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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

PLAINTIFFS’ MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Hon. Angela F. Lucero

MOTION

Pursuant to ORCP 32 D and 32 M, Plaintiffs Schearon Stewart and Jason Stewart (“Plaintiffs”) respectfully move for final approval of the settlement in this case. Defendants do not oppose the motion. The motion is supported by the following memorandum of points and authorities and the accompanying Declaration of Ryan Aldridge (“Aldridge Decl.”), filed concurrently herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

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,

1 purchased certain meat products at a Safeway store located in Oregon, offered on a Buy One, Get
2 One (BOGO) or Buy One, Get Two Free (BOG2) promotion, using their Safeway Club Card.
3 Preliminary Approval Order at 2 (TCF 3/6/2023). The Court’s order also preliminarily
4 appointed Plaintiffs Schearon and Jason Stewart as class representatives and preliminarily
5 appointed the attorneys at Sugerman Dahab and Tim Quenelle PC as class counsel. Order at 2–
6 3. Through the order, the Court found preliminarily that the class as defined in the settlement
7 agreement meets all of the requirements for certification of a settlement class and that the
8 proposed settlement was the product of arms’-length negotiations by experienced counsel. The
9 Court ordered that notice of the proposed settlement be served to class members.

10 Through this motion, Plaintiffs now report that the notice ordered by this Court has been
11 successfully completed. Neither Class counsel nor the Court-approved settlement administrator
12 has received any objections to the settlement, and only six class members have chosen to opt out.
13 Class counsel now moves for final approval.

14 **II. BACKGROUND**

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

1 Defendants filed answers in late 2016. Albertson’s Answer to Amended Complaint, TCF
2 11/3/2016, ¶¶ 6–10; Safeway’s Answer to Amended Complaint, TCF 11/3/2016, ¶¶ 6–10. They
3 collectively asserted nine affirmative defenses, including that Plaintiffs and class members have
4 suffered no ascertainable loss, lacked standing, and failed to mitigate their damages; that
5 Plaintiffs failed to allege sufficient facts to warrant class certification and/or class damages; that
6 the Court cannot certify a class because individual questions predominate over common
7 questions; that the claims are barred by waiver, estoppel, and laches; that Plaintiffs’ claims are
8 barred because Defendants acted in good faith, and that Plaintiffs’ claims are barred by the
9 statute of limitations. Albertson’s Answer ¶¶ 6–7; Safeway’s Answer at 5–6.

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

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

19 Under the terms of the settlement, each class member will receive the full measure of
20 statutory damages under the UTPA, which is \$200. ORS 646.638(1) & (8). Counsel will also
21 receive their attorneys’ fees (in an amount up to 20 percent of the common fund) and costs.

22 **III. THE TERMS OF THE SETTLEMENT**

23 Under the terms of the proposed settlement, each class member is expected to receive a
24 recovery of \$200 after payment of attorneys’ fees and costs. In other words, if the Court grants
25 Plaintiffs’ motion for final approval of the settlement and for attorneys’ fees and costs, class
26 members will receive 100 percent of the statutory damages allowed under the UTPA. Additional

1 detail relating to the value of the settlement, the amount of Plaintiffs’ request for fees and costs,
2 and the reach of the Court-approved notice program is set forth below.

3 **A. Value of the Settlement to Class Members**

4 In exchange for dismissal of this action and the settlement release, Defendants have
5 agreed to pay a total of \$107,000,000 to be used for direct payments to the members of the
6 settlement class, after deductions of Court-approved fees and expenses.

7 The Settlement does not require settlement class members to submit a claim or take any
8 action to receive the money they are entitled to under the Settlement. Rather, payments will be
9 made to class members by direct deposit or by mailing a check to their last known address.

10 **B. Attorneys’ Fees and Expenses**

11 On April 17, 2023, Class Counsel filed a motion with the Court requesting to be paid up
12 to 20 percent of the fund created by the proposed settlement, which equals \$21,400,000. As
13 stated in the memorandum accompanying that motion, this amount is consistent with the amount
14 stated in the class notice, which informed class members that Class Counsel would seek fees an
15 amount up to 20 percent of the settlement. As is further explained in the memorandum
16 accompanying Plaintiffs’ motion for an award of attorneys’ fees, the requested 20-percent fee is
17 also well below the amount set forth in the contingent fee agreement that Class counsel executed
18 with Plaintiffs, and is also at the low end of the range of presumptively reasonable fees approved
19 by the Oregon Supreme Court in *Strawn v. Farmers Ins. Co. of Or.*, 353 Or 210, 217, 297 P3d
20 439 (2013).

