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11  
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13  
14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**  
16

17 ANDRE BATUNGBACAL, an  
individual and on behalf of a class of  
18 similarly situated persons,

19 Plaintiffs,

20 v.

21 POWER BALANCE LLC, a Delaware  
Limited Liability Company, TROY  
22 JOHN RODARMEL, an individual,  
JOSH RODARMEL, an individual,  
23 KEITH KATO, an individual, and  
DOES 1 through 10, inclusive,

24 Defendants.  
25  
26  
27  
28

**NATIONWIDE CLASS ACTION**

Case No. SA CV11-00018 CJC (MLGx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 **I. INTRODUCTION**

4 This litigation is based on the allegation that since 2007 Power Balance has  
5 engaged in the practice of advertising, selling and distributing Power Balance  
6 Accessories, which contain one or more “Mylar Holograms”, represented as being  
7 able to work and interact with a body’s natural energy flow thereby yielding  
8 physiological benefits when worn close to the body. Specifically, Power Balance  
9 represented that the bracelets and accessories increased one’s strength, endurance  
10 and flexibility.

11 Andre Batungbacal was one of the consumers in the United States who relied  
12 on these representations and bought a Power Balance bracelet. In December 2010,  
13 the Australian and Italian government consumer watchdog agencies independently  
14 made findings that there was not sufficient scientific support for the representations  
15 that Power Balance products increased one’s strength, endurance and flexibility. On  
16 January 4, 2011, Andre Batungbacal filed a complaint against Power Balance, Troy  
17 John Rodarmel, Josh Rodarmel, and Keith Kato (the “Power Balance Defendants”)  
18 on behalf of himself and a purported nationwide class of purchasers in the United  
19 States alleging that the Power Balance Defendants’ representations and practices  
20 with respect to the Power Balance Accessories constituted an unfair business  
21 practice prohibited by California Business and Professions Code §§ 17200 *et seq.*, as  
22 well as fraud, deceit, and negligence, violation of the Consumer Legal Remedies  
23 Act through California Civil Code § 1750, *et. seq.*, and that Power Balance  
24 benefitted from unjust enrichment as a result of that practice.

25 In an effort to seek actual damages from the Power Balance Defendants in  
26 addition to restitution, on January 7, 2011, Plaintiff served the Power Balance  
27 Defendants a cease and desist letter in compliance with Civil Code §1782(d)  
28 (“CLRA Letter”).

1 After receipt of the Complaint and the CLRA Letter, Power Balance retained  
2 counsel who immediately contacted Plaintiff's counsel and expressed an intent to  
3 comply with the CLRA Letter and a desire to resolve any and all issues arising out  
4 of the Complaint.

5 While Power Balance denies any wrongdoing or legal liability arising out of  
6 these allegations, the parties have reached an agreement to settle this action on the  
7 terms set forth in the Stipulation and Agreement of Settlement (the "Settlement  
8 Agreement") which is attached hereto as Exhibit 1.<sup>1</sup> A fully executed copy of the  
9 Settlement Agreement will be filed with the Court after all parties have signed. This  
10 document represents the final version of the Settlement Agreement as agreed to by  
11 the attorneys for all parties.

12 The Class, certified for settlement purposes only, is comprised of all persons  
13 in the United States who purchased Power Balance products from January 1, 2006 to  
14 the day immediately preceding the beginning of the Claims Period as set by the  
15 Court. The Settlement Agreement provides for the full refund of the retail price of  
16 the Power Balance Product covered by the settlement to any Class Member who  
17 makes a claim , plus an additional \$5.00 to cover shipping and handling expenses –  
18 all of the Class Members' actual damages. With approximately 1.7 million Power  
19 Balance Products sold in the United States, the value of the proposed settlement to  
20 the Class is in excess of \$57,000,000.00. This is \$29,000,000.00 more than the  
21 largest recovery possible had Plaintiff proceeded to trial and obtained an award for  
22 restitution only.

---

23  
24 <sup>1</sup>Plaintiffs represent to the Court, as required by Rule 23(e)(3), that there are no  
25 "side agreements" made in connection with the proposed settlement of this action  
26 and that the Settlement Agreement attached hereto as Exhibit 1 represents the full,  
27 complete and exclusive terms and conditions applicable to the proposed settlement.  
28 The agreement was the product of an arms length negotiation including a mediation  
on February 4, 2011 before noted mediator Honorable John K. Trotter (Ret.).

