UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

IN RE: SKECHERS TONING SHOES PRODUCTS LIABILITY LITIGATION	MASTER FILE No. 3:11-MD-2308-TBR MDL No. 2308 Honorable Thomas B. Russell
This document relates to: Grabowski v. Skechers U.S.A., Inc., S.D. California, C.A. No. 3:10-01300	Case No.: 3:12-CV-00204-TBR

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND REQUEST FOR ATTORNEYS' FEES AND EXPENSES

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Plaintiff Tamara Grabowski ("Plaintiff Grabowski") and Plaintiff Venus Morga ("Plaintiff Morga") (together, "Plaintiffs") respectfully submit this memorandum in support of the motion for final approval of class action settlement and Plaintiffs' request for award of attorneys' fees and reimbursement of expenses.

I. INTRODUCTION

The parties seek final approval of a proposed nationwide settlement (the "Settlement[1]") that this Court previously determined, on preliminary review, to be "fair, reasonable and adequate." *See* Memorandum Opinion and Order (preliminarily certifying a class for settlement purposes, preliminary approving the class settlement, appointing Class Counsel, directing the issuance of notice to the Class, scheduling a fairness hearing, and issuing related Orders), at 13 (Dkt. No. 148, August 12, 2012) ("Preliminary Approval Order").

The preliminarily-approved settlement of Plaintiffs' claims should now be granted final approval. This consumer class action between Plaintiffs and Defendant Skechers U.S.A., Inc. ("Skechers") (collectively, the "Parties"), arises out of the deceptive and false advertising and sale of Skechers' "toning shoes," which Skechers brand named Shape-ups, Shape-ups Toners/Trainers, Resistance Runner, and Tone-ups (collectively "Skechers Toning Shoes"). The Settlement provides for the establishment of a $40 million non-reversionary fund, plus up to an additional $5 million for attorneys' fees and costs, providing the Class the very relief Class Counsel sought when they initiated this litigation – (i) individuals who purchased Skechers Toning Shoes and who submit qualifying claims will receive cash payments that will range from

[1] All capitalized terms have the same meaning as set forth in the Settlement Agreement, filed with the Court on May 16, 2012, (Dkt. No. 82), Amendment One to Settlement Agreement, filed with the Court on May 24, 2012 (Dkt. No. 88), Amendment Two to Settlement Agreement, filed with the Court on August 10, 2012 (Dkt. No. 147) (collectively "Settlement").
All citations to docket numbers are in reference to MDL No. 2308.

around half the purchase price of the Eligible Shoes up to the total purchase price of those shoes, depending on the number of claims submitted through the Settlement claims process; and (ii) requires Defendant to implement significant changes to the advertising at issue. In negotiating this Settlement, Class Counsel also worked with the Federal Trade Commission ("FTC") and various state Attorneys General. Under the various settlement agreements, Class Members have been notified and monetary relief will be administered and distributed through this class action under the direction and supervision of Class Counsel. Meanwhile, Skechers' conduct is governed by the injunctive provisions of the Stipulated Order between the FTC and Skechers that will place significant restrictions on future advertising and marketing of the Skechers Toning Shoes. As a strong indicator of the strength of this Settlement and the important role this private class action lawsuit played, the amount of money being paid to Class Members is the highest amount paid to consumers in the history of the FTC. This historic settlement should be approved because it readily meets the "fair, reasonable and adequate" standard for final approval.

For final review of a class action settlement, the Court should view the Settlement "in light of the general policy favoring settlement of class actions." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 778 (N.D. Ohio 2010); *see also Franks v. Kroger Co.*, 649 F. 2d 1216, 1224 (6th Cir. 1981) (The "law generally favors and encourages the settlement of class actions"; *In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 985, 1008 (S.D. Ohio 2001) ("there is a strong presumption by courts in favor of settlement"). For the reasons stated herein, this Court should grant final approval of the Settlement.

With substantial resources and the ability to seek appeals of adverse decisions, Skechers could have protracted any litigation to the point where it could have taken years for the Class to enjoy any recovery, if at all. During that time Skechers could have continued to falsely advertise

the Toning Shoes, thereby expanding the universe of deceived consumers even wider and increasing its revenue from the sale of the deceptively advertised Toning Shoes.

Further, the Settlement was the product of extensive, arms-length negotiations between the Parties. As demonstrated below, the Class meets all requirements for final certification of a settlement class, and the Class Notice program has satisfied all of the requirements of Federal Rules of Civil Procedure, Rules 23(c)(2)(B) and (e), and has provided the best notice practicable under the circumstances to Class Members.

Moreover, the award of attorneys' fees and expenses requested by Plaintiffs' Counsel, and to which the Parties agreed, is well within the ranges established by the case law. The Settlement provides that Skechers not oppose an award of attorneys' fees and expenses up to $5 million, which will be in addition to and separate from the non-reversionary $40 million settlement fund, bringing the total monetary value of the Settlement to $45 million. Thus, the agreed-to award of attorneys' fees and expenses represents just over 11% of the total $45 million common fund, without taking into account the value of injunctive relief. Awarding just 11% of the common fund is below the accepted range of attorney fee awards in class settlements.

The Settlement represents an excellent recovery for the Class – a point confirmed by the remarkably low number of Class Members who have so far elected to either opt out or object to the Settlement. Indeed, since the Court-approved Notice program commenced on September 8, 2012 – which included over a quarter million direct mailings of the Notice to potential Class Members, publication of the Notice in a nationally circulated consumer magazine, Internet publication by banner advertising on highly trafficked web sites, mobile banner advertising, banner advertising on Pandora, a national press release, a blog press release, a Facebook settlement page and extensive media coverage – there have been nearly no substantive objections

to the Settlement, and only 71 requests for exclusion. *See* Declaration of Jeanne C. Finnegan, APR ("Finegan Decl.") and Declaration of Caroline P. Barazesh ("Barazesh Decl.") filed contemporaneously herewith.[2]

For the reasons set forth, the Court should find that the proposed Settlement is "fair, reasonable, and adequate" under Fed. R. Civ. P. 23(e)(2) and should be granted final approval. Likewise, as demonstrated below, the Class meets all the applicable requirements; therefore, the Court should grant final certification of the settlement Class. Finally, the Court should grant approval of the negotiated attorneys' fees and expenses and award incentive payments to Plaintiff Grabowski and Plaintiff Morga in the amounts of $2,500 each.

II. HISTORY OF THE LITIGATION

A. Pretrial Litigation

Beginning in May of 2010, several of Plaintiffs' Counsel began investigating the advertising claims about "toning" footwear, including retaining and working with a marketing expert and a medical doctor and professor who is an expert in and conducts research concerning the orthopedic and physiological effects of footwear on the human body and who develops and designs footwear for orthopedic use. Declaration of Timothy G. Blood in Support of Motion for Final Approval ("Blood Decl."), ¶4. Plaintiffs' Counsel's investigation also included researching, gathering and analyzing studies demonstrating the disadvantages of various types of toning footwear, including Skechers' toning footwear, investigation of Skechers' advertising and marketing, and research and analysis of Skechers' financial and sales information related to Skechers Toning Shoes. *Id.*, ¶5.

[2] The objector and opt-out figures are current through December 14, 2012. Pursuant to the Preliminary Approval Order (Dkt. No. 148), the deadline for opting out or objecting to the Settlement is January 14, 2013. Plaintiffs will respond to all objections on or before February 1, 2013, in compliance with the response deadline set forth in the Preliminary Approval Order.

On June 18, 2010, Counsel for Plaintiff Grabowski filed a class action complaint in the United States District Court for the Southern District of California, entitled *Grabowski v. Skechers, U.S.A.*, No. 3:10-cv-01300-JM(MDD) ("*Grabowski*"), which was assigned to Judge Jeffrey T. Miller. *Id.,* ¶6. The complaint asserted claims for false advertising under California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §1770, *et. seq.*, California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §17200, *et. seq.*, and breach of express warranty on behalf of a nationwide class of purchasers alleging Skechers' advertising and marketing of its Toning Shoes was false and misleading, and the Toning Shoes did not actually provide any of the claimed physiological or other health benefits to consumers. Plaintiff alleged that California law applied to all members of the Class nationwide because Skechers is headquartered in California, and the conduct at issue was devised in and emanated from California. *See generally*, *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 613 (1987); *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 919 (2001); *Wershba v. Apple Computer, Inc*., 91 Cal. App. 4th 224, 242 (2001); *Hanlon v. Chrysler Corp*., 150 F. 3d 1011, 1022-23 (9th Cir. 1998); *Chavez v. Blue Sky Natural Bev. Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010). Skechers answered the *Grabowski* complaint on August 20, 2010. Blood Decl., ¶8.

On August 25, 2010, a related class action captioned *Morga v. Skechers U.S.A., Inc.*, No. 3:10-cv-01780-JM(WVG) ("*Morga*"), was filed in the United States District Court for the Southern District of California on behalf of Plaintiff Morga. *Id.*, ¶7. The allegations were the same as in *Grabowski*, with overlapping causes of action on the same nationwide basis. Plaintiffs' Counsel in both *Grabowski* and *Morga* have worked together to ensure efforts were not, and are not, duplicated. *Id.* Skechers answered the *Morga* complaint on October 15, 2010.

