THE HONORABLE MARY E. ROBERTS
Department 4
Noted for Consideration:
With Oral Argument

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

JULIUS TERRELL, as an individual and as a representative of the class,

Plaintiff,

v.

COSTCO WHOLESALE CORP.,

Defendant.

NO. 16-2-19140-1 SEA

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiff Julius Terrell respectfully moves for final approval of the Class Action Settlement Agreement reached between Plaintiff and Defendant Costco Wholesale Corporation ("Defendant" or "Costco") ("Settlement").[1] For the reasons set forth in this memorandum and in the papers previously submitted in support of preliminary approval, the Settlement is fair, adequate, reasonable, and in the best interests of the Class. Accordingly, Plaintiff respectfully requests that the Court grant final approval of the Settlement by: (1) finally approving the proposed Settlement as fair, adequate, and reasonable for the certified Settlement Class and (2) determining that adequate notice was provided to the Settlement Class.

II. STATEMENT OF FACTS

This is a class action in which Plaintiff alleges that Defendant's employment application procedures did not comply with the requirements of the Fair Credit Reporting Act ("FCRA"). Declaration of E. Michelle Drake in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Drake Prelim. Decl.") ¶ 3. Plaintiff commenced the lawsuit in this Court. *Id.* Defendant removed and immediately moved to dismiss. *Id.* ¶ 4. The district court initially denied Defendant's motion to dismiss, but then remanded after the Ninth Circuit amended a decision that was central to the Court's dismissal order. *Id.* After remand, Costco moved to dismiss the action and the parties cross-filed motions for summary judgment. In connection with these motions, the parties fully briefed two key legal issues: (1) whether Plaintiff has standing to assert his FCRA claim in Washington state court and (2) whether Costco violated Section 1681b(b)(2) of the FCRA by procuring a consumer report on Plaintiff without first providing Plaintiff with a disclosure that complied with the FCRA. *Id.* ¶ 5.

Before this Court could rule on these issues, the parties commenced settlement negotiations, exchanging key information regarding the size of the potential settlement class and

[1] Unless otherwise defined herein, all capitalized terms shall have the meaning set forth in the Class Action Settlement Agreement and Release, which is attached as Exhibit A to the Drake Prelim. Decl.

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Defendant's background check policies and procedures. Drake Prelim. Decl. ¶ 7. The parties mediated with Rodney A. Max of Upchurch Watson White & Max for a full day, ultimately reaching agreement. *Id.* ¶ 8. On March 1, 2018, this Court granted preliminary approval of the Settlement.

Since the preliminary approval motion was filed, the court-approved notice has been sent to class members. Supplemental Declaration of Jennifer M. Keough Regarding Notice and Administration and Administration Costs ("Suppl. Keough Decl."), ¶ 4-6. The deadline for submitting claims, objections and opt outs has passed. *Id.* ¶ 7. No class members objected to the Settlement and, out of 113,489 class members, only 41 have timely opted out of the Settlement. *Id.* ¶ 10, 12. In contrast, the administrator has received approximately 21,535 complete, timely, non-duplicative claims.[2] *Id.* ¶ 13. This is equal to 19.23% of the Class Members who were required to file claims in order to receive a payment, and, assuming that the Court grants the pending motion for attorney's fees, approval of the Settlement will result in payment of about $63 to each participating class member.[3] Declaration of E. Michelle Drake in Support of Plaintiff's Motion for Final Approval of Class Action Settlement ("Drake Final Decl.") ¶ 2.

III. STATEMENT OF ISSUES

1. Should the Court grant final approval to the Settlement, given that it is fair, adequate, and reasonable?

2. Should the Court determine that adequate notice was provided to the Settlement Class?

[2] The Administrator has received a total of 29,962 claims. A preliminary review indicates that approximately 21,535 (or 72%) of those claims are valid unique claims that were submitted by Class Members. Suppl. Keough Decl. ¶ 14. Because claims were accepted online, it is not atypical for some invalid or duplicate claims to be submitted. *Id*. Review of the validity of the submitted claims is continuing. Id. ¶ 15.

[3] If all claims received were valid, that rate would go up to approximately 27%, and the payment per class member would decrease to just over $46. Drake Final Decl. ¶ 2.

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IV. EVIDENCE RELIED UPON

Plaintiff relies upon the Drake Prelim Decl. submitted in support of preliminary approval, the Declaration of E. Michelle Drake in Support of Plaintiff's Motion for Attorneys' Fees, Costs, and Class Representative Service Award ("Drake Fees Decl."), the Drake Final Decl., the Declaration of Jennifer M. Keough Regarding Notice and Administration and Administration Costs ("Keogh Decl."), the Suppl. Keough Decl., the exhibits attached to those declarations, and all pleadings and papers filed in this action.

