

to honor the BOGO promotion, and (c) instead offering a “discount” of a lesser amount on the purchase of the same pillows.

PARTIES

3. *Plaintiff Philip Stamm* is, at all relevant times, a resident and citizen of the State of New York.

4. *Defendant My Pillow* is a Minnesota corporation with its corporate offices, call center, and manufacturing facility all located in Minnesota. Upon information and belief, the Company is also known as My Pillow Direct LLC. My Pillow manufactures pillows (and other products), advertises the sale of these pillows on television nationwide and in New York and elsewhere, and sells its pillows in New York and throughout the United States.

JURISDICTION AND VENUE

5. Diversity jurisdiction requires that (a) all adverse parties be citizens of different states and (b) the amount in controversy exceed \$75,000. 28 U.S.C. § 1332(a). Here, the parties are citizens of different states; Plaintiff is a citizen of New York, and Defendant is a citizen of Minnesota. However, the amount in controversy is below the statutory threshold. 28 U.S.C. § 1332(a). Therefore, *diversity jurisdiction does not exist over this action*.

6. Further, diversity jurisdiction does not exist under the Class Action Fairness Act of 2005 (“CAFA”) as the aggregate amount in controversy *does not exceed* \$5,000,000.

7. Venue is proper as Plaintiff is a resident of New York and Defendant advertises in New York.

FACTUAL ALLEGATIONS

8. Defendant was incorporated in July 2009 in Minnesota by its founder, Michael Lindell. Prior to its incorporation, in 2004, Mr. Lindell had developed its centerpiece product,

the “My Pillow” pillow. Upon information and belief, since 2009, the My Pillow pillow has been marketed and sold exclusively by and through Defendant.

9. Starting in 2011, Defendant began airing extended commercials (“infomercials”) promoting the My Pillow for sale.

10. Upon information and belief, in 2014, Defendant began its BOGO promotion through various devices including infomercials. During these commercials or infomercials, consumers were told that if they purchased one My Pillow and used the provided “promo” code, the consumer would receive a second My Pillow for free. Upon information and belief, this BOGO promotion ran continuously through at least early January 2017.

11. Defendant’s founder, Mr. Lindell, admitted in Consumerreports.org, “Should My Pillow Become Your Pillow?”, last updated on November 3, 2016, that “[t]he ad for MyPillow is running ‘constantly somewhere in the U.S.’ every day across multiple networks, and 10 time a day on the Fox network alone”.

12. On November 15, 2016, Defendant’s accreditation in the Better Business Bureau (“BBB”) was revoked because of its failure to adhere to the BBB Code of Advertising Standards.

13. On or about January 3, 2017, the BBB lowered Defendant’s rating to an “F”. The BBB made this decision after it reviewed Defendant’s BOGO offer and determined that it violated the BBB Code of Advertising.

14. On January 23, 2017, after watching a My Pillow BOGO infomercial, Plaintiff attempted to place an order over the internet for two (2) standard/queen size My Pillow pillows using the provided “promo” code so that he would receive his second My Pillow for “free”, and as advertised.

15. The My Pillow promo code was not accepted by Defendant's website and Plaintiff was not able to complete his order using this promo code to secure the BOGO "benefits."

16. Immediately thereafter, Plaintiff telephoned Defendant and asked a representative of Defendant to accept the BOGO promo code and complete his order. The representative of Defendant inputted a promo code known as "my539" which only provided Plaintiff a discount of approximately 33% off of the purported full retail price for two (2) My Pillow pillows instead of the promised and advertised BOGO promotion. Plaintiff was therefore improperly charged \$125.15, including shipping, handling, and tax. See Exhibit A, attached hereto.

17. As a direct result of Defendant's deceptive practices and actions as described above, Plaintiff was damaged and paid a price premium for the two (2) My Pillow pillows and did not receive the advertised price.

CLASS REPRESENTATION ALLEGATIONS

18. Plaintiff brings this action on behalf of himself and for (1) a Nationwide Class and (2) a New York Subclass that consists of citizens of New York.

19. The Class and Subclass of persons that Plaintiff seeks to represent are defined as:

(a) The "Nationwide Class" is defined as:

All persons who (1) attempted to purchase My Pillow pillows from Defendant using a BOGO promo code; (2) who were not successful in completing a purchase of My Pillow pillows using the BOGO promo code; and (3) who were instead redirected to a different promo code which did not honor the BOGO advertised price, resulting in a higher charge to the consumer than advertised.

(b) The "New York Subclass" is defined as:

All citizens of the State of New York who (1) attempted to purchase My Pillow pillows from Defendant using a

BOGO promo code; (2) who were not successful in completing a purchase of My Pillow pillows using the BOGO promo code; and (3) who were instead redirected to a different promo code which did not honor the BOGO advertised price, resulting in a higher charge to the consumer than advertised.

20. Excluded from the Nationwide Class and New York Subclass are Defendant's legal representatives, officers, directors, employees, assigns, and successors; the United States government and any agency or instrumentality thereof; the judge to whom this case is assigned and any member of the judge's immediate family.

