

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


**[PROPOSED] ORDER GRANTING MOTION
FOR CLASS CERTIFICATION**

Plaintiffs Jane Doe and John Doe moved for certification of a class of Washington residents who are or were patients of defendants Virginia Mason Medical Center or Virginia Mason Health System (together, "Virginia Mason") or any of their affiliates and who exchanged communications at www.virginiamason.org or the MyVirginiaMason patient portal. The Court has considered the motion, opposition, reply, and surreply, and the evidence submitted by the parties, as well as counsel's argument at the September 17, 2021, hearing on the motion, and is fully advised.

Plaintiffs are patients of Virginia Mason Medical Center who allege that Virginia Mason bugs its web-property to redirect its patients' identities and confidential communications to third-party digital marketing companies. Plaintiffs allege that when they used Virginia Mason's

1 web-property, the “bugs” that VM planted—tracking pixels that scrape HTML tags and text
2 from Internet communications—transmitted Plaintiffs’ personally identifiable information and
3 communications with Virginia Mason to Facebook, Google, Signal, and The Trade Desk. The
4 transmitted information included health information that Virginia Mason shared when a
5 patient entered, exited, or communicated inside the “MyVirginiaMason” patient portal.
6 Plaintiffs allege that tens of thousands of Washingtonians have been subjected to the same
7 allegedly unlawful practices. Plaintiffs assert claims for violation of the Washington Consumer
8 Protection Act, per se violation of the CPA, identity theft, intrusion upon private affairs,
9 fraudulent concealment/ nondisclosure, breach of confidentiality, violation of the Washington
10 Healthcare Information Act, negligence, breach of contract, and quasi-contract/unjust
11 enrichment.

12 A “primary function of the class action is to provide a procedure for vindicating claims
13 [that], taken individually, are too small to justify individual legal action but which are of
14 significant size and importance if taken as a group.” *Chavez v. Our Lady of Lourdes Hosp. at*
15 *Pasco*, 190 Wn.2d 507, 514, 54 P.3d 665 (2018) (quoting *Brown v. Brown*, 6 Wn. App. 249,
16 253, 492 P.2d 581 (1971)). A class should be certified if it satisfies the requirements of CR
17 23(a)—numerosity, commonality, typicality, and adequacy—and the 23(b)(3) requirements
18 that common questions of law or fact “predominate over any questions affecting only
19 individual members” and a class action be “superior to other available methods for the fair
20 and efficient adjudication of the controversy.” *Id.* at 514.

21 The Court finds that the CR 23(a) requirements are satisfied. A class with at least 40
22 members is sufficiently large for class certification. *Chavez*, 190 Wn.2d at 520; CR 23(a)(1).
23 There are more than 84,000 potential members of the Class, satisfying the numerosity
24 requirement. Virginia Mason argues that the Class is not “sufficiently identifiable” but it does
25 not have to be. It is enough that the class definition is based on objective criteria. *See Briseno*
26 *v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017). The class definition is based on
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1 objective criteria and most Class members can be identified from Virginia Mason's data.

2 CR 23(a)(2) requires that there be questions of law or fact common to the class. A
3 single common issue important to the outcome of the litigation is enough. *Behr*, 113 Wn. App.
4 at 320. "[T]here is a low threshold to satisfy this test." *Id.* at 320, 54 P.3d 665. If a defendant
5 has "engaged in a 'common course of conduct' in relation to all potential class members,"
6 class certification is appropriate regardless of whether "different facts and perhaps different
7 questions of law exist within the potential class." *Brown*, 6 Wn. App. at 255; *see also Pellino v.*
8 *Brink's Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011) ("CR 23 does not require 'that the shared
9 questions of law or fact be identical' as to each individual class member." (quoting *Miller v.*
10 *Farmer Bros. Co.*, 115 Wn. App. 815, 824, 64 P.3d 49 (2003))).

