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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO

DEPARTMENT S-22

HONORABLE BRYAN F. FOSTER, JUDGE

ARMIN AMIRI,

Plaintiff,

vs.

MY PILLOW,

Defendant.

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) Case No.
) CIVDS 1606479
)
)
)
)

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS

MONDAY, JANUARY 30, 2017

San Bernardino, California

APPEARANCES:

FOR THE PLAINTIFF: RYAN J. CLARKSON
SHALINI DORGRA
Attorneys at Law

FOR THE DEFENDANT: JEFF RICHARD
Attorney at Law

FOR OBJECTORS: KEVIN D. GAMARNIK
Attorney at Law

Reported by: LINDA F. BALDWIN, RPR, RMR, RDR
Official Reporter, CSR-12453

LINDA F. BALDWIN, RDR, CSR# 12453

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Exhibit C

1 SAN BERNARDINO, CALIFORNIA; MONDAY, JANUARY 30, 2017
2 DEPARTMENT S-22 HONORABLE BRYAN F. FOSTER, JUDGE
3 MORNING SESSION

4 APPEARANCES:

5 RYAN J. CLARKSON and SHALINI DORGRA,

6 Attorneys at Law, appearing on behalf of the
7 Plaintiff;

8 JEFF RICHARD,

9 Attorney at Law, appearing on behalf of the
10 Defendant;

11 KEVIN D. GAMARNIK,

12 Attorney at Law, appearing on behalf of the
13 Objectors.

14 (LINDA F. BALDWIN, RPR, RMR, RDR
15 Official Reporter, CSR-12453)

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17 P R O C E E D I N G S

18 THE COURT: Amiri versus My Pillow.

19 MR. CLARKSON: Good morning, Your Honor. Ryan
20 Clarkson appearing on behalf of the Plaintiff and the
21 Plaintiff class.

22 MS. DORGRA: Good morning, Your Honor. Shalini
23 Dorgra on behalf of the Plaintiff.

24 MR. RICHARD: Good morning, Your Honor. Jeff
25 Richard for Defendant.

26 MR. GAMARNIK: Good morning, Your Honor. Kevin

LINDA F. BALDWIN, RDR, CSR# 12453

1 Gamarnik on behalf of objectors.

2 THE COURT: That everybody? Tentative on this is
3 to grant the motion to extend the deadline to file an
4 objection to proposed class settlement. In light of the
08:34:59 5 notice issues, good cause exists to extend the deadline.

6 Also to sustain the objectors' objection with
7 respect to the overbroad nature of the release in light of
8 the claims being raised by the Plaintiff's Complaint.

9 I intend to deny final approval of the settlement
08:35:18 10 and the related motion given that the issues raised in the
11 objection, it's not sufficiently demonstrated that the
12 release is fair, adequate, or reasonable to extend the
13 claims in connection with -- you're trying to settle out
14 things that were not part of the original Complaint. I
08:35:49 15 mean, that's -- the concern here is that there was an
16 objection raised to the -- what is that? I don't have that
17 written down here, BOGO. I can't remember what that --

18 MR. GAMARNIK: Buy one get one free.

19 THE COURT: Yeah, get one free. That was it.
08:36:12 20 That seems to be totally different than what -- it's not
21 encompassed in the lawsuit that was filed that you're
22 settling in this matter, and yet you're asking for that to
23 be released, and there's no notice given. There seems to be
24 a lack of notice given to consumers that if they didn't opt
08:36:32 25 in to this, that they would lose those claims. And I think
26 that those claims are separate and distinct from the claims

1 that are involved in this litigation.

2 MR. CLARKSON: Well, Your Honor, as a preliminary
3 matter, the BOGO or buy one get one free claims were
4 considered in the settlement discussions. They were
08:36:52 5 considered in terms of how to shape this lawsuit.

6 We're not really dealing with distinct claims.
7 We're dealing with two different theories of the case, but
8 both theories are theories as to how to shape a lawsuit
9 based on advertising, marketing, and sales practices.

08:37:14 10 THE COURT: Well, I understand that, but the
11 original Complaint dealt with falsely advertising and saying
12 that it didn't perform as it was supposed to perform and it
13 didn't do what it was supposed to do.

14 The buy one get one free had nothing to do with
08:37:32 15 the performance aspect of the product. They have to do with
16 the fact that they weren't actually doing that. They were
17 raising the price in order to buy one get one free when you
18 have to end up paying essentially what you'd have to pay for
19 two of them. And that's a little different concept than
08:37:52 20 what you're talking about in terms of quality.

