

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

IN RE:

**SKECHERS TONING SHOE
PRODUCT LIABILITY LITIGATION**

This Document Applies to All Actions

: **CASE: 3:11-md-02308-TBR**
:
: **MDL No.: 2308**
:
:
: **Judge Thomas B. Russell**

PRACTICE AND PROCEDURE ORDER NO. 7

**ESTABLISHMENT OF PLAINTIFFS' PERSONAL INJURY LITIGATION
EXPENSE FUND TO COMPENSATE AND REIMBURSE ATTORNEYS FOR
SERVICES PERFORMED AND EXPENSES
INCURRED FOR COMMON BENEFIT**

This Practice and Procedure Order No. 7 shall apply to all personal injury claims pending before the Court in MDL No. 2308.

1. The Court finds that it is appropriate to establish a system for the sequestration of a certain percentage of payments that may be made by defendant(s) to personal injury plaintiff(s) in settlement of claims or satisfaction of judgments (all such payments hereinafter referred to as "claim payments"). The funds so sequestered are to be available to provide for reimbursement of costs and payment of attorneys' fees to Common Benefit Attorneys, subject to a proper showing in the future. "Common Benefit Attorneys" means the Plaintiffs' Steering Committee ("PSC") personal injury counsel and other MDL attorneys who have been authorized by Co-Lead Counsel Ronald E. Johnson, Jr., Robert K. Jenner, or by other PSC personal injury counsel designated pursuant to the Court's Orders appointing members to Steering Committee to perform work for the common benefit of personal injury plaintiffs in MDL 2308 and of plaintiffs represented by any state-court personal injury counsel that agrees to associate hereunder (hereinafter the "Common Benefit Attorneys").

2. a. Before making any claim payment to a personal injury plaintiff whose claim has been resolved in federal court, defendants shall deduct from the payment an amount equal to five percent (5%) of the gross amount and shall pay each sum as hereinafter provided for deposit into the MDL 2308 Fee and Cost Trust Account (this Account and its procedures will be established in a future order of this Court).

b. In measuring the gross amount, the defendant shall include the present value of any fixed and certain payments to be made in the future; in the event that a defendant makes payment to an insurance annuity company, the present value shall be the amount of the payment to the insurance annuity company.

c. In measuring the gross amount, the defendant shall exclude (1) court costs that are to be paid by the defendant; and (2) any payments to be made by the defendant on an intervention asserted by third-parties, such as to physicians, hospitals, and other health-care providers in subrogation related to treatment of plaintiff.

3. a. “Associated State Court Personal Injury Counsel” are those who have executed an Agreement substantially in the form attached to this Order as “Exhibit 1.”

b. On the first working day of each month, the PSC personal injury counsel shall provide to defendant’s liaison counsel an updated list of the name of any state court attorney who has associated with MDL PSC personal injury counsel.

c. (i) Before making any claim payment to a personal injury plaintiff represented by Associated State Court Personal Injury Counsel whose name appears on the most recent updated list as provided in Paragraph 3(b), defendants shall deduct an amount equal to five percent (5%) of the gross amount and shall pay such sum as hereinafter provided for deposit into the MDL 2308 Fee and Cost Trust Account (this Account and its procedures will be established in a future order of this Court).

(ii) In measuring the gross amount, the defendant shall include the present value of any fixed and certain payments to be made in the future; in the event that a defendant makes payment to an insurance annuity company, the present value shall be the amount of the payment to the insurance annuity company.

(iii) In measuring the gross amount, the defendant shall exclude (1) court costs that are to be paid by the defendant; and (2) any payments to be made by

the defendant on an intervention asserted by third-parties, such as to physicians, hospitals, and other health-care providers in subrogation related to treatment of plaintiff.

d. Defendant shall have primary responsibility for withholding five percent (5%) of the claim payments and tendering such sums to the MDL 2308 Fee and Cost Account. If, however, a defendant fails to do so, in addition to the Court's power generally, including the exercise of its powers to compel payments by defendant in compliance with this Order, the Court, under appropriate circumstances, can be expected to seek such payment from the plaintiff and/or his or her counsel under terms that are just and equitable.

e. Any plaintiff or plaintiff's counsel whose case or claim has been subjected to the withholding of the 5% amount and who disputes the application of this Order to that claim payment is instructed to make a motion, pursuant to the Federal Rules of Civil Procedure and the Local Rules of this Court, seeking relief from the application of this Order to his or her claim payment that sets forth with particularity the grounds for such relief. Any such motion shall be made within 30 days of receipt by such plaintiff or plaintiff's counsel of the claim payment. Any such motion shall be filed "under Seal" in such a way that protects the confidentiality of the settling parties and, unless directed otherwise by the Court, shall not reveal the dollar value of the claim payment or the amount in disputed.

