permit at ¶2). Moreover, DEQ did not require Bullseye to measure or source test its actual emissions. Instead, DEQ employed a formula based on the amount of glass Bullseye produced to determine the quantity of particulate emitted. (Ex. D: Durrin Aff. at ¶2).

Since that time, DEQ has reiterated its lack of concern, while acknowledging it knew Bullseye was melting HAPs. In 1999, a DEQ compliance inspection found Bullseye in compliance and observed:

Other issues: EPA nor the Department has rectified the issue of HAPs from Bullseye’s glassmaking process. There are several additives that are used for color, that may be considered hazardous. However, it is unknown how much of the material is bound within the glass as opposed to being emitted. Until more is known about the process and/or emissions, Bullseye has agreed to monitor all raw materials and continue reporting them as part of the permit conditions.

1 (Ex. E: 1999 DEQ Compliance Inspection Memo).

2 Five years later, DEQ's concerns had not changed. The Review Report supporting
3 Bullseye's 2004 permit states:

4 A major source is a facility that has potential to emit more than 10 tons/year of any
5 single HAP or 25 tons/year of combined HAPs. [Bullseye] uses approximately 6,000
6 pounds of dry materials per year that contain HAP substances. After the dry products
7 are mixed, water is added to moisten the batch before firing. *No data on the potential
8 emissions through the furnace stack are available for these chemicals. Assuming that
all of the material was released, the facility would not have potential to emit single or
combined HAP at levels of concern.*

9 (Ex. F: 2004 ACDP Review Report at 4 ¶15) (emphasis added).

10 In 2011, when DEQ reviewed the most recent permit renewal, the Review Report noted
11 that "Dry materials used at the facility may include arsenic trioxide, cadmium, selenium,
12 chromium, and lead as coloring agents or to produce trade-mark characteristics in the glass."
13 Once again, the Review Report noted there was "no data" on "potential emissions" from these
14 materials. And again, DEQ stated that even if Bullseye emitted "all of this material" as
15 particulate into the environment, the facility would not exceed the only applicable regulatory
16 standard. (Ex. G: 2011 ACDP Review Report at 5 ¶13).

17 Indeed, DEQ expressly permitted Bullseye to melt arsenic and kept track of the amount
18 used. In its 2011 permit, DEQ authorized Bullseye to *emit* up to 2.7 tons of arsenic *per furnace*
19 (for its old furnaces) without violating federal guidelines. (Ex. D: Durrin Aff. at ¶4). Yet at the
20 time Bullseye *melted* less than a ton for all furnaces combined.
21

22 At no time did DEQ raise any concerns about these practices. It never asked Bullseye to
23 conduct any tests on its emissions and never asked it to install additional pollution controls.
24

25 Perhaps most tellingly, when news of elevated levels of cadmium and arsenic broke in February
26

1 2016, DEQ was as surprised as Bullseye. As reported by EarthFix, Sarah Armitage, DEQ’s air
2 toxics specialist, acknowledged that “neither the company nor the state environmental regulators
3 knew that Bullseye could be emitting excess metals.” (Ex. H: EarthFix news article at 3)¹⁰. Ms.
4 Armitage added, “We didn’t know, and they didn’t know. . . . It looks like this is new
5 information, that people were not aware of these emissions.” *Id.*¹¹
6

7 Plaintiffs make no attempt to reconcile their arguments about Bullseye’s state of mind
8 with this evidence. They claim that Bullseye knowingly and deliberately subjected the
9 environment to harm. But it is clear that no one—either Bullseye or DEQ—knew there was a
10 risk of hazardous metal emissions from Bullseye’s processes.

11 **1. *Opacity Issues Had No Relationship to HAPs Emissions***

12 Unable to show Bullseye’s knowledge of metal in its emissions, plaintiffs pursue a
13 different tactic. Plaintiffs claim that because Bullseye occasionally had problems with the
14 opacity of its emission, it must have known it was emitting HAPs. But opacity is not a product of
15 melting metals. In any event, Bullseye successfully resolved all such concerns decades ago. The
16 only concerns DEQ ever expressed regarding Bullseye’s emissions involved opacity. (Ex. D:
17 Durrin Aff. at ¶3). Between 1985 and 1987, Bullseye worked with DEQ to address those
18 concerns. (Ex. A: Schwoerer Aff. at ¶13).
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22 ¹⁰Cassandra Profita, *Portland Heavy Metals Emissions Linked to Glass Facility*, EarthFix (Feb. 4,
2016, <http://www.opb.org/news/article/portland-heavy-metals-emissions-linked-to-glass-facility/>).

23 ¹¹Bullseye does not concede that it ever emitted excess metals. Further discovery, investigation
24 and scientific study is needed to assess the validity and reliability of the testing on which plaintiffs and
25 the state rely. Moreover, additional discovery is needed to establish that the levels if accurate are
26 attributable to Bullseye. But even assuming for purposes of argument the elevated levels of metals are
attributable to Bullseye, the evidence shows that neither Bullseye nor the state had any awareness of
excess HAPs. As discussed in Section IV, below, for this reason alone, plaintiffs’ motion should be
denied.

1 Plaintiffs' claim that a March 14, 1986 letter Bullseye sent DEQ discussing opacity
2 shows Bullseye knew it was emitting HAPs. (Ex. A: Schwoerer Aff. at ¶14).¹² But an
3 acknowledgement that one is emitting "particulate matter" is not a recognition of HAPs
4 emissions. Rather, Bullseye explained that its opacity problem stemmed from the use of recycled
5 glass and borax. *Id.* Bullseye also stated that it could resolve the problem by (i) reformulating its
6 glass to reduce those raw materials, and (ii) using a mechanical screw charger (in lieu of hand-
7 shoveling) to introduce the raw materials into the furnace more slowly. *Id.* DEQ endorsed
8 Bullseye's proposal when it issued an Air Contaminant Discharge Permit (ACDP) on August 14,
9 1986 (which would expire in 1991) permitting the company to discharge up to a ton of
10 particulate matter annually, knowing full well that Bullseye was using arsenic, cadmium, and
11 selenium in its uncontrolled furnaces. (Ex. I: 1986 ACDP at 5; Ex. A: Schwoerer Aff. at ¶15).¹³
12 Taken together, the documents establish that Bullseye and DEQ were concerned not about HAPs
13 emissions but rather plume opacity.
14
15

16 Although Bullseye had worked diligently to implement the proposed production changes
17 and had succeeded in reducing opacity in one-third of its melts by reducing the borax
18 component, the company needed additional time to comply fully with the opacity limits. (Ex. J:
19 03/12/87 DEQ Interoffice Memo from R.H. Wixom; Ex. A: Schwoerer Aff. at ¶16). Bullseye
20

21 ¹²See Exhibit 20 to Plaintiffs' Memo: plaintiffs neglected to include the two-page attachment to
22 this letter. The complete document is attached as Exhibit V to the Menikoff Declaration.

23 ¹³Plaintiffs' reliance on a 2008 publication for the proposition that "[p]articulates are a significant
24 pollutant emitted by glass manufacturers" to suggest that Bullseye knew it emitted HAPs is misleading at
25 best. (See Memo at 5 at n. 8). The term "particulate" does not mean Hazardous Air Pollutants. Particulates
26 are pollutants regulated by the Clean Air Act irrespective of the nature of the particulate. A particulate can
include dust, ash, soot and smoke, each of which poses its own pollution concerns regardless of whether
they contain hazardous materials. So, while Bullseye's permits allowed it to emit tons of particulate
matter annually, neither DEQ nor Bullseye equated the term "particulate" with HAPs. (Ex. A: Schwoerer
Aff. at ¶9).

