

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

KIMBERLY CAREY, SHANNON DILBECK,  
and VICTORIA MOLINAROLO, individuals, on  
their own behalf and on behalf of all others  
similarly situated,

Plaintiffs,

v.

NEW BALANCE ATHLETIC SHOE, INC.,

Defendant.

Civil Action No. 11-cv-10001-LTS

**SETTLEMENT AGREEMENT**

Table of Contents

	<u>Page</u>
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. DEFINITIONS .....</b>	<b>5</b>
<b>III. SETTLEMENT RELIEF .....</b>	<b>10</b>
<b>IV. NOTICE TO THE CLASS.....</b>	<b>14</b>
<b>V. REQUESTS FOR EXCLUSION .....</b>	<b>20</b>
<b>VI. OBJECTIONS TO SETTLEMENT .....</b>	<b>21</b>
<b>VII. RELEASE AND WAIVER .....</b>	<b>22</b>
<b>VIII. ATTORNEYS' FEES AND EXPENSES AND INDIVIDUAL PLAINTIFF AWARDS.....</b>	<b>26</b>
<b>IX. PRELIMINARY APPROVAL ORDER, FINAL ORDER, FINAL JUDGMENT AND RELATED ORDERS .....</b>	<b>27</b>
<b>X. MODIFICATION OR TERMINATION OF THIS AGREEMENT .....</b>	<b>29</b>
<b>XI. GENERAL MATTERS AND RESERVATIONS.....</b>	<b>32</b>

**TABLE OF EXHIBITS**

<b><u>Document</u></b>	<b><u>Exhibit Number</u></b>
Claim Form .....	1
Class Notice .....	2
Final Order .....	3
Final Judgment.....	4
Preliminary Approval Order .....	5
Summary Settlement Notice .....	6
Settlement Claim Procedures and Claim Calculation Protocol .....	7
Notice Administrator's Affidavit.....	8
Confidentiality Agreement.....	9
Photos of Current Product Packaging .....	10
Stipulation of Dismissal.....	11
Banner Advertisements .....	12
Addenda .....	13

**IT IS HEREBY STIPULATED AND AGREED**, by, between and among Plaintiffs Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo, and Defendant New Balance Athletic Shoe, Inc., with all terms as defined below, through their duly-authorized counsel, that the above-captioned action, *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.), and the matters raised therein, are settled, compromised, and dismissed on the merits with prejudice, on the terms and conditions set forth in this Settlement Agreement and the release set forth herein, subject to the approval of the Court.

**I. INTRODUCTION**

A. There are two class actions pending in the United States District Court for the District of Massachusetts against New Balance alleging that New Balance engaged in untrue and deceptive advertising promotion and marketing practices associated with its toning shoes. These actions are: (i) *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.) (captioned above); and (ii) *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10632-LTS (D. Mass.). The complaints filed in both of these actions allege similar factual predicates, and each alleges similar claims, including unjust enrichment and consumer protection violations. New Balance's marketing campaign relating to the Toning Shoes is presently the focal point of the class action complaints.

B. On December 7, 2010, a putative class action lawsuit captioned *Bistra Pashamova v. New Balance Athletic Shoes, et al.* (BC450545) ("California Case"), was filed in the Superior Court of the State of California in the County of Los Angeles. In this complaint, plaintiff alleged, among other things, that she purchased New Balance toning footwear in the United States. The California Case was filed on behalf of the plaintiff and others similarly situated and sought to certify a class defined as "[a]ll consumers in the United States who purchased at retail any Toning Shoes (the "Class"), from December 7, 2006, until the final

disposition of this case (the “Class Period”).” The California Case’s counts include: (1) Violations of California’s Unfair Competition Law, California Business and Professions Code Sections 17200 *et seq.*; (2) Violations of California’s Unfair Competition Law, California Business and Professions Code Sections 17500; (3) Violations of the Consumers Legal Remedies Act, California Civil Code Sections 1750 *et seq.*; (4) Breach of Express Warranty; and (5) Unjust Enrichment. The California Case sought damages including individual restitution, declaratory relief, reasonable attorneys’ fees and costs, statutory pre-judgment interest and any relief the court deems just and proper. The California Case was removed to the United States District Court for the Central District of California on January 5, 2011, and assigned civil action number 2:11-cv-00135-CAS-PJW. A First Amended Complaint was then filed in the California Case on March 10, 2011 on behalf of new plaintiffs Kimberly Carey and Shannon Dilbeck, which removed Bistra Pashamova as a party. On April 6, 2011, plaintiffs Kimberly Carey and Shannon Dilbeck and Defendant New Balance filed a stipulation to transfer the California Case to the United States District Court for the District of Massachusetts. On April 7, 2011, Judge Christina A. Snyder granted the Parties’ stipulation and ordered the transfer of the California Case to the District of Massachusetts. On April 13, 2011, the District of Massachusetts assigned the California Case case number 1:11-cv-10632.

C. On January 3, 2011, the above captioned putative class action captioned *Bistra Pashamova v. New Balance Athletic Shoe Inc.* (1:11-cv-10001) was filed in the United States District Court for the District of Massachusetts (the “Action”). Plaintiff in this Action similarly filed her action “on behalf of herself and a nationwide Class of all others similarly situated consisting of all persons in the United States who purchased at retail any Toning Shoes (the “Class”), from the time of its market introduction in until [sic] the final disposition of this case

(the “Class Period”).” Plaintiff’s allegations were substantially similar to those in the California Case and alleged violations of Massachusetts’ Untrue and Misleading Advertising Statute (G.L. c. 266 § 91) as well as claims for breach of express warranty and unjust enrichment. The Action seeks restitution, disgorgement of revenues, declaratory relief, reasonable attorneys’ fees and costs, statutory pre-judgment interest and any relief the court deems just and proper. On October 27, 2011, a First Amended Complaint was filed in the Action on behalf of new plaintiffs Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo, removing plaintiff Bistra Pashamova, and adding a claim for unfair and deceptive conduct in violation of M.G.L. ch. 93A, § 2 *et seq.*

D. New Balance filed Answers to both the California and Massachusetts original complaints and amended complaints. New Balance expressly denied and continues to deny any and all wrongdoing alleged in the filed actions, including, but not limited to, the California Case and the Action, and neither admits nor concedes any actual or potential fault, wrongdoing or liability in connection with any facts or claims that have been or could have been alleged against it in these actions.

E. The California Case and the Actions are pending before Magistrate Judge Leo T. Sorokin in the United States District Court for the District of Massachusetts. These actions were noted as related cases and Plaintiffs’ attorneys in these actions were appointed Interim Class Counsel on July 15, 2011. The California Case and the Action are hereinafter referred to as the “Actions.”

F. On January 21, 2011, Whitney Stagg and Jennifer Vaughn filed a putative class action against New Balance, with substantially similar allegations to those averred in the Actions, in the Circuit Court of Washington County, Arkansas (the “*Stagg & Vaughn Action*”).

On January 24, 2011, Elizabeth Tuberville filed another putative class action against New Balance, with substantially similar allegations to those averred in the Actions, in the Circuit Court of Ouachita County, Arkansas (the “*Tuberville Action*”). Counsel for plaintiffs in the *Stagg & Vaughn Action* and the *Tuberville Action* have agreed to support this Settlement and the terms in the Settlement Agreement, as indicated in the Addenda, which are attached hereto as Exhibit 13.

G. Class Counsel have conducted an extensive and thorough examination, investigation, and evaluation of the relevant law, facts and allegations to assess the merits of the claims and potential claims to determine the strength of both defenses and liability sought in the Actions.

H. New Balance produced to Plaintiffs, through Class Counsel, extensive class discovery. Plaintiffs and Class Counsel have thoroughly reviewed the documents. In particular, New Balance produced voluminous documentation to Class Counsel regarding the Toning Shoes in the following categories: (i) product design, creation and development; (ii) scientific studies and research; (iii) marketing, advertising, media, and public relations; (iv) sales and accounting records; and (v) e-mail correspondence kept by key New Balance custodians. In total, New Balance produced over 40,000 pages of documents.

I. Based upon their review, investigation, and evaluation of the facts and law relating to the matters alleged in the pleadings, Plaintiffs and Class Counsel, on behalf of the Plaintiffs in the Actions and the other members of the proposed Class, have agreed to settle the Actions pursuant to the provisions of this Agreement, after considering, among other things: (1) the substantial benefits to Plaintiffs and the other Class Members under the terms of this Agreement; (2) the risks, costs and uncertainty of protracted litigation, especially in complex

actions such as this, as well as the difficulties and delays inherent in such litigation; and (3) the desirability of consummating this Agreement promptly in order to provide effective relief to Plaintiffs and the other Class Members.

J. New Balance expressly denies any wrongdoing alleged in the pleadings and does not admit or concede any actual or potential fault, wrongdoing, or liability in connection with any facts or claims that have been or could have been alleged against it in the Actions and / or any other actions. Even though New Balance expressly denies any wrongdoing, New Balance considers it desirable for these cases to be settled and dismissed, because this Settlement will finally put Plaintiffs' claims and the underlying matters to rest and will avoid the substantial expense, burdens, and uncertainties associated with the continued litigation of these claims and cases.

## **II. DEFINITIONS**

A. As used in this Agreement and the attached exhibits (which are an integral part of this Agreement and are incorporated in their entirety by reference), the following terms have the following meanings, unless this Agreement specifically provides otherwise:

1. "Action" means *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.).

2. "Actions" means *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.) and *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10632 (D. Mass.).

3. "Agreement" or "Settlement" means this Settlement Agreement and the exhibits attached hereto or incorporated herein, including any subsequent amendments and any exhibits to such amendments.

4. “Attorneys’ Fees and Expenses” means such funds as may be awarded by the Court to Class Counsel from New Balance to compensate all Class Counsel for their fees and expenses in connection with the Actions and the Settlement, as described in Section VIII of this Agreement (below).

5. “California Case” means *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10632 (D. Mass).

6. “Claim” means the claim of a Class Member or his or her representative submitted on a Claim Form as provided in this Agreement.

7. “Claimant” means a Class Member who has submitted a Claim.

8. “Claim Form” means the document, in substantially the same form as Exhibit 1 attached to this Agreement.

9. “Claim Period” means the time period in which Class Members may submit a Claim Form for review to the Class Action Settlement Administrator. The Claim Period shall run for one hundred eighty (180) days from the date of the first dissemination of the Summary Settlement Notice or Class Notice, whichever is earlier.

10. “Claim Process” means that process for submitting Claims described in this Agreement.

11. “Class Action Settlement Administrator” means the third-party agent or administrator agreed to by the Parties and appointed by the Court. The Parties agree that Garden City Group, Inc. shall be retained to implement the claims and Settlement requirements of this Agreement, subject to the Court’s approval.

12. “Class” means all persons or entities that, during the Class Period, purchased any and all Toning Shoes from New Balance and/or its authorized retailers including,

without limitation, New Balance U.S. Retailers, New Balance Stores, shopnewbalance.com, joesnewbalanceoutlet.com, New Balance Outlets and/or other third-party retailers. Excluded from the Class are: (a) New Balance's Board members or executive-level officers, including its attorneys; (b) persons or entities who purchased the Toning Shoes primarily for the purpose of resale; (c) any claims for personal injury relating to the use of the Toning Shoes; (d) distributors or re-sellers of the Toning Shoes; (e) the judge and magistrate judge presiding over the Action and their immediate families; (f) governmental entities; and (g) persons or entities who or which timely and properly exclude themselves from the Class as provided in this Agreement.

13. "Class Member" means a member of the Class.

14. "Class Counsel" means: Robert Ahdoot, Tina Wolfson, and Ahdoot & Wolfson, PC.

15. "Class Notice" means a notice substantially in the form attached hereto as Exhibit 2.

16. "Class Period" means the period from January 1, 2010, up to and including the date of the first dissemination of the Summary Settlement Notice or Class Notice, whichever is earlier.

17. "Controlled Instability Shoe" means any shoe that utilizes designs aimed at creating some level of instability to utilize the wearer's muscles in a different or altered manner from traditional shoes.

18. "Court" means the United States District Court for the District of Massachusetts.

19. "Fairness Hearing" means the hearing at or after which the Court shall make a final decision whether to approve this Agreement as fair, reasonable, and adequate. The

Parties shall request that the Court schedule the Fairness Hearing for a date that is at least one hundred and fifty-five (155) days, but no later than one hundred and seventy-five (175) days, after entry of Preliminary Approval Order.

20. “Final Order and Final Judgment” means the Court’s order approving the Settlement and this Agreement, as described in Section IX.B of this Agreement, which is to be substantially in the forms attached hereto as Exhibits 3 and 4, respectively.

21. “Final Settlement Date” means the date on which the Final Order and Final Judgment approving this Agreement becomes final. For purposes of this Agreement:

- a. if no appeal has been taken from the Final Order and Judgment, “Final Settlement Date” means the date on which the time to appeal therefrom has expired; or
- b. if any appeal has been taken from the Final Order and Final Judgment, “Final Settlement Date” means the date on which all appeals therefrom, including petitions for rehearing or reargument, petitions for rehearing en banc and petitions for certiorari or any other form of review, have been finally disposed of in a manner that affirms the Final Order and Judgment; or
- c. if the Class Counsel and New Balance agree in writing, “Final Settlement Date” can occur on any other agreed date.

22. “Notice Administrator” means the Court-appointed third-party agent or administrator agreed to by the Parties and appointed by the Court. The Parties agree that Garden City Group, Inc. shall be retained to implement the notice and related requirements of this Agreement.

23. “Parties” means Plaintiffs and New Balance, collectively, as each of those terms is defined in this Agreement.

24. “Plaintiffs” means Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo.

25. “Plaintiffs’ Counsel” means counsel for the Plaintiffs in the Action, who are: Ahdoot & Wolfson, PC.

26. “Preliminary Approval Order” means the order to be entered by the Court preliminarily approving the Settlement as outlined in Section IX.A of this Agreement and should be substantially in the form attached hereto as Exhibit 5.

27. “New Balance” means New Balance Athletic Shoe, Inc.

28. “New Balance’s Counsel” means Goodwin Procter LLP.

29. “Release” means the release and waiver set forth in Section VII of this Agreement and in the Final Order and Final Judgment.

30. “Released Parties” means New Balance, its past, present and future parents (including but not limited to New Balance, Inc., and any intermediary and/or ultimate parents), officers, directors, employees, stockholders, agents, attorneys, administrators, successors, suppliers, distributors, reorganized successors, spin-offs, assigns, holding companies, related companies, subsidiaries, affiliates, joint-ventures, partners, members, divisions, predecessors, authorized retailers, of Toning Shoes for resale, including, without limitation, New Balance U.S. Retailers, New Balance Stores, [shopnewbalance.com](http://shopnewbalance.com), [joesnewbalanceoutlet.com](http://joesnewbalanceoutlet.com), New Balance Outlets as well as other third-party retailers of the Toning Shoes.

31. “Settlement Claim Procedures and Claim Calculation Protocol” means the protocol attached hereto as Exhibit 7.

32. “Summary Settlement Notice” means the Summary Class Notice for publication substantially as attached hereto as Exhibit 6.

33. “Toning Shoes” means New Balance’s Rock&Tone, TrueBalance, and Aravon Ria, Aravon Riley, and Aravon Quinn shoes referred to as toning shoes, and other applicable New Balance shoes referred to as toning shoes, purchased as new by Class Members during the Class Period.

B. Other capitalized terms used in this Agreement but not defined in this Section II shall have the meanings ascribed to them elsewhere in this Agreement.

C. The terms “he or she” and “his or her” include “it” or “its” where applicable.

### **III. SETTLEMENT RELIEF**

Settlement relief shall consist of two primary components: (1) refunds to Class Members who submit valid Claims; and (2) New Balance’s agreement to refrain from certain conduct relating to its marketing and advertising of its toning shoes.

A. Relief Amount:

1. New Balance shall deposit \$2.3 million (the “Escrowed Fund(s)”) in escrow to be held by the Class Action Settlement Administrator, which shall be the “Escrow Agent”.

2. In addition to the Escrowed Funds, New Balance shall pay \$500,000 for administrative/notice costs to the Class Action Settlement Administrator for (a) charges and invoices by the Class Action Settlement Administrator and Notice Administrator relating to this Settlement; (b) the costs and expenses associated with disseminating the notice, including, but not limited to, the Class Notice and the Summary Settlement Notice, to the Class; (c) the costs and expenses associated with claims administration; (d) the costs and expenses associated with

the timely, valid, and approved Claims submitted by Class Members pursuant to the Claim Process (collectively, the “Administrative Costs”). If such costs exceed \$500,000, then the remaining costs shall be paid out of the Escrowed Fund. If such costs are less than \$500,000, then New Balance shall pay the balance into the Escrowed Fund, and such funds shall be added to the Escrowed Funds.

B. Claim Form Submission and Review:

1. Class Members may submit a Claim through the Claim Process during the Claim Period and the Class Action Settlement Administrator shall review and process the Claim pursuant to the Settlement Claim Procedures and Claim Calculation Protocol, which is attached hereto as Exhibit 7. As part of the Claim Process, Class Members shall be eligible for the relief provided in this Agreement, provided Class Members complete and timely submit the Claim Form, which shall be included with the Class Notice, to the Class Action Settlement Administrator within the Claim Period.

2. As further specified in the Settlement Claim Procedures and Claim Calculation Protocol, the Claim Form shall advise Class Members that the Class Action Settlement Administrator has the right to request verification of the purchase of Toning Shoes, including, but not limited to, receipt(s) or other documentation demonstrating purchase of any and all of the Toning Shoes during the Class Period. If the Class Member does not timely comply and/or is unable to produce documents to substantiate and/or verify the information on the Claim Form and the Claim is otherwise not approved, the Claim shall be disqualified.

3. The Class Action Settlement Administrator shall provide periodic updates to Class Counsel and to New Balance regarding Claim Form submissions beginning not later than one week before the Fairness Hearing date and continuing on a monthly basis thereafter.

4. The Class Action Settlement Administrator shall begin to pay timely, valid, and approved Claims commencing ten (10) days after the close of the Claim Period so long as this period is after the Final Settlement Date, or sooner upon New Balance and Plaintiffs' Counsel's joint direction, but not before the issuance of the Court's Final Order and Final Judgment approving the Settlement. In the event the Final Settlement Date falls after the close of the Claim Period, then the Class Action Settlement Administrator shall begin to pay timely, valid, and approved Claims commencing ten (10) days after the Final Settlement Date. The Class Action Settlement Administrator shall have completed the payment to Class Members who have submitted timely, valid and approved Claims pursuant to the Claim Process no later than one hundred twenty (120) days after either the Final Settlement Date or the close of the Claim Period, whichever is later.

5. The relief to be provided to eligible Class Members for each pair of Toning Shoes purchased by an eligible Class Member, shall be an initial amount of \$50.00 ("Initial Claim Amount") and a maximum amount of \$100.00. Applicable Toning Shoes purchase price, sales taxes, and / or shipping charges paid by Class Members shall not be used to calculate the relief relating to the purchase of the Toning Shoes. In the event a Class Member has purchased more than one pair of the Toning Shoes, that Class Member may submit one Claim for each pair of Toning Shoes purchased.

C. Adjustments and Remaining Funds:

1. If the total of the timely, valid and approved Claims submitted by Class Members exceeds the available relief, minus any fees, payments, and costs set forth in this Agreement, each eligible Class Member's Initial Claim Amount shall be reduced on a *pro rata* basis.

2. If the total of the timely, valid and approved Claims submitted by Class Members is less than the available relief, minus any fees, payments, and costs set forth in this Agreement, then the Initial Claim Amount award to each eligible Class Member shall be increased on a *pro rata* basis, with a maximum increase of up to, but not more than, \$100.00, not including any applicable sales tax.

3. If there are any funds remaining in the Escrowed Fund from the claim program, including, but not limited to, any funds remaining in the Escrowed Fund after all Claims have been paid or un-cashed distributions made payable to eligible Class Members (“Residual Funds”), the Class Action Settlement Administrator shall equally distribute the Residual Funds to the following non-profit organizations: Playworks ([www.playworks.org](http://www.playworks.org)), KaBOOM! ([www.kaboom.org](http://www.kaboom.org)), and Special Olympics ([www.specialolympics.org](http://www.specialolympics.org)), and/or other nonprofit organization(s) or foundation(s) that are agreed upon by the Parties. The Residual Funds will not be returned to Defendant. Defendant represents and warrants that any payment of Residual Funds to any charities, non-profit organizations, or governmental entit(ies) shall not reduce any of its donations or contributions to any entity, charity, charitable foundation or trust, and / or non-profit organization.

D. Agreement to Refrain from Certain Conduct

In addition to the relief discussed above, as part of this Agreement, New Balance will agree to take commercially reasonable efforts to refrain from the following conduct : (i) New Balance will not make or assist others in making any claims that the Toning Shoes or the Controlled Instability Shoes, are effective in strengthening muscles or that wearing such product will result in quantified percentage or amount of muscle toning or strengthening, unless that representation is non-misleading and is supported by at least one adequate well controlled human

clinical study; (ii) New Balance will not make or assist others in making any other health or fitness benefit claims about the Toning Shoes and Controlled Instability Shoes, including, but not limited to, claims about muscle tone and/or muscle activation, unless that representation is non-misleading and New Balance possesses and relies upon competent and reliable scientific evidence to substantiate that the representation is true; and (iii) New Balance will not misrepresent or assist others in misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study or research relating to New Balance's Toning Shoes or Controlled Instability Shoes. For the purposes of this agreement, third party sales of Controlled Instability Shoes in connection with product packaging illustrated in Exhibit 10 already in third party retail inventory prior to the Settlement Date shall not constitute a violation of this Agreement.

#### **IV. NOTICE TO THE CLASS**

##### **A. Duties of the Class Action Settlement Administrator and the Notice Administrator**

1. The Parties shall jointly recommend and retain Garden City Group, Inc. to be the Class Action Settlement Administrator and the Notice Administrator to help implement the terms of this Agreement. Following the Court's preliminary approval of this Agreement and the Court's appointment of the proposed Class Action Settlement Administrator and the proposed Notice Administrator, the Notice Administrator shall disseminate notice to the Class as provided for in the Affidavit of the Notice Administrator, substantially in the form attached as Exhibit 8 to this Agreement, as specified in the Preliminary Approval Order and in this Agreement, and in order to comply with all applicable laws, including, but not limited to, the Due Process Clause of the Constitution.

2. The Notice Administrator shall be responsible for, without limitation:

(a) printing, mailing, or arranging for the mailing of the Class Notice; (b) arranging for the publication of the Summary Settlement Notice; (c) handling returned mail not delivered to Class Members; (d) attempting to obtain updated address information for any Class Notice returned without a forwarding address; (e) making any additional mailings required under the terms of this Agreement; (f) responding to requests for Class Notice; (g) receiving and maintaining on behalf of the Court any Class Member correspondence regarding requests for exclusion and objections to the Settlement; (h) forwarding written inquiries to Class Counsel or their designee for a response, if warranted; (i) establishing a post office box for the receipt of any correspondence; (j) responding to requests from Class Counsel and/or New Balance's Counsel; (k) establishing a web site and toll-free voice response unit with message and live operator capabilities to which Class Members may refer for information about the Actions and the Settlement; and (l) otherwise implementing and/or assisting with the dissemination of the notice of the Settlement. The Class Action Settlement Administrator shall be responsible for, without limitation, implementing the terms of the Claim Process and related administrative activities. The Notice Administrator and/or the Class Action Settlement Administrator shall coordinate their activities to minimize costs in effectuating the terms of this Agreement.

3. If the Class Action Settlement Administrator and/or the Notice Administrator make a material or fraudulent misrepresentation to, or conceal requested material information from, Class Counsel, New Balance, or New Balance's Counsel, then the Party to whom the misrepresentation is made shall, in addition to any other appropriate relief, have the right to demand that the Class Action Settlement Administrator and/or the Notice Administrator, as applicable, immediately be replaced. If the Class Action Settlement Administrator and/or the

Notice Administrator fail to perform adequately on behalf of New Balance or the Class, the Parties may agree to remove the Class Action Settlement Administrator and/or the Notice Administrator. The other Party shall not unreasonably withhold consent to remove the Class Action Settlement Administrator and/or the Notice Administrator, but this shall occur only after New Balance and Class Counsel have attempted to resolve any disputes regarding the retention or dismissal of the Class Action Settlement Administrator and/or the Notice Administrator in good faith, and, if they are unable to do so, after the matter has been referred to the Court for resolution.

4. The Class Action Settlement Administrator and/or the Notice Administrator may retain one or more persons to assist in the completion of his or her responsibilities.

5. Not later than ten (10) days before the date of the Fairness Hearing, the Notice Administrator shall file with the Court: (a) a list of those persons who have opted out or excluded themselves from the Settlement; and (b) the details outlining the scope, methods and results of the notice program.

6. The Notice Administrator shall promptly after receipt provide copies of any requests for exclusion, objections, and/or related correspondence to Class Counsel and New Balance's Counsel.

B. Class Notice:

1. Dissemination of the Mailed Class Notice

a. No later than one (1) business day after the entry of the Preliminary Approval Order, New Balance shall provide the Notice Administrator with the name, mailing address, and e-mail address of each

reasonably identifiable Class Member, subject to the existence of such information and its current possession, if at all, by New Balance.

b. Beginning not later than five (5) business days after entry of the Preliminary Approval Order and to be substantially completed not later than fifteen (15) days after entry of the Preliminary Approval Order, and subject to the requirements of the Preliminary Approval Order and the Settlement Agreement, the Notice Administrator shall send the Class Notice by Electronic Mail (“E-Mail”) to: (i) each reasonably identifiable Class Member’s last known E-Mail address; and (ii) each appropriate State and Federal official, as specified in 28 U.S.C. § 1715, and shall otherwise comply with Fed. R. Civ. P. 23 and any other applicable statute, law, or rule, including but not limited to, the Due Process Clause of the United States Constitution.

c. No later than thirty-five (35) days after entry of the Preliminary Approval Order, the Notice Administrator shall send the Summary Settlement Notice by First Class U.S. Mail, proper postage prepaid, to each Class Member whose E-mail address returned a message as undeliverable, subject to the existence of such information as provided by New Balance pursuant to Section IV.B.1.a of this Agreement.

d. No later than fifty (50) days after entry of the Preliminary Approval Order, the Notice Administrator shall: (i) re-mail any Summary Settlement Notices returned by the United States Postal Service with a forwarding address that are received by the Notice Administrator; (ii) by

itself or using one or more address research firms, as soon as practicable following receipt of any returned Summary Settlement Notices that do not include a forwarding address, research any such returned mail for better addresses and promptly mail copies of the Summary Settlement Notice to the better addresses so found.

2. Contents of the Class Notice: The Claim Form and the Class Notice shall be in a form substantially similar to the document attached to this Agreement as Exhibits 1 and 2, respectively, and shall advise Class Members of the following:

a. General Terms: The Class Notice shall contain a plain and concise description of the nature of the Actions, the history of the litigation of the claims, the preliminary certification of the Class, and the proposed Settlement, including information on the identity of Class Members, how the proposed Settlement would provide relief to the Class and Class Members, what claims are released under the proposed Settlement and other relevant terms and conditions.

b. Opt-Out Rights: The Class Notice shall inform Class Members that they have the right to opt out of the Settlement. The Class Notice shall provide the deadlines and procedures for exercising this right.

c. Objection to Settlement: The Class Notice shall inform Class Members of their right to object to the proposed Settlement and appear at the Fairness Hearing. The Class Notice shall provide the deadlines and procedures for exercising these rights.

d. Fees and Expenses: The Class Notice shall inform Class Members about the amounts being sought by Plaintiffs' Counsel as Attorneys' Fees and Expenses and individual awards to the Plaintiffs, and shall explain that New Balance will pay the fees and expenses awarded to Plaintiffs' Counsel and individual awards to the Plaintiffs in addition to amounts being made available for relief to Class Members and without reducing such relief amounts.

e. Claim Form: The Class Notice shall include the Claim Form, which shall inform the Class Member that he or she must fully complete and timely return the Claim Form within the Claim Period to be eligible to obtain relief pursuant to this Agreement.

C. The Summary Settlement Notice: The Notice Administrator shall have the publication of the Summary Settlement Notice substantially completed no later than sixty-five (65) days after entry of the Preliminary Approval Order as described in the Affidavit of the Notice Administrator, and in such additional newspapers, magazines, and/or other media outlets as shall be agreed upon by the Parties. The form of Summary Settlement Notice agreed upon by the Parties is in the form substantially similar to the one attached to the Agreement as Exhibit 6.

D. Internet Web site: Prior to the dissemination of the Class Notice pursuant to Section IV.B.1 to Section IV.C, the Notice Administrator shall establish an Internet website, [www.newbalancesettlement.com](http://www.newbalancesettlement.com), that will inform Class Members of the terms of this Agreement, their rights, dates and deadlines and related information. The web site shall include, in .pdf format, materials agreed upon by the Parties and/or required by the Court. Banner ads on the Internet shall direct Class Members to the website. The form of the Banner ads agreed upon

by the Parties is in the form substantially similar to the one attached to the Agreement as Exhibit 12.

