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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JUN 07 2016

BY Christin Davis
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*Attorneys for Plaintiff Armin Amiri
and the Proposed Class*

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

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

Plaintiff,

vs.

MY PILLOW, INC., a Minnesota Corporation;
and DOES 1-10, inclusive,

Defendants.

Case No. CIVDS1606479

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

*[Declaration of Ryan J. Clarkson, Declaration
of Mark Schey, and [Proposed] Order filed
concurrently herewith]*

Date: July 11, 2016

Time: 8:30 a.m.

Dept.: S22

Complaint Filed: April 26, 2016

By Fax

Clarkson Law Firm, P.C.
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Los Angeles, CA 90013

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COUNTY OF SAN BERNARDINO
CIVIL DIVISION

1 The Parties are pleased to announce that they have reached a fair, adequate, and reasonable
2 agreement to resolve this action on a class-wide basis. By this application, Plaintiff Armin Amiri
3 ("Plaintiff") seeks preliminary approval of: (1) an arms-length, stipulated class action settlement
4 agreement; (2) class notice and related settlement administration documents and deadlines; and (3)
5 a final approval hearing date. Defendant My Pillow, Inc. (hereafter "Defendant") does not oppose
6 this application.

7 I. INTRODUCTION

8 The Parties propose a settlement to resolve this action on a nationwide basis. Plaintiff
9 alleges that Defendant made unsubstantiated, false, and misleading statements relating to the
10 labeling and advertising of their My Pillow brand pillow products (hereafter the "Covered
11 Products")¹, and that Plaintiff suffered injury as a result of those statements in violation of the
12 California Unfair Competition Law ("UCL," Cal. Bus. & Prof. Code § 17200, *et seq.*) and False
13 Advertising Law ("FAL," Cal. Bus. & Prof. Code § 17500, *et seq.*), and the common law. The
14 primary relief sought by Plaintiff is equitable relief in the form of changes to the advertising of the
15 Covered Products. Defendant denied, and continues to deny, any liability or wrongdoing of any
16 kind associated with the claims alleged in the Action, and further contends that, for any purpose
17 other than settlement, the claims alleged in the Action are not appropriate for class treatment.

18 The Parties engaged in lengthy and informed arms-length settlement negotiations beginning
19 in April 2016. The negotiations followed a months-long investigation of the Covered Products by
20 Plaintiff's counsel. During the course of those negotiations, the Parties exchanged information and
21 were fully informed as to the strength and weakness of their respective legal positions. The result
22 of the negotiations is a fair compromise and is described in the Settlement Agreement and Release
23 ("Settlement Agreement") filed concurrently herewith as Exhibit 1 to the Declaration of Ryan J.
24 Clarkson ("Clarkson Decl.").

25 As described in the Settlement Agreement, the proposed settlement provides that Defendant
26 will modify its advertising of the Covered Products with respect to several health, endorsement, and

27
28 ¹ As defined in the Settlement Agreement, the term Covered Products means the pillow products that are or have
been manufactured, marketed and/or distributed by Defendant under the My Pillow brand including all sizes. See
Settlement Agreement, Clarkson Decl., Ex.1 at Art. I, ¶I.

1 testimonial claims. Clarkson Decl., Ex.1 at Art. III, ¶D.2. Additionally, Defendant has agreed to
2 provide for restitution to the Settlement Class, notice and administration expenses, and attorney's
3 fees and costs.

4 Because the settlement terms and notice plan are fair and reasonable under the applicable
5 criteria and guidelines, Plaintiffs respectfully request that the court issue an order: (1) preliminarily
6 approving the terms of the proposed Settlement Agreement, (2) provisionally certifying the
7 Settlement Class for settlement purposes only, (3) provisionally appointing Clarkson Law Firm,
8 P.C. as Class Counsel and Plaintiff as Class Representative for settlement purposes only, (4)
9 approving the form, content, and schedule of class notice, and (5) scheduling a Final Fairness
10 Hearing.

11 **II. SUMMARY OF THE LITIGATION**

12 **A. Plaintiff's Claims**

13 This class action alleges that Defendant made unsubstantiated, false, and misleading claims
14 on their product labels and advertising for the Covered Products in violation of the California
15 Unfair Competition Law ("UCL," Cal. Bus. & Prof. Code § 17200, *et seq.*) and False Advertising
16 Law ("FAL," Cal. Bus. & Prof. Code § 17500, *et seq.*), and the common law. As set forth in
17 Plaintiff's complaint, Plaintiffs allege that Defendant falsely advertises the Covered Products with
18 several claims in the product advertising and marketing. Specifically, Plaintiff challenges
19 Defendant's claims that the My Pillow and My Pillow bedding products can solve all of your
20 sleeping problems, including insomnia, neck and back pain, snoring, and more, using its patented
21 interlocking filling and custom fit sizing, the Product's inventor as being a "sleep expert," as well
22 as display of logos of prominent third party news organizations as endorsements.

23 **B. Plaintiffs' Investigation and Discovery**

24 Plaintiffs and counsel began investigating Defendant's advertising of the Covered Products
25 in or about early 2016. *See* Clarkson Decl. at ¶3. Class Counsel's investigation included, among
26 other things:

- 27 (a) obtain and review of hundreds of electronic images and hard copies of website,
28 commercials, infomercials and other advertisements of the Covered Products;

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- (b) obtain, review and analyze various applicable scientific studies regarding sleep, pillows and related health claims for Covered Products;
- (c) review of Covered Products sales and revenue and related documents;
- (d) discussions with infomercial industry consultants;
- (e) review scientific information with consultant;
- (f) extensive legal research regarding Counsel's evaluation of the prospective merits and weaknesses of the case;
- (g) preparation of a class action complaint and draft motion for class certification;
- (h) analysis of potential class-wide damages;
- (i) review of advertising claims history and various "language models" for changes to the advertising of the Covered Products; and
- (j) extensive legal research and evaluation of the applicable law with respect to the claims asserted in the complaint and the potential defenses thereto.

