

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

DECLARATION OF TIMOTHY G. BLOOD IN SUPPORT OF MOTION
FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT
AND REQUEST FOR ATTORNEYS' FEES AND EXPENSES

BLOOD HURST & O'REARDON, LLP

BLOOD HURST & O'REARDON, LLP

1 I, TIMOTHY G. BLOOD, declare:

2 1. I am the managing partner of Blood Hurst & O'Reardon, LLP ("BHO"), co-
3 counsel for Plaintiff in the above captioned action and one of the firms designated as Class
4 Counsel by the Court pursuant to Fed. R. Civ. Proc. 23(g)(3) in the preliminary approval order.
5 I submit this declaration in support of the Plaintiffs' Motion for Final Approval of Class
6 Action Settlement and Request for Attorneys' Fees and Expenses. I make this declaration
7 based on my personal knowledge and on information and belief from my knowledge of the
8 lawsuit and its proceedings.

9 2. Attached as Exhibit A is a copy of my firm's resume.

10 3. As described more fully below, the settlement presented for final approval is
11 the result of settlement discussions which started in December 2010 and intensified in May,
12 2011, comprising over a year's worth of negotiations. It is part of a resolution that includes a
13 regulatory settlement reached with the Federal Trade Commission ("FTC") and the attorneys
14 general and consumer protection bureaus of 44 states and the District of Columbia. I believe
15 this is an outstanding settlement. It will provide cash payments to Class Members and,
16 because of the unique and innovative aspects of the class notice program, has resulted in a high
17 level of participation by Class Members.

18 4. Before this action was filed, my firm and my co-counsel investigated the factual
19 allegations ultimately made in the complaint. For my firm, this investigation began in May of
20 2010, when we began to research advertising claims about "toning" footwear. Our
21 investigation included retaining and working with a professor and practicing medical doctor
22 who is an expert in and conducts research concerning the orthopedic and physiological effects
23 of footwear on the human body and who develops and designs footwear for orthopedic use. In
24 addition to the medical doctor, we also retained a highly regarded marketing expert.

25 5. Our investigation included researching, gathering and analyzing studies
26 demonstrating the disadvantages of different types of toning footwear, including Skechers'
27 toning footwear, as well as those purporting to show the advantages of different types of
28

1 toning footwear. Our investigation also included an extensive search and review of Skechers'
2 advertising and marketing materials for its toning shoes. We also researched and analyzed
3 available financial and sales information about Skechers, generally, and financial and sales
4 information related to Skechers' toning shoes specifically.

5 6. On June 18, 2010, my firm along with Bonnett, Fairbourn, Friedman & Balint,
6 P.C. filed a class action complaint in the United States District Court for the Southern District
7 of California on behalf of Plaintiff Tamara Grabowski. Also, on June 17, 2010, Plaintiff sent
8 by certified mail a notice of letter pursuant to Cal. Civil Code §1781 of the California
9 Consumers Legal Remedies Act ("CLRA") to permit Plaintiff to seek damages under that act
10 if defendant did not correct its alleged behavior within the statutory time period. California is
11 an appropriate venue to allege a nationwide class because Skechers is headquartered in
12 California and the conduct giving rise to the lawsuits occurred in California, thereby meeting
13 the constitutional due process requirements. *See Washington Mut. Bank v. Superior Court*, 24
14 Cal. 4th 906, 919 (2001); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 242 (2001).

15 7. On August 25, 2010, Milberg LLP along with Shepherd, Finkelman, Miller &
16 Shah, LLP and Edgar Law Firm, LLC filed a similar class complaint in the United States
17 District Court for the Southern District of California on behalf of Plaintiff Venus Morga.
18 Plaintiffs' counsel in both *Grabowski* and *Morga* worked together from early on to ensure
19 efforts were not and are not duplicated. My firm, Milberg LLP, Bonnett, Fairbourn, Friedman,
20 & Balint, P.C., Shepherd, Finkelman, Miller & Shah, LLP, Edgar Law Firm, LLC, and Cuneo,
21 Gilbert & LaDuca, LLP are collectively referred to as Plaintiffs' Counsel. Also on August 25,
22 2010, counsel for *Morga* sent a notice letter pursuant to California Civil Code §1781.

