

Rick Klingbeil, OSB #933326  
email: rick@klingbeil-law.com  
RICK KLINGBEIL, PC  
107 SE Washington St., Ste. 233  
Portland, OR 97214  
O: 503-473-8565  
C: 503-490-6763  
F: 503-427-9001

of Attorneys for Plaintiff  
Additional attorneys listed on final page

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION**

**JILL BRUNELLE**, an Oregon  
resident, on behalf of herself and all  
similarly situated persons,  
**HEATHER DEWITT**, a Washington  
resident, on behalf of herself and all  
similarly situated persons,

**Plaintiffs,**

v.

**MY PILLOW, INC.**, a Minnesota  
Corporation,

**Defendant.**

Case No. 3:16-cv-2007

**AMENDED CLASS ACTION  
ALLEGATION COMPLAINT**

**Fraud; State Unlawful Trade  
Practices, Unfair Competition, and  
False Advertising Law.**

**JURY TRIAL  
DEMANDED**

Plaintiffs individually and on behalf of the Classes described below, through  
counsel allege as follows:

**NATURE OF THE CASE**

1. This is a proposed class action. Plaintiffs, on behalf of themselves and all similarly situated persons currently seek injunctive relief based on Defendant's acts and omissions. This includes relief for a national class based on fraud and state subclasses based on violations of individual state consumer protection acts and similar state laws.

2. These claims relate to two nationwide advertising campaigns by My Pillow, Inc. Both campaigns involved a business practice commonly referred to as "false reference pricing." False reference pricing is the act of misrepresenting the regular price of a good that is purportedly offered at a "sale price" or as part of a buy one get one free offer.

3. In one campaign, My Pillow, Inc. offered a pillow for sale, and claimed to include a "free" pillow as part of the purchase. This is commonly known as, and is referred to by My Pillow as a "buy one get one free" or "BOGO" promotion (hereinafter, "BOGO Promotion"). My Pillow, Inc.'s BOGO Promotions were made in television advertisements seen throughout the United States, on the MyPillow.com website, on the internet website YouTube, and on other media, all of which were and are accessible throughout the United States, including Oregon and Washington.

4. The My Pillow, Inc. BOGO Promotions were false and deceptive because My Pillow, Inc. did not provide one pillow "free." Instead, it inflated the regular price of the pillow being purchased as part of the promotion, resulting in the buyer purchasing two pillows at or near the combined regular price for two pillows.

Stated alternatively, the pillow that was being sold as part of the BOGO Promotion could be purchased for a substantially lower price without inclusion of the “free” pillow. Defendant attempted to mislead purchasers into buying two pillows instead of one under the guise that one of the two pillows was free, when it was not.

5. In another similar and related advertising campaign also involving false reference pricing, My Pillow, Inc. offered a pillow for sale, and claimed to provide a 50% discount off its regular price. My Pillow, Inc.’s 50% Off offers were made in television advertisements seen throughout the United States, on the MyPillow.com website, on the internet website YouTube, and on other media, all of which were and are accessible throughout the United States, including Oregon and Washington (hereinafter “50% Off Promotion”).

6. The My Pillow, Inc. 50% Off Promotions were false and deceptive because My Pillow, Inc. was not providing a pillow for 50% off the regular price of the pillow. Instead, it inflated the price of the pillow to approximately twice the regular price, then offered an illusory 50% discount.

7. Concurrent with filing and service of this Amended Complaint for injunctive relief, Oregon Plaintiff / Subclass Representative Brunelle provided the required notice to Defendant pursuant to ORCP 32(H). Plaintiffs / Class Representatives hereby give notice that if Defendant fails to timely satisfy the requirements of ORCP32(H) and ORCP32(I), then they intend to amend this Amended Complaint to add claims for monetary damages for the benefit of

themselves and all Class and Subclass Members.

### **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1367(a) and §1332 because: (a) Plaintiff / Subclass Representative Brunelle is a resident of Oregon, Plaintiff / Subclass Representative DeWitt is a resident of Washington, and Defendant My Pillow, Inc. is a Minnesota corporation with its principal place of business in Minnesota, and; (b) if added through amendment, the damage claims will exceed \$75,000 in the aggregate.

9. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. §1332(d)(2), the “Class Action Fairness Act.” On information and belief, there are thousands of class members in the Nationwide Class and both state Subclasses, and if added through amendment the amount in controversy will exceed \$5,000,000, and Plaintiffs and substantially all members of the Class are citizens or residents of different states than Defendant.

10. This Court has personal jurisdiction over Defendant because it does business in the state of Oregon and this District and a substantial portion of the wrongdoing alleged in this Complaint took place here. Defendant has intentionally availed itself to markets and customers in the state of Oregon and this District through the presence of marketing and promotion using locally televised advertisements and sales of products into Oregon and this District. Defendant has



contacts with Oregon and this District sufficient to render the exercise of jurisdiction by this Court permissible under traditional notions fair play and substantial justice.