1 wrote to DEQ in March 1987 explaining again that the plume was “inherent in the process of
2 melting recycled glass fluxed with borax.” (Pls.’ Ex. 21 at 2). Importantly, Bullseye was upfront
3 with DEQ about the compliance delay and opened its facility to DEQ’s inspectors to discuss its
4 compliance efforts to date and the reasons it needed more time. (Ex. A: Schwoerer Aff. at ¶16;
5 Pls.’ Ex. 21 at 3-4). DEQ again endorsed Bullseye’s planned handling of the opacity problem
6 and issued an addendum to its discharge permit extending the compliance deadline by one year.
7 (Ex. K: Addendum to 1986 ACDP; Ex. A: Schwoerer Aff. at ¶16). Still, DEQ did not require
8 additional monitoring or emissions control. *Id.* Bullseye had spent a considerable sum of money
9 without regret working to improve its opacity technology. Mr. Schwoerer told DEQ inspectors,
10 “changing Bullseye’s processes had cost more than \$500,000, but that we were stronger for the
11 process.” (Ex. A: Schwoerer Aff. at ¶17).

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13
14 One year later, on March 1, 1988, DEQ inspectors returned to Bullseye to take opacity
15 readings. Bullseye had succeeded in meeting its stated objectives. DEQ reported that Bullseye’s
16 new furnaces kept a neutral pressure and as a result, “*operate cleaner because they will not*
17 *exhaust out* when being charged.” (Ex. L: 03/09/88 DEQ Interoffice Memo from R.H. Wixom at
18 2) (emphasis added). DEQ never mentioned HAPs during this meeting. Rather, in conclusion the
19 inspector concluded:

20
21 Bullseye Glass has achieved compliance through the method chosen by Daniel
22 (reformulation rather than control equipment). They are now melting 7000
23 lbs of material per day, 50 weeks per year. Their daily waste consists of
24 around 3000 lbs per day which is hauled to landfill by AWS Garbage Service.

25 *Id.* DEQ was satisfied that Bullseye’s batch melts met the necessary emissions standards and
26 thus Bullseye had no reason to believe that its particulate emissions posed a risk to the health and
welfare of the community. (Ex. A: Schwoerer Aff. at ¶18).

1 In summary, throughout the years, DEQ permitted Bullseye to emit tons of particulate
2 matter from its uncontrolled furnaces. (Ex. D: Durrin Aff. at ¶2). DEQ *never* required Bullseye
3 to measure its actual emissions *nor* did it ever request source testing of its emissions. *Id.* Rather,
4 DEQ calculated Bullseye’s permitted particulate emissions based on the amount of glass
5 produced. Importantly, Bullseye never came close to reaching the limits of its permitted
6 emissions. In fact, as shown in plaintiffs’ Exhibit 15, between 2007 and 2015, this formula
7 applied to Bullseye’s production, establishes that Bullseye routinely emitted *only about 16% of*
8 *its permitted amount.* (Pls.’ Ex. 15: Annual DEQ Reports for Bullseye Permits; Ex. D: Durrin
9 Aff. at ¶3).

11 **2. Bullseye Modernized Production Processes and Reduced Greenhouse Gas**
12 **Emissions**

13 Plaintiffs are simply wrong to suggest that Bullseye has done nothing to upgrade its
14 production processes. They also falsely suggest that Bullseye has been emitting the same plumes
15 for the past 30 years. (Memo at 5). In truth, the company has made significant and meaningful
16 improvements in its production process. (Ex. A: Schwoerer Aff. at ¶¶19-20). The manufacturing
17 changes in the mid- to late-eighties taught Bullseye how to control its visible emissions. *Id.* at
18 ¶19. Also, over the years Bullseye expanded its facility, added and rebuilt numerous furnaces,
19 and upgraded its materials-handling. *Id.* And throughout this time as Bullseye owner, Mr.
20 Schwoerer, attests, “[e]nvironmental and health concerns have always played a part in
21 [Bullseye’s] decision-making.” *Id.* A most notable example is Bullseye’s move in 2005 from an
22 ambient air furnace system to a liquid oxygen system. *Id.* at ¶20. As a result, Bullseye has
23 produce a cleaner fuel, which has led to an even greater reduction in visible emissions. *Id.* More
24 significantly, as DEQ has acknowledged, this change dramatically reduced Bullseye’s
25
26

1 greenhouse gas emissions: installation of this system reduced nitrous oxide emissions by forty
2 percent. (Ex. G: 2011 ACDP Review Report at 3).

3 Significantly, it was Bullseye's move to a liquid oxygen system furnace that led Mr.
4 Schwoerer to purchase two used baghouses. Contrary to plaintiffs' claim this purchase had
5 *nothing* to do with HAPs. Rather it arose out of a concern that the conversion to the liquid
6 oxygen system would produce visible water-vapor emissions that could potentially violate
7 Bullseye's opacity limits. (Ex. A: Schwoerer Aff. at ¶26). Mr. Schwoerer was thinking
8 preemptively about a means to control a water-vapor plume. *Id.* He purchased the used, stainless
9 steel baghouses online for \$1000 with the thought they might be useful should Bullseye
10 encounter further opacity problems. *Id.* Because the problem did not materialize, Bullseye did
11 not need the baghouses. *Id.*

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14 **3. *Four Complaints to DEQ Do Not Establish that Bullseye Knew of HAPs Emissions
or Acted Recklessly***

15 Plaintiffs further attempt to cast Bullseye as an unrepentant polluter by citing to four
16 complaints DEQ received over a sixteen-year period, three of which were unsubstantiated.
17 Bullseye resolved all four to DEQ's satisfaction. When these complaints are presented in full
18 context, it is evident that plaintiffs unfairly castigate Bullseye based on incomplete information.

19 (1) *Fine glass fiber complaint.* Plaintiffs first cite an October 15, 1987 neighbor's
20 complaint about glass fiber falling around her house. (Memo at 5). But there was simply no merit
21 to this complaint. Plaintiffs ignore that the DEQ inspector found no glass. As recorded in the
22 report following Bullseye's 1992 permit review, the complaint was unsubstantiated:
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1 An onsite observation did not substantiate the complaint. An inspection done
2 on March 1, 1988 found the facility to be in compliance with permit
3 conditions. The facility obtained compliance with opacity limits by
reformulating the glass compositions to reduce emissions.

4 (Ex. M: 1992 Air Contaminant Discharge Permit Application Review Report at 2 ¶9).

5 (2) “Hot ash” discharge complaint. A neighbor complained in 2000 that Bullseye was
6 discharging “hot ash.” This was the only complaint about Bullseye from 1999 through 2004. (Ex.
7 D: Durrin Aff. at ¶5). When DEQ commented on the “hot ash” complaint during the 2004 permit
8 renewal process, DEQ wrote that it was unlikely there had been any such discharge. Because, as
9 DEQ explained, “[w]ater is added to the mixed dry ingredients as a moistening agent prior to
10 firing in the furnace.” (Ex. F: 2004 ACDP Review Report at 3 ¶9). Even though there had been
11 no unusual stack discharge or emission, Bullseye acknowledged that it was possible that
12 particulate matter could accumulate on the roof. (Pls.’ Ex. 26). To address this concern, Bullseye
13 voluntarily constructed a baghouse to collect dust from the air in its batch room—the room
14 where raw materials, including HAPs, are stored and mixed. (Ex. D: Durrin Aff. at ¶5).

