SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000626-123

DATE : JULY 22, 2013

BY THE HONOURABLE MR. JUSTICE MARK G. PEACOCK, J.S.C.

LÉNINE PETIT
Petitioner
v.
NEW BALANCE ATHLETIC SHOE, INC.
and
NEW BALANCE, INC.
and
NEW BALANCE CANADA INC.
Respondents

JUDGMENT

Introduction

[1] The Petitioner seeks to have the Court authorize his class action so that the Court may approve a settlement agreement.

A- CONTEXT

[2] Mr. Petit introduced his Motion to Authorize a Class Action on October 10, 2012.

[3] He seeks to represent:

> ***"all persons residing in Canada who purchased New Balance Toning Shoes between January 1, 2010 and June 21, 2013."***

[4] The "Toning Shoes" involved are the Respondents':

a) Rock & Tone;

b) TrueBalance;

c) Aravan Ria;

d) Aravan Riley; and

e) Aravan Quinn.

[5] The Petitioner paid $125.00 to purchase his New Balance TrueBalance shoes.

[6] The Petitioner alleges in his proceedings that he purchased these Toning Shoes "from having been exposed to the New Balance marketing campaign and having read their product labelling that the True Balance shoes would cause me to tone and strengthen my muscles, to burn more calories and to lose weight without any further changes in my diet or exercise routine". (this Court's emphasis).

[7] The Petitioner asserts that in September 2012, he became aware of class action proceedings in the United States against New Balance concerning these particular shoes which alleged that the manufacturer's claims for the products' benefits were not scientifically-proven and were misleading.

[8] Similarly, in the present proceedings, the Petitioner alleges that the Respondents are liable for misleading advertising and misrepresentations concerning the benefits of Toning Shoes, in contravention of the *Consumer Protection Act*[1], the *Civil Code of Quebec*[2] and the *Competition Act*[3].

[9] In fact, a settlement agreement was signed on or about July 27, 2012[4], in proceedings taken in the United States without any admission of liability (the "American proceedings").

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1 RSQ, c P-40.1.

2 RSQ, c C-1991.

3 RSC 1985, c C-34.

4 Exhibit R-13 to the Petitioner's original Motion to Authorize.

[10] Accordingly, the Petitioner had the benefit of the "roadmap" provided through the settlement of the American proceedings. The Canadian settlement agreement was reached shortly after institution of the proceedings. Therein, the Respondents deny any wrongdoing and deny making any misrepresentations ***"with respect to the benefits of wearing its Toning Shoes"*** and assert that the class action does not meet the criteria for authorization but consent to its authorization only for the purposes of settlement.

[11] Since the Petitioner seeks to represent class members from across Canada, he ensured nationwide publication of the settlement agreement in both official languages[5] as required by the Court.

[12] At this stage, the Court must determine three issues:

a) whether the criteria of art. 1003, *C.C.P.* have been met so that the Court can authorize the bringing of the class action for the sole purpose of authorizing the settlement;

b) whether the proposed Settlement Agreement is in the members' interests and should be accepted; and

c) whether to approve the legal fees and disbursements of Class Counsel and an honorarium requested for the Petitioner.

B- AUTHORIZATION OF THE CLASS ACTION

[13] The Court must determine whether this proceeding meets the four tests of art. 1003 (a)-(d), *C.C.P.* To do so, the Court must undertake a ***"serious analysis with some flexibility"***[6] and not the ***"somewhat relaxed"*** approach suggested by the Petitioner. The headings are the actual wording of each of these sub-sections. Class action authorization is an exceptional procedure permitted by the legislator under the *Code of Civil Procedure*[7], provided the four criteria are met. Authorization provides unique rights and obligations to class members – whether in the context of settlement or ongoing litigation. Even where authorization is sought in the context of settlement, the burden remains on the petitioner to prove that the four statutory criteria are met.