11. Venue is proper within the state of Oregon and this District pursuant to 29 U.S.C. §1391.

### **THE PARTIES**

12. Plaintiff / Oregon Class Representative Jill Brunelle (“Brunelle”) is an individual who resided in the state of Oregon and participated in the BOGO Promotion within Oregon during the applicable class period.

13. Plaintiff / Washington Class Representative Heather DeWitt (“DeWitt”) is an individual who resided in the state of Washington and participated in the BOGO Promotion within Washington during the applicable class period.

14. Defendant My Pillow, Inc. (“MyPillow”) is a Minnesota limited liability company with its principal place of business in Minnesota.

15. MyPillow’s 70,000 square foot manufacturing plant is located in Shakopee, Minnesota, where it produces approximately 25,000 pillows per day.

### **DEFENDANT’S CONDUCT**

#### **Buy One Get One Free Promotion**

16. At various times during the class period, MyPillow, through its televised advertisements, web pages, and other media (collectively, “advertisements”), presented a BOGO Promotion related to its pillows.

17. MyPillow began its BOGO Promotion advertisement campaign in 2014 based in substantial part on extended televised advertisements (“infomercials”). MyPillow’s infomercials encouraged viewers to call in to a toll free number to place an order with an operator, or visit Defendant’s website, [www.mypillow.com](http://www.mypillow.com) to order its pillows.

18. On information and belief, MyPillow’s infomercials were and are running a combined average of approximately 175 to 200 times per day on local and national networks, radio, and television channels.

19. The MyPillow BOGO Promotion was heavily advertised on various television stations, including Fox News. In order to receive a “free” pillow under the BOGO Promotion, the advertisements provided a promotion code. Various alphanumeric promotion codes applied, such as “MY105” and “MY16”.

20. The My Pillow promotion codes for the BOGO Promotion are readily and freely available at no cost to the general public on the MyPillow website, in its commercials, and at various third party websites on the internet, including “Retail Me Not”, <https://www.retailmenot.com/view/mypillow.com>; “Coupons.com”, <https://www.coupons.com/coupon-codes/mypillow/>; Promospro, <http://www.promospro.com/promo-codes-mypillow>; “Offers.com”, <http://www.offers.com/mypillow/>; and other similar sites.

21. The pillows could be purchased under the BOGO Promotion either by calling into the number provided in the advertisements and ordering through an operator, or purchased online through the [www.MyPillow.com](http://www.MyPillow.com) website.

22. The advertisements stated “call or go online now to order MyPillow and Mike will give you a second pillow absolutely free. Use the promo code on your screen to get two MyPillows for the price of one.”

23. To participate in the BOGO Promotion, Class Members, including Plaintiff, listened to the advertisements, and either ordered online, or phoned in and ordered through an operator.

24. Unbeknownst to Plaintiffs / Class Representatives and Class Members, they were not getting two pillows “for the price of one.” Instead, MyPillow 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.

25. 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 MyPillow, however, could be purchased from the MyPillow website for a regular price of \$49.99 plus shipping with a readily available “promo code,” and from MyPillow on Amazon.com for \$59.95 with free shipping 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. The same is true with regard to the King Premium pillow purchased under the BOGO promotion.

26. MyPillow's advertisements regarding the BOGO Promotion have been consistent throughout the class period.

27. Below are screenshots of MyPillow television advertisements related to the BOGO Promotion during the class period:





### **50% Off Promotion**

28. At various times during the class period, MyPillow, through its televised advertisements, web pages, and other media (collectively, “advertisements”), presented a “50% Off” offer related to its pillows.

29. The 50% Off Promotion was similar to the BOGO Promotion in that both were widely advertised by MyPillow, the misconduct in both was based on false reference pricing, both used readily available “promotional codes”, and with both - contrary to the offer being promoted by MyPillow - consumers were essentially purchasing a MyPillow at its regular price while being told they were getting a significant price reduction or a no cost item.

30. MyPillow began its 50% Off Promotion advertising campaign in approximately 2011 based in substantial part on extended televised advertisements (“infomercials”). MyPillow’s infomercials encouraged viewers to call in to a toll free number to place an order with an operator, or visit Defendant’s website, [www.mypillow.com](http://www.mypillow.com) to order its pillows.

31. The MyPillow 50% Off Promotion was heavily advertised on various television stations, including Fox News. In order to receive a pillow under the 50% Off Promotion, the advertisements provided a promotion code. Various alphanumeric promotion codes applied.

