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CIRCUIT COURT
DANE COUNTY, WI
2023CV001572

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

DANIELLE PAUL,
ROBERT GUENTHER,

Plaintiffs

Case No. 23CV1572

v.

ROGERS BEHAVIORAL HEALTH
SYSTEM, INC.,

Defendant

MEMORANDUM SUPPORTING PLAINTIFFS' FEE & SERVICE AWARD PETITION

INTRODUCTION

The Court should approve plaintiffs' fee and service award request as "reasonable" under Chapter 803 because they achieved what they set out to accomplish in this case. In 2023, plaintiffs sued Rogers alleging the company had installed tracking technology on its website, rogersbh.org. Plaintiffs allege they never permitted Rogers to use that technology to track their activity, including the cookies and pixels designed to transmit data to third parties like Facebook and Google. Because plaintiffs are patients, they allege that activity violated state and federal law under statutory, contract, and tort principles. As relief, they demanded Rogers compensate them for violating their privacy. And with the settlement, plaintiffs achieved just that.

The parties negotiated the settlement at "arm's length" through counsel, an exchange that was "cordial and professional" but "adversarial in nature." Plaintiffs conditioned their participation on receiving pre-mediation discovery from Rogers showing who was in the class and the extent that its technology tracked patient activity. With that information, plaintiffs understood the landscape affecting settlement and could negotiate in the class's interest. Although plaintiffs believed they would have prevailed through a motion dismiss, class certification, summary judgment, and trial, they acknowledge the case was not without risk. Pixel-tracking cases are novel, and although cases like this one have proliferated across the country, few have navigated through class certification and none through trial, so there is no roadmap for litigating cases like these. As a result, plaintiffs considered their case's strengths in context with its weaknesses when negotiating with Rogers. Through these efforts, the parties brokered a framework for settling that they refined into the settlement agreement.

The agreement creates a \$650,000 settlement fund, a result that stands apart given the class size. With only 59,513 class members, that equals over \$10 per class member before deducting

fees and expenses, exceeding the results achieved in other cases like this. Because the payments will be “pro rata,” the amount delivered will vary depending on the claims rate, but Rogers will pay every penny without any amount reverting.

In other words, plaintiffs secured the relief they wanted when they sued Rogers, without litigating the case for years or risking recovering nothing at all. As a result, the Court should approve plaintiffs’ petition for two reasons. *First*, plaintiffs justify their attorney fee and expense request under Wisconsin law and its counterpart federal standards, ensuring the class their recovery while paying their attorneys a “market rate.” And *second*, the Court should approve plaintiffs’ service awards to recognize what they contributed to the class.

BACKGROUND

Without repeating the background described in the “preliminary” and “final approval” motions, plaintiffs provide the following context:

a. Plaintiffs’ claims

Plaintiffs are Rogers and received care from its providers at its Oconomowoc, West Allis, Brown Deer locations. Doc. 24 (“CAC”) ¶¶ 21, 25. As a “behavioral” health provider, that included evaluating treatments for “trauma recovery,” and “OCD.” *Id.* Because it is a health provider, Rogers had a duty to maintain the information it collects from patients like plaintiffs in confidence, including as a “covered entity” under HIPAA. *Id.* ¶¶ 280-282; *See* 42 U.S.C. § 1320d & 45 C.F.R. Part 160-45. Despite that duty, plaintiffs plead that in May 2017, Rogers embedded its website with the “Meta Pixel,” a technology that tracks and discloses information entered on websites to companies like Facebook and Google. *Id.* ¶ 39. As a result, Rogers’ tracking technology caption plaintiffs’ activity on its site and disclosed it to those companies, with the data needed to identify

who plaintiffs were and what they were doing on the site. *Id.* ¶ 11. The purpose in collecting the data was to “use it for advertising[,” one plaintiffs never consented to. *Id.*

Because plaintiffs allege that activity violated their patient rights, they sued Rogers under seven counts, alleging it violated their privacy rights under statutory, tort, and contract principles. *Id.* Prayer for Relief. As relief, they demanded that Rogers compensate them for violating their privacy, including “compensatory, consequential, nominal, exemplary, punitive, and actual damages[.]” *Id.* ¶ D.

