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 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

PLAINTIFF GRABOWSKI'S OPPOSITION TO

APPLICATIONS FOR ATTORNEYS' FEES AND COSTS

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I. INTRODUCTION

In ruling on preliminary approval of this Settlement, this Court made clear that, consistent with Rule 23 and Sixth Circuit law, attorneys' fees and expenses would be awarded only to those counsel who can "demonstrate…that their efforts resulted in a benefit to the class." *See* MDL Dkt. 148 (Preliminary Approval Order) at 18. In addition to Class Counsel, only counsel for plaintiffs Stalker, Hochberg, and Loss filed applications.[1] *See* MDL Dkts. 399, 401, and 404. Together, they seek over $1,350,000 in fees and expenses, representing over 27% of the $5 million in attorneys' fees and expenses preliminarily awarded by the Court. The most sought is by the lawyers representing Stalker. They have submitted a patently inflated lodestar and did not perform any task that resulted in any benefit to any class member, let alone the class as a whole. To the contrary, all of their work was performed at the pleading stage in drafting a copycat complaint and jockeying for attorneys' fees, not performing tasks that were actually intended to benefit the class.

Additionally, the 897.25 hours submitted by counsel are excessive given the tasks completed. None of these counsel conducted any discovery and played absolutely no role in the actual settlement of this case (which provided the only relief available to the class). Stalker's counsel, the only counsel to perform any tasks beyond the complaint and opposing a motion to dismiss, seek the majority of their fees for filing a potentially harmful - unsuccessful - class certification motion that was based on no evidence and was solely intended to position Stalker's counsel for fees. As Skechers' counsel put it, "[the motion] didn't add any value to this case." MDL Dkt. 399-2, Ex. D (Preliminary Approval Hearing Transcript), at 13:10-18. Stalker's

[1] The Court ordered that all applications for attorneys' fees be submitted no later than 15 days prior to the deadline for the submission of objections. *See* MDL Dkt. 148, at 25. In addition to Class Counsel, counsel for Stalker and Hochberg submitted applications on December 28, 2012, and counsel for Loss submitted an application on December 31, 2012. No other applications were filed.

counsel added no value to the case – a fact confirmed by the Federal Trade Commission. *See* Ex. A (letter from Jon M. Steiger, Director, FTC).

Class Counsel do not oppose a fee award to counsel for Loss and Hochberg, who have generally been cooperative and supportive of the settlement, but the amount requested is high and the requested multipliers on their lodestars (from 2.8 to 3) are not justified. Counsel assumed no risk in litigating this case (they merely filed duplicate cases, some even after settlement was reached) and did not bring about the "exceptional success" for the class.

II. STANDARD FOR AWARDING ATTORNEYS' FEES

In a class action, a court has an independent duty to determine an award of attorneys' fees and expenses. *See Rawlings v. Prudential-Bach Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (discussing protection of class interests). In preliminarily awarding the aggregate $5 million in attorneys' fees and expenses, the Court held that fees and expenses would be paid only to "eligible counsel." MDL Dkt. 148 at 18. To be eligible, counsel "must demonstrate to the Court that their efforts resulted in a benefit to the class. Only upon a showing that a benefit accrued to the class ***as a result of counsel's efforts*** will fees and expenses be awarded." *Id.* (emphasis added); *see also* MDL Dkt. 147 (Amendment Two to Settlement Agreement). In its initial order concerning preliminary approval, the Court explained:

> 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.

MDL Dkt. 145 (8/8/12 Order), at 7.

This standard is consistent with Rule 23 and the law of the Sixth Circuit. Fed. R. Civ. P. 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or the parties' agreement." *See also Rawlings*, 9 F.3d at 516 ("[A]ttorney's fees by federal courts in common fund cases [must] be reasonable under the circumstances.").

In general, when determining whether a fee request is "reasonable", the court should consider among other things, "(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 benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing involved on both sides." *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996). As the advisory committee explained, "[o]ne 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. P. 23(h) advisory committee's notes (2003). Thus, the court should consider "the common benefit each applicant conferred upon the plaintiff class relative to each other applicant" when awarding fees. *In re Sulzer Orthopedics, Inc.*, 398 F.3d 778, 780-81 (6th Cir. 2005); *see also In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 181 (3d 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").

