STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

BRENT MCCULLOUGH,

Plaintiff,

v.

TRUE HEALTH NEW MEXICO, INC.,

Defendant.

Case No. D-202-CV-2021-06816

CLASS ACTION

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

On December 19, 2022, the Court preliminarily approved a class action settlement between Plaintiffs Brent McCullough, Jason Clement, Stephanie Wade, Karen Siegman, and Miriam Shanks, individually and as Class Representatives (collectively, "Plaintiffs") and Defendant True Health New Mexico, Inc. ("True Health" or "Defendant") (collectively, the "Settling Parties") relating to a data incident that occurred on or about October 5, 2021, in which cybercriminals had unauthorized access to Defendant's network (the "Data Incident"). The Court has conditionally certified a settlement class of approximately 62,982 persons. Following preliminary settlement approval, notice was successfully disseminated to the Settlement Class in accordance with the Court's order. Reaction from the Class has been overwhelmingly positive, with only seven requests for exclusion and two objections. Accordingly, Plaintiffs now move for final approval of the settlement. Defendant does not oppose this request.

The preliminarily approved settlement, as set forth in the executed Settlement Agreement ("Settlement," "Settlement Agreement," or "SA") previously submitted to the Court as Exhibit 1

to the Motion for Preliminary Approval, resolves Plaintiffs' claims on a class-wide basis. The settlement is fair, reasonable, and adequate, has been well-received by the Class, and satisfies all the criteria for final approval under New Mexico law. Final settlement approval should be granted and the two objections to the settlement should be stricken as defective or denied as meritless.

II. BACKGROUND

On October 5, 2021, True Health discovered that an unauthorized individual had gained access to True Health's network systems. True Health conducted an investigation and determined that the personally identifiable information ("PII") and protected health information ("PHI") (collectively, "Private Information") of approximately 62,982 persons was subject to access in the Data Incident. The unauthorized individual had access to the following Private Information of the True Health patients: "name, date of birth, age, home address, email address, insurance information, medical information, social security number, health account member ID, provider information, dates of service, and provider identification number and dates of service."[1]

On December 3, 2021, Plaintiff McCullough filed a complaint against True Health on behalf of himself and similarly situated individuals. *McCullough v. True Health*, Case No. D-202-CV-2021-06816. Plaintiff McCullough brought claims for negligence, negligence per se, breach of fiduciary duty, breach of implied contract, unjust enrichment, and violation of the New Mexico Unfair Trade Practices Act, NMSA 1978 §§ 57-12-1 *et seq* ("UPA").

On January 25, 2022, Plaintiffs Jason Clement, Stephanie Wade, and Karen Siegman filed a complaint against True Health on behalf of themselves and similarly situated individuals.

[1] *True Health New Mexico Informs Individuals of Data Security Incident and Offers Support*, BUSINESS WIRE, https://www.businesswire.com/news/home/20211115005734/en/True-Health-New-Mexico-Informs-Individuals-of-Data-Security-Incident-and-Offers-Support (last accessed Apr. 21, 2023).

Clement et al v. True Health, Case No. D-101-CV-2022-00129. Plaintiffs Clement, Wade, and Siegman brought claims for negligence, negligence per se, invasion of privacy by intrusion, breach of express contract, breach of implied contract, breach of fiduciary duty, violation of the UPA, and unjust enrichment.

On January 26, 2022, Plaintiff Miriam Shanks filed a complaint against True Health on behalf of herself and all others similarly situated. *Shanks v. True Health*, Case No. D-202-CV-2022-00449. Plaintiff Shanks brought claims for negligence, negligence per se, implied breach of contract, and violation of the UPA.

On March 21, 2022, Plaintiff McCullough and the plaintiffs from the *Clement* action agreed to consolidate the *McCullough* and *Clement* actions. Plaintiff Shanks agreed to stay her case for thirty days after the date of the mediation. No further litigation of that case has occurred.

In early 2022, the Settling Parties began to engage in arm's length negotiations concerning a possible settlement of this matter. Declaration of Ben Barnow ("Barnow Decl."), attached as Exhibit 1, ¶ 3; Declaration of Andrew W. Ferich ("Ferich Decl."), attached as Exhibit 2, ¶ 4. The Settling Parties eventually agreed to attend a mediation which was held on July 12, 2022. *Id*. The Settling Parties engaged Bennett G. Picker, Esq. as a mediator to oversee settlement negotiations in the action. *Id*. In advance of formal mediation, the Settling Parties discussed their respective positions on the merits of the claims and class certification and provided detailed information to the mediator on the relevant facts and law. Barnow Decl., ¶ 4; Ferich Decl., ¶ 5. Following arm's length settlement negotiations, including a full-day mediation before Mediator Picker, the Settling Parties reached agreement on the general terms of the Settlement. Barnow Decl., ¶ 5; Ferich Decl., ¶ 6.

The Settling Parties recognize and acknowledge the benefits of settlement in this case. Absent settlement, Class Counsel believes that Plaintiffs could succeed in certifying the Class of approximately 62,982 of True Health's current and former patients. Barnow Decl., ¶ 6; Ferich Decl., ¶ 7. Nevertheless, Plaintiffs recognize that all litigation has risks, and that discovery, class certification proceedings, and trial would be time-consuming and expensive for both parties. *Id.* Class Counsel also recognize the potential benefits of early resolution, not the least being that Settlement Class members will receive valuable identity theft protection and compensation far sooner. *Id.* Class Counsel have, therefore, determined that the preliminarily approved Settlement agreed to by the Settling Parties is fair, reasonable, and adequate. Barnow Decl., ¶ 7; Ferich Decl., ¶¶ 7-8.

