Hon. William L. Dixon
Hearing Date: September 29, 2023
Hearing Time: 10:00 a.m.
With Oral Argument

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

AMY GARCIA, ANTHONY GIBBONS, and TAYLOR RIELY-GIBBONS, individually and on behalf of all others similarly situated, Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF LICENSING, an agency of the State of Washington, Defendant.	No. 22-2-05635-5 SEA PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

Since this Court granted Plaintiffs' Motion for Preliminary Approval, the reaction of the Settlement Class has been overwhelmingly positive. Of the nearly 546,000 Settlement Class members, only 20 have opted out of the settlement, and only two have submitted objections—amounting to significantly less than one percent of the Class. Plaintiffs, by and through their counsel of record, thus respectfully request the Court grant Plaintiffs' Motion for Final Approval of this Class Action Settlement so that Plaintiffs may begin the process of distributing benefits to those members of the Settlement Class who have submitted valid claims.

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II. STATEMENT OF FACTS

A. Factual Background

Department of Licensing ("DOL"), an agency of the State of Washington, issues licenses for 39 types of businesses and professions. Am. Compl. ¶ 9, Dkt. 7. DOL maintains professional and occupational licensees' information in a system known as the Professional Online Licensing and Regulatory Information System ("POLARIS"). *Id*. ¶ 10. DOL required Plaintiffs and the Settlement Class Members to provide certain information to DOL via POLARIS to obtain professional licenses. *Id*. ¶ 12. This information included, but was not limited to, full names, e-mail addresses, Social Security numbers, dates of birth, and/or driver's license or state identification numbers ("Personal Information"). *Id.* In many instances, Plaintiffs and the Settlement Class Members also provided additional Personal Information as part of the licensing process, including credit card numbers, bank account numbers, routing numbers, telephone numbers, and places of employment. *Id*.

In or before the week of January 24, 2022, DOL became aware of suspicious activity involving professional and occupational license information contained in POLARIS. *Id*. ¶ 16. DOL's subsequent investigation revealed that POLARIS was accessed in the Data Breach, and Personal Information for approximately 545,901 licensees was stolen, including their names, e-mail addresses, Social Security numbers, dates of birth, and/or driver's license or state identification numbers. *Id*. ¶ 18; Decl. of Timothy W. Emery ISO Motion for Preliminary Approval ("Emery MPA Decl.") Ex. 1, Dkt. 57. Hackers may also have acquired additional personal information, including credit card account numbers, bank account numbers, routing numbers, telephone numbers, and places of employment. *Id*. ¶ 19.

B. Procedural History, Discovery, and Settlement Negotiations

On April 18, 2022, Plaintiff Amy Garcia filed this Action against DOL in King County

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Superior Court, alleging, among other things, that DOL failed to properly protect personal information in accordance with its duties and that it had inadequate data security. Dkt. 1. Plaintiffs filed an Amended Complaint on May 6, 2022, that added Plaintiffs Anthony Gibbons and Taylor Riely-Gibbons. Dkt. 7. Plaintiffs allege a cause of action for negligence and seek equitable, monetary, and injunctive relief. *Id*.

Shortly after the lawsuit was filed, Plaintiffs served DOL with formal written discovery seeking documents related to the merits of Plaintiffs' claims, any potential defenses thereto, and class certification. *See* Emery MPA Decl. ¶ 20. DOL filed a Motion to Dismiss on June 24, 2022, and Plaintiffs filed their Opposition on August 1, 2022. Dkt. 27, 32. Shortly thereafter, the Parties began to explore resolution through their counsel. Emery MPA Decl. ¶ 22. The Parties agreed to engage Bennett G. Picker of Stradley Ronon as a mediator to oversee settlement negotiations in the Action. *Id*. In advance of formal mediation, DOL provided informal discovery related to the merits of Plaintiffs' claims, potential defenses thereto, and class certification, and the Parties discussed their respective positions on the merits of the claims and class certification. *Id*. ¶ 23. Plaintiffs also provided DOL informal discovery related to their experiences with the Data Breach and their capacity to serve as Class Representatives. *Id*. The Parties participated in extensive arm's-length settlement negotiations conducted through Mr. Picker that included a day-long mediation session on February 15, 2023, followed by continued negotiations over several weeks. *Id*. ¶ 24. Plaintiff Anthony Gibbons also personally participated in the mediation session with Mr. Picker, and he approves of the Settlement that the Parties reached. *Id*.

These protracted settlement negotiations culminated in the Parties agreeing on the form of a CR 2A Agreement on or about March 28, 2023. *Id*. ¶ 25. The Parties thereafter finalized all the terms of the Settlement and executed the Settlement Agreement on April 27, 2023. *Id*.

