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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT
JAN 30 2018
BY Karina Venegas
KARINA VENEGAS, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

ARMIN AMIRI, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

MY PILLOW, INC., a Minnesota corporation, and DOES 1 through 10, inclusive,

Defendants.

JILL BRUNELLE, individually, and on behalf of all others similarly situated; HEATHER DEWITT, individually, and on behalf of all others similarly situated; DONALD PUCKETT, individually, and on behalf of all others similarly situated,; PATRICK KAVANAGH, individually, and on behalf of all others similarly situated; THERESA CORDERO, individually, and on behalf of all others similarly situated, CHRISTIE KAUTSKY, individually, and on behalf of all

Case No. CIVDS 1606479

(Assigned to Hon. Bryan Foster, S22)

INTERVENOR PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Hearing: February 26, 2018
Time: 8:30 a.m.
Dept.: S22

others similarly situated, and
SUSAN BALMER individually, and on behalf of all others similarly situated,

Intervenors,

v.

MY PILLOW, INC., a Minnesota corporation,

Defendant.

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD HEREIN:

Please take notice that at 8:30 a.m. on February 26, 2018 as soon thereafter as the matter may be heard in Department S22 of the Superior Court of California, County of San Bernardino, San Bernardino District – Civil Division, located at 247 West Third Street, San Bernardino, CA 92415-0210, Intervenor Plaintiffs Jill Brunelle, Heather Dewitt, Donald Puckett, Patrick Kavanagh, Christie Kautsky, Susan Balmer and Theresa Cordero (collectively "Plaintiffs") will, and hereby do, move this Court for an Order:

(1) Granting final approval to the proposed settlement; and

(2) Entering final judgment as to all members of the Settlement Class.

The Motion is based on this Notice; the attached Memorandum of Points and Authorities; the Declaration of Robert A. Curtis; the Declaration of Robert K. Shelquist; upon all the records and files in this action; and upon such further evidence and argument as may be presented prior to or at the time of hearing on the motion.

Dated: January 30, 2018

FOLEY, BEZEK, BEHLE, & CURTIS LLP
LOCKRIDGE GRINDAL NAUEN P.L.L.P.

By: _____
Robert A. Curtis
Kevin D. Gamarnik
Robert K. Shelquist
Attorneys for Intervenor Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Intervenor Plaintiffs Jill Brunelle, Heather Dewitt, Donald Puckett, Patrick Kavanagh, Christie Kautsky, Susan Balmer and Theresa Cordero (collectively "Plaintiffs") and their counsel, by this motion, seek an Order of the Court:

(1) Granting final approval to the proposed settlement; and

(2) Entering final judgment as to all members of the Settlement Classes.

For the reasons explained herein, Plaintiffs submit that the settlement in this action is fair, reasonable and adequate and in the best interests of the Settlement Classes and, therefore, merits this Court's final approval. Accordingly, the Court should grant Plaintiffs' motion, which is unopposed, and enter final judgment as to all members of the Settlement Classes.

II. BRIEF SUMMARY OF FACTS

Plaintiffs allege the following facts in the case:

My Pillow offered a pillow for sale, and included a "free" pillow as part of the purchase. These advertisements were seen throughout the United States and on the MyPillow.com website. This advertising campaign began in 2014, in substantial part on extended televised advertisements called infomercials. My Pillow's infomercials encouraged viewers to call in to a toll-free number to place an order with an operator. My Pillow's infomercials were running a combined average of approximately 175 to 200 times per day on local and national networks, radio, and television channels. The advertisements / infomercials specifically stated "call or go online now to order My Pillow and Mike will give you a second pillow absolutely free. Use the promo code on your screen to get two My Pillows for the price of one." This is known as a "Buy-one-get-one" offer, or BOGO for short.

