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

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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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 Preliminary Approval of Class Action Settlement ("Motion") and entry of the [Proposed] Order Preliminarily Approving Class Action Settlement, Conditionally Certifying the Settlement Class, and Providing for Notice and Scheduling Order, attached as Exhibit 5 to the concurrently filed Settlement Agreement.[1]

I. INTRODUCTION

Plaintiffs seek preliminary approval of a proposed nationwide settlement (the "Settlement") of this consumer class action between Plaintiffs and defendant Skechers U.S.A., Inc. ("Skechers") (collectively, the "Parties"), arising out of the 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 meets both goals of this litigation – cash payments of up to the full retail price paid by Class Members for the Toning Shoes and an end to Skechers' allegedly improper advertising.

The Settlement was a result of a collaborative effort between the Parties, the Federal Trade Commission ("FTC"), and the Attorneys General and consumer protection bureaus in 44 states and the District of Columbia. Plaintiffs have worked on this matter since May of 2010 and have been engaged in active settlement negotiations since before May of 2011. This Settlement is part of a global resolution that also resulted in a Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief ("Stipulated Order") between Skechers and the FTC and Consent Judgments and Agreed Final Judgments ("Consent and Agreed Final Judgments") between the state agencies and Skechers. The compensation for consumers will be paid out and administered through this Settlement. This Settlement, the Stipulated Order, and the Consent and Agreed Final Judgments are products of an extensive joint effort by Class

[1] All capitalized terms have the same meaning as set forth in the Settlement Agreement.

Counsel, the FTC, and the states to maximize the settlement consideration available to the Class, including monetary relief, and to end the disputed conduct.

Under the proposed Settlement, a $40 million non-reversionary fund, will be created to refund money to Class Members and pay the notice and settlement administration costs (which are estimated to be less than $2 million). Unlike many common fund settlements, Plaintiffs' Counsel's attorneys' fees and litigation-related expenses will be paid separately and in addition to the $40 million fund by Skechers, bringing the total monetary value of the settlement to $45 million.

Class Members who submit properly completed claim forms will initially receive $40.00 for Shape-ups, $27.00 for Toners/Trainers (Podded Sole Shoes), $20.00 for Tone-ups (Non-Podded Sole), and $42.00 for Resistance Runner shoes. If enough money remains in the fund following the processing of all claims – and the Parties believe that enough money will – Class Members will receive up to double these initial amounts. Double the initial amount represents the approximate full purchase price Class Members paid for the Skechers Toning Shoes.

Additionally, as a part of this Settlement, Skechers is further bound to comply with the Stipulated Order between the FTC and Skechers that will place significant restrictions on future advertising and marketing of the Skechers Toning Shoes. Because this injunction is also part of this Settlement, it can be enforced by private parties in addition to the FTC.

The proposed Settlement will fully and finally resolve the claims of Plaintiffs and the other Class members. The Class is defined as:

> All persons and entities who purchased Skechers: (1) Shape-up rocker bottom shoes ("Shape-ups"); (b) the Resistance Runner rocker bottom shoes ("Resistance Runner"); (c) Shape-ups Toners/Trainers, and Tone-ups with podded outsoles ("Podded Sole Shoes"); and (d) Tone-ups non-podded sandals, boots, clogs, and trainers ("Tone-ups (Non-Podded Sole)") footwear in the United States from August 1, 2008 up to and including the date notice is first disseminated to the Class.

Excluded from the Class are: (a) Skechers' Board members or executive-level officers, including its attorneys; (b) persons or entities who purchased the Eligible Shoes primarily for the purpose of resale; (c) retailers or re-sellers of Eligible Shoes; (d) government entities; (e) persons or

entities who or which timely and properly exclude themselves from the Class as provided in the Agreement; and (f) persons or entities who purchased the Eligible Shoes via the Internet or other remote means while not residing in the United States. A comprehensive list by style number of the Toning Shoes that are part of the Settlement is attached as Exhibit 10 to the Settlement Agreement.

