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

PLAINTIFF GRABOWSKI'S REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

As set forth in Plaintiffs' Joint Motion for Final Approval of Class Action Settlement and Certification of Settlement Class ("Final Approval Brief") (*Grabowski* Dkt. 114-1), the Settlement is "fair, reasonable and adequate" and has been well received by the Class. Since implementing an extensive notice program which included mailing direct notice to 252,732 Class members, publication through a nationally circulated consumer magazine, Internet advertising, a national press release, a blog press release, a Facebook settlement page and extensive nationwide unpaid media coverage, only eleven possible objections were received.[1] *See Grabowski* Dkt. 114-8 (Declaration of Jeanne C. Finnegan, APR, Concerning Implementation and Adequacy of Class Member Notification Program ("Finegan Decl.")), ¶10; *Grabowski* Dkt. 114-34 (Declaration of Caroline P. Barazesh Regarding Due Diligence and Proof of Mailing ("Barazesh Decl.")), ¶5. The overwhelming majority of Class members are satisfied with the exceptional relief provided through the landmark Settlement.[2] The handful of objections received should not stand in the way of this Settlement and should be overruled. The objections appear to be from well-meaning consumers, but none raise any legal issues that would call into question final approval of the Settlement.

Two objectors argue that if claimants have receipts, they should be entitled to a full refund of the purchase price. The Settlement however, compensates consumers regardless of whether they have receipts in an amount that is fair and represents payments exceeding the

[1] *See* Declaration of Leslie E. Hurst in Support of Plaintiff Grabowski's Response to Objections to Settlement ("Hurst Decl."), ¶2.

[2] As stated in the Final Approval Motion, the monetary relief provided to Class members under the Settlement is the largest in the history of the Federal Trade Commission ("FTC"). *Grabowski* Dkt. 114-1 (Final Approval Brief), at 2.

amount an individual Class Member would receive if Plaintiffs succeeded on the merits at trial. These objections should be overruled.

Seven objectors object to the Settlement because they are satisfied with their purchases of the Toning Shoes either because they like to wear them or they feel they received some health benefit from wearing them. These objections actually point out the risk inherent in this case – some people are happy with the shoes and believe they do what is claimed. The fact that these testimonials exist, yet Plaintiff was nonetheless able to achieve this Settlement, supports a finding that the Settlement is fair, adequate and reasonable. They should be overruled as well.

Finally, one objector does not agree with the amount she will receive because she claims to have suffered personal injuries as a result of wearing the Toning Shoes. The Settlement addresses the claims asserted in the *Grabowski* and *Morga* complaints, which relate to false advertising in connection with the sale of the shoes – not personal injury claims. She is free to pursue a personal injury action. Accordingly, this objection should be overruled.

II. THE FEW OBJECTIONS ARE MERITLESS AND SHOULD BE OVERRULED[3]

A. The Small Amount of Objectors Indicates The Settlement's Fairness

"A small number of objections, particularly in a class of this size, indicates that the settlement is fair, reasonable and adequate. Moreover, the trial court should not withhold approval of the settlement merely because some class members object to it." *Hainey v. Parrott*, 617 F. Supp. 2d 668, 675 (S.D. Ohio 2007) (approving settlement with five objections from class of 835 members); *In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 214 (S.D. Ohio 1997); *In re*

[3] The Class Action Settlement Administrator reports that it has received 1072 timely opt outs. The list of Class members who have excluded themselves will be filed by the Class Action Settlement Administrator no later than ten days before the Fairness Hearing.

Of note here is that 975 of the opt outs were submitted by two law firms on behalf of their clients who allege personal injuries from the Toning Shoes. Hurst Decl., ¶4. These aside, only 97 Class members have excluded themselves, meaning that the overwhelming majority of Class members have chosen to participate in the Settlement.

Cardizem CD Antitrust Litig., 218 F.R.D. 508, 527 (E.D. Mich. 2003) ("A certain number of opt-outs and objections are to be expected in a class action….If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). Of the 252,732 potential Class members who were mailed notices[4] and the hundreds of thousands reached through the extensive nationwide coverage of the Settlement, only 11 objections were received. *See Grabowski* Dkt. 114-8 (Finegan Decl.), ¶10. The extraordinary reaction of the Class favors approval of the Settlement.

