THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

IN RE: SKECHERS TONING SHOES PRODUCTS LIABILITY LITIGATION	MASTER FILE No. 3:11-MD-2308-TBR MDL No. 2308 Honorable Thomas B. Russell
This document relates to: Grabowski v. Skechers U.S.A., Inc. S.D. California, C.A. No. 3:10-01300	Case No.: 3:12-CV-00204-TBR

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

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Plaintiff Tamara Grabowski ("Plaintiff Grabowski") and Plaintiff Venus Morga ("Plaintiff Morga") (together, "Plaintiffs") respectfully submit this reply memorandum in support of the Motion for Preliminary Approval of Class Action Settlement ("Motion") and entry of the [Proposed] Order Preliminarily Approving Class Action Settlement, Conditionally Certifying the Settlement Class, and Providing for Notice and Scheduling Order.[1]

I. Introduction

The lawyers for a plaintiff in a later-filed, duplicative action urge this court to deny preliminary approval of this outstanding settlement. These lawyers do so not because of any concern for the class or any problem with the settlement, but to better position themselves for attorneys' fees.

To begin, these lawyers ("Stalker's Counsel") are not counsel of record in the case that has been settled and that is the subject of this motion. Second, they have done nothing to bring about the result in this case. In fact, despite a factual recitation (accompanied by a declaration) that would lead a reader to draw incorrect conclusions, the unfortunate history of their actions reveals a consistent pattern of placing their personal interests ahead of the class, a concern already addressed by the district judge presiding over the *Stalker* case before it was transferred to this Court.

As detailed in the opening brief in support of preliminary approval, Plaintiff Tamara Grabowski, through her counsel ("Proposed Class Counsel"), has obtained an outstanding settlement for the class, and her lawyers have earned the privilege of Class Counsel appointment. Simply put, Stalker's Counsel do not have the reputation or track record in consumer protection actions to orchestrate a settlement reached hand-in-hand with the Federal Trade Commission ("FTC"). In fact, only one other time has the FTC worked so closely with private plaintiff's

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

counsel, and that was in another action handled by Proposed Class Counsel, *Altieri v. Reebok International Ltd*. The *Altieri* action resulted in a $25 million cash settlement.

The proposed settlement here presents another historic first. For the FTC, it is "the largest ever truth-in-advertising case of its kind that will result in consumer restitution."[2] The proposed settlement is a record breaker for the FTC because of the work done by Proposed Class Counsel, and not because of anything done by Stalker's Counsel.

Proposed Class Counsel are already hard at work administering the proposed settlement. A benefit of the unique partnership between Proposed Class Counsel and the FTC is that Proposed Class Counsel can more effectively notify members of the proposed class about the settlement. After careful coordination with the FTC and the many states that have joined in the settlement and after establishing the claim submission infrastructure supervised by Proposed Class Counsel, on May 16, 2012, the FTC held a widely publicized press conference to announce the settlement, including the FTC portion. On the same day, Proposed Class Counsel filed this preliminary approval motion [Dkt. No. 83] and activated the settlement website to allow potential class members to file claims when they heard news of the settlement. The resulting news coverage has been exceptional. Every major news outlet, including every major network and over 2,000 print and online news sources, reported this settlement. To date, more than 280,000 claims have been submitted online and by hard copy through the claim administration system set up by Proposed Class Counsel, representing over $26 million in requested refunds. Proposed Class Counsel have been supervising this claims process and have handled hundreds of inquiries from potential class members. *See* Supplemental Declaration of Timothy G. Blood in Support of Motion for Preliminary Approval of Class Action Settlement ("Supp. Blood Decl.")

[2] See http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice_Press&id=379256&v= article10 (last visited June 20, 2012).

at ¶¶ 16, 17.