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C. Preliminary Approval

On May 11, 2023, this Court granted preliminary approval of this class action settlement. Dkt. 61. The Court determined the Settlement Agreement was the result of arm's-length negotiations between the parties after contested litigation, that it had no obvious defects, and that it was within the range of reasonable settlement approval. *Id.* The Court also affirmed the form and content of the proposed notices to be mailed and posted on the internet, concluding they were adequate to provide notice of the Settlement Agreement to the Class, the requisite information regarding this settlement, and that the proposed plan for this notice was sufficient. *Id*. The Court also certified a CR 23(b)(3) settlement class consisting of the people affected by the data breach. *Id.*

D. Terms of the Proposed Settlement

The Settlement Agreement was previously filed with the Court. Emery MPA Decl. Ex. 1, Dkt. 57. In addition to addressing the identified security deficiencies, the settlement requires DOL to pay $3.6 million into a non-reversionary common settlement fund set up by the Settlement Administrator (the "Settlement Fund"). This fund will be used to fund (a) settlement payments, (b) identity theft protection and credit monitoring services, (c) settlement administration costs, (d) service awards to the Class Representatives, and (e) attorney's fees, costs, and expenses. *Id*. ¶ 45. The following summarizes its core terms:

1. The Settlement Class

The "Settlement Class" is defined as:

> All individuals whose personal information was compromised in the Data Breach disclosed by the Washington State Department of Licensing in February 2022. The Settlement Class specifically excludes: (1) DOL and its officers and directors; (ii) all Settlement Class Members who timely and validly submit requests for exclusion from the Settlement Class; (iii) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity

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> occurrence of the Data Breach or who pleads *nolo contendere* to any such charge; and (iv) members of the judiciary to whom this case is assigned, their families, and members of their staff.

Id. ¶ 42.

2. Consideration

The Settlement Agreement provides for reimbursement of out-of-pocket losses and credit monitoring services to Settlement Class Members who submit a timely and valid Claim. Additionally, DOL has committed to improved data security.

(i) Out-of-Pocket Losses

Settlement Class Members who submitted a timely Valid Claim using an approved Claim Form, along with necessary supporting documentation, are eligible to receive compensation for unreimbursed out-of-pocket losses, up to a total of $7,500 per person, subject to the limits of the Settlement Fund. *Id*. ¶ 51. Out-of-pocket losses include: (i) unreimbursed losses incurred as a result of the Data Breach, including unreimbursed bank fees, long distance phone charges, cell phone charges (only if charged by the minute), data charges (only if charged based on the amount of data used), postage, or gasoline for local travel; (ii) fees for unreimbursed identity protection expenses, such as credit reports, credit monitoring, or other identity theft insurance products purchased between January 16, 2022 and May 11, 2023; and (iii) reimbursement for up to 4 hours of time spent remedying issues related to the Data Breach at $35 per hour. *Id*.

(ii) Credit Monitoring Services

Settlement Class Members are eligible to receive two years of identity theft protection and credit monitoring services, which includes three bureau credit monitoring and alerts. *Id*. ¶ 56. This is in addition to the credit monitoring services previously offered to individuals who were notified of the Data Breach. *Id*. The protection and monitoring provided shall include, at a

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minimum: (a) Dark Web monitoring, (b) identity restoration and recovery services; and (c) $1,000,000 identity theft insurance with no deductible.

(iii) Business Practice Commitments

As a result of this litigation and settlement, DOL has implemented or will implement certain reasonable steps to adequately secure its systems and environments ("Business Practice Commitments"), including the following data security measures:

- Review of Policies and Procedures. DOL will periodically review and revise its policies and procedures addressing data security as reasonably necessary.
- Vulnerability Assessment. DOL will agree to implement automated vulnerability scanning tools that cover its systems and will set policies for prompt remediation.
- Firewall Implementation. DOL will agree to place all systems containing PII behind application firewalls.
- Limit Remote Access. DOL will agree to configure remote access to its networks in accordance with industry best practices. This applies to any kind of remote access, including node-on-network and node-on-node. DOL will configure all systems to alert on unsuccessful administrative account logins.
- Implement Password Policies. DOL will agree to verify that all default passwords are changed to follow password policies that comply with best practices.

Id. ¶ 63. DOL will also maintain a program to educate and train its employees on the importance of the privacy and security of PII. *Id*. ¶ 64. Actual costs for the implementation and maintenance of Business Practice Commitments will not be paid from settlement proceeds. *Id*. ¶ 66.

3. Results of the Notice and Claims Process

The Parties implemented the Court-approved Notice Program in coordination with the approved Settlement Administrator, Kroll Settlement Administration LLC ("Settlement Administrator" or "Kroll"). Prelim. Approval Order ¶¶ 7–10, 14–15, Dkt. 61. Using records provided by DOL, Kroll created a database list of Settlement Class Members and verified the addresses using multiple methods. Declaration of Scott M. Fenwick of Kroll Settlement Administration LLC In Connection with Final Approval of Settlement ("Fenwick Decl.") ¶ 4.

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This resulted in mailable address records for 545,729 Settlement Class Members. *Id*. Kroll caused the Court-approved Notice and Claim Forms to be sent via USPS first-class mail on June 9, 2023. *Id*. ¶ 8.

As of July 26, 2023, USPS returned 2,836 Notices with an updated address for such Settlement Class Members (the period in which USPS automatically forwards the Notice had expired), and Kroll re-mailed these Notices to the Settlement Class Members at their updated addresses. *Id*. ¶ 9. As of July 26, 2023, 64,106 notices were returned as undeliverable without forwarding addresses, and Kroll was able to find new addresses and re-sent the Notices to 54,941 Settlement Class Members. *Id*. ¶ 10. Kroll estimates that Notices were likely delivered to 98.02 percent of the Settlement Class. *Id*. ¶ 11. In addition, Kroll will send Reminder Notice to the Settlement Class via email (where available) and mail (where no email is available). *Id*. ¶ 12.

