

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

■ **NIRAS**

Plaintiff

- and -

**SKECHERS USA INC., SKECHERS USA INC. II, AND SKECHERS USA CANADA
INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: September 21, 2012

Issued by

Local Registrar

Address of court office: 161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

TO: Skechers USA Inc.
228 Manhattan Beach Boulevard #200
Manhattan Beach, California 90266-6825
USA

Tel: 310-318-3100
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AND TO: Skechers USA Inc. II
225 S Sepulveda Boulevard
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Tel: 310-318-3100
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AND TO: Skechers USA Canada Inc.
2425 Matheson Boulevard East, Suite 120
Mississauga, Ontario
L4W 5K4

Tel: 905-238-7121
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DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Toning Shoes**” or “**Toning Footwear**” means any and/or all footwear marketed and sold by Skechers under the brand names “Shape-Ups”, “Resistance Runner”, “Shape-ups Toners/Trainers” and “Tone-ups”;
- (b) “*Courts of Justice Act*” means the Ontario Courts of Justice Act, RSO 1990, c C-43, as amended;
- (c) “**Class**” or “**Class Members**” means all people in Canada who have purchased **Skechers Toning Footwear**;
- (d) “*Class Proceedings Act*” means the Class Proceedings Act, 1992, SO 1992, c 6, as amended;
- (e) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, as amended;
- (f) “*Competition Act*” means the *Competition Act*, RSC 1985, c C-34, as amended;
- (g) “*Negligence Act*” means the *Negligence Act*, R.S.O. 1990, c. N-1, as amended;
- (h) “*Sale of Goods Act*” means the *Sale of Goods Act*, R.S.O. 1990, c S.1, as amended;

- (i) “**Consumer Protection Legislation**” means:
- (j) *Fair Trading Act*, RSA 2000, c F-2, as amended;
 - (k) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, as amended;
 - (l) *The Business Practices Act*, CCSM, c B120, as amended;
 - (m) *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended,
and *Trade Practices Act*, RSNL 1990, c T-7, as amended;
 - (n) *Business Practices Act*, RSPEI 1988, c B-7, as amended; and
 - (o) *Consumer Protection Act*, SS 1996, c C-30.1, as amended;
- (p) “**Defendants**” or “**Skechers**” means Skechers USA Inc., Skechers USA Inc. II and Skechers USA Canada Inc.;
- (q) “**Plaintiff**” means ■ Niras; and
- (r) “**Representation**” means the **Defendants’** false, misleading or deceptive representations regarding the alleged performance characteristics, uses, benefits and/or qualities of the **Toning Shoes** which they did not possess as well as their use of exaggeration, innuendo and ambiguity regarding their ability to provide significant **Health Benefits**;
- (s) “**Health Benefits**” means the **Defendants’** claims that the **Toning Shoes** will promote:
- (i) Getting in shape without setting foot in a gym;
 - (ii) Weight loss, muscle tone and improvement of posture;
 - (iii) Tightening abdominal muscles;
 - (iv) Improvement of blood circulation;

- (v) Strengthening the back;
- (vi) Firming buttocks muscles;
- (vii) Toning and firming thigh muscles;
- (viii) Firming calf muscles;
- (ix) Increasing cardiovascular health;
- (x) Reducing stress on knee and ankle joints;
- (xi) Relieving muscle tension and fatigue;
- (xii) Engaging muscles not normally used when walking on hard ground;
- (xiii) Reducing impact on joints and lower back;
- (xiv) Improvement of quality of life by changing the way of walking; and
- (xv) Improvement of stamina and metabolism.

