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

6 SCHEARON STEWART and JASON  
7 STEWART, individually and on behalf of all  
8 other similarly situated persons,

9 Plaintiffs,

10 v.

11 ALBERTSON'S COMPANIES, LLC a  
12 foreign limited liability company;  
13 ALBERTSON'S LLC, a foreign corporation;  
14 SAFEWAY, Inc., a foreign business  
15 corporation,

16 Defendants,

Case No. 16CV15125

**DECLARATION OF DAVID F.  
SUGERMAN IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
ATTORNEYS' FEES, COSTS AND  
SERVICE AWARD**

Hon. Angela F. Lucero

16 I, David F. Sugerman, declare as follows:

17 1. I am an adult, and I reside in Oregon. I have personal knowledge of the matters  
18 set forth in this declaration. If called to testify in court under oath, I would testify to the facts set  
19 forth in this declaration.

20 2. I have served as lead counsel on this case.

21 3. I was admitted to practice in Oregon in 1986. I have handled class actions in state  
22 and federal court for over 30 years, including class action cases involving consumer protection,  
23 wage theft, employment discrimination, dangerous products, and prison conditions. I have  
24 successfully handled class actions in state and federal court, including settlements, trials, and  
25 appeals. I regularly lecture locally and nationally on topics related to consumer class actions and  
26 teach the subject as an adjunct law professor at Lewis & Clark. I have also been heavily

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1 involved in legislative advocacy on consumer protection and class action issues throughout my  
2 career. Through my work, I am well acquainted with the subject matter areas of consumer  
3 protection class actions, including local, state, and national standards and practices. I am also  
4 well acquainted with issues of risk and results, which are at issue for this motion.

5 4. In this case, class counsel learned from a whistleblower that Oregon Safeway  
6 Stores were engaged in an illegal pricing practice. We began to investigate the case in 2016 and  
7 learned that Safeway Stores were regularly putting meat on sale, “Buy One, Get One Free.” after  
8 marking up the unit price of the product. Our initial investigation included surveys at Safeway  
9 stores throughout Oregon.

10 5. The Oregon Unlawful Trade Practices Act and implementing regulations provide  
11 that such practices are unlawful trade practices. We filed this action in 2016.

12 6. The original team included our firm, now known as Sugerman Dahab, and Tim  
13 Quenelle, an Oregon solo practitioner who specializes in consumer protection litigation.

14 7. Mr. Quenelle and I have worked together for approximately 20 years and have  
15 successfully handled multiple consumer class actions involving illegal cable television late fees,  
16 predatory trade school fraud, steering of auto insurance repairs, and overcharges at the pump.

17 8. We tried *Scharfstein v. BP West Coast Products, LLC*, 292 Or App 69, 423 P.3d  
18 757, *rev den*, 363 Or 815, 431 P3d 90 (2018), *cert dismissed*, — U.S. —, 140 S Ct 16, 204 L  
19 Ed 2d 1170 (2019), which ultimately resulted in a recovery of over \$409 million for consumers  
20 and significant funding for Oregon Legal Aid, Oregon Consumer Justice, and the University of  
21 Oregon.

22 9. Success in these cases requires a keen understanding of the Oregon Unlawful  
23 Trade Practices Act and class action procedure. It requires a high skill level and the ability to  
24 respond to the most sophisticated and best-resourced defendants. Those skills include the ability  
25 to obtain necessary discovery, the trial skills necessary to obtain a successful outcome at trial, the  
26 skills and talent necessary to succeed on appeal, and the negotiation and mediation skills to bring

1 the case to a successful conclusion.

2 10. After the trial court granted an early motion to dismiss, we added appellate  
3 counsel to the legal team. Travis Eiva handled the appeal in the Court of Appeals and secured a  
4 reversal of the trial court dismissal. Mr. Eiva also handled the matter on petition for review  
5 before the Oregon Supreme Court. *Stewart v. Albertsons*, 308 Or App 464, *rev den*, 368 Or 273  
6 (2021).