With input from counsel for the Parties, Kroll established a Settlement Website, operational as of May 21, 2023, where Settlement Class Members could obtain important information about the settlement and submit Claim Forms electronically. *Id*. ¶ 5. As of July 26, 2023, the website has received 92,054 views. *Id*. On May 12, 2023, Kroll established a toll-free phone number to provide Settlement Class Members with additional information regarding the settlement through both automated messages and live call center representatives. *Id*. ¶ 6. As of July 26, 2023, the toll-free number has received 4,930 phone calls. *Id*.

4. <u>Claims, Requests for Exclusion, and Objections to Date</u>

Under the schedule established by the Preliminary Approval Order, the deadline for Settlement Class Members to submit an objection to or request for exclusion from the settlement is August 9, 2023, and the deadline for Settlement Class Members to submit claims is October 9, 2023. Prelim. Approval Order ¶¶ 14–15; Fenwick Decl. ¶¶ 14, 19.

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As of July 26, 2023, a total of 9,590 Claim Forms were timely submitted by Settlement Class Members. Fenwick Decl. ¶ 15. This represents a claims rate of 1.8 percent, which falls within the average claims rate for this type of settlement.

Only 20 requests for exclusion were received by Kroll. *Id*. ¶ 20. As of the date of this filing, only two objections have been made. *Id*.

III. STATEMENT OF ISSUES

Should this Court enter an order of final approval over this class action settlement when it provides fair and reasonable relief to the Class, ends expensive and uncertain litigation, and the Class Notice satisfied due process?

IV. EVIDENCE RELIED UPON

Plaintiffs rely upon the Declaration of Scott M. Fenwick of Kroll Settlement Administration LLC in Connection with Final Approval of Settlement ("Fenwick Decl."); the Declaration of Timothy W. Emery In Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Costs, and Service Awards ("Emery Fee Decl."); the Declaration of Timothy W. Emery In Support of Plaintiffs' Motion for Preliminary Approval ("Emery MPA Decl.") and the Settlement Agreement ("S.A.") attached thereto as Exhibit 1 (Dkt. 57); and the previous pleadings and records on file in this matter.

V. AUTHORITY AND ARGUMENT

A. The Settlement Warrants Final Approval.

Approval of a class action settlement "take[s] place over three stages. First, the parties present a proposed settlement asking the Court to provide preliminary approval for both (a) the settlement class and (b) the settlement terms." *Rinky Dink Inc. v. Elec. Merch. Sys. Inc*., No. C13-1347 JCC, 2015 WL 11234156, at *1 (W.D. Wash. Dec. 11, 2015). "Second, if the court does preliminarily approve the settlement and class, (i) notice is sent to the class describing the

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terms of the proposed settlement, (ii) class members are given an opportunity to object or opt out, and (iii) the court holds a fairness hearing at which class members may appear and support or object to the settlement." *Id.* "Third, taking account of all of the information learned during the aforementioned processes, the court decides whether or not to give final approval to the settlement and class certification." *Id.*; *see also In re Toys "R" Us-Del., Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 448 (C.D. Cal. 2014).

When considering final approval of a class action settlement, a court determines whether the settlement is "fair, adequate, and reasonable." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001) (*quoting Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). This is a "largely un-intrusive inquiry." *Id.* at 189. Although the Court possesses some discretion in determining whether to approve a settlement,

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit 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. (*quoting Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)). Moreover, "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution." *Id.* at 190 (*quoting Officers for Justice*, 688 F.2d at 625).

In evaluating whether a class settlement is "fair, adequate, and reasonable," courts generally reference the following criteria, with differing degrees of emphasis: (1) the likelihood of success by plaintiffs; (2) the amount of discovery or evidence; (3) the settlement terms and conditions; (4) recommendation and experience of counsel; (5) future expense and likely duration of litigation; (6) recommendation of neutral parties, if any; (6) number of objectors and nature of objections; and (8) the presence of good faith and absence of collusion. *Id.* at 188–89 (citing 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 11.43 (3d ed.

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1992)). This list is "not exhaustive, nor will each factor be relevant in every case." *Id*. at 189 (*quoting Officers for Justice*, 688 F.2d at 625).

B. The Settlement is Fair, Adequate, and Reasonable.

This settlement provides virtually complete relief to the Class, gives closure for DOL, fosters judicial efficiency, and furthers public policy. As a matter of "express public policy," Washington courts strongly favor and encourage settlements. *City of Seattle v. Blume*, 134 Wn.2d 243, 258 (1997); *see also Pickett*, 145 Wn.2d at 190 ("voluntary conciliation and settlement are the preferred means of dispute resolution"). This is particularly true in class actions and other complex matters where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the Class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (acknowledging a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned").

The Settlement Agreement is fair, adequate, and reasonable. Settlement Class Members were provided claims for: (i) two years of identity theft protection and credit monitoring services, (ii) cash reimbursement for out-of-pocket costs incurred as a result of the Data Breach (up to $7,500 per Class Member), and (iii) cash reimbursement for time expended as a result of the Data Breach (at $35 per hour for a maximum of 4 hours per Class Member). Emery MPA Decl. Ex. 1, at ¶¶ 51, 56.

