

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

REBECCA FRISKE, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

BONNIER CORPORATION, a Delaware
corporation,

Defendant.

Case No. 16-cv-12799-DML-EAS

District Judge David M. Lawson
Magistrate Judge Elizabeth A.
Stafford

**PLAINTIFF'S MOTION FOR ATTORNEYS' FEES,
EXPENSES, AND INCENTIVE AWARD**

COMES NOW, Plaintiff Rebecca Friske, by and through her undersigned counsel, and hereby moves the Court under Fed. R. Civ. P. 23(h) for an award of reasonable attorneys' fees and expenses in the total amount of \$623,500, and for an incentive award to Plaintiff in the amount of \$2,500, in connection with the proposed class settlement between Plaintiff and Defendant Bonnier Corp. Defendant does not oppose the relief requested herein. One class member has filed an objection to the settlement. (Dkt. No. 74). In support of her motion, Plaintiff relies upon the Memorandum and Declarations filed contemporaneously herewith.

WHEREFORE, Plaintiff respectfully requests the Court GRANT her motion, overrule/deny the objection, and enter the proposed order submitted in conjunction with Plaintiff's motion for final approval of the class settlement.

Dated: September 3, 2019

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
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Case No. 16-cv-12799-DML-EAS

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**PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR
ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD**

STATEMENT OF ISSUES PRESENTED

1. Should the Court find the requested award of attorneys' fees and expenses, and the Plaintiff's incentive award, are reasonable and warrant approval?

Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Gascho v. Global Fitness Holdings, LLC, 822 F.3d 269 (6th Cir. 2016)

Hadix v. Johnson, 322 F.3d 895 (6th Cir. 2003)

Moeller v. American Media, Inc., No. 16-cv-11367, Dkt. No. 42 (E.D. Mich. Sept. 28, 2017)

Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513 (6th Cir. 1993).

Statutes

Michigan Video Rental Privacy Act, M.C.L. § 445.1711, *et seq.*

Rules

Fed. R. Civ. P. 23

I. INTRODUCTION

In conjunction with her motion for final approval of the class action Settlement Agreement reached with Defendant Bonnier Corporation (“Defendant” or “Bonnier”), Plaintiff Rebecca Friske (“Plaintiff”) now respectfully moves the Court for approval of Class Counsel’s attorneys’ fees and expenses. Additionally Plaintiff requests a small incentive award for her efforts in bringing this action and finally resolving it on terms favorable to the Class.

The Settlement Agreement fully and finally resolves claims that Bonnier violated the Michigan Video Rental Privacy Act (“VRPA”), M.C.L. §§ 445.1711, *et seq.*, by disclosing Plaintiff’s and other Michigan customers’ personal magazine subscriber information to third parties without notice or consent. The Agreement covers a Settlement Class composed of 164,509 members, and establishes a \$2,150,000 Settlement Fund through which class members will obtain relief.

Since the Court granted preliminary approval on June 25, 2019 (Dkt. No. 66), Plaintiff, Defendant, and the Settlement Administrator have successfully implemented the Court-approved notice plan. Based on the projected final number of claims, the cash payout to each claimant will reach \$76–79, which is near the top of the range initially projected by Class Counsel in Plaintiff’s motion for preliminary approval of the settlement. *See* Dkt. No. 62, at 11.

For the reasons articulated below, Plaintiff respectfully requests the Court approve her request for \$623,500 in attorneys' fees and expenses, plus a \$2,500 incentive award for her efforts in successfully concluding this litigation.

II. BACKGROUND

On March 19, 2019, the Parties submitted the proposed settlement to the Court for preliminary approval of the Settlement Agreement and Notice Plan. *See* Dkt. No. 62. After a hearing on June 11, 2019, the Court granted preliminary approval on June 25, 2019, conditionally certified the Settlement Class, and authorized dissemination of notice with minor revisions. *See* Dkt. No. 66.

III. ATTORNEYS' FEES AND COSTS ARE REASONABLE

“In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.” Fed. R. Civ. P. 23(h)(1). In this case, the Settlement Agreement authorizes Class Counsel to petition the Court for no more than \$625,000 of the \$2,150,000 cash Settlement Fund. *See* Dkt. No. 62-1 at ¶ 7.1.