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5 See para. 39 and 40, Petitioner's June 14, 2013 Affidavit. Publication occurred on May 10, 2013, both in the Globe and Mail and La Presse as well as online and through Twitter.

6 *D'Urzo* v. *Tnow Entertainment Group Inc. et al.*, 2012 QCCS 3820.

7 RSQ, c C-25.

1- The Recourses of the Members Raise Identical, Similar or Related Questions of Law or Fact

[14] The identical, similar or related questions of fact or law to be decided for all Members of the Group are:

a) Did the Respondents engaged in unfair, false, misleading or deceptive acts or practices regarding the marketing and sale of its New Balance Toning Shoes?

b) Should injunctive relief be ordered to prevent the Respondents continuing to perpetuate the unfair, false, misleading and/or deceptive conduct?

c) Are the Respondents responsible to pay compensatory and/or punitive compensatory and/or punitive damages of class members and if so, in what amount?

[15] In view of the similarity of the questions of fact and law involved in this proceeding, the Court determines that this first criterion has been met.

2- Facts Alleged Seem to Justify the Conclusions Sought

[16] If the Petitioner is able to prove the allegations made, the Members of the Group may be entitled to collect certain compensatory damages on the basis of the Respondents' fault. In the Settlement Agreement, the Respondents deny all responsibility.

[17] Accordingly, the Court finds that the second criterion is met.

3- The Composition of the Group Makes the Application of Art. 59 or 67, C.C.P. Difficult or Impracticable

[18] The Court was advised that sales of Toning Shoes in Canada were approximately 5% of American sales. American sales were in the order of $1,250,000.00 for approximately 1.25 million units sold.

[19] In the settlement of the American proceedings, approximately 14,000 claims have been submitted. Five percent (5%) of this figure – as a rough estimate – would mean approximately 700-750 claims in Canada, if the same ratios hold.

[20] The Court understands that there is no common database of the Canadian purchasers which were sold at numerous different types of retail outlets across Canada.

[21] At the same time, given the approximate unit purchase price of $125.00, it is unlikely that individual purchasers would be motivated to undertake their own individual litigation.

[22] Accordingly, class proceedings are appropriate and this third criterion is met.

4- The Member to Whom the Court Intends to Ascribe the Status of Representative is in a Position to Represent the Members Adequately

[23] The Petitioner is a 37 year-old technician from the greater Montreal area who has a D.E.C. in computer science. In his present employment, he is in charge of his department for the employer for whom he has worked for the last seven years.

[24] The Petitioner has already been involved as a petitioner in another class action proceeding some two or three years ago, which the Court understands was not authorized. It is useful for the Petitioner to have had this experience and to have instructed class counsel in the past.

[25] Furthermore, the Petitioner has no conflict of interest in the present proceedings.

[26] On the basis of these facts and having reviewed his affidavit, the Court is satisfied that the Petitioner meets the criteria to represent the members adequately.

[27] Accordingly, the Court determines that the fourth criterion is met.

[28] Therefore, the Court is satisfied that all four criteria of art. 1003, *C.C.P.* have been met and the class action is authorized for the purpose of settlement.

C- APPROVING THE SETTLEMENT

[29] The original Motion to Authorize was filed on October 10, 2012 and the Settlement Agreement was signed on March 26, 2013, about five months later.

[30] The criteria that the Court must apply to determine whether a settlement in a class action should be approved are well known. None of the criteria are determinative and depending on the circumstances, some may have greater weight than others[8].

[31] The relevant criteria for the present case are:

a) the likelihood of success of the class action and the chances of recovery;

b) the nature and importance of the evidence to be adduced;

c) the terms and conditions of the settlement;

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[8] *Association de protection des épargnants et investisseurs du Québec (APEIQ)* v. *Corporation Nortel Networks*, 2007 QCCS 266 at para. 63-66.

d) the recommendation of the Petitioner's attorneys; and

e) the good faith of the parties and the absence of collusion.