Id., ¶8. Thereafter, all discovery and pretrial and trial dates in *Grabowski* and *Morga* were coordinated before Judge Miller. *Id.*

On February 7, 2011, Plaintiffs jointly moved to file amended complaints. *Id.* Plaintiffs' motion was granted on February 17, and on February 18, 2011, the *Grabowski* and *Morga* complaints were amended to allege damages under the CLRA, and to add additional factual allegations. *Id.* Skechers answered the amended complaints on March 7, 2011. *Id.* On April 16, 2012, the United States Judicial Panel on Multidistrict Litigation formally transferred both *Grabowski* and *Morga* to this Court pursuant to 28 U.S.C. §1407. *Id.*, ¶13. On May 11, 2012, pursuant to Fed. R. Civ. P. 15(a)(2), a second amended complaint was filed in *Grabowski*. *Id.*, ¶9. The amendments were largely technical to conform to the aspects of the Settlement, such as ensuring the class definition is consistent and using similar language as used in the Settlement Agreement. *Id.* On May 15, 2012, Skechers answered the amended complaint. *Id.*

In November 2010, the Parties exchanged initial disclosures pursuant to Fed. R. Civ. P. 26 and negotiated a joint discovery plan, which was submitted to the court. *Id.*, ¶10. On December 6, 2010, the Parties attended the initial discovery and early neutral evaluation conference during which the court coordinated and set discovery, pretrial, and trial dates in both *Grabowski* and *Morga*. *Id.*

On December 20, 2010, Plaintiffs' Counsel served comprehensive formal discovery requests on Skechers, including Requests for Production of Documents, Interrogatories, and Requests for Admissions. *Id.*, ¶11. Plaintiffs' Counsel also drafted and submitted an electronic discovery protocol and proposed protective order. *Id.* The Parties met and conferred concerning changes to the protective order on several occasions. *Id.* Skechers responded to the formal

discovery on February 8, 2011, and the Parties began meeting and conferring over those responses. *Id.*

While the Parties were meeting and conferring, Skechers moved to stay the proceedings in *Grabowski* and *Morga* pending the Ninth Circuit's decision in *Mazza v. American Honda Motor Co., Inc.* and the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*. *Id.*, ¶12. Plaintiffs opposed the motion. *Id.* On March 7, 2011, Judge Miller granted Skechers' motion to stay all proceedings so that the court could benefit from any guidance provided by the decisions in *Mazza* and *Dukes*. *Id.* On July 1, 2011, after the Supreme Court issued its opinion in *Wal-Mart Stores*, Plaintiffs moved to lift the stay, but voluntarily withdrew the motion at Defendant's request based on favorable progress made in the settlement negotiations that resulted in this Settlement. *Id.* After *Mazza* and *Dukes* were decided, Plaintiffs again moved to lift the stay on January 13, 2012. *Id.* While the actions were formally stayed, Plaintiffs' Counsel continued to investigate and gather facts, and take other actions to allow counsel to move quickly once the stay was lifted. *Id.*, ¶14.

B. Settlement Discussions

Plaintiffs' Counsel were able to push for settlement discussions with Skechers' Counsel in part by leveraging work Plaintiffs' Counsel had done with the FTC on other matters, including work performed in a factually similar lawsuit entitled *In re Reebok EasyTone Litigation*, No. 4:10-cv-11977-FDS (D. Mass) ("*Reebok*"). *Id.*, ¶15. Plaintiffs' Counsel's efforts in *Reebok* resulted in a $28.5 million cash settlement, which was granted final approval on January 19, 2012. *Id.* The *Reebok* settlement, like this Settlement, was part of a global resolution reached with the FTC and numerous state Attorneys General and consumer protection bureaus. *Id.* Because the approach in *Reebok* was new and involved a large regulatory agency, the *Reebok* settlement required a significant amount of effort formulating a workable framework for

resolution and bringing about that resolution. *Id.*, ¶17. Plaintiffs' Counsel's accomplishments in *Reebok* made the settlement here possible. *Id.*

Settlement discussions between Skechers' Counsel and Plaintiffs' Counsel began in December 2010, shortly after the first early neutral evaluation conference with the court in the Southern District of California. *Id.* ¶18. More substantive settlement discussions began in March 2011, during which time Plaintiffs' Counsel proposed the joint private class/FTC approach that was achieved in *Reebok*. *Id.* On May 17, 2011, the Parties had a face-to-face meeting at Skechers' counsel's office in Newport Beach, California. *Id.* This began a six-month long series of settlement negotiations between Skechers' counsel, Plaintiffs' Counsel, the FTC, and to a lesser degree, the state Attorneys General and consumer protection bureaus. *Id.*

During the course of settlement discussions, Skechers produced relevant documents, including electronically stored information, and provided interviews with key Skechers personnel. *Id.*, ¶¶21, 23. Plaintiffs' Counsel requested, were provided with, and thoroughly reviewed relevant documents from Skechers, including documents regarding: (i) product design, initiative and development; (ii) scientific studies and research; (iii) marketing, advertising, media, and public relations; and (iv) sales and pricing data. In total, Plaintiffs' Counsel was given over 13.5 GB of data, consisting of approximately 6,574 documents (about 24,500 pages). *Id., ¶*21.

This extensive document production and review process was followed by Plaintiffs' Counsel's interviews of several key witnesses produced by Skechers who had knowledge of the facts at issue, and who were at the center of the circumstances alleged. *Id.*, ¶23. Over the course of several days Plaintiffs' Counsel interviewed: (i) Savva Teteriatnikov, Vice President of Design at Skechers (original designer of the Shapeup shoe) concerning the design and

development of Skechers Toning Shoes and studies related to Skechers' health claims; (ii) George Zelinsky, President of Retail Stores for Skechers concerning Skechers' corporate structure, retail pricing for Skechers Toning Shoes, and Skechers' health claims regarding the Skechers Toning Shoes; (iii) Rick Graham, Senior Vice President of Domestic Shoe Sales for Skechers concerning pricing, sales and revenue data for Skechers Toning Shoes, and in-store advertising for Skechers Toning Shoes; and (iv) Jennifer Clay, Vice President of Corporate Communications concerning Skechers' advertising and marketing of Skechers Toning Shoes. *Id.* These interviews provided Plaintiffs' Counsel with additional information confirming their allegations regarding Skechers' product testing, advertising and marketing strategy. *Id.*

By the end of November 2011, the broad agreement of the settlement terms, including the amounts, had been reached. *Id.*, ¶20. Every aspect of this Settlement was heavily negotiated, including the overall dollar amount of the Settlement and each aspect of the Settlement Agreement and exhibits, including the release, the amounts available to individual Class Members making claims, the claims process and the Class Member notice and outreach program. *Id.* Beginning in November 2011, and up to the time the Settlement was executed, the Parties worked to document and finalize numerous details. *Id.* Meanwhile, all of these negotiations were done within the context of corresponding agreements between Skechers and the FTC and state Attorneys General and consumer protection bureaus. *Id.*

The various aspects of the settlement and settling process were carefully coordinated. On May 16, 2012, the FTC entered into the Stipulated Order with Skechers concerning its Toning Shoes. Pursuant to the Stipulated Order, the FTC filed a Complaint for Permanent Injunction and Other Equitable Relief ("FTC Complaint") against Skechers for its advertisements and claims regarding its Skechers Toning Shoes products, alleging violations of the Federal Trade

Commission Act, specifically 15 U.S.C. §45(a), which prohibits "unfair or deceptive acts or practices in or affecting commerce," and 15 U.S.C. §52, which prohibits the dissemination of any false advertisement in or affecting commerce. Attorneys General and consumer protection bureaus in 44 states and the District of Columbia (the "AG Actions") also filed a similar complaint against Skechers.

Meanwhile, also on May 16, 2012, Plaintiffs filed the subject Settlement Agreement along with their Motion for Preliminary Approval ("Motion for Prelim. App."). *Id.* ¶25. Along with both agreements, the notice program was launched with a nationwide news conference, press releases and the class action settlement administration center, including a website set up for the settlement. The response from the public was tremendous, with the press releases and news conference generating large numbers of visits to the website and early-filed claims.

On June 6, 2012, Sonia Stalker, a plaintiff in one of the Later-Filed Actions, filed an objection to the proposed settlement concerning her counsel's demand for attorneys' fees. *Id.* On June 25, 2012, Plaintiffs filed a response to the *Stalker* objections. *Id.* On July 24, 2012, the Court held a preliminary fairness hearing and heard oral arguments on the merits of the proposed settlement, and the objections thereto. *Id.* ¶26. Stalker's counsel confirmed at that hearing that Stalker's object was not about the merits of the Settlement – Stalker fully endorsed the Settlement – but about attorneys' fees. On August 3, 2012, the Court heard additional arguments on the remaining issues at a telephonic conference of the Parties. *Id.* By order of August 8, 2012, the Court suggested changes to the Settlement that, if substantially adopted, would allow the Court to preliminarily approve the Settlement. *Id.* ¶27. On August 10, 2012, Plaintiffs filed a Second Amended Settlement Agreement which restated the injunction language in the original Settlement to ensure it reflected the Parties' intent, and modified the terms regarding requests for

attorneys' fees. *Id.* ¶28. On August 13, 2012, the Court issued an order preliminarily approving the Settlement and notice program, preliminarily certifying the settlement Class, appointing Class Counsel, and issuing a stay of the Later-Filed Actions. *Id.* ¶29.

III. THE SETTLEMENT TERMS

A. Settlement Benefits

1. Cash Payments

The Settlement provides for cash payments to all Class Members who submit valid claims. Under the Settlement, Skechers deposited $40 million into an Escrow Fund (the "Escrowed Funds") maintained by the Class Action Settlement Administrator for the benefit of the Class. Class Members will receive the following relief based on the particular model of Toning Shoes they purchased, the number of Toning Shoes purchased, and the number of Class Members that submit claims. Although the claims period remains open and a significant amount of work is left to be done to eliminate duplicative claims, incorrectly filed claims and to correct similar issues before final amounts are known, the Settlement provides for the following:

Item	Initial Amount	Maximum Amount
Shape-ups	$40.00	$80.00
Podded Sole Shoes	$27.00	$54.00
Tone-ups (Non-Podded Sole)	$20.00	$40.00
Resistance Runner	$42.00	$84.00

To receive an award, Class Members timely submit a simplified Claim Form (Ex. 1 to Settlement Agreement) either online at www.skecherssettlement.com or by U.S. mail. Class Members must submit claims to obtain relief because Skechers generally does not have their addresses (since the Skechers Toning Shoes were sold over-the-counter).

In the event the Escrowed Funds are not sufficient to pay all Claimants the minimum amounts, each claim will be proportionally reduced on a *pro rata* basis. If any money remains after distribution to the Class (which is unlikely), it will be sent to the FTC, potentially for further redress efforts. None of the $40 million fund will revert to Skechers.