32. The My Pillow promotion codes for the 50% Off Promotion are readily and freely available at no cost to the general public on the MyPillow website, in its commercials, and at various third party websites on the internet, including “Retail Me Not”, <https://www.retailmenot.com/view/mypillow.com>; “Coupons.com”, <https://www.coupons.com/coupon-codes/mypillow/>; Promospro, <http://www.promospro.com/promo-codes-mypillow>; “Offers.com”, <http://www.offers.com/mypillow/>; and other similar sites.

33. The pillows could be purchased under the 50% Off Promotion either by calling into the number provided in the advertisements and ordering through an operator, or purchased online through the [www.MyPillow.com](http://www.MyPillow.com) website.

34. To participate in the 50% Off Promotion, Class Members listened to the advertisements, and either ordered online, or called in and ordered through an operator.

35. Unbeknownst to Class Members, they were not getting pillows for 50% off the regular price. Instead, MyPillow was inflating the regular price of the first pillow to approximately or exactly twice its regular price, then offering “50% Off” of the inflated price to the consumer, resulting in a final price that was at or near the regular price of the pillow.

36. For example, those obtaining a Queen Sized Premium pillow as part of the 50% Off Promotion were told that one Premium Queen Sized Premium pillow was priced at \$99.97, and that by applying the 50% off code, they received the pillow at half of its regular price. One Queen Sized Premium pillow from MyPillow, however, could be purchased from the MyPillow website for a regular price of \$49.99 with a readily available “promo code,” and from MyPillow on Amazon.com without a “promo code” for \$59.95. When a Queen Sized Premium pillow was obtained as part of the 50% Off Promotion, the 50% Off claim was illusory and misleading.

37. MyPillow’s advertisements regarding the 50% Off Promotion have been consistent throughout the class period.

### **INDIVIDUAL ALLEGATIONS**

38. Plaintiff / National Class / Oregon Subclass Representative Brunelle is an Oregon resident. Within the class period, Brunelle saw the MyPillow



advertisement on a television station, listened, understood, and relied on the representation that if she purchased one premium pillow from MyPillow, she would get another premium pillow from MyPillow for “free.”

39. Based on this information, she later called MyPillow. During the call, she paid a total of \$119.95 (including shipping and handling of \$9.98) to purchase one King Premium pillow (Item# K 2034-G) and to get one King Premium pillow for “free.” Her order, numbered 328455310, was placed on July 6, 2016 and shipped on July 7, 2016.

40. Based on Defendant’s representations made as part of the advertisement, she believed the true and regular price of the one pillow was \$109.97 (\$119.95 minus shipping and handling) and that the second pillow was being provided to her free of charge. Instead, one King Premium pillow could be obtained at the MyPillow website for a regular price of \$54.99, and from MyPillow at Amazon.com for \$69.95. Thus, the “free” pillow was not actually free. The transaction was instead a disguised purchase of two pillows.

41. Plaintiff / National Class / Washington Subclass Representative DeWitt is a Washington resident. Within the class period, DeWitt saw the MyPillow advertisement on a television station, listened, understood, and relied on the representation that if she purchased one premium pillow from MyPillow, she would get another premium pillow from MyPillow for “free.”



42. Based on this information, she later called MyPillow. During the call, and paid a total of \$119.19 (including shipping and handling) to purchase one Premium pillow and to get one Premium pillow for “free.” Her order was placed on August 29, 2016.

43. Based on Defendant’s representations made as part of the advertisement, she believed the true and regular price of the one pillow was \$119.19 (minus shipping and handling) and that the second pillow was being given to her free of charge. Instead, one King Premium pillow could be obtained at the MyPillow website for a regular price of \$54.99, and from MyPillow at Amazon.com for \$69.95. Thus, the “free” pillow was not actually free. The transaction was instead a disguised purchase of two pillows.

#### **PUBLIC’S EXPERIENCE WITH DEFENDANT’S BOGO PROMOTION**

44. Consumers have expressed their dismay with the fraudulent and misleading nature of the MyPillow BOGO Promotion and the 50% Off Promotion. The common thread of complaints is based on MyPillow’s false insistence that the “regular” price of its Premium MyPillow is \$99.97 (Queen) or \$109.97 (King), when in reality, the regular price at which almost all Premium MyPillows can be purchased and are sold on the website and elsewhere, including [www.Amazon.com](http://www.Amazon.com), is approximately half that amount.

45. These complaints and questions, and MyPillow’s responses establish that the “regular” price for the Premium Queen Pillow is \$49.99 and the Premium King

Pillow is \$59.99. Examples taken from MyPillow's internet commentary include the following:

- a. Richard B: "No pillow is worth 100.00 dollars. So this crap you buy one and get on free your [sic] paying for the free one."