[32] As noted earlier, the present proceedings benefited from the prior settlement of the American class proceeding.

[33] Since this Canadian litigation was settled early on without discoveries or expert evidence being filed, it is difficult for the Court to evaluate - with any degree of precision - the Petitioner's chances for success had the litigation been heard on the merits.

[34] What is clear is that the outcome of the litigation would probably have turned on a battle between competing experts. Accordingly, the outcome is uncertain: the following brief excerpts demonstrate why. In its advertising material[9], New Balance relies on its ***"consultation with Dr. Joseph Hamill, PhD"***, university professor, ***"one of the world experts on lower-extremity biomechanics"*** along with the New Balance Sport Research Laboratories, who both confirmed ***"the positive effects of walking in New Balance Rock & Tone footwear***". On the other hand, the Petitioner relies on a study undertaken by the Departments of Physical Therapy and Exercise and Sport Science of the University of Wisconsin at La Crosse which concludes ***"wearing so-called fitness shoes will have no beneficial effect on exercise intensity or caloric expenditure compared to wearing a regular running shoe. Additionally, there is no evidence that wearing shoes with an unstable sole design will improve muscle strength and tone more than wearing a regular running shoe."***

[35] If the litigation had proceeded, the class could anticipate a trial of some complexity and expense as well as the possibility of appeals.

[36] The recommendation of the benefits of settlement by the Petitioner's counsel also carries weight. He has been a member of the Bar for 10 years and has specialized in class actions for 7 years. Importantly, he acted in a very similar case concerning training shoes which also settled as a class action against a competing manufacturer[10].

[37] Finally, the terms of settlement are particularly advantageous to the Petitioner and class members.

[38] In addition to avoiding substantial expense and time in litigation as a result of the early settlement, the terms of settlement are arguably better than those even received in the American settlement. The Court views the following features of the settlement very positively:

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9 Exhibit R-4 to the Petitioner's original exhibits.

10 *Markus* v. *Reebok Canada inc.*, [2012] QCCS 3562.

a) a claim can be made online without any proof of purchase for one pair of the Toning Shoes for which a claimant would receive a $100.00 cash reimbursement, i.e. 80% of a $125.00 retail price;

b) a claimant for multiple purchases may receive up to $200.00 by way of cash reimbursement but a proof of purchase may be required for any second or additional pair of shoes;

c) the "take-up rate" in the U.S. is 1.25% which the Court understands is 1.25% of the 1,250,000 of U.S. unit sales. Given that Canadian sales are approximately 5% of U.S. sales, this would mean, if this take-up rate was applied to the 60,000 units likely sold in Canada, the expected number of claims would be 750. If this is the case, then multiplied times $100.00 per claim, would mean a total of $75,000.00 in claims to be paid. Since the Settlement Agreement provides for a total payout of up to $155,000.00, this will be more than ample to cover all Canadian-resident claimants;

d) any Canadian purchaser who made a timely claim in the U.S. settlement (but who would have been refused as not being an American resident) will be considered as part of the Canadian settlement;

e) the « ***Fonds d'aide aux recours collectifs*** » has recognized that the settlement meets the requirements of the « *Règlement sur le pourcentage prélevé par le Fonds d'aide aux recours collectifs*[11] », as the Fonds will receive 2% of the funds reimbursed to Quebec resident claimants;

f) the claim period is a lengthy one: up to November 14, 2013;

g) part of the settlement confirms that the Respondents will stop making certain defined representations in the future as regards the benefits of the Toning Shoes;

h) no potential member of the class objected to the approval;

i) there has been good faith throughout between the parties' counsel and there is absolutely no evidence of any collusion; and

j) the Respondents' counsel will administer the payment of claims.

[39] The advantages of the settlement far outweigh any inconveniences: particularly, due to the speed and extent of the recovery, the simplicity of the claims procedure and the bilingual services offered to answer any questions from potential

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[11] RRQ, c R-2.1, r 2.

claimants. For these reasons, the Court is satisfied that the settlement is in the best interest of the members and should be approved.