III. THE ATTORNEYS' FEES SOUGHT BY COUNSEL FOR STALKER, HOCHBERG, AND LOSS ARE NOT REASONABLE

A. Counsel for Stalker, Hochberg, and Loss Did Not and Cannot Demonstrate That They Conferred Any Benefit To The Class

All plaintiffs' counsel, including Stalker's counsel, agree that the results achieved by Class Counsel for the class were significant. *See* Ex. D (Preliminary Approval Hearing Transcript), at 12:24-13:3 (Stalker's counsel admitting the settlement is very good, and they only object to whether they will receive attorneys' fees). However, plaintiffs' counsel in a class settlement are only entitled to fees and expenses if they can demonstrate that "a benefit accrued to the class ***as a result of counsel's efforts***." MDL Dkt. 148, at 18. The fees and expenses sought by Hochberg and Loss are too high, but they generally cooperated in getting relief to the

class. The fees and expenses sought by Stalker on the other hand are wholly unjustified. As the evidentiary record demonstrates, everything Stalker's counsel did – from filing a copycat case in California to its evidence-free class certification motion to objecting to preliminary approval of this settlement - was to position themselves to obtain fees, not to benefit the class. In their application, they have not made even a colorable connection between their actions and a Class benefit. Worse, their conduct has, at times jeopardized the interests of the Class. The truth is that all relief provided to the Class in this Settlement was as a result of the tasks performed by counsel for Grabowski and Morga.

As the Settlement Agreement indicates, counsel for Grabowski and Morga undertook extensive research and investigation of the facts and claims before filing the initial complaint in June 2010 including consultation with a medical doctor. *See* MDL Dkt. 82 (Settlement Agreement), ¶D. Moreover, counsel for Grabowski and Morga conducted the only discovery by any plaintiffs' counsel including reviewing over 24,500 pages of documents and interviewing Skechers' corporate witnesses and competitors, and were the only plaintiffs' counsel that participated in settlement discussions with defense counsel and the FTC. *See id.*, ¶¶D, I, and J; *Grabowski* Dkt. 114-2 (Declaration of Timothy G. Blood in Support of Final Approval), ¶¶4-6, 22, 23. In fact, it is because of Class Counsel's successful settlement in a prior similar class action based on toning shoes, *In re Reebok Easytone Litigation*, that the FTC and Class Counsel continued the unique private class-FTC approach achieved here. *See Grabowski* Dkt. 114-2, ¶18. None of the other three counsel applying for attorneys' fees and expenses was involved in the *Reebok* action.

As the FTC acknowledges, none of the later-filed actions, including Stalker's, contributed in any way generally or specifically to the resolution of the case. *See* Ex. A (Letter from Jon M. Steiger, Director, FTC). No other counsel participated in any settlement discussions with

defense counsel or the FTC, or otherwise played any role in achieving the substantial results for the class.

Despite failing to show in their application for attorneys' fees how any benefit to the class accrued due to their efforts, Stalker's counsel seeks $750,000 in fees (15% of the total fee award), a multiplier of 2.81 on their lodestar. Stalker's counsel's fee application reveals their purported basis for this fee: they claim to have performed essentially seven months of work that was limited to filing a copycat complaint (that was not very good), responding to a motion to dismiss or stay, and briefing and filing a reckless class certification motion that was based only on the allegations in the complaint. *See* MDL Dkt. 399-2, at 4. Apparently cognizant of the standard for awarding fees and their inability to satisfy it on these facts, much like it did in opposing preliminary approval of this settlement, Stalker's counsel advances an additional basis for their application for an award of $750,000 in fees: they "were the first attorneys to discover the existence of the class, and in fact brought the idea to the BHO and Milberg firms." MDL Dkt. 399 at 5. This is a gross misstatement of the actual facts and does not justify the requested $750,000 in fees.

As addressed at the preliminary approval stage, Stalker's counsel initially contacted Class Counsel in April 2010 concerning a potential false advertising case against a ***different*** shoe manufacturer, MBT. *See* MDL Dkt. 104-1, Supplemental Declaration of Timothy G. Blood in Support of Motion for Preliminary Approval of Class Action Settlement ("Supp. Blood Decl."), ¶4. Stalker's counsel reached out to Class Counsel because of Class Counsel's expertise in litigating and achieving significant relief for class members in other false advertising cases. *Id.* Class Counsel thoroughly investigated the claims by among other things consulting with a medical doctor with expertise in the area of rocker bottom shoes (something Stalker's counsel never bothered to do). *Id.*, ¶6. Stalker's counsel was unhappy that Class Counsel insisted on investigating the claims before filing suit, and so independently pursued claims against MBT.

Id. at ¶¶6-8. It appears from the docket that Stalker's counsel ultimately dismissed the MBT case (*see* Ex. B (Docket in MBT case)) but in any event, it had nothing to do with this case.