2. Injunctive Relief

The Settlement, in conjunction with the Stipulated Order that Skechers entered into with the FTC, requires Skechers to undertake and implement significant and substantial changes to its marketing, advertising, and labeling of the Skechers Toning Shoes, and to report on those changes. The Stipulated Order has been submitted for entry by the United States District Court for the Northern District of Ohio through the FTC's aforementioned enforcement action. The conduct changes apply to any footwear sold by Skechers that purports to improve or increase muscle tone, strength, or muscle activation. Skechers will be permanently enjoined from: (i) making or assisting others in making any claims that the Skechers' toning footwear are effective in strengthening muscles, cause weight loss, or increase caloric expenditure, calorie burn, blood circulation, aerobic conditioning, muscle tone, and muscle activation, unless these representations are non-misleading and, at the time of making such representation, Skechers possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true, which evidence is specifically defined in relation to each type of claim; and (ii) misrepresenting or assisting others in misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study or research relating to Skechers' toning footwear, including misrepresenting that wearing any Skechers' toning footwear will result in a quantified percentage or amount of muscle activation, toning, or strengthening. Skechers is also subject to compliance monitoring and reporting, including, but not limited to permitting the FTC to obtain: (i) additional reports within 14 days of receipt of written notice from the FTC; (ii)

additional discovery upon request; (iii) additional interviews of requested persons; (iv) for a period of three years from the date of entry of the Stipulated Order, notification of any changes in the corporate structure of Skechers that would result in the emergence of a successor corporation; and (v) a report within 180 days of the entry of the Stipulated Order stating compliance with the Stipulated Order.

3. Notice and Administration Costs and Attorneys' Fees and Expenses

The costs of Class Notice and claims administration will be paid from the Escrowed Funds. Plaintiffs' Counsel and Skechers also agree that any award of attorneys' fees and expenses to Plaintiffs' Counsel and any other counsel representing or purporting to represent the Class or any of its members, shall not, in the aggregate, exceed $5 million. Dkt. No. 147 at 2. Plaintiffs' Counsel's attorneys' fees and expenses will be paid by Skechers in addition to the $40 million reserved for the Escrowed Funds. Skechers also agrees not to oppose any request for Court-awarded incentive payments to Plaintiff Grabowski and Plaintiff Morga up to $2,500 each, which is also in addition to the $40 million reserved for the Escrowed Funds.

B. The Class Notice Program

The Parties have developed a comprehensive and innovative notice program with input from Garden City Group, Inc. ("Garden City"), a company that specializes in developing class action notice plans. The details of the notice program, including the methodology underlying its design, are further explained in the Declaration of Jeanne C. Finegan, APR, filed with this motion.

The Parties have worked diligently with Garden City to achieve the most efficient and effective notice program for this Settlement. The notice program works in conjunction with the FTC's May 16, 2012, press conference and press release to announce its settlement with Skechers.

The notice program was designed to provide broad notice intended to reach as many Class Members as possible, and to satisfy due process requirements. At the center of this first phase of the notice program is the website specifically set up for this Settlement. The address of the Settlement Website appeared on all of the notice pieces, and is hyper-linked where a notice piece appears on the Internet, including the FTC's website. The online Claim Form can be completed from the Settlement Website. The Settlement Website also provides information about the Settlement, including the Class Notice. To ensure Class Members can file claims at the time they learn of the settlement from the FTC's media activities (but before formal class notice is sent), the Website, including the online Claim Form, was operational as of May 16, 2012. The deadline to submit a Claim Form is April 18, 2013.

Direct notice was sent by first class mail to over 250,000 Skechers customers for which Skechers had mailing addresses. Barazesh Decl., ¶9. However, because the Toning Shoes are most typically sold over the counter at retail stores, Skechers does not have mailing addresses for most Class Members. Consequently, the notice program focused on disseminating notice through the Internet and hard-print media based on where Class Members are most likely to see the notice. Finegan Decl., ¶¶13-22. The publication portion of the first phase of this notice plan was designed to reach 77% of adults 18 to 44, and 82% of the primary target audience, women 18 to 44 years of age, with an average frequency of five times to the Class. *Id.*, ¶10.

The Settlement was also publicized through the use of Internet "banner ads." Banner ads are short, Internet-based advertisements designed to attract attention. When presented with such an ad, an interested Internet user need only click on the banner ad to be taken directly to the Settlement Website. *Id.*, ¶17. Internet banner ads were posted on the following sites for a period of time to deliver approximately 278,000,000 impressions: Yahoo! RON, Yahoo! Health,

Yahoo! Mail, MSN Hotmail, MSN Health & Fitness, Fox News, Prevention.com, Runners World.com, 24/7 Real Media, Inc., Univison, and Facebook. *Id.*, ¶16. This was particularly helpful because nearly 89% of the targeted audience is online, and 73.4% of those are medium to heavy users of the Internet. Declaration of Jeanne C. Finegan, APR, Concerning Proposed Class Member Notification Program (Dkt. No. 83-6), ¶28.

Further, to capture the growing population of cell phone users (who fall squarely into the target audience), mobile banner advertising, similar to Internet banner advertising, was sent to those accessing the Internet through their cell phone. *Id.*, ¶30. These mobile phone users will see the banner and, if they choose, can click to seek additional information and/or to call the toll free line. *Id.* Although this effort cannot be calculated into the overall reach and frequency of the program, it will increase the opportunity for potential Class Members to see the message. Approximately 93% of the target audience owns a mobile phone. *Id.*

The notice program also included advertising on Pandora, a streaming Internet radio site. *Id.*, ¶31. Pandora is available to listeners on their computers and mobile devices. *Id.* As the listener requests music, targeted banner advertising, based on the listener's demographic profile are served to that listener. For this notice program, home page banner ads will be posted on mobile and web at www.pandora.com. The total estimated impressions included in the Pandora buy are 6,000,000. *Id.*

In addition to these components of the notice program, which are capable of inclusion in reach and frequency calculations, the notice program was further enhanced by issuing press releases, which were picked up by media outlets, to provide "free media" discussing and explaining the proposed Settlement. *See Id.*, ¶32. The press release sent jointly by the Parties was sent to over 300 blogs covering fitness and exercise, dieting, nutrition, jogging/running, and

sports. *Id.*, ¶33. Additionally, a Facebook settlement page was set up, which tied into Facebook advertising regarding the Settlement. *Id.*, ¶¶34, 35. Sponsored tweets on Twitter were also sent, targeted to Mom/Lifestyle and Health and Fitness categories. Sponsored blog posts were also made on these categories. *Id.*, ¶34.

The notice by these various means of publication was a resounding success that exceeded initial reach and frequency estimates. The notice reached an estimated 84 to 89 percent of the target market, with an average frequency of over five times. Finegan Decl., ¶23.

The Summary Settlement Notice was the notice piece primarily published on the Internet and in the above-referenced publications and through other dissemination channels. The Summary Settlement Notice is a summary version of the longer, more formal, Class Notice. The Summary Notice was designed to readily provide potential Class Members with essential information about the Settlement, including information on submitting a claim. The Summary Settlement Notice also contained a general description of the lawsuit, the Settlement relief, how to file a claim and a general description of Class Members' legal rights. The Summary Settlement Notice directed Class Members to the Settlement Website dedicated exclusively to the Settlement, and to a toll-free telephone number that Class Members may use to obtain a copy of the long-form Class Notice and other information. The Claim Form can also be completed online on the Settlement Website. To date, about 87% of the Claimants submitted their Claim Forms online. The Summary Settlement Notice is attached to the Settlement Agreement as Exhibit 6.

Complementing the media notice efforts was the full-length Class Notice, a copy of which is attached to the Settlement Agreement as Exhibit 2. The Class Notice contains detailed information about the lawsuit, the Claim Form, the Settlement benefits and the Release, as well

as information about how Class Members can opt-out, object, or exercise other rights under the Settlement. The Class Notice (and the Claim Form) is available on the Settlement Website and Class Counsel's law firm websites. It also is mailed to any Class Member who requests a copy. Further, as noted above, it was mailed to over 250,000 persons who had purchased Skechers' products and are potential Class Members. Barazesh Decl., ¶9.

Finally, a 24-hour toll-free telephone number was established to provide callers with information about the Settlement through an interactive voice recording system. Live customer service representatives will be available to answer any individual questions or, as needed, direct the caller to Class Counsel. Like the notice program, the Settlement Website and toll-free phone number have been a success. There have been over 2 million visitors to the site and over 180,000 calls to the toll-free number. Barazesh Decl., ¶¶7-8.

IV. THE SETTLEMENT WARRANTS FINAL APPROVAL

As demonstrated below, the Settlement fully satisfies the factors for determining the propriety of a class action settlement under Rule 23.

A. The Standard for Approval of a Class Action Settlement

Pursuant to Rule 23(e), after directing notice to all class members in a reasonable manner and prior to granting final approval to the proposed settlement, the Court must conduct a fairness hearing and determine whether the settlement's terms are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)[3]; *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 140 (W.D. Ky. 1992). In making this overall determination, courts consider the following factors:

> (1) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement;

[3] Internal citations and quotations omitted and emphasis in the original unless otherwise stated.

(2) the risks, expense, and delay of further litigation;

(3) the judgment of experienced counsel who have competently evaluated the strength of their proofs;

(4) the amount of discovery completed and the character of the evidence uncovered;

(5) whether the settlement is fair to the unnamed Class members;

(6) objections raised by Class members;

(7) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining; and

(8) whether the settlement is consistent with the public interest.

UAW v. General Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007); *Lonardo*, 706 F. Supp. 2d at 779 ("While Sixth Circuit courts do not always articulate these factors using this language, . . . the above list includes the factors commonly recognized as relevant. The Court, moreover, 'may choose to consider only those factors that are relevant to the settlement and may weigh particular factors according to the demands of the case.'"); *Whitford*, 147 F.R.D. at 140 (and authorities cited therein); *Vukovich*, 720 F.2d at 922-23; *Telectronics*, 137 F. Supp. 2d at 1009.

B. The Settlement Satisfies the Criteria for Final Approval

This Settlement fully meets this standard for final approval and, further, should be approved by this Court. In the experienced judgment of Class Counsel, the risks faced by Plaintiffs and the Class in proceeding with the litigation, and the uncertainty that a more favorable result could be obtained if this case were litigated against Skechers through trial and the inevitable post-trial motions and appeals, militate strongly in favor of approving the Settlement.