D- SHOULD THE COURT APPROVE THE LEGAL FEES REQUESTED?

[40] Class counsel has requested the Court authorize the payment of legal fees negotiated with the Respondents of $95,000.00, which are not deducted from the $155,000.00 set aside for the claimants.

[41] In the case of the settlement of the American proceedings, the U.S. District Court for the District of Massachusetts approved attorneys' fees in the amount of $950,000.00.

[42] The legal tests to be applied by the Court have been discussed at length in the jurisprudence[12].

[43] Three issues might be raised by class members concerning the legal fees:

a) while the potential recovery to class members may be in the order of $75,000.00 - all individual claims considered - the attorneys' fees amount to $95,000.00;

b) the Canadian legal fees represent approximately 10% of the American legal fees whereas Canadian sales represent only 5% of American sales; and

c) the Canadian attorneys were able to "piggyback" on the U.S. settlement and hence, benefit from the legal work on the file done previously by American attorneys[13].

[44] Class counsel argues that these legal fees will be paid directly by the Respondents and will not come out of the $155,000.000 set aside for all the Canadian claimants. With due respect, the Court is not convinced by this argument. In cases where the claimants do not have a 100% recovery under a settlement agreement, part of those fees negotiated for class counsel could always have been used by the Respondents to "top up" the recovery to the claimants.

[45] That said, the Court is convinced for other reasons that these legal fees should be approved. An important determinant is to see how these negotiated fees compare to the retainer agreement. In the present case, the retainer agreement

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[12] *D'Urzo*, supra, note 6.

[13] See the case of *Pellemans et al.* v. *Vincent Lacroix et al.*, 2011 QCCS 1345 at para. 60 to 63 where Mr. Justice André Prévost urges caution in allowing contingency fees which may appear too high because of the secondary implication of Quebec counsel who "piggyback' on settlements already obtained.

provided for the higher of the application of either a 3.5 multiplier or based on hourly rates. The Motion for Authorization, which is supported by a sworn affidavit by Class counsel, notes that if used, the hourly rate calculations would have produced a bill of $81,528.35 plus taxes whereas the multiplier option would have produced a bill of $300,047.10 plus taxes. For the reasons that follow, the Court is satisfied that the fees requested fall within a range of reasonableness. While it is true that the requested fees are approximately $13,500.00 above the amount arrived at in the mandate: $81,528.35, the circumstances of this case merit this additional premium in excess of the hourly rates:

a) there is an excellent early result which ensures approximately 80% of recovery for each individual purchaser; and

b) Class Counsel's firm has and will provide additional useful services at no additional cost, including:

i) remaining on the file to monitor payouts and answer questions from potential claimants;

ii) class counsel's firm has used its skills regarding the Internet both to disseminate information concerning this class action to the widest audience and has done so in both official languages;

iii) in general, class counsel are entitled to a reasonable premium on those cases in which they get an early good settlement which compensate for those more difficult contingency cases for which they may have to wait many years before recovering any of their fees, including the ever present risk of recovering nothing if the case is unsuccessful[14].

[46] The hourly rate charged by lead Class Counsel is $475.00 - $525.00 per hour. He has a 10-year call to the Bar and seven years specialized experience in class actions. The Court was given no comparative hourly rates to help it ascertain whether this hourly rate was reasonable[15].

[47] However, there is no opposition from class members. In the circumstances of the present case, the Court authorizes the legal fees requested.

E- HONORARIUM FOR THE PETITIONER

[48] The law does not provide for the Petitioner to receive any payment in recognition of the time and effort expended in achieving this successful settlement.

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[14] *Helm* v. *Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 (CanLII), para. 26.

[15] The Canadian Lawyer magazine publishes an annual survey of hourly rates and fees. No such evidence was introduced.

