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3
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

**PLAINTIFFS' STATEMENT OF
ATTORNEYS' FEES AND COSTS**

Hon. Angela F. Lucero

16 By their signatures below, Class counsel offers the following facts in support of an award
17 of reasonable and necessary fees, costs, and disbursements. Plaintiffs are entitled to recover
18 attorneys' fees, costs, and disbursements pursuant to the following facts and legal authority:

19 1. Plaintiffs and the Class pursued claims for relief under the Oregon Unlawful
20 Trade Practices Act. Plaintiffs allege an entitlement to fees and costs pursuant to ORS
21 646.638(3).

22 2. Plaintiffs and Defendants recently entered into a class-wide settlement in the
23 amount of \$107,000,000. Plaintiffs have separately sought approval of this compromise from the
24 Court, which it has preliminarily approved, and will file a motion for final approval of the
25 settlement after class members' deadline to object to or opt out of the settlement.

1 3. Based on data produced by Defendants, the settlement amount represents
2 approximately \$200 per class member—the maximum statutory damage amount—plus 20
3 percent in attorneys’ fees.

4 4. Plaintiffs hereby request attorneys’ fees in the amount of 20 percent of the fund
5 created by the proposed settlement, which equals \$21,400,000.

6 5. As of the date of this filing, Class counsel has worked more than 5300 hours on
7 this matter to date and expects to continue working on the case until completion. In short form,
8 the case was filed in 2016. After reversal of a judgment of dismissal, the case was remanded for
9 trial. The case settled weeks before the start of trial. Additional details are set forth in the
10 memorandum of law filed in support of this statement and the Declaration of David Sugerman
11 (“Sugerman Declaration”), filed concurrently herewith.

12 6. The case required the work of four different law firms: Sugerman Dahab, Tim
13 Quenelle PC, Eiva Law, and Resolution Strategies. The summary of roles and hours for all firms
14 is set forth in the accompanying Sugerman Declaration.

15 7. Separately, Plaintiffs request reimbursement of out-of-pocket costs incurred to
16 date of \$289,420.34, together with approval to deduct anticipated future costs of \$337,785, for
17 total costs of \$627,205.34.

18 8. As required by ORCP 32 M(2)(b), a copy of the written fee agreement is provided
19 with this petition as an attachment to the Sugerman Declaration.

20 9. The basis and specific factors supporting the requested common fund allocation
21 of 20 percent is included in Plaintiffs’ Memorandum in Support of Statement of Attorneys’ Fees
22 and Costs, which is attached hereto.

23 10. In summary, Plaintiffs are entitled to attorney fees in the sum of \$21,400,000,
24 which is 20 percent of the settlement fund and costs of \$627,205.34.

SUGERMAN DAHAB

1 DATED this 17th day of April, 2023.

2 By: /s/ Nadia H. Dahab

3 **David F. Sugerman**, OSB No. 862984

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19 *Attorneys for Plaintiffs and the Class*

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **PLAINTIFFS' STATEMENT OF ATTORNEYS' FEES AND COSTS** 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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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

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

Plaintiffs,

v.

ALBERTSON’S COMPANIES, LLC a foreign limited liability company; ALBERTSON’S LLC, a foreign corporation; SAFEWAY, Inc., a foreign business corporation,

Defendants,

Case No. 16CV15125

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ STATEMENT OF ATTORNEYS’ FEES AND COSTS

Hon. Angela F. Lucero

I. INTRODUCTION

On March 6, 2023, this Court entered an order preliminarily certifying the settlement class in this case, which includes all persons who, between May 4, 2015, and September 7, 2016, purchased certain meat products at a Safeway store located in Oregon, offered on a Buy One, Get One (BOGO) or Buy One, Get Two Free (BOG2) promotion, using their Safeway Club Card. The Court’s order also preliminarily appointed Plaintiffs Schearon and Jason Stewart as class representatives and preliminarily appointed the attorneys at Sugerman Dahab and Tim Quenelle

1 PC as class counsel. Through the order, the Court preliminarily approved the proposed
2 settlement as “fair, reasonable, and adequate”; directed notice to be sent to the class; and
3 scheduled a hearing to consider whether to (1) grant final approval of the settlement; (2) allow
4 class counsel’s application for attorneys’ fees, expenses, and service award; and (3) approve the
5 distribution of the funds to class members.

6 As of the date of this filing, notice has been distributed to the settlement class members,
7 and a final approval hearing is set for July 10, 2023. Class counsel now moves for an award of
8 attorneys’ fees and expenses. Counsel seeks fees in the amount of 20 percent of the common
9 fund of \$107 million (or \$21,400,000), plus costs in the amount of \$627,205.34. Counsel has
10 invested significant time in this matter and has achieved a stellar result. That result, in counsel’s
11 view, will benefit all members of the class.