In addition, DOL will pay for (i) all settlement and administration expenses (estimated to total $613,350.59), (ii) a maximum of $1,080,000 for court approved attorneys' fees, plus costs and expenses, and (iii) service awards of up to $6,000 for each of the five Class Representatives (maximum of $30,000). *Id*. ¶¶ 76, 85, 87; Fenwick Decl. ¶ 21.

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1. Plaintiffs' Likelihood of Success Supports Final Approval.

The existence of risk and uncertainty to the Plaintiffs and Class "weigh heavily in favor of a finding that the settlement was fair, adequate, and reasonable." *Pickett*, 145 Wn.2d at 192. Here, the Plaintiffs and Class sought to hold DOL responsible for a data breach that was precipitated by the criminal actions of a third party. By litigation standards, data breach cases are still relatively new. Courts around the country are grappling with what legal principles apply to these types of claims. Similarly, with the numerous data breaches that have occurred, proving a class member's Personal Information was compromised by a particular breach (as opposed to another) presents challenges for proving causation of damages.

Throughout this litigation and settlement process, DOL maintained it was not liable for any alleged wrongdoing. *See, e.g.*, Mot. to Dismiss FAC, Dkt. 27; Emery MPA Decl. Ex. 1, at ¶ I.3. Accordingly, although Plaintiffs are confident in the strength of their case against DOL, the outcome is nonetheless uncertain. There was also a very real risk of a prolonged and expensive appeals process that DOL was far more financially equipped to handle than Plaintiffs. While attorneys' fees and litigation costs would undoubtedly have increased as a result, the potential recovery for Settlement Class Members would likely not have exceeded the settlement, even with a win at trial.

Class Counsel understood and considered these risks when negotiating the Settlement Agreement, which eliminates these risks and provides substantial compensation to Class Members without further delay.

2. The Amount of Discovery and Evidence Supports Final Approval.

Where "extensive discovery" takes place before a class action settlement, final approval is favored. *See Pickett*, 145 Wn.2d at 199. This is to ensure the parties have "sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship*,

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151 F.3d 1234, 1239 (9th Cir. 1998). This information can be obtained through formal or informal discovery. *See Clesceri v. Beach City Investigations & Protective Servs.*, *Inc.*, No. CV-10-3873-JLS (RZx), 2011 WL 320998, at *9 (C.D. Cal. Jan. 27, 2011).

Here, Plaintiffs obtained all available public records regarding the Data Breach, as well as informal discovery related to the merits of Plaintiffs' claims, potential defenses thereto, and class certification. Emery MPA Decl. ¶ 23. With this information, Class Counsel were prepared and were able to negotiate a settlement that provides substantial and certain relief for the Class that is greater relief than most settlements in this arena provide. *Id.* ¶¶ 24, 27–28.

3. The Settlement Terms and Conditions Support Final Approval.

The terms and conditions of the proposed Settlement Agreement support its final approval. All Class Members who submitted a valid and timely Claim Form remain entitled to the cash compensation described above and two years of identity theft protection and credit monitoring services. The latter has a retail value of $19.99 per Class Member, representing an aggregate value of $3,386,625.84 for the 7,059 Class Members who signed up for this valuable service. Emery Fee Decl. ¶ 7; Emery MPA Decl. Ex. 1, at ¶ 56; Fenwick Decl. ¶ 18. The identity theft protection and credit monitoring service is designed to protect Class Members from the very harm alleged in this lawsuit. Specifically, it monitors a Class Member's credit profile and notifies them of any changes. The service proactively searches the Dark Web (where illegal transactions of Personal Information occur) and helps facilitate removal of Personal Information on the Dark Web. Further, in the event a Class Member's Personal Information has been used improperly, there is $1 million in insurance benefits available to compensate them for their loss and assist in remedying the problem. *Id*.

As for the cash benefits, Class Members are entitled to $35 per hour for up to four hours' worth of time investigating the Data Breach, enrolling in previous credit monitoring made

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available to them, checking their credit, and otherwise responding to the Data Breach. As of July 26, 2023, 7,740 Class Members submitted claims for lost time, totaling 13,056 hours. Fenwick Decl. ¶ 16. This amounts to $456,960 in cash benefits to participating Settlement Class Members. *Id*.

For those Class Members who already incurred damages, they were invited to apply for extraordinary benefits; *i.e*., cash compensation for expenses they already paid for up to $7,500. As of July 26, 2023, 490 Class Members applied for these extraordinary benefits, for an allowed amount of $1,473,247.57. *Id*. ¶ 17.

The settlement reached with DOL covers all of the foregoing benefits. Accordingly, the settlement provides fair, reasonable and adequate recovery in light of the risks of further litigation.

4. The Positive Recommendation and Extensive Experience of Counsel Support Final Approval.

"When experienced and skilled class counsel support a settlement, their views are given great weight." *Pickett*, 145 Wn.2d at 200. Class counsel in the present matter, who are experienced and skilled in class action litigation, support the settlement as fair, reasonable, adequate in the best interests of the Class. Emery MPA Decl. ¶¶ 3–17. Class Counsel have significant class action experience and have litigated the case aggressively and effectively. Given Class Counsel's knowledge and experience, Counsel believe the settlement is an excellent result that provides substantial benefits for Settlement Class Members.