Class Members submitting claims will receive refunds of significant portions of the purchase price of the Toning Shoes and Skechers will be enjoined through the Stipulated Order

from continuing the marketing and advertising practices challenged in the complaints. When the Settlement is considered in balance against the needless risk and expense of proceeding through trial, it is more than adequate for final approval.

Furthermore, individual criteria used by courts in the Sixth Circuit also weigh in favor of final approval of the Settlement, as described more fully below. *See, e.g. UAW,* 497 F.3d 615, 631. It is well-established that public policy highly favors settlement as a means of resolving disputes. *See also*, *United States v. Lexington-Fayette Urban Cty. Gov't*, 591 F.3d 484, 490 (6th Cir. 2010) ("public policy generally supports 'a presumption in favor of voluntary settlement' of litigation"); *Rusiecki v. City of Marquette*, 64 Fed. Appx. 936, 938 (6th Cir. 2003) ("public policy favors settling cases without litigation, and settlement agreements should be upheld whenever it is equitable to do so"). This is especially true in the context of complex class action litigation. *Granada Invest., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *E.E.O.C. v. Wal-Mart Stores, Inc.*, No. 6:01-CV-339-KKC, 2011 U.S. Dist. LEXIS 146077, at *11 (E.D. Ky. Dec. 20, 2011); *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 U.S. Dist. LEXIS 150427, at *42 (E.D. Mich. Dec. 13, 2011); *Brent v. Midland Funding, LLC*, No. 3:11 CV 1332, 2011 U.S. Dist. LEXIS 98763, at *32 (N.D. Ohio Sept. 1, 2011); *Sheick v. Automotive Component Carrier, LLC*, No. 2:09-cv-14429, 2010 U.S. Dist. LEXIS 110411, at *38 (E.D. Mich. Oct. 18, 2010). An analysis of the factors strongly favors final approval of the Settlement.

1. The Likelihood of Success on the Merits Weighed Against the Amount and Form of the Relief Offered, and the Risks, Expense, and Delay of Further Litigation

The amount of this Settlement represents the highest consumer redress in a false advertising case for the FTC. It is an excellent result that was brought about through the actions of Plaintiffs and their counsel. Although Class Counsel are confident about the merits of the case, there are substantial hurdles in prosecuting this case to trial against Skechers, a multi-

million dollar corporation which possesses considerable financial resources and has retained the large national defense firm of O'Melveny & Myers to prosecute its defense. Here, prevailing on the breach of express warranty claim, the consumer protection claims under California's Consumers Legal Remedies Act, California Civil Code §1750, *et seq.*, and the unfair and deceptive conduct claims in violation of California Business & Professions Code §§17200, *et seq.* (and, if needed, the laws of other states), would involve numerous legal and factual issues that would require many depositions and extensive discovery and testimony, significantly increasing the expense and duration of the litigation. Recently, the area of consumer protection and false advertising has seen a number of new rulings that have not always been favorable to consumers, and an increasingly sophisticated defense to these actions. These rulings relate to class certification, remedies, choice of law and issues relating to the burden of proof, and other proof issues related to assessments of the scientific support behind advertising claims like those at issue. In addition, Plaintiffs would be required to prove their theory and calculations of recoverable damages with the help of expert testimony. Conducting the balance of fact discovery with regard to these claims would be a complex and expensive endeavor. The Settlement provides these remedies without the risks and delays of continued litigation, trial and appeal. The expense, complexity and duration of litigation are significant factors considered in evaluating the reasonableness of a settlement. *UAW*, 497 F.3d at 631. Litigating this class action through trial would be time-consuming and expensive. As this Court noted previously, the risk of proceeding with litigation is an important consideration weighing in favor of approving a settlement. *In re Countrywide Fin. Corp. Cust. Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2009 U.S. Dist. LEXIS 119870, at *36 (W.D. Ky. Dec. 22, 2009). The question of whether Skechers has sufficient scientific substantiation for the advertised health benefits of the Skechers

Toning Shoes would require a "battle of the experts" in front of a fact finder – a risky proposition for both parties. *See Wade v. Kroger*, No. 3:01CV-699-R, 2008 U.S. Dist. LEXIS 97200, at *14 (W.D. Ky. Nov. 20, 2008). Moreover, a contested class certification is always a risk itself. *See, e.g.*, *In re Packaged Ice Antitrust Litig.*, 2011 U.S. Dist. LEXIS 150427, at *55-56. If Plaintiffs were able to certify a class, the next step absent a settlement, Skechers would challenge the merits of Plaintiffs' claims at every stage of pretrial proceedings and through trial, resulting in additional years of expensive and hotly contested litigation. Moreover, even if the Class could recover a judgment after a trial, the additional delay through post-trial motions and the appellate process could deny the Class any recovery for years and, with the passage of time, make it more difficult to locate and pay Class Members once a favorable judgment became final.

The Settlement, which consists of significant cash payment to Class Members in relation to the amount they paid for the eligible Skechers products at issue and the product they received (footwear), as well as important conduct changes, results in an immediate tangible recovery without considerable risk, expense, and delay of trial. This result weighs heavily in favor of the proposed Settlement. *See*, *e.g.*, *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) ("The issue would undoubtedly devolve into a battle of experts whose outcome cannot be accurately ascertained in advance.").

With this timely Settlement, there is certain and current relief for the Class, as opposed to protracted and uncertain litigation. Moreover, because Class Counsel largely have achieved the compensatory and injunctive relief that they set out to achieve, the prospect of recovering more for the Class after protracted litigation does not outweigh the benefits to the Class achieved by entering into the Settlement now. Accordingly, these factors strongly favor final approval.

2. The Judgment of Experienced Counsel

In approving class settlements, courts have given great weight to the opinion and judgment of experienced counsel who have conducted arm's-length negotiations. Class Counsel are well-informed and experienced class action attorneys, and endorse this Settlement. This compels a finding that the Settlement should be approved. *UAW v. GMC*, No. 05-CV-73991-DT, 2006 U.S. Dist. LEXIS 14890, at *57 (E.D. Mich. Mar. 31, 2006) (Where "counsel for all parties are reputable practitioners and trial counsel experienced in complex class action litigation. . .their collective judgment in favor of the Settlement is entitled to considerable weight.").

Counsel respectfully submit that the quality of their work in this case is apparent from their vigorous prosecution of the Action, in conjunction and cooperation with the investigative efforts of the FTC. Only once before, in the *In re Reebok EasyTone Litigation*, No. 4:10-cv-11977-FDS (D.Mass) ("*Reebok*"), has the FTC and private parties entered into a global settlement where consumer redress has been paid through a class action settlement. Blood Decl., ¶¶ 15-17. The fact that it again occurred here demonstrates a high degree of trust and confidence in Class Counsel. Counsel have worked tirelessly from inception of their pre-filing factual investigation in May of 2010, to the extensive discovery, and the long settlement negotiations. Blood Decl., ¶¶14-24.

Moreover, Class Counsel is well apprised of the strength of its claims. As reflected by the firm resumes attached to their concurrently submitted declarations, Plaintiffs' Counsel are comprised of highly experienced and successful plaintiff class action attorneys. *See* Plaintiffs' Counsel's Declarations and firm resumes attached thereto, currently filed; *see also* Prelim. App. Order at 24 (Dkt. No. 148) (finding that Class Counsel "are experienced and adequate counsel"). The collective judgment of Class Counsel, and only after the lengthy discovery and negotiations,

was that this Settlement is in the best interests of the Class. This judgment should be given substantial deference by this Court, as Class Counsel are zealous consumer advocates, understand the fiduciary duties involved in class representation, and have histories of achieving success and results on behalf of plaintiff classes that speak for themselves. Thus, the quality and opinions of experienced Class Counsel militate in favor of final approval of the Settlement.

3. The Amount of Discovery Completed and the Character of the Evidence

Class Counsel have conducted ample discovery necessary to assess the strengths and weaknesses of Plaintiffs' claims. *UAW*, 2006 U.S. Dist. LEXIS 14890, at *58-*59; *Lonardo*, 706 F. Supp. 2d at 782 ("[A]nother factor the Court considers in evaluating the Settlement Agreement is the amount and character of the evidence assembled to date."); *Telectronics*, 137 F. Supp. 2d at 1014-15. As detailed in the Blood Declaration, the Parties have engaged in significant discovery, providing Class Counsel with the ability to make a fully informed decision on how to optimally negotiate the Settlement. Blood Decl., ¶¶4-5, 21-23. Plaintiffs' Counsel's in-depth knowledge of the Action resulting from their investigation and confirmatory discovery supports the Settlement. Prior to entering into the Settlement, Plaintiffs' Counsel conducted a thorough investigation and analysis of Plaintiffs' legal claims, conducted an extensive fact investigation, and engaged in informal confirmatory discovery. Plaintiffs' Counsel vetted Defendant's numerous advertisements and other representations pertaining to its Toning Shoes across several different forms of media – including print ads, television commercials, sponsored reviews and new media advertisements. This review included advertisements for the Skechers Toning Shoes on Defendant's www.skechers.com website and promotional content on the video sharing website www.youtube.com. Plaintiffs' Counsel reviewed Defendant's public documents, including annual reports and press releases, as well as reports on Skechers'

advertising campaign in industry news sources to build a detailed understanding of Defendant's sales and marketing strategy and results. Blood Decl., ¶¶4-5. Further, Plaintiffs' Counsel reviewed numerous published scientific studies concerning exercise physiology and biomechanics and conferred with experts in the relevant fields, including a medical doctor who is an expert in the orthopedic and physiological effects of footwear on the human body, to develop a complete understanding of the alleged lack of scientific support for Defendant's "toning" claims. *Id.* In addition, Plaintiffs' Counsel conducted hours-long, in-person interviews of the primary witnesses of the principal factual issues in the Action, including Savva Teteriatnikov, Vice President of Design (the original designer of the Shape-up shoe); George Zelinsky, President of Retail Stores; Rick Graham, Senior Vice President of Domestic Shoe Sales; and Jennifer Clay, Vice President of Corporate Communications. *Id*. ¶23. This extensive investigation and discovery provided the Parties with a strong basis from which to assess the strengths and weaknesses of their respective cases and their positions on liability and damages. Taken as a whole, this investigatory work and confirmatory discovery favor final approval of the Settlement.

