

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

IN RE:

**SKECHERS TONING SHOE
PRODUCT LIABILITY LITIGATION**

: CASE: 3:11-md-02308-TBR

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MDL No.: 2308

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This Document Applies to All Actions

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Judge Thomas B. Russell

**FIRST AMENDED PRACTICE AND PROCEDURE ORDER NO. 7:
ESTABLISHMENT OF PLAINTIFFS’ PERSONAL INJURY LITIGATION EXPENSE
FUND TO COMPENSATE AND REIMBURSE ATTORNEYS FOR SERVICES
PERFORMED AND EXPENSES INCURRED FOR COMMON BENEFIT**

The Court finds that it is appropriate to establish a system for the sequestration of a certain percentage of payments that may be made by defendant(s) to personal injury plaintiff(s) in settlement of claims or satisfaction of judgments (all such payments hereinafter referred to as “claim payments”). The funds so sequestered are to be available to provide for reimbursement of costs and payment of attorneys’ fees to Common Benefit Attorneys, subject to a proper showing in the future. The Court's Order (Docket #68) is AMENDED as follows:

A. DEFINITIONS

1. “California Consolidated Actions” refers to certain cases pending in the Superior Court of the State of California, Los Angeles County, before the Honorable Elihu Berle, the lead case of which is *Kathy Bartek, et al. v. Skechers USA, Inc., et al.*, BC476903.

2. “MDL” refers to this Multidistrict Litigation, MDL No. 2308.

3. “MDL PSC” and “MDL Co-Lead Counsel” refer to the Plaintiffs’ Steering Committee and Plaintiffs’ Co-Lead Counsel (respectively), established by Practice and Procedure Order No. 3.

4. “California PSC” and “California Co-Lead Counsel” refer to the Plaintiffs’ Steering Committee and Co-Lead Counsel (respectively) identified in the March 12, 2013 Case Management Order.

5. “Combined PSC” means, collectively, the MDL PSC and California PSC.

6. “Common Benefit Attorneys” means:

- a. the MDL Plaintiffs’ Steering Committee,
- b. the California Consolidated Actions’ Plaintiffs’ Steering Committee,
- c. other MDL and California state attorneys who have been authorized by
 - i. MDL Co-Lead Counsel, Ronald E. Johnson, Jr. and/or Robert K. Jenner,
 - ii. California Co-Lead Counsel, C. Brooks Cutter; R. Michael Bomberger; and/or Martin Crump, and/or
- d. other Combined PSC personal injury counsel designated pursuant to the Court’s Orders appointing members to Steering Committee to perform work for the common benefit of personal injury plaintiffs in MDL 2308, the California Consolidated Actions, and the plaintiffs represented by any state-court personal injury counsel that agree to associate hereunder.

7. “Associated State Court Personal Injury Counsel” are those who have executed an Agreement substantially in the form attached to this Order as Exhibit 1.

B. MDL 2308 FEE AND TRUST COST ACCOUNT

1. Before making any claim payment to a personal injury plaintiff whose claim has been resolved in federal court, in California state court, or by any Associated State Court Personal Injury Counsel, defendants shall deduct from the payment an amount equal to six

percent (6%) of the gross amount and shall pay each sum as hereinafter provided for deposit into the MDL 2308 Fee and Cost Trust Account.

2. One third of each assessment, two percent (2%), shall be allocated to pay and/or reimburse the expenses that have been and/or will be incurred at the direction of the Common Benefit Attorneys for the common benefit of all plaintiffs with a case relating to these proceedings. The remaining two-thirds of each assessment, four percent (4%), shall be allocated to pay and/or reimburse the costs of legal services that have been and/or will be provided by Common Benefit Attorneys for the common benefit of all plaintiffs with a case related to these proceedings.

3. In measuring the gross amount, the defendant shall include the present value of any fixed and certain payments to be made in the future; in the event that a defendant makes payment to an insurance annuity company, the present value shall be the amount of the payment to the insurance annuity company.

4. In measuring the gross amount, the defendant shall exclude (1) court costs that are to be paid by the defendant; and (2) any payments to be made by the defendant on an intervention asserted by third-parties, such as to physicians, hospitals, and other health-care providers in subrogation related to treatment of plaintiff.

5. Defendant shall have primary responsibility for withholding six percent (6%) of the claim payments and tendering such sums to the MDL 2308 Fee and Cost Account. If, however, a defendant fails to do so, in addition to the Court's power generally, including the exercise of its powers to compel payments by defendant in compliance with this Order, the Court, under appropriate circumstances, can be expected to seek such payment from the plaintiff and/or his or her counsel under terms that are just and equitable.

