THE HONORABLE MICHAEL K. RYAN
Department 37
Noted for Consideration: May 23, 2025 at 11:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JANE DOE and JOHN DOE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

VIRGINIA MASON MEDICAL CENTER, and VIRGINIA MASON HEALTH SYSTEM,

Defendants.

NO. 19-2-26674-1 SEA

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT

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I. INTRODUCTION

A few months before trial, and after five years of intense litigation involving cutting edge legal theories and complex facts, Plaintiff negotiated an outstanding settlement that includes substantial monetary relief and impactful changes to Defendants' practices to safeguard sensitive health information. Defendants Virginia Mason Medical Center and Virginia Mason Health System ("VM") agreed to pay up to $6,750,000 to Settlement Class Members who file claims, and the robust claims rate means the full amount of the Settlement Funds will be distributed to the Class. Settlement notice and administration costs, attorneys' fees and costs, and the class representative service award will not diminish the amount available to pay the Class because VM will pay those amounts separate from and on top of the Settlement Funds.

Settlement Class Members have responded enthusiastically, with 63,866 Settlement Class Member filing valid claims, only 41 timely requesting exclusion and only one objecting. If the settlement is approved, claimants who visited VM's website will receive an estimated $37.57 and those who logged into the patient portal will receive an estimated $75.14. Settlement Class Members' enthusiastic response to the settlement confirms that it is fair, reasonable, and adequate and should be approved.

II. STATEMENT OF FACTS

The procedural history of this case is detailed in Plaintiff's Motion for Attorneys' Fees, Litigation Costs, and Service Award (Doc. 367). Over five years of contentious litigation, the parties engaged in substantial discovery and motion practice, including discretionary review of the Court's class certification order by the Washington Court of Appeals and Supreme Court, VM's motion to decertify, and cross-motions for summary judgment. Prior settlement discussions were unfruitful but the parties reopened discussions as they were preparing for trial, assisted by retired Judge Laura Inveen. After several months of adversarial and arm's-length negotiations, Plaintiff negotiated an excellent settlement for the Class. *See* Doc. 364 Ex. 1 (Settlement Agreement ("SA")).

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The Court granted preliminary approval of the settlement in December 2024, finding, among other things, that the proposed Notice Program satisfied CR 23 and due process. Doc. 365. Settlement Administrator EAG fully executed the Notice Program, sending email and postcard notices to 763,471 Class Members, and reminder notices thirty days before the claim deadline, ultimately reaching over 95% of the Class. In addition, the Settlement Website received 535,908 page views from 142,924 unique visitors. Ross Decl. ¶¶ 7-9, 11.

Settlement Class Members' response has been extremely positive. Only 41 Class Members (0.005%) timely requested exclusion. *Id.* ¶ 20; Terrell Decl. Ex. A (list of timely exclusion requests). Three Class Members submitted exclusion requests shortly after the deadline. Terrell Decl. Ex. B. Plaintiff asks the Court to accept them as timely; VM opposes that request. One Class Member objected. Ross Decl. ¶ 21; Terrell Decl. ¶ 4, Ex. C (objection).

EAG has determined that 63,866 Class Members submitted valid claims, a claims rate of 8.4%. Ross Decl. ¶ 18. There are 6,599 Patient Portal Subclass Claims, 2,671 Public Website User Subclass Claims, and 54,596 combined Patient Portal and Website Claims. *Id*. ¶ 18.

The claims deadline was April 28 and the validation process is not yet complete. There are 398 deficient claims, 18 of which were incomplete and 380 that could not be matched to a Class Member. EAG will send deficiency notices to those individuals, who will have 30 days to correct the deficiency. *Id.* ¶ 17; SA 3.4. Nine late claims were submitted, three of which would otherwise be valid. *Id.* ¶ 16. Plaintiff asks the Court to accept the three otherwise valid late claims as timely. In addition, one Class Member sent a letter to EAG saying she intends to appear at the Final Approval Hearing. *Id.* ¶ 21; Terrell Decl. ¶ 5, Ex. D. She did not file a claim but after speaking with Class Counsel she now understands more about the litigation and would like to file a claim. Terrell Decl. ¶ 5. Plaintiff asks the Court to accept her claim as timely.