4. Payment by defendant to the MDL 2308 Fee and Cost Account of the assessment amount shall fully discharge the defendant's obligation under this Order.

5. The requirements of paragraph 2 shall apply regardless of whether a plaintiff's case is disposed of during the time it is on the docket of the transferee court, or following remand or transfer from the transferee court to another federal district court for trial, or transfer to other district courts in accordance with 28 U.S.C. § 1404 or other provisions of law. The requirements shall follow the case to its final disposition in any United States court, including a court having jurisdiction in bankruptcy.

6. As a condition of appointment made by this Court of any counsel to the Plaintiffs' Steering Committee or any sub-committee thereof, such counsel are deemed to have agreed to the terms of paragraph 2 for all said counsel obtaining any personal injury recovery in any federal or state forum, however, recoveries in a federal forum shall be

subject to a five percent (5%) assessment and recoveries in a state forum (or unfilled claims that results in a recovery) shall be subject to a five percent (5%) assessment, provided counsel for that state court litigant has executed an “Agreement” set forth in paragraph 7(a), below.

7. a. Any plaintiff counsel may obtain the PSC Personal Injury Counsel’s Common Benefit Resource Materials by executing an Agreement substantially in the form attached to this Order as “Exhibit 1” (which Agreement defines “the PSC Personal Injury Counsel’s Common Benefit Resource Materials”) and becoming an Associated State Court Personal Injury Counsel. No state court litigant will be subject to a tax, fee, assessment or other charge imposed by this Court except upon execution of an express written agreement with the PSC to share the PSC’s Common Benefit Resource Materials as provided in this Order.

b. Subject to Section 7(e) herein, this Order will not restrict a defendant’s ability to provide, produce, or make available for inspection any deposition transcript and accompanying exhibits.

c. Subject to Section 7(e) herein, this Order will not restrict a defendant’s ability (1) to cross-notice depositions in state court proceedings or other proceedings outside these MDL proceedings. Accordingly, no tax, fee assessment or other charge will be imposed on any state court litigant by virtue of attending and participating in depositions conducted pursuant to any PPO or other order in these MDL proceedings, and/or by virtue of use by any party in a state court case of transcripts, videotapes and/or exhibits from such depositions.

d. Subject to Section 7(e) herein, this Order will not restrict a defendant’s ability (1) to assemble collections or depositories of its own documents and other materials related to hormone therapy, or (2) to include such collections or depositories (or subsets of such collections or depositories as independently determined by the defendant or by non-MDL parties or witnesses) in its responses to discovery requests from other parties in non-MDL proceedings.

e. In the event that any party in a non-MDL proceeding serves a document demand for “all documents selected for production and/or copying by the PSC in MDL 2308 (or a substantially similar demand, or “transcripts and exhibits from all

depositions taken by the PSC in MDL 2308 or by Associated State Court Personal Injury counsel, the defendant shall give Co-Lead Plaintiffs' Counsel written notice of that demand within three days of receipt, and prior to producing responsive materials. Nothing herein waives the right of PSC personal injury counsel to seek an assessment from the party demanding and receiving (or otherwise obtaining) the above described materials in recognition of the benefit conferred on the party by the Common Benefit Attorneys' preparation and conduct of fact and expert depositions, document discovery, and the like. Under these circumstances of this Order allows a court to find an exception to Section 7(a-d).

9. a. The Court or its designated trustee shall maintain detailed records which identify all claim payments made to personal injury plaintiffs, the personal injury plaintiffs' and plaintiffs' counsel's names, current address and telephone numbers, civil action numbers or other identifying number, amount of deposit, date of deposit, and other information that may be required by the circumstances. All such records shall be maintained as highly confidential material and the only persons with access to such records shall be the Court and its designated trustee. The purpose of maintaining confidentiality is to protect the defendants' legitimate concerns regarding disclosure of the amounts that any defendant deposits into the escrow fund, inasmuch as knowledge of such amounts would allow calculation of settlements paid by the defendant, which settlements may be confidential.

b. The trustee shall report to the Court from time to time the sums that are deposited in the account together with the information supplied to the trustee by the paying defendant at the time of the deposit that will be sufficient for the trustee to determine if the amount deposited is the amount required to be paid under the terms of this Order. The trustee shall confer with the defendants and the court to determine the appropriate form that should be completed and accompany any payment to be made to the trustee to allow the trustee to verify the accuracy of any payments made. The fees and costs of the trustee shall be paid from the Trust Account upon the approval of this Court.

