

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

IN RE: SKECHERS TONING SHOES
PRODUCTS LIABILITY LITIGATION

This Document Relates To:

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

– and –

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

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

MDL No. 2308

Honorable Thomas B. Russell

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

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

**PLAINTIFF SONIA STALKER'S COUNSEL'S REPLY IN SUPPORT OF
APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS**

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Plaintiff Sonia Stalker's Counsel respectfully submits the following Reply in support of their Application for Award of Attorneys' Fees And Costs [ECF No. 399 in 11-md-02308] (the "Application").

I. The Opposition Does Not Dispute the Main Facts and Law Supporting an Award of Fees to Stalker's Counsel

Plaintiffs' Counsel has filed an opposition to the Application. *See* Plaintiff Grabowski's Opposition to Applications for Attorneys' Fees and Costs [ECF No. 420 in 11-md-02308] (the "Opposition" or "Opp."). Significantly, the Opposition fails to deny the main facts advanced in support of the Application, *i.e.*, that: (1) certain of Stalker's Counsel first identified the existence of the class and told the BHO and Milberg firms; (2) personnel from the BHO and Milberg firms both admitted they had never before thought of bringing claims against toning shoe makers; (3) the parties specifically discussed bringing claims against Skechers; and (4) the BHO and Milberg firms then took this information and filed on their own. *Cf.* Application at 2-3 with Opposition, generally. Thus Plaintiffs' Counsel does not dispute that certain of Stalker's counsel first discovered Skechers' wrongdoing through their own investigation.

Moreover, Plaintiffs' Counsel does not dispute the legal authority cited in the Application establishing that an attorney who "discover[s] wrongdoing through his or her own investigation ... will be entitled to compensation whether or not chosen as lead counsel." Application at 5-6 (*quoting In re Adelpia Communs. Corp. Sec. & Derivative Ltlig.*, 2008 U.S. Dist. LEXIS 67220, *15-*16 (S.D.N.Y. Sept. 3, 2008) and *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 195 (3d Cir. 2005)). In fact, the Opposition itself cites to this same *Cendant* case—acknowledging that it presents the proper legal analysis here. *See* Opposition at 3 (*citing to In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 181 (3d Cir. 2005)). The Opposition's failure to dispute these facts or law alone warrants granting the Application.

II. Plaintiffs' Counsel's Accusation that Stalker's Counsel Acted Solely In the Pursuit of Fees is Meritless

In the Opposition, Plaintiffs' Counsel accuses Stalker's Counsel of merely "jockeying for attorneys' fees" in litigating their case. Opp. at 1. This offensive accusation is as false as it is disingenuous.

Plaintiffs' Counsel would have this Court believe that they acted solely for the benefit of the class, and not for fees. As attorneys seeking \$5,000,000 in fees for a settlement obtained in large part through the skill and labor of the Federal Trade Commission, this does not appear to be the case. Plaintiffs' Counsel's hypocrisy is highlighted in the fact that they wish the Court to generously compensate their work in "investigating" the advertising claims at issue¹ – but at the same time, deny all compensation to the Stalker Counsel for their investigation that first identified issues with the advertising and thus enabled Plaintiffs' Counsel to begin their investigation. According to Plaintiffs' Counsel, such work is only compensable when performed by them and no one else.

There is a simple reason why the Stalker Counsel and other plaintiff counsel continued to work their cases during the settlement negotiations. It is because Plaintiffs' Counsel excluded all other plaintiff counsel from the settlement process. Settlement negotiations apparently began in December of 2010 (*see* Memorandum at 8), but were kept secret until May of 2012. While Plaintiffs' Counsel hurls accusations, it would be quite easy to assert that the only reason why Plaintiffs' Counsel proceeded in this fashion – as opposed to conducting global settlement negotiations – was to "jockey[]" for fees. Indeed, Plaintiffs' Counsel seeks to deny fees to others by arguing that other counsel "played absolutely no role in the actual settlement of this case." Opp. at 1.

¹ Plaintiffs' Memorandum in Support of Motion for Final Approval of Class Action Settlement and Request for Attorneys' Fees and Expenses [ECF No. 403-1 in 11-md-02308] ("Memorandum") at 4.

The reason other counsel did not participate is because, of course, Plaintiffs' Counsel did not permit them to. This Court should not reward these tactics.

III. Plaintiffs' Counsel's Accusation that Stalker's Counsel Has Not Been "Cooperative" is Unavailing

As indicated, the Opposition employs an abusive tone and heaps mudslinging accusations at Stalker's counsel. Indeed, Plaintiffs' Counsel's invective is so palpable that it even prompted another party to note that "[t]he *Grabowski* counsel was particularly harsh against counsel in the Stalker matter", and to sense a certain "animosity" present. Reply Brief in Support of Motion and Application for Award of Attorneys' Fees and Costs by Counsel for Plaintiffs Shannon Loss, *et al.* [ECF No. 477 in 11-md-02308] ("*Loss Reply*") at 4.

The source of Plaintiffs' Counsel's animosity appears to be related to its repeated accusation that Stalker's Counsel was supposedly not "cooperative" with regard to the settlement. *See Opp.* at 2, 8. Plaintiffs' Counsel focuses in particular on the Stalker Counsel's filing of their own class certification motion. *See Opp.* at 6-7. But this motion was filed in 2010—almost two years *before* the settlement was announced in May of 2012. *See Declaration of Ray A. Mandlekar in Support of Application for Award of Attorneys' Fees and Costs by Plaintiff Sonia Stalker's Counsel* [ECF No. 399-2 in 11-md-02308] ("*Mandlekar Decl.*") at 17. Stalker's Counsel's pursuit of class certification cannot be seen as "uncooperative" with a settlement that had not even occurred yet. Plaintiffs' Counsel is unable to point to a single un-"cooperative" act done after the settlement came into existence. The accusation is meritless.