15
16 (3) “Blue-grey” smoke. DEQ reported in 2007 that it had received a complaint from the
17 neighboring cement company about a “constant flow of ‘blue-grey’ smoke” with fifteen to fifty
18 percent opacity. (Pls.’ Ex. 15). Importantly, DEQ investigated the matter and concluded the
19 “complaint could not be verified.” (Ex. T: 09/13/07 handwritten notes, attached to DEQ
20 Pollution Complaint Intake Form). Furthermore, DEQ did not consider this incident worth
21 mentioning in its Review Report prepared in connection with Bullseye’s 2011 permit
22 application. (Ex. D: Durrin Aff. at ¶6).

23
24 (4) Powdered glass collection on rooftop. Lastly, Bullseye received a complaint in 2013
25 that powdered glass was collecting on its roof. *Id.* at ¶7. This situation, however, had nothing to
26

1 do with emissions from Bullseye’s furnaces, nor did it have anything to do with HAPs. *Id.*
2 Rather, it involved Bullseye’s ventilation system, which had apparently been drawing glass dust
3 from around a glass crushing machine onto the roof. *Id.* Bullseye corrected the problem by
4 connecting its glass crushing equipment to the baghouse Bullseye it had previously installed in
5 the batch room. Since then, the crushing equipment has remained attached to baghouse. *Id.*
6

7 **4. Bullseye’s Stack Cleaning Is Not Evidence of Knowledge of HAPs Emissions**

8 Plaintiffs claim that because Bullseye cleans material out of its furnace stacks, it must
9 have known it had metal emissions. Plaintiffs describe the stack materials as a “buildup of
10 ‘heavy metal’ particulate matter.” (Memo at 5). Bullseye disputes this characterization, and
11 never believed the stack buildup contained metals. Instead, Bullseye believed that

12 melting glass causes volatilization of certain parts of the batch mix, such
13 as sodium and borax. Those materials would flow from the furnace into
14 the stacks. Depending on the moisture content of those materials, and
15 outside factors such as the dew point, the volatilized sodium and boron
can condense into a powdery white particulate, and collect in the stacks.

16 (Ex. A: Schworer Aff. at ¶22). And indeed, a test of the material many years ago confirmed the
17 material was made up of sodium borate. *Id.* While the 2005 move to a pure oxygen furnace
18 increased buildup of material, that is explained by factors unrelated to HAPs, namely the quicker
19 condensation of the particulate. *Id.* at ¶ 23.

20 **5. Bullseye Was Not Reckless with Its Waste Management**

21 Bullseye’s waste management has no bearing on plaintiffs’ trespass or nuisance claims.
22 Plaintiffs nevertheless contend that Bullseye has handled its waste carelessly so as to suggest that
23 its waste management is a sign of its overall bad character. In truth, plaintiffs misunderstand
24

25 //

26

1 Bullseye’s waste disposal process. But because they assume the worst of Bullseye, any misstep is
2 evidence of a callous disregard for the environment and the community. Plaintiffs are wrong.

3 Of course, Bullseye’s glass manufacturing generates waste during various stages of
4 production: the batch room baghouse generates raw material dust, there is glass and other residue
5 that is cleaned out of furnaces, and flawed glass becomes waste. (Ex. A: Schwoerer Aff. at ¶27).
6 Historically, all of this waste was treated in the same manner. *Id.* Bullseye put the waste material
7 in the furnace to glassify it. *Id.* When Bullseye could not use the glass, it was discarded. *Id.*
8 Bullseye, however, did not callously discard hazardous materials into the environment; Bullseye
9 disposed of colored glass. *Id.* DEQ was well aware (1) that Bullseye reintroduced waste
10 materials into the melting process,¹⁴ and (2) that Bullseye disposed of glass. (Ex. A: Schwoerer
11 Aff. at ¶27). Bullseye flatly disputes Patrick O’Neal’s characterization of the waste-melt process.
12 Mr. Schwoerer attests that Bullseye melted the waste material in the same way it handled all
13 batch melts: “All standard processes regarding temperature and damper settings were used.” *Id.*
14 Mr. O’Neal’s assertions to the contrary are simply false. *Id.*

17 **C. Bullseye Opposed an EPA Rule that Was Never Intended to Apply to Colored Art Glass**
18 **Manufacturers**

19 Plaintiffs’ argument that Bullseye sought to avoid reasonable pollution control by
20 objecting to a proposed federal rule regulating large scale glass manufacturers is not well taken
21 and misstates the facts. Bullseye did not lobby to change a rule that was intended to impose new

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23 //

24 //

26 ¹⁴See Exhibit G: 2011 ACDP Review Report at 4 ¶7(a).

1 standards on a company such as itself. In truth, DEQ alerted Bullseye that this proposed federal
2 rule was intended to regulate large glass manufacturers but could have the *unintended*
3 consequence of regulating the markedly different and notably smaller art glass industry.¹⁵
4

5 The Clean Air Act authorizes EPA to issue National Emission Standards for Hazardous
6 Air Pollutants or NESHAPS. Bullseye's 2004 DEQ permit said there were no NESHAPS
7 applicable to Bullseye. In addition, the permit said that EPA's Performance Standards for Glass
8 contained in 40 C.F.R. Part 60, Subpart CC were not applicable to Bullseye. (Ex. F: 2004 ACDP
9 Review Report at 4 ¶16).

10 In August 2007 a DEQ employee, Kathy Amidon, called Bullseye's Controller, Eric
11 Durrin, to inform him that EPA was proposing a NESHAP for glass manufacturers. She
12 explained that the proposed regulation was aimed at large float and container glass
13 manufacturers. She also stated that the rule writers may have been completely unaware of the
14 colored art glass industry and may have inadvertently drafted a rule that could apply to Bullseye.
15 (Ex. N: Durrin Dep. at 50-51).¹⁶ Ms. Amidon shared this information with Bullseye around the
16 same time that she and Mr. Durrin had been discussing the "blue smoke" complaint. (Ex. D:
17 Durrin Aff. at ¶9). The following month Ms. Amidon forwarded an EPA Fact Sheet about the
18 proposed NESHAP and said Bullseye had 30 days to comment. (Ex. O: 09/25/07 Email from K.
19 Amidon to E. Durrin). Significantly, the Fact Sheet stated the rule "would affect approximately
20 21 existing glass manufacturing facilities." (Ex. P: EPA Fact Sheet at 2). EPA also noted that
21
22
23

24 ¹⁵The history of this proposed rule change as it relates to Bullseye and the colored art glass
25 industry is discussed in greater detail in the affidavit of Bullseye's Controller, Eric Durrin, at paragraphs 8
26 through 19, attached as Exhibit D.

¹⁶Although Plaintiffs attach an excerpt of Mr. Durrin's testimony, at Exhibit 3, they neglected to
include his testimony that it was DEQ who alerted Bullseye about the proposed NESHAP.