Id. at ¶3.

C. Procedural Summary and Settlement Discussions

Following the initial investigation by Plaintiffs and Plaintiffs' counsel, in early April 2016, Plaintiffs notified Defendant of its alleged violations of California consumer law with respect to the advertising and labeling of the Covered Products. *Id.* at ¶4. Plaintiffs' letter detailed the advertising claims at issue, along with analyzing the relevant science. *Id.* Plaintiffs advised Defendant that they intended to proceed with filing a class action complaint should defendant fail to correct and repair the alleged violations. *Id.*

In April 2016, Defendant's counsel responded to Plaintiffs' letter, denying Plaintiffs' allegations. *Id.* at ¶5. The parties entered into a standstill agreement where Plaintiff agreed to hold the filing of the complaint so that the parties could exchange additional information regarding Plaintiffs' claims. *Id.* After thoroughly reviewing that information, the Parties began to discuss a possible resolution of Plaintiffs' claims. *Id.* at ¶5. Over the course of the next several weeks, the parties engaged in hard-fought, protracted, arm-length negotiations to craft a resolution of this

1 action on a classwide basis, which culminated in the final Settlement Agreement executed in in
2 June 2016. *Id.* at ¶6.

3 **III. THE PROPOSED SETTLEMENT**

4 The salient terms of the Settlement Agreement are summarized below.

5 **A. The Settlement Class**

6 The Settlement Agreement provides for the certification of a Class for settlement purposes
7 (the "Settlement Class"):

8 All persons who purchased Covered Products for personal use and not for resale in the
9 United States, its territories, or at any United States military facility or exchange during the
10 Class Period.

11 Excluded from the Settlement Class are all persons who validly opt out of the Settlement Class in a
12 timely manner, counsel of record (and their respective law firms) for the Parties, Defendant and any
13 of its parents, affiliates, subsidiaries, independent service providers and all of their respective
14 employees, officers, and directors; the presiding judge in the Action any persons who received
15 remuneration from Defendant to act as an endorser of the Covered Products; any natural person or
16 entity that entered into a release with Defendant prior to the Effective Date concerning any Covered
17 Products. *See* Clarkson Decl., Ex.1 at Art. I, ¶Y.

18 **B. The Settlement Consideration**

19 **1. Changes to Advertising & Marketing**

20 As part of the Settlement Agreement, Defendant has agreed to substantial equitable relief in
21 the form of changes to the advertising of the Covered Products. Specifically, in "Within 60 days
22 after the full execution of this Agreement, Defendant will remove health claims and testimonials that
23 include health claims from its website and other marketing materials, unless it has competent and
24 reliable scientific evidence for such claims." Clarkson Decl., Ex. 1 at Art. III, ¶D.2.

25 **2. Monetary Relief**

26 In addition to the advertising and labeling changes, the Settlement Agreement provides for
27 substantial restitution to Settlement Class Members. Clarkson Decl., Ex. 1 at Art. III, ¶D.2.
28 Specifically, Settlement Class Members who submit a valid and timely Claim Form with sufficient

1 proof will be eligible to receive compensation in the form of refunds of \$5.00 per household. *Id.* at
2 Art. III, ¶D.2. Receipts are not required to obtain cash payment. Settlement Class members may
3 substantiate their claims through the submission of a Claim Form and Affidavit attesting to the
4 purchase of Covered Products during the Class Period under penalty of perjury. *Id.* To facilitate the
5 claim process for Settlement Class Members, the Claim Form may be obtained online. *Id.*

6 **C. Release by the Class**

7 Plaintiff's and Settlement Class Members' consideration is in the form of a release of the
8 claims alleged, or that could have been alleged, in the *Amiri* action. Pursuant to the terms of the
9 Settlement Agreement, the class releases Settled Claims as follows:

10 "[A]ny and all claims, demands, actions, and causes of action of any kind or nature
11 whatsoever, whether at law or equity, known or unknown, direct, indirect, or consequential,
12 liquidated or unliquidated, foreseen or unforeseen, developed or undeveloped, arising under
13 common law, regulatory law, statutory law, or otherwise, including but not limited to
14 unjust enrichment, theft by deception, fraud, breach of warranty express or implied,
15 violation of California Civil Code 1750 et seq., violation of California Business and
16 Professions Code Sections 17200 et seq. and 17500 et seq., and any related or similar state
17 consumer protection statutes, claims for restitution, disgorgement of profits, injunctive and
18 declaratory relief, arising out of or relating to the advertising, packaging, labeling,
19 marketing, promotion, sale or distribution of the Covered Products, including all claims
20 which were alleged or which could have been alleged by Plaintiff, Class Counsel, the
21 Settlement Class and/or any Settlement Class Member against the Discharged Parties in the
22 Action, or any other legal action, whether those claims are asserted individually or on a
23 class-wide basis (the "Released Claims"). However, this definition expressly excludes
24 claims for personal injury."

25 Clarkson Decl., Ex. 1 at Art. I, ¶W & Art. III, ¶C.1

26 **D. Notice to the Class and Claims Process**

27 Because Defendant possesses information as to the identities and corresponding contact
28 information for the majority of Settlement Class Members, but not all members, a multi-faceted

1 approach consisting of direct email and mail notice, print publication notice and internet posting.
2 Clarkson Decl. at ¶7; Declaration of Mark Schey ("Schey Decl.") at ¶3. The class will receive notice
3 of their right to assert a claim, as well as the opportunity to object to the settlement or opt out.
4 Counsel for the parties agree that the proposed plan provides reasonable notice in light of the nature
5 of the individual claims, the limitations on the scope of the release, the methods that Defendants
6 generally use to communicate with consumers, and the expenditure of available resources. Clarkson
7 Decl. at ¶8.

