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

KARI NELSON, individually, and KIONO
NELSON as the Personal Representative for
the ESTATE OF FREDDY NELSON, JR.,

Plaintiffs,

vs.

TMT DEVELOPMENT CO., LLC, an
Oregon Limited Liability Company; D.
PARK CORPORATION, an Oregon
Corporation dba HAYDEN MEADOWS;
HAYDEN MEADOWS, A JOINT
VENTURE; LOWE’S HOME CENTERS,
LLC; MATTHEW CADY, dba
CORNERSTONE SECURITY GROUP;
JEFFREY JAMES, dba CORNERSTONE
SECURITY GROUP; TJ LATHROM, dba
CORNERSTONE SECURITY GROUP; and
LOGAN GIMBEL,

Defendants.

Case No. 21CV40742

PLAINTIFFS’ MOTION FOR LEAVE TO
FILE THIRD AMENDED COMPLAINT
AND ADD PUNITIVE DAMAGES

The Honorable Leslie Bottomly

1 **TABLE OF CONTENTS**

2 **MOTION** 3

3 **I. UTCR 5.050 Information** 3

4 **II. UTCR 5.010 Certification** 4

5 **INTRODUCTION**.....ERROR! BOOKMARK NOT DEFINED.

6 **FACTUAL BACKGROUND**..... 4

7 **I. The TMT Defendants Targeted and Harassed the Nelsons**..... 5

8 **II. TMT Directed Cornerstone to Target and Harass the Nelsons**..... 5

9 **III. TMT Implemented a Zero Tolerance Policy at Delta Park Center, Resulting in Increased Tensions and Violence**..... 7

10 **IV. TMT and Cornerstone’s Targeted Harassment against the Nelsons Escalated** 11

11 **V. TMT Repeatedly Urged Lowe’s to De-Authorize Freddy Nelson and Trespass Him from Delta Park Center**..... 13

12

13 **VI. TMT and Cornerstone’s Targeted Harassment Culminated in Violence and Freddy Nelson’s Murder**..... 17

14 **PROCEDURAL HISTORY**..... 18

15 **ARGUMENT**..... 20

16 **I. Legal Standard** 20

17 A. Standard for a Motion to Amend to Add Punitive Damages 20

18 B. Standard for All Other Motions to Amend 21

19 **II. TMT’s Reckless Conduct Gives Rise to a Claim For Punitive Damages**..... 21

20 **III. Non-Punitive Damages Amendments**..... 26

21 A. Joint Liability Between TMT and Cornerstone 26

22 B. The Nelsons’ Negligent Infliction of Emotional Distress Claims 27

23 C. Kari Nelson’s Negligence Claim 29

24 **CONCLUSION** 29

1 **MOTION**

2 Pursuant to ORCP 23 A and ORS 31.725(2), Plaintiffs Kari Nelson and Kiono Nelson, as
3 the Personal Representative for the Estate of Freddy Nelson, Jr., hereby move the Court for an
4 order granting leave to file their third amended complaint to add a claim for punitive damages
5 against Defendants TMT Development Co., LLC; D. Park Corporation, doing business as
6 Hayden Meadows; and Hayden Meadows, a Joint Venture (collectively, "TMT").

7 Plaintiffs also move to add additional facts regarding joint liability among Defendants
8 Matthew Cady, Jeffrey James, and TJ Lathrom, all doing business as Cornerstone Security
9 Group (collectively, "Cornerstone") and TMT; amend Plaintiffs' Negligent Infliction of
10 Emotional Distress ("NIED") claims against all defendants; add allegations to Plaintiff Kari
11 Nelson's negligence claim against all defendants; further amend existing allegations to provide
12 further detail and clarity as depositions have been taken and more evidence has been gathered;
13 and finally, remove the Negligence *Per Se* claim against Defendant Logan Gimbel ("Gimbel").

14 This motion is supported by the Declaration of Benjamin Turner ("Turner Decl."), the
15 exhibits attached thereto, and the following points and authorities. A redline and a clean copy of
16 Plaintiffs' proposed Third Amended Complaint are attached thereto as Exhibit A and Exhibit B,
17 respectively.

18 **I. UTCR 5.050 INFORMATION**

19 Time requested for argument: 60 minutes
20 Telephone attendance requested: No
21 Counsel located 25+ miles from the court: No
22 Recording services requested: Yes

1 **II. UTCR 5.010 CERTIFICATION**

2 Pursuant to UTCR 5.010, Plaintiffs certify that they have conferred with counsel for
3 Defendants via telephone regarding the substance of this motion. (Turner Decl. ¶¶ 3-6.) TMT,
4 Defendant Logan Gimbel (“Gimbel”), and Defendant Lowe’s Home Centers, LLC (“Lowe’s”) object.
5 (*Id.* at ¶¶ 3-5.) Cornerstone stipulates to the filing of the proposed Third Amended
6 Complaint. (*Id.* at ¶ 6.) Plaintiffs were unable to resolve the issues underlying this motion
7 without court intervention.

8 **FACTUAL BACKGROUND**

9 This lawsuit arises out of the brutal killing of Freddy Nelson, Jr. on May 29, 2021, by
10 TMT agent and Cornerstone employee, Logan Gimbel, as Freddy’s wife, Kari Nelson, watched
11 in horror in the parking lot of the Lowe’s at Delta Park Center. As owner and property manager
12 of Delta Park Center, TMT¹ owed an affirmative duty to protect business invitees from
13 foreseeable harm and to provide adequate security. In the face of this duty, they took actions and
14 implemented company policies to harass the Nelsons along with other patrons of Delta Park
15 Center. Freddy’s death was the culmination of months of harassment of the Nelsons beginning in
16 February 2020 by TMT and Cornerstone.

17 Soon after TMT’s first encounter with Freddy, TMT and Cornerstone began to interfere
18 with Freddy’s work as a pallet vendor at the Delta Park Center Lowe’s. For over a year, TMT
19 worked closely with Cornerstone to harass and intimidate Freddy so that he would abandon his
20

21 _____
22 ¹ Defendants D. Park Corporation, Hayden Meadows, and Hayden Meadows, A Joint Venture
23 (collectively “D. Park”) exist solely to own Delta Park Center. Vanessa Sturgeon is the president
24 of these entities, as well as the president of Defendant TMT Development Co., LLC, which
solely manages properties owned by her through her various business entities. Defendant TMT
Development Co., LLC, is an agent of D. Park and the latter is jointly and severally responsible
for the actions of the former. D. Park and Defendant TMT Development Co., LLC, jointly
managed and maintained Delta Park Center. (*See* Ex. A, Proposed 3d Am. Compl. ¶ 11.)

1 business relationship with Lowe’s. They were ultimately successful on May 29, 2021, when
2 Gimbel pepper-sprayed the Nelsons and then shot and killed Freddy.

3 **I. THE TMT DEFENDANTS TARGETED AND HARASSED THE NELSONS**

4 In February 2020, the Nelsons decided to convert a bus into a motorhome. (*See* Turner
5 Decl, Ex. 1, Kari Nelson Dep. 43:1-44:24, 173:18-174:7.) The Nelsons parked their motorhome,
6 as well as a camper trailer, at the end of N. Kerby Avenue just outside of Delta Park Center. (*Id.*)
7 They lived in the camper while working on their motorhome. (*Id.*) Freddy worked a variety of
8 odd jobs to make ends meet, but his main source of income was selling pallets. (*Id.* at 37:23-
9 39:9.)