CLAIM

2. The proposed Representative Plaintiff, ■ Niras, claims on his own behalf and on behalf of the members of the Class of persons as defined in defined in paragraph 4 below (the “Class”) as against Skechers USA Inc., Skechers USA Inc. II and Skechers USA Canada Inc. (collectively the “Defendants”):

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;
- (b) A declaration that the Representation was a false and misleading representation contrary to s. 52(1) of the *Competition Act*;

- (c) A declaration that the Representation was made in violation of s. 14 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation¹;
- (d) A declaration that the Representation was made in violation of s. 15 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation²;
- (e) A declaration that the notice given by the Plaintiff on September 21, 2012, on his own behalf and on behalf of “person similarly situated”, is sufficient to give notice to the Defendants on behalf of all Class Members;
- (f) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation³;
- (g) An accounting of revenues received by the Defendants resulting from the sale of their Toning Shoes as a result of the Representation to the Plaintiff and to the Class Members;

¹ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 6; *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 4; *The Business Practices Act*, CCSM, c B120, s. 2; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 2; *Trade Practices Act*, RSNL 1990, c T-7, s. 5; *Business Practices Act*, RSPEI 1988, c B-7, s. 2; and *Consumer Protection Act*, SS 1996, c C-30.1, s. 5.

² Specifically, the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 8; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 8; *Trade Practices Act*, RSNL 1990, c T-7, s. 6; and *Business Practices Act*, RSPEI 1988, c B-7, s. 2.

³ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s 7.2(3).

- (h) A declaration that any funds received by the Defendants through the sale of their Toning Shoes as a result of the Representation are held in trust for the benefit of the Plaintiff and Class Members;
- (i) In addition, or in the alternative, restitution or a refund of all monies paid to or received by the Defendants from the sale of their Toning Shoes to members of the Class;
- (j) Damages pursuant to s. 36 of the *Competition Act*, to s. 18 (2) of the *Consumer Protection Act*, and to the parallel provisions of the Consumer Protection Legislation⁴ in the amount of \$10,000,000 or in an amount to be determined for each member of the Class;
- (k) Punitive, aggravated, and exemplary damages in the amount of \$2,000,000 or as this Honourable Court deems appropriate;
- (l) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (m) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;

⁴ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 7(3); *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 171; *The Business Practices Act*, CCSM, c B120, s 23(2) ; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 10(2); *Trade Practices Act*, RSNL 1990, c T-7, s 14(2); *Business Practices Act*, RSPEI 1988, c B-7, s 4(1); and *Consumer Protection Act*, SS 1996, c C-30.1, s. 5.

- (n) A permanent injunction restraining the Defendants from continuing any actions taken by them in contravention of the Consumer Protection Legislation, the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act*;
- (o) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (p) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 2 (9) of the *Class Proceedings Act*;
- (q) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon pursuant to the *Excise Tax Act*, R.S.C. 1990. C. E-15; and
- (r) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in all the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff, ■■■ Niras, is an individual residing in the City of Borden, in the Province of Ontario. Mr. Niras purchased a pair of the Defendants' Toning Shoes after having received information from the Defendants as to the alleged Health Benefits.

The Class

4. The Plaintiff seeks to represent the following class of which he is a member (the “Proposed Class”):

All persons resident in Canada that purchased Skechers Toning Footwear.

The Defendants

5. The Defendant Skechers USA, Inc. (“Skechers USA”) is Delaware corporation with its principal place of business in Manhattan Beach, California. It is a lifestyle and athletic footwear company that designs and sells footwear, including Toning Footwear, to men, women and children.

6. The Defendant Skechers USA, Inc. II (“Skechers USA II”) is a wholly-owned subsidiary of Skechers USA and is a Delaware corporation with its principal place of business in Manhattan Beach, California.

7. The Defendant Skechers USA Canada Inc. (“Skechers Canada”) is a wholly-owned subsidiary of Skechers USA that is carrying on business throughout Canada, including within the Province of Ontario.

8. The Defendants are residents in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.

9. The Defendants are jointly and severally liable for the acts and omissions of each other.

THE NATURE OF THE CLAIM

10. The Defendants are and, have been at all relevant times, engaged in the business of designing, manufacturing, producing, distributing, marketing and/or selling Skechers Toning Shoes under various brands or labels, including “Shape-Ups”, “Resistance Runner”, “Shape-ups Toners/Trainers” and “Tone-ups”.

11. These class proceedings concern the false, misleading and/or deceptive Representations made by the Defendants concerning the alleged Health Benefits associated with the Skechers Toning Shoes that were designed, manufactured, produced, distributed, marketed and ultimately offered for sale to the public by the Defendants.

12. The Defendants made the Representation that their Toning Shoes had been scientifically proven to provide significant Health Benefits as defined above, more so than ordinary running shoes.