[49] However, the Settlement Agreement contemplates the payment of $1,000.00 as a lump sub-payment to the Petitioner in recognition of the time and effort he has expended.

[50] In his affidavit of June 14, 2013, the Petitioner details his work and effort:

a) seeking out specialized class counsel and instructing them;

b) reviewing the pleadings;

c) discussing settlement;

d) informing himself on his ongoing obligations to act in the best interest of all potential class members; and

e) informing himself of that information put on the web by Class Counsel.

[51] It would have been helpful for the Court to know how much time the Petitioner has expended: this is not in evidence.

[52] Be that as it may, the uncontradicted evidence is clear that the Petitioner acted conscientiously throughout.

[53] The Random House Webster's College Dictionary, defines "honorarium" as a:

> ***"a payment in recognition of acts or professional services for which custom or propriety forbids a price to be set."***

[54] The Court qualifies the payment of this amount of $1,000.00 not as a fee for services but rather as a symbolic recognition of the work and energy expended by the Petitioner on behalf of the Members. It is reasonable, merited and within the bounds of such honoraria in other cases[16].

[55] The role of the representative is unique in class action proceedings. The very purpose of the class action is to provide a procedural vehicle so that justice may be rendered where the individual claim is likely so small as to not justify a person taking their own legal proceeding.

[56] In the other cases, the jurisprudence has recognized that *quantum meruit* amounts may be awarded to petitioners where the amounts in issue are substantial and the effort expended equally substantial[17].

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[16] *Richard* v. *Volkswagen Group Canada Inc.*, 2012 QCCS 5534, para. 59.
and *Price* v. *Mattel Canada Inc.*, 2011 QCCS 2903, para. 15.

[17] See *Lavoie* v. *Régie de l'assurance maladie du Québec*, 2013 QCCS 866, para. 52 and following.

Conclusion

POUR CES MOTIFS, LE TRIBUNAL :

[57] **ACCUEILLE** la requête;

[58] **AUTORISE** un recours collectif contre les Intimées pour les fins d'un règlement hors cour;

[59] **ATTRIBUE** au Requérant le statut de représentant du groupe décrit comme suit :

> « *toutes les personnes résidant au Canada qui ont acheté des chaussures tonifiantes New Balance entre le 1 janvier 2010 et le 21 juin 2013.* »

[60] **DÉCLARE** que la Convention de règlement R-1 (incluant son préambule et ses Annexes) constitue une transaction au sens des articles 2631 et suivant du *Code civil du Québec*, obligeant toutes les parties et tous les Membres du recours collectif qui ne sont pas exclus;

[61] **DÉCLARE** que la Convention de règlement R-1 est valide, équitable et raisonnable, et qu'elle correspond au meilleur intérêt des Membres du Groupe, du Requérant et des Intimées;

[62] **APPROUVE** la Convention de règlement R-1;

[63] **DÉCLARE** que l'ensemble de la Convention de règlement R-1 en anglais et en français (incluant son Préambule et ses Annexes) fait partie intégrante du présent jugement;

WHEREFORE, THE COURT:

[57] **GRANTS** the present motion;

[58] **AUTHORIZES** the bringing of a class action against the Respondents for the purposes of settlement;

[59] **ASCRIBES** to the Petitioner the status of representative of the group herein described as:

> *"all persons residing in Canada who purchased New Balance Toning Shoes between January 1, 2010 and June 21, 2013."*

[60] **DECLARES** that the Settlement Agreement R-1 (including its Preamble and its Schedules) constitutes a transaction within the meaning of articles 2631 and following of the *Civil Code of Quebec,* binding all parties and all Class Members who are not excluded;

[61] **DECLARES** that the Settlement Agreement R-1, is valid, fair, reasonable and in the best interest of the Class Members, the Petitioner, and the Respondents;

[62] **APPROVES** the Settlement Agreement R-1;

[63] **DECLARES** that the Settlement Agreement R-1 in its entirety and in both French and English (including its Preamble and its Schedules) is an integral part of this judgment;