10 Soon after the Nelsons moved onto N. Kerby Avenue in February 2020, they began to
11 experience harassment at the hands of TMT Maintenance Manager, Brian Hug. (*Id.* at 153:2-
12 160:22.) His TMT employee profile read: “Brian Hug is the first to admit it. ‘I can’t leave
13 anything alone.’ * * * The big stuff. The little stuff. Whether it’s his job or not, he notices
14 everything – and does something about it.” (*Id.*, Ex. 2, Brian Hug Profile.) True to this
15 description, Hug visited the Nelsons several times at their home and informed them that they
16 could not park on N. Kerby Avenue. (*Id.*, Ex. 1, Nelson Dep. 153:2-160:22.) In response, Freddy
17 Nelson repeatedly informed Hug that they were parked on a public road. (*Id.* at 154:16-22) The
18 Portland Police Bureau (“PPB”) informed Hug that N. Kerby Avenue was a public road, and the
19 Nelsons were not trespassing on TMT property. (*Id.* at 167:6-14.)

20 **II. TMT DIRECTED CORNERSTONE TO TARGET AND HARASS THE NELSONS**

21 TMT and Cornerstone signed a contract to provide security beginning November 4, 2019.
22 (*Id.*, Ex. 3, TMT/Cornerstone Agreement.) The contract authorized Cornerstone and its officers,
23 employees, and affiliates to be and act as the “person in charge” at Delta Park Center. (*Id.*)
24 Cornerstone management understood this to mean that they stood in the shoes of TMT as the

1 property owner and manager and they represented TMT’s “victimhood.” (*Id.*, Ex. 4, Rance
2 Harris Dep. 37:17-38:10.) The agreement and its addenda expressed concerns by TMT about the
3 very nature of armed security. TMT initially “wanted everyone unarmed while on duty”, but
4 Cornerstone countered that TMT’s “current security provider was working armed at night,”
5 described a “current climate of attacks on Law Enforcement/Security Officers,” painted Delta
6 Park Center as “plagued by an influx of criminal activity, illegal dumping, and unauthorized land
7 use,” and went on to describe the dangerous conditions that Cornerstone employees had
8 experienced. (*Id.*, Ex. 3, TMT/Cornerstone Agreement, at p. 3.)

9 Instead of following up on these inflammatory claims by Cornerstone, TMT worked with
10 Cornerstone to target, harass, threaten, and intimidate the Nelsons. While Cornerstone guards
11 were the on-the-ground presence at Delta Park Center, TMT’s Associate Property Manager
12 Henry Hornecker, and his replacement, Property Manager Marc Wilkins, were extensively
13 involved in Cornerstone’s activities. (*Id.*, Ex. 5, Nov. 5, 2020, Wilkins Email.) Wilkins had
14 access to Cornerstone’s security guard & patrol operations portal, would receive copies of every
15 incident report Cornerstone generated for Delta Park Center, and would “read and take action on
16 any property damage, graffiti, etc.” (*Id.*; *see also* Ex. 6, Marc Wilkins Dep. 93:10-95:6.) Wilkins
17 frequently contacted Cornerstone employees directly about problems he perceived at Delta Park
18 Center and gave specific directions despite lacking security experience. (*Id.*, Ex. 7, Matthew
19 Cady Dep. 283:11-14, 284:7-12, 286:10-18.)

20 TMT’s Property Maintenance Manager, Brian Hug, also closely supervised and directed
21 Cornerstone employees at Delta Park itself. TMT required that all new hires of Cornerstone meet
22 personally with Hornecker and Hug before being stationed at Delta Park Center. (*Id.* at 198:16-
23 199:3.) Hug, in particular, took “a very active role” in advising Cornerstone employees and
24 directing their activities at Delta Park Center, including his “opinions on how [Cornerstone]

1 should best handle those updates that [Hug] would give [Cornerstone employees].” (*Id.* at 199:4-
2 201:17, 203:4-10, 203:16-22.) Hug continued to follow and harass the Nelsons personally, but
3 now also had Cornerstone guards follow and harass the Nelsons as well. (*See, e.g., id.*, Ex. 8,
4 Killian Kuhn Dep. 79:5-14; Ex. 9, Patrick Storms Dep. 139:16-21, 187:5-188:15.) TMT
5 exercised daily control over Cornerstone’s employees, instructing them on “how security is
6 conducted in the park” and pressuring Cornerstone to implement “more manpower,” “more
7 security, more presence.” (*Id.* at 141:8-142:2.)

8 **III. TMT IMPLEMENTED A ZERO TOLERANCE POLICY AT DELTA PARK** 9 **CENTER, RESULTING IN INCREASED TENSIONS AND VIOLENCE**

10 The Oregon Beverage Recycling Cooperative (“OBRC”) maintained a BottleDrop in
11 Delta Park Center. When the pandemic struck in 2020, all grocery stores stopped accepting
12 empty bottles and cans for recycling. The Delta Park Center BottleDrop was one of only two
13 locations in Portland to return bottles and cans. Hundreds of people arrived at Delta Park Center
14 to do so. As a result, tensions erupted between TMT and OBRC.

15 TMT President Vanessa Sturgeon argued that OBRC should “immediately deploy armed
16 security to manage this situation.” (*Id.*, Ex. 10, Mar. 28, 2020, Willamette Week Article.) OBRC
17 replied that OBRC had its own trained security and that “introducing armed guards into the
18 equation * * * creates a much greater danger of an unintentionally violent confrontation.” (*Id.*,
19 Ex. 11, Mar. 27, 2020, Sturgeon/Bailey Email.) This would be one of many concerns expressed
20 to TMT about its use of armed security at Delta Park Center.

21 TMT was again warned about the dangerous practices of Cornerstone on May 7, 2020.
22 (*Id.*, Ex. 12, May 7, 2020, Hornecker/Bailey Email.) On that date, OBRC terminated its security
23 relationship with Cornerstone and expressed serious concerns to TMT about its security’s
24 excessive use of force and encroachment on tenant property. (*Id.*) OBRC stated that “it is

1 unacceptable for Cornerstone security contracted by TMT to come on to [tenant]-leased premises
2 and treat an individual in this manner, especially when he is not causing a disturbance. * * *

3 Their actions may be in violations of standards set by DPSST².” (*Id.*)

4 TMT did not only ignore these warnings, but it further directed and encouraged
5 Cornerstone’s dangerous and violent behavior. On July 7, 2020, Cornerstone met with TMT to
6 discuss implementation of TMT’s “Zero Tolerance Policy” at Delta Park Center. (*Id.*, Ex. 13,
7 July 7, 2020, Cornerstone Memo Re TMT Zero Tolerance Policy.) This policy mandated that
8 such minor offenses as “walking across the grass,” “being behind buildings,” “littering,” and
9 “loitering” would result in being “immediately trespassed and removed from Delta Park Center”.
10 (*Id.*; *see also* Ex. 7, Cady Dep. 189:15-190:16.) The policy was put in place at the direction and
11 request of TMT Associate Property Manager Hornecker and TMT Maintenance Manager Hug.
12 (*Id.*, Ex. 4, Harris Dep. 25:10-22.) Hornecker in particular would be upset with Cornerstone for
13 not stopping someone merely “walking behind buildings” at Delta Park Center. (*Id.* at 83:2-14.)

