

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

IN RE: SKECHERS TONING SHOES
PRODUCTS LIABILITY LITIGATION

MASTER FILE No. 3:11-MD-2308-TBR

MDL No. 2308

This Document Relates To:

Honorable Thomas B. Russell

Grabowski v. Skechers U.S.A., Inc.
S.D. California, Case No. 3:10-01300

Case No. 3:12-cv-00263-TBR

– and –

Final Fairness Hearing: March 19, 2013
1:00 p.m.

Stalker v. Skechers USA Inc.,
C.D. California, Case No. 2:10-cv-05460

**APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS BY
PLAINTIFF SONIA STALKER'S COUNSEL
[Fed. R. Civ. Proc. 23(h) & 54(d)(2)]**

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I. Introduction

Counsel for Plaintiff Sonia Stalker,¹ the second person to file a class action case against Skechers for false advertising, seeks an award of attorneys' fees and costs. Stalker's counsel were the first attorneys to identify the class of persons seeking relief against Skechers for false advertising, and in fact brought the idea to the attorneys who would become Class Counsel. These attorneys then filed the case without Stalker's counsel, resulting in their appointment as Class Counsel. It was the investigation and actions of Stalker's counsel that set in motion Class Counsel's filing of their case, allowing Class Counsel to win the "race to the courthouse." Under these circumstances, caselaw provides that Stalker's counsel should receive an award of fees, as an attorney's "discover[y of] wrongdoing through his or her own investigation" "creates a substantial benefit for the class."

Moreover, Stalker's counsel logged over 520 hours of work on the case. Defense counsel admitted that this aggressive representation by Stalker's counsel placed its client in "a multi-front war." Such vigorous representation of a proposed class commonly incentivizes a class action defendant to settle.

Simple fairness also supports an award of fees. Stalker's counsel should not be deprived of all fees simply because the BHO and Milberg firms chose to take the Stalker Counsel's information and file their cases without them. By this Application, Stalker's Counsel seeks an award of \$750,000.00 from the \$5,000,000.00 in proposed fees under the settlement, representing 15% of the total fees requested by Class Counsel, and the reimbursement of \$1,161.00 in costs.

¹ Plaintiff Sonia Stalker ("Stalker") is the plaintiff in *Sonia Stalker v. Skechers USA Inc.*, original Central District of California Case No. 2:10-cv-05460, filed July 2, 2010, and transferred to this Court as Case No. 3:12-cv-00263, received on May 22, 2012.

II. Factual and Procedural Background

On May 16, 2012, the law firms of Blood Hurst & O'Reardon LLP ("BHO") and Milberg LLP ("Milberg"), along with other counsel, filed in this Court a Motion for Preliminary Approval of Class Action Settlement [ECF No. 83 in 11-md-02308] ("Motion"). Among other things, the Motion requested that this Court appoint the BHO and Milberg firms as "Class Counsel" (Motion at 2) and that the Court rule that "Class Counsel, in their sole discretion, shall allocate and distribute [an] award of Attorneys' Fees and Expenses among Plaintiffs' Counsel..." Settlement Agreement [ECF No. 82 in 11-md-02308] at 26. The Motion indicated a forthcoming request for attorneys' fees for Class Counsel in the amount of \$5,000,000.00. *Id.* at 26.

The undersigned counsel objected to the Motion on the basis that, among other things, the proposed scheme whereby Class Counsel held absolute power to divide attorneys' fees among plaintiffs' counsel was prohibited by law, as the Court must supervise any award of fees. *See* Opposition of Plaintiff Sonia Stalker and Her Counsel to Motion for Preliminary Approval of Class Action Settlement [ECF. No. 95 in 11-md-02308] ("Opposition") at 7-9. On this basis (and on another basis urged by Stalker's counsel), this Court declined initial approval of the proposed settlement, stating on the fees question that "the Court finds that Stalker's argument has merit." August 8, 2012, Order [ECF No. 145 in 11-md-02308] ("August 8, 2012, Order") at 5.

