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
Hochberg, et al., v. Skechers U.S.A., Inc. Case No. 3:12-cv-00370	

HOCHBERG'S COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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On August 8, 2012, the Court entered an order (the "August 8th Order") directing counsel in the above-captioned action, as well as counsel in the various related cases consolidated before it, to make a motion for an award of fees and expenses. The Court directed that "[c]ounsel 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." In accordance with the August 8th Order, Plaintiff's Counsel in the above-captioned Action ("Hochberg's Counsel") hereby moves the Court for an award for reasonable attorneys fees of $450,000, and reimbursement of out-of-pocket expenses totaling $1,291.97.

PRELIMINARY STATEMENT

Hochberg's Counsel can clearly establish a connection between the tasks they performed and the benefit accruing to the class as a result. First, Plaintiff Wendie Hochberg and Brenda Baum filed their complaint in the United States District Court for the Eastern District of New York, captioned *Hochberg v. Skechers U.S.A. Inc.,* 11 Civ. 5751 (SLT)(MDG) (E.D.N.Y) (the "*Hochberg* Action"), on behalf of Skechers purchasers in the State of New York only. At the time of this filing, in November 2011, the Ninth Circuit had already granted a Rule 23(f) petition in *Mazza v. Am. Honda Motor Co., Inc.*, whereby it would consider whether a nationwide class could be certified under California's Unfair Competition Law, Business and Professional Code §17200 *et seq*. and Consumer Legal Remedies Act, Civil Code §1750 *et seq*. While other cases, including *Grabowski v. Skechers U.S.A., Inc.*, No. 10-cv-1300-JM (WVG) (S.D. Cal.) (the "*Grabowski* Action"), had been filed against Defendant on behalf of a nationwide class, the potential decision in *Mazza* could imperil that nationwide class. The *Hochberg* Action proved to be filed prudently, as the Ninth Circuit subsequently issued a decision significantly limiting the

ability of class actions filed under California consumer protection statutes (like the *Grabowski* Action) to be nationally certified. Accordingly, the filing and litigation of the *Hochberg* Action was necessary to protect New York consumers' claims in light of the Ninth Circuit's decision in *Mazza*.

Second, Hochberg's Counsel meaningfully contributed to the litigation and the Settlement. Hochberg's Counsel fended off Defendant's attempt to stay the *Hochberg* Action in favor of the *Grabowski* Action, and under the direction of Magistrate Judge Go, was entitled to proceed with discovery. The litigation deadlines and propounded discovery in the *Hochberg* Action put the pressure on Defendants to enter into a timely and meaningful settlement, and resolution of the claims asserted in the *Hochberg* Action was necessary for a global settlement with Skechers.

The reasonableness of Hochberg's Counsel's fee request is apparent in light of the fact that based on the 2010 census, the United States Census Bureau estimates that New Yorkers constitute 6.25% of the U.S. Population. 6.25% of the $40 million Settlement Fund in this case is $2.5 million. Hochberg's Counsel is requesting $450,000, or 18% of the $2.5 million "New York" portion of the Settlement Fund.

Additionally, Hochberg's Counsel's fee request is also reasonable compared to other factors considered by the Sixth Circuit, including (1) a lodestar cross-check; (2) that the litigation was undertaken on a contingent basis; (3) society's stake in rewarding attorneys who produce such benefits; (4) the complexity of the litigation; and (5) the professional skill and standing of counsel on all sides. [1]

Finally, Hochberg's Counsel's request for reimbursement of expenses is reasonable and

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[1] The 2.5 multiplier being sought by Hochberg's Counsel is consistent with the multiplier being sought by Grabowski's counsel.

should be awarded.