14 Although this meeting established the formal introduction of this policy, it had been in
15 place informally for months at the direction of TMT. (*Id.* at 150:3-20.) Hornecker and Hug,
16 however, did not feel Cornerstone was doing enough because its employees “weren’t jacking up
17 everybody walking across the grass.” (*Id.*, Ex. 7, Cady Dep. 182:15-22.) Instead, TMT believed
18 Cornerstone needed to take “more action, more correction to persons on the property.” (*Id.*)
19 Cornerstone expressed that enforcement of TMT’s policy “doesn’t allow Cornerstone Security
20 Group the opportunity to comply with DPSST regulations.” (*Id.*, Ex. 13, July 7, 2020, Memo.) In
21 other words, TMT forced Cornerstone to apply its policy and break the law. (*Id.*; *see also*, Ex. 7,
22 Cady Dep. 185:2-187:9; Ex. 4, Harris Dep. 26:15-17, 29:20-23.) Rather than complying with
23

24 ² DPSST is the Oregon Department of Public Safety Standards and Training.

1 Oregon law and the DPSST regulations, Cornerstone enforced TMT’s Zero Tolerance Policy
2 zealously—especially against Freddy Nelson.

3 On September 29, 2020, the tension escalated in an interaction between a Cornerstone
4 employee and Freddy. (*Id.*, Ex. 14, Sept. 29, 2020, Cornerstone Bodycam Video³.) Freddy’s
5 attempts to deescalate were met with antagonization by the Cornerstone employee:

6 “Cornerstone: Alright. You sit here shaking. You’re looking for a fight, man.

7 Nelson: Whatever.

8 Cornerstone: I can already tell. The adrenaline’s pumping through you. You’re
9 ready. You’re balling up your fists. I get it. I see it.

10 Nelson: I’m balling up my fists? Around my keys?

11 Cornerstone: **You want a fight.**

12 Nelson: You just -

13 Cornerstone: So you know what?

14 Nelson: You’re trying to agitate it, right?

15 Cornerstone: I’m telling you. **I’m warning you right now.**

16 Nelson: You’re trying to agitate. You’re trying to agitate, right?

17 Cornerstone: **I’m going to take you down. You understand me? Do you
18 understand me?”**

18 (*Id.*)

19 The very next day, OBRC’s attorney wrote to TMT’s attorney to address—among other
20 issues—excessive force by Cornerstone. He wrote: “TMT’s insistence on armed guards is
21 unreasonable both in terms of a response to issues and in light of the vastly increased cost of
22 armed guards. OBRC asserts that all of the guards should be unarmed.” (*Id.*, Ex. 15, Sept. 30,
23

24 ³ Viewable at <https://vimeo.com/932687033>. Also provided to the Court on a USB drive.

1 2020, OBRC Letter to TMT at p. 5.) OBRC went on to document multiple incidents of excessive
2 force by Cornerstone and noted that “Cornerstone’s antagonism and use of unwarranted force are
3 problematic and unreasonable” and that “Cornerstone’s officers are using excessive force and
4 interfering with OBRC’s lawful use of the premises.” (*Id.*)

5 OBRC again reported escalating issues to TMT on December 31, 2020. (*Id.*, Ex. 16, Dec.
6 31, 2020, OBRC Letter to TMT.) OBRC stated that “the actions of Cornerstone differ from what
7 TMT is telling OBRC” and pointed out that the PPB “had several incidents with Cornerstone
8 Security where Cornerstone had unnecessarily escalated the situation. * * * Cornerstone will
9 often be escorting someone to the edge of the Delta Park complex and will react when that
10 person says something to incite them. * * * Cornerstone will react aggressively and then call
11 Portland Police [to] resolve the situation they helped to create.” (*Id.* at p. 2.)

12 OBRC went on to note that they were “disturbed by the fact that the armed guards
13 presently on site cause matters to escalate as they interact with those who use OBRC’s facilities.
14 * * * [T]he interventions appear to immediately use excessive force and rather than resolving
15 issues this use of force intensifies conflicts.” (*Id.* at p. 4.) OBRC offered a prescient warning:
16 “Simply giving a security officer a firearm and putting him or her out there is a recipe for
17 disaster. It also appears as if some of the current security officers are attempting to provoke a
18 response rather than resolve incidents.” (*Id.*)

19 Despite serious complaints, TMT took minimal steps to address these concerns with
20 Cornerstone. In early January 2021, TMT Property Manager Wilkins spoke with Cornerstone
21 regarding these concerns and asked that Cornerstone provide an option for unarmed security or
22 an explanation as to why it would not do so. (*Id.*, Ex. 17, Jan. 7, 2021, Wilkins/Cornerstone
23 Email.) Cornerstone outright refused to “offer any unarmed services,” cited misleading crime
24 statistics at Delta Park Center, and vaguely alleged “Multiple assaults” on its officers and

1 “Politically motivated attacks and doxing from Antifa and other radical groups.” (*Id.*, Ex. 18,
2 Cornerstone Memo.) Cornerstone’s justifications for providing armed security were never
3 questioned or even reviewed by TMT.

4 **IV. TMT AND CORNERSTONE’S TARGETED HARASSMENT AGAINST THE** 5 **NELSONS ESCALATED**

6 Over the next few months, Freddy Nelson continued to experience harassment at Delta
7 Park Center, especially when he attempted to collect pallets from Lowe’s. On January 15, 2021,
8 Cornerstone employees confronted Freddy at the Lowe’s lumberyard entrance. They informed
9 him that “due to multiple property rule violations in regards to unauthorized taking of pallets,”
10 Freddy was “excluded from Delta Park Center for one year.” (*Id.*, Ex. 19, Jan. 15, 2021,
11 Cornerstone Incident Report.) According to Cornerstone, Freddy was “calm and inquisitive” and
12 attempted to talk to the Lowe’s manager before being informed that “**the property rule**
13 **violation was related to the owner of the property, TMT Development.**”⁴ (*Id.*) (emphasis
14 added).

15 In March 2021, TMT scheduled a meeting with Cornerstone to discuss “standard
16 operating procedures, [TMT’s] ‘Zero Tolerance Policy’, towing, ground leases, tenant loss
17 prevention, Bottle Drop, and the overall Scope of Services.” (*Id.*, Ex. 20, Mar. 19, 2021,
18 Wilkins/Cornerstone Email.) This meeting between TMT Property Manager Wilkins and TMT
19 Maintenance Manager Hug and Cornerstone managers Matthew Cady and Rance Harris was held
20 on Thursday, March 25. (*Id.*)

21 A week later, on April 1, 2021, TMT Property Manager Wilkins e-mailed PPB regarding
22 “the vehicles parked along N. Kerby Avenue”—one of which included the Nelsons, who Hug

23 ⁴ TMT decided that authorization from Lowe’s alone was not sufficient to be an approved pallet
24 vendor. Any such vendor needed authorization from Lowe’s **and** a separate authorization from
TMT. (*See id.*, Ex. 7, Storms Dep. 181:18-182:15.)

