

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-06-000608-121

(Class Action)
SUPERIOR COURT

J. ANGELL

Petitioner

-vs.-

SKECHERS U.S.A. INC., legal person
duly constituted, having its head office at
228 Manhattan Beach Boulevard, City of
Manhattan Beach, State of California,
90266, U.S.A.

and

SKECHERS U.S.A. INC. II, legal person
duly constituted, having its head office at
228 Manhattan Beach Boulevard, City of
Manhattan Beach, State of California,
90266, U.S.A.

and

SKECHERS USA CANADA INC., legal
person duly constituted, having its head
office at 2425 Matheson Boulevard East,
Suite 120, City of Mississauga, Province
of Ontario, L4W 5K4

Respondents

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
&
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)**

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER
STATES AS FOLLOWS:

I. GENERAL PRESENTATION

A) The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

- all residents in Canada who have purchased SKECHERS Shape-Ups[®] footwear, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased SKECHERS Shape-Ups[®] footwear, or any other group to be determined by the Court;

2. Petitioner contends that the Respondents marketed and sold Skechers Shape-Ups shoes through the use of false or misleading advertisements and representations regarding their ability to provide significant health benefits by altering users' gait, without any further changes in a consumer's diet or exercise routine;

3. These claimed health benefits are that purchasers will:

- a. Get in shape without setting foot in a gym;
- b. Promote weight loss, tone muscles, and improve posture;
- c. Tighten abdominal muscles;
- d. Improve blood circulation;
- e. Strengthens the back;
- f. Firm buttocks muscles;
- g. Tone and firm thigh muscles;
- h. Firm calf muscles;
- i. Increase cardiovascular health;
- j. Reduce stress on knee and ankle joints;
- k. Relieve muscle tension and fatigue;
- l. Engage muscles not normally used when walking on hard ground;
- m. Reduce impact on your joints and lower back;
- n. Improve your life by changing the way you walk;

- o. Improve stamina and metabolism;
4. In fact, the only independent and reliable scientific study on the subject demonstrated that there is no evidence to support the claims that Skechers Shape-Ups shoes provide any health benefits whatsoever compared to regular athletic and walking shoes;
 5. By reason of these actions and omissions, the Respondents induced consumers into purchasing Skechers Shape-Ups shoes that do not live up to their promised results, thereby causing Petitioners and the members of the class to suffer economic damages and physical and material injuries, which they are entitled to claim;

B) The Respondents

6. Respondent Skechers U.S.A., Inc. (“Skechers USA”) is Delaware corporation with its head office in California. It is a lifestyle and athletic footwear company that designs and sells footwear, including Skechers Shape-Ups, to men, women and children of all ages;
7. Respondent Skechers U.S.A., Inc. II (“Skechers USA II”) is a wholly owned subsidiary of Skechers U.S.A. and is a Delaware corporation with its head office in California;
8. Respondent Skechers USA Canada Inc. (“Skechers Canada”) is a wholly-owned subsidiary of Skechers USA that does business throughout Canada, including the province of Quebec, the whole as appears more fully from a copy of an extract from the *Registre des enterprise*, produced herein as **Exhibit R-1**;
9. Respondent Skechers USA II is the registrant of the trade-mark SKECHERS SHAPE-UPS (TMA771319) which was filed on March 2nd 2009, the whole as appears more fully from a copy of the report from the CIPO Canadian trade-marks database, produced herein as **Exhibit R-2**;
10. During the relevant time period, Respondents Skechers USA, Skechers USA II, and Skechers Canada have been responsible for the manufacture, design, marketing, distribution, promotion and/or sale of Skechers Shape-Ups shoes throughout Canada, including the Province of Quebec;
11. Given the close ties between the Respondents and considering the preceding, all the Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, all of the Respondents will be referred to as “Skechers” for the purposes hereof;