E. Toll-Free Telephone Number: Prior to the dissemination of the Class Notice pursuant to Section IV.B.1 to Section IV.C, the Notice Administrator shall establish a toll-free telephone number that will provide Settlement-related information to Class Members.

**V. REQUESTS FOR EXCLUSION**

A. Any Class Member who wishes to be excluded from the Class must mail a written request for exclusion to the Notice Administrator at the address provided in the Class Notice, postmarked no later than ninety-five (95) days after entry of the Preliminary Approval Order, or as the Court otherwise may direct, and specifying that he or she wants to be excluded. The Notice Administrator shall forward copies of any written requests for exclusion to Class Counsel and New Balance's Counsel. A list reflecting all requests for exclusion shall be filed with the Court by the Notice Administrator no later than ten (10) days before the Fairness Hearing.

B. Any potential Class Member who does not file a timely written request for exclusion as provided in the preceding Section V.A shall be bound by all subsequent proceedings, orders, and judgments, including, but not limited to, the Release, in the Action, even if he or she has litigation pending or subsequently initiates litigation against New Balance relating to the claims and transactions released in the Action. New Balance's Counsel shall provide to the Notice Administrator, within ten (10) business days of the entry of the Preliminary Approval Order, a list of all counsel for anyone who has litigation against New Balance that involves the Toning Shoes. The Notice Administrator shall mail copies of the Class Notice to all such legal counsel. New Balance will promptly direct the Notice Administrator to serve the Class Notice on counsel for any Class Members who subsequently initiate litigation, arbitration,

or other proceedings against New Balance relating to claims alleging events occurring during the Class Period, the Toning Shoes, and/or otherwise involving the Release.

## **VI. OBJECTIONS TO SETTLEMENT**

A. Any Class Member who has not filed a timely written request for exclusion and who wishes to object to the fairness, reasonableness, or adequacy of this Agreement or the proposed Settlement, or to the award of Attorneys' Fees and Expenses, or the individual awards to Plaintiffs, must deliver to the Class Counsel identified in the Class Notice and to New Balance's Counsel, and file with the Court, no later than ninety-five (95) days after entry of the Preliminary Approval Order, or as the Court otherwise may direct, a written statement of the objections, as well as the specific reason(s), if any, for each objection, including any legal support the Class Member wishes to bring to the Court's attention, any evidence or other information the Class Member wishes to introduce in support of the objections, a statement of whether the Class Member intends to appear and argue at the Fairness Hearing, and list the Class Member's purchase(s) of the Toning Shoes. Class Members may do so either on their own or through an attorney retained at their own expense. The objection must include proof of purchase for the Toning Shoes. Acceptable proof of purchase includes a cash register receipt, a credit card receipt or a credit card statement that sufficiently indicates the purchase of the Toning Shoes. The Parties shall request that the Court allow any interested party to file a reply to any objection, as described in this Section VI.A, no later than seven (7) days before the Fairness Hearing.

B. Any Class Member who files and serves a written objection, as described in the preceding Section VI.A, may appear at the Fairness Hearing, either in person or through personal counsel hired at the Class Member's expense, to object to the fairness, reasonableness, or adequacy of this Agreement or the proposed Settlement, or to the award of Attorneys' Fees and

Expenses or awards to the individual Plaintiffs. Class Members or their attorneys who intend to make an appearance at the Fairness Hearing must deliver a notice of intention to appear to one of the Class Counsel identified in the Class Notice and to New Balance's Counsel, and file said notice with the Court, no later than ninety-five (95) days after entry of the Preliminary Approval Order, or as the Court may otherwise direct.

C. Any Class Member who fails to comply with the provisions of Sections VI.A and VI.B above shall waive and forfeit any and all rights he or she may have to appear separately and/or to object, and shall be bound by all the terms of this Agreement and by all proceedings, orders and judgments, including, but not limited to, the Release, in the Action.

D. Any Class Member who objects to the Settlement shall be entitled to all of the benefits of the Settlement if this Agreement and the terms contained therein are approved, as long as the objecting Class Member complies with all requirements of this Agreement applicable to Class Members, including the timely submission of Claim Forms and other requirements discussed herein.

## **VII. RELEASE AND WAIVER**

A. The Parties agree to the following release and waiver, which shall take effect upon entry of the Final Order and Final Judgment.

B. In consideration for the Settlement benefits described in this Agreement, Plaintiffs and the other members of the Class, on behalf of themselves, their heirs, guardians, assigns, executors, administrators, predecessors, and/or successors, will fully, finally and forever release, relinquish, acquit, and discharge the Released Parties from – and shall not now or hereafter institute, maintain, or assert on their own behalf, on behalf of the Class or on behalf of any other person or entity – any and all manner of claims, actions, causes of action, suits, rights, debts,

sums of money, payments, obligations, reckonings, contracts, agreements, executions, promises, damages, liens, judgments and demands of whatever kind, type or nature and whatsoever, both at law and in equity, whether past, present or future, mature or not yet mature, known or unknown, suspected or unsuspected, contingent or noncontingent, whether based on federal, state or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim that Plaintiffs or Class Members ever had, now have, may have, or hereafter can, shall or may ever have against the Released Parties in any other court, tribunal, arbitration panel, commission, agency, or before any governmental and/or administrative body, or any other adjudicatory body, on the basis of, connected with, arising from, or in any way whatsoever relating to the purchase of Toning Shoes during the Class Period and the claims alleged in the complaint in the Action, and, more particularly, but without in any way limiting the generality of the foregoing, arising from, directly or indirectly, or in any way whatsoever pertaining or relating to the claims alleged in the complaint in the Action, including, but not limited to, communications, disclosures, nondisclosures, representations, statements, claims, omissions, messaging, design, testing, marketing, advertising, promotion, packaging, displays, brochures, studies, manufacture, distribution, operation, performance, functionality, notification, providing, offering, dissemination, replacement, sale and/or resale by the Released Parties of the Toning Shoes; any claims for rescission, restitution or unjust enrichment for all damages of any kind; violations of any state's deceptive, unlawful and/or unfair business and/or trade practices, false, misleading or fraudulent advertising, consumer fraud and/or consumer protection statutes; any violation of the Uniform Commercial Code, any breaches of express, implied and/or any other warranties, any similar federal, state or local statutes, codes, damages, costs, expenses, extra-contractual damages, compensatory damages, exemplary damages, special damages, penalties,

punitive damages and/or damage multipliers, disgorgement, declaratory relief, expenses, interest, and/or attorneys' fees and costs against the Released Parties pertaining to or relating to the claims alleged in the complaint in the Action, notwithstanding that Plaintiffs and the Class acknowledge that they may hereafter discover facts in addition to or different from those that they now know or believe to be true concerning the subject matter of the Action and/or the Release herein.

C. Notwithstanding the language in this section and/or this Agreement, the Plaintiffs and the other members of the Class are not releasing any claims of or relating to personal injury.

D. Plaintiffs represent and warrant that they are the sole and exclusive owner of all claims that they personally are releasing under this Agreement. Plaintiffs further acknowledge that they have not assigned, pledged, or in any manner whatsoever, sold, transferred, assigned or encumbered any right, title, interest or claim arising out of or in any way whatsoever pertaining to the Action, including without limitation, any claim for benefits, proceeds or value under the Action, and that Plaintiffs are not aware of anyone other than themselves claiming any interest, in whole or in part, in the Action or in any benefits, proceeds or values under the Action. Class Members submitting a Claim Form shall represent and warrant therein that they are the sole and exclusive owner of all claims that they personally are releasing under the Settlement and that they have not assigned, pledged, or in any manner whatsoever, sold, transferred, assigned or encumbered any right, title, interest or claim arising out of or in any way whatsoever pertaining to the Action, including without limitation, any claim for benefits, proceeds or value under the Action, and that such Class Member(s) are not aware of anyone other than themselves claiming any interest, in whole or in part, in the Action or in any benefits, proceeds or values under the Action.

E. Without in any way limiting its scope, and, except to the extent otherwise specified in the Agreement, this Release covers by example and without limitation, any and all claims for attorneys' fees, costs, expert fees, or consultant fees, interest, or litigation fees, costs or any other fees, costs, and/or disbursements incurred by Plaintiffs' Counsel, or by Plaintiffs or the Class Members.

F. Plaintiffs expressly understand and acknowledge, and all Class Members will be deemed by the Final Order and Final Judgment to acknowledge, that certain principles of law, including, but not limited to, Section 1542 of the Civil Code of the State of California, provide that "a general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." To the extent that anyone might argue that these principles of law are applicable – notwithstanding that the Parties have chosen Massachusetts law to govern this Agreement – Plaintiffs hereby agree that the provisions of all such principles of law or similar federal or state laws, rights, rules, or legal principles, to the extent they are found to be applicable herein, are hereby knowingly and voluntarily waived, relinquished and released by Plaintiffs and all Class Members.

G. Nothing in this Release shall preclude any action to enforce the terms of the Agreement, including participation in any of the processes detailed therein.

H. Plaintiffs and Defendant hereby agree and acknowledge that the provisions of this Release together constitute an essential and material term of the Agreement and shall be included in any Final Order and Final Judgment entered by the Court.

**VIII. ATTORNEYS' FEES AND EXPENSES AND INDIVIDUAL PLAINTIFF AWARDS**

A. On behalf of Plaintiffs' Counsel, Class Counsel agrees to make and New Balance agrees not to oppose, an application for an award of Attorneys' Fees and Expenses in the Action that will not exceed \$950,000 in fees and expenses incurred up to the submission of their expenses to the Court prior to the Fairness Hearing, which shall be the sole aggregate compensation paid by New Balance for all Class Counsel representing the Class. In addition to, the payments set forth herein in Section III.A and Section VIII.C, and New Balance's full and complete performance of any and all obligations, terms and conditions set forth in the Agreement, New Balance shall pay the Attorneys' Fees and Expenses awarded by the Court.

B. Class Counsel, in their sole discretion, shall allocate and distribute this award of Attorneys' Fees and Expenses among all of the counsel who have acted on behalf of the Class, all of whom are the Class Counsel.

C. New Balance shall pay to Class Counsel the entire Attorneys' Fees and Expenses awarded by the Court (the "Fee Payment") within fifteen (15) business days after the occurrence of the Final Settlement Date.

D. Class Counsel for Plaintiffs may petition the Court for incentive awards of up to \$5,000 per Plaintiff. The purpose of such awards shall be to compensate the Plaintiffs for efforts and risks taken by them on behalf of the Class. Any incentive awards made by the Court shall be paid out of the Escrowed Fund, as instructed by Class Counsel, within ten (10) business days after the occurrence of the Final Settlement Date.

E. New Balance shall not be liable for or obligated to pay any fees, expenses, costs, or disbursements to, or incur any expense on behalf of, any person or entity, either directly or

indirectly, in connection with the Actions or this Settlement Agreement, other than the amount or amounts expressly provided for in this Settlement Agreement.

**IX. PRELIMINARY APPROVAL ORDER, FINAL ORDER, FINAL JUDGMENT AND RELATED ORDERS**

A. The Parties shall seek from the Court, within fifteen (15) business days after the execution of this Agreement, a Preliminary Approval Order in a form substantially similar to Exhibit 5. The Preliminary Approval Order shall, among other things:

1. Certify a nationwide settlement-only class, approve Plaintiffs Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo as Class Representatives and appoint Class Counsel as counsel for the class, pursuant to Fed. R. Civ. P. 23;
2. Preliminarily approve the Settlement;
3. Require the dissemination of the Notice and the taking of all necessary and appropriate steps to accomplish this task;
4. Determine that the notice complies with all legal requirements, including, but not limited to, the Due Process Clause of the United States Constitution;
5. Schedule a date and time for a Fairness Hearing to determine whether the Preliminary Approval Order should be finally approved by the Court;
6. Require Class Members who wish to exclude themselves to submit an appropriate and timely written request for exclusion as directed in the Agreement and Class Notice and that a failure to do so shall bind those Class Members who remain in the Class;
7. Require Class Members who wish to object to the Agreement to submit an appropriate and timely written statement as directed in the Agreement and Class Notice;

8. Require Class Members who wish to appear to object to the Agreement to submit an appropriate and timely written statement as directed in the Agreement and Class Notice;

9. Require attorneys representing individual Class Members, at their own expense, to file a notice of appearance as directed in the Agreement and Class Notice;

10. Issue a preliminary injunction;

11. Appoint the Class Action Settlement Administrator and/or the Notice Administrator;

12. Authorize New Balance to take all necessary and appropriate steps to establish the means necessary to implement the Agreement;

13. Issue an order requiring execution of a Confidentiality Agreement in the form attached hereto as Exhibit 9, governing Class Members or their counsel who file a motion for access to discovery, in the event that such motion is granted; and

14. Issue other related orders to effectuate the preliminary approval of the Agreement.

B. After the Fairness Hearing, the Parties shall seek to obtain from the Court a Final Order and Final Judgment in the forms substantially similar to Exhibits 3 and 4, respectively. The Final Order and Final Judgment shall, among other things:

1. Find that the Court has personal jurisdiction over all Class Members, the Court has subject matter jurisdiction over the claims asserted in the Amended Complaint and/or Action, and that venue is proper.

2. Finally approve the Agreement and Settlement, pursuant to Fed. R. Civ. P. 23;

3. Finally certify the Class for settlement purposes only;
4. Find that the notice and the notice dissemination methodology complied with all laws, including, but not limited to, the Due Process Clause of the United States Constitution;
5. Dismiss the Action with prejudice;
6. Incorporate the Release set forth in the Agreement and make the Release effective as of the date of the Final Order and Final Judgment;
7. Issue a permanent injunction;
8. Authorize the Parties to implement the terms of the Agreement;
9. Retain jurisdiction relating to the administration, consummation, enforcement, and interpretation of the Agreement, the Final Order and Final Judgment, and for any other necessary purpose; and
10. Issue related Orders to effectuate the final approval of the Agreement and its implementation.

C. Within ten (10) days following the Final Settlement Date, Plaintiffs shall file a stipulation of dismissal with prejudice in the California Case, in the form attached hereto as Exhibit 11.

#### **X. MODIFICATION OR TERMINATION OF THIS AGREEMENT**

A. The terms and provisions of this Agreement may be amended, modified, or expanded by written agreement of the Parties and approval of the Court; provided, however that, after entry of the Final Order and Final Judgment, the Parties may by written agreement effect such amendments, modifications, or expansions of this Agreement and its implementing documents (including all exhibits hereto) without further notice to the Class or approval by the

Court if such changes are consistent with the Court's Final Order and Final Judgment and do not limit the rights of Class Members under this Agreement.

B. This Agreement shall terminate at the discretion of either New Balance or the Plaintiffs, through Class Counsel, if: (1) the Court, or any appellate court(s), rejects, modifies, or denies approval of any portion of this Agreement or the proposed Settlement that the terminating party in its (or their) sole judgment and discretion reasonably determine(s) is material, including, without limitation, the terms of relief, the findings, or conclusions of the Court, the provisions relating to notice, the definition of the Class, and/or the terms of the Release; or (2) the Court, or any appellate court(s), does not enter or completely affirm, or alters or expands, any portion of the Final Order and Judgment, or any of the Court's findings of fact or conclusions of law, that the terminating party in its (or their) sole judgment and discretion reasonably determine(s) is material. The terminating party must exercise the option to withdraw from and terminate this Agreement, as provided in this Section X, by a signed writing served on the other Parties no later than 20 days after receiving notice of the event prompting the termination. The Parties will be returned to their positions *status quo ante*.

C. If an option to withdraw from and terminate this Agreement arises under Section X.B above, neither New Balance nor Plaintiffs are required for any reason or under any circumstance to exercise that option and any exercise of that option shall be in good faith.

D. If this Agreement is terminated pursuant to Section X.B, above, then:

1. this Agreement shall be null and void and shall have no force or effect, and no Party to this Agreement shall be bound by any of its terms, except for the terms of Sections X.D herein;

2. the Parties will petition to have any stay orders entered pursuant to this Agreement lifted;

3. all of its provisions, and all negotiations, statements, and proceedings relating to it shall be without prejudice to the rights of New Balance, Plaintiffs or any Class Member, all of whom shall be restored to their respective positions existing immediately before the execution of this Agreement, except that the Parties shall cooperate in requesting that the Court set a new scheduling order such that neither Party's substantive or procedural rights is prejudiced by the attempted Settlement;

4. Released Parties, as defined in Section II, above, including, without limitation, New Balance, expressly and affirmatively reserve all defenses, arguments, and motions as to all claims that have been or might later be asserted in the Actions, including, without limitation, the argument that the Actions may not be litigated as a class action;

5. Plaintiffs and all other Class Members, on behalf of themselves and their heirs, assigns, executors, administrators, predecessors, and successors, expressly and affirmatively reserve and do not waive all motions as to, and arguments in support of, all claims, causes of actions or remedies that have been or might later be asserted in the Actions including, without limitation, any argument concerning class certification, consumer fraud, and treble or other damages;

6. neither this Agreement, the fact of its having been made, nor the negotiations leading to it, nor any discovery or action taken by a Party or Class Member pursuant to this Agreement shall be admissible or entered into evidence for any purpose whatsoever;

7. any Settlement-related order(s) or judgment(s) entered in this Action after the date of execution of this Agreement shall be deemed vacated and shall be without any force or effect;

8. all costs incurred in connection with the Settlement, including, but not limited to, notice, publication, and customer communications, will be paid from the Escrowed Funds. Neither Plaintiffs nor Class Counsel shall be responsible for any of these costs or other Settlement-related costs;

9. any attorneys' fees and expenses previously paid to Plaintiffs' Counsel shall be returned to New Balance; and

10. notwithstanding the terms of this paragraph, if Settlement is not consummated, Plaintiffs' Counsel may include any time spent in Settlement efforts as part of any statutory fee petition filed at the conclusion of the case, and New Balance reserves the right to object to the reasonableness of such requested fees.

#### **XI. GENERAL MATTERS AND RESERVATIONS**

A. The obligations of the Parties to conclude the proposed Settlement is and shall be contingent on the following:

1. entry by the Court of the Final Order and Final Judgment approving the Settlement, from which the time to appeal has expired or which has remained unmodified after any appeal(s); and

2. New Balance's payments as set forth in Section III.A. and Section VIII.C. of this Settlement Agreement, and New Balance's full and complete performance of any and all obligations, terms and conditions set forth in the Agreement.

B. The Parties and their counsel agree to keep the existence and contents of this Agreement confidential until the date on which the Motion for Preliminary Approval is filed; *provided, however*, that this section shall not prevent New Balance from disclosing such information, prior to the date on which the Motion for Preliminary Approval is filed, to state and federal agencies, independent accountants, actuaries, advisors, financial analysts, insurers or attorneys, nor shall it prevent the Parties and their counsel from disclosing such information to persons or entities (such as experts, courts, co-counsel, and/or administrators) to whom the Parties agree disclosure must be made in order to effectuate the terms and conditions of this Agreement.

C. Plaintiffs and Class Counsel agree that the confidential information made available to them solely through the settlement process was made available, as agreed to, on the condition that neither Plaintiffs nor their counsel may disclose it to third parties (other than experts or consultants retained by Plaintiffs in connection with this case); that it not be the subject of public comment; that it not be used by Plaintiffs or Plaintiffs' Counsel in any way in this litigation should the Settlement not be achieved, and that it is to be returned if a Settlement is not concluded; *provided, however*, that nothing contained herein shall prohibit Plaintiffs from seeking such information through formal discovery if not previously requested through formal discovery or from referring to the existence of such information in connection with the Settlement of this litigation.

D. All information marked as "Attorneys' Eyes Only" or "Confidential" provided by New Balance to Plaintiffs, Plaintiffs' Counsel, or any individual Class Member, counsel for any individual Class Member and/or administrators, pursuant to the implementation of this Agreement or by Court Order, constitutes trade secrets and highly confidential and proprietary

business information and shall be deemed “Attorneys’ Eyes Only” or “Confidential” pursuant to the protective orders that have been or will be entered in the Actions, and shall be subject to all of the provisions thereof. Any materials inadvertently produced shall, upon New Balance’s request, be promptly returned to New Balance’s Counsel, and there shall be no implied or express waiver of any privileges, rights, and defenses.

E. Within ninety (90) days after the Final Settlement Date (unless the time is extended by agreement of the Parties), Plaintiffs’ Counsel, and any expert or other consultant employed by them in such capacity or any other individual with access to documents provided by New Balance to Plaintiffs’ Counsel shall either: (i) return to New Balance’s Counsel, all such documents and materials (and all copies of such documents in whatever form made or maintained) produced by New Balance in the Actions and any and all handwritten notes summarizing, describing or referring to such documents; or (ii) certify to New Balance’s Counsel that all such documents and materials (and all copies of such documents in whatever form made or maintained) produced by New Balance in the Actions and any and all handwritten notes summarizing, describing or referring to such documents have been destroyed; *provided, however*, that this section shall not apply to any documents made part of the record in connection with a Claim, nor to any documents made part of a Court filing, nor to Plaintiffs’ Counsel’s work product. New Balance’s Counsel agrees to hold all documents returned by Plaintiffs’ Counsel, and any expert or other consultant or any other individual employed by Plaintiffs’ Counsel in such capacity with access to documents provided by New Balance, until six months after the distribution of the Escrowed Funds to Class Members who submitted acceptable Claim Forms. Six months after the distribution of the Escrowed Funds to Class Members who submitted acceptable Claim Forms, the Class Action Settlement Administrator shall return all documents

and materials to New Balance and/or Class Counsel that produced the documents and materials, except that it shall destroy any and all Claim Forms, including any and all information and/or documentation submitted by Class Members.

F. New Balance's execution of this Agreement shall not be construed to release - and New Balance expressly does not intend to release - any claim New Balance may have or make against any insurer for any cost or expense incurred in connection with this Settlement, including, without limitation, for attorneys' fees and costs.

G. Class Counsel represent that: (1) they are authorized by the Plaintiffs to enter into this Agreement on behalf of Plaintiffs, their respective present or past law firms and any other attorneys who have represented or who now represent Plaintiffs in these Actions with respect to the claims in these Actions; and (2) they are seeking to protect the interests of the Class.

H. Plaintiffs represent and certify that: (1) they have agreed to serve as representatives of the Class proposed to be certified herein; (2) they are willing, able, and ready to perform all of the duties and obligations of representatives of the Class, including, but not limited to, being involved in discovery and fact finding; (3) they have read the substantive pleadings in the Actions, including the complaint and/or the Amended Complaints, or have had the contents of such pleadings described to them; (4) they are familiar with the results of the fact-finding undertaken by Class Counsel; (5) they have been kept apprised of settlement negotiations among the Parties, and have either read this Agreement, including the exhibits annexed hereto, or have received a detailed description of it from Class Counsel and they have agreed to its terms; (6) they have consulted with Class Counsel about the Actions and this Agreement and the obligations imposed on representatives of the Class; (7) they have authorized Class Counsel to execute this Agreement on their behalf; and (8) they shall remain and serve as representatives of

the Class until the terms of this Agreement are effectuated, this Agreement is terminated in accordance with its terms, or the Court at any time determines that said Plaintiff(s) cannot represent the Class.

I. New Balance represents and warrants that the individual(s) executing this Agreement is authorized to enter into this Agreement on behalf of New Balance.

J. This Agreement, complete with its exhibits, sets forth the sole and entire agreement among the Parties with respect to its subject matter, and it may not be altered, amended, or modified except by written instrument executed by Class Counsel and New Balance's Counsel on behalf of New Balance. The Parties expressly acknowledge that no other agreements, arrangements, or understandings not expressed in this Agreement exist among or between them and that in deciding to enter into this Agreement, they rely solely upon their judgment and knowledge. This Agreement supersedes any prior agreements, understandings, or undertakings (written or oral) by and between the Parties regarding the subject matter of this Agreement.

K. This Agreement and any amendments thereto shall be governed by and interpreted according to the law of the Commonwealth of Massachusetts, notwithstanding its conflict of laws provisions.

L. Any disagreement and/or action to enforce this Agreement shall be commenced and maintained only in the Court in which these Actions are pending.

M. Whenever this Agreement requires or contemplates that one of the Parties shall or may give notice to the other, notice shall be provided by e-mail and/or next-day (excluding Saturdays, Sundays, and Federal Holidays) express delivery service as follows:

1. If to New Balance, then to:

R. David Hosp  
Paul R. Gauron  
GOODWIN PROCTER LLP  
53 State Street  
Boston, Massachusetts 02109  
Tel.: 617.570.1000  
Fax: 617.523.1231  
E-Mail: rhosp@goodwinprocter.com  
pgauron@goodwinprocter.com

and

Edward J. Haddad  
New Balance Athletic Shoe, Inc.  
Brighton Landing  
20 Guest Street  
Boston, Massachusetts 02135  
Tel.: 617.746.2250  
Fax: 617.782.6250  
E-Mail: ed.haddad@newbalance.com

2. If to Plaintiffs, then to:

Robert Ahdoot  
Tina Wolfson  
Ahdoot & Wolfson, PC  
10850 Wilshire Blvd., Suite 370  
Los Angeles, California 90024  
Tel.: 310-474-9111  
Fax: 310-474-8585  
E-Mail: rahdoot@ahdootwolfson.com  
twolfson@ahdootwofson.com

N. All time periods set forth herein shall be computed in calendar days unless otherwise expressly provided. In computing any period of time prescribed or allowed by this Agreement or by order of the Court, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a Federal Holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have

made the office of the clerk of the court inaccessible, in which event the period shall run until the end of the next day that is not one of the aforementioned days. As used in this section “Federal Holiday” includes New Year’s Day, Birthday of Martin Luther King, Jr., Presidents’ Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Patriot’s Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States.

O. The Parties reserve the right, subject to the Court’s approval, to agree to any reasonable extensions of time that might be necessary to carry out any of the provisions of this Agreement.

P. The Class, Plaintiffs, Class Counsel, New Balance and/or New Balance’s Counsel shall not be deemed to be the drafter of this Agreement or of any particular provision, nor shall they argue that any particular provision should be construed against its drafter or otherwise resort to the *contra proferentem* canon of construction. All Parties agree that this Agreement was drafted by counsel for the Parties during extensive arm’s length negotiations. No parol or other evidence may be offered to explain, construe, contradict, or clarify its terms, the intent of the Parties or their counsel, or the circumstances under which this Agreement was made or executed.

Q. The Parties expressly acknowledge and agree that this Agreement and its exhibits, along with all related drafts, motions, pleadings, conversations, negotiations, and correspondence, constitute an offer of compromise and a compromise within the meaning of Federal Rule of Evidence 408 and any equivalent rule of evidence in any state. In no event shall this Agreement, any of its provisions or any negotiations, statements or court proceedings relating to its provisions in any way be construed as, offered as, received as, used as, or deemed to be evidence of any kind in the Actions, any other action, or in any judicial, administrative,

regulatory or other proceeding, except in a proceeding to enforce this Agreement or the rights of the Parties or their counsel. Without limiting the foregoing, neither this Agreement nor any related negotiations, statements, or court proceedings shall be construed as, offered as, received as, used as or deemed to be evidence or an admission or concession of any liability or wrongdoing whatsoever on the part of any person or entity, including, but not limited to, the Released Parties, Plaintiffs, or the Class or as a waiver by the Released Parties, Plaintiffs or the Class of any applicable privileges, claims or defenses.

R. Plaintiffs expressly affirm that the allegations contained in the Amended Complaints were made in good faith and have a basis in fact, but consider it desirable for the Actions to be settled and dismissed because of the substantial benefits that the proposed Settlement will provide to Class Members.

S. The Parties, their successors and assigns, and their counsel undertake to implement the terms of this Agreement in good faith, and to use good faith in resolving any disputes that may arise in the implementation of the terms of this Agreement.

T. The waiver by one Party of any breach of this Agreement by another Party shall not be deemed a waiver of any prior or subsequent breach of this Agreement.

U. If one Party to this Agreement considers another Party to be in breach of its obligations under this Agreement, that Party must provide the breaching Party with written notice of the alleged breach and provide a reasonable opportunity to cure the breach before taking any action to enforce any rights under this Agreement.

V. The Parties, their successors and assigns, and their counsel agree to cooperate fully with one another in seeking Court approval of this Settlement Agreement and to use their best efforts to effect the prompt consummation of this Agreement and the proposed Settlement.


W. This Agreement may be signed with a facsimile signature and in counterparts, each of which shall constitute a duplicate original.

Agreed to on the date indicated below.

APPROVED AND AGREED TO BY THE  
PLAINTIFFS, IN THEIR INDIVIDUAL AND  
REPRESENTATIVE CAPACITIES

By:   
KIMBERLY CAREY

DATE: \_\_\_\_\_

By:   
SHANNON DILBECK

DATE: \_\_\_\_\_

By: \_\_\_\_\_  
VICTORIA MOLINAROLO

DATE: \_\_\_\_\_

APPROVED AND AGREED TO BY  
CLASS COUNSEL

By: \_\_\_\_\_  
ROBERT AHDOOT  
TINA WOLFSON  
AHDOOT & WOLFSON, PC

DATE: \_\_\_\_\_

W. This Agreement may be signed with a facsimile signature and in counterparts, each of which shall constitute a duplicate original.

