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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SHEILA DASHNAW *et al.*,  
Plaintiff,  
v.  
NEW BALANCE ATHLETICS, INC.,  
Defendant.

Case No.: 17cv159-L(JLB)

**CLASS ACTION**  
**ORDER GRANTING**  
**PLAINTIFF'S SECOND**  
**RENEWED MOTION FOR**  
**PRELIMINARY APPROVAL OF**  
**SETTLEMENT**

In this putative class action Plaintiffs allege consumer fraud relating to "made in USA" representations on certain New Balance athletic shoes in violation of California False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.* (including violation of § 17533.7 relating to the sale of goods produced abroad); Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*; California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*; breach of express warranty; negligent misrepresentation; and unjust enrichment. Plaintiffs seek injunctive and declaratory relief, restitution or disgorgement of profits or unjust enrichment, and damages, including punitive damages. Defendant New Balance Athletics, Inc. ("New Balance") removed this action from State court. This Court

1 has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. §  
2 1332(d).

3 After an investigation, formal discovery, extensive motion briefing, including  
4 a motion for class certification and *Daubert* challenges to Plaintiffs' experts, the  
5 parties reached settlement in private mediation. Plaintiffs filed a motion for  
6 preliminary class action settlement approval. (Docs. no. 99, 103.) The motion was  
7 denied because Plaintiffs did not meet the requirements of Federal Rule of Civil  
8 Procedure 23. (Docs. no. 101, 105.) Pending before the Court is Plaintiffs' second  
9 amended motion seeking preliminary approval of the Amended Settlement  
10 Agreement signed December 7, 2018, which together with attached exhibits, sets  
11 forth the terms and conditions of the class settlement as currently proposed. (Doc.  
12 no. 106-1 ("Motion") and doc. no. 106-3 ("Settlement"), respectively.) Plaintiffs  
13 also seek class action certification for settlement purposes and approval of the  
14 proposed notice of class action settlement. Defendant does not oppose.

15 Having read and considered the Motion, including supporting declarations,  
16 exhibits and the Settlement, the Court finds and orders as follows:

17 1. The Court certifies for settlement purposes a Class comprised of:  
18 All persons who purchased any and all “Made in USA” Shoes from  
19 New Balance and/or its Authorized Retailers in California from  
20 December 27, 2012 up to and including January \_\_, 2019 (“Class  
21 Period”). “Made in USA’ Shoes” means the New Balance’s “Made in  
22 USA” labeled shoes purchased as new by Class Members during the  
23 Class Period, in California listed below:

ELIGIBLE NEW BALANCE SHOE MODELS	
601	ML996
M1140	ML997
M1290	MR1105
M1300	MR993
M1400	MW812
M1540	PM15
M1700	PM16
M2040	US574

**ELIGIBLE NEW BALANCE SHOE MODELS**

M3040	US576
M498	US990
M574	US993
M585	US998
M587	W1140
M770	W1290
M990	W1400
M991	W1540
M995	W3040
M996	W498
M997	W587
M9975	W990
M998	W998
MK706	WK706
ML1300	WR993
ML1978	WW812

Excluded from the Class are: (a) New Balance’s board members and employees, including its attorneys; (b) any persons who purchased the “Made in USA” Shoes for the purposes of resale (c) distributors or re-sellers of “Made in USA” Shoes; (d) the judge and magistrate judge and their immediate families presiding over this action; (e) governmental entities; and (f) persons or entities who or which exclude themselves from the Class as provided in the notice.