13. These claims were not supported by verified facts or by any scientific evidence at the time they were made, and presently, they continue to be unverified.

14. By way of the Representation, the Defendants represented that their Toning Shoes had performance characteristics, uses, benefits and/or qualities that they did and do not have. The Defendants used exaggeration, innuendo and ambiguity as to the Health Benefits of its Toning Shoes. Such false, misleading or deceptive representations deceived or tended to deceive the Class Members.

15. The Skechers Toning Shoes were intended to be placed into the stream of commerce, to be distributed, offered for sale and sold to the Plaintiff and to the public in Ontario and in other Provinces and Territories in Canada.

16. Skechers knew or ought to have known that purchasers of these Toning Shoes would not be reasonably able to protect their interests, that such purchasers would be unable to receive a substantial benefit from the Toning Shoes and that consumers would be relying on the Defendants' untrue statement to their detriment.

17. The Representation was made for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants. The Representation was made knowingly or recklessly. The Representation was made to the public. The Representation was false or misleading in a material respect, namely as to the strengthening and toning benefits of the Defendants' Toning Shoes.

18. The Class Members have suffered and will suffer injuries, losses or damages as a result of the Defendants' conduct.

19. On May 16, 2012, the Defendant entered into a Settlement Agreement with the Federal Trade Commission (the "FTC"), simultaneously with the FTC's filing of a complaint against Skechers, relating to the conduct that is the subject matter of this Claim, with the U.S. District Court for the Northern District of Ohio Eastern Division.

20. Skechers USA has agreed to return \$40,000,000, minus administration expenses, to United States Purchasers of Skechers Toning Footwear.

21. Canadian consumers were never compensated for damages incurred as a result of purchasing the Defendants' Toning Shoes in reliance upon the Representation.

SCIENTIFIC CLAIMS

22. Skechers has claimed that as a result of the Health Benefits, users could “[g]et in shape without setting foot in a gym” and simply “shape up while you walk.” Skechers bolstered consumers' confidence by claiming on its website that “four clinical studies in the US and Japan show that Shape-ups increase muscle activity and energy consumption over standard fitness shoes.

23. In truth and in fact, these ‘representations’ were not substantiated at the times that they were made.

24. Virtually every independent scientist has verified that none of the benefits promised by the Defendants are actually realized by the consumer and that there is no evidence to support the claims that Skechers Toning Shoes provide any health benefits whatsoever compared to regular athletic and walking shoes.

25. 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.”

26. 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.”

27. 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”.

28. Not only does Skechers Toning Footwear 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 Toning Footwear;

29. The Defendants know or understand that the promotion and advertising of their Toning Shoes in part targets consumers and customers in Canada.

30. The Defendants placed these Toning Shoes into the stream of commerce in Ontario and elsewhere with the expectation that consumers, such as the Plaintiff and Class Members, would purchase the product based on their Representation.

THE REPRESENTATIVE PLAINTIFF

31. In 2010, the Plaintiff purchased a pair of Skechers Shape-Ups from Skechers Retail in Vaughan, Ontario for a purchase price of approximately \$100 plus taxes.

32. The Plaintiff purchased the Toning Shoes based on the Defendants' marketing and after having read the product's labelling. Specifically, he believed that the Skechers Shape-Ups Shoes would cause him to tone and strengthen his muscles and cause him to lose weight while he walked.

33. The Plaintiff has suffered damages as a result of purchasing the Toning Shoes, including the costs of purchasing these expensive Toning Shoes, including sales taxes.

CAUSES OF ACTION

Misrepresentation and Negligence of the Defendants

34. The Defendants breached their duty of care to the Plaintiff and to the Class Members by offering for sale Toning Shoes that were not fit for the purpose for which they were purchased, i.e. the purported Health Benefits. The Defendants produced and sold Toning Shoes to the Class Members in reliance upon the Defendants' untrue Representation. Class Members were unable to receive a substantial benefit from the Toning Shoes to their detriment.