Agreed to on the date indicated below.

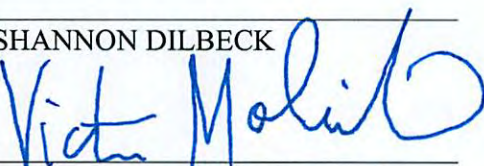
APPROVED AND AGREED TO BY THE  
PLAINTIFFS, IN THEIR INDIVIDUAL AND  
REPRESENTATIVE CAPACITIES

By: \_\_\_\_\_  
KIMBERLY CAREY

DATE: \_\_\_\_\_

By: \_\_\_\_\_  
SHANNON DILBECK

DATE: \_\_\_\_\_

By:   
VICTORIA MOLINAROLO

DATE: 7-28-12

APPROVED AND AGREED TO BY  
CLASS COUNSEL

By: \_\_\_\_\_  
ROBERT AHDOOT  
TINA WOLFSON  
AHDOOT & WOLFSON, PC

DATE: \_\_\_\_\_

W. This Agreement may be signed with a facsimile signature and in counterparts, each of which shall constitute a duplicate original.

Agreed to on the date indicated below.


APPROVED AND AGREED TO BY THE  
PLAINTIFFS, IN THEIR INDIVIDUAL AND  
REPRESENTATIVE CAPACITIES

By: \_\_\_\_\_ DATE: \_\_\_\_\_  
KIMBERLY CAREY

By: \_\_\_\_\_ DATE: \_\_\_\_\_  
SHANNON DILBECK

By: \_\_\_\_\_ DATE: \_\_\_\_\_  
VICTORIA MOLINAROLO

APPROVED AND AGREED TO BY  
~~CLASS COUNSEL~~

By:  \_\_\_\_\_ DATE: JULY 27, 2012  
ROBERT AHDOOT  
TINA WOLFSON  
AHDOOT & WOLFSON, PC

APPROVED AND AGREED TO BY  
AND ON BEHALF OF NEW BALANCE  
ATHLETIC SHOE, INC.

By: Edward J. Haddad  
Name: EDWARD J. HADDAD  
Title: VICE President

DATE: July 27, 2012

By: R. David Hosp  
R. DAVID HOSP  
GOODWIN PROCTER LLP

DATE: July 27, 2012

**EXHIBIT 1**

## ***New Balance Shoe Class Action Settlement***

### ***Claim Form***

Use this claim form only if you bought eligible New Balance Toning shoes from ***January 1, 2010 to [DATE], 2012***. The eligible New Balance shoes are listed below.

**All claim forms must be electronically submitted no later than [DATE] or postmarked no later than [DATE] to:**

New Balance Settlement  
c/o GCG  
P.O. Box 9903  
Dublin, OH 4017-5803

<b>CLAIM INFORMATION</b>	
<b>CLASS MEMBER INFORMATION</b>	

Name:

Mailing Address:

*Number and Street*

City:  State:  Zip Code:

Best Telephone  
Number:

(     )     -

E-mail  
Address:

<b><i>PURCHASE INFORMATION – NEW BALANCE SHOES</i></b>	
<b><i>Eligible New Balance Shoe Types</i></b>	<b><i>Quantity Purchased</i></b>
Rock&Tone	
TrueBalance	
Aravon Ria	
Aravon Riley	
Aravon Quinn	

Payment amounts to eligible Class Members will vary depending upon the number and amounts claimed by all Class Members and other adjustments and deductions as specified in the Settlement Agreement. The amount could be up to \$100 for each pair of Toning Shoes purchased.

**Please note: If you submit a claim where the amount sought exceeds \$200.00, the Class Action Settlement Administrator may request proof of purchase to validate your claim. If the total amount of all claims submitted by all class members exceeds the total available relief, subject to any and all applicable deductions, the Class Action Settlement Administrator may request proof of purchase to validate your claim. If requested, you must provide proof of purchase or your claim will be reduced or denied and you may not appeal the reduction or denial.**

**AFFIRMATION**

I declare or affirm, under penalty of perjury, that the information in this claim form is true and correct to the best of my knowledge and that I purchased the applicable product(s) claimed above between January 1, 2010 and [DATE]. I understand that the decision of the Class Action Settlement Administrator is final and binding. I understand that my claim form may be subject to audit, verification and Court review.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**Claim Forms must be electronically submitted no later than [DATE] or postmarked no later than [DATE], 2012.**

Questions? Visit [www.newbalancesettlement.com](http://www.newbalancesettlement.com) or call, toll-free, [number].

**EXHIBIT 2**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

KIMBERLY CAREY, SHANNON  
DILBECK, and VICTORIA  
MOLINAROLO, individuals, on their own  
behalf and on behalf of all others similarly  
situated,

Plaintiffs,

v.

NEW BALANCE ATHLETIC SHOE,  
INC.,

Defendant.

Civil Action No. 11-cv-10001-LTS

NOTICE OF CLASS ACTION, PROPOSED SETTLEMENT, AND FAIRNESS HEARING

*A Federal Court authorized this notice. This is not a solicitation from a lawyer.*

**YOU ARE NOT BEING SUED.**

**If you purchased the New Balance Toning Shoes listed below from January 1, 2010 up to and including [DATE], the proposed settlement of a class action lawsuit may affect your rights.**

- The settlement will provide \$2.3 million to pay claims from those who purchased New Balance Toning Shoes, at any time from January 1, 2010 to [DATE].
- To qualify, you must have purchased at least one pair of the New Balance Toning Shoes, listed on page 6 of this Notice.

Your legal rights may be affected whether you act or not. **Read this notice carefully because it explains decisions you must make and actions you must take now.**

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:</b>		
<b>DO NOTHING</b>	You get no payment. You give up your rights.	
<b>SUBMIT A CLAIM FORM</b>	This is the only way to get a payment.	The Claim Form, which is attached to this notice, must be completed and electronically submitted no later than <b>[DATE]</b> or mailed <b>postmarked</b> no later than <b>[DATE]</b> . One claim form may be submitted for each pair of eligible shoes purchased.
<b>EXCLUDE YOURSELF</b>	You get no payment under the settlement. This is the only choice that will allow you to sue New Balance on your own about the claims discussed in this notice.	An exclusion request must be in writing and mailed to the Settlement Administrator <b>postmarked</b> on or before <b>[DATE]</b> .
<b>OBJECT TO THE SETTLEMENT</b>	You can write to the Court about why you do not agree with any aspect of the settlement.	An objection must be in writing, filed with the Court, and served on the Parties on or before <b>[DATE]</b> .
<b>GO TO A HEARING</b>	You can ask to speak to the Court about the “fairness” of the settlement, after you submit your objection.	If you wish to appear and speak to the Court, you must submit a Notice of Intention to Appear form, in writing, and file it with the Court on or before <b>[DATE]</b> in addition to submitting a timely objection.

- These rights and options – **and the deadlines to exercise them** – are explained in this notice.
- The Court still has to decide whether to approve the settlement. Payments will be distributed if the Court approves the settlement and after appeals, if any, are resolved in favor of the settlement. Please be patient.
- If you do not exclude yourself from the Class, the proposed settlement (if finally approved) will release certain claims, which are reprinted in full in Appendix A to this notice, and will affect your right to start or continue any other lawsuit or proceeding involving Toning Shoes.

**WHAT THIS NOTICE CONTAINS**

<b>PART I: WHY YOU HAVE RECEIVED THIS NOTICE</b>	<b>4</b>
1. WHY DID I RECEIVE THIS NOTICE?	4
2. WHAT IS THIS LAWSUIT ABOUT AND WHY DID IT SETTLE?	4
3. WHAT DOES THE SETTLEMENT PROVIDE?	5
<b>PART II: DESCRIPTION OF THE CLASS</b>	<b>5</b>
4. WHY IS THIS A “CLASS ACTION”?	5
5. AM I A MEMBER OF THE CLASS?	5
6. ARE THERE EXCEPTIONS TO BEING INCLUDED?	5
7. WHAT ARE THE “TONING SHOES”?	6
8. I’M STILL NOT SURE IF I’M INCLUDED	6
<b>PART III: DECISIONS YOU MUST MAKE NOW</b>	<b>6</b>
9. WHAT DO I NEED TO DO NOW?	6
10. WHAT DO I GIVE UP IF I CHOOSE TO STAY IN THE CLASS?	6
11. DO I HAVE TO SIGN A RELEASE?	6
12. WHAT IF I DO NOTHING?	7
<b>PART IV: SETTLEMENT BENEFITS – WHAT YOU CAN GET</b>	<b>7</b>
13. WHAT CAN I GET FROM THE SETTLEMENT?	7
14. HOW CAN I MAKE A CLAIM?	8
15. WHAT IS THE CLAIM PROCESS?	8
16. HOW MUCH IS THE CLAIM PROCESS WORTH TO THE CLASS?	8
17. WHAT HAPPENS AFTER ALL CLAIMS ARE PROCESSED AND THERE ARE FUNDS REMAINING?	9
18. WHEN WILL I GET MY PAYMENT, IF ANY?	9
<b>PART V: CAN I FILE A LATER LAWSUIT MAKING SIMILAR CLAIMS?</b>	<b>9</b>
<b>PART VI: THE LAWYERS REPRESENTING THE CLASS</b>	<b>10</b>
19. DO I HAVE A LAWYER IN THIS CASE?	10
20. HOW WILL THE LAWYERS AND CLASS REPRESENTATIVES IN THE ACTION BE PAID?	10
<b>PART VII: EXCLUDING YOURSELF FROM THE SETTLEMENT</b>	<b>11</b>
21. HOW DO I GET OUT OF OR EXCLUDE MYSELF FROM THE SETTLEMENT?	11
22. WHAT HAPPENS IF I EXCLUDE MYSELF FROM THE CLASS?	11
23. IF I DON’T EXCLUDE MYSELF, CAN I SUE NEW BALANCE LATER?	12
<b>PART VIII: OBJECTING TO THE SETTLEMENT</b>	<b>12</b>
24. HOW CAN I OBJECT TO THE PROPOSED SETTLEMENT?	12

25.	WHAT IS THE DIFFERENCE BETWEEN “OBJECTING” AND “EXCLUDING”?	13
<b>PART IX: THE COURT’S FAIRNESS HEARING</b>		<b>13</b>
26.	WHEN AND WHERE WILL THE COURT DECIDE WHETHER TO APPROVE THE SETTLEMENT?	13
27.	DO I HAVE TO COME TO THE HEARING?	13
28.	MAY I SPEAK AT THE FAIRNESS HEARING?	14
29.	WHAT DO I HAVE TO DO TO SPEAK AT THE FAIRNESS HEARING?	14
<b>PART X: GETTING ADDITIONAL INFORMATION</b>		<b>14</b>

## PART I: WHY YOU HAVE RECEIVED THIS NOTICE

### 1. WHY DID I RECEIVE THIS NOTICE?

You received this notice because you may be a Class Member able to receive payment from a proposed settlement of a class action. This lawsuit was brought on behalf of persons or entities that purchased Toning Shoes (more fully described below) from New Balance Athletic Shoe, Inc. (“New Balance”), and/or its authorized retailers.

The Court approved this notice because you have a right to know about the proposed settlement, and about your rights and options, before the Court decides whether to approve the settlement. You will be informed of the progress of this settlement and may receive payment if you are a Class Member and submit a completed and timely Claim Form.

This package explains: (1) this lawsuit, (2) the proposed settlement, (3) your legal rights, (4) what payments are available, (5) who is eligible for what payments under the settlement, (6) how to get a payment, and (7) other important information.

Information about the settlement is summarized below. The Settlement Agreement, available on the settlement website, gives greater detail on the rights and duties of the parties. If there is any conflict between this notice and the Settlement Agreement, the Settlement Agreement controls.

### 2. WHAT IS THIS LAWSUIT ABOUT AND WHY DID IT SETTLE?

The lawsuit, *Kimberly Carey, et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.) (the “Action”), concerns claims that New Balance violated certain state laws and consumer protection statutes in connection with the marketing and sale of Toning Shoes since January 1, 2010. Plaintiffs claim that New Balance, in connection with the marketing and sale of Toning Shoes, misrepresented the benefits of wearing Toning Shoes to consumers. Plaintiffs further claim that Toning Shoes did not provide the benefits to consumers claimed by New Balance. New Balance denies any and all claims of wrongdoing and does not admit any fault, wrongdoing or liability.

The plaintiffs in the Action, through their attorneys, thoroughly investigated the facts and law

relating to the issues in the Action. The parties believe that the settlement is fair, reasonable, and adequate and will provide substantial benefit to the Class. The Court has not decided whether the plaintiffs' claims or New Balance's defenses have any merit, and it will not do so if the proposed settlement is approved. The proposed settlement does not suggest that New Balance has or has not done anything wrong, or that the plaintiffs and the Class would or would not win their case if it were to go to trial.

### **3. WHAT DOES THE SETTLEMENT PROVIDE?**

The settlement provides that New Balance will create a fund of \$2.3 million. This will be used to resolve all approved Claims submitted through the Claim Process. The fund is subject to certain terms, requirements, and deductions, as further described below in Question 16. New Balance is also agreeing to refrain from certain conduct in its marketing. Each of the three (3) named Class Representatives will be paid an amount not to exceed \$5,000, as awarded by the Court, to be paid from the \$2.3 million fund. New Balance has also agreed to separately pay an additional \$500,000 for notice and administration costs. In addition to the \$2.3 million fund and \$500,000 in notice and administration costs, New Balance has agreed to pay attorneys' fees and costs, separately, in a total amount not to exceed \$950,000, as awarded by the Court.

## **PART II. DESCRIPTION OF THE CLASS**

### **4. WHY IS THIS A "CLASS ACTION"?**

In a class action, one or more people, called Class Representatives (in this case, Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo), sue on behalf of themselves and other people who have similar claims. All these people are Plaintiffs and Class Members. The company they sue, in this case New Balance, is called the Defendant. One Court resolves the issues for all Class Members in a Class Action, except for those who exclude themselves from the Class. The Court in charge of this case is the United States District Court for the District of Massachusetts, located at the following address: 1 Boston Courthouse Way, Boston, Massachusetts 02210.

### **5. AM I A MEMBER OF THE CLASS?**

Except as noted below, the Class includes all persons or entities that bought Toning Shoes from New Balance U.S. Retailers, New Balance Stores, [shopnewbalance.com](http://shopnewbalance.com), [joesnewbalanceoutlet.com](http://joesnewbalanceoutlet.com), New Balance Outlets, or other third-party retailers from January 1, 2010 through [DATE].

### **6. ARE THERE EXCEPTIONS TO BEING INCLUDED?**

The Class does not include the following persons, entities, or claims:

- New Balance's board members or executive-level officers, including its attorneys;
- Persons or entities who purchased the Toning Shoes primarily for purposes of resale;
- Any claims for personal injury relating to the use of Toning Shoes;
- Distributors or re-sellers of Toning Shoes;
- The judge and magistrate judge and their immediate families presiding over the Action;

- Governmental entities; and
- Persons or entities who or which timely and properly exclude themselves from the Class as provided in the Settlement Agreement.

## **7. WHAT ARE THE “TONING SHOES”?**

“Toning Shoes” means New Balance’s toning shoes, referred to as the New Balance Rock&Tone, TrueBalance, Aravon Ria, Aravon Riley, or Aravon Quinn models.

## **8. I’M STILL NOT SURE IF I’M INCLUDED.**

If you do not understand whether or not you are a Class Member, you can visit our web site, [www.newbalancesettlement.com](http://www.newbalancesettlement.com), or you can contact Class Counsel.

# **PART III: DECISIONS YOU MUST MAKE NOW**

## **9. WHAT DO I NEED TO DO NOW?**

**FIRST**, you must decide whether you wish to remain in the Class or exclude yourself from the Class. If you want to be excluded from the Class, you must write to the Class Action Settlement Administrator as described below in Question 21 **no later than [DATE]**.

**SECOND**, if you remain in the Class, you may object to any part of the proposed settlement by filing a written objection with the Court. You must also provide a copy to Class Counsel and New Balance’s Counsel, as described in Question 24. The Court and the parties must **receive** your written objection **no later than [DATE]**.

Additionally, if you file an objection, you may also request to appear and speak at the Court’s Fairness Hearing. If you wish to appear and speak you must submit an objection and, also, file and serve a Notice of Intention to Appear at the Fairness Hearing, **by [DATE]**. See Question 29 for more information.

**THIRD**, if you remain a Class Member, you can submit a Claim Form, as described below. Claim Forms may be submitted online no later than **[DATE]** or mailed, postmarked no later than **[DATE]**. You may submit one Claim Form for each pair of eligible Toning Shoes purchased.

## **10. WHAT DO I GIVE UP IF I CHOOSE TO STAY IN THE CLASS?**

If you choose to remain in the Class, you may submit a Claim Form and may receive payment under the settlement. You will be deemed to give New Balance and the Released Parties the Release and Waiver of Claims set forth in **Appendix A**. You will also be bound by all Court actions and judgments entered. You will not be able to sue or otherwise proceed against New Balance on any claims related to this lawsuit.

## **11. DO I HAVE TO SIGN A RELEASE?**

No. If you remain in the Class, you will automatically release New Balance and the Released Parties from any claims set forth in **Appendix A** and will give up your rights to pursue or continue any action against New Balance relating to your Toning Shoes and the claims at issue in this lawsuit. **A word-for-word copy of the Release section from the Settlement Agreement is attached to this Notice as Appendix A.** Because Class Members will release a wide range of claims in order to receive the benefits in the Settlement Agreement, please carefully read the “Release And Waiver of Claims” attached to this Notice as **Appendix A**.

## **12. WHAT IF I DO NOTHING?**

**If you are a Class Member and do nothing, you will not get any payment from the settlement, but will be bound by the settlement’s release and waiver of claims.** You must complete and submit a Claim Form on or before the deadline, which is [DATE], in order to be considered for payment under the settlement.

Unless you exclude yourself from the Class, if the settlement is approved all of the Court’s orders will apply to you and you won’t be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against New Balance about the claims in this lawsuit, ever again, regardless of whether you submit a Claim Form.

## **PART IV: SETTLEMENT BENEFITS – WHAT YOU CAN GET**

## **13. WHAT CAN I GET FROM THE SETTLEMENT?**

Your payment in this settlement depends upon the approval of your claim and the total sum of all approved Claims submitted by all other Class Members and other factors specified in the Settlement Agreement and in this Class Notice. As a result, the amount of relief available to eligible Class Members may vary.

If the total value of all approved Claims submitted by Class Members exceeds the amount of money available to pay claims (*i.e.*, \$2.3 Million less any fees, costs, and payments specified in the Settlement Agreement), each eligible Class Member’s award shall be reduced on a pro rata basis. Likewise, if the total value of all approved claims submitted by Class Members is less than the amount of money available to pay claims (*i.e.*, \$2.3 Million less any fees, costs, and payments specified in the Settlement Agreement), each eligible Class Member’s award shall be increased on a pro rata basis to a maximum of \$100. In the event a Class Member purchased more than one pair of the Toning Shoes, that Class Member may submit one Claim for each eligible pair of Toning Shoes purchased.

In addition, New Balance has agreed to refrain from making certain claims in their marketing and sale of toning shoes. Specifically, New Balance will not say that their toning shoes are effective in strengthening muscles or that wearing such products will result in measurable amounts of muscle toning unless it is supported by a well-controlled human clinical study. Please see the settlement agreement for further information.

#### **14. HOW CAN I MAKE A CLAIM?**

To receive a payment under the settlement, you must send in a Claim Form. A Claim Form and directions are attached as **Appendix B** to this Class Notice. You may also obtain and print a Claim Form and other relevant documents by visiting **[www.newbalancesettlement.com](http://www.newbalancesettlement.com)**. Please read the instructions and certification carefully, and fill out the form completely and accurately. Claim forms must be **electronically submitted** no later than **[DATE]** or mailed **postmarked** no later than **[DATE]** and addressed to:

New Balance Settlement  
c/o GCG  
P.O. Box 9903  
Dublin, OH 4017-5803

You may submit a claim form for each pair of eligible shoes purchased.

#### **15. WHAT IS THE CLAIM PROCESS?**

The Class Action Settlement Administrator will review each Claim Form. You may be requested to verify your purchase of Toning Shoes, by providing receipt(s) or other documentation. If you do not respond to these requests, it may result in the denial of your Claim. You will have thirty-five (35) days from the date of the Settlement Administrator's request to respond.

If a Claim is not contested, you will receive payment for that Claim in accordance with the terms of the Settlement Agreement. If the total Claims submitted by one person exceed \$200.00, proof of purchase to validate the claim may be requested. Finally, all usual and customary steps to prevent fraud and abuse in the Claim Process will be taken. This includes denying claims in whole or in part to prevent fraud or abuse. Class Counsel and New Balance will be provided a report on the denial of any claim due to insufficient documentation and may recommend additional action including payment.

The payment of approved Claims shall begin ten (10) days after the close of the Claim Period so long as this period is after the date the settlement is final and approved, including any appeals that must be resolved in favor of the settlement (the "Final Settlement Date"). Please see the settlement agreement and Question 18 for further information on how the Final Settlement Date is determined. The payment process shall be completed with approved Claims within one hundred twenty (120) days from its beginning.

#### **16. HOW MUCH IS THE CLAIM PROCESS WORTH TO THE CLASS?**

The settlement will provide a fund of \$2.3 million that will be used to pay (i) a portion of the costs and expenses associated with the notice and claims administration that exceed \$500,000 (New Balance will pay such costs and expenses up to \$500,000 separately and in addition to the \$2.3 Million fund); (ii) incentive payments of up to \$5,000 to each named plaintiff, as ordered by the court; and (iii) valid and approved Claims submitted by Class Members pursuant to the Claim Process.

The fund will not be used to pay New Balance's attorneys' fees and costs or Class Counsels' attorneys' fees and costs.

#### **17. WHAT HAPPENS AFTER ALL CLAIMS ARE PROCESSED AND THERE ARE FUNDS REMAINING?**

If there are any funds remaining after all claims are processed, those funds shall be awarded *cy pres* and distributed to the following non-profit organizations: The Special Olympics ([www.specialolympics.org](http://www.specialolympics.org)), KaBOOM ([www.kaboom.org](http://www.kaboom.org)), and Playworks ([www.playworks.org](http://www.playworks.org)). No remaining funds will be returned to New Balance.

#### **18. WHEN WILL I GET MY PAYMENT, IF ANY?**

The Court will hold a Fairness Hearing on [DATE] at [TIME] to decide whether or not to approve the proposed settlement. The Court must finally approve the proposed settlement before any payments can be made. The Court will grant its approval only if it finds that the proposed settlement is fair, reasonable, and adequate. In addition, the Court's order may be subject to appeals. It is always uncertain whether these appeals can be resolved, and resolving them takes time, sometimes more than a year. Finally, there remains a possibility that this settlement may be terminated for other reasons. Everyone who sends in a Claim Form will be informed of the progress of the settlement. Please be patient. **The payment of approved Claims will begin ten (10) days after the close of the Claim Period so long as this is after the Final Settlement Date. It may begin sooner if agreed to by Plaintiffs' Counsel and New Balance. In the event the Final Settlement Date falls after the close of the Claim Period, then payments of approved Claims will begin ten (10) days after the Final Settlement Date.**

**The Class Action Settlement Administrator shall have completed the payment to Class Members who have submitted timely, valid, and approved Claims, no later than one hundred and twenty (120) days after the Final Settlement Date or the close of the Claim Period, whichever is later.**

#### **PART V: CAN I FILE A LATER LAWSUIT MAKING SIMILAR CLAIMS?**

**No. If you remain a member of the Class and the settlement is finally approved, you will be automatically prohibited from starting or continuing any lawsuit or other proceeding against New Balance if those claims have been (or could have been) asserted in this lawsuit.**

As part of this settlement, the Court has preliminary stopped all Class Members and/or their representatives (who do not timely exclude themselves from the Class) from filing, participating in, or continuing litigation as Class Members or otherwise against New Balance (or against any of its related parties or affiliates), and/or from receiving any benefits from any lawsuit, administrative, or regulatory proceeding or order in any jurisdiction, based on or relating to the claims or causes of actions or the facts, and circumstances relating thereto, in the class action.

The Court has also preliminary stopped all persons from filing, beginning, or prosecuting a

lawsuit against New Balance (or against any of its related parties or affiliates) as a class action, a separate class, or group for purposes of pursuing a putative class action (including by seeking to amend a pending complaint to include class allegations or by seeking class certification in a pending action in any jurisdiction) on behalf of Class Members who do not timely exclude themselves from the Class, based on or relating to the claims, facts, and/or circumstances of the class action.

Upon final approval of the settlement, Plaintiffs and New Balance will ask the Court to enter a permanent ruling forbidding all Class Members and/or their representatives and/or personnel from engaging in the activities described above. All Class Members will be bound by this order.

## PART VI: THE LAWYERS REPRESENTING THE CLASS

### 19. DO I HAVE A LAWYER IN THIS CASE?

The Court has designated attorneys at the law firm of **Ahdoot & Wolfson, P.C.** to represent you and the other Class Members in this lawsuit. The lawyers representing you and the Class Members are called “Class Counsel.” **You will not be charged for the services of the Class Counsel.** No later than fourteen (14) days prior to the objection deadline (see Part VIII), Class Counsel shall submit a request to the Court for payment of attorneys’ fees and costs not to exceed \$950,000. Any fees and costs awarded by the Court will be paid by New Balance and will not reduce the settlement relief available to Class Members.

You may contact Class Counsel about this lawsuit and proposed settlement at the following address:

Robert Ahdoot  
Tina Wolfson  
10850 Wilshire Blvd., Suite 370  
Los Angeles, California 90024  
classactioncounsel@gmail.com

You have the right to retain your own lawyer to represent you in this case, but you are not obligated to do so. If you do hire your own lawyer, you will have to pay his or her fees and expenses. You also have the right to represent yourself before the Court without a lawyer.

### 20. WILL THE LAWYERS AND CLASS REPRESENTATIVES IN THE ACTION BE PAID?

Class Counsel have prosecuted this case on a completely contingent fee and have not been paid anything to date for their services. Class Counsel will request attorneys’ fees and expenses not to exceed \$950,000 to be paid directly by New Balance outside of the Settlement Fund.

Class Counsel will petition the Court for incentive awards of up to \$5,000.00 for each of the named plaintiffs, Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo. The purpose of such awards is to compensate for efforts and risks taken by them on behalf of the Class. Any

such amount awarded by the Court as an incentive award for the named plaintiffs will be paid out of the \$2.3 Million fund.

New Balance shall pay the attorneys' fees and expenses and awards to Class Counsel within fifteen (15) business days after the Final Settlement Date. New Balance shall not be responsible for or obligated to pay any other fees, expenses, or costs in connection with this lawsuit or the Settlement Agreement, other than the amounts expressly provided for in the Settlement Agreement.

## PART VII: EXCLUDING YOURSELF FROM THE SETTLEMENT

If you don't want a payment from this settlement, but you want to keep the right to sue or continue to sue New Balance on your own about the legal issues in this case, then you must take steps to get out of the Class. This is called excluding yourself or "opting out" of the Class.

### 21. HOW DO I GET OUT OF OR EXCLUDE MYSELF FROM THE SETTLEMENT?

If you want to be excluded from the Class, you must write to the Class Action Settlement Administrator. To exclude yourself from the settlement, you must send a letter by mail. Your exclusion request letter must be **postmarked** no later than **[DATE]**. Send your letter to:

New Balance Settlement  
c/o GCG  
P.O. Box 9903  
Dublin, OH 4017-5803

Your letter requesting exclusion does not need to be in any particular form, but it shall include the following information in order to be effective:

- (1) your name;
- (2) your address;
- (3) your telephone number;
- (4) the Toning Shoes for which you are requesting exclusion;
- (5) a statement that you wish to be excluded from the Class;
- (6) your signature; and
- (7) the case name and case numbers: *Kimberly Carey, et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.)

Please write "**EXCLUSION REQUEST**" on the lower left-hand corner of the *front* of the envelope.

### 22. WHAT HAPPENS IF I EXCLUDE MYSELF FROM THE CLASS?

If you request exclusion from the Class, then for each of the excluded Toning Shoes:

- You will **not** be eligible for payment under the proposed settlement;

- You will **not** be allowed to object to the terms of the proposed settlement, and
- You will **not** be bound by any subsequent rulings entered in this case if the proposed settlement is finally approved.

**However, if your request for exclusion is late or deficient, you will still be a part of the Class, you will be bound by the settlement and by all other orders and judgments in this lawsuit, and you will not be able to participate in any other lawsuits based on the claims in this case.**

### **23. IF I DON'T EXCLUDE MYSELF, CAN I SUE NEW BALANCE LATER?**

**No.** If the Court approves the proposed settlement and you do not exclude yourself from the Class, you release (give up) all claims that have been or could have been asserted in this lawsuit relating to your Toning Shoes.

## **PART VIII: OBJECTING TO THE SETTLEMENT**

You have the right to tell the Court that you do not agree with the settlement or any or all of its terms.