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 Preliminary Approval (Blood Decl."), ¶4. Plaintiffs' Counsel's investigation also included researching, gathering and analyzing studies demonstrating the disadvantages of different types of toning footwear, including Skechers' toning footwear, investigation of Skecher's advertising and marketing, and research and analysis of Skecher's financial and sales information related to Skecher's Toning Shoes. *Id.*, ¶5.

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. 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. 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* worked together to ensure efforts were not and are not duplicated. 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.

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. 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 Skecher's 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. 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 Skecher's 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. 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.

Settlement discussions between Skechers' Counsel and Plaintiffs' Counsel began in December 2010 shortly after the first early neutral evaluation conference. *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 defendant's counsel's office in Newport Beach, California. *Id.* This began a six-month long series of settlement negotiations between Skecher's counsel, Plaintiffs' Counsel, the FTC, and to a lesser degree, the states. *Id.*

During the course of settlement discussions, Skechers produced relevant documents, including electronically stored information, and provided interviews with key Skechers personnel. *Id.*, ¶21. 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.*

This extensive document production and review process was followed by Plaintiffs' Counsel's interviews of several key witnesses produced by Skecher's 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 Skecher's 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 to up to the time the Settlement was executed, the parties worked to document and finalize numerous details. 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.*

On May 16, 2012, the FTC entered into the Stipulated Order with Skechers concerning its Skechers 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.

III. THE PROPOSED SETTLEMENT

A. Settlement Benefits

1. Cash Payments

The Settlement provides for cash payments to all Class Members who submit valid claims. Under the Settlement, Skechers will deposit $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 Toning Shoes

they purchased, the number of Toning Shoes purchased and the number of Class Members that submit claims:

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

Class Members may recover these amounts by timely submitting 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).

If the total amount of eligible and approved claims submitted by Class Members is less than the available relief, each Class Members' award will be increased on a *pro rata* basis, with a maximum increase of up to double the initial amount, as reflected above. These maximum amounts represent the approximate retail price Class Members would have paid for the Toning Shoes. This amount represents full compensation to Claimants as measured by the most optimistic measure of damages. Similarly, the initial amounts provided to Class Members generally exceeds the likely alternative measure of damages – the difference between the purchase price for the Toning Shoes as represented and the value of the product received, if the product received is compared to regular "non-toning" shoes.

Although the Parties anticipate the Escrowed Funds will be sufficient to pay all Claimants the minimum amounts, if the total amount of eligible and approved claims exceeds the total amount available for distribution, then each claim will be proportionally reduced on a *pro rata* basis. If any money remains after distribution to the Class, 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 is entering 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 products 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. Skechers agrees to not oppose Plaintiffs' Counsel's application for reasonable attorneys' fees and expenses not to exceed $5 million. 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 awards for class representatives up to $2,500 per class representative, which is also in addition to the $40 million reserved for the Escrowed Funds.

To bring about the dismissal of the lawsuits filed on top of *Grawboski* and *Morga*, Plaintiffs Counsel also intend to use a portion of the requested fee award to attempt to pay plaintiffs' counsel in those later-filed actions.

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, Concerning Proposed Class Member Notification Program ("Finegan Decl."), filed with this joint 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.

In part because of the FTC's media activity, the parties here have developed a unique two phase notice program. Phase I of the notice program is 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 ("Settlement Website"). The address of the Settlement Website will appear on all of the notice pieces, and will be 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 will also provide 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, is operational as of May 16, 2012. Should the Court grant preliminary approval, the Website will be updated accordingly, including with the addition of information pertaining to the class action settlement and Class Members' rights.

Additionally, during Phase I of the notice plan, direct notice will be sent by first class mail to Skechers' customers for which Skechers has mailing addresses. Finegan Decl., ¶14. However, because the Eligible 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 focuses on disseminating notice through the Internet and hard-print media based on where Class Members are most likely to see the notice, including in two publications of People Magazine. *Id.*, ¶26. The publication portion of the first phase of this notice plan is designed to reach 77**%** of adults 18 to 44 and 82% of the primary target audience, women 18 to 44 years of age, *Id.*, ¶18, with an average frequency of 2.6 to 2.7 times to the Class. *Id.*, ¶43.