C) The Situation

12. Skechers Shape-Ups shoes are shoes that purportedly provide health and fitness benefits such as toning and strengthening muscles in the lower body. Unlike traditional athletic shoes, which are designed to provide the wearer with support, Skechers Shape-Ups shoes are designed to create slight instability. The theory of Skechers Shape-Ups shoes is that the instability the shoe causes will force muscles to work harder to stabilize, resulting in benefits such as muscle toning, shaping, and strengthening;
13. It has been reported that toning shoe sales (by all the companies that produce such shoes) in the United States increased from \$17 million in 2008 to approximately \$145 million in 2009 and peaked in 2010 with sales close to \$1 billion. The Canadian market can be estimated at around 10% of the USA market;
14. Skechers Shape-Ups shoes have what Skechers describes as a “unique kinetic wedge.” This wedge is essentially a piece of foam, which is thickest at the heel and progressively thinner towards the toes, contained between the outer and inner soles of the shoe. This, in conjunction with an outer sole that is rounded rather than flat, is intended to alter the way the wearer stands and/or walks;
15. Skechers designs, manufactures and markets a variety of styles for the Skechers Shape-Ups, including Women’s Shape-Ups Fit, Women’s Shape-Ups Sleek Fit, Women’s Shape-Ups Strength, Women’s Shape-Ups XF Energy Blast, Women’s Shape-Ups Optimize, Women’s Shape-Ups X Wear Hyper Active, Women’s Shape-Ups Metabolize, Women’s Shape-Ups Kinetix Response SRT, Women’s Shape-Ups XF Energy Blast, Women’s Shape-Ups Accelerators, Women’s Shape-Ups Wear Hyper Blast, Women’s Shape-Ups Point Five Jamaica Fab Abs, Women’s Shape-Ups Point Five Hearty, Women’s Shape-Ups Jump Start, Women’s Shape-Ups Action Packed, Men’s Shape-Ups XT, Men’s Shape-Ups XT Rendition, Men’s Shape-Ups Salerno Tusciano, Men’s Shape-Ups Salerno Oxford, and Men’s Shape-Ups XWear Haywood;
16. Until recently, Skechers’ website www.myshape-ups.com advertised numerous benefits of Shape-Ups including “improves posture, strengthens the back, firms buttocks muscles, tones and firms thigh muscles, firms calf muscles, improves blood circulation, tightens abdominal muscles, and reduces knee joint stress”, but to which is no longer a valid web address;
17. Some of the specific representations made by Skechers on its website are that its Skechers Shape-Ups shoes “maximize calorie burn”, “firm buttocks”, and “improve posture”, the whole as appears more fully from a copy of the

Respondent's website www.ca.skechers.com, produced herein as **Exhibit R-3**;

18. Some of the specific representations made by Skechers through print advertisements as well as through online advertising are that walking in Skechers Shape-Ups:

- improves posture;
- improves blood circulation;
- strengthens back muscles;
- tightens abdominal muscles;
- reduces cellulite and tones thighs;
- improve cardiovascular health;
- reduce stress on knee joints and ankles;
- promotes weight loss; and
- firms leg, calf and buttock muscles,

The whole as appears more fully from a copy of two advertisements, produced herein as **Exhibit R-4** and **Exhibit R-5**;

19. The box that the shoes are sold in states "shape up while you walk" and that they are designed to help "burn more calories" "activate core muscles" and "improve posture". The shoes are also sold with booklet, a small pamphlet, two (2) DVD's, and a holder – all of which essentially make the same and more allegations about the health benefits or Skechers Shape-Ups, the whole as appears more fully from a copy of said marketing materials, produced herein *en liasse* and recited as if at full length as **Exhibit R-6**;

20. Skechers used these claims regarding the alleged benefits of its Skechers Shape-Ups shoes to persuade consumers to believe that its Shape-Ups shoes would confer upon them significant health benefits by altering users' gait, without any further changes in a consumer's diet or exercise routine;

21. In truth and in fact, these representations were not substantiated at the times that they were made;

22. In the study entitled "THE PHYSIOLOGIC AND ELECTROMYOGRAPHIC RESPONSES TO WALKING IN REGULAR ATHLETIC SHOES VERSUS "FITNESS SHOES" by John P. Porcari, Ph.D., John Greany, Ph.D., Stephanie Tepper, B.S., Brian Edmonson, B.S., Carl Foster, Ph.D. from the Departments of Physical Therapy and Exercise and Sport Science, University of Wisconsin-La Crosse it states:

"The "clinical" studies supporting the benefits of these shoes have all been non-peer reviewed and internally funded. A review of these studies finds

that they generally had small sample sizes, lacked adequate research control, and had questionable or no statistical analyses.

...

Because there seems to be unsubstantiated claims about the benefits of walking in fitness shoes, the purpose of this study was two fold: First was to evaluate the exercise responses (heart rate, oxygen consumption, caloric expenditure, and ratings of perceived exertion) to walking in regular athletic shoes compared to fitness shoes. The second was to evaluate muscle activation (via electromyography) when walking in regular athletic shoes compared to fitness shoes. This investigation was conducted as two separate studies using two separate groups of subjects.