4. The Settlement Is Fair to the Unnamed Class Members

Substantively, the terms of the proposed Settlement are eminently fair. The Settlement provides cash reimbursement drawn from a $40 million non-reversionary fund. Class Members will receive an amount which would exceed the likely measure of damages – the difference between the purchase price for the product as represented and the value of the product received. In addition, Skechers will stop the disputed advertising practices that were the subject of this litigation.

The reimbursement schedule is determined from the retail value over time of the Skechers Toning Shoes. This objective determination and the subsequent *pro rata* allocation of remaining funds ensure that the distribution of funds is fair for all Class Members.

5. Opt-Outs and Objections Raised by Class Members

Courts also consider the reaction of Class Members to the proposed settlement. The opt-out and objection deadline is on January 14, 2013. As directed by the Court, Plaintiffs will respond to all of the objections in their responsive papers due no later than February 1, 2013. At this point, however, it is notable that the response from Class Members has been exceedingly positive. To date, only 71 Class Members have opted out, and less than 10 objections have been filed or otherwise submitted. The objections received to date are not generally critical of the Settlement terms in themselves, rather, the objectors do not approve of litigation or class actions in general, or were satisfied with the shoes' performance, regardless that they did not provide the toning benefits advertised.

6. The Settlement Is the Product of Arm's-Length Negotiations

When a "settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair." *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 381 (N.D. Ohio 2001) (citing *Vukovich*, 720 F.2d at 923); *see also Best Foods v. Aerojet-Gen. Corp.*, No. 1:89-CV-503, 2000 U.S. Dist. LEXIS 12712, at *32 (W.D. Mich. Aug. 24, 2000); *White v. Morris*, 811 F. Supp. 341, 342 (S.D. Ohio 1992); *Newberg on Class Actions*, §11.41 (4th ed. 2007) ("There is a presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for Court approval"). Moreover, the presence of a governmental participant further supports this presumption. *See Lexington-Fayette Urban Cty. Gov't*, 591 F.3d at 490 ("the presumption [in favor of settlement] is particularly strong where a consent decree has been negotiated").

Here, the Parties only arrived at the Settlement after intensive and extensive arm's-length negotiations and after sufficient discovery of relevant documents and witnesses. Even after the first drafts of the Settlement Agreement were written, not all issues were resolved, and the Settlement Agreement and corresponding exhibits went through countless more versions and drafts before being finalized and executed.

As for conducting relevant discovery, Plaintiffs' Counsel's efforts were more than sufficient. Plaintiffs' Counsel undertook extensive investigation, interviewed consumers who purchased the products, gathered and analyzed the advertising and marketing materials at issue, analyzed scientific reports of the claims, analyzed Skechers' publicly-available financial and finance-related information, obtained and analyzed Skechers' internal financial and finance-related information (including sales information), and obtained and analyzed publicly available and internal marketing information. In addition, Plaintiffs' Counsel conducted hours-long, in-person interviews of the primary witnesses of the principal factual issues in the Action, including Savva Teteriatnikov, Vice President of Design (the original designer of the Shape-up shoe); George Zelinsky, President of Retail Stores; Rick Graham, Senior Vice President of Domestic Shoe Sales; and Jennifer Clay, Vice President of Corporate Communications. This extensive investigation and discovery provided the Parties with a strong basis from which to assess the strengths and weaknesses of their respective cases and their positions on liability and damages.

As further evidence of arm's-length negotiations, the FTC was involved. Clearly, the proposed Settlement is the product of arm's-length negotiations between capable and experienced counsel and the FTC after substantial discovery of relevant documents and witnesses. Thus, the Settlement should be entitled to a presumption of fairness, reasonableness and adequacy.

7. The Settlement Is Consistent with the Public Interest

A final factor for the Court to consider is the public interest in approving the Settlement. *Lonardo*, 706 F. Supp. 2d at 782. The Settlement here is plainly consistent with the public interest. As the court observed in *Lonardo*, "[c]lass actions are meant to serve the public interest by providing an incentive for lawyers and class representatives to litigate on behalf of a group of people whose injury is legitimate and meaningful, but whose individual damages are not substantial enough to make litigation on an individual basis worthwhile." *Id.* Class Counsel have, *via* the Settlement, prevented Skechers from continuing to falsely advertise the health benefits of their "toning" shoes. Moreover, *via* the Settlement, Class Counsel have obtained compensation for members of the public who have been affected by the challenged advertising and have purchased the Toning Shoes. Because the individual injury inflicted by Defendant's deceptive practices was just several dollars at a time, Class Members had no incentive to bring these claims on an individual basis. Because the Settlement helps ensure truthful advertising and provides recovery for small-sum injuries that would have otherwise gone uncompensated, the Settlement is consistent with the public interest.

V. THE CLASS SHOULD BE CERTIFIED

The Sixth Circuit recognizes the propriety of certifying a class for the purpose of settling a consumer protection class action. *See, e.g.*, *Olden v. Gardner*, 294 Fed. Appx. 210 (6th Cir. 2008). Where a court is evaluating the certification question in the context of a proposed settlement class, questions regarding the manageability of the case for trial purposes are not considered. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial"); *Sullivan v. De Beers Inv., Inc.*, 667 F.3d 273, 300 (3d

Cir. 2011) (same, and finding potential differences among state laws do not render an action unmanageable).

A. The Settlement Class Satisfies the Requirements of Federal Rule of Civil Procedure 23(a)

Rule 23(a) enumerates four prerequisites for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Each of these requirements is met here.

1. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a). Numerosity is easily established if the proposed class includes thousands of individuals. *See Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). Here, Skechers is a nationwide manufacturer of shoes that has sold millions of Skechers Toning Shoes nationwide. Thus, it can be deduced that there is a large number of absent Class Members such that the numerosity requirement is satisfied. *See Potter v. Blue Cross Blue Shield of Mich.*, Case No. 10-cv-14981, 2011 U.S. Dist. LEXIS 92076, at *15 (E.D. Mich. July 14, 2011) ("As long as general knowledge and common sense indicate that the class is large, the numerosity requirement is satisfied").

2. Commonality

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. . .Their claims must depend upon a common contention. . .That common contention, moreover, must be of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Walmart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2551 (2011). Still, to meet this requirement, "there need be only a single issue common to all members of the class." *Adams v. Anheuser-Busch Cos.*, No. 2:10-cv-826, 2012 U.S. Dist.

LEXIS 42364, at *19 (E.D. Ohio Mar. 28, 2012) (quoting *In re Am. Med. Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996)). The "mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Id.* (quoting *Powers v. Hamilton Cty. Public Defender Comm.*, 501 F.3d 592, 619 (6th Cir. 2007)).

Here, the core issue for each Class Member's claim is whether the Skechers Toning Shoes provide the toning benefits promised in Skechers' advertisements and labeling. The determination of the truth or falsity of Skechers' advertising claim will resolve this central issue in one stroke. Accordingly, the commonality requirement is satisfied.

3. Typicality

The typicality requirement is satisfied if the representative's claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Powers*, 501 F.3d at 618 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082)). Indeed, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Powell v. Tosh*, 280 F.R.D. 296, 307 (W.D. Ky. 2012) (typicality requirement satisfied where class members suffered similar injuries from defendant's course of conduct, though with varying frequency and degree).

Here, Skechers exposed Plaintiffs and the other Class Members to the same marketing message to induce Plaintiffs and other Class Members to purchase the Skechers Toning Shoes. Plaintiffs seek to obtain the same relief pursuant to the same legal theories as those of the other Class Members. Plaintiffs' claims are the same as those of other Class Members. Therefore, the typicality requirement is met.

4. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy is satisfied where: (i) the representative has common interests with unnamed members of the class, and (ii) it appears that the representatives will vigorously prosecute the interests of the class through qualified counsel. *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 563 (6th Cir. 2007). The adequacy requirement is met here. First, Plaintiffs have common interests with Class Members that are conflict-free – Plaintiffs and Class Members are seeking redress from what is essentially the same injury – the purchase of falsely advertised Toning Shoes. Second, through qualified Class Counsel who are experienced in conducting class action litigation, Plaintiffs have vigorously prosecuted the case and reached an exceptional settlement on behalf of the absent Class Members. *See* Blood Decl., ¶¶4-24; Declaration of Janine L. Pollack in Support of Motion for Final Approval, ¶¶2-8; *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000) ("the court reviews the adequacy of class representation to determine whether class counsel are qualified, experienced, and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another"). As such, the adequacy requirement is satisfied.

B. The Settlement Class Satisfies The Requirements of Federal Rules of Civil Procedure 23(b)(3)

Certification under Rule 23(b)(3) is appropriate "whenever the actual interests of the parties can be served best by settling their difference in a single action." *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 407 (M.D. Tenn. 1996) (quoting 7A C.A. Wright, A.R. Miller, & Kane, *Federal Practice & Procedure* § 1777 (2d ed. 1986)). There are two fundamental conditions to certification under Rule 23(b)(3): (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) a class action is

superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *Beattie*, 511 F.3d at 560. Rule 23(b)(3) encompasses those cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing the procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615. Indeed, Rule 23(b)(3) is "'particularly helpful in enabling numerous person who have small claims that might not be worth litigation in individual actions to combine their resources and bring an action to vindicate their collective rights,'" such as in the situation here. *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, No. 1:08-cv-605, 2008 U.S. Dist. LEXIS 107425, at *31 (N.D. Ohio, Feb. 10, 2009) (quoting 7AA Wright & Miller, *Federal Practice & Procedure* § 1777); *see also Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 404 (6th Cir. 1980) (noting that, where the general public may be ignorant of the technical requirements of a statute, the class action suit could be "the greatest single benefit derived in an area of regulation in which the responsibility of policing falls principally on the shoulders of the private citizen and private counsel").