Where, in cases like this one, attorneys' fees and costs are sought from a common fund, the only requirement is that any such award “be reasonable under the circumstances.” *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). While reasonableness “depends on the circumstances of each case,” the most common methods for calculation of attorneys' fees in common fund cases are

the lodestar and percentage-of-the-fund methodologies. *Id.* at 516-17. Whatever approach is used, the court must “articulate the reasons for adopting a particular methodology and the factors considered in arriving at the fee,” including:

- (1) the value of the benefit rendered to the plaintiff class;
- (2) the value of the services on an hourly basis;
- (3) whether the services were undertaken on a contingent fee basis;
- (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
- (5) the complexity of the litigation; and
- (6) the professional skill and standing of counsel involved on both sides.

Gascho v. Global Fitness Holdings, LLC, 822 F.3d 269, 280 (6th Cir. 2016) (quoting *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009)).

Here, Plaintiff requests the Court adopt the percentage-of-the-fund methodology, and, for the reasons explained below, award Class Counsel attorneys’ fees and costs of \$623,500, or 29% of the Settlement Fund.

A. The percentage-of-the-fund methodology should be used to determine the reasonableness of Class Counsel’s fee and expense request.

The Sixth Circuit has recognized a trend “towards adoption of a percentage of the fund method.” *New York State Teachers’ Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 243 (E.D. Mich. 2016) (quoting *Rawlings*, 9 F.3d at 515, and citing *In re Sulzer Orthopedics, Inc.*, 398 F.3d 778, 776 (6th Cir. 2005)). The percentage-of-the-fund methodology also has a number of benefits the lodestar method does not: it “is easy to calculate;” it “establishes reasonable expectations on the part of the

plaintiffs’ attorneys as to their expected recovery;” and it “encourages early settlement.” *Id.*; see also *In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) (similar); *In re Packaged Ice Antitrust Litig.*, No. 08-mdl-1952, 2011 WL 6209188, at *17 (E.D. Mich. Dec. 13, 2011). Finally, the percentage-of-the-fund approach “allows a Court to prevent inequity by assessing attorneys’ fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit.” *Stanley v. U.S. Steel Co.*, No. 04-cv-74654, 2009 WL 4646647, at *1 (E.D. Mich. Dec. 8, 2009).

Recognizing the benefits provided by the percentage-of-the-fund methodology, district courts in four recent VRPA class settlements have chosen to utilize that methodology in determining the reasonableness of attorneys’ fee requests. See *Moeller v. American Media, Inc.*, No. 16-cv-11367, Dkt. No. 42 pp. 7-8 (E.D. Mich. Sept. 28, 2017) (awarding 35% of fund as attorneys’ fees); *Coulter-Owens v. Rodale, Inc.*, No. 14-cv-12688, Dkt. No. 54, p. 13 (E.D. Mich. Sept. 29, 2016) (awarding 25% of fund as attorneys’ fees); *Kinder v. Meredith Corp.*, No. 14-cv-11284, Dkt. No. 81, p. 6 (E.D. Mich. May 18, 2016) (awarding 35% of fund as attorneys’ fees); *Halaburda v. Bauer Publishing Co.*, No. 12-cv-12831, Dkt. No. 68, p. 8 (E.D. Mich. Jan. 6, 2015) (awarding 30% of fund as attorneys’ fees).

In this case, the Court should follow the weight of recent authority and award Class Counsel 29% of the Settlement Fund for attorneys' fees and costs for the reasons more fully explained below.

B. The relevant factors demonstrate the reasonableness of Class Counsel's Fee Request.

i. The Class will obtain valuable benefits as a result of Class Counsel's work.

The Settlement Agreement in this case covers approximately 164,509 class members, or 164,506 after subtracting the three who have requested exclusion. Dkt. No. 63 at ¶14; Jeter Decl. ¶ 14 (filed with motion for final approval). These class members are guaranteed to obtain tangible relief either through claims made against the \$2,150,000 cash Settlement Fund, or by receiving a free one-year subscription to a Bonnier publication. Dkt. No. 62 at 11.