8 1. Notice Plan

9 The notice plan is set forth in the Settlement Agreement and the Declaration of Mark Schey,
10 Founding Partner of Legal Noticing at Digital Settlement Group, LLC ("DSG"). The Parties have
11 developed a notice plan with DSG, a firm that specializes in developing class action notice plans and
12 administering class action settlements. Defendant does not maintain customer lists for all purchasers
13 of the Covered Products, but does possess either email or physical mailing addresses for the majority
14 of the class. *See* Schey Decl. at ¶3. Consequently, the notice plan focuses on disseminating notice
15 through direct means (email and mail) as well as a publication notice targeted to reach Settlement
16 Class Members. *Id.* at ¶3.

17 2. Publication and Long-Form Notices

18 The proposed forms of notice are attached to the Settlement Agreement as Exhibits D and F.
19 These notices were developed with the expertise of the notice and settlement administrator, DSG.
20 Schey Decl. at ¶5; Clarkson Decl. at ¶9. The notices are designed in accordance with the Federal
21 Judicial Center's "plain language" guidelines. Schey Decl. at ¶4. In the opinion of DSG, the
22 Notices "comport with all aspects of California Rule of Court 3.766, the Due Process Clause of the
23 Constitution, and also the guidance for effective notice articulated in the FJC's Manual for Complex
24 Litigation, 4th." Schey Decl. at ¶17.

25 3. Settlement website and Toll-Free Telephone Support

26 The class notice will direct consumers to an Internet website dedicated to the settlement and
27 the claims process (www.pillowsettlement.com), where Settlement Class Members can review the
28 long form notice, settlement documentation, and relevant court documents. The settlement website

1 will be designed and maintained by DSG. Schey Decl. at ¶13. In addition, DSG will maintain a toll-
2 free call-in number for the settlement where class members can obtain information about the
3 settlement and obtain a paper claim form. Schey Decl. at ¶14.

4 **E. Service Payment to Named Representative Plaintiff**

5 The Settlement Agreement contains a provision that Plaintiff Armin Amiri will apply for an
6 award of up to \$2,500, for their services and efforts on behalf of the class. Clarkson Decl., Ex. 1 at
7 Art. III, ¶E. This amount will be paid by Defendant. *Id.* This award is fair, adequate and reasonable
8 given Plaintiffs' involvement in the background investigation of Defendants, the litigation, and the
9 settlement process. Clarkson Decl. at ¶10.

10 **F. Attorneys' Fees and Costs**

11 The Settlement Agreement provides that Plaintiffs will request, and Defendants will not
12 object to, an award of reasonable attorneys' fees and costs not to exceed \$130,000. Clarkson Decl.,
13 Ex. 1 at Art. III, ¶F. In accordance with California class action procedure, Plaintiff will submit a
14 detailed attorneys' fees and costs application, and an application for a class representative incentive
15 award in connection with the motion for final approval of the settlement. Given the value of the
16 monetary relief, the injunctive relief obtained, the overall success achieved, and counsel's lodestar,
17 the attorneys' fees sought are reasonable. *See* Clarkson Decl. at ¶11.

18 **G. Costs of Administration and Notice Plan**

19 The Settlement Agreement provides that notice and administration costs will be paid by
20 Defendant. Clarkson Decl., Ex. 1 at Art. V. The parties, in conjunction with DSG, estimate that
21 the costs of administration (including the media costs of the notice plan) will be approximately
22 \$300,000.

23 **IV. ARGUMENT**

24 **A. Legal Standard for Preliminary Approval**

25 California courts favor settlement, particularly in class actions and other complex cases in
26 which substantial resources can be conserved by avoiding the time, cost and rigors of formal
27 litigation. *See* 2 Newberg on Class Actions, Settlement of Class Actions § 11.41 (3d ed. 1992)
28 (collecting cases); *Stambaugh v. Sup. Ct.*, 62 Cal.App.3d 231, 236 (1976); *Class Plaintiffs v. City of*

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1 *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529
2 F.2d 943, 950. In reviewing class action settlements, courts have broad powers to determine
3 whether a settlement is fair under the circumstances of a case. *See Mallick v. Sup. Ct.*, 89
4 Cal.App.3d 434, 438 (1979); *see also Dunk v. Ford Motor Co.* 48 Cal.App.4th 1794, 1801 (1996)
5 (“The court must determine the settlement is fair, adequate and reasonable.”). Because voluntary
6 settlements are highly favored by the law, a court should not substitute its own judgment for the
7 good faith negotiations of experienced counsel. *See Dunk*, 48 Cal.App.4th at 1801; *see also In re*
8 *Agent Orange Prods. Liab. Litig.* 597 F.Supp. 740, 758-59 (E.D.N.Y. 1984).

9 In reviewing a proposed settlement, the Court’s inquiry “must be limited to the extent
10 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
11 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
12 whole, is fair, reasonable and adequate to all concerned.” *Dunk*, 48 Cal.App.4th at 1801 (quoting
13 *Officers for Justice v. Civil Service Com’n of City and County of San Francisco*, 688 F.2d 615, 625
14 (9th Cir. 1982)). Thus, the purpose of the preliminary evaluation of a class action settlement is to
15 determine whether the proposed settlement is within the range of possible approval, and thus whether
16 notice to the class of the terms and conditions of the settlement and the scheduling of a formal
17 fairness hearing are worthwhile. *See* 2 Newberg on Class Actions, Settlement of Class Actions §
18 11.25; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245-46.

19 **B. The Settlement is Fair, Reasonable and Adequate and it Should be Preliminarily**
20 **Approved**

21 The starting point of the Court’s inquiry is the Settlement Agreement. *See, e.g., Dunk*, 48
22 Cal.App.4th at 1800-01. To this end, there is a presumption that the settlement is fair, reasonable
23 and adequate if (i) the settlement is a product of arms-length negotiations, (ii) investigation and
24 discovery are sufficient to allow counsel and the court to act intelligently, and (iii) counsel is
25 experienced in the litigation. *Id.* at 1802; *see also* MANUAL FOR COMPLEX LITIGATION, Third, §
26 30.42 (1995). This settlement clearly meets that standard.

