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, Case No. 3:10-01300 – and – *Stalker v. Skechers USA, Inc.*, C.D. California, Case No. 2:10-cv-05460	Case No. 3:12-cv-00263-TBR

OPPOSITION OF PLAINTIFF SONIA STALKER AND HER COUNSEL TO MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiff Sonia Stalker and her counsel respectfully submit the following Opposition to the Motion for Preliminary Approval of Class Action Settlement [ECF No. 83]:

I. Introduction

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. On May 16, 2012, proposed lead counsel 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 ("Motion"). The Motion requests that this Court enter a proposed Preliminary Approval Order ("Preliminary Approval Order"). *See* Motion at 3.[1]

Stalker opposes the Motion on the following grounds:

a) The Motion calls for the appointment of the BHO and Milberg firms as lead counsel. Instead of making this summary appointment, this Court should appoint lead counsel only after first inviting submissions from all interested counsel who wish to serve in that role, and applying the factors prescribed by Federal Rule of Civil Procedure 23 ("Rule 23"), subsection (g), for selecting lead counsel.

b) The Motion requests that the Court award the entire $5 million dollars in proposed attorneys' fees to the BHO and Milberg Firms – and then attorneys Tim Blood and Janine Pollack of those two firms will distribute fees to other plaintiffs' counsel in their "sole discretion." This provision is both contrary to law and contravenes the procedure provided for in the Manual for

[1] The Preliminary Approval Order has been filed as ECF No. 82-5, with the following title: "Order Preliminarily Certifying a Class for Settlement Purposes, Preliminarily Approving the Class Settlement, Appointing Class Counsel, Directing the Issuance of Notice to the Class, Scheduling a Fairness Hearing, and Issuing Related Orders."

Complex Litigation for the distribution of fees. This Court– and not lead counsel – must determine the fair division of attorneys' fees among plaintiffs' counsel. The BHO and Milberg firms cannot be permitted to evade judicial supervision of the award of fees to counsel.

c) The settlement provides that the two plaintiffs represented by the BHO and Milberg firms may apply to the Court for "incentive awards" of up to $2,500. Other plaintiffs such as Stalker, however, should also be permitted to apply to the Court for such awards.

d) The 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).

Accordingly, in light of these defects, Plaintiff respectfully requests this Court issue an order denying the Motion without prejudice.

II. Factual and Procedural Background

The Motion presents a proposed class action settlement between named plaintiffs represented by the BHO and Milberg firms and Skechers USA, Inc. ("Skechers"), along with procedures calculated to resolve all pending litigation against Skechers. *See, e.g.*, Preliminary Approval Order at 12-13 (providing for injunctions against prosecution of other cases, including plaintiff Stalker's case). As the BHO and Milberg firms recognize, the proposed settlement was reached through the efforts of the Federal Trade Commission ("FTC") and the Attorneys General and consumer protection bureaus in 44 states and the District of Columbia. *See* Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement ("Memorandum") [ECF No. 83-1] at 1.

Stalker and her counsel are of course welcoming of the efforts of the FTC and the Attorneys General in seeking to resolve this matter. Certain actions taken by the BHO and Milberg firms, however, evince a disturbing attempt to hastily and improperly usurp the Court's supervisory role in approving the settlement. For example, as early as May 17, 2012, the BHO and Milberg firms

apparently created a website for the proposed settlement, www.skecherssettlement.com, which represented to class members that "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."[2] Of course, this statement to class members is false – the Court has not designated these attorneys as class counsel, and is not required to do so. Such conduct indicates that these two firms are perhaps jumping the gun in attempting to assert control over future proceedings in this case.

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."[3] 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

[2] *See* Declaration of Christopher J. Morosoff in Support of Opposition to Motion for Preliminary Approval of Class Action Settlement ("Morosoff Decl."), Exhibit 1 (copy of www.skecherssettlement.com/EN/faq as of May 17, 2012).