VM has advised Class Counsel that it is considering auditing the Patient Portal claims pursuant to section 2.2(i) of the Settlement Agreement and may challenge the validity of some of the claims. VM has not yet provided Class Counsel with complete information about the process it intends to use for the audit, including the reliability and completeness of its data

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sources and the timing of the process. VM's counsel said that VM hopes to have completed the process by the Final Approval Hearing.

The Settlement Agreement provides for payments of $90 for each Patient Portal claim, $45 for each Public Website claim, and $135 for each combined Portal and Public Website claim, to be reduced pro rata if the claims total more than $6.75 million. SA 2.2(a), (b), (c), (f). The claims EAG has deemed valid exceed that amount, totaling $8,084,565. After the pro rata reduction, Patient Portal claimants will receive $75.14, Public Website claimants will receive $37.57, and Combined Portal and Public Website claimants will receive $112.71. Ross Decl. ¶ 19. EAG will adjust these amounts if necessary after the deficient claims are resolved and VM's audit process is complete.

Plaintiff will file an update on the status of the claims process two days before the Final Approval Hearing.

III. STATEMENT OF ISSUES

Whether the Court should (1) grant final approval of the settlement, (2) find the Settlement Class received adequate notice, (3) approve the four valid but untimely claims, (4) allow the three Class Members who submitted untimely requests for exclusion to exclude themselves, and (5) approve VM's separate payment of a service award to Plaintiff and award attorneys' fees and costs to Class Counsel.

IV. EVIDENCE RELIED UPON

Plaintiff relies upon the declarations of Beth Terrell and Blake Ross, Plaintiff's motions for preliminary approval (Doc. 363-364) and for attorneys' fees, costs, and service award (Doc. 367-371), and the pleadings on file.

V. ARGUMENT

When considering a motion for final approval of a class action settlement under CR 23, the Court's inquiry is whether the settlement is "fair, adequate, and reasonable." *Pickett v. Holland Am. Line-Westours,* 145 Wn.2d 178, 188 (2001) ("it is universally stated that a proposed class settlement may be approved by the trial court if it is determined to be 'fair, adequate, and

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reasonable'" (citation omitted)). As part of that determination, the Court must ensure the class received adequate notice of the settlement. *Summers v. Sea Mar Cmty. Health Centers*, 29 Wn. App. 2d 476, 491 (2024), *rev. denied*, 549 P.3d 112 (Wash. 2024). As discussed below, the requirements for final approval are met.

A. The Settlement is fair, adequate, and reasonable.

In evaluating whether a class settlement is "fair, adequate, and reasonable," courts generally refer to eight criteria, with differing degrees of emphasis: the likelihood of success by plaintiff; the amount of discovery or evidence; the settlement terms and conditions; the recommendation and experience of counsel; future expense and likely duration of litigation; the recommendation of neutral parties, if any; the number of objectors and nature of objections; and the presence of good faith and the absence of collusion. *Pickett*, 145 Wn.2d at 192; *see also Deien v. Seattle City Light*, 26 Wn. App. 2d 57, 67 (2023). This list is "not exhaustive, nor will each factor be relevant in every case …. The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Pickett,* 145 Wn.2d at 189.

The approval of a settlement agreement "is a delicate, albeit largely unintrusive inquiry by the trial court." *Id.* The Court's review "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.* (citation omitted). However, "[i]t is not the trial court's duty, nor place, to make sure that every party is content with the settlement." *Id.*; *see also Deien*, 26 Wn. App. 2d at 67 (the proposed settlement is not "to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators"). Moreover, "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution." *Pickett*, 14 Wn.2d at 190 (citation omitted).

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1. The settlement provides substantial relief to the Settlement Class.