During Phase I, the Settlement will also be 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 and immediately will be taken to the Settlement Website. *Id.*, ¶29. Internet banner ads will be 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.*, ¶28. This is particularly helpful because nearly 89% of the targeted audience is online and 73.4% of those are medium to heavy users of the internet. *Id.*

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, will be served

during Phase I 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.*

Moreover, Phase I of the notice program will include advertising on Pandora, a streaming internet radio site. *Id.*, ¶31. Pandora is available to listeners on their computers or 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. Banner ads are only served to potential Class Members when they are actively using the service. 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, Phase I of the notice program will be further enhanced by issuing a press release, which will be picked up by media outlets to provide "free media" discussing and explaining the proposed Settlement. *See Id.*, ¶32. To further enhance Phase I, the press release will be issued to over 300 blogs covering fitness and exercise, dieting, nutrition, jogging/running, and sports. *Id.*, ¶33. Additionally, a Facebook settlement page will be set up, which will tie into Facebook advertising regarding the Settlement. *Id.*, ¶¶34, 35. Sponsored tweets on Twitter will be sent, targeted to Mom/Lifestyle and Health and Fitness categories. Sponsored blog posts will also be made on these categories. *Id.*, ¶34.

Phase II will only be implemented, if needed, near the end of the notice program period. *Id.*, ¶36. The purpose of Phase II is to save money to pay higher claim amounts if Class Member participation is sufficient as a result of Phase I and the FTC's and states' media efforts, but to increase Class Member participation should claim rates be lower than expected. On behalf of Class Counsel, Garden City Group, will closely monitor the web traffic and claimant inquiries and submissions during the course of the notice program so that Plaintiffs' Counsel can

determine the need and extent of implementing Phase II. *Id.* Based on those findings, Phase II will only be implemented to further increase visibility of the program and expand the opportunity for Class Members to timely file a claim. *Id.* Phase II will be more targeted and will utilize online and mobile advertising. *Id.*, ¶¶37, 38. If implemented, Phase II would add an additional 114,500,000 impressions to the notice program, thereby increasing the overall reach of the target audience to 83%. *Id.*, ¶39.

The Summary Settlement Notice will be 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 is designed to readily provide potential Class Members with essential information about the Settlement, including information on submitting a claim. The Summary Settlement Notice also contains a general description of the lawsuit, the Settlement relief, how a claim can be filed, and a general description of Class Members' legal rights. The Summary Settlement Notice directs 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. Based on the experience of Class Counsel, approximately 90% of all Claimants will submit their Claim Forms online. The Summary Settlement Notice is attached to the Settlement Agreement as Exhibit 6.

Complementing these notice efforts in Phase I is 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 will be available on the Settlement Website and Class Counsel's law firm websites. It also will be mailed to any Class member who requests a copy.

Finally, a 24-hour toll-free telephone number will be 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. Finegan Decl., at ¶42.

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE PROPOSED SETTLEMENT

A. The Standard for Preliminary Approval

It is well-established that public policy highly favors settlement as a means of resolving disputes. *See, e.g., 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");[2] *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. *See, e.g., U.A.W. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) ("[W]e must consider . . . the federal policy favoring settlement of class actions"); *Granada Invest., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *E.E.O.C. v. Wal-Mart Stores, Inc.*, Civil Action No. 6:01-CV-339-KKC, 2011 WL 6400160, at *9 (E.D. Ky. Dec. 20, 2011); *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 WL 6209188, at *7 (E.D. Mich. Dec. 13, 2011); *Brent v. Midland Funding, LLC*, No. 3:11 CV 1332, 2011 WL 3862363, at *12 (N.D. Ohio Sept. 1, 2011); *Sheick v. Automotive Component Carrier, LLC*, No. 2:09-cv-14429, 2010 WL 4136958, at *14 (E.D. Mich. Oct. 18, 2010).