b. Settlement

After serving Rogers, the hospital retained a “well-regarded defense firm with experience in cyber-security investigation and litigation.” Doc. 37 ¶ 34. Plaintiffs’ counsel also has over a decade in experience litigating privacy matters, including as lead counsel in over 70 privacy class actions. *Id.* ¶ 12. With this experience and after evaluating the case, the parties agreed to “explore early resolution and work together cooperatively to resolve their claims.” *Id.* ¶ 35. To that end, plaintiffs insisted on receiving “key information to inform the settlement negotiations, including without limitation the size of the Settlement Class, facts concerning the named Plaintiffs, and other pertinent facts.” *Id.* With that information, plaintiffs understood the landscape affecting their claims and “the strengths and weaknesses underlying their claims and defenses.” *Id.* ¶ 36. And to avoid any conflict with the class, the parties agreed they would not negotiate attorney fees or service awards until they agreed on the settlement’s core terms. This “arm’s length” process resulted in the settlement agreement.

c. Attorney fee & service award request

As explained above, the parties “did not discuss or agree upon payment of attorneys’ fees, costs, and expenses or Plaintiffs’ service award until after they agreed on all material terms of relief

to the Settlement Class. Counsel does this because it ensures the class's interests take precedence. *Id.* ¶ 66. As fees, plaintiffs request an award equaling “35% of the Net Settlement Fund” to cover their labor and their costs and expenses. *Id.* ¶ 67. As service awards, plaintiffs request \$3,500 each for \$7,000 total, sums meant to recognize “Plaintiffs for their efforts on behalf of the Settlement Class, including assisting in the investigation of the case, reviewing the pleadings, remaining available for consultation throughout settlement negotiations, answering counsel’s many questions, and reviewing the terms of the Settlement Agreement.” *Id.* ¶ 68. And like plaintiffs’ attorney fees, the service awards were “negotiated after the primary terms of the Settlement were negotiated.” *Id.* As explained below, the Court should grant these requests Under Chapter 803 because they are “reasonable” under the circumstances.

LEGAL STANDARD

Wisconsin Statute § 803.08 governs class actions, including attorney fee petitions. Under section 803.08(13) “the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by the parties' agreement[.]” In so doing, the court uses four “procedures” listed under § 803.08. Those procedures are: (i) that plaintiff must move the court to approve their fees and costs, with notice to the parties and class members; (ii) that class members may object to plaintiff’s motion; (iii) the court “may” hold a hearing under Wis. Stat. § 805.17 to decide the petition; and (iv) the court “may” refer the petition to a referee under Wis. Stat. § 805.06. In other words, § 803.08(13) *mandates* procedures (i) and (ii) and *permits* procedures (iii) and (iv).

Caselaw clarifies that Wisconsin courts may consider federal law in applying § 803.08: “Wisconsin courts and practitioners can look to the well-developed body of federal case law interpreting [Federal Rule of Civil Procedure] 23 for guidance[.]” *Harwood v. Wheaton*

Franciscan Servs., Inc., 2019 WI App 53, ¶21, 388 Wis. 2d 546, 558, 933 N.W.2d 654, 660 (citing Judicial Council Committee Notes, 2017, § 803.08). In fact, the Legislature amended § 803.08 “to craft a Wisconsin class action rule that tracks as closely as possible to federal practice[.]” *Id.* Thus, the Court may consider federal law in approving plaintiff’s fee application.

ARGUMENT

a. The Fee Application is “reasonable” under Wis. Stat. § 803.08 and should be granted.