### **24. HOW CAN I OBJECT TO THE PROPOSED SETTLEMENT?**

If you choose to remain a Class Member, you have a right to object to any part of the proposed settlement. The Court will consider your views.

To object, you must send a letter saying that you object to *Kimberly Carey, et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.) Your written objection must include:

- (1) your name;
- (2) your address;
- (3) your telephone number;
- (4) proof of purchase of Toning Shoes, such as a cash register receipt, a credit card receipt, or a credit card statement that sufficiently indicates the purchase of the Toning Shoes;
- (5) a written statement of your objection(s), including any legal support and/or any supporting evidence you wish to introduce;
- (6) a statement of whether you intend to appear and argue at the Fairness Hearing;
- (7) your signature; and
- (8) the case name and case numbers: *Kimberly Carey, et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.)

If you choose to object, in order to be considered by the Court, your written objections must be **filed with the Court, and copies must be received by all of the following recipients no later than [DATE]:**

<b>COURT</b>	<b>CLASS COUNSEL</b>	<b>DEFENSE COUNSEL</b>
--------------	----------------------	------------------------

Clerk of the Court <b>United States District Court  District of Massachusetts</b> John Joseph Moakley U.S. Courthouse 1 Courthouse Way Boston, Massachusetts 02210	Robert Ahdoot Tina Wolfson <b>Ahdoot &amp; Wolfson, P.C.</b> 10850 Wilshire Blvd. Suite 370 Los Angeles, California 90024	R. David Hosp <b>GOODWIN PROCTER  LLP</b> 53 State Street Boston, Massachusetts 02109
---	--	--

If you file objections, but the Court approves the settlement as proposed, you can still complete a Claim Form to be eligible for payment under the settlement, subject to the terms and conditions discussed in this Notice and in the Settlement Agreement.

## **25. WHAT IS THE DIFFERENCE BETWEEN “OBJECTING” AND “EXCLUDING”?**

Objecting is simply a way of telling the Court that you don’t like something about the settlement. You can only object if you stay in the Class.

If you object to the settlement, you still remain a member of the Class and you will still be eligible to submit a Claim Form. You will also be bound by any subsequent rulings in this case and you will not be able to file or participate in any other lawsuit or proceeding based upon or relating to the claims, causes of action, facts, or circumstances of this case. Excluding yourself is telling the Court that you don’t want to be a part of the Class. If you exclude yourself, you have no basis to object to the settlement and appear at the Fairness Hearing because it no longer affects you.

## **PART IX: THE COURT’S FAIRNESS HEARING**

The Court will hold a final hearing (called a Fairness Hearing) to decide whether to finally approve the settlement. You may attend and ask to speak, but you don’t have to.

## **26. WHEN AND WHERE WILL THE COURT DECIDE WHETHER TO APPROVE THE SETTLEMENT?**

On [DATE], at [TIME], the Court will hold a Fairness Hearing at the United States District Court for the District of Massachusetts, before the Honorable Leo T. Sorokin, in Courtroom 24, John Joseph Moakley U.S. Courthouse, 1 Courthouse Way, Boston, Massachusetts 02210.

At the hearing, the Court will consider whether to grant final certification to the Class for settlement purposes, whether to approve the proposed settlement as fair, reasonable, and adequate, and will make a final ruling on all related settlement issues. The Court will also decide whether to award attorneys’ fees and costs, as well as Class Representatives awards.

## **27. DO I HAVE TO COME TO THE HEARING?**

No. Class Counsel will answer questions the Court may have at the Fairness Hearing. But you are welcome to come at your own expense. Please note that the Court has the right to change the

date and/or time of the Fairness Hearing without further notice. If you are planning to attend the hearing, you should confirm the date and time before going to the Court.

## **28. MAY I SPEAK AT THE FAIRNESS HEARING?**

Yes, if you have filed an objection, you may ask the Court for permission to speak at the hearing. To do so, you must submit an objection and also file a document called a “Notice of Intention to Appear.”

## **29. WHAT DO I HAVE TO DO TO SPEAK AT THE FAIRNESS HEARING?**

If you are a member of the Class, and you (or your attorney) wants to appear and speak at the Fairness Hearing, you (or your attorney) must have submitted an objection and must file a **Notice of Intention to Appear at the Fairness Hearing** with the Clerk of the Court, and deliver that Notice to the attorneys for both sides, at the addresses listed above. **Your Notice of Intention to Appear at the Fairness Hearing must be filed and received by the Court, New Balance’s Counsel, and Class Counsel, at the addresses specified in Question 24 no later than [DATE].**

If you file objections and appear at the Fairness Hearing, but the Court approves the settlement as proposed, you can still complete a Claim Form to be eligible for payment under the settlement, subject to the terms and conditions discussed in this Notice and in the Settlement Agreement.

## **PART X: GETTING ADDITIONAL INFORMATION**

This Notice and the accompanying documents summarize the proposed settlement. More details are contained in the Settlement Agreement. The full Settlement Agreement is on file with the Clerk of the Court. For a more detailed statement of the matters involved in this case, you may review the complaint and the other papers and Court orders on file in the Clerk’s office at any time during normal business hours, Monday through Friday, 8:30 a.m. to 5:00 p.m. EDT.

If you have questions after reading this notice, you can visit **[www.newbalancesettlement.com](http://www.newbalancesettlement.com)** to obtain additional information about the proposed settlement and the Claim Form or you can call, toll-free, 1-866-893-0232 to obtain additional information about the settlement. You may also direct your questions about the settlement to Class Counsel, whose names and addresses are listed in Question 20 of this Notice.

## **PLEASE DO NOT CALL THE COURT OR THE CLERK OF THE COURT**

Dated: [DATE], 2012

Clerk of the Court for the United States  
District Court for the District of  
Massachusetts

## **APPENDIX A**

### **Release And Waiver of Claims**

1. The Parties agree to the following release and waiver, which shall take effect upon entry of the Final Order and Final Judgment.

2. In consideration for the Settlement benefits described in this Agreement, Plaintiffs and the other members of the Class, on behalf of themselves, their heirs, guardians, assigns, executors, administrators, predecessors, and/or successors, will fully, finally, and forever release, relinquish, acquit, and discharge the Released Parties from – and shall not now or hereafter institute, maintain, or assert on their own behalf, on behalf of the Class, or on behalf of any other person or entity – any and all manner of claims, actions, causes of action, suits, rights, debts, sums of money, payments, obligations, reckonings, contracts, agreements, executions, promises, damages, liens, judgments, and demands of whatever kind, type, or nature whatsoever, both at law and in equity, whether past, present, or future, mature or not yet mature, known or unknown, suspected or unsuspected, contingent or noncontingent, whether based on federal, state, or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim that Plaintiffs or Class Members ever had, now have, may have, or hereafter can, shall, or may ever have against the Released Parties in any other court, tribunal, arbitration panel, commission, agency, or before any governmental and/or administrative body, or any other adjudicatory body, on the basis of, connected with, arising from, or in any way whatsoever relating to the purchase of Toning Shoes during the Class Period and the claims alleged in the complaints in the Action, and, more particularly, but without in any way limiting the generality of the foregoing, arising from, directly or indirectly, or in any way whatsoever pertaining or relating to the claims alleged in the complaints in the Action, including, but not limited to, communications, disclosures, nondisclosures, representations, statements, claims, omissions, messaging, design, testing, marketing, advertising, promotion, packaging, displays, brochures, studies, manufacture, distribution, operation, performance, functionality, notification, providing, offering, dissemination, replacement, sale, and/or resale by the Released Parties of the Toning Shoes; any claims for rescission, restitution, or unjust enrichment for all damages of any kind; violations of any state’s deceptive, unlawful and/or unfair business and/or trade practices, false, misleading or fraudulent advertising, consumer fraud and/or consumer protection statutes; any violation of the Uniform Commercial Code, any breaches of express, implied and/or any other warranties, any similar federal, state, or local statutes, codes, damages, costs, expenses, extra-contractual damages, compensatory damages, exemplary damages, special damages, penalties, punitive damages and/or damage multipliers, disgorgement, declaratory relief, expenses, interest, and/or attorneys’ fees and costs against the Released Parties pertaining or relating to the claims alleged in the complaints in the Action, notwithstanding that Plaintiffs and the Class acknowledge that they may hereafter discover facts in addition to or different from those that they now know or believe to be true concerning the subject matter of the Action and/or the Release herein.

3. “Released Parties” means New Balance, its past, present, and future parents (including but not limited to New Balance, Inc., and any intermediary and/or ultimate parents), officers, directors, employees, stockholders, agents, attorneys, administrators, successors, suppliers, distributors, reorganized successors, spin-offs, assigns, holding companies, related companies,

subsidiaries, affiliates, joint-ventures, partners, members, divisions, predecessors, and authorized retailers of Toning Shoes for resale, including, without limitation, New Balance U.S. Retailers, New Balance Stores, shopnewbalance.com, joesnewbalanceoutlet.com, New Balance Outlets, as well as other third-party retailers of the Toning Shoes.

4. Notwithstanding the language in this section and/or this Agreement, the Plaintiffs and the other members of the Class are not releasing any claims of or relating to personal injury.

5. Plaintiffs represent and warrant that they are the sole and exclusive owner of all claims that they personally are releasing under this Agreement. Plaintiffs further acknowledge that they have not assigned, pledged, or in any manner whatsoever, sold, transferred, assigned, or encumbered any right, title, interest, or claim arising out of or in any way whatsoever pertaining to the Action, including without limitation, any claim for benefits, proceeds, or value under the Action, and that Plaintiffs are not aware of anyone other than themselves and other class members claiming any interest, in whole or in part, in the Action or in any benefits, proceeds, or values under the Action. Class Members submitting a Claim Form shall represent and warrant therein that they are the sole and exclusive owner of all claims that they personally are releasing under the Settlement and that they have not assigned, pledged, or in any manner whatsoever, sold, transferred, assigned, or encumbered any right, title, interest, or claim arising out of or in any way whatsoever pertaining to the Action, including without limitation, any claim for benefits, proceeds, or value under the Action, and that such Class Member(s) are not aware of anyone other than themselves claiming any interest, in whole or in part, in the Action or in any benefits, proceeds, or values under the Action.

6. Without in any way limiting its scope, and, except to the extent otherwise specified in the Agreement, this Release covers by example and without limitation, any and all claims for attorneys' fees, costs, expert fees, or consultant fees, interest, or litigation fees, costs or any other fees, costs, and/or disbursements incurred by Plaintiffs' Counsel, or by Plaintiffs or the Class Members.

7. Plaintiffs expressly understand and acknowledge, and all Class Members will be deemed by the Final Order and Final Judgment to acknowledge, that certain principles of law, including, but not limited to, Section 1542 of the Civil Code of the State of California, provide that "a general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." To the extent that anyone might argue that these principles of law are applicable – notwithstanding that the Parties have chosen Massachusetts law to govern this Agreement – Plaintiffs hereby agree that the provisions of all such principles of law or similar federal or state laws, rights, rules, or legal principles, to the extent they are found to be applicable herein, are hereby knowingly and voluntarily waived, relinquished, and released by Plaintiffs and all Class Members.

8. Nothing in this Release shall preclude any action to enforce the terms of the Agreement, including participation in any of the processes detailed therein.

9. Plaintiffs and Defendant hereby agree and acknowledge that the provisions of this Release together constitute an essential and material term of the Agreement and shall be included in any Final Order and Final Judgment entered by the Court.

**APPENDIX B**

**Claim Form**

**EXHIBIT 3**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

KIMBERLY CAREY, SHANNON  
DILBECK, and VICTORIA MOLINAROLO,  
individuals, on their own behalf and on behalf  
of all others similarly situated,

Plaintiffs,

v.

NEW BALANCE ATHLETIC SHOE, INC.,

Defendant.

Civil Action No. 11-cv-10001-LTS

**FINAL ORDER APPROVING CLASS ACTION SETTLEMENT**

This motion for final approval, having been brought before the Court jointly by the Parties pursuant to their Settlement Agreement, with its attached exhibits (collectively, the “Settlement Agreement”), signed and filed with this Court on [DATE], to settle *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, 11-cv-10001-LTS (D. Mass.) (the “Action”); and

The Court having entered an Order dated [DATE] (the “Preliminary Approval Order”), preliminarily certifying the putative class in this action for settlement purposes only under Fed. R. Civ. P. 23(a) and (b)(3), ordering individual and publication notice to potential Class Members, scheduling a Fairness Hearing for [DATE], providing potential Class Members with an opportunity either to exclude themselves from the settlement class or to object to the proposed settlement and issuing related Orders; and

The Court having held a Fairness Hearing on [DATE] to determine whether to grant final approval of the proposed settlement and issue related relief; and

The Court having considered the papers submitted by the Parties and by all other persons who timely submitted papers in accordance with the Preliminary Approval Order, and having heard oral presentations by the Parties and all persons who complied with the Preliminary Approval Order, and based on all of the foregoing, together with this Court's familiarity with the Action, it is hereby

**ORDERED, ADJUDGED AND DECREED** as follows:

1. **Incorporation of Other Documents.** This Final Order Approving Class Action Settlement incorporates and makes a part hereof: (a) the Settlement Agreement, including all amendments and exhibits thereto, and definitions included therein, which was signed and filed with this Court on [DATE]; (b) the briefs, affidavits, declarations, and other materials filed in support of the settlement and Class Counsel's request for an award of attorneys' fees and reimbursement of expenses; (c) the record at the Fairness Hearing; (d) the documents listed on the docket sheet or otherwise submitted to the Court; and (e) all prior proceedings in the Action.

2. **Jurisdiction.** Because due, adequate, and the best practicable notice has been disseminated and all potential Class Members have been given the opportunity to exclude themselves from or object to this class action settlement, the Court has personal jurisdiction over all Class Members (as defined below). The Court has subject-matter jurisdiction over the claims asserted in the complaint and/or the Action pursuant to 28 U.S.C. §§ 1332 and 1367, including, without limitation, jurisdiction to approve the proposed settlement and the Settlement Agreement and all exhibits attached thereto, grant final certification to the Class, dismiss the Action on the merits and with prejudice, and issue related orders. The Court finds that venue is proper in this district pursuant to 28 U.S.C. § 1391.

3. **Final Class Certification.** The Class preliminarily certified by this Court is hereby finally certified for settlement purposes only under Fed. R. Civ. P. 23(a), (b)(3), and (c)(2), the Court finding that the Class fully satisfies all the applicable requirements of Fed. R. Civ. P. 23 and due process. The Class shall consist of all persons or entities that purchased, any and all Toning Shoes from New Balance and/or its authorized retailers including, without limitation, New Balance U.S. Retailers, New Balance Stores, shopnewbalance.com, joesnewbalanceoutlet.com, New Balance Outlets and/or other third-party retailers, from January 1, 2010, up to and including [DATE] (the “Class Period”). “Toning Shoes” means New Balance’s toning shoes purchased as new by Class Members during the Class Period, which are Rock&Tone, TrueBalance, and Aravon Ria, Aravon Riley, and Aravon Quinn toning shoes. Excluded from the Class are: (a) New Balance's Board members and executive-level officers, including its attorneys; (b) persons or entities who purchased the Toning Shoes primarily for the purpose of resale; (c) claims for personal injury relating to the use of Toning Shoes; (d) distributors or re-sellers of Toning Shoes; (e) the judge and magistrate judge and their immediate families presiding over the Action; (f) governmental entities; and (g) persons or entities who or which timely and properly exclude themselves from the Class as provided in the Settlement Agreement.

4. **Requests for Exclusion.** The Court finds that only those persons and entities for the specific Toning Shoes listed in Exhibit A to the Affidavit of \_\_\_\_\_ and filed with the Court have submitted timely and valid requests for exclusion from the Class and are therefore not bound by this Final Order and accompanying Final Judgment. Class Counsel and New Balance’s Counsel may mutually agree to allow additional Class Members to exclude themselves or to withdraw their exclusion requests by filing an appropriate notice with the Court.

5. **Adequacy of Representation.** Class Plaintiffs Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo (collectively, “Class Plaintiffs”) have adequately represented the Settlement Class for purposes of entering into and implementing the settlement. Robert Ahdoot and Tina Wolfson of Ahdoot & Wolfson, P.C. are experienced and adequate Class Counsel. Class Plaintiffs and Class Counsel have satisfied the requirements of Fed. R. Civ. P. 23(a)(4), and 23(g).

6. **Class Notice.** The Court finds that the dissemination of the Class Notice, the publication of the Summary Settlement Notice, the establishment of a website containing settlement-related materials, the establishment of a toll-free telephone number, and all other notice methods set forth in the Settlement Agreement and the Notice Administrator’s Declaration and the notice dissemination methodology implemented pursuant to the Settlement Agreement and this Court’s Preliminary Approval Order, as described in the Notice Administrator’s Declaration, a copy of which is incorporated herein and made a part hereof:

- a. constituted the best practicable notice to Class Members under the circumstances of the Action;
- b. constituted notice that was reasonably calculated, under the circumstances, to apprise Class Members of: (i) the pendency of this action; (ii) the terms of the proposed settlement; (iii) their rights under the proposed settlement; (iv) their right to exclude themselves from the Class and the proposed settlement; (v) their right to object to any aspect of the proposed settlement (including, but not limited to, final certification of the settlement class, the fairness, reasonableness, or adequacy of the proposed settlement, the adequacy of the Class’s representation by Plaintiff or Class Counsel, and/or the award of attorneys’ fees); (vi) their right

to appear at the Fairness Hearing – either on their own or through counsel hired at their own expense – if they did not exclude themselves from the Class; and (vii) the binding effect of the Orders and Judgment in this action, whether favorable or unfavorable, on all persons who did not request exclusion from the Class;

- c. constituted notice that was reasonable, due, adequate, and sufficient notice to all persons and entities entitled to be provided with notice; and
- d. constituted notice that met all applicable requirements of the Federal Rules of Civil Procedure, 28 U.S.C. § 1715, the Due Process Clause of the United States Constitution, and any other applicable law, as well as complied with the Federal Judicial Center’s illustrative class action notices.

7. **Final Settlement Approval.** The terms and provisions of the proposed settlement and Settlement Agreement, including all exhibits, have been entered into in good faith and are hereby fully and finally approved as fair, reasonable, and adequate as to, and in the best interests of, each of the Parties and the Class Members, and in full compliance with all applicable requirements of the Federal Rules of Civil Procedure, the Class Action Fairness Act (P.L. 109-2), the United States Constitution (including the Due Process Clause), and any other applicable law. The settlement is approved and all objections to the settlement are overruled as without merit. The Parties and Class Members are hereby directed to implement and consummate the Settlement Agreement according to its terms and provisions. New Balance shall take all steps necessary and appropriate to provide Class Members with the benefits to which they are entitled under the terms of the Settlement Agreement.

8. **Early Implementation.** New Balance and Class Counsel are hereby authorized, and without requiring further approval of this Court – to implement the settlement before the

Final Settlement Date (as defined in the Settlement Agreement), in which case all provisions in the Settlement Agreement specifying actions to be taken on or after the Final Settlement Date shall, to the extent necessary, be deemed to provide that those actions shall be taken on or after the date New Balance elects to implement the settlement.

9. **Binding Effect.** The terms of the Settlement Agreement and of this Final Order and the accompanying Final Judgment shall be forever binding on Plaintiffs, New Balance and all Class Members, as well as their heirs, executors, administrators, predecessors, successors, and assigns, and those terms shall have res judicata and other preclusive effect in all pending and future claims, lawsuits, or other proceedings maintained by or on behalf of any such persons, to the extent those claims, lawsuits or other proceedings involve matters that were or could have been raised in the Action or are otherwise encompassed by the Release.

10. **Release.** The following Release, which is also set forth in Section VII of the Settlement Agreement, is expressly incorporated herein in all respects, including all defined terms used therein, is effective as of the date of this Final Order and the accompanying Final Judgment, and forever discharges the Released Parties from any claims or liabilities arising from or related to the Release:

1) In consideration for the Settlement benefits described in this Agreement, Plaintiffs and the other members of the Class, on behalf of themselves, their heirs, guardians, assigns, executors, administrators, predecessors, and/or successors, will fully, finally, and forever release, relinquish, acquit, and discharge the Released Parties from – and shall not now or hereafter institute, maintain, or assert on their own behalf, on behalf of the Class or on behalf of any other person or entity – any and all manner of claims, actions, causes of action, suits, rights, debts, sums of money, payments, obligations, reckonings, contracts, agreements, executions, promises, damages, liens, judgments and demands of whatever kind, type, or nature whatsoever, both at law and in equity, whether past, present, or future, mature or not yet mature, known or unknown, suspected or unsuspected, contingent or noncontingent, whether based on federal, state, or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim that Plaintiffs or Class Members ever had, now have, may have, or hereafter

can, shall or may ever have against the Released Parties in any other court, tribunal, arbitration panel, commission, agency, or before any governmental and/or administrative body, or any other adjudicatory body, on the basis of, connected with, arising from, or in any way whatsoever relating to the purchase of Toning Shoes during the Class Period and the claims alleged in the complaint in the Action, and, more particularly, but without in any way limiting the generality of the foregoing, arising from, directly or indirectly, or in any way whatsoever pertaining or relating to the claims alleged in the complaint in the Action, including, but not limited to, communications, disclosures, nondisclosures, representations, statements, claims, omissions, messaging, design, testing, marketing, advertising, promotion, packaging, displays, brochures, studies, manufacture, distribution, operation, performance, functionality, notification, providing, offering, dissemination, replacement, sale, and/or resale by the Released Parties of the Toning Shoes; any claims for rescission, restitution, or unjust enrichment for all damages of any kind; violations of any state's deceptive, unlawful, and/or unfair business and/or trade practices, false, misleading, or fraudulent advertising, consumer fraud, and/or consumer protection statutes; any violation of the Uniform Commercial Code, any breaches of express, implied and/or any other warranties, any similar federal, state, or local statutes, codes, damages, costs, expenses, extra-contractual damages, compensatory damages, exemplary damages, special damages, penalties, punitive damages, and/or damage multipliers, disgorgement, declaratory relief, expenses, interest, and/or attorneys' fees and costs against the Released Parties pertaining to or relating to the claims alleged in the complaint in the Action, notwithstanding that Plaintiffs and the Class acknowledge that they may hereafter discover facts in addition to or different from those that they now know or believe to be true concerning the subject matter of the Action and/or the Release herein.

2) Notwithstanding the language in this section and/or this Agreement, the Plaintiffs and the other members of the Class are not releasing any claims of or relating to personal injury.

3) Plaintiffs represent and warrant that they are the sole and exclusive owner of all claims that they personally are releasing under this Agreement. Plaintiffs further acknowledge that they have not assigned, pledged, or in any manner whatsoever, sold, transferred, assigned, or encumbered any right, title, interest or claim arising out of or in any way whatsoever pertaining to the Action, including without limitation, any claim for benefits, proceeds, or value under the Action, and that Plaintiffs are not aware of anyone other than themselves claiming any interest, in whole or in part, in the Action or in any benefits, proceeds, or values under the Action. Class Members submitting a Claim Form shall represent and warrant therein that they are the sole and exclusive owner of all claims that they personally are releasing under the Settlement and that they have not assigned, pledged, or in any manner whatsoever, sold, transferred, assigned, or encumbered any right, title, interest, or claim arising out of or in any way whatsoever pertaining to the Action, including without limitation, any claim for benefits, proceeds, or value under the

Action, and that such Class Member(s) are not aware of anyone other than themselves claiming any interest, in whole or in part, in the Action or in any benefits, proceeds, or values under the Action.

4) Without in any way limiting its scope, and, except to the extent otherwise specified in the Agreement, this Release covers by example and without limitation, any and all claims for attorneys' fees, costs, expert fees, or consultant fees, interest, or litigation fees, costs or any other fees, costs, and/or disbursements incurred by Plaintiffs' Counsel, or by Plaintiffs or the Class Members.

5) Plaintiffs expressly understand and acknowledge, and all Class Members will be deemed by the Final Order and Final Judgment to acknowledge, that certain principles of law, including, but not limited to, Section 1542 of the Civil Code of the State of California, provide that "a general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." To the extent that anyone might argue that these principles of law are applicable – notwithstanding that the Parties have chosen Massachusetts law to govern this Agreement – Plaintiffs hereby agree that the provisions of all such principles of law or similar federal or state laws, rights, rules, or legal principles, to the extent they are found to be applicable herein, are hereby knowingly and voluntarily waived, relinquished, and released by Plaintiffs and all Class Members.

6) Nothing in this Release shall preclude any action to enforce the terms of the Agreement, including participation in any of the processes detailed therein.

7) Plaintiffs and Defendant hereby agree and acknowledge that the provisions of this Release together constitute an essential and material term of the Agreement and shall be included in any Final Order and Final Judgment entered by the Court.

11. **Permanent Injunction.** All Class Members and/or their representatives who have not been timely excluded from the Class are hereby permanently barred and enjoined from bringing, filing, commencing, prosecuting, maintaining, intervening in, participating in, continuing or receiving any benefits from, as class members or otherwise, any lawsuit (including putative class actions), arbitration, administrative, regulatory, or other proceeding in any jurisdiction that is covered by the Release. All Class Members and all persons in active concert or participation with Class Members are permanently barred and enjoined from organizing or soliciting the participation of any Class Members who did not timely exclude themselves from

the Class into a separate class or group for purposes of pursuing a putative class action, any claim or lawsuit in any jurisdiction that is covered by the Release. Pursuant to 28 U.S.C. §§ 1651 (a) and 2283, the Court finds that issuance of this permanent injunction is necessary and appropriate in aid of the Court's continuing jurisdiction and authority over the Action.

**12. Enforcement of Settlement.** Nothing in this Final Order or in the accompanying Final Judgment shall preclude any action to enforce the terms of the Settlement Agreement; nor shall anything in this Final Order or in the accompanying Final Judgment preclude Plaintiffs or other Class Members from participating in the Claim Process described in the Settlement Agreement if they are entitled to do so under the terms of the Settlement Agreement.

**13. Attorneys' Fees and Expenses.** Class Counsel are hereby awarded attorneys' fees and reimbursement of their disbursements and expenses in the amount of \_\_\_\_\_, which amounts are approved as fair and reasonable, pursuant to Fed. R. Civ. P. 23(h) and are in accordance with the terms of the Settlement Agreement. The Court finds that the above stated award of attorneys' fees is fair and reasonable in consideration of, among other things, the efforts of Class Counsel and the settlement they achieved for the Class. The Court finds that the amount of expenses is reasonable and that the expenses were reasonably incurred in the course of the litigation. Class Counsel, in their discretion, shall allocate and distribute this award of attorneys' fees and expenses among Plaintiffs' Counsel. All objections to Class Counsel's request for an award of attorneys' fees and reimbursement of expenses are hereby overruled.

**14. Incentive Awards.** The Court hereby awards \_\_\_\_\_ to each of the named Plaintiffs, Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo, as incentive awards in their capacities as representative Plaintiffs in the Action.

15. **No Other Payments.** The preceding two paragraphs of this Final Order cover, without limitation, any and all claims against the Released Parties for attorneys' fees and expenses, costs, or disbursements incurred by Class Counsel or any other counsel representing Plaintiffs or Class Members, or incurred by Plaintiffs or the Class Members, or any of them, in connection with or related in any manner to the Action, the settlement of the Action, the administration of such settlement, and/or the Release, except to the extent otherwise specified in this Final Order, and accompanying Final Judgment and the Settlement Agreement. Plaintiffs are not precluded from seeking attorneys' fees, expenses, costs, or disbursements from an objecting Class Member or his or her counsel (and not New Balance or its counsel) in connection with an appeal filed by an objecting Class Member.

16. **Modification of Settlement Agreement.** The Parties are hereby authorized, without needing further approval from the Court, to agree to and adopt such amendments to, and modifications and expansions of, the Settlement Agreement, and all exhibits attached, as are consistent with this Final Order and the accompanying Final Judgment and do not limit the rights of Class Members under the Settlement Agreement.

17. **Retention of Jurisdiction.** The Court has jurisdiction to enter this Final Order and the accompanying Final Judgment. Without in any way affecting the finality of this Final Order and/or the accompanying Final Judgment, this Court expressly retains jurisdiction as to all matters relating to the administration, consummation, enforcement and interpretation of the Settlement Agreement and of this Final Order and the accompanying Final Judgment, and for any other necessary purpose, including, without limitation:

- a. enforcing the terms and conditions of the Settlement Agreement and resolving any disputes, claims, or causes of action that, in whole or in part, are related to or arise

out of the Settlement Agreement, this Final Order or the accompanying Final Judgment (including, without limitation, whether a person or entity is or is not a Class Member; and whether claims or causes of action allegedly related to this case are or are not barred by this Final Order and the accompanying Final Judgment);

- b. entering such additional Orders as may be necessary or appropriate to protect or effectuate this Final Order and the accompanying Final Judgment, dismissing all claims on the merits and with prejudice, and permanently enjoining Class Members from initiating or pursuing related proceedings, or to ensure the fair and orderly administration of this settlement; and
- c. entering any other necessary or appropriate Orders to protect and effectuate this Court's retention of continuing jurisdiction; provided, however, that nothing in this paragraph is intended to restrict the ability of the Parties to exercise their rights under paragraphs 8 and 16 or as otherwise provided in the Settlement Agreement.

