

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-06-000626-123

(Class Action)
SUPERIOR COURT

L. PETIT

Petitioner

-vs.-

NEW BALANCE ATHLETIC SHOE, INC., legal person duly constituted, having its head office at 20 Guest Street, Suite 20, City of Boston, State of Massachusetts, 02135-2064, U.S.A.

and

NEW BALANCE, INC., legal person duly constituted, having its head office at 20 Guest Street, Suite 1000, City of Boston, State of Massachusetts, 02135-2064, U.S.A.

and

NEW BALANCE CANADA, INC., legal person duly constituted, having its head office at 3660 Hurontario Street, 9th Floor, City of Mississauga, Province of Ontario, L5B 3C4

Respondents

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
&
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)**

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER
STATES AS FOLLOWS:



I. GENERAL PRESENTATION

A) The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

- all residents in Canada who have purchased NEW BALANCE Toning Footwear, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased NEW BALANCE Toning Footwear, or any other group to be determined by the Court;
2. “New Balance Toning Footwear” includes all men and women’s shoes and sandals marketed under the brand names “TrueBalance”, “Rock&Tone”, “Aravon Ria”, “Aravon Riley” and “Aravon Quinn”;
3. Petitioner contends that the Respondents marketed and sold New Balance Toning Footwear through the use of false or misleading advertisements and representations regarding their ability to provide significant physiological health benefits by altering the sole of the shoe to keep the user’s feet off balance, without any further changes in a consumer’s diet or exercise routine;
4. The Respondents have represented through video, print, point of sale, press release and product packaging advertisements that wearing New Balance Toning Footwear will lead to numerous health benefits and that by simply wearing the Toning Shoes during daily activities, as compared to traditional walking shoes, any person will increase muscle activation, calorie burn and weight loss;
5. Additionally, New Balance’s marketing campaign is replete with the following and other similar statements, with respect to the Toning Footwear:
- a. “Tones while you walk”;
 - b. “Helping you tone up and slim down with every step”;
 - c. “Encourages muscle activation and calorie burn with each step”;
 - d. “Every step you take in truebalance shoes makes your body work to maintain your natural balance, causing you to activate your muscles, engage your core and burn more calories”;
 - e. “Tone muscles you didn’t even know you had”;

- f. “Activate muscles by maintaining balance”;
 - g. “Burn calories and activate muscles”;
 - h. “Builds and tones muscle from your legs, to your glutes, to your core as it helps you burn calories and lose weight faster “;
 - i. “Activates your muscles for toning from your calves to your glutes to your core”; and
 - j. “Every step ... makes your body work to maintain your natural balance and in doing so activates muscles”;
6. In fact, virtually every independent scientist has verified that none of the benefits promised by the Respondents are actually realized by the consumer and that there is no evidence to support the claims that New Balance Toning Footwear products provide any health benefits whatsoever compared to regular athletic and walking shoes;
7. By reason of these actions and omissions, the Respondents induced consumers into purchasing New Balance Toning Footwear products that do not and cannot live up to their promised results, thereby causing Petitioners and the members of the class to suffer economic damages and physical injuries, which they are entitled to claim;

B) The Respondents

8. Respondent New Balance Athletic Shoe, Inc. (“New Balance USA”) is an American company with its head office in Massachusetts. It is a lifestyle and athletic footwear company that manufactures and markets athletic footwear, including New Balance Toning Footwear, to men, women and children of all ages. Along with wholesale distribution, New Balance USA sells the Toning Shoes on its e-commerce website and in its own retail stores;
9. Respondent New Balance, Inc. is an American company with its head office in Massachusetts. It is the parent company of New Balance USA;
10. Respondent New Balance Canada, Inc. (“New Balance Canada”) is a wholly-owned subsidiary of New Balance, Inc. that does business throughout Canada, including the province of Quebec, the whole as appears more fully from a copy of an extract from the *Registraire des entreprises*, produced herein as **Exhibit R-1**;
11. Respondent New Balance USA is the registrant of the trade-marks NEW BALANCE (TMA224869) which was filed on June 11th 1976, NEW BALANCE (TMA600766) which was filed on April 17th 2002 and N NEW BALANCE

(TMA692581) which was filed on January 30th 2006, the whole as appears more fully from a copy of the reports from the CIPO Canadian trade-marks database, produced herein *en liasse* as **Exhibit R-2**;

