The Honorable John H. Chun

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

In re Fred Hutchinson Cancer Center Data Security Litigation.

Case No. 2:23-cv-01893-JHC

MOTION TO REMAND

NOTE ON MOTION CALENDAR:
February 16, 2024

STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

I. INTRODUCTION

Plaintiffs Alexander Irvine and Barbara Twaddell ("Plaintiffs"), plaintiffs in *Irvine, et al. v. Fred Hutchinson Cancer Center and the University of Washington*, No. 2:24-cv-00030 (W.D. Wash.) (the "*Irvine* action"), respectfully request that the Court remand the *Irvine* action to the Superior Court of King County, Washington. Defendant Fred Hutchinson Cancer Center ("FHCC") removed the *Irvine* action, originally filed in Washington state court, pursuant to the Class Action Fairness Act's ("CAFA") minimal diversity requirement. The Court should grant Plaintiffs' Motion because the Court lacks subject matter jurisdiction over the *Irvine* action. As explained herein, the Court should remand the *Irvine* action because (i) the prerequisites to CAFA jurisdiction are not satisfied as CAFA does not apply to cases involving a governmental entity (here, the University of Washington); (ii) CAFA's mandatory home state exception applies, which requires the Court to decline to exercise jurisdiction; and (iii) the Court can decline to exercise jurisdiction under the discretionary home state exception to CAFA jurisdiction.[1]

II. FACTUAL BACKGROUND

Plaintiffs filed this action in the Superior Court of King County, Washington on December 11, 2023.[2] *Irvine* Docket, ECF No. 1-2 ("Complaint" or "Compl."). In their Complaint, Plaintiffs,

[1] If the Court grants Plaintiffs' Motion based on any of the CAFA exceptions described herein, the Court should also remand *Beach, et al. v. Fred Hutchinson Cancer Center, et al.*, No. 2:24-cv-00031; *Aleshire v. Fred Hutchinson Cancer Center, et al.*, No. 2:24-cv-00034; *Reed v. Fred Hutchinson Cancer Center*, No. 2:24-cv-00029; and *Arneson v. Fred Hutchinson Cancer Center*, No. 2:24-cv-00033, to the Superior Court of Washington, as the Court would similarly lack subject matter jurisdiction over those actions. Additionally, the Court should then dismiss *Doe v. Fred Hutchinson Cancer Center, et al.*, No. 2:23-cv-01893; *Hunter v. Fred Hutchinson Cancer Center*, No. 2:23-cv-01988; *Ayers v. Fred Hutchinson Cancer Ctr.*, No. 2:23-cv-01916; *Holz, et al. v. Fred Hutchinson Cancer Center*, No. 2:23-cv-01998; and *Ristvet, et al. v. Fred Hutchinson Cancer Center*, No. 2:24-cv-00019 without prejudice based on the same reasoning. Though these actions were all initially filed in this Court, dismissal is proper when the Court lacks subject matter jurisdiction over actions originally filed in federal court. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Little v. NatureStar N. Am., LLC*, No. 1:22-cv-00232-JLT-EPG, 2023 U.S. Dist. LEXIS 213222, at *7 (E.D. Cal. Nov. 29, 2023) (dismissing class action originally brought in federal court for lack of CAFA jurisdiction); *Petkevicius v. NBTY, Inc.*, No. 3:14-cv-02616-CAB-(RBB), 2017 U.S. Dist. LEXIS 43636, at *13 (S.D. Cal. Mar. 24, 2017) (same).

[2] *Irvine, et al. v. Fred Hutchinson Cancer Center, et al.*, No. 23-2-24438-9 (Sup. Ct. King Cnty., Wash.).

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Washington citizens, assert claims against Defendants FHCC and the University of Washington ("UW" and FHCC are "Defendants") arising out of an incident in which an unauthorized party gained access to FHCC's network systems and removed files containing the personally identifying information and personal health information of Plaintiffs and class members (the "data breach"). *Id.* ¶ 3. Plaintiffs filed their Complaint individually and on behalf of a putative class of "All United States citizens whose personally identifiable information or personal health information was accessed in the data breach and disclosed to unauthorized persons . . ." *Id.* ¶ 62. Plaintiffs asserted claims for negligence, negligence per se, breach of fiduciary duty, breach of implied contract, unjust enrichment, and violation of the Washington Consumer Protection Act. *Id.* ¶ 6.