5. Future Expense and Likely Duration of Litigation Support Final Approval.

Another factor the Court considers in assessing the fairness of a settlement is the expense and likely duration of the litigation had a settlement not been reached. *Pickett*, 145 Wn.2d at 188. This settlement guarantees substantial recovery and continued credit monitoring services for

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Class Members while obviating the need for lengthy, uncertain, and expensive litigation. Continued litigation of this matter would cause additional expense and delay. Although the Parties conducted significant informal discovery up to this point, substantial work would be necessary to prepare the case for trial. Expert discovery would be required to prepare for trial, which would have been expensive to conduct. Even if Plaintiffs had prevailed, justice would have been delayed. In contrast, the settlement makes substantial monetary relief available to Class Members in a prompt and efficient manner.

C. The Reaction of the Class Supports Final Approval.

A court may infer a class action settlement is fair, adequate, and reasonable when few, if any, class members object to it. *See Pickett*, 145 Wn.2d at 200-01 (approving settlement with almost fifty objections). Here, the deadline to opt out or object to settlement is August 9, 2023. As of the date of this filing, only one Class Member formally objected[1] and only 20 Class Members opted out. Fenwick Decl. ¶ 20. This indicates strong support for the settlement by the Settlement Class Members and weighs heavily in favor of final approval. *See Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc*., 16-cv-3146 JKB, 2019 WL 3183651 at *5 (D. Md. Jul. 15, 2019) (finding opt-out rate of .026 percent indicated strong support for settlement of data breach action).

Thus far, 1.8 percent of the Class has submitted claims. Fenwick Decl. ¶ 15. This is within the average claims acceptance rate for data breach actions. In the *In re Anthem, Inc. Data Breach Litig*., for example, the claims rate was approximately 1.8 percent. 327 F.R.D. 299 (N.D. Cal. 2018) (also noting that class data breach settlements in *In re Home Depot* and *In re Target* had claims rates of 0.2 percent and 0.23 percent respectively).

[1] Robert S Miller appears to have filed an objection with the Court on June 20, 2023, but did not serve a copy of the objection on the Parties as required by Paragraphs 70–71 of the Settlement Agreement. *See* Dkt. 62. Mr. Miller's objection is nevertheless discussed in Section V.D.1 below.

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D. Only Two Class Members Filed an Objection with the Court.

As of July 26, 2023, 9,590 Settlement Class Members have submitted claims and Kroll has received just 20 requests for exclusion and one objection. Fenwick Decl. ¶¶ 15, 20. One additional objection was filed with the Court, but was not served on the Parties. *Id*. ¶ 20; Dkt. 62.

In similar situations, courts have typically deemed such a small number of objections as affirmative support for settlement approval, as the number of objections suggests an overall favorable reaction from the class. *Rodriguez v. West Publishing Corp*., 563 F.3d 948, 967 (9th Cir. 2009) ("The court had discretion to find a favorable reaction to the settlement among class members given that, of 376,301 putative class members to whom notice of the settlement had been sent, 52,000 submitted claims forms and only fifty-four submitted objections."); *see also Churchill Vill. LLC v. Gen. Elec*., 361 F.3d 566, 577 (9th Cir. 2004) (affirming final approval where "only 45 of the approximately 90,000 notified class members objected to the settlement" and 500 class members opted out); *Hughes v. Microsoft Corp*., No. C98–1646C, C93–0178C, 2001 WL 34089697, at *8 (W.D. Wash. Mar. 26, 2001) ("Over 37,000 notices were sent and over 3,600 class members contacted class counsel wanting to participate. . . . [L]ess than 1% of the class opted out and only nine objections were submitted. In view of the widespread publicity about the settlement, these indicia of the approval of the class of the terms of the settlement support a finding of fairness under Rule 23.").

1. <u>The substance of Mr. Beaufait's and Mr. Miller's objections does not raise any material concerns about the settlement.</u>

Although the fact that there were only two objections weighs in favor of approving the settlement, it is also important to consider the substance of those objections. *See Allen v. Bedolla*, 787 F.3d 1218, 1223–24 (9th Cir. 2015) ("To survive appellate review, the district court . . . must

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give a reasoned response to all nonfrivolous objections.").[2] The objections were filed by Settlement Class Members Robert S. Miller (Dkt. 62) and Mark Beaufait (Dkt. 64). Mr. Miller admits that the Data Breach did not financially affect him, yet requests five years of credit monitoring, rather than the two years provided to the Class. *See* Dkt. 62. Mr. Beaufait alleges he was subjected to a "partial email and credit card attack (2 weeks ago), from a combination of stolen and public information," but admits it is "impossible to know" whether the attack came as a result of the DOL Data Breach. *See* Dkt. 64. Mr. Beaufait requests six years of credit monitoring. *Id*.

Mr. Miller's and Mr. Beaufait's objections to the duration of credit monitoring, which was a key component of the compromise and ultimate settlement in this matter, is essentially an objection that the settlement amount is not enough. Courts routinely reject such objections. "Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *see also Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 544 (W.D. Wash. 2009) (quoting *Hanlon* and overruling objections generally claiming "that the Settlement could have been better by providing different or additional relief, or by utilizing a different claims procedure" because the settlement was "fair, adequate and free from collusion"). In this case, the settlement is fair, adequate, and free from collusion—that Mr. Miller and Mr. Beaufait believe it should be a greater amount does not undermine this conclusion.

