

BURSOR & FISHER
P.A.

888 SEVENTH AVENUE
NEW YORK, NY 10019
www.bursor.com

JOSEPH I. MARCHESE
Tel: 646.837.7410
Fax: 212.989.9163
imarchese@bursor.com

December 20, 2018

Via ECF & Facsimile:

The Honorable Naomi Reice Buchwald
United States District Court for the Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Moeller v. Advance Magazine Publishers Inc. d/b/a Condé Nast*,
Case No. 15-cv-05671-NRB (S.D.N.Y.)

Dear Judge Buchwald:

I write on behalf of Plaintiff Elizabeth Moeller (“Plaintiff”) pursuant to Rule 2.E.1 of your Honor’s Individual Practices, to summarize Plaintiff’s Motion For Attorneys’ Fees, Costs, Expenses, And Incentive Award (the “Motion”).

After over three years of litigation, the Parties reached agreement on a Class Action Settlement. The Settlement – preliminarily approved by this Court on October 24, 2018 – is the latest of several class settlements reached under the Michigan Preservation of Personal Privacy Act (the “PPPA”), and secures extraordinary relief for the Settlement Class. The Settlement creates a \$13.75 million non-reversionary cash Settlement Fund. In terms of the monetary relief to class members, those who submit a short and simple one-page claim form will receive a *pro rata* cash payment estimated at \$75.¹

Plaintiff’s Motion seeks an award of attorneys’ fees of one-third of the Settlement, or \$4,583,333.33, plus reimbursement of \$33,084.46 in costs and expenses associated with this action, as well as an incentive award of \$10,000 for Plaintiff for her service as class representative. As detailed in the Introduction to the Memorandum of Law In Support of Plaintiff’s Motion (“Plf.’s Br.”), the requested attorneys’ fee is an equal percentage to that approved by other courts in this District in PPPA class action settlements. *See Taylor v. Trusted Media Brands, Inc.*, No. 16-cv-01812-KMK, Dkt. 87 (S.D.N.Y. Feb. 1, 2018) (awarding one-third of \$8.225 million settlement fund resolving plaintiff’s PPPA claim); *Ruppel v. Consumers Union of United States, Inc.*, No. 16-cv-02444-KMK, Dkt. 111 (S.D.N.Y. Dec. 4, 2018) (awarding one-third of \$16.375 million settlement fund resolving plaintiff’s PPPA claim). And it is a lesser percentage than courts have approved in the Eastern District of Michigan. *See Perlin v. Time Inc.*, No. 16-cv-10635-GCS, Dkt. 55 (E.D. Mich. Oct. 15, 2018) (awarding 40% of \$7.4 million settlement fund resolving plaintiff’s PPPA claim); *Kinder v. Meredith Corp.*, No.

¹ This estimate is based upon participation rates that have been experienced by counsel in similar consumer class action settlements, including those under the PPPA.

14-cv-11284-TLL, Dkt. 81 (E.D. Mich. May 18, 2016) (awarding 35% of \$7.5 million settlement fund resolving plaintiff's PPPA claim); *Moeller v. American Media, Inc.*, No. 16-cv-11367-JEL, Dkt. 42 (E.D. Mich. Sept. 28, 2017) (awarding 35% of \$7.6 million settlement fund resolving plaintiff's PPPA claim).

In common-fund cases such as this one, courts in the Second Circuit apply one of two fee calculation methods – the “percentage of the fund” method or the “lodestar” method. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). The Court has discretion in choosing which method to employ. *See McDaniel v. County of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (holding that “the decision as to the appropriate method [is left] to ‘the district court, which is intimately familiar with the nuances of the case’”) (quoting *Goldberger*, 209 F.3d at 48). “[T]he trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases.” *In re Beacon Assocs. Litig.*, 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013). In fact, the “trend” of using the percentage of the fund method to compensate class counsel is now “firmly entrenched in the jurisprudence of this Circuit.” *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 388 (S.D.N.Y. 2013). As the Second Circuit has stated, the percentage method “directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). “In contrast, the ‘lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in gimlet-eyed review of line-item fee audits.’” *Id.* (quoting *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002)).