On January 8, 2024, FHCC removed the *Irvine* action to federal court, asserting diversity jurisdiction under CAFA. Irvine Docket, ECF No. 1 ("Notice of Removal"), ¶¶ 7, 15–22. FHCC admits it is a citizen of Washington. *Id.* ¶ 17. UW is a "state entity authorized under the laws of Washington." Compl. ¶ 22. FHCC asserted as a basis for federal jurisdiction that it "sent notifications of the Data Incident . . . to people with addresses in all 50 states, the District of Columbia, and internationally" and "the data at issue includes addresses for individuals treated at Fred Hutch as well as those treated at other facilities that Fred Hutch has relationships with throughout the country. Thus, members of the putative class are located in all fifty states, and many are more likely than not citizens of a state other than Washington." Notice of Removal ¶¶ 20–21.

The Notice of Removal asserts that it is Plaintiffs' burden to establish that an exception to CAFA jurisdiction applies. *Id.* ¶ 23, n.1. As the facts of Defendants' data breach notice and Ninth Circuit law show, Plaintiffs are able to carry that burden. Accordingly, the Court should grant Plaintiffs' motion and remand their case to the Superior Court of King County, Washington.

III. ARGUMENT

A. Legal Standard

"Subject matter jurisdiction refers to 'the courts' statutory or constitutional *power* to adjudicate the case." *Latimer v. AT&T Mobility LLC*, 605 F. Supp. 3d 1333, 1337 (W.D. Wash.

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2022) (emphasis in original) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). "[D]istrict courts are courts of limited jurisdiction and they are obligated to determine whether they have jurisdiction over a particular action." *Ramirez v. Our Lady of Lourdes Hosp.*, No. 2:13-cv-01108-RSM, 2013 U.S. Dist. LEXIS 137923, at *4 (W.D. Wash. Sept. 25, 2013) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)); *see also Mashiri v. Dep't of Educ.*, 724 F.3d 1028, 1031 (9th Cir. 2013) ("[F]ederal courts have a continuing, independent obligation to determine whether subject matter jurisdiction exists."). In 2005, Congress passed CAFA, which "significantly expanded federal jurisdiction in diversity class actions." *Lewis v. Verizon Communs., Inc.*, 627 F.3d 395, 398 (9th Cir. 2010). However, CAFA has certain prerequisites and exceptions that limit federal courts' subject matter jurisdiction over class actions. *See* 28 U.S.C. § 1332(d)(3)–(5). When a court lacks jurisdiction over an action removed under CAFA, remand to state court is appropriate. *Sanchez v. Abbott Labs.*, No. 2:20-cv-01436-TLN-AC, 2021 U.S. Dist. LEXIS 122765, at *3 (E.D. Cal. June 29, 2021) ("Nonetheless, '[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded' to state court. (alteration in original) (quoting 28 U.S.C. § 1447(c))).

B. The Court Lacks CAFA Jurisdiction Because UW is a Governmental Entity

1. Legal Standard

"As a threshold matter, CAFA applies to 'class action' lawsuits where . . . the primary defendants are not 'States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.'" *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1020 (9th Cir. 2007) (citing § 1332(d)(5)); § 1332(d)(5)(A). The purpose of this requirement is to "prevent states, state officials, or other governmental entities from dodging legitimate claims by removing class actions to federal court and then arguing that the federal courts are constitutionally prohibited from granting the requested relief" and to ensure "that cases in which such entities are the primary targets will be heard in state courts *that do not face the same constitutional*