III. TERMS OF THE SETTLEMENT

A. The Settlement Benefits

The Settlement makes available three categories of benefits for Settlement Class members: Ordinary Expense Reimbursement; Extraordinary Expense Reimbursement; and Credit Monitoring Protections. *See* SA ¶¶ 18–20. Settlement Class members must submit a valid claim in order to receive the benefits. *Id*. In addition, True Health has agreed to provide equitable relief in the form of heightened data security. *Id*. ¶ 21. The details of these benefits are as follows:

1. Ordinary Expense Reimbursement

Settlement Class members are entitled to recover compensation for up to $250 of their ordinary out-of-pocket expenses, that were incurred between October 5, 2021, and the Claims Deadline, as a result of the Data Incident. *Id*. ¶ 18 These expenses include: (i) cost to obtain credit reports; (ii) fees related to credit freezes; (iii) card replacement fees; (iv) late fees; (v)

overlimit fees; (vi) interest on payday loans taken as a result of the Incident; (vii) other bank or credit card fees; (viii) postage, mileage, and other incidental expenses resulting from lack of access to an existing account; and (ix) costs associated with credit monitoring or identity theft insurance if purchased as a result of the Incident; (x) compensation for attested-to lost time spent monitoring accounts, reversing fraudulent charges, or otherwise dealing with the aftermath/clean-up of the Incident, at the rate of $20 per hour for up to five (5) hours of lost time (attestation requires at least a narrative description of the activities performed during the time claimed and their connection to the Incident). *Id*.

2. Extraordinary Expense Reimbursement

Settlement Class members are also eligible to recover compensation for up to $5,000 of their documented extraordinary monetary out-of-pocket losses incurred on or after October 5, 2021. SA ¶ 19. To receive benefits under this category, Settlement Class members will need to provide documentation plausibly supporting that the loss was not reimbursed by any other source, the loss was in material part caused by the Incident, and the Settlement Class member made reasonable efforts to avoid, or seek reimbursement for, the loss, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance. *Id*. Any Settlement Class member who suffered documented fraud, attempted fraud, or publication or actual misuse associated with PHI compromised as a result of the Incident can also claim up to an additional three hours of lost time, at $20 per hour, for time spent remedying the fraud or attempted misuse, subject to the $5,000 extraordinary expense cap. *Id*.

3. Credit Monitoring Protections

Settlement Class members are also entitled to claim two years of three bureau credit monitoring and identity theft insurance through Epiq. *Id*. ¶ 20.

4. Equitable Relief

Under the Settlement, True Health must also implement certain security policies for at least one year from the Effective Date of the Settlement. *Id*. ¶ 21. These increased security measures include: a written information security policy which employees will be required to review; cybersecurity training; a written password policy; Multi-Factor Authentication for remote access to email; and endpoint security measures. *Id*.

B. Notice and Settlement Administration

On December 19, 2022, the Court appointed Epiq Class Action and Claims Solutions, Inc. ("Epiq") as Claims Administrator (the "Claims Administrator"). The Claims Administrator in accordance with the Court's Preliminary Approval Order, provided notice to the Class in the manner set forth below.

The Claims Administrator provided written notice in the form of a Postcard Notice via United States Postal Service ("USPS") first class mail to all Settlement Class members with a valid mailing address. Declaration of Cameron R. Azari, Esq. on Notice Plan Implementation ("Azari Decl."), attached hereto as Exhibit 3, ¶ 10. Prior to mailing the Notice, the Claims Administrator checked all mailing addresses against the National Change of Address database to ensure address information was up-to-date and accurately formatted for mailing. *Id*. ¶ 11. When Postcard Notices returned as undeliverable, the Postcard Notices were re-mailed to any new address available through USPS information and to better addresses that were found using a third-party lookup service. *Id*. ¶ 12. The Claims Administrator created a publicly available website and toll-free hotline devoted to providing relevant information related to the case and settlement and assistance to Class Members. *Id*. ¶ 15. The proposed notice plan was designed to

reach the greatest practicable number of members of the Settlement Class. *Id*. ¶ 6. The Settlement Administrator has and will continue to review and evaluate each claim form, including any required documentation submitted, for validity, timeliness, and completeness through the end of the claims period. *Id*. ¶ 22.

C. Opt-Outs and Objections

The Notice, as approved by the Court, informed each Settlement Class member of his or her right to request exclusion from the Settlement Class and not to be bound by the Settlement, if, before the Opt-Out Date, the Settlement Class member personally completed and mailed a request for exclusion to the Claims Administrator at the address set forth in the Short Form Notice. For a Settlement Class member's Opt-Out Request to be valid, it must have included his or her name, address, and signature and must state that he or she wants to be excluded from the Settlement. SA ¶¶ 37–38.

Furthermore, Settlement Class members were able to object to the Settlement by filing with the Court and serving a written objection to the Settlement to Class Counsel and Defendant's Counsel before the objection deadline. *Id.* ¶ 43. Each Objection must have stated: (a) the objector's full name, address, telephone number (if any), and e-mail address (if any); (b) information identifying the objector as a Settlement Class member; (c) a written statement of all grounds for the objection, accompanied by any legal support the objector cares to submit; (d) the identity of all lawyers (if any) representing the objector; (e) the identity of all of the objector's lawyers (if any) who will appear at the Final Fairness Hearing; (f) a list of all persons who will be called to testify at the Final Fairness Hearing in support of the objection; (g) a statement confirming whether the objector intends to personally appear and/or testify at the Final Fairness Hearing; and (h) the objector's signature or the signature of the objector's duly

authorized lawyer or other duly authorized representative. *Id.* ¶ 41. The objection also needed to provide: (a) a list, by case name, court, and docket number, of all other cases in which the objector (directly or through a lawyer) has filed an objection to any proposed class action settlement within the last three (3) years and (b) a list, by case number, court, and docket number, of all other cases in which the objector was a named plaintiff in any class action or served as a lead plaintiff or class representative. *Id*. ¶ 42.