2. This action meets the class certification requirements of Federal Rule of Civil Procedure 23(a) and (b)(3). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also id.* at 620-27. The Class is sufficiently numerous. The parties estimate that at least several hundred thousand of individuals fit the definition of the Class. As alleged in the operative first amended complaint, all of Plaintiffs' claims are premised on the contention that the label on "Made in USA" Shoes misled the consumers to believe that the shoes were American-made, when a significant part of the materials and labor were derived from abroad. Furthermore, Plaintiffs claim that as a result of this allegedly false advertising, Defendant was able to overcharge California consumers for the shoes and induce purchases that otherwise would not have been made. At least with respect to the statutory consumer protection claims,

1 Plaintiffs are not required to prove individual reliance, so long as the alleged  
2 misrepresentation would mislead a reasonable consumer. *See Williams v. Gerber*  
3 *Prods Co.*, 553 F.3d 934, 938 (9th Cir. 2008) (am. Dec. 22, 2008); *see also*  
4 *Chapman v. Skype, Inc.*, 220 Cal. App. 4th 217, 230 (2013). In this regard, "it is  
5 necessary only to show that members of the public are likely to be deceived." *In re*  
6 *Tobacco II Cases*, 46 Cal.4th 298, 312 (2009) (internal quotation marks, brackets,  
7 ellipsis and citation omitted). Accordingly, the legal and factual issues are  
8 sufficiently uniform to meet the commonality and predominance requirements.  
9 Based on the allegations regarding products purchased, Plaintiffs' claims are typical  
10 of the Class. Plaintiffs and their counsel have demonstrated they can adequately  
11 represent the absent Class members. Finally, the Court finds that maintenance of  
12 this action as a class action is superior to individual litigation.

13         3. Plaintiffs Sheila Dashnaw, William Meier, and Sheryl Jones are  
14 appointed as representatives for the conditionally certified Class. Jason H. Kim of  
15 Scheneider Wallace Cottrell Konecky Wotkyns LLP and Aubry Wand of The Wand  
16 Law Firm, P.C., are appointed as counsel for the conditionally certified settlement  
17 Class ("Class Counsel") pursuant to Federal Rule of Civil Procedure 23(g).

18         4. Class Counsel is conditionally authorized to act on behalf of the Class  
19 members with respect to the acts or consents under the Settlement. Any member of  
20 the Class may enter an appearance through counsel of his or her own choosing and  
21 at his or her own expense. Any member of the Class who does not enter an  
22 appearance through counsel or appear on his or her own behalf will be represented  
23 by Class Counsel.

24         5. The Settlement provides for injunctive and monetary relief. The  
25 injunctive relief requires Defendant to more accurately disclose the domestic content  
26 of its shoes. The monetary relief portion of the Settlement provides for a fund of  
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1 approximately \$535,000 for payment of claims.<sup>1</sup> Each Class member can recover a  
2 maximum of \$10 per qualifying pair of shoes, up to \$50 for 5 or more pairs or \$100  
3 per household. In the event funds remain after all valid claims are paid, or any  
4 claim payment checks remain uncashed, the remainder will be distributed in equal  
5 parts to the Public Justice Foundation and Consumer Federation of California as *cy*  
6 *pres* recipients. On the other hand, if valid claims exceed the fund, the claim  
7 payments will be reduced pro rata. The \$10 per pair of shoes represents Plaintiffs'  
8 maximum recovery based on their experts' opinion, if they prevail on their theory  
9 that Defendant charged a \$10 premium based on the allegedly inaccurate "Made in  
10 USA" representation. In addition to disputing liability altogether, Defendant  
11 countered with its own expert opinions to dispute the \$10 premium. In order to  
12 receive \$10 per pair of shoes, approximately 5% of the Class members would have  
13 to submit valid claims. A more common, albeit "very low," claim rate is between 10  
14 and 15%. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017).  
15 If 10 to 15% of Class members submit valid claims, they will recover between \$3.62  
16 and \$5.43 per pair. When balanced against the cost and uncertainty associated with  
17 further litigation, the Court finds that the terms of the Settlement are within the  
18 range of possible approval as fair, reasonable and adequate under Federal Rule of  
19 Civil Procedure 23(e), and that there is a sufficient basis for notifying the Class of  
20 the Settlement. Accordingly, the Court grants preliminary approval of the  
21 Settlement.

22 6. The parties shall cooperate and comply with all of their respective  
23 obligations under the Settlement to the extent they must be performed pending final  
24 settlement approval.