18. **No Admissions.** Neither this Final Order, the accompanying Final Judgment, nor the Settlement Agreement (nor any other document referred to herein, nor any action taken to carry out this Final Order or the accompanying Final Judgment) is, may be construed as, or may be used as an admission or concession by or against New Balance or Released Parties of the validity of any claim or defense or any actual or potential fault, wrongdoing, or liability whatsoever. Entering into or carrying out the Settlement Agreement, and any negotiations or proceedings related to it, shall not in any event be construed as, or deemed evidence of, an admission or concession as to New Balance's denials or defenses and shall not be offered or

received in evidence in any action or proceeding against any Party hereto in any court, administrative agency or other tribunal for any purpose whatsoever, except as evidence of the settlement or to enforce the provisions of this Final Order and the accompanying Final Judgment and the Settlement Agreement; provided, however, that this Final Order, the accompanying Final Judgment, and the Settlement Agreement may be filed in any action against or by New Balance or Released Parties to support a defense of res judicata, collateral estoppel, release, waiver, good-faith settlement, judgment bar or reduction, full faith and credit, or any other theory of claim preclusion, issue preclusion, or similar defense or counterclaim.

19. Dismissal of Action. The Action (including all individual and Class claims presented therein) is hereby dismissed with prejudice, without fees or costs to any Party except as otherwise provided in this Order and the accompanying Final Judgment and the Settlement Agreement.

---

LEO T. SOROKIN  
UNITED STATES MAGISTRATE JUDGE

**EXHIBIT 4**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

KIMBERLY CAREY, SHANNON DILBECK, and  
VICTORIA MOLINAROLO, individuals, on their  
own behalf and on behalf of all others similarly  
situated,

Plaintiffs,

v.

NEW BALANCE ATHLETIC SHOE, INC.,

Defendant.

Civil Action No. 11-cv-10001-LTS

**FINAL JUDGMENT**

IT IS on this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, HEREBY ADJUDGED AND  
DECREED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 58 THAT:

1. The settlement of this class action on the terms set forth in the Parties' Settlement Agreement, with exhibits (collectively, the "Settlement Agreement"), and definitions included therein, signed and filed with this Court on **[DATE]**, is finally approved, and the following class is granted final certification for settlement purposes only under Fed. R. Civ. P. 23(a) and (b)(3): all persons or entities that purchased any and all Toning Shoes from New Balance and/or its authorized retailers including, without limitation, New Balance U.S. Retailers, New Balance Stores, shopnewbalance.com, joesnewbalanceoutlet.com, New Balance Outlets, and/or other third-party retailers, from January 1, 2010 up to and including **[DATE]** (the "Class Period"). Excluded from the Class are: (a) New Balance's Board members and executive-level officers, including its attorneys; (b) persons or entities who purchased the Toning Shoes primarily for the purpose of resale; (c) claims for personal injury relating to the use of Toning Shoes; (d)

distributors or re-sellers of Toning Shoes; (e) the judge and magistrate judge and their immediate families presiding over the Actions; (f) governmental entities; and (g) persons or entities who or which timely and properly exclude themselves from the Class as provided in the Settlement Agreement. "Toning Shoes" means New Balance's toning shoes, purchased as new by Class Members during the Class Period, which are Rock&Tone, TrueBalance, and Aravon Ria, Aravon Riley, and Aravon Quinn toning shoes.

2. The Court finds that only those persons and entities listed in Exhibit \_\_\_\_ to the Affidavit of \_\_\_\_\_, and filed with the Court have submitted timely and valid requests for exclusion from the Class and are therefore not bound by this Final Judgment and accompanying Final Order. Class Counsel and New Balance's Counsel may mutually agree to allow additional Class Members to exclude themselves or to withdraw their exclusion requests by filing an appropriate notice with the Court.

3. The Class Notice, the Summary Settlement Notice, the web site, the toll-free telephone number, and all other notices in the Settlement Agreement and the Declaration of the Notice Administrator, and the notice methodology implemented pursuant to the Settlement Agreement: (a) constituted the best practicable notice under the circumstances; (b) constituted notice that was reasonably calculated to apprise Class Members of the pendency of the Actions, the terms of the settlement, and their rights under the settlement, including, but not limited to, their right to object to or exclude themselves from the proposed settlement and to appear at the Fairness Hearing; (c) were reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and (d) met all applicable requirements of law, including, but not limited to, the Federal Rules of Civil Procedure, 28 U.S.C. § 1715, and the Due Process

Clause(s) of the United States Constitution, as well as complied with the Federal Judicial Center's illustrative class action notices.

4. All Class Members and/or their representatives who have not been timely excluded from the Class with respect to the Toning Shoes are permanently barred and enjoined from bringing, filing, commencing, prosecuting, maintaining, intervening in, participating (as class members or otherwise) in, or receiving any benefits from any other lawsuit (including putative class action lawsuits), arbitration, administrative, regulatory, or other proceeding, order, or cause of action in law or equity in any jurisdiction that is covered by the Release. In addition, all Class Members and all persons in active concert or participation with Class Members are permanently barred and enjoined from organizing Class Members who have not been excluded from the Class into a separate class for purposes of pursuing, as a purported class action, any lawsuit (including by seeking to amend a pending complaint to include class allegations, or seeking class certification in a pending action) that is covered by the Release. Pursuant to 28 U.S.C. §§ 1651(a) and 2283, the Court finds that issuance of this permanent injunction is necessary and appropriate in aid of the Court's continuing jurisdiction and authority over the Actions.

5. New Balance shall take all steps necessary and appropriate to provide Class Members with the benefits to which they are entitled under the terms of the Settlement Agreement and pursuant to the Orders of the Court.

6. Class Counsel shall be awarded \_\_\_\_\_ in attorneys' fees and costs, which amount is approved as fair and reasonable, in accordance with the terms of the Settlement Agreement.

8. Each of the named Plaintiffs, Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo, shall each be awarded \_\_\_\_\_ as incentive awards in their capacity as representative Plaintiffs in the Actions.

9. The Court will retain continuing jurisdiction over the Actions for the reasons and purposes set forth in this Court's Final Approval Order.

---

LEO T. SOROKIN  
UNITED STATES MAGISTRATE JUDGE

**EXHIBIT 5**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

KIMBERLY CAREY, SHANNON  
DILBECK, and VICTORIA  
MOLINAROLO, individuals, on their own  
behalf and on behalf of all others similarly  
situated,

Plaintiffs,

v.

NEW BALANCE ATHLETIC SHOE, INC.,

Defendant.

Civil Action No. 11-cv-10001-LTS

**ORDER PRELIMINARILY CERTIFYING A CLASS FOR SETTLEMENT PURPOSES,  
PRELIMINARILY APPROVING THE CLASS SETTLEMENT, APPOINTING CLASS  
COUNSEL, DIRECTING THE ISSUANCE OF NOTICE TO THE CLASS, SCHEDULING  
A FAIRNESS HEARING, AND ISSUING RELATED ORDERS**

This motion having been brought before the Court jointly by Plaintiff and New Balance Athletic Shoe, Inc. (“New Balance”); and

*Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, 11-cv-10001-LTS, having been filed on January 3, 2011 in the United States District Court for the District of Massachusetts (the “Action”); and

The Action alleges, on behalf of a nationwide class of consumers, that New Balance violated Massachusetts Untrue and Misleading Advertising Statute (G.L. c. 266 § 91) as well as a claim for common law unjust enrichment regarding New Balance’s marketing campaign relating to its toning shoes and seeking compensatory damages, declaratory relief, attorneys’ fees and costs, as well as any relief the Court deems just and proper; and

The Plaintiffs filed an amended complaint that included a count alleging the violation of M.G.L. c. 93A, §§ 2 and 9; and

The Court appointed Ahdoot & Wolfson, PC as Interim Class Counsel on July 15, 2011; and

Class Counsel has conducted a thorough examination, investigation, and evaluation of the relevant law, facts, and allegations to assess the merits of the claims and potential claims to determine the strength of both defenses and liability sought in the Action; and

Class Counsel, on behalf of Plaintiffs and the other members of the Class having engaged in extensive class discovery including, but not limited to, receiving and reviewing over 40,000 pages of documents; and

The Parties having entered into a Settlement Agreement in which the Parties have agreed to settle the Action, pursuant to the terms of the Settlement Agreement, subject to the approval and determination of the Court as to the fairness, reasonableness, and adequacy of the settlement which, if approved, will result in a final judgment and final order, pursuant to the terms and conditions of the Settlement Agreement, being issued in the Action, and dismissal of the Action with prejudice;

This Order Preliminarily Certifying A Class For Settlement Purposes, Preliminarily Approving The Class Settlement, Appointing Class Counsel, Directing The Issuance Of Notice To The Class, Scheduling A Fairness Hearing, And Issuing Related Orders shall hereafter be referred to as the “Preliminary Approval Order”; and

The Court having read and considered the Motion for Preliminary Approval and Memorandum in support thereof, the Settlement Agreement, including the exhibits attached

thereto (together, the “Settlement Agreement”) and all prior proceedings herein, and good cause appearing based on the record, hereby orders as follows:

IT IS on this \_\_\_\_ day of \_\_\_\_\_, 2012, ORDERED, ADJUDGED, AND DECREED as follows (all capitalized terms being defined as they are defined in the Settlement Agreement unless otherwise specified or defined herein):

1. **Stay of the Actions.** All non-settlement-related proceedings in the Action are hereby stayed and suspended until further order of this Court. In addition, all proceedings in the related action entitled *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, 1:11-cv-10632, originally filed on December 7, 2010 in the Superior Court of the State of California in the County of Los Angeles, removed to the United States District Court for the Central District of California on January 5, 2011, and transferred to the United States District Court for the District of Massachusetts by order dated April 7, 2011 (the “California Action”) is also hereby stayed and suspended under further order of this Court; and

2. **Preliminary Class Certification for Settlement Purposes Only.** The Action is preliminarily certified as a class action for settlement purposes only, pursuant to Fed. R. Civ. P. 23(a) and (b)(3). The Court preliminarily finds for settlement purposes that: (a) the Class certified herein numbers at least in the thousands of persons, and that joinder of all such persons would be impracticable, (b) there are issues of law and fact that are typical and common to the Class, and that those issues predominate over individual questions; (c) a class action on behalf of the certified Class is superior to other available means of adjudicating this dispute; and (d) as set forth in paragraph 4, below, Plaintiff Carey, Plaintiff Dilbeck, Plaintiff Molinarolo, and Class Counsel are adequate representatives of the Class. New Balance retains all rights to assert that this action may not be certified as a class action, except for settlement purposes only.

3. **Class Definition.** The Class shall consist of all persons or entities that purchased, any and all Toning Shoes from New Balance and/or its authorized retailers including, without limitation, New Balance U.S. Retailers, New Balance Stores, shopnewbalance.com, joesnewbalanceoutlet.com, New Balance Outlets, and/or other third-party retailers, from January 1, 2010 up to and including the date of the first dissemination of the Summary Settlement Notice or Class Notice, whichever is earlier. Excluded from the Class are: (a) New Balance's board members and executive-level officers, including its attorneys; (b) persons or entities who purchased the Toning Shoes primarily for the purpose of resale; (c) claims for personal injury relating to the use of Toning Shoes; (d) distributors or re-sellers of Toning Shoes; (e) the judge and magistrate judge and their immediate families presiding over the Action; (f) governmental entities; and (g) persons or entities who or which timely and properly exclude themselves from the Class as provided in this Agreement. "Toning Shoes" means New Balance's toning shoes purchased as new by Class Members during the Class Period, which are New Balance's Rock&Tone, TrueBalance, Aravon Ria, Aravon Riley and Aravon Quinn toning shoes.

4. **Class Representatives and Class Counsel.** Plaintiffs Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo are designated as representatives of the conditionally certified Class. The Court preliminarily finds that these individuals are similarly situated to absent Class Members and therefore typical of the Class, and will be adequate Class representatives. Robert Ahdoot and Tina Wolfson of Ahdoot & Wolfson, P.C. are experienced and adequate Class Counsel, whom the Court preliminarily finds are experienced and adequate counsel, are hereby designated as Class Counsel.

5. **Preliminary Settlement Approval.** Upon preliminary review, the Court finds that the Settlement Agreement and the settlement it incorporates, appear fair, reasonable

and adequate. Manual for Complex Litigation (Fourth) § 21.632 (2004). Accordingly, the Settlement Agreement is preliminarily approved and is sufficient to warrant sending notice to the Class.

6. **Jurisdiction.** The Court has subject-matter jurisdiction over the Action pursuant to 28 U.S.C. §§ 1332 and 1367, and personal jurisdiction over the Parties before it. Additionally, venue is proper in this District pursuant to 28 U.S.C. § 1391.

7. **Fairness Hearing.** A Fairness Hearing shall be held on \_\_\_\_\_ at \_\_\_\_\_ at the United States District Court for the District of Massachusetts, 1 Courthouse Way, Boston, Massachusetts 02210, to determine, among other things: (a) whether the Action should be finally certified as a class action for settlement purposes pursuant to Fed. R. Civ. P. 23(a), and (b)(3); (b) whether the settlement of the Action should be approved as fair, reasonable and adequate, and finally approved pursuant to Fed. R. Civ. P. 23(e); (c) whether a final order and final judgment should be entered in the Action pursuant to the terms of the Settlement Agreement, including a dismissal of the Action with prejudice; (d) whether Class Members should be bound by the release set forth in the Settlement Agreement; (e) whether Class Members and related persons should be subject to a permanent injunction; (f) whether the application of Class Counsel for an award of Attorneys' Fees and Expenses should be approved pursuant to Fed. R. Civ. P. 23(h); and (g) whether the application of the named Plaintiffs for incentive awards should be approved. The submissions of the Parties in support of the settlement, including Plaintiffs' applications for Attorneys' Fees and Expenses and incentive awards, shall be filed with the Court no later than fourteen (14) days prior to the deadline for the submission of objections and may be supplemented up to seven (7) days prior to the Fairness Hearing.

8. **Administration.** In consultation with and approval of Class Counsel, New Balance or its designee is hereby authorized to establish the means necessary to administer the proposed settlement and implement the Claim Process, in accordance with the terms of the Agreement.

9. **Class Notice.** The proposed Class Notice, Summary Settlement Notice and the notice methodology described in the Settlement Agreement and the Declaration of the Notice Administrator are hereby approved.

(a) Pursuant to the Settlement Agreement, the Court appoints Garden City Group, Inc. ("GCG") to be the Class Action Settlement Administrator and Jeanne Finegan of GCG to be the Notice Administrator to help implement the terms of the Settlement Agreement.

(b) Beginning not later than five (5) business days after entry of the Preliminary Approval Order and to be substantially completed not later than fifteen (15) days after entry of the Preliminary Approval Order and subject to the requirements of the Preliminary Approval Order, the Settlement Agreement and the Declaration of the Notice Administrator, the Notice Administrator shall commence sending the Class Notice by Electronic Mail ("E-mail") to:

(i) each reasonably identifiable Class Member's last known E-mail address, reasonably obtainable from New Balance, which addresses shall be provided to the Notice Administrator by New Balance, no later than one (1) business day after the day of entry of the Preliminary Approval Order, subject to the existence of such information; and (ii) each appropriate State and Federal official, as specified in 28 U.S.C. § 1715, and shall otherwise comply with Fed. R. Civ. P. 23 and any other applicable statute, law, or rule, including, but not limited to, the Due Process Clause of the United States Constitution.

(c) The Notice Administrator shall have the publication of the Summary Settlement Notice substantially completed no later than sixty-five (65) days after entry of the Preliminary Approval Order. The Notice Administrator shall publish the Summary Settlement Notice as described in the Declaration of the Notice Administrator and in such additional newspapers, magazines, and/or other media outlets as shall be agreed upon by the Parties.

(d) No later than thirty-five (35) days after entry of the Preliminary Approval Order, the Notice Administrator shall send the Summary Settlement Notice by First Class U.S. Mail, proper postage prepaid, to each Class Member whose E-mail address returned a message as undeliverable, subject to the existence of such information as provided by New Balance pursuant to Section IV.B.1.a of this Agreement. The Notice Administrator shall: (a) re-mail any Summary Settlement Notices returned by the United States Postal Service with a forwarding address that are received by the Notice Administrator no later than fifty (50) days after entry of the Preliminary Approval Order; (b) by itself or using one or more address research firms, as soon as practicable following receipt of any returned Summary Settlement Notices that do not include a forwarding address, research any such returned mail for better addresses and promptly mail copies of the Summary Settlement Notices to the better addresses so found.

(e) Prior to the dissemination of the Class Notice as set forth above in paragraphs 9(a) to 9(d), the Notice Administrator shall establish an Internet website, [www.newbalancesettlement.com](http://www.newbalancesettlement.com), that will inform Class Members of the terms of this Agreement, their rights, dates and deadlines, and related information. The web site shall include, in PDF format, materials agreed upon by the Parties and as further ordered by this Court.

(f) Prior to the dissemination of the Class Notice as set forth above in paragraphs 9(a) to 9(d), the Notice Administrator shall establish a toll-free telephone number that will provide Settlement-related information to Class Members.

(g) The Notice Administrator shall timely disseminate any remaining notice, as stated in the Settlement Agreement and/or the Declaration of the Notice Administrator.

(h) Not later than ten (10) days before the date of the Fairness Hearing, the Notice Administrator shall file with the Court: (a) a list of those persons who have opted out or excluded themselves from the Settlement; and (b) the details outlining the scope, methods, and results of the notice program.

10. **Findings Concerning Notice.** The Court finds that the notices described in Paragraph 9 of this order: (a) constitute the best practicable notice; (b) are reasonably calculated, under the circumstances, to apprise the Class Members of the pendency of the Action, the terms of the proposed settlement, and their rights under the proposed settlement, including, but not limited to, their right to object to or exclude themselves from the proposed settlement and other rights under the terms of the Settlement Agreement; (c) are reasonable and constitute due, adequate, and sufficient notice to all Class Members and other persons entitled to receive notice; and (d) meet all applicable requirements of law, including, but not limited to, 28 U.S.C. § 1715, Fed. R. Civ. P. 23(c) and (e) and the Due Process Clause(s) of the United States Constitution. The Court further finds that all of the notices are written in simple terminology, are readily understandable by Class Members, and comply with the Federal Judicial Center's illustrative class action notices.

11. **Exclusion from Class.** Any Class Member who wishes to be excluded from the Class must mail a written request for exclusion stating such a request for exclusion and

containing the information set forth in the Class Notice, postmarked no later than ninety-five (95) days after entry of the Preliminary Approval Order, or as the Court otherwise may direct, to the Notice Administrator, in care of the address provided in the Class Notice. The Notice Administrator shall forward copies of any written requests for exclusion to Class Counsel and New Balance's Counsel. A list reflecting all requests for exclusion shall be filed with the Court by the Notice Administrator no later than ten (10) days before the Fairness Hearing. If the proposed settlement is finally approved, any Class Member who has not submitted a timely written request for exclusion from the Class shall be bound by all subsequent proceedings, orders, and judgments in the Action, even if the Class Member previously initiated or subsequently initiates against any or all of the Released Parties any litigation or other proceeding encompassed by the Release and the claims released in the Settlement Agreement. Persons who properly exclude themselves from the Class shall not be entitled to participate in the benefits of the Settlement Agreement. New Balance's Counsel shall provide to the Notice Administrator, within ten (10) business days of the entry of the Preliminary Approval Order, a list of all counsel for anyone who has litigation against New Balance that involves the Toning Shoes. The Notice Administrator shall mail copies of the Class Notice to all such legal counsel. New Balance will promptly direct the Notice Administrator to serve the Class Notice on counsel for any Class Members who subsequently initiate litigation, arbitration, or other proceedings against New Balance relating to claims alleging events occurring during the Class Period, the Toning Shoes, and/or otherwise involving the Release.

12. **Objections and Appearances.** Any Class Member or counsel hired at any Class Member's own expense who complies with the requirements of this paragraph may object to any aspect of the proposed settlement.

(a) Any Class Member who has not filed a timely written request for exclusion and who wishes to object to the fairness, reasonableness, or adequacy of the Settlement Agreement, the proposed Settlement, the award of Attorneys' Fees and Expenses, or the individual awards to Plaintiffs, must deliver to the Class Counsel identified in the Class Notice and to New Balance's Counsel, and file with the Court, no later than ninety-five (95) days after entry of the Preliminary Approval Order, a written statement of objections, as well as the specific reason(s), if any, for each objection, including any legal support the Class Member wishes to bring to the Court's attention and any evidence or other information the Class Member wishes to introduce in support of the objections, a statement of whether the Class Member intends to appear and argue at the Fairness Hearing, and list the Class Member's purchase(s) of either Toning Shoes, or be forever barred from so objecting. The objection must include proof of purchase of the Toning Shoes. Acceptable proof of purchase includes a cash register receipt, a credit card receipt or a credit card statement that sufficiently indicates the purchase of the Toning Shoes.

(b) Any Class Member who files and serves a written objection, as described above, may appear at the Fairness Hearing, either in person or through personal counsel hired at the Class Member's expense, to object to the fairness, reasonableness, or adequacy of the Settlement Agreement or the proposed Settlement, or to the award of Attorneys' Fees and Expenses or awards to the individual Plaintiffs. Class Members or their attorneys who intend to make an appearance at the Fairness Hearing must deliver a notice of intention to appear to one of the Class Counsel identified in the Class Notice and to New Balance's Counsel, and file said notice with the Court, no later than ninety-five (95) days after entry of the Preliminary Approval Order. Any Class Member who fails to comply with the provisions in this section shall

waive and forfeit any and all rights he or she may have to appear separately and/or to object, and shall be bound by all the terms of the Settlement Agreement, this Order, and by all proceedings, orders, and judgments, including, but not limited to, the Release in the Settlement Agreement in the California Action and the Massachusetts Action.

(c) Any interested party may file a reply to any written objection, as described in Section 12.a. herein. A reply to an objection must be served and filed no later than seven (7) days before the Fairness Hearing.

13. **Preliminary Injunction.** All Class Members and/or their representatives who do not timely exclude themselves from the Class are hereby preliminarily barred and enjoined from filing, commencing, prosecuting, maintaining, intervening in, participating in, conducting, or continuing litigation as class members, putative class members, or otherwise against New Balance (or against any of its related parties or affiliates), and/or from receiving any benefits from, any lawsuit, administrative, or regulatory proceeding or order in any jurisdiction, based on or relating to the claims or causes of actions or the facts, and circumstances relating thereto, relating to the Toning Shoes, the Action, and/or the Release. In addition, all such persons are hereby preliminarily barred and enjoined from filing, commencing, or prosecuting a lawsuit against New Balance (or against any of its related parties or affiliates) as a class action, a separate class, or group for purposes of pursuing a putative class action (including by seeking to amend a pending complaint to include class allegations or by seeking class certification in a pending action in any jurisdiction) on behalf of Class Members who do not timely exclude themselves from the Class, arising out of, based on or relating to the claims, causes of action, facts, and/or circumstances relating thereto, relating to the Toning Shoes, the Action and/or the Release. Pursuant to 28 U.S.C. §§ 1651(a) and 2283, the Court finds that issuance of this

preliminary injunction is necessary and appropriate in aid of the Court's continuing jurisdiction and authority over this Action.

14. **Post-Office Box(es).** The Notice Administrator or their designated agent(s) shall rent one or more post-office boxes in the name of the Clerk of the Court, to be used for receiving requests for exclusion from the Class and any other communications. Other than the Court or the Clerk of Court and the Notice Administrator, only New Balance, New Balance's Counsel, Class Counsel, and their designated agents shall have access to these post-office box(es).

15. **Disclosure of Objections.** The Notice Administrator, New Balance's Counsel, and Class Counsel shall promptly furnish to each other copies of any and all objections or written requests for exclusion that might come into their possession.

16. **Termination of Settlement.** This Order shall become null and void and shall be without prejudice to the rights of the parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if: (a) the settlement is not finally approved by the Court, or does not become final, pursuant to the terms of the Settlement Agreement; (b) the settlement is terminated in accordance with the Settlement Agreement; or (c) the settlement does not become effective as required by the terms of the Settlement Agreement for any other reason. In such event, the settlement and Settlement Agreement shall become null and void and be of no further force and effect, and neither the Settlement Agreement nor the Court's orders, including this Order, relating to the settlement shall be used or referred to for any purpose whatsoever.

17. **Use of Order.** This Order shall be of no force or effect if the settlement does not become final and shall not be construed or used as an admission, concession, or

declaration by or against New Balance of any fault, wrongdoing, breach, or liability. Nor shall the Order be construed or used as an admission, concession, or declaration by or against Plaintiffs or the other Class Members that their claims lack merit or that the relief requested is inappropriate, improper, or unavailable, or as a waiver by any party of any defenses or claims he, she, or it may have in these Action or in any other lawsuit.

18. **Access to Documents.** During the pendency of this Court's consideration of the proposed Settlement Agreement, if Class Members and/or their attorneys file a motion for discovery and such motion is granted for good cause shown and under the applicable standards, such persons shall not be given access to these materials unless and until they enter into the Confidentiality Agreement, which is attached as Exhibit 9 to the Settlement Agreement. The terms and conditions of the Confidentiality Agreement are incorporated herein by reference and if breached may be the basis for a finding of contempt of Court.

19. **Retaining Jurisdiction.** This Court shall maintain continuing jurisdiction over these settlement proceedings to assure the effectuation thereof for the benefit of the Class.

20. **Continuance of Hearing.** The Court reserves the right to adjourn or continue the Fairness Hearing without further written notice.

---

LEO T. SOROKIN  
UNITED STATES MAGISTRATE JUDGE

**EXHIBIT 6**

## **If you purchased New Balance Toning Shoes your rights may be affected by a proposed class action settlement.**

*Para una notificación en Español, llamar o visitar nuestro website.*

A proposed class action settlement has been reached involving New Balance Toning Shoes.

### **ARE YOU AFFECTED?**

You may be a Class Member if you purchased the Toning Shoes listed below from New Balance and/or its authorized retailers from January 1, 2010 until **[Month, Day, Year]**.

---

#### **TONING SHOES:**

Rock&Tone, TrueBalance, Aravon Ria, Aravon Riley and Aravon Quinn

---

### **WHAT IS THIS CASE ABOUT?**

The lawsuit claims that New Balance violated certain state laws regarding the marketing and sale of its Toning Shoes. New Balance denies it did anything wrong. The Court did not decide which side was right. Instead, the parties have decided to settle.

### **WHAT DOES THIS SETTLEMENT PROVIDE?**

A settlement fund of \$2.3 million has been set up to pay (i) claims to eligible Class Members, (ii) a portion of the costs of settlement notice and administration, and (iii) incentive payments to the named plaintiffs. New Balance is also agreeing to refrain from certain practices and separately pay attorneys' fees and costs, and the other portion of the costs for settlement notice and administration. Full details about the Settlement are on the website below.

### **HOW DO YOU ASK FOR A PAYMENT?**

**To get money, eligible Class Members must submit a claim form online no later than [Month, Day, Year] or postmarked no later than [Month, Day, Year].** Payments could be up to \$100 for each pair of Toning Shoes purchased, but will vary depending upon the number of claims submitted by all Class Members and the amount of the fees, costs, and payments specified in the Settlement Agreement.

### **WHAT ARE YOUR OPTIONS?**

If you are a Class Member, you may (1) do nothing; (2) exclude yourself; (3) send in a Claim Form; and/or (4) object to the settlement.

If you don't want to be bound by the settlement, you must exclude yourself by letter **postmarked by [Month, Day, Year]**. If you exclude yourself, you can't get a payment, but you can sue New Balance for these claims. If you stay in the Class, you may submit a Claim Form and/or object to the settlement. Claim Forms must be submitted by **[Month, Day, Year]**. Objections must be filed with the Court by **[Month, Day, Year]**.

---

### **PLEASE SEE THE DETAILED NOTICE**

at **www.newbalancesettlement.com** or call **866-893-0232** for complete instructions on how to file a claim, object, or exclude yourself and other important information. The Court will hold a hearing in this case on **[Month, Day, Year]** at **[TIME]** in the Federal Courthouse, Courtroom 24, located at 1 Courthouse Way, Boston, MA 02210, to consider final approval of the settlement, payment of attorneys' fees and expenses of up to \$950,000 to lawyers for the Class (Ahdoot & Wolfson, P.C. of Los Angeles, California), and payments of up to \$5,000 for each of the three named plaintiffs, and related issues. The motion(s) by Class Counsel for those fees, costs and incentive awards will be available on the Settlement website after they are filed, and no later than 14 days before the objection deadline. The Court has appointed Robert Ahdoot and Tina Wolfson of Ahdoot & Wolfson, P.C. to represent the class. You may appear at the hearing, but you don't have to.

**HOW CAN YOU GET MORE INFORMATION?**

Visit [www.newbalancesettlement.com](http://www.newbalancesettlement.com) or call, **866-893-0232**, or write to **Carey v. New Balance Athletic Shoe, Inc., c/o GCG, P.O. Box 9903, Dublin, OH 43017-5803**. Or visit us on Facebook at [www.facebook.com/NewBalanceSettlement](https://www.facebook.com/NewBalanceSettlement).