These tangible benefits to Class Members far surpass other privacy class settlements where payment was made only through *cy pres* rather than directly to the class. *See id.* at 16 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 820-22 (9th Cir. 2012) (granting final approval for settlement of claims with only form of monetary payment to *cy pres* fund); *In re Netflix Privacy Litig.*, No. 11-cv-379, 2013 WL 1120801, at *6-7 (N.D. Cal. Mar. 18, 2013) (similar); *In re Google Buzz Privacy Litig.*, No. 10-cv-672, 2011 WL 7460099, at *3-5 (N.D. Cal. June 2, 2011) (similar)).

Plus, the benefits provided to Class Members in this case are similar to those provided in other VRPA settlements. *See Moeller*, No. 16-cv-11367, Dkt. No. 42 (granting final approval to class settlement where only those class members who made claims would receive pro rata portion of settlement fund); *Coulter-Owens*, No. 14-cv-12688, Doc. 54 (similar); *Kinder*, No. 14-cv-11284, Dkt. No. 81 (similar); *Halaburda*, No. 12-cv-12831, Dkt. No. 68 (similar). And the percentage of the fund requested in this case (29%) is lower than the percentage requested in all but one of the prior VRPA class settlements. *See Moeller*, No. 16-cv-11367, Dkt. No. 42 pp. 7-8 (awarding 35% of fund as attorneys' fees); *Coulter-Owens*, No. 14-cv-12688, Dkt. No. 54, p. 13 (awarding 25% of fund as attorneys' fees); *Kinder*, No. 14-cv-11284, Dkt. No. 81, p. 6 (awarding 35% of fund as attorneys' fees); *Halaburda*, No. 12-cv-12831, Dkt. No. 68, p. 8 (awarding 30% of fund as attorneys' fees).

For each of these reasons, the benefits provided to class members in this case justify an award of 29% of the cash Settlement Fund for Class Counsel's fees and expenses. Notably, this percentage does not reflect the value of the magazine subscriptions provided to non-claiming class members. If this value is considered, the requested fee is percentage is substantially smaller.¹ *See Daenzer v. Wayland*

¹ Because the total value of the subscription portion of the settlement will depend upon the number of claims made and the value of the specific magazines requested, it is not possible to estimate the exact total value of this non-cash portion accurately, but a reasonable estimate, assuming a final claims rate for cash of 11 percent and an average subscription value of \$7.50, is approximately

Ford Inc., No. 01-cv-133, 2003 WL 22414966, at *6 (W.D. Mich. Sept. 25, 2003) (“When attorneys are awarded fees from the common fund, they generally receive 20–30 percent of the common fund, with 25 percent serving as the benchmark.”); *see also Thacker v. Chesapeake Appalachia*, 695 F. Supp. 2d 521, 528 (E.D. Ky. 2010) (“Using the percentage approach, courts ... have regularly determined that 30% fee awards are reasonable.”); *In re Telectronics*, 137 F. Supp. 2d 1029, 1046 (S.D. Ohio 2001) (“[T]he range of reasonableness has been designated as between twenty to fifty percent of the common fund.”).

ii. Class Counsel’s lodestar supports their fee request.

As of the filing of this motion, Class Counsel have expended 1,209.9 hours in litigating this case and obtaining global resolution. *See* Declaration of Gary Lynch ¶6 (attached to this filing); Declaration of Daniel Myers ¶7; Declaration of Robert Wood ¶¶5–6. The value of these hours multiplied by the firm’s usual billing rates for each professional equals \$695,280. *See* Lynch Decl. ¶6; Myers Decl. ¶7; Wood Decl. ¶¶5–6. In addition to their time, Class Counsel have incurred total expenses in the amount of \$35,038.65. Lynch Decl. ¶8; Myers Decl. ¶9; Wood Decl. ¶8. Class

\$1,098,060 (determined by multiplying 146,408 non-claiming Class Members by \$7.50). Adding that value to the \$2.15 million gross cash value of the settlement yields a total gross settlement value of \$3,248,060. When Class Counsel’s requested fees and expenses of \$623,500 are divided by \$3,248,060, the result shows that the fee request would equal 19.2% of the total gross value of the Settlement to the Class.