At the preliminary approval stage, the Court is not required to undertake an in-depth consideration of the relevant factors for final settlement approval. Rather, the Court need only "make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement and date of the final fairness hearing." *Manual for Complex Litigation (Fourth)*, § 21.633, at 321 (2004). Moreover, the Court "must take care not to intrude upon the private

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

settlement negotiations of the parties any more than is necessary to determine that the agreement is not the result of fraud or collusion, and that is fair and adequate in light of the potential outcome and costs of litigation." *Smith v. Ajax Magnethermic Corp.*, No. 4:02-cv-0980, 2007 WL 3355080, at *5 (N.D. Ohio Nov. 7, 2007). As this Court noted, "[a]t the state of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval." *In re Countrywide Fin. Corp. Cust. Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *7 (W.D. Ky. Dec. 22, 2009) (quoting *Manual for Complex Litigation (Fourth)*, § 21.63). Thus, the factors that the Court should evaluate at this stage are limited:

> In determining whether preliminary approval is appropriate, the Court should evaluate whether the proposed settlement appears to be the product of serious, informed, non-collusive negotiation, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.

Hyland v. HomeServices of Am., Inc., No. 3:05-CV-612-R, 2012 WL 122608, at *2 (W.D. Ky. Jan. 17, 2012); *accord In re Countrywide Fin. Corp. Cust. Data Sec. Breach Litig.*, 2009 WL 5184352, at *7; *see In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 WL 3070161 (E.D. Mich. August 2, 2010).

Here, the proposed Settlement clearly satisfies the standard for preliminary approval, as there is no question as to its fairness, reasonableness, and adequacy; it is well within the range of possible approval.

B. The Proposed Settlement is a Product of Serious, Informed, and Non-Collusive Arm's Length Negotiations After Substantial Relevant Discovery Was Taken

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. 330, 351 (N.D. Ohio 2001) (citing *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983)); *see also Best Foods v. Aerojet-Gen. Corp.*, No. 1:89-CV-503, 2000 WL 1238910, at *9 (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 several 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 an 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.

The proposed Settlement is the product of arm's-length negotiations between capable and experienced counsel and consultations with both state and federal governments after substantial

discovery of relevant documents and witnesses. Thus, the Settlement should be entitled to a presumption of fairness, reasonableness and adequacy.

C. The Terms of the Proposed Settlement are Fair, Reasonable, and Adequate

Substantively, the terms of the proposed Settlement are eminently fair. The Settlement provides cash reimbursement drawn from a $40 million in non-reversionary fund. The initial amount of cash reimbursement for each Claimant is measured to exceed the likely alternative measure of damages – the difference between the purchase price for the product as represented and the value of the product received. Meanwhile, the probable amount of cash reimbursement, which is double the initial amount, represents the most optimistic measure of damages – the full purchase price for the product without actually requiring Class Members to return the product. In addition, Skechers will stop the disputed advertising practices that were the subject of this litigation. As discussed above, Skechers has entered into the Stipulated Order with the FTC and Consent and Agreed Final Judgments with state agencies to halt the disputed conduct. The Settlement further binds Skechers to implement the changes required by the Stipulated Order.

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. *U.A.W.*, 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.*, 2009 WL 5184352, at *9. 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 factfinder – a risky proposition for both parties. *See Wade v. Kroger*, Civil Action No. 3:01CV-699-R, 2008 WL 4999171, at *4 (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 WL 6209188, at *12. If Plaintiffs are unable to certify a class, the case

would be effectively over, and Skechers would have prevailed, regardless of the merits of the claims. At minimum, absent settlement, this litigation would likely continue for years before Plaintiffs or the Class sees any recovery. That a settlement would eliminate the delay and expenses strongly weighs in favor of approval.

D. All Class Members and Class Representatives are Treated Fairly

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.

As for the incentive award request for Plaintiff Grabowski and Plaintiff Morga, district courts in the Sixth Circuit have looked at the following factors in determining whether to approve incentive awards:

> (1) the action taken by the Class Representatives to protect the interests of Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the class Representatives in pursuing the litigation.

