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

MICHAEL BERGESON, individually and on
behalf of others similarly situated,

Plaintiff,

v.

VIRGINIA MASON MEDICAL CENTER,

Defendants.

No. 22-2-09089-8 SEA

**PLAINTIFF’S MOTION FOR
ATTORNEYS’ FEES, COSTS, AND
SERVICE AWARD, AND
MEMORANDUM IN SUPPORT**

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1 Plaintiff Michael Bergeson (“Plaintiff”) respectfully submits this Memorandum in Support
2 of his Motion for Attorneys’ Fees, Costs, and Service Awards.

3 I. INTRODUCTION

4 On April 7, 2023, this Court preliminarily approved a proposed Class Action Settlement
5 between Plaintiff and Defendant Virginia Mason Medical Center (“Defendant” or “VMMC”, and
6 together with Plaintiff the “Parties”). Class Counsel’s efforts created significant benefits for the
7 approximately 1,533 individuals who are a part of the Settlement Class: (1) up to \$2,500 per Class
8 Member in ordinary expense reimbursements, lost time reimbursements and extraordinary expense
9 reimbursements; (2) two years of credit monitoring and identity protection services from
10 myTrueIdentity; and (3) equitable relief in the form of information security enhancements which
11 will help to ensure that the Private Information of Settlement Class Members, which is still in
12 VMMC’s possession, is protected. In addition to the benefits described above, the Settlement
13 Agreement provides that VMMC is to pay all costs of Notice and Settlement Administration,
14 attorneys fees and costs awarded by the Court, and an approved Plaintiff’s Service Award—
15 separate and apart from the funds available to Settlement Class Members.

16 Class Counsel have zealously prosecuted Plaintiff’s and Class Members’ claims, achieving
17 the Settlement Agreement only after extensive investigation and arm’s length negotiations. As
18 compensation for the significant benefit conferred on the Settlement Class, Class Counsel
19 respectfully move the Court for an award of attorneys’ fees and costs in the amount of \$100,000,
20 which represents far below 25% of the total potential benefit earned for the Class—the benchmark
21 for fees regularly used by Washington Courts. *See Bowles v. Wash. Dep’t of Ret. Sys.*, 121 Wash.
22 2d 52, 72 (1993). This request should be approved because it is extremely modest in comparison
23 to the benefit negotiated, and is reasonable and appropriate amount in light of the substantial risks
24 presented in prosecuting this action in a rapidly evolving area of law, the quality and extent of

1 work conducted, and the stakes of the case. Class Counsel also respectfully move the Court for an
2 award of \$1,500 to Plaintiff for his work on behalf of the Class.

3 **II. STATEMENT OF ISSUES AND RELIEF REQUESTED**

4 Accordingly, and relying on the following Memorandum of Points and Authorities, the
5 Declaration of Plaintiff’s Counsel David K. Lietz filed herewith (“Lietz Fees Decl.”), and the other
6 papers on file in this matter, Plaintiff respectfully requests the Court grant Plaintiff’s Motion for
7 Attorneys’ Fees, Costs, and Service Award and enter an order that:

- 8 (1) grants Plaintiff’s request for attorneys’ fees and costs in the amount of \$100,000;
9 (2) grants Plaintiff’s request for a Service Award in the amount of \$1,500; and
10 (3) granting such other, further, or different relief as the Court deems just and proper.

11 **III. STATEMENT OF FACTS AND EVIDENCE RELIED UPON¹**

12 **a. Initial Investigation and Communications**

13 VMMC is a health-care services provider and part of the larger Virginia Mason Franciscan
14 Health, which is one of the largest healthcare providers in the greater Seattle area. *See* Decl. of
15 David K. Lietz in Support of Pl.’s Unopposed Mot. for Prelim. App. of Class Action Settlement ¶
16 30.b (“Lietz MPA Decl.”). In the ordinary course of receiving treatment and health care services
17 from VMMC, patients are required to provide sensitive personal and private information deemed
18 necessary to provide care. *Id.* ¶ 30.c.

19 Plaintiff alleges the Data Incident, which occurred between January 16-20, 2022, occurred
20 when unauthorized person(s) accessed VMMC’s computer network. *Id.* ¶ 30.d. The information
21 the information potentially accessed in the Data Breach included the Private Information of
22 Plaintiff and approximately 1,523 Class Members. *Id.* ¶ 30.e.