The settlement provides comprehensive relief for the Settlement Class. VM will pay $6,750,000 to Class Members who submitted valid claim forms and make meaningful changes to its practices to protect Class Members' sensitive health information. SA 2.1, 2.3-2.5. The estimated payments of $75.14 for Portal claims, $37.57 for Public Website claims, and $112.71 for Combined claims compare favorably to the relief in other similar settlements. *See In re Advocate Aurora Health Pixel Litig.*, 2024 WL 3357730, at *2 (E.D. Wis. July 10, 2024) (approving class settlement with healthcare provider that used pixels on website paying up to $50 per claim); *In re TikTok, Inc., Consumer Privacy Litig.*, 617 F. Supp. 3d 904, 918 (N.D. Ill. 2022) (approving settlement paying $27.19 to $163.13 per claim for alleged collection and distribution of users' biometric information without authorization); *In re U.S. Fertility, LLC Data Sec. Litig.*, Terrell Decl. Ex. E (final approval order in medical data breach settlement providing $50 to claimants without documentation). All Settlement Class Members, including those who chose not to file a claim and future VM patients will benefit from VM's agreement to maintain a Web Governance Committee that will monitor VM's use of analytics and advertising technologies on its website and patient portal, ensure compliance with applicable law (even if the government issues new guidance), and ensure full disclosure of its practices. *See Kurowski v. Rush Sys. for Health*, Terrell Decl. Ex. F (final approval of settlement providing solely for similar injunctive relief on behalf of patients alleging healthcare provider disclosed PII on public website and patient portal).

2. The settlement is an excellent result given the risks of continuing to litigate.

The Class's likelihood of success on the merits is among the most important factors in evaluating a settlement. *Pickett*, 145 Wn.2d at 192. The existence of risk and uncertainty at the time of settlement "weighs heavily in favor of a finding that the settlement was fair, adequate, and reasonable." *Id.*; *see also Deien*, 26 Wn. App. 2d at 68 (affirming settlement approval where trial court considered "the facts and circumstances of the claims and defenses asserted in the

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action, and the potential risks and likelihood of success of pursuing class certification and trial on the merits").

When the parties negotiated this settlement they were preparing to file motions to exclude expert testimony and proposed trial plans, and for a trial date a few months away. Doc. 347, 352. The Court's orders on the parties' summary judgment motions and VM's decertification motion narrowed the issues to be tried and made some findings that were helpful to the Class, but also noted some challenges Plaintiff and the Class faced in proving their claims. For example, the Court found that browsing history has economic value and VM took something of value when it shared patients' browsing history with Facebook and Google without prior consent, but questioned whether the browsing history VM shared could be characterized as healthcare information on a classwide basis. Doc. 340, 346; *see also Jordan v. Nationstar Mortgage, LLC*, 2018 WL 11436310, at *3 (E.D. Wash. Nov. 26, 2018) (following summary judgment, "important issues were left for trial, making the proposed settlement a fair and adequate result for the Class").[1]

The outcome of a trial is always uncertain, but a jury trial in this case raises the added difficulties of explaining complex technology in the context of novel application of statutory and common law claims. Washingtonians have varied and often strong opinions about internet privacy, medical privacy, and the sharing of data with technology companies like Google and Facebook. How these views would play out in a jury room is impossible to predict. Trial is also expensive, and in this case would have involved the testimony of numerous witnesses, including eight expert witnesses, over several weeks. If the Class prevailed VM would undoubtedly appeal, as evidenced by VM's petitions for review up to the Washington Supreme Court of Judge Lum's class certification order. The settlement, by contrast, will provide a prompt and guaranteed recovery for the Class. Settlement Class Members who filed valid

[1] "CR 23 is no longer 'identical' to Fed. R. Civ. P. 23 because of amendments to the federal rule. However, Washington courts may look to federal decisions in applying the Washington Rules of Civil Procedure when the Washington and federal rules are 'substantially similar.'" *Summers*, 29 Wn. App. 2d at 487.

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claims will receive cash payments and everyone in the Class, as well as future VM patients, will benefit from the changes to VM's business practices. *See Deien*, 26 Wn. App. 2d at 72 n.4 ("much of the injunctive relief set forth in the agreement would likely not have been available to the plaintiffs were this litigation resolved on the merits").

3. Because the settlement was reached at the close of discovery, the parties knew the risks of continuing to litigate and the parameters of a favorable settlement.

