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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

**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

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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.

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

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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.

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

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

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

FEE AGREEMENT

I, Jason Stewart (“client,” “clients”) hereby agree to employ the law offices of David F. Sugerman Attorney, PC and Tim Quenelle, Attorney at Law (“attorneys”) to represent me in connection with:

Consumer law claims against Safeway, Albertsons and others for unlawful sales practices.

I agree to the following terms:

1. Duties of the Attorneys

The attorneys agree to represent me and to use their efforts to pursue the claim or claims and attempt to achieve a recovery for me.

2. Duties of the Client

As a client, I agree to cooperate with my attorneys, to truthfully share all information necessary, and to keep in contact with the attorneys throughout the time the claim is pending.

3. Attorney Fees

A. No Recovery, No Fee

I understand and agree that in the event there is no recovery of any sums on my behalf, the attorneys will receive no legal fees whatsoever for their legal services.

B. In the Event of a Recovery

If there is a recovery, the attorney fees to be paid shall be a percentage of the gross recovery, as follows:

If a settlement is reached prior to the start of a trial, arbitration hearing, or other proceeding, then one-third (33-1/3%) of the gross recovery shall be paid as the attorney fee.

If a trial, arbitration, hearing or other proceeding has started and a settlement, judgment, or other recovery occurs thereafter, then forty percent (40%) of the gross recovery shall be paid as the attorney fee.

C. If defendant pays legal fees to attorneys, client shall be credited amount paid by defendant.

D. If this matter proceeds as a class action, additional provisions control the fee agreement, as set described in Paragraph 8.

4. Appeal

For purposes of this agreement, attorneys do not now agree to represent Client on appeal. Under ordinary circumstances, an appeal will result in an additional fee.

5. Structured Settlements

In some cases, a defendant pays a settlement to the client over a specific period of time. This is called a structured settlement. If all or part of the client's recovery is based upon a structured settlement, the attorney fee shall be paid up front and not over time. I agree that the legal fee shall be computed as set forth in paragraph 3 above, but shall be based on the actual cost to the defendant. If the actual cost is unknown, then I agree to pay the attorney fee based on the present value of the structured settlement.

6. Cancellation of Agreement

I understand that I have the right to cancel this agreement by notifying attorneys in writing within 24 hours after this agreement is signed, or by the same time the next working day. If I later terminate this agreement, I understand that attorneys shall be entitled to the reasonable value of their services rendered prior to the cancellation of this agreement. The value of attorneys' services shall be the hourly rate charged at the time this agreement is cancelled. Attorneys may withdraw as the client's attorney if (a) the law firm's investigation of the facts and circumstances leads them to believe that the client's claim is not one that should be pursued; (b) if the client is not truthful with the attorneys or their staff; (c) if the client is not cooperative with the attorneys or the staff; or (d) if a conflict of interest develops between the client and attorneys.

7. Costs and Out of Pocket Expenses

I understand that attorneys may incur out of pocket expenses in pursuing my claim. I agree to pay any costs and out of pocket expenses incurred on my behalf. I understand that if there is no recovery, I agree to pay the costs and out of pocket expenses, to the extent that my circumstances permit, based upon attorneys' determination of ability to pay.

8. Class Action Fees

Attorneys have explained that this case will be filed as a class action. Attorney fees in class action cases are controlled by the court; however, the court may look to this agreement in setting such fees.

9. Class Representatives

Clients agree that they will serve as class representatives. Class representatives have certain duties and obligations, including providing some personal and financial information to the defendants, as well as giving deposition testimony. These obligations generally will not be greater than the obligations that clients would have if the case was not pursued as a class action; however, the obligations on class representatives are greater than those on other members of the class. Class representatives also have duties to the class to ensure that any potential settlement offer is fair to the class as a whole and not only in the clients' best interests. Clients agree that the attorney-client privilege will not prevent attorneys from using any information received from clients to benefit other members of the class. Clients understand that if they withdraw from the lawsuit, clients will maintain the attorney-client privilege and will not use or disclose privileged information without permission.

10. Limited Powers of Class Representatives

Clients understand that class representatives have limited powers to settle their claims brought in a class action. Settlements of class actions require court approval. Should clients wish to settle claims over the objection of attorneys, clients may need to retain independent counsel.

11. Conflicts of Interest

Clients understand that attorneys are likely to represent many individuals in the same or similar circumstances. Attorneys have explained, and clients understand, that lawyers' simultaneous representation of multiple clients may create certain types of conflict of interest. These conflicts may include a limited fund against which a successful claimant may make a recovery. Conflicts may also arise because different clients may have different views about how the litigation should be conducted.

12. Consent to Representation with Potential Conflict of Interest

Clients specifically consent to attorneys' representation of multiple clients, despite the potential conflicts of interest. Clients acknowledge that they have had an opportunity to discuss the potential conflict with independent counsel and have decided that they wish for attorneys to represent them in pursuing their claims, despite the potential conflicts of interest.

Dated: 4. 28, 2016

By: /s/ Tim Quenelle
Attorney

[Signature]
Client

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Dated: 4-26, 2016

By: /s/ Tim Quenelle
Attorney

Achilles Stewart
Client

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:

Sarah J. Crooks
PERKINS COIE LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209
Tel: (503) 727-2000

- by Overnight Delivery
 - by Facsimile
 - by U.S. Mail with postage prepaid
 - by OJD eFile & Serve
 - by Email
- scrooks@perkinscoie.com

Lindsey E. Dunn (to be admitted *pro hac vice*)
PERKINS COIE LLP
1900 16th Street, Ste. 1400
Denver, CO 80202
Tel: (303) 291-2400

- by Overnight Delivery
 - by Facsimile
 - by U.S. Mail with postage prepaid
 - by OJD File & Serve
 - by Email
- ldunn@perkinscoie.com

Abdul Kallon (admitted *pro hac vice*)
PERKINS COIE LLP
1201 Third Ave. #4900
Seattle, WA 98101
Tel: (206) 359-8000

- by Overnight Delivery
 - by Facsimile
 - by U.S. Mail with postage prepaid
 - by OJD File & Serve
 - by Email
- akallon@perkinscoie.com

Attorneys for Defendants

DATED this 17th day of April, 2023.

By: /s/ Nadia H. Dahab
David F. Sugerman, OSB No. 862984
Nadia H. Dahab, OSB No. 125630
Sarah R. Osborn, OSB No. 222119
SUGERMAN DAHAB
707 SW Washington Street Ste. 600
Portland, OR 97205
Tel: (503) 228-6474
david@sugermindahab.com
nadia@sugermindahab.com
sarah@sugermindahab.com

Attorneys for Plaintiffs