[3] *See* Declaration of Timothy G. Blood in Support of Motion for Preliminary Approval of Class Action Settlement ("Blood Decl.") [ECF No. 83-2] at ¶4 ("Before this action was filed, my firm and my co-counsel investigated the factual allegations ultimately made in the complaint. 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] at ¶4 ("Before this action was filed, my firm and my co-counsel ... investigated the factual allegations ultimately made in the complaint filed on August 25, 2010.... This investigation began in *May of 2010*, when we began to research advertising claims about 'toning' footwear"). Unless otherwise stated, all emphasis is added and internal citations and quote marks are omitted.

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.[4]

That Stalker's counsel was the first to identify the claims of the class – and was the impetus for the BHO and Milberg firms' filing of their suits – is a fact of significance. As discussed below, the Stalker counsel's work in this regard allows them to seek an award of attorneys' fees from the Court. One aspect of the proposed settlement, as discussed, attempts to eliminate their ability to do this and instead improperly vest all control in awarding attorneys' fees to the BHO and Milberg firms.

Thus by this Opposition Plaintiff Stalker and her counsel seek to ensure that the Court is permitted to rule on the proposed settlement without undue haste, and has the ability to apply the correct legal standards to the issues. While the BHO and Milberg firms are clearly eager to secure total control over the award of attorneys' fees and other aspects of the settlement, this should not take precedence over following the law.

III. Argument

A. This Court Should Invite Submissions From All Interested Attorneys to Serve as Lead Counsel

In its Order Regarding Practice and Procedure Upon Transfer and Setting Initial Status Conference issued on January 31, 2012 ("P&P Order") [ECF No. 3], this Court asked the various plaintiffs' counsel involved in the present MDL to "discuss and attempt to agree upon," among other

[4] The BHO firm filed its case on June 18, 2010; Stalker filed her case on July 2, 2010; the Milberg firm filed its case on August 25, 2010. Stalker, however, was the very first plaintiff to serve Skechers with a complaint.

items, the appointment of "plaintiffs' lead counsel and/or plaintiffs' steering committee, as well as plaintiffs' liaison counsel." P&P Order at 1-2. Since entry of the P&P Order, additional cases have transferred to and consolidated into this MDL. In addition to the *Grabowski* and *Morga* cases, this MDL now includes at least 6 other proposed class action suits, with claims similar or identical to *Grabowski* and *Morga*, seeking relief for Skechers' false and misleading advertising claims. At present, the parties have not agreed upon, and this Court has not issued any order appointing, lead or liaison counsel.

The instant Motion seeks to circumvent this Order that plaintiffs' counsel "discuss and attempt to agree upon" the appointment of class counsel. Further, the instant Motion, if granted, would eviscerate Rule 23's requirement that where more than one applicant seeks appointment as class counsel, the Court must consider each adequate applicant and appoint the applicant the Court finds is best able to serve the interests of the class. *See* Rule 23(g)(2). The Motion seeks an order appointing BHO and Milberg as class counsel, without permitting any other counsel to submit an application to the Court, or allowing the Court to consider any other applicant. As such, the Motion seeks an order which would contravene Rule 23(g)(2).

In this case, counsel for Plaintiff Stalker (and possibly counsel for other plaintiffs as well) wishes to seek appointment as lead or co-lead counsel. Where, as here, more than one attorney or law firm seeks to be appointed lead counsel, Rule 23(g)(2) provides: "If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class." Rule 23(g)(2). Counsel for Stalker, however, were never served with the instant Motion, and have not been given the opportunity to submit an application to this Court for appointment as lead counsel. It was only by monitoring of the docket in this MDL that counsel for Stalker became aware of, and obtained a copy of, the instant Motion. In addition, counsel for Stalker

have a particularly compelling claim for appointment as lead counsel, as it was they who first identified and investigated the claims against Defendant in this case. *See* Morosoff Decl., ¶¶3-10.