The deadline for Settlement Class members to opt-out of or object to the Settlement was on April 14, 2023, which was 60 days after the Notice Date. SA ¶¶ 37, 43. This date was provided on the notice sent to Class Members and is clearly posted on the Settlement website.

D. Attorneys' Fees, Costs and Expenses, and Service Awards

Class Counsel requested the Court approve an award of Attorneys' Fees, Costs, and Expenses in the amount of $315,000, and Service Awards of $1,500 to each Class Representative. *See* Plaintiffs' Unopposed Motion for Attorneys' Fees, Costs and Expenses, and Service Awards. As described in the pending fee motion, the requested Service Awards reflect the work the Class Representatives have performed in assisting Class Counsel with this litigation and their dedication to bring this lawsuit on behalf of the Settlement

E. Release

In exchange for the relief described above, Settlement Class members who do not opt out of the Settlement will fully release True Health for all claims arising from or related to claims asserted in the Litigation (the "Plaintiffs' Released Claims" defined in the Settlement Agreement at ¶ 13(z)). SA ¶¶ 25–27.

V. THE SETTLEMENT SHOULD BE FINALLY APPROVED

A. Final Approval of the Settlement is Warranted

The Settlement is an excellent result for the Settlement Class. It provides significant financial relief to participating Settlement Class members as compensation for Plaintiffs' Released Claims, and relieves the Settling Parties of the burden, uncertainty, and risk of continued litigation. The Settlement is fair, reasonable, and adequate, and the Court should grant final approval.

"On a motion for final approval of a class action settlement, and after conducting a fairness hearing, the Court's inquiry is whether the settlement is fair, reasonable, and adequate." *Fager v. Centurylink Communs., LLC*, No. 14-cv-00870 JCH/KK, 2015 U.S. Dist. LEXIS 190790, at *8 (D.N.M. June 25, 2015) (internal quotations omitted).[2] Courts should not reject a settlement solely because it does not provide a complete victory. "[T]he very essence of a settlement agreement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Acevedo v. Sw. Airlines Co.*, Civil Action No. 1:16-cv-00024-MV-LF, 2019 U.S. Dist. LEXIS 213691, at *10 (D.N.M. Dec. 10, 2019) (quoting *Officers for Justice v. Civil Serv. Com.*, 688 F.2d 615, 624 (9th Cir. 1982)). In addition, New Mexico "[p]ublic policy favors settlement of cases." *King v. Allstate Ins. Co.*, 2007-NMCA-044, ¶ 17, 141 N.M. 612, 616.

"[I]n New Mexico, class action settlements are evaluated by the district court for their fairness, adequacy, and reasonableness." *N.M. State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 46, 382 P.3d 923, 936. While "New Mexico has not adopted a standard by which to evaluate the fairness of a class action settlement," in one case, the New Mexico Court of Appeals analyzed two different approaches and created a framework to analyze a settlement. *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶ 41, 143 N.M. 158, 174,

[2] It is appropriate to look to federal cases analyzing Federal Rule of Civil Procedure 23 when "determining the appropriate legal standards to apply" under N.M. R. Civ. P. Dist. Ct. 1-023(B)(3) because the rules are "essentially identical." *Romero v. Philip Morris Inc.*, 2005-NMCA-035, ¶ 35, 137 N.M. 229, 238.

overruled on other grounds 2008-NMSC-058, 145 N.M. 77. The court decided on the following factors: "First, we examine the settlement process, including the adequacy of discovery, the fairness of the process afforded objectors, and the fairness and honesty of the negotiation. Then we look at the risks of litigation, including the merits and complexities of the parties' claims and the potential duration and cost of trial. We view the reasonableness of the settlement in light of the risks of litigation and the possible recovery at trial. Finally, we examine the class members' reaction to the settlement." *Id*., 2007-NMCA-158, ¶ 42, 143 N.M. at 174–75. Application of these factors to this case demonstrates that the Settlement is fair, reasonable, and adequate.

1. Fairness of the Settlement Process

In examining the fairness of the settlement process, the Court of Appeals identified three areas to consider: the adequacy of discovery, fairness to objectors, and the conduct of the settlement negotiations. *Id*. All three of these considerations point to a fair, reasonable, and adequate settlement agreement process.

Class Counsel received ample discovery to determine that the settlement is fair. Prior to the mediation between the Settling Parties, Class Counsel requested documents from Defendant in order to ascertain what would be a fair, reasonable, and adequate settlement in this case. Barnow Decl., ¶ 4; Ferich Decl., ¶ 5. This discovery guided Class Counsel in its negotiations with Defendant and gave Class Counsel confidence that the Settlement meets the standards of N.M. R. Civ. P. Dist. Ct. 1-023 ("Rule 1-023"). *Id*.

Further, the Settlement provided a class member who wanted to object to the Settlement the means to do so in a fair manner. The Settlement allowed a Settlement Class member 60 days after the Notice Date to file an objection. SA ¶ 43. A Settlement Class member wishing to object may appear at the Final Fairness Hearing to testify regarding his or her objection. *Id*. ¶ 41. The

requirements for the objection are stated clearly in the Settlement Agreement and will also be available on the Settlement Website. *See id*. Class Counsel is aware of only two objections raised regarding the Settlement. *See* Objection of Paula Jaramillo and Jaida Annalicia Connolly ("Jaramillo Objection") (filed April 12, 2023); Objection of Sean M. FitzPatrick ("FitzPatrick Objection") (filed April 14, 2023). The two objections were not submitted in the manner called for in the Settlement Agreement, as Class Counsel did not receive the objections via U.S. Mail. Barnow Decl., ¶ 8; Ferich Decl., ¶ 9. Nevertheless, these objections are devoid of merit and Class Counsel addresses them below. The objection procedure in the Settlement supports the fairness of the Settlement.