Moreover, as discussed above, the reason why Stalker's Counsel continued to litigate their case pre-settlement is because Plaintiffs' Counsel chose to exclude all other counsel from the settlement negotiations, thus keeping the existence of these negotiations secret. As noted by the *Loss* counsel, they too continued to litigate because Plaintiffs' Counsel kept all negotiations to

themselves. *See Loss Reply* at 1-2. Plaintiffs’ Counsel’s displeasure at other counsel working their cases before the settlement was announced is a problem of their own making.

The real basis for Plaintiffs’ Counsel’s accusation that Stalker’s Counsel has not been “cooperative” with the settlement – and for their resulting “animosity” towards Stalker’s Counsel – is clear. It is the fact that Stalker’s Counsel successfully challenged Plaintiffs’ Counsel’s attempt to control the distribution of attorneys’ fees and evade judicial review of that distribution. *See Application* at 2. That Stalker’s Counsel’s efforts resulted in the removal of an improper clause from the settlement agreement is hardly a basis to deny them fees, however much it may have angered Plaintiffs’ Counsel. On the contrary, it supports an award of fees.²

IV. The FTC Takes No Position On Any Attorneys’ Fee Motion

Plaintiffs’ Counsel apparently sought the assistance of the Federal Trade Commission to support the former’s position on attorneys’ fees. The Opposition claims that, “[a]s 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.” *Opp.* at 4 (citing to Letter from Jon M. Steiger, Director, FTC). In reality, however, Mr. Steiger’s letter does not say this. Instead, Mr. Steiger says that he is simply “not aware of any contribution made by any other class action plaintiffs toward the resolution of this matter.” [ECF No. 420-2 in 11-md-02308 at 2]. The letter does not display any awareness by Mr. Steiger whatsoever as to the factual basis for the Application.

Moreover, while Mr. Steiger speaks in terms of “contribution” “toward the resolution of this matter,” this is not the standard for an award of attorneys’ fees as articulated by this Court. *See*

² The Opposition also accuses Stalker’s counsel of not being “supportive” of the settlement. *Opp.* at 2. Strangely, it then proceeds to describe a statement by the Stalker Counsel as asserting that “the settlement is very good.” *Id.* at 3. This is a clear expression of “support[.]” for the settlement.

Application at 4 (quoting Court as speaking in terms of “benefit accruing to the class”). While Plaintiffs’ Counsel self-servingly pushes “contribution” “toward the resolution of this matter” as the standard, given their tactical exclusion of all other counsel from settlement negotiations, this Court’s standard is instead controlling. Also, with all due respect to Mr. Steiger and the FTC, the analysis here is for the Court, not the FTC. As discussed *supra* in §I, Stalker’s Counsel has made certain factual and legal contentions that Plaintiffs’ Counsel has failed to dispute. This is the state of affairs regardless of whether the FTC has an opinion on the subject. In any event, Mr. Steiger states also that “neither I nor the Federal Trade Commission takes a position on the appropriateness of any particular fee application.” *Id.* Thus Mr. Steiger’s letter provides Plaintiffs’ Counsel with no support.³

V. Plaintiffs’ Counsel’s Remaining Accusations Are Unavailing

Plaintiffs’ Counsel makes a number of other accusations, all of which, however, are false and/or irrelevant. For example, the Opposition states that “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*).” Opp. at 5 (emphasis added). This is inaccurate. Attorney Ray Mandlekar of Stalker’s Counsel personally participated in a telephonic discussion with this medical doctor along with an attorney from the BHO firm. *See* Supplemental Declaration of Ray A. Mandlekar in Support of Application for Award of Attorneys’ Fees and Costs by Plaintiff Sonia Stalker’s Counsel (“Supp. Mandlekar. Decl.”) at ¶2.

³ Plaintiffs’ Counsel argues that the Stalker Counsel’s hours are excessive, and that they should not receive the requested 2.81 multiplier. *See* Opp. at 8-10. Stalker’s Counsel stands by their submitted hours. If anything, Plaintiffs’ Counsel’s submitted 3,648 hours and multiplier of 2.47 (*see* Memorandum at 43) are grossly excessive given the FTC’s lead role here.

The Opposition claims also that “Stalker’s counsel was unhappy that Class Counsel insisted on investigating the claims before filing suit, and so independently pursued claims against MBT.” Opp. at 5-6. This too is inaccurate. Stalker’s Counsel was dissatisfied with the BHO firm’s unexplained, repeated delays in finalizing the complaint in the case. *See* Supp. Mandlekar. Decl. at ¶3. The Opposition claims also that “[n]one of these counsel [seeking fees] conducted any discovery.” Opp. at 1. This statement is inaccurate as well. *See* Mandlekar Decl. at 4 (attorney Mandlekar time entry for “[p]ropound discovery and engage in meet-and-confer efforts”).

VI. Conclusion

For the foregoing reasons, Stalker’s Counsel respectfully requests this Court grant their Application.

DATED: February 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, 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 8th day of February 2013, at Claremont, California.


Gwen Simmons