If the Court certifies the proposed class in this case for settlement purposes, Rule 23(g) requires that the Court appoint "class counsel." Rule 23(g)(1). When appointing class counsel, Rule 23(g) requires that the Court "must consider," among other factors, "the work counsel has done in identifying or investigating potential claims in the action." Rule 23(g)(1)(A)(i). Given the opportunity to seek appointment as lead counsel, Stalker's counsel will show the Court that it was they, and not BHO or Milberg, who first identified and investigated the potential claims against Skechers, and that BHO's complaint was modeled on one originally drafted by Stalker's counsel. *See* Morosoff Decl. at ¶11. If the instant Motion is granted, however, the Court will not have the opportunity to consider this evidence, which is relevant to the determination.[5] Rule 23(g)(1) requires that the Court consider such evidence before appointing class counsel.

Rule 23(g)(1)(B) further provides that, when appointing class counsel, the Court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." F.R.C.P. 23(g)(1)(B). In this case, one factor the Court should consider is BHO's and Milberg's representation to the class (discussed above) that they had been appointed by the Court to represent the class, when such is not the case. This Court should have the opportunity to consider all pertinent matters, and all applications from any plaintiffs' counsel interested in seeking

[5] *See* Jerold S. Solovy, *et al., Moore's Federal Practice* - Civil §23.120(3)(a) (3d ed. 2011) (when "the applying attorney . . . filed a complaint that was merely copied from another similar action, and did not devote any substantial efforts to the identification and investigation of potential claims before filing the complaint, the fact that the applicant filed the action should not weigh as heavily in the appointment decision").

appointment as class counsel. The instant Motion, if granted, would deprive the Court of that opportunity. As such, the Motion should be denied.

B. This Court Must Supervise the Division of Attorneys' Fees Among Plaintiffs' Counsel

The Preliminary Approval Order seeks to have this Court state that: "Upon preliminary review, the Court finds that the Settlement Agreement and the settlement it incorporates, appears fair, reasonable and adequate." Preliminary Approval Order at 5. With regard to attorneys' fees, that Settlement Agreement provides that the BHO and Milberg firms will seek the creation of a $5 million fund of attorneys' fees for themselves, and are allowed to pay a portion of that $5 million in fees to counsel in other actions – such as Stalker's counsel – in their "sole discretion." Settlement Agreement [ECF No. 82] at 26-27. Thus, approval of this aspect of the Settlement Agreement will allow the BHO and Milberg firms to exercise complete discretion over the award of fees to other counsel, thereby evading Court supervision of the awards.

This is highly improper. Notably, proposed lead counsel has failed to submit any authority supporting the alleged propriety of a court doling out fees to lead counsel to distribute as they see fit. *See generally*, Memorandum. In reality, the authorities require that the Court maintain strict supervision over any division of fees, thus prohibiting the practice. For example, the Manual for Complex Litigation makes clear that the Court must oversee the distribution of fees between plaintiffs' counsel:

> *The court* must distribute the fund among the various plaintiffs' attorneys, which may include class counsel, court-designated lead and liaison counsel, and individual plaintiff's counsel.

Manual for Complex Litigation, Fourth, §14.11; *see also In re City of New York*, 2011 U.S. Dist. LEXIS 152728, *36 (E.D.N.Y. Dec. 2, 2011) (following the *Manual* on the point).[6] Indeed,

> in a class action settlement, the district court has an *independent duty* under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and *divided up fairly among plaintiffs' counsel.*

In re High Sulfur Content Gasoline Prods. Liab. Litig., 517 F.3d 220, 227 (5th Cir. 2008) (reversing court approval of allocation of fees by lead counsel in *ex parte* procedure); *see also Larson v. Sprint Nextel Corp.*, 2010 U.S. Dist. LEXIS 3270, *108 (D.N.J. Jan. 15, 2010) ("responsibility for determining fees for the work of non-lead counsel performed before the appointment of the lead plaintiff will rest, in the first instance, with the district court"). The BHO and Milberg firms should not be trusted to divide fees among counsel in their "sole discretion," because obviously, "[t]hey [would] make recommendations on their own fees and thus have a financial interest in the outcome. How much deference is due the fox who recommends how to divvy up the chickens?" *High Sulfur Content Gasoline Prods.*, 517 F.3d at 235.