Additionally, contrary to Stalker's counsel's assertions, there was certainly no "race to the courthouse" to file this case. *See* MDL Dkt. 399 at 3. The truth is that as Stalker's counsel pursued claims against MBT, Class Counsel continued to investigate claims against Skechers (something other plaintiffs' counsel were doing as well) and filed a complaint against Skechers only after the claims were sufficiently vetted. The relief that was achieved for the class in this case is a direct result of Class Counsel's well-researched complaint, expertise in litigating false advertising cases, and innovation and success in coordinating settlement with the FTC. *See Grabowski* Dkt. 114-2, ¶¶4-6, 15-22. Stalker's counsel did nothing to facilitate any of that.

Nonetheless, even if it were true that Stalker's counsel conceptualized novel claims against toning shoe manufacturers, only a mere fraction of the hours for which they seek fees relates to any pre-complaint investigation. *See* MDL Dkt. 399-2, Ex. F (Madlekar submitted 21 of 417.20 total hours in connection with filing complaint); MDL Dkt. 399-1, Ex. D (Hafif submitted 16 hours of 109.30 total hours in connection with filing complaint). Instead, the vast majority of the work conducted by Stalker's counsel (and for which they seek compensation) was in connection with Stalker's ill-fated motion for class certification. *See* MDL Dkt. 399-2, ¶18 (Mandlekar submitted an unrealistic 247.75 of 417.20 total hours for work in connection with class certification briefing). Despite Stalker's counsel's assertions, the filing of the bare-bones class certification motion was not a source of pressure on Skechers to settle (and did not provide any relief to the class) because its sole purpose was to position Stalker's counsel for fees in this case. The motion was reckless as it was based entirely on the allegations in the complaint, contained absolutely no evidence (Stalker's counsel did not take discovery), and posed no actual or perceived threat to Skechers. As Skechers stated in opposing the motion:

> This class certification motion is premature and must be rejected outright or taken off-calendar to permit discovery to take place. Plaintiff Sonia Stalker ('Plaintiff')

> filed this motion to create an artificial record of 'progress' in an effort to avoid dismissal, stay, or transfer of this action. Under controlling Ninth Circuit law, this matter should be dismissed – or, at a minimum, transferred to the Southern District of California where two other actions [*Grabowski* and *Morga*] purporting to represent the same class are pending (one of which is the undisputed first-filed action).

Ex. C (Defendant Skechers U.S.A., Inc.'s Opposition to Plaintiff Stalker's Motion for Class Certification), at 1. Had the court not recognized Stalker's motion for what it is and not stayed the case, the inevitable adverse ruling on her motion for class certification would have harmed the class, not provided any benefit to it.

In fact, in direct contrast to Stalker's counsel's representation that the filing of the class certification motion is the "type of pressure [that] makes a defendant settle" (MDL Dkt. 399 at 7), Stalker's counsel's actions were counterproductive in achieving relief for the class. As Skechers' counsel explained:

> [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.
>
> That class certification motion was precipitously brought without any basis for it, and it was after we had offered them an opportunity to be transferred to San Diego to be joined with the other two cases. They wanted to go their own way. That's their option. They can do that. ***But it didn't add any value to this case to have that motion brought***.

MDL Dkt. 399-2, Ex. D (Preliminary Approval Hearing Transcript), at 13:10-18 (emphasis added); *see also* Ex. D at 24:4-6 ("the case was not even remotely positioned for a class certification motion that early before any discovery or other actions"). Thus, the "multi-front war" that Stalker's counsel touts in their brief (*see* MDL Dkt. 399 at 7), was not pressure Stalker's counsel put on Skechers to settle this case, but rather, road blocks to settlement and eventual relief for the class. Accordingly, Stalker's counsel is not entitled to fees because they are unable to show "that a benefit accrued to the class ***as a result of counsel's efforts,***" because all of their efforts were counterproductive or, at best irrelevant to eventual settlement of this case.

Hochberg's counsel seeks $450,000 in fees for drafting and filing a complaint in November 2011 (17 months after the *Grabowski* complaint was filed and the same month the broad terms of the settlement were reached), responding to a motion to stay, and drafting discovery requests. Hochberg's counsel's only claim that any of these tasks benefited the class is that because Hochberg's complaint was filed in New York, a state with a large number of class members. Dkt. 401, at 7-8. Nonetheless, Hochberg's counsel have been cooperative and expressed a sincere willingness to work in the interests of the Class, in sharp contrast to Stalker's counsel.