Plaintiffs and class members were consumers who viewed the advertisement on television or heard the advertisement on the radio, and relied on the representation that if they purchased one premium pillow from My Pillow, they would get another premium pillow from My Pillow for "free." Plaintiffs called the number provided by My Pillow and paid over $100 (including shipping and handling) to purchase one pillow to receive the other pillow for "free." Unbeknownst to the

consumers at the time of purchase, including Plaintiffs, was that My Pillow was inflating the regular price of the first pillow to approximately or exactly twice its regular price, thereby passing on the cost of the "free" pillow to the consumer. Thus, if the pillow was to be purchased without participating in the BOGO promotion, the pillow could be purchased for substantially less. For example, those obtaining two Standard / Queen Premium pillows as part of the BOGO Promotion paid $99.97, plus shipping. One Standard / Queen Premium pillow from My Pillow, however, could be purchased from the My Pillow website for a regular price of $49.99 plus shipping with a readily available "promo code," and from My Pillow on Amazon.com for $59.95 with free shipping included without the use of a "promo code." When two Standard / Queen Premium pillows were obtained as part of the BOGO Promotion, the "free" pillow was not actually free because more consideration than necessary was provided for the first pillow.

My Pillow's misrepresentation was material because it inflated the price of the pillow that it was selling (and receiving consideration for) as part of the BOGO promotion in order to pass along the cost of the "free" pillow to the consumer. Given that My Pillow sold the single pillow for far less on its website and on Amazon.com, it knew that it's representations concerning the price of the pillow as part of the BOGO promotion was false. This deceptive promotion was extremely effective—My Pillow, in a little less than 2 years, sold 1,727,811 BOGO offers for a total revenue of approximately $210,000,000.

III. SUMMARY OF PROCEDURAL HISTORY

Plaintiffs' counsel, Foley Bezek Behle & Curtis, LLP—in conjunction with Rick Klingbeil P.C. and Brady Mertz P.C.—is the lead firm in a coordinated effort to prosecute this national class action. Plaintiffs' counsel filed the first My Pillow BOGO class action in Oregon in October 2016 (the "*Brunelle* case"). Declaration of Robert A. Curtis ("Curtis Decl.") ¶ 8. After doing research and determining that Minnesota's Consumer Protection Statute provided an opportunity to allege a national class against My Pillow—because My Pillow was a Minnesota corporation—FBB&C in conjunction with Klingbeil, Mertz and the Lockridge Grindal Nauen P.L.L.P. firm out of Minnesota, filed the first national BOGO class action case against My Pillow in January 2017 (the "*Puckett* case"). Curtis Decl. ¶ 8.

At approximately the same time as Plaintiffs filed the Minnesota complaint, the Better Business Bureau of Minnesota lowered My Pillow's ranking from a grade of "A" to an "F" citing the deceptive nature of My Pillow's BOGO offer. Curtis Decl. ¶ 9. This made national news and from that news Plaintiffs' counsel learned for the first time that My Pillow had been sued in this Court over statements that its pillow had improved health benefits (the "*Amiri* case") and that case had tentatively settled. Curtis Decl. ¶ 9. When Plaintiffs pulled the docket of the instant matter they discovered that the *Amiri* case was preliminarily approved, the objection deadline had passed, and that there was an upcoming hearing for final approval. Curtis Decl. ¶ 9.

Plaintiffs also learned that even though BOGO issues were not pleaded in the *Amiri* case, the release being granted by the class in *Amiri* was broad enough to cover Plaintiffs' BOGO lawsuit. Curtis Decl. ¶ 10. Thus, Plaintiffs made a motion to the *Amiri* Court for leave to file a belated objection and then filed an objection based on the breadth of the release. Curtis Decl. ¶ 10. As a result of Plaintiffs' objection, at the final approval hearing this Court denied final approval without prejudice stating:

> "I intend to deny final approval of the settlement and the related motion given that the issues raised in the objection, it's not sufficiently demonstrated that the release is fair, adequate, or reasonable to extend the claims in connection with -- you're trying to settle out things that were not part of the original Complaint….[The Buy one get one free] seems to be totally different than what -- it's not encompassed in the lawsuit that was filed that you're settling in this matter, and yet you're asking for that to be released, and there's no notice given."

