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

SCHEARON STEWART and JASON STEWART individually and on behalf of all other similarly-situated persons,	)	Case No. 16CV15125
Plaintiffs,	)	<b>PLAINTIFFS' AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL</b>
vs.	)	CLASS ACTION
ALBERTSON'S, COMPANIES, LLC a foreign limited liability company;	)	UNLAWFUL TRADE PRACTICES ACT
ALBERTSON'S LLC, a foreign corporation;	)	(ORS 646.608) EQUITABLE RELIEF AND
SAFEWAY, Inc., a foreign business corporation	)	MONEY DAMAGES
Defendants.	)	CLAIMS NOT SUBJECT TO MANDATORY ARBITRATION

Plaintiffs allege:

**PRELIMINARY STATEMENT**

**1.**

Every day during the class period, Albertson's and Safeway grocery stores in Oregon make special price offers on their meat products. These special offers are available to consumers every day, in every store. The meat products, which rotate, are sold as a special "Buy One, Get One Free," or similarly, "Buy One, Get Two Free." The "free" product is prominently promoted on special point-of-sale ads and on the packaging of the product itself. But Albertson's and

1 Safeway have found a way to make consumers pay for the seemingly “free” product.

2 When Albertson’s and Safeway stores offer meat products under these promotions, they  
3 raise the unit prices of the original meat product above the regular retail price. Thus, consumers  
4 are actually paying for the meat that is sold as “free” in these special sales. In other words,  
5 Safeway and Albertson’s stores raise the unit price of the original meat, such that consumers are  
6 paying substantially more for the original product to cover the cost of the “free” product. As a  
7 result, consumers making purchases under these promotions are not getting a free product.  
8 Instead, they are paying more per pound than regularly-priced meat, and they are buying more  
9 meat in order to obtain the illusory “free” product. These “free” sales constitute unfair and  
10 deceptive practices. The Oregon Unlawful Trade Practices Act and implementing regulations  
11 prohibit these practices. Schearon Stewart and Jason Stewart (“Plaintiffs” or “Stewarts”) bring  
12 this action on behalf of themselves and similarly situated consumers. Plaintiffs previously  
13 provided the notice required by ORCP 32H. Plaintiffs now seek equitable relief, including an  
14 injunction, actual and statutory damages, prejudgment interest, and attorney fees.

## 15 PARTIES

### 16 2.

17 Albertson’s, Companies, LLC is a holding company that owns both Safeway, Inc. and  
18 Albertson’s LLC. Safeway, Inc. is a foreign corporation that operates retail supermarkets in  
19 Oregon under the Safeway tradename. Albertson’s LLC operates retail supermarkets in Oregon  
20 under the Albertson’s tradename. Based on information and belief, Albertson’s Companies, LLC  
21 put in place the pricing practices at issue in Albertson’s and Safeway stores.

### 22 3.

23 Plaintiff Schearon Stewart is a resident of the State of Oregon. He shops at the Safeway  
24 store in Sherwood, Oregon, where he bought chicken legs on the “Buy One, Get Two Free”  
25 program. His most recent purchase was on April 18, 2016. Plaintiff Jason Stewart (no relation) is  
26 a resident of the State of Oregon. He shops at the Safeway store on Pacific Highway in Tigard,

1 Oregon, where he bought chicken breast and beef eye of round on the “Buy One, Get Two Free”  
2 program. His most recent purchase was of chicken on April 23, 2016.

### 3 JURISDICTION AND VENUE

#### 4 4.

5 Defendants conduct regular and sustained business across the Oregon, including in  
6 Multnomah County. This court has jurisdiction over claims arising under the Oregon Unlawful  
7 Trade Practices Act (UTPA). ORS 646.638.