**EXHIBIT 7**

### **Settlement Claim Procedures and Claim Calculation Protocol**

This Settlement Claim Procedures and Claim Calculation Protocol (the “Protocol”) are part of the Settlement Agreement (“Agreement”) and shall be used by the Class Action Settlement Administrator to review, address, implement, and process those Claims submitted pursuant to the Agreement and otherwise implement the terms of the Claim Process in the Agreement. All capitalized terms used in this Protocol shall have the same meaning given them in the Agreement.

#### **1. Class Action Settlement Administrator’s Role and Duties**

- (a) The Class Action Settlement Administrator shall be selected by the agreement of the Parties and recommended to and approved by the Court.
- (b) The Class Action Settlement Administrator must consent, in writing, to serve and shall abide by the obligations of the Agreement, this Protocol, and the Orders issued by the Court.
- (c) The Class Action Settlement Administrator shall coordinate with the Escrow Agent regarding the Escrowed Funds. However, the Class Action Settlement Administrator shall have no authority, under any circumstance, to withdraw or disburse any Escrowed Funds. Distribution of any Escrowed Funds shall occur only upon written instructions of New Balance, which may authorize New Balance’s Counsel.
- (d) The Class Action Settlement Administrator shall have access to information about the balance in the Escrowed Funds to perform calculations relating to: (i) the costs and expenses associated with disseminating the notice, including, but not limited to, the Class Notice and the Summary Settlement Notice, to the Class; (ii) the costs and expenses associated with claims administration; and (iii) timely, valid, and approved Claims submitted by Class Members pursuant to the Claim Process.
- (e) The Class Action Settlement Administrator warrants that it knows of no reason why it cannot fairly and impartially administer the Claim Process set forth in the Agreement. The Class Action Settlement Administrator shall not process the Claim of any Class Member if the Class Action Settlement Administrator, New Balance, and/or Class Counsel determines there is a conflict of interest. If the Class Action Settlement Administrator, New Balance, or Class Counsel learns of a conflict of interest as to a Claim, that party shall give written notice to the other parties, who shall resolve any such circumstances by further written agreement. Any unresolved dispute over such conflict of interest shall be submitted to the Court for resolution. The Class Action Settlement Administrator shall indemnify and defend the Parties and their counsel against any liability arising from the Class Action Settlement Administrator’s breach of this provision.
- (f) The Class Action Settlement Administrator shall keep a clear and careful record of all communications with Claimants, all claims decisions, all expenses, and all tasks performed in administering the Claim Process.

- (g) The Class Action Settlement Administrator shall provide periodic updates to Class Counsel and New Balance regarding Claim Form submissions beginning not later than one week before the Fairness Hearing date and continuing on a weekly basis thereafter.
- (h) As provided in Section III.A.2 of the Agreement, the first \$500,000 in actual cost of the Class Action Settlement Administrator shall be paid by New Balance. Thereafter, from time to time, as determined by submitted and approved invoices from the Escrowed Funds, with any remaining balance paid after the conclusion of the Claim Period and/or the payments to eligible Claimants.
- (i) The Class Action Settlement Administrator shall take all reasonable efforts to administer the Claims efficiently and avoid unnecessary fees and expenses. The Class Action Settlement Administrator shall only be reimbursed for fees and expenses supported by detailed and clear timesheets and receipts for costs. As soon as work commences, the Class Action Settlement Administrator shall provide a detailed written accounting of all fees and expenses on a monthly basis to Class Counsel and New Balance's Counsel, and shall respond promptly to inquiries by Class Counsel and New Balance's Counsel concerning fees and expenses.
- (j) The Parties are entitled to observe and monitor the performance of the Class Action Settlement Administrator to assure compliance with the Agreement and this Protocol. The Class Action Settlement Administrator shall promptly respond to all inquiries and requests for information made by New Balance, its counsel, or Class Counsel.

2. **Locating, Obtaining, and Submitting Claim Forms**

- (a) The Claim Form, which is substantially similar to the form attached as Exhibit 1 to the Agreement, shall be available as part of the Class Notice, on the Internet website at [www.newbalancesettlement.com](http://www.newbalancesettlement.com), or by contacting by telephone or by mail or other similar delivery service the Class Action Settlement Administrator and/or Notice Administrator. The Claim Form on the Internet website and the hard copy Claim Form shall be identical in content.
- (b) The Claim Form shall advise Class Members that, upon request, the Class Action Settlement Administrator has the right to request verification of the purchase of Toning Shoes, including, but not limited to, receipt(s) or other documentation demonstrating purchase of any and all of the Toning Shoes during the Class Period. If the Class Member does not timely comply and/or is unable to produce documents to substantiate and/or verify the information on the Claim Form and the Claim is otherwise not approved, the Claim may be reduced or denied.
- (c) Class Members may submit a Claim to the Class Action Settlement Administrator during the Claim Period. As part of the Claim Process, Class Members shall be eligible for the relief provided in the Agreement, provided Class Members

complete and timely submit the Claim Form to the Class Action Settlement Administrator within the Claim Period, subject to the terms herein and in the Agreement.

- (d) Claims may be submitted by completing the Claim Forms in hard copy by mail or other similar delivery service or on-line through a web-based Claim Form at the Internet website, [www.newbalancesettlement.com](http://www.newbalancesettlement.com).
- (e) The Class Action Settlement Administrator and/or Notice Administrator shall establish and maintain an Internet website, [www.newbalancesettlement.com](http://www.newbalancesettlement.com), that shall be easily accessible through commonly used Internet Service Providers for the submission of claims. The Internet website shall be designed to permit Class Members to readily and easily submit Claims and obtain information about the Class Members' rights and options under the Agreement. The Internet website shall be maintained continuously until the end of the Claim Period. The Class Action Settlement Administrator shall be solely responsible for receiving and processing requests for Claim Forms and for promptly delivering Claim Forms to the Class Members who request them.
- (f) The Class Action Settlement Administrator also shall establish a toll-free telephone number that will have recorded information answering frequently asked questions about certain terms of the Settlement, including, but not limited to, the Claim Process and instructions about how to request a Claim Form and/or Class Notice as well as an option to reach a live operator.

3. **Claim Form Review and Processing**

- (a) The Class Action Settlement Administrator shall begin the Claim Process so that it is completed within the time period specified in the Agreement. Except as provided in Paragraph 3(b)(iii) (below), Class Members must submit their Claims so that they are postmarked or submitted online no later than the end of the Claim Period.
- (b) The Class Action Settlement Administrator shall gather, review, prepare, and address the Claim Forms received pursuant to the Claim Process and the Agreement.
  - (i) Claims that have been properly submitted shall be designated as Approved Claims. The Class Action Settlement Administrator shall examine the Claim Form before designating the Claim as an Approved Claim, to determine that the information on the Claim Form is reasonably complete. In determining whether a Claim Form is reasonably complete, the Class Action Settlement Administrator shall consider what an ordinary person would be able to complete on the Claim Form, and shall readily deem a Claim as an Approved Claim provided a sufficient amount of money is available in the Escrowed Funds to pay all properly completed Claim Forms and all fees and costs that are permitted to be deducted from the

Escrowed Funds pursuant to Section III.A.2 of the Agreement and sufficient information is provided on the Claim Form to enable the mailing of the settlement payment to the Claimant.

- (ii) No Claimant may submit more than one Claim Form for each pair of Toning Shoes owned by the Claimant, and two or more Claimants may not submit Claim Forms for all or part of the same purchase. The Class Action Settlement Administrator shall identify any Claim Forms that appear to seek relief on behalf of the same Claimant (“Duplicative Claim Forms”). The Class Action Settlement Administrator shall determine whether there is any duplication of Claims, if necessary by contacting the Claimant(s) or their counsel. The Class Action Settlement Administrator shall designate any such Duplicative Claims as rejected Claims to the extent they allege the same damages or allege damages on behalf of the same Claimant.
- (iii) The Class Action Settlement Administrator shall, in its discretion or pursuant to the joint instructions of the Parties, decide whether to accept Claim Forms submitted after the Claim Period. In deciding whether to accept a late-submitted Claim Form, the Class Action Settlement Administrator shall take into account whether enough money exists in the Escrowed Funds to pay all valid and timely submitted claims in full, including, but not limited to, any adjustments made pursuant to Section III.C in the Agreement, and the length of time the Claim Form was submitted after the close of the Claim Period, including, but not limited to, whether the late-submitted Claim would delay the distribution of the Escrowed Funds to Claimants and the reason(s) for the late submission of the Claim Form. Whenever reasonably possible, if a Claim Form is valid but untimely, it shall be paid provided the Escrowed Funds are sufficient to pay in full all valid and timely submitted Claims and applicable fees and costs. In the event the Class Action Settlement Administrator determines that the late-submitted Claim Form is materially incomplete, but may be cured by the Claimant, the Class Action Settlement Administrator shall contact the Claimant to cure any deficiency with the late-submitted Claim Form, if reasonably practical and if the Parties agree.
- (iv) The Class Action Settlement Administrator shall exercise, in its discretion, all usual and customary steps to prevent fraud and abuse and take any reasonable steps to prevent fraud and abuse in the Claim Process. The Class Action Settlement Administrator may, in its discretion, deny in whole or in part any Claim to prevent actual or possible fraud or abuse.
- (v) By agreement of the Parties, the Parties can instruct the Class Action Settlement Administrator to take whatever steps they deem appropriate to preserve the Escrowed Funds to further the purposes of the Agreement if the Class Action Settlement Administrator identifies actual or possible fraud or abuse relating to the submission of Claims, including, but not

limited to, denying in whole or in part any Claim to prevent actual or possible fraud or abuse.

- (c) The Class Action Settlement Administrator shall provide periodic reports to Class Counsel, New Balance's Counsel, and a representative of the Commission regarding the implementation of the Agreement and this Protocol. To the extent a review of individual Claim Forms is needed, such review should be limited to Class Counsel and a representative of the Commission.
  - (i) For those claims where the amount sought by the Class Member exceeds \$200.00, the Class Action Settlement Administrator may review timely submitted Claim Forms and approve or contest any of the Claims, including, but not limited to, requesting that the Class Member submit a receipt demonstrating purchase of the Toning Shoes during the Class Period. Failure to timely or fully respond to a deficiency letter from the Class Action Settlement Administrator may result in a reduction or denial of the Class Member's Claim, unless New Balance, Class Counsel, and a representative of the Commission otherwise agree.
  - (ii) Upon agreement of the Parties, if the total amount of Claims submitted by all Class Members exceeds the available relief as specified in Sections III.A.2 and III.C of the Agreement and/or Section 4(d) of the Protocol, then the Class Action Settlement Administrator may request proof of purchase for some or all of the Claims.
  - (iii) If a Claim Form is not contested, that Claim shall be processed for payment by the Class Action Settlement Administrator. If a Claim Form is contested, including but not limited to, requesting supporting documentation, the Class Action Settlement Administrator shall promptly notify the Parties and mail a letter that advises the Claimant of the reason(s) why the Claim Form was contested and request, if applicable, any and all additional information and/or documentation, to validate the Claim and have it submitted for payment. The additional information and/or documentation can include, for example, receipts evidencing purchase of the Toning Shoes and/or the payment amount. The Claimant shall have thirty-five (35) days from the date of the postmarked letter sent by the Class Action Settlement Administrator to respond to the request from the Class Action Settlement Administrator and the Claimant shall be so advised.
    - (A) In the event the Claimant timely provides the requested information and/or documentation, the Claim shall be deemed validated and shall be processed by the Class Action Settlement Administrator for payment.
    - (B) In the event the Claimant does not timely and completely provide the requested information and/or documentation, the Class Action

Settlement Administrator shall send the Claimant a letter stating that the Claim has been reduced or denied unless New Balance and Class Counsel otherwise agree.

- (d) The Class Action Settlement Administrator's reduction or denial of a Claim pursuant to paragraph 3(c)(iii) above is final and may not be appealed by the Claimant, Class Counsel, New Balance, or New Balance's Counsel. However, if a Claimant's Claim is reduced or denied because the Class Action Settlement Administrator determined that the documentation submitted to support Claimant's Claim was not sufficient to prove up the Claim, the Class Action Settlement Administrator shall provide a report to Class Counsel and New Balance's Counsel who shall meet and confer in an attempt to resolve these deficient Claims. If Class Counsel reasonably recommends payment of the Claim or payment of a reduced claim amount and New Balance agrees (and New Balance's agreement shall not be unreasonably withheld), then Class Counsel shall instruct the Class Action Settlement Administrator to pay those Claims. Class Counsel may petition the Court in the event New Balance's agreement is unreasonably withheld.
- (e) The Class Action Settlement Administrator shall provide all information gathered in investigating Claims, including, but not limited to, copies of all correspondence and email and all notes of the Class Action Settlement Administrator, the decision reached, and all reasons supporting the decision, if requested by Class Counsel or New Balance.

4. **Claim Calculation and Payment of Valid Claims**

- (a) As specified in Section III of the Agreement, the Class Action Settlement Administrator shall select the timely, valid, and approved Claims submitted pursuant to the Claim Process to be paid from the Escrowed Funds (i) minus any payments or expected payments for the costs and expenses associated with disseminating the notice, including, but not limited to, the Class Notice and the Summary Settlement Notice, to the Class and the costs and expenses associated with claims administration pursuant to the terms and conditions of the Agreement; and/or (ii) subject to any pro rata adjustments.
- (b) The Class Action Settlement Administrator shall begin to pay timely, valid, and approved Claims not before ten (10) days after the close of the Claim Period, so long as this period is after the Final Settlement Date, or sooner upon New Balance and Plaintiffs' Counsel's joint discretion, but not before the issuance of the Court's Final Order and Final Judgment approving the Settlement. In the event the Final Settlement Date falls after the close of the Claim Period, then the Class Action Settlement Administrator shall begin to pay timely, valid, and approved Claims commencing ten (10) days after the Final Settlement Date. Not later than one hundred twenty (120) days after either the occurrence of the Final Settlement Date or the close of the Claim Period, whichever is later, the Class Action Settlement Administrator shall have completed the payment to Class Members who have submitted timely, valid and approved Claims pursuant to the Claim

Process, provided, further however, that New Balance and Plaintiffs' Counsel may, at their joint discretion, commence this payment period after final approval of the settlement by the Court, but before the attainment of the Final Settlement Date.

- (c) The relief to be provided to eligible Class Members shall be as follows:

Item	Initial Amount	Maximum
All Toning Shoes	\$50.00	Not more than \$100.00

Applicable Toning Shoes purchase price, sales taxes, and/or shipping charges paid by Class Members shall not be used to calculate the relief percentages relating to the purchase of the Toning Shoes.

- (d) Adjustments and Remaining Funds

- (i) If the total of the timely, valid, and approved Claims submitted by Class Members exceeds the available relief, minus any fees and costs set forth in the Agreement, each eligible Class Member's award shall be reduced on a pro rata basis.
- (ii) If the total of the timely, valid, and approved claims submitted by Class Members is less than the available relief, minus any fees and costs set forth in the Agreement, each eligible Class Member's award shall be increased on a pro rata basis, with a maximum increase of up to, but not more than, the Maximum amount stated in the chart in Paragraph 4(c) above, not including any applicable sales taxes.
- (iii) If there are any funds remaining from the Claim Process, including, but not limited to, uncashed distributions made payable to eligible Class Members, any remaining funds shall be equally distributed to the following non-profit organizations: Playworks ([www.playworks.org](http://www.playworks.org)), KaBOOM! ([www.kaboom.org](http://www.kaboom.org)), and Special Olympics ([www.specialolympics.org](http://www.specialolympics.org)), and/or other nonprofit organization(s) or foundation(s) that are agreed upon by the Parties. Such funds will not be returned to New Balance.

**EXHIBIT 8**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

KIMBERLY CAREY, SHANNON DILBECK,  
and VICTORIA MOLINAROLO, individuals, on  
their own behalf and on behalf of all others  
similarly situated,

Plaintiffs,

v.

NEW BALANCE ATHLETIC SHOE, INC.,

Defendant.

Civil Action No. 11-cv-10001-  
LTS

**DECLARATION OF JEANNE C. FINEGAN, APR, CONCERNING PROPOSED  
CLASS MEMBER NOTIFICATION PROGRAM**

I, JEANNE C. FINEGAN declare as follows:

**INTRODUCTION**

1. I am a Senior Vice President of The Garden City Group, Inc. (“GCG”), and of GCG Communications, a division of GCG. This Declaration is based upon my personal knowledge, as well as on information provided to me by Class Counsel, my associates and staff and including information reasonably relied upon in the fields of advertising, media and communications.

2. GCG was engaged by the Parties to develop and implement a proposed legal notice program (the “Notice Program”) to inform Class Members of the proposed class action Settlement between plaintiffs and Defendant New Balance Athletic Shoe, Inc., as described in the proposed Order Preliminary Certifying a Class for Settlement Purposes, *Preliminarily Approving the Class Settlement, Appointing Class Counsel, Directing the Issuance of Notice to the Class, Scheduling a Fairness Hearing, and*

*Issuing Related Orders* (“Order”), pp. 3 to 4, the proposed Settlement Class (“Class”) in the litigation is defined as follows:

All persons or entities that purchased, any and all Toning Shoes from New Balance and/or its authorized retailers including, without limitation, New Balance U.S. Retailers, New Balance Stores, shopnewbalance.com, joesnewbalanceoutlet.com, New Balance Outlets and/or other third-party retailers, from January 1, 2010 up to and including the date of the first dissemination of the Summary Settlement Notice or Class Notice, whichever is earlier. Excluded from the Class are: (a) New Balance’s Board members and executive-level officers, including its attorneys; (b) persons or entities who purchased the Toning Shoes primarily for the purpose of resale; (c) claims for personal injury relating to the use of Toning Shoes; (d) distributors or re-sellers of Toning Shoes; (e) the judge and magistrate judge and their immediate families presiding over the Action; (f) governmental entities; and (g) persons or entities who or which timely and properly exclude themselves from the Class as provided in this Agreement. “Toning Shoes” means New Balance’s toning shoes purchased as new by Class Members during the Class Period, which are New Balance’s Rock&Tone, TrueBalance, Aravon Ria, Aravon Riley and Aravon Quinn toning shoes.

3. This Declaration describes and details the proposed Notice Program. In addition, it will address why this proposed Notice Program is the best notice practicable under the circumstances of this class action, and is reasonably estimated to reach an estimated 76-78 percent of adults 25 to 64 years of age, that is the affected members of the Settlement Class (“Class Members”) with an average frequency of 4 times.

### **QUALIFICATIONS**

4. I have served as an expert, directly responsible for the design and implementation of hundreds class action notice programs, some of which are the largest and most complex programs ever filed in both the United States and in Canada. GCG’s legal notices have appeared in more than 40 languages in approximately 170 countries.

5. I have more than 20 years of communications and advertising experience and I am the only Notice Expert accredited in Public Relations (APR) by the Universal Accreditation Board, a program administered by the Public Relations Society of America. Further, I have provided testimony before Congress on issues of notice. Also, I have

lectured, published and been cited extensively on various aspects of legal noticing, product recall and crisis communications and have served the Consumer Product Safety Commission (CPSC) as an expert to determine ways in which the Commission can increase the effectiveness of its product recall campaigns.

6. Additionally, GCG was established in January 1984 to administer settlements of class actions, mass tort litigations, SEC and FTC disgorgement actions, bankruptcies, and other major litigations. GCG has a considerable amount of experience in class action administration and the development of notice programs. In its over 25 years, our team has served as administrator for over 2,500 cases. In the course of our history, GCG has mailed over 287 million notices, disseminated over 700 million emails, handled over 28 million phone calls, processed over 50 million claims, and distributed over \$33 billion in benefits. GCG's legal notices have appeared in more than 40 languages in approximately 170 countries.

7. I have designed, implemented or consulted on many of the largest and highest profile national and international legal notice communication programs for a wide range of class actions and regulatory and consumer matters that include product liability, construction defect, antitrust, asbestos, medical pharmaceutical, human rights, civil rights, telecommunications, media, environmental, securities, banking, insurance and bankruptcy. Those cases include, but are not limited to: *In Re Nortel I & II Securities Litigation*, Civil Action No. 01-CV-1855 (RMB), Master File No. 05 MD 1659 (LAP) (S.D.N.Y. 2006), *SEC v. Vivendi Universal, S.A., et al.*, Case No. 03-CV-10195-PKC (S.D.N.Y. 2003); *In re: Canadian Air Cargo Shipping Class Actions* (Ontario Superior Court of Justice, Court File No. 50389CP, Supreme Court of British Columbia, Quebec Superior Court); *DeHoyos v. Allstate Insurance Company*, Civil Action No SA-01-CA-1010-FB (W.D. Tex. 2006); *In re: John's Manville (Statutory Direct Action Settlement, Common Law Direct Action and Hawaii Settlement)*, Index No 82-11656 (BRL) (Bankr. S.D.N.Y. 2004); *Deke, et al. v. Cardservice International*, Case No. BC 271679 (Los Angeles County Sup. Ct., Cal. 2004); *Sager v. Inamed Corp. and McGhan (Medical Breast Implant Litigation)*, Case No. 01043771 (Santa Barbara County Sup. Ct., Cal. 2004); *Wilson v. Massachusetts Mutual Life Insurance Company*, No. D-101-CV 98-02814 (1st Jud. Dist. Ct., Santa Fe County, N.M.); *In re: Florida Microsoft Antitrust*

*Litigation*, Index No. 99-27340 (11th Jud. Dist. Ct. of Miami, Dade County, Fla.); *In re: Montana Microsoft Antitrust Litigation*, No. DCV 2000 219 (1st Jud. Dist. Ct., Lewis & Clark County, Mont.); *In re: MCI Non-Subscriber Ratepayers*, MDL No. 1275 (S.D. Ill.); *Sparks v. AT&T Corporation*, No. 96-LM-983 (3d Jud. Cir., Madison County, Ill.); *Pigford v. Glickman*, No. CA 97-19788 (PLF) (D.D.C.); *In re: SmithKline Beecham Clinical Billing*, No. CV 97-L-1230 (3d Jud. Dist., Madison County, Ill.); *Schmidt v. Adidas Salomon A.G.*, No. OCN-L-1248-01 (N.J. Super. Ct.); *MacGregor v. Schering Plough Corp.*, No. EC248041 (Los Angeles County Sup. Ct., Cal.); *In re: Louisiana-Pacific Inner Seal Siding*, Nos. 879-JE and 1543JE (D. Or.); *Foster v. ABTco Siding Litigation*, No. 95-151-M (Cir. Ct. of Choctaw County, Ala.); *In re: Johns-Manville Phenolic Foam*, No. CV 96-10069 (D. Mass.); *In re: James Hardie Roofing*, No. CV 00-2-17945-65SEA (King County Super. Ct., Wash.); *Claybrook v. Sunbeam Corporation*, No. CV-98-C-1546-W (UWC) (N.D. Ala.); *In re: American Cyanamid*, No. CV-97-0581-BH-M (S.D. Ala.); *Bristow v. Fleetwood Enterprises*, No. Civ 00-0082-S-ELJ (D. Idaho); *Spencer v. Shell Oil Co.*, No. CV 94-074 (Harris County Dist. Ct., Tex.); and *In re: StarLink Corn Products*, No. 01 C 1181 (N.D. Ill.).

8. In evaluating the adequacy and effectiveness of my notice programs, courts have repeatedly recognized my work as an expert. For example, in *DeHoyos, et al. v. Allstate Ins. Co.*, No. SA-01-CA-1010 (W.D.Tx.). In the Amended Final Order and Judgment Approving Class Action Settlement, the Honorable Fred Biery stated:

[T]he undisputed evidence shows the notice program in this case was developed and implemented by a nationally recognized expert in class action notice programs. ... This program was vigorous and specifically structured to reach the African-American and Hispanic class members. Additionally, the program was based on a scientific methodology which is used throughout the advertising industry and which has been routinely embraced routinely [sic] by the Courts.

And recently in *Stern v. AT&T Mobility Wireless*, No. 09-cv-1112 CAS-AGR (C.D.Cal.). In the Final Approval Order, the Honorable Christina A. Snyder stated:

[T]he Court finds that the Parties have fully and adequately effectuated the Notice Plan, as required by the Preliminary Approval Order, and, in fact, have achieved better results than anticipated or required by the

Preliminary Approval Order.

a. ***Gemelas v. The Dannon Company***, No. 1:08-cv-00236 (N.D. Ohio, E. Div.). In the Judgment, Final Order, and Decree, Judge Dan Aaron Polster approved the notice program, stating:

In accordance with the Court's Preliminary Approval Order and the Court-approved notice program, the Class Action Settlement Administrator caused the Class Notice to be distributed on a nationwide basis in magazines and newspapers (with circulation numbers exceeding 81 million) specifically chosen to reach Class Members. In addition, the Settlement was widely publicized using Internet banner ads, press releases, audio news releases, via a Settlement Website, and through a toll-free number. ... The Declaration of Jeanne C. Finegan [sic], attesting to the dissemination of the Class Notice, demonstrates compliance with this Court's Preliminary Approval Order. ... The distribution of the Class Notice constituted the best notice practicable under the circumstances, and fully satisfied the requirements of Federal Rule of Civil Procedure 23, the requirements of due process, 28 U.S.C. 1715, and any other applicable law.

b. ***In re Expedia Hotel Taxes and Fees Litigation***, Case No. 05-2-02060-1 SEA, Superior Court of Washington in and for King County (2009). In the Order Granting Final Approval of Class Action Settlement, Judge Monica Benton stated:

The Notice of the Settlement given to the Class ... was the best notice practicable under the circumstances. All of these forms of Notice directed Class Members to a Settlement Website providing key Settlement documents including instructions on how Class Members could exclude themselves from the Class, and how they could object to or comment upon the Settlement. The Notice provided due and adequate notice of these proceeding and of the matters set forth in the Agreement to all persons entitled to such notice, and said notice fully satisfied the requirements of CR 23 and due process.

c. ***Stefanyshyn v. Consolidated Industries***, Case No. 79 D 01-9712-CT-59, Tippecanoe County Sup. Ct. (Ind.) (May 28, 2009). In the Order Granting Final Approval of Settlement, Judge Randy Williams stated:

The long and short form notices provided a neutral, informative, and clear explanation of the Settlement... The proposed notice program was properly designed, recommended, and implemented ... and constitutes the “best practicable” notice of the proposed Settlement. The form and content of the notice program satisfied all applicable legal requirements... The comprehensive class notice educated Settlement Class members about the defects in Consolidated furnaces and warned them that the continued use of their furnaces created a risk of fire and/or carbon monoxide. This alone provided substantial value.

d. ***Berger, et al., v. Property ID Corporation, et al.***, CV 05-5373-GHK (CWx) (C.D.Cal.):

The notice of the proposed Settlements provided to the Classes satisfies the requirements of Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure and the requirements of due process.

e. ***McGee v. Continental Tire North America, Inc. et al.***, Civ. No. 06-6234-(GEB) (D.N.J.):

The Class Notice, the Summary Settlement Notice, the website, the toll-free telephone number, and all other notices in the Agreement, and the notice methodology implemented pursuant to the Agreement: (a) constituted the best practicable notice under the circumstances; (b) constituted notice that was reasonably calculated to apprise Class Members of the pendency of the Action, the terms of the Settlement and their rights under the Settlement, including, but not limited to, their right to object to or exclude themselves from the proposed Settlement and to appear at the Fairness Hearing; (c) were reasonable and constituted due, adequate and sufficient notice to all persons entitled to receive notification; and (d) met all applicable requirements of law, including, but not limited to, the Federal Rules of Civil Procedure, 20 U.S.C. Sec. 1715, and the Due Process Clause(s) of the United States Constitution, as well as complied with the Federal Judicial Center’s illustrative class action notices.

f. ***In re: Canadian Air Cargo Shipping Class Actions*** (Ontario Superior Court of Justice, Court File No. 50389CP, Supreme Court of British Columbia, Quebec Superior Court). In the Endorsement of Settlement, Ontario Superior Court of Justice Regional Senior Justice Lynne C. Leitch stated:

I am satisfied the proposed form of notice meets the requirements of s. 17(6) of the CPA and the proposed method of notice is appropriate.

g. ***In re: Nortel Network Corp., Sec. Litig.***, Civil Action No. 01-CV-1855 (RMB) Master File No. 05 MD 1659 (LAP) (S.D.N.Y.). *See* slip op. at 4 (S.D.N.Y. Dec. 26, 2006). Regarding the B.C. Canadian notification effort: *Jeffery v. Nortel Networks*, [2007] BCSC 69 at para. 50, the Honorable Mr. Justice Groberman said:

The efforts to give notice to potential class members in this case have been thorough. There has been a broad media campaign to publicize the proposed Settlement and the court processes. There has also been a direct mail campaign directed at probable investors. I am advised that over 1.2 million claim packages were mailed to persons around the world. In addition, packages have been available through the worldwide website [www.nortelsecuritieslitigation.com](http://www.nortelsecuritieslitigation.com) on the Internet. Toll-free telephone lines have been set up, and it appears that class counsel and the Claims Administrator have received innumerable calls from potential class members. In short, all reasonable efforts have been made to ensure that potential members of the class have had notice of the proposal and a reasonable opportunity was provided for class members.