1. Common Questions Predominate

The Rule 23(b)(3) predominance inquiry "'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Kinder v. Northwestern Bank*, 278 F.R.D. 176, 185 (W.D. Mich. 2011) (quoting *Amchem*, 521 U.S. at 622). To satisfy the predominance requirement, a plaintiff must show that the "issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Beattie*, 511 F.3d at 564. In essence, "the predominance requirement asks whether that common factual or legal question 'is at the heart of the litigation.'" *Kinder*, 278 F.R.D. at 185 (quoting *Powers*, 501 F.3d at 619).

The predominance requirement is easily satisfied here. As discussed above, Plaintiffs allege that they and other Class Members are entitled to the same legal remedies based upon the same alleged wrongdoing by Skechers – exposure to the same alleged false and misleading advertising claims. Plaintiffs allege that all of the advertisements, including the packaging and related materials, convey the same advertising message – that the Skechers Toning Shoes products will tone the wearer and make him or her more fit, simply by wearing the products. *See* Blood Decl., Ex. B (samples of Skechers Toning Shoes advertisements). The central issues for every Class Member are whether Skechers' advertising and marketing campaign conveyed this message to the reasonable consumer and whether the claim is true or substantiated. These issues predominate and are together the "heart of the litigation" because they would be decided in every trial brought by individual Class Members and can be proven or disproven with the same Class-wide evidence.

Common issues predominate for this nationwide Class even though some Class Members' home state consumer protection laws may differ from that of California because all Class Members suffered a common injury caused by Skechers' common course of conduct. *Sullivan*, 667 F.3d at 300. Accordingly, any "idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-23 (9th Cir. 1998); *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 530 (3d Cir. 2004) ("variations in the rights and remedies available to injured class members under the various laws of the fifty states [do] not defeat commonality and predominance").

Under these circumstances, predominance under Rule 23(b)(3) are satisfied.

2. A Class Action is the Superior Method to Resolve this Controversy

Rule 23(b)(3) sets forth the relevant factors for determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. These factors include: (i) class members' interest in individually controlling separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3); *Salvagne v. Fairfield Ford, Inc.*, 264 F.R.D. 321, 329 (S.D. Ohio 2009). But "[t]he 'most compelling rationale for finding superiority in a class action' is the existence of a 'negative value suit,' . . . one in which the costs of enforcement in an individual action would exceed the expected individual recovery." *Pfaff v. Whole Foods Mkt. Group, Inc.*, No. 1:09-cv-02954, 2010 U.S. Dist. LEXIS 104784, at *18 (N.D. Ohio Sept. 29, 2010) (finding superiority where individual recovery was expected to be under $100).

Application of the Rule 23(b)(3) "superiority" factors shows that a class action is the preferred procedure for this Settlement. The amount of damages to which an individual Class Member would be entitled is not large. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1191 (9th Cir. 2001); *Wiener v. Dannon Co.*, 255 F.R.D. 658, 671 (C.D. Cal. 2009). Thus, there is a "compelling rationale" in favor of finding superiority because it is neither economically feasible, nor judicially efficient, for the hundreds of thousands of Class Members to pursue their claims against Skechers on an individual basis. *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights"); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Additionally, the fact of settlement eliminates any potential difficulties in managing the trial of this action as a class

action. *See Amchem*, 521 U.S. at 620 (when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems. . .for the proposal is that there be no trial"). As such, under the circumstances presented here, a class action is clearly superior to any other mechanism for adjudicating the case. The requirements of Rule 23(b)(3) are satisfied.

VI. PLAINTIFFS' COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND EXPENSES

Plaintiffs' Counsel[4] have worked on this matter for over two and one-half years. On June 18, 2010, they filed the first action in the country, and two of Plaintiffs' Counsel, Blood, Hurst & O'Reardon, LLP and Milberg, LLP, have been appointed Class Counsel. Preliminary Approval Order at 24. The Settlement was achieved, negotiated, drafted, and finalized by Plaintiffs' Counsel. They have earned the trust and respect of the FTC, forging a unique partnership with the FTC to bring about this outstanding Settlement. Only counsel with sufficient stature in the field could bring about this result in this way.

This Settlement, however, did not come together over night, and was by no means guaranteed. Plaintiffs' Counsel utilized information obtained *via* informal investigation and expert consultation, *via* document review (roughly 24,500 pages), and *via* witness interviews to facilitate settlement discussions and inform Skechers of its potential liabilities. Blood Decl., ¶¶4-5, 21-23.

Settlement negotiations began in December 2010. *Id.*, ¶18. By this time, Plaintiffs' Counsel had already investigated Skechers' advertising claims, consulted with experts and

[4] "Plaintiffs' Counsel" includes the six firms that worked on the *Grabowski* and *Morga* cases: Blood Hurst & O'Reardon, LLP, Milberg, LLP, Bonnett, Fairbourn, Friedman & Balint, P.C., Shepherd, Finkelman, Miller & Shah, LLP, Edgar Law Firm, LLC, and Cuneo, Gilbert & LaDuca, LLP.

medical specialists, exchanged initial disclosures, negotiated a joint discovery plan, attended an initial discovery and early neutral evaluation conference, served comprehensive formal discovery, drafted and submitted an electronic discovery protocol and proposed protective order, and met and conferred on several occasions. *Id.*, ¶¶4-17.

Class Counsel spearheaded the settlement negotiations, advocating a joint class/FTC settlement with Defendant. It is an unusual relationship, happening only one other time. *Id.*, ¶¶16-19.

Class Counsel's ability to utilize a positive relationship with the FTC deserves further comment. As stated above, Class Counsel first worked with the FTC in *Reebok*, which helped set the stage for this Settlement. Mr. Blood spent many hours working with the FTC and Reebok, including meeting with each of the FTC commissioners, including the Chairman, to earn the trust of the FTC so that this type of structure could be used. The result has been outstanding because the class action was used to increase the monetary recovery while the FTC's ability to generate news helped drive settlement participation. The $28.5 million settlement obtained for the benefit of Reebok purchasers served to alert Skechers to its potential exposure, and Class Counsel was able to so use its successes in *Reebok* as leverage in this matter. *Reebok* represented the first joint success of Class Counsel and the FTC. Just as this Settlement was orchestrated by Class Counsel and reached hand-in-hand with the FTC, so too was *Reebok*. The relationship between these parties began in *Reebok* and flourished here.

It is important to further appreciate that the FTC is generally involved in public enforcement actions that result in consent decrees. Barbara J. Rothstein, Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges, page 26 (2005). That is, the FTC generally works to stop ongoing advertising violations with less of an emphasis on returning

money to purchasers of a falsely advertised product. Here, the combined efforts have resulted in the best of both worlds. The work of Class Counsel led directly to the creation of the settlement fund that will be primarily used to provide refunds to purchasers. And the work of the FTC, supported by Plaintiffs' Counsel, led to the extremely detailed and extensive Stipulated Order that will limit Skechers' future advertising, which order will be diligently enforced by the FTC.

For the FTC, this Settlement is "the largest ever truth-in-advertising case of its kind that will result in consumer restitution."[5] This case represents a historic first, a record breaker that was achieved because of work done by Plaintiffs' Counsel.

Further, the resulting news coverage has been exceptional. Every major news outlet, including every major network and over 2,000 print and online news sources, reported this Settlement, which has in turn enhanced participation in the claims process. Class Counsel created and supervise the claims process and directly have handled hundreds of inquiries from Class Members by phone, email and letter. *See* Supplemental Declaration of Timothy G. Blood in Support of Motion for Preliminary Approval of Class Action Settlement ("Supp. Blood Decl.") at ¶¶13, 16. Class Counsel's work will continue long after final approval is granted. Claims handling with the number of Class Members here takes a tremendous amount of time and effort, which Plaintiffs' Counsel are committed to doing without additional compensation.

VII. PLAINTIFFS' COUNSEL'S REQUEST FOR FEES AND REIMBURSEMENT OF EXPENSES SHOULD BE APPROVED

"It is well established that 'a lawyer who recovers a common fund. . .is entitled to a reasonable attorney's fee from the fund as a whole." *New Eng. Health Care Emples. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006) (*quoting Boeing Co. v.*

[5] http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice_Press&id=379256&v=article10 (last visited June 20, 2012).

Van Germert, 444 U.S. 472, 478 (1980)). Plaintiffs' Counsel have achieved an exemplary settlement for the Class. Their efforts have resulted in the creation of a $45 million fund for the benefit of the Class. The maximum refund amounts available under the settlement represent full compensation to purchasers as measured by the most optimistic measure of damages.

An award of fees and expenses totaling $5 million, which represents 11% of the $45 million settlement value,[6] is well below the percentages commonly granted by courts in the Sixth Circuit, where "[f]ee awards in common fund cases typically range 'from 20 to 50 percent of the common fund created'". *Id.* (*quoting Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 910 (S.D. Ohio 2001)).

A. Substantial Deference is Given to Negotiated Fee Agreements

It should first be noted that the $5 million fee and expense award sought was negotiated by the Parties. "Negotiated and agreed-upon attorneys' fees as part of a class-action settlement are encouraged as an 'ideal' toward which the parties should strive." *Bailey v. AK Steel Corp.*, No. 1:06-cv-468, 2008 U.S. Dist. LEXIS 18838, at *2-3 (S.D. Ohio Feb. 28, 2008). *See also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 829 (D. Mass. 1987) ("The authorities encourage parties situated as those herein to agree as to the amount of counsel fees to be paid."). The deference to negotiated fees is particularly true where, as here, the attorneys' fees are negotiated separately from and after all terms of the settlement have been agreed to by the parties. *Williams v. MGM-Pathe Communc'cs Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) ("parties to a class action properly may

[6] When calculating the value of a class settlement for purposes of awarding attorneys' fees based on a percentage of the value, the settlement value includes the relief to the class, the cost of notice and settlement administration, and attorneys' fees and expenses. Manual for Complex Litigation §21.7 p. 334-35 (4th ed. 2010); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 771 (S.D. Ohio 2007); *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 943 (9th Cir. 2011); *In re Brokerage Antitrust Litig.*, 579 F.3d 241, 283 (3rd Cir. 2009); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996).

negotiate not only the settlement of the action itself, but also the payment of attorneys' fees"); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) ("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees.").