12 **II. BACKGROUND**

13 In this case, Plaintiffs and the Class allege that Defendants engaged in a predatory pricing
14 practice by raising the regular price of various meat products before selling them in their BOGO
15 sale promotion. Through that promotion, Defendants nearly doubled the unit price of those
16 products. Both Oregon and federal rules provide that a retailer cannot promote and sell goods as
17 “free” when it raises the price of goods to cover the cost of the “free” goods. *See, e.g.*, OAR
18 137-020-0015(2)(a)(B) & (2)(a)(C); Federal Trade Comm’n, “Free Offer Guide,” 16 CFR §
19 251.1 (1971). Plaintiffs and the Class therefore alleged that the BOGO promotion and sales
20 violated Oregon’s Unlawful Trade Practices Act (UTPA), including ORS 646.608(1)(u).
21 Pursuant to ORS 646.638(8), Plaintiffs and the Class sought to recover statutory damages in the
22 amount of \$200 per class member, on the ground that Defendants recklessly or knowingly
23 violated the UTPA through their BOGO and BOG2 programs. This Court certified a class, and
24 the matter was set for trial.

25 Defendants filed answers in late 2016. Albertson’s Answer to Amended Complaint, TCF
26 11/3/2016, ¶¶ 6–10; Safeway’s Answer to Amended Complaint, TCF 11/3/2016, ¶¶ 6–10. They

1 collectively asserted nine affirmative defenses, including that Plaintiffs and class members have
2 suffered no ascertainable loss, lacked standing, and failed to mitigate their damages; that
3 Plaintiffs failed to allege sufficient facts to warrant class certification and/or class damages; that
4 the Court cannot certify a class because individual questions predominate over common
5 questions; that the claims are barred by waiver, estoppel, and laches; that Plaintiffs' claims are
6 barred because Defendants acted in good faith, and that Plaintiffs' claims are barred by the
7 statute of limitations. Albertson's Answer ¶¶ 6–7; Safeway's Answer at 5–6.

8 The trial court granted Defendants' early motion to dismiss, which later was reversed on
9 appeal. *Stewart v. Albertsons*, 308 Or App 464, *rev den*, 368 Or 138 (2021). The case was
10 remanded, and, consistently with this Court's case management order, the parties participated in
11 additional discovery. Case Management Order, TCF 7/8/2022.

12 Both before and after the appeal, the parties engaged in extensive discovery. That
13 discovery included depositions of both Plaintiffs and several of Defendants' employees and
14 former employees, and several motions to compel documents or transactional data that
15 Defendants repeatedly refused to produce. Discovery continued up until mid-February 2023,
16 when the parties reached agreement on the material terms of a class settlement.

17 Under the terms of that settlement, each class member will receive the full measure of
18 statutory damages under the UTPA, \$200. ORS 646.638(1) & (8). Counsel will also receive
19 their attorneys' fees (in an amount up to 20 percent of the common fund) and costs. At issue for
20 this Court, then, is whether the proposed 20 percent fee is fair and reasonable in the
21 circumstances of this case.

22 **III. LEGAL STANDARD**

23 The amount of attorneys' fees that should be awarded to class counsel is a question of
24 fact as to which the trial court has wide discretion. *Parrott v. Carr Chevrolet, Inc.*, 156 Or App
25 257, 282–83, 965 P2d 440 (1998), *aff'd in part, rev'd in part*, 331 Or 537, 17 P3d 473 (2001)
26 (reversing reduction of punitive damage award and reinstating jury verdict); *Creditors Protective*

1 *Assoc., Inc. v. Britt*, 58 Or App 230, 235, 648 P2d 414 (1982). Oregon Rule of Civil Procedure
2 (“Rule”) 32 M provides the starting point on the availability of fees in class actions. Rule 32 M
3 and ORS 20.075 govern the process for determining the amount of those fees.¹

4 The touchstone of the analysis is reasonableness. *Strawn v. Farmers Ins. Co. of Or.*, 353
5 Or 210, 217, 297 P3d 439 (2013). In *Strawn*, the plaintiff and the class prevailed on both fee-
6 shifting and non-fee shifting claims. As *Strawn* explains, there are two methods for setting
7 attorneys’ fees. The lodestar approach calculates fees by the hours worked multiplied by the
8 hourly rate. *Id.* at 217. The common-fund approach determines fees based on a percentage of
9 the fund, such that all beneficiaries contribute toward fees and costs. *Id.* at 217–18. When the
10 result creates a settlement fund, the common fund approach is the preferred methodology.