And of the U.S. notice program, the Honorable Loretta A. Preska stated:

The form and method of notifying the U.S. Global Class of the pendency of the action as a class action and of the terms and conditions of the proposed Settlement ... constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

h. ***Lucas v. KMART Corporation***, Civil Action No 99-CV-01923 (JLK) (D. Colo. 2006):

[T]he Court finds this extensive notice program to be more than adequate and approves it as the ‘best notice practicable under the circumstances’ and consistent with the requirements of F.R.C.P. 23 and due process.

i. ***Varacallo v. Massachusetts Mutual Life Insurance Company***, Civil Action No. 04-2702 (JLL) (D.N.J. 2004):

[A]ll of the notices are written in simple terminology, are readily understandable by Class Members, and comply with the Federal Judicial Center's illustrative class action notices.

j. ***Wilson v. Massachusetts Mutual Life Insurance Company***, Case No. D-101-CV 98-02814 (First Judicial District Court County of Santa Fe State of New Mexico 2002):

The Notice Plan was the best practicable and reasonably calculated, under the circumstances of the action . . . [and] that the notice meets or exceeds all applicable requirements of law, including Rule 1-023(C)(2) and (3) and 1-023(E), NMRA 2001, and the requirements of federal and/or state constitutional due process and any other applicable law.

k. ***Thomas A. Foster and Linda E. Foster v. ABTco Siding***, Case No. 95-151-M (Circuit Court of Choctaw County, Alabama 2000):

The notice program constitutes the best notice practicable under the circumstances of this Action. This finding is based on the overwhelming evidence of the adequacy of the notice program.

l. ***Sparks v. AT&T Corporation***, Case No. 96-LM-983 (Third Judicial Circuit Madison County, Illinois 2001). In granting final approval to the Settlement, the Court commented on the notification program as follows:

The Court further finds that the notice of the proposed Settlement was sufficient and furnished Class Members with the information they needed to evaluate whether to participate in or opt out of the proposed Settlement. The Court therefore concludes that the notice of the proposed Settlement met all requirements required by law, including all Constitutional requirements.

m. ***In re: Louisiana-Pacific Inner-Seal Siding***, Civil Action Nos. 879-JE, and 1453-JE (D. Or. 1995, 1999):

[T]he notice given to the members of the Class fully and accurately informed the Class members of all material elements of the Settlement...[through] a broad and extensive multi-media notice campaign.

9. Additionally, I have published extensively on various aspects of legal noticing, including the following publications and articles:

(a) Co-Author, with Hon. Dickran Tevrizian, “*Expert Opinion: It’s More Than Just a Report...Why Qualified Legal Experts Are Needed to Navigate the Changing Media Landscape*,” BNA Class Action Litigation Report, 12 CLASS 464, 5/27/11.

(b) Co-Author, with Hon. Dickran Tevrizian, “Your Insight: It’s More Than Just a Report...Why Qualified Legal Experts Are Needed to Navigate the Changing Media Landscape,” TXLR, Vol. 26, No. 21, 5/26/2011.

(c) Author, *Five Key Considerations for a Successful International Notice Program*, BNA Class Action Litigation Report, 4/9/10 Vol. 11, No. 7 p. 343.

(d) Quoted: *Technology Trends Pose Novel Notification Issues for Class Litigators*, BNA Electronic Commerce and Law Report, 15, ECLR 109, 1/27/10.

(e) Author, *Legal Notice: R U ready 2 adapt?* BNA Class Action Litigation Report, Vol. 10, No. 14, 7/24/2009, pp. 702-703.

(f) Author, *On Demand Media Could Change the Future of Best Practicable Notice*, BNA Class Action Litigation Report, Vol. 9, No. 7, 4/11/2008, pp. 307-310.

(g) Quoted in, *Warranty Conference: Globalization of Warranty and Legal Aspects of Extended Warranty*, Warranty Week, February 28, 2007, available at [www.warrantyweek.com/archive/ww20070228.html](http://www.warrantyweek.com/archive/ww20070228.html).

(h) Co-Author, *Approaches to Notice in State Court Class Actions*, For The Defense, Vol. 45, No. 11, November, 2003.

(i) Author, *The Web Offers Near, Real-Time Cost Efficient Notice*, American Bankruptcy Institute Journal, Vol. XXII, No. 5, 2003.

(j) Author, *Determining Adequate Notice in Rule 23 Actions*, For The Defense, Vol. 44, No. 9, September, 2002.

(k) Co-Author, *The Electronic Nature of Legal Noticing*, American Bankruptcy Institute Journal, Vol. XXI, No. 3, April, 2002.

(l) Author, *Three Important Mantras for CEO's and Risk Managers in 2002*, International Risk Management Institute, irmi.com/, January, 2002.

(m) Co-Author, *Used the Bat Signal Lately*, The National Law Journal, Special Litigation Section, February 19, 2001.

(n) Author, *How Much is Enough Notice*, Dispute Resolution Alert, Vol. 1, No. 6, March, 2001.

(o) Author, *Monitoring the Internet Buzz*, The Risk Report, Vol. XXIII, No. 5, January, 2001.

(p) Author, *High-Profile Product Recalls Need More Than the Bat Signal*, International Risk Management Institute, irmi.com/, July 2001.

(q) Author, *The Great Debate - How Much is Enough Legal Notice?* American Bar Association -- Class Actions and Derivatives Suits Newsletter, Winter 1999.

(r) Author, *What are the best practicable methods to give notice?* Georgetown University Law Center Mass Tort Litigation Institute, CLE White Paper: Dispelling the communications myth -- A notice disseminated is a notice communicated, November 1, 2001.

10. In addition, I have lectured or presented extensively on various aspects of legal noticing. A sample list includes the following:

- a. CLE International 8<sup>th</sup> Annual Class Actions Conference, Faculty Panelist, How Social Media and Networking has Changed Class Actions Nationwide, Los Angeles, California May 2012.
- b. CLE International, Faculty Panelist, Building a Workable Settlement Structure, CLE International, San Francisco, California May, 2011.
- c. Consumer Attorneys of San Diego (CASD), Faculty Panelist, “21st Century Class Notice and Outreach,” 2nd Annual Class Action Symposium CASD Symposium, San Diego, California, October 2010.
- d. Consumer Attorneys of San Diego (CASD), Faculty Panelist, “The Future of Notice,” 2nd Annual Class Action Symposium CASD Symposium, San Diego, California, October 2009.
- e. American Bar Association, Speaker, 2008 Annual Meeting, “Practical Advice for Class Action Settlements: The Future of Notice In the United States and Internationally – Meeting the Best Practicable Standard.”
- f. American Bar Association, Section of Business Law Business and Corporate Litigation Committee – Class and Derivative Actions Subcommittee, New York, NY, August 2008.
- g. Faculty Panelist, Women Lawyers Association of Los Angeles (WLALA) CLE Presentation, “The Anatomy of a Class Action.” Los Angeles, CA, February 2008.
- h. Faculty Panelist, Practicing Law Institute (PLI) CLE Presentation, 11th Annual Consumer Financial Services Litigation. Presentation: Class Action Settlement Structures -- “Evolving Notice Standards in the Internet Age.” *New York/Boston* (simulcast) March, 2006; *Chicago*, April, 2006; and *San Francisco*, May 2006.
- i. Expert Panelist, U.S. Consumer Product Safety Commission. I was the only legal notice expert invited to participate as an expert to the Consumer Product Safety Commission to discuss ways in which the CPSC could enhance and measure the recall process. As an expert panelist, I discussed how

the CPSC could better motivate consumers to take action on recalls and how companies could scientifically measure and defend their outreach efforts. Bethesda, MD, September 2003.

j. Expert Speaker, American Bar Association. Presentation: “How to Bullet-Proof Notice Programs and What Communication Barriers Present Due Process Concerns in Legal Notice,” ABA Litigation Section Committee on Class Actions & Derivative Suits, Chicago, August 6, 2001.

11. A comprehensive description of my credentials and experience that qualify me to provide expert opinions on the adequacy of class action notice programs is attached as Exhibit A.

### **NOTICE PROGRAM CONSIDERATIONS**

12. As discussed below, and in the Settlement Agreement, the Notice Program was designed to reach an estimated 76 to 78 percent of United States Adults who are 25 to 64 years of age, with an average frequency of 4 times through direct mail, via mail, postcard notice, in the form of the Summary Settlement Notice, to bounced emails subject to available addresses, and a comprehensive paid media program, which incorporates traditional and new media outlets and mobile media. In addition, a Settlement website will be created which will allow Class Members to obtain information about the proposed Settlement, find important Court documents including the Settlement class notice and claim form, and a toll-free information line where Class Members may obtain basic information about the Settlement, as well as request that a claim packet be mailed to them, or seek other assistance. Specifically, the proposed Notice Program includes the following components:

- CAFA Notice to appropriate state and federal government officials.
- Direct mail notice to known Class Members by email or postcard notice.
- Publication of a short-form notice (“Summary Notice”) in a nationally circulated consumer magazine
- Banner advertising on highly trafficked websites
- Mobile advertising on a widely visited mobile online network

- A press release in English and Spanish; and a release targeted to journalists in the Fitness and Nutrition category
- A 100 character social networking post to a variety of PR Newswire's social network presences including Twitter, LinkedIn and Facebook
- A social media release to key health and fitness blogs
- A Facebook Settlement page that will contain the same documents as the Settlement website
- An informational website ([www.newbalancesettlement.com](http://www.newbalancesettlement.com)) on which the notices and other important Court documents are posted; and
- A toll-free information line, 1-866-893-0232, where Class Members could call 24/7 for more information, about the Settlement, including but not limited to requesting copies of the claim packet, and an option to speak to a live operator as well as a Spanish option for a call back.

#### **DIRECT NOTICE THROUGH EMAIL**

13. I have been informed by Class Counsel that New Balance has email addresses for approximately six (6) percent of potential class members, which were obtained during the course of normal business. I further understand from Class Counsel that there are some instances where a street address is also available. GCG will send the Summary Class Notice by email, to approximately 70,142 Class Members' last known email address reasonably obtainable from New Balance customer online purchases directly from New Balance. Where an email is determined undeliverable and a street address is available, GCG will then send notice by postcard.

14. GCG has routinely administered class action settlements where email was used to provide notice and approved by the Court. These cases include but are not limited to the following: *In Re: Webloyalty.com, Inc.* Marketing and Sales Practices Litigation, No. 1:07-md-01820 (D. Mass. filed Nov. 9, 2007); *George v. National Collegiate Athletic Association, et al.*, No. 08-CV003401 (S.D. Tenn. filed May 22, 2008); *Robert V. Townes, IV v. TransUnion, LLC and TrueLink, Inc.*, No. 04-1488 (D. Del. filed Dec. 1, 2004); *Robert Anthony v. Yahoo! Inc.*, No. 5:05-cv-04175 (N.D. Cal. filed Oct. 15, 2005); and *Radosti, et al. v. Envision EMI, LLC, et al.*, No. 1:09-cv-887 (N.D. Cal).

15. In each of these consumer class actions, the Court approved Email Notice as an appropriate notice vehicle to distribute Notice of Settlement and each of these cases received final approval from the Court.

16. GCG closely monitors failed email delivery attempts throughout the Email Notice distribution. Reasons emails are not delivered are often due to the email account being closed or the email address having a bad domain name (collectively these are called “Hard Bounces”). GCG makes three delivery attempts to complete email delivery when GCG receives an un-deliverable notification for reasons such as inactive or disabled accounts, full recipient mailboxes, recipient server network or technical auto-replies, and recipient server was too busy or unable to deliver (collectively, “Soft Bounces”) as these types of bounces will often result in a delivery by the third attempt.

17. In order to effectively implement email notice campaigns, GCG maintains a proprietary list of contacts at Internet Service Providers (“ISPs”) that GCG communicates with when an ISP will receive large volumes of class action notice emails. Communication with ISPs in advance of email notice campaigns facilitates the email notice process and assists in the reduction of blockings.

18. In an attempt to maximize email delivery rates and minimize electronic and manual discarding of Email Notices, GCG takes special care formatting and distributing Email Notices. GCG emails always contain a subject line, which specifically identifies the email as important to the receiver. GCG also avoids sending lengthy emails and email notices that are, or are accompanied by, attachments. Sending extremely lengthy emails and emails as or with attachments trigger SPAM filters and significantly drive down deliverability. Additionally, GCG avoids the use of identified words that might trigger SPAM filters and drive down deliverability.

19. GCG reviews emails used in notice campaigns to make sure they do not contain content or parameters that trigger SPAM filters and significantly drive down deliverability.

20. Further, GCG follows all standard email protocols such as “unsubscribe” links, as well as lists the Court information and GCG’s contact information in the email, so that it can be verified, independently by the receiver.

21. The Email Notice will include information regarding the Settlement along with direct links to and instructions for accessing the content of the Settlement Website and further information. In the cases where an email has been determined “undeliverable” due to either a Soft or a Hard Bounce, and GCG has been provided with a street address associated with the bounced email, GCG will send postcard notice, in the form of the Summary Settlement Notice, to the intended recipient. This notice will contain summary information on the Settlement and similar to the Email Notice, direct persons to the Settlement Website for further detailed information.

22. A report will be provided to the court on the results of this effort upon the completion of the Notice Program.

23. The Class Notice shall describe the nature of the Actions, including information on the identity of Class Members, how the proposed Settlement would provide relief to the Class, their rights as well as important dates and deadlines. Additionally, the notices will include the website address and toll-free number, which will be prominently positioned in the Class Notices, so Class Members may easily obtain more detailed information.

### **METHODOLOGY**

24. To appropriately design and target the notice publication component of the Notice Program, we have used a scientific methodology that is used throughout the advertising industry and that has been embraced by courts in the United States. See *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579 (1993) (experts must apply a technique that may be tested by peers and use industry accepted methodology); *Kumho Tire Co. v. Carmichael* 526 U.S. 137 (1999) (same). The methodology discussed in this Declaration has been accepted by numerous courts, including those listed in paragraphs 7 and 8, above.

25. Media is typically purchased based on both demographic (i.e., age, gender, ethnicity, income, education) and psychographic (i.e., lifestyle, product and brand preference, media usage, and media definition) characteristics. Based on these characteristics, populations will tend to use media in differing ways.

26. In order to determine the most appropriate media to employ in this notice publication program, my staff and I have studied data provided by nationally syndicated media research bureaus, including GfK Mediamark Research and Intelligence, LLC (“GfK MRI”) and comScore.<sup>1</sup> Media research bureaus scientifically characterize populations in clusters by demographic factors including age, ethnicity, income, geographical distribution, income, gender, and profession. Once the demographic profile has been established, research continues to include a target audience’s psychographic characteristics, such as their choice of media. A media study can define a target audience by product, service, and brand usage habits. The study can identify which media channels are favored by the target audience (i.e., the potential Class Members). For instance, what magazines are they reading, how frequently, and whether they are reading the daily newspaper or visiting a favored website.

27. Based on these research tools, we are able to measure and report to the Court the percentage of the target Class that will be reached by the notice publication component and how many times the target audience had the opportunity to see the message. In advertising, this is commonly referred to as a “Reach and Frequency” analysis, where “Reach” refers to the estimated percentage of the unduplicated audience exposed to the campaign, and “Frequency” refers to how many times, on average, the target audience had the opportunity to see the message. The calculations are used by advertising and communications firms worldwide, and have become a critical element to help provide the basis for determining adequacy of notice in class actions.

---

<sup>1</sup> GfK MRI is a nationally syndicated research tool. It is the leading supplier of multi-media audience research, and provides comprehensive reports on demographic, lifestyle, product usage and media exposure. GfK MRI conducts more than 26,000 personal interviews annually to gather their information, and is used by more than 450 advertising agencies as the basis for the majority of media and marketing campaigns. comScore is a global Internet information provider on which leading companies and advertising agencies rely for consumer behavior insight and Internet usage data. comScore maintains a proprietary database of more than 2 million consumers who have given comScore permission to monitor their browsing and transaction behavior, including online and offline purchasing. comScore panelists also participate in survey research that captures and integrates their attitudes and intentions.

### **APPLICATION**

28. The first step is to establish the demographic profile. This analysis is based on multiple sources, which includes the products at issue, competitive corporate brand market analysis, information provided by Class Counsel and nationally syndicated media research data from GfK MRI data. Reviewed in aggregate, this data reveals that the most appropriate target demographic profile for this notice program is “adults 25 to 64 years of age.”

29. The next step in developing an appropriately targeted notice program is to review the target audience’s general media preferences from GfK MRI data. We conduct a quintile analysis of each medium to measure the sample respondents’ usage of a medium. The data is segmented into five equally sized groups (by population), each of which is called a quintile, and then arranged by heaviest to lightest consumption of a medium. For our purposes, as set forth in the chart below, we are looking at the top three quintiles, which are the heaviest users of a given medium, e.g., in this case, medium to heavy users of magazines and the Internet.

### **NOTICE PUBLICATION**

30. Utilizing nationally syndicated media research data, we have designed the notice publication component described below to reach our national target: Adults 25 to 64 years of age.

<b>NOTICE PROGRAM DEVELOPMENT</b>	
<b>Media Usage Quintiles</b>	
<b>Media</b>	<b>Percentage of Target Audience That Are Medium to Heavy Users</b>
Magazine	61%
Internet	65%

Source: GfK MRI Doublebase 2011

31. This information enables us to prioritize medium selection, and ultimately prepare a statistical analysis for the Court estimating, based on our recommendations, what percentage of the target audience might be reached by the proposed legal Notice Program. Based on this analysis, we selected the publication program described below.

### **MAGAZINE**

32. As the quintiles indicate, adults 25 to 64 are also readers of magazines. Therefore we have included the popular, general consumer magazine People Magazine.

33. People Magazine is a weekly publication with a wide circulation of 3,556,753. GfK MRI reports one of the largest pass-along rates of any magazine for People at approximately 12.69 readers per copy, for a total readership of approximately 45,135,195.

34. Specifically, published notice will appear once in the selected publication, as follows:

MAGAZINE CIRCULATION AND READERSHIP				
Title	Circulation	Unit Size	Insertions	Total Readership
People Magazine	3,556,753	1/3 Page	2	45,135,195

### **INTERNET**

35. Internet advertising is a helpful method of providing notice in this case, given that, according to GfK MRI, 82 percent of targeted adults 25 to 64 are online and 65 percent of those are medium to heavy users, as discussed above. Internet banner ads will be posted on the sites identified below for a sufficient period of time to deliver approximately 440,000,000 impressions. Advertising will be purchased against a specific target of adults 25 to 64.

(a) **Yahoo!** is one of the most trafficked Internet destinations worldwide. According to comScore Media Metrix, in January 2012 Yahoo

reached almost 90 percent of all U.S. adults age 18 and older with over 64 million average daily visitors. A run of Network buy on Yahoo! could include banner advertising on the many Yahoo! Sites, such as News, Finance and Sports. It also may include advertising on Yahoo's network of sites, which includes hundreds of publisher partners' sites and many from comScore's top 250 list.

(b) **AOL Run of Network** includes advertising on any of their many "channels" such as News, Travel, Health, Autos, among others. According to comScore January 2012 data, over 13 million people visit AOL.com each day averaging about 22 minutes on the site per day.

(c) **24/7 Real Media, Inc.** was named among the top five ad networks in the U.S. according to comScore's June 2010 rankings. The network includes over 2,000 web properties such as: Oprah, ivillage, Weather.com, MySpace and FoxNews among many others. Advertising may be purchased throughout the entire network or within specific "channels" such as technology, news, sports, etc.

(d) **Facebook** is the number one social networking site on the web. Facebook consistently ranks in the top 3 highest trafficked websites overall with over 50 percent of active users logging on to Facebook each day. According to comScore's 2010 Digital Year in Review, Facebook ranked number one in terms of time spent online in August 2010 and accounts for 12.3 percent of total time spent online. According to a January 2012 comScore report, Facebook visitors spent an average of 34 minutes per day on Facebook.

(e) **Condé Nast Run of Collection Network** is a consortium of websites, which may include Lucky.com, Self.com, Wired.com, Gourmet.com and GolfDigest.com.

(f) **MSN Hotmail** is currently the second largest web-based email service. According to comScore January 2012 data, MSN Hotmail had over 8 million daily visitors. Visitors spent an average of 25.6 minutes per day with this property.

WEBSITES
Yahoo RON
AOL
24/7
Facebook
Condé Nast Run of Collection Network
MSN Hotmail
<b>Estimated Total Estimated Impressions: 440,000,000</b>

36. Banner ads will allow users to self identify themselves as potential Class Members, where they may then “click” on the banner and then link directly to the official website for more information.

#### **MOBILE BANNER ADVERTISING**

37. To further enhance the notice effort, and to capture the growing population of cell phone users, the notice program will include banner advertising on mobile phones. It is important to note that an estimated 91 percent of the target audience adults 25 to 64 years of age have a cell/mobile phone. In addition, almost 30 percent accessed the Internet via their cell phone in the last month. Banner ads will be served up as users are accessing the Internet on their cell phones. Users must be on the Internet via their mobile device in order to be served a banner ad and count as an impression. Mobile cell phone users will have the option to click to connect directly to the official website or click to the official toll-free number.

Websites
MSN Mobile Run of Site
<b>Estimated Total Impressions: 4,500,000</b>

### **PRESS RELEASE**

38. A neutral press release will be issued over PR Newswire's US1 English and Hispanic newlines. The press release will be broadly distributed to thousands of media outlets, including newspapers, magazines, national wire services, television and radio broadcast media, and web publications. The Hispanic newline is distributed to hundreds of Spanish news Websites and portals, as well as TV, radio, newspapers and social networking media. In addition, the release will also be distributed to approximately 900 journalists in the microlist category, Fitness and Nutrition.

### **SOCIAL MEDIA**

39. As a further enhancement to this notice program, we intend to issue a blog release to approximately 250 blogs covering fitness and exercise, dieting, nutrition, jogging/running, and sports. Other social media elements include:

- (a) Set up and maintain a Facebook Settlement page, which will tie into the Facebook advertising and have a link directly to the official web site.
- (b) A 100 character social networking post to a variety of PR Newswire's social network presences including Twitter, LinkedIn and Facebook.

### **MONITORING**

40. An important component to any Notice Program is monitoring how many news articles appear as a result of the outreach efforts. GCG will monitor for mentions of the Settlement in the various press. The additional opportunities to see this message by way of articles will further enhance the overall reach of the Notice Program.

### **OFFICIAL SETTLEMENT WEBSITE**

41. Importantly, the Notice Program includes an official website, [www.newbalancesettlement.com](http://www.newbalancesettlement.com). This website will serve as a "landing page for the banner advertising," and will host the full length Class Notice. The Class Notice contains

detailed information about the lawsuit, the Claim Form, the Settlement benefits and the Release, as well as information about how Class Members can opt-out, object, or exercise other rights under the Settlement. The website address will be prominently displayed in the publication notice, and also will be provided on the toll-free telephone helpline. Spanish speakers will be directed to call the toll free number where they can obtain information in Spanish through a live operator as well as a Spanish option for a call back. The website established and maintained by GCG will be accessible 24-hours a day, 7-days a week.

### **TOLL-FREE TELEPHONE HELPLINE**

42. GCG will establish and maintain a 24-hour toll-free telephone line, 1-866-893-0232, where callers may obtain information about the class action Settlement. Once a caller connects to the helpline, he or she will hear an Interactive Voice Recording (“IVR”). The IVR will provide detailed information to callers regarding frequently asked questions about this Settlement, including relevant information about the Settlement and contact information should Class Members have additional questions, and allow members of the Settlement Class to request a claim form. The IVR will also provide an option to speak with a live operator in English or Spanish, and if after hours, Class Members can request a return call in either language. . The telephone number will be prominently displayed in the direct mail and email Notice, the publication Notice, and on the website.

### **CAFA NOTICE**

43. The Settlement Administrator will provide notice of the proposed Settlement under CAFA 28 U.S.C. §1715(b) to appropriate state and federal government officials.

### **CONCLUSION**

44. Using tools and methods accepted within the advertising industry, the media and direct notice through email in this program has been reasonably calculated to

reach an estimated 76 to 78 percent of the target audience, with an average frequency of 4 times, which provides the best notice practicable under the circumstances, and is consistent with other court approved notice programs in similar matters.

45. I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 27, 2012, in Lake Oswego, Oregon.

  
JEANNE C. FINEGAN

# EXHIBIT 9

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

KIMBERLY CAREY, SHANNON DILBECK, and  
VICTORIA MOLINAROLO, individuals, on their  
own behalf and on behalf of all others similarly  
situated,

Plaintiffs,

v.

NEW BALANCE ATHLETIC SHOE, INC.,

Defendant.

Civil Action No. 11-cv-10001-LTS

**CONFIDENTIALITY AGREEMENT FOR DISCOVERY  
MATERIALS MADE AVAILABLE TO CLASS MEMBERS**

Pursuant to the Settlement Agreement and all of its attached exhibits, which are incorporated herein by reference, including, but not limited to, this Confidentiality Agreement for Discovery Materials Made Available to Class Members (“Confidentiality Agreement”), it is hereby stipulated and agreed, by and between the undersigned, as follows:

1. Pursuant and subject to the Court’s Order, New Balance will provide the undersigned Class Member(s) and/or counsel retained at those Class Member(s)’ expense and/or certain other persons identified in Paragraph 6 (below) with access to documents New Balance disclosed to Class Counsel in the course of discovery in this Action.

2. The following documents and materials to be reviewed pursuant to this Confidentiality Agreement shall be deemed “Confidential Information.” “Confidential Information” shall be limited to:

- (a) the design, initiative, development, scientific studies, and research relating to the Eligible Shoes;
- (b) sales and accounting records relating to the Eligible Shoes;

(c) marketing, advertising, media and public relations materials relating to the Eligible Shoes;

(d) intercompany and intracompany communications relating to the information above; and

(e) related information and materials.

In addition, any and all notes, memoranda, or dictation that copies, reproduces, reflects, incorporates, or otherwise refers to the Confidential Information made by any person afforded access to Confidential Information pursuant to this Confidentiality Agreement shall be treated as, and deemed to be, Confidential Information as well.

3. All Confidential Information to which the undersigned and/or certain other persons identified in Paragraph 6 (below) are given access is subject to this Confidentiality Agreement, and such Confidential Information shall not be used or disclosed to anyone or in any manner, except as provided herein.

4. The undersigned and/or certain other persons identified in Paragraph 6 (below) specifically certify(ies) that he/she/they shall use the Confidential Information solely for purposes of evaluating the fairness, reasonableness, and adequacy of the proposed settlement in this Action and for no other purpose. In particular and without limitation, Confidential Information provided pursuant to this Confidentiality Agreement shall not be used: (a) in the litigation of this Action, should the Parties not reach a settlement and/or in the Other Actions<sup>1</sup>; (b) in the litigation of this Action, if the Court should fail to approve the proposed settlement for any reason, or if any appellate court should reverse an order of this Court approving the proposed settlement and/or the Other Actions; and/or (c) in any other litigation, arbitration, or other

---

<sup>1</sup> "Other Actions" means *Whitney Stagg and Jennifer Vaughn v. New Balance Athletic Shoe, Inc.*, CV11-241-2 (Arkansas Circuit Court, Washington County) and *Elizabeth L. Tuberville v. New Balance Athletic Shoe, Inc.*, CV-2011-023-6 (Arkansas Circuit Court, Ouachita County).

judicial or administrative proceeding, including, without limitation, in the investigation or preparation of any such proceeding, and/or the Other Actions.

5. The undersigned and/or certain other persons identified in Paragraph 6 (below) may inspect the Confidential Information by prior appointment at a time during regular business hours and at a location designated by Class Counsel. Duplication of documents or materials containing Confidential Information shall not be permitted, except for documents that the undersigned Class Member(s) and/or their counsel represent to the Court that they need to duplicate for the Court in support of a point of objection. The cost of any duplication shall be borne by the requesting Class Member or their counsel. Any such documents shall be filed under seal with the Court, labeled, "Confidential – Subject to Protective Order," and shall be delivered to the Clerk of the Court in an envelope bearing the notation, "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION SUBMITTED UNDER SEAL PURSUANT TO COURT ORDER." However, in the course of inspecting the Confidential Information, the undersigned Class Member(s) and/or certain other persons identified in Paragraph 6 (below) shall be permitted to make a reasonable amount of notes reflecting their review of Confidential Information, which shall also be treated as Confidential Information.

6. Access to Confidential Information shall be subject to the protective order entered in this case and limited to those persons who are working directly on the Class Member's behalf, to whom it is necessary that the Confidential Information be disclosed and who are:

- a. the undersigned Class Member(s);
- b. their undersigned counsel;
- c. employees of such counsel assigned to and necessary to assist such counsel in evaluating the proposed settlement; and

- d. consultants or experts, to the extent necessary to assist the undersigned Class Member(s) and/or their counsel in evaluating the proposed settlement.