21 **C. Notice Program**

22 Notice has also been completed consistently with the notice plan proposed by the parties
23 and approved by the Court. The following summarizes the notice program.

24 1. Notice Program Execution

25 For the purposes of this case, P&N, the Court-approved settlement administrator,
26 maintains a database of 421,710 settlement class members, which was used to effectuate the

1 notice campaign as outlined in the Court’s order and in the parties’ settlement agreement.

2 Aldridge Decl. ¶ 5.¹

3 The class data file contained 19,290 records with a phone number only. Aldridge Decl.
4 ¶ 5. P&N performed reverse look-up searches on those records. Aldridge Decl. ¶ 5. After
5 conducting the reverse look-up and reviewing the remaining class data, P&N identified email
6 addresses for 287,738 class members and mailing address sufficient to attempt mailing the short-
7 form notice for 332,227 settlement class members. Aldridge Decl. ¶ 5.

8 Before sending the notice by email, P&N performed an email hygiene and verification
9 process designed to protect the integrity of the email campaign and maximize deliverability.
10 Aldridge Decl. ¶ 6. That process included deduplication, syntax validation, misspelled domain
11 detection and correction, domain validation, and risk validation. Aldridge Decl. ¶ 6. Email
12 addresses for 286,621 class members passed the hygiene and verification process. Aldridge
13 Decl. ¶ 6. In sending the email notice, P&N followed standard email best practices, including
14 utilizing “unsubscribe” links and the settlement administrator contact information. Aldridge
15 Decl. ¶ 6. Beginning on April 17, 2023, P&N caused the short-form notice to be sent via email
16 to the 286,621 email addresses for class members that passed the hygiene and verification
17 process. Aldridge Decl. ¶ 6. The email notice was successfully delivered to 263,758 email
18 addresses. Aldridge Decl. ¶ 6.

19 P&N coordinated and caused the short-form notice to be mailed via U.S. first-class mail
20 to class members for whom a mailing address was available from the class data. Aldridge Decl.
21 ¶ 7. This postcard notice included (a) the web address to the case website for access to
22 additional information, (b) a description of the rights and options as a class member and the dates
23 by which to act on those options, and (c) the date of the final approval hearing. Aldridge Decl.

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25 ¹ Class counsel initially sent P&N a class member data file containing a total of 426,442
26 records. Aldridge Decl. ¶ 5. After deduplicating the data, P&N determined that the Class
consists of 421,710 unique records. Aldridge Decl. ¶ 5.

1 ¶ 7. The postcard notice mailing was completed on or before April 17, 2023, in accordance with
2 the Court’s Preliminary Approval Order. Aldridge Decl. ¶ 7.

3 Before mailing, all mailing addresses were checked against the National Change of
4 Address (NCOA) database maintained by the United States Postal Service (USPS). Aldridge
5 Decl. ¶ 8. In addition, the addresses were certified via the Coding Accuracy Support System
6 (CASS) to ensure the quality of the zip code and verified through Delivery Point Validation
7 (DPV) to verify the accuracy of the addresses. Aldridge Decl. ¶ 8. P&N caused the mailing of
8 the postcard notice by U.S. first class mail to a total of 332,227 class members. Aldridge Decl.
9 ¶ 8.

10 In the initial mailing campaign, P&N executed postcard notice mailings to 332,007 class
11 members that passed address validation. Aldridge Decl. ¶ 9. Thereafter, P&N executed skip
12 tracing on the records that did not pass address validation and, based on information obtained
13 through skip tracing, caused to be mailed a postcard notice to an additional 220 class members.
14 Aldridge Decl. ¶ 9. P&N also executed supplemental mailings for 42,862 class members for
15 which an initial postcard notice was not deliverable but for which P&N was able to obtain an
16 alternative mailing address through (1) forwarding addresses provided by the USPS, (2) skip
17 trace searches using the LexisNexis third-party vendor database, or (3) requests received directly
18 from class members. Aldridge Decl. ¶ 9.

19 Beginning on April 17, 2023, and continuing through May 15, 2023, P&N caused digital
20 notice to be served on the social media platform, Facebook. Aldridge Decl. ¶ 10. The social
21 media campaign was geographically targeted to Oregon and neighboring border towns. Aldridge
22 Decl. ¶ 10. A total of 37,617,022 impressions were served over the four-week period. Aldridge
23 Decl. ¶ 10.