### 8 CLASS ALLEGATIONS

#### 9 5.

10 The class consists of all consumers who, within one year before the date of the filing of  
11 the Complaint, bought meat products sold on buy one/get one free, or buy one/get two or get  
12 three free basis (“BOGO Sales”) at Oregon Albertson’s grocery stores or Oregon Safeway  
13 grocery stores, using the Safeway Club Card at Safeway Stores and coupons at Albertson’s  
14 grocery stores. The products at issue include petite beef sirloin, boneless pork chops, boneless  
15 chicken, boneless, skinless chicken breasts, chicken legs, beef bottom round, and beef eye of  
16 round. The exact products, including the precise numbers of units sold, can be confirmed through  
17 Defendants’ extensive electronic records logged with every purchase. Excluded from the class  
18 are all attorneys for the class; officers and directors of either Defendant, including officers and  
19 directors of any entity with an ownership interest in either defendant; any judge who sits on the  
20 case; and all jurors and alternate jurors who sit on the case.

#### 21 6.

22 Based on information and belief, every day within the class period, Defendants have  
23 rotating BOGO meat promotions in their grocery meat departments. The Safeway BOGO meat  
24 promotions require loyalty cards, which Safeway refers to as its “Club Card.” Each Club Card  
25 has a unique number.

#### 26 7.

1 Items included in these BOGO meat promotions have various names and may be  
2 minimally prepared—e.g., seasoned or cut. They include the following beef products: petite  
3 sirloin, beef bottom round, and beef eye of round; the following pork products: boneless pork  
4 chops; and the following chicken products: boneless skinless chicken breasts and chicken  
5 quarters (leg and thigh).

6 **8.**

7 Defendants sell the same meat products at regular Club Card prices that are lower than  
8 the BOGO prices. When they do this, Defendants sometimes sell the same product under  
9 different names. For example, boneless, skinless chicken breast is sold at regular Club Card  
10 prices and also under the BOGO program. Recently, Safeway sold boneless, skinless chicken  
11 breasts to Club Card members for \$1.99 per pound. At the same time, Safeway sold seasoned  
12 boneless, skinless chicken breasts for \$9.99 per pound in a Buy 1, Get 2 Free promotion.

13 **9.**

14 Common BOGO items include petite sirloin, sometimes cut thin and sometimes  
15 seasoned. When it is not part of the BOGO program, “petite sirloin” may be sold as “round tip  
16 steak,” “sirloin petite roast,” or as “beef sirloin petite steak boneless.” Similarly, in the BOGO  
17 program, Defendants commonly sell “pork chops boneless,” often seasoned. When it is not in the  
18 BOGO program, “pork chops boneless” are sold as “pork loin chops.” The use of different  
19 names does not change the fact that the same cut of meat is being sold at a much higher unit  
20 price in the BOGO promotion and is sold outside of the BOGO promotion for substantially less  
21 per pound.

22 **10.**

23 At times, the BOGO program’s meat products may be minimally prepared. For example  
24 the chicken breast and pork chops are often sold with seasoning, and some of the meat products  
25 are sold “thin-sliced.” These minimal differences and services are offered to all customers at no  
26 charge. Specifically, Safeway tells consumers, “We’ll season or marinade [sic] your selection,

1 exactly how you like it, at no charge.” Safeway also will “trim your [meat] purchase to your  
2 exact specifications.” <http://www.safeway.com/ShopStores/The-Market-SJ-Meat-Seafood.page>  
3 (accessed Mar. 11, 2016). Similarly, Albertsons will custom cut meat upon request.  
4 <http://www.albertsonsmarket.com/page/dept/meatseafood> (accessed Mar. 17, 2016).

5 **11.**

6 In all events, the minimal processing—seasoning and thin-slicing—add no value because  
7 Defendants provide the same minimal processing for free on non-BOGO meat products.

8 **12.**

9 Based on information and belief, contrary to the language of the free product offer, the  
10 BOGO products are not actually free. When Defendants offer a BOGO item, on a “Buy 1, get 2  
11 free” basis, the consumer should receive the second and third units free if she or he first buys one  
12 unit. However, if a consumer purchases only two units when faced with a “Buy 1, get 2 free”  
13 offer, the consumer is charged full price for the second item. It is not free.

14 **13.**

15 Based on information and belief, while the products rotate, the BOGO sales program runs  
16 365 days per year in each of Defendants’ stores in Oregon.