Curtis Decl., Ex. B, Transcript of January 30, 2017 Hearing.

After this Court's ruling, My Pillow and the Amiri counsel tried to settle around Plaintiffs and the BOGO claims being asserted in the *Brunelle* and *Puckett* actions again. *Amiri* tried to amend the *Amiri* complaint to add a new class representative and to specifically plead BOGO claims in the *Amiri* Complaint and to change the notice to specifically reference that the release was covering BOGO claims. Curtis Decl. ¶ 12. However, no new consideration was being given for the BOGO claimants so Plaintiffs objected again. Curtis Decl. ¶ 13. At a newly-set final approval hearing, this Court again agreed with Plaintiffs and denied final approval without

prejudice a second time citing inadequate compensation to the BOGO class members. Curtis Decl., Ex. C, Judge Foster's Order Denying Final Approval.

While all this was occurring, an additional BOGO case was filed in Montana. Curtis Decl. ¶ 15. Plaintiffs reached out to Montana counsel and they joined Plaintiffs' team in the prosecution of this national class action. Curtis Decl. ¶ 15. My Pillow then filed comprehensive Motions to Dismiss in Oregon, Minnesota and Montana and a Motion to Stay in Minnesota. Curtis Decl. ¶ 15. Plaintiffs filed a motion to appoint lead counsel in Minnesota and lengthy opposition briefs in all three jurisdictions. Curtis Decl. ¶ 16. In addition, Plaintiffs won their opposition to the motion to stay at a contested hearing in the District Court in Minnesota. Curtis Decl. ¶ 16. Shortly thereafter, Plaintiffs and My Pillow agreed to mediate. Curtis Decl. ¶ 16.

Settlement negotiations spanned approximately four months. During that time the parties exchanged informal settlement discovery including document productions and calculations of class size. Curtis Decl. ¶ 17. They also exchanged lengthy legal briefs wherein both sides discussed their respective views on the status of the law on damages as a result of these BOGO claims in attempts to inform each other as to the strength and weakness of their respective legal positions. Curtis Decl. ¶ 17. Defendant denied, and continues to deny, any liability or wrongdoing of any kind associated with the claims alleged.

Ultimately, the parties participated in a formal mediation on August 18, 2017 with the Honorable Peter Lichtman (ret.). Judge Lichtman supervised numerous contentious back and forth negotiations and finally resolved the matter when both sides agreed to his "Mediator's Compromise." Curtis Decl. ¶ 19. The result of the negotiations is a fair compromise and is described in the Settlement Agreement and Release ("Settlement Agreement") filed concurrently herewith as Exhibit A to the Curtis Decl.

This Settlement was granted preliminarily approved by this Court on September 25, 2017. Curtis Decl. ¶ 22 and Ex. D. And, in accordance with that preliminary approval order, as set forth in the Declaration of Mark Schey, notice has been provided to the Settlement Class.

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IV. SUMMARY OF SETTLEMENT TERMS

The key terms of the Settlement Agreement are as follows:

A. The Settlement Class

As a part of the Settlement, subject to the Court's approval, the parties have stipulated to conditional certification of the following two subclasses: (1) Direct Purchaser Settlement Class: "All persons who purchased Covered Products directly from My Pillow, Inc." and (2) Non-Direct Purchaser Settlement Class: All persons who purchased Covered Products from sources other than My Pillow, Inc.[1]

Excluded from the Settlement Class are all persons who validly opt out of the Settlement Class in a timely manner, counsel of record (and their respective law firms) for the Parties, Defendant and any of its parents, affiliates, subsidiaries, independent service providers and all of their respective employees, officers, and directors; the presiding judges in any of the Actions and any natural person or entity that entered into a release with Defendant prior to the Effective Date concerning any Covered Products.

