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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SHEILA DASHNAW, *et al.*,

Plaintiffs,

v.

NEW BALANCE ATHLETICS, INC.,

Defendant.

Case No. 3:17-cv-00159-L-JLB

**ORDER DENYING WITHOUT  
PREJUDICE PLAINTIFF'S  
MOTION FOR PRELIMINARY  
APPROVAL OF SETTLEMENT**

Pending before the Court in this putative class action alleging consumer fraud relating to "made in USA" representations on certain New Balance athletic shoes, is Plaintiffs' motion for preliminary approval of class action settlement. The motion is denied without prejudice for the following reasons:

1. The representation in the motion and the proposed class notice that class members will receive "up to \$10" in damages is problematic. "Up to \$10" is the maximum class member payment provided under the settlement agreement. The actual amount depends on the number of claims. However, based on the representations in Plaintiff's motion, the class members will not receive \$10 unless the class participation rate is extremely low or the factual representations in support

1 of the proposed settlement are inaccurate by a wide margin. Pursuant to the  
2 settlement agreement, Defendant is to pay \$750,000 as "total Relief Amount." From  
3 that amount, an estimated \$200,000 is deducted for settlement administration costs  
4 and \$15,000 for requested class representative service compensation. After  
5 deductions, approximately \$535,000 is available to pay the class members.  
6 Defendant estimates that one million qualifying pairs of New Balance shoes were  
7 sold to the putative class. Assuming that the estimate is accurate, and that every  
8 putative class member submits a claim for one pair of shoes, each will receive  
9 \$0.54. It is very uncommon in consumer class actions for every class member to  
10 submit a claim. "[I]t is not unusual for only 10 or 15% of the class members to  
11 bother filing claims." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th  
12 Cir. 2017) (internal quotation marks and citation omitted). Ten or 15% are "low  
13 participation rates." *Id.* If only 10% of the putative class submit claims, their  
14 estimated recovery will be \$5.35. To receive \$10, the participation rate would have  
15 to be abysmally low -- just over 5%. A realistic estimate of individual class member  
16 recovery is relevant to the settlement fairness determination under Federal Rule of  
17 Civil Procedure 23(e), see *In re Bluetooth Headset Prod. Liability Litig.*, 654 F.3d  
18 935, 946 (9th Cir. 2011), and to the adequacy of the proposed notice to the class, see  
19 *In re Online DVD Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015). The  
20 estimate of class member recovery provided in the motion and proposed notice  
21 appears inaccurate on its face, and lacks a plausible explanation.

22 2. The proposed *cy pres* award does not comply with *Dennis v. Kellogg*  
23 *Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (" [W]e require that there be a driving nexus  
24 between the plaintiff class and the *cy pres* beneficiaries.").

25 3. The parties have provided no evidence of compliance with 28 U.S.C. §  
26 1715.

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1           4.     The proposed class notice must be amended to make clear that making  
2 an objection does not preclude a class member from submitting a claim.

3           5.     Federal Rule of Civil Procedure 23(e)(5) provides that "[a]ny class  
4 member may object" to the proposed settlement. Although the parties may  
5 encourage class members to provide written objections by a date certain, the Court  
6 is not inclined to prohibit a class member from objecting, if he or she did not file  
7 written objections or did not do so in a timely manner. Accordingly, the proposed  
8 notice must be amended consistent with this order.

9           For the foregoing reasons, Plaintiff's motion for preliminary approval of class  
10 action settlement is denied without prejudice to re-filing after curing the foregoing  
11 defects.

12           **IT IS SO ORDERED.**

13  
14 Dated: October 5, 2018

  
15 Hon. M. James Lorenz  
16 United States District Judge  
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