V. AUTHORITY AND ARGUMENT

When considering a motion for final approval of a class action settlement under Washington Civil Rule 23, the court's inquiry is 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) (noting that "[a]lthough CR 23 is silent in guiding trial courts in their review of class settlements, 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 reasonable'") (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)).

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; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and the absence of collusion. *Pickett*, 145 Wn.2d at 192 (citing 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.43 "General Criteria for Settlement Approval" (3d ed. 1992)). 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."

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Pickett, 145 Wn.2d at 189 (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)).[4]

The approval of a settlement agreement "is a delicate, albeit largely unintrusive inquiry by the trial court." *Pickett*, 145 Wn.2d at 189. Although the Court possesses discretion in determining whether a proposed class action settlement should be approved,

> the 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.

Pickett, 145 Wn.2d at 189 (quoting *Officers for Justice*, 688 F.2d at 625). Moreover, as the court in *Pickett* observed, "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 the end, "[s]ettlement is the offspring of compromise; the question we address 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); *see also Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 544 (W.D. Wash. 2009).

A. The Settlement Is Fair, Adequate, and Reasonable

The Court should begin its analysis with a presumption that the settlement between the Parties is fair, adequate, and reasonable. *See M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987) ("Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair.") (footnote omitted). These factors are well satisfied here, where the settlement is the product of arm's-length negotiations conducted by capable counsel with extensive experience in complex class action litigation after

[4] CR 23 is identical to its federal counterpart, Fed. R. Civ. P. 23; thus, federal cases interpreting the analogous federal provision are highly persuasive. *Pickett*, 145 Wn. 2d at 188.

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meaningful discovery and analysis. Each of these factors is encompassed by the criteria that the Washington Supreme Court identified in *Pickett*, which are addressed individually below.

1. Plaintiff's Likelihood of Success Supports Final Approval of the Settlement

The existence of risk and uncertainty to Plaintiff at the time of mediation "weighs heavily in favor of finding that the settlement was fair, adequate, and reasonable." *See Pickett*, 145 Wn.2d at 192. In the absence of a settlement, there are several procedural hurdles Plaintiff would have to clear to prevail, including challenges to class certification, motions for summary judgment, and motion to dismiss. Several potentially dispositive motions, including Defendant's motion to dismiss, Costco's motion for summary judgment, and Plaintiff's motion for partial summary judgment were fully briefed and pending before the Court at the time of settlement. These pending motions presented clear risks to the litigation going forward. Drake Prelim. Decl. ¶ 6. Among other things, Plaintiff would have to convince the Court that Defendant's conduct was willful in order to recover statutory damages. 15 U.S.C. §§ 1681n(a)(1), 1681o(a)(1) (limiting a plaintiff to actual damages unless defendant acted willfully); *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (proving willfulness in FCRA cases was "a high hurdle to clear" and weighed in favor of settlement approval). Comparatively, if either of Costco's motions succeeded, the case would have been dismissed.

Class Counsel maintain their conviction that all claims asserted in the Complaint are valid and meritorious, but they understand that these or other issues could have severely undermined the viability of the class claims. Such a prospect injected a high degree of uncertainty into this case. Moreover, the outcomes of trial, and any appeals, are inherently uncertain. These are important factors weighing in favor of final approval of the Settlement.

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2. The Substantial Amount of Discovery Completed Supports Final Approval of the Settlement

Courts also consider the amount and nature of discovery and evidence developed at the time of settlement in determining whether the settlement is fair, adequate, and reasonable. *Pickett*, 145 Wn.2d at 199. Class Counsel dedicated over 500 hours to this case, investigating the allegations made by Costco employees, researching related legal issues, preparing the Complaint; and exchanging and reviewing pre-mediation discovery. Drake Fees Decl. ¶¶ 14-16. Class Counsel insisted that Defendant provide key factual information before the mediation so that they could assess the size of the proposed class. In briefing multiple dispositive motions, Class Counsel learned the legal risks they faced if they proceeded with the litigation.

By the time the parties had executed the Settlement, they had sufficient information to assess the strengths and weaknesses of their respective cases, and Class Counsel in particular had sufficient legal and factual bases to make a thorough appraisal of the adequacy of the settlement. *See* Drake Prelim. Decl. ¶¶ 7-8. In short, Class Counsel are in an excellent position to recognize, and to represent to the Court, that the settlement provides a very good result for the Class and should be granted final approval.