27 **1. The Settlement Agreement is the product of arms-length negotiations by**
28 **experienced counsel**

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Experienced counsel, operating at arms-length, have weighed the strengths and weaknesses of the case, examined all of the issues and, as a result, endorse the proposed settlement. *See* Clarkson Decl. at ¶12. As noted, Class Counsel's endorsement is entitled to great weight following arms-length settlement negotiations. *See Dunk*, 48 Cal.App.4th at 180 ("Due regard should be given to what is otherwise a private consensual agreement between the parties."); *see also Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988). Indeed, absent a finding of fraud or collusion, settlement agreements negotiated and endorsed by experienced counsel are presumptively fair and reasonable. *See Dunk*, 48 Cal.App.4th at 1802. The record provided to the Court evidences the lengthy, careful investigation and informal discovery by Plaintiff and Class Counsel in this case. As a result, Class Counsel was able to negotiate the significant advertising changes and substantial cash payments for Settlement Class Members.

During the course of the negotiations, each party considered, among other things, the risks and expenses of further litigation, the prospect of losing on the merits, and the complexities associated with the present state of the law (including issues related to individual reliance of the named class representative and the concept of class-wide reliance). Clarkson Decl. at ¶13. Class Counsel also considered the benefits that the Settlement Agreement would convey to the class and the public and the present monetary value of the equitable relief. *Id.* All of those factors, taken in conjunction dictate that the Settlement Agreement is (i) the product of arms-length negotiations and (ii) in the best interests of the class. *See Dunk*, 48 Cal.App.4th at 1803.

2. The Settlement Agreement is fair and reasonable in light of the Parties' respective legal positions

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

1 which each side gives ground in the interest of avoiding litigation.”). Rather, a settlement is
2 considered against the backdrop of the facts and circumstances surrounding a particular case. *See id.*
3 at 246-50. When judged against that standard, it is clear that the Settlement Agreement – which
4 secures substantial equitable relief and restitution for class members– provides a fair, reasonable and
5 adequate settlement for the class.

6 **a. The difficulty in proving the “materiality” of the allegedly**
7 **unsubstantiated claims**

8 Plaintiffs are confident that the labeling and advertising of the Covered Products presented a
9 common misrepresentation to consumers on the product labels that was certifiable as a class on the
10 basis of a presumption of “materiality” and reliance under the standards set forth in *Vasquez v. Sup.*
11 *Ct.*, 4 Cal.3d 800 (1971) and *Mass. Mutual Life Ins. Co. v. Sup. Ct.* 97 Cal.App.4th 1282 (2002).
12 Nevertheless, through the investigation, Plaintiffs learned that Defendants were prepared to present
13 evidence that consumers rely on a host of factors and representations when deciding to buy the
14 Covered Products which could defeat a finding of commonality at class certification. Likewise,
15 Plaintiffs learned that Defendant was prepared to argue that the advertising claims at issue (in
16 particular the testimonial claims) were vague claims akin to non-actionable puffery, which no
17 reasonable consumer would rely. *See Haskell v. Time, Inc.*, 857 F.Supp. 1392, 1399 (1994). Either
18 of those arguments could defeat a finding of materiality.

19 Moreover, Defendant was prepared to argue that the majority of Plaintiff’s allegations were
20 non-actionable “lack of substantiation” claims. “Under California law, substantiation claims may
21 not be brought by private consumers.” *Marshall v. PH Beauty Labs, Inc.*, No. CV 15-02101-DDP
22 (AGRx), 2015 U.S. Dist. LEXIS 68636, at *7-8 (C.D. Cal. May 27, 2015). See also Cal. Bus. &
23 Prof. Code § 17508(b) (giving power to demand substantiation for advertising only to “the Director
24 of Consumer Affairs, the Attorney General, any city attorney, or any district attorney”). As the
25 California Court of Appeal explained in *National Council Against Health Fraud, Inc. v. King Bio*
26 *Pharm., Inc.*, 107 Cal. App. 4th 1335, 1345 (2003), “[t]he Legislature, by enacting Business and
27 Professions Code section 17508, recognized the need for the Attorney General and other prosecuting
28 authorities to be able to require advertisers to substantiate advertising claims. With Business and

1 Professions Code section 17508, the Legislature established an administrative procedure by which
2 prosecuting authorities may demand such substantiation. The statute is expressly applicable only to
3 prosecuting authorities. Private plaintiffs are not authorized to demand substantiation for advertising
4 claims.” *See also Marshall*, 2015 U.S. Dist. LEXIS 68636, at *8 (holding that a substantiation claim
5 cannot serve as the basis for a false advertising or UCL claim under California law.); *Aloudi v.*
6 *Intramedic Research Grp., LLC*, No. 15-cv-00882-HSG, 2015 U.S. Dist. LEXIS 89366 (N.D. Cal.
7 July 9, 2015) (“The California legislature ‘has expressly permitted prosecuting authorities, but not
8 private plaintiffs, to require substantiation of advertising claims This limitation prevents undue
9 harassment of advertisers and is the least burdensome method of obtaining substantiation for
10 advertising claims.”)

11 In addition, Defendant is prepared to present evidence of overwhelming satisfaction with the
12 Covered Products, including its tens of thousands of unsolicited consumer testimonials. Clarkson
13 Decl. at ¶15. Further, Defendant is prepared to submit evidence maintains a money-back guarantee
14 policy for any dissatisfied customers and that any customers who were dissatisfied had no issue with
15 obtaining a refund. Clarkson Decl. at ¶14-15. Thus, Plaintiffs anticipated that even if a
16 presumption of reliance were applied by the Court in order to certify a class, Defendants would
17 argue that such presumption was rebuttable, Plaintiff’s claims were non-actionable, and such
18 evidence presented by Defendants could weigh significantly against class certification or any class
19 recovery.

