UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

John Does 1-5, et al. v. Kaiser Foundation Health Plan, Inc., et al.

John Does 1-5 v. Kaiser · No. 23-cv-02865-EMC · Decided October 24, 2025

OPINION

Doe

PER CURIAM.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN DOES 1-5, et al., Case No. 23-cv-02865-EMC Plaintiffs,

ORDER RE PLAINTIFFS’ MOTION

v. FOR PRELIMINARY APPROVAL

KAISER FOUNDATION HEALTH PLAN,

INC., et al., Docket No. 345 Defendants. Plaintiffs are individuals who have filed a class action against three Kaiser entities[1] (collectively, “Kaiser”). Plaintiffs allege that Kaiser violated their privacy rights, and those of others similarly situated, in violation of various federal and state laws. According to Plaintiffs, unbeknownst to Plaintiffs and other Kaiser Plan Members, Kaiser has installed code from multiple third parties throughout the Kaiser website and mobile applications that allows third party companies, including but not limited to Quantum Metric, Twitter, Adobe, Microsoft Bing, . . . Google[,] [and Dynatrace] (collectively, “Third Party Wiretappers”) to intercept the content of Plaintiffs and Class Members’ patient status, identifying information, medical topics researched, choices made, information shared and communications with their medical providers, including personally identifiable medical information, Protected Health Information (“PHI”) that Kaiser was required to protect under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. § 1320d-6, and other confidential information and communications, when that information is in transit. CAC ¶ 4. Now pending before the Court is Plaintiffs’ motion for preliminary approval of a class action settlement. The settlement is between Plaintiffs and only one Kaiser entity: KFHP. The parties have stipulated to a dismissal of the other two Kaiser entities. See Docket No. 347 (stipulation). The dismissal of those two entities would be without prejudice but would convert to a dismissal with prejudice once, in essence, there is final approval of the class action settlement and a final judgment. Objections have been filed with respect to the motion for preliminary approval. One set of objectors is represented by the three law firms: Labaton, Milberg, and Bryson. The firms also represent thousands of other Kaiser plan members. The other set of objectors is represented by the Potter firm. Potter also represents thousands of other Kaiser plan members. For convenience, the first set of objectors shall hereinafter be referred to as the Labaton Objectors and the second set as the Potter Objectors.[2] Having considered both the parties and the Objectors' submissions, as well as the oral argument of counsel, the Court hereby rules as follows.

I. DISCUSSION

A. Settlement Terms Here, the parties have agreed to a gross settlement fund of $46 million (which could increase up to $47.5 million) for a settlement class of approximately 13.1 million people. The net settlement fund is expected to be about $27.48 million once deductions are taken for, e.g., attorneys' fees, litigation expenses, settlement administration fees, and incentive awards. If there is a claims rate of 5-10% (as anticipated by the settlement administrator), the payout to each claiming class member would be about $20.98-$41.95. Each class member has already benefited from Plaintiffs' litigation of this case because, after Plaintiffs moved for a preliminary injunction, "Kaiser disabled, deleted, or modified the internet technologies provided by Adobe, Bing, Google, Twitter, and Quantum Metric" and further migrated "Dynatrace technology to the on-premises deployment model offered by Dynatrace"; in addition, Kaiser implemented consent banners on its [2] The Potter Objectors did not timely file their brief. Nor did the Potter Objectors provide any explanation as to why they failed to timely file. Their attorneys have been well aware of this website and apps. Docket No. 374 (Pls. Supp. Br. at 7-8). B. Judicial Review of Proposed Class Action Settlement Under Federal Rule of Civil Procedure 23(e), a court may approve a proposed settlement of a class action if it is fair, reasonable, and adequate. See Fed. R. Civ. P. 23(e)(2) (listing factors for a court to consider); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (same). The Court has considered the factors identified in Rule 23(e)(2) and Hanlon. It finds that the proposed settlement falls within the range of reasonableness such that notice of the proposed settlement should be given to the class.[3] The risk of continuing litigation is significant. As indicated by the Court's order granting in part Kaiser's motion to dismiss the first amended complaint, it is not clear that Kaiser allowed the code on its website and apps for the benefit of the third parties (as opposed to itself). The parties have also pointed to additional risks in the opening brief, including the following: • Individuals could be subject to arbitration (such as the named California plaintiff). See Mot. at 12. • For the nationwide claims, choice of law could be a problem. See Mot. at 12. • Privacy breach case law is still developing (e.g., damages methodologies). See Mot. at 13 n.11.