The conduct of the settlement negotiations further demonstrates that the settlement is fair, reasonable, and adequate. There is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. *See Nat'l Am. Ins. Co. v. Rodriquez*, No. CV 19-1020 KG/CG, 2021 U.S. Dist. LEXIS 36344, at *9 (D.N.M. Feb. 26, 2021) (holding that a proposed settlement "was fairly and honestly negotiated" because the settlement was "the result of an arms-length negotiation after private mediation"). Here, the Settlement resulted from contested and extensive arm's-length negotiations. Barnow Decl. ¶ 5; Ferich Decl., ¶ 6. Those negotiations included a mediation before Bennett G. Picker. *Id*. The excellent result for the Settlement Class (significant monetary relief, privacy protection, and the remedial measures/security enhancements Defendant must make to its data security system) show that this Settlement was reached as a result of good faith negotiations and an absence of collusion.

2. Risks of Litigation

Although Plaintiffs and Class Counsel are confident that their claims would survive on their merits, Plaintiffs and Class Counsel also recognize that there are substantial risks if the

litigation were to continue. Data breach cases are "particularly complex and risky." *Miranda v. Golden Entm't Nv*, No. 2:20-cv-00534-APG-DJA, 2021 U.S. Dist. LEXIS 90580, at *9 (D. Nev. May 12, 2021) (collecting cases). In the event that a settlement is not approved in this case, Defendant would likely challenge Plaintiffs' claims at every stage of litigation and would likely challenge Plaintiffs' ability to bring the case on behalf of the Class. While they disagree with Defendant's view of the case, Class Counsel are mindful of the inherent problems of proof and possible defenses to the claims asserted in the litigation. They also recognize the difficulties in establishing liability on a class-wide basis through summary judgment or even at trial and in achieving a result better than that offered by the Settlement here.

Defendant's ability to pay is another risk of litigation that is avoided by settlement. The potential costs of continued litigation are high. Defendant is currently able to honor the terms of and pay all valid claims under the Settlement Agreement, which provides that each Settlement Class member can receive a significant portion of what they would be entitled to were they to proceed with litigation and succeed on the merits. However, Defendant's ability to pay the same amount after costly litigation is not a guarantee.

3. Settlement Recovery Compared to Possible Recovery at Trial

The Settlement benefits that Plaintiffs have obtained for the Class are well within the range of possible recovery of benefits at trial. Due to the risks of data breach litigation, Class Counsel believes that it is possible that the Class could receive nothing if the case is further litigated. Barnow Decl., ¶ 6; Ferich Decl., ¶ 7. The Settlement instead provides immediate benefits to the Settlement Class and ensures that Settlement Class members are compensated for the injuries they have suffered from the Data Incident. *Id*.

In the absence of settlement, it is certain that the expense, duration, and complexity of the

protracted litigation that would result would be substantial. Not only would the Settling Parties have to undergo significant motion practice before any trial on the merits could even be contemplated, but evidence and witnesses, including costly expert witnesses, would have to be assembled as witnesses during any trial. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on the merits, as well as any decision on class certification. As such, the immediate and considerable relief provided to the Settlement Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and prolonged litigation, trial, and appellate process.

4. Class Members' Reactions

Only seven Settlement Class members have opted out of the Settlement and only two separate objections to the Settlement were made. *See* Azari Decl., ¶ 20; Jaramillo Objection; FitzPatrick Objection. Only ten of the approximately 62,982 Settlement Class members, or 0.016% of the Settlement Class, chose to opt-out or object to the Settlement. This low number of opt-outs and objections confirms the Settlement as fair, reasonable, and adequate. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("[T]he 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." (collecting cases)); *Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 2001) (finding the low number of opt-outs (0.10614% of class) and objections (0.0052% of class) supported final approval); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) ("A certain number of opt-outs and objections are to be expected in a class action. If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." (internal citations omitted)). Additionally, Plaintiffs have approved of the Settlement

and believe that it is fair and reasonable in light of the defenses raised by Defendant and the potential risks involved with continued litigation.

B. The Court Should Deny the Objections to the Settlement

Class Counsel is aware of two objections to the Settlement. Each should be denied for two reasons: 1) neither objection meets the procedural requirements for objections under the Settlement and 2) neither objection has merit.

1. Objectors Failed to Satisfy the Settlement's Procedural Requirements for Submitting Settlement Objections

Under the Settlement and pursuant to the Preliminary Approval Order, Objections were to be filed with the Court and served upon Class Counsel via mail no later than 60 days after the Notice Date. *See* SA ¶ 43; Preliminary Approval Order ¶ 21. Settlement Class members who do not timely file and serve their objection "may not, at the discretion of the Court, be permitted to object to the approval of the Settlement at the Final Approval Hearing and may be foreclosed from seeking any review of the Settlement or the terms of the Settlement Agreement by appeal or other means." Preliminary Approval Order ¶ 24. Objectors Jaramillo and Connolly filed their objection with the Court on April 12, 2023, but failed to serve the objections to Class Counsel and Defense Counsel via mail, only sending the objection via email. *See* Jaramillo Objection; Barnow Decl., ¶ 8; Ferich Decl. ¶ 9. Objector FitzPatrick timely filed his objection with the Court on April 14, 2023, but failed to serve the objections to Class Counsel and Defense Counsel via mail. *See* FitzPatrick Objection; Barnow Decl. ¶ 8; Ferich Decl. ¶ 9.

Additionally, a Settlement Class member who chose to object to the Settlement needed to include in the objection "a statement confirming whether the objector intends to personally appear and/or testify at the Final Fairness Hearing," among other requirements. *Id*. ¶ 20. Neither of the objections met this requirement. *See* Jaramillo Objection; FitzPatrick Objection. The

Preliminary Approval Order states, "Any Settlement Class member who does not submit a timely Objection in complete accordance with the Settlement Agreement and the Long-Form Notice, or as otherwise ordered by the Court, shall not be treated as having filed a valid Objection to the Settlement and shall forever be barred from raising any objection to the Settlement." Preliminary Approval Order ¶ 25. The objectors here failed to timely file and/or serve their objections and failed to meet all the requirements of an objection under the Settlement. As such, the Court should strike these improper objections.