In re Countrywide Fin. Corp. Cust. Data Sec. Breach Litig., No. 3:08-MD-01998, 2010 WL 3341200, at *12 (W.D. Ky. Aug. 23, 2010). As an initial matter, the award will have no impact on the amount available for all Class Members since they will be paid separately from the Escrowed Funds. Both proposed Class Representatives have contributed to the effort to prosecute the common claims with Class Counsel, ultimately recovering a $40 million fund and injunctive relief for their fellow Class Members. As such, to account for their willingness to step forward and represent other consumers, and to compensate them for their contributions, the Settlement provides for incentive awards of $2,500 each. Incentive awards are especially appropriate for a case with a common fund like this, where the award has no effect on the common fund and the amounts requested is beneath or in line with the average for a recovery of this size. *See id.*; *see also, e.g.*, *Physicians of Winter Haven LLC v. Steris Corp.*, No. 1:10 CV 264, 2012 WL 406966, at *9 (N.D. Ohio Feb. 6, 2012) (incentive award of $15,000 for a $20

million recovery); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 787 (N.D. Ohio 2010) (incentive awards of $5,000 to each class representative for an $18 million recovery); *Hainey v. Parrott*, No. 1:02-CV-733, 2007 WL 3308027, at *6 (S.D. Ohio Nov. 6, 2007) (incentive awards of $50,000 to each class representative for a $6 million fund).

As such, the Settlement is well within the "range of possible approval" and should thus be preliminarily approved.

V. THE CLASS SHOULD BE CONDITIONALLY 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. *See 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.*, Case No. 2:10-cv-826, 2012 WL 1058961, at *7 (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*, - F.R.D. -, Case No. 5:09CV-121-R, 2012 WL 692049, at *9 (W.D. Ky. Mar. 2, 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. 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., Ex. A (Blood Hurst & O'Reardon, LLC Firm Resume); Declaration of Janine l. Pollack in Support of Motion for Preliminary Approval, Ex. A (Milberg LLP Firm Resume); *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.*, Case No. 1:08-cv-605, 2009 WL 347758, at *10 (N.D. Ohio, Feb. 10, 2009) (quoting 7A 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 Over Individual Issues

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 Claimant 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 Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 315 (3d Cir. 1998) ("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 Settle 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 "'the 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.*, Case No. 1:09-cv-02954, 2010 WL 3834240, at *7 (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 "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 . . . 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. THE PROPOSED CLASS NOTICE PROGRAM SHOULD BE APPROVED

The threshold requirement concerning the sufficiency of class notice is whether the means employed to distribute the notice is reasonably calculated to apprise the class of the pendency of the action, of the proposed settlement, and of the class members' rights to opt out or object. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). The mechanics of the notice process are best left to the discretion of the court, subject only to the broad "reasonableness" standards imposed by due process. In the Sixth Circuit, "[a]ll that notice must do is 'fairly apprise . . . prospective members of the class of the terms of the proposed settlement' so that class members may come to their own conclusions about whether the settlement serves their interests.'" *Gooch v. Life Inv. Ins. Co. of Am.*, 672 F.3d 402, 423 (6th Cir. 2012) (quoting *U.A.W.*, 497 F.3d at 630). "Due process does not require the notice to set forth every ground on which class members might object to the settlement." *Gooch*, 672 F.3d at 423. Accordingly, the contents of the notice "are sufficient:"

> if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, . . . that any class member may appear and be heard at the hearing, and information [about] the class members' right to exclude themselves and the results of failure to do so.

Id. (quoting *Newberg on Class Actions*, §8:32).

Here, the proposed Notice, including the long form Class Notice and the Summary Settlement Notice, satisfies these content requirements. *See* Settlement Agreement, Exs. 2 (Class Notice) and 6 (Summary Settlement Notice). The Notice is written in simple, straightforward language and includes: (1) basic information about the lawsuit; (2) a description of the benefits provided by the Settlement; (3) an explanation of how Class Members can obtain Settlement benefits; (4) an explanation of how Class Members can exercise their right to opt-out or object to the Settlement; (5) an explanation that any claims against Skechers that could have been litigated

in this action will be released if the Class Member does not opt out of the Settlement; (6) the names of Class Counsel and information regarding attorneys' fees and expenses, as well as Plaintiffs' incentive awards; (7) the Fairness Hearing date; (8) an explanation of eligibility for appearing at the Fairness Hearing; and (9) the Settlement Website and a toll free number where additional information can be obtained. *See* Settlement Agreement, Exs. 2 (Class Notice) and 6 (Summary Settlement Notice). The Notice also informs Class Members that Plaintiffs' final approval papers and request for attorneys' fees will be filed prior to the objection deadline.