1 The Settlement Agreement is the result of arm's-length negotiations between  
2 the parties occurring with the substantial assistance during mediation held on  
3 February 4, 2011 before noted mediator the Honorable John K. Trotter (Ret.) and  
4 continuing for numerous weeks thereafter. The parties now ask this Court to enter  
5 an order:

- 6 (1) granting preliminary approval of the proposed settlement;
- 7 (2) certifying the class for the purposes of settlement only;
- 8 (3) approving the proposed form and method of giving notice to the Class  
9 of the pendency of this action and the settlement;
- 10 (4) scheduling dissemination of the notice; and
- 11 (5) scheduling a hearing on final approval of the settlement and plaintiffs'  
12 counsel's application for an award of attorneys' fees and reimbursement of  
13 expenses.

## 14 15 **II. BACKGROUND**

### 16 17 **A. Procedural History**

18 Plaintiff Andre Batungbacal commenced the instant lawsuit by filing a Class  
19 Action Complaint against Defendants, Power Balance, LLC, a Delaware Limited  
20 Liability Company, Troy John Rodarmel, an individual, Josh Rodarmel, an  
21 individual, Keith Kato, in United States District Court for the Central District of  
22 California, Case Number SA CV11-00018 CJC (MLGx) on January 14, 2011. This  
23 Settlement stemmed from a mediation attended by counsel and this Motion is  
24 brought as a coordinated effort by the parties in this action.

25 The instant action alleges that Power Balance committed unfair business  
26 practices prohibited by California Business and Professions Code §§ 17200 *et seq.*,  
27 fraud, deceit and negligence and benefitted from unjust enrichment.

1           **B.     Factual Allegation of Plaintiff**

2           Defendant Power Balance LLC (“Power Balance”) has distributed in  
3 commerce the Power Balance Accessories throughout the United States, Europe and  
4 Australia. The Accessories, which purportedly contain one or more “Mylar  
5 Holograms”, were marketed as being able to work and react with a body’s natural  
6 energy flow thereby yielding physiological benefits when worn close to the body.  
7 Specifically, it was represented and marketed that the instant benefits of the Power  
8 Balance Accessories included “increased core strength,” “greater flexibility,” and  
9 “improved balance.”

10           Plaintiff contends that Power Balance did not and does not maintain any  
11 credible scientific evidence that supported the representations or claims made to the  
12 public. Plaintiff contends that, overall, Power Balance’s print, online and in-store  
13 advertisements misled consumers into believing Power Balance Accessories  
14 maintained properties which benefitted users and consumers by delivering improved  
15 strength, flexibility and balance. Plaintiff further contends that Power Balance has  
16 been unjustly enriched at the expense of Plaintiff and the Class members who  
17 purchased Power Balance Products and Accessories.

18  
19           **C.     Factual Allegations of Power Balance**

20           No answer has been filed by Power Balance in the instant case. After  
21 protracted and lengthy discussions, Plaintiff is informed that Power Balance  
22 believes in its products and that customers are satisfied with the performance of the  
23 products. Power Balance further contends that Plaintiff would have a difficult time  
24 certifying a class and proving liability or damages. In particular, there were varying  
25 representations over time, which will lead to individual questions of representations  
26 and reliance predominating. Furthermore, Power Balance contends that the  
27 overwhelming majority of the putative class members are satisfied with the product  
28 which will make Plaintiff’s claims atypical, and will make causation an issue

1 defeating class certification. For the same reasons, Power Balance contends that  
2 liability and damages are unsupported and cannot be proven.

3  
4 **D. The Settlement**

5 In the months since the filing of the instant action all parties expended  
6 substantial amounts of time, energy, and resources<sup>2</sup> to investigate and develop their  
7 respective positions. Based on their prosecution of this case and their independent  
8 evaluation, counsel for the Class are of the opinion that the settlement with Power  
9 Balance for the consideration and on the terms set forth in the Settlement Agreement  
10 is fair, reasonable, and adequate, and in the best interest of the Class in light of all  
11 known facts and circumstances, including the risk of delay, defenses asserted by  
12 Power Balance and potential appellate issues.<sup>3</sup>