Meanwhile, Stalker's Counsel have filed the only opposition to the motion for preliminary approval ("Opposition") [Dkt. No. 95]. Tellingly, Stalker urges the court to deny preliminary approval of the proposed settlement, not because the settlement is anything other than an excellent one for the proposed class, but because Stalker and her counsel want to angle for attorneys' fees and an incentive award. Their very opposition, which puts their interests ahead of the members of the proposed class, demonstrates that neither Stalker nor her counsel would be adequate to represent the proposed class. Oddly, they also claim the proposed preliminary approval order does not preserve Stalker's right to opt-out of the class. Although they are flatly wrong, Proposed Class Counsel wrote Stalkers' Counsel, offering to allow Stalker to opt out. Not surprisingly, Stalkers' counsel declined the offer. Supp. Blood Decl. at ¶15 and Ex. 2.

Stalker's opposition provides absolutely no reason to deny preliminary approval. It is based on incorrect facts and is utterly without legal basis. Stalker's opposition should be rejected and the proposed settlement should be preliminarily approved, including appointment of "Class Counsel" as defined in the Settlement Agreement, so that the proposed class can be formally noticed and the settlement can move to the next phase in the approval process.

II. Argument

Stalker and her counsel make four arguments, more or less, for why the settlement process should be disrupted. First, they argue that the court should "invite [] submissions from all interested counsel who wish to serve" in the role of "lead counsel" (Opposition at 1) instead of appointing Proposed Class Counsel, citing to an unrelated order entered by the Court concerning organization of plaintiffs' counsel in the personal injury actions transferred here by the Judicial Panel on Multidistrict Litigation (*id.* at 4) and based on "facts" that are simply

incorrect. The actual facts demonstrate why Stalker's Counsel should not be appointed lead counsel.

Second, Stalker argues that the preliminary approval motion requests that the Court award all of the attorneys' fees to Proposed Class Counsel to distribute "in their 'sole discretion.'" Opposition at 1. Preliminarily approving the proposed settlement does not result in any payment of attorneys' fees. An application for an award of attorneys' fees will be made at the end of the process, in conjunction with the final settlement fairness hearing. At this stage, the Court need only "make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement and date of the final fairness hearing." *Manual for Complex Litigation (Fourth)*, §21.633, at 321 (2004).

Additionally, proving the adage "no good deed goes unpunished," Proposed Class Counsel negotiated the attorneys' fees provision expressly to permit those who filed duplicative actions to receive payment - even though the case law is clear that attorneys who have not contributed to the outcome of the action are not entitled to attorneys' fees. This was done to protect the settlement against problems that can arise over attorneys' fees. The attorneys' fees provision is structured to allow Proposed Class Counsel to pay the other plaintiffs' lawyers in a transparent, ethical manner in compliance with Fed. R. Civ. Proc. 23(e)(3), even though those lawyers have no right to an award of fees.

Third, Stalker opposes preliminary approval because she wants to be able to apply for a class representative incentive award. At the appropriate time, she is free to do so (although her basis for such an award appears lacking). Regardless, her potential, future incentive award application simply provides no basis to deny preliminary approval of this settlement.

Finally, Stalker asserts that the proposed "Preliminary Approval Order issues injunctions against the prosecution of other filed cases against Skechers, without sufficient clarification that those cases may proceed as opt-out individual cases pursuant to Rule 23(b)(3)." Opposition at 2. Factually, Stalker is wrong, and of course she (and every other class member) has a right to opt out under Fed. R. Civ. Proc. 23(c)((2)(B)(v). In any event, Stalker has made it clear that she does not want to opt out of the proposed settlement, so her motives in even raising the issue are unclear. Supp. Blood Decl., ¶15 and Ex. 2.

A. Proposed Class Counsel, Not Stalker's Counsel, Have Demonstrated They Meet The Test to Serve as Class Counsel

Stalker's Counsel ask the Court to invite submissions from "all interested counsel to serve" as Class Counsel, presumably so they can be appointed, even though they have done nothing, while Proposed Class Counsel have worked for many months to bring about an outstanding settlement and continue to work to obtain approval of the settlement and oversee the already massive class member response to the proposed settlement. Stalkers' Counsel's attempts to disrupt this process should be rejected. There is no legal rule or practical reason to bring in new lawyers with no experience with this settlement and limited experience with this case.

