

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

J PODAWILTZ, individually and on behalf of all other similarly situated persons,

Plaintiff,

vs.

SWISHER INTERNATIONAL, INC., a Delaware corporation,

Defendant.

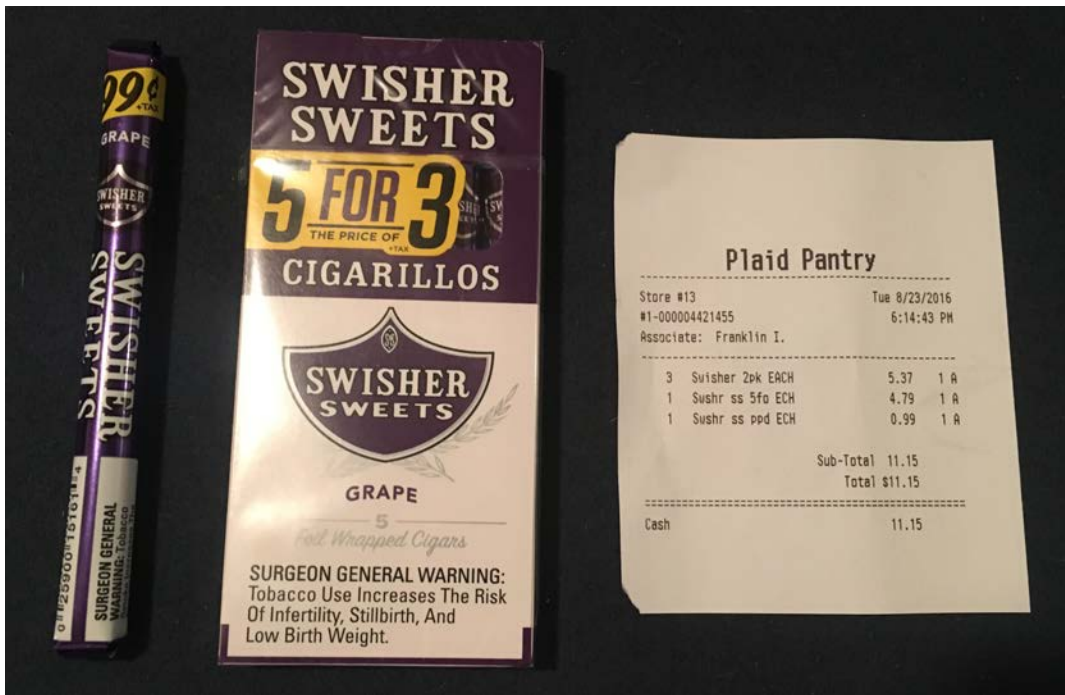
Case No.

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Oregon Unlawful Trade Practices Act
ORS 646.608

Class action claims not subject to mandatory arbitration

Filing fee authority: ORS 21.135
Filing fee: \$252



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3 **PRELIMINARY STATEMENT**

4 In order to increase its sales, Swisher International, Inc. (defendant) falsely
5 advertises its 5-pack cigarillos as “**5 for the price of 3**”. Defendant’s “**5 for the**
6 **price of 3**” promotion is misleading because a 5-pack cost J Podawiltz (plaintiff)
7 \$4.79 – but a single cigarillo would have cost only 99 cents.
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10 Plaintiff alleges that within the past year, he and many other Oregon
11 consumers have suffered ascertainable economic losses as a result of defendant’s
12 false and misleading “**5 for the price of 3**” promotion. Fortunately for plaintiff and
13 other Oregon consumers like him, the Oregon Unlawful Trade Practices Act ORS
14 646.608 *et seq.* (UTPA) prohibits false and misleading representations like
15 defendant’s “**5 for the price of 3**” promotion.
16

17 Plaintiff brings this UTPA action on behalf of himself and other similarly
18 situated Oregon consumers. He currently seeks only equitable relief, including an
19 injunction. Should defendant fail to make things right and fail to comply with ORCP
20 32 I, plaintiff intends to amend his complaint to add claims for damages.
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23 **THE PARTIES**

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25 Defendant is a Delaware business corporation that regularly sells its cigarillos
26 for profit in Oregon retail stores, including Plaid Pantry, Fred Meyer, Safeway, Rite
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2 Aid, 7-Eleven and others. Defendant put in place its pricing practices, including the
3 price of its individual and five-pack cigarillos.

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5 3.

6 Plaintiff is a resident of the State of Oregon. He shops at Plaid Pantry in
7 Portland, Oregon, where he bought defendant's "**5 for the price of 3**" 5-pack
8 cigarillos promotion. His most recent purchase was August 1, 2016.