Courts consider the amount and nature of discovery and evidence developed at the time of settlement in determining whether a settlement is fair, adequate, and reasonable. *Pickett*, 145 Wn.2d at 199; *see also Rinky Dink, Inc. v. World Bus. Lenders*, 2016 WL 3087073, at *3 (W.D. Wash. May 31, 2016) ("A key inquiry is whether the parties had enough information to make an informed decision about the strength of their cases and the wisdom of settlement."). This case was heavily litigated. The parties had nearly completed discovery, engaged in dispositive motion practice, and were preparing for trial when the case settled. Plaintiff served five sets of discovery on VM and subpoenas on ten third parties, including Facebook and Google. VM produced over 10,000 pages of documents and third parties produced over 500,000 pages. Plaintiffs responded to several sets of discovery and produced documents. The parties took 19 depositions, including of Plaintiffs, VM representatives, and the parties' eight experts. The parties had developed a solid foundation for settlement negotiations, armed with a full understanding of challenges they would face at trial.

4. The settlement is the result of arm's-length negotiation and supported by experienced counsel.

This settlement is the result of adversarial litigation and arm's-length negotiations between attorneys experienced in this type of litigation. Collectively, Class Counsel have litigated hundreds of class actions, including many consumer class actions, and they have expertise in litigating data privacy issues. *See* Docs. 368—371 (describing Class Counsel's experience); *see also Pickett*, 145 Wn.2d at 200 ("When experienced and skilled class counsel support a settlement, their views are given great weight." (citation omitted)); *Deien*, 26 Wn.

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App. 2d at 68 (affirming trial court's finding that Terrell Marshall attorneys have "significant experience litigating class action lawsuits" and agreeing their support of a settlement is entitled to great weight). Judge Inveen's assistance with the negotiations is further evidence that they were non-collusive. *See In re Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices & Products Liability Litig.*, 2019 WL 536661, at *8 (N.D. Cal. Feb. 11, 2019) (settlement reached with the assistance of an experienced mediator supports finding of adequacy and non-collusive negotiations).

5. The reaction of the Class supports final approval of the settlement.

The Settlement Class's response supports approval of the settlement. The claims rate of 8.4% is commendable for a consumer class action. *See Summers,* 29 Wn. App. 2d at 486, 496 (affirming approval of settlement with 0.5% claims rate and citing cases recognizing that "response rates in class actions generally range from 1 to 12 percent, with a median response rate of 5 to 8 percent" and "consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns" (citations omitted)). In addition, only one Class Member objected, and a court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it. *See, e.g.*, *Pickett*, 145 Wn.2d at 200–01 (finding "fewer than 50 objections to the proposed settlement out of 470,000 class notices sent to more than 750,000 potential class members" was a "de minimis level of objection"). The Class's response shows strong support for the settlement.

6. The Court should overrule the sole objection to the settlement.

Only one of the 763,471 Settlement Class Members objected to the settlement. The objector says she has experienced identity theft and the settlement payments to Class Members are too small considering the stress she has suffered from the identity theft. Her objection was late but she attached an envelope addressed to EAG and postmarked March 27, 2025, showing she originally mailed her objection one day before the deadline but it was returned to her. Terrell Decl. Ex. C. She also filed a timely Combined Portal and Website claim that EAG deemed to be valid. Class Counsel spoke with the objector and explained the nature of

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the claims in this case as well as her right to exclude herself. She said she does not want to seek leave to file a late exclusion to pursue an individual lawsuit. *Id.* ¶ 4.

Plaintiff suggests the Court address and overrule this objection even though it was technically untimely and was not filed with the Court as required by the Settlement Agreement and outlined in the Notice. SA ¶¶ 6.1, 6.3; Ross Decl. Exs. A & B (Notices). There is no question that the emotional and other consequences of identity theft can be severe, but this is not a typical data breach case and does not involve the type of wrongdoing the objector appears to have experienced. The relief provided by this settlement is in line with other similar settlement, as discussed above, and fairly compensates the Settlement Class. *See Summers*, 29 Wn. App. 2d at 499-504 (overruling objection that the settlement amount was inadequate and recognizing that "[a] possibility that the settlement could have been better does not mean it was not fair, reasonable, or adequate" because "[a] proposed settlement is not judged against a hypothetical or speculative measure of what might have been achieved"); *see also Washburn v. Porsche Cars N. Am., Inc.*, 2025 WL 1017983, at *8 (W.D. Wash. Apr. 4, 2025) (overruling objections to the relief provided by settlement, noting that "[c]ourts have repeatedly held that as settlements are the result of compromises, a class settlement that does not fully compensate each class member is not grounds for rejecting a settlement," and citing cases).