B. Settlement Class Member Benefits

The Settlement Agreement provides for substantial restitution to Settlement Class members. Defendant will provide for restitution to the Settlement Class, notice and administration expenses, and attorney's fees and costs. The settlement class members who submit a timely and valid claim form will receive the benefits outlined in the Settlement Agreement. Curtis Decl., Ex. A, Settlement Agreement, para. III (E)(1). This consists of the following:

- Direct Purchaser Class Members are entitled to receive one of the following three cash payments, whichever is higher: (1) $6 for those who purchased one or more Covered Products directly from Defendant; (2) $6 per pillow (maximum $12 total) for those who acquired two Covered Products pursuant to a buy one get one free ("BOGO") offer as part of their initial purchase from Defendant; and (3) $6 per pillow (maximum $24 total) for those who acquired four or more Covered Products

[1] "Covered Products" means the products bearing the labeled brand name My Pillow that are marketed and/or distributed by Defendant, including all sizes.

pursuant to a BOGO offer as part of their initial purchase from Defendant.

- Direct Purchaser Class Members who are entitled to receive $12 will have the opportunity to elect to receive one free My Pillow GoAnywhere Pillow (currently available at $15) in lieu of a cash payment and Direct Purchasers who are entitled to receive $24 will have the opportunity to elect to receive two free My Pillow GoAnywhere Pillows in lieu of a cash payment (the claims administrator will communicate this option to approved claimants after the administrator determines the potential cash benefits);
- Direct Purchaser Class Members who submitted a valid claim form during the Claims Period for the initial settlement are entitled to receive an additional $5 payment; and
- Non-Direct Purchaser Class Members who submitted a valid claim form during the Claims Period for the initial settlement are entitled to receive the same cash benefit as provided in the initial settlement and in the Court-approved class notice relating to the initial settlement.

To facilitate the claim process for Settlement Class Members, the Claim Form may be submitted online or by mail. Curtis Decl., Ex. A, Settlement Agreement, para. III (E)(2).

C. Total Settlement Amount

There is no cap on the number of claims that can be submitted. During pre-mediation discovery, it was determined that My Pillow sold over 1,700,000 BOGO offers. Curtis Decl. ¶ 17. Notice was sent to over 2,500,000 class members. Curtis Decl. ¶ 23. If each of those individuals claims the $12 available to them, the potential value of the settlement exceeds $30,000,000. The value is even greater when considering that shipping and handling is included.

In addition to paying all claims that are submitted, My Pillow has agreed to separately pay:

(1) The cost of notice and settlement administration. Curtis Decl., Ex. A, Settlement Agreement, para. IV(B).

(2) Attorneys' fees and costs[2] to be split amongst all Direct Purchaser Settlement Class Counsel totaling $2,000,000; Curtis Decl., Ex. A, Settlement Agreement, para. III (H)(2).

(3) Incentive awards of $2,500 to each of the proposed class representatives. Curtis Decl., Ex. A, Settlement Agreement, para. III(G).

In addition, Plaintiffs have secured valuable injunctive relief on a class-wide basis, namely, My Pillow has not been running its BOGO ads for almost 6 months and agrees that it will not advertise a single size of a Covered Product with a BOGO offer in a trade area for more than six (6) months during any twelve (12) month period. Curtis Decl., Ex. A, Settlement Agreement, para. III(F).