11 It is also appropriate to award attorneys’ fees where, as here, Class counsel created a
12 significant common benefit for the class. See *Crandon Cap. Partners v. Shelk*, 342 Or 555, 565,
13 157 P3d 176 (2007) (recognizing the common benefit doctrine and concluding that a court may
14 spread attorneys’ fees among persons benefited by a lawsuit where the lawsuit created a common
15 benefit, and it would be equitable for each to share in the cost of the attorneys’ work in creating
16 that benefit). In common fund class action cases, fee awards typically fall between 20 and 30
17 percent of the fund. *Strawn*, 353 Or at 229–30 (citing 4 *Newberg on Class Actions* § 14:6, at
18 550).²

19 Oregon courts have consistently approved percentage-of-fund fee awards in class action
20 settlements—often in the range of 30 percent or more. *Rowden v. Pac. Coast Seafoods*, No.
21 9310-06899 (Mult Cty Cir Ct) (one-third fee; fee shifting case); *Daggett v. Blind Enters. of Or.*,
22 No. CY-95-421-ST (D Or) (50 percent fee; fee-shifting case); *Shea v. Chicago Pneumatic Tool*
23 *Co.*, No. 9509-06261 (Mult Cty Cir Ct) (one-third of common fund); *Rausch v. Hartford Fin*

24 _____

25 ¹ Oregon’s Rules of Professional Conduct separately regulate fees. ORPC 1.5. Additional
26 guidance on attorneys’ fees comes from case law.

² In *Strawn*, the fee exceeded 42 percent of the fund. *Id.* at 230–31.

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1 *Servs Grp.*, 2007 WL 671334 (D Or Feb 26, 2007) (30 percent of common fund); *Razilov v.*
2 *Nationwide Mutual Ins. Co.*, 2006 WL 3312024 (D Or Nov 13, 2006) (30 percent of common
3 fund); *Bellshaw v. Farmers Ins. Co. of Oregon*, No. 15CV16877 (Mult Cty Cir Ct) (30 percent
4 fee of common fund of \$23.5 million; appeal pending). The cases place a premium on risk;
5 hours spent merit review, but they do not determine the reasonableness of a fee where, as here,
6 the work is undertaken on a contingent fee and counsel advances costs. *Erickson v. Farmers Ins.*
7 *Co. of Or.*, 175 Or App 548, 550, 29 P3d (2001). In such cases, counsel takes the risk that there
8 will be no recovery at the end of the case. In the process, counsel devotes both time and out-of-
9 pocket costs to fund the litigation.

10 A percentage-based fee award is appropriate only if the party’s fee agreement provides
11 for a percentage and is truly contingent. *English v. Multnomah Cty.*, 229 Or App 15, 30, 209 P3d
12 831 (2009). The fee agreement in this case calls for a contingent fee. Declaration of David of
13 Sugerman in Support of Plaintiffs’ Statement of Attorneys’ Fees and Costs (“Sugerman Decl.”)
14 ¶ 19, Ex. 1.

15 **IV. ARGUMENT**

16 **A. Rule 32 Factors**

17 ORCP 32 M(1)(e) provides that “[i]n determining the amount of attorneys’ fees for a
18 prevailing class the court shall consider the following factors:

- 19 (i) The time and effort expended by the attorney in the litigation, including the
20 nature, extent, and quality of the services rendered;
- 21 (ii) Results achieved and benefits conferred upon the class;
- 22 (iii) The magnitude, complexity, and uniqueness of the litigation;
- (iv) The contingent nature of success; and
- (v) Appropriate criteria in Rule 1.5 of the Oregon Rules of Professional Conduct.”

23 Each of those factors weighs in favor of approval of Class counsel’s request for fees here.

24 First, the amount of time and effort expended by the attorneys in this case, including the
25 nature, extent, and quality of those services, is supported by the facts set forth in the Sugerman
26 Declaration. Those facts demonstrate that Class counsel spent in excess of 5300 hours on this

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1 case and provided quality services consistent with the substantial experience that counsel brought
2 to this case.

3 Second, the benefit conferred by the settlement is substantial and valued at \$107,000,000.
4 That settlement amount equals approximately \$200 per class member, plus 20 percent in
5 attorneys' fees. In other words, class members will net approximately 100 percent of the relief
6 available to them under the UTPA.

7 Third, the risks of the litigation for Class counsel were high. Sugerman Decl. ¶¶ 21–27.
8 Class counsel filed this case in 2016. To litigate the case, counsel has worked over five thousand
9 hours without prior compensation. Over the course of the six years of this case, counsel will also
10 spend in excess of \$627,000 in out-of-pocket expenses. All of this is done on a contingency
11 basis. Sugerman Decl. ¶¶ 19–20.