Stalker's Counsel suggests that Proposed Class Counsel should not be appointed because Stalker's Counsel better meet the standard set forth in Rule 23(g)(1)(A) of the Federal Rules of Civil Procedure.[3] Under Rule 23(g)(1)(A) the court, in appointing Class Counsel, must consider:

[3] Stalker's Counsel argues that if the Motion is granted, the "Court will not have the opportunity to consider" evidence demonstrating that they "first identified and investigated the potential claims against Skechers." Opposition at 6. But the Court has an opportunity to consider such evidence because it is in the Declaration of Christopher J. Morosoff.

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law;

(iv) and the resources that counsel will commit to representing the class.

As demonstrated in the Motion and accompanying declarations, Proposed Class Counsel readily satisfy these factors. *See* Opening Brief at 21; Declaration of Timothy G. Blood at ¶¶ 4-5, Exhibit A [Dkt. No. 83-2]; Declaration of Janine L. Pollack in Support of Motion for Preliminary Approval at ¶¶3-4, Exhibit A [Dkt. No. 83-5].

Stalker's Counsel point to only part of the first factor — "the work counsel has done in identifying . . . claims in the action," arguing that Proposed Class Counsel were not the first to "identify" the claims because Stalker's Counsel identified claims in a *different* matter against a *different* company, known as MBT. Opposition at 6. Even then, Stalker's Counsel's did little more than suggest an idea for a case against a different company. With MBT, Stalker's Counsel wanted to file a complaint with allegations that were not properly vetted and without conducting an adequate investigation. They prepared a bare-bones complaint patterned after a complaint prepared by Mr. Blood in another case. Mr. Blood, however, insisted that if they wanted him and his firm to be involved in a case against MBT, the case had to be properly investigated and worked up. Mr. Blood and his firm, not Stalker's Counsel, conducted the pre-suit investigation and case work-up, including locating, retaining and working with an expert witness to draft a complaint. However, they did not file the case with Stalker's Counsel. *See* Supp. Blood Decl. at ¶¶4-9. Stalker's Counsel went on to file the action against MBT (using their version of the complaint, which required three sets of amendments to survive dismissal on the pleadings for

lack of particularity and merely alleging non-actionable "puffery"). *Id*. at ¶8. Presumably, if that case is ultimately successful, they will be paid (however, in sharp contrast to this case, virtually nothing has happened in MBT aside from motions to dismiss).

With regard to litigation against Skechers, Stalker's Counsel's actions have been less than exemplary and already have been criticized. First, they filed a copy cat of *Grabowski*. Supp. Blood Decl. at ¶11. Then, just one month after their removal to federal court, and without taking any written discovery or depositions, and without submitting any expert testimony, they filed a motion for class certification. In response, the district court vacated the class certification motion and stayed the action in favor of *Grabowski*. *Id*. at ¶11.

Stalker's Counsel also suggest that Proposed Class Counsel should not be appointed Class Counsel because Proposed Class Counsel "attempt[ed] to hastily and improperly usurp the Court's supervisory role in approving the settlement." Opposition at 2. Stalker's Counsel's ridiculous accusation is based on one sentence that appeared on the settlement website for about 26 hours, which stated: "The Court has designated attorneys Timothy G. Blood, of Blood Hurst & O'Reardon, LLP and Janine L. Pollack, of Milberg LLP to represent you and the other Class Members in this lawsuit." *Id*. at 3. That sentence, which is boilerplate language on settlement websites under ordinary circumstances, was erroneously written by the claims administrator, not Proposed Class Counsel. It appeared in the "Frequently Asked Questions" link when the website went live on May 16, 2012, to handle claims expected to be generated by the FTC press conference. Supp. Blood Decl. at ¶12. Stalker's Counsel fails to note that when Proposed Class Counsel noticed the error the very next day, on May 17, 2012, they instructed the website administrator to immediately correct it to read (and currently reads): "Timothy G. Blood, of

Blood Hurst & O'Reardon, LLP and Janine L. Pollock, of Milberg LLP are proposed Class Counsel to represent you and the other Class Members in this lawsuit." *Id*. at ¶13.