Counsel anticipates incurring substantial additional hours throughout the final approval and settlement process. Lynch Decl. ¶7; Myers Decl. ¶8; Wood Decl. ¶7.

The requested \$623,500 fee and expense award represents a multiplier of 0.897 when measured against the total lodestar value of the time counsel devoted to this case. Because this is “negative” multiplier (*i.e.*, below 1.0), it is necessarily well within the range of reasonableness, as courts often approve fee requests when the lodestar crosscheck reveals multipliers well above 1.0. *See In re Cardinal Health Inc. Securities Litig.*, 528 F. Supp. 2d 752, 767 (S.D. Ohio 2007) (noting typical multiplier “ranges from 1.3 to 4.5”); *Manners v. Amer. Gen. Life Ins. Co.*, No. 98-cv-266, 1999 WL 33581944, at *31 (M.D. Tenn. Aug. 11, 1999) (recognizing that multipliers “have ranged from 1–4 and have reached as high as 10”). Furthermore, District Courts have complete discretion in awarding fees and expenses pursuant to a common fund, meaning a lodestar cross check is not mandatory or required. *See Gascho*, 822 F.3d at 280 (“District courts have the discretion to select the particular method of calculation.”); *see, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. Appx. 496, 501 (6th Cir. 2011) (finding cross-check optional). For these reasons, the time Class Counsel expended in litigating and resolving this case fully justify their fee and expense request.

iii. This case was taken on a contingency basis

Litigating cases on a contingent basis “often justifies an increase in the award of attorney’s fees.” *Doe 1-2 v. Deja Vu Servs., Inc.*, No. 16-cv-10877, 2017 WL 2629101, at *11 (E.D. Mich. June 19, 2017). This results from the significant risk of undertaking the expense and time of litigating complex cases with the “very real possibility of getting nothing whatsoever.” *Underwood v. Carpenters Pension Trust Fund*, No. 13-cv-14464, 2017 WL 655622, at *14 (E.D. Mich. 2017).

Here, counsel for the class took on this case on a contingent fee basis. Lynch Decl. ¶4; Myers Decl. ¶4; Wood Decl. ¶3. Over the three years this action has been pending, Plaintiff’s counsel has investigated Defendant’s privacy practices and policies, engaged in dispositive and class certification motions practice, participated in mediations in New York and Detroit and extended settlement negotiations, and conducted significant discovery with Bonnier and third parties, all without any guarantee of recouping their fees and expenses. Lynch Decl. ¶5; Myers Decl. ¶5; Wood Decl. ¶4. Significantly, Class Counsel took on this case before the Sixth Circuit ruled that individuals have standing to seek relief under the VRPA, *see Coulter-Owens v. Time, Inc.*, 695 Fed. Appx. 117 (6th Cir. 2017), and despite the fact that Plaintiff’s (and the class) claims were potentially barred by various statutory defenses. As a result, this factor supports Class Counsel’s fee request.

iv. Society has an interest in awarding attorney's reasonable fees through enforcement of consumer protection and privacy statutes.

“Consumer class actions ... have value to society ... both as deterrents to unlawful behavior ... and as private law enforcement regimes that free public sector resources.” *Gascho*, 822 F.3d at 287. “[T]o encourage these positive societal effects, class counsel must be adequately compensated.” *Id.*; *see also Doe 1-2 v. Deja Vu Servs., Inc.*, No. 16-cv-10877, 2017 WL 2629101, at *11 (E.D. Mich. June 19, 2017) (“Society has a stake in rewarding attorneys who achieve a result that the individual class members probably could not obtain on their own.”).

Here, society has an interest in ensuring alleged privacy violations of Michigan consumers are redressed. This lawsuit, in all likelihood, was the only way to obtain any benefit for any of the members of the class, as most would never have discovered Defendant's alleged violations of the VRPA. Accordingly, without the effort of Plaintiff and Class Counsel, none of the class members would have received anything for the alleged privacy violations engaged in by Defendant. For that reason, this factor supports Class Counsel's fee and expense request.

v. The potential complexity of the litigation supports Class Counsel's fee request.