• Not all claims would necessarily survive – e.g., in its order granting in part the motion to dismiss the first amended complaint, the Court dismissed Plaintiffs' claims for violations of the Electronic Communications Privacy Act, the California Invasion of Privacy Act, and the California Confidentiality of Medical Information Act. See Mot. at 13. • If claims with statutory damages were dismissed, then there might only be nominal damages or damages could be too individualized. See Mot. at 12-13. 25 Notably, Objectors do not make any contention that the relief provided for by the proposed 26 27 3 In so ruling, the Court is not holding, e.g., that the attorneys' fees sought is appropriate and 1 settlement is unreasonable as a substantive matter – e.g., that the gross settlement fund is too low. 2 Rather, Objectors' main challenge is to the definition of the class; Objectors seek to be excluded 3 from the class. Objectors also contend that, if they are included within the definition of the class, 4 then they should be permitted to do "mass opt-outs"; for example, individuals represented by the 5 same counsel should be able to opt out by their attorney submitting an opt out that covers all of 6 them in one fell swoop. Finally, Objectors suggest that California Kaiser plan members have 7 better claims compared to non-California plan members and that the allocation of the settlement 8 fund should reflect this. 9 C. Settlement Class Definition 10 The definition of the settlement class in the case at bar takes into account this Court's 11 rulings in In re 23andMe, Inc. Customer Data Sec. Breach Litig., No. 24-md-03098-EMC, 2024 12 U.S. Dist. LEXIS 219622 (N.D. Cal. Dec. 4, 2024). There, the Court held that the settlement class 13 definition should be "modified to exclude those 23andMe customers who have chosen to exercise 14 their right to arbitrate, whether by making a mere demand for arbitration or by filing a formal 15 complaint with the arbitral forum (but not, e.g., simply threatening to arbitrate)." Id. at *43 16 (conditioning preliminary approval on a modification to the settlement class definition); see also 17 id. at *41 (indicating that those in arbitration cannot "be included in a certified class given 18 potential concerns about typicality/adequacy").4 19 Here, the parties have agreed to a settlement class definition that recognizes exclusion of 20 those in arbitration but only on certain terms. Essentially, the settlement class definition provides 21 that, if an individual did not perfect their arbitration request, they are included in the settlement 22 class. 23 "Perfected Arbitration Claim" means the Claim of a current or former Kaiser Permanente member who completed either of the 24 following on or before the filing of the Motion for Preliminary Approval of the Settlement: 25 (a) Preparing and serving an individual demand for arbitration 26 27 4 In addition, there may be concerns of lack of commonality under Rule 23(a) and predominance pursuant to Rules 7 and 8 of the Rules for Kaiser Permanente 1 Member Arbitrations of the Office of the Independent Administrator (the "Rules"); and the claimant or their 2 counsel has paid the $150 filing fee required by Rule 12 or submitted a filing fee waiver pursuant to Rule 13; or 3 (b) Where the current or former Kaiser Permanente member was 4 included on a Demand for Arbitration on behalf of 25 or more claimants that was prepared and served pursuant to

5 Rules 7 and 8 of the Rules, the Demand complies with Rule

4(a) of the Supplemental Rules Governing Mass Arbitrations 6 (the "Supplemental Rules") and the claimant or their counsel has paid the $150 filing fee required by Supplemental Rule 5 7 and Rule 12 8 for claims that refer to, relate to, or are otherwise based on any act, omission, practice, or conduct alleged or at issue in the Consolidated 9 Class Action Complaint. 10 Sett. Agmt. ¶ 1.11 (emphasis added). 11 As an initial matter, the Court notes that – though not entirely clear –