23 8. Skechers answered the *Grabowski* and *Morga* complaints on August 20, 2010
24 and October 15, 2010, respectively. Thereafter, all discovery and pretrial and trial dates in the
25 *Grabowski* and *Morga* actions were coordinated before Judge Jeffrey T. Miller in the United
26 States District Court for the Southern District of California. On February 7, 2011, Plaintiffs
27 jointly moved to file amended complaints. On February 17, 2011, Plaintiffs' motion was
28

1 granted, and on February 18, 2011, the *Grabowski* and *Morga* complaints were amended to
2 allege damages under the CLRA and to add additional factual allegations. Skechers answered
3 the *Grabowski* and *Morga* amended complaints on March 7, 2011.

4 9. On May 11, 2012, pursuant to Fed. R. Civ. Proc. 15(a)(2), a second amended
5 complaint was filed in *Grabowski*. These amendments were largely technical in nature to
6 conform to aspects of the subject settlement, such as ensuring the class definition is consistent
7 and using similar language as used in the Settlement Agreement to avoid any confusion.
8 Skechers answered the second amended complaint on May 15, 2012.

9 10. In November 2010, the parties exchanged initial disclosures pursuant to Fed. R.
10 Civ. Proc. 26 and negotiated a joint discovery plan, which was subsequently submitted to the
11 court. On December 6, 2010, the parties attended the initial discovery and early neutral
12 evaluation conference during which discovery, pretrial and trial dates were coordinated and set
13 in both *Grabowski* and *Morga*. The parties first discussed the possibility of a resolution of the
14 cases shortly after the early neutral evaluation conference, including settlement frameworks.

15 11. On December 20, 2010, Plaintiffs *Grabowski* and *Morga* jointly served written
16 discovery on Skechers consisting of Requests for Production of Documents, Interrogatories,
17 and Requests for Admissions. Plaintiffs also drafted and provided to Skechers an electronic
18 discovery protocol and proposed protective order for confidential discovery. The parties met
19 and conferred concerning changes to the protective order on several occasions. On February 8,
20 2011, Skechers provided responses to the discovery. The parties began meeting and
21 conferring over outstanding issues with the responses.

22 12. While the parties were meeting and conferring, Skechers moved to stay the
23 proceedings in *Grabowski* and *Morga* pending the Ninth Circuit's decision in *Mazza v.*
24 *American Honda Motor Co., Inc.* and the Supreme Court's decision in *Wal-Mart Stores, Inc. v.*
25 *Dukes*. Plaintiffs opposed the motion. On March 7, 2011, Judge Miller granted Skechers'
26 motion to stay all proceedings so that the court could benefit from any guidance provided by
27 the decisions in *Mazza* and *Dukes*. On July 1, 2011, after the Supreme Court issued its opinion
28

1 in *Dukes*, Plaintiffs moved to lift the stay, but voluntarily withdrew the motion at defendant's
2 request based on favorable progress made in the settlement negotiations that resulted in the
3 subject settlement. On January 13, 2012, after *Mazza* and *Dukes* were decided, Plaintiffs again
4 moved to lift the stay.

5 13. On January 5, 2012, *Morga* and *Grabowski* were conditionally transferred to
6 this Court for MDL proceedings along with the personal injury cases against Skechers
7 concerning its toning shoes. Plaintiffs and Skechers opposed the conditional transfer. While
8 Plaintiffs' motion to lift the stay before Judge Miller was pending, on April 16, 2012, *Morga*
9 and *Grabowski* were formally transferred to this Court for MDL proceedings.

10 14. Although entry of the order staying formal proceedings made Plaintiffs'
11 Counsel's job more difficult, it did not stop Plaintiffs' Counsel from continuing to investigate
12 and gather facts and taking other actions to allow Plaintiffs' Counsel to either move quickly on
13 the litigation once the stay was lifted or apply sufficient litigation pressure on defendant to
14 enable meaningful settlement discussions.

15 15. These other actions included pushing for settlement discussions by leveraging
16 work my co-counsel and I had done with the Federal Trade Commission on other matters and,
17 most significantly, in a factually similar lawsuit entitled *In re Reebok EasyTone Litigation*, No.
18 4:10-cv-11977-FDS (D. Mass) ("*Reebok*"). Our efforts in *Reebok* resulted in a \$28.5 million
19 cash settlement, which was granted final approval on January 19, 2012. The *Reebok*
20 settlement, like this settlement, was part of a global resolution reached with the FTC and
21 numerous state attorneys general and consumer protection bureaus.