35. The Class Members relied on the Representation made by the Defendants as to the performance characteristics, uses, benefits and/or qualities of the Toning Shoes. The Defendants used exaggeration, innuendo and ambiguity as to the Health Benefits of its Toning Shoes. In particular, the Class Members relied on the Defendants' Representations that wearing the Toning Shoes would result in:

- (a) Getting in shape without setting foot in a gym;
- (b) Promotion of weight loss, muscle tone and improving posture;
- (c) Tightening abdominal muscles;
- (d) Improving blood circulation;
- (e) Strengthening the back;
- (f) Firming buttocks muscles;
- (g) Toning and firming thigh muscles;
- (h) Firming calf muscles;
- (i) Increasing cardiovascular health;
- (j) Reducing stress on knee and ankle joints;
- (k) Relieving muscle tension and fatigue;
- (l) Engaging muscles not normally used when walking on hard ground;
- (m) Reducing impact on joints and lower back;
- (n) Improving quality of life by changing the way of walking; and
- (o) Improving stamina and metabolism.

36. The Defendants misrepresented to Class Members the performance characteristics, uses, benefits and/or qualities of the Toning Shoes. The Defendants did this with the full knowledge that the Class Members were relying on this information to inform their purchases. The Class Members had no other way of knowing of the false nature of the Defendants' Representation regarding the Toning Shoes. The aforesaid loss suffered by the Plaintiff and the Class Members was caused by this negligence and negligent misrepresentation, particulars of which include, but are not limited to, the following:

- (a) The Defendants failed to accurately represent the performance characteristics, uses, benefits and/or qualities of their Toning Shoes; and
- (b) The Defendants used exaggeration, innuendo and ambiguity as to the Health Benefits of its Toning Shoes.

37. By virtue of the acts and omissions described above, the Defendants were negligent and caused damage to the Plaintiff and to the Class Members.

38. The loss, damage and injuries were foreseeable.

39. The Defendants' negligence proximately caused the loss, damage, injury and damages to the Plaintiff and to the other Class Members.

CAUSATION

40. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants are the direct and proximate cause of the Plaintiff's and Class Members' injuries.

41. The Class Members have suffered real and substantial injury, economic loss, and damages arising from the aforesaid acts, omissions, wrong doings, and breaches of legal duties and obligations of the Defendants and are therefore entitled to the relief sought as well as judgment against the Defendants.

42. The Plaintiff pleads that by virtue of the acts and omissions described above, the Defendants are liable in damages to him and to the Class Members and that each Defendant is responsible for the acts and omissions of the other Defendants for the following reasons:

- (a) Each was the agent of the other;
- (b) Each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;
- (c) Each company entered into a common advertising and business plan to manufacture, distribute, market, test and sell the Toning Shoes;
- (d) Each Defendant owed a duty of care to the other and to each Class Member by virtue of the common business plan to manufacture, distribute, market, test and sell the Toning Shoes; and
- (e) The Defendants intended that their businesses be run as one global business organization.

43. The Plaintiff and the other Class Members are entitled to legal and equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate.

44. The Plaintiff and Class Members are entitled to recover damages and costs of administering the plan to distribute the recovery of the action in accordance with the *Consumer Protection Act*.

STATUTORY REMEDIES

45. The Defendants are in breach of the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act* and/or other similar/equivalent legislation.

46. The Plaintiff pleads and relies upon competition, consumer protection and trade legislation and common law, as it exists in this jurisdiction, and the equivalent/similar legislation and common law in other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendants' inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

Breach of the *Sale of Goods Act*

47. At all times relevant to this action, the Plaintiff and Class Members were "buyer[s]" within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

48. At all times relevant to this action, the Defendants were “seller[s]” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

49. The transactions by which the Plaintiff and Class Members purchased their “goods” from the Defendants were “sale[s]” within the meaning of those terms as defined in s.1 of the *Sale of Goods Act*.

50. The Defendants were aware that the consumers purchased the Toning Shoes for the particular purpose of the alleged Health Benefits based on their marketing and advertising and there is therefore an implied warranty or condition that the goods will be reasonably fit for such purpose.

51. The Defendants committed a fault or wrongful act by breaching the implied condition as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed and/or advertised, as per s.15 of Part I of the *Sale of Goods Act*, the Defendants are liable. The Class is entitled to maintain an action for breach of warranty under ss. 51 & 55 of the *Sale of Goods Act*.