The Court should plaintiffs’ fee request under Wisconsin law considering the result they achieved. As above, Wisconsin state courts benefit from the “well-developed body of federal case law interpreting [Federal Rule of Civil Procedure] 23 for guidance[.]” *Harwood*, 2019 WI App 53, ¶21 (citing Judicial Council Committee Notes, 2017, § 803.08). Under that law the “court has considerable discretion to determine the reasonableness of attorneys’ fees because it has the greatest familiarity with the case and is in the best position to scrutinize the attorneys’ work.” *McKinnie v. JP Morgan Chase Bank, NA*, 678 F. Supp. 2d 806, 814 (E.D. Wis. 2009). And under this standard, the “percentage method” is preferred because “of its relative simplicity of administration.” *Florin v. Nationsbank of Ga., NA*, 34 F.3d 560, 566 (7th Cir. 1994).

In fund cases like this it is “commonplace to award the lawyers for the class a percentage of the fund, in recognition of the fact that most suits for damages in this country are handled on the plaintiff’s side on a contingent fee basis.” *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998). That “typical” fee is “between 33 and 40 percent.” *Id.* As a result, courts in the Seventh Circuit award fees equaling around 35% for fund cases. *Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 795 (7th Cir. 2018) (affirming award with “the sum of 36% of the first \$10 million”); *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (finding 40% to be “the customary fee in tort litigation”); *Behrens v. Landmark Credit Union*, No. 17-CV-101-JDP, 2018 WL 3130629, at *16

(W.D. Wis. June 26, 2018) (“And generally, a 33 to 40 percent contingency fee is considered consistent with the market rate and reasonable.”); *In re Forefront Data Breach Litig.*, No. 21-cv-887, 2023 WL 6215366, at *8 (E.D. Wis. Mar. 22, 2023) (same); *Neeck v. Badger Bros. Moving, LLC*, No. 19-cv-834, 2021 WL 1945829, at *3 (W.D. Wis. May 14, 2021) (same). Plaintiffs request here falls within that range at 35%.

Courts in the Seventh Circuit also consider factors “that bear on the market price for legal fees include the risk of nonpayment, the quality of the attorney’s performance, the amount of work necessary to resolve the litigation, and the stakes of the case[.]” *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 833 (7th Cir. 2018). As explained below, plaintiffs meet each factor.

First, plaintiff’s counsel risked no fee at all, as the case delves into claims that have not been tested across the country. Indeed, considering the pixel-tracking decision in cases like *Hartley v. Univ. of Chicago Med. Ctr.*, No. 22 C 5891, 2023 WL 7386060 (N.D. Ill. Nov. 8, 2023), plaintiffs risked not prevailing at the motion to dismiss stage, much less at class certification and summary judgment. By settling, plaintiffs avoided that “inherent risk” and delivered relief to the class now, rather than years from now. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011). This is not to mention that “the costs associated with discovery in complex class actions can be significant.” See *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 964 (N.D. Ill. 2011). Rather than exhaust their resources, plaintiffs devoted them to the class and settlement, saving the class vast expense and a great deal of time, on top of that already expended, as well as expose it to the inherent risk of continued litigation.” *Adams v. Aztar Indian Gaming Co., LLC*, No. 3:20-cv-143, 2023 WL 6536785, at *5 (S.D. Ind. Aug. 11, 2023). As a result, this factor favors the fee request.

Second, counsel's performance justifies their request. When comparing the result achieved here to other pixel-tracking cases, this case exceeds others in the relief provided per class member. For instance, in *Novant Health* the district court approved a \$6.6 million settlement for a class with around 1.3 million members. *In re Novant Health, Inc.*, No. 1:22-CV-697, 2024 U.S. Dist. LEXIS 107949, at *27 (M.D.N.C. June 17, 2024). That breaks down to around \$4.89 per person. But here, the per person breakdown is around \$10.92 per person, doubling what plaintiffs achieved in *Novant*. This is not to mention that counsel's fee request undershoots those found in other privacy actions. *Linnins v. Haeco Americas, Inc.*, No. 1:16CV486, 2018 WL 5312193, at *1 (M.D.N.C. Oct. 26, 2018) (approving \$150,000 in attorney fees with a \$312,500 claim fund); *In re Banner Health Data Breach Litig.*, No. 2:16-CV-02696-SRB, 2020 WL 12574227, at *6 (D. Ariz. Apr. 21, 2020) (approving \$2.9 million in attorney fees with a \$6 million claim fund); *Target Corp. Customer Data Security Breach Litigation*, MDL No. 14-2522 (D. Minn. March 19, 2015) (approving \$6.75 million in attorneys' fees, plus costs, with a \$10 million common fund). As a result, the Court should find this factor favors the fee request.