23
24
25 ¹ This section has been adopted, in large part, from Plaintiff’s Unopposed Motion for Preliminary
26 Approval, filed on or about March 15, 2023 (“MPA”).

1 **b. Procedural Posture**

2 After receiving notification of the Data Incident, Plaintiff filed his initial complaint on June
3 15, 2022, bringing causes of action for: (1) violation Washington State Uniform Health Care
4 Information Act (“UHCIA”); (2) violation of the Washington State Consumer Protection Act
5 (“CPA”); (3) Negligence; (4) Negligence per se; (5) Breach of Express Contract; (6) Breach of
6 Implied Contract; (7) Breach of Implied Covenant of Good Faith and Fair Dealing; (8) Breach of
7 Confidence; (9) Unjust Enrichment; (10) Breach of Fiduciary Duty. *Id.* at ¶ 32. Shortly after
8 Plaintiff filed his complaint, the Parties determined that this case could benefit from early
9 settlement discussions. *Id.* at ¶ 34. Over the next several months the parties engaged in arm’s-
10 length negotiations and reached an agreement. The Court entered its Preliminary Approval Order
11 on April 7, 2023. Pursuant to the timeline set forth in the Preliminary Approval Order, Plaintiff
12 now submits this Motion for Attorneys’ Fees, Costs, and Service Award.

13 **d. Summary of Settlement²**

14 1. Settlement Class

15 The Settlement Class includes all persons who were sent written notification by Virginia
16 Mason Medical Center that their PII was potentially compromised as a result of the Data Incident.
17 *Id.* at ¶ 41.

18 2. Settlement Benefits

19 The Settlement negotiated on behalf of the Class provides for three separate forms of relief.
20 *Id.* at ¶ 40. First, VMCM will provide direct monetary relief to Class Members for reimbursement
21 of actual ordinary and extraordinary expenses stemming from the Data Incident, as well as for lost
22 time spent dealing with the Data Incident. *Id.* Second, all Settlement Class Members will have the
23 ability to claim two years of three bureau credit monitoring, and identity theft insurance provided
24

25 _____
26 ² The Settlement Agreement can be found in full at Lietz MPA Decl., Ex. 1.

1 by TransUnion myTrueIdentity. *Id.* Finally, VMMC will provide equitable relief in the form of
2 information security enhancements. *Id.*

3 The payments available to Settlement Class Members are divided into three separate
4 categories. The first category is expense reimbursement for Ordinary Losses. This allows
5 Settlement Class Members to submit a claim for reimbursement out-of-pocket expenses, fairly
6 traceable to the Data Incident, up to \$500 per Class Member.

7 Settlement Class Members are also eligible to receive reimbursement for up to three hours
8 of documented lost time spent dealing with the Data Incident (calculated at the rate of \$20 per
9 hour). *Id.* at ¶ 42.a. Claims for lost time are included within the \$500.00 cap on Ordinary Losses.
10 *Id.*

11 Settlement Class Members may also seek reimbursement for Extraordinary Losses up to
12 \$2,500 per Class Member. This category allows Class Members to seek reimbursement for
13 monetary out-of-pocket losses incurred as a result of the Data Incident and not already covered by
14 one or more of the normal reimbursement categories. *Id.* at ¶ 42.b.

15 In addition to claims for reimbursement of expenses and lost time, Settlement Class
16 Members are eligible to claim two years of three bureau credit monitoring and identity theft
17 insurance, paid for by the Defendant. *Id.* at ¶ 40.

18 All Settlement Class Members will also benefit from the information security
19 enhancements VMMC has implemented since the Data Incident as part of the Settlement. *Id.* at ¶
20 43.

21 3. Notice and Claims Process

22 The Court appointed Postlewaite & Netterville (“P&N”) as the Notice Specialist and
23 Claims Administrator in this case. *See* PA Order. Upon information and belief, Notice in this case
24 has been provided as agreed upon and as approved by the Court’s Preliminary Approval Order and
25 will be reported on more extensively in Plaintiff’s Motion for Final Approval of Class Action
26

1 Settlement. Lietz Fees Decl. ¶ 20,23. The Claims Period is ongoing. *Id.* As of June 22, 2023, no
2 requests for exclusion from or objections to the Settlement Agreement have been received by the
3 Settlement Administrator or Class Counsel. Lietz Fees Decl. ¶¶ 21-22. Plaintiff will file a
4 Declaration from P&N certifying completion of Notice and detailing the status of the Claims
5 Administration process with her Motion for Final Approval. *Id.* ¶ 23.