V. NOTICE OF THE PROPOSED SETTLEMENT

Pursuant to the notice plan approved by the Court as a part of its Preliminary Approval Order, the Settlement Administrator, Digital Settlement Group, provided Notice to the Classes. In the present case, the objective of the Notice Plan is to execute the most effective plan using a combination of direct email and postcard notice to the known class. Declaration of Mark Schey ("Schey Decl.") ¶ 6. The notices directed potential Class Members to a Settlement Website, where they were able to view important documents, review frequently asked questions, and file a claim with their unique id and pin. *Ibid.* A toll-free number with an Interactive Voice Response ("IVR") system has also been available to answer potential questions. *Ibid.*

The initial list provided included 2,956,173 emails. After cleansing the email list, the notice was emailed to 2,540,962 customers. Schey Decl. ¶ 9. First Class Postcards were sent to the 415,211 cleansed emails and the 249,022 Class Members had emails "bounce" (returned as undelivered). *Ibid.* In total 539,517 postcards were sent through the United States Postal Service. *Ibid.*

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[2] Plaintiffs' counsel has filed a separate motion for an award of attorneys' fees, expenses and incentive awards to be heard at the time of the final approval hearing. Therefore, the fairness and reasonableness of these attorneys' fees, expenses and incentive awards is discussed separately in that brief. However, given the overall success achieved, and counsel's lodestar, the attorneys' fees sought are reasonable.

VI. RECOMMENDATION OF COUNSEL

Class Counsel, who have significant experience in the representation of plaintiffs in class action lawsuits, has conducted an extensive legal and factual investigation of the claims and defenses asserted in the action. Curtis Decl. ¶¶ 1-7, 17-19; see also, generally, Declarations of Mr. Shelquist, Mr. Klingbeil, Mr. Mertz, Ms. Varnell, Mr. Gertsner and Mr. Bingham filed in support of Plaintiffs' Motion for Attorneys Fees. As part of this investigation, Plaintiffs' counsel have reviewed documents and other information and taken discovery concerning the composition of the Settlement Class and the merits of Plaintiffs' claims, and conducted an investigation into the potential damages claims of the Settlement Class. Curtis Decl. ¶¶ 17-19. Class Counsel has conducted significant pretrial investigation, legal research, motion practice and discovery. *Ibid*. Class Counsel has analyzed the facts, as well as the law, relevant to the merits of the claims asserted in this action. Based upon their investigation, discovery and analysis, Counsel for Plaintiffs have determined that the Settlement is in the best interests of the members of the Settlement Class. Curtis Decl. ¶¶ 20-21.

The Parties have engaged in extensive settlement negotiations that were conducted in good faith. The terms of the Settlement Agreement were reached only after extensive arm's-length negotiations between Counsel for Plaintiffs and counsel for Defendant. Through these settlement negotiations, the Parties have reached agreement on a proposed settlement of this Class that they believe to be fair, adequate and reasonable, and in the best interests of the members of the Settlement Class. Curtis Decl. ¶¶ 19-21. Class Counsel recommends the Settlement based upon their determination that the Settlement will confer substantial benefits on the members of the stipulated Settlement Class and Subclass.

VII. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standard for Final Approval

Settlements, in general, are highly favored by the courts. *Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 52 (noting that the California Supreme Court "has placed an extraordinarily high value on settlement"). The Ninth Circuit has noted that "voluntary conciliation and settlement are the

preferred means of dispute resolution. This is especially true in complex class action litigation." *Officers for Justice v. Civil Service Com'n* (9th Cir. 1982) 688 F.2d 615, 625. However, in order "to prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action requires court approval." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794,1800, quoting *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579. Nevertheless, in evaluating a class action settlement, a court has broad powers to determine whether a proposed settlement is fair and reasonable under the circumstances of the case. *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438; Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 234-235 ["In general, questions whether a settlement was fair and reasonable, whether notice to the class was adequate ... are matters addressed to the trial court's broad discretion."]

In order to approve a class action settlement, the trial court must find that the proposed class action settlement is fair, reasonable and adequate. *Dunk*, 48 Cal.App.4th at 1801; *Hanlon v. Chrysler Corp*. (9th Cir. 1998) 150 F.3d 1011, 1026. In so doing, the trial court should not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute." *7-Eleven Owners For Fair Franchising v. The Southland Corporation* (2000) 85 Cal.App.4th 1135, 1145, quoting *Officers for Justice*, 688 F.2d at 625. Rather, the assessment of the trial court "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as whole, is fair, reasonable and adequate to all concerned." *Dunk*, 48 Cal.App.3d at 1801. In short, "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits." *7-Eleven Owners*, supra, 85 Cal.App.4th at 1145; *Officers for Justice*, 688 F.2d at 625.