Third, although this case settled through "early resolution," that is no bar to approving the fee request. As courts hold, "it is important that Class Counsel not be penalized where its record of success produces an early settlement and favorable result for the Class." *Ramsey v. Philips N. Am. LLC*, No. 18-CV-1099-NJR-RJD, 2018 U.S. Dist. LEXIS 226672, at *9 (S.D. Ill. Oct. 15, 2018). This is because "early settlement greatly benefits the Class by avoiding years of hard-fought litigation and substantial litigation expenses. It also guarantees substantial recovery without years of delay and risk of non-payment[.]" *Id.* And in a case like this, the prospect for litigation even after trial loomed, "which could have resulted in reducing or negating, and certainly would have delayed, any judgment in favor of Plaintiffs, even putting aside the near certainty of appeal."

Gehrich v. Chase Bank U.S., 316 F.R.D. 215, 230 (N.D. Ill. 2016). That aside, the Court should also recognize this settlement’s size—less than \$1 million. Indeed, this is not a “super fund” case warranting a lowered percentage on a “sliding scale” as the settlement grows. *Id.* at 236 (“Empirical studies on attorney fees in class actions confirm that the percentage of the total settlement allocated to fees tends to decrease as the total size of the settlement increases.”). For these reasons, the Court should find counsel avoided wasting resources on litigation when the settlement delivers the outstanding relief it does *now*, rather than years from now.

And fourth, the “stakes of the case” warrant the fee request. This factor interrelates with the risk factor above, recognizing that this case’s theory has not been tested in cases across the country, raising the “stakes” that come with it. Again, “[t]he risk that further litigation might result in plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees.” *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (C.D. Cal. 2008). For this same reason, this factor favors plaintiffs’ fee request.

b. The requested service award for Plaintiff is reasonable and should be granted.

A service award of \$3,500 to plaintiffs recognizes their service to the class as “an essential ingredient of any class action[.]” *Cook v. Niedart*, 142 F.3d 1004, 1016 (7th Cir. 1998) (citations omitted) (affirming \$25,000 incentive award to plaintiff); *see also* 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed.2008) (“Incentive awards are fairly typical in class action cases.”); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A. L.Rev. 1303 (2006). An “incentive award is appropriate if it is necessary to induce an individual to participate in the suit... relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended

in pursuing the litigation.” *Id.* Indeed, service awards “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general. Awards are generally sought after a settlement or verdict has been achieved.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009); *See Fox*, No. 3:18-CV-00327-JDP, 2021 WL 826741, at *6 (awarding the named plaintiff a \$2,500 service award). Indeed, “[b]ecause a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.” *Cook*, 142 F.3d..

The Court should award plaintiffs \$3,500 for serving the class and representing its interests. Without their efforts, the class would not have achieved the settlement they did or recovered anything. To support the class, plaintiffs devoted time to investigating their claims, approving the complaint and remain “available for consultation throughout the settlement negotiations,” answering counsel’s questions and reviewing the agreement. Doc. 37 ¶ 68. As a result, plaintiffs request that the Court recognize and reward their efforts by approving the service awards.

Plaintiffs notified the class about their services awards and, to date, no class members have objected. Given the amounts, plaintiffs do not believe any court would reject them considering award payments in other class actions. *See, e.g., Lively v. Dynegy, Inc.*, No. 05-CV-0063-MJR, 2008 WL 4657792 (S.D. Ill. Sept. 30, 2008) (awarding \$10,000 to each of three plaintiffs). Thus, the Court should approve the \$3,500 service awards as “reasonable.”

CONCLUSION

For the reasons stated above, the court should grant plaintiffs’ petition for attorney fees and service awards.

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