...

There was no significant difference in EMG levels in the gastrocnemius, rectus femoris, biceps femoris, gluteus maximus, erector spinae, or rectus abdominus between the four types of shoes. It can be seen that EMG activity was generally higher at the higher workloads (i.e., 3.0/0% grade vs. 3.5 mph/0% grade vs. 3.5 mph/5% grade), as expected.

...

The results of this study found no evidence that walking in fitness shoes had any positive effect on exercise heart rate, oxygen consumption, or caloric expenditure compared to walking in a regular running shoe.

Based upon the results of this study, wearing so-called fitness shoes will have no beneficial effect on exercise intensity or caloric expenditure compared to wearing a regular running shoe. Additionally, there is no evidence that wearing shoes with an unstable sole design will improve muscle strength and tone more than wearing a regular running shoe.”

The whole as appears more fully from a copy of said scientific study, produced herein as **Exhibit R-7**;

23. In a summary of this study by the American Council on exercise (“ACE”), the following further remarks were made:

“For the exercise response study, researchers recruited 12 physically active female volunteers, ages 19 to 24 years. All study subjects completed a dozen five-minute exercise trials in which they walked on a treadmill for five minutes wearing each type of shoe. The shoe order was randomized as the subjects were asked to walk at 3.0 mph with a 0% grade hill; 3.5 mph/0% grade; and at 3.5 mph/5.0% grade. Meanwhile researchers monitored each subject’s oxygen consumption, heart rate, ratings of perceived exertion (RPE) and caloric expenditure.

To measure muscle activation, researchers recruited a second group of 12 physically active female volunteers, ages 21 to 27 years, who performed a similar battery of five-minute treadmill trials (as explained above) rotating

shoes at random. Researchers used electromyography (a.k.a. EMG) to record muscle activity in six muscle areas: gastrocnemius (calf), rectus femoris (quads), biceps femoris (hamstrings), gluteus maximus (buttocks), erector spinae (back), and rectus abdominis (abs), as subjects walked in each of the four pairs of shoes. As a baseline for EMG analysis, maximum voluntary isometric contractions (MVIC) on all muscles were also performed using manual muscle techniques prior to testing.”

...

“Do you feel different when you’re wearing these shoes? Of course you do because you’re walking on probably an inch worth of cushioning,” explains Porcari. “They feel different, and that’s why when people first wear them they’re probably going to be sore because you’re using different muscles. But if you wear any sort of abnormal shoes that you’re not used to wearing, your muscles are going to get sore. Is that going to translate into toning your butt, hamstrings and calves? Nope. Your body is just going to get used to it.”

The whole as appears more fully from a copy of said summary, produced herein as **Exhibit R-8**;

24. The ACE concluded that: “Across the board, none of the Toning Shoes showed statistically significant increases in either exercise response or muscle activation during any of the treadmill trials” and that “there is simply no evidence to support the claims that these shoes will help wearers exercise more intensely, burn more calories or improve muscle strength and tone”;

25. A USA Today article stated in part:

“A growing number of doctors are warning that Toning Shoes don’t deliver on their marketing promises and could cause injuries by, among other things, changing a person’s gait, or way of walking.

Claims that Toning Shoes can significantly contribute to person’s fitness are “utter nonsense.””

The whole as appears more fully from a copy of the article entitled “A revolutionary sneaker, or overhyped gimmick?” dated June 20, 2010, produced herein as **Exhibit R-9**;

26. Not only do Skechers Shape-Ups shoes not provide the benefits as claimed, they have significant drawbacks which Skechers has omitted from its advertising. Specifically, because Skechers Shape-Ups shoes are designed to constantly challenge the user’s balance, they are unsuitable for users with flat feet, or those who have pre-existing difficulties maintaining their balance. Additionally, consumers who are more prone to injury in areas that are



responsible for maintaining balance (such as the hamstring or ankle) will exacerbate that risk by using Skechers Shape-Ups shoes;

