

1
2
3
4
5 IN THE CIRCUIT COURT OF THE STATE OF OREGON
6 IN AND FOR THE COUNTY OF MULTNOMAH

7
8 STEVEN SCHARFSTEIN, individually and on
behalf of all other similarly situated persons,

9 Plaintiffs,

10 vs.

11 BP WEST COAST PRODUCTS, LLC, a
12 Delaware limited liability company;

13 Defendant.
14
15

Case No. 1112-17046

**PLAINTIFF'S MOTION FOR
FINAL APPROVAL OF
SETTLEMENT AND POINTS
AND AUTHORITIES IN
SUPPORT**

Hon. Stephen K. Bushong
Hearing: June 4, 2019 at 3:00 pm

16 **MOTION**

17
18 On behalf of the class, plaintiff Steven Scharfstein moves for an order granting
19 final approval of the settlement in this action. ORCP 32 D. Plaintiff Scharfstein relies
20 upon the accompanying declarations of David F. Sugerman, lead counsel for the class
21 and Cameron R. Azari, on behalf of the notice administrator.
22

23 **POINTS AND AUTHORITIES**

24 **A. Posture**

25 The Court granted preliminary approval of this settlement and approval of the
26 proposed plan of notice on March 26, 2019. In the motion for preliminary approval, the

1 class representative provided substantial background on the litigation and the proposed
2 settlement. In summary form, the matter was tried to a jury, and the class prevailed. The
3 trial court entered judgment for total damages of \$409,300,000. BP West Coast Products
4 (“BPWCP”) appealed. The class prevailed on appeal. *Scharfstein v. BP West Coast*
5 *Products, LLC*, 292 Or App 69, rev den, 363 Or 815 (2018). BPWCP sought certiorari
6 with the U.S. Supreme Court.
7

8 In the process, the parties attended a mediation and then continued settlement
9 negotiations. The parties entered into a settlement agreement and now seek final approval
10 for the settlement. If the settlement is approved, BPWCP will withdraw its cert petition.
11

12 Under the terms of the settlement, BPWCP will pay the face amount of the
13 judgment but will obtain a compromise on the interest and a more favorable payment
14 structure. Interest will be reduced from 9 percent to 3 percent, and payments will be made
15 in two roughly equal installments, the first estimated to be in July of this year, and the
16 second in July of 2020.
17

18 **B. The settlement, class notice and objections**

19 The Court approved the proposed notice plan, and the administrator completed the
20 approved notice process. Declaration of Cameron Azari, pp. 5-8, Para 9-22. This was a
21 significant undertaking, as there were 1.7 million claimants. Declaration of David F.
22 Sugerman in Support of Final Approval, pp. 2-3, Para 9. Class notice successfully
23 reached approximately 95 percent of the claimants in the class. Azari Dec., p. 8, Para 24.
24

25 Notice complied with the court-approved notice plan in this case. It also fully
26 complied with due process requirements. Azari Dec., pp. 6-8, Para 12-24. In summary,
27

1 1.7 million claimants were mailed postcard notice informing them of the settlement, with
2 a link to a website with detailed notice and additional information on how to object, how
3 to contact the administrator, and how to contact class counsel. As well, the class
4 administrator set up a phone line to handle class member questions. Azari Dec., pp. 6-8,
5 Para 13-22.
6

7 There were no objections to the proposed settlement before the deadline set forth
8 in the notice. Sugerman Dec., p. 3, Para 12. That is remarkable, on the one hand, but not
9 surprising, on the other. Under the settlement, each class member will receive a total of
10 approximately \$185. The compromise did not reduce class members' recoveries. In an
11 earlier notice, class members were told that they would receive at least \$164. That was
12 the proportional amount recovered (\$200), less the proportionate amount of attorney fees
13 and costs (\$36) awarded the common fund. Sugerman Dec., p. 3, Para 13.
14
15

16 As part of the settlement, the *cy pres* recovery remains intact. The *cy pres*
17 component arose because some 16 percent of the class could not be located through direct
18 means. Sugerman Dec., p. 3, Para 10.
19

20 After notice went out, class counsel received several hundred contacts by phone
21 and email. The vast majority were calling or emailing to update their mailing addresses.
22 Sugerman Dec., p. 4, Para 16. Some were calling to ask questions about the terms of the
23 settlement or to confirm that it was a legitimate process. Sugerman Dec., p. 4, Para 16.
24 One caller asked how he could opt out, and one indicated that she would file an objection.
25 Sugerman Dec., p. 4, Para 16.
26

1 The class totals 2 million consumers, and 1.7 million consumers are receiving
2 direct notice and direct payment. The estimated 100-200 contacts made with class
3 counsel represent a tiny percentage of the class. The total of two arguably disgruntled
4 class members (the belated opt-out and the potential objector) indicate that only one in a
5 million class members communicated anything approaching unhappiness or opposition to
6 the settlement.
7

