No. A-

IN THE

Supreme Court of the United States

BP WEST COAST PRODUCTS, LLC,

Applicant,

v.

STEVEN SCHARFSTEIN ET AL.,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to this Court's Rule 13.5, BP West Coast Products, LLC ("Applicant") respectfully requests a 60-day extension of time, to and including April 8, 2019, within which to file a petition for a writ of certiorari to the Oregon Court of Appeals.*

The Oregon Court of Appeals' opinion was issued on May 31, 2018. *See Scharfstein v. BP West Coast Prods., LLC*, 423 P.3d 757 (Or. Ct. App. 2018). The Oregon Supreme

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* Pursuant to Rule 29.6 of this Court, undersigned counsel state that BP West Coast Products, LLC is a wholly owned indirect subsidiary of BP p.l.c. No intermediate parent of BP West Coast Products, LLC is a publicly traded corporation. BP p.l.c., a publicly traded corporation organized under the laws of England and Wales, has no parent corporation, and there is no publicly held corporation that owns 10% or more of BP p.l.c.'s stock.

Court denied Applicant's timely petition for review on November 8, 2018. Unless extended, the time within which to file a petition for a writ of certiorari will expire on February 6, 2019. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257. Copies of the Oregon Court of Appeals' opinion and the order of the Oregon Supreme Court denying review are attached hereto as Exhibit A and Exhibit B, respectively.

1. Steven Scharfstein sued Applicant in 2011 in Oregon state court alleging that Applicant violated the Oregon Unlawful Trade Practices Act ("UTPA") by failing to disclose on the street signs of ARCO gasoline stations that customers would be charged a $0.35 fee for debit-card transactions—even though the fee was disclosed at several other locations throughout the stations. The complaint sought $200 in statutory damages for each of the two million consumers who used a debit card to purchase gasoline at ARCO stations in Oregon during the two-and-a-half-year class period.

The trial court certified the class and, in so doing, ruled that class members' reliance on the purported non-disclosure was not an element of the plaintiff's UTPA claim. The court therefore allowed the claim to proceed without any showing that *any* member of the class was actually misled by the absence of a disclosure of the debit-card fee on ARCO station street signs. Indeed, ARCO stations had been charging the fee in Oregon since 1988, and thus most, if not virtually all, of the class members were likely aware of the fee throughout the class period.

The trial court further ruled, as a matter of law, that gasoline stations are required to disclose debit-card fees on their street signs. The jury subsequently returned a verdict that Applicant "knowingly or recklessly" violated this requirement. The trial court awarded the

class $409 million in statutory damages. That amount was 571 times greater than the class's total relevant expenditure of $716,000 on the debit-card fee during the class period. Although $66 million of the award was deemed "unclaimed," the court divided that amount between two *cy pres* beneficiaries, the Oregon State Bar and the Oregon Community Foundation.

Applicant challenged the $409 million award as unconstitutionally excessive under this Court's decision in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and asked the trial court either to strike the award or to decertify the class. The court concluded that the *Gore* framework does not apply to statutory damages and upheld the award under a highly deferential standard it distilled from a nearly-century-old case, *St. Louis, Iron Mountain & Southern Railway Co.* v. *Williams*, 251 U.S. 63 (1919). The Oregon Court of Appeals affirmed the judgment, concluding that the trial court did not abuse its discretion in refusing to decertify the class. *See Scharfstein* v. *BP West Coast Prods.*, 423 P.3d 757 (Or. App. Ct. 2018). The Oregon Supreme Court denied Applicant's petition for review.

2. This Court's review would be warranted because there is a well-developed circuit split on the proper standard for evaluating constitutional challenges to statutory-damages awards. The Second and Seventh Circuits and at least one state appellate court have held that the *Gore* guideposts apply to statutory damages, *see, e.g.*, *Parker* v. *Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Murray* v. *GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006), but four other circuits—as well as several other state appellate courts—have refused to apply *Gore* to statutory damages, instead fashioning a variety of inconsistent tests that are united only by the near-absolute deference they afford to statutory-damages awards, *see, e.g.*, *Sony BMG Music Entm't* v. *Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013); *Vanderbilt Mortg.*

& Fin., Inc. v. *Flores*, 692 F.3d 358, 374 (5th Cir. 2012); *Zomba Enters., Inc.* v. *Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007); *Capitol Records, Inc.* v. *Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012).

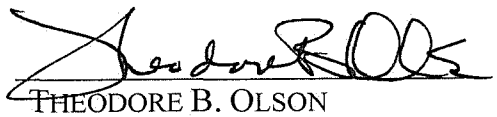
Had the Oregon courts followed the approach of the Second and Seventh Circuits and applied the *Gore* guideposts in this case, they would have been compelled to conclude that the $409 million award is unconstitutionally excessive: (1) Applicant's conduct was not at all reprehensible—Applicant mistakenly believed that the debit-card fee did not need to be disclosed and the jury made no finding that anyone was actually misled by the disclosure; (2) the ratio between the statutory damages and the actual class expenditure of $716,000 was an extraordinary 571-to-1; and (3) similar disclosure rules in other jurisdictions cap statutory penalties at *much* lower amounts. But the trial court—like the First, Fifth, Sixth, and Eighth Circuits, and several other state courts—held that "the standards that apply for the constitutional review of punitive damages" do not "apply to the review of statutory damages." June 26, 2014 Tr. 78. Instead, the trial court applied a much more deferential excessiveness standard, agreeing with the plaintiff that the award was constitutional merely because it did not threaten to bankrupt Applicant.

This case represents a valuable opportunity for the Court to resolve the lower courts' disagreement regarding the constitutional standard governing statutory-damages awards. That question is particularly important in the context of class actions, where the aggregation of millions of individual claims can result in massive class-wide awards, such as the $409 million award here.

3. Additional time for Applicant to file its petition for a writ of certiorari is warranted because the parties are currently engaged in mediation discussions. A negotiated resolution of the case would obviate the need to file a petition and thereby promote judicial economy and conserve the parties' resources. A 60-day extension of time would afford the parties additional time to continue their mediation discussions. No party would be prejudiced by such an extension because the judgment is accruing interest at a rate that is well above commercially available interest rates.

Accordingly, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari by 60 days, to and including April 8, 2019.

Respectfully submitted.



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January 25, 2019