In reaching its ultimate determination as to the fairness, adequacy and reasonableness of a proposed class action settlement, the Court may consider a variety of factors, including: the strength of the plaintiff's case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining the case as a class action through trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and

views expressed by Class Counsel; and the reaction of the class members to the proposed settlement. *Dunk*, 48 Cal.App.4th at 1801. However, this "list of factors is not exhaustive and should be tailored to each case." *Ibid.* In this regard, the trial court is "free to engage in a balancing and weighing of factors depending on the circumstances of each case." *Wershba*, 91 Cal.App.4th at 245.

Ultimately, before granting final approval to a proposed settlement, the Court must carefully scrutinize the proposed settlement "with the purpose of protecting the rights of the absent class members who will be bound by the settlement." *Wershba*, 91 Cal.App.4th at 245. At that time, the Court must "reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id., quoting Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F. 2d 615, 625; *Wershba*, 91 Cal.App.4th at 246 ["[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial."]; *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242.

B. Application of the *Dunk* Factors to this Settlement

Evaluating the Settlement in this action under the factors set forth in *Dunk*, it is clear that the Settlement warrants the Court's final approval.

First, in order to be considered fair and reasonable, a proposed class action settlement does not have to provide 100 percent of the possible damages that could be recovered if the case ultimately was tried to a successful conclusion. *See Wershba*, 91 Cal. App. 4th at 250 ("Compromise is inherent and necessary in the settlement process. Thus, even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'"). Rather, a settlement is considered against the backdrop of the facts and circumstances surrounding a particular case. *See id*. at 246-50. When judged against that standard,

it is clear that this Settlement – which secures substantial restitution for class members– provides a fair, reasonable, and adequate settlement for the Settlement Class.

One relevant factor in determining whether the Settlement is fair, reasonable and adequate, is the risk of continued litigation balanced against the certainty and immediacy of recovery. *See Dunk*, 48 Cal. App. 4th at 1801-02. Although Plaintiffs believe the case against Defendant is strong, such confidence must be tempered by the fact that the settlement is extremely beneficial (providing a significant immediate return) and that there were significant risks of less or no recovery, particularly in a complex case such as this one. Plaintiffs' counsel is convinced that this settlement is in the best interests of the Class based on the negotiations and the detailed knowledge of the issues presented herein. *See* Curtis Decl. ¶ 21. In negotiating the Settlement Agreement, Plaintiffs' counsel balanced the proposed settlement against the probable outcome of class certification and a trial on the merits. Curtis Decl. ¶ 19. The risks of class certification, trial and the normal "perils" of litigation, as well as the specific defenses and issues discussed above, were all weighed in reaching the proposed settlement. Curtis Decl. ¶ 19. Further, the time value of the present settlement, and the refund that will be provided to members of the Class were also carefully considered by Class Counsel in agreeing to the proposed settlement. Curtis Decl. ¶ 19. Indeed, as one court has aptly noted, "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Officers for Justice*, supra, 688 F.2d at 625.

Second, this case has been very time consuming and expensive for the parties, having been pursued over a period of almost two years. Over that period of time, Class Counsel has spent collectively more than 1600 hours litigating this matter. Curtis Decl. ¶ 24, see also, generally, Declarations of Mr. Shelquist, Mr. Klingbeil, Mr. Mertz, Ms. Varnell, Mr. Gertsner and Mr. Bingham filed in support of Plaintiffs' Motion for Attorneys Fees. It would be reasonable to expect that the law firms representing the Defendant over the same span of time have spent at least this much time defending this case. In the absence of a settlement, the time and expense of all of the parties will increase further as the parties can be expected to engage in additional

discovery, lengthy motion practice with respect to certification of the class, and extensive preparation before proceeding with a multi-day trial.