20 **b. Liability issues and the “Battle of the Experts”**

21 As with any contested class action, the proofs on the merits would also be subject to
22 significant scrutiny. In particular, Defendants had scientific substantiation for the health claims and
23 testimonials that appeared in the advertising for Covered Products, and Defendants shared with
24 Plaintiff information that supported those some of claims. *See Clarkson Decl.* at ¶¶13-16. While
25 Plaintiff raised some (and was prepared to raise more) questions on the validity and applicability of
26 that substantiation, there certainly was no guarantee that the testimony of Plaintiff’s experts would
27 have been accepted over that from Defendants and their experts. In other words, the case would
28 have been reduced to a classic battle of the experts over both the fact and degree of substantiation.

1 See, e.g., *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985), *aff'd*, 798
2 F.2d 735 (2d Cir. 1986) (approving settlement where "it is virtually impossible to predict with any
3 certainty which testimony would be credited, and ultimately, which damages would be found to have
4 been caused by actionable, rather than the myriad non-actionable factors such as general market
5 conditions"). Again, while Plaintiffs were confident that their experts, ultimately, would be deemed
6 believable and credible, the possibilities of a defense verdict were certainly real. If that did occur,
7 the class would be left with nothing.

8 Against that backdrop, the settlement achieved here is more than fair, reasonable and
9 adequate. Indeed, it is a tremendous result for Plaintiff, the putative class and the public. The
10 primary goal in this litigation was to achieve class-wide equitable relief in the form of revisions to
11 the Covered Products' advertisements with respect to the health claims and testimonial claims made
12 in the My Pillow advertising. That goal was achieved by this settlement, as Defendants have agreed
13 to significant revisions to the My Pillow advertising and this settlement will create an enforceable
14 legal obligation with respect to those changes. In sum, given the facts and circumstances of this case,
15 the settlement is demonstrably fair, reasonable and adequate.

16 **c. Difficulty of proving "advertising injury" and a price premium**

17 The concept of "advertising injury" is a hotly contested issue in false advertising actions and
18 presents a potential major roadblock to achieving class certification and any recovery here. Because
19 Plaintiff and the Class received value from the pillow products at issue, the crux of Plaintiff's claims
20 are that consumers would not have paid as much the Covered Products if they knew that the claims
21 in Defendant's advertising claims were allegedly false and deceptive. *See* Compl. at ¶24. Thus, even
22 if Plaintiff were ultimately successful in establishing liability for the challenged claims, the
23 calculation of restitution and damages would not amount to a return of the full purchase price for the
24 Covered Products. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1149 (2003);
25 *Shersher v. Sup. Ct.*, 154 Cal.App.4th 1491, 1498 (2007); *see also Colgan v. Leatherman Tool Grp.*,
26 *Inc.*, 135 Cal. App. 4th 663, 700 (Ct. App. 2006) (rejecting restitutionary award for products "Made
27 in U.S.A." where expert "did not attempt to quantify either the dollar value of the consumer
28 impact"). The difficulties of establishing advertising injury are magnified in a case such as this one

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1 where the Covered Products' advertisements contained multiple different claims. While Plaintiff
2 contends that the health claims, testimonials and endorsements for the Covered Products were not
3 "as advertised," the Covered Products did provide some value to consumers. Defendant intends to
4 argue that even if Plaintiff's allegations about Defendant's health, testimonial and endorsement
5 claims are correct, Defendants are entitled to a "set off" of the value for the pillows, and Plaintiff
6 could not present any reliable damages model to tie the alleged misrepresentation to a specific price
7 premium. *See* Clarkson Decl. at ¶14. Defendant presented information that its pillows are high-end
8 products, evidenced by My Pillow's proprietary, patented interlocking "fill" and the products Made
9 in the U.S.A. Clarkson Decl. at ¶14. In fact, Defendant was prepared to present additional evidence
10 that no price premium was associated with the health claims and testimonial for the Cover Products,
11 comparable, generic pillows cost the same or more than the Covered Products, and that the majority
12 of consumers took advantage of "buy one, get one free" promotions offered by Defendant. Clarkson
13 Decl. at ¶¶14-15. As part of the background investigation here, Plaintiff's Counsel investigated this
14 potential defense, and surveyed prices in both brick and mortar stores where My Pillow is sold (such
15 as Bed Bath & Beyond) and online retailers. Clarkson Decl. at ¶14. In these stores, a generic, basic
16 pillow (without many of the features of My Pillow or its patented fill) can cost in the \$20-30 range,
17 and many other pillows retail for the same price or substantially more than My Pillow. Clarkson
18 Decl. at ¶14-15. Thus, in evaluating the risks moving forward, Plaintiff's Counsel had concerns that
19 one conclusion that could be drawn from Defendant's arguments and plaintiff's own "price survey"
20 research is that Plaintiff and the Class (particularly those consumers who took advantage of the "buy
21 one get one") may have received more value under the applicable analysis and may have no
22 damage/restitution claim. *See* Clarkson Decl. at ¶14.

23 In other words, there was a significant risk that Plaintiff would not be able to show "[t]he
24 difference between what the plaintiff paid and the value of what the plaintiff received" on a
25 classwide basis or appropriately tie any "price premium" to the alleged misrepresentations. *See, e.g.,*
26 *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009); *In re Tobacco Cases II*, 240 Cal. App.
27 4th 779, 795 (2015) ("a party seeking restitution must return any benefit received."). The difficulties
28 in making the restitution/damages/price premium calculation may prevent class certification of

1 Plaintiff's claims, or greatly reduce or negate any potential recovery if the case were tried to verdict.
2 *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433, 185 L. Ed. 2d 515 (2013)(At class
3 certification, plaintiff must show that "damages are capable of measurement on a classwide basis.");
4 *see also Herron v. Best Buy Stores, LP*, No. 2:12-cv-02103-TLN-CKD, 2016 U.S. Dist. LEXIS
5 52486, at *28 (E.D. Cal. Apr. 18, 2016)(Denying class certification where plaintiff failed to present
6 a restitution/damages model that appropriately tied a price premium attributable to defendant's use
7 of the misleading advertisements and product labeling omissions.). Thus, the amount provided in this
8 settlement (\$5.00 per household) is certainly within the range of reasonableness, and, likely exceeds
9 what could have been recovered at trial. Clarkson Decl. at ¶13.