Rule 23 specifically contemplates that it is the court that will make awards of attorneys' fees to non-lead counsel:

> [Rule 23(h)] provides a format for *all* awards of attorney fees and nontaxable costs in connection with a class action, *not only the award to 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, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel.

Rule 23(h) Advisory Committee Notes to the 2003 Amendments.

[6] This Court has stated that: "The Court will be guided in its management of this litigation by the Manual for Complex Litigation, Fourth, which has been approved by the Judicial Conference of the United States." P&P Order at 6.

Substantial grounds exist to support an application for attorneys' fees by Stalker's counsel:

> 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 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 Adelphia Communs. Corp. Sec. & Derivative Litig., 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)). Because Stalker's counsel first discovered the existence of the class and their claims, Stalker's counsel has a legitimate basis to seek fees in this case. But most importantly, "*the court*, not the lead plaintiff, must decide for itself what firms deserve compensation." *Id.* at 16.

In light of the patent impropriety of allowing the BHO and Milberg firms to allocate fees among other plaintiffs' counsel without Court supervision, this aspect of the proposed settlement precludes its preliminary approval. Instead, any proposed settlement should provide that the Court shall apportion attorneys' fees among all counsel.

C. Other Plaintiffs Should be Permitted to Seek Incentive Awards

The settlement provides that the two plaintiffs represented by the BHO and Milberg firms may apply to the Court for "incentive awards" of up to $2,500 in light of the "efforts and risks taken by them on behalf of the Class." Settlement Agreement at 28. Other plaintiffs such as Stalker, however, should also be permitted to apply to the Court for such awards. It is unclear what "efforts and risks" the BHO and Milberg plaintiffs undertook beyond Ms. Stalker, who also filed a case, participated in discovery and executed a declaration in support of a class certification motion.

D. The Preliminary Approval Order Must Preserve Class Members' Right to Opt-Out and File Individual Actions

The Preliminary Approval Order seeks certification of a class pursuant to Rule 23 (b)(3). *See* Preliminary Approval Order at 4. Pursuant to Rule 23(b)(3), class members have an absolute right to

opt-out, *i.e.*, exclude themselves from the class and "bring individual actions if they wish." *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 387, 391 (S.D. Ohio 2008). Thus Stalker (along with class members and plaintiffs in other actions) has a right to eventually exclude herself from the proposed class settlement and pursue her own individual action.

The Preliminary Approval Order, however, could be read to provide improperly for the issuance of an injunction against Stalker's case even if she does exclude herself from the settlement. *See* Preliminary Approval Order at ¶13. While this Paragraph begins by discussing an injunction covering class members "who do not timely exclude themselves from the Class," it then features an unqualified sentence stating simply that "Specifically, the following actions are hereby preliminary enjoined:"– and listing cases including Stalker's case. In reality, cases such as Stalker's must be permitted to proceed as an individual (*i.e.*, non-class action) case at her discretion if she chooses to opt-out of the class. An injunction against any prosecution of her case would only be proper if Stalker failed to exclude herself from the class. Thus, as written, this injunction provision in the Preliminary Approval Order is impermissibly broad. It should not be approved unless rewritten to clarify that no injunction is issued against the prosecution of an individual case by class members who exclude themselves from the class action settlement.

IV. Conclusion

For the foregoing reasons, Plaintiff Stalker and her counsel respectfully request this Court issue an order denying the Motion for Preliminary Approval of Class Action settlement without prejudice.

DATED: June 6, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2012, I served the foregoing via e-mail on each attorney appearing on the Panel Attorney Service List for MDL 2308, and that I have mailed the foregoing document or paper via the United States Postal Service to those attorneys on the Panel Attorney Service List for MDL 2308 who do not have an e-mail address.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 6th day of June 2012, at Palm Desert, California.

Christopher J. Morosoff