22 16. The *Reebok* settlement was the first of its kind where the FTC and private
23 litigants worked together in reaching a global resolution, with the class significantly benefiting
24 because of increased awareness of the settlement (and corresponding increased participation in
25 the settlement) without more money spent on a notice program and, arguably, a higher overall
26 recovery, and certainly higher than many other consumer settlements obtained by the FTC
27 alone. There, as here, the recovery for consumers is administered through the class action.
28

1 17. Because the approach was new and involved a large regulatory agency, the
2 *Reebok* settlement required a significant amount of effort to formulate a framework for
3 resolution and bring about that resolution. For example, I met with each of the five FTC
4 Commissioners, including the Chairman of the FTC, in Washington, D.C. Both before and
5 after these meetings, I also worked extensively with other high-level FTC staff members about
6 a resolution of *Reebok*. The work we did in *Reebok* made the settlement here possible.

7 18. In this case, settlement discussions began in December 2010, shortly after the
8 Early Neutral Evaluation Conference was held in *Grabowski* and *Morga* with the Magistrate
9 Judge assigned to the case in the United States District Court for the Southern District of
10 California. By the time of the conference, we strongly suspected that the FTC had begun or
11 was about to begin a non-public investigation of Skechers. More substantive settlement
12 discussions began in March 2011, during which time I proposed the joint private class/FTC
13 approach. By May 2011, the parties were ready to have a face-to-face meeting to discuss
14 settlement structure. On May 17, 2011, that meeting was held at defendant's counsel's office
15 in Newport Beach, California. This began a six-month long series of settlement negotiations
16 between Skechers' counsel, Plaintiffs' Counsel, the FTC, and to a lesser degree, the states.

17 19. Plaintiffs' Counsel's involvement with the FTC was substantial. Based on my
18 past experience with the FTC, including in *Reebok*, it was crucial that we coordinate with the
19 FTC to every extent possible so that the settlement result was the best for the Class. The level
20 of coordination has been very high and very productive.

21 20. At the end of November 2011, the broad agreement of the settlement terms,
22 including the amounts, had been reached. Every aspect of this settlement was heavily
23 negotiated, including the overall dollar amount of the settlement and each aspect the
24 Settlement Agreement and exhibits, including the release, the amounts available to individual
25 Class Members making claims, the claims process, and the class member notice and outreach
26 program. Beginning in November 2011, the parties worked to document and finalize
27 numerous details. Meanwhile, all of these negotiations were done within the context of
28

1 corresponding agreements between Skechers and the FTC and state attorneys general and
2 consumer protection bureaus.

3 21. During our initial discussions with Skechers concerning settlement, I conveyed
4 that Plaintiffs' Counsel required Skechers to provide additional discovery before the parties
5 could reach agreement to settle the actions in order to ensure that we did not miss any relevant
6 aspect of the case in our investigation, Rule 26 information or otherwise. Plaintiffs requested
7 and were provided with and thoroughly reviewed relevant documents from Skechers,
8 including electronically stored information regarding: (a) product design, initiative and
9 development; (b) scientific studies and research; (c) marketing, advertising, media and public
10 relations; and (d) sales and pricing data. In total, Skechers produced over 13.5 GB of data,
11 including 6,574 documents encompassing 24,500 pages. Plaintiffs' Counsel organized a team
12 of attorneys who reviewed and analyzed Skechers' production.

13 22. Early in this case, Plaintiffs' Counsel also interviewed key witnesses at
14 Skecher's main competitor, Reebok, who provided important information on and context about
15 the toning shoe industry in general, Skechers in particular, product testing and advertising and
16 marketing strategy.

17 23. Using this information, along with Skechers' document production and pre-suit
18 investigation, Plaintiffs' Counsel interviewed key witnesses produced by Skechers who had
19 direct knowledge of the facts at issue and who were at the center of the circumstances alleged.
20 Over the course of days, Plaintiffs' Counsel interviewed: (i) Savva Teteriatnikov, Vice
21 President of Design at Skechers (original designer of the Shapeup shoe) concerning the design
22 and development of Skechers' Toning Shoes and studies related to Skechers' health claims;
23 (ii) George Zelinsky, President of Retail Stores for Skechers concerning Skechers' corporate
24 structure, retail pricing for Skechers' Toning shoes, and Skechers' health claims regarding the
25 Skechers' Toning Shoes; (iii) Rick Graham, Senior Vice President of Domestic Shoe Sales for
26 Skechers concerning pricing, sales and revenue data for Skechers' Toning Shoes, and in-store
27 advertising for Skechers' Toning Shoes; and (iv) Jennifer Clay, Vice President of Corporate
28

1 Communications concerning Skechers' advertising and marketing of Skechers' Toning Shoes.
2 These interviews provided Plaintiffs' Counsel with additional information confirming their
3 allegations regarding Skechers' product testing, advertising and marketing strategy.