13 Similarly, Power Balance has concluded that any further defense of this  
14 Litigation would be protracted and expensive. Substantial amounts of Power  
15 Balance's time, energy, and resources have been and, absent this Settlement  
16 Agreement, will continue to be devoted to the defense of the claims asserted by  
17 Plaintiff. Power Balance has also assessed the risk of a finding against it, and the  
18 monetary exposure associated therewith, and has taken into account the settlement  
19 negotiations to date. Power Balance has therefore agreed to settle in the manner and  
20

21  
22 <sup>2</sup> As part of their settlement efforts, the parties agreed to participate in formal  
23 mediation on February 4, 2011 before noted mediator the Honorable John K. Trotter  
24 (Ret.). The parties reached a preliminary settlement on all material terms at the  
25 mediation, and afterward, continued with confirmatory discovery and detailed  
negotiations as to the material terms of the agreement. After six weeks of constant

26 <sup>3</sup> It would be Power Balance's position in litigation that a class could not be  
27 certified because of individual issues of fact and law would not predominate. For  
28 example, varying issues of reliance and satisfaction, among other things.



1 on the terms set forth in the Settlement Agreement.

2 The Class, certified for settlement purposes only, is comprised of all persons  
3 in the United States who purchased Power Balance products from January 1, 2006 to  
4 the day immediately preceding the beginning of the Claims Period, which will  
5 commence on May 1, 2011 or on a date to be determined by the Court. The Claims  
6 Period will end four (4) months after the date it begins.

7 Pursuant to the proposed Settlement Agreement Power Balance will provide  
8 for the full refund (100%) of the retail price of the Power Balance Product(s) to any  
9 Class Member who makes a claim, plus an additional \$5.00 to cover shipping and  
10 handling expenses.<sup>4</sup> A list of the Power Balance Products and their retail prices are  
11 attached as Exhibit A to the Settlement Agreement. Power Balance will create an  
12 evergreen settlement fund starting with an initial five hundred thousand dollars  
13 (\$500,000.00) from which to pay claims. This will be funded on the first day of the  
14 claims period and replenished so that at no time will the settlement fund have less  
15 than two hundred and fifty thousand dollars (\$250,000.00), until all claims have  
16 been paid. Each Member of the Class who does not opt-out of the Settlement  
17 Agreement will be eligible to receive a full refund (100%) of the entire retail price  
18 of the Power Balance Product(s) purchased. This will amount in a greater recovery  
19 for Class members than if Power Balance was proven at trial to have been unjustly  
20 enriched and thereby required to disgorge monies earned as restitution. (See  
21 Declaration of Andrew Safir p.8:20-25).

22  
23  
24 <sup>4</sup> The Settlement Agreement permits a claim of up to 10 Power Balance Products per  
25 class member and Power Balance may approve any claims made above that. The  
26 cap of 10 was instituted to protect Power Balance from fraudulent claims. Based  
27 upon the confirmatory discovery, the average purchaser bought two Power Balance  
28 Products. Therefore, the cap of 10 per claim per class member was considered  
reasonable.

1 In addition to a full refund as part of the settlement Power Balance will agree  
2 to a permanent Injunction and change their advertising and marketing practices  
3 accordingly. As part of this injunction, Power Balance will not represent in any  
4 advertising to potential customers (including, but not limited to, any written or oral  
5 representations) that Power Balance Products will “improve balance, strength or  
6 flexibility” or that Power Balance Products “work with your body energy,” unless  
7 and until Power Balance is able to provide the Court with evidence that supports  
8 such representations. Power Balance also will not use what Plaintiff contends are  
9 misleading live demonstrations seeking to demonstrate the potential benefits of their  
10 Products, unless and until Power Balance is able to provide this Court with evidence  
11 demonstrating the accuracy of such tests and demonstrations. Moreover, Power  
12 Balance will use its best efforts to remove any video postings demonstrating the  
13 Muscle Test that appear on its website or other media outlets.

14  
15 **III. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY**  
16 **APPROVAL**

17  
18 As a matter of public policy, settlement is a strongly favored method for  
19 resolving disputes. *See Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d  
20 437, 443 (9th Cir. 1989) (“...if there is room for doubt, we ought not to resolve it in  
21 a manner that sends the parties back to litigation.”). This is especially true in  
22 complex class actions such as this. *Officers for Justice v. Civil Serv. Comm’n*, 688  
23 F.2d 615, 625 (9th Cir. 1982).

