

**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
	:	
This document relates to:	:	MDL No. 2308
	:	
<i>Grabowski v. Skechers U.S.A., Inc.</i> 3:12-cv-00204-TBR	:	MOTION AND APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS BY COUNSEL FOR PLAINTIFFS SHANNON LOSS, ET AL.
- And -	:	
	:	
<i>Loss v. Skechers U.S.A., Inc.</i> 3:12-cv-00078-TBR	:	
_____	:	

Plaintiffs' counsel in the *Loss v. Skechers, U.S.A., Inc.*, class action case hereby move this Court for an order approving counsel's request for attorneys' fees and reimbursement of costs incurred in this case. Plaintiffs' motion and application for approval of fees and costs is submitted in accordance with the Court's Order of August 13, 2012.

I. INTRODUCTION

The *Loss* Plaintiffs filed their class action complaint in the Federal District Court, Western District of Kentucky on February 10, 2012. The *Loss* complaint sought class action certification on behalf of a nationwide class of consumers who purchased Skechers' Shape-Ups toning shoes. The *Loss* Plaintiffs alleged that Defendant marketed and promoted its Shape-Ups toning shoes to consumers throughout the United States by claiming in print, television, and internet advertisements that wearing Shape-Ups would result in noticeable health and physiological benefits to consumers,

including weight loss, firmer muscles, reduced cellulite, improved circulation, and improved posture. Defendant used these claims regarding the purported benefits of Shape-Ups to charge a premium for the shoe, which consumers readily paid, believing that Shape-Ups would confer upon them significant health benefits. Unbeknownst to consumers, Defendant's claims were false. Defendant's Shape-Ups provided no health benefit to users beyond what any other ordinary sneaker provides. Moreover, Shape-Ups have actually caused injury to some consumers. Defendant's false and misleading advertising campaign has allowed them to reap millions of dollars of profit at the expense of the consumers who purchased Defendant's Shape-Ups shoes. The *Loss* action sought monetary damages for consumers, and to enjoin Defendant's deceptive and unlawful advertising regarding its Shape-Ups shoes.

At the time the *Loss* action was filed no motions for class certifications had yet been heard or ruled upon by any court where similar complaints were pending. Further, no proposed settlement had been announced. Many of the filed class action cases had been stayed by their respective courts and no discovery had been conducted.

Counsel for Plaintiffs in the *Loss* matter therefore proceeded to litigate their claims. Plaintiffs engaged in significant motion practice and pretrial proceedings, up until the time a proposed settlement was announced in the *Grabowski* case.¹ The activities of the *Loss* Plaintiffs, that directly benefitted the class, and helped Plaintiffs achieve a successful resolution, are further described below.

¹ On May 16, 2012, Plaintiffs in the *Grabowski* matter, pending in this MDL court, filed a preliminary motion for approval of a class action settlement. The class action settlement set aside \$5 million for the payment of attorneys' fees and expenses. This \$5 million is separate and in addition to the \$40 million non-revisionary settlement funds to pay consumers' claims. The court granted preliminary approval to the *Grabowski* class action settlement on August 13, 2012, including the approval of the \$5 million award for attorneys' fees and expenses.

II. ARGUMENT

Plaintiffs' counsel in the *Loss* action have spent approximately 92 hours on this litigation. See *ex. 1, Affidavit of M. Bailey*. This time directly inured to the benefit of the class, and was only cut short due to the announcement of the class action settlement and the consequent cooperation of the *Loss* Plaintiffs' counsel in seeking approval of the settlement.

The *Loss* case, filed on February 10, 2012, was the first class action to be filed directly in the Western District of Kentucky. Previously, on December 19, 2011, the Judicial Panel on Multidistrict Litigation (JPML) issued an order transferring to Judge Russell in the Western District of Kentucky all cases relating to personal injuries suffered by individuals wearing Skechers Shape-Ups toning shoes. Thus, the *Loss* Plaintiffs' filing of a class action permitted all claims of Plaintiffs', both personal injury and consumer claims, to be heard before a single court.