10. Each party who is in any way affected by the creation of an obligation to make a claim payment shall promptly provide to the Registry of this District Court or

other approved Trust Account a report containing the information described in paragraph 9. This report is intended to assist the Court and its designated trustee in monitoring compliance with this Order.

11. Upon a proper showing, the Common Benefit Attorneys will be entitled to receive an award of counsel fees and reimbursement of out-of pocket litigation expenses to be paid from the MDL 2308 Fee and Cost Trust Account in such amounts as are determined by the Court, after a hearing, based on the appropriate and controlling law. In making such an award, the Court will first determine the amount of costs for which reimbursement is appropriate. The amount remaining in the MDL 2308 Fee and Cost Trust Account after deducting the amount of costs awarded by the Court will be available for any award of counsel fees. In making an award of counsel fees to the Common Benefit Attorneys and in apportioning any fee award among those attorneys, appropriate consideration will be given to the experience, talent, and contribution made by each Common Benefit Attorney who seeks to cover counsel fees from the MDL 2308 Fee and Cost Trust Account, provided, however, that the Court will only consider compensation for those services which were authorized or designated PSC personal injury counsel.

12. Any sum ordered to be paid by the Court pursuant to this Order as an award of counsel fees shall be deducted from the gross recovery that any plaintiff would have been entitled to receive. Any sum ordered to be paid by the Court pursuant to this Order as reimbursement for out-of-pocket costs shall be prorated among the plaintiff's whose claim payments were deposited, in part, in the MDL 2308 Fee and Cost Trust Account.

13. Nothing in this Order will limit the amount of attorney's fees and costs, in the form of a percentage award or otherwise, which may be awarded by the Court in the event of recovery in any personal injury action certified as a class action under Fed.R.Civ.P.23.

14. The Court is not making the determination by this Order that the Common Benefit Attorneys shall receive any specific sum or percentage as payment of counsel fees and reimbursement of litigation expenses. Such a determination is specifically reserved for an appropriate time following petitions related to such an award. Rather, this Order is intended to develop a mechanism for the creation of a fund from which the

amount of fees and costs to which the Common Benefit Attorneys ultimately may be determined to be entitled may be award and paid with reliability.

15. At such time as the MDL 2308 Fee and Cost Trust Account contains balances that are not necessary to be retained for the payment of fees and costs, the Court will, upon applicable provisions of law, following a hearing, make refunds on an equitable basis, or if such balances are of small amounts, enter such orders concerning the disposition of such funds as are appropriate under the law.

IT IS SO ORDERED.

EXHIBIT 1

Exhibit 1

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

IN RE:

**SKECHERS TONING SHOE
PRODUCT LIABILITY LITIGATION**

: CASE: 3:11-md-02308-TBR
:
:
: MDL No.: 2308
:
:
: ALL CASES

AGREEMENT

This Agreement is made this ____ day of _____, 2012 by and between the Plaintiff's Steering Committee ("PSC") personal injury counsel appointed by the United States District Court for the Western District of Kentucky in MDL Docket No. 2308 and the following Associated State-Court Personal Injury Counsel, _____.

WHEREAS the United States District Court for the Western District of Kentucky has appointed Counsel to serve as members of the PSC to facilitate the conduct of pretrial proceedings in the federal personal injury actions relating to the use of Skechers Shape Up shoes.

WHEREAS the PSC personal injury counsel in association with other attorneys working for the common benefit of personal injury plaintiffs have developed or are in the process of developing litigation resource and reference materials which will be valuable in the litigation of state court proceedings involving Skechers Shape Ups induced injuries, including:

- a) collections compiled by the PSC of CD-ROMs and a virtual depository containing images of the key documents selected by the personal injury counsel from the document productions of the defendants and third-parties in MDL 2308;
- b) a bibliographic database providing a "coded" index of such key documents;

- c) collections compiled by the PSC of the depositions of each generally applicable fact witness taken in MDL 2308 and in any coordinated state-court actions in the form of transcripts, text searchable computer disks and CD-ROMs;
- d) creation of time-lines, cast of characters, and other summaries and analyses relating to the facts at issue in MDL 2308;
- e) collections compiled by the PSC of expert reports on generally applicable liability and generally applicable causation issues, as well as transcripts of such experts' testimony;
- f) collections compiled by the PSC of cross examination of defendants' experts on generally applicable liability and generally applicable causation issues; and
- g) preparation and collections compiled by the PSC of Daubert briefing and argument on generally applicable liability and generally applicable causation expert opinions.