impediments to granting relief." *Hale v. N. Broward Hosp. Dist.*, No. 22-cv-60362-WPD, 2023 U.S. Dist. LEXIS 68546, at *29 (S.D. Fla. Mar. 28, 2023) (emphasis in original) (quoting S. Rep. 109-13 at 42 (2005)); *see also Kendrick v. Conduent State & Local Sols., Inc.*, 910 F.3d 1255, 1258 (9th Cir. 2018). The Ninth Circuit has explicitly stated that "satisfaction of § 1332(d)(5) serves as a prerequisite, rather than as an exception, to jurisdiction under § 1332(d)(2)." *Serrano*, 478 F.3d at 1020 n.3; *Kendrick v. Xerox State & Local Sols., Inc.*, No. 18-cv-00213-RS, 2018 U.S. Dist. LEXIS 57056, at *13 (N.D. Cal. Apr. 3, 2018) ("the Ninth Circuit has stated clearly its view that the requirements of Section 1332(d)(5) are in fact a prerequisite for jurisdiction."); *accord Monaco v. W. Va. Parkways Auth.*, 57 F.4th 185, 188, 189 n.3 (4th Cir. 2023); *Hart v. FedEx Ground Package Sys.*, 457 F.3d 675, 680 (7th Cir. 2006); *In re FedEx Ground Package Sys., Inc. Emp. Pracs. Litig.*, No. 3:05-MD-527 RM (MDL-1700), 2010 U.S. Dist. LEXIS 12733, at *53–54 (N.D. Ind. Feb. 11, 2010) ("Section 1332(d)(5) serves as a prerequisite, rather than an exception, to jurisdiction under § 1332(d)(2).").

The burden is on FHCC as the removing party to establish that the prerequisites of CAFA jurisdiction, including section 1332(d)(5)(A), are met. *Wash. State v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011) ("The burden of establishing removal jurisdiction, even in CAFA cases, lies with the defendant seeking removal."); *Lin v. Kennewick*, No. C20-1029RSL, 2021 U.S. Dist. LEXIS 121383, at *4 (W.D. Wash. June 29, 2021) ("The party seeking a federal forum has the burden of establishing that federal jurisdiction is proper."); *Harbers v. Eddie Bauer, LLC*, 415 F. Supp. 3d 999, 1004 (W.D. Wash. 2019) ("Although 'no antiremoval presumption attends cases invoking CAFA' . . . the removing party bears the burden of establishing federal jurisdiction." (citations omitted)); *Becher v. Nw. Mut. Life Ins. Co.*, No. CV 10-6264 PSG (AGRx), 2010 U.S. Dist. LEXIS 135854, at *7–8 (C.D. Cal. Dec. 9, 2010) ("The removing party has the burden of proving 'prerequisites.'" (citing *Serrano*, 478 F.3d at 1020–21, 1020 n.3)); *Evergreen Capital Mgmt. LLC v. Bank of N.Y. Mellon Tr. Co., N.A.*, No. CV 20-7561-MWF (AGRx), 2020 U.S. Dist. LEXIS 195659, at *8 (C.D. Cal. Oct. 20, 2020) ("For example, § 1332(d)(5), provides that CAFA

STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

jurisdiction 'shall not apply' if the conditions in § 1332(d)(5)(A) and (B) are met, and thus, the removing party must show that neither of these conditions are present to establish CAFA jurisdiction.").

2. UW is the Primary Defendant

Since the burden of proof is on FHCC, it should have addressed section 1332(d)(5)(A)'s requirements when removing the *Irvine* action—but it failed to do so. *See generally* Notice of Removal. However, it is clear the Court lacks jurisdiction under section 1332(d)(5)(A). Here, UW is the primary Defendant. UW is the primary Defendant because plaintiffs in the Consolidated Litigation seek substantial relief from UW, and because UW is the only Defendant connected to every class member. FHCC is inextricably linked to UW. Medical services there are performed by UW physicians and they share their data. Many, probably most, of the class members' treatment was at one of UW's facilities, not at FHCC. Thus, no matter what entity originally collected class members' information and connects them to the data breach, all class members have claims against UW and UW is the only Defendant liable to the entire class. *See Hangarter v. Paul Revere Life Ins. Co.*, No. C 05-04558 WHA, 2006 U.S. Dist. LEXIS 5295, at *8 (N.D. Cal. Jan. 26, 2006). As expressed in the CAFA Senate Report:

> For purposes of [section 1332(d)(5)(A)], the Committee intends that 'primary defendants' be interpreted to reach those defendants who are the real 'targets' of the lawsuit -- i.e., the defendants that would be expected to incur most of the loss if liability is found. Thus, the term 'primary defendants' should include any person who has substantial exposure to significant portions of the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes (as opposed to simply a few individual class members)."

Corsino v. Perkins & Marie Callender's, Inc., No. CV 09-09031 MMM (CWx), 2010 U.S. Dist. LEXIS 10009, at *14-15 (C.D. Cal. Jan. 19, 2010) (quoting S. Rep. No, 109-14, at 43–44 (2005)).