11 The overarching common questions in this case are whether Virginia Mason bugged its
12 web-property with source code that caused tracking cookies to be deposited on Plaintiffs' and
13 class members' computing devices, whether Virginia Mason disclosed Plaintiffs' and class
14 members' personally identifiable data and communications to third parties, and whether
15 Virginia Mason accurately disclosed its practices in its privacy policies. Answering these
16 questions will resolve common issues that are central to all class members' claims. Additional
17 common questions include whether Virginia Mason knew or should have known its web-
18 property transmitted class members' data to third parties, whether Virginia Mason breached
19 duties of confidentiality to class members, whether Virginia Mason's privacy policies
20 constitute an enforceable contract with class members and, if so, whether Virginia Mason
21 breached it, whether Virginia Mason's conduct is unfair or deceptive in violation of the CPA,
22 and whether class members were damaged by Virginia Mason's conduct.

23 The CR 23(a)(3) typicality requirement "is satisfied if the claim 'arises from the same
24 event or practice or course of conduct that gives rise to the claims of other class members,
25 and if his or her claims are based on the same legal theory.'" *Pellino*, 164 Wn. App. at 684
26 (quoting *Behr*, 113 Wn. App. at 320). "Where the same unlawful conduct is alleged to have
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1 affected both the named plaintiffs and the class members, varying fact patterns in the
2 individual claims will not defeat the typicality requirement.” *Id.* Typicality is satisfied.
3 Plaintiffs’ claims arise from the same course of conduct that gives rise to the claims of other
4 Class Members and are based on the same legal theories.

5 Virginia Mason argues that Plaintiffs’ posting of some medical information on their
6 personal Facebook pages creates unique defenses. But the premise of liability in this case, and
7 privacy cases generally, is that it is the patient’s choice to disclose protected data and it is
8 actionable for a medical provider to intrude upon that choice regardless of what the plaintiff
9 has chosen to do with her information. *See In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2014
10 WL 2758598, at *21 (N.D. Cal. Jun. 17, 2014) (“A user’s independent actions do not alter the
11 analysis of whether Hulu knowingly disclosed PII.”). For similar reasons, it is also irrelevant
12 that Plaintiffs, and other Class members, use different types of devices to access the internet
13 and have different practices with respect to internet privacy. Virginia Mason’s patient portal
14 was also designed to prevent patients from blocking third-party disclosures by requiring
15 patients to enable cookies to enter the patient portal. There is also no merit to Virginia
16 Mason’s argument that Plaintiffs did not allow it sufficient discovery of their computers and
17 mobile devices since Virginia Mason did not move to compel and courts “generally require a
18 heightened showing of good cause” to take the “extreme step” of accessing highly personal
19 and sensitive material on personal computers. *Cefalu v. Holder*, No. 12-0303 THE, 2013 WL
20 4102160, at *1 (N.D. Cal. Aug. 12, 2013).

21 The fourth prerequisite for certification is a finding that the named plaintiffs will “fairly
22 and adequately protect the interest of the class.” CR 23(a)(4). This requirement is satisfied if
23 the named plaintiffs are able to prosecute the action vigorously through qualified counsel and
24 the plaintiffs do not have interests antagonistic to those of Class members. *See Hansen v.*
25 *Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003). Plaintiffs and their counsel have
26 shown their commitment to pursuing this case on behalf of the Class. Plaintiffs have no
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1 interests antagonistic to the other Class Members and Plaintiff’s counsel is experienced in
2 litigating class actions and privacy claims. The adequacy requirement is satisfied.

3 The Court also finds that the CR 23(b)(3) requirements are satisfied. A class action may
4 be maintained under CR 23(b)(3) if the “court finds that the questions of law or fact common
5 to the members of the class predominate over any questions affecting only individual
6 members, and that a class action is superior to other available methods for the fair and
7 efficient adjudication of the controversy.” CR 23(b)(3).

8 “To determine whether common issues predominate over individual ones, a trial court
9 pragmatically examines whether there is a common nucleus of operative facts in each class
10 member’s claim.” *Chavez*, 190 Wn.2d at 516. “The relevant inquiry is whether the issue shared
11 by class members is the dominant, central, or overriding issue in the litigation.” *Id.* (quoting
12 *Miller*, 115 Wn. App. at 825). Predominance is “not defeated merely because individual factual
13 or legal issues exist; ... ‘[a] single common issue may be the overriding one in the litigation,
14 despite the fact that the suit also entails numerous remaining individual questions.’” *Id.* at 519
15 (alterations in original) (quoting *Miller*, 115 Wn. App. at 825). It is well established that “[a]
16 class action is not precluded by the possibility that individual issues may predominate once
17 the general illegality of the questioned practice is determined.” *Johnson v. Moore*, 80 Wn.2d
18 531, 535, 496 P.2d 334 (1972).