7 11. By the time the matter was remanded, Nadia Dahab had joined the firm and the  
8 trial team. We also expanded the team further to add Eric English and Pat O'Malley of  
9 Resolution Strategies to serve as settlement counsel.

10 12. All counsel worked on a contingent fee, with a fee division agreed upon between  
11 counsel. Under the fee division, Resolution Strategies and Travis Eiva each receive 7.5 percent  
12 of the fee, and Sugerman Dahab and Tim Quenelle each receive 42.5 percent of the fee.  
13 Sugerman Dahab and Tim Quenelle are responsible for costs.

14 13. After remand, Tim Quenelle led discovery efforts, which principally focused on  
15 data recovery and analysis. Throughout the case, Defendants engaged in a number of practices  
16 that made the case more difficult. They repeatedly denied that they retained the necessary  
17 pricing and sales data, repeatedly filed pleadings with inaccurate price data, repeatedly refused to  
18 produce data in a useable format, repeatedly refused to provide complete data, and repeatedly  
19 concealed the existence of data fields that would have provided the necessary proof. This  
20 required multiple depositions and substantial work from Plaintiffs' data expert.

21 14. After remand, Nadia Dahab took the lead on day-to-day case management and on  
22 briefing and argument of all motions before the Court. Most notably, Ms. Dahab successfully  
23 briefed and argued the class certification motion.

24 15. Messrs. English and O'Malley at all times led settlement discussions, through  
25 multiple meetings and communications with defense counsel, representatives of Defendants, and  
26 the mediator.

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1           16.     Ultimately, the parties agreed to mediation and retained Senior Judge Henry  
2 Kantor. Messrs. English and O’Malley led the mediation team. Tim Quenelle, our data expert,  
3 and Nadia Dahab also served on the mediation team.

4           17.     In addition to overall coordination and leadership, I took the lead on trial  
5 preparation and planned to take the lead at trial. In the lead-up to trial, we retained a total of four  
6 experts to testify and lined up several additional witnesses as well. We conducted focus groups,  
7 created demonstrative exhibits, and were fully engaged in trial preparation when we settled the  
8 case.

9           18.     Based upon the facts and our level of preparation, our team insisted that we would  
10 not settle for less than 100 percent of statutory damages plus attorneys’ fees. Defendants  
11 ultimately agreed to settle at that level.

12           19.     This case was at all times handled on a contingent fee basis. A copy of the  
13 written fee agreement as required by ORCP 32 M(2)(b) is attached as **Exhibit 1** to this  
14 declaration.

15           20.     Under the terms of that fee agreement, counsel advances and covers all costs and  
16 gets paid only if we make a recovery. The fee percentage is one third (33 and 1/3 percent) in the  
17 event of settlement and 40 percent if the case goes to trial, with the stipulation that the Court  
18 controls the fee in the event that the case proceeds as a class action.

19           21.     As a general matter, consumer class actions are high-risk cases, and this case was  
20 no exception. These cases usually require many years to complete. They often require success  
21 in both the trial and appellate courts. They often require hundreds of thousands of dollars in  
22 costs.

23           22.     There are additional layers of risk and challenge. During the life of a consumer  
24 class action, class counsel must be prepared to put in thousands of hours of work. That work  
25 produces no income, and it displaces other potential cases. Thus, the economics are such that  
26 class counsel must finance out-of-pocket the day-to-day operation and overhead of their firms.

1 And, on top of that, IRS rules provide that costs invested into cases are not deductible business  
2 expenses.

3 23. Beyond these economic challenges, risk includes the apparent risk of losing the  
4 case. Even in the best of cases—and this is among the best of consumer class action cases—  
5 there is the inevitable risk that a jury will find for the defense on liability.

6 24. There is a greater risk beyond the trial risk. Albertsons would have certainly  
7 appealed an adverse judgment. And the appellate process would have added years to the case.