UW is clearly a state governmental entity. It is a state university created by Washington statutes. *See*, *e.g.*, RCW 28B.20.010 ("The state university located and established in Seattle, King county, shall be designated the University of Washington."). This Court has held that the

University of Washington is "an 'arm of the state' for the purposes of diversity jurisdiction." *Bd. of Regents of the Univ. of Wash. v. Emp'rs Ins. Co. of Wausau*, No. 2:22-cv-01538-RAJ, 2023 U.S. Dist. LEXIS 132573, at *8 (W.D. Wash. July 31, 2023); *see also Univ. of Idaho v. Great Am. Ins. Co.*, No. CV 05-220, 2005 U.S. Dist. LEXIS 49828, at *13 (D. Idaho Sept. 26, 2005) (noting the majority of circuits to address the question "have held that these institutions are arms of their respective state governments"). This Court has similarly held that UW's subdivisions are also arms of the state. *See Marquez v. Harborview Med. Ctr.*, No. C16-1450RSM, 2018 U.S. Dist. LEXIS 20265, at *24 (W.D. Wash. Feb. 7, 2018) (finding a medical center "operated and managed" by UW to be a state agency under Washington law). Washington courts have reached the same conclusion. *E.g.*, *Hontz v. State*, 105 Wn.2d 302, 310 (1986) ("Because the University of Washington is a state agency, Harborview, as operated and managed by the University, is an arm of the State.").

As a state governmental entity, UW has sovereign immunity in federal court. Here, "the existence or waiver of immunity is not the issue; the only issue is whether the entity is such that a claim of immunity may be made." *Kendrick*, 910 F.3d at 1260. "Although the State of Washington does permit tort actions against it in Washington state courts . . . it has not waived its Eleventh Amendment immunity to suits against it in federal court." *Lovely v. Washington*, No. C08-5625 FDB, 2010 U.S. Dist. LEXIS 591, at *10 (W.D. Wash. Jan. 4, 2010); *see also Woods v. Washington*, No. C10-117RSM, 2011 U.S. Dist. LEXIS 278, at *11 (W.D. Wash. Jan. 4, 2011) (dismissing claims against University of Washington on the basis of sovereign immunity). UW is the primary defendant, a state government entity, and is the type of entity that could claim sovereign immunity. FHCC did not address this prerequisite to federal jurisdiction when removing the *Irving* action. *See generally* Notice of Removal. Thus, the Court lacks subject matter jurisdiction and must remand the *Irving* action.

STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

C. The Home State Exception to CAFA Jurisdiction Applies

Even when CAFA's prerequisites are met, "district courts must decline jurisdiction when a statutory exception applies." *Krueger v. Alaska Airlines, Inc.*, No. C22-1777-JCC, 2023 U.S. Dist. LEXIS 49776, at *2 (W.D. Wash. Mar. 6, 2023). One such exception is the home state exception found in section 1332(d)(4)(B). The home state exception provides that a district court shall decline to exercise jurisdiction where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). Here, both elements are satisfied. It is undisputed that FHCC and UW are citizens of Washington. Additionally, it is likely that more than two-thirds of the putative class are citizens of Washington. As such, the mandatory home state exception applies and requires the Court to remand this action.

The burden is on plaintiffs to demonstrate that a CAFA exception applies, *Brinkley v. Monterey Fin. Servs., LLC*, 873 F.3d 1118, 1122 (9th Cir. 2017), but the "burden of proof placed upon a plaintiff should not be exceptionally difficult to bear." *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 886 (9th Cir. 2013).

1. Last Known Addresses Support a Presumption of Citizenship

The first element of the home state exception requires the movant to show that "greater than two-thirds of the members of all proposed plaintiff classes, in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). "For diversity jurisdiction purposes, a natural person is a citizen of a state if she is a citizen of the United States and the state is her state of domicile." *Serrano v. Bay Bread LLC*, No. 14-cv-01087-TEH, 2014 U.S. Dist. LEXIS 127939, at *5 (N.D. Cal. Sep. 10, 2014) (citing *Kanter v. Warner-Lambert Co*., 265 F.3d 853, 857 (9th Cir. 2001)); *see also* Compl. ¶ 62 (defining the Class as "All United States citizens . . ."). A person's citizenship is determined by their domicile, or the place they reside with intent to remain or to which they intend to return. *Adams v. W. Marine Prods.*, 958 F.3d 1216, 1221 (9th Cir. 2020).