1 “[n]o small businesses are impacted by the proposed rule.” *Id.*¹⁷ Further, EPA pointedly stated
2 that the proposed rule would apply to Title V glass manufacturers “because they are “major
3 sources of particulate matter, nitrogen oxides, or both.” (*Id.*; Ex. D: Durrin Aff. at ¶11). Thus, by
4 all appearances, Bullseye was correct to conclude the proposed rule was not intended to apply to
5 small colored art glass manufacturers, such as itself. Indeed, Bullseye was not a “major source”
6 because it emitted just a small fraction of the particulate matter or HAPs needed to qualify.¹⁸
7

8 DEQ suggested that Bullseye contact EPA to obtain clarification on the proposed
9 NESHAP applicability. Mr. Durrin did just that. He soon discovered Ms. Amidon had been
10 correct: EPA had no knowledge or awareness of the small art glass industry. EPA told Mr.
11 Durrin the agency had drafted the rule based on a study of large float and container glass
12 manufacturers who produce thousands of times more glass than Bullseye. (Ex. D: Durrin Aff. at
13 ¶12). On behalf of Bullseye, Mr. Durrin, then did what any reasonable corporate citizen would
14 do: he followed the necessary protocol to ensure that a rule intended only for the large glass
15 industry did not inadvertently sweep up in its wake the small businesses it meant to exclude.
16 Accordingly, Mr. Durrin submitted formal comments to EPA as required. He pointed out the
17 differences between the large float glass manufacturing processes and the small art glass
18 industry. Specifically, he noted that large glass manufacturers use “continuous furnaces,” which
19 by definition operate twenty-four hours per day and are constantly fed raw material and produce
20
21

22 ¹⁷Mr. Durrin wrote back to Ms. Amidon pointing out his observations from the EPA Fact Sheet
23 namely, that it affected only twenty-on glass manufacturers and that it would not impact small businesses.
24 (Ex. S: 09/25/07 Email from E. Durrin to K. Amidon).

25 ¹⁸DEQ had long determined that Bullseye did not qualify for “major source” designation: “A
26 major source is a facility that has the potential to emit 100 tons/yr or more per year of any criteria
pollutant.” (Ex. G: 2011 ACDP Review Report at 5 ¶12). Further, DEQ found that if all of Bullseye’s
material were released as particulate matter, it would not have the potential to emit HAP at the major
source threshold. *Id.*

1 a constant flow of glass. (Ex. D: Durrin Aff. at ¶13). Large glass producers like Corning use
2 these furnaces, which have the capacity to produce several thousand times more glass than
3 Bullseye. (Ex. A: Schwoerer Aff. at ¶28). In contrast, Bullseye (and other art glass
4 manufacturers) operate much smaller “periodic furnaces,” which produce a single, small batch of
5 glass at a time and are often inactive or idle. (Ex. D: Durrin Aff. at 15; Ex. Q: 10/09/07 Letter
6 from E. Durrin to R. Morales at BE00016206-07). Mr. Schwoerer aptly sums up the difference
7 between a continuous and periodic furnace this way:

9 Comparing the emissions from one of Bullseye’s furnaces to a continuous
10 furnace is like comparing a lawn mower to a diesel locomotive. When EPA
11 created rules for large glass manufacturers, it made no sense to apply them to
12 our much smaller operation, even though both processes might emit similar
13 particulate matter. When you start a lawnmower, you may get a burst of
14 exhaust. But it is nothing compared to what a diesel engine produces as it
15 runs continuously for days.

16 (Ex. A: Schwoerer Aff. at ¶29). Mr. Durrin suggested to EPA that the rule could be revised to
17 exclude “periodic” furnaces like Bullseye’s.¹⁹ Apparently, EPA agreed with this approach.

18 On January 2, 2008, DEQ notified Bullseye that EPA exempted “pot furnaces and
19 periodic furnaces” from the NESHAP. (Ex. D: Durrin Aff. at ¶18; Ex. W: 01/02/08 Email from
20 E. Durrin to K. Amidon). And DEQ for its part agreed that the new NESHAP did not apply to
21 Bullseye. When DEQ renewed Bullseye’s permit, it concluded that “40 C.F.R. 63, Subpart
22 SSSSSS, NESHAP for Glass Manufacturing Area Sources, is not applicable to [Bullseye]

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24 //

25 ¹⁹Plaintiffs’ Exhibit 30 misquotes Mr. Schwoerer on the subject of periodic and continuous
26 furnaces. As he clarifies in his affidavit, a continuous furnace is constantly charged with raw materials
and thus will produce a continuous emission of greater volume than a periodic furnace. (Ex. A: Schwoerer
Aff. at ¶30). Further, Mr. Schwoerer was not at any time referring to HAP emissions. *Id.*

1 because the regulation applies only to continuous furnaces. Bullseye operates only periodic
2 furnaces.” (Ex. G: 2011 ADCP Review Report at ¶15).²⁰

3 **D. Knowledge that Heavy Metals Are a Hazardous Material Does Not Establish**
4 **Knowledge of HAPs Emissions**

5 Plaintiffs’ contention that the care and regard Bullseye shows for its employees is
6 evidence that it knew of harmful HAPs emissions is a red herring. Here plaintiffs create false
7 equivalence between the conditions and air within Bullseye’s facility and its post-production
8 emissions. The working conditions within Bullseye say nothing about what was or is being
9 emitted.
10

11 It goes without saying that Bullseye takes its responsibility for worker safety very
12 seriously. (Ex. D: Durrin Aff. at ¶¶20-24). The company takes great care to ensure that OSHA
13 requirements are met because the company is aware that its employees come in direct contact
14 with hazardous materials. But it does not follow that because employees handle hazardous
15 materials that Bullseye has knowledge of HAPs emissions. These employees are obliged to wear
16 protective gear because they risk exposure to high concentrations of hazardous metals that would
17 never occur outside the facility. For example, batch room employees scoop powdered metal
18 compounds out of containers and into a batch mixer. (Ex. D: Durrin Aff. at ¶22). The dust from
19 this work could be harmful.
20

21
22 ²⁰Plaintiffs’ rely on a purported statement by Spectrum glass that continuous furnaces produce
23 fewer emissions than periodic furnaces. (Memo at 9-10). Bullseye knows nothing about the details of the
24 specific furnace Spectrum referred to. (Ex. D: Durrin Aff. at ¶17). Even if Spectrum’s comment
25 accurately characterizes its own furnaces, plaintiffs’ reliance on this unverified assertion misses the larger
26 point, which is that (i) colored art glass manufacturers (including Spectrum) produce an exceptionally
small volume of glass (and hence a proportionately smaller amount of particulate matter) when compared
to the large float and container glass companies, and (ii) EPA ultimately modified the rule to exclude
periodic furnaces, to exempt colored art glass manufacturers from the NESHAP.