PROCEDURAL BACKGROUND

On June 18, 2010, the *Grabowski* Action was filed in the Southern District of California, asserting claims under California consumer protection statutes on behalf of a nationwide class. Joint Declaration of Kevin S. Landau and Marc L. Godino in Support of a Request of Reimbursement of Attorneys' Fees and Expenses ("Joint Decl.") at ¶ 3. Subsequently, the Ninth Circuit granted a Rule 23(f) petition in *Mazza v. American Honda Motor Co., Inc.*, whereby it would consider whether a nationwide class could be maintained under California consumer statutes. *Id.* at ¶ 5. The *Grabowski* Action was stayed by the Southern District of California pending the decision in *Mazza*. *Id.*

On November 23, 2011, the *Hochberg Action* was filed in the United States District Court for the Eastern District of New York. *Id.* at ¶ 4. Mindful of the potential impact of the Ninth Circuit's ruling in *Mazza*, the *Hochberg* Action alleged violations of New York General Business Law § 349, as well as claims of unjust enrichment, on behalf of Skechers purchasers in the State of New York only. *Id.*

On January 12, 2012, the Ninth Circuit Court of Appeals decided *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012); this decision potentially limited the reach of California's consumer protection laws to non-California consumers, and made it more difficult to certify a nationwide class. *Id.* at ¶ 6.

On February 3, 2012, Defendant answered the complaint in the *Hochberg* Action, but also filed a Motion to Dismiss, or in the Alternative, Transfer or Stay, solely based on the "first to file" rule. *Id.* at ¶ 7. Hochberg's Counsel filed a response to Defendant's motion, explaining why the "first to file" rule did not apply, and that Defendant's application of the first to file rule

was inconsistent with its previous claims in other courts that the actions filed on behalf of California consumers would not encompass non-California consumers. *Id.*

On March 14, 2012, Hochberg's Counsel and Defendant's Counsel held a Rule 26(f) discovery conference, and met and conferred regarding scheduling issues and a confidentiality stipulation. *Id.* at ¶ 8.

On March 23, 2012, Magistrate Judge Marilyn D. Go of the Eastern District of New York held a status conference. There, Defendant urged that the Court stay the case pending resolution of the first-to-file motion, but Magistrate Judge Go stated, "certainly based on what I read in the pre-motion letters would not be prepared to stay discovery at this point." *Id.* at ¶ 9.[2] As a result, Magistrate Judge Go rejected Defendant's motion to stay request and ordered that the case should proceed and setting a class discovery deadline of September 24, 2012. She encouraged the parties to coordinate with counsel in the *Grabowski* Action on discovery and potential settlement issues. She entered a minute entry on the docket on March 23 indicating, "Prior to the

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[2] The Hochberg Plaintiffs' letter to Magistrate Judge Go, sent on February 24, 2012, explained that the *Hochberg* Action was not duplicative of *Grabowski* based on the *Mazza* decision. The letter also pointed out the Skecher's position before the New York Court was inconsistent with the position it had taken in *Stalker v. Skechers USA, Inc.*, 2:10cv05460 (C.D. Cal 2010), where it argued, in a Memorandum in Opposition to Ms. Stalker's Motion for Class Certification [Dkt. No. 25], the following positions:

- "The state *where* each class member received representations about Shape-ups® and any reliance or purchase occurred therefore has the greatest interest in determining the proper protection and scope of recovery—if any—for that individual." Opp. Class Cert. Br. at 9;

- "California's consumer protection laws cannot, consistent with the dictates of due process, be applied to residents of other states who bought, used, and saw ads about Shape-ups® in their home states." *Id.* at 7; and

- "[E]very state has an interest in protecting its citizens from allegedly fraudulent conduct occurring within its borders and in defining the scope of recovery for its citizens." *Id.* at 8.

next conference, the parties must confer on coordinating discovery with the California action and explore settlement, including engaging in an informal exchange of information as may be appropriate." *Id.*

On April 16, 2012, the parties exchanged Rule 26(a) initial disclosures and Plaintiffs propounded discovery requests asking for documents produced in the *Grabowski* Action. *Id.* at ¶ 10. Plaintiffs also propounded a Rule 30(b)(6) deposition notice relating to advertising and marketing on Defendant's ecommerce sites. *Id.*

On April 24, 2012, Magistrate Judge Go held a second status conference where the parties updated the Court on the status of discovery and settlement discussions. On May 16, 2012, the Judicial Panel on Multidistrict Litigation transferred the *Hochberg* Action to the Western District of Kentucky. *Id.* at ¶ 11.

Pursuant to Magistrate Judge Go's directives, Hochberg's Counsel reached out to Skechers and counsel in the *Grabowski* Action to coordinate discovery and settlement negotiations. Defendant indicated that it was trying to reach a global nationwide settlement of all Skechers consumer protection actions. Hochberg's Counsel discussed the outline of a potential settlement, including the amount that would be available to the class and the settlement structure. Hochberg's Counsel found that the terms were fair and reasonable to New York class members and found the settlement terms in the best interest of such class members. *Id.* at ¶ 12.