Third, although Plaintiffs view the risk of not obtaining or maintaining class certification through court proceedings as minimal, any failure to obtain or maintain class certification would be the death knell for the Settlement Class.

Fourth, the relief obtained under the Settlement is significant and meaningful. There is no cap on the number of claims that can be submitted. Notice was sent to over 2,500,000 class members. Curtis Decl. ¶ 23. If each of those individuals claims the $12 available to them, the potential value of the settlement exceeds $30,000,000. The value is even greater when considering that shipping and handling is included. Curtis Decl. ¶ 23. In addition to paying all claims that are submitted, My Pillow has agreed to separately pay the cost of notice and settlement administration, attorneys' fees and costs, and incentive awards. Lastly, Plaintiffs have secured valuable injunctive relief on a class-wide basis.

Fifth, the discovery conducted, both informal and formal was sufficient for the parties to make an informed decision on the issue of settlement. Curtis Decl. ¶ 18, 21.

Sixth, Class Counsel who possess substantial experience in the field of class actions, recommend the Settlement. Curtis Decl. ¶ 1-7; *see also,* Declarations of Mr. Shelquist, Mr. Klingbeil, Mr. Mertz, Ms. Varnell, Mr. Gertsner and Mr. Bingham filed in support of Plaintiffs' Motion for Attorneys Fees. Where, as here, the counsel recommending the proposed settlement for approval are known to the Court as competent and experienced, significant weight may be given to their opinion. *Kirkorian v. Borelli* (N.D. Cal. 1988) 695 F.Supp. 446, 451. *See also, Warren v. Tampa* (M.D. Fla. 1988) 693 F.Supp. 1051, 1060 ("[T]he Court is affording great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation."), aff'd. (11th Cir. 1989) 893 F.2d 347; *Flinn v. FMC Corp.* (4th Cir. 1975) 528 F.2d 1169, 1173 n.14, cert. denied (1976) 424 U.S. 967; *In re Minolta Camera Products Antitrust Litigation* (D. Md. 1987) 668 F.Supp. 456, 459; *Blank v. Talley Industries, Inc.* (S.D.N.Y 1975) 64 F.R.D. 125, 132.

Seventh, to date, the reaction of the class members to the proposed settlement has been decidedly "pro-settlement." As of the filing of this Motion, only eight (8) class members have objected and only 888 have opted out of the Settlement Class. Curtis Decl. ¶ 25. Therefore, the reaction of the class members to whom the Settlement Notice was distributed was "overwhelmingly positive" reaction to the Settlement and an indication that the class members "strongly favor" the Settlement. *See, e.g., 7-Eleven Owners*, supra, 85 Cal.App.4th at 1152-1152 (finding the response of class members to be "overwhelmingly positive" where only 80 of the 5,454 class members receiving notice elected to opt out and only 9 class members objected to the settlement); *Wershba*, supra, 91 Cal.App.4th at 245 (finding that "settlement class members strongly favored the settlement" where 20 class members objected to the settlement".)

C. The Settlement Is Presumptively Fair

Under California law, a "presumption of fairness" exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the Court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. 7-*Eleven Owners*, supra, 85Cal.App.4th at 1146; Dunk, 48 Cal.App.4th at 1802.

All four prerequisites for presumptive fairness are present in this case: (1) the Settlement is the result of arm's-length bargaining by the parties and their counsel; Curtis Decl. ¶¶ 19-21. (2) counsel have conducted sufficient discovery to satisfy themselves that the Settlement Agreement is fair, reasonable and adequate and in the best interests of the Settlement Class; Curtis Decl. ¶ 18. (3) counsel for Plaintiffs have many years of experience in litigating class actions and have negotiated numerous other class settlements that have been approved by courts throughout California and the United States; Curtis Decl. ¶ 1-7. and (4) to date only a minutiae percentage of the Settlement Class has objected. Curtis Decl. ¶ 25.