1 But Bullseye’s concern about possible hazardous air quality within the facility has
2 nothing to do with its emissions or its knowledge of air quality outside the facility. In fact, the
3 permissible OSHA exposure limits are *thousands of times higher* than both Oregon’s Ambient
4 Air Benchmarks and the average air concentration monitored near Bullseye in October 2015. *Id.*
5 at ¶23. Stated differently, and as detailed in Mr. Durrin’s affidavit, Bullseye is not required to
6 provide protective gear unless an employee is exposed to air concentrations that are roughly
7 *10,000 times higher* than the concentrations reported by DEQ’s October 2015 air monitoring. *Id.*
8 at ¶24. There is nothing about this that would have suggested to Bullseye that metals were being
9 emitted, let alone in harmful concentrations.
10

11 For plaintiffs to claim that Bullseye cares only for its employees and nothing for the
12 health and welfare of its neighbors and community is a non-sequitur. It is also demonstrably
13 false. Bullseye, its owners, and its employees, have always considered themselves part of the
14 Southeast Portland community. (Ex. A: Schwoerer Aff. at ¶10). For six years Mr. Schwoerer
15 lived just ten feet from the facility, in a dwelling later removed during the expansion of
16 Bullseye’s plant. *Id.* Moreover, many of Bullseye’s neighbors are Bullseye employees. *Id.* This
17 includes Sam Andreakos, Bullseye’s glass chemist (who knows as well as anyone the raw
18 materials going into its glass) and who has lived within a third of a mile from Bullseye for over
19 30 years. *Id.* To bring this point home, at least thirty-three current and former employees live or
20 have lived within the purported affected area. (*Id.* at ¶11; Ex. R: Map of current and past
21 residences of Bullseye employees). Mr. Schwoerer puts it simply: “The people at Bullseye have
22 always cared about the facility’s impact on the environment, because we live there, too.” (Ex. A:
23
24
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1 Schwoerer Aff. at ¶11). Bullseye also opens “[its] facility for lectures, demonstrations, glass-
2 making classes, and school groups, all to enrich the SE Portland community.” *Id.*

3 **E. Bullseye Responded to the Revelations by Swiftly, and at Great Expense, Building an**
4 **Exceptionally Clean Manufacturing Facility**

5 Plaintiffs’ most egregious attack on Bullseye is that it balked at taking responsibility for
6 its emissions. (Memo at 11-12). As plaintiffs well know, since February 2016, Bullseye has
7 gone to great lengths—and great expense—to construct what is now one of the cleanest
8 manufacturing facilities in Oregon. Bullseye has done everything DEQ has asked: it has installed
9 state-of-the-art emissions controls; it has done extensive testing and retesting to assure the
10 quality of its emissions; and for significant periods of time, it did not manufacture portions of its
11 catalogue to assure that harmful metals were not being emitted. Against this remarkable record,
12 plaintiffs offer only a few carefully edited comments made by Lani McGregor in unguarded
13 emails to colleagues. Of course, once again, they ignore the portion of her email that does not fit
14 into their characterization of Bullseye as the sinister polluter. Plaintiffs contend unfairly that it
15 reflects a disregard for the emissions problem when, in fact, Ms. McGregor says:
16
17

18 For now, we will/must put ALL our efforts – and funds – to building our
19 emissions control systems. We also have plans for certain reformulations
20 that may help us address the absence of certain colors in the palette.

21 That does NOT mean that we don’t also want to rebuild our relationship
22 with the neighborhood. To that end, I believe that all the efforts you are
23 making here will have huge benefits.

24 //

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1 **IV. LEGAL ARGUMENT**

2 There is only one conclusion to draw from DEQ’s thirty-year history of permit renewals:
3 neither DEQ nor Bullseye had reason to believe that the exceedingly small amount of HAPs used
4 in Bullseye’s glass-making processes emitted a harmful or dangerous level of pollutants. The
5 record presented here in full refutes the erroneous inferences plaintiffs have drawn to suggest
6 Bullseye knew differently. Bullseye has never been cavalier or reckless in the conduct of its
7 glass-making business. Because Bullseye had no knowledge of dangerous HAPs emissions and
8 because there is no evidence of harm, plaintiffs’ motion should be denied.

9
10 **A. Punitive Damages Are Improper Where the Defendant Has an Honest and Reasonable**
11 **Belief He Was Not Encroaching on the Rights of Others**

12 In Oregon, recovery of punitive damages, while “not ‘favored in the law,’” has been
13 sanctioned “whenever there was evidence of a wrongful act done **intentionally**, with **knowledge**
14 that it would cause harm to a particular person.” *McElwain v. Georgia-Pacific Corp.*, 245 Or.
15 247, 249 (Or. 1966) (emphasis added). The Oregon Supreme Court elaborated:

16 The intentional disregard of the interest of another is the equivalent
17 of legal malice, and justifies punitive damages for trespass. Where
18 there is proof of an intentional, unjustifiable infliction of harm with
19 deliberate disregard of the social consequences, the question of
award of punitive damages is for the jury.

20 *Id.* (internal citations omitted). In other words, to state a claim for punitive damages there must
21 be knowledge of the danger and an intent to disregard the same without justification.

22 It is improper to award punitive damages where defendant has an honest and reasonable
23 belief he was not encroaching on rights of others. *Williams v. Invenergy, LLC*, Case No.
24 13CV01391, 2016 WL 1725990, at *19 (D Or Apr. 28, 2016) (relying on *Senn v. Bunick*, 40 Or
25 App 33, 42 (1979)). Punitive damages “are a penalty for conduct that is culpable by reason of
26

1 motive, intent or extraordinary disregard of or indifference to known or highly probable risks to
2 others.” *Id.* at 517. “For punitive damages, some conscious disregard of or highly irresponsible
3 indifference to this human element in the decision on equipment is required.” *Id.* Conversely,
4 punitive damages not available where the defendant acted in good faith. *Senn v. Bunick*, 40 Or
5 App 33, 42 (1979). Put differently, “to justify punitive damages the conduct must go beyond
6 mere carelessness to a willful disregard of risk of harm to others of a magnitude evincing a high
7 degree of social irresponsibility.” *Schmidt v. Pine Tree Land Development Co.*, 291 Or. 462
8 (1981).

10 In *Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*, 500 F Supp 984 (D Or
11 1980), the United States District Court synthesized a number of the air pollution cases addressing
12 the question of punitive damages. The district court concluded

14 that punitive damage awards may be imposed for business
15 activities, harmful to others, carried out in disregard of the
16 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.

17 *Id.* at 988 (D Or 1980). Indeed, punitive damages are essentially a penalty for misconduct. The
18 Oregon Supreme Court, in *Andor by Affatigato*, 303 Or 505, 517 (1987), later explained it this
19 way:

21 Punitive damages, however, by definition are not part of a
22 plaintiff’s compensation for what she has lost; they are a penalty
23 for conduct that is culpable by reason of motive, intent, or
24 extraordinary disregard of or indifference to know or highly
probable risks to others. . . . For punitive damages, some conscious
disregard of or highly irresponsible indifference to this human
element in the decision [] is required.

25 *Id.* at 517. In summary, the all-important threshold question in all cases involving the question of
26

1 punitive damages is whether the defendant had knowledge that its conduct would cause harm and
2 acted with an intentional disregard for the rights of others.