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27 <sup>1</sup> Defendant will pay \$750,000 from which an estimated \$200,000 is to be paid  
28 to the Settlement Administrator, and \$15,000 for enhancement payments to  
Plaintiffs, subject to Court approval. In addition to the \$750,000, Defendant will  
pay up to \$650,000 to Class Counsel for fees and costs, subject to Court approval.

1           7.     Heffler Claims Group is appointed as Settlement Administrator. The  
2 Settlement Administrator shall comply with its duties as set forth in the Settlement  
3 and this Order.

4           8.     The Court approves the long form and the summary notice attached to  
5 the Settlement as Exhibits 2 and 7, respectively (doc. no. 106-3 at 47-68 and 99-  
6 102<sup>2</sup> (collectively "Notice")) with the changes indicated in Exhibits A and B to this  
7 Order, which are incorporated herein by reference. Deletions are indicated by  
8 strikethroughs, and additions are indicated in bold italicized font. Please note that  
9 Paragraphs 11 and 12 of the long form notice have been reversed. The parties must  
10 review the table of contents and all date and page references in the Notice to assure  
11 accuracy after revisions.

12           9.     Plaintiffs propose to disseminate the long form notice by direct email to  
13 the Class members whose addresses are known, issuing a press release to a  
14 California wire service, publishing the summary notice in the Los Angeles Times in  
15 print and online, advertising the Settlement online on the websites most likely to be  
16 frequented by the Class, including Facebook and Instagram, establishing a  
17 settlement website where the Class members can access the long form notice, and  
18 establishing a 24-hour toll free interactive voice response telephone line. (*See Decl.*  
19 *of Jeanne C. Finegan* (doc. no. 106-14 ("Finegan Decl.")) at 10-15; Settlement ¶  
20 IV.B.1.) The Court finds the foregoing notice program adequate, provided that (a)  
21 the website provides access to the complaint and amended complaint, all orders of  
22 this Court relating to settlement approval, Plaintiffs' pending motion with all  
23 supporting documents and exhibits, the Notice, and, at the time of filing with the  
24 Court, any motion for attorney's fees and costs of Class Counsel and enhancement  
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27 <sup>2</sup> Page numbers are assigned by the Electronic Filing System. The long form  
28 notice includes Appendices A through C (Release and Waiver of Claims, Claim  
Form and Exclusion Form).

1 payments to Plaintiffs, as well as any motion for final settlement approval with all  
2 supporting documents and exhibits; and (2) the telephone line allows putative Class  
3 members ultimately to reach a live person, or provide information on how to reach a  
4 live person, to answer questions. With these conditions, the proposed manner of  
5 distribution and form of the notice are approved. The notice satisfies due process  
6 requirements and requirements of Federal Rule of Civil Procedure 23(c)(2) and  
7 (e)(1), is the best notice practicable under the circumstances, and shall constitute due  
8 and sufficient notice to the Class.

9 10. No later than **February 13, 2019**, Class Counsel shall file a motion, if  
10 any, for attorney's fees and costs of Class Counsel and enhancement payments to  
11 Plaintiffs.

12 11. No later than **May 6, 2019**, the Class members shall submit their claims  
13 or requests for exclusion, if any, by following instructions in the long form notice.

14 12. Any Class member who chooses to be excluded will not be entitled to  
15 any monetary recovery under the Settlement, will not be bound by the Settlement,  
16 and will have no right to object to the Settlement or appeal the judgment, if any.

17 13. If the Settlement is ultimately approved, any Class members who did  
18 not choose to be excluded shall be bound by the Settlement, as well as all  
19 subsequent orders and judgment in this action. As provided in Paragraph 16 of the  
20 long form notice (Ex. A hereto), they will release certain claims as fully stated in the  
21 Release and Waiver of Claims ("Released Claims"). In addition, they shall be  
22 preliminarily enjoined pending final approval of the Settlement from filing,  
23 commencing, prosecuting, maintaining, intervening in, participating in, conducting,  
24 or continuing litigation as class members, putative class members, or otherwise  
25 against New Balance (or against any of its related parties or affiliates), and/or from  
26 receiving any benefits from, any lawsuit, administrative, or regulatory proceeding or  
27 order in any jurisdiction asserting any Released Claims.