10 **d. Risks of continued litigation**

11 One relevant factor in determining whether the proposed Settlement Agreement is fair,
12 reasonable and adequate, is the risk of continued litigation balanced against the certainty and
13 immediacy of recovery. *See Dunk*, 48 Cal.App.4th at 1801-02. Although Plaintiff believes that the
14 case against the Defendants is strong, such confidence must be tempered by the fact that the
15 Settlement is beneficial (providing a significant immediate return) and that there were significant
16 risks of less or no recovery, particularly in a complex case such as this one. Class Counsel is
17 convinced that this settlement is in the best interests of the Class based on the negotiations and the
18 detailed knowledge of the issues presented, and many of the risks described herein. *See Clarkson*
19 *Decl. at ¶15*. In negotiating the Settlement Agreement, Plaintiff reviewed and carefully considered
20 how to best protect the class through equitable relief so as to deter future injurious conduct, and
21 compensate Class Members who would like a refund for purchases of the Covered Products.
22 Specifically, Class Counsel balanced the proposed settlement, including all of the injunctive relief
23 provisions and the cash payments to Settlement Class Members, against the probable outcome of
24 class certification and a trial on the merits. *Id. at ¶15*. The risks of class certification, trial and the
25 normal "perils" of litigation, as well as the specific defenses and issues discussed above, were all
26 weighed in reaching the proposed settlement. *Id.* Further, the time value of the present settlement,
27 the fact that changes will be made to the Covered Products advertising, and the refund that will be
28

1 provided to members of the Class were also carefully considered by Class Counsel in agreeing to the
2 proposed settlement. *Id.*

3 In ruling on a preliminary approval motion, “[t]he Court should consider the vagaries of
4 litigation and compare the significance of immediate recovery by way of the compromise to the
5 mere possibility of relief in the future, after protracted and expensive litigation. In this respect, ‘[i]t
6 has been held proper to take the bird in hand instead of a prospective flock in the bush.’”
7 *Oppenlander v. Standard Oil Co.* (D. Colo.1974) 64 F.R.D. 597, 624. While Class Counsel believes
8 Class Members’ claims are meritorious, they are experienced and realistic, and understand that the
9 outcome of a trial and appeals that may follow are uncertain in both outcome and duration – all risks
10 that should be considered in assessing the fairness of the Settlement Agreement, which guarantees an
11 immediate award to all participating claimants. Plaintiff has achieved a certain and worthwhile
12 benefit for the Class in exchange for the mere possibility of recovery at some indefinite time in the
13 future. Because the Settlement Agreement provides immediate and significant relief, without the
14 attendant risks of continued litigation, it warrants this Court’s approval.

15 **3. The extent of investigation, litigation and discovery supports the settlement**

16 Class Counsel thoroughly investigated and evaluated the strengths and weaknesses of this
17 case before reaching the settlement. *See* Clarkson Decl. at ¶16. Class Counsel’s factual investigation
18 included:

- 19 (a) obtain and review of hundreds of electronic images and hard copies of website,
20 commercials, infomercials and other advertisements of the Covered Products;
- 21 (b) obtain, review and analyze various applicable scientific studies regarding sleep, pillows
22 and related health issues;
- 23 (c) review of Covered Products sales and revenue and related documents;
- 24 (d) discussions with infomercial industry consultants;
- 25 (e) review scientific information with consultant;
- 26 (f) extensive legal research regarding Counsel’s evaluation of the prospective merits and
27 weaknesses of the case;
- 28 (g) preparation of a class action complaint and draft motion for class certification;

1 (h) analysis of potential class-wide damages;

2 (i) review of advertising claims history and various “language models” for changes to the
3 advertising of the Covered Products; and

4 (j) extensive legal research and evaluation of the applicable law with respect to the claims
5 asserted in the complaint and the potential defenses thereto.

6 *Id.* at ¶16.

7 In sum, the proposed settlement came only after this case was fully investigated for nearly a
8 year by experienced counsel. This litigation has reached the stage where Plaintiff has a thorough
9 understanding of the strengths and weaknesses of the case sufficient to support the reasonableness of
10 the Settlement Agreement and its terms. *Id.* at ¶16. This assessment is entitled to great weight, and
11 strongly supports preliminary approval of the proposed settlement. *See Dunk*, 48 Cal.App.4th at
12 180.

13 **C. The Court Should Grant Provisional Class Certification Of The Settlement Class
14 And Appointment of Class Representative and Class Counsel**

15 Plaintiff requests that the Court provisionally certify the proposed class for settlement
16 purposes only. Pursuant to California Rule of Court 3.769(d), “the Court may make an order
17 approving or denying certification of a provisional settlement class after the preliminary settlement
18 hearing.” Unlike the standards applied in ordinary certification proceedings, under California law
19 the prerequisites for class certification are substantively relaxed for “settlement classes.” *See*
20 *Wershba*, 91 Cal.App.4th at 237-44. Instead, heightened concerns over the appropriateness of
21 California settlement classes are satisfied by a “careful fairness review of the settlement by the trial
22 court.” *Id.* at 240.