Similarly, counsel for Loss fares no better. Loss did not file a complaint until February 12, 2012, 20 months after the *Grabowski* complaint was filed and well-after the broad terms of the settlement, including the total monetary amount of the settlement, were reached. *See Grabowski* Dkt. 114-2, ¶20 ("At the end of November 2011, the broad agreement of the settlement terms, including the amounts, had been reached."). Loss' counsel asserts that they facilitated efficiency in this action by filing the complaint in this Court and pushing to have *Grabowski* and *Morga* transferred to this MDL, and by reaching out to Class Counsel once it became known that a settlement was reached. *See* MDL Dkt. 404 at 3-4. After some initial jockeying (*see Grabowski* Dkt. 67 and MDL Dkt. 92), they generally have been cooperative and expressed a sincere willingness to work in the interests of the class.

B. The Hours Submitted By Counsel for Stalker Are Excessive

Even if the Court were to entertain a fee award for these counsel, under the lodestar method, the hours they spent must be "reasonably expended." *See B&G Mining, Inc. v. Dir., OWCP*, 522 F.3d 657, 661 (6th Cir. 2008) (quoting *Hensley v. Echkart*, 461 U.S. 424, 433 (1983)) (lodestar is the calculation of "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate"). The hours now claimed by Stalker's counsel are not reasonable.

Counsel for Stalker submit 526.5 hours for work that related exclusively to the initial pleading stage. *See* MDL Dkts. 399-1 and 399-2. Tellingly, Ray Mandlekar, one of Stalker's counsel, declared that he performed 417.20 hours of work in this case, 413.5 hours of which were completed by the beginning of January 2011. *See* MDL Dkt. 399-2, at 4; MDL Dkt. 399-2, Ex. F (submitting 413.5 hours between end of June 2010 and beginning of January 2011, and only 3.7 hours after January 2011).[2] Timothy G. Blood, one of Class Counsel, submitted a total of 487.25 hours for work conducted over the course of 2.5 years that included negotiating the settlement and submitting it to the Court for approval. *See Grabowski* Dkt. 114-2, at 10 (submitting time performed up to December 2012).

Additionally, as discussed above, almost 60% of Mr. Mandlekar's hours relate to Stalker's vapid motion for class certification that was filed simply for strategic advantage for counsel and was not based on any evidence or any possible benefit to the class. *See* MDL Dkt. 399-2, ¶18 (Mandlekar submitted 247.75 of 417.20 total hours for work in connection with class certification briefing). It is difficult to imagine spending so much time preparing what was, in essence, a shell of a motion devoid of any evidence. If the time was actually incurred, it certainly was not incurred reasonably. Stalker's counsel should not be rewarded for grossly excessive billing for filing a form opening motion simply to generate fees and attempting to create the illusion of faster progress over Class Counsel's first-filed *Grabowski* case.

[2] Mr. Mandlekar submits time for work performed from 1/7/10-1/10/10 for "[r]esearch and draft opposition to Defendant's motion to stay." *See* MDL Dkt. 399-2, Ex. F, at 2. Presumably these are typos that occurred in reconstructing his time, as Stalker's complaint was not filed until July 2010. The *Stalker* case was stayed on January 21, 2011. *See* MDL Dkt. 399-2, Ex. E at docket entry 40.

IV. A LODESTAR MULTIPLIER IS NOT JUSTIFIED

Even if fees are awarded to counsel for Stalker, Hochberg, and Loss, any such fees should be limited to their reasonable lodestars without a multiplier.[3]

The purpose of a multiplier is "to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefit achieved." *Rawlings*, 9 F.3d at 516. Counsel do not provide a justification for a multiplier, and there is none. Stalker's case was stayed early on in litigation, and the only substantive work that was performed in filing a motion for class certification, actually worked at cross-purpose to achieving the Settlement, as described by Skechers' counsel. *See* MDL Dkt. 399-2, Ex. D (Preliminary Approval Hearing Transcript), at 13:10-18. Similarly, Hochberg and Loss filed their complaints so late and simply copied the *Grabowski* complaint, thereby taking no risks. The multipliers ranging from 2.8 to 3.006 simply cannot be justified and should not be awarded.

V. CONCLUSION

For the foregoing reasons, the application for attorneys' fees and costs made by counsel for Stalker should be denied. The applications made by counsel for Loss and Hochberg should be significantly reduced.

Dated: January 22, 2013

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[3] Stalker's counsel has a lodestar of $266,629.00 and is requesting a multiplier of 2.81; Hochberg's counsel has a lodestar of $157,223.25 and is requesting a multiplier of 2.8; and Loss' counsel has a lodestar of $49,885.00 and is requesting a multiplier of 3.006.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, 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 on January 22, 2013, at San Diego, California.

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