Collectively, the Notice provides Class Members with sufficient information to make an informed and intelligent decision about the Settlement. As such, it satisfies the content requirements of Rule 23. *See In re Compact Disc Minimum Advertised Price Antitrust Litig*., 216 F.R.D. 197, 203 (D. Me. 2003) ("The notice must describe fairly, accurately and neutrally the claims and parties in the litigation . . . entitled to participate, including the right to exclude themselves from the class.").

Additionally, the proposed dissemination of the Notice satisfies all due process requirements. This is an excellent, well thought-out and thorough notice program. To design the notice program and disseminate the Notice, the Parties request that the Court approve Garden City as the Media Notice Administrator. For settlement and claims administration, the Parties request the Court approve BMC Group ("BMC") as the Class Action Claims Administrator. Both Garden City and BMC are nationally recognized administrators of class action settlements and legal notice programs. Each has provided notice for and administered hundreds of class action settlements. They have distributed billions of dollars to consumers and investors. *See* http://www.gardencitygroup.com and http://www.bmcgroup.com.

Because Skechers does not sell the Skechers Toning Shoes directly to most Class Members, Skechers does not have mailing addresses or other contact information for most members of the Class. As detailed above, based upon Skechers' media plans for the products, Garden City designed a notice program that maximizes exposure to Class Members through various media, including magazines, Internet, and social media sites, while taking into account

the FTC's and states' media efforts. The Summary Settlement Notice will be published in media most likely to be read by Class Members. Additionally, for those Class Members that can be reasonably identified from, *inter alia*, Skechers' customer return profiles and Eligible Shoe retailers, they will be sent notice directly by first-class mail. Moreover, Class Notice and Claim Forms will be available through the Settlement Website (www.skecherssettlement.com) maintained by the Class Action Settlement Administrator with links from Class Counsel's and the FTC's websites. Finally, the Class Notice will be available on the Settlement Website and will be provided to Class Members who request it via the toll-free number established for this Settlement.

In sum, the contents and dissemination of the proposed Notice constitute the best notice practicable under the circumstances and fully comply with the requirements of Rule 23.

VII. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION

A federal district court overseeing the settlement of a nationwide class action may enjoin parallel litigation in state and federal courts under the Anti-Injunction Act, 28 U.S.C. § 2283, and the All Writs Act, 28 U.S.C. § 1651(a), to enjoin *See Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 499 (N.D. Ill. 2009) ("There is ample authority supporting the court's power to stay pending federal and state cases to effectuate class action settlement approval."). There are three actions pending in state court[3] and two class actions pending in other federal district courts,[4] all of which allege similar claims as those alleged in the Action. In order to protect the rights of Class Members, avoid any confusion created by the pendency of those parallel actions, and preserve the Court's jurisdiction over this settlement, the Court should

[3] *Tomlinson v. Skechers U.S.A., Inc.*, Case No. CV2011-121-7 (Ark. Cir. Ct. filed Jan. 13, 2011); *Lovston v. Skechers U.S.A., Inc.*, Case No. CV-11-321 (Ark. Cir. Ct. filed May 13, 2011); *Scovil v. Skechers U.S.A., Inc.*, Case No. A-12-660756-C (Dist. Ct., Clark Cnty., Nevada, filed April 25, 2012).

[4] *Stalker v. Skechers U.S.A., Inc.*, No. CV 10-05460 JAK (JEMx) (C.D. Cal. filed July 2, 2010); *Hochberg v. Skechers U.S.A., Inc.*, No. CV11-5751 (E.D.N.Y. filed Nov. 23, 2011). On May 8, 2012, the Judicial Panel on Multidistrict Litigation issued conditional transfer orders for the *Stalker* and *Hochberg* cases tentatively transferring those matters to this Court for coordination with the MDL proceedings.

issue a preliminary injunction enjoining Class Members and their representatives from pursuing claims that are parallel to and duplicative of those alleged in the Second Amended Complaint.