24 Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval  
25 for the compromise of claims brought on a class basis. At the final approval  
26 hearing, the Court will have before it papers submitted in support of the proposed  
27 settlement and will be asked to make a determination as to whether the settlement is  
28 fair, reasonable, and adequate under all of the circumstances. At this juncture,

1 however, the parties request only that the Court grant preliminary approval of the  
2 settlement.

3 In determining whether preliminary approval is warranted, the sole issue  
4 before the Court is whether the proposed settlement is within the range of what  
5 might be found fair, reasonable, and adequate, so that notice of the proposed  
6 settlement should be given to Class Members and a hearing scheduled to consider  
7 final settlement approval. *See Manual for Complex Litigation, Fourth* §13.14 at 173  
8 (Federal Judicial Center 2004) (“First, the [court] reviews the proposal preliminary  
9 to determine whether it is sufficient to warrant public notice and a hearing. If so, the  
10 final decision on approval is made after the hearing.”).

11 The parties now request the Court to take the first step in this process and  
12 grant preliminary approval of the proposed settlement. The proposed settlement  
13 clearly satisfies the standard for approval. The settlement requires that Power  
14 Balance provide a complete and full refund for the entire retail price of any Power  
15 Balance Products purchased. This is above and beyond the amount Class members  
16 would be entitled to if Power Balance was ordered, as restitution, to disgorge the  
17 amount it was unjustly enriched. The Settlement calls for an immediate initial  
18 seeding of a settlement pool in the amount of five hundred thousand dollars  
19 (\$500,000.00) to provide for refunds to Class members. Power Balance will  
20 continue to make monetary contributions to the settlement fund to ensure the  
21 amount does not dip, during the claims period, below two hundred and fifty  
22 thousand dollars (\$250,000.00). Given the agreement by the Power Balance  
23 Defendants to make the class members whole, there is no reason to proceed with  
24 protracted litigation and unnecessarily face those risks associated with class action  
25 matters. Counsel believe this settlement represents a good resolution to this  
26 Litigation and eliminates the risk that the Class might not otherwise recover or  
27 recover a lesser amount if litigation were to continue.

28 Moreover, reference to factors considered by courts in granting final approval

1 of class action settlements lends support to the proposition that the settlement is well  
2 within the range of possible approval. The terms of the proposed settlement are the  
3 product of arm's-length negotiations between the parties and achieved largely  
4 during formal mediation under the guidance of noted mediator the Honorable John  
5 K. Trotter (Ret.). During these negotiations, Counsel zealously advanced Plaintiff's  
6 position and were fully prepared to continue to litigate rather than accept a  
7 settlement that was not in the best interest of the Class. Similarly, Defendants,  
8 through their counsel, zealously advanced its position that Plaintiff would have  
9 insurmountable problems on class certification, liability and damages. Defendants  
10 likewise were fully prepared to continue to litigate rather than settle the Litigation  
11 for an unreasonably high amount.

12 Plaintiff, through his counsel, having carefully considered and evaluated,  
13 *inter alia*, the relevant legal authorities and evidence to support the claims asserted  
14 against Defendants, the likelihood of prevailing on these claims, the risk, expense,  
15 and duration of continued litigation and the likely appeals and subsequent  
16 proceedings necessary if Plaintiff did prevail against Defendants at trial, have  
17 concluded that the settlement is fair, reasonable and adequate and in the best interest  
18 of the Class. *See* (Ravipudi Decl.) Counsel<sup>5</sup> has significant experience in complex  
19 class action litigation and have negotiated numerous other class action settlements  
20 throughout the country. It is well established that significant weight should be  
21 attributed to the belief of experienced counsel that settlement is in the best interest  
22 of the Class. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992), citing  
23 *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

24 Last, the short duration of the Class period, the formal injunction, and the fact  
25

---

26 <sup>5</sup> As fully set forth in the attached declaration of Rahul Ravipudi, Plaintiff's  
27 counsel is experienced in complex and class action litigation, and has prosecuted  
28 similar cases throughout the nation. *See* Ravipudi Decl., ¶ 7.

1 that Power Balance will cease the allegedly wrongful conduct make the terms of the  
2 settlement fair, reasonable, and adequate. Therefore, the parties believe that the  
3 number of objectors to the Class settlement at the final approval hearing will be  
4 minimal.