MyPillow: "Hello Richard, Without a promo code, the pillows are \$99.97 each. Two pillows would be \$199.94 without a promo code. If you have a promo code we will either take off the cost of one pillow on the BOGO of [sic] if you want or need a single pillow, we will drop the cost from \$99.97 to \$49.98, 50% off. In order to get these prices you must have a valid promo code. It is the same anywhere with a buy one get one deal. You have to buy the first object at full price to get the second free."

- b. Mark D: "Buy one get one free. But if you just want to buy one, it's 50 bucks! But if you want one free, it's a hundred bucks. This guy is a scammer stay away guys."

MyPillow: "Hello Mark. Without a promo code, the pillows are \$99.97 each. Two pillows would be \$199.94 without the promo code. If you have a promo code we will either take off the cost of one pillow on the BOGO of [sic] if you only want or need a single pillow we will drop the cost from \$99.97 to \$49.98, 50% off. In order to get these prices you must have a promo code."

Mark D: "Promo code!" Come on! Who charges a hundred bucks for a pillow? They're fifty bucks a piece. It's simple logic. You buy one at 50 bucks, you get the next one free. Promo code! What does that mean? It's a scam. \*\*\* If I can buy one at 50 bucks, the next one should be free. Promo code, or no promo code. "PROMO CODE=SCAM!!!"

- c. Donnie E: "I can purchase this pillow for 49.95 without entering a "special promo just for KLOS listeners" I feel bad for those that paid full price on the internet."
- d. Glenda J: "If it retails for 59.00 then that's what it should be when he offers the buy one get one free! They raised the price so it's not really a deal but misleading!"
- e. Michael O: "The new promotion is a scam! One at K Mart / Wally World is \$49.97. Buy One, Get One with promo code is

99.94. How are you getting one free? This is a shameful attempt to trick customers. You should be ashamed,,,, Ashamed indeed, pillow man!"

MyPillow: "\*\*\*\* The Buy one get one free deal is only through our website. **When we sell our pillows on Amazon/eBay/Walmart they are already marked down to 50% off the original price. We do this because those retailers do not accept promo codes like the ones you see on TV or Radio. With the buy one get on free deal you would purchase the first pillow at retail value (99.95 – 109.95) and get the second one free. If you purchase 2 pillows on amazon/eBay that would come out to be the same prices as the deal on our website.**" (Bold added.)

- f. "How can they get away with advertising one pillow for \$49 and offering a buy one get on free offer for \$99? This "promo" is all over the tv and their website. Where is consumer protection on this. \*\*\* Two for one means two pillows for \$49, not \$99." Chapel Hill, NC.
- g. "Very disappointed and don't believe "get one free". Its is [sic] a lie and you are charged for two." Laguna Woods, CA.
- h. "Question: the my pillow commercial site offers 2 for the price of 1. Does this apply to this site also[?]

Answer: Unfortunately, the Buy one get on free deal is only though our website. **We sell our pillows on amazon and they are already marked down to 50% off the original price. With the buy one get one free deal you would purchase the first pillow at retail value (99.95-109.95) and get the second one for free. If you Purchase 2 pillows on amazon they would come out to be the same price as the deal from our website** --- By My Pillow, Inc. on January 1, 2016 SELLER" (Bold added.)

- i. "My Pillow: Most of the places you see the pillows for less than what we charge, are places that buy our classic or premium pillows at a steep discount and set their own prices. We have no control of the prices that our vendors sell the pillow for. We sell both the classic and the premium pillows for the same price; \$99.97 each is our regular price. With a valid promo code you can either buy one get one free or get a single pillow at 50% off

the normal price which would come to \$49.95. **So as you can see, our price when broken down, and using a valid promo code, our price is comparable to other vendors.** \*\*\* October 7 at 10:29am. (Bold added.)

### **CLASS ALLEGATIONS**

46. Plaintiffs bring this action for themselves, and on behalf of all similarly situated persons who participated in the BOGO Promotion and 50% off Promotion nationwide, in Oregon and Washington and any other such Class States as the Court may determine appropriate for class certification treatment pursuant to Federal Rules of Civil Procedure 23(a) and 23(b).

47. The Class and Subclasses of persons that Plaintiffs seek to represent are initially defined as:

- (a) The “Nationwide BOGO Class” defined as:  
all persons who, at any time during the applicable class period purchased a pillow from Defendant as part of its “Buy One Get One Free” Promotion.
- (b) The “Nationwide 50% Off Class” defined as:  
all persons who, at any time during the applicable class period purchased a pillow from Defendant as part of its “50% Off” Promotion.
- (c) The “Oregon State BOGO Subclass” defined as:

all persons who, at any time during the applicable Subclass period, were Oregon residents and purchased a pillow from Defendant as part of its “Buy One Get One Free” Promotion.

(d) The “Oregon State 50% Off Subclass” defined as:

all persons who, at any time during the applicable Subclass period, were Oregon residents and purchased a pillow from Defendant as part of its “50% Off” Promotion.