In the Opposition, the undersigned counsel explained their belief that they are entitled to an award of attorneys' fees based on the facts of how this litigation had its genesis:

Plaintiff Stalker and her counsel are in a unique position to object to the conduct of the BHO and Milberg firms. This is because two lawyers representing Stalker were in fact the catalyst for the BHO and Milberg firms' filing of their suits against Skechers, and were apparently the first lawyers to discover the existence of the proposed class and their claims against Skechers. Lawyers from the BHO and Milberg firms have represented to the Court that they first began investigating this

case in “May of 2010.”^[fn] What these Declarations fail to mention, however, is that Stalker attorneys Ray Mandlekar and Chris Morosoff, in April of 2010, contacted both the BHO and Milberg firms and informed them of the existence of a class of persons having these false advertising claims against Skechers. Personnel from both the BHO and Milberg firms responded that they had never heard of such claims – *i.e.*, acknowledging that Mandlekar and Morosoff were the original source of the claims – but then later proceeded to file their cases without the participation of Mandlekar and Morosoff. *See* Morosoff Decl. at ¶¶3-10.^[fn]

Opposition at 3-4. The Opposition included a Declaration by Mr. Morosoff attesting to these facts. *See* Declaration of Christopher J. Morosoff in Support of Opposition to Motion for Preliminary Approval of Class Action Settlement [ECF No. 94 in 11-md-02308] (“Morosoff Declaration”) at ¶¶3-11.² Significantly, while Mr. Blood of the BHO firm filed a declaration in response, he did not dispute this chronological sequence of events or deny these events occurred. *See* Supplemental Declaration of Timothy G. Blood in Support of Motion for Preliminary Approval of Class Action Settlement [ECF No. 104-1 in 11-md-02308] (“Blood Supp. Decl.”).

While the BHO firm succeeded in winning the “race to the courthouse,” it was not by that much. The BHO firm filed its case on June 18, 2010; Stalker filed her case on July 2, 2010. And notably, the Milberg firm did not file its case until after Stalker did, on August 25, 2010. Stalker was the first plaintiff to serve Skechers with a complaint. *See* Mandlekar Decl. at ¶4.

From inception until the BHO firm’s filing of the Motion, Stalker’s counsel aggressively litigated her case. They were the first counsel to file a class certification motion. Her counsel propounded discovery and engaged in meet-and-confer efforts. They also opposed lengthy motions

² For the Court’s convenience, the Morosoff Declaration is attached as Exhibit A to the Declaration of Ray A. Mandlekar in Support of Application for Attorneys’ Fees and Costs (“Mandlekar Declaration”).

to dismiss and to stay filed by Skechers. *See* Mandlekar Decl. at ¶18 and Exhibit E thereto. Stalker’s counsel logged over 520 hours in pursuit of the class’s claims. *See* Mandlekar Decl. at ¶18; Declaration of Greg Hafif In Support of Application for Attorneys’ Fees and Costs (“Hafif Declaration”) at ¶10.

At a hearing before this Court, counsel for Skechers admitted that this heavy activity by Stalker’s counsel exerted pressure on it. *See* July 24, 2012, Transcript of Preliminary Settlement Hearing Before Honorable Thomas B. Russell United States District Senior Judge (a portion of which is attached as Exh. D to the Mandlekar Decl.) at 21:10-12 (“They [*i.e.*, Stalker’s counsel] have been a cost on this process to us. I’ve been fighting a multi-front war with them until they were stayed by Judge Otero”).

III. Argument

A. This Court’s Standard Governing an Award of Fees

In this Court’s August 8, 2012, Order, it stated that:

Counsel seeking an award of fees and expenses must clearly establish a connection between the tasks they performed and the benefit accruing to the class as a result. Mere arguments that counsel’s actions benefited the class without a concrete demonstration of that benefit will be insufficient to receive an award. “Courts discharging [the responsibility of awarding fees] have looked to a variety of factors. One fundamental focus is the result actually achieved for the class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members.” Fed. R. [Civ. Proc.] 23 advisory committee’s notes for 2003 amendments. The Court will be guided by this “basic consideration” when addressing any award of fees and expenses.

August 8, 2012, Order at 7-8.³ As discussed below, Stalker’s counsel is able to make this showing and support it with caselaw.

B. An Award of Fees is Justified Because Stalker’s Counsel First Identified the Class and Was the Reason for the BHO/Milberg Filings Which Resulted in the Settlement

As discussed, Stalker’s counsel were the first attorneys to discover the existence of the class, and in fact brought the idea to the BHO and Milberg firms. While attorneys for the BHO and Milberg firms stated that they first began investigating this case in “May of 2010,”⁴ Morosoff and Mandlekar first contacted them about the case in April of that year. *See* Morosoff Decl. at ¶6, ¶9; Mandlekar Decl. at ¶9, ¶12. Personnel from both the BHO and Milberg firms responded that they had never heard of such claims – *i.e.*, acknowledging that Mandlekar and Morosoff were the original source of the claims. *See* Morosoff Decl. at ¶10; Mandlekar Decl. at ¶13. Mr. Blood has not denied that these events occurred or challenged their chronology. *See* Blood Supp. Decl.