5  
6 **IV. THE PARTIES HAVE STIPULATED TO CERTIFICATION FOR**  
7 **PURPOSES OF SETTLEMENT AND CERTIFICATION IS**  
8 **APPROPRIATE**

9 Prior to granting preliminary approval of a settlement, the Court should  
10 determine the proposed Settlement Class is a proper class for settlement purposes.  
11 *See Manual for Complex Litigation, Fourth*, §21.632; *Amchen Products, Inc. v.*  
12 *Windsor*, 521 U.S. 591, 620 (1997). The Court can certify a class where plaintiffs  
13 demonstrate that the proposed class and proposed class representatives meet the four  
14 prerequisites in Rule 23(a) – numerosity, commonality, typicality, and adequacy of  
15 representation – and one of the three requirements of Rule 23(b). F.R.C.P. 23; *In Re*  
16 *Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 132-133 (2nd Cir. 2001).

17 **A. The Requirement of Numerosity Is Satisfied**

18 An estimated 1.7 million Power Balance Products were purchased by  
19 approximately 973,782 class member during the Class Period at issue in the  
20 Litigation. (See Declaration of Andrew Safir, table 2 p.8:12-18). Thus this  
21 combined number of consumers is so numerous that joinder of all settlement class  
22 members is impracticable. F.R.C.P. 23(a)(1).

23  
24 **B. The Requirement of Commonality Is Satisfied**

25 The legal and factual issues in this case are common for all members of the  
26 class. Defendants' policies and marketing surrounding the sale of Power Balance  
27 Accessory products did not distinguish between or among consumers. Defendants'  
28 actions toward the class members were identical, so the issues of whether these

1 actions support Plaintiffs' claim for damages is likewise identical. Included among  
2 these common issues are:

3 a. Whether Defendants' made statements constituting untrue and/or  
4 misleading advertising in violation of California Business & Professions Code §  
5 17500 et. seq.;

6 b. Whether Defendants' conduct in misrepresenting the benefits of the  
7 Power Balance Accessories constituted unfair business practices in violation of  
8 California Business & Professions Code § 17200 et seq.;

9 c. Whether Defendants' conduct in misrepresenting the benefits of the  
10 Power Balance Accessories constituted fraudulent business practices in violation of  
11 California Business & Professions Code § 17200 et seq.;

12 d. Whether Defendants' represented that the Power Balance Accessories  
13 have characteristics, uses, or benefits which they do not have;

14 e. Whether Defendants' conduct, as alleged in this Complaint, caused  
15 injury to the Plaintiff and/or other member of the Class; and

16  
17 f. The appropriate measure of damages sustained by the Plaintiff and/or  
18 other members of the Class.

19  
20 **C. The Requirement of Typicality Is Satisfied**

21 Plaintiff's claims are typical of those of the settlement class because the  
22 claims of all class members arise from Power Balance's sale of various Power  
23 Balance Products. See Declaration of Andre Batungbacal at ¶ 9. Again, the conduct  
24 of Power Balance toward Plaintiff and the Settlement Class is identical.

25  
26 **D. The Requirement of Adequate Representation Is Satisfied**

27 Plaintiff and class counsel have fairly and adequately represented and  
28 protected the interests of all settlement class members. Plaintiff has no interests

1 antagonistic to the settlement class members. Class counsel have conducted a  
2 thorough pre-filing and continuing investigation, vigorously prosecuted the actions,  
3 and negotiated a settlement which provides prompt and valuable relief to settlement  
4 class members. Counsel for the class have significant experience in complex class  
5 action litigation and have negotiated numerous other class action settlements  
6 throughout the country.

7  
8 **E. The Settlement Class Should be Certified Under Rule 23(b)(3)**

9 Certification is appropriate because Plaintiff has satisfied the predominance  
10 and superiority requirements under Rule 23(b)(3). Under the Rule 23(b)(3)  
11 predominance analysis, the Court must determine whether the proposed class is “  
12 ‘sufficiently cohesive to warrant adjudication by representation.’” *Hanlon*, 150 F.3d  
13 at 1022, citing *Amchem Prods.*, 521 U.S. at 623, 117 S.Ct. 2231. This reasoning  
14 was continued in the recent case *Wright v. Linkus Enterprises, Inc.* (E.D. Cal. 2009)  
15 259 F.R.D. 468, 473. The Court granted preliminary approval of the settlement  
16 agreement stating that:

17 The requirement is satisfied if a plaintiff establishes that a  
18 “common nucleus of facts and potential legal remedies  
19 dominates” the litigation. *Id.* The “common nucleus of  
20 facts” in the present case derives from the alleged policies  
21 that required class members to work without  
22 compensation, meal and rest periods, and/or  
23 reimbursement for expenses. Based on these alleged  
24 violations of federal and state law, class members would  
25 be entitled to the same legal remedies. Accordingly, class  
26 certification for purposes of preliminary approval of the  
27 Settlement Agreement is proper, despite the existence of  
28 minor factual differences between individual class  
members, because the common issues predominate over  
varying factual predicates

*Wright v. Linkus Enterprises, Inc.* (E.D. Cal. 2009) 259  
F.R.D. 468, 473

1  
2 The questions of law and fact common to all class members are set forth  
3 above. These common issues predominate over any individual issues such as the  
4 nature and extent of damages. *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)  
5 (“The amount of damages is invariably an individual question and does not defeat  
6 class action treatment.”). The damages issues in this case are easily manageable  
7 because there is a simple and fair formula for obtaining proof of purchase of Power  
8 Balance products, ascertaining the full retail price and refunding it to consumers.

9 Additionally, a class action is clearly superior to other available methods for  
10 the fair and efficient adjudication of the controversy because joinder of all class  
11 members who purchased Power Balance Products is impossible.

12 Moreover, as the damages suffered by individual members of the settlement  
13 class may be relatively small, the expenses and burden of individual litigation would  
14 make it impossible for all settlement class members to individually redress the harm  
15 allegedly done to them. Finally, centralizing the litigation of claims in this court is  
16 desirable.

17 In sum, the Settlement Class is suitable for certification, and the Court should  
18 certify the Settlement Class pursuant to Rule 23(b)(3), for purposes of granting  
19 preliminary approval to the settlement.

20  
21 **V. THE PROPOSED NOTICE IS REASONABLY CALCULATED TO**  
22 **REACH MEMBERS OF THE CLASS**

23  
24 Before approving a settlement, “the court must direct to class members the  
25 best notice that is practicable under the circumstances, including individual notice to  
26 all members who can be identified through reasonable effort.” Fed.R.Civ.P.  
27 23(c)(2)(B).

28 The [Proposed] Preliminary Approval Order requires Power Balance to send a



1 Notice of Proposed Class Action Settlement and Hearing Date for Court Approval  
2 (“Notice”) to all members of the Class. The Notice fairly apprises Class Members  
3 of their rights with respect to the settlement and, therefore, is the best notice  
4 practicable under the circumstances and should be approved by the Court. *See*  
5 *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993).

6 The Notice identifies the parties, and describes the lawsuit and the settlement  
7 Class in a straightforward manner. The Notice also succinctly describes the  
8 essential terms of the settlement, advises the settlement Class members as to what  
9 must be done to participate in the settlement, and identifies all parties whose claims  
10 are being released.

11 The Notice also includes a statement of the steps individual settlement Class  
12 members can take to object to the settlement or opt-out of the Class and provides all  
13 applicable deadlines for such action. The Notice informs Class members that they  
14 may appear at the final approval hearing through counsel, should they choose to do  
15 so. The Notice further informs Class members that if they do not exclude  
16 themselves from the Class, and the settlement is approved, they will be bound by the  
17 resulting judgment. Class members are referred to contact the parties’ counsel to  
18 obtain more detailed information.

19 The Notice also contains information regarding counsel’s fee and expense  
20 application and the proposed plan for allocating the settlement proceeds among  
21 Class Members. Thus, the Notice will provide the necessary information for Class  
22 members to make an informed decision regarding the proposed settlement.

23 With respect to the proposed method of giving notice, it is appropriate  
24 because it is “reasonably calculated to reach the members of the class.” *Mendoza v.*  
25 *United States*, 623 F.2d 1338, 1351 (9th Cir. 1980). Pursuant to the terms of the  
26 settlement, the proposed Notice Plan shall consist of 1) A Summary Notice of this  
27 Settlement that will be e-mailed directly to each and every one of Power Balance’s  
28 customers who fall within the Class; 2) the Summary Notice of this Settlement will