6 **IV. THE COURT SHOULD APPROVE THE REQUEST FOR A SERVICE AWARD**
7 **TO THE CLASS REPRESENTATIVES, ATTORNEYS' FEES, AND COSTS.**

8 **a. Plaintiff's Service Award is Justified.**

9 The Settlement Agreement provides for a Service Award to Plaintiff in the amount of
10 \$1,500—an amount less than half the value for which any Class Member can make a claim. The
11 rationale for making service or incentive awards to named plaintiffs is that he or she should be
12 compensated for the expense or risk he has incurred in conferring a benefit on other members of
13 the Class. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). They serve as
14 premiums in addition to any claims-based recovery, and promote the public policy of
15 representative lawsuits. *Id.* at 958–59. The Service Award sought by Plaintiff here is modest in
16 comparison with others regularly approved in Washington and Ninth Circuit Courts. *See e.g.*,
17 *Bailey v. Grays Harbor Cnty. Pub. Hosp. Dist. No. 2*, No. 20-2-00217014 (Wash. Super. Ct. Sept.
18 21, 2020) (approving service awards in the amount of \$2,500 to each class representative); *In re*
19 *Online DVD-Rental Antitrust Litig.*, 77 F. 3d 934, 947–48 (9th Cir. 2015) (approving service
20 payments to plaintiffs in the amount of \$5,000 each); *Johnson v. MGM Holdings, Inc.*, No. 18-
21 35967 (9th Cir. 2019) (affirming district court's order awarding service awards in the amount of
22 \$1,500).

23 The modest Service Award here serves the purpose of compensating Plaintiff for his
24 efforts, which include maintaining contact with counsel, participating in client interviews,
25 providing relevant documents, assisting in the investigation of the case, remaining available for
26

1 consultation throughout mediation, reviewing relevant pleadings and the Settlement Agreement,
2 and for answering counsel's many questions. Lietz Fees Decl. ¶ 9. It is further justified by the
3 benefits conferred on the Class due to Plaintiff's willingness to serve as a representative. Because
4 of Plaintiff's desire to file suit here, Class Members are able to make a claim for two years of credit
5 monitoring and identity theft insurance valued at \$29.95 per month, for a value of \$718.80 per
6 class member ($\$29.95 \text{ per month} \times 24 \text{ months} = \718.80), up to \$500 of ordinary expense
7 reimbursements and lost time, up to \$2,500 of extraordinary expense reimbursements, and gain
8 the benefit of increased data protection measures designed to protect their Private Information that
9 remains in VMMC's possession. As such, the service award requested for Plaintiff is reasonable.

10 **b. Costs and Fees Sought by Counsel for Plaintiff are Reasonable and Should be**
11 **Approved.**

12 After agreeing to the terms of the Settlement on behalf of the Class, counsel for Plaintiff
13 negotiated their fees and costs separate from the benefit to Class Members, in the amount of
14 \$100,000. Lietz MPA Decl. ¶¶ 56–57.

15 1. The Percentage-of-Recovery Approach is Appropriate for Determining Fees.

16 Under Washington law, the percentage-of-recovery approach is used in calculating fees in
17 common fund/common benefit cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002);
18 *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wash. 2d 52, 72 (1993); *Bowles v. Wash. Dep't of Ret.*
19 *Sys.*, 121 Wash. 2d 52, 73–74 (1993) (rejecting a lodestar critique in a common fund case and
20 applying the percent-of-recovery approach). The common benefit doctrine stems from the premise
21 that those who receive the benefit of a lawsuit without contributing to its costs are “unjustly
22 enriched” at the expense of the successful litigant. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
23 (1980) (noting that the preferred method in common fund cases has been to award a reasonable
24 percentage of the fund). “Stated differently, the doctrine allows an attorney ‘in equity to recover
25 fees in the absence of a contract or statute when his services confer a substantial benefit for a group
26

1 of people.” *Dolan v. King Cnty.*, 13 Wash. App. 2d 1054 (May 12, 2020) (quoting *Lynch v.*
2 *Deaconess Med. Ctr.*, 113 Wash. 2d 162, 167–68 (1989)).