17 **14.**

18 Based on information and belief, there are approximately 99 Safeway stores in Oregon,  
19 and approximately 24 Albertson’s stores in Oregon. All of the stores BOGO meat programs  
20 operate under central policies put in place by Albertson’s Companies, LLC. The only significant  
21 difference between the two brands BOGO programs is that Safeway’s BOGO meat program  
22 operates in conjunction with its Club Card program, while Albertson’s BOGO meat program  
23 uses coupons.

24 **15.**

25 In March 2016, Defendants offered for sale in Oregon the following meat products  
26 BOGO and non-BOGO:

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<b>Item</b>	<b>Non-BOGO Price</b>	<b>BOGO Price</b>
USDA Choice Beef Eye of Round Steak	\$6.99/lb.	\$12.99/lb (thin)
Beef Bottom Round Steak	\$4.99/lb.	\$14.99/lb (seasoned)
Chicken Breast Skinless/ Boneless	\$1.88/lb.; \$2.29/lb.	\$9.99/lb (seasoned)
Pork Chops Boneless	\$4.49/lb.	\$12.99/lb (seasoned)
USDA Choice Beef Petite Sirloin	\$3.97/lb.	\$16.99/lb (seasoned) \$12.99/lb (unseasoned)

**16.**

The BOGO sales programs violate the Oregon Unlawful Trade Practices Act (“UTPA”) and give rise to class claims for violations of ORS 646.6081(j) and (1)(s). Further, Defendants’ practices violate OAR 137-020-0015 in ways that give rise to class claims under ORS 646.608(1)(u). The claims under these provisions of the UTPA are common to the class.

**17.**

The class is so numerous that joinder is impracticable. The exact size of the class and the class’s pecuniary losses can be calculated from Defendants’ sales records.

**18.**

There are questions of fact and law common to the class, in that each member has suffered ascertainable loss as a direct result of Defendants’ violations of OAR 137-020-0015(2) and as a result of these violations of ORS 646.608 (1)(j), 1(s), and 1(u). Common questions of law and fact predominate over any questions affecting only individual class members. Common questions include:

- 1 A. Whether Defendants may lawfully raise the per-unit price of meat products when they  
2 rotate the products into the BOGO programs;
- 3 B. Whether Defendants' minimal processing with otherwise free or *de minimis* value  
4 add-ons (e.g., thin slicing, seasoning, breading) allow Defendants to raise the prices  
5 of the BOGO products;
- 6 C. Whether Defendants' BOGO programs violate ORS 646.608(1)(j);
- 7 D. Whether Defendants' programs violate ORS 646.608(1)(s);
- 8 E. Whether Defendants' programs violate ORS 646.608(1)(u);
- 9 F. Whether, under the facts of these claims, Plaintiff and the class must prove reliance as  
10 to any or all of the alleged violations;
- 11 G. If so, whether reliance may be proved on a class-wide basis;
- 12 H. Whether Plaintiffs and class members are entitled to equitable and injunctive relief;
- 13 I. Whether an injunction to prevent future harm is appropriate in this case;
- 14 J. Whether Defendants acted recklessly or knowingly as set forth in ORS 64.638(1) and  
15 ORS 646.638(8), such that Plaintiffs and members of the class are entitled to recover  
16 statutory damages of \$200; and
- 17 K. Whether Plaintiffs and the class are entitled to recover attorneys' fees and costs for  
18 violations of the UTPA under ORS 646.638(1).

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21 **19.**

22 The claims of the named Plaintiffs are typical of the claims of the class in that:

- 23 A. Each bought meat products through the BOGO programs;
- 24 B. All claims involve the same conduct and the same alleged violations of OAR 137-  
25 020-0015 and ORS 646.608;
- 26

- 1 C. The pricing practices of raising BOGO products unit prices operate in a standardized  
2 fashion in all of Defendants' Oregon grocery stores;
- 3 D. The injuries suffered by the named Plaintiffs and the class members differ only in the  
4 amounts of pecuniary losses and number of transactions per class member; and
- 5 E. The named Plaintiffs' claims for relief are based upon the same legal theories as are  
6 the claims of the class members.