1 obsessively targeted. (*Id.*, Ex. 21, April 5, 2021, Wilkins/PPB Email.) Receiving no response, he
2 followed up a few days later on April 5 to ask if “private security [has] the authority to threaten
3 to arrest someone.” (*Id.*)

4 On April 14, Cornerstone management e-mailed TMT to complain about Freddy and
5 inform them that “Cornerstone WILL NOT un-exclude this subject [Freddy Nelson] or honor
6 Lowes agreement to let this subject back on the property.” (*Id.*, Ex. 22, April 14, 2021,
7 Wilkins/Cornerstone Email.) In response, TMT Property Manager Wilkins first explained that
8 TMT and Cornerstone had been unlawfully intruding on Lowe’s premises to harass Freddy and
9 accepted responsibility for doing so:

10 “As a reminder, Lowe’s is a Ground Lease and they are responsible for everything
11 within the blue boundary line, see attached. This technically includes security.

12 * * *

13 This all should have been made clear when you first started security activity at
14 Delta Park Center. This is completely on us.

15 * * *

16 Also, regarding managing the activity of our tenants vendors. I completely
17 understand the reason why we need to be aware of who’s behind the building but
18 this might be another area we need to re-evaluate

19 * * *

20 Moving forward, next time your officers encounter Mr. Nelson, can you please
21 give him my number if he still does not feel he should be excluded.”

22 (*Id.*; see also Ex. 6, Wilkins Dep. 97:2-9, 117:12-118:14.) The “blue boundary line” includes the
23 back of Lowe’s, where Cornerstone employees had accosted Freddy. (*Id.* at 116:17-117:5.) It
24 also includes the parking lot where a Cornerstone employee shot Freddy Nelson after pepper-
spraying both him and his wife. (*Id.*) After informing Cornerstone that they could not provide

1 security on Lowe’s premises, TMT failed to keep Cornerstone off the property. Instead, TMT
2 worked with Cornerstone to exclude Freddy Nelson from that same premises.

3 Wilkins then sent a second email to Cornerstone management wherein he highlighted
4 Cornerstone’s comment that it would “NOT un-exclude this subject or honor Lowes agreement
5 to let this subject back on the property” and requested a call⁵ to “make sure we are all on the
6 same page in our vendor/client relationship.” (*Id.*, Ex. 23, Apr. 14, 2021, Wilkins/Cornerstone
7 Email.)

8 **V. TMT REPEATEDLY URGED LOWE’S TO DE-AUTHORIZE FREDDY
9 NELSON AND TRESPASS HIM FROM DELTA PARK CENTER**

10 Meanwhile, the Back End Department Supervisor of the Delta Park Center Lowe’s,
11 Laurie Sugahbeare, had been contacting TMT repeatedly to confirm that Freddy Nelson was
12 authorized to pick up pallets:

- 13 • On April 7th, she emailed Wilkins stating that Lowe’s wanted “to set up a pallet
14 pickup with Pacific Pallets. The Owner[’]s name is Freddy Nelson * * *. His
15 trucks are marked and labeled. (*Id.*, Ex. 24, April 7, 2021, Sugahbeare/Wilkins
16 Email.)
- 17 • Having mistyped Wilkins’ email, she then forwarded her email to Hug on April
18 9th and stated: “We would like to get a thumbs up for our pallet vendor asap.”
19 (*Id.*, Ex. 25, April 9, 2021, Sugahbeare/Wilkins Emails.)
- 20 • After receiving no response, she again emailed Wilkins and Hug on April 15th:
21 **“We are still awaiting your approval so that Cornerstone does not run this
22 person off our site for work we want him to do. With all the issue[s] we had**

23
24 ⁵ Neither Wilkins nor Cady allegedly remember this conversation.

1 with the pallets this past year we want to ensure we do this correctly.” (*Id.*, Ex.
2 26, April 15, 2021, Sugahbeare/TMT Email) (emphasis added).

3 Hug and Wilkins ignored her emails. Instead, they decided that they did not want to
4 “honor Lowe’s agreement” and contacted Lowe’s corporate office to inform them that “a
5 transient that lives nearby * * * is picking up your pallets.” (*Id.*, Ex. 27, April 15-21, 2021,
6 Wilkins/Lowe’s Emails.) Wilkins then informed Cornerstone that “Lowe’s Corporate * * * is
7 looking into this and [Freddy Nelson] is probably not a pallet vendor that is authorized.” (*Id.*, Ex.
8 28, April 15, 2021, Wilkins/Cornerstone Email.)

9 On the morning of April 19, 2021, Cornerstone again trespassed on Lowe’s property
10 without authorization to harass Freddy Nelson. (*Id.*, Ex. 29, April 19, 2021, Cornerstone Incident
11 Report.) Cornerstone employees again “informed Freddy numerous times he was trespassed.”
12 (*Id.*) Freddy informed Cornerstone employees that he was an authorized vendor, which Lowe’s
13 management confirmed. (*Id.*) Despite being authorized, Freddy Nelson voluntarily left the
14 property. (*Id.*, Ex. 30, April 19, 2021, Cornerstone Bodycam Video⁶.) Cornerstone employees
15 immediately contacted TMT Maintenance Manager Hug, and TMT Property Manager Wilkins
16 followed up with Cornerstone management within mere minutes. (*Id.*, Ex. 31, April 19, 2021,
17 Wilkins/Cornerstone Email.)

18 That very same morning, Wilkins contacted Lowe’s corporate office because “on-site
19 staff [is] allowing a local transient to pick up your pallets and I’m not sure this is something you
20 would want.” (*Id.*, Ex. 27, April 15-21, 2021, Wilkins/Lowe’s Emails, at p. 4.) Lowe’s responded
21 that its pick up program was having a hard time keeping up, to which Wilkins asked again if
22 “your on-site staff [is] allowing a local transient to pick up your pallets in the interim? The
23

24 ⁶ Viewable at <https://vimeo.com/932671554>. Also provided to the Court on a USB drive.

1 individual's name is 'Freddy Nelson' is this approved by Lowe's? Again, this individual is living
2 adjacent to Delta Park Center in an RV." (*Id.* at pp. 2-3.) When Lowe's corporate replied that its
3 "store manager just confirmed he has not given anyone permission to take pallets from our
4 store," Wilkins responded—despite repeated documentation to the contrary—that Freddy had
5 "been trespassed for picking up pallets which is why our security was confronting him and then
6 he would state he had permission (creating unnecessary tension) from Lowe's, which I figured
7 was not that case and thank you for confirming he is incorrect. Do you have a preference on him
8 still being trespassed? Our security is adamant that he remain trespassed." (*Id.* at p. 2) Lowe's
9 did not respond. (*Id.*) Wilkins emailed yet again whether Lowe's had a response to this
10 "trespassing." (*Id.*) Finally, Lowe's corporate responded, "I'd think we would want him
11 trespassed." (*Id.* at p. 1.)