3 In calculating a percentage fee award in a class action involving a settlement fund, the
4 Supreme Court has recognized that a litigant or a lawyer who recovers a common fund for the
5 benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the
6 fund as a whole, even if part of the fund remains unclaimed or reverts to the defendant. *Dolan v.*
7 *King Cnty.*, 13 Wash. App. 2d 1054 (May 12, 2020) (quoting *Van Gemert*, 444 U.S. at 478; *see*
8 *also Id.* at 480 (the class members’ “right to share the harvest of the lawsuit upon proof of their
9 identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class
10 representatives and their counsel”).

11 2. The Requested Fee Satisfies Washington’s Percentage-of Recovery Test.

12 Acceptable fees often range between 20% to 30% of a common fund. *Bowles v. Wash.*
13 *Dep’t of Ret. Sys.*, 121 Wash. 2d at 72; *see also Six (6) Mexican Workers v. Ariz. Citrus Growers*,
14 904 F.2d 1301, 1311 (9th Cir. 1990). In Washington, the benchmark is 25% percent of the fund,
15 and courts allow for adjustments from this figure where appropriate. *Bowles v. Wash. Dep’t of Ret.*
16 *Sys.*, 121 Wash. 2d at 72. “The benchmark percentage should be adjusted, or replaced by a lodestar
17 calculation, when special circumstances indicate that the percentage recovery would be either too
18 small or too large in light of the hours devoted to the case or other relevant factors.” *Six (6) Mexican*
19 *Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). Washington courts,
20 including those in King County, have regularly granted fees requests equal to 25% or more of the
21 common fund. *See, e.g., Romatka v. Brinker Int’l Payroll Co.*, No. 132149371, 2014 WL 6778248
22 (Wash. Super. Ct. Oct. 24, 2014) (approving fees of 25% of the value of the common fund); *Barnett*
23 *v. Wal-Mart Stores, Inc.*, No. 01-2-24553-8, 2009 WL 2377907 (Wash. Super. Ct. July 10, 2009)
24 (approving \$10.5 million in fees, equal to 30% of the common fund); *see also Bailey v. Grays*
25 *Harbor Cnty. Pub. Hosp. Dist. No. 2*, No. 20-2-00217014 (Wash. Super. Ct. Sept. 21, 2020)

1 (granting final approval of data breach class action settlement and awarding fees equal to 20% the
2 total settlement value in claims made settlement).

3 As is true with all common fund cases, this Settlement provides a guaranteed and
4 ascertainable benefit to the class that will not revert back to Defendant. Then, in addition to the
5 guaranteed benefit (the increased data security safeguards, ensuring that Settlement Class
6 Members' Private Information is better protected), Settlement Class Members can *also* make a
7 claim for lost time and expense reimbursements up to \$2,500 per person, in addition to claiming
8 two years of credit monitoring and identity theft protection, valued at \$718.80 per person. Though
9 subject to a per person maximum, the monetary relief for Class Members is *not capped in the*
10 *aggregate*, which means the maximum amount available to Settlement Class Members is
11 approximately \$4,934,420.40.³ In fact, if all Settlement Class Members made a claim for *only* the
12 credit monitoring, which they are entitled to simply for being a member of the class, without having
13 incurred any out of pocket losses or lost time, and zero additional expense, the value of the actual
14 monetary relief to the Settlement Class would be over \$1.1 million.

15 Here, Class Counsel has negotiated, for all Class Members, "the right to share in a harvest"
16 equal to up to \$3,218.80 per person—or nearly \$5 million, plus the information security
17 enhancements implemented by VMMC. *See Van Gemert*, 444 U.S. at 478. Even if no Settlement
18 Class Member has yet sustained a loss that is reimbursable under the Settlement, the fees provided
19 amount to just 8.9% of the benefit conferred on the Class—before even taking in to account the
20 equitable relief they will each receive in the form of heightened information security measures
21 taken by VMMC to protect their Private Information. In whole, the requested attorneys' fees
22 actually amount to less than 2% of the total benefit negotiated by Class Counsel and provided for
23 the Class. Thus, Plaintiff's fee request is eminently reasonable.

