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United States District Court

District of Massachusetts

### Notice of Electronic Filing

The following transaction was entered on 8/10/2023 at 2:10 PM EDT and filed on 8/10/2023

**Case Name:** Ambrose v. Boston Globe Media Partners LLC

**Case Number:** 1:22-cv-10195-RGS

**Filer:**

**Document Number:** 61(No document attached)

#### Docket Text:

Judge Richard G. Stearns: **ELECTRONIC ORDER** entered. The court will **GRANT IN PART** and **DENY IN PART** the [55] Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award. The parties having reached a settlement agreement (with a final settlement approval hearing scheduled for September 7, 2023), class counsel now seek an attorneys' fees and expenses award of \$1,666,666.67 out of the class fund -- a third of the common fund, the maximum amount permitted in the parties' Settlement Agreement. See Mem. in Supp. of Mot. for Attorneys' Fees [Dkt # 56]; Am. Settlement Agreement [Dkt # 51] para. 8.1; see also *id.* para. 6.4 (noting that consideration of any petition for attorneys' fees, expenses, and incentive awards are to be considered by the court separately from the court's evaluation of the Settlement Agreement).

In awarding attorneys' fees and expenses at the close of class action litigation, courts may use a lodestar approach or a percentage of the fund (POF) method -- the latter of which plaintiffs' attorneys request -- or a combination of the two. See *In re Thirteen Appeals Arising Out of San Juan Dupont Hotel Fire Litig.*, 56 F.3d 295, 307-309 (1st Cir. 1995). "Ordinarily a court approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees, using the alternative method to doublecheck the reasonableness of the fee." *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 187 (D. Mass. 1998).

In common fund cases such as this one, the POF method is generally the preferred fee mechanism. See *Thirteen Appeals*, 56 F.3d at 307. As discussed extensively by Judge Selya in *Thirteen Appeals*,

using the POF method in a common fund case enhances efficiency, or, put in the reverse, using the lodestar method in such a case encourages inefficiency. Under the latter approach, attorneys not only have a monetary incentive to

spend as many hours as possible (and bill for them) but also face a strong disincentive to early settlement.

*Id.* at 308.

However, even under the more flexible POF approach, "[a]dministration of the rule is subject to the trial court's informed discretion. Reasonableness is the touchstone, and a request that promises to yield an unreasonable result must be trimmed back or rejected outright." *In re Fid./Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999). The court at this stage serves as a form of "fiduciary" for the class, because "[w]here... the plaintiff class is unrepresented in the issue of attorneys' fees, the court must jealously guard the interests of the class." *In re Fid./Micron Sec. Litig.*, 1998 WL 313735, at \*2 (D. Mass. June 5, 1998), *vacated on other grounds*, 167 F.3d 735 (1st Cir. 1999).

With reasonableness in mind and the lodestar method as a useful anchoring, this court requested that plaintiffs' counsel supplement their request for attorneys' fees with documentation of their time entries and billing rates. *See* 8/1/2023 Order [Dkt # 59]; *see also In re Fid./Micron Sec. Litig.*, 167 F.3d at 738 ("[Counsel requesting attorneys' fees] must establish the reasonableness of their requests. In the course of that exercise, the trial court may insist on examining particulars, such as receipts and logs, so that it can determine whether the claimed expenses were reasonable, necessary, and incurred for the benefit of the class. Unverified expenses may be rejected out of hand.").

Having reviewed counsel's time entries, the court finds that the requested POF is significantly out of proportion with the lodestar amount, and will trim it back. Plaintiffs' counsel indicate that the lodestar amount of their work on this matter, including expenses, is \$236,736.65. *See* Ex. 1 of Supp. Aff. of Philip L. Fraietta [Dkt # 60-1] at 3. The near \$1.67 million amount requested out of plaintiffs' settlement fund represents a multiplier of over seven times the lodestar amount.

The petitioners argue that they are entitled to the amount sought because the claims and theories at issue in this case were novel, complicated, and unsettled. Further, they argue that they assumed risk and procured a successful outcome. As with any class action litigation, some risk was involved. *See In re Fid./Micron Sec. Litig.*, 1998 WL 313735, at \*3. Further, while it may be the case that this was the first Facebook Tracking Pixel-based VPPA case filed, the issues briefed were not novel "in the sense of being 'different from anything ever known or seen before.'" *Id.* For example, pre-existing case law supported plaintiff's arguments that the Complaint adequately pled that the Boston Globe was a video tape service provider within the meaning of the VPPA and that subscribers' PII was transmitted. *See, e.g.,* Pl.'s Opp'n to Mot. to Dismiss [Dkt # 28] at 4, citing *In re Facebook, Inc., Consumer Privacy User Profile Litigation*, 402 F. Supp. 3d 767 (N.D. Cal. 2019); *id.* at 13-15. Finally, the success of the settlement was reasonable, but not staggering, given counsel's own estimate that individual class members are expected to recover payments of approximately \$20-40 dollars each (and up to a 7 days' extension on any pre-existing Boston Globe digital subscription as in-kind relief).

In light of these considerations, the court finds a 15% POF award for counsel, or \$750,000, more fitting when considering the relevant factors. The revised award is more closely tied to the work performed by counsel and the comparator lodestar amount, while still offering a reasonable incentive to lawyers to assume the risks of class action litigation while not disincentivizing settlements.

**In consideration of the time and effort of plaintiff David Ambrose for the benefit of the class, the court will also approve the requested incentive award of \$5,000 to be paid to Ambrose, the class representative. (RGS, law1)**

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