24 On April 17, 2023, P&N published the settlement website,
25 www.safewaybogoclassaction.com. Aldridge Decl. ¶ 11. Visitors to the settlement website can
26 download the long-form notice, the claim form, and various court documents, such as the Class

1 Action Complaint, the settlement agreement, Plaintiffs’ motion for attorneys’ fees, and the
 2 Court’s Preliminary Approval Order. Aldridge Decl. ¶ 12. Visitors are also able to submit
 3 claims electronically; submit address updates electronically; and find answers to frequently
 4 asked questions (FAQs), important dates and deadlines, and contact information for the
 5 settlement administrator. Aldridge Decl. ¶ 12. As of June 21, 2023, the settlement website has
 6 received 489,956 unique visitors and 5,283,232 page views. Aldridge Decl. ¶ 12.

7 Finally, P&N established a toll-free telephone number, 1-855-475-1347, which is
 8 available twenty-four hours per day. Aldridge Decl. ¶ 13. Settlement class members can call
 9 and interact with an interactive voice response (“IVR”) system that provides important
 10 settlement information and offers the ability to leave a voicemail message to address specific
 11 requests or issues. Aldridge Decl. ¶ 13. The number appeared in all notices and in multiple
 12 locations on the settlement website. Aldridge Decl. ¶ 13. The number will remain active
 13 through the close of this settlement program. Aldridge Decl. ¶ 13.

14 2. Notice Program Reach

15 Through the notice procedures outlined above, P&N attempted to send direct notice to all
 16 361,431 (85.71%) class members for whom a valid email or mailing address was available.
 17 Aldridge Decl. ¶ 15. As of June 21, 2023, the Notice Program reached a total of 341,753
 18 (81.04%) of Settlement Class Members. Aldridge Decl. ¶ 15. Table 1, below, provides an
 19 overview of dissemination results and reach statistics for the Notice Program. Aldridge Decl.
 20 ¶ 15.

21 **Table 1: Direct Notice Program Dissemination & Reach**

Description	Volume of Class Members	Percentage of Class Members
Class Members	421,710	100.00%
Email Notice		
(+ Total Email Notices Sent	286,621	67.97%
(+ Total Email Notices Delivered	263,758	62.54%

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1	(-) Total Email Notices Bounced/Undeliverable	22,863	5.42%
2	Initial Notice Mailing		
	(+) Postcard Notices Mailed (Initial Campaign)	332,007	78.73%
3	(+) Postcard Notices Mailed (Initial Skip Traces)	220	0.05%
4	(-) Total Postcard Notices Returned as Undeliverable	90,792	21.53%
5	Supplemental Notice Mailing		
	(+) Total Postcard Notices Re-mailed	42,862	10.16%
6	(-) Total Undeliverable (Re-Mailed) Postcard Notices	6,249	1.48%
7	Direct Notice Program Reach		
	(+) Received Only Email Notice	63,705	15.11%
8	(+) Received Only Postcard Notice	77,995	18.49%
9	(+) Received Both Email and Postcard Notice	200,053	47.44%
10	(=) Received Direct Notice	341,753	81.04%

11 3. Claims Received

12 The settlement agreement and this Court’s Preliminary Approval Order directed that class
13 members for whom the settlement administrator lacks sufficient information to make a direct
14 payment may file a claim. Aldridge Decl. ¶ 16. The online claim submission feature was
15 available on the settlement website beginning April 17, 2023. Aldridge Decl. ¶ 16. The
16 settlement website also provided a feature for class members who received direct notice to
17 update their contact information and select a preferred payment method such as Venmo, PayPal,
18 E-MasterCard, Zelle, ACH, and Paper Check. Aldridge Decl. ¶ 16. The deadline for class
19 members to submit a claim form was June 16, 2023.

20 Systematic or suspicious claims are submissions with indicators that suggest fraud.
21 Aldridge Decl. ¶ 17. Examples of such indicators include multiple submissions from a single IP
22 Address, submissions from known fraudulent email domains or utilizing formulaic patterns to
23 create email addresses (examples included in the Table 2 below), and submissions that appear to
24 be unrelated to each other with a request to be paid using the same digital payment account
25 information. Aldridge Decl. ¶ 17. Over the last year, P&N has observed and experienced a
26 significant increase in apparent systematic or suspicious claims filings in cases for which it

1 serves as Settlement or Claims Administrator, as well as an increase in the level of sophistication
2 with which fraudulent claims are filed. Aldridge Decl. ¶ 17. For instance, P&N has observed
3 the use of contact information of real people (obtained through the dark web or publicly
4 available datasets) to divert the claim payment to a digital payment account (e.g., PayPal or a
5 digital payment card) or email address controlled by fraudulent actors. Aldridge Decl. ¶ 17.