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126 NW CANAL STREET, SUITE 100
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(206) 622-3536

While Plaintiffs have the burden of proof for establishing a CAFA exception applies, the Ninth Circuit in *King v. Great American Chicken Corp.*, was "careful to point out that 'the burden of proof placed upon a plaintiff should not be exceptionally difficult to bear.'" *Id.* at 878 (quoting *Mondragon*, 736 F.3d at 886). Instead, the Ninth Circuit cautioned, a district court "should consider the entire record to determine whether evidence of residency can properly establish citizenship." *Id.* at 879 (citations and quotations omitted). While the "moving party must provide some facts in evidence from which the district court may make findings regarding class members' citizenship," *Brinkley*, 873 F.3d at 1121 (citation and quotations omitted), Plaintiffs "are not required to submit multiple points of data probative of citizenship for each potential class member, but rather plaintiffs 'may rely on the presumption of continuing domicile, which provides that, once established, a person's state of domicile continues unless rebutted with sufficient evidence of change." *Garcia v. Task Ventures, LLC*, No. 16-cv-809-BAS(JLB), 2016 U.S. Dist. LEXIS 168664, at *9 (S.D. Cal. Dec. 6, 2016) (quoting *Mondragon*, 736 F.3d at 886). Further, "district courts are permitted to make reasonable inferences from facts in evidence." *Mondragon*, 736 F.3d at 879.

According to information provided to Plaintiffs by counsel for FHCC, to notify patients of the data breach, Defendants mailed notice letters to 896,793[3] addresses. Declaration of Anthony L. Parkhill dated January 23, 2024 ("Parkhill [1/23/24] Decl.") ¶ 4. Of the 896,793 letters that were mailed, 809,707 (approximately 90.29%) were sent to an address in Washington. *Id.* Both UW and FHCC have locations only in Washington.[4] FHCC's website touts its commitment to the

[3] According to information provided by FHCC, FHCC mailed 903,216 notice letters in total. However, 6,423 of those addresses were either "blank" or appear to have been sent to addresses in foreign countries or military installations, which do not bear on the citizenship of class members. Parkhill [1/23/24] Decl. ¶ 6. Foreign addresses have been excluded from the calculations presented herein because Plaintiffs' class definition includes only United States citizens. Compl. ¶ 62; *see also Kanter*, 265 F.3d at 857 ("To be a citizen of a state, a natural person must first be a citizen of the United States."). Addresses in United States Territories were retained.

[4] *Fred Hutch Locations*, FRED HUTCH CANCER CTR., https://www.fredhutch.org/en/about/fredhutch-locations.html (last accessed Jan. 24, 2024); *Find a Location*, UW MED., https://www.uwmedicine.org/search/locations (last accessed Jan. 24, 2024).

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(206) 622-3536

community, noting "The trends in cancer incidence and mortality in Washington state haven't changed in five years, and marginalized communities continue to suffer the most. In 2023, efforts to address these trends were accelerated by the expansion of our Cancer Consortium's catchment area to include all of Washington state, including 39 counties, 7.7 million people and many more communities in need of cancer and disease prevention, screening and treatment."[5]

Here, the last known address of putative class members support a presumption of citizenship. "[N]umerous courts treat a person's residence as prima facie evidence of the person's domicile." *Mondragon*, 736 F.3d at 886; *see also Hollinger v. Home State Mut. Ins. Co.,* 654 F.3d 564, 571 (5th Cir. 2011) ("Evidence of a person's place of residence is prima facie proof of his domicile."); *Mason,* 842 F.3d at 390 ("[T]he law affords a rebuttable presumption that a person's residence is his domicile."); *Anderson v. Watts,* 138 U.S. 694, 706 (1891) ("The place where a person lives is taken to be his domicile until facts adduced establish the contrary[.]"). Furthermore, "a party with the burden of proving citizenship may rely on the presumption of continuing domicile, which provides that, once established, a person's state of domicile continues unless rebutted with sufficient evidence of change." *Mondragon,* 736 F.3d at 885. Indeed, unlike "the unique context of federal diversity jurisdiction [where] a contrary presumption of constitutional import takes precedence," "the residency-domicile presumption fits particularly well in the CAFA exception context, where the moving party is tasked with demonstrating a fact-centered proposition about a mass of individuals, many of whom may be unknown at the time the complaint is filed and the case removed to federal court." *Mason*, 842 F.3d at 392–93. The Ninth Circuit has expressly rejected the notion that "evidence of residency can never establish citizenship." *Mondragon,* 736 F.3d at 886; *see also King,* 903 F.3d at 878.