Objectors seem to argue that something less than a formal demand for arbitration (or a formal filing of an arbitration complaint) should be good enough to take someone out of the settlement class definition. See Labaton Opp’n at 3 (asking for exclusion of “all individuals who have attempted to arbitrate or provided notice of their intent to arbitrate”). But in 23andMe, this Court essentially rejected that position, stating that “the settlement class definition agreed to by the parties must be modified to exclude those 23andMe customers who have chosen to exercise their right to arbitrate, whether by making a mere demand for arbitration or by filing a formal complaint with the arbitral forum (but not, e.g., simply threatening to arbitrate).” 23andMe, 2024 U.S. Dist. LEXIS 219622, at *43 (emphasis added). The Court thus rejects Objectors’ contention here. That being said, the Court agrees with Objectors that the settlement class definition as phrased inappropriately includes the requirement that a class member must have paid the filing fee. The 23andMe settlement class definition did not include that requirement, and the Court sees no reason to impose such a requirement. If an individual chose arbitration with Kaiser and then (for whatever reason) did not pay the filing fee, then the arbitration would go no further. That would not necessarily then give the person the right to jump back into litigation. Requiring payment of the arbitration filing fee would be particularly problematic in this case where the allowed a consolidated demand for arbitration with payment of only $150 total. This leaves the Court with one final issue regarding the settlement class definition: should the Labaton clients and some of the Potter clients be excluded from the settlement class definition because they did demand arbitration even if they subsequently abandoned arbitration by initiating lawsuits in state court? The Labaton clients have filed a class action lawsuit in state court, asserting not clarification and enforcement of arbitration, but the same substantive privacy claims against Kaiser asserted in the instant case. Likewise, nearly all the Potter clients (with the exception of a small number of individuals who are still actively pursuing arbitration) have joined one of five mass actions filed in state court, asserting substantive claims similar to those asserted in the instant case. Labaton and Potter argue that their clients who have filed suit should still be excluded from the class even though they are no longer actively pursuing arbitration. Labaton and Potter suggest that they were forced to file lawsuits on their clients’ behalf because, even though the clients wanted to arbitrate, Kaiser improperly had the arbitral rules changed once the mass arbitrations were initiated. Thus, Labaton and Potter essentially argue that, as an equitable matter, their clients should be counted as arbitrating individuals and thus categorically excluded from the defined class herein. But even if the Labaton and Potter clients were “forced” to file lawsuits,[5] the Court in 23andMe did not exclude those in arbitration because of equitable reasons; rather, it did so because of Rule 23’s requirements on, e.g., typicality and adequacy where such putative class members would be litigating in two independent fora. Because the Labaton and Potter clients are all now in litigation and have effectively withdrawn from arbitration (at least for purposes of this Court’s adjudication of the class definition for purposes of the present proposed settlement), the

22 Rule 23 concerns that drove the exclusion in 23andMe no longer apply.

23 Therefore, so long as the settlement class definition is modified so that exclusion extends 24 only to those who have demanded or initiated arbitration and are still in the arbitration track, and 25 not to those who are now in the state court litigation track, the Court would be inclined to grant 26 5 In the case filed by the Labaton clients (Guevara), the complaint did not contain any allegations 27 about asking for a return to arbitration because of inappropriate conduct by Kaiser. Although the 1 preliminary approval. The Labaton and Potter clients would fall within the settlement class 2 definition by virtue of having, at least for purposes of the current motion before this Court, 3 effectively abandoned arbitration by filing and joining a suit in state court. 4 D. Mass Opt-Outs

5 In 23andMe, the Court already indicated that it would not permit mass opt-outs. See

6 23andMe, Inc. 2024 U.S. Dist. LEXIS 219622, at *84 (not permitting en masse objections; citing 7 in support In re CenturyLink Sales Pracs. & Sec. Litig., MDL No. 17-2795 (MJD/KMM), 2020 8 U.S. Dist. LEXIS 114110, at *9-10 (D. Minn. June 29, 2020), where court explained that "'the 9 requirement that a class member must individually sign is vital, because it ensures that the class 10 member is individually consenting to opt out, and avoids a third party or lawyer representing that 11 they have that class member's authority, without the class member making an informed, individual 12 decision'"). 13 The Court acknowledges that, in a decision that issued subsequently, Judge Freeman 14 allowed for mass opt-outs. Specifically, she accepted a mass opt-out from the Labaton firm, 15 which claimed to represent approximately 69,500 individuals. 16 Here, Labaton has represented under oath that each of the Arbitration Claimants did make an individualized decision to retain 17 Labaton's legal services and to opt out from the Class in order to pursue claims in arbitration. The Court sees no reason why the 18 Arbitration Claimants may not act through their attorneys in executing those requests to opt out of the Class. As the Court noted 19 at the hearing, should it turn out that any of the Arbitration Claimants did not so retain and authorize Labaton, those individuals 20 would have a malpractice remedy. And for any opt-out claimant who does not have an arbitration agreement with Google, Labaton 21 has confirmed that its representation will cover their pursuit of their claims in other judicial forums. In short, the Court rejects Google's 22 argument that accepting these opt-outs presents a due process issue. 23 In re Google Assistant Priv. Litig., No. 5:19-cv-04286-BLF, 2025 U.S. Dist. LEXIS 28914, at *9-24 10 (N.D. Cal. Feb. 14, 2025). This Court respectfully disagrees. It is questionable whether a 25 malpractice suit is a real remedy: malpractice claims generally have rigorous standards (including 26 having to prove prejudice which often requires the plaintiff to demonstrate a likelihood she would 27 have prevailed in the underlying case but for the malpractice), and an individual may not be in a 1 in essence, a fiduciary duty to the class. 2 The Potter firm argues that, even aside from the mass opt-out issue, the opt-out process is 3 burdensome and confusing. It makes, for example, the following criticisms: 4 • The short-form notice is what the settlement class members will receive (the long- 5 form is available only on the settlement website), and it does not spell out