B. Class members received the best notice practicable.

Notice of a class settlement must "be given to all members of the class in such manner as the court directs." CR 23(e). To protect class members' rights, courts must ensure they receive "the best notice practicable under the circumstances." CR 23(c)(2). "This is notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Summers*, 29 Wn. App. 2d at 491 (quoting *Jane Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1045 (9th Cir. 2019)).

In ruling on Plaintiff's motion for preliminary approval, the Court determined that the Notice Program met these requirements. Doc. 365 ¶ 7. EAG fully implemented the Notice

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Program. Over 95% of Settlement Class Members received direct notice by mail and email, a rate that is high for class action notice and particularly notable since the class includes VM patients from ten years ago. Ross Decl. ¶ 8. EAG also emailed a reminder notice 30 days before the claim deadline to Class Members who had not yet filed claims. *Id.* ¶ 10. Class Members could also access information about the settlement on the Settlement Website (virginiamasonprivacyclassaction.com), where EAG posted key documents, including the Notices, Claim Form, Settlement Agreement, Motion for Preliminary Approval, Order Granting Preliminary Approval, and Motion for Attorneys' Fees, Costs, and Service Award and supporting declarations. *Id.* ¶ 11. Class Members made 2,924 calls to the dedicated toll-free number EAG established, and were able to speak with a live operator or obtain information through an IVR system. *Id.* ¶¶ 14-15. Class Counsel assisted more than 50 Class Members with questions about the settlement and the claim process. Terrell Decl. ¶ 8. These response levels confirm the effectiveness of the Notice Program.

C. The requested attorneys' fees, costs, and service award should be approved.

Plaintiff filed his motion for attorneys' fees, costs, and service award on February 26, 2025 (Doc. 367–371), and EAG posted it to the Settlement Website the following business day. Ross Decl. ¶ 11. There were no objections to the fee request of $5,000,000, reimbursement of $378,601 in costs, and a $10,000 service award. If approved by the Court, these amounts will be paid separately from the $6,750,000 Settlement Funds.

Since filing the motion, Class Counsel's lodestar has increased by dozens of hours spent responding to Class Member inquiries, working with EAG on notice and settlement administration issues, conferring with VM about its plan for auditing and potentially challenging Patient Portal claims, and preparing this motion. Class Counsel will devote additional time to preparing for and attending the Final Approval Hearing, continuing to assist Class Members and oversee settlement administration, and ensuring the terms of the Settlement Agreement are properly executed, including the payment of Class Members' claims. Terrell Decl. ¶ 8; *see also Washburn*, 2025 WL 1017983, at *9-10 (approving fee with a 1.201 multiplier in part because

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counsel expected to spend additional time responding to class member inquiries and on claims administration, and approving hourly rates for partners ranging from $1,000 to $1,125, associate rate of $800, and paralegal rates of $300-$350, as set forth in counsel's declaration at ECF No. 50 ¶ 17).

VI. CONCLUSION

Plaintiff requests the Court grant final approval of the settlement, approve the four valid but untimely claims forms, allow the three Class Members who submitted untimely requests for exclusion to exclude themselves, and approve the requested attorneys' fees, costs, and service award.

RESPECTFULLY SUBMITTED AND DATED this 12th day of May, 2025.

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I certify that this memorandum contains 3,709 words, in compliance with the Local Civil Rules.

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DECLARATION OF SERVICE

I, Beth E. Terrell, hereby certify that on May 12, 2025, I caused true and correct copies of the foregoing to be served via the means indicated below:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 12th day of May, 2025.

By: /s/ Beth E. Terrell, WSBA #26759
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