3. The Comprehensive Settlement Terms and Conditions Support Final Approval of the Settlement

The Settlement terms and conditions provide for comprehensive relief. Defendants have agreed to pay $2,490,000 for the benefit of the Settlement Class. Drake Prelim. Decl., Ex. 3 (Settlement Agreement) ¶ 3. Out of this fund, Plaintiff has requested that the Court approve (1) a $3,500 service payment for Julius Terrell to compensate him for his time and effort on behalf of the Settlement Class; (2) a payment of $179,822 to JND Legal Administration for sending notices, and administering the settlement; (3) a payment of approximately $17,780.12 to compensate Class Counsel for the actual costs incurred prosecuting this action; and (4) a payment of $830,000 to Class Counsel as attorneys' fees. Settlement ¶ 7.4; Drake Fees Decl. ¶ 16, 22, 25.

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Presuming the Court approves Plaintiff's request for fees, costs, incentive payment, and settlement administrator costs, the remaining net settlement amount ($1,458,897.88) will be divided among Settlement Class Members entitled to Autopay and Settlement Class Members who have submitted valid claims to the Settlement Administrator. Settlement ¶ 1.25. No funds will revert to Defendant. Settlement ¶ 3.1. This will result in a likely recovery of approximately $63 to each participating class member.[5] Drake Final Decl. ¶ 2. This recovery compares very favorably with settlements in similar FCRA class actions. *See Patrick v. Interstate Management Co., LLC*, No. 8:15-cv-1252, ECF No. 42 (M.D. Fla. Jan. 14, 2016) (class member recovery of $16.40); *Manuel v. Wells Fargo Bank, N.A.*, No. 3:14-cv-238, ECF No. 118 (E.D. Va. Dec. 17, 2015) (class member recovery of $35); *Landrum v. Acadian Ambulance Serv., Inc.*, No. 14-cv-1467, ECF No. 37 (S.D. Tex. Nov. 5, 2015) (class member recovery of $10); *Walker v. McClane/Midwest, Inc.*, No. 2:14-CV-04315, ECF No. 26 (W.D. Mo. July 20, 2015) (class member recovery of $24).

The funds distributed to the Settlement Class will be allocated in a manner that is fair and reasonable, and no segment of the Settlement Class is excluded from relief or consigned to inferior benefits. Settlement ¶ 4.2. In sum, the relief that the Settlement provides is significant and fair, especially considering the risks inherent to litigation and the defenses available to Defendant.

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

"When experienced and skilled class counsel support a settlement, their views are given great weight." *Pickett*, 145 Wn.2d at 200 (citing *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983)). Class Counsel in this case, who are very experienced and skilled in class action litigation, support the settlement as fair, reasonable, and adequate, and in the best interests of the Class as a whole. Drake Prelim. Decl. ¶ 14, Drake Fees Decl. ¶ 26. Indeed,

[5] If all claims received were deemed valid, the payment per class member would decrease to just over $46. *Id.* ¶ 2.

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given Class Counsel's extensive knowledge and experience in litigating class actions, and Class Counsel's thorough evaluation of the strengths and weaknesses of this case gained through discovery, Class Counsel believe this settlement to be an excellent result.

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

Another factor for the Court to consider 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; *Officers for Justice*, 688 F.2d at 625. In applying this factor, the Court weighs the benefits of the settlement against the expense and delay involved in achieving an equivalent or more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 434 (5th Cir. 1971).

The settlement guarantees a substantial recovery for the Class while obviating the need for lengthy, uncertain, and expensive pretrial practice, trial, and appeals. The pending motions, regarding subject matter jurisdiction and whether the challenged form complied with the law, aptly demonstrate the risks of this litigation in motion practice, at trial, and on appeal. Even if the Class prevailed against Defendant at trial, Defendant would likely appeal any adverse rulings, thereby delaying relief to the Class for an indefinite amount of time and running up expenses in the form of attorneys' fees and litigation costs.

6. The Reaction of the Class Thus Far Supports Final Approval of the Settlement

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; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."). . A court can approve a class action settlement as fair, adequate, and reasonable

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even over the objections of a large number of class members. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291–96 (9th Cir. 1992). .

The Settlement Class has reacted extremely well to the Settlement. There have been zero objections and only 41 timely opt-outs received from the 113,489 Class Members. The lack of opposition to the Settlement speaks volumes as to its fairness, and consequently, this factor strongly supports the Settlement. *See In re Phenylpropanolamine (PPA) Products Liab. Litig.,* 227 F.R.D. 553, 564 (W.D. Wash. 2004) ("[T]he Class Members themselves have effectively voted heavily in favor of the Settlement, by not opting out. In fact, 95% of Class Members have chosen to take part in the Settlement.").