1 be mailed in a post card to all Class Members whose addresses can be located from  
2 Power Balance's records and third party GSI Commerce's records and will also be  
3 sent by Power Balance in a direct message to each of its Facebook friends 3) a  
4 Facebook Notice, comprised of a prominently displayed reference to the Settlement,  
5 will be published on the Power Balance home page of Facebook, located at located  
6 at [www.facebook.com/powerbalance](http://www.facebook.com/powerbalance) with a link to the Settlement Website; 4) A  
7 Summary Published Notice will also be published on a nationwide basis, in the first  
8 issue of each of the following publications that is available after the Preliminary  
9 Approval Order is signed: *Parade Magazine*, *Sports Illustrated* and *People*; 5) A  
10 Long Form Notice consisting of the complete form of Notice and Claim Form,  
11 available to Class Members attached as exhibit "D" to the Settlement Agreement,  
12 will be Published on Power Balance's website located at [www.powerbalance.com](http://www.powerbalance.com);  
13 and 6) the Published Notice and Long Form Notice will also be available on a  
14 settlement website (created for purposes of settlement) located at  
15 [www.pbsettlement.com](http://www.pbsettlement.com).

16 In addition a telephone number for class members to obtain information and  
17 contact the Claims Administrator will be established and maintained until the end of  
18 the claims period. Considering the nature of Power Balance's business and that  
19 sales were made nationwide, these multiple methods of notice will be most likely to  
20 reach a high percentage of Class members. By providing notice in this manner, the  
21 Claims Administrator estimates that more than 70% of the Class members will be  
22 reached.

23 For these reasons, the parties request the Court approve the proposed Notice  
24 attached as "Exhibits C, D, and E to the Settlement Agreement" and approve the  
25 dissemination of these Notices by the methods described above.

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1 **VI. PROPOSED SCHEDULE OF EVENTS**

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In connection with preliminary approval of the settlement, the parties request that the Court establish dates by which notice of the settlement will be provided to Class members and dates by which Class members may exclude themselves from the Class or object to the settlement. The following schedule is proposed and may be inserted by the Court into the accompanying [Proposed] Order Preliminarily Approving Settlement and Approving the Form and Manner of Notice:

Event	Date
Time period to establish Settlement Website and Dedicated Claimant Telephone Number:	Within 30 days after the entry of an Order granting preliminary approval of the Settlement Agreement.
Last day to provide Notice by Email, Facebook, and Nationwide Publication:	45 days after the entry of an Order granting preliminary approval of the Settlement Agreement
Last day for Class members to object to or opt-out of the settlement:	45 days after the Notice is sent to the Class
Final Approval Hearing:	Within 105 days after the entry of an Order granting preliminary approval of the Settlement Agreement

1 **VII. CONCLUSION**

2 For all of these reasons, the settlement before the Court falls within the range  
3 of possible approval, and therefore, merits preliminary approval. The parties submit  
4 that this proposed settlement is fair, reasonable, and in the best interests of the Class.  
5 The parties therefore respectfully requests this Court to (1) grant preliminary  
6 approval of the proposed settlement; (2) certify the class for the purposes of  
7 settlement; (3) approve the proposed form and method of giving notice to the Class  
8 of the pendency of this action and the settlement; (4) schedule dissemination of the  
9 notice; and (5) schedule a hearing on final approval of the settlement and plaintiffs'  
10 counsel' application for an award of attorneys' fees and reimbursement of expenses  
11 at which time Class members may be heard.

12  
13 DATED: March 25, 2011

PANISH SHEA & BOYLE LLP

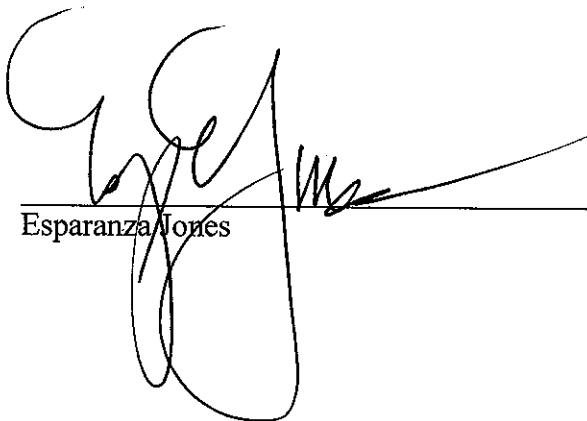
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18 Attorneys for Plaintiff  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 25th day of March 2011, I electronically filed the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of said filing to the following counsel of record registered:

Michael Avenatti  
Eagan Avenatti, LLP  
450 Newport Center Drive  
Second Floor  
Long Beach, CA 92660  
*Attorneys for Defendants*

DATED: March 25, 2011

By:   
Esparanza Jones