3 Significantly, a close look at the facts of the cases cited by plaintiffs as well as other air
4 pollution cases illustrate that Bullseye’s case is unlike those in which the courts left open the
5 possibility for a punitive damages award. The present case differs from *McElwain v. Georgia-*
6 *Pacific Corp.*, insofar as that defendant operated with knowledge that it actually was spreading
7 harmful pollutants from its paper mill to neighboring lands. Hence, the appellate court reversed
8 the trial court’s withdrawal of the issue of punitive damage liability because the “defendant *knew*
9 when it decided to construct its kraft mill in Toledo, that there was danger, if not a probability,
10 that the mill would cause damage to the adjoining property.” *McElwain*, 245 Or at 250 (emphasis
11 added).²¹ Further, in *McElwain*, “[t]he record [was] equally clear that, almost from the day it
12 began to operate, the effluents from defendant’s mill were a source of concern to the State Board
13 of Health, and its successor, the State Sanitary Authority, and to the owners of the adjacent
14 property.” *Id.* Moreover, even though the defendant was in the process of installing pollution
15 control devices, the defendant *knew* there were considerable quantities of escaping particulate
16 matter since the mill started up. *Id.* at 253. It is also worth noting, the defendant did not dispute
17 that its “noxious and toxic gases, fumes and smoke and particles” had deposited on plaintiffs’
18 property and killed trees and vegetation. *Id.* at 248. Rather, the defendant paper mill argued that
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23 ²¹Plaintiffs’ reliance on *McElwain* misses the point. Bullseye does not make the argument
24 plaintiffs anticipated: Bullseye does not suggest that the company worked to mitigate a *known* harm.
25 (Memo at 19). Rather, stated again, Bullseye had no knowledge of potentially hazardous emissions until
26 February 2016. Nor did it have reason to believe (given the wealth of communications with DEQ) that its
production operations might cause damage to neighboring properties. Importantly, however, further
discovery and investigation is needed before it can be shown with any scientific certainty that Bullseye is
the sole source or even a source of the elevated levels of metals reported in February 2016.

1 it had tried to mitigate and alleviate the harm it was causing through pollution control devices.
2 *Id.* at 251. On these facts, the court remanded the case for a new trial because the defendant *knew*
3 the mill would cause damage and the evidence showed there was actual damage to neighboring
4 properties from the effluent fallout.

5
6 Similarly, in *Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*, the district
7 court faulted defendant for failing to ascertain whether its emissions were harmful where there
8 was an abundance of evidence that its production plant had for many years been damaging the
9 neighboring peach and cherry orchards. Further, defendant itself knew that its plant fluoride
10 emissions could be harmful to vegetation. The defendant “company had maintained its own
11 orchard in the vicinity. . . as a means of monitoring the effects of the plant’s emissions upon fruit
12 crops.” *Orchard View Farms*, 500 F Supp at 990. Hence, when neighboring orchardists
13 complained to the company in writing that “the plant’s emissions were causing ‘severe damage
14 to the fruit set, fruit, and foliage of our cherry trees,’” *id.* at 992, and later provided concrete
15 evidence of a pattern of reduced crop production and other damage, the company was fully
16 aware that its operations were likely damaging the neighboring crops. The evidence showed that
17 for many years, the company was “repeatedly alerted to possibility of harm by the orchardists,
18 the county extension agents, the federal fruit inspectors and the MCAES researchers.” *Id.* at 999.
19 In the court’s evaluation, the wealth of scientific evidence, “combined with frequent complaints
20 of the orchardists, render[ed] disingenuous [the company’s] claim to a well-founded and sincere
21 belief that the plant’s emissions never damaged cherry crops in the Dalles.” *Id.* at 1000. Under
22 these circumstances, the court concluded the company failed to exercise proper diligence to
23 ascertain the impact of its emissions and failed to fulfill its societal obligation to control harmful
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1 emissions. *Id.* at 1022. Thus, for those claim years (before the company changed its attitude
2 about air monitoring and pollution controls), the court determined punitive damages should be
3 awarded. *Id.* at 1025.²²

4 Plaintiffs cite to *Williams v. Invenenergy, LLC*, No. 2:13-CV-01391-AC, 2016 WL 1725990
5 (D Or Apr 28, 2016), for the proposition that efforts to mitigate harm does not inoculate the
6 defendant from possible punitive damages. Again, the issue here is not mitigation of harm but a
7 lack of knowledge. Nonetheless, *Williams*, a recent nuisance case, supports Bullseye’s position
8 that punitive damages are inappropriate here. In *Williams*, plaintiff filed a complaint against a
9 wind farm operator for common law trespass and nuisance. The court observed that in nuisance
10 actions, punitive damages are recoverable where the defendant “acted with an ‘aggravated
11 disregard of the rights of others and where the violation of societal interests is sufficiently great
12 and of a kind that sanctions would tend to prevent.” *Id.* at *19. Conversely, the court pointed out:

15 Obviously, awarding punitive damages against a defendant who
16 took pains to avoid encroachment [on the plaintiffs’ rights], and
17 who honestly and reasonably believed he was not encroaching [on
those rights], would not promote societal interests by deterring
others in the future.

18 *Id.* (quoting *Senn v. Bunick*, 40 Or App 33, 42 (1979)).

19 Just as in the cases discussed above, the defendants in *Williams* knew that noise and
20 vibrations from the wind farm were creating a nuisance for the neighbors. Plaintiff also
21 introduced evidence that defendants had (i) engaged in deception when discussing noise limits
22

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24 _____
25 ²²“Midway through the 1965-71 claim period a change occurred in both the attitude of the
26 company and its efforts to carry out pollution control measures so as to behave like a good neighbor.”
Orchard View Farms v. Martin Marietta Aluminum, Inc., 500 F Supp 984, 1024 (D Or 1980). For this
reason, the court would not award punitive damages for the claims years 1969 through 1971. *Id.*

1 with concerned neighbors; (ii) continued operations during this period; (iii) misrepresented the
2 applicable noise standards to encourage them to drop complaints; and (iv) employed
3 manipulative and deceptive testing methods. *Id.* at *20. Hence, plaintiff Williams had presented
4 ample evidence from which a jury could conclude that defendants “maliciously and recklessly
5 interfered with [his] right to enjoy his property.” *Id. Accord Lampert v. Reynolds Metals Co.*, 372
6 F2d 245 (9th Cir 1967) (applying *McElwain* and reversing trial court holding that punitive
7 damages were impermissible where defendant had known for years that fluorides were settling
8 on plaintiff’s land with resultant damages to plaintiff’s crops.)

10 **B. A Punitive Damage Claim Is Improper Because Bullseye Had No Knowledge of**
11 **Encroachment**

12 As the cases above demonstrate, the threshold question is whether Bullseye had
13 knowledge of harmful emissions. The record Bullseye presents shows it did not. Rather, Bullseye
14 had an honest, good faith belief that it was not emitting harmful metals and therefor did not—and
15 could not—act intentionally or “in disregard of [its] societal obligations.” *Orchard View Farms,*
16 *Inc.*, 500 F Supp at 988. For this reason alone, plaintiffs’ motion should be denied.

18 Neither Bullseye (nor DEQ) had reason to be concerned about hazardous pollutants; they
19 simply did not know. As Mr. Schwoerer explained, Bullseye reasonably believed that the
20 relatively small amount of heavy metals used in its production were “glassified” and not being
21 emitted into the air.²³ DEQ, for its part, was likewise was unconcerned about any metals
22 Bullseye might emit, and thus repeatedly renewed Bullseye’s discharge permits, writing:
23 “Assuming that all of the material was released as PM [particulate matter], the facility would not
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²³See page 6, above. See generally Section III(A) and (B).