7  
8 **20.**

9 The named Plaintiffs will fairly and adequately protect and represent the interests of the  
10 class in that:

- 11 A. Their claims are typical of the claims of the class members;
- 12 B. They are represented by attorneys who have extensive experience handling class  
13 actions under the Unlawful Trade Practices Act, who are qualified and competent,  
14 and who will vigorously prosecute this litigation; and
- 15 C. Their interests are not antagonistic or in conflict with the interests of the class  
16 members.

17  
18 **21.**

19 A class action is superior to other available methods for the fair and efficient adjudication  
20 of this case in that:

- 21 A. Common questions of law and fact predominate over factors affecting only individual  
22 members;
- 23 B. As far as Plaintiffs know, no class action that purports to include Oregon consumers  
24 suffering the same injury has been commenced;
- 25  
26



- 1 C. Individual class members have little interest in controlling the litigation, due to the  
2 high cost of individual action, the relatively small amounts of damages suffered by  
3 any individual Plaintiff; and because Plaintiffs and their attorneys will vigorously  
4 pursue the claims;
- 5 D. The forum is desirable, as Defendants do business in Multnomah County;
- 6 E. A class action will be an efficient method of adjudicating the claims of the class  
7 members who have suffered relatively small monetary damages, as a result of the  
8 same conduct by defendants;
- 9 F. In the aggregate, class members have claims for relief that are significant in scope  
10 relative to the expense of litigation;
- 11 G. Injunctive relief will prevent further ongoing harm to Plaintiffs and class members;
- 12 H. The availability electronic data will facilitate proof of class members' claims,  
13 processing of those claims, and distributions of any recoveries;
- 14 I. As to customers who paid cash and for whom there are fewer records, to the extent  
15 that class members cannot be located, their monies may be distributed through a *cy*  
16 *pres* process under ORCP 32 O.

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19 **ALLEGATIONS COMMON TO ALL CLAIMS**

20 **22.**

21 At all times in the class period, Defendants have had in place a BOGO meat sales  
22 program that operates at its Oregon Albertson's and Safeway grocery stores. **23.**

23 Products sold under the BOGO program are prominently marked and marketed as "Buy  
24 1, Get 1 Free" or "Buy 1, Get 2 Free." The products are grouped in a particular meat case with  
25 prominent signs highlighting the program.

26 **24.**

1 Based on information and belief, the same pricing practices take place in Oregon  
2 Albertson's stores, though consumers in those stores do not present loyalty cards. Instead, they  
3 present readily available coupons.

4 **25.**

5 OAR 137-020-0015 prohibits the sale of free goods when the costs of the "free" goods  
6 are passed on to consumers. The rule defines "free" items as those that are, "without charge or  
7 cost, monetary or otherwise, to the recipient\*\*\*\*." OAR 137-020-0015(1)(b). Additional items  
8 included—here seasoning, thin-slicing, and breading—are evaluated based on whether the  
9 consumer can purchase a similar product without the additional purchase of other goods. Official  
10 Commentary, OAR 137-020-0015(1). The regulation likewise defines "regular price" as, "the  
11 price, in the same quantity, quality and with the same service, at which the seller \*\*\* has openly  
12 sold \*\*\* the product \*\*\* in Oregon in the most recent and regular course of business, for a  
13 reasonably substantial period of time, i.e., a 30-day period, prior to the offer\*\*\*\*."

14 **26.**

15 Defendants' pricing violates OAR 137-020-0015(2) in one or more of the following  
16 ways:

- 17 A. Defendants use "free" in an unfair and deceptive fashion by pricing the BOGO items  
18 at prices higher than the regular price in violation of OAR 137-020-0015(2)(a)(C);
- 19 B. Defendants engage in deceptive or misleading practices by failing to disclose that  
20 their add-ons are otherwise available for free and thus do not allow the per unit price  
21 increases in violation of OAR 137-020-0015(2)(a)(D);
- 22 C. Defendants engage in deceptive or misleading practices by altering product names to  
23 thwart price comparison in violation of OAR 137-020-0015(2)(a)(D);
- 24 D. Defendants engage in deceptive or misleading practices because the product which is  
25 prominently marked "free" is not free in violation of OAR 137-020-0015(2)(a)(D);
- 26 E. Defendants engage in deceptive or misleading practices by increasing per unit prices