On August 8, 2012, this Court entered the August 8th Order urging the parties to amend the settlement agreement to eliminate a clause that would give lead counsel "sole discretion" in allocating attorneys' fees, and replace it with a provision that placed the discretion more in the hands of the Court. The Court suggested (and the parties adopted), the following language in the settlement agreement:

> Attorneys' fees and expenses shall be awarded by the Court in accordance with Federal Rules of Civil Procedure 23(h) and 54(d)(2). No award of fees or expenses shall be granted from the established fund unless a party first makes a motion to the Court for an award of fees in accordance with those rules. Attorneys' fees and expenses will only be awarded to those parties demonstrating that their efforts resulted in a benefit to the Class.

The Court explained how it would interpret this provision when awarding attorneys fees:

> The Court would note that, under the terms of the proposed revision, attorneys' fee and expenses will only be awarded to those parties whose efforts resulted in a benefit to the class. 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. Evid. 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.

Id. at ¶¶ 6-7.

ARGUMENT

An award of attorneys' fees should consider "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Moulton v. U.S. Steel Corp.,* 581 F.3d 344, 352 (6th Cir. 2009) (citing *Bowling v. Pfizer, Inc.,* 102 F.3d 777, 780 (6th Cir.1996)). The Court, in the August 8th Order, asked Hochberg's Counsel to address the first issue: the value of the benefit rendered to the plaintiff class. This is addressed in Part I. However, the other five factors are addressed in Part II. Hochberg's Counsel's request for reimbursement of expenses is addressed at Part III.

I. THERE IS A CLEAR CONNECTION BETWEEN THE TASKS PERFORMED BY HOCHBERG'S COUNSEL AND THE BENEFIT TO CLASS MEMBERS

A. The *Hochberg* Action Was Necessary to Ensure that New York Consumers Were Represented

The *Hochberg* Action was filed, on behalf of a class of New York consumers only, to ensure that New York class members were represented. The *Grabowski* Action purported to bring claims on behalf of a nationwide class under California's Unfair Competition Law, Business and Professional Code §17200 *et seq*. and Consumer Legal Remedies Act, Civil Code §1750 *et seq*. However, the Ninth Circuit granted the Rule 23(f) petition in *Mazza*, which created the significant possibility that certification of nationwide classes in consumer cases could be limited under these statutes. Before the case was transferred to this Court, the Southern District of California judges in the *Grabowski* Action recognized the import of the Ninth Circuit's ruling in *Mazza*; and stayed the *Grabowski* Action pending a decision in *Mazza*. Recognizing the impact that an adverse decision in *Mazza* could have in actions against Defendant, Ms. Hochberg and Ms. Baum filed the *Hochberg* Action, on behalf of New York residents only, to preserve claims of New York consumers.

This proved to be a prudent measure, because on January 12, 2012 the Ninth Circuit in *Mazza* vacated the lower court's granting of class certification, finding that the nationwide class sought there did not satisfy the requirements of Rule 23. As a result of *Mazza,* the potential that the *Grabowski* Action would be able to encompass a nationwide class was diminished, and thus the *Grabowski* Action could not be relied upon to encompass and protect a class of New York consumers. Although the Settlement as currently structured encompasses a nationwide class, the filing, litigation, and settlement of the *Hochberg* Action protects New York consumers in the event that (1) this Court declines to certify a nationwide settlement class, or (2) a nationwide

settlement class is overturned on appeal. Accordingly, the filing and litigation of the *Hochberg* Action was necessary to protect New York consumers' claims in light of the Ninth Circuit's decision in *Mazza*.

