

**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>	:	REPLY BRIEF IN SUPPORT OF
3:12-cv-00204-TBR	:	MOTION AND APPLICATION FOR
	:	AWARD OF ATTORNEYS' FEES AND
- And -	:	COSTS BY COUNSEL FOR
	:	PLAINTIFFS SHANNON LOSS, ET AL.
<i>Loss v. Skechers U.S.A., Inc.</i>	:	
3:12-cv-00078-TBR	:	
	:	

Plaintiffs' counsel hereby file the following Reply Brief in further support of their motion and application for an award of attorneys' fees and costs. Plaintiffs' motion for an award of attorneys' fees and costs, filed December 31, 2012, sought an award of \$150,000 in attorneys' fees and \$462.95 in costs. (Docket No. 404). Plaintiffs in the *Grabowski v. Skechers, USA, Inc.* case filed an objection to the request for fees and costs. (Docket No. 420). Although counsel in *Grabowski* support an award of fees to Plaintiffs' counsel herein, they assert that the amount requested is too high and the requested multipliers are not justified. *Grabowski's* counsel also assert that counsel herein did not assume any risk in this litigation. The objections are unfounded and Plaintiffs' counsel should be awarded the fees and costs requested.

Plaintiffs' counsel did assume risk in filing this complaint and taking on this case on a contingency fee basis. At the time the *Loss* complaint was filed, Plaintiffs' counsel were unaware of any negotiations with Defendant's counsel regarding the settlement of any of the multiple class action complaints filed throughout the country. There was no

publicity or announcement about any settlement with Defendant at the time the complaint was filed. Although a motion for preliminary approval of a class action settlement was filed three months after the *Loss* complaint was filed, there was no guarantee the court was going to grant approval of the settlement. Plaintiffs' counsel herein were ready, willing and able to continue with this case and represent Plaintiffs in the event the settlement was not preliminarily approved.

Moreover, counsel's request for fees is not excessively high or unjustified. Counsel's request for fees of \$150,000 represents a mere 3% of the total \$5,000,000 preliminarily approved for an award of fees and costs, and only 0.375% of the \$40,000,000 common benefit fund established for class members. Plaintiff's counsel request is the smallest amount requested by any counsel that submitted a motion for approval of attorneys' fees and costs.¹ As set forth in Plaintiffs' motion and application for an award of attorneys' fees and costs, the work done by Plaintiffs' counsel in this case directly benefited the class.

Counsel in *Grabowski* assert that the multiplier to the lodestar requested by Plaintiffs' counsel is excessive. However, a multiplier of 3 is perfectly in line with awards granted in many litigations. *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915, 924 (E.D. Ky. 1986) (court granted multiplier of 5); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (multiplier of 6.) Moreover, with increasing frequency courts are using the percentage of the fund method for calculating attorneys' fees in common fund cases, rather than the lodestar method. *New England Health*

¹ Plaintiff's counsel in *Grabowski* requested an award of \$5,000,000 (100% of the fund). (Docket No. 403). Plaintiff's counsel in *Stalker* requested an award of \$750,000 (15% of the fund). (Docket No. 399). Plaintiff's counsel in *Hochberg* requested an award of \$450,000 (9% of the fund). (Docket No. 401).

Care Employees Pension Fund v. Fruit of the Loom, Inc., 234 F.R.D. 627, 633 (W.D. Ky., 2006); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 515 (6th Cir. 1993); *Howes v. Atkins*, 668 F. Supp. 1021, 1024 (W.D. Ky. 1987) (“[t]here has been a trend away from the lodestar approach and back to a percentage award in common fund cases.”) The “Sixth Circuit have indicated their preference for the percentage-of-the-fund method in common fund cases.” *Fruit of the Loom, Inc.*, 234 F.R.D. at 633 (quoting *In re: Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003)). The percentage of the fund method better accounts for the quality of work and results obtained, whereas the lodestar method “provides incentives for overbilling and the avoidance of early settlement.” *Rawlings*, 9 F.3d at 516-17. Thus, the more appropriate method in common fund cases is the percentage of the fund method, with the only criteria being that the award of attorneys’ fees be “reasonable under the circumstances.” *In re Sulzer Orthopedics, Inc.*, 398 F.3d 778, 781 (6th Cir. 2005).

In determining the reasonableness of a requested fee percentage, courts in the Sixth Circuit rely on six factors:

- (1) the value of the benefit rendered to the plaintiff class;
- (2) the value of the services on an hourly basis;
- (3) whether the services were undertaken on a contingent basis;
- (4) society’s stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
- (5) the complexity of the litigation; and
- (6) the professional skill and standing of counsel involved on both sides

Fruit of the Loom, Inc., 234 F.R.D. at 634 (citing *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)).

As set forth in Plaintiffs’ motion and application for an award of fees and costs, Plaintiffs’ counsel work in this case directly benefitted the class and helped Plaintiffs achieve a successful result. Plaintiffs’ counsel undertook this litigation on a contingency

basis with no guarantee of success. This was a complex nationwide class action complaint and Plaintiffs' counsel had the experience and expertise to prosecute this case to the fullest extent necessary. (See affidavit of M. Bailey, ex. 1 of Plaintiffs' motion and application). The 0.375 percentage of the common fund requested by Plaintiffs' counsel is more than reasonable and justified. See *Fruit of the Loom, Inc.*, 234 F.R.D. at 633 (in common fund cases, fee awards typically range from 20 to 50 percent of the common fund.); *In re Arm Financial Group Inc. Securities Litig.*, 2006 U.S. Dist. LEXIS 63528, *20-21 (W.D. Ky. Aug. 31, 2006) (finding 40% of settlement fund to be a fair and reasonable award of attorneys' fees and costs).

Plaintiffs' counsel in the *Grabowski* matter objected to all the applications for attorneys' fees and costs. The *Grabowski* counsel was particularly harsh against counsel in the *Stalker* matter, who they claimed was an obstacle throughout the entire litigation. Plaintiffs' counsel herein should not be penalized for any animosity between counsel in the *Grabowski* and *Stalker* matters. Nor should the *Grabowski* counsel have challenged the request of Plaintiffs' counsel for fees and costs. Plaintiffs' counsel herein were cooperative throughout this litigation and did not pose a bar to class certification or the efforts of other counsel.

Plaintiffs' counsel respectfully request that they be awarded attorneys' fees in the amount of \$150,000 and costs in the amount of \$462.95.

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 6th day of February 2013. 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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