[2] While Washington courts have not explicitly adopted this requirement, "CR 23 is identical to its federal counterpart, Fed. R. Civ. P. 23, and thus, federal cases interpreting the analogous federal provision are highly persuasive." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188 (2001).

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E. The Presence of Good Faith and Absence of Collusion Support Final Approval.

In determining the fairness of a settlement, the Court should consider the presence of good faith and the absence of collusion. *Pickett*, 145 Wn.2d at 201. Here, there has been no collusion or bad faith. The settlement is the result of extensive negotiations between experienced attorneys who are highly familiar with class action litigation and the legal and factual issues of this case. Emery MPA Decl. ¶¶ 22–25. At all times, the negotiations leading to the settlement were adversarial, non-collusive, and at arm's length. *Id.*

F. Class Members Received the Best Notice Practicable.

This Court has determined that the notice program meets the requirements of due process and applicable law, provides the best notice practicable under the circumstances, and constitutes due and sufficient notice of all individuals entitled thereto. Prelim. Approval Order, Dkt. 61. The Settlement Administrator implemented the program with the help of Class Counsel. *See generally* Fenwick Decl.

To date, the Notice program has been successful. Approximately 534,955 postcards were delivered successfully. *Id*. ¶ 11. As of July 26, 2023, the Settlement Website had 92,054 views, and 9,590 claims have been made. *Id*. ¶¶ 5, 15. All told, Kroll was able to achieve direct notice to approximately 98.02 percent of the Settlement Class. *Id*. ¶ 11.

G. The Requested Attorneys' Fees are Fair and Reasonable.

By separate motion, Class Counsel will request a fee of $1,080,000 (30 percent of the Settlement Fund), plus reasonable costs and expenses. This amount was negotiated only after the Parties agreed to all substantive terms of the settlement. Emery MPA Decl. ¶¶ 30–31.

The requested fee is supported by both the lodestar and percentage-of-the-fund methods that courts use to determine fees in class action cases. *Vizcaino v. Microsoft Corp*., 142 F. Supp.2d 1299, 1301 (W.D. Wash. 2001); *Lobatz v. U.S. West Cellular of California, Inc*., 222

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F.3d 1142, 1147 (9th Cir. 2000) ("the aggregate amount of attorneys' fees and class settlement payments may be viewed as a constructive class common-fund"). This requested fee is 30 percent of the Settlement Fund, which is in line with the benchmark that courts in the Ninth Circuit have coalesced around. *In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 942 (9th Cir. 2011). However, in reality the percentage is significantly lower because it does not take into account the value of the equitable relief guaranteed under the Settlement Agreement, including the data security enhancements DOL has implemented or will implement, as well as employee education and training. Emery MPA Decl. Ex. 1, at ¶¶ 63–66. When all of the benefits are valued, proposed Class Counsel's fee request is far below 30 percent, and imminently reasonable. The amount requested by Class Counsel in this matter is reasonable and fair in light of the exceptional results achieved for the Class. Finally, Class Members received settlement notices stating the amount and percentage of fees Class Counsel requested.

H. The Requested Service Awards are Fair and Reasonable.

DOL agreed to pay a service award in the amount of $6,000 to each of the five Class Representatives. *Id*. ¶ 85. Plaintiffs request this Court award them the agreed-upon service awards in their concurrently-filed Motion for an Award of Attorneys' Fees, Costs, and Service Awards.

"Service" awards "are intended to compensate class representatives for work undertaken on behalf of a class." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015). Here, the requested service awards do not create a conflict of interest between the five Class Representatives and the Settlement Class Members because the service awards are small compared to the overall settlement relief, there was no agreement between the Class Representatives and Class Counsel regarding the awards, and the awards are not conditioned on the Plaintiffs' support for the Settlement Agreement. The basis for the service awards is purely

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to compensate Plaintiffs for their time and efforts in initiating the lawsuit, staying abreast of all aspects of this litigation, cooperating in discovery, responding to discovery requests, participating in the settlement discussions, and fairly and adequately protecting the interests of the Settlement Class Members. Thus, the service awards do not constitute preferential treatment.

These factors support approval of the settlement.

I. Final Certification of the Settlement Class is Appropriate.

This Court provisionally certified the Settlement Class in the Preliminary Approval Order, finding that the requirements of Rules 23(a) and (b)(3) were met. Dkt. 61. Since that time, there have been no developments that would alter this conclusion. The Settlement Class should now be finally certified.

Certification of a settlement class requires analysis of the factors defined in CR 23. *Pickett*, 145 Wn.2d at 188–89. Washington courts liberally interpret CR 23 because the rule avoids the multiplicity of litigation, saves class members the costs and trouble of filing individual lawsuits, and frees the defendant from the harassment of identical future litigation. *Chavez v. Our Lady of Lourdes Hospital at Pasco*, 190 Wn.2d 507, 515 (2018) (citing *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318 (2002)).

J. The Rule 23 Certification Requirements are Satisfied.

Rule 23(a) requires the following criteria be met in order for a class to be certified: (1) numerosity of claimants; (2) questions of law or fact are common to the class; (3) the claims of the class representative are typical of the claims of the class; and (4) the class representative will fairly and adequately protect the interests of the class. These prerequisites are met here for purposes of settlement.