the details of the opt-out process in and of itself but rather requires members to refer to the long-form notice. See Opp'n at 8. • Settlement class members may not want to opt out online given that their personal information has already been compromised. See Opp'n at 8-9. • Online opt-outs are also problematic because settlement class members could be discouraged from opting out if the settlement website is confusing, is slow to load, or goes offline. See Opp'n at 9. • The long-form notice is too long (15 pages). See Opp'n at 9. • A settlement class member cannot opt out without having their unique settlement ID number; it would be easier for members to opt out by using their Kaiser member ID numbers instead. See Opp'n at 9. These criticisms largely lack merit. For example, it makes sense to have a short-form notice go out in the first instance for several reasons: (1) given the number of settlement class members, it would be more expensive to send out long-form notices, at least by mail, cf. Supp. Mulholand Decl. ¶ 3 (noting that to mail the short-form notice to 13.1 million settlement class members would cost about $9 million); and (2) even though e-mail notice could accommodate the long-form notice, it would likely be more of a deterrent to have the long-form notice in the e-mail (i.e., settlement class members likely would not want to read an email of any significant length). As for the means of opting out, a settlement class member can opt out by mail, not just online. To the extent Potter argues that there is no need for a settlement ID number given that the class members should have Kaiser member IDs, a Kaiser member ID is, in and of itself, private information. Requiring disclosure of such personal health-related information on an opt-out form find their unique settlement ID number, that should be easily addressable – i.e., the settlement ID number can be place prominently on the notice, and the member can contact the settlement administrator for help. While the Court rejects Objectors' arguments above, it emphasizes that the individualized opt-out process should not be cumbersome or burdensome. In this regard, the Court does not take issue with, e.g., a longer opt-out period so that Labaton and Potter can have more time to get the individualized opt-outs. The individualized opt-outs should also be acceptable with either a wet-ink signature or an electronic one (e.g., Docusign). If Labaton and Potter wish to collect the individualized opt-outs and then give them to the settlement administrator (rather than requiring each member opting out to send their form to the class action administrator or the Court), that would appear to be a reasonable request. The Court orders the parties and Objectors to meet and confer to determine a reasonable process for individualized opt-outs to be made. The parties and/or Objectors may wish to include the settlement administrator in these discussions. Finally, the Court notes that both the parties and Objectors have agreed that, should there be any individuals who are excluded from the settlement class because they have demanded or initiated arbitration, they should be given notice of the settlement so that they have an opportunity to "opt in."[6] The Court directs the parties and Objectors to discuss the opt-in process as well.

E. California Plan Members

Finally, Objectors claim that California plan members (such as themselves) have higher-value claims compared to non-California plan members, but the parties' settlement agreement – or rather, the plan of allocation established by Plaintiffs – does not recognize such. But Objectors' position fails to take into account that this Court already indicated in its prior order granting in part Kaiser's motion to dismiss that there were problems with the California claims. Given the litigation risk, it is not clear that California plan members are in a stronger position compared to non-California plan members. Furthermore, all class members face the same litigation risk of whether Kaiser intentionally or negligently allowed third parties to use plan member information for their own benefit (as opposed to Kaiser's). It is also worth noting that a reallocation does not make much sense given the relatively small payouts that are expected in this case. If a given class member believes that they are entitled to a higher payout, they can opt out.

Il. CONCLUSION

For the foregoing reasons, the Court is inclined to grant preliminary approval to the proposed class action settlement but that will turn on modification of the settlement class definition and opt-out means, as discussed above. The Court continues the hearing on preliminary approval to November 25, 2025, at 1:30 p.m. The hearing will be held via Zoom. By November 13, 2025, the parties and Objectors shall file supplemental papers addressing the results of their meet and confer. (If the settlement agreement, class notice, etc. are modified, such papers shall also be filed at that time.) If there are disagreements, each party or Objector shall state its last offer of compromise. The Court strongly prefers a joint filing by the parties and Objectors. IT IS SO ORDERED. Dated: October 24, 2025

EDW. . CHEN

United States District Judge