(e) The “Washington State BOGO Subclass” defined as:

all persons who, at any time during the applicable Subclass period, were Washington residents and purchased a pillow from Defendant as part of its “Buy One Get One Free” Promotion.

(f) The “Washington State 50% Off Subclass” defined as:

all persons who, at any time during the applicable Subclass period, were Washington residents and purchased a pillow from Defendant as part of its “50% Off” Promotion.

48. Excluded from the Nationwide Class and the Oregon and Washington State Subclasses is: (a) any Defendant, person, firm, trust, corporation, officer, director, or other individual or entity in which Defendant has a controlling interest or which is related to or affiliated with Defendant, and any current employee of Defendant; (b) all persons who make a timely election to be excluded from the proposed Class; (c) the judge(s) whom this case is assigned and any immediate

family members thereof; and (d) the legal representatives, heirs, successors-in-interest or assigns of any excluded party.

49. Plaintiffs' fraud claim is appropriate for class-wide certification and treatment because each Class Representative can prove the elements of their claim on a class-wide basis using the same evidence that would be used to prove those elements in individual actions alleging the same claims.

50. Brunelle's claims as Class Representative for the Oregon State Subclass and DeWitt's claims as Class Representative for the Washington State Subclass are appropriate for subclass certification and treatment because they can prove the elements of their state law claims on a subclass-wide basis using the same evidence that would be used to prove those elements in individual actions alleging the same Oregon and Washington State Subclass claims.

51. Numerosity Under Rule 23(a)(1). Members of the National Class and Oregon and Washington State Subclasses are so numerous that joinder of all members individually into one action, or into an individual state-wide action, or otherwise is impractical. On information and belief, the National Class consists of substantially more than 1,000,000 members, and the Oregon and Washington State Subclasses likely exceed 10,000 members each.

52. Commonality and Predominance under Rule 23(a)(2) and (b)(3). Common questions of law and fact are shared by Plaintiffs and members of the

National Class and the Oregon and Washington State Subclasses which predominate over any individual issues.

53. For the National Class, common issues of law include:

- a. Did Defendant make a material misrepresentation regarding the nature of the transaction?
- b. Did Defendant make a material misrepresentation regarding the actual or regular price of its MyPillow pillow?
- c. Did Defendant make a material misrepresentation regarding whether the purchaser was receiving a free MyPillow pillow?
- d. Did Defendant make a material misrepresentation regarding whether the purchaser was receiving an actual discount off the regular price?
- e. If so, what was the actual amount of the discount provided to Class Members by Defendant's 50% off promotion?

54. For the Oregon State Subclass common questions of law and fact include each of the above common questions of law and fact applicable to the National Class, and in addition:

- a. Did Defendant violate ORS §646.608(j) because its conduct constituted a false or misleading representation of fact concerning the reasons for, existence of, or amount of price reduction;

- b. Did Defendant violate ORS §646.608(p) because its conduct constituted a false or misleading statement about a promotion used to publicize a product;
- c. Did Defendant violate ORS §646.608(s) because its conduct constituted a false or misleading representation of fact concerning the offering price of, or the person's cost for goods;
- d. Did Defendant violate ORS §646.608(u) because its conduct was declared to be unfair or deceptive in trade or commerce by administrative rules established by the Oregon Attorney General in accordance with the provisions of ORS chapter 183?
- e. Was Defendant's conduct proscribed by OAR 137-020-0015(2)(a)(B) which states: "A person engages in conduct which is unfair or deceptive in trade or commerce \*\*\* when the person makes a free offer in conjunction with the purchase \*\*\* of goods \*\*\* When the item to be purchased \*\*\* can be purchased for a lesser price without the "free" item?"
- f. Was Defendant's conduct proscribed by OAR 137-020-0015(2)(a)(C) which states: "A person engages in conduct which is unfair or deceptive in trade or commerce \*\*\* when the person makes a free offer in conjunction with the purchase \*\*\* of goods \*\*\* At a price that is higher than the "regular price"?"



- g. Was Defendant's conduct proscribed by OAR 137-020-0015(2)(a)(D) which states: "A person engages in conduct which is unfair or deceptive in trade or commerce \*\*\* when the person makes a free offer in conjunction with the purchase \*\*\* of goods \*\*\* That is deceptive or misleading?
- h. Did Defendant violate ORS §646.608(sss) because its conduct was proscribed by ORS §646.644 relating to Free Offers?
- i. Should the court grant equitable relief under ORS §646.638(8)(c)?;
- j. What types of equitable relief are appropriate under Oregon law?
- k. Was notice to Defendant required under ORCP 32H, and if so, was proper notice provided by the representative of the Oregon Subclass?
- l. Were Defendant's violations of ORS 646.608 reckless or through knowing use or employment of a method, act, or practice declared unlawful by ORS §646.608?
- m. Are Brunelle and Oregon State Subclass members entitled to an award of actual damages or statutory damages of \$200 for each violation under ORS §646.638(8)(a)?
- n. What is the amount of actual damages per violation?
- o. Are punitive damages appropriate against Defendant pursuant to ORS §646.638(8)(b)?
- p. If punitive damages are appropriate, what is the proper amount?