1. The Class is So Numerous That Joinder of All Members is Impracticable.

The numerosity requirement is satisfied where "the class is so numerous that joinder of

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all members is impracticable." *Kavu, Inc. v. Omnipack Corp*., 246 F.R.D. 642, 647 (W.D. Wash. 2007) (court found that sending unsolicited faxes to at least 3,000 recipients satisfied numerosity). Although there is no specific number required to satisfy the numerosity requirement, courts generally find that numerosity is satisfied when there are at least 40 class members. *Our Lady of Lourdes*, 190 Wn.2d at 520; *Agne v. Papa John's Int'l, et al*., 286 F.R.D. 559, 567 (W.D. Wash. 2012). Here, the Parties estimate the Class to be comprised of 545,901 individuals. Emery MPA Decl. ¶ 26, Ex. 1 ¶ I.2. It is impracticable to join the more than half of a million putative Settlement Class Members and the numerosity requirement is clearly satisfied.

2. There Are Common Issues of Law and Fact.

It is not necessary that every question of law or fact is common to the class. *Abdullah v. U.S. Sec. Associates, Inc*., 731 F.3d 952, 957 (9th Cir. 2013). Instead, Rule 23(a)(2) requires only a "single *significant* question of law or fact." *Abdullah*, 731 F.3d at 957 (quoting *Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 589 (9th Cir. 2012)). Commonality requires courts to "find that determination of a common contention's truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* (internal quotations omitted). In this way, "[w]hat matters to class certification . . . is not the raising of common 'questions' even in droves but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Here, the Parties have reached a resolution of the litigation, driven in large part by the common issues of law and fact that apply to the Class Members.

In this case, Class Members are all confronted with the same issue: they all allegedly had their personal information exposed in the Data Breach as a result of DOL's failure to secure their personal information. In the absence of class certification and settlement, each individual Class Member would be required to litigate a long list of common issues of law and fact, all relating

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to DOL's alleged common course of conduct that allowed the Settlement Class Members' Personal Information to be exposed. Am. Compl. ¶¶ 18–19, 63–73, Dkt. 7. Rule 23(a)(2)'s commonality requirement is satisfied. Numerous data breach cases have been certified across the country for settlement purposes.

3. The Class Representatives' Claims are Typical.

Representative claims are typical of the class claims if they are "reasonably coextensive with those of the absent class members." *Hanlon*, 150 F.3d at 1020; *see also Hansen v. Ticket Track, Inc*., 213 F.R.D. 412, 415 (W.D. Wash. 2003). The typicality element examines whether: (1) the case is based on conduct that is not unique to the plaintiff; (2) the class members have been injured by the same conduct as the plaintiff; and (3) the class members have the same or a similar injury to the plaintiff. *Agne*, 286 F.R.D. at 568. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims." *Kavu*, 246 F.R.D. at 648 (citing *Smith v. University of Washington Law School*, 2 F.Supp.2d 1324, 1342 (W.D. Wash. 2007)). The plaintiffs' claims "need not be identical to the claims of other class members, but the class representative must be part of the class and possess the same interests and suffer the same injury as the class members." *Rodriguez v. Carlson*, 166 F.R.D. 465, 473 (E.D. Wash. 1996).

Here, Plaintiffs have the same claims as the Class, and must satisfy the same elements of every other Class Member. Supported by identical legal theories, Plaintiffs and all Class Members share claims based on the same course of conduct: DOL's failure to secure their personal information. Plaintiffs and all Class Members have allegedly been injured in the same manner by having their valuable personal information exposed.

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4. The Named Plaintiffs and their Counsel Adequately Represent the Class.

The adequacy of representation requirement is satisfied if: (1) the class representative is represented by qualified and competent counsel; and (2) the class representative's interests do not conflict with the interests of the proposed class members. *See Hanlon*, 150 F.3d at 1020; *see also Hansen*, 213 F.R.D. at 415; *Fernandez v. Dep't of Social & Health Svcs*., 232 F.R.D. 642, 645 (E.D. Wash. 2005). Plaintiffs satisfy both prongs of the adequacy requirement.

First, Plaintiffs and each Class Member allegedly have been injured in the same manner. *See, e.g.*, Am. Compl. ¶ 73. Plaintiffs assert the same legal claims and theories as those of all Class Members. Plaintiffs seek the identical relief that would be sought by all members of the Class. No known conflict exists between Plaintiffs and the proposed Class. *Id*. ¶ 58. Plaintiffs agreed to assume the responsibility of representing the Class, which includes responding to discovery requests and diligently pursuing this action in cooperation with counsel. Plaintiffs have taken their obligations to the Class seriously. Nothing more is required.

Second, proposed Class Counsel have extensive experience and expertise in prosecuting complex actions, including class and data breach actions. *Id.* ¶¶ 3–16. In pursuing this litigation vigorously, Plaintiffs advanced and will continue to advance and fully protect the interests of the Class. Accordingly, CR 23(a)(4)'s requirement of adequate representation is satisfied.