21 MR. CLARKSON: Well, I think, Your Honor, that
22 when looking at how to shape a false advertising case like
23 this, you can go based on sometimes multiple theories,
24 right?

08:38:04 25 In this case we had health claims that were being
26 made that this product could even help assist with snoring,

1 fibromyalgia, etcetera, very aggressive claims.

2 THE COURT: I've seen the commercial.

3 MR. CLARKSON: Yes. You've seen the commercial.

4 Quite frankly, from Plaintiff's perspective and from our
08:38:21 5 perspective after investigating claims, the buy one get one
6 free theory was a weak ancillary theory and just didn't make
7 sense to focus on that as the predominant focus of the
8 lawsuit.

9 THE COURT: Well, I agree with that, but the
08:38:39 10 problem you have with it is that when notice of the
11 litigation goes out to the consumer, if they don't opt in
12 they have no way of knowing that -- if they have a buy one
13 get one free claim, that that is encompassed in this and
14 that if they don't appear they're going to run into problems
08:38:59 15 or that they have a right to file a claim separate from
16 that.

17 MR. RICHARD: Can I address just that issue, Your
18 Honor?

19 THE COURT: Sure.

08:39:04 20 MR. RICHARD: And Mr. Clarkson may not be finished
21 with his overall comments, but it seems to me that your
22 comments are more in line with a situation where the class
23 notice goes out and says, hey, this is about health issues;
24 this is about logos on a screen, and settlement, you know,
08:39:24 25 at the hearing. We say, wait a minute; we want to make it
26 broader.

1 We came to Your Honor at the preliminary approval
2 hearing with the Complaint being what it was, and we
3 presented Your Honor with a settlement that wasn't limited
4 to the health issues. It said marketing, packaging, and
08:39:44 5 sale. And, in fact, the notice of the class didn't say this
6 case is about health claims. The notice of the class very
7 clearly said it's about marketing, packaging, and sale.

8 And so the class members, when they got their
9 notice, they knew this was about marketing, packaging, and
08:39:58 10 sale which clearly includes the BOGO.

11 So I think the class was very much on notice.
12 There were a number of the claimants who mentioned the BOGO
13 in their correspondence with the administrator. They knew
14 what this was about.

08:40:13 15 So I don't think this is a stretching beyond the
16 notice. The notice drew, I think, a fair circle around the
17 claims that were being settled, and the class knew that.

18 THE COURT: I'm not convinced that it did. I
19 think that the buy one get one free aspect of it is a
08:40:29 20 different quality than what the original notice was talking
21 about.

22 They talk about general advertising in reference
23 to the manner in which the product performed, not in terms
24 of how it was sold or -- what was that -- if you want to
08:40:48 25 resubmit this and carve out the BOGO claims, then I think
26 that it's a fair settlement.

1 MR. CLARKSON: Your Honor, may I address a little
2 different issue or attack this from a little bit of a
3 different angle? And that is to me it appears that this
4 discussion of whether there should be a carveout is really
08:41:10 5 not -- maybe not an issue for this Court, and maybe it's
6 premature. Maybe it's an issue that should be raised, you
7 know, to the extent that the Defendant raises this
8 settlement and release as a shield in the cases that were
9 just recently filed in October, six months after the
08:41:31 10 settlement agreement was consummated in Oregon and the other
11 jurisdiction. It seems like the judges in that case could
12 look and evaluate and say does this release encompass the
13 claims in this particular case.

14 THE COURT: Oh, I think the release does encompass
08:41:46 15 that. That's the problem. That's the difficulty. I think
16 that the release -- my review of the release is that if I
17 approve this, it basically cuts off the objectors' claims in
18 this matter.

19 And I don't believe that they were given fair
08:42:00 20 notice, nor is the original lawsuit contained in that.
21 That's where I see the problem with that.

22 And I understand your position on it is that,
23 well, you know, it can be decided later on; but that -- I'm
24 just muddying the waters by doing that. I think you have to
08:42:20 25 clear up that issue right now.

26 It either has to be that, you know, you resend

1 notice out to the consumer that they -- this is including,
2 you know, this is inclusive of the BOGO claims and that
3 those claims are subject to this settlement and that if they
4 want to opt in to the agreement, they can, or they can opt
08:42:48 5 out and bring their own action. But I think that that's
6 where the problem comes in.