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10 4.

11 **JURISDICTION AND VENUE**

12 Defendant conducts regular and sustained business across Oregon, including
13 in Multnomah County. This court has jurisdiction over claims arising under Oregon's
14 UTPA.
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17 **CLASS ALLEGATIONS**

18 The class consists of all consumers who, within one year before the date of the
19 filing of this complaint, bought defendant's "**5 for the price of 3**" 5-pack cigarillos
20 promotion at an Oregon retail store and paid more for their five-pack than defendant
21 charged for three of its individual cigarillos at the same location. The price of
22 defendant's individual and five-pack cigarillos and the quantity sold at each Oregon
23 retail store can be determined based on defendant's pricing sheets and sales records
24 and other customer data. Excluded from the class are all attorneys for the class,
25 officers and directors of defendant, including officers and directors of any entity with
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2 an ownership interest in defendant; any judge who sits on the case; and all jurors
3 and alternate jurors who sit on the case.

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6 Defendant represents to its customers that its five-pack of cigarillos are sold
7 at “**5 for the price of 3**”. Customers are essentially told that they can save money
8 by purchasing a higher volume of defendant’s product.

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10 7.

11 For instance, at Plaid Pantry, defendant sold plaintiff its cigarillo five-pack
12 for \$4.79. However, defendant sells its individual cigarillos at Plaid Pantry for 99
13 cents each. The 99 cent price on defendant’s individual cigarillos is pre-printed on
14 its package. Plaintiff purchased defendant’s five-pack and suffered an ascertainable
15 economic loss because he paid over 4 dollars for a product that should have cost him
16 no more than \$2.97 based on defendant’s “**5 for the price of 3**” representation.

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18 8.

19 Defendant’s “**5 for the price of 3**” promotion violated ORS 646.608(1)(j) and
20 (s), giving rise to class claims under the UTPA. These UTPA claims are common to
21 the class.
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24 9.

25 The class is so numerous that joinder is impracticable. The size of the class
26 and the classes’ ascertainable monetary losses can be calculated based on
27 defendant’s pricing sheets and sales records and other customer data.
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2 10.

3 There are questions of fact and law common to the class because each member
4 suffered ascertainable monetary loss as a result of defendant's UTPA violations
5 alleged above. Common questions of fact and law predominate over any questions
6 affecting only individual class members. Common questions include whether
7 defendant may advertise its 5-packs as "**5 for the price of 3**" when three individual
8 cigarillos actually cost less than its 5-packs, whether defendant's "**5 for the price**
9 **of 3**" promotion violates ORS 646.608(1)(j) and (s), whether under these facts,
10 plaintiff and the class must prove reliance as to defendant's alleged violations, if so,
11 whether reliance may be proved on a class-wide basis, whether plaintiff and class
12 members are entitled to equitable and injunctive relief, whether plaintiff and class
13 members' claims may be pre-empted, whether an injunction to prevent future harm
14 is appropriate, whether defendant acted willfully, recklessly, or intentionally under
15 ORS 646.638(1), whether plaintiff and class members are entitled to recover actual
16 damages and \$200 statutory damages from defendant, and whether plaintiff and the
17 class are entitled to recover attorney fees and costs for defendant's alleged UTPA
18 violations.
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23 11.

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25 Plaintiff's claim is typical of the claims of the class because each bought a five-
26 pack of defendant's cigarillos under defendant's "**5 for the price of 3**" promotion at
27 an Oregon retail store where defendant's five-packs cost more than the cost of three
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2 individual cigarillos, the injuries suffered by plaintiff and the class members differ
3 only in the amounts of economic losses and number of transactions per class member,
4 and plaintiff's claims for relief are based upon the same legal theories as are the
5 claims of the class members.
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Plaintiff will fairly and adequately protect and represent the interests of the class because his claims are typical of the claims of the class, he is represented by attorneys who have experience handling class action litigation and consumer protection cases who are qualified and competent, and who will vigorously prosecute this litigation, and their interests are not antagonistic or in conflict with the interests of the class.

13.