4 24. Agreement was reached on all of the substantive terms of the settlement and the
5 settlement was memorialized in the Settlement Agreement before we began discussions with
6 Skechers' counsel about Plaintiffs' attorneys' fees and expenses, other than the fact that
7 whatever the amount awarded by the Court, attorneys' fees and expenses would be paid on top
8 of and in addition to the settlement consideration to be paid to the Class. As with the other
9 aspects of the settlement, negotiations over fees and costs were hard-fought, with Plaintiffs'
10 Counsel ultimately agreeing to seek less than standard benchmarks under applicable law.

11 25. On May 15, 2012, Plaintiffs filed their Motion for Preliminary Approval. On
12 June 6, 2012, Plaintiff Sonia Stalker, a Plaintiff in one of the Later-Filed Actions, filed an
13 objection to the proposed settlement. Stalker's primary objection was that her counsel should
14 be appointed Class Counsel, not the two firms (BHO and Milberg LP) who ran the litigation
15 and negotiated the settlement and that attorneys' fees should be distributed by the Court. On
16 June 25, 2012, Plaintiffs filed a response to the *Stalker* objections. Neither the existence of the
17 *Stalker* action, nor the lawyers representing Stalker, played any role whatsoever in the
18 litigation or resolution of this action. At most, Stalker and her attorneys have been an
19 unfortunate distraction. In fact, the Parties negotiated a unique attorneys' fees provision in an
20 attempt to allow the lawyers for plaintiff Stalker to be paid so they did not instead object to the
21 settlement or take other action to attempt to disrupt the settlement and delay distribution of the
22 settlement relief to the Class. The very purpose of this attorneys' fee provision was included
23 in the Settlement Agreement to reduce the possibility of improper conduct motivated by the
24 pursuit of attorneys' fees so that the Class could receive payment as soon as possible. Stalker
25 even objected to this provision.

26 26. On July 24, 2012, the Court held a preliminary fairness hearing and heard oral
27 arguments on the merits of the proposed settlement and the objections thereto. On August 3,
28

1 2012, the Court heard additional arguments on remaining issues at a telephonic conference
2 with the parties.

3 27. By order of August 8, 2012, the Court suggested changes to the settlement that,
4 if substantially adopted would allow the Court to preliminarily approve the settlement.

5 28. On August 10, 2012, Plaintiffs filed Amendment Two to Settlement
6 Agreement which clarified the injunction language in the original Settlement Agreement.
7 Amendment Two also provided that attorneys' fees and expenses shall be awarded by the
8 Court only upon a party's motion and only be awarded if the moving party demonstrated that
9 its efforts resulted in a benefit to the Class.

10 29. On August 13, 2012, the Court issued an Order Preliminarily Approving the
11 Settlement and Notice Program, Preliminarily Certified a Settlement Class, appointed Class
12 Counsel, and issued a stay of the Later-Filed Actions.

13 30. Since approval, the response of the Class Members has been extensive and
14 overwhelmingly positive. *See* Declaration of Caroline Barazesh, ¶¶7-8, 12-13.

15 31. I believe this settlement meets each of the requirements for final approval. As
16 described above, the negotiations leading to this settlement occurred at arm's-length and were
17 hard-fought. The settlement occurred after a thorough investigation of the facts and analysis
18 of the legal claims. Based on the pre- and post- filing investigations and discovery, work with
19 experts and extensive informal discovery, I believe there was more than ample information to
20 negotiate a resolution of this action with sufficient knowledge of the strengths and weaknesses
21 of the claims. Further, as indicated in my firm's resume and the resumes of my co-counsel, we
22 have extensive experience successfully litigating this type of action. For more than the last 19
23 years, I have successfully litigated consumer false advertising actions like this one in courts
24 across the country and have litigated similar "toning shoe" actions, including *Reebok*. Defense
25 counsel, O'Melveny & Myers in general, and Jeffery Barker and Daniel Petrocelli in
26 particular, are also very experienced class action and trial attorneys. Obviously, the FTC
27 specializes in false advertising matters.
28

BLOOD HURST & O'REARDON, LLP

1 32. I also believe the settlement consideration is adequate. The cash offered will
2 provide claimants with an amount in excess of the likely measure of damages were the case to
3 be tried, *i.e.*, the difference between the purchase price of the Toning Shoes as represented and
4 the value of the product received, if the value of the product received is compared to regular
5 “non-toning” shoes.