7. Any person given access to Confidential Information shall be advised, prior to being granted access, of the terms of this Confidentiality Agreement and of the Court's Protective Order and shall thereby become bound by their terms, including without limitation, the requirement that such Confidential Information may not be disclosed to any person other than those described in Paragraph 6 (above). In addition, access to Confidential Information shall not be provided to any person described in Subparagraphs 6.c or 6.d of this Confidentiality Agreement until and unless such person has executed an undertaking in the form attached hereto as Exhibit A. The individual who provides access to Confidential Information to such person shall retain the executed undertaking and shall provide a copy of it to Designated Class Counsel and to New Balance's Counsel.

8. By providing access to Confidential Information, no party to this Action shall be deemed to have waived any claim that such information is privileged, confidential, or protected from discovery as attorney work product, nor shall any party use this Confidentiality Agreement as an admission or concession that the Confidential Information is relevant, material, responsive, admissible, or otherwise discoverable in any pending or future litigation or judicial or administrative proceeding. The undersigned Class Member(s) and/or certain other persons identified in Paragraph 6 (above) agree that they, or any of them, shall not contend or otherwise take the position in this or in any other pending or future litigation or judicial or administrative proceeding that any party has waived the attorney-client privilege and/or the protection of the

attorney work product doctrine, or any other privilege or protective doctrine, with regard to Confidential Information.

9. The terms of this Confidentiality Agreement shall survive the termination of this Action and/or the Other Actions. At the earlier of: (a) the conclusion of any or all appeals of the Final Order and/or Final Judgment approving the proposed settlement, or (b) such time as the parties terminate their Settlement Agreement, all persons having received Confidential Information shall either return such material and all copies thereof (including notes and other records containing or reflecting Confidential Information) to New Balance's Counsel or shall destroy such material. New Balance reserves the right to demand written certification of destruction from any person who has been given access to Confidential Information.

10. The terms of this Confidentiality Agreement shall be enforceable by any aggrieved party, including any party to this Action. The undersigned and/or other persons identified in Paragraph 6 (above) agree(s) that, if he/she/they fail to comply with this Confidentiality Agreement, New Balance may suffer irreparable harm that may not be adequately compensated for by monetary damages alone. Any breach of the terms of this Confidentiality Agreement shall give rise to any and all applicable legal and equitable remedies for enforcement of the Confidentiality Agreement and/or relief, including, without limitation, injunctive relief and/or damages, for its breach, in addition to any other remedies available at law.

11. Pursuant to the Court's Preliminary Approval Order incorporating this Confidentiality Agreement, any breach of the terms of this Confidentiality Agreement shall constitute a violation of the Court's Preliminary Approval Order and may result in an order of contempt of Court and/or other sanctions, upon application to the Court by any party aggrieved

by such violation, including any party to this Action. The undersigned and/or certain other persons identified in paragraph 6 below consent to the jurisdiction of the United States District Court for the District of Massachusetts for purposes of interpretation and enforcement of the terms of this Confidentiality Agreement.

12. Any dispute over the meaning or interpretation of this Confidentiality Agreement shall be governed by the laws of the Commonwealth of Massachusetts, disregarding any conflicts-of-law provisions.

13. The undersigned Class Member(s) and/or their counsel agree(s) to notify Class Counsel and New Balance's Counsel immediately: (a) of any disclosure of Confidential Information in violation of this Confidentiality Agreement and or the Court's Preliminary Approval Order, even if inadvertent; and (b) if any person granted access to the Confidential Information under this Confidentiality Agreement is served with or otherwise receives a subpoena, summons, court order, request, or application requiring disclosure of Confidential Information. In any such instance, the undersigned Class Member(s) and/or their counsel agree(s): (a) not to oppose New Balance's efforts to prevent the disclosure of the Confidential Information; and (b) not to surrender the Confidential Information to any third party without the consent of New Balance or except by the final order of a court with competent jurisdiction.

14. The notice required in Paragraph 13 of this Confidentiality Agreement must be provided by e-mail and overnight delivery service to:

R. David Hosp  
GOODWIN PROCTER LLP  
53 State Street  
Boston, Massachusetts 02109  
Tel.: 617.570.1000  
Fax: 617.523.1231  
E-Mail: rhosp@goodwinprocter.com

Robert Ahdoot  
Tina Wolfson  
10850 Wilshire Blvd., Suite 370  
Los Angeles, California 90024  
Tel.: 310-474-9111  
Fax: 310-474-8585  
E-Mail: rahdoot@ahdootwolfson.com  
twolfson@ahdootwofson.com

15. No waiver by any party hereto of any breach of any term or condition of this Confidentiality Agreement shall be deemed a waiver of a similar or dissimilar term or condition.

16. The waiver by one party of any breach of this Confidentiality Agreement by another party shall not be deemed a waiver of any prior or subsequent breach of this Confidentiality Agreement.

17. The undersigned certify(ies) and agree(s) that he/she/they: (a) has read, understands, consents, accepts, and agrees to be bound by the terms of this Confidentiality Agreement and the Preliminary Approval Order and by the terms of any future Orders of the Court concerning the information he/she shall receive; and (b) shall use the Confidential Information solely for the purposes of evaluating the fairness, reasonableness, and adequacy of the proposed settlement in this Action and for no other purpose.

18. This Confidentiality Agreement may be executed in one or more counterparts, each of which shall constitute a duplicate original.

Dated: \_\_\_\_\_

COUNSEL, INDIVIDUALLY AND ON BEHALF  
OF THE CLASS MEMBER(S):

\_\_\_\_\_ [Signature]

\_\_\_\_\_ [Print Name]

\_\_\_\_\_ [Firm Name]

\_\_\_\_\_ [Print Name of Class Member(s)]

\_\_\_\_\_ [Address and Telephone Number]

THE CLASS MEMBER(S):

\_\_\_\_\_ [Signature]

\_\_\_\_\_ [Print Name]

\_\_\_\_\_ [Address and Telephone Number]

**EXHIBIT A TO THE CONFIDENTIALITY AGREEMENT**

The undersigned hereby certifies that he/she understands, consents and acknowledges that Confidential Information is being provided to him/her pursuant to the terms and restrictions of the Settlement Agreement preliminarily approved by the United States District Court for the District of Massachusetts (the "Court") in Kimberly Carey et al. v. New Balance Athletic Shoe, Inc., Civil Action No. 11-cv-10001-LTS, and by the Court's Preliminary Approval Order. The undersigned also certifies that he/she has been provided with the Confidentiality Agreement, has read, understands, consents, accepts and agrees to be bound by its terms.

The undersigned acknowledges that breach of the Confidentiality Agreement shall be actionable by any aggrieved party, including any party to the aforementioned Action, and that such breach shall subject the undersigned to any and all applicable legal and equitable remedies for enforcement of the Stipulation and/or relief, including damages, for its breach. The undersigned also acknowledges that breach of the Stipulation will violate the Court's Order and may subject the undersigned to an order of contempt of Court or other sanctions, upon application to the Court by any party aggrieved by such violation, including any party to the aforementioned Action. The undersigned hereby subjects himself/herself to the jurisdiction of the Court for purposes of enforcement of the terms and restrictions of the Stipulation and/or the Preliminary Approval Order.

Dated: \_\_\_\_\_, \_\_\_\_\_

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

**EXHIBIT 10**

# truebalance

## vosre petit secret beauté

grâce à une technologie exclusive empruntée à la planche d'équilibre, truebalance ouvre de nouvelles perspectives en matière de chaussures tonifiantes. Spécialement conçues pour faire travailler votre corps à chacun de vos pas et vous aider à mobiliser vos muscles et à engager votre tronc. Encore mieux, à la différence des autres chaussures de ce type, elles ne vous donnent ni l'air, ni l'impression d'être en déséquilibre, ce qui les rend très confortables et vous permet de garder votre petit secret beauté pour vous.

## truebalance peut vous aider à :

brûler  
des calories

faire travailler  
vos quadriceps

faire travailler  
vos muscles  
fessiers

faire travailler vos  
muscles ischio-  
jambiers

faire travailler  
vos muscles  
du mollet



### PRUDENCE :

Les produits truebalance sont des équipements d'entraînement délibérément destinés à compromettre l'équilibre de l'utilisateur. En raison de l'instabilité sciemment induite par ce produit, New Balance en déconseille vivement l'utilisation aux personnes nécessitant une posture stable, ou sujettes à des chutes ou à une instabilité chronique.

# truebalance

## your hidden beauty secret

truebalance, the next level of body shaping shoes, made with a unique balance board technology. Specifically designed to help work your body with every step, helping to activate your muscles and engage your core. And best of all, they don't look or feel overly unstable like other comparable shoes, so they're immediately comfortable to wear, and you can keep your beauty secret all to yourself.

## truebalance is designed to help:

burn  
calories

activate  
quad muscles

activate  
glute muscles

activate  
hamstring  
muscles

activate  
calf muscles



### CAUTION:

truebalance products are training tools designed to intentionally compromise the balance of the wearer. Due to the intentionally produced instability of this product, New Balance does not advise use for individuals who require a stable platform or may be prone to falls or instability.

WTBRI-12



# truebalance

## votre petit secret beauté

grâce à une technologie exclusive empruntée à la planche d'équilibre, truebalance ouvre de nouvelles perspectives en matière de chaussures tonifiantes. Spécialement conçues pour faire travailler votre corps à chacun de vos pas et vous aider à mobiliser vos muscles et à engager votre tronc. Encore mieux, à la différence des autres chaussures de ce type, elles ne vous donnent ni l'air, ni l'impression d'être en déséquilibre, ce qui les rend très confortables et vous permet de garder votre petit secret beauté pour vous.

## truebalance peut vous aider à :

brûler  
des calories

faire travailler  
vos muscles  
fessiers

faire travailler vos  
muscles ischio-  
jambiers

faire travailler  
vos quadriceps

faire travailler  
vos muscles  
du mollet



### PRUDENCE :

Les produits truebalance sont des équipements d'entraînement délibérément destinés à compromettre l'équilibre de l'utilisateur. En raison de l'instabilité sciemment induite par ce produit, New Balance en déconseille vivement l'utilisation aux personnes nécessitant une posture stable, ou sujettes à des chutes ou à une instabilité chronique.

# truebalance

## your hidden beauty secret

truebalance, the next level of body shaping shoes, made with a unique balance board technology. Specifically designed to help work your body with every step, helping to activate your muscles and engage your core. And best of all, they don't look or feel overly unstable like other comparable shoes, so they're immediately comfortable to wear, and you can keep your beauty secret all to yourself.

### CAUTION:

truebalance products are training tools designed to intentionally compromise the balance of the wearer. Due to the intentionally produced instability of this product, New Balance does not advise use for individuals who require a stable platform or may be prone to falls or instability.

WTBRI-12

## truebalance is designed to help:



TONING



WW855GB

TONING  
TONIFIANT

WOMENS | FEMMES

newbalance.com

8

USA

6

UK

39

EUR

2A

NARROW | ITROIT



8

86350

46885

7



SLIMS DOWN  
BURNS CALORIES  
TONES MUSCLES

new balance®



TONIFIANT



AFFINE LA SILHOUETTE  
BRÛLE LES CALORIES  
TONIFIE LES MUSCLES

new balance®

new balance®



**TONING**

**TONING**



TONIFIANT

**EXHIBIT 11**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

KIMBERLY CAREY, SHANNON  
DILBECK, and VICTORIA MOLINAROLO,  
individuals, on their own behalf and on behalf  
of all others similarly situated,

Plaintiffs,

v.

NEW BALANCE ATHLETIC SHOE, INC.;  
and DOES 1-10, inclusive,

Defendants.

Civil Action No. 11-cv-10632-LTS

**STIPULATION OF DISMISSAL**

Pursuant to the Settlement Agreement filed on [DATE] in *Kimberly Carey, et al. v. New Balance Athletic Shoe, Inc.*, Case No. 11-cv-1001-LTS (D. Mass.) (the “Settlement Agreement”), and finally approved by the Court on [DATE], Plaintiffs Kimberly Carey, Shannon Dilbeck, and Victoria Molinarolo (“Plaintiffs”) and Defendant New Balance Athletic Shoe, Inc. hereby jointly stipulate to the dismissal of Plaintiffs’ Complaint and above-captioned action in its entirety ***with prejudice***, without costs and fees (except as otherwise provided in the Settlement Agreement), and waiving all rights of appeal.

Respectfully submitted,

KIMBERLY CAREY, SHANNON DILBECK  
& VICTORIA MOLINAROLO

By their attorneys

---

Tina Wolfson  
twolfson@ahdootwolfson.com  
Robert Ahdoot  
rahdoot@ahdootwolfson.com  
AHDoot & WOLFSON, PC  
10850 Wilshire Blvd., Suite 370  
Los Angeles, California 90024  
Telephone: 310-474-9111  
Facsimile: 310-474-8585  
Plaintiffs' Counsel

LAW OFFICES OF HOWARD FRIEDMAN,  
PC

Howard Friedman  
hfriedman@civil-rights-law.com  
90 Canal Street, 5<sup>th</sup> Floor  
Boston, Massachusetts 02114  
Telephone: 617-742-4100  
Facsimile: 617-742-5858  
Plaintiffs' Local Counsel

Dated: \_\_\_\_\_

Respectfully submitted,

NEW BALANCE ATHLETIC SHOE, INC.

By its attorneys,

---

R. David Hosp (BBO # 634091)  
Mark S. Puzella (BBO # 644850)  
Erin M. Michael (BBO # 672904)  
GOODWIN PROCTER LLP  
53 State Street  
Boston, Massachusetts 02109  
Tel.: 617.570.1000  
Fax: 617.523.1231  
E-Mail: rhosp@goodwinprocter.com  
mpuzella@goodwinprocter.com  
emichael@goodwinprocter.com

**CERTIFICATE OF SERVICE**

I certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on [DATE].

# EXHIBIT 12

BANNER ADS

EXAMPLE 1:

A banner advertisement with a dark background and orange wavy lines. The text is white and yellow. The headline is 'NEW BALANCE CLASS ACTION SETTLEMENT'. The body text says 'If you purchased certain New Balance Toning Shoes you could get money from a proposed class action settlement.' There is a yellow button with 'Click Here >'. At the bottom left, it says 'Prepared by GCG'.

**NEW BALANCE  
CLASS ACTION  
SETTLEMENT**

If you purchased certain  
New Balance Toning Shoes  
you could get money from  
a proposed class action  
settlement.

**Click Here >**

Prepared by GCG

EXAMPLE 2:

A banner advertisement with a dark background and a red header bar. The text is white and yellow. The headline is 'NEW BALANCE SETTLEMENT'. The body text says 'IF YOU PURCHASED NEW BALANCE TONING SHOES You could get money from a proposed class action settlement.' There is a yellow button with 'Click Here >'. At the bottom left, it says 'Prepared by GCG'.

**NEW BALANCE SETTLEMENT**

**IF YOU PURCHASED  
NEW BALANCE  
TONING SHOES**

You could get money  
from a proposed class  
action settlement.

**Click Here >**

Prepared by GCG

**EXHIBIT 13**

**ADDENDUM TO SETTLEMENT AGREEMENT**

This Addendum (“Addendum”) to the Settlement Agreement is made and entered into on the last day indicated below by Whitney Stagg and Jennifer Vaughn, and all potential claimants including, but not limited to, heirs, spouses, next of kin, successors, beneficiaries, assigns, agents, representatives, guardians, trustees, executors, administrators or personal representatives, and any other person, natural or legal, claiming in whole or in part by, through or under the signatory and whether or not participating in the settlement by payment or otherwise (the “Releasing Parties”) and New Balance Athletic Shoe, Inc. (“New Balance”).

**RECITALS**

WHEREAS, on January 21, 2011, Whitney Stagg and Jennifer Vaughn filed the *Stagg & Vaughn Action* in the Circuit Court of Washington County, Arkansas. The *Stagg & Vaughn Action* was filed on behalf of the named plaintiffs and “all Arkansas residents who purchased New Balance’s True Balance and Rock&Tone shoes in the last 5 years” and alleged that Ms. Stagg & Ms. Vaughn purchased New Balance toning shoes and further alleged claims for: (1) Breach of Express Warranty; (2) Breach of Implied Warranty of Fitness for a Particular Purpose; (3) Breach of Implied Warranty of Merchantability; (4) Violation of the Arkansas Deceptive Trade Practices Act; and (5) Unjust Enrichment. Plaintiffs *Stagg & Vaughn* sought monetary damages, as well as any relief the court may deem just and proper.

WHEREAS, the *Stagg & Vaughn Action* was removed to the United States District Court for the Western District of Arkansas on February 18, 2011. The *Stagg &*

*Vaughn* Plaintiffs filed a Motion to Remand on March 21, 2011, and the *Stagg & Vaughn Action* was remanded to the Circuit Court of Washington County on May 25, 2011;

WHEREAS, New Balance filed a motion to dismiss the *Stagg & Vaughn Action* on June 6, 2011;

WHEREAS, Plaintiffs filed a response to New Balance's motion to dismiss on June 16, 2011; and New Balance filed a reply brief on June 27, 2011;

WHEREAS, the Court denied New Balance's motion to dismiss on September 29, 2011; and New Balance filed a Notice of Appeal regarding this decision on October 28, 2011;

WHEREAS, New Balance filed an answer to the *Stagg & Vaughn* Complaint on October 20, 2011;

WHEREAS, the named Plaintiffs in the *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.) (the "*Carey Action*"), on behalf of the members of the proposed class, have reached an agreement to settle the *Carey Action* pursuant to the provisions of the Settlement Agreement, which has been or will shortly be submitted for preliminary approval; and

WHEREAS, the *Stagg & Vaughn* Plaintiffs and *Stagg & Vaughn* Plaintiffs' Counsel, and New Balance, desire to resolve the *Stagg & Vaughn Action* in conjunction with the resolution of the nationwide class action settlement, which would extinguish the claims alleged in the *Stagg & Vaughn Action*, pursuant to the terms of the Settlement Agreement in the *Carey Action*;

NOW THEREFORE, *Stagg & Vaughn* Plaintiffs and New Balance hereby agree to the terms of this Addendum as more fully set forth herein.

## **ADDENDUM**

### **I. DEFINITIONS**

A. “*Stagg & Vaughn Court*” means the Circuit Court of Washington County, Arkansas.

B. “*Stagg & Vaughn Parties*” means New Balance, *Stagg & Vaughn* Plaintiffs and *Stagg & Vaughn* Plaintiffs’ Counsel, collectively, and “Party” means each of New Balance, *Stagg & Vaughn* Plaintiffs and *Stagg & Vaughn* Plaintiffs’ Counsel individually.

C. “*Stagg & Vaughn Plaintiffs*” means Whitney Stagg and Jennifer Vaughn.

D. “*Stagg & Vaughn Plaintiffs’ Counsel*” means Taylor Law Partners LLP, Crowley Norman LLP, and Keil & Goodson, P.A., and Nix, Patterson & Roach, LLP.

E. All other terms, conditions and/or definitions are as stated in the Settlement Agreement, all of which are incorporated as if fully set forth herein.

### **II. CONSIDERATION**

A. After execution of this Addendum and the issuance of the preliminary Approval Order, and during the Claim Period, *Stagg & Vaughn* Plaintiffs, who are Class Members, shall be entitled to submit a Claim to the Claim Process and obtain the other benefits specified in the Settlement Agreement.

B. Beginning as soon as practicable, but no later than (5) days after the execution of this Addendum, the Parties shall jointly move the Court to stay the *Stagg & Vaughn Action* during the pendency of the class action settlement approval process

associated with the Settlement Agreement up to and including the occurrence of the Final Settlement Date.

C. In consideration for the full release of all claims in the *Stagg & Vaughn Action* and upon attainment of the Final Settlement Date, New Balance shall pay the *Stagg & Vaughn* Plaintiffs \$2,500 each as an incentive award and New Balance shall pay *Stagg & Vaughn* Plaintiffs' Counsel a total of \$100,000 in attorneys' fees and costs in full and complete satisfaction of their attorneys' fees and costs incurred on behalf of the *Stagg & Vaughn* Plaintiffs in the *Stagg & Vaughn Action*. In compliance with Fed. R. Civ. P. 23(e)(3), this Addendum shall be properly submitted in the *Carey Action*. The purpose of such an award to the *Stagg & Vaughn* Plaintiffs shall be to compensate the *Stagg & Vaughn* Plaintiffs for efforts and risks taken by them in *Stagg & Vaughn*. The payments mentioned in this subsection shall be paid by New Balance as instructed by *Stagg & Vaughn* Plaintiffs' Counsel, not later than thirty (30) business days after the occurrence of the Final Settlement Date.

D. *Stagg & Vaughn* Plaintiffs' Counsel shall not seek any additional fees, costs and/or related demands for payment in the *Stagg & Vaughn Action* or the *Carey Action*. *Stagg & Vaughn* Plaintiffs shall not seek any requests for compensation, other than that specified in this Addendum, in the *Stagg & Vaughn Action* and/or the Actions.

E. In consideration of the terms of this Addendum and the Settlement Agreement and for other good and valuable consideration, which is hereby acknowledged, Plaintiffs shall dismiss the *Stagg & Vaughn Action* with prejudice and without fees and costs, other than those agreed to in this Addendum, not later than five (5) days after the Final Settlement Date.

### III. GENERAL PROVISIONS

A. All of the terms and conditions in the Settlement Agreement shall apply to the *Stagg & Vaughn* Plaintiffs, except *Stagg & Vaughn* Plaintiffs may not object to the settlement, exclude herself and/or opt out of the Settlement.

Agreed to on the date indicated below.

APPROVED AND AGREED TO BY STAGG & VAUGHN PLAINTIFFS:

BY Whitney Stagg  
WHITNEY STAGG

DATE 6/21/2012

BY Jennifer Vaughn  
JENNIFER VAUGHN

DATE 6/20/12

APPROVED AND AGREED TO BY STAGG & VAUGHN PLAINTIFFS' COUNSEL,  
TAYLOR LAW PARTNERS LLP:

BY W.H. Taylor  
W.H. TAYLOR

DATE 6/19/12

APPROVED AND AGREED TO ON BEHALF OF NEW BALANCE ATHLETIC  
SHOE, INC.:

BY Edward J. Haddad

DATE July 27, 2012

Name: EDWARD J. HADDAD

Title: VICE PRESIDENT

**ADDENDUM TO SETTLEMENT AGREEMENT**

This Addendum (“Addendum”) to the Settlement Agreement is made and entered into on the last day indicated below by Elizabeth Tuberville, and all potential claimants including, but not limited to, heirs, spouses, next of kin, successors, beneficiaries, assigns, agents, representatives, guardians, trustees, executors, administrators or personal representatives, and any other person, natural or legal, claiming in whole or in part by, through or under the signatory and whether or not participating in the settlement by payment or otherwise (the “Releasing Parties”) and New Balance Athletic Shoe, Inc. (“New Balance”).

**RECITALS**

WHEREAS, on January 24, 2011, Elizabeth Tuberville filed the *Tuberville Action* in the Circuit Court of Ouachita County, Arkansas. The *Tuberville Action* was filed on behalf of the named plaintiff and “all Arkansas consumers who purchased New Balance toning shoe products” and alleged that Ms. Tuberville purchased a pair of New Balance toning shoes and further alleged claims for: (1) Violations of the Arkansas Deceptive Trade Practices Act; and (2) Unjust Enrichment. Plaintiff Tuberville sought “an award against Defendants...in amounts equal to the amount each class member enriched Defendants and for which Defendants have been unjustly enriched,” as well as any relief the court may deem just and proper;

WHEREAS, the *Tuberville Action* was removed to the United States District Court for the Western District of Arkansas on February 23, 2011. The *Tuberville* Plaintiff filed a Motion to Remand on March 16, 2011, and the *Tuberville Action* was remanded to the Circuit Court of Oachita County on April 21, 2011;

WHEREAS, New Balance filed an answer to the *Tuberville* Plaintiff's Complaint on May 2, 2011; and an amended answer on July 8, 2011;

WHEREAS, the *Tuberville* Plaintiff filed a motion for class certification on May 11, 2011, and New Balance filed its opposition to the motion for class certification on June 24, 2011. The *Tuberville* Plaintiff filed a reply brief on July 7, 2011.

WHEREAS, the Court granted the *Tuberville* Plaintiff's motion for class certification on January 9, 2012; and New Balance filed a Notice of Appeal regarding the class certification decision on March 5, 2012;

WHEREAS, the named Plaintiffs in the case, *Kimberly Carey et al. v. New Balance Athletic Shoe, Inc.*, Case Number 11-cv-10001-LTS (D. Mass.) (the "*Carey Action*"), on behalf of the members of the class, have reached an agreement to settle the *Carey Action* pursuant to the provisions of the Settlement Agreement, which has been or will shortly be submitted for preliminary approval; and

WHEREAS, the *Tuberville* Plaintiff and *Tuberville* Plaintiff's Counsel, and New Balance, desire to resolve the *Tuberville Action* in conjunction with the resolution of the nationwide class action settlement, which would extinguish the claims alleged in the *Tuberville Action*, pursuant to the terms of the Settlement Agreement in the *Carey Action*;

NOW THEREFORE, *Tuberville* Plaintiff and New Balance hereby agree to the terms of this Addendum as more fully set forth herein.

## **ADDENDUM**

### **I. DEFINITIONS**

A. "Tuberville Court" means the Circuit Court of Ouachita County, Arkansas

B. “*Tuberville Parties*” means New Balance, *Tuberville Plaintiff* and *Tuberville Plaintiff’s Counsel*, collectively, and “*Party*” means each of New Balance, *Tuberville Plaintiff* and *Tuberville Plaintiff’s Counsel* individually.

C. “*Tuberville Plaintiff*” means Elizabeth Tuberville.

D. “*Tuberville Plaintiff’s Counsel*” means Emerson Poynter LLP.

E. All other terms, conditions and/or definitions are as stated in the Settlement Agreement, all of which are incorporated as if fully set forth herein.

## **II. CONSIDERATION**

A. After execution of this Addendum and the issuance of the preliminary Approval Order, and during the Claim Period, *Tuberville Plaintiff*, who is a Class Member, shall be entitled to submit a Claim to the Claim Process and obtain the other benefits specified in the Settlement Agreement.

B. Beginning as soon as practicable, but no later than (5) days after the execution of this Addendum, the Parties shall jointly move the Court to stay the *Tuberville Action* during the pendency of the class action settlement approval process associated with the Settlement Agreement up to and including the occurrence of the Final Settlement Date.

C. In consideration for the full release of all claims in the *Tuberville Action* and upon attainment of the Final Settlement Date, New Balance shall pay the *Tuberville plaintiff* \$2,500 as an incentive award and New Balance shall pay *Tuberville Plaintiff’s Counsel* a total of \$295,000 in attorneys’ fees and costs in full and complete satisfaction of their attorneys’ fees and costs incurred on behalf of the *Tuberville Plaintiff* and the class in the *Tuberville Action*. In compliance with Fed. R. Civ. P. 23(e)(3), this

Addendum shall be promptly submitted in the *Carey Action*. The purpose of such an award to the *Tuberville* Plaintiff shall be to compensate the *Tuberville* Plaintiff for efforts and risks taken by her in *Tuberville*. The payments mentioned in this subsection shall be paid by New Balance as instructed by *Tuberville* Plaintiff's Counsel, not later than thirty (30) business days after the occurrence of the Final Settlement Date.

D. *Tuberville* Plaintiff's Counsel shall not seek any additional fees, costs and/or related demands for payment in the *Tuberville Action* or the *Carey Action*. *Tuberville* Plaintiff shall not seek any requests for compensation, other than that specified in this Addendum, in the *Tuberville Action* and/or the Actions.

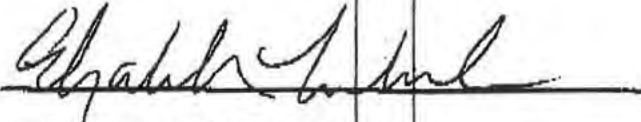
E. In consideration of the terms of this Addendum and the Settlement Agreement and for other good and valuable consideration, which is hereby acknowledged, Plaintiff shall dismiss the *Tuberville Action* with prejudice and without fees and costs, other than those agreed to in this Addendum, not later than five (5) days after the Final Settlement Date.

### **III. GENERAL PROVISIONS**

A. All of the terms and conditions in the Settlement Agreement shall apply to the *Tuberville* Plaintiff, except *Tuberville* Plaintiff may not object to the settlement, exclude herself and/or opt out of the Settlement.

Agreed to on the date indicated below.

APPROVED AND AGREED TO BY TUBERVILLE PLAINTIFF:

BY   
ELIZABETH TUBERVILLE

DATE 6/19/12

APPROVED AND AGREED TO BY TUBERVILLE PLAINTIFF'S COUNSEL,  
EMERSON POYNTER LLP:

BY   
SCOTT POYNTER

DATE 6/20/2012

APPROVED AND AGREED TO ON BEHALF OF NEW BALANCE ATHLETIC  
SHOE, INC.:

BY Edward J. Haddad

DATE July 27, 2012

Name: EDWARD J. HADDAD

Title: VKE President