23 Nevertheless, even when subjected to the higher scrutiny of the ordinary certification
24 prerequisites,² it is clear that the proposed settlement class merits provisional certification. Indeed,
25 the two requirements necessary to maintain a class under California Code of Civil Procedure § 382 –

26 ² The question of class certification is “essentially a procedural one that does not ask whether an action is legally or
27 factually meritorious.” *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-40. Plaintiffs are not required to prove their
28 case at the certification stage. Rather, they must simply demonstrate that the matter is suitable for resolution on a classwide
basis. *Id.* at 438-39, 443. “Since the judicial system substantially benefits by the efficient use of its resources, class
certifications should not be denied so long as the absent class members’ rights are adequately protected.” *Richmond v. Dart
Industries, Inc.* (1981) 29 Cal.3d 462, 474.

1 an ascertainable class and a well-defined community of interest – are easily met. Moreover, there is
2 no question that a class action is the superior method of adjudication in this matter.

3 **1. The class is ascertainable**

4 To determine whether a class is ascertainable, the court examines: (1) the class definition; (2)
5 the means available for identifying the class members; and (3) whether the class is sufficiently
6 numerous. *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.

7 **a. The class definition sufficiently identifies all class members**

8 Class members can be readily identified when the class is defined by “objective
9 characteristics” and “common transactional facts.” *Evans v. Lasco Bathware* (2009) 178
10 Cal.App.4th 1417, 1422. Here, the Class is defined as follows: “All persons who purchased
11 Covered Products for personal use and not for resale in the United States, its territories, or at any
12 United States military facility or exchange during the Class Period.” The class is objectively
13 defined, and is limited by geography and by the time period that the false advertisements were
14 disseminated to the public. Because the advertising for the Covered Products is based on the same
15 uniform misrepresentations, the class is defined in such a way that self-identification and
16 identification through Defendant’s own records is possible when it becomes necessary.
17 Accordingly, the class definition sufficiently identifies all class members. *Hicks v. Kaufman &*
18 *Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915 (granting class certification where “the class
19 [wa]s precise, objective, and [could] be determined from public records and Kaufman’s own
20 records”).

21 **b. The class is sufficiently numerous**

22 A class is sufficiently numerous to warrant class treatment when it is impracticable to bring
23 all members of the class before the court. *See* Cal. Civ. Proc. Code § 382. The exact number of
24 parties necessary for a class action is indefinite and may be “construed liberally.” *Rose v. City of*
25 *Hayward* (1981) 126 Cal.App.3d 926, 934 (granting class certification); *see also Hebbard v.*
26 *Colgrove* (1972) 28 Cal.App.3d 1017, 1030 (“[T]here is no set number required as a matter of law
27 for the maintenance of a class action”). In *Vasquez*, the Supreme Court held that a class of
28 approximately 200 persons was sufficiently numerous. *Vasquez*, 4 Cal.3d at 810. Notably, classes

1 have been certified comprising of as low as forty-two, thirty-five and even ten individuals. *See*
2 *Rose*, 126 Cal.App.3d 926; *Collins v. Rocha* (1972) 7 Cal. 3d 232; *Bowles v. Sup. Ct.* (1955) 44 Cal.
3 2d 574.

4 Here, the parties estimate that the class consists of a minimum of several hundred thousand
5 consumers. The numerosity element is clearly established.

6 **2. A well-defined community of interest exists**

7 The California Supreme Court identifies three factors which embody the community of
8 interest requirement: (1) predominate questions of law or fact; (2) class representatives with claims
9 or defenses typical of the class; and (3) class representatives who can adequately represent the Class.
10 *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Each is satisfied in the instant case.

11 **a. Common issues of law and fact predominate**

12 If the case proceeded to the class certification stage, the court would determine whether
13 “common questions are sufficiently pervasive to permit adjudication in a class action rather than in a
14 multiplicity of suits.” *Vasquez v. Sup. Ct.* (1971) 4 Cal. 3d 800, 810. Common questions can
15 predominate when they are either sufficiently numerous or substantial. *See Collins*, 7 Cal.3d at 238.
16 Class certification is proper where the common issues represent the “principal issues in any
17 individual action, both in terms of time to be expended on their proof and of their importance.”
18 *Vasquez*, 4 Cal.3d at 810. If those principal common issues are tried separately, “a multiplicity of
19 legal actions dealing with identical basic issues would be required in order to permit recovery by
20 each class member.” *Id.* Class certification thus does not require that common questions be
21 completely dispositive as to all potential members of the Class. *Rosack v. Volvo of Am. Corp.*
22 (1982) 131 Cal.App.3d 741, 754. As a general rule, if the defendant’s liability can be determined by
23 facts common to all class members, a class will be certified even if the members must individually
24 prove damages. *Hicks*, 89 Cal.App.4th at 916.

25 This is the prototypical case for class treatment because common evidence can be used to
26 resolve the common question of whether Defendants engaged in unlawful, unfair, and/or fraudulent
27 conduct in violation of the UCL, FAL and the common law in an effort to induce consumers to
28 purchase the Covered Products. The present case is based on uniform misrepresentations made

1 prominently on the television and web advertisements of the Covered Products seen by every class
2 member. Accordingly, it is indisputable that the propriety of these representations would be
3 "principal issues in any individual action," and, thus, that common issues predominate. *See*
4 *Vasquez*, 4 Cal. 3d at 810.

5 **b. Plaintiff's claims are typical of absent class members**

6 The typicality requirement does not require "that the class representative must have identical
7 interests with the class members. The only requirements are that common questions of law and fact
8 predominate and that the class representative be similarly situated." *Richmond*, 29 Cal.3d at 470.
9 "Most differences in situation or interest among class members should not bar class suit." *Wershba*,
10 91 Cal.App.4th at 238. Here, Plaintiff's claims are typical of those of the proposed class because
11 their claims pose the same exact questions of law and fact as those of the class members and arise
12 from the same misrepresentations on the product packaging and in advertisements that give rise to
13 the claims of all Class Members. Thus, there is a sufficient relationship between the injuries to
14 Plaintiff and the conduct which affects the entire Class.