12 Fourth, this case involved complexities of class procedure and the Unlawful Trade
13 Practices Act (UTPA) that are constantly (indeed, currently) evolving. Sugerman Decl. ¶ 9. To
14 understand the evolving judicial interpretations of the UTPA, including the impact of the
15 UTPA's reliance requirement on questions of class procedure, requires specialized knowledge,
16 skill, and experience. So, too, with respect to class action procedure and the steps necessary to
17 achieve certification and negotiate a fair and adequate settlement. And through the appeal in this
18 case, counsel received a much-needed published appellate opinion addressing matters of first
19 impression relating to the meaning and requirements of Rule 32's cure provision. *See* ORCP
20 32 I; *see also Stewart v. Albertsons*, 308 Or App 464, *rev den*, 368 Or 138 (2021).

21 Finally, the complexity of the case is further shown by the skill of the lawyers involved
22 on both sides of the case. Class counsel has a class action practice involving many areas of
23 complex litigation. Sugerman Decl. ¶¶ 3, 6–9. And fifth, the requested 20 percent fee has
24 routinely been awarded in class action litigation in courts across the country.

25 The common fund approach is appropriate where, as here, Class counsel created a fund.
26 *See Strawn*, 353 Or at 218–19 (citations omitted); ORCP 32 M(1)(c) (“If the prevailing class

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1 recovers a judgment that can be divided for the purpose, the court may order reasonable attorney
2 fees and litigation expenses of the class to be paid from the recovery.”). The common fund
3 theory provides that beneficiaries share in the cost of legal efforts to create, discover, increase, or
4 preserve a fund of money to which others have a claim. *Strunk v. Public Emps. Retirement Bd*,
5 341 Or 175, 181, 139 P3d 956 (2006). Here, the requested fee, 20 percent, is within the range of
6 acceptable attorneys’ fees in Oregon cases.

7 Additional discussion relating to individual factors is set forth below.

8 **1. The time and effort expended by the attorney in the litigation,**
9 **including the nature, extent, and quality of services rendered and the**
10 **magnitude, complexity, and uniqueness of the litigation.**

11 The aggregate attorney hours as of the date of this filing exceed 5300, and class counsel
12 expects to expend at least 100 additional hours preparing a final approval motion, attending a
13 final approval hearing, answering class member questions, responding to the notice
14 administrator, administering the case, and supervising the distribution of the settlement fund.
15 Sugerma Decl. ¶ 30.

16 Class counsel possesses extensive knowledge and experience in prosecuting class actions.
17 Sugerma Decl. ¶ 3. They have successfully litigated and resolved other consumer class actions
18 against large corporations. Sugerma Decl. ¶¶ 7–8. In this case, counsel’s expertise allowed it
19 to build a novel and successful case resulting in substantial funds for Oregon consumers.
20 Sugerma Decl. ¶ 29. The specialized skills and expertise support granting the requested fee.

21 **2. The results achieved and benefits conferred.**

22 The results in this case speak for themselves. Class counsel recovered the full measure of
23 statutory damages, plus fees, on the eve of trial. Because counsel has litigated many complex
24 consumer cases involving claims under the UTPA, they were able to successfully litigate and
25 settle this matter on terms that will benefit Oregon consumers. Sugerma Decl. ¶ 29. The
26 requested fee is reasonable.

1 **3. The contingent nature of success.**

2 This was a contingent fee case. Class counsel advanced all time and costs and would not
3 recover for such time or costs in the absence of a recovery for the class. Sugerman Decl. ¶ 20.
4 The contingent nature of the case means several things in this setting. First, and most obviously,
5 attorneys for the class are paid only if and when they succeed. Second, a case like this represents
6 significant opportunity costs for small firms. Cases of this magnitude absorb substantial
7 resources and require counsel to decline other cases, in order to devote necessary resources to the
8 case.

9 **B. ORS 20.075(2) Factors**

10 ORS 20.075(2) sets forth nine considerations, which largely overlap with the ORCP
11 32 M factors. Each factor listed in ORS 30.075(2) is addressed below.

12 **1. The time and labor required in the proceeding, the novelty and**
13 **difficulty of the questions involved in the proceeding and the skill**
14 **needed to perform the legal services.**

15 The successful outcome in this case required thousands of hours of attorney time. The
16 challenges included mastery of class action procedure and the UTPA, successful appellate
17 advocacy, high level electronic discovery and data recovery, and mediation and settlement skills.
18 The case settled on the eve of trial and only did so because a top-tier trial team was fully
19 prepared for trial. There are very few lawyers, law firms, and groups that have the collective
20 skills to successfully navigate a case of this magnitude.