27. In May 2011, Consumer Reports documented that Sketchers Shape-Ups had been the subject of more reports of injuries or complaints than any other product in its database, the whole as appears more fully from a copy of the article entitled “Are toning shoes unsafe? Reports of injuries raise concerns” dated May 25, 2011, produced herein as **Exhibit R-10**;
28. In response to the existing body of literature and numerous complaints to the company about chronic and traumatic injuries from its Shape-Ups shoes, Skechers has dramatically altered the design of its Shape-Ups shoes to lessen the negative impact of the rocker bottom design;
29. The advertisements and representations made by the Respondents as set forth herein were, and are, false or misleading. The acts and practices of the Respondents as alleged herein constitute unfair or deceptive acts or practices and the making of false advertisements;
30. Consumers were induced into purchasing Skechers Shape-Ups shoes through the use of false and misleading representations, thereby vitiating their consent and entitling them to claim a refund for the purchase price of the product;
31. The Respondents’ false and misleading advertising campaign allowed it to reap millions of dollars of profit at the expense of the consumers it has misled into believing that “clinical studies” show that Shape-Ups allow consumers to “get in shape without setting foot in a gym”;

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

32. Petitioner purchased Skechers Shape-Ups shoes in November 2011 from Sports Experts at 930 Sainte-Catherine Street West, in Montreal, Quebec for approximately \$100 plus taxes;
33. Petitioner believed, from having seen Skechers marketing and having read their product labelling, that the Skechers Shape-Ups shoes would cause him to tone and strengthen his muscles and cause him to lose weight without any further changes in his diet or exercise routine;
34. Petitioner has since discovered, while researching online, that these product claims have not been scientifically proven and several class actions have been filed in the United States for this same product due to false advertising, the whole as appears more fully from a copy of said Class Action Complaints, produced herein as **Exhibit R-11**;

35. In consequence, Petitioner feels that he has been misled by the Respondents and that had he known the true facts, the Petitioner would not have purchased Skechers Shape-Ups;
36. Petitioner's damages are a direct and proximate result of the Respondents' conduct and the companies' false and misleading advertising;
37. In consequence of the foregoing, Petitioner is justified in claiming damages;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

38. Every member of the class has purchased Skechers Shape-Ups shoes believing that it would cause them to tone and strengthen their muscles, due to the Respondents' marketing, advertising, and labelling;
39. The class members were, therefore, induced into error by the Respondents' false and misleading advertising;
40. Had the Respondents disclosed the truth about their Skechers Shape-Ups shoes, that they did not offer any extra toning or strengthening over regular shoes and that possible injuries could occur, reasonable consumers would not have purchased them;
41. Each member of the class is justified in claiming at least one or more of the following as damages:
- a. The purchase price of their Skechers Shape-Ups shoes;
 - b. Bodily and material injury;
 - c. Punitive damages;
42. Respondents engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from class members;
43. All of these damages to the class members are a direct and proximate result of the Respondents' conduct and their false and misleading advertising;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical

44. Petitioner is unaware of the specific number of persons who purchased Skechers Shape-Ups shoes, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
 45. Class members are numerous and are scattered across the entire province and country;
 46. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondent. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Respondent would increase delay and expense to all parties and to the court system;
 47. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
 48. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
 49. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondent and that which the Petitioner wishes to have adjudicated upon by this class action
50. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
 51. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
 52. The recourses of the members raise identical, similar or related questions of fact or law, namely:
 - a) Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Skechers Shape-Ups?



- b) Are the Respondents liable to the class members for reimbursement of the purchase price of the Skechers Shape-Ups shoes as a result of their misconduct?
 - c) Are the Respondents liable to the class members for bodily or material injury as a result of using Skechers Shape-Ups shoes?
 - d) Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
 - e) Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?
53. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

54. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages and an injunctive remedy;
55. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioner requests that he be attributed the status of representative of the Class

56. Petitioner is a member of the class;

57. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

58. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

59. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

60. Petitioner, with the assistance of his attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;

61. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondent's conduct;

62. Petitioner understands the nature of the action;



63. Petitioner's interests are not antagonistic to those of other members of the class;

B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

64. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;

65. The Petitioner's attorneys practice their profession in the judicial district of Montreal;

66. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages and for injunctive relief;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

- all residents in Canada who have purchased SKECHERS Shape-Ups[®] footwear, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased SKECHERS Shape-Ups[®] footwear, or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Skechers Shape-Ups?
- b) Are the Respondents liable to the class members for reimbursement of the purchase price of the Skechers Shape-Ups shoes as a result of their misconduct?

- c) Are the Respondents liable to the class members for bodily or material injury as a result of using Skechers Shape-Ups shoes?
- d) Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- e) Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

ORDER that said notice be available on the Respondent's website with a link stating "Notice to Skechers Shape-up footwear owners";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs, including all publications fees.

Montreal, April 12, 2012

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.
Per: Me Jeff Orenstein
Attorneys for the Petitioner