1 over comparable product available at regular prices to the same customers in violation  
2 of OAR 137-020-;0015(2)(a)(D); and

3 F. Defendants engage in deceptive or misleading practices because the meat can be  
4 purchased for a lesser price without the “free” meat special, in violation of OAR 137-  
5 020-0015(2)(a)(B)

6 **CLAIM FOR RELIEF—VIOLATION OF ORS 646.608**

7 **First Count-willful violation**

8 **27.**

9 Defendants willfully violated ORS 646.608 in one or more of the following ways that  
10 caused ascertainable losses to Plaintiffs and class members:

- 11 A. Defendants engaged in unlawful pricing practices by raising BOGO program meat  
12 products above regular prices in violation of OAR 137-020-0015 and thereby violated  
13 ORS 646.608(1)(u);
- 14 B. Defendants make false or misleading representations of fact concerning the existence  
15 of or amounts of price reductions in violation of ORS 646.608(1)(j); and
- 16 C. Defendants make false or misleading representations of fact concerning the offering  
17 price of goods in violation of ORS 646.608(1)(s).

18 **28.**

19 As a result of these violations of these UTPA, Plaintiffs and members of the class  
20 suffered ascertainable losses, in that they paid more for meat, they did not receive free meat, and  
21 they bought more meat than they otherwise would have purchased without the deceptive  
22 designation of “free” product.

23 **29.**

24 Plaintiffs and the proposed class seek an injunction to ensure cessation of the unlawful  
25 trade practices. ORS 646.636.

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**30.**

Plaintiffs and the class are also entitled to equitable relief in the form of an accounting, restitution, and—unless agreed upon by Defendants—an order to preserve data related to these claims. ORS 646.638(1). Plaintiffs and the class are also entitled to recover actual damages, prejudgment interest, and attorneys’ fees and costs. ORS 646.638(3).

**Second Count-Reckless or knowing violation**

**31.**

Plaintiffs incorporate and re-allege paragraphs 1-26 and 28-29.

**32.**

Defendants engaged in the conduct at issue in this case in reckless disregard of the requirements of ORS 646.608(1) and OAR 137-020-0015 and/or with knowledge that their BOGO pricing practices violated the cited statute and rules. As a result, Plaintiffs and the class have suffered the previously described ascertainable losses.

**33.**

Plaintiffs and the class are entitled to an injunction and also to recover \$200 per class member, plus prejudgment interest, and attorney fees and costs. ORS 646.638(8). As well, Plaintiffs may later seek punitive damages.

WHEREFORE, Plaintiffs seek judgment against Defendants and the following relief:

1. Unless otherwise agreed to by Defendants, an order directing them to preserve class members’ electronic records;
2. An order certifying this matter as a class action pursuant to ORCP 32;
3. On Plaintiffs’ claim for relief for violation of the UTPA, ORS 646.608: an injunction prohibiting Defendants from continuing the BOGO program pricing practices that violate OAR 137-020-0015 and ORS 646.608 through misleading use of the term “free” and through increasing unit prices; equitable relief in the form of an order


1 requiring an accounting, restitution, interest, and attorneys' fees and costs;

2 4. On plaintiffs' first count, actual damages, prejudgment interest, and attorney fees and  
3 costs;

4 5. On plaintiffs' second count, statutory damages of \$200 per consumer, prejudgment  
5 interest, and attorney fees and costs; and

6 6. Such other relief as the Court may deem just.

7 DATED this 11<sup>th</sup> day of July, 2016.

8  
9  
10 By:   
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Attorneys for Plaintiffs

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**DEMAND FOR JURY TRIAL**

Plaintiffs demand trial by jury as to each issue to which they and the class are entitled to a jury trial.

DATED this 11<sup>th</sup> day of July, 2016.

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **PLAINTIFFS' AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** on the following person(s) on this same day:

by electronic mail

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DATED this 11<sup>th</sup> day of July, 2016.

By: 

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