55. For the Washington State Subclass common questions of law and fact include each of the above common questions of law and fact applicable to the National Class, and in addition:

- a. Did Defendant violate RCW 19.86.020 by engaging in a method of competition or unfair or deceptive act or practice in the conduct of a trade or commerce?
- b. Does Washington law, under *Panag v. Farmers Ins. Co. of Washington*, 204 P.3d 885, 166 Wash.2d 27 (Wash., 2009) allow the court to look to Federal Trade Commission guidance, 16 CFR 251, *Guide Concerning the use of the Word "Free" and Similar Representations*, to determine whether Defendant violated RCW 19.86.020?
- c. Does Washington law, under *Panag v. Farmers Ins. Co. of Washington*, 204 P.3d 885, 166 Wash.2d 27 (Wash., 2009) allow this court or jury to look to Federal Trade Commission guidance, 16 CFR 233, *Guides Against Deceptive Pricing*, to determine whether Defendant violated RCW 19.86.020?
- d. What is the proper measure of actual damages under RCW 19.86.020?
- e. Do the facts of this case provide a basis for the court to treble actual damages pursuant to RCW 19.86.090?

- f. Do the facts of this case provide a basis for the court to award attorney fees pursuant to RCW 19.86.090?
- g. Is equitable relief appropriate under RCW 19.86.090?
- h. What types of equitable relief are appropriate under Washington law?

56. Each of the Plaintiff's / Class Representative's claims are typical of the claims of the members of the National Class. Each National Class claim arises from the same type events, practices, and course of conduct by Defendant -- the MyPillow BOGO Promotion and its 50% Off Promotion. The legal theories asserted by Plaintiffs / Class Representatives are the same as the legal theories that will be asserted on behalf of the National Class -- claims for fraud.

57. Brunelle's claims as Oregon State Subclass Representative for the Oregon State Subclass are typical of the claims of the members of the Oregon State Subclass. The claims arise from the same type events, practices, and course of conduct by Defendant -- the BOGO Promotion and 50% Off Promotion.

58. Plaintiff Brunelle is willing and prepared to serve the Court and proposed Oregon State Subclass in a representative capacity with all of the required material obligations and duties. Brunelle will fairly and adequately protect the interests of the National Class and the Oregon State Subclass, and has no interests adverse to or which directly or irrevocably conflict with the other members of the National Class or the Oregon State Subclass.

59. The self-interests of Brunelle are co-extensive with, and not antagonistic to those of the absent members of the National Class and the members of the Oregon State Subclass. Brunelle will represent and protect the interests of the absent National Class and the Oregon State Subclass.

60. DeWitt's claims as Washington State Subclass Representative for the Washington State Subclass are typical of the claims of the members of the Washington State Subclass. The claims arise from the same type events, practices, and course of conduct by Defendant -- the BOGO Promotion and 50% Off Promotion.

61. Plaintiff DeWitt is willing and prepared to serve the Court and proposed Washington State Subclass to which she belongs in a representative capacity with all of the required material obligations and duties. Brunelle will fairly and adequately protect the interests of the National Class and the Washington State, and has no interest adverse to or which directly or irrevocably conflict with the other members of the National Class or the Washington State Subclass.

62. The self-interests of DeWitt are co-extensive with, and not antagonistic to those of the absent members of the National Class and the members of the Washington State. DeWitt will represent and protect the interests of the absent National Class and the Washington State Subclass.

63. Plaintiffs have engaged the services of the following counsel and law firms: Rick Klingbeil, PC; Brady Mertz, PC, Robert Curtis and Foley Bezek Behle & Curtis, LLP. Counsel are experienced in litigation, complex litigation, and class action

cases, and will protect the rights of and otherwise effectively represent the named Class Representatives and absent National Class and State Subclass members.

64. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because joinder of all parties is impracticable. The operative facts relating to Plaintiffs and members of the National Class and State Subclasses are the same, the damages suffered by individual Class and State Subclass Members are relatively small, the expense and burden of individual litigation makes it inefficient and ineffective for Members of the Class and State Subclasses to individually redress the wrongs done to them, and proceeding as a class action will resolve thousands of claims in a manner that is fair to Defendant and Class Members. There will be no difficulty in the management of this case as a class action with a National class consisting of members from 50 states, and two State Subclasses consisting of the same individuals from the class states.

