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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 IN PART  
AND DENYING IN PART THE  
JOINT MOTION TO MODIFY  
NOTICE PLAN, CLASS NOTICE,  
AND SETTLEMENT  
IMPLEMENTATION DATES**

On January 24, 2019, the Court issued the Order Granting Plaintiff's Second Renewed Motion for Preliminary Approval of Settlement. (*See* doc. no. 108 ("Jan. 24 Order") and doc. no. 106 ("Sec. Renewed Mot."), respectively.) Among other things, the January 24 Order preliminarily approved the proposed class action settlement contained in the Amended Settlement Agreement signed December 7, 2018 (doc. no. 106-3 ("Settlement")), set the content and procedure for a full length and summary notice to the settlement class (Jan. 24 Order Exs. A & B, collectively, "Notice"), and provided a schedule through the final settlement approval hearing. On February 15, 2019, the parties filed the pending Joint Motion to Modify Notice Plan, Class Notice, and Settlement Implementation Dates (doc. no. 110 ("Joint Mot.")), seeking relief from failure to timely comply with the January 24 Order. They seek to delay Notice

1 distribution and increase the Notice cost to the putative Class members by \$20,000. For  
2 the reasons which follow, the Joint Motion is granted in part and denied in part.

3 **A. Effect of Proposed Changes on the Preliminary Settlement Approval**

4 The parties explain that they did not comply with the January 24 Order because  
5 they discovered the summary notice was too long for the 1/8 page ad they had proposed  
6 in their Second Renewed Motion, and that a 1/4 page ad is needed, which will increase  
7 the Notice expense from the \$200,000 estimate in the Settlement (Settlement ¶ III.A.1),  
8 to \$220,000 (Decl. of Jeanne Finegan (doc. no. 110-1 ("Finegan Decl.") ¶ 3). According  
9 to the parties, this will decrease the settlement fund available to the Class members;  
10 however, the estimated claim payments will be reduced by less than \$0.25. (Joint Mot.  
11 at 3-4.)

12 Because the monetary effect on the projected individual Class member recovery is  
13 small, the change to a 1/4 page ad does not alter the Court's finding in the January 24  
14 Order that the terms of the Settlement are in the range of possible approval as fair,  
15 reasonable and adequate under Federal Rule of Civil Procedure 23(e). Accordingly, the  
16 request to modify the January 24 Order to accommodate the higher cost of a larger print  
17 ad is granted.

18 **B. Enlargement of Time**

19 The parties request to delay the distribution of Notice by two weeks or more, and  
20 the final settlement approval hearing by approximately six weeks. (Joint Mot. at 5.) A  
21 showing of good cause is required to enlarge time for compliance with an order. Fed. R.  
22 Civ. Proc. 6(b). The Joint Motion was filed on February 15, 2019, more than a week  
23 after some of the due dates set in the January 24 Order had already passed. (*See*  
24 Settlement ¶ IV.B.1. & 3 (notice by email and publication due Feb. 7, 2019).) When, as  
25 here, the request for extension is made after the time had already passed, the requesting  
26 party must show excusable neglect. Fed. R. Civ. Proc. 6(b)(1)(B). In determining  
27 whether to grant an extension for excusable neglect, the Court looks to four equitable  
28 factors:

1 (1) the danger of prejudice to the non-moving party, (2) the length of  
2 delay and its potential impact on judicial proceedings, (3) the reason for  
3 the delay, including whether it was within the reasonable control of the  
4 movant, and (4) whether the moving party's conduct was in good faith.

5 *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004) (citing *Pioneer Inv. Servs. Co. v.*  
6 *Brunswick Assoc. Ltd. Ptnshp*, 507 U.S.380, 395 (1993)).

7 The parties contend that they did not comply with the January 24 Order because  
8 they discovered that "the new Court Approved Summary notice at 1,100 words is more  
9 than double the word count that would fit in [the proposed 1/8 page] ad unit." (Finegan  
10 Decl. ¶ 3.) The summary notice the parties proposed in their Second Renewed Motion  
11 contained 973 words. (*See* doc. no. 106-5.) If 1,100 words is more than double the word  
12 count that will fit a 1/8 page ad, then 973 words surely came very close. With the  
13 exercise of due diligence, the parties should have known when they filed their Second  
14 Renewed Motion that the 1/8 page ad they were proposing was grossly inadequate. They  
15 offer no explanation why they could not discover this error before filing their motion on  
16 December 7, 2018, much less why their delay is excusable. The parties selected and  
17 retained Heffler Claims Group as the Settlement Administrator. With the Settlement  
18 Administrator's assistance, they were in the best position to discover the error before  
19 filing. Although there is no apparent evidence of bad faith, the Court finds that the Class  
20 Counsel and the Settlement Administrator failed to perform their duties with due  
21 diligence.