8 **C. Legal Standards**

9 ORCP 32 D vests in the trial court the power to review and approve class action
10 settlements. The text of the rule provides no guidance on the applicable standards, but
11 case law fills in the gaps.
12

13 The trial court must determine whether the proposed settlement is fundamentally
14 fair, adequate, and reasonable. *Froeber v. Liberty Mut. Ins. Co.*, 222 Or App 266, 275
15 (2008)(adopting the standards applied by federal courts under FRCP 23(e)). Reviewing
16 courts grant broad discretion to the trial court. *Id.* Substantial deference to the trial court
17 is appropriate because the trial court is in the best position to assess the fairness of a
18 settlement.
19

20 **D. The settlement is fundamentally fair, adequate, and reasonable.**

21 The only amount compromised here was interest. It is true that the aggregate
22 reduction in interest is substantial. However, BPWCP is still paying substantially more
23 than the face amount of the judgment to settle the case.
24

25 While the class has won at every level, there are two significant risks to the class.
26

In this consumer class action, a large class recovered over \$400 million in statutory

1 damages, with a substantial difference between the actual harm and the state law statutory
2 damage remedy. While the class successfully argued that BPWCP failed to preserve any
3 federal question, those who practice in this area know that some of the unpreserved issues
4 are of interest to the current Supreme Court. The certiorari petition presented a clash
5 between the time-honored principle of adequate and independent state grounds versus
6 emerging due process issues on the limits on statutory damages. Sugerman Dec., p. 4,
7 Para 17-18.

9 Class counsel believed that the risk that the U.S. Supreme Court would take
10 certiorari was relatively low; however, a decision on the merits had the potential to
11 annihilate the claim. There was additional risk, in that the U.S. Supreme Court could
12 decide a completely unrelated case that might radically alter the landscape. Sugerman
13 Dec., p. 5, Para 20. The modest compromise on interest was a wise choice, given the risk.
14 Sugerman Dec., p. 5, Para 21.

17 **E. The Court should grant final approval and enter judgment**

18 As part of the settlement, the parties agreed to a form of proposed final approval
19 order and a proposed form of judgment. Class counsel is simultaneously e-filing the
20 agreed-upon forms of order and judgment for the Court's consideration. There are
21 multiple steps to completion of the settlement that are tied to entry of the final approval
22 order and final judgment. Accordingly, class counsel respectfully requests that the court
23 promptly enter the final approval order and the judgment so that the parties and the
24 administrator may move forward to effectuate the settlement.
25
26

CONCLUSION

The proposed settlement is fundamentally fair, adequate, and reasonable. Class counsel respectfully requests that the Court approve the settlement and promptly enter its order of approval and final judgment so that the parties may enter the payment phase of this long case.

DATED this 28th day of May, 2019.

By: 

David F. Sugerman, OSB No. 86298
DAVID F. SUGERMAN ATTORNEY, PC
707 SW Washington Street, Suite 600
Portland, OR 97205
Telephone (503) 228-6474
Email: david@davidsugerman.com

Tim Alan Quenelle, OSB No. 93400
TIM QUENELLE, PC
4800 SW Meadows Rd, #300
Lake Oswego, OR 97035
Telephone (503) 675-4330
Email: tim.quenelle@gmail.com.

Amy Johnson, OBS No. 112044
5836 SE Madison St
Portland, OR 97215
Phone: 503-939-2996
E-mail: amy@savagejohnson.com

Joshua L. Ross, OSB No. 034387
STOLL STOLL BERNE LOKTING & SHLACHTER PC
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: jross@stollberne.com

Attorneys for Plaintiff and the Class

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT** on the following persons on this same day:

☒ and by electronic mail and notice of filing using the Cm/ECF system

Sarah Crooks, OSB No. 971512
Nathan Morales, OSB No. 145763
Stoel Rives, LLP
900 SW Fifth Ave, Suite 2600
Portland OR 97204

David Harris, *Pro Hac Vice*
Greensfelder, Hemker & Gale PC
10 South Broadway, Suite 2000
St. Louis MO 63102

Attorneys for Defendant

Jeffrey C. Thede, OSB No. 794153
Thede, Culpepper, Moore, Munro & Silliman
111 SW Fifth Ave, Suite 3675
Portland OR 97204

Steven Wilker, OSB No. 911882
Tonkon Torp, LLP
888 SW Fifth Ave, Suite 1600
Portland OR 97204

Counsel for Oregon Community Foundation

Counsel for Oregon State Bar

DATED this 28th day of May, 2019.

By: 

David F. Sugerman, OSB No. 86298
DAVID F. SUGERMAN, ATTORNEY PC
707 SW Washington Street, Suite 600
Portland, Oregon 97205
Phone: (503) 228-6474
Fax: (503) 228-2556
E-Mail: david@davidsugerman.com
Attorney for Plaintiffs