12. Given the close ties between the Respondents and considering the preceding, all Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, all Respondents will be referred to as “New Balance” for the purposes hereof;

C) The Situation

13. “Toning Footwear” or “Toning Shoes” are shoes and/or sandals that are purported to provide physiological benefits such as muscle activation, calorie burn and weight loss by altering the sole of the shoe to keep the user’s feet off balance;

I. Claims of Increased Muscle Activation, Calorie Burn and Weight Loss

14. According to New Balance, the design of the TrueBalance Toning Shoes utilizes the “latest innovation in fitness” and a “breakthrough balance board technology offering superior comfort and enhanced toning and calorie burning while you walk.” It also features a “new responsive cushioning technology designed for maximum comfort and increased muscle tone and strength” as well as “two opposing leaflet design,” in the sole of the shoe to create a destabilizing effect (as is pictured directly below). New Balance claims that the wearer must engage his or her “core” or abdominal muscles, quadriceps, gluteus, hamstrings and calves to stay in balance, which in turn results in toning of muscles, additional calorie burning, and losing weight, the whole as appears more fully from extracts from the Respondents’ website www.newbalance.ca, produced herein *en liasse* as **Exhibit R-3**;



15. Similarly, according to New Balance, the Rock&Tone Toning Shoes feature a “rocker bottom”, in other words, a “rounded sole unit made of a soft, lightweight cushioning material” that causes the wearer’s foot “to move differently in the ideal movement (i.e. heel-to-toe) pattern to create a stronger, more functional body” and to increase muscle activation, calorie burning, and weight loss, as compared to the use of a traditional working shoe. The Respondents’ Press Release asserts that the Toning Shoe “tones the muscles from your legs to your glutes to your core and helps burn calories” and that “with every step you take in New Balance rock&tone footwear, the heel-to-toe rocking motion demands a greater range of front to back motion and increased muscle use, resulting in toning from the calves to the glutes to the core and ultimately more overall calories burned”, the whole as appears more fully a copy of the Respondents’ Press Release dated April 1, 2010, produced herein as **Exhibit R-4**;
16. The basic message of New Balance’s nationwide marketing is that by simply wearing the Toning Shoes during daily activities, as compared to traditional walking shoes, any person will increase muscle activation, calorie burn and weight loss;
17. New Balance claims that it’s shoes “work while you walk, helping you tone up and slim down with every step”, the whole as appears more fully from a copy of the Respondents’ advertisement, produced herein as **Exhibit R-5**;
18. Wendy Yang, General Manager of Wellness at New Balance claims that New Balance Toning Footwear is “...very wearable, while also being very comfortable and delivering on all the benefits of muscle toning, calorie burning and slimming properties,” the whole as appears more fully from a copy of the article entitled “New Balance Makes Toning Push” dated April 12, 2010, produced herein as **Exhibit R-6**;
19. New Balance makes these assertions on the product packaging itself; claiming that the Toning Shoes will tone muscles and burn calories by specific percentages and claiming that “truebalance shoes makes your body work to maintain your natural balance, causing you to activate your muscles and engage your core.” New Balance directly makes the claims that wearing the Toning Shoes will result in 16% increased glute muscle activation, 16% increased hamstring muscle activation, 14% increased calf muscle activation, 29% increased quad muscle activation and a 10% increased calorie burning, the whole as appears more fully from a copy of the product labelling produced herein as **Exhibit R-7**;
20. Paradoxically, New Balance actually claims that the Toning Shoes will tone muscles and burn calories more by specific percentages, as compared to traditional walking shoes. Depending on the advertisement, New Balance sometimes claims that wearing the Toning Shoes will result in 16% increased

glute muscle activation, 16% increased hamstring muscle activation, 14% increased calf muscle activation, 29% increased total muscle activation, and a 10% increase in calorie burning; or, in other ads, all of the above, except for a 29% increase in muscle activation to the quads (instead of 29% increase in total muscle activation); or “up to 27% muscle activation and up to 8% increased calorie burn”, the whole as appears more fully from two (2) copies of the Respondents’ advertisements, produced herein *en liasse* as **Exhibit R-8**;