12 Wilkins then turned around and emailed Cornerstone to inform them that Freddy Nelson
13 was not authorized to pick-up pallets and would remain trespassed. (*Id.*, Ex. 32, April 21, 2021,
14 Wilkins/Cornerstone Email; *see also* Ex. 7, Cady Dep. 293:4-294:15.) Wilkins also asked
15 Cornerstone for its "full trespass list and * * * trespass document on Mr. Nelson" and to
16 "confirm the issue with Mr. Nelson is now resolved." (*Id.*, Ex. 33, April 21, 2021,
17 Wilkins/Cornerstone Email.) The next day, Wilkins again asked Cornerstone for this
18 information, stating that "it's imperative we get his (and all) current trespass documentation as
19 soon as possible" and again asked that "Cornerstone explain some of their de-escalation
20 techniques?" (*Id.*, Ex. 33, April 22, 2021, Wilkins/Cornerstone Email.) Cornerstone simply
21 responded that "De escalation tactics come strait fom Oregon DPSST force continuum manadate
22 and the Verbal Judo Instiute." (*Id.*, Ex. 34, April, 26, 2021, Wilkins/Cornerstone Email) (spelling
23 errors in original).

1 On May 3, 2021, Wilkins emailed Cornerstone yet again asking for the trespass
2 documentation for Freddy and asked for a check-in with himself and Hug. (*Id.*, Ex. 35, May 3,
3 2021, Wilkins/Cornerstone Email.) Yet he made no further inquiry into Cornerstone’s supposed
4 “de-escalation techniques.” Receiving no response, he emailed yet again on May 5. (*Id.*, Ex. 36,
5 May 5, 2021, Wilkins/Cornerstone Email.) That afternoon, they set a meeting for Friday, May
6 14. In setting that meeting, Wilkins noted that:

- 7 • “Lowe’s [and several other tenants] are ALL Ground Leases”;
- 8 • Cornerstone should patrol non-ground lease tenants and “the right of way [*sic*]
9 surrounding Delta Park Center’s Ground Lease Tenants;”
- 10 • “No changes to * * * your presence on Ground Leases at this time. * * * We
11 encourage you to continue using your de-escalation techniques before any use of
12 force but we realize the situation is tenuous and obviously trust your officers
13 judgement as security professionals.”

14 (*Id.*, Ex. 37, May 5, 2021, Wilkins/Cornerstone Email.) TMT’s distinction between ground
15 leases and non-ground leases was brand new information to Cornerstone, and TMT provided no
16 guidance to Cornerstone about how these two different types of tenants were supposed to be
17 treated and patrolled differently. (*Id.*, Ex. 7, Cady Dep. 337:25-338:10, 339:15-339:2, 339:15-
18 340:6, 341:4-18.)

19 Meanwhile, Wilkins had communicated to Freddy that he was no longer an authorized
20 pallet seller for Lowe’s.⁷ However, Freddy still believed he could continue to shop at Lowe’s. In
21 early May 2021, he texted Lowe’s Back End Department Supervisor:

23 ⁷ Rather unbelievably, Wilkins has zero memory of communicating with Freddy that he was not
24 an authorized pallet vendor, he has zero memory of communicating with corporate Lowe’s
regarding Freddy’s not being an authorized pallet vendor, and he has zero memory of

1 “Mark called from TMT he said that he was in touch with Lowe’s corporate
2 hesitated not have me listed as an authorized vendor. He said the corporate
3 overrides any deal that might be made with local managers. I would still like your
4 account if there's any way that can happen. I have filed a grievance with the
licensing Authority over the respite from his security guards. My attorney stated
that as a customer they cannot stop me from coming to your business. So I'm kind
of waiting to see what happens next. **At worst case I'm still a loyal customer.**”

5 (*Id.*, Ex. 38, Freddy Nelson/Sugahbeare Texts) (emphasis added). Freddy never returned to
6 collect pallets after this date.

7 **VI. TMT AND CORNERSTONE’S TARGETED HARASSMENT CULMINATED IN**
8 **VIOLENCE AND FREDDY NELSON’S MURDER**

9 Only a couple weeks later, on May 29, 2021, a Cornerstone security guard trespassed on
10 Lowe’s property, as Cornerstone guards had been doing for months with TMT’s explicit
11 knowledge and permission. Freddy Nelson, who remained a loyal customer of Lowe’s, attempted
12 to shop at Lowe’s with his wife. They were both pepper-sprayed and Freddy was murdered by
13 TMT’s security officer, Logan Gimbel, who shot at him four times. (*Id.*, Ex. 39, May 29, 2021,
14 Cornerstone Bodycam Video⁸.)

15 In sum, TMT created and Cornerstone enforced unlawful policies to harass and exclude
16 almost any customer at Delta Park Center they did not like. TMT informed Cornerstone that they
17 did not have the right to patrol the property of ground lease tenants but nevertheless instructed
18 them to do so. In particular, TMT worked closely with Cornerstone to harass and intimidate
19 Freddy Nelson so that he would abandon his business relationship with Lowe’s. They were
20 successful.

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24 communicating with corporate Lowe’s regarding on-site staff knowing that Freddy was not an
authorized pallet vendor. (*Id.*, Ex. 6, Wilkins Dep. 145:2:10, 145:21-146:23.)

⁸ Viewable at <https://vimeo.com/932687033>. Also provided to the Court on a USB drive.

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PROCEDURAL HISTORY

This wrongful death and personal injury action was filed on October 19, 2021, against TMT, Cornerstone, and Logan Gimbel. Gimbel moved to stay the action pending his criminal trial for murder on April 28, 2022. Cornerstone moved to join this motion. Gimbel was subsequently convicted by an Oregon jury of murder in the second degree, unlawful use of a weapon, and two counts of unlawful use of mace on May 8, 2023. Plaintiffs filed a motion to amend for punitive damages against Gimbel and his employer, Cornerstone, on May 26, 2023. Plaintiffs also moved to add Lowe’s at that same time. This Court granted that motion on July 3, 2023, and the Second Amended Complaint was filed.

TMT filed Rule 21 Motions on July 20, 2023. After conferral, these motions were taken off calendar as Plaintiffs agreed to amend the Plaintiffs’ NIED claims and Plaintiff Kari Nelson’s negligence claims against all defendants. Those amendments are reflected in the accompanying proposed Third Amended Complaint. (*See id.*, Exs. A & B, Proposed 3d Am. Compl. ¶¶ 84-Complaint.)

Cornerstone filed Rule 21 Motions on July 18, 2023. After oral argument and supplemental briefing, the Court denied the motion to dismiss the Negligence *Per Se* claim brought against Cornerstone on November 22, 2023.