“[M]ost class actions are inherently complex[.]” *In re Telectronics Pacing Systems, Inc.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001). This case is no different. It involved several complex legal issues, including issues of contract formation,

whether Defendant sells its magazines “at retail,” whether Defendant sufficiently notified customers about its data practices, and whether Defendant discloses information for exclusive marketing purposes or for some other reason. Class counsel also spent time investigating and confirming Defendant’s privacy violations, as Defendant’s alleged practices were not advertised or disclosed to the public. For these reasons, this factor supports Class Counsel’s fee and expense request.

vi. Class Counsel’s professional skill and standing support their fee request.

As demonstrated in the first motion for preliminary approval, Class Counsel have a wealth of experience in litigation consumer class actions, and have been involved in numerous consumer protection lawsuits throughout the country. Dkt. Nos. 25-1, 25-2 (firm resumes). In addition to the experience of Class Counsel, the law firm of Richardson, Patrick, Brickman and Westbrook, LLC, also has worked on this case. Similar to Class Counsel, this firm and its attorneys have significant experience in consumer protection class actions. Wood Decl. ¶ 1 (containing hyperlink to current firm resume). In short, Class Counsel and other attorneys who worked on this case have significant professional skill and experience, and are well-respected in the legal community.

In addition, opposing counsel in this case, Shutts and Bowen, LLP, are well respected and have skill in defending class suits. In fact, the firm and its attorneys on this case have successfully defended and defeated many class actions to date. In

the event this case failed to settle, Defendant's counsel would certainly have been expected to mount a formidable defense. As such, the skill and standing of Class Counsel and opposing counsel weighs in favor of granting Class Counsel's fee and expense request.

IV. THE COURT SHOULD GRANT THE REQUESTED INCENTIVE AWARD.

“Incentive awards are ‘efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class.’” *Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, No. 09-cv-1162, 2016 WL 6272094, at *2 (W.D. Mich. Mar. 1, 2016) (quoting *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003)). “These awards are ‘usually viewed as extensions of the common-fund doctrine, a doctrine that holds that a litigant who recovers a common fund for the benefit of persons other than himself is entitled to recover some of his litigation expenses from the fund as a whole.’” *Id.* (quoting *Hadix*, 322 F.3d at 898).

In four recent VRPA settlements in Michigan, class plaintiffs were awarded incentive awards ranging from \$2,000 to \$10,000. *See Moeller*, No. 16-cv-11367, Dkt. No. 42 p. 8 (E.D. Mich. Sept. 28, 2017) (awarding \$5,000 incentive award to each class representative); *Coulter-Owens*, No. 14-cv-12688, Dkt. No. 54, pp. 14-15 (awarding \$2,000 incentive award); *Kinder*, No. 14-cv-11284, Dkt. No. 81, p. 6

(awarding \$10,000 incentive award); *Halaburda*, 12-cv-12831, Dkt. No. 68, p. 8 (awarding \$5,000 incentive award).

In this case, an award of \$2,500 is justified and comports with the other VRPA settlements to date. Ms. Friske spent time with Class Counsel investigating the claims in this case, and she provided substantial assistance in drafting and reviewing her complaint. Myers Decl. ¶6. Ms. Friske also actively participated in the litigation and settlement process. *Id.* For these reasons, a \$2,500 incentive award to Ms. Friske is reasonable and justified.

CONCLUSION

For the reasons stated above, Plaintiff and Class Counsel respectfully request that the Court grant her motion, overrule/deny the objection, and enter the proposed order submitted in conjunction with Plaintiff's motion for final approval of the class settlement.

Dated: September 3, 2019

Respectfully submitted,

/s/ Gary F. Lynch
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CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, September 3, 2019, I electronically filed the foregoing document with the Clerk of Court using the Court's ECF filing system, which will send notification to all counsel of record.

/s/ Gary F. Lynch
Gary F. Lynch