6. In order to ensure that monetary contributions to the MDL 2308 Fee and Cost Account are and continue to be equitable and that the funds within the Account are sufficient to cover anticipated expenses, the Combined PSC may require assessments be made by the Common Benefit Attorneys on an ongoing basis and/or as it deems necessary. The assessments will be made to the firms with cases in the MDL and California Consolidated Actions.

C. ASSOCIATED STATE COURT PERSONAL INJURY COUNSEL

1. The MDL PSC personal injury counsel shall provide to defendant's liaison counsel an updated list of the name of any state court attorney who has associated with MDL PSC personal injury counsel.

2. Before making any claim payment to a personal injury plaintiff represented by Associated State Court Personal Injury Counsel whose name appears on the most recent updated list as provided in Paragraph (C)(1), defendants shall deduct an amount equal to six percent (6%) of the gross amount and shall pay such sum as hereinafter provided for deposit into the MDL 2308 Fee and Cost Trust Account. Payment shall be made as described in Section B.

3. Any plaintiff or plaintiff's counsel whose case or claim has been subjected to the withholding of the 6% amount and who disputes the application of this Order to that claim payment is instructed to make a motion, pursuant to the Federal Rules of Civil Procedure and the Local Rules of this Court, seeking relief from the application of this Order to his or her claim payment that sets forth with particularity the grounds for such relief. Any such motion shall be made within 30 days of receipt by such plaintiff or plaintiff's counsel of the claim payment. Any such motion shall be filed "under Seal" in such a way that protects the confidentiality of the settling parties and, unless directed otherwise by the Court, shall not reveal the dollar value of the claim payment or the amount in disputed.

D. COMMON BENEFIT RESOURCE MATERIALS

1. Any plaintiff counsel may obtain the PSC Personal Injury Counsel's Common Benefit Resource Materials by executing an Agreement substantially in the form attached to this Order as "Exhibit 2" (which Agreement defines "the PSC Personal Injury Counsel's Common Benefit Resource Materials") and becoming an Associated State Court Personal Injury Counsel. No state court litigant will be subject to a tax, fee, assessment or other charge imposed by this Court except upon execution of an express written agreement with the PSC to share the PSC's Common Benefit Resource Materials as provided in this Order to the extent that such state court litigant does not use, in any fashion, the Common Benefit Resource Materials.

2. Subject to Paragraph (D)(5) herein, this Order will not restrict a defendant's ability to provide, produce, or make available for inspection any deposition transcript and accompanying exhibits.

3. Subject to Paragraph (D)(5) herein, this Order will not restrict a defendant's ability (1) to cross-notice depositions in state court proceedings or other proceedings outside these MDL proceedings. Accordingly, no tax, fee assessment or other charge will be imposed on any state court litigant by virtue of attending and participating in depositions conducted pursuant to any PPO or other order in the MDL proceedings or California Consolidated Actions, and/or by virtue of use by any party in a state court case of transcripts, videotapes and/or exhibits from such depositions.

4. Subject to Paragraph (D)(5) herein, this Order will not restrict a defendant's ability (1) to assemble collections or depositories of its own documents and other materials related to hormone therapy, or (2) to include such collections or depositories (or subsets of such collections or depositories as independently determined by the defendant, by non-MDL parties or

witnesses, or by non-California Consolidated Actions' parties or witnesses) in its responses to discovery requests from other parties in non-MDL, non-California proceedings.

5. In the event that any party in a non-MDL or non-California proceeding serves a document demand for "all documents selected for production and/or copying by the Combined PSC in MDL 2308 or the California Consolidated Actions," or a substantially similar demand, or "transcripts and exhibits from all depositions taken by the Combined PSC in MDL 2308," or the California Consolidated Actions, or by Associated State Court Personal Injury counsel, the defendant shall give Co-Lead Plaintiffs' Counsel written notice of that demand within three days of receipt, and prior to producing responsive materials.

6. Nothing herein waives the right of Combined PSC personal injury counsel to seek an assessment from the party demanding and receiving (or otherwise obtaining) the above described materials in recognition of the benefit conferred on the party by the Common Benefit Attorneys' preparation and conduct of fact and expert depositions, document discovery, and the like.