Of important note, the Panel issued a conditional transfer order to transfer *Grabowski* and *Morga*, class action cases pending in California, to the Skechers Toning Shoes MDL, but those plaintiffs and defendant opposed the transfer. They jointly asserted that transfer of the nationwide class action cases would slow down the MDL proceedings and, the advertising claims being asserted by individuals in the MDL were secondary to their personal injury claims. Thus, the *Grabowski* and *Morga* plaintiffs sought to multiply proceedings in federal court by splintering the Skechers consumer and personal injury actions. The *Loss* Plaintiffs opposed this splintering. Instead, the Plaintiffs in *Loss*, whose class action complaint was already pending in front of Judge Russell in the Western District of Kentucky, filed a brief with the JPML supporting

transfer of the class action cases to Judge Russell. The *Loss* Plaintiffs contended that transfer of the pending class action cases to the MDL was appropriate due to the numerous overlapping factual and legal issues between the personal injury cases and the pending class action cases. Furthermore, coordination of all cases in one court would avoid expensive and overlapping proceedings and promote judicial economy. The JPML agreed with the *Loss* Plaintiffs and transferred the *Grabowski* and *Morga* class actions to the MDL court. Thus, the *Loss* Plaintiffs played a considerable part in having the class action cases transferred to the MDL Court. As a result, judicial comity and economy were promoted. Furthermore, competition among the courts with pending class action cases was prevented.

Plaintiffs' Counsel in *Loss* continued to provide benefit to the class once the class action cases were transferred to the MDL court. Plaintiffs' counsel in *Loss* provided guidance to the Court to establish a timetable for the resolution of the class action complaints, separate and apart from the personal injury cases involving Skechers' toning shoes. Establishing a similar yet distinct track helped move forward the class actions towards preliminary approval by the Court of the class action settlement.

Furthermore, after learning of the preliminary settlement being reached by Counsel in the *Grabowski* matter, counsel in the *Loss* action reached out to all counsel who had pending class action cases in order to work in a cooperative and joint manner with counsel in the *Grabowski* matter. Counsel in the *Loss* action, experienced counsel who have worked on numerous class action matters and complex MDL litigations, reviewed the proposed class action settlement and determined the proposed settlement was fair, reasonable and a benefit to the class. Rather than oppose the class action

settlement, counsel in the *Loss* matter supported the settlement as being fair, reasonable and providing monetary relief to class members.

Plaintiffs' counsel in the *Loss* case should be rewarded for their efforts and time spent in this litigation, which at all times has been focused upon efficiency, fairness and cooperation. Plaintiffs' request for an award of attorneys' fees and reimbursement of expenses should be granted. "It is well established that 'a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Regarding an award of attorneys' fees, the Sixth Circuit simply requires, "that the award of attorneys' fees by federal courts in common fund cases be reasonable under the circumstances." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 315 (6th Cir. 1993) (citing *Smillie v. Park Chem. Co.*, 710 F.2d. 271, 275 (6th Cir. 1983)). In determining whether to implement a lodestar or percentage of the fund method, the unique circumstances of the particular case must be considered: "[t]he lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved." *Rawlings*, 9 F.3d at 516. The lodestar sum may be "increased by a 'multiplier' to account for the costs and risks involved in the litigation, as well as the complexities of the case and the size of the recovery." *In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation*, 268 F. Supp. 2d 907, 922 (citing *Telectronics Pacing Systems, Inc.*, 137 F. Supp. 2d 1029, 1041 (S.D. Ohio 2001)). Regardless of which method is ultimately used, the Sixth Circuit has made it

clear that the most important consideration is whether the overall attorney's fees is reasonable under the circumstances of the specific case. *Id.* at 516 (citing *Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983)).

Plaintiffs' Counsel herein respectfully requests an award of attorneys' fees and reimbursement of expenses. Plaintiffs' Counsel undertook this litigation on a contingency fee basis with no guarantee of success. Counsel advanced expenses as well as time on behalf of the class, at a juncture when the outcome was wholly unknown. As set forth in the affidavit of attorney Melanie S. Bailey, the firm of Burg Simpson has spent approximately 92 hours of time dedicated to this litigation. But for the *Grabowski* settlement, counsel would have committed all resources to further advance this case. Plaintiffs' counsel respectfully requests a proportional share of the \$5 million attorneys' fees fund, as preliminarily approved by this Court. Plaintiffs' counsel respectfully requests that they be awarded not less than \$150,000 in attorneys' fees, which is roughly a multiplier of three times their lodestar, for their efforts in organizing, consolidating and cooperating in the resolution of this case. Plaintiffs' counsel herein undertook this litigation on a contingency basis and have not yet been compensated for their time and efforts in this litigation.

III. CONCLUSION

Based on the foregoing, the *Loss* counsel respectfully requests an award of attorneys' fees in an amount not less than \$150,000 to compensate counsel for the time and effort spent on this litigation. Counsel further requests \$462.95 for the reimbursement of expenses.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed electronically on this 31st day of December 2012. All counsel of record will be notified of this filing through the Court's electronic filing system and/or by email delivery.

Melanie S. Bailey
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