The fact that 19.23% of the Class Members required to submit claim forms to participate in the settlement did so also is an impressive reaction of the class to the settlement, and speaks to the efforts make to notify the class. This rate exceeds what is normally achieved in cases of this type. *See, e.g. Vasco v. Power Home Remodeling Grp. LLC*, No. 15-4623, 2016 WL 5930876, *12 (E.D. Pa. Oct. 12, 2016) (finding that a claims rate of approximately 9% was higher than those approved in other consumer class settlements); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 (3d Cir. 2011) (describing special master finding that "consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns").

7. The Presence of Good Faith, the Absence of Collusion, and the Approval of a Third-Party Mediator Support Final Approval of the Settlement

In determining the fairness of a settlement, the Court should consider the presence of good faith and absence of collusion on the part of the parties to it. *Pickett*, 145 Wn.2d at 201. Here, there have been absolutely no allegations of collusion or bad faith.

Furthermore, courts recognize that arm's-length negotiations conducted by competent counsel with the assistance of a third-party mediator are *prima facie* evidence of fair settlements. As the United States Supreme Court has held, "One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge

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and negotiating skill agreed upon the figure through arms-length bargaining . . . .” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *see also Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 WL 34089697, at *7 (W.D. Wash. Mar. 26, 2001) (“A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced capable counsel after meaningful discovery.”); *In re Phenylpropanolamine (PPA) Products Liability Litig.*, 227 F.R.D. 553, 567 (W.D. Wash. 2004) (approving settlement entered into in good faith, following arm’s-length and non-collusive negotiations).

The proposed settlement is the result of extensive, arm’s-length negotiations between experienced attorneys who are highly familiar with class action litigation in general and with the FCRA litigation in particular. The parties participated in mediation with the assistance of an experienced mediator, Rodney A. Max on January 26, 2018. After a full day of hard-fought negotiations, the parties agreed to the terms the Settlement. Drake Prelim. Decl. ¶ 8. For these reasons, the criteria identified by the court in *Pickett* weigh in favor of final approval of the settlement.

B. Class Members Received the Best Notice Practicable

This Court has already determined that the notice program in this case meets the requirements of due process and applicable law, provides the best notice practicable under the circumstances, and constitutes due and sufficient notice to all individuals entitled to notice. This notice program is being fully implemented by independent claims administrator, JND. *See* Suppl. Keough Decl. ¶¶ 4-7.

The Settlement Administrator, JND, has provided notice in the method approved by the court. Suppl. Keough Decl. ¶¶ 4-7. JND sent notice to all Settlement Class Members by either first class mail or email, with first class mail used if any emails bounced back or remained unopened. *Id*. In total, the Settlement Administrator has sent over 100,000 email notices, and over 12,000 postcard notices, all in the form approved by the Court. *Id*. For mail notices returned as undeliverable, JND forwarded to the relevant address provided by the Postal

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Service, if applicable, or skip-traced and re-mailed after an additional address was found, if possible. *Id.* ¶ 8.

JND also sent email reminder notices to individuals who had not submitted claim forms by a certain date, consistent with the notice program negotiated by Class Counsel. This reminder notice went above and beyond the notice typically provided in a class action, and is likely responsible for the high claims rate in this case. This notice program demonstrates Counsel's commitment to the Class, and ensures that as many class members as possible benefit from the Settlement.

JND also has established and is maintaining a website dedicated to this lawsuit. Suppl. Keough Decl. ¶ 9. On the website, Settlement Class Members can submit claims, access court documents, including the Settlement Agreement, Plaintiff's preliminary approval papers, the Court's preliminary approval Order, and Plaintiff's motion for fees and costs, review important dates, and locate JND's contact information if they need further assistance. *Id*. Settlement Class Members also can call an automated toll-free number and an email address to obtain further information about the Settlement Agreement. *See id.* ¶ 12. As of June 4, 2018, the settlement website had received 16,477 visits, 1,857 individuals had called the toll-free number, and 432 emails had been received and responded to. *Id.* ¶¶ 10-12.

The notice program approved by this Court and implemented by JND has provided due and adequate notice of these proceedings and of the matters set forth therein, including the Settlement, to all parties entitled to such notice and has satisfied the requirements of CR 23, the requirements of constitutional due process, and the requirements set forth in *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). Due process is satisfied.

VI. CONCLUSION

By all relevant measures, the Settlement is fair, adequate and reasonable and deserves this Court's final approval. All Settlement Class Members who file claims will receive a share of the substantial Settlement Fund, divided pro rata. Plaintiff respectfully requests that the

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Court enter the [Proposed] Order and Final Judgment Approving Settlement Between Plaintiff and Defendants that he has submitted with this motion.

DATED this 4th day of June, 2018.

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