6 **Table 2.**

7

First Name	Last Name	Email Address
CADY	H [REDACTED]	[REDACTED]vvyfiede@hotmail.com
Roxann	OL [REDACTED]	[REDACTED]prxqwfqj@hotmail.com
Dan	How [REDACTED]	[REDACTED]loasbkn@outlook.com
Theresa	R [REDACTED]	[REDACTED]inptjwxfr@yahoo.com
Lester	Ma [REDACTED]	[REDACTED]zk8jeq@hotmail.us
Bernita	Ha [REDACTED]	[REDACTED]mqcw6cr@hotmail.us
Dalia	L [REDACTED]	[REDACTED]ew7s4o2@hotmail.us
Trevor	R [REDACTED]	[REDACTED]8fkj8@payusmail.com
Colleen	W [REDACTED]	[REDACTED]9pvry8@stock-ivt.com

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16 P&N uses industry-accepted practices and processes to identify, investigate, and validate
17 and/or reject potentially fraudulent submissions, including safeguards to ensure that claims with
18 indications of automation were submitted by real persons. Aldridge Decl. ¶ 18. Consistently
19 with those practices and processes, P&N will request additional information from potential
20 suspicious claimants to verify the submissions. Aldridge Decl. ¶ 18. That request, which is sent
21 by email, requires the claimant to submit documentation within twenty-one (21) days to verify
22 the claimant's name and address. Aldridge Decl. ¶ 18. P&N will cause a reminder email to be
23 sent within seven (7) days of the initial email request to claimants who have not yet provided the
24 requested documentation. Aldridge Decl. ¶ 18. The reminder email will notify claimants that if
25 their response is not submitted to the settlement administrator by the deadline, their submission
26 will not be considered valid. Aldridge Decl. ¶ 18. In P&N's experience, this claim verification

1 process generally will yield a small volume of valid responses—likely less than one percent of
2 the total suspicious submissions. Aldridge Decl. ¶ 18.

3 Consistent with that experience, in this case, as of June 21, 2023, P&N had received
4 166,121 submissions. Aldridge Decl. ¶ 19. Of those, 151,309 were identified as suspicious
5 submissions seeking to update claimant contact information, and 8,048 were identified as
6 suspicious submission of new potential claims. Aldridge Decl. ¶ 19. After review of those
7 submissions using the practices and process described above, P&N has determined that only
8 6,066 of those 166,121 submissions are valid. Aldridge Decl. ¶ 19. Table 3 below provides
9 summary statistics of submissions:

Table 3: Submissions Overview (as of June 21, 2023)	
Description	Volume
Contact Information Updates	
Total Submissions Received	158,015
(-) Systematic or Suspicious Submissions	151,309
(-) Invalid Submissions	696
(-) Duplicate Submissions	2
Net Valid Submissions	6,008
New Claims	
Total Submissions Received	8,106
(-) Systematic or Suspicious Submissions	8,048
Net Valid Submissions	58

19 As of the date of this declaration, P&N continues to analyze claims that have already
20 been received as well as any additional timely claims mailed to the settlement administrator and
21 postmarked by June 16, 2023. Aldridge Decl. ¶ 19.

22 4. Exclusions and Objections

23 As of June 21, 2023, P&N had received six exclusion requests from class members.
24 Aldridge Decl. ¶ 21. As of June 26, 2023, P&N had not received any objections from class
25 members. Aldridge Decl. ¶ 22. The settlement agreement and this Court’s Preliminary
26

1 Approval Order directed objections to be filed with the Court and also mailed to the settlement
2 administrator by June 16, 2023.

3 5. Direct Settlement Payments

4 The settlement agreement and the Court’s Preliminary Approval Order directs that for
5 those class members for whom the settlement administrator has sufficient information to make a
6 direct payment, the settlement administrator will issue direct payments to class members. As of
7 June 21, 2023, P&N anticipates that it will send direct payments to at least 341,753 class
8 members. Aldridge Decl. ¶ 20. Those direct payments total \$68,350,600. For those
9 submissions in which P&N requested additional information (for the purposes of verifying
10 potentially fraudulent changes of class member contact information), P&N will default to the
11 original mailing information provided in the class data for the purpose of delivering payment.
12 Aldridge Decl. ¶ 20.