B. The Objectors Do Not Meet The Heavy Burden of Upsetting The Settlement

On the merits of their submissions, the Objectors do not meet their burden of upsetting the Settlement. While the decision of whether to grant final approval of the settlement is committed to this Court's sound discretion (*Bailey v. Great Lakes Canning, Inc*., 908 F.2d 38, 42 (6th Cir. 1990)), with respect to settlement objectors, the law is clear that "approval should not be denied 'merely because some class members object to it.'" *Enter. Energy Corp. v. Columbia Gas Transmission Corp*., 137 F.R.D. 240, 246 (S.D. Ohio 1991); *see also Lazy Oil v. Witco Corp.*, 95 F. Supp. 2d 290, 333 (W.D. Pa. 1997) ("The fact that some class members object is neither uncommon nor fatal to settlement approval."). Rather, an objector "has a heavy burden of demonstrating that the [settlement] is unreasonable." *See Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983); *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 528 (E.D.KY. 2010) ("Once preliminary approval has been granted, a class action settlement is presumptively reasonable, and an objecting class member must overcome a heavy burden to prove that the settlement is unreasonable.") (quoting *Levill v. Monsanto Research Corp*., 191 F.R.D. 543, 550 (S.D. Ohio 2000)). The Objectors' stated concerns do not meet this burden.

[4] *See Grabowski* Dkt. 114-34 (Barazesh Decl.), ¶¶5, 9.

1. Two Objectors Seek The Full Purchase Price

Mr. Garrison (*Grabowski* Dkt. 109) and Mr. Korotaeff (MDL Dkt. 405) both object to the Settlement on the basis that Class members with a purchase receipt should be entitled to receive the entire purchase price of the Toning Shoes.

"In deciding whether to approve [a] settlement, however, '[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.'" *Thacker*, 695 F. Supp. 2d at 529 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). "A settlement will not be rejected solely because it does not provide a complete victory to the plaintiffs." *In re Countrywide Fin. Corp. Customer Data Sec. Breach*, No. 8-MD-01998, 2010 U.S. Dist. LEXIS 87409, at *27 (W.D.Ky. Aug. 23, 2010); *see also Hanlon*, 150 F.3d at 1027 ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion."). Indeed, a class action settlement "is a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed." *Williams*, 720 F.2d at 922.

Here, the Settlement taken as a whole or from the perspective of an individual Class Member evidences an outstanding recovery for the Class and is fair, reasonable, and adequate. Through the efforts of Class Counsel, claimants will receive a significant portion of their 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. The relief provided under the Settlement represents the highest consumer recovery in a false advertising case brought by the FTC. In fact, despite Mr. Garrison's and Mr. Korataeff's objections that they will not receive the full purchase price, Class members will receive an amount that exceeds the likely measure of damages if Plaintiffs were successful on the merits – the difference

between the purchase price for the product as represented and the value of the product received. *See Grabowski* Dkt. 114-1 (Brief in Support of Final Approval), at 24.

Additionally, "objections based purely upon individual claims of loss do not warrant disapproval of the proposed settlement." *Thacker*, 695 F. Supp. 2d at 528. "The Court's role in assessing the fairness of a settlement is not to make a *de novo* evaluation of whether the measures applied to all claimants provide each individual with a satisfactory recovery…Rather, the [terms of the settlement are] sufficient if its terms, when applied to the entire group of individuals represented, appear reasonable." *Id.* (internal citations omitted).

Mr. Garrison and Mr. Korotaeff do not criticize the Settlement as unfair, unreasonable, or inadequate on grounds that apply generally to the entire Class, but rather, contend that because they have receipts, they should receive the full purchase price. Under any available remedy, the amount of the remedy does not turn on whether the purchaser has or does not have a receipt. The Settlement reflects this rule – regardless of whether a Class member retained his or her receipt (most did not), he or she is entitled to the same relief.[5] This is a strength of the Settlement, not a weak spot. Accordingly, these objections should be overruled.