That Proposed Class Counsel acted immediately to correct the website to ensure that class members have accurate information further evidences the adequacy of Proposed Class Counsel to represent the potential class. See *id*. In stark contrast, Stalker's Counsel should have noted in their Opposition that the website had long since been corrected.

Stalker's demand to apply for "lead counsel" is without merit and no basis to deny preliminary approval of the proposed settlement.

B. Stalker's Counsel Does Not Understand the Purpose of the Attorneys' Fees Provision

Stalker's Counsel objects that the attorneys' fees provision in the Settlement Agreement authorizes Class Counsel to distribute fees in their "sole discretion." They misunderstand the purpose of this provision and how it works. Section IX.B. and C. of the Settlement Agreement give Proposed Class Counsel discretion to pay to counsel in the "Later-Filed Actions" a portion of the attorneys' fees and expenses awarded by the Court to Proposed Class Counsel because the attorneys in the Later-Filed Actions are not otherwise entitled to fees from this settlement.

The problem which we believe the attorneys' fees provision solves is this: A lawyer is not entitled to a fee if he or she did not help bring about the benefit to the class. *See In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 181 (3rd Cir. 2005) (copycat complaints "will not result in fee awards for each firm that files a complaint: such copycat complaints do not benefit the class, and are merely entrepreneurial efforts taken by firms attempting to secure lead counsel status."); *In re Honeywell Int'l, Inc. Sec. Litig.*, No. 00-cv-3605, 2004 U.S. Dist. LEXIS 28177, No. 00-3605, at *3 (D.N.J. Oct. 12, 2004) ("[A]ttorneys who confer no benefit on the class and simply serve the interests of an individual plaintiff are not entitled to be compensated from the

common fund.") (citation omitted). Because the plaintiffs' counsel in the "Later-Filed Actions" did not contribute to the proposed settlement (a fact with which Skechers and the FTC agree), these attorneys would not be entitled to a payment of attorneys' fees, even if they were to file an application for fees. Nonetheless, recognizing the problems this can cause for the settlement, Proposed Class Counsel devised a creative solution that will allow lawyers with no formal right to fees to still be paid something.

Under §IX.C of the Settlement Agreement, Class Counsel intend to make an application for an award of attorneys fees and then, out of their award, pay the lawyers in the "Later-Filed Actions" a reasonable portion of their fee in return for the dismissal of Later-Filed Actions. Although Class Counsel will give up some of their fees, they will reduce the prospect of unnecessary hurdles to settlement approval (similar to the behavior now exhibited by Stalker's Counsel), so that the benefits of the settlement – the $40 million – can be paid to the proposed class as promptly as possible. This problem and the solution has been explained to plaintiffs' counsel in all of the Later-Filed Actions, but only the Stalker's Counsel complain.

At any rate, none of the arguments Stalker's Counsel make here justify denying preliminary approval.

C. Stalker's Desire for an Incentive Award is not a Basis to Deny Preliminary Approval

Stalker next opposes preliminary approval because she wants to be able to apply for a class representative incentive award. While it appears that she has no basis to receive such an award (she is not the representative of a certified class), at the appropriate time, she is free to make such a request. However, her desire to seek a class representative incentive award simply provides no basis to deny preliminary approval.

D. The Proposed Settlement Preserves All Class Members' Rights to Opt-Out and File Individual Actions

Finally, Stalker asserts that the proposed Preliminary Approval Order would prevent her from opting out of the class and pursuing her case individually. No fair (or even tortured) reading of the proposed order supports this position. Under Rule 23(c)((2)(B)(v), a class member has a right to exclude him or herself from the class, and in doing so, preserve his or her right to pursue individual litigation. *See Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415, 426 (6th Cir. 1999).

Regardless, this issue appears to be more pretense than actual concern. After receiving Stalker's opposition brief, Proposed Class Counsel contacted Stalker's Counsel to let them know that if Stalker wanted to opt out of the proposed class, she could do so. Stalker declined the invitation. Supp. Blood Decl., ¶15 and Exs. 1 and 2.

III. Conclusion

For the reasons set forth above and in the Motion, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement, approve the proposed notice program and set a date for the fairness hearing.

Dated: June 25, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed June 25, 2012.

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