The Second Circuit has articulated six factors that should be considered when determining the reasonableness of a requested percentage to award as attorneys' fees: “(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.” *Goldberger*, 209 F.3d at 50. As detailed in Plaintiff's Motion, a review of these factors support Class Counsel's fee request. *See* Plf.'s Br. at Argument § I.B. Specifically: (1) Class Counsel expended significant time and labor to this case, including motion to dismiss briefing and oral argument, document and deposition discovery, third party discovery, and summary judgment briefing; (2) the case was complex, involving factual complexity regarding publisher data sharing practices and novel legal issues including new Supreme Court precedent on Article III standing; (3) Class Counsel faced significant risk in litigating this case from the outset, including an amendment to the PPPA, a motion to dismiss, and a motion for summary judgment making fact-intensive arguments concerning whether the recipients of Defendant's magazine subscriber disclosures were agents of the Defendant, and whether Defendant provided adequate notice of its disclosures under the PPPA, among other arguments; (4) Class Counsel are well-respected attorneys with significant experience litigating consumer class actions of similar size, scope, and complexity, including under the PPPA, and faced well-resourced and experienced defense counsel; (5) Courts in the Second Circuit routinely approve fee requests for one-third of a common fund, including in PPPA cases; and (6) society undoubtedly has a strong interest in incentivizing lawyers to bring complex litigation that is necessary to protect the privacy of consumers' personal reading choices.

Moreover, Plaintiff seeks reimbursement of out-of-pocket costs and expenses of \$33,084.46. These expenses are categorized in the Declaration of Joseph I. Marchese submitted to the Court herewith. The incurred costs include court fees, mediation fees, legal research charges, travel costs, postage fees, court reporting fees, and other related costs. “Courts typically allow counsel to recover their reasonable out-of-pocket expenses.” *McMahon v. Olivier Cheng Catering & Events, LLC*, 2010 WL 2399328, at *8 (S.D.N.Y. Mar. 3, 2010). Indeed, “[c]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.” *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *18 (S.D.N.Y. July 27, 2007). Here, each of these costs and expenses was necessarily and reasonably incurred to bring this case to a successful conclusion. And the costs and expenses only equate to 0.2% of the settlement fund. See *In re IMAX Secs. Litig.*, 2012 WL 3133476, at *6 (S.D.N.Y. Aug. 1, 2012) (listing cases approving costs and expenses totaling approximately 2% of the settlement funds). The Court should therefore approve the reimbursement of costs and expenses in the amount of \$33,084.46.

Finally, Plaintiff seeks an incentive award of \$10,000 in recognition of her services as class representative. The requested incentive award of \$10,000 is well within the range of incentive awards approved by this Court and others in this Circuit. See, e.g., *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2018 WL 3863445, at *2 (S.D.N.Y. Aug. 14, 2018) (approving incentive awards of \$25,000); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (noting case law supports payments of between \$2,500 and \$85,000). Moreover, as detailed in the Declaration of Elizabeth Moeller submitted to the Court herewith, Plaintiff spent approximately 70 hours protecting the interests of the class through her involvement in this case, including by assisting Class Counsel with investigating her claims, aiding in drafting the First Amended Complaint, preserving and producing documents in discovery, and preparing for and sitting for her deposition in New York City.

For the reasons set forth above, Plaintiff respectfully requests that the Court grant her Motion For Attorneys’ Fees, Costs, Expenses, And Incentive Award, and (1) approve attorneys’ fees in the amount of one-third of the settlement fund, or \$4,583,333.33, (2) approve reimbursement of costs and expenses in the amount of \$33,084.46, (3) grant Ms. Moeller an incentive award of \$10,000 in recognition of her efforts on behalf of the class, and (4) award such other and further relief as the Court deems reasonable and just.

Very truly yours,



Joseph I. Marchese

CC: All counsel of record (via ECF)