24
25 _____
26 ³ (1,533 Class Members) x (\$3,218.80, the maximum amount of monetary relief (including the
credit monitoring) per Class Member) = \$4,934,420.20.

1 The fee here is further justified based on the contingent nature of this case (*see* Lietz Fees
2 Decl. ¶¶ 12-17)—and the risks involved with data breach cases in general. While almost all class
3 actions involve a high level of risk, expense, and complexity, numerous courts have recognized
4 that data breach cases are especially risky, expensive, and complex given the unsettled and
5 evolving nature of the law. *See, e.g., In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019
6 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) (“Data breach litigation is complex and risky. This
7 unsettled area of law often presents novel questions for courts. And of course, juries are always
8 unpredictable.”); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018)
9 (noting that “many of the legal issues presented in [] data-breach case[s] are novel”). This risk is
10 highlighted by the fact that data breach cases have faced substantial hurdles in making it past the
11 pleading stage—and more in obtaining and maintaining certification. *See Hammond v. Bank of*
12 *N.Y. Mellon Corp.*, No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25,
13 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage); *see also In*
14 *re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying
15 certification on the basis that Plaintiffs in a data breach case could not show that common issues
16 predominated).

17 Accordingly, Class Counsel’s request for attorneys’ fees is reasonable, supported by a
18 lodestar cross check especially in light of the contingent nature of the case, and should be approved.

19 4. Class Counsel’s Costs are Reasonable and Should be Reimbursed.

20 Expense awards are provided for typical out-of-pocket expenses that are or would be
21 charged to a fee-paying client, and should be reasonable and necessary. *See In re Immune Resp.*
22 *Sec. Litig.*, 497 F. Supp. 2d 1166, 1177–78 (S.D. Cal. 2007); (citing *Harris v. Marhoefer*, 24 F.3d
23 16, 19 (9th Cir. 1994)). Class Counsel here seeks reasonable and necessary costs, which are
24 included in the \$100,000 award requested. Lietz Fees Decl. ¶ 19. The litigation expenses incurred
25 by Plaintiff’s counsel in this case include: local counsel costs, filing fees, service fees, and research
26

1 costs. Lietz Fees Decl. ¶ 19. The costs incurred were reasonable, and necessary to resolve the
2 litigation. *Id.*; see also *In re Immune Resp.Sec. Litig.*, 497 F. Supp. 2d at 1177–78 (finding
3 \$261,971.79 in costs such as filing fees, photocopy costs, travel expenses, postage, telephone and
4 fax costs, computerized legal research fees, and mediation expenses are relevant and necessary
5 expenses in class action litigation). Expense awards are provided for typical out-of-pocket
6 expenses that are or would be charged to a fee-paying client, and should be reasonable and
7 necessary. *Id.* (citing *Harris v. Marhoefer*, 24 F.3d at 19).

8 These costs are included in Plaintiff’s request for \$100,000 in attorney’s fees, costs, and
9 expenses combined. Because the costs are reasonable and necessary for the litigation, Class
10 Counsel’s motion should be granted.

11 **V. CONCLUSION**

12 Class Counsel, with the help of Plaintiff, has made significant benefits available to Class
13 Members. In return, they seek fees, costs, and a Service Award well below the range of those
14 regularly approved by Washington Courts. As of June 22, 2023, no Class Member has objected to
15 any part of the Settlement—including the requests before the Court today. The fees, costs, and
16 Service Award are inherently reasonable, and as such Plaintiff respectfully requests their approval.

17
18 Dated this 23rd day of June 2023.

19 **FRANK FREED SUBIT & THOMAS LLP**

20 By: /s/ Michael C. Subit

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Counsel for Plaintiff and the Class

1 **WORD COUNT CERTIFICATION**

2 I certify that this memorandum contains 3,282 words, in compliance with the Local Civil
3 Rules.

4 **CERTIFICATE OF SERVICE**

5 I hereby certify that a true and correct copy of the foregoing document was served via King
6 County E-Service and/or email upon the following:
7

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15 DATED this 23rd day of June 2023.

16 */s/ James Gamboa*
17 James Gamboa