Under the "necessary in aid of" exception to the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court may issue an injunction to prevent parallel litigation in state courts that would impair the court's jurisdiction over and disposition of a case. *See In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 236 (3d Cir. 2002) ("The threat to the federal court's jurisdiction posed by parallel state actions is particularly significant where there are conditional class certification and impending settlements in federal actions."). An injunction is particularly appropriate in complex class action settlements, which "make[] special demands on the court." *Id.* at 235 (affirming issuance of an injunction in MDL class action where class was provisionally certified and settlement preliminarily approved). Federal courts therefore routinely issue injunctions in conjunction with class action settlements. *See Hanlon*, 150 F.3d at 1018, 1024-25 (injunction upheld where class action settlement was preliminarily approved and state court action would have excluded an entire subclass); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 880-81 (11th Cir. 1989) (class action had reached final judgment, and state court litigation would have interfered with post-judgment proceedings); *In re Baldwin-United Corp.*, 770 F.2d 328, 337-38 (2d Cir. 1985) (class action MDL where class was certified, settlement agreements finalized, and only final court approval remained); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 195, 202-04 (3d Cir. 1993) (class action settlement imminent).

This Court also has authority to enjoin competing parallel federal court actions under the All Writs Act, 28 U.S.C. § 1651(a), which permits a Court to issue "all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." As with the "necessary in aid of" exception to the Anti-Injunction Act, the All Writ Act gives a federal district court the power to protect its jurisdiction by enjoining parallel federal actions that would interfere with the court's ability to oversee a class action settlement. *See Midland Funding, LLC v. Brent*, No. 08-cv-1434, 2011 U.S. Dist. LEXIS 52449, at *7 (N.D. Ohio May 17, 2011) (order conditionally certifying nationwide class action and enjoining parallel litigation

"[g]iven the risk of conflicting orders resulting from parallel litigation in this matter"); *United States v. New York Telephone Co.*, 434 U.S. 159, 174, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977) ("The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.") (internal citations omitted). The Court may issue an injunction as soon as "the litigation reaches the settlement stage" in order to "effectuate a final settlement." *In re Mexico Money Transfer Litig.*, No. 98 C 2407, 1999 WL 1011788, at *3 (N.D. Ill. Oct. 19, 1999).

A preliminary injunction is warranted in this case because the parties, in conjunction with the Federal Trade Commission and Attorneys General for forty-four states and the District of Columbia, have reached a comprehensive global settlement of the claims asserted on behalf of the class, and the settlement has been submitted to the Court for preliminary and final approval. This Court's ability to manage that settlement would be impaired if competing federal and state actions were allowed to proceed in parallel with this action, raising the possibility of conflicting orders and communications from other putative class counsel in those actions. An injunction will permit Class Members to review the notice materials discussing the terms of the proposed nationwide settlement and to assess their rights and options without the distraction and confusion that would be occasioned by those competing actions. In short, the interests of Class Members and the jurisdiction of the Court will be impaired if, during the notice period, parallel actions alleging virtually identical claims to those asserted in the instant action were allowed to proceed.

VIII. THE PROPOSED SCHEDULE OF EVENTS

The key settlement-related dates, such as the time to complete publication of the Summary Settlement Notice or to opt-out or object, are based on when preliminary approval of the Settlement is granted and the Fairness Hearing date. The settlement-related dates calculated in accordance with the provisions of the Settlement Agreement are as follows:

Event	Date
Notice dissemination to the Class begins	Not later than 30 calendar days after entry of the Preliminary Approval Order
Notice dissemination substantially completed	Not later than 90 days before the Fairness Hearing
Last day for exclusions or objections to the Settlement	Postmarked no later than 30 days before the Fairness Hearing
Parties to file briefs supporting papers seeking final approval and response to objections	Not later than 45 days before the Fairness Hearing
Parties to file supplemental briefs in support of final approval and in response to objections.	Not later than 7 days prior to the Fairness Hearing
First day Fairness Hearing can be set	No earlier than 150 days after entry of Preliminary Approval Order

Accordingly, the Parties request that the Court schedule the Fairness Hearing 150 days after entry of its order granting preliminary approval, or as soon thereafter as the Court's schedule permits.

IX. CONCLUSION

Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement, approve the proposed notice program, and set a date for the Fairness Hearing.

Dated: May 16, 2012

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