Over the ensuing months, significant discovery has been conducted, with fourteen depositions taken by Plaintiffs’ counsel and one taken by defense counsel:

- October 16, 2023: Jennifer Voigt, unlicensed Cornerstone officer
- October 16, 2023: Dylan Forster, Cornerstone Security officer
- October 17, 2023: Killian Kuhn, Cornerstone management
- October 18, 2023: Henry Hornecker, TMT Associate Property Manager
- October 18, 2023: Marc Wilkins, TMT Property Manager

- 1 • October 19, 2023: Defendant Matthew Cady, Cornerstone owner
- 2 • October 21, 2023: Patrick Storms, Cornerstone management
- 3 • January 8, 2024: Rance Harris, Cornerstone management
- 4 • January 9, 2024: continuation of Defendant Matthew Cady, Cornerstone owner
- 5 • January 11, 2024: Jules Bailey, OBRC President
- 6 • March 11, 2024: Plaintiff Kari Nelson
- 7 • March 19, 2024: Lisa Nesbitt, Lowe's property manager
- 8 • March 20, 2024: Defendant Jeffrey James, Cornerstone owner
- 9 • March 21, 2024: Cristin Bansen, TMT Vice President
- 10 • March 22, 2024: Robert Steele, Cornerstone management

11 The parties are also currently in the process of scheduling additional depositions for
12 April, May, and June:

- 13 • Vanessa Sturgeon, TMT President
- 14 • Brian Hug, TMT Maintenance Manager
- 15 • Laurie Sugahbeare, Delta Park Center Lowe's Back End Department Supervisor
- 16 • Thomas Calhoun, Cornerstone management
- 17 • Plaintiff Kiono Nelson, son of the Nelsons
- 18 • Damion Nelson, son of the Nelsons
- 19 • Keegan Nelson, son of the Nelsons

20 A fourteen-day jury trial is currently scheduled for September 3, 2024.

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1 **ARGUMENT**

2 **I. LEGAL STANDARD**

3 **A. Standard for a Motion to Amend to Add Punitive Damages**

4 ORCP 23 A states that a party may amend its pleadings by leave of court and that “leave
5 should be *freely given* when justice so requires.” (Emphasis added.) Oregon law favors liberal
6 amendment of pleadings. *Holmes v. Oregon Assn. Credit Mgmt.*, 52 Or App 551, 558, 628 P2d
7 1264 (1981). Pursuant to the punitive damages statute, ORS 31.725, plaintiffs are required to
8 meet only a minimal standard—they must “set forth specific facts supported by admissible
9 evidence adequate to avoid the granting of a motion for a *directed verdict* to the party opposing
10 the motion on the issue of punitive damages.” ORS 31.725 (3)(a) (emphasis added).

11 ORS 31.725(3)(a) is drafted so that a jury makes determinations about punitive damages
12 unless the Court would direct a verdict against the punitive damage claim based on the
13 evidence. The directed verdict standard in Oregon is a high hurdle: The Court must not direct a
14 verdict unless there is **no evidence** to support an element of the claim. *Bolt v. Influence, Inc.*, 333
15 Or 572, 578, 43 P3d 425 (2002) (“[O]nly when there is no evidence to support an element may
16 the claim be withdrawn from the jury’s consideration.”); *see also State v. Brown*, 306 Or 599,
17 602, 761 P2d 1300 (1988) (emphasis in original) (“[T]he jury must be permitted to consider
18 every claim on which the plaintiff has presented some evidence tending to establish each element
19 of that claim.”). That is to say, if the plaintiffs produce “**some evidence** of a prima facie case,”
20 then the court *must* grant leave to amend. *Bolt*, 333 Or at 579 (emphasis added). Moreover, under
21 the “directed verdict” standard, “the court must not weigh the evidence,” instead, the court must
22 consider the evidence, “including all reasonable inferences drawn therefrom,” in the light most
23 favorable to the plaintiffs. *Id.* at 577.

1 **B. Standard for All Other Motions to Amend**

2 Conversely, in granting a motion to amend for any allegations that are not part of a
3 punitive damages claim, no evidence is required. Instead, “the gravamen of the inquiry [under
4 ORCP 23 A] is whether allowing a pretrial amendment would unduly prejudice the opposing
5 party.” *Eklof v. Persson*, 369 Or 531, 538, 508 P3d 468 (2022), *citing C.O. Homes, LLC v.*
6 *Cleveland*, 366 Or 207, 216, 460 P3d 494 (2020).

7 The *Eklof* analysis does not consider the merits of a proposed amendment unless it is
8 truly futile, that is, “one could not prevail on the merits due to some failing in the pleading or
9 some unavoidable bar or obstacle * * * such as * * * lack[] [of] subject matter jurisdiction[.]”
10 *Eklof*, 369 Or at 553. In reviewing proposed amendments, the court “must consider relevant
11 aspects of justice, such as fairness” to the parties. *Id.* at 539-40. Further, the court must remain
12 cognizant that the purpose of pleadings is “to facilitate a proper decision on the merits, and not to
13 erect formal and burdensome impediments in the litigation process.” *Howey v. United States*, 481
14 F2d 1187, 1190 (9th Cir 1973) (cleaned up); *see also Cook v. Croisan*, 25 Or 475, 477 (1894)
15 (“The practice of allowing amendments liberally, so as to enable the parties, while in court, to
16 have their differences settled and determined, has been uniformly approved and encouraged by
17 the courts.”).

18 **II. TMT’S RECKLESS CONDUCT GIVES RISE TO A CLAIM FOR PUNITIVE**
19 **DAMAGES**

20 A plaintiff can recover punitive damages in cases “in which ‘the violation of societal
21 interests is sufficiently great and the conduct involved is of a kind that sanctions would tend to
22 prevent.’” *Harrell v. Travelers Indem. Co.*, 279 Or 199, 209, 567 P2d 1013 (1977), *quoting*
23 *Starkweather v. Shaffer*, 262 Or 198, 207, 497 P2d 358 (1972). Even gross negligence “may
24 provide a proper basis for an award of punitive damages.” *Harrell*, 279 Or at 209. Punitive

1 damages are awarded to deter the defendant and others from similar conduct in the future.
2 *DeMendoza v. Huffman*, 334 Or 425, 443-47, 51 P3d 1232 (2002). They are proper when the
3 defendant “has acted with malice or has shown a reckless and outrageous indifference to a highly
4 unreasonable risk of harm and has acted with a conscious indifference to the health, safety and
5 welfare of others.” ORS 31.730(1). Taken in the light most favorable to the Plaintiffs, the
6 evidence submitted in support of this motion shows that the conduct of the TMT’s conduct meets
7 that standard.

8 Punitive damages have been awarded in cases involving conduct far less reprehensible
9 than this. *See Andor by Affatigato v. United Air Lines, Inc.*, 303 Or 505, 511, 739 P2d 18, 22
10 (1987), *citing Lewis v. Oregon Beauty Supply Co.*, 302 Or 616, 733 P2d 430 (1987) (punitive
11 damages for nonverbal infliction of severe emotional distress); *Green v. Uncle Don's Mobile*
12 *City*, 279 Or 425, 568 P2d 1375 (1977) (punitive damages for fraud); *Roshak v. Leathers*, 277 Or
13 207, 560 P2d 275 (1976) (punitive damages for assault and battery); *Harrell v. Ames*, 265 Or
14 183, 508 P2d 211 (1973) (punitive damages awarded against defendant who struck plaintiff
15 while driving under the influence of intoxicants); *McElwain v. Georgia-Pacific Corp.*, 245 Or
16 247, 421 P2d 957 (1966) (punitive damages for intentional discharge of pollutants); *Gumm v.*
17 *Heider*, 220 Or 5, 348 P2d 455 (1960) (punitive damages for malicious prosecution).

18 Accordingly, there is more than “some evidence” here where TMT—both through their own
19 employees and through the Cornerstone’s employees—harassed and intimidated the Nelsons
20 both at their home and at Delta Park Center.