Breach of the *Consumer Protection Act*

52. At all times relevant to this action, the Plaintiff and Class Members were “consumer[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

53. At all times relevant to this action, the Defendants were “supplier[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

54. The transactions by which the Plaintiff and Class Members purchased their Toning Shoes from the Defendants were “consumer transaction[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

55. The Defendants have engaged in an unfair practice by making a Representation to Class Members which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss.14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Representing that the Toning Shoes had performance characteristics, uses, benefits and/or qualities, which they did not have;
- (b) The Defendants used exaggeration, innuendo and ambiguity as to the purported Health Benefits of its Toning Shoes; and
- (c) The Defendants knew or ought to have known about the substantial risk that the consumer would be unable to receive a substantial benefit from the Toning Shoes.

56. The Plaintiff states that the Representation was false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Plaintiff and the Class to purchase the Toning Shoes as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

57. The Plaintiff and the Class Members relied on the Representation.

58. The reliance upon the Representation by the Plaintiff and Class Members is established by his or her purchase and/or use of the Toning Shoes. Had the Plaintiff and Class Members

known that the Representation were false and misleading they would not have purchased and/or used the Toning Shoes.

Breach of the *Competition Act*

59. Further or alternatively, the Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render the Defendants jointly and severally liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

60. The Defendants made the Representation to the public and in so doing breached s.52 of the *Competition Act* because the Representation:

- (a) Was made for the purpose of promoting the business interests of the Defendants;
- (b) Was made to the public;
- (c) Was false and misleading in a material respect; and
- (d) Stated performance characteristics, uses, benefits and/or qualities of the Toning Shoes that was not based on adequate and proper testing.

61. The Plaintiff and Class Members relied upon the Representation by buying and/or using the Toning Shoes and suffered damages and loss.

62. Pursuant to s. 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from the breach of s. 52.

63. Pursuant to s. 36 of the *Competition Act*, the Plaintiff and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

64. The Plaintiff and Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

Compensatory Damages (Economic and Non-Economic Losses)

65. As a result of their regretful purchase of the Toning Shoes, the Plaintiff and the Class Members have suffered and will suffer a loss, damage, injury and sustained damages, the particulars of which include, *inter alia*:

- (a) The costs of purchasing the Toning Shoes; and
- (b) Other damages as described herein.

Punitive, Exemplary and Aggravated Damages

66. The Defendants have demonstrated and taken a cavalier and arbitrary approach with respect to their obligations to the Class Members.

67. At all material times, the conduct of the Defendants as set forth above was malicious, deliberate and oppressive towards its customers and the general public, and the Defendants conducted themselves in a wilful, wanton and reckless manner, as set forth above.

68. The Defendants' aforesaid acts, omissions, wrongdoings and breaches of legal duties and obligations constitute unfair business practices and dealings with its customers and with the public.

69. As a result of the aforesaid acts, omissions, wrong doings and breaches of legal duties and obligations by the Defendants, the Plaintiff and Class Members have sustained substantial injury, economic loss and damages, and are entitled to awards of aggravated, punitive, and exemplary damages.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

70. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendants' conduct, including the alleged breaches of any of the *Sale of Goods Act*, the *Consumer Protection Act*, or the *Competition Act* constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

71. The Plaintiff reserves the right to elect at the Trial of the Common Issues to Waive the Tort of Negligence and to have damages assessed in an amount equal to the gross revenues earned by the Defendants or the net income received by the Defendants or a percent of the sale of the Toning Shoes as a result of the Defendants' false Representation which resulted in revenues and profit for the Defendants.

72. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the sale of the Toning Shoes and as such, *inter alia*, that:

- (a) The Defendants have obtained an enrichment through revenues and profits from the sale of the Toning Shoes;
- (b) The Plaintiff and other Class Members have suffered a corresponding deprivation including the price of the Toning Shoes; and
- (c) The benefit obtained by the Defendants and the corresponding detriment experienced by the Plaintiff and Class Members has occurred without juristic reason. Since the monies that were received by the Defendants resulted from the Defendants' wrongful acts, there is and can be no juridical reason justifying the Defendants' retaining any portion of such money paid.