VIII. ALL THE OBJECTIONS SHOULD BE OVERRULED

The "existence of objections does not mean that the settlement is unfair." *Bailey v. AK Steel Corp.*, 2008 WL 495539, at *4 (S.D.Ohio 2008). "If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *See In re*

Austrian & German Bank Holocaust Litig.(2000) 80 F. Supp. 2d 164, 175; *Boyd v. Bechtel Corp.*, (N.D. Cal. 1979) 485 F. Supp. 610, 624 (finding "persuasive" the fact that 84% of the class has filed no opposition); *Stoetzner v. U.S. Steel Corp*., (3rd Cir. 1990) 897 F.2d 115, 118-19 (finding that 29 objections out of a 281-member class "strongly favors settlement").

Out of over 2,500,000 class members, Class Counsel and the Claims Administrators only received eight (8) written "objections" to the Settlement. This amount to less than 0.000004% of the total class. Seven of these "objections" were provided by people who either dislike or disfavor class actions or complain about the fees or incentive awards being requested. These include the "objections" filed Scott Darren Lindemuth, John J. Kokosky, Bronwyn C. Hertz, Pamela Lorence, Joseph O'Malley, Minnie Potter and Patricia J. Archer. Curtis Decl. ¶ 25, Exs. E, F, G, H, I, J, K. However, none of these seven "objections" address the substance of the claims, the status of the law on false reference pricing claims, the risks associated with the case or the amount of time or effort put forth by Class counsel. See *In re: Broadcom Corp. Sec. Litig.* (C.D. Cal. 2005) 2005 US Dist. LEXIS 41983 ("[T]he uninformed judgment of one objector cannot be substituted for that of Lead Counsel, or that of a former [] judge who supervised [the] mediation process.") The objections to the fees and incentive awards do not even address the authorities and arguments raised by Class Counsel in their separately filed Motion for Attorney Fees, which is incorporated herein. Indeed, the fact that only a small number of objections were received "strongly favors settlement" and should be viewed as powerfully indicative of the adequacy of the settlement.

On January 29, 2018 (the evening before this Motion was scheduled to be filed), Plaintiffs' counsel received by mail an eighth objection from a Phillip Stamm represented by a New York law firm who allegedly has a BOGO-related case filed in New York.[3] Due to the press of time to complete this Motion and get it on file, Class counsel has not fully reviewed and researched this 20-page objection. Curtis Decl. ¶ 26, Ex. L. Nevertheless, Class Counsel will file a supplemental brief addressing this objection prior to the hearing on the Motion for Final Approval.

[3] It should be noted that based on the summons attached to the objection, this New York case was filed over 5 months after Class Counsel filed their initial BOGO–related class action.

IX. CONCLUSION

For all of the foregoing reasons, and on the basis of the authorities cited herein, Plaintiffs respectfully request that the Court enter an order in the form proposed: (1) granting final approval to the proposed settlement in this action; and (2) entering final judgment as to all members of the Settlement Class in this action.[4]

Dated: January 30, 2018

FOLEY BEZEK BEHLE, & CURTIS LLP
LOCKRIDGE GRINDAL NAUEN P.L.L.P.

By: _____
Robert A. Curtis
Kevin D. Gamarnik
Robert K. Shelquist
Attorneys for Intervenor

[4] Rule 3.769 (h) of the *California Rules of Court* requires the Court to make and enter a final judgment upon granting final approval to a class action settlement. Under Rule 3.769 (h), "[t]he judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment." Concurrently herewith, Plaintiffs are submitting a [Proposed] Order Granting Final Approval To Proposed Settlement And Entering Final Judgment As To All Members Of The Settlement Class (the "Final Approval Order And Judgment"). This Order provides for the Court's retention of jurisdiction over all matters relating to the Settlement, including enforcement of the terms of the Final Approval Order And Judgment.