65. Class members may be notified of the pendency of this action by several means, including notice on promotional websites and social media related to the BOGO Promotion and 50% Off Promotion, directly based on charge and banking card records used in the transactions, and if deemed necessary or appropriate by the Court, through published notice.

66. Further, upon information and belief, MyPillow recorded details about the individual purchasers in an electronic form, which provides a direct method of notifying a substantial percentage of National Class and State Subclass members.

67. The prosecution of separate actions by individual National Class and State Subclass members would create a risk of inconsistent or varying adjudications with respect to individual members, which would establish incompatible standards of conduct for Defendant. Defendant has acted on grounds that apply generally to the National Class and any State Subclass making equitable relief appropriate to the Class as a whole.

## **NATIONAL CLASS**

### **FIRST CLAIM FOR RELIEF**

#### **(Intentional Fraud / Deceit – BOGO Promotion)**

68. On behalf of themselves and the members of the National Class, Plaintiffs / Class Representatives reallege paragraphs 1 through 67, and further allege:

69. Defendant represented to Plaintiffs and to each Class Member that it offered a BOGO Promotion through which Plaintiffs and each Class Member would obtain a free pillow if they purchased one pillow from MyPillow at the regular price. As part of this BOGO Promotion, Defendant misrepresented the regular price of one pillow. For example, in the case of Brunelle, MyPillow represented that the price of one King Premium pillow (as part of the BOGO Promotion), was at or approximately \$109.98 plus shipping. However, one such pillow could have been purchased off of the MyPillow website, [www.mypillow.com](http://www.mypillow.com) for \$54.99 plus shipping, or from MyPillow through [www.Amazon.com](http://www.Amazon.com) for \$69.95 with free shipping.

70. Defendant's misrepresentation was material because it inflated the price of the pillow that it was selling as part of the BOGO Promotion in order to pass along the cost of the "free" pillow to the consumer.

71. MyPillow knew that its representations concerning the price of the pillow as part of the BOGO Promotion was false - it sold a single pillow for far less on both its [www.mypillow.com](http://www.mypillow.com) website and on [www.amazon.com](http://www.amazon.com).

72. MyPillow intended that its misrepresentation regarding the BOGO Promotion be acted on by Plaintiffs and Class Members.

73. Plaintiffs and other Class Members were not aware of the true price of the pillow and reasonably relied on the truth of MyPillow's representations.

74. As a direct and proximate result of their reliance on MyPillow's material misrepresentations, Plaintiffs and Class Members suffered an ascertainable loss of money.

75. Plaintiffs and Nationwide Class are entitled to injunctive relief as necessary to cause Defendant to stop all fraudulent conduct associated with its BOGO Promotion.

## **NATIONAL CLASS**

### **SECOND CLAIM FOR RELIEF**

**(Intentional Fraud / Deceit – 50% Off Promotion)**

76. On behalf of themselves and the members of the National Class, Plaintiffs / Class Representatives reallege paragraphs 1 through 77, and further allege:

77. Defendant represented to Class Members that it offered a 50% Off Promotion through which each Class Member would obtain a pillow from MyPillow at 50% off the regular price. As part of this 50% Off Promotion, Defendant misrepresented the regular price of one pillow. For example, MyPillow represented that the price of one King Premium pillow (as part of the 50% Off Promotion) was at or approximately \$109.98 plus shipping. However, one such pillow could have been purchased off of the MyPillow website, [www.mypillow.com](http://www.mypillow.com) for \$54.99 plus shipping, or from MyPillow through [www.Amazon.com](http://www.Amazon.com) for \$69.95 with free shipping.

78. Defendant's misrepresentation was material because it inflated the price of the pillow that it was selling as part of the 50% Off Promotion to approximately double of the regular price for the pillow, then applied the 50% discount to that fictitious price.

79. Because of Defendant's use of a fictitious price, Class Members did not actually receive 50% off the regular price of the pillow, but instead received a substantially lower discount, or none at all.

80. MyPillow knew that its representations concerning the price of the pillow as part of the 50% Off Promotion was false - it sold a single pillow for far less on both its [www.mypillow.com](http://www.mypillow.com) website and on [www.amazon.com](http://www.amazon.com).



81. MyPillow intended that its misrepresentation regarding the 50% Off Promotion be acted on by Plaintiffs and Class Members.

82. Plaintiffs and other Class Members were not aware of the true price of the pillow and reasonably relied on the truth of MyPillow's representations.

83. As a direct and proximate result of their reliance on MyPillow's material misrepresentations, Plaintiffs and Class Members suffered an ascertainable loss of money.

84. Plaintiffs and Nationwide Class are entitled to injunctive relief as necessary to cause Defendant to stop all fraudulent conduct associated with its 50% Off Promotion.