E. RECORDKEEPING

1. MDL 2308 Plaintiffs' Liaison Counsel ("Liaison Counsel") shall maintain detailed records which identify all claim payments made to personal injury plaintiffs, the personal injury plaintiffs' and plaintiffs' counsel's names, current address and telephone numbers, civil action numbers or other identifying number, amount of deposit, date of deposit, and other information that may be required by the circumstances. All such records shall be maintained as highly confidential material and the only persons with access to such records shall be Liaison Counsel and her agents. The purpose of maintaining confidentiality is to protect the defendants' legitimate concerns regarding disclosure of the amounts that any defendant deposits

into the escrow fund, inasmuch as knowledge of such amounts would allow calculation of settlements paid by the defendant, which settlements may be confidential.

2. Liaison Counsel shall report to the Court from time to time the sums that are deposited in the account together with the information supplied to Liaison Counsel by the paying defendant at the time of the deposit that will be sufficient for Liaison Counsel to determine if the amount deposited is the amount required to be paid under the terms of this Order. Liaison Counsel shall confer with the defendants and the court to determine the appropriate form that should be completed and accompany any payment to be made to Liaison Counsel to allow Liaison Counsel to verify the accuracy of any payments made. The fees and costs incurred as a result of Liaison Counsel's responsibilities under this Section shall be paid from the Trust Account upon the approval of this Court.

F. ADDITIONAL PROVISIONS

1. Payment by defendant to the MDL 2308 Fee and Cost Account of the assessment amount shall fully discharge the defendant's obligation under this Order.

2. The requirements of Section B shall apply regardless of whether a plaintiff's case is disposed of during the time it is on the docket of the transferee court, or following remand or transfer (a) from the transferee court to another federal district court for trial, (b) from the transferee court to other federal district courts in accordance with 28 U.S.C. § 1404 or other provisions of law, or (c) to any state court in which venue is appropriate. The requirements shall follow the case to its final disposition in any United States court, any California court, or any state court in which venue is appropriate, including a court having jurisdiction in bankruptcy.

3. The requirements of Section B shall apply to all cases and/or claims of clients of any counsel who signed or who are deemed to have signed the Agreement, whether the case was

filed or not, or tolled or not tolled, and/or all cases and/or claims of clients of counsel who received, used, or benefited from the Common Benefit Work Product.

4. The Combined Co-Lead Counsel and members of the Combined PSC are deemed to have agreed to the terms of this Order for all said counsel obtaining any personal injury recovery in any federal or state forum.

G. DISBURSEMENT

1. Upon a proper showing, the Common Benefit Attorneys will be entitled to receive an award of counsel fees and reimbursement of out-of pocket litigation expenses to be paid from the MDL 2308 Fee and Cost Trust Account in such amounts as are determined by the Court, after a hearing, based on the appropriate and controlling law, giving due consideration to the recommendation of the Common Benefit Fee Committee. In making such an award, the Court will first determine the amount of costs for which reimbursement is appropriate. The amount remaining in the MDL 2308 Fee and Cost Trust Account after deducting the amount of costs awarded by the Court will be available for any award of counsel fees. In making an award of counsel fees to the Common Benefit Attorneys and in apportioning any fee award among those attorneys, appropriate consideration will be given to the experience, talent, and contribution made by each Common Benefit Attorney who seeks to cover counsel fees from the MDL 2308 Fee and Cost Trust Account, provided, however, that the Court will only consider compensation for those services which were authorized by designated Combined PSC personal injury counsel.

2. Any sum ordered to be paid by the Court pursuant to this Order as an award of counsel fees shall be deducted from the gross recovery that any plaintiff would have been entitled to receive. Any sum ordered to be paid by the Court pursuant to this Order as

reimbursement for out-of-pocket costs shall be prorated among the plaintiff's whose claim payments were deposited, in part, in the MDL 2308 Fee and Cost Trust Account.

3. Nothing in this Order will limit the amount of attorney's fees and costs, in the form of a percentage award or otherwise, which may be awarded by the Court in the event of recovery in any personal injury action certified as a class action under Fed.R.Civ.P.23.

4. The Court is not making the determination by this Order that the Common Benefit Attorneys shall receive any specific sum or percentage as payment of counsel fees and reimbursement of litigation expenses. Such a determination is specifically reserved for an appropriate time following petitions related to such an award. Rather, this Order is intended to develop a mechanism for the creation of a fund from which the amount of fees and costs to which the Common Benefit Attorneys ultimately may be determined to be entitled may be award and paid with reliability.

5. At such time as the MDL 2308 Fee and Cost Trust Account contains balances that are not necessary to be retained for the payment of fees and costs, the Court will, upon applicable provisions of law, following a hearing, make refunds on an equitable basis, or if such balances are of small amounts, enter such orders concerning the disposition of such funds as are appropriate under the law.

For the foregoing reasons, the Court's Order (Docket #68) is AMENDED.