22 If all that were at stake with the Joint Motion were the parties' relative interests in  
23 this litigation, the Joint Motion could easily be denied. In the class action context,  
24 however, the Court is primarily concerned with prejudice to the putative Class members.  
25 Although the moving parties failed to give any plausible explanation for their oversight,  
26 the Court is not in the position to deny their request for extension of time, because it  
27 would deprive the putative Class members of their choice to participate in the  
28 Settlement.

1 For the foregoing reasons, the request for extension of time is granted, but only  
2 insofar as it does not unduly delay Settlement administration. The January 24 Order is  
3 supplemented and amended as follows:

4 1. The Settlement Administrator shall **forthwith, and in no event later than**  
5 **February 22, 2019**, disseminate the long form notice and publish the summary notice  
6 with changes as approved in this Order.

7 2. The Settlement Administrator shall **forthwith, and in no event later than**  
8 **March 1, 2019**, send the hard copy summary notices with changes as approved in this  
9 Order.

10 3. No later than **March 14, 2019**, the Settlement Administrator shall re-send  
11 hard copy summary notices which were returned as undeliverable.

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

14 5. To the extent Class members choose to file written objections, they are  
15 encouraged to do so no later than **June 14, 2019**. Any replies to objections shall be filed  
16 no later than **June 21, 2019**.

17 6. No later than **June 21, 2019**, Plaintiffs shall file their motion for final  
18 approval of the Settlement. In addition to the requirements stated in the January 24  
19 Order, the motion papers shall include a detailed breakdown of fees and costs incurred  
20 by the Settlement Administrator, which must include the invoice for publishing the  
21 summary notice in print as well as other vendor invoices.

22 7. To the extent any Class members choose to file a Notice to Appear, they  
23 are encouraged to do so no later than **July 8, 2019**.

24 8. The final approval hearing is continued to **July 15, 2019 at 10:30 a.m.**

25 **C. Changes to the Notice Content**

26 The parties request to make three changes to the Notice content. They request  
27 that (1) the notices reflect the new schedule leading to the final approval hearing; (2)  
28 the notices incorporate the increased cost; and (3) the Class members, should they

1 chose to submit written objections to the Settlement, be directed to file them with the  
2 Court instead of also submitting them to the Settlement Administrator.

3 Based on the findings in Sections A. and B. above, the request to amend the  
4 Notice is granted. The January 24 Order is supplemented and amended to permit  
5 changing the Notice to reflect (1) the dates set forth in Section B. above; (2) the  
6 increased cost of printed ad notice discussed in Section A. above; and (3) the change  
7 in the procedure for objecting to the Settlement, *i.e.*, written objections to the  
8 Settlement, if any, need not be submitted to the Settlement Administrator, but may be  
9 filed with the Court.

10 **D. Change to the Manner of Distributing Summary Notice in Print**

11 Finally, the parties request that the summary notice be published in print in the  
12 People Magazine's California edition instead of the Los Angeles Times as  
13 recommended in the Second Renewed Motion (Decl. of Jeanne Finegan (doc. no. 106-  
14 14) ¶¶ 14, 24) and approved in the January 24 Order. They claim this is necessary to  
15 reduce the cost of the larger ad size. While a 1/4 page ad in the Los Angeles Times, 4  
16 times a week (*see* Finegan Decl. (doc. no. 106-14) ¶ 14), would increase the cost of  
17 notice by \$30,000, the same size ad in People Magazine's California edition  
18 (presumably only once a week) will increase it by \$20,000. (*See* Finegan Decl. ¶ 3.)  
19 The Claim Administrator assures that publication in the People Magazine's California  
20 edition will not reach fewer, but slightly more putative Class members. (*Id.* ¶¶ 2-6 &  
21 nn.1-3.)

22 Based on the representations in the parties' briefing and declarations, the Court  
23 finds that changing print publication of the summary notice to People Magazine's  
24 California edition will not diminish the adequacy of notice to meet due process  
25 requirements and requirements of Federal Rule of Civil Procedure 23(c)(2) and (e)(1).  
26 The request to change the publication is therefore granted.

27 For the foregoing reasons, the Joint Motion is granted in part and denied in part  
28 as stated above. This Order amends and supplements the January 24 Order. Unless

1 expressly stated herein, all duties and obligations imposed by the Settlement and the  
2 January 24 Order remain in effect. The Court is not inclined to entertain any further  
3 requests for modification to the Notice and Settlement administration process. This  
4 Order shall forthwith be posted on the Settlement website.

5 **IT IS SO ORDERED.**

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7 Dated: February 20, 2019

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9 Hon. M. James Lorenz  
10 United States District Judge  
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