Which will collectively be referred to as the "PSC Personal Injury Common Benefit Resource Materials"; and

WHEREAS the undersigned Associated State-Court Personal Injury Counsel are desirous of acquiring the PSC Personal Injury Common Benefit Resource Materials and establishing an amicable working relationship with the PSC Personal Injury Counsel for the mutual benefit of their clients;

NOW, THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

1. With respect to each personal injury client who they represent in connection with Shape Ups toning shoe related claim, other than clients with claims filed or pending in any federal court, each of the undersigned Associated State-Court Personal Injury Counsel shall deposit or cause to be deposited in an MDL 2308 Fee and Cost Account established by the District Court in the MDL five percent (5%) of the gross amount recovered by each such client. For purposes of this Agreement, the gross amount of recovery shall include the present value of any fixed and certain payments to be made in the future.

2. The undersigned Associated State-Court Personal Injury Counsel, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PSC

personal injury counsel a lien upon and/or a security interested in any recovery by any client who they represent in connection with any Shape Ups toning shoe injury, to the full extent permitted by law, in order to secure payment in accordance with the provisions of paragraph 1 of this Agreement. The undersigned Associated State-Court Personal Injury Counsel will undertake all actions and execute all documents which are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

3. This Agreement shall apply to each and every claim or action arising from the use of Shape Ups toning shoes in which the undersigned Associated State-Court Personal Injury Counsel have a right to a fee recovery, whether it is filed in state court or is an unfiled case that results in a recovery, and whether or not the undersigned Associated State-Court Personal Injury Counsel's name is on the state court papers or settlement agreement.

4. The undersigned Associated State-Court Personal Injury Counsel, shall notify Plaintiff's Liaison Counsel in writing of any recovery obtained or to be obtained base on a claim for which such counsel has a right to fee recovery (including an unfiled case) within ten (10 day of the date a settlement is made or a judgment is reached.

State –Court Personal Injury Counsel

Dated

EXHIBIT 2

THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

**IN RE:
SKECHERS TONING SHOE
PRODUCTS LIABILITY LITIGATION**

**THIS DOCUMENT RELATES TO ALL
CASES**

Master File No. No. 3:11-MD-2308-TBR
MDL No. 2308

Honorable Thomas B. Russell
U.S. District Judge

ACKNOWLEDGMENT AND AGREEMENT

WHEREAS, the Plaintiffs' Steering Committee ("PSC") personal injury counsel in association with other attorneys working for the common benefit of personal injury plaintiffs have developed or are in the process of developing litigation resource and reference materials (the "PSC Personal Injury Common Benefit Resource Materials") for the litigation of MDL and state court proceedings involving injuries allegedly induced by the use of Skechers Shape-Ups[®] shoes;

WHEREAS, the PSC Personal Injury Common Benefits Resource Materials includes documents produced by defendants and third parties, depositions, and information copied or extracted therefrom, as well as all copies, excerpts, summaries, or compilations thereof, and other items ("Protected Material") that are subject to the Protective Order entered by United States District Court for the Western District of Kentucky on _____; and

WHEREAS, the undersigned agrees and acknowledges, that the Protected

Material has been made available, in part, to avoid duplicative discovery.

NOW, THEREFORE, the undersigned attorney acknowledges and agrees that:

I, _____ of
_____, am attorney of record for
_____ in the case of _____
currently pending in _____ declare under penalty of perjury
that:

1. I have read in its entirety and understand the Protective Order that was issued by the United States District Court for the Western District of Kentucky on _____ in the above-captioned multi-district litigation proceeding.
2. I agree to comply with and to be bound by all the terms of the Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt.
3. I solemnly promise that I will not disclose in any manner any information or item that is subject to the Protective Order to any person or entity except in strict compliance with the provisions of the Protective Order.
4. I agree to submit to the jurisdiction and venue of the United States District Court for the Western District of Kentucky for the purpose of enforcing the terms of the Protective Order, even if such enforcement proceedings occur after termination of the above named action, and understand that the Court may impose sanctions for any violation of the attached Protective Order.
5. I further agree not to seek discovery from defendants Skechers U.S.A., Inc., Skechers U.S.A., Inc. II, and Skechers Fitness Group, that is duplicative of the PSC

Personal Injury Common Benefit Resource Materials and acknowledge that I am accepting access to that information in lieu of seeking duplicative discovery.

Date:_____

Printed name:

Signature:

With a Copy to:

DEFENDANTS' LIAISON COUNSEL

Jill F. Endicott

DINSMORE & SHOHL LLP

101 South Fifth Street, Suite 2500

Louisville, KY 40202

Phone: (502) 581-8000

Fax: (502) 581-8111

Email: jill.endicott@dinsmore.com