2. The Objections Fail and Should be Denied for Substantive Reasons

Even if the objections were filed and served in a timely matter and met all requirements under the settlement, the objections are not meritorious. Objectors Jaramillo and Connolly object that the settlement does not provide enough years of credit monitoring. *See* Jaramillo Objection. Courts often approve data breach settlements that provide two years or fewer of credit monitoring along with reimbursements for lost time and expenses. *See Yvonne Mart Fox v. Iowa Health Sys.*, No. 3:18-cv-00327-JDP, 2021 U.S. Dist. LEXIS 40640, at *17 (W.D. Wis. Mar. 4, 2021) (finally approving settlement that provides one year of credit monitoring along with reimbursements for lost time and expenses); *Johansson-Dohrmann v. CBR Sys.*, No. 12-cv-1115-MMA (BGS), 2013 U.S. Dist. LEXIS 103863, at *20-21 (S.D. Cal. July 24, 2013) (denying objection that the two years of credit monitoring offered in conjunction with reimbursements was insufficient and granting final approval); *Hashemi v. Bosley, Inc.*, No. CV 21-946 PSG (RAOx), 2022 U.S. Dist. LEXIS 210946, at *40 (C.D. Cal. Nov. 21, 2022) (granting final approval to settlement which provides two years of credit monitoring services in addition to reimbursements for losses as a result of the data breach). The two years of three bureau credit monitoring that Settlement Class members are entitled to, along with reimbursements, are

adequate benefits under this settlement and are the product of significant arms-length negotiations.

The Jaramillo Objection also points to the benefits provided in the Equifax data breach settlement from 2017, namely the reimbursement for lost time (at $25 per hour up to 20 hours) and expenses. *See* Jaramillo Objection. But the Equifax settlement limits the payments for these benefits at $38,000,000.00 total and the class size in that case is estimated to be 147,000,000 persons. *See In re: Equifax Inc. Customer Data Security Breach Litigation*, No. 1:17-md-2800 (N.D. Ga.), ECF No. 739-2, § 6.2.6. This means that if 5% of the Equifax settlement class submitted claims all for the same amount, they payment would be approximately $5.17. By contrast, under the Settlement here, there is no global cap to the benefits that Settlement Class members are able to claim, only an individual cap of $250 for ordinary expense reimbursement (including reimbursement for lost time at $20 per hour for up to 5 hours) and $5,000 for extraordinary expense reimbursement (including an additional 3 hours of lost time at $20 per hour). SA ¶¶ 18–19. When the size of the Equifax settlement class and the global cap on settlement benefits is taken into account, it becomes clear that the benefits of the Settlement here are at least on par with the benefits under the Equifax settlement, if not better.

Objector FitzPatrick also argues that the benefits provided under the Settlement are inadequate. *See* FitzPatrick Objection at 1. The objection first highlights HIPAA penalty amounts, but notes, "[C]omparing HIPAA penalties to a civil settlement might be an apples to oranges comparison." *Id* at 2. Objector FitzPatrick is exactly correct that this is an apples to oranges comparison. HIPAA does not provide a private right of action and therefore any money for a HIPAA violation only goes to the federal government, not to consumers. *See Laster v.*

Careconnect Health Inc., 852 F. App'x 476, 478 (11th Cir. 2021) ("[E]very circuit to have considered the issue has also held that no private right of action exists under HIPAA."). Objector FitzPatrick then turns to a list of data breach settlements and notes that they are "multi million-dollar settlements." *Id*. What Objector FitzPatrick fails to note is the size of the classes in those settlements. For example, the website notes that the Anthem class had 80 million persons in it, the Home Depot breach included 50 million credit cards and email addresses, the Ashley Madison breach exposed 36 million accounts, and the Target breach exposed 42 million payment cards.[3] By contrast, the class here is made up of approximately 62,982 persons. Courts around the country have approved settlements that provide similar benefits to classes that are more similar to the one here than the multi-million-person class settlements on the website identified by Objector FitzPatrick. *See*, *e.g.*, *Chacon v. Nebraska Medicine*, No. 8:21-cv-00070 (D. Neb.), ECF No. 24 (finally approving settlement in medical data breach that provided reimbursements of up to $300 for ordinary expenses, $20 per hour of lost time up to 6 hours, and $3,000 in extraordinary expense reimbursements to the 125,106-person class and one year of credit monitoring to a subset of the class that had Social Security numbers or drivers' license numbers exposed in the breach)[4]; *Adubaker v. Dominion Dental USA, Inc.*, No. 1:19-cv-01050 (E.D. Va.), ECF No. 159 (finally approving medical data breach settlement that provides benefits of up to $300 in ordinary expense reimbursement (including up to $20 per hour of lost time up to 5 hours), $7,500 in extraordinary expense reimbursement, and no credit monitoring for 2.9 million settlement class members). The settlement benefits here are on par if not better with other similar settlements that have been finally approved as fair, reasonable, and adequate by courts

[3] *See Data Breach Settlement*, ClassAction.com, https://www.classaction.com/data-breach/settlement/ (last accessed Apr. 18, 2023).
[4] More information on the details of the settlement are available at: https://www.databreachtoday.com/proposed-settlement-in-nebraska-medicine-data-breach-lawsuit-a-16834.

throughout the country.