1 have the potential to emit single or combined HAP *at levels of concern.*” (Ex. F: 2004 ACDP
2 Review Report at 5 ¶15) (emphasis added). DEQ’s air toxics specialist again stated as much in
3 February 2016.²⁴ Indeed, not until DEQ received air monitoring results in early 2016, did it
4 perceive any potential harmful emissions arising from Bullseye’s manufacturing processes even
5 though DEQ knew full well the raw materials Bullseye used as well as the manufacturing
6 processes it employed.²⁵ Hence, Bullseye cannot be said to have “maliciously and recklessly
7 interfered with plaintiffs’ use and enjoyment of their properties.”
8

9 **C. A Punitive Damage Claim Is Improper Because Plaintiffs Offer No Evidence of Harm**

10 Equally important, unlike the cases cited above, plaintiffs offer no evidence of damage to
11 their properties. Plaintiffs simply allege in their Complaint without any verification that
12 “Bullseye’s pollutants landed on Plaintiffs’ trees, moss, soil, plants, houses and other objects on
13 their property.” (Second Amended Complaint at ¶22). From this unsubstantiated allegation,
14 plaintiffs then allege as damages a diminution in property values. (*See, e.g.*, Second Amended
15 Complaint at ¶37). But plaintiffs offer no evidence supporting the allegation that Bullseye
16 deposited particulate matter on their property nor do they offer evidence that their property
17 values have in fact decreased (much less as a result of their proximity to Bullseye.)
18

19 Even assuming the allegations could be taken as evidence—which they cannot—their
20 claims of depressed or declining property values are at best dubious. In fact, year over year (from
21 2016 to 2017) median home sale price in the zip code (97202) where Bullseye is located have
22 increased 5.85 percent. Consider that this increase in median sale price stands in contrast to some
23
24

25 ²⁴See page 9, above

26 ²⁵See pages 7-9, above.

1 inner Southwest Portland neighborhoods (97122 and 97219) where home sale prices have
2 actually decreased.²⁶ Further, the average median home sale price in Bullseye’s neighborhood is
3 \$547,000; the median metro-wide is \$375,157.²⁷ Given the commonly-known fact that housing
4 sale prices have increased year over year in the affected area, the allegation that plaintiffs’
5 properties have lost value is not borne out.
6

7 Plaintiffs also claim to fear there are toxins in their body for which they seek damages to
8 compensate for testing. *Id.* at ¶51. Again, these are mere allegations in plaintiffs’ Second
9 Amended Complaint; plaintiffs offer no evidence of actual damage or injury stemming from
10 Bullseye’s alleged wrongful conduct. Putting aside the question of whether Bullseye is the likely
11 source of any toxins that *might* be found in plaintiffs’ bodies, a *fear* of harm is by definition
12 speculative.²⁸ A fear of some injury is not—and cannot be—the equivalent of actual harm. In
13 contrast, in *Williams v. Invenergy, LLC*, 2016 WL 1725990, at *1, the plaintiff introduced
14 evidence of actual physical harm linked to the noise and vibrations of the wind turbines. *Id.* at
15 *1. And indeed, his health problems were serious enough that he was forced to move out of his
16 home to escape the noise. *Id.*
17

18 //
19 //
20 //
21

22 ²⁶The interactive site *Portland real estate snapshot* generates this information using data from the
23 Regional Multiple Listing Service, which tracks real estate listings and sales in the Portland area.
<http://projects.oregonlive.com/housing/home-sales>.

24 ²⁷*Id.*

25 ²⁸As will be shown later, during class certification litigation, toxins (including heavy metal
26 toxins) are a naturally occurring features of our environment. Further, in any urban environment, there are
numerous sources of HAPs: diesel vehicles, train yards, wood burning fireplaces, lead pipes, other
manufacturing facilities.

1 **D. Plaintiffs Would Not Survive a Motion for Directed Verdict Because They Offered No**
2 **Evidence of Harm or an Intent to Emit Hazardous Materials in Disregard of Others**
3 **Rights**

4 Because plaintiffs fail to present evidence necessary to establish a claim for punitive
5 damages, their motion to amend the pleading should be denied. This is not a matter of plaintiffs
6 offering sufficient evidence to defeat a motion for directed verdict. *See Bolt v. Influence, Inc.*,
7 333 Or 572 (2002). This is a matter of plaintiffs failing to provide evidence essential to show that
8 Bullseye knew it was emitting hazardous materials. In contrast, Bullseye, for its part, has
9 submitted admissible evidence establishing that *it did not* conduct its business activities in a
10 manner *knowingly* and *intentionally* harmful to others, in “disregard of the corporation’s societal
11 obligations.” *See Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*, 500 F Supp 984,
12 988 (D Or 1980).

13
14 Firstly, plaintiffs have failed to offer evidence that Bullseye had knowledge of harmful
15 emissions. Rather, plaintiffs connect two facts (i) the use of heavy metals in colored art glass
16 manufacturing, and (ii) recent air monitoring showing elevated levels of metals in the air and
17 *infer erroneously* that Bullseye knew it was releasing a harmful level of pollutants. As
18 previously stated, this is not a case where anyone complained to Bullseye about HAPs. And, as
19 explained above, the opacity concerns had nothing to do with HAPs. Bullseye worked
20 assiduously to resolve the opacity problem as well as the other two complaints of fugitive
21 emissions (e.g., roof particulate or dust), as soon as practicable once the issues were brought to
22 Bullseye’s attention.²⁹ Bullseye has in these ways always “behaved like a good neighbor.”
23
24 Again, this is a case different from *McElwain* and *Orchard View Farms*, wherein the defendants
25

26 ²⁹See Section III(B)(1) and (3), above.

1 had knowledge that its effluents were encroaching on their neighbors’ property and likely
2 causing damage. *See Andor by Affatigato*, 303 Or at 514 (pointing out the difference for punitive
3 damages purposes when a defendant “operated *with knowledge* that it actually was spreading
4 harmful pollutants form its paper mill to neighboring lands” and citing to *McElwain*) (emphasis
5 added).
6

7 Even assuming that further discovery, investigation and scientific study establishes that
8 Bullseye was a material source of the elevated levels of metals, as is alleged, at most one might
9 argue that Bullseye misunderstood or miscalculated the nature of its glass-making processes. But
10 these mistakes, if true, would evidence nothing more than an error in judgment or perhaps
11 negligence. Neither of those provide an actionable claim for punitive damages. As, the Oregon
12 Supreme Court aptly stated: “Misjudgment and negligence do not rise to the point of punitive
13 damages by prefixing a quantifier like ‘gross.’” *Andor by Affatigato v. United Air Lines, Inc.*,
14 303 Or 505, 515 (1987).
15

16 Secondly, plaintiffs fail to state a claim for punitive damage because there is no evidence
17 in the record of trespass or resulting harm. Plaintiffs assume a trespass by presupposing that
18 Bullseye is the source the pollutants. This fact has yet to be litigated, much less proved. Further,
19 as shown above, to the extent plaintiffs’ “evidence” of injury is simply based on the allegations
20 in their Second Amended Complaint, their claim fails. It goes without saying that allegations in a
21 complaint are just that—allegations—they are not evidence.³⁰
22

23 //

24 _____
25 ³⁰Should plaintiffs endeavor to remedy this fatal flaw by submitting evidence (by way of
26 document or affidavit), this court should strike that evidence since Bullseye would have had no
opportunity to respond to the new information. Alternatively, Bullseye should be permitted to submit a
surreply to answer the new evidence.