6 33. Attached as Exhibit B is a true and correct collection of exemplar
7 advertisements concerning Skechers toning shoes. These exemplars were part of a larger
8 collection of advertisements produced by defendant to Plaintiffs’ Counsel during the course of
9 this litigation.

10 34. Throughout the litigation, Plaintiff Tamara Grabowski has done everything
11 required to represent the interests of Class Members. Ms. Grabowski assisted in my firms’
12 pre-filing investigation of the claims and provided to my firm all documents and information
13 regarding her purchase of Skechers Toning Shoes. She attended the Early Neutral Evaluation
14 conference in the Southern District of California, taking time off from work to do so. She
15 remained in contact with my firm throughout the litigation, promptly responding to our
16 inquiries for further information and calling our office to keep up to date on the status of the
17 case and proceedings. Ms. Grabowski at all times professed her willingness to sit for
18 deposition and to testify at trial. She met with partners from my firm to review the proposed
19 settlement on multiple occasions prior to signing the Settlement Agreement.

20 35. The hourly rates for the attorneys and paralegals in my firm as shown in the
21 chart below are the same as the regular current rates charged for their services in non-
22 contingent matters and have been accepted as reasonable by other district courts in numerous
23 other class action litigations. *See e.g., Hartless v. Clorox Company*, 273 F.R.D. 630, 644 (S.D.
24 Cal. 2011); *Shames v. Hertz Corp.*, No. 07-cv-2174-MMA (WMC), 2012 U.S. Dist. Lexis
25 158577 at *61 (S.D. Cal. Nov. 5, 2012).

26 36. The total number of hours expended on this litigation by my firm through
27 December 26, 2012, is 1,352.75 hours. The total lodestar for my firm is \$725,270.00.
28

BLOOD HURST & O'REARDON, LLP

NAME	HOURS	RATE	LODESTAR
Timothy Blood (partner)	487.25	\$695.00	\$338,638.75
Leslie Hurst (partner)	210.00	\$585.00	\$122,850.00
Thomas O'Reardon II (partner)	258.25	\$510.00	\$131,707.50
Paula Roach (associate)	126.50	\$410.00	\$ 51,865.00
Timothy Morgan (project atty)	.25	\$310.00	\$ 76.25
Sean Coletta (project atty)	208.50	\$310.00	\$ 63,592.50
Bethany Maxwell (paralegal)	21.00	\$280.00	\$ 5,880.00
Paralegal (various)	41.00	\$260.00	\$ 10,660.00
TOTAL	1,352.75		\$725,270.00

37. The hours and lodestar will increase because, as Class Counsel, my firm is responsible for final approval reply papers and responding to any objectors, attending the final approval hearing, post judgment motions and appeals, and claims administration. Because of the large response to the class notice, my firm has expended significant time so far responding to hundreds of letters received by potential class members, hundreds of emails, and up to a hundred telephone calls. Based on our experience in prior consumer settlements, these communications with class members will continue throughout the claim review process until claims are paid. On an ongoing basis, my firm is in regular contact with the Claims Administrator regarding the claims and opt out processes, oversees the process and regularly reviews and acts on the reports provided by the Claims Administrator.

38. My firm's lodestar figures are based upon the firm's billing rates, which rates do not include charges for expense items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

39. As detailed below, my firm has incurred a total of \$6,836.42 in unreimbursed expenses in connection with the prosecution of this litigation through December 26, 2012. The expenses incurred in this action are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

<i>DISBURSEMENT</i>	<i>TOTAL</i>
Meals, Hotels & Transportation	\$2,006.25
Photocopies	\$1,781.15
Postage	\$ 21.06
Long Distance Telephone/Conference Calls	\$ 411.14
Filing & Service Fees	\$ 880.00
Lexis, Online Research	\$1,586.82
Website/Claim Form Linkage	\$ 150.00
<i>TOTAL</i>	<i>\$6,836.42</i>

I declare under penalty of perjury under the laws of California and the United States that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters, I believe them to be true. Executed on this 28th day of December, 2012, at San Diego, California.

s/ Timothy G. Blood
TIMOTHY G. BLOOD

BLOOD HURST & O'REARDON, LLP

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

TIMOTHY G. BLOOD

BLOOD HURST & O'REARDON, LLP
701 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/338-1100
619/338-1101 (fax)
tblood@bholaw.com

BLOOD HURST & O'REARDON, LLP