On these facts, caselaw provides that Stalker’s counsel should receive an award of fees. As one court stated:

If an attorney creates a substantial benefit for the class in this period [before the appointment of lead counsel]– by, for example, discovering wrongdoing through his

³ The authority cited by the Court permits an award of fees to attorneys other than class counsel: “In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel” Fed. R. Civ. Proc. 23, Notes of Advisory Committee on 2003 Amendments.

⁴ *See* Declaration of Timothy G. Blood in Support of Motion for Preliminary Approval of Class Action Settlement [ECF No. 83-2 in 11-md-02308] at ¶4 (“For my firm, this investigation began in May of 2010, when we began to research advertising claims about ‘toning’ footwear”); Declaration of Janine L. Pollack in Support of Motion for Preliminary Approval of Class Action Settlement (“Pollack Decl.”) [ECF No. 83-5 in 11-md-02308] at ¶4 (“This investigation began in May of 2010, when we began to research advertising claims about ‘toning’ footwear”).

or her own investigation, or by developing legal theories that are ultimately used by lead counsel in prosecuting the class action— then he or she will be entitled to compensation whether or not chosen as lead counsel.

In re Adelpia Communs. Corp. Sec. & Derivative Ltlig., 2008 U.S. Dist. LEXIS 67220, *15-*16 (S.D.N.Y. Sept. 3, 2008) (quoting *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 195 (3d Cir. 2005)).

The efforts of Stalker’s counsel satisfy this standard. It is undisputed that Stalker’s counsel “discover[ed] wrongdoing through [their] own investigation” and communicated this discovery to Class Counsel. As acknowledged by caselaw, such action “creates a substantial benefit for the class” and warrants an award of fees. *Adelpia Communs.*, 2008 U.S. Dist. LEXIS 67220, *15-*16; *Cendant Corp.*, 404 F.3d at 195.

These efforts by Stalker’s counsel similarly satisfy this Court’s requirement that a request for fees should be based on a “benefit accruing to the class.” August 8, 2012, Order at 7-8. As just stated, caselaw recognizes that the discovery of wrongdoing “creates a substantial benefit for the class.” Indeed, the independent discovery of wrongdoing by Stalker’s counsel, and their sharing of this information with the BHO firm, was the genesis of this litigation and the resulting settlement. It was the Stalker counsel’s early efforts that allowed the BHO firm to win the “race to the courthouse.” The Stalker counsel’s actions directly set in motion the events culminating in this settlement. To the extent this settlement creates a “benefit accruing to the class” (which it does), so inexorably did the actions of the Stalker counsel, which enabled the necessary events leading to that settlement.

Simple fairness also supports an award of fees here. Stalker’s counsel should not be deprived of all fees simply because the BHO and Milberg firms chose to take the Stalker Counsel’s information and file their cases without them. Nor would it be fair that an award of fees would turn

completely on the fact that the defendant picked firms (*e.g.* BHO and Milberg) with which to negotiate a settlement to the exclusion of others, resulting in a windfall for these firms.

C. An Award of Fees is Justified Because the Stalker Counsel's Work Created Pressure on Skechers to Settle

Stalker's counsel put in approximately 520 hours of work in the case. Defense counsel admitted that this placed its client in a draining "multi-front war." Mandlekar Decl. Exh. D. Such vigorous representation of a proposed class commonly incentivizes a class action defendant to settle. As can be seen by the included Declarations, these requesting counsel seem to be the only firm who began formal discovery and had a class certification motion ready to be heard until the case was stayed. This type of pressure is exactly what makes a defendant settle.

IV. Conclusion

For the foregoing reasons, Stalker's Counsel respectfully requests this Court issue an order awarding them \$750,000.00 in attorneys' fees from the \$5,000,000.00 in proposed fees under the settlement, and the reimbursement of \$1,161.00 in costs.⁵

DATED: December 28, 2012

Respectfully submitted,

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⁵ Stalker's counsel attempted on several occasions to negotiate a reasonable resolution of this dispute with Class Counsel but no agreement was reached. *See* Hafif Decl. at ¶14.

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2012, a copy of the foregoing was filed electronically and served via ECF to all counsel listed on the Attorney Service List. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28th day of December 2012, at Claremont, California.


Gwen Simmons