21 The Court has already found that there is “some evidence” that Cornerstone and Gimbel
22 acted with the requisite culpability to add a claim of punitive damages. What has since become
23 clear through the documents produced and the deposition testimony elicited is that TMT and
24 Cornerstone were jointly responsible for the negligent and reckless security at Delta Park Center.

1 TMT will argue that it hired a qualified security company and relied upon Cornerstone as trained
2 security professionals. This argument is belied by the mountain of admissible evidence that
3 shows that TMT management instructed and directed Cornerstone employees on the minutiae of
4 their job, including the harassment and intimidation of the Nelsons in attempting to banish them
5 from Lowe’s. (Turner Decl., Ex. 5, Nov. 5, 2020, Wilkins Email; Ex. 6, Wilkins Dep. 93:10-
6 95:6; Ex. 7, Cady Dep. 198:16-201:17, 203:4-10, 203:16-22, 283:11-14, 284:7-12, 286:10-18;
7 Ex. 8, Kuhn Dep. 79:5-14; Ex. 9, Storms Dep. 139:16-21, 141:8-142:2, 187:5-188:15.) These
8 directives addressed specific security issues on a day-to-day basis, including who to exclude or
9 “trespass,” what minor violations were grounds for trespass, which areas constituted a basis for
10 trespass, and how to exclude or trespass patrons, namely the Nelsons, from Delta Park Center.
11 (*Id.*, Ex. 13, July 7, 2020, Cornerstone Memo Re TMT Zero Tolerance Policy; *see also* Ex. 4,
12 Harris Dep. 25:10-22, 83:2-14, 150:3-20; Ex. 7, Cady Dep. 182:15-22; 189:15-190:16)

13 TMT may attempt to hide their culpability behind the contract between itself and
14 Cornerstone. (*See id.*, Ex. 3, TMT/Cornerstone Agreement.) While it stated on its face that
15 Cornerstone was not the employee or agent of TMT, it granted it substantial authority to act as a
16 “person, a representative, or employee of [TMT]” and the “person in charge” of the property.
17 (*Id.*) As Cornerstone management described it:

18 “When someone trespasses [on] the property as the person in charge then we take
19 that as they’re trespassing against us because **we are acting on behalf of the**
20 **person who would’ve been trespassed on. Since the owner is not there**
21 technically standing on the property he’s not being trespassed on, his property is,
22 and we are there representing him, so then **we basically represent his**
23 **victimhood through us.”**

24 (*Id.*, Ex. 4, Harris Dep. 38:1-10.)

TMT recklessly exercised their control over Cornerstone’s employees, instructing them
on “how security is conducted in the park” and pressuring Cornerstone to implement “more

1 manpower,” “more security, more presence.” (*Id.*, Ex. 9, Storms Dep. 141:8-142:2.) TMT
2 management, Hornecker and Hug, wanted to meet and “talk to every new [Cornerstone]
3 employee at Delta Park Center.” (*Id.*, Ex. 7, Cady Dep. 198:16-25.) Hug in particular “took a
4 very active role in conducting conversations with [Cornerstone] officers and advising them of
5 every development * * * that’s going around the property.” (*Id.* at 199:6-9.) During a typical
6 shift, it would be abnormal for a Cornerstone officers “to not have a conversation with Brian
7 [Hug].” (*Id.* at 200:7-8.) Hug would “direct Cornerstone officers on the ground to do specific
8 things” in an apparent attempt to “control [Cornerstone] officers and tell them what to do and
9 * * * what their priority that day was versus what [Cornerstone] officers already are doing.” (*Id.*
10 at 203:4-10, 203:16-22.)

11 In fact, the obsession and fixation on Freddy Nelson by TMT and Cornerstone all began
12 with Brian Hug in March 2020, shortly after the Nelsons moved to N. Kerby Avenue near Delta
13 Park Center. Hug went to their private residence and attempted to “trespass” and “exclude” them
14 from a public road. (*Id.*, Ex. 1, Nelson Dep. 153:5-154:18.) When he was unsuccessful, Hug
15 continued to harass the Nelsons at their residence with Cornerstone employees in tow. (*Id.* at
16 156:20-160:19.) On each occasion, Hug would again try to “trespass” and “exclude” the Nelsons
17 from a public road while the Cornerstone employees watched. (*Id.*) Hug also contacted the PPB,
18 who confirmed that the Nelsons could not be trespassing on a public road. (*Id.* at 167:9-14.)

19 Hug would “see things around [Delta Park Center] * * * and inform [Cornerstone] that
20 there was activity going on, either suspicious activity or suspicious persons in place they
21 shouldn’t be.” (*Id.*, Ex. 9, Storms Dep. 139:7-11.) Hug might first approach such “suspicious
22 persons,” but if they did not do what he said, “he would give [Cornerstone] a call and say hey,
23 can you come swing by and talk to this person.” (*Id.*, Ex. 8, Kuhn Dep. 79:9-14.) Soon enough,
24 Cornerstone took over Hug’s harassment of the Nelsons. Its officers would leave their station at

1 Delta Park Center to come to N. Kerby Avenue to harass the Nelsons and try to exclude them
2 from public property. (*Id.*, Ex. 14, Sept. 29, 2020, Cornerstone Bodycam Video⁹.)

3 TMT not only closely directed Cornerstone’s actions on the ground at Delta Park Center
4 but also dictated their actions from their headquarters in downtown Portland, receiving hundreds
5 of incident reports and then giving Cornerstone employees “specific directions about what to do
6 with an issue at Delta Park.” (*Id.*, Ex. 6, Wilkins Dep. 94:3-95:6; Ex. 7, Cady Dep. 283:12-14.)
7 TMT did this despite Cornerstone explaining that it was “not in professional conduct to direct a
8 vendor’s [i.e., Cornerstone] employees” because Cornerstone was in the best position to
9 “understand a lot of the legalities into what our job pertains to, [while TMT] would not
10 necessarily be up to speed on all the goings-on when it comes to the legality of action.” (*Id.*, Ex.
11 7, Cady Dep. 286:13-18.) TMT ignored these warnings and continued to push its unlawful and
12 aggressive security policies that escalated tensions and violence among Cornerstone officers and
13 Delta Park Center patrons like the Nelsons.

14 As warned many months prior, “[s]imply giving a security officer a firearm and putting
15 him or her out there is a recipe for disaster.” (*Id.*, Ex. 16, Dec. 31, 2020, OBRC Letter to TMT.)
16 Instead of resolving incidents, TMT and Cornerstones provoked them. (*Id.*) As a result of the
17 concerted and reckless actions of TMT and Cornerstone, Freddy Nelson was brutally murdered
18 by a Cornerstone officer as Kari Nelson sat only an arm’s length away, watching her husband
19 bleed out and die through a cloud of pepper spray. (*Id.*, Ex. 39, May 29, 2021, Cornerstone
20 Bodycam Video.)

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⁹ Viewable at <https://vimeo.com/932687033>. Also provided to the Court on a USB drive.