### **OREGON SUBCLASS**

#### **CLAIMS FOR RELIEF**

#### **(ORS §646.608 - Unlawful Trade Practices)**

85. On behalf of herself and the Oregon Subclass, Brunelle realleges paragraphs 1 through 67, and further alleges:

86. Defendant violated:

- a. ORS §646.608(j) because its conduct constituted a false or misleading representation of fact concerning the reasons for, existence of, or amount of price reduction;
- b. ORS §646.608(p) because it constituted a false or misleading statement about a promotion used to publicize a product;

- c. ORS §646.608(s) because it constituted a false or misleading representation of fact concerning the offering price of, or the person's cost for goods;
- d. ORS §646.608(u) because its conduct was declared to be unfair or deceptive in trade or commerce by administrative rules established by the Oregon Attorney General in accordance with the provisions of ORS chapter 183. Specifically, Defendant's conduct was proscribed by OAR 137-020-0015(2)(a)(B), (C), and (D), Unfair or Deceptive Use of "Free" Offers, which state:

"A person engages in conduct which is unfair or deceptive in trade or commerce \*\*\* when the person makes a free offer in conjunction with the purchase \*\*\* of goods:

\*\*\*

(B) When the item to be purchased \*\*\* can be purchased for a lesser price without the "free" item; [or]

(C) At a price that is higher than the "regular price"; [or]

(D) That is deceptive or misleading.;

- e. ORS §646.608(sss) because its conduct was proscribed by ORS §646.644 relating to Free Offers.

87. Brunelle and Oregon Subclass Members are entitled to injunctive relief pursuant to ORS §646.638(8)(c).

### **WASHINGTON SUBCLASS**

#### **CLAIMS FOR RELIEF**

#### **(RCW 19.86.020 -- Consumer Protection Act)**

88. On behalf of himself and the Washington Subclass, DeWitt realleges paragraphs 1 through 67, and further alleges:

89. Defendant violated RCW 19.86.020 because its acts and omissions described above constituted unfair or deceptive acts or practices in the conduct of a trade or commerce.

90. DeWitt and Washington Subclass Members are entitled to injunctive relief.

### **REQUEST FOR RELIEF**

#### **Case Management**

91. On behalf of themselves, the National Class, and Oregon and Washington State Subclass Members, Plaintiffs / Class Representatives seek an Order from this Court:

- a. Certifying this action as a class action as set forth above, or as a class action or issue class as otherwise deemed appropriate by the Court pursuant to a Motion to Certify Class Action to be filed by Plaintiffs in this case;

- b. Appointing Plaintiffs Brunelle and DeWitt as National Class Representatives; appointing Brunelle as representative for the Oregon State Subclass; and appointing DeWitt as representative for the Washington State Subclass.
- c. Approving counsel listed herein as class counsel for the National Class, the Oregon and Washington State Subclasses, and any future State Subclasses.
- d. Setting a trial by jury for all issues so triable.

### **Damages**

#### **National Class**

92. Injunctive relief as necessary to cause Defendant to stop all fraudulent and misleading conduct associated with its BOGO Promotion and 50% Off Promotion.

93. Plaintiffs / Class Representatives hereby give notice that if Defendant fails to timely satisfy the requirements of ORCP32(H) and ORCP32(I), they intend to amend this Amended Complaint to add claims for monetary damages for the benefit of themselves and all Class and Subclass members.

#### **Oregon Subclass**

94. Injunctive relief as necessary to prevent future violations of ORS §646.608, ORS §646.644, and OAR 137-020-0015 pursuant to ORS §646.638(8)(c).

95. Plaintiffs / Class Representatives hereby give notice that if Defendant fails to timely satisfy the requirements of ORCP32(H) and ORCP32(I), they intend to

amend this Amended Complaint to add claims for monetary damages for the benefit of themselves and all Class and Subclass members.

**Washington Subclass**

96. Injunctive relief as necessary to prevent future violations of RCW 19.86.020 pursuant to RCW 19.86.090;

97. Plaintiffs / Class Representatives hereby give notice that if Defendant fails to timely satisfy the requirements of ORCP32(H) and ORCP32(I), they intend to amend this Amended Complaint to add claims for monetary damages for the benefit of themselves and all Class and Subclass members.

**Dated:** January 5, 2016.

Rick Klingbeil, PC

/s/ Rick Klingbeil

---

Rick Klingbeil, OSB #933326  
107 SE Washington St., Ste. 233  
Portland, Oregon 97214  
O: 503-473-8565  
C: 503-490-6763  
[rick@klingbeil-law.com](mailto:rick@klingbeil-law.com)

Additional Attorneys:

Brady Mertz, OSB #970814  
Robert Curtis, Foley Bezek Behle & Curtis, LLP  
*pro hac vice* application to be submitted