B. Hochberg's Counsel Meaningfully Contributed to the Litigation and Its Settlement

The *Hochberg* Action was a needed component to the furtherance of the litigation and the eventual Settlement, and unlike several other actions, was proceeding based on a court imposed schedule against Defendant. On March 23, 2012, Magistrate Judge Go ordered discovery to proceed, and directed a discovery cut-off deadline of September 24, 2012. In the course of actively litigating the *Hochberg* Action, Hochberg's counsel:

- conducted legal and factual research into claims and causes of actions on behalf of New York class;
- filed a complaint in the United States District Court for the Eastern District of New York, which Skechers answered;
- filed a response to Defendant's Motion to Dismiss, or in the Alternative, Transfer or Stay based on "first to file" doctrine;
- engaged in Rule 26(f) conference with Defendant's counsel;
- participated in March 23, 2012 status conference at which Hochberg's Counsel persuaded Magistrate Judge Go to allow discovery to go forward and set a class certification deadline despite Skechers' counsel urging the court to stay the action based on its "first to file" motion;
- exchanged Rule 26(a) initial disclosures;
- negotiated a confidentiality agreement with Skechers;
- facilitated a Rule 26(f) discovery conference with Defendant's Counsel;

- propounded discovery upon Defendant, including (1) a Rule 30(b)(6) deposition notice relating to advertising and marketing on Defendant's ecommerce sites; and (2) document requests relating to documents produced in the Grabowski Action; and
- participated in Settlement discussions to ensure that the claims of New York class members were fairly represented.

Joint Decl. at ¶ 13.

Had the Settlement not been effectuated when it was, the *Hochberg* Action would have proceeded with substantive litigation. The litigation deadlines and propounded discovery in the *Hochberg* Action raised the pressure on Defendants to move forward and enter into a timely and meaningful settlement. Resolution of the claims asserted in the *Hochberg* Action was necessary for a global settlement with Skechers.[3] Accordingly, the litigation of the *Hochberg* Action directly contributed to the Settlement, and provided a direct benefit to the class – especially New York consumers. However, the *Hochberg* Action also provided further leverage to effectuate the Settlement benefiting all nationwide class members, not just New Yorkers.

C. Hochberg's Counsel's Fee Request Is Reasonable in Proportion to Estimation of the Percentage of the Settlement Fund Allocated to New York Consumers

While the *Hochberg* Action provides value to all nationwide class members, the reasonableness of Hochberg's Counsel's fee request is also apparent when breaking out the portion of the nationwide class that consists of New Yorkers. As of 2011, the United States

[3] Defendant recognized that the *Hochberg* Action needed to be included along with the other actions in the Settlement. In fact, David Weinberg, Skechers' CFO, stated that an impetus for the Settlement was that Skechers "could not ignore the exorbitant cost and endless distraction of several years spent defending multiple lawsuits in multiple courts across the country . . ." Joint Decl. at ¶ 15.

Census Bureau estimates that New Yorkers constitute 6.25% of the U.S. Population.[4] 6.25% of the $40 million Settlement Fund in this case is $2.5 million. Hochberg's Counsel is requesting $500,000, or 20% of the $2.5 million "New York" portion of the Settlement Fund. This is less than the 25% recognized by this Court as benchmark in common fund cases. *See In re Countrywide Fin. Corp. Customer Data Security Breach Litig.*, No. 3:08-MD-1998, 2010 WL 3341200, at *10 (W.D. Ky. Aug. 23, 2010) (Russell, J.). This further demonstrates the reasonableness of Hochberg's Counsel's fee request.

II. HOCHBERG'S COUNSEL SHOULD BE AWARDED A FEE IN ACCORDANCE WITH OTHER FACTORS ENUNCIATED BY THE SIXTH CIRCUIT

Hochberg's Counsel satisfied the other five factors enunciated by the Sixth Circuit in *Moulton* and *Bowling, supra*. Each factor is discussed below.

A. The Value of the Services on an Hourly Basis

This Court has examined lodestar as a "cross-check" to ensure the reasonableness of a fee award. *See In re Countrywide*, 2010 WL 3341200, at *10. Here, Hochberg's Counsel has expended 279.05 hours litigating the *Hochberg* Action, for a lodestar of $157,223.25. Joint Decl. at ¶ 16. The $450,000 fee request represents a modest 2.8 multiplier of Hochberg's Counsel's lodestar. This multiplier is consistent with the law in this Circuit as well as the multiplier requested by *Grabowski's* Counsel. *See Lowther v. AK Steel Corp.*, No. 1:11-cv-877, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (collecting cases demonstrating that a 3.06 lodestar multiplier is reasonable); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 767 (S.D. Ohio 2007) (lodestar multiplier of six).