5. The Settlement Class Meets the Predominance and Superiority Requirements of Rule 23(b)(3).

If the elements of Rule 23(a) are met, a class action is maintainable if one of the subsections of Rule 23(b) is also satisfied. *Hanlon*, 150 F.3d at 1022. This action is well-suited for certification under Rule 23(b)(3) in the context of settlement because questions common to the Class Members predominate over questions affecting only individual Class Members, and the class action device provides the best method for the fair and efficient resolution of the Class's

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claims. *Id.* Indeed, DOL supports class certification for the purpose of effectuating the proposed settlement. When addressing the propriety of class certification, the Court should take into account the fact that, in light of the settlement, trial will now be unnecessary, and so manageability of the Class for trial purposes is not relevant to the Court's inquiry. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

(i) Common Questions Predominate.

A class action is appropriate under CR 23(b)(3) if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." The predominance requirement is more demanding than the commonality requirement, but does not demand unanimity of common questions; instead, it simply requires that common questions outweigh individual issues. *King v. Riveland*, 125 Wn.2d 500, 519 (1994). This inquiry addresses whether there is a common nucleus of operative facts in each class member's claim. *Our Lady of Lourdes*, 190 Wn.2d at 516. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative basis rather than on an individual basis." *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (citing *Hanlon*, 150 F.3d 1011, 1022). Even a single individual factual or legal issue may satisfy the predominance inquiry so long as it is common among the class and is an overriding issue in the case. *Our Lady of Lourdes*, 190 Wn.2d at 519.

Common questions predominate here for purposes of settlement. Common questions include whether (1) DOL acted negligently in storing Class Members' personal information; (2) whether DOL acted negligently in even having the Class Members' personal information at the time of the Data Breach; (3) whether DOL had appropriate security measures in place to prevent the Data Breach; and (4) whether the Class Members' personal information was used or

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accessed. Predominance is satisfied.

(ii) Class Treatment is Superior to Alternative Methods of Adjudication.

The Court should certify the Class if it finds that a "class action is superior to other available methods for fair and efficient adjudication of the controversy." CR 23(b)(3). "A class action may be superior if class litigation of common issues will reduce litigation costs and promote greater efficiency, or if no realistic alternative exists." *Connor v. Automated Accounts, Inc*., 202 F.R.D. 265, 272 (E.D. Wash. 2001). Factors of superiority include whether members of the class have an interest in individually controlling the litigation, the extent and nature of litigation concerning the controversy already commenced by other members of the class, the desirability of concentrating the litigation of the claims in the particular forum, and the difficulties likely to be encountered in the management of the class action. CR 23(b)(3).

Here, Class Members have not expressed an interest in individually controlling the litigation because no other lawsuits have been filed. This is likely due to the exorbitant costs associated with bringing data breach actions because of the document-intensive discovery and expenses of experts necessary to prove the claims. Judicial economy is enhanced by allowing these claims to be processed *en masse*. That is why a class action is superior. It is desirable to concentrate the claims in this forum, which is in Washington State where the DOL operates and the majority of Class Members reside. Concentrating the claims into one forum and certifying the class is likely the only way the Class Members' rights will be vindicated. *Our Lady of Lourdes*, 190 Wn.2d at 524. The Parties have not encountered difficulties with the administration of this settlement that would rise to the level of preventing class treatment. Indeed, a class action is the superior method of adjudicating consumer claims arising from this Data Breach—just as in other, similar, data breach cases where class-wide settlements have been approved. *See, e.g.*, *In re LinkedIn User Privacy Litig*., 309 F.R.D. 573, 585 (N.D. Cal. 2015); *In re the Home Depot,*

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Inc. Customer Data Sec. Breach Litig., 2016 WL 6902351, at *2 (N.D. Ga. Aug. 23, 2016); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2009 WL 5184352, at *6–7 (W.D. Ky. Dec. 22, 2009). Class treatment is superior for settlement in this case.

K. Plaintiffs Should be Confirmed as Class Representatives and Plaintiffs' Counsel Should be Confirmed as Class Counsel.

Plaintiffs also request that the Court formally and finally designate them as the Settlement Class Representatives to implement the terms of the settlement. As detailed above, Plaintiffs will fairly and adequately represent and protect the interests of the Settlement Class. Plaintiffs' Counsel should be formally and finally appointed as Class Counsel. They have devoted significant time and resources to prosecuting this action on behalf of Plaintiffs and the proposed Settlement Class. Plaintiffs' Counsel have extensive experience in class actions, particularly those involving data breaches. Emery MPA Decl. ¶¶ 5–16. Accordingly, Plaintiffs' Counsel have already and will continue to adequately represent the interests of the Settlement Class and should be appointed as Class Counsel.

VI. CONCLUSION

The Settlement Agreement is fair, adequate, and reasonable in light of the potential obstacles to recovery in this case and the continued risk of litigation. For these reasons, Plaintiffs respectfully request the Court enter Plaintiffs' Proposed Order Granting Final Approval.

Dated July 26, 2023.

By: */s/ Timothy W. Emery*

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Attorneys for Plaintiffs and the Class

I certify that this memorandum contains 7,690 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I, Jennifer Chong, under penalty of perjury of the laws of the state of Washington, certify and declare that I caused a true and correct copy of the foregoing document to be served on the following parties on July 26, 2023 as indicated below:

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Dated this 26th day of July, 2023, at Seattle, Washington.

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