[64] **ORDONNE** aux parties et aux Membres du Groupe, sauf ceux exclus conformément à la Convention de règlement et au présent jugement, de se conformer à la Convention de règlement R-1;

[64] **ORDERS** the parties and the Class Members, with the exception of those who are excluded in accordance with the terms and conditions of the Settlement Agreement and with this judgment, to conform to the Settlement Agreement R-1;

[65] **APPROUVE** la forme et le contenu du Formulaire de réclamation et du Formulaire de demande d'exercice du droit d'exclusion, respectivement les Annexes A et C de la Convention de règlement R-1;

[65] **APPROVES** the form and content of the Claim Form and Opt-Out Form, respectively as Schedules A and C of the Settlement Agreement R-1;

[66] **ORDONNE** que chaque Membre du Groupe qui désire s'exclure de la Convention de règlement R-1 et ainsi ne pas être obligé par la Convention de règlement, soit tenu d'agir conformément avec la Convention de règlement et le Formulaire de demande d'exercice du droit d'exclusion (Annexe C de la Convention de règlement);

[66] **ORDERS** that each Class Member who wishes to opt out of the Settlement Agreement R-1, and thus not be bound by the Settlement Agreement, has to do so in conformity with the Settlement Agreement and the Opt-Out Form (Schedule C of the Settlement Agreement);

[67] **DÉTERMINE** le calendrier relatif à l'administration de la Convention de règlement, à savoir :

a) Échéance pour exercice du droit d'exclusion : le 19 août 2013;

b) Échéance pour transmettre une réclamation conforme à la Convention de règlement : le 14 novembre 2013.

[67] **DETERMINES** the schedule regarding the administration of the Settlement Agreement, namely:

(a) The deadline for opting out of the Settlement Agreement: August 19, 2013;

(b) The deadline to file a claim under the Settlement Agreement: November 14, 2013.

[68] **DÉCLARE** que pour être valides, les Formulaires de réclamation doivent être remplis et transmis tel que stipulé à la Convention de règlement R-1;

[68] **DECLARES** that to be eligible, Claims Forms must be completed and submitted in the manner stipulated by the Settlement Agreement R-1;

[69] **ORDONNE** que les prélèvements du Fonds d'aide aux recours collectifs soient prélevés seulement sur chaque réclamation individuelle des membres résidents au Québec, telle que prévue à la Convention de règlement R-1, et être remis conformément à la *Loi sur le*

[69] **ORDERS** that the levies by the *Fonds d'aide aux recours collectifs* be collected only on each claim made by Quebec residents, as provided for in the Settlement Agreement R-1, and be remitted according to the *Loi sur le recours collectifs*, and the *Règlement sur le*

Recours collectifs, et *le Règlement sur le pourcentage prélevé par le Fonds d'aide aux Recours collectifs*;

[70] [17] **APPROUVE** le paiement forfaitaire de 1000$ au Requérant conformément à la Convention de règlement R-1;

[71] **APPROUVE** le versement par les Intimées aux Procureurs-Requérant des honoraires extrajudiciaires et frais prévue à la Convention de règlement R-1;

[72] **RÉSERVE** le droit des parties de s'adresser au tribunal pour solutionner quelque litige découlant de la Convention de règlement R-1;

[73] **LE TOUT**, sans frais.

pourcentage prélevé par le Fonds d'aide aux recours collectifs;

[70] **APPROVES** the payment of $1,000 to the Petitioner in accordance with the Settlement Agreement R-1;

[71] **APPROVES** the payment by the Respondents to Class Counsel of its extrajudicial fees and costs as provided for in the Settlement Agreement R-1;

[72] **RESERVES** the right of parties to ask the Court to settle any dispute arising from the Settlement Agreement R-1;

[73] **THE WHOLE**, without costs.

J.S.C.

MARK G. PEACOCK, J.S.C.

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Date of hearing: June 21, 2013