7 I think it's more of a notice problem than it is
8 a -- you know, I don't have any information as to how many
9 potential claimants there are in this regard, but I think
08:43:06 10 you have to go through a whole process again to bring them
11 in.

12 MR. CLARKSON: Well, to your point, if the same
13 people will be -- would be notified, if the Court were to
14 ask us to re-give notice, the same exact people would be
08:43:23 15 notified.

16 So we had 1.3 million people notified via email,
17 so I think -- is the Court then stating that it believes
18 that the notice should be re-effected to those individuals
19 and with greater specificity as to this particular theory?
08:43:41 20 Or could the Court give -- maybe give us a little more
21 guidance on that particular issue.

22 MR. GAMARNIK: Your Honor, I'd like to speak to
23 this issue as well.

24 MR. RICHARD: Your Honor, I just briefly spoke
08:43:51 25 with my client, and they are okay with Your Honor's
26 recommendation to re-notice it I think to address Your

1 Honor's points.

2 MR. GAMARNIK: Your Honor, if I may, this lawsuit,
3 the immediate action was about the health claims that were
4 raised. They had nothing to do with the buy one get one
08:44:05 5 free.

6 The case law is pretty clear that the settlement
7 must be limited to the factual predicate of the claims
8 pleaded.

9 If it were a situation where any sort of false
08:44:17 10 advertising claim could be released even though one is not
11 based on the factual predicate, that would be a situation
12 where almost every corporation would want to get sued in
13 class action. They would just settle out the claims for
14 cheap and be released of any and all claims that occurred --

08:44:33 15 THE COURT: Well, that prevents them from amending
16 their Complaint to encompass this portion of it.

17 MR. GAMARNIK: If they were to amend the
18 Complaint, they would still then have to be able to show
19 that the settlement is fair and reasonable. That's a whole
08:44:45 20 entire process they have to go through.

21 THE COURT: I agree with that.

22 MR. GAMARNIK: And I think -- I don't think that
23 they'd be able to amend the Complaint at this juncture given
24 that now there has been a buy one get one free class action
08:44:56 25 brought in other jurisdictions that would predate that type
26 of cause of action. This case has nothing to do with the

1 buy one get one free case.

2 MR. RICHARD: Your Honor, one of the responses to
3 that is -- and I think it's a misstatement they make in
4 their papers, the objectors, they claim -- first they
08:45:13 5 assume, but then they sort of adopt it as a fact, that the
6 Plaintiff in this case didn't buy it on a BOGO. He did buy
7 it on a BOGO, so he would have standing to file that Amended
8 Complaint and give the -- so certainly they can object back
9 here if they wish and say it's fair or not fair, but I think
08:45:32 10 they don't have the right to stop that process.

11 THE COURT: I tend to agree. So I'm going to deny
12 without prejudice. You can take whatever steps you feel are
13 necessary to get -- to meet the objections that are set
14 forth.

08:45:47 15 MR. RICHARD: Okay.

16 THE COURT: Okay.

17 MR. CLARKSON: Thank you, Your Honor.

18 THE COURT: Notice waived?

19 MR. CLARKSON: Notice waived.

08:45:51 20 MR. GAMARNIK: Yes. Notice waived.

21 MR. RICHARD: Yes.

22 THE JUDICIAL ASSISTANT: There's no future date.

23 Would you like to set. . .

24 THE COURT: Let's put it out till April 3rd. Give
08:46:04 25 you 90 days -- well, actually, set it out to April 24th.

26 Gives you 90 days to try to clarify whatever problems you

1 have.

2 THE JUDICIAL ASSISTANT: And I just want to
3 clarify with you, all the motions are denied? Three
4 different ones?

08:46:20 5 THE COURT: Yes. All denied.

6 MR. GAMARNIK: The objection is sustained, Your
7 Honor.

8 THE COURT: Objection's sustained, but the
9 motions -- motion to file approval and motion for award of
08:46:29 10 attorneys fees and motions for service award to the class
11 representatives, and those are all denied without prejudice.

12 MR. RICHARD: Thank you, Your Honor.

13 MR. CLARKSON: Thank you, Your Honor.

14 THE COURT: Okay.

15 (Proceedings in the above-entitled
16 matter were concluded at 8:46 a.m.)

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