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[4] As of 2011, the United States Census Bureau estimated the population of the United States at 311,591,917, and the population of New York at 19,465,197.
See http://quickfacts.census.gov/qfd/states/36000.html (last checked December 28, 2012).

B. The Services Were Undertaken on a Contingent Fee Basis

Hochberg's Counsel has prosecuted this case on an entirely contingent basis. Joint Decl. at ¶ 17. Accordingly, Hochberg's Counsel took the considerable risk that they would never be compensated for either the time expended or out-of-pocket expenses incurred in litigating the *Hochberg* Action. "[C]ontingency fee arrangements indicate that there is a certain degree of risk in obtaining a recovery." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 1029, 1043 (S.D. Ohio 2001). Accordingly, this factor supports an award of attorneys' fees. *See In re Countrywide*, 2010 WL 3341200, at *11 (this Court noted that the contingent fee supported an award of attorneys fees).

C. Society Has a Stake in Rewarding Attorneys Who Produce Such Benefits in Order to Maintain an Incentive to Others

In evaluating the reasonableness of a fee request, the Court considers society's stake in rewarding attorneys who produce a common benefit for class members in order to maintain an incentive to others. *See In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534 (E.D. Mich. 2003) ("Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society."). As the Court in *Telectronics* stated:

> [I]n litigating this case, Class and Plaintiff's Counsel expended significant resources of both time and monies. . . We believe that, without such a class action, small individual claimants would lack the resources to litigate a case of this magnitude. Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling such small claimants to pool their claims and resources.

137 F. Supp. 2d at 1042-43.

Here, as demonstrated above, Hochberg's Counsel's efforts in prosecuting the Hochberg Action provide a substantial benefit to society, and ensuring that the New York consumer protection laws are effectuated. Accordingly, this factor supports an award of attorneys' fees.

D. The Complexity of the Litigation

Courts in this Circuit also consider the complexity of the litigation in determining the reasonableness of an attorneys' fee award. While "[m]ost class actions are inherently complex," *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001), this one presented a number of complicated legal and factual issues concerning (1) whether Defendant's statements concerning the health benefits of Skechers Shape-Ups were material to purchasers; (2) to what extent consumers relied upon such statements; (3) whether the price of Skechers Shape-Ups was improperly inflated due to such statements; and (4) whether consumers suffered damages as a result of Defendant's conduct. Joint Decl. at ¶ 18. Accordingly, this factor supports an award of attorneys' fees.

E. The Professional Skill and Standing of Counsel Involved on Both Sides

Finally, courts in this Circuit evaluate the professional skill and standing of counsel in determining the reasonableness of a fee request. Here, the skill and standing of counsel for all parties was of the highest caliber.

Hochberg's Counsel consists of the law firms of (1) Glancy Binkow and Goldberg LLP, and (2) Taus Cebulash & Landau LLP. Each of these three law firms has considerable experience in the field of class action litigation, especially class action consumer litigation, and has each recovered many millions of dollars for consumers in similar settlements. Joint Decl. at ¶ 19. Résumés for each firm are included at Exhibits C and D of the Joint Declaration.

Defendant was represented by O'Melveny & Myers, LLP, a first-tier law firm with over 800 attorneys in 16 offices worldwide. The quality of opposing counsel is also important in evaluating the quality of services rendered by plaintiff's counsel. *See In re Delphi Corp. Sec. Deriv. and ERISA Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) ("The ability of Co-Lead

Counsel to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the fee award requested.”). Accordingly, this factor supports an award of attorneys’ fees.

III. HOCHBERG’S COUNSEL SHOULD BE REIMBURSED FOR INCURRED OUT-OF-POCKET EXPENSES

“[C]lass counsel in entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurrent in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses.” *In re Cardizem*, 218 F.R.D. at 535. Hochberg’s Counsel seeks reimbursement of $1,291.97 for expense mostly consisting of filing fees and research and mailing costs. Joint Decl. at ¶ 21. This minimal amount is reasonable and Hochberg’s Counsel should be reimbursed.

CONCLUSION

For the foregoing reasons, Hochberg’s Counsel’s request for fees and reimbursement of expenses should be awarded in its entirety.

Dated: December 28, 2012

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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 Court's 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 Los Angeles, California.

s/Marc L. Godino
Marc L. Godino