Class Counsel and Skechers' counsel separated the issues of settlement and fees, negotiating all substantive terms of the settlement first, postponing discussion of attorneys' fees and expenses until after all substantive terms were in place. Blood Decl., ¶24. With years of experience and an intimate knowledge of the strengths of their respective cases, Counsel approached all negotiations under market conditions: Plaintiffs' Counsel wished to maximize their fees to compensate for their risk, innovation, contingency and creativity; Defendant's counsel attempted to limit the financial burdens levied upon its client.

The response of the Class Members is indicative of the exceedingly fair and reasonable nature of Counsel's negotiated fees. As discussed above, comprehensive notice was disseminated nationwide by various media and enhanced by widespread news reports. In response so far, no objections to the fee and expense request have been filed. Under these circumstances, great deference should be paid to the negotiated character of the fee. *In re Delphi Corp. Sec.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) ("The Class's reaction to the requested fee award is also important evidence of the fairness and reasonableness of the fee request.").

B. The Requested Fee and Expense Award is Reasonable

The importance of awarding commensurate fees in common fund cases is well documented:

> [C]ourts have been careful to award a fully compensable reasonable fee based on the underlying economic inducement for class action lawyers to pursue potentially expensive or complex common fund class litigation. These lawyers assume the risk of no compensation unless they successfully confer common fund benefits on the class, based on their reasonable expectation that they will share in the

> recovery in a fair proportion, in contrast to receiving a fee based initially on time-expended criteria that fail[ed] to give the results obtained factor consideration.

1 Newberg on Class Actions, §1.09 (2d ed. 1993) (footnote omitted).

The preferred approach to determine a reasonable fee award in common fund cases is to award a percentage of the class benefit. In the Sixth Circuit specifically, courts "have indicated their preference for the percentage-of-the-fund method in common fund cases." *New Eng. Health Care*, 234 F.R.D. at 633 (*quoting In re Cardizem DC Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003)).

This is because the lodestar method fails to adequately compensate counsel for the skill exercised, and the risks undertaken. As stated in *New Eng. Health Care* and *In re Cardizem*,

> The lodestar method should arguably be avoided in situations where such a common fund exists because it does not adequately acknowledge (1) the result achieved or (2) the special skill of the attorney(s) in obtaining that result. Courts and commentators have been skeptical of applying the formula in common fund cases…. Many courts have strayed from using lodestar in common fund cases and moved towards the percentage of the fund method which allows for a more accurate approximation of a reasonable award for fees.

Id. (quoting *Fournier v. PFS Investments, Inc.*, 997 F. Supp. 828, 832-33 (E.D. Mich. 1998)). Additionally, "the lodestar method is too cumbersome and time-consuming of the resources of the Court." *Id.* (*quoting F&M Distribs. Inc. Sec. Litig.*, 1999 U.S. Dist. LEXIS 11090, at *8 (E.D. Mich. June 29, 1999) (internal quotes and citations omitted)). As the Supreme Court has made clear, "[a] request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437.

Here, Plaintiffs' Counsel's $5 million request for fees and expenses is just 11% of the $45 million settlement value. This percentage is below the range historically awarded in class

actions in this Circuit.[7] The award requested is also reasonable when considered in light of the *Ramey* factors.

In *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974), the Sixth Circuit set forth specific factors that the district court should consider in assessing the reasonableness of a percentage of the fund fee awarded from a common fund:

(a) the value of the benefit rendered to the class;

(b) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;

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[7] *See*, *e.g.*, *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521 (E.D. Ky. 2010) (30% award); *In re Delphi Corp.*, 248 F.R.D. at 505 (20% award); *Miracle v. Bullitt County*, No. 05-130-C, 2008 U.S. Dist. LEXIS 94217 (W.D. Ky. Nov. 19, 2008) (30% award); *Cardinal Health Inc.*, 528 F. Supp. 2d at 768 (18% award); *New Eng. Health Care*, 234 F.R.D. at 634 (25% award); *Kogan v. AIMCO Fox Chase*, 193 F.R.D. 496 (E.D. Mich. 2000) (30% award); *In re Cincinnati Microwave, Inc. Sec. Litig.*, No. 1:95-cv-00905-HJW-TSH, Order and Final Judgment (S.D. Ohio Mar. 21, 1997) (Weber, J.) (awarding 30% of the common fund as fees in settlement of class action); *In re Structural Dynamics Research Corp. Sec. Litig.*, No. 1:94-cv-00630-HJW, Final Judgment and Order (S.D. Ohio Mar. 22, 1996) (Weber, J.) (same, awarding 30%); *In re Nord Res. Corp. Sec. Litig.*, No. 3:90-cv-00380-WHR, Order (S.D. Ohio Dec. 9, 1994) (Rice, J.) (same, awarding 30%); *In re Valley Sys. Sec. Litig.*, No. 5:92-cv-2124-SHB, Final Judgment and Order of Dismissal (N.D. Ohio May 16, 1984) (Bell, J.) (same, awarding 30%); *Howes v. Atkins*, 668 F. Supp. 1021 (E.D. Ky. 1987) (40% award); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 640 F. Supp. 697 (S.D. Ohio 1986) (25% award); *In re Cincinnati Gas & Elec. Co. Sec. Litig.*, 643 F. Supp. 148 (S.D. Ohio 1986) (approx. 15% award); *Adams v. Standard Knitting Mills, Inc.*, No. 8052, 1978 U.S. Dist. LEXIS 20317, at *8 (E.D. Tenn. Jan. 6, 1978) (35.8% award); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366 (S.D. Ohio 1990) (15% award); *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915 (E.D. Ky. 1986) (29.1% award); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (15.6% award of cash portion of settlement or 2.4 multiplier under lodestar).

A 1996 Federal Judicial Center Study covering all class actions in four selected federal district courts, found that attorneys' fee "median rates ranged from 27% to 30%." Thomas E. Willging, Laurel L. Hooper, and Robert J. Niemic, *Symposium: The Institute of Judicial Administration Research Conferences on Class Actions: Class Actions and the Rulemaking Process: An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges* (1996), at 69. This finding is in line with an analysis of fee awards in class actions conducted from January 1995 to June 1996 by National Economic Research Associates, an economics consulting firm. This study reports on the central question of attorneys' fees: "Regardless of case size, fees average approximately 32 percent of the settlement." Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja, Denise N. Martin, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions* National Economic Research Associate (November 1996), at 12-13.

(c) the services were undertaken on a contingent fee basis;

(d) the value of the services on an hourly basis;

(e) the complexity of the litigation; and

(f) the professional skill and standing of all counsel.

Id. at 1196; *see also New England Health Care,* 234 F.R.D. at 634*; Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996); *Simillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983). Application of these factors supports a fee well in excess of the 11% award requested here.

1. The Value of the Benefit Obtained

The results achieved for the benefit of the class have consistently been held to be one of the most important factors considered in making a fee and expense award. *Hensley*, 461 U.S. at 436; *In re Delphi Corp*., 248 F.R.D. at 503 ("The primary factor in determining a reasonable fee is the result achieved on behalf of the class."). Plaintiffs' Counsel here have obtained benefits for the Class in the aggregate amount of $45 million. This Settlement is the largest of its kind. Claimants will receive an amount that generally exceeds the likely measure of damages at trial – the difference between the purchase price for the Toning Shoes as represented and the value of the product received. *Id.* Seen another way, this amount is around half the purchase price of the Eligible Shoes.

In addition to creating a significant non-reversionary monetary benefit for the Class, Skechers has agreed to implement detailed and extensive changes in its advertising and conduct, which will be policed by the FTC. Though not included in the $45 million settlement value, the benefits of the injunctive relief are substantial, weighing further in favor of fee approval.

2. The Public Interest

"Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this benefits society." *In re Delphi Corp*., 248 F.R.D. at 503 (*quoting Cardizem*, 218

F.R.D. at 534). Every state in the country has laws against false advertising. Additionally, the FTC was created to combat false advertising. The partnership between Plaintiffs' Counsel and the FTC demonstrates that this lawsuit and settlement advance the public interest.

In addition, because of this lawsuit, actions by Attorneys General in 44 states and the District of Columbia were filed against Skechers. Consent judgments were or will be entered in the AG Actions, settling all of those claims.

As stated in the Settlement Agreement:

> "This Settlement between Plaintiffs and Skechers, the Stipulated Order entered into between the FTC and Skechers, and the Consent and Agreed Final Judgments entered between Skechers and the State Attorneys General are the products of work performed by Class Counsel, the FTC, and the State Attorneys General in conjunction, and the foregoing have coordinated these resolutions to maximize the settlement consideration available to the Class under this Settlement, including the monetary relief available to Class Members." Dkt. 82 at 7.

There is no question that the public interests served by this Settlement support the modest fee award requested.

3. The Contingent Nature of the Fee

"This factor accounts for the substantial risk an attorney takes when he or she devotes substantial time and energy to a class action despite the fact that it will be uncompensated if the case does not settle and is dismissed." *Lonardo*, 706 F. Supp. 2d at 796. *See also In re Rio Hair Naturalizer Prod. Liab. Lit*, MDL No. 1055, 1996 U.S. Dist. LEXIS 20440, at *55 (recognizing that the "risk entailed a major investment of attorney time and financial resources over a period of nearly two years").

Each of Plaintiffs' Counsel undertook the case on a contingent basis. *See* Plaintiffs' Counsel's concurrently filed declarations. Yet, success in this litigation was by no means guaranteed. Similarly Plaintiffs' Counsel filed these actions before the FTC took any public action. Plaintiffs' Counsel had no way of knowing the FTC would also conduct an investigation

and, absent the work of some of Plaintiffs' Counsel, the partnership forged between this case and the FTC would not have occurred. Had this Settlement not been reached, and had Plaintiffs been unsuccessful at trial, Counsel would have lost time and effort so far totaling over 3,648 hours. Billed at their customary rate, this represents an investment of over $2 million by Plaintiffs' Counsel. On top of that, Plaintiffs' Counsel have also already advanced the Class over $42,800 in costs.