13 **IV. LEGAL ARGUMENT**

14 No class action case may be settled or compromised without trial court approval. ORCP
15 32D. The standard for final approval of a class action settlement is that the settlement must be
16 fundamentally fair, adequate, and reasonable. *Froeber v. Liberty Mut. Ins. Co.*, 222 Or App 266,
17 274–75, 193 P3d 999 (2008) (“[F]ederal courts evaluating proposed class action settlements
18 under ORCP 32 D’s federal counterpart, FRCP 23(e) * * * have noted that the ‘universally
19 applied standard is whether the settlement is fundamentally fair, adequate and reasonable.’”
20 (quoting *Class Plaintiffs v. City of Seattle*, 955 F2d 1268, 1276 (9th Cir 1992))); *see also*
21 *Redican v. Horizon Realty Advs. LLC*, 2016 WL 8604452, at *2 (Aug 3, 2016 Lane Cty Cir Ct)
22 (“It is appropriate for this Court to apply those standards in considering the parties’ proposed
23 settlement.”); Manual for Complex Litigation § 21.61 (4th ed 2013) (“Manual”) (“To determine
24 whether a proposed settlement is fair, reasonable, and adequate, the court must examine whether
25 the interests of the class are better served by the settlement than by further litigation.”). The
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1 decision to approve a class settlement is left to the sound discretion of the Court. *Froeber*, 222
2 Or App at 275.

3 As explained in Plaintiffs’ motion seeking preliminary approval of the proposed
4 settlement, the settlement provides significant relief to the Class and falls well within the range
5 of reasonableness for the purpose of judicial approval. First, the settlement provides substantial
6 relief to the Class—indeed, Class members will receive the full measure of damages available to
7 them under the UTPA, which is \$200. Courts have determined that “[a] settlement can be
8 satisfying even if it amounts to a hundredth or even—a thousandth of a single percent of the
9 potential recovery.” *Behrens v. Wometco Enters., Inc.*, 118 FRD 534, 542 (SD Fla 1988), *aff’d*
10 899 F2d 21 (11th Cir 1990); *City of Detroit v. Grinnell Corp.*, 356 F Supp 1380, 1386 (SDNY
11 1972) (recovery of 3.2 to 3.7 percent of the amount sought is “well within the ball park”), *aff’d*
12 *in part, rev’d on other grounds*, 495 F2d 448 (2d Cir 1974); *Martel v. Valderamma*, 2015 US
13 Dist LEXIS 49830 at * 17 (CD Cal 2015) (approving settlement of \$75,000 when potential
14 damages were \$1.2 million, or about 6 percent). Here, the total amount of the settlement—which
15 was the product of robust, arms’-length negotiations—is the full measure of damages available
16 under Oregon law.

17 That amount is, by any measure, fair, reasonable, and adequate, particularly given the
18 risks the Plaintiffs and Class faced in this litigation. Declaration of David F. Sugerman in
19 Support of Plaintiffs’ Motion for Attorneys’ Fees (“Sugerman Decl.”) ¶¶ 21–27; *see* Newberg §
20 13:15 (“In ascertaining whether a settlement falls ‘within the range of possible approval,’ courts
21 compare the settlement amount to the relief the class could expect to recover at trial.”). Plaintiffs
22 would have faced significant risks in litigating this case through trial, including the risks that the
23 class action trial could result in an adverse judgment, or that a favorable judgment could be
24 delayed or overturned on appeal. Sugerman Decl. ¶¶ 21–27. Additional litigation would further
25 result in substantial additional attorneys’ fees and costs. These costs and the uncertainty of
26 success provide additional grounds for approval of the settlement.

1 Class counsel fully considered the complexities of this litigation, the risks and expense
2 of continuing this case through summary judgment and trial, and the likely appeals from a
3 favorable judgment at trial. After weighing those risks against the guaranteed recovery to the
4 Class in the full amount allowed under Oregon law, Class counsel firmly believes that the
5 settlement represents a desirable resolution of this litigation. Sugerman Decl. ¶ 29.

6 **V. CONCLUSION**

7 This settlement represents a fair compromise to end this litigation. Under the settlement,
8 class members will realize the full measure of damages available to them under the UTPA. The
9 Class therefore respectfully requests that the Court grant the pending fee petition and grant final
10 approval to this settlement.

11 DATED this 26th day of June, 2023.

12 By: /s/ Nadia H. Dahab

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

14 **Nadia H. Dahab**, OSB No. 125630

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Attorneys for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **PLAINTIFFS’ MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT** on the following named person(s) on the date indicated below:

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Attorneys for Defendants

DATED this 26th day of June, 2023.

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