2. The Proposed Class Member Buffer is Sufficient to Meet Plaintiffs' Burden

The information provided by FHCC demonstrates that the last known addresses of 90.29%

[5] *2023 Annual Report*, FRED HUTCH CANCER CTR., https://www.fredhutch.org/en/about/about-the-hutch/annual-report/2023-annual-report.html#community-highlights (last accessed Jan. 24, 2024).

of the proposed class are in Washington. Specifically, FHCC sent 809,707 of 896,793 notice letters to addresses in Washington. FHCC mailed only 87,068 letters to addresses outside of Washington. There is a "buffer" of 211,845 potential class members with Washington addresses before the "greater than two-thirds" limit is at risk

In *King*, the Ninth Circuit described the level of factual data a plaintiff must provide to demonstrate the state of residence "greater than two thirds" of the class. 903 F.3d at 880. There, relying on data at least four years old, the plaintiff supplied a stipulation that 67% of the class were residents of the same state as the defendant. *Id.* at 879. The defendant, in turn, provided minimal evidence that at least some of those class members had moved, thus casting doubt on whether the plaintiff had demonstrated "greater than two thirds." *Id*. Thus, since there was no cushion in the data to allow for the loss of some class members' residence to other states:

> [t]here was no evidence to support a factual finding that the proportion of California citizens was greater than two-thirds. With the likelihood that some number of the employees were not legally domiciled in California, that others may later have moved out of state, and that some were not citizens, the [2/3] stipulation was insufficient, and there was no other evidence to fill the gap.

Id. at 880.

Here, Plaintiffs need to demonstrate that "over two-thirds" of proposed class members are citizens of Washington to require remand of this matter to the state court under CAFA's home state exception, 28 U.S.C. § 1332(d)(4)(B). The two-thirds threshold is met if at least 597,862 of the 896,793 total notice letters were sent to Washington Citizens. That is easily met here, where 809,707 class members have addresses in Washington and are presumptively Washington citizens. Unlike in *King*, there is a large buffer of 211,845 potential class members who are presumptively Washington citizens before the two-thirds threshold is in jeopardy.

FHCC's assumption-riddled notice of removal cannot rebut the evidence before the Court. For example, FHCC assumes that people traveling from out-of-state to be treated at FHCC gave FHCC a Washington Address. Notice of Removal ¶ 37. FHCC also speculates that there are deceased individuals or persons who gave a Washington address to take advantage of FHCC's

financial assistance. *Id.* ¶¶ 38–39. Even if that were the case, it defies logic to believe over 210,000 people who received notice letters fall into either category. As this Court has noted, a "party's residence is 'prima facie' proof of that person's domicile and, once a person's domicile has been established it presumptively continues unless rebutted with sufficient evidence of change." *E.L.A. v. United States*, No. 2:20-cv-1524-RAJ, 2022 U.S. Dist. LEXIS 101701, at *11 (W.D. Wash. June 3, 2022) (citation omitted). Here, the addresses to which FHCC mailed notice letters are prima facie proof that approximately 90.29% of the class are citizens of Washington. As such, the home state exception applies and this action must be remanded to Washington state court.

D. The Discretionary CAFA Exception Applies

In addition to the mandatory home state exception discussed above, CAFA contains a discretionary exception under which the Court may decline to exercise jurisdiction:

> [a] district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed . . . .

28 U.S.C. § 1332(d)(3). As previously discussed, 809,707 of 896,793 notice letters (approximately 90.29%) were mailed to addresses in Washington. Both Defendants are located in Washington and serve primarily the people of Washington. The requirements of the discretionary exception are met if approximately 298,931 of the 809,707 Washington addresses belong to Washington citizens. It would require more than 510,776 of the Washington addresses to belong to non-Washington citizens for the discretionary exception's one-third threshold to not be met.