8 25. The bigger risk is the risk that an unrelated case changes the applicable rules  
9 while the case is on appeal.

10 26. Plaintiffs' risk vulnerability included a significant risk that before final  
11 disposition, the U.S. Supreme Court would radically restrict recovery of statutory damages in  
12 class action cases. It is no secret that U.S. Chamber of Commerce and other pro-corporate  
13 advocates are critical of such cases. Attacks on statutory damages are ramping up. *See, e.g.*,  
14 U.S. Chamber of Commerce, Statement of U.S. Chamber Institute for Legal Reform on the  
15 Telephone Consumer Protection Act of 1991 (May 18, 2016), *available at*  
16 <https://www.commerce.senate.gov/services/files/160DA169-E11E-4243-BC70-4649A77E37E6>  
17 (last visited Apr 17, 2023). It is quite possible that a future statutory damage case decision  
18 would change the landscape and require reversal of any judgment entered in this case. That  
19 future risk is far more consequential and uncontrollable than the risks of loss at trial.

20 27. Similar attacks have been mounted against *cy pres* provisions, like ORCP 32 O,  
21 that distribute unclaimed funds to class members indirectly through legal aid and other entity  
22 funding. Again, as long as a case is pending on appeal, future changes put the judgment at risk.

23 28. The other major factor that the Court must assess is the outcome or result  
24 achieved in this case. When we assess outcomes, we like to think about gross recovery and  
25 percentage chances of losing. Typically, we use a formula that assesses the maximum recovery  
26 and discounts it for risk. So, for example, if you believe that the maximum recovery is \$200 and

1 you have an 80 percent chance of prevailing—which is very high, given risks—the settlement  
2 value would be \$160. That calculation does not generally account for the costs and fees, though  
3 we often also assess risk by calculating the likely future fees and costs.

4 29. In this case, the recovery amount is 100 percent. There is no discount. Further,  
5 that \$200 is the net recovery. Fees are fully funded by Defendants. That is a spectacular  
6 outcome by any measure.

7 30. A summary of hours by firm is below. To date, our time spent on this case  
8 exceeds 5300 hours. It is likely that we will spend 100 or more additional hours through the  
9 process of final approval and administration. Time records are available should the Court wish  
10 to review counsel’s records in additional detail. The time spent by Travis Eiva set forth below is  
11 an estimate.

<b>Firm</b>	<b>Total Hours</b>
Tim Quenelle PC	3644
Sugerman Dahab	856
Resolution Strategies	592
Eiva Law	250
<b>TOTAL:</b>	<b>5342</b>

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19 31. A summary of our costs to date is set forth below, including costs paid to date and  
20 future billed or expected costs. The costs will total \$627,205.34. Counsel can provide the Court  
21 with additional details, should it wish to review the costs.

<b>Costs Paid to Date:</b>	
Tim Quenelle PC	\$260,372.71
Sugerman Dahab	\$29,047.63
<b>Total to date:</b>	<b>\$289,420.34</b>

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<b>Costs Billed or Expected:</b>	
Class Administration (expected)	\$294,647.00
Experts (billed)	\$43,138.00
<b>Total (billed or expected):</b>	<b>\$337,785.00</b>

32. At the time of settlement, class counsel agreed to limit the fee request to 20 percent of the common fund, even though the presumptive range is 20 to 30 percent. The fee is fair and reasonable.

I declare that the above statement is true to the best of my knowledge and belief, and that I understand it is subject to penalty for perjury.

EXECUTED on this 17th day of April, 2023, in Portland, Oregon.

/s/ David F. Sugerman  
**David F. Sugerman**, OSB No. 869284

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be served the foregoing **DECLARATION OF DAVID F. SUGERMAN IN SUPPORT OF PLAINTIFFS’ MOTION FOR ATTORNEYS’ FEES, COSTS AND SERVICE AWARD** on the following named person(s) on the date indicated below:

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DATED this 17th day of April, 2023.

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