73. The Defendants are constituted as constructive trustees in favour of the Class Members for all of the monies received because, among other reasons:

- (a) The Defendants were unjustly enriched by receipt of the monies paid for the Toning Shoes;
- (b) The Class Members suffered a corresponding deprivation by purchasing the Toning Shoes;
- (c) The monies were acquired in such circumstances that the Defendants may not in good conscience retain them;
- (d) Equity, justice and good conscience require the imposition of a constructive trust;

- (e) The integrity of the market would be undermined if the court did not impose a constructive trust; and
- (f) There are no factors that would render the imposition of a constructive trust unjust.

74. Further, or in the alternative, the Plaintiff claim an accounting and disgorgement of the benefits which accrued to the Defendants.

COMMON ISSUES

75. Common questions of law and fact exist for the Class Members and predominate over any questions affecting individual members of the Class. The common questions of law and fact include:

- (a) Did the Defendants advertise, represent or hold themselves out as producing or manufacturing Toning Shoes that would yield significant the Health Benefits?
- (b) Did the Defendants impliedly warrant these products for fitness for a particular purpose?
- (c) Did the Defendants intend that the Toning Shoes be purchased by the Plaintiff, Class Members and/or others?

- (d) Did the Defendants intend or foresee that the Plaintiff or other Class Members would purchase the Toning Shoes based on the Representation regarding the Health Benefits?
- (e) Did the Defendants engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Skechers Toning Footwear?
- (f) Are the Defendants liable to the Class Members for reimbursement of the purchase price of the Skechers Toning Footwear as a result of their misconduct and unfair business practices?
- (g) Should an injunctive remedy be ordered to prohibit the Defendants from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- (h) Are the Defendants responsible to pay compensatory and/or punitive damages to class members and in what amount?
- (i) Did the Defendants' negligence proximately cause loss or injury and damages?
- (j) Did the Class Members suffer direct losses or damages?
- (k) Did the Class Members suffer indirect losses or damages?
- (l) Did the Defendants' acts or practices breach the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act* or other similar/equivalent legislation.

EFFICACY OF CLASS PROCEEDINGS

76. The members of the proposed Class number in the hundreds of thousands. As a result, the Class is so numerous that joinder in a single action is not practical. However, proceeding with the Class Members' claim by way of a class proceeding is both practical and feasible.

77. Class counsel proposes to prosecute these claims on behalf of the Class through this Action and through other actions commenced by the offices of Consumer Law Group. These actions include *Jason Angell v. Skechers U.S.A. Inc et alii*, an action commenced before the Quebec Superior Court in Montreal (April 12, 2012, File No.: 500-06-000608-121).

78. Individual members of the proposed class do not have a significant interest in individually controlling the prosecution of their claim by way of separate actions and individualized litigation would also present the potential for varying, inconsistent and contrary judgments and would magnify the delay and expense to all parties resulting from multiple proceedings on the same issues. The cost to pursue individual actions concerning this claim would effectively deny the individual Class Members access to the Courts and appropriate legal relief.

79. The Plaintiff will fully and adequately protect the interests of the proposed Class Members and has retained counsel to represent the Class Members who are qualified to prosecute complex class action litigation. Neither the Plaintiff nor his solicitors have interests which are contrary to, or conflicting with, the interests of the proposed Class.

LEGISLATION

80. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Courts of Justice Act*, the *Consumer Protection Act*, the *Negligence Act*, the *Sale of Goods Act*, the *Competition Act* and other Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

81. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) Defendant Skechers USA Canada Inc. has a registered office in Ontario;
- (b) The Defendants engage in business with residents of Ontario;
- (c) The Defendants derive substantial revenue from carrying on business in Ontario;
and
- (d) The damages of Class Members were sustained in Ontario.

82. The Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

Service Outside of Ontario

83. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h), (o) and (p) of Rule 17.02 of the *Rules of Civil Procedure*. Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));
- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (e) Against a person outside Ontario who is necessary and/or proper party to a proceeding properly brought against another person served in Ontario; ie. Skechers USA Canada Inc. (rule 17.02(o));
- (f) Against a person carrying on business in Ontario (rule 17.02(p)); and
- (g) The claim is authorized by statute, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)).

Date: September 21, 2012

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SKECHERS USA CANADA INC. et *alli*
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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