1           14. No later than **May 13, 2019**, Plaintiffs shall file their motion for final  
2 approval of the Settlement. In addition to the required and customary filings, the  
3 motion papers shall include (1) any communications received from any government  
4 official in response to notice under 28 U.S.C. § 1715; and (2) the Claim  
5 Administrator's affidavit regarding compliance with its duties under the Settlement  
6 and this Order. The Claim Administrator's affidavit must include a report as  
7 outlined in the Finegan Declaration at Paragraphs 16 through 26, as well as copies  
8 of the long form and summary notice, press release, and internet ads used in the  
9 Notice dissemination process, the number of putative Class members submitting  
10 claims, objections or requests for exclusion (including any untimely or disputed  
11 claims, objections and exclusion requests); the number of Class members to whom a  
12 payment will be made; calculation on the estimated payment per pair of "Made in  
13 USA" Shoes; and the estimated amount of the *cy pres* award, if any.

14           15. The final approval hearing is set for **June 10, 2019 at 10:30 a.m.** in  
15 Courtroom 5B of the United States District Court for the Southern District of  
16 California, located at 221 West Broadway, San Diego, California 92101  
17 ("Hearing"), to determine all necessary matters concerning the Settlement, including  
18 whether to grant final certification to this action as a class action for settlement  
19 purposes, whether to approve the proposed Settlement as fair, adequate, and  
20 reasonable; and whether to grant the motion for attorney's fees and costs of Class  
21 Counsel and for enhancement payments to Plaintiffs.

22           16. Any member of the Class may appear at the Hearing in person or  
23 through counsel of his or her own choosing and at own expense. Any member of  
24 the Class who does not appear will be represented by Class Counsel.

25           17. Any member of the Class may object to the Settlement ("Objectors").  
26 Objectors may present evidence and/or file briefs, if any, relevant to the issues to be  
27 determined by the Court. Objectors are encouraged no later than **May 6, 2019** to  
28 comply with the instructions in the long form notice (Ex. A hereto). Any interested



1 party may file and serve a reply to objections, which shall not exceed ten (10) pages  
2 in length, no later than **May 30, 2019**. If a member of the Class intends to speak at  
3 the Hearing, he or she is encouraged no later than **June 3, 2019** to submit to the  
4 Settlement Administrator and file with the Court a Notice of Intent to Appear.

5 18. This Order shall not be construed as an admission, concession, or  
6 declaration by or against New Balance of any fault, wrongdoing, breach, or liability.  
7 Nor shall the Order be construed or used as an admission, concession, or declaration  
8 by or against Plaintiffs or the other Class members that their claims lack merit or  
9 that the relief requested is inappropriate, improper, or unavailable, or as a waiver by  
10 any party of any defenses or claims he, she, or it may have in this or any other action  
11 or proceeding.

12 19. Any motions for discovery filed by Class members pending final  
13 approval of the Settlement shall be directed to Magistrate Judge Jill L. Burkhardt,  
14 including any request by the parties to condition their response to a Confidentiality  
15 Agreement attached as Exhibit 10 the Settlement.

16 20. As of the date this Order is signed, all due dates associated with this  
17 action are vacated, except for those related to the administration of the Settlement.

18 21. If the Settlement does not become effective in accordance with its  
19 terms, or is not finally approved, or is terminated, canceled or fails to become  
20 effective for any reason, this Order may be vacated upon an appropriate motion filed  
21 no later than seven calendar days after the triggering event.

22 22. The Court reserves the right to adjourn or continue the date of the  
23 Hearing and all dates provided for in the Settlement without further notice, and may  
24 determine the matters on the briefs without a hearing.

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1           23. The Court retains jurisdiction to consider any further applications  
2 related to the Settlement.

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4           **IT IS SO ORDERED.**

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6 Dated: January 24, 2019

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9 Hon. M. James Lorenz  
United States District Judge

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