The FitzPatrick Objection next attacks Plaintiffs' request for attorney fees. Objector FitzPatrick's main contention here is that the hourly rates of class counsel are not in line with local New Mexico hourly rates. *See* Fitzpatrick Objection at 4. But as Plaintiffs point out in the Motion for Attorneys' Fees, the more relevant community to look at here is the community of attorneys that litigate complex class actions nationwide, including data privacy class actions. *See Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK-CBS, 2006 U.S. Dist. LEXIS 51420, at *13 (D. Colo. July 27, 2006). Class Counsel here do not only practice in one locality, but rather litigate these cases throughout the country, as evidenced by the cases listed in their resumes, submitted with the now-granted Motion for Preliminary Approval. Class Counsel identifies numerous cases in which their historical hourly rates, which are similar to their current rates, have been approved in many different courts. *See* Plaintiffs' Unopposed Motion for Attorneys' Fees, Costs and Expenses, and Service Awards at 18–19. As Plaintiffs' Motion for Attorneys' Fees explains, Plaintiffs' requested fees are reasonable in light of the work performed and the benefits that have been made available to the Settlement Class.

Objector FitzPatrick's next contention is with the amount of information available to him regarding the Data Breach. *See* FitzPatrick Objection at 5. However, the information available to him and the Court is certainly enough to demonstrate that the Settlement is fair, reasonable, and adequate and to inform Settlement Class members whether they should file a claim, object, or opt out of the settlement. Materials obtained pursuant to formal and informal discovery are not provided to class members for myriad reasons, including the confidentiality of the information, the sensitivity of the information (which could create further security risks if it falls into the wrong hands), and others. Plaintiffs described the types of PII/PHI that were exposed as a result

of the breach.[5] Plaintiff McCullough's complaint alleges that the types of information exposed in the breach could open Settlement Class members up to fraud or identity theft. *See* Complaint ¶¶ 27–36. The Settlement allows Settlement Class members reimbursements for fraud or identity theft up to $5,000 and offers them two years of credit monitoring and identity theft insurance services. The benefits afforded to the Settlement Class by the Settlement provide restitution to Settlement Class members for any harm they have already experienced and affords them protection from harm as a result of the Data Breach for an additional two years in the future. As such, the Settlement provides fair, reasonable, and adequate benefits to Settlement Class members. In any event, Class Counsel are highly experienced and capable to do the job they are appointed to do.

Objector FitzPatrick closes his objection with two more criticisms of the Settlement. FitzPatrick Objection at 5–6. One of these criticisms is that the Settlement Class members have to file and/or mail opt-outs and objections to the Settlement. *Id*. However, this is simply the required process for Rule 1-023(B)(3) class actions. *See* Rule 1-023(C)(2)(a) (requiring notice to class members after a class is certified that notifies class members that "the court will exclude the member from the class if the member so requests by a specified date"). Objector FitzPatrick's final contention is that the equitable relief contemplated by the Settlement will not occur because True Health may cease to exist. *See* FitzPatrick Objection at 6. The purpose of the equitable relief in the Settlement is to protect Settlement Class members' PII/PHI that is still in the possession and control of True Health. Should True Health no longer exist, True Health will no longer have that PII/PHI in its possession and the purpose of the equitable relief will be satisfied.

The Settlement is the result of arms-length negotiations between Class Counsel and counsel for True Health and required compromise on both sides. Similar settlements are

[5] *See* n.1, *supra*.

routinely approved by courts throughout the United States. The Settlement is fair, reasonable, and adequate and provides Settlement Class members concrete, immediate relief and avoids the risks of continued litigation. The attorney's fees requested by Class Counsel are fair in light of the work performed and the benefits achieved for the Settlement Class. Both of the objections should be denied.

C. The Court Should Grant Final Certification of the Settlement Class

Pursuant to the Settlement, the Court should certify the following Settlement Class:

> All Persons to whom True Health sent notification that their personal information and/or protected health information may have been or was exposed to unauthorized third parties as a result of the Incident.

SA ¶ 13(bb).

A class may be certified under Rule 1-023 if the following "prerequisites" are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 1-023(A). In this case, the Settlement Class meets all of the prerequisites. In addition to these prerequisites, a settlement under Rule 1-023(B)(3) must meet additional requirements. In order to certify a class under Rule 1-023(B)(3), the Court must find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The Court preliminarily certified the Settlement Class in its Preliminary Approval Order, finding that the Rule 1-023 elements were all met. *See* Preliminary Approval Order. Nothing has

occurred that would change the Court's previous determination that Plaintiffs have satisfied the requirements under Rule 1-023. First, pursuant to Rule 1-023(A)(1), there can be no doubt that numerosity is satisfied as the Settlement Class consists of approximately 62,982 persons. Pursuant to Rule 1-023(A)(2), there are questions of law or fact common to the class, including whether True Health had duties to safeguard the PII/PHI in its possession, whether True Health violated those duties, whether implied contracts existed between Settlement Class members and True Health, and whether Plaintiffs and Settlement Class members are entitled to damages and the measure of such damages and relief, among other issues. Rule 1-023(A)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Here, the claims of the named Plaintiffs are typical of the claims of the Settlement Class. Plaintiffs' and Settlement Class members' claims arise from the same nucleus of facts relating to the Data Breach, pertain to a common defendant True Health, and are based on the same legal theories. Finally, under Rule 1-023(A)(4), Plaintiffs and their counsel do not have any conflicts of interest with Settlement Class members and have demonstrated their commitment to prosecute the action vigorously on behalf of the class.

The facts here also meet the requirements of Rule 1-023(B). Plaintiffs' claims depend on whether True Health had reasonable data security measures in place to protect Plaintiffs' and Class Members' PII/PHI, and whether True Health could have prevented unauthorized exposure of Plaintiffs' PII/PHI or mitigated its effects with more adequate data protection. These questions can be resolved by resort to common evidence for all Settlement Class members, including True Health's internal documents, testimony of its employees, and expert analysis. In addition, the class action mechanism is superior for resolving this matter given the very large size of the proposed class weighed against the expense and burden of individual actions. Because Plaintiffs

satisfy the Rule 23 requirements, the Court should grant final certification of the Class.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order (1) finally certifying the Settlement Class for settlement purposes; (2) striking or overruling the Jaramillo and FitzPatrick objections; (3) granting final approval of the Settlement; (4) finding that Notice has been conducted in accordance with the Court-approved notice plan and due process; (5) granting Plaintiffs' Motion for Attorneys' Fees, Costs and Expenses, and Service Awards; and (6) dismissing with prejudice Plaintiffs' and Settlement Class members' claims against True Health New Mexico relating to the Data Breach.