21. The exact number of members of the Nationwide Class and New York Subclass are believed to be so numerous that joinder of all members into one action, or into an individual statewide action is impractical. Upon information and belief, the Nationwide Class consists of hundreds of thousands of members, and the New York Subclass consists of thousands of members.

22. The claims raised by Plaintiff are typical of the claims of the Nationwide Class and New York Subclass members, and all claims are based on the same general legal theories and claims for relief.

23. There are common questions of law and fact that relate to and affect the rights of each member of the Nationwide Class and New York Subclass, and these questions predominate over any questions affecting only individual members. The common issues include, but are not limited to:

For the Nationwide Class:

(a) Whether Defendant advertised a BOGO promotion for the sale of its My Pillow pillows that included the use of a BOGO promo code;

(b) Whether Defendant misrepresented that its BOGO promo code would work as advertised and result in purchasers receiving a “free” My Pillow pillow;

(c) Whether Defendant’s BOGO representations were false and/or misleading and/or deceptive;

(d) Whether Defendant failed to honor its BOGO promotion when presented with a BOGO promo code; and

(e) Whether Defendant instead provided a promotion code of a lesser value.

For the New York Subclass:

(a) Did Defendant violate New York General Business Law § 349 because its conduct constituted deceptive acts or practices that was materially misleading and resulting in Plaintiff suffering damages;

(b) Whether Defendant advertised a BOGO promotion for the sale of its My Pillow pillows that included the use of a BOGO promo code;

(c) Whether Defendant failed to provide the New York Class with working BOGO promo codes;

(d) Whether Defendant failed to honor its BOGO promotion when presented with a BOGO promo code; and

(e) Whether Defendant engaged in unconscionable, unfair, or deceptive acts or practices related to the sale of My Pillow pillows.

24. Plaintiff’s claims are typical of the claims of the members of the Nationwide Class. Each Nationwide Class claim arises from the same facts, circumstances, and Defendant’s course of conduct and practices. Plaintiff’s legal theories are the same that will be asserted on

behalf of the Nationwide Class; namely, money damage claims arising from deceptive conduct which harmed consumers.

25. Plaintiff's claims are typical of the claims of the New York Subclass, in that the claims of all New York Subclass members are based on (a) Defendant's failure to provide working BOGO promo codes, (b) Defendant's failure to honor its BOGO promotion, (c) Defendant's unconscionable, unfair, and/or deceptive acts and/or practices related to failure to honor its advertised price, and (d) Defendant's unjust enrichment. There is no conflict between Plaintiff and other members of the New York Subclass with respect to this action or with respect to the claims for relief set forth herein.

26. Plaintiff will fairly and adequately protect the interests of all Nationwide Class and New York Subclass members in the prosecution of this action and in the administration of all matters relating to the claims raised in this lawsuit. Plaintiff is similarly situated with all Nationwide Class and New York Subclass members who purchased the My Pillow pillows, and he has sustained damages similar to those sustained by the members of the Nationwide Class and New York Subclass he seeks to represent.

27. Plaintiff has retained the services of attorneys who are experienced and capable in prosecuting class action lawsuits. Neither Plaintiff nor Plaintiff's counsel have any interests which might prevent them from vigorously pursuing this action.

28. Maintaining this action as a class action is superior to all other available methods of adjudication because it will promote the convenient administration of justice and will achieve a fair and efficient adjudication of the controversy in this matter, which will affect the interests of tens of thousands of potential class members.

29. The prosecution of separate actions by or against individual members of the Nationwide Class and/or New York Subclass would create a risk of inconsistent or varying adjudications that would confront Defendant with incompatible standards of conduct.

30. The dollar amount of the individual claims is insufficient to support separate actions, thus a multitude of potential claimants have small potential damages that require aggregation in order to be pursued.

31. Final equitable and declaratory relief is appropriate because Defendant should be required, in addition to paying damages, to be enjoined from its continuing violations of the law.

32. This lawsuit is manageable as a class action because the proofs are essentially the same for all members of the Nationwide Class and New York Subclass on all of the principal issues.

33. Defendant's conduct was the same as to all members of the Nationwide Class and New York Subclass.

34. The Nationwide Class and New York Subclass members do not have a significant interest in controlling the prosecution of separate actions involving the subject matter of this litigation, especially because the individual claims are too small individually to warrant litigating their claims on an individual basis.

COUNT I

VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349

(On Behalf of the New York Subclass)

35. Plaintiff incorporates by reference each and every preceding allegation as if it is specifically set forth herein.

36. GBL Section 349 prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.”

37. Defendant violated GBL Section 349 because it engaged in (a) consumer-oriented conduct that was (b) materially misleading and that (c) caused plaintiff to suffer injury as a result of the Defendant’s deceptive act or practice.

38. Defendant engaged in commercial conduct by selling the My Pillow pillows directly to its end user customers in New York and elsewhere.