21 **2. The likelihood, if apparent to the client, that the acceptance of the**
22 **particular employment by the attorney would preclude the attorney**
23 **from taking other cases.**

24 This factor is of limited relevance because clients in consumer protection cases do not
25 typically assess the likelihood that acceptance would preclude other work. But because the
26 Court retains plenary authority over fees and costs, *see* ORCP 32 M, it is arguably an appropriate
factor to consider. Each commitment to a class action is a major commitment of small-firm

1 resources that will necessarily limit these firms' capacity for additional work during the
2 pendency of the case. Sugerman Decl. ¶ 22.

3 **3. The fee customarily charged in the locality for similar services.**

4 In individual contingent fee cases, the fee is typically one-third, although percentages
5 vary. Caselaw likely displaces this consideration; as explained above, the presumptive range is
6 20 to 30 percent.

7 **4. The amount involved in the controversy and the results obtained.**

8 Had the class prevailed at trial, each class member would have been entitled to recover
9 \$200 in statutory damages, plus attorneys' fees. Thus, under the terms of this settlement, class
10 members are netting a full recovery. The aggregate settlement amount of \$107 million is a
11 spectacular outcome.

12 **5. Time limitations imposed by the client or the circumstances.**

13 This factor is of limited relevance. The client did not impose time limitations; the lack of
14 time limitations and six-year course of this case imposed other pressures, but they do not act as
15 time limits.

16 **6. The nature and length of the attorneys' professional relationship with
the client.**

17 This factor presumably addresses long-term, institutional clients and not the duration of
18 the case. It is of limited relevance to consumer class actions.

19 **7. The experience, reputation, and ability of the attorneys.**

20 The assembled legal team has had repeated, consistent success in pursuit of consumer
21 protection class actions. Past wins include *Scharfstein v. BP West Coast Products, LLC*, 292 Or
22 App 69, 423 P.3d 757, *rev den*, 363 Or 815, 431 P3d 90 (2018), *cert dismissed*, — U.S. —,
23 140 S Ct 16, 204 L Ed 2d 1170 (2019), for debit card overcharges, resulting in a trial court win
24 of \$409 million that was fully affirmed and settled on appeal; *Adams v. Western Culinary*
25 *Institute*, No. 0803-3530 (Mult Cty Cir Ct) (predatory trade school fraud; \$31 million
26 settlement); *Bellshaw v. Farmers Insurance Co. of Oregon*, No. 15CV16877 (Mult Cty Cir Ct)

1 (\$23.5 million trial court win; case pending on appeal); and *Martin v. Comcast*, No. 0407-07245
2 (Mult Cty Cir Ct) (illegally assessed cable television late fees; \$23 million settlement). The
3 results, which come over a span of almost two decades, establish that the team is highly skilled
4 and experienced. Over that time, the team has developed a reputation for obtaining spectacular
5 results in consumer class action cases.

6 **8. Whether the fee is fixed or contingent.**

7 The fee and associated costs are wholly contingent. Sugerman Decl. ¶ 19.

8 **9. Whether the attorney performed the services on a pro bono basis or**
9 **the award of attorney fees otherwise promotes access to justice.**

10 The services were on a contingent fee basis. But some 425,000 Oregon consumers are
11 entitled to receive approximately \$200 per person, which represents real relief. In addition,
12 unclaimed funds are divided between Oregon Legal Aid and the following organizations:
13 National Association of Consumer Advocates, National Consumer Law Center, Public Justice,
14 Oregon Consumer Justice, and the Oregon Food Bank. This substantial relief and dedicated *cy*
15 *pres* residual funds will have a significant impact on access to justice.

16 **C. RPC 1.5 Factors**

17 Many of the RPC factors replicate Rule 32 M. Class counsel adopts the prior discussion
18 where the factors overlap and discusses unique RPC 1.5 factors below.

19 **1. The fee customarily charged in the locality for similar legal services—**
20 **RPC 1.5(b)(3).**

21 On this factor, there are two salient measures. First, class counsel executed a written fee
22 agreement that called for a 33 percent fee. Sugerman Decl. ¶ 20. The requested fee of 20
23 percent is below that agreed-upon amount. Second, the *Strawn* court noted that the presumptive
24 reasonable fee in complex, common-fund class actions range from 20 to 30 percent. *Strawn*, 353
25 Or at 229–30. The fee of 20 percent requested in this case falls within, and at the low end, of
26 that presumptive range.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ STATEMENT OF ATTORNEYS’ FEES AND COSTS** 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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