Dated: April 26, 2023

By: */s/ Mark Fine*

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Counsel for Plaintiffs
* admitted pro hac vice

DECLARATION OF SERVICE

I, Mark Fine declare that I effected service of the following document(s) on the parties listed below via e-mail.

Parties:

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Counsel for Defendant True Health New Mexico, Inc.

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

DATED this 26th day of April, 2023.

/s/ Mark Fine

Exhibit 1

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

BRENT MCCULLOUGH, Plaintiff, v. TRUE HEALTH NEW MEXICO, INC., Defendant.	Case No. D-202-CV-2021-06816 CLASS ACTION

DECLARATION OF BEN BARNOW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Ben Barnow, hereby declare as follows:

1. I am an attorney admitted to practice law in the State of Illinois and the State of New York. I am the President of Barnow and Associates, P.C. ("Barnow and Associates"), and one of Class Counsel. I have personal knowledge of the matters stated in this declaration except those stated on information and belief, and as to those, I believe them to be true. If called upon, I could and would competently testify to them. This declaration is submitted in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

2. On December 3, 2021, my firm Barnow and Associates, P.C. and co-counsel Ahdoot & Wolfson, PC, filed a complaint against True Health New Mexico, Inc. ("True Health" or "Defendant") on behalf of Plaintiff Brent McCullough and similarly situated individuals relating to the True Health data breach ("Data Breach").

3. In early 2022, I and my co-counsel began to engage in arm's length negotiations concerning a possible settlement of this matter. We eventually agreed to attend a mediation with

True Health which was held on July 12, 2022. Our firms engaged Bennett G. Picker, Esq. as a mediator to oversee settlement negotiations in the action.

4. In advance of formal mediation, the parties discussed their respective positions on the merits of the claims and class certification and provided detailed information to the mediator on the relevant facts and law. Plaintiffs also received ample discovery before and during mediation and settlement negotiations that allowed Class Counsel to determine that the settlement is fair. Specifically, Class Counsel requested pre-mediation informal discovery and documents from Defendant to ascertain what would be a fair, reasonable, and adequate settlement in this case.

5. Following arm's length settlement negotiations, including a full-day mediation before Mr. Picker, the Settling Parties reached agreement on the general terms of the Settlement.

6. The Settlement benefits that Plaintiffs have obtained for the Class are well within the range of possible recovery of benefits at trial. Class Counsel recognize and acknowledge the benefits of settling this case. Absent settlement, I believe that Plaintiffs could succeed in certifying the Class of approximately 62,982 of True Health's current and former patients. Due to the risks of data breach litigation, as well as much litigation, Class Counsel believe that it is possible that the Class could receive little or nothing if the case is further litigated. All litigation has risks, and discovery, class certification proceedings, and trial would be time-consuming and expensive for both parties. Early resolution is particularly important and beneficial here, including because Settlement Class members will receive valuable identity theft protection and compensation far sooner than they otherwise would have had litigation continued.

7. As previously noted, Barnow and Associates has decades of experience in the prosecution of class actions, including data breach and privacy lawsuits such as this action. My and my firm's experience were previously set forth in detail in the now-granted Motion for

Preliminary Approval and supporting papers, as well as the pending motion for attorneys' fees and supporting papers. Based on my experience and my knowledge regarding the factual and legal issues in this matter, and given the substantial benefits provided by the Settlement, it is my opinion that the proposed Settlement in this matter is fair, reasonable, and adequate, is in the best interests of the Settlement Class Members, and should be finally approved by the Court.

8. To my knowledge, I did not receive U.S. Mail service of the two objections in this litigation, the first of which was filed jointly by Paula Jaramillo and Jaida Annalicia Connolly and the second filed by Sean M. Fitzpatrick. However, I have read them.

Dated: April 26, 2023

By: */s/ Ben Barnow*

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Counsel for Plaintiffs

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Exhibit 2

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

BRENT MCCULLOUGH, Plaintiff, v. TRUE HEALTH NEW MEXICO, INC., Defendant.	Case No. D-202-CV-2021-06816 CLASS ACTION

DECLARATION OF ANDREW FERICH IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Andrew W. Ferich, hereby declare as follows:

1. I am an adult, I have personal knowledge of the facts stated herein, and I am competent to so testify. I am co-counsel for Plaintiffs in this action. I am a partner at the law firm Ahdoot & Wolfson, PC ("AW"), and a member in good standing of the bars of the state of Pennsylvania, New Jersey, and the District of Columbia.

2. This Declaration is submitted in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement. I make the following declaration based upon my own personal knowledge and, where indicated, as based on information and belief, that the following statements are true. If called upon as a witness, I could and would competently testify as follows.

BACKGROUND AND SETTLEMENT NEGOTIATIONS

3. On December 3, 2021, my firm Ahdoot Wolfson and co-counsel Barnow and Associates, P.C., filed a complaint against True Health on behalf of Plaintiff Brent McCullough and similarly situated individuals relating to the True Health data breach ("Data Breach").

4. In early 2022, I and my co-counsel began to engage in arm's length negotiations concerning a possible settlement of this matter. We eventually agreed to attend a mediation with True Health which was held on July 12, 2022. Our firms engaged Bennett G. Picker, Esq. as a mediator to oversee settlement negotiations in the action.