21. New Balance consistently makes the above-described claims through billboards, signs on buses and trains and bus and train stops, print ads, signs in stores, point of sale advertising, television advertising, internet advertising, including, among others, www.newbalance.ca, www.newbalance.com, postings on the video sharing websites such as www.youtube.com, and advertisements on internet search engines including Google;
22. However, the New Balance Toning Shoes have not been proven to provide such benefits. To the contrary, according to the only legitimate scientific tests, wearing the Toning Shoes provides no additional activation to the gluteus, hamstring or calf muscles and does not burn any additional calories. Moreover, scientists are concerned that wearing the Toning Shoes may actually lead to injury, a fact which New Balance deceptively omits from its advertising;
23. New Balance’s representations and omissions are false, misleading, and reasonably likely to deceive the public;
24. New Balance’s nationwide advertising campaign has been quite extensive and comprehensive and New Balance has spent millions of dollars to convey these deceptive messages to consumers throughout the United States and Canada. New Balance conveyed and continues to convey its deceptive claims about the Toning Shoes through a variety of media, including point of sale displays, television, magazines, the Internet and on the product’s packaging;
25. New Balance’s advertising and marketing campaign is designed to persuade consumers to believe that its footwear will confer upon them significant health benefits and to cause them to purchase New Balance Toning Shoes as a result of the deceptive messages. The only real reason a consumer would buy the Toning Shoes is to obtain the advertised benefits;
26. As a result of this deceptive and misleading marketing campaign, the New Balance Toning Shoe launch has elevated the footwear brand to one of the top sellers in its product category, and has generated substantial sales revenue;

27. New Balance has been able to charge a significant price premium for Toning Shoes over other footwear products, including other New Balance Footwear products;

II. The Claim that New Balance's Representations are Based on Scientific Studies

28. To bolster consumer confidence and to further reinforce the appearance that its assertions are legitimate and that New Balance Footwear is different from ordinary footwear, the Respondents have consistently represented that there is scientific evidence to support its claims;

29. Even the mere assertion of the precise percentages of muscle activation and calorie burn increases would lead a reasonable consumer to believe that such claims are backed by scientific studies. Moreover, New Balance has made explicit statements that its assertions are backed by scientific evidence;

30. As an example, the product packaging i.e. the shoe box and accompanying tags, that the consumer views immediately prior to making his or her final purchase decision, claims that wearing the Toning Shoes will result in specific percentages of increased calorie burning and muscle activation;

31. In a Press Release dated April 1, 2012 (Exhibit R-4), the Respondents claim that "consumer testing has shown it to be the most wearable and most comfortable perception testing in New Balance's state of the art Sports Research Laboratory" and that "in wear tests, subjects began to notice the toning effects after the first week of use". The Respondents further state that:

"The design of New Balance rock&tone footwear was based on learnings from the pedorthic and rehabilitation communities which show that rocker bottoms encourage the use of alternative muscle groups resulting in additional toning and caloric expenditure.

Consultations with Dr. Joseph Hamill, PhD, a Professor in the Department of Kinesiology at the University of Massachusetts and one of the world's experts on lower-extremity biomechanics along with the New Balance Sports Research Laboratory, have illustrated the positive effects of walking in New Balance rock&tone footwear. Additionally, a variety of tests have been performed which substantiate these claims, including Electromyography (muscle activity), VO₂ (oxygen consumption), and "blind" human perception testing",

32. In a video commercial, Holly Perkins, a purported New Balance Ambassador states in part:

“...Greatest toning effect and caloric burn from them through walking workouts, you’ll also get those toning benefits from every step you take in them with casual daily wear. Not only will you be increasing muscle activation which leads to an increase in calorie burn with every step you take, you’ll feel right away how unbelievably comfortable these shoes are. And because New Balance designed them to look sleeker and slimmer than other toning shoes, they don’t tell the world that you’re toning so you can wear them all day every day. I love these shoes because I can absolutely feel my calves, hamstrings, glutes and core working much more than when I’m in traditional athletic shoes”;

33. In another video commercial, a voice-over states, in part:

“Introducing truebalance, the newest member of the New Balance toning collection. An innovative shoe that helps women engage their muscles and indulge in their wellness. To look at a pair you might never know truebalance is a toning shoe. Its appearance is deceptively stylish but make no mistake, it is a specialized piece of footwear that when worn builds and tones muscles from your legs, to your glutes, to your core as it helps you burn calories and lose weight faster. Test results confirm this, showing up to a 29% increase in muscle activation and up to a 10% increase in calorie burning versus regular walking shoes”;