19 The central common questions in this case—whether Virginia Mason bugged its web-
20 property; whether Virginia Mason caused tracking cookies used by third parties to be
21 deposited on and accessed from Plaintiffs’ and class members’ computing devices, whether
22 Virginia Mason disclosed Plaintiffs’ and class members’ personally identifiable data and
23 communications to third parties, and whether Virginia Mason accurately disclosed this
24 practice in its privacy policies—will be answered with common evidence, including expert
25 testimony and testimony of Virginia Mason employees about the source code on the web-
26 property and the privacy policy disclosures, internal Virginia Mason documents, and evidence
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1 related to the third parties that obtained class members' data and communications. Any one
2 of these common questions is sufficiently dominant to satisfy predominance.

3 Virginia Mason has not identified any individualized issues that preclude certification.
4 The arguments in Virginia Mason's surreply support class certification because they raise
5 common questions rather than individualized ones. Virginia Mason also relies on *In re Hulu*
6 *Privacy Litigation*, No. C 11-03764 LB, 2014 WL 2758598 (N.D. Cal. Jun. 17, 2014), but *Hulu* did
7 not address the conduct at issue in this case since Virginia Mason used post-*Hulu* cookie-
8 syncing technologies. Because the Class includes only patients, Virginia Mason's argument
9 that non-patients could be visiting its web-property is irrelevant. Whether patient status is
10 protected health information is a common question, as is whether Virginia Mason's conduct
11 caused Class Members' injuries. Finally, Plaintiffs are not required to show that damages can
12 be proven with common evidence. *See Chavez*, 190 Wn.2d at 521.

13 Superiority is satisfied when a class action is superior to other methods of adjudication
14 for resolution of the claims at issue. *Chavez*, 190 Wn.2d at 511. Factors relevant to superiority
15 include: (A) the interest of members of the class in individually controlling the prosecution or
16 defense of separate actions; (B) the extent and nature of any litigation concerning the
17 controversy already commenced by or against members of the class; (C) the desirability or
18 undesirability of concentrating the litigation of the claims in the particular forum; (D) the
19 difficulties likely to be encountered in the management of a class action. CR 23(b)(3).

20 The relevant factors support certification. Class Members are unlikely to be aware of
21 the claims asserted in this case and unlikely to pursue litigation because of the amount of
22 damages they may recover. *See Chavez*, 190 Wn.2d at 523 ("Where individual damages are
23 small, the class vehicle is usually deemed to be superior."). There are also no manageability
24 concerns that undermine superiority. Class treatment will conserve judicial resources,
25 promote consistency, and ensure that class members have their day in court. The existence of
26 some individual issues and the fact that they "might take some time to resolve does not make
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1 a class action unmanageable." *Chavez*, 190 Wn.2d at 521; *see also id.* ("Trial courts have a
2 'variety of procedural options to reduce the burden of resolving individual damage issues,
3 including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class
4 members, or even class decertification after liability is determined.'" (citation omitted)).

5 THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' Motion for Class Certification is
6 GRANTED.

7 1. The following class is certified under CR 23(a) and (b)(3):

8 All Washington residents who are, or were, patients of Virginia
9 Mason Medical Center or Virginia Mason Health System or any of
10 their affiliates and who exchanged communications at
11 www.virginiamason.org or the MyVirginiaMason patient portal.

12 2. Jane Doe and John Doe are appointed to serve as Class Representatives and the
13 law firms of Simmons Hanly Conroy, LLC, Terrell Marshall Law Group PLLC, the Gorny Law Firm
14 LC, Kiesel Law LLP, and the Simon Law Firm, PC are appointed to serve as Class Counsel.

15 3. The parties are directed to meet and confer about providing notice to class
16 members and propose a notice plan to the Court within 30 days of entry of this order.

17 IT IS SO ORDERED.

18 DATED this 27 day of September, 2021.

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21 THE HONORABLE DEAN LUM

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