2. Satisfaction With The Toning Shoes Is Not a Basis for Rejecting the Settlement – Instead, It Is a Reason to Approve It

Ms. Mikolajewski (Hurst Decl., Ex. A), Mr. Lammers (*Grabowski* Dkt. 98), Ms. Passer (Hurst Decl., Ex. B), Ms. Wallace (*Grabowski* Dkt. 99), Ms. Frechette (*Grabowski* Dkt.

[5] The Claim Form provides that if Class members are making claims in excess of $200.00, claimants may be required to show proof of purchase. Additionally, if the total amount of all claims submitted by all class members exceeds the total available relief, subject to any and all applicable deductions, the Class Action Settlement Administrator may request proof of purchase to validate the claim. *See* MDL Dkt. 82-1 (Claim Form).

90); Ms. Duffy (*Grabowski* Dkt. 88),[6] Ms. Cadek (*Grabowski* Dkt. No. 97), and Ms. Laxson (*Grabowski* Dkt. 120) have filed "objections" to the Settlement, but none actually complains about any of the terms of the Settlement. Instead, they simply express their satisfaction with their purchases. For example, Ms. Frechette states that although she did not lose any weight from using the Toning Shoes, she "was pleased that [her] feet and legs didn't hurt anymore." *Grabowski* Dkt. 90; *see also* Hurst Decl., Ex. A (Ms. Mikolajewski stating that although she "did not lose weight or tone," she finds the shoes "comfortable.").

Courts do not consider letters contesting the merits of the case or supporting defendants to be valid objections. *See, e.g., Date v. Sony Elecs. Inc.*, No. 07-15474, 2009 U.S. Dist. LEXIS 15837, at *17 (E.D. Mich. Feb. 20, 2009) ("One objection filed was not an objection, but a letter in support of Sony"); *U.A.W. v. Gen. Motors Corp.*, No. 05-CV-73991, 2006 U.S. Dist. LEXIS 14890, at *69 (E.D. Mich. Mar. 31, 2006) ("A disagreement over the merits of the parties' dispute, however, is not a basis for disapproving a settlement."). None of these objectors expressed any reason why the Settlement is not fair, reasonable or adequate. To the contrary, although few voiced support for these shoes, the fact that some people think they worked highlights the risk of losing at trial. Additionally, if these Class members did not want to participate in the Settlement because of their satisfaction with the Toning Shoes, they have the ability to opt out.

3. One Objector Seeks Relief for Personal Injury Claims Not Alleged in the *Grabowski* Complaint

Finally, Ms. Hollis (MDL Dkt. No. 367) objects to the Settlement because she believes the amount she will receive will not adequately compensate her personal injuries she allegedly

[6] Ms. Duffy expressed her desire to opt out, but wanted the Court to "hear her comments" and thus, has been included as a possible objection.

sustained while wearing the Toning Shoes.[7] The Settlement, however, relates to the claims asserted in *Grabowski*, a case about false advertising of the Toning Shoes, not personal injuries sustained as a result of wearing them. Accordingly, the Settlement relief is directly related to the claims asserted. *Thacker*, 695 F. Supp. 2d at 528 ("objections based purely on individual claims of loss do not warrant disapproval of the proposed settlement"). Additionally, the Settlement expressly provides that, "[n]otwithstanding the language in this section and/or this Agreement, the members of the Class, other than [named] Plaintiffs, are not releasing any claims of or relating to personal injury." MDL Dkt. 82 (Settlement Agreement), § VIII, C. Ms. Hollis' objection should be overruled.

III. CONCLUSION

For the foregoing reasons, the objections should be overruled and final approval of the Settlement granted.

Dated: February 1, 2013

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[7] Ms. Hurst tried to contact Ms. Hollis on several occasions to inform her about the language in the Settlement, but was unable to reach her. Ms. Hollis had no voicemail or message recording system on which to leave her a message. *See* Hurst Decl. at ¶3.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2013, 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 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 hereby certify that on February 1, 2013, I mailed the foregoing document or paper via the United States Postal Service to the Objectors listed on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 1, 2013, at San Diego, California.

s/ *Timothy G. Blood*
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