15 **c. Plaintiffs and Counsel will adequately represent the Class**

16 "Adequacy of representation depends on whether the plaintiff's attorney is qualified to
17 conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interest of the
18 class." *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.

19 Plaintiff's interests are not antagonistic to the interests of the class members because their
20 claims arise from the same uniform misrepresentations and standardized conduct of Defendant as
21 those of the proposed class, and Plaintiff seeks remedies equally applicable and beneficial to the
22 Class. Additionally, Plaintiff has retained competent and experienced counsel in both class action
23 and consumer fraud-related litigation. Class Counsel has successfully prosecuted numerous class
24 action cases, including cases involving alleged false advertising of dietary supplement products. *See*
25 *Clarkson Decl.* at ¶17. Class Counsel is capable of, and committed to, prosecuting this action
26 vigorously on behalf of the Class. *Id.* at ¶17. Accordingly, Plaintiff satisfies the adequacy
27 requirement. *See McGhee*, 60 Cal.App.3d at 450.

28 **3. A class action is the superior method of adjudication**

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1 A class action must be the superior method of adjudication to any available alternatives by
2 providing "substantial benefits to litigants and the courts." *Fireside Bank v. Sup. Ct.* (2007) 40
3 Cal.4th 1069, 1089. First, a class action is superior when "the benefits of certification are not
4 measured by reference to individual recoveries alone." *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th
5 429, 445. Indeed, class action allows for "several salutary by-products, including a therapeutic
6 effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises
7 by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple
8 litigation involving identical claims." *Vasquez*, 4 Cal.3d at 808.

9 Second, a class action is superior when the amount at issue for an individual plaintiff is not
10 enough to warrant an individual filing. *See Newberg on Class Actions* § 4:30 (4th ed. 2002). This
11 would create one of two possible unsavory effects. On the one hand, plaintiffs may be discouraged
12 from taking individual action, thus allowing an unscrupulous seller to retain the benefits of its
13 wrongful conduct. *Vasquez*, 4 Cal. 3d at 808. On the other hand, plaintiffs may yet take individual
14 action, but in doing so, burden the courts with duplicative proceedings regarding the same arguments
15 and evidence, resulting in "a multiplicity of trials conducted at enormous expense to both the judicial
16 system and the litigants." *See Sav-on Drug Stores, Inc. v. Sup. Ct.* (2011) 34 Cal. 4th 319, 340
17 (citing *Bodds v. Divested Atomic Corp.* (S.D. Ohio 1991) 141 F.R.D. 58, 67).

18 Here, a class action is the superior method of adjudication. As noted above, the proposed
19 Settlement Class consists of several hundred thousand consumers, and any attempt to try their claims
20 individually would unnecessarily clog in the court system. Adjudicating the case using class action
21 procedures would prove the most efficient means of reaching the most just outcome for all parties
22 involved.

23 D. The Court Should Approve the Proposed Class Notice

24 The type of notice to which a member of a class is entitled depends upon the information
25 available to the parties about that person. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*
26 (1950) 339 U.S. 306, 318; *Schroeder v. City of New York* (1962) 371 U.S. 208, 212. That said, the
27 Court has a great deal of discretion in applying the prevailing notice standard. As one California
28

1 court recently held, "the manner of giving notice is subject to the trial court's virtually complete
2 discretion." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 57.

3 Because the identity and contact information for class members is not known for all class
4 members, notice of the class action settlement by publication is adequate. *See, e.g., Cooper v. Amer.*
5 *Sav. & Loan Assn.* (1976) 55 Cal.App.3d 274, 285. "The standard is whether notice has a reasonable
6 chance of reaching a substantial percentage of the class members." *Wershba*, 91 Cal.App.4th at 251.
7 It is not necessary to show that notice reached each member of a nationwide class. *Id.* The proposed
8 multi-faceted publication notice was designed by the parties in concert with a settlement
9 administrator with significant expertise in consumer class settlements, and easily meets all the
10 applicable requirements. In this instance, the Publication Notice will contain the information in the
11 form set forth in Exhibit F to the Settlement Agreement, as well as any additional information the
12 Court deems necessary. Additionally, the Publication Notice will be posted on the settlement
13 website, to further ensure Settlement Class Members receive the best practicable notice. *Schey Decl.*
14 *at ¶4.; see also Hypertouch, Inc. v. Sup. Ct.* (2005) 128 Cal.App.4th 1527, 1540.

15 Accordingly, Plaintiffs request that the Court approve the Notice and the associated
16 settlement claim documents.

17 VI. PROPOSED SCHEDULE OF EVENTS

18 As set forth in the Settlement Agreement, Plaintiffs and Defendant propose the following
19 schedule of events:

Event	Proposed Date
Publication Notice Period Begins	20 calendar days after entry of the Preliminary Approval Order
Publication Notice Period Ends	60 days after Publication Period Begins
Objection/Opt-out deadline	60 days after notice period ends
Claims Deadline	90 days after notice period ends
Briefs in support of Final Approval, Award of Attorneys Fees & Costs Due	21 days following Claims Deadline
Responses to Any Objections Due	At least 2 business days before the Final Approval Hearing
Final Approval Hearing	30 days following Claims Deadline

1 **VII. CONCLUSION**

2 The Parties respectfully submit that the proposed Settlement is fair, adequate, reasonable
3 and is in the best interests of the Settlement Class. Under the applicable criteria and guidelines, the
4 Court should (1) preliminarily approve the terms of the proposed Settlement Agreement, (2)
5 provisionally certify the Settlement Class for settlement purposes only, (3) provisionally appoint
6 Clarkson Law Firm as Class Counsel and Plaintiffs as Class Representatives for settlement
7 purposes only, (4) approve the form and schedule of Settlement Notice, and (5) schedule a Final
8 Fairness Hearing.
9

10 DATED: June 7, 2016

CLARKSON LAW FIRM, P.C.

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