1 In conclusion, plaintiffs offer no “proof of an intentional, unjustifiable infliction of harm
2 with deliberate disregard of the social consequences” of its actions. *See McElwain v. Georgia-*
3 *Pacific Corp.*, 245 Or. 247, 249 (Or. 1966). Accordingly, their motion should be denied.

4 **V. DEFENDANT BULLSEYE’S MOTION FOR CONTINUANCE**

5 If the Court is not inclined to deny plaintiffs’ motion, defendant Bullseye hereby moves,
6 in the alternative, for a continuance on plaintiffs’ motion to amend the pleading. The Court
7 should exercise its discretion under ORS 31.725 to continue the motion for two reasons: First, a
8 continuance is necessary to allow Bullseye to conduct discovery needed to ensure that it has had
9 a full and fair opportunity to oppose the motion. And second, plaintiffs’ motion is premature
10 since class certification litigation will address issues that go the heart of whether plaintiffs even
11 have a viable class action case against Bullseye.
12

13 **A. The Court Should Grant a Continuance to Allow Bullseye to Conduct Discovery**
14 **Necessary to Oppose the Motion**

15 The Court should continue ruling on plaintiffs’ motion to amend to allow Bullseye an
16 opportunity to conduct the discovery necessary to oppose the motion. ORS 31.725(4) specifically
17 allows a court to grant a continuance to permit a party opposing the motion “to conduct such
18 discovery as is necessary to establish one of the grounds for denial of the motion specified in
19 subsection (3) of this section.” ORS 31.725(4).³¹
20

21
22 ³¹ORS 31.725(3) directs a court to deny a motion to amend if:

- 23 (a) the court determines that the affidavits and supporting documentation
24 submitted by the party seeking punitive damages fail to set forth the specific fact
25 supported by admissible evidence adequate to avoid the granting of a motion for a
26 directed verdict to the party opposing the motion on the issue of punitive damages
in a trial on the matter; or
(b) The party opposing the motion establishes that the timing of the motion to
amend prejudices the party’s ability to defend against the claim for punitive
damages.

1 Bullseye needs the opportunity to conduct discovery and obtain evidence to defeat the
2 motion by showing (a) that plaintiffs fail to offer specific facts adequate to avoid the granting of
3 a motion for directed verdict; and (b) to show that the motion is premature and prejudices
4 Bullseye's ability to defend against the claim. Further discovery, investigation and scientific
5 study is needed specifically to rebut plaintiffs' claims that Bullseye was a material source (if a
6 source at all) of the elevated levels of metals and was the entity responsible for the alleged harm.
7 Notably, these issues go to the heart of the ultimate question plaintiffs' motion raises: Did
8 Bullseye "conduct its business activities in a manner knowingly and intentionally harmful to
9 others, in "disregard of the corporation's societal obligations." *Orchard View Farms, Inc. v.*
10 *Martin Marietta Aluminum, Inc.*, 500 F Supp 984, 988 (D Or 1980).
11

12 Additionally, insofar as plaintiffs' claim is predicated on the alleged diminution in the
13 value of their property, discovery is needed on this count. Bullseye should have an opportunity to
14 establish that plaintiffs' property values have not been impacted by their proximity to Bullseye.
15

16 Bullseye needs discovery to address all these issues and defeat plaintiffs' motion.

17 **B. Plaintiffs' Motion to Amend is Premature Because the Issue of Class Certification Has**
18 **Yet to Be Litigated**

19 Bullseye disputes that its facility is the source (much less the sole source) of the heavy
20 metals DEQ only recently measured in the affected area. Further, Bullseye does not concede that
21 its facility, even if a source of hazardous metals, has damaged plaintiffs' properties. The case for
22 damages has yet to be made and perhaps will only be made if and when class certification is
23 granted. At a minimum, the salient issues that are at the core of liability for trespass, nuisance
24
25
26

1 and negligence will be flushed out during the class certification litigation.³² Until then, there is
2 insufficient evidence to adjudge the merits of plaintiffs’ motion. For this reason, the motion to
3 amend is premature at best.

4 Further, even assuming plaintiffs can provide evidence of damage, which they have not,
5 there will be significant evidentiary hurdles to establish a nexus between Bullseye’s heavy metal
6 use and plaintiffs’ alleged damages. In any event, these are open questions that have yet to be
7 answered and will likely only be answered during the class certification litigation, at the earliest,
8 or sometime after class certification, at the latest.

9
10 Moreover, at present, in a sense, there is no real case. If the plaintiffs fail to establish a
11 class and cannot move forward with the present litigation, then the current motion to amend
12 would become moot. For this reason, and in the interests of judicial economy and efficiency, the
13 Court should postpone ruling on plaintiffs’ motion.

14
15 Should plaintiffs argue that each presently has a live case or controversy against
16 Bullseye, plaintiffs would be mischaracterizing the legal posture of the current case. If class
17 certification is denied (because they failed to establish any one of the preliminary requirements
18 for certification: numerosity, commonality, typicality and adequacy of representation) then each
19 plaintiff, should he or she choose, would either have to initiate a new, separate lawsuit or they
20 would have to sever into nine individual lawsuits. Either way, the current motion to amend
21

22
23 ³²In the course of the class certification litigation, the court will necessarily consider certain issues
24 that go to the merits of the case and whether there is a viable class action against Bullseye. For example,
25 the “predominance” inquiry asks “how central are the common questions, and will common proof resolve
26 them?” *Pearson v. Phillip Morris, Inc.*, 358 Or 88, 110 (2015). The court will have to assess “whether it
is ‘likely’ that the final determination of the action will require separate adjudications to resolve factual or
legal questions regarding the individual class members and, if so, how many individual adjudications
would be required.” *Id.*

1 would not be applicable. This Court should conserve judicial resources by continuing this motion
2 until such time as plaintiffs obtain class certification.

3 **VI. CONCLUSION**

4 The Court should deny plaintiffs' Motion to Amend the Pleading to Assert Claim for
5 Punitive Damages because (1) they have failed to show that Bullseye knew it was emitting
6 harmful pollutants, and (2) they have offered no evidence of harm or damages.
7

8 In the alternative, Bullseyes moves this Court for an order under ORS 31.725(4) granting
9 a continuance of plaintiffs' motion. A continuance is needed to ensure that Bullseye has a full
10 and fair opportunity to respond to this motion. Additional discovery goes to the heart of the
11 ultimate question plaintiffs' motion raises: Did Bullseye "conduct its business activities in a
12 manner knowingly and intentionally harmful to others, in "disregard of the corporation's societal
13 obligations." *Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*, 500 F Supp 984, 988
14 (D Or 1980). Accordingly, plaintiffs' motion to amend is premature, and this court should grant a
15 continuance.
16

17 DATED Sept. 1, 2017

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing **DEFENDANT BULLSEYE GLASS CO.’S**
3 **OPPOSITION TO MOTION TO AMEND PLEADING TO ASSERT CLAIM FOR**
4 **PUNITIVE DAMAGES *or in the alternative* MOTION TO CONTINUE RULING ON**
5 **PLAINTIFFS’ MOTION TO AMEND** upon the following counsel of record via email on
6 September 1, 2017:

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