1 **III. NON-PUNITIVE DAMAGES AMENDMENTS**

2 Under ORCP 23 A, which governs Plaintiffs’ motion to amend to add allegations outside
3 those supporting their claim for punitive damages, the proper inquiry is not whether Plaintiffs
4 have shown “some evidence,” but instead “whether allowing a pretrial amendment would unduly
5 prejudice the opposing party.” *Eklof*, 369 Or at 538, *citing C.O. Homes, LLC*, 366 Or at 216. The
6 merits of those proposed amendments are not considered unless the amendments would be truly
7 futile. *Eklof*, 369 Or at 553. Defendants are not unduly prejudiced by these meritorious
8 amendments as they seek to address issues raised by defendants in prior motion practice and
9 include additional factual allegations uncovered through the course of litigation and numerous
10 depositions and document discovery.

11 **A. Joint Liability Between TMT and Cornerstone**

12 Oregon law recognizes joint liability in its adoption of Section 876 of the Second
13 Restatement of Torts, which sets out the three ways in which persons or entities acting in concert
14 may be held liable for the other’s tortious conduct. *Granewich v. Harding*, 329 Or 47, 53, 985
15 P2d 788 (1999). These include:

- 16 “(a) does a tortious act in concert with the other or pursuant to a common design
17 with him, or
18 (b) knows that the other's conduct constitutes a breach of duty and gives
19 substantial assistance or encouragement to the other so to conduct himself, or
20 (c) gives substantial assistance to the other in accomplishing a tortious result and
his own conduct, separately considered, constitutes a breach of duty to the third
person.”

21 *Id.* at 53-54.

22 Here, TMT created and Cornerstone enforced unlawful policies to harass, intimidate,
23 menace, annoy, and threaten people at or near Delta Park Center. TMT expressly directed
24 Cornerstone to “immediately trespass and remove” patrons, often physically, from Delta Park

1 Center for minor, non-threatening activities. (*Id.*, Ex. 13, July 7, 2020, Cornerstone Memo Re
2 TMT Zero Tolerance Policy.) Cornerstone implemented this TMT policy even when they knew
3 it violated DPSST regulations and Oregon law. (*Id.*; *see also*, Ex. 7, Cady Dep. 185:2-187:9.)

4 TMT and Cornerstone had a common design to exclude Freddy Nelson and not “honor
5 Lowes agreement to let this subject back on the property” through its improper means of
6 escalating harassment and intimidation. (*Id.*, Ex. 22, April 14, 2021, Wilkins/Cornerstone
7 Email.) TMT and Cornerstone were repeatedly made aware that their security policies and
8 systemic use of excessive force at Delta Park Center were inciting violence, unnecessarily
9 escalating conflict, and a “recipe for disaster.” (*Id.*, Ex. 16, Dec. 31, 2020, OBRC Letter to
10 TMT.) Instead of either TMT or Cornerstone heeding these warnings, they doubled down and
11 assisted and encouraged the other to continue their tortious conduct. (*Id.*) As a direct and
12 predictable result of their concerted actions, violence was incited rather than quashed. Freddy
13 Nelson was killed and Kari Nelson was injured, and TMT and Cornerstone are jointly liable for
14 causing such harm.

15 **B. The Nelsons’ Negligent Infliction of Emotional Distress Claims**

16 Under Oregon law, a plaintiff may recover for purely emotional distress when the
17 tortfeasor violated a “legally protected interest” independent of the plaintiff’s interest in being
18 free from negligent conduct. *I.K. v. Banana Republic, LLC*, 317 Or App 249, 254, 505 P3d 1078
19 (2022), *citing Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or 543, 559, 652 P2d 318
20 (1982). The framework for determining the existence of a “legally protected interest” is laid out
21 in *Philibert v. Kluser*, 360 Or 698, 385 P3d 1038 (2016). Such interest must be “of sufficient
22 importance as a matter of public policy to merit protection from emotional impact.” *Id.* at 705.
23 For instance, Oregon courts have recognized the right to be free from private nuisance, the right
24 of a surviving spouse to have the remains of a deceased spouse undisturbed, the right to avoid

1 observing the physical injury of a close family member, and the right to be free from being video
2 recorded while using a private restroom as legally protected interests in support of an NIED
3 claim. *Philibert*, 360 Or at 706-07 (collecting cases); *I.K.*, 317 Or App at 256-57. The source of
4 such right “can come from many sources—statutes, constitutional provisions, regulations, local
5 ordinances, and the historical and evolving common law.” *Philibert*, 360 Or at 706, quoting *MT*
6 *& M Gaming, Inc. v. City of Portland*, 360 Or 544, 562, 383 P3d 800 (2016).

7 Likewise, here, both Freddy and Kari Nelson had a right to avoid watching the other be
8 pepper sprayed by Gimbel, suffering physical injury, as they had to watch in horror. *Philibert*,
9 360 Or at 707. Kari Nelson also had a right to be free from having to watch her husband be shot
10 point-blank four times and brutally murdered by Gimbel. *Id.* And both had a right to be free from
11 pervasive harassment, menacing, and intimidation by TMT and Cornerstone. *See, e.g., State v.*
12 *Love*, 271 Or App 545, 554, 351 P3d 780 (2015), citing *State v. Moyle*, 299 Or 691, 700-01, 705
13 P2d 740 (1985) (tracing the evolution of the common law violation of “disturbing the peace” or
14 “breach of the peace” into the crimes of disorderly conduct and harassment, the latter of which
15 “is intended to reach disorderly conduct creating alarm or annoyance for an individual rather
16 than the general public.”); *see also State v. Garcias*, 296 Or 688, 699, 679 P2d 1354 (1984)
17 (discussing common law origins of menacing).

18 Plaintiffs’ complaint has included NIED claims on behalf of both Freddy and Kari
19 Nelson since its initial filing and seeks now to add additional support for such claims. As these
20 claims already exist and Plaintiffs are amending to address arguments raised in Rule 21 Motions,
21 there is no prejudice to defendants and amendments should be permitted in light of ORCP 23 A’s
22 commandment that “leave shall be freely given when justice so requires.”
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1 **C. Kari Nelson’s Negligence Claim**

2 In the Second Amended Complaint, Plaintiffs were permitted to add a negligence claim
3 brought on behalf of Plaintiff Kari Nelson. The particular ways in which each defendant was
4 negligent or reckless were alleged under the negligence claims brought on behalf of Plaintiff
5 Estate of Freddy Nelson, Jr. in that Complaint but were not re-alleged under Plaintiff Kari
6 Nelson’s separate negligence claim. (*See id.*, Turner Decl., Ex. A, Proposed 3d Am. Compl. ¶¶
7 49, 55, 59, 65.) For the sake of clarity, and in response to arguments raised in TMT’s Rule 21
8 Motions, those particulars of negligence are repeated for Kari Nelson’s negligence claim in
9 Plaintiff’s Proposed Third Amended Complaint. (*See id.* at ¶¶ 107-10.) There is no undue
10 prejudice, and such amendment is meritorious and should be granted.

11 **CONCLUSION**

12 For the foregoing reasons, Plaintiffs respectfully request that this Court grant their
13 Motion for Leave to File Third Amended Complaint and Add Punitive Damages.

14
15 DATED this 10th day of April, 2024.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the below date, I served a true and correct copy of the foregoing

3 **Plaintiffs’ Motion for Leave to File Third Amended Complaint and Add Punitive Damages**

4 on the following in the manner(s) described below:

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13 DATED this 10th day of April, 2024.

14 D'AMORE LAW GROUP, P.C.

15 By: s/ Erin Mitchell
16 Erin Mitchell, paralegal