For cases brought in a defendant's home state (as here) in which between one-third and two-thirds of the Class members are citizens of that state, a federal judge has the discretion in the interests of justice to decline to exercise that jurisdiction based on consideration of six listed factors designed to help assess whether the claims "are indeed local in nature." S. REP. 109-14, 28, 2005 U.S.C.C.A.N. 3, 28. CAFA's legislative history shows that the purpose of the discretionary home state exception is "to ensure that state courts can continue to adjudicate truly local controversies

in which some [or none] of the defendants are out-of-state corporations." *Id.* The legislature expressly intended that district courts should have discretion to consider certain factors to allow a class action that otherwise meets CAFA's requirements to proceed in a state court if it asserts "primarily local claims under local law for what is primarily a local group of claimants to proceed in state court, particularly where the action has not been pleaded manipulatively to avoid federal jurisdiction and the case is not likely to become an 'orphan' that cannot be coordinated with similar class actions." *Id.* at 39.

Pursuant to the discretionary provision of the home state exception, 28 U.S.C. § 1332(d)(3), this Court must consider whether: A) the claims involve matters of national interest; B) the claims will be governed by the laws of Washington; C) the case has been pleaded to avoid federal jurisdiction; D) the case was brought in a forum with a "distinct nexus" to the Class, harms, and Defendants; E) the number of Washington citizens in the class "is substantially larger" than the number of citizens from any other state and the "citizenship of the [non-Washington class members] is dispersed among a substantial number of States"; and F) one or more class actions asserting similar claims have been filed in the 3-year period preceding the filing of this case. *Id.*

Here, the discretionary exception's requirements are easily met. Both Defendants are located solely within Washington and serve primarily Washington citizens. All class members would have sought treatment or healthcare at a location in Washington. Indeed, only 87,086 (or approximately 9.71%) of the potential class have an address outside of Washington. Further, Plaintiffs' causes of action are all based on state law. These claims were not pleaded to avoid federal jurisdiction; indeed, Plaintiffs seek to represent a national class. Compl. ¶ 62. Plaintiffs brought this action in King County Superior Court. Both Defendants are based in King County, and therefore that forum has a "distinct nexus" to the potential class members, who sought treatment or healthcare in King County. FFHC states it mailed notice to "all 50 states, the District of Columbia, and internationally." Notice of Removal ¶ 20. Therefore, the 87,086 potential class members with non-Washington addresses are widely dispersed across a number of states. Several

other class actions over the same data breach were filed in response to the data breach in Washington state court and Washington federal court. These are now consolidated.

This class action addresses only local claims related to the data breach under Washington law for primarily Washington class members. All class members sought medical treatment while physically in Washington. This matter is exactly of the sort that legislators "carved out" of CAFA for remand.

IV. CONCLUSION

Plaintiffs Alexander Irvine and Barbara Twaddell respectfully request that the Court grant their motion; enter the proposed order submitted herewith; and remand this action to the Superior Court of King County, Washington.

I certify that the foregoing memorandum has 4,719 words, in compliance with Local Civil Rules.

STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

Dated: January 24, 2024

Respectfully submitted,

/s/ Alexander F. Strong
Alexander F. Strong, WSBA #49839
astrong@bs-s.com
Stephen K. Strong, WSBA #6299
skstrong@bs-s.com
STOBAUGH & STRONG, PC
126 NW Canal Street, Suite 100
Seattle, WA 98107
Telephone: (206) 622-3536
Facsimile: (206) 622-5759

Ben Barnow*
b.barnow@barnowlaw.com
Anthony L. Parkhill*
aparkhill@barnowlaw.com
Riley W. Prince*
rprince@barnowlaw.com
BARNOW AND ASSOCIATES, P.C.
205 West Randolph Street, Ste. 1630
Chicago, IL 60606
Telephone: (312) 621-2000
Facsimile: (312) 641-5504

Counsel for Plaintiffs Alexander Irvine and Barbara Twaddell

**pro hac vice*

DECLARATION OF SERVICE

The undersigned hereby declares that a true and correct copy of the following documents were filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of filing to all counsel of record:

1. Plaintiffs Alexander Irvine and Barbara Twaddell's Motion to Remand
2. Declaration of Anthony L. Parkhill in Support of Motion to Remand

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 24th day of January, 2024.

/s/ Anders Forsgaard
Anders Forsgaard

STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536