A class action is superior to other available methods for fair and efficient adjudication of this case because commons questions of law and fact predominate over other factors affecting only individual members, as far as plaintiff knows, no class action that purports to include Oregon consumers suffering the same injury has been commenced, individual class members have little interest in controlling the litigation, due to the high cost of individual actions, the relatively small amounts of damages suffered, and because plaintiff and his attorneys will vigorously pursue the claims. The forum is desirable because defendant does business in Multnomah County. A class action will be an efficient method of adjudicating the claims of the

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2 class members who have suffered relatively small monetary damages, as a result of
3 the same conduct by defendant. In the aggregate, class members have claims for
4 relief that are significant in scope relative to the expense of litigation. Injunctive
5 relief will prevent further ongoing harm to plaintiff and the class, and the
6 availability of defendant's pricing sheets and sales records and other customer data
7 will facilitate proof of class claims, processing class claims, and distributions of any
8 recoveries. To the extent customers who made purchases under defendant's "**5 for**
9 **the price of 3**" promotion cannot be located, their monies may be distributed
10 through a *cy pres* process.
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14 14.

15 Defendant's "**5 for the price of 3**" promotion violates ORS 646.608(1)(j)
16 because it makes a misleading representation to its customers about the reason for
17 its alleged price reduction, and because it makes a false representation to its
18 customers about the alleged existence of a price reduction, in hopes of increasing its
19 five-pack cigarillos sales, when in fact its customers would be better off buying its
20 cigarillos in smaller quantities.
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23 15.

24 Defendant's "**5 for the price of 3**" promotion violates ORS 646.608(1)(s)
25 because it makes a misleading representation of fact concerning the offering price of
26 its five-packs (i.e., misleading its customers into believing that they would be better
27 off buying its cigarillos in higher quantities), and because it makes a false
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2 representation of fact concerning the offering price of its five-packs (i.e., falsely
3 representing that for the price of three individual cigarillos, its customers can
4 purchase a five-pack of cigarillos.)

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6 16.

7 Defendant knew or should have known its “**5 for the price of 3**” promotion
8 was false and misleading because many of the individual cigarillos defendant sells
9 in Oregon has defendant’s 99 cents price pre-printed on their packages before they
10 reach Oregon retail stores, and defendant sells its five-packs for more than \$2.97 in
11 stores where it sells its individual cigarillos for 99 cents. Retail clerks in the Portland
12 area admit defendant’s “**5 for the price of 3**” promotion is confusing to consumers.

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15 17.

16 **CLAIMS FOR RELIEF – VIOLATION OF ORS 646.608**

17 Defendant willfully, recklessly, and/or intentionally violated ORS
18 646.608(1)(j) and (s) as alleged above. Defendant’s violation caused plaintiff and
19 class members ascertainable economic losses (i.e., the amount paid for a five-pack in
20 excess of what would have been paid for three individual cigarillos).

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22 18.

23 Defendant continues its unlawful “**5 for the price of 3**” promotion
24 throughout Oregon retail stores to this day. Plaintiff and the proposed class seek an
25 injunction under ORS 646.636 to stop defendant’s unlawful trade practices.

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2 19.

3 Plaintiff and the class are also entitled to equitable relief in the form of an
4 accounting, restitution, and unless agreed upon by defendant, an order to preserve
5 data including pricing sheets and sales records and customer data that relates to
6 these claims under ORS 646.638(1). Plaintiff and the class are also entitled to
7 recover interest and attorney fees and costs under ORS 646.638(3).
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10 20.

11 Upon discovery of information that defendant's UTPA violations alleged in
12 this complaint were malicious, plaintiff and the class may intend to amend this
13 complaint to include claims for punitive damages.
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16 Unless defendant complies with ORCP 32 I, plaintiff will amend this
17 complaint to add claims for actual and statutory damages.
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WHEREFORE, plaintiff seeks judgment and the following relief:

- A. Unless otherwise agreed to by defendant, an order directing it to preserve pricing sheets, sales records, and other customer data;
- B. An order certifying this matter as a class action under ORCP 32;
- C. An injunction prohibiting defendant from continuing its “**5 for the price of 3**” promotion in violation of the UTPA, and equitable relief in the form of an order requiring an accounting, restitution, interest, and attorney fees and costs, and
- D. Other relief the court deems necessary.

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury as to each issue to which he and the class are entitled to a jury trial.

DATED: August 25, 2016

/s/ Michael Fuller
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18
19 **PROOF OF MAILING**

20 Under ORS 646.638(2), I declare and certify that on the date below I caused a
21 copy of this complaint to be mailed to the Oregon Attorney General at the following
22 address:

23 **Ellen Rosenblum**

24 **Oregon Attorney General**

25 **Oregon Department of Justice**

26 **1162 Court Street NE**

27 **Salem, Oregon 97301-4096**

28 DATED: August 25, 2016

/s/ Michael Fuller

Michael Fuller, OSB No. 09357

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– Page 11 of 11