5. In advance of formal mediation, the parties discussed their respective positions on the merits of the claims and class certification and provided detailed information to the mediator on the relevant facts and law. Plaintiffs also received ample discovery before and during mediation and settlement negotiations that allowed Class Counsel to determine that the settlement is fair. Specifically, Class Counsel requested pre-mediation informal discovery and documents from Defendant to ascertain what would be a fair, reasonable, and adequate settlement in this case.

6. Following arm's length settlement negotiations, including a full-day mediation before Mr. Picker, the Settling Parties reached agreement on the general terms of the Settlement.

7. The Settlement benefits that Plaintiffs have obtained for the Class are well within the range of possible recovery of benefits at trial. Class Counsel recognize and acknowledge the benefits of settling this case. Absent settlement, I believe that Plaintiffs could succeed in certifying the Class of approximately 62,982 of True Health's current and former patients. Due to the risks of data breach litigation, as well as much litigation, Class Counsel believe that it is possible that the Class could receive little or nothing if the case is further litigated. All litigation has risks, and discovery, class certification proceedings, and trial would be time-consuming and expensive for both parties. Early resolution is particularly important and beneficial here, including because Settlement Class members will receive valuable identity theft protections and compensation far sooner than they otherwise would have had litigation continued.

8. As previously noted, AW has decades of experience in the prosecution of class actions, including data breach and privacy lawsuits such as this action. My and my firm's experience were previously set forth in detail in the now-granted Motion for Preliminary Approval and supporting papers, as well as the pending motion for attorneys' fees and supporting papers. Based on my experience and my knowledge regarding the factual and legal issues in this matter, and given the substantial benefits provided by the Settlement, it is my opinion that the proposed Settlement in this matter is fair, reasonable, and adequate, is in the best interests of the Settlement Class Members, and should be finally approved by the Court.

9. I did not receive U.S. Mail service of the two objections in this litigation, the first of which was filed jointly by Paula Jaramillo and Jaida Annalicia Connolly, and the second filed by Sean M. Fitzpatrick.

Dated: April 26, 2023

By: */s/ Andrew W. Ferich*

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Counsel for Plaintiffs

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Exhibit 3

IN THE SECOND DISTRICT COURT OF THE
STATE OF NEW MEXICO

BRENT MCCULLOUGH,	)	Case No. D-202-CV-2021-06816
Plaintiff,	)	
v.	)	
TRUE HEALTH NEW MEXICO, INC.,	)	
Defendant.	)	

DECLARATION OF CAMERON R. AZARI, ESQ. ON IMPLEMENTATION AND ADEQUACY OF NOTICE PLAN

I, Cameron R. Azari, Esq., hereby declare and state as follows:

1. My name is Cameron R. Azari, Esq. I have personal knowledge of the matters set forth herein, and I believe them to be true and correct.

2. I am a nationally recognized expert in the field of legal notice, and have served as an expert in hundreds of federal and state cases involving class action notice plans.

3. I am a Senior Vice-President of Epiq Class Action and Claims Solutions, Inc. ("Epiq") and the Director of Legal Notice for Hilsoft Notifications, a firm that specializes in designing, developing, analyzing, and implementing large-scale, un-biased, legal notification plans. Hilsoft Notifications is a business unit of Epiq.[1]

OVERVIEW

4. This declaration describes the implementation of the Settlement Notice Plan ("Notice Plan") for *McCullough v. True Health New Mexico Inc*., Case Nos. D-202-CV-2021-06816; D-101-CV-2022-00129; D-202-CV-2022-00449, in the Second District Court of the State of New Mexico. I previously executed my *Declaration of Cameron R. Azari, Esq. on Notice Plan and Notices* on November 30, 2022, which described the Notice Plan, detailed Hilsoft's class action notice experience, and attached Hilsoft's *curriculum vitae.*

[1] References to Epiq in this declaration include Hilsoft Notifications.

NOTICE PLAN SUMMARY

5. New Mexico Rule of Civil Procedure for the District Courts 1-023 directs that notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[2] The Notice Plan as implemented satisfied these requirements.

6. This Notice Plan was designed to reach the greatest practicable number of members of the Settlement Class. The Notice Plan individual notice efforts reached approximately 97.2% of the identified Settlement Class. The reach was further enhanced by a settlement website. In my experience, the reach of the Notice Plan was consistent with other court-approved notice plans, was the best notice practicable under the circumstances of this case, and satisfied the requirements of due process, including its "desire to actually inform" requirement.[3]

NOTICE PLAN DETAIL

7. On December 19, 2022, the Court approved the Notice Plan designed by Hilsoft and appointed Epiq as the Claims Administrator in the *Order Allowing Preliminary Approval of Class Action Settlement and Directing Notice of Proposed Settlement* ("Preliminary Approval Order"), which provisionally certified the following "Settlement Class" defined as:

> [A]ll persons to whom True Health sent notification that their personal information and/or protected health information may have been or was exposed to unauthorized third parties as a result of the Incident.

8. After the Court's Preliminary Approval Order was entered, we began to implement the Notice Plan. This declaration will detail the notice activities undertaken and explain how and why the Notice Plan was comprehensive and well-suited to the Settlement Class. This declaration will also discuss the administration activity to date. The facts in this declaration are based on my personal knowledge, as well as information provided to me by my colleagues in the ordinary course of my business at Epiq.

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[2] N.M. R. Civ. P. Dist. Ct. 1-023 (c)(2).

[3] *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 315 (1950) ("But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . .").

NOTICE PLAN IMPLEMENTATION

Individual Notice

9. On December 29, 2022, Epiq received one data file containing 65,448 records for identified members of the Settlement Class. The data included names and physical addresses for virtually all identified members of the Settlement Class. Epiq deduplicated and rolled-up the records where names and addresses were an exact match and loaded 64,242 unique members of the Settlement Class records into its database for the case. This data was used to provide individual notice to