4. The Value of the Services on an Hourly Rate

The complexity and magnitude of this litigation has been significant. Investigating and launching such litigation against a multi-national corporation consumes an enormous amount of Plaintiffs' Counsel's time, labor, and resources. To confirm the value of the services rendered, Counsel have submitted their fee and expense declarations. These declarations confirm the reasonableness of the agreed-to fee under the lodestar/multiplier cross-check approach. *In re Beverly Hills Fire*, 639 F. Supp. 915, 919; *Cardinal Health Inc.*, 528 F. Supp. 2d at 767.

As stated above, Plaintiffs' Counsel have so far expended an aggregate of over 3,648 hours of professional time, valued at $2,003,384. *See* Plaintiffs' Counsel's Declarations.

After first deducting the out-of-pocket expenses from the $5 million request, the lodestar to-date results in a multiplier of 2.47. This lodestar will continue to decrease as Plaintiffs' Counsel continue working on the case. Even a 2.47 multiplier is at the low to mid-range of multipliers deemed appropriate in other similar cases. In nationwide class action cases, multipliers generally range from 1 to 4 and have reached as high as 10. 3 *Newberg* §14.03. A 2003 survey of 1,120 federal class actions found the average multiplier was 3.89.[8] And multipliers far higher than that resulting here have been awarded in this Circuit.[9]

[8] Beverly Stuart J. Logan, Dr. Jack Moshman & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions,* 24 Class Action Reports (Mar.-Apr. 2003) (Survey of common

Further, and important for the lodestar/multiplier analysis, Plaintiffs' Counsel's work is far from over. In the best case scenario, Plaintiffs' Counsel will spend significant additional time: (i) filing their final approval reply papers and responding to objections; (ii) preparing for and attending the final approval hearing; and (iii) overseeing the claim review and payments to Class Members. Often, responding to objectors involves obtaining written discovery, deposition testimony, or both from the objectors. In fact, the Preliminary Approval Order contemplates discovery from objectors, stating that objectors "may be required to sit for deposition regarding matters concerning the objection." Preliminary Approval Order (Dkt. No. 148) at 31. And if there are appeals, hundreds of thousands of dollars of additional attorney time may be incurred in post-judgment motions (such as appeal bond requests) and in defending the Settlement on appeal to the Sixth Circuit. None of this additional time will be compensated. Yet, as Plaintiffs' Counsel's lodestar inevitably increases, the multiplier will decrease, all of which further supports the reasonableness of the requested fee award.

5. The Complexity of the Litigation

"[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources." *New England Health Care*, 234 F.R.D. at 632 (*quoting Cardizem*, 218 F.R.D. at 530). This case concerns a years-long marketing and advertising campaign developed by a sophisticated company. The subject matter of the science is complex

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benefit fee awards entered by state and federal courts between 1973 and 2003, 1,120 class action cases, found that when measured as a percentage of the total recovery, common benefit awards averaged 18.4%, with an effective average multiplier of 3.89).

[9] *See e.g. Rawlings v. Prudential*, 9 F.3d 513, 517 (6th Cir. 1993) (2 multiplier); *Beverly Hills Fire*, 639 F. Supp. at 924 (multiplier of 5); *Cardinal Health Inc.*, 528 F. Supp.2d at 768 (multiplier of 6); *Bailey*, 2008 U.S. Dist. LEXIS 18838, at *8 (awarding 3.08 multiplier); *Manners v. American General Life Ins. Company*, No. 3-98-0266, 1999 U.S. Dist. LEXIS 22880, at *93 (M.D. Tenn. Aug. 11, 1999) (awarding 3.8 multiplier).

(measurement of the orthopedic and physiological effects of wearing the Toning Shoes) and Skechers has spent a lot of money on research attempting to substantiate its advertising claims.

Had Plaintiffs' Counsel elected to litigate this matter further, the issues presented would have required extensive expert testimony, and there was no way to guarantee that a jury would believe Plaintiffs' experts over those retained by Skechers.

6. The Skill and Efficiency of the Attorneys Involved

The quality of the representation and the standing of counsel at the bar are also important factors in determining the reasonableness of the requested fee.

Class Counsel are nationally known leaders in consumer protection class actions. Blood Decl., ¶30. Indeed, this unique Settlement was made possible because of the reputations of Class Counsel. *Cardizem*, 218 F.R.D. at 525 (recognizing that the court "may also rely on the participation of State Attorneys General as a factor in favor of the fairness and adequacy of the Settlement").

The knowledge and experience gained from litigating *Reebok* were instrumental to Counsel's negotiations in this matter. In this regard, Counsel brought with it a grasp of the nuanced legal and scientific issues that is unmatched by others in the legal community. Because it more thoroughly understood the issues presented and the science underlying Plaintiffs' claims, Counsel was able to more effectively negotiate on behalf of the Class. Absent Counsel's unblemished record and expertise, and without the support of the FTC, a settlement of this magnitude likely would not have been reached.

On the other side, Skechers was represented by the reputable, nationwide defense firm of O'Melveny & Myers, LLP. Jeffrey Barker and Daniel Petrocelli, who headed up Skechers' defense, are partners in O'Melveny's Century City office in Los Angeles, and members of the Business Trial and Litigation Practice. They have successfully litigated business litigation at

both trial and appellate levels, including for example, the criminal defense in the Enron criminal trial.

In light of the quality of Skechers' defense, Plaintiffs' Counsel should also be rewarded for their efficiency. In spite of Skechers' ability to stay formal proceedings for a period, and in spite of the disruption caused by the filing of copycat cases and the MDL proceedings, Plaintiffs' Counsel were able to litigate and then settle this Action (which resolves all of the MDL class cases) in just over two and one-half years. Plaintiffs' Counsel's skillful and efficient case management clearly demonstrates their quality, while the terms of the Settlement speak for themselves. Their extensive, thorough, and detailed work, efficient management of discovery, and skillful settlement negotiations enabled Plaintiffs' Counsel to obtain a settlement that will provide a value of $45 million to the Class (without factoring in the value of conduct changes being implemented by Skechers). All of the *Ramey* factors demonstrate the reasonableness of Counsel's negotiated fee.

C. Plaintiffs' Counsel Should be Awarded Their Out-of-Pocket Expenses

The negotiated $5 million award sought includes compensation for both Plaintiffs' Counsel's fees and expenses. Plaintiffs' Counsel therefore also respectfully request reimbursement of their out-of-pocket expenses incurred in the litigation of the Action. Plaintiffs' Counsel have worked on this case since May of 2010, and have appropriately incurred $42,847.30 in expenses. *See* Plaintiffs' Counsel's Declarations.

"Under the common fund doctrine, 'class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses'" *New England Health*, 234 F.R.D. at 634-35 (*quoting Cardizem*, 218 F.R.D. at 535). In determining which expenses are

reasonable and compensable the question is whether such costs are of the variety typically billed by attorneys to paying clients in similar litigation. *Id.*; *see also Cleveland Area Bd. of Realtors v. Euclid*, 965 F. Supp. 1017, 1023 (N.D. Ohio 1997).

Plaintiffs' Counsel's declarations testify that the out-of-pocket expenses incurred by each of their firms were for expenses not included in overhead, are of the type they typically bill for, and were all reasonably incurred expenses for this litigation. Plaintiffs' request for reimbursement of expenses should be granted.

VIII. PLAINTIFFS ARE ENTITLED TO INCENTIVE AWARDS

Incentive awards are fairly typical in class actions. *Rodreguez v. West Publishing Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Here, Plaintiffs request approval of modest incentive awards; $2,500 for Plaintiff Grabowski and $2,500 for Plaintiff Morga. The amounts requested are moderate and therefore are consistent with or below the amounts typically awarded in similar litigation. *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (awarding $50,000 to each of six class representatives); *Lonardo*, 706 F. Supp. 2d at 787 (awarding $5,000 incentive award to each of three class representatives, stating "[c]ourts within the Sixth Circuit. . .recognize that, in common fund cases and where the settlement agreement provides for incentive awards, class representatives who have had extensive involvement in a class action litigation deserve compensation beyond amounts to which they are entitled to by virtue of class membership alone."); *Hartless v. Clorox Company*, 273 F.R.D. 630, 646 (S.D. Cal. 2011) (awarding the requested $4,000 to one plaintiff and $2,000 to the other). *Brotherton v. Cleveland,* 141 F. Supp. 2d 907, 917 (S.D. Ohio 2001) ($50,000 incentive award reasonable); *Physicians of Winter Haven, LLC v. Steris Corp.,* No. 1:10 CV 264, 2012 U.S. Dist. LEXIS 15581, at *31 (N.D. Ohio Feb. 6, 2012) ($15,000 award); *In re Dun &*

Bradstreet Customer Litig., 130 F.R.D. 366, 373-374 (S.D. Ohio 1990) ($55,000 to two class representatives and $35,000 to three other representatives).

The incentive awards requested are justified in light of the willingness of these Plaintiffs to devote their time and energy to prosecuting a representative action. Both Ms. Grabowski and Ms. Morga contributed their efforts by providing information and documents to their counsel, contacting and consulting their counsel concerning the litigation and settlement, reviewing the Settlement Agreement, and were at all times willing to testify at deposition and trial. Blood Decl., ¶34; Edgar Decl., ¶3. Furthermore, Ms. Grabowski and Ms. Morga attended the early neutral evaluation conference on behalf of the Plaintiff class, taking time off of work to do so. *Id*. The incentive awards are reasonable in consideration of the overall benefit conferred to Skechers purchasers, to which benefit, Ms. Grabowski and Ms. Morga devoted time and effort. Further, Skechers has agreed to pay these awards to the Plaintiffs separate and apart from the $45 million dollar common fund, and payment of these awards will not reduce the fund.

IX. CONCLUSION

Plaintiffs respectfully request that the Court grant final approval of the Settlement, certify the Class for purposes of the Settlement, award Plaintiffs' Counsel attorneys' fees and expenses in the amount of $5 million and award incentive payments to Plaintiffs in the amount of $2,500 each.

Dated: December 28, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed December 28, 2012.

s/ *Timothy G. Blood*
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