39. Defendant’s deceptive acts were directed at New York citizens.

40. Defendant misled Plaintiff (and the New York Subclass) for the following reasons:

(a) Advertising the sale of My Pillow pillows under a BOGO promotion with an ineffective BOGO promo code;

(b) Refusing to honor the BOGO promotion and/or BOGO promo code; and

(c) Imposing an alternative and inadequate “discount” promo code.

41. Defendant’s deceptive practice(s) caused Plaintiff (and the New York Subclass) to pay more for the My Pillow pillows than the My Pillow pillows were actually worth.

42. Defendant’s unfair practices offend public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to the New York Subclass.

43. Defendant profited from the sale of the My Pillow pillows to Plaintiff and members of the New York Subclass.

44. Defendant’s BOGO promotion relating to the sale of its My Pillow pillows, refusal to honor this promotion, and substitution of an inferior discount for the same products, constitutes unconscionable commercial practices, deception, false pretenses, the knowing

concealment, suppression, or omissions of material facts with the intent that others would rely on such concealment, suppression, or omission in connection with the sale of the My Pillow pillows into the stream of commerce in violation of the New York Consumer Protection from Deceptive Acts and Practices Act, GBL § 349.

COUNT II

FRAUD/DECEIT

(On Behalf of the Nationwide Class and the New York Subclass)

45. Plaintiff repeats and incorporates the allegations above as if fully set forth herein

46. Defendant represented to Plaintiff and to each class member that there was a BOGO Promotion by which Plaintiff and each class member would obtain a free pillow from My Pillow if they purchased one pillow from My Pillow at the regular price. For example, Plaintiff attempted to place an order over the internet for two (2) standard/queen size My Pillow pillows using the provided “promo” code so that he would receive his second My Pillow for “free”, and as advertised. The My Pillow promo code was not accepted by Defendant’s website and Plaintiff was not able to complete his order using this promo code to secure the BOGO “benefits.” Immediately thereafter, Plaintiff telephoned Defendant and asked a representative of Defendant to accept the BOGO promo code and complete his order. The representative of Defendant inputted a promo code known as “my539” which only provided Plaintiff a discount of approximately 33% off of the purported full retail price for two (2) My Pillow pillows instead of the promised and advertised BOGO promotion. Plaintiff was therefore improperly charged \$125.15, including shipping, handling, and tax.

47. My Pillow intended that its misrepresentation be acted on by Plaintiff and by the rest of the class members.

48. Plaintiff as well as other class members was not aware of the true price of the pillow and reasonably relied on the truth of My Pillow's representations.

49. As a direct and proximate result of Plaintiff's and class members' reliance on My Pillow's material misrepresentations, Plaintiff, Nationwide Class, and the New York Subclass members have suffered an ascertainable loss of money.

COUNT III

UNJUST ENRICHMENT

(On Behalf of the Nationwide Class and the New York Subclass)

50. Plaintiff repeats and incorporates the allegations above as if fully set forth herein.

51. As a result of the deceptive and unfair sales and marketing practices, Plaintiff, the Nationwide Class and the New York Subclass have been harmed because the revenues flowing to the Company inured to the benefit of Defendant.

52. Defendant has been enriched, at the expense of unwitting consumers, by profiting from the unconscionable sales and marketing practices.

53. Plaintiff and other members of the Class are entitled to damages as a result of the unjust enrichment of Defendant, including the disgorgement of all revenue received by Defendant as a result of the foregoing plus interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

As to the Nationwide Class:

- (A) Certify the Nationwide Class pursuant to CPLR Article 9;
- (B) Award damages to Plaintiff and the Nationwide Class in an amount to be determined at trial;

(C) Award Plaintiff and the Nationwide Class their expenses and costs of suit, pre-judgment interest, and reasonable attorney's fees;

(D) Grant restitution to Plaintiff and the Nationwide Class and require Defendant to disgorge its ill-gotten gains; and

(E) Award Plaintiff and the Nationwide Class punitive and/or exemplary damages as appropriate.

As to the New York Subclass:

(A) Certify the New York Subclass pursuant to CPLR Article 9;

(B) Award damages, including statutory and actual damages to Plaintiff and the New York Subclass in an amount to be determined at trial;

(C) Award Plaintiff and the New York Subclass their expenses and costs of the suit, pre-judgment interest, post-judgment interest, and reasonable attorney's fees; and

(D) Grant restitution to Plaintiff and the New York Subclass and require Defendant to disgorge its ill-gotten gains;

As to both the Nationwide Class and New York Subclass:

(A) Permanently enjoin Defendant from conducting the aforementioned types of deceptive practices; and

(B) Grant any and all such other relief as the Court deems appropriate.

JURY DEMAND

Plaintiff hereby demands a trial by jury.

Dated: March 21, 2017

GAINEY, McKENNA, & EGLESTON

By: Thomas J. McKenna
Thomas J. McKenna

Gregory M. Egleston
440 Park Avenue South, 5th Floor
New York, NY 10016
Telephone: (212) 983-1300
Facsimile: (212) 983-0383
Email: tjmckenna@gme-law.com
Email: gegleston@gme-law.com

Attorneys for Plaintiff