34. In truth and in fact, these representations were not substantiated at the times that they were made and there are no well-designed scientific studies that support the Respondents’ health benefits claim;

III. The Scientific Community has Rejected New Balance’s Claims

35. According to sound science, there is no difference between the Toning Shoes and regular walking shoes in terms of heart rate, calories burned, oxygen consumption or muscle activity;

36. None of New Balance’s purported scientific studies, if any, have been subjected to any traditional scientific scrutiny, in that none of them were conducted by impartial, double-blinded third parties, and none were subjected to peer review or other methods traditionally used by the scientific community to ensure accurate results. Rather, these purported studies, if any, were commissioned by New Balance and, from their inception, have been nothing more than deceptive marketing tools. Further, actual scientifically sound studies have found that shoes such as the Toning Shoes do not provide the benefits claimed by New Balance;

37. Contrary to the Respondents' statements about the increased muscle activation effect of its New Balance Footwear, walking in New Balance Footwear provides no greater amount of muscle activation or exercise response than walking in ordinary footwear. Indeed, clinical evidence suggests that the Respondents' claims regarding the New Balance Footwear are deceptive and that wearing the Toning Shoes could actually result in harm to the wearer;

38. In a recent study entitled "THE PHYSIOLOGIC AND ELECTROMYOGRAPHIC RESPONSES TO WALKING IN REGULAR ATHLETIC SHOES VERSUS "FITNESS SHOES" by John P. Porcari, Ph.D., John Greany, Ph.D., Stephanie Tepper, B.S., Brian Edmonson, B.S., Carl Foster, Ph.D. from the Departments of Physical Therapy and Exercise and Sport Science, University of Wisconsin-La Crosse it states:

"The "clinical" studies supporting the benefits of these shoes have all been non-peer reviewed and internally funded. A review of these studies finds that they generally had small sample sizes, lacked adequate research control, and had questionable or no statistical analyses.

...

Because there seems to be unsubstantiated claims about the benefits of walking in fitness shoes, the purpose of this study was two fold: First was to evaluate the exercise responses (heart rate, oxygen consumption, caloric expenditure, and ratings of perceived exertion) to walking in regular athletic shoes compared to fitness shoes. The second was to evaluate muscle activation (via electromyography) when walking in regular athletic shoes compared to fitness shoes. This investigation was conducted as two separate studies using two separate groups of subjects.

...

There was no significant difference in EMG levels in the gastrocnemius, rectus femoris, biceps femoris, gluteus maximus, erector spinae, or rectus abdominus between the four types of shoes. It can be seen that EMG activity was generally higher at the higher workloads (i.e., 3.0/0% grade vs. 3.5 mph/0% grade vs. 3.5 mph/5% grade), as expected.

...

The results of this study found no evidence that walking in fitness shoes had any positive effect on exercise heart rate, oxygen consumption, or caloric expenditure compared to walking in a regular running shoe.

Based upon the results of this study, wearing so-called fitness shoes will have no beneficial effect on exercise intensity or caloric expenditure compared to wearing a regular running shoe. Additionally, there is no evidence that wearing shoes with an unstable sole design will improve muscle strength and tone more than wearing a regular running shoe."



The whole as appears more fully from a copy of said scientific study, produced herein as **Exhibit R-9**;

39. In a summary of this study by the American Council on exercise (“ACE”), the following further remarks were made:

“For the exercise response study, researchers recruited 12 physically active female volunteers, ages 19 to 24 years. All study subjects completed a dozen five-minute exercise trials in which they walked on a treadmill for five minutes wearing each type of shoe. The shoe order was randomized as the subjects were asked to walk at 3.0 mph with a 0% grade hill; 3.5 mph/0% grade; and at 3.5 mph/5.0% grade. Meanwhile researchers monitored each subject’s oxygen consumption, heart rate, ratings of perceived exertion (RPE) and caloric expenditure.

To measure muscle activation, researchers recruited a second group of 12 physically active female volunteers, ages 21 to 27 years, who performed a similar battery of five-minute treadmill trials (as explained above) rotating shoes at random. Researchers used electromyography (a.k.a. EMG) to record muscle activity in six muscle areas: gastrocnemius (calf), rectus femoris (quads), biceps femoris (hamstrings), gluteus maximus (buttocks), erector spinae (back), and rectus abdominis (abs), as subjects walked in each of the four pairs of shoes. As a baseline for EMG analysis, maximum voluntary isometric contractions (MVIC) on all muscles were also performed using manual muscle techniques prior to testing.”

...

“Do you feel different when you’re wearing these shoes? Of course you do because you’re walking on probably an inch worth of cushioning,” explains Porcari. “They feel different, and that’s why when people first wear them they’re probably going to be sore because you’re using different muscles. But if you wear any sort of abnormal shoes that you’re not used to wearing, your muscles are going to get sore. Is that going to translate into toning your butt, hamstrings and calves? Nope. Your body is just going to get used to it.”

The whole as appears more fully from a copy of said summary, produced herein as **Exhibit R-10**;

40. The ACE concluded that: “Across the board, none of the toning shoes showed statistically significant increases in either exercise response or muscle activation during any of the treadmill trials” and that “there is simply no evidence to support the claims that these shoes will help wearers exercise more intensely, burn more calories or improve muscle strength and tone”;
41. In addition to making false affirmation assertions, New Balance has failed to disclose that the Toning Shoes may actually cause injury, a concern prevalent



among members of the scientific community who have studied such shoes. For example, a USA Today article stated in part:

“A growing number of doctors are warning that toning shoes don’t deliver on their marketing promises and could cause injuries by, among other things, changing a person’s gait, or way of walking.

Claims that Toning Shoes can significantly contribute to person’s fitness are “utter nonsense.””

David Davidson, national president of the American Academy of Podiatric Sports Medicine, says the shoes basically make adults learn to walk, or run, all over again by changing their gait. That’s a ‘scary’ prospect for someone with a ‘borderline problem’ they might not know about..‘Nothing about these shoes has any redeeming value...’ he says. ‘Sorry, I don’t see it”’,

The whole as appears more fully from a copy of the article entitled “A revolutionary sneaker, or overhyped gimmick?” dated June 20, 2010, produced herein as **Exhibit R-11**;

42. Not only does New Balance Footwear not provide the benefits as claimed, the Toning Shoes have significant drawbacks which New Balance has conveniently omitted from its advertising. Specifically, because the New Balance Toning Shoes are designed to constantly challenge the user’s balance, they are unsuitable for users with flat feet, or for those who have pre-existing difficulties maintaining their balance. Additionally, consumers who are more prone to injury in areas that are responsible for maintaining balance (such as hamstring or ankle) will exacerbate that risk by wearing New Balance Toning Shoes;

43. As the USA Today article (Exhibit R-11) explained:

“De Lateur and other doctors warn that toning shoes create their advertised benefit by destabilizing how a person walks and say that wearing the shoes can result in strained Achilles tendons. De Lateur also says the shoes can be a particular problem for older consumers or those who have difficulty keeping their balance.

Bryan Markinson, chief of podiatric medicine at Mount Sinai School of Medicine in New York, says some of his patients who are "not in the greatest of shape" have inflamed their Achilles tendons while wearing toning shoes. People thinking of buying them, he says, should begin an "active stretching program" or else risk injury.



Jonathan Deland, chief of foot and ankle service at the Hospital for Special Surgery in New York, warns the shoes can be "dangerous" for people with balance problems”;

44. The Respondents’ representations are deceptive. In fact, many notable physicians and podiatrists do not endorse New Balance Footwear. For example, the president of the American Academy of Podiatric Sports Medicine stated that toning shoes pose “major risks, especially for adults. Creating instability, on adults especially is not a good thing,” the whole as appears more fully from a copy of the article entitled “Can EasyTone, FitFlops, TrimTreads or other shoes tone your body?” dated August 24, 2010, produced herein as **Exhibit R-12**;
45. Even though walking in New Balance Footwear offers no greater benefit in toning or muscle activation, calorie burn or weight loss than walking in traditional (and lower-priced) walking shoes, New Balance Footwear has been a huge commercial success for the Respondents;
46. New Balance has reaped millions of dollars in profits by wrongfully leading consumers to believe that scientific studies prove that the Toning Shoes facilitate the toning of the core and gluteus muscles, quads, hamstrings and calves, and the burning of calories. Consumers would certainly not have paid the prices they did for, or would not have purchased at all, the New Balance Toning Shoes, had they known the truth – that Toning Shoes have none of the benefits described by New Balance and in fact, increase the likelihood that some users will suffer serious injuries, such as broken ankles or pulled hamstrings;
47. The advertisements and representations made by the Respondents as set forth herein were, and are, false or misleading. The acts and practices of the Respondents as alleged herein constitute unfair or deceptive acts or practices and the making of false advertisements;
48. As a result of the Respondents’ deceptive claims, consumers have purchased a product that does not perform as advertised. Moreover, the Respondents have been able to charge a significant price premium for New Balance Footwear over other traditional, comparable footwear products that do not make these deceptive health and fitness claims;
49. Consumers were induced into purchasing New Balance Footwear through the use of false and misleading representations, thereby vitiating their consent and entitling them to claim a refund for the purchase price of the product;



II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

50. Petitioner purchased New Balance TrueBalance 850, in the fall of 2011 from Boutique New Balance at 677 Rue Sainte-Catherine Ouest, in Montreal, Quebec for approximately \$125 plus taxes;
51. Petitioner believed, from having been exposed to the New Balance marketing campaign and having read their product labelling, that the New Balance Footwear would cause him to tone and strengthen his muscles, to burn more calories and to lose weight without any further changes in a diet or exercise routine;
52. Petitioner has since discovered, while researching online, that these product claims have not been scientifically proven and that several class actions were filed in the United States for this same product due to false advertising and have subsequently been settled, the whole as appears more fully from copies of said Class Action Complaints and Settlement Agreement, produced herein *en liasse* as **Exhibit R-13**;
53. In consequence, Petitioner feels that he has been misled by New Balance and that had he known the true facts, the Petitioner would not have purchased the New Balance Footwear;
54. Petitioner's damages are a direct and proximate result of the Respondents' conduct and the companies' false and misleading advertising;
55. In consequence of the foregoing, Petitioner is justified in claiming damages;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

56. Every member of the class has purchased New Balance Toning Footwear believing that it would cause them to tone and strengthen their muscles, to burn more calories and to lose weight without any further changes in a diet or exercise routine, due to the Respondents' marketing, advertising, and labelling;
57. The class members were, therefore, induced into error by the Respondents' false and misleading advertising;
58. Had the Respondents disclosed the truth about their New Balance Footwear, that they did not offer any extra toning, strengthening, caloric burn capability or weight loss over regular shoes, reasonable consumers would not have purchased them;



59. Each member of the class is justified in claiming at least one or more of the following as damages:
- a. The purchase price of their New Balance Toning Footwear;
 - b. Punitive damages;
60. Respondents engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from class members;
61. All of these damages to the class members are a direct and proximate result of the Respondents' conduct and their false and misleading advertising;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
62. Petitioner is unaware of the specific number of persons who purchased New Balance Toning Footwear, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
63. Class members are numerous and are scattered across the entire province and country;
64. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondent. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Respondents would increase delay and expense to all parties and to the court system;
65. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
66. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
67. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;



B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondents and that which the Petitioner wishes to have adjudicated upon by this class action

68. Individual questions, if any, pale by comparison to the numerous common questions that predominate;

69. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, the Respondents' misconduct;

70. The recourses of the members raise identical, similar or related questions of fact or law, namely:

- A) Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its New Balance Footwear?
- B) Are the Respondents liable to the class members for reimbursement of the purchase price of the New Balance Footwear as a result of the misconduct?
- C) Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate the unfair, false, misleading, and/or deceptive conduct?
- D) Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?

71. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

72. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages and an injunctive remedy;

73. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the class;



ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioner requests that he be attributed the status of representative of the Class

74. Petitioner is a member of the class;

75. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

76. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

77. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

78. Petitioner, with the assistance of his attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;

79. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;

80. Petitioner understands the nature of the action;

81. Petitioner's interests are not antagonistic to those of other members of the class;

B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

82. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;

83. The Petitioner's attorneys practice their profession in the judicial district of Montreal;

84. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages and for injunctive relief;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

- all residents in Canada who have purchased NEW BALANCE Footwear, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased NEW BALANCE Footwear, or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- A) Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its New Balance Footwear?
- B) Are the Respondents liable to the class members for reimbursement of the purchase price of the New Balance Footwear as a result of its misconduct?
- C) Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate its unfair, false, misleading, and/or deceptive conduct?
- D) Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;



ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

ORDER that said notice be available on the Respondents' website with a link stating "Notice to New Balance Footwear owners";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs, including all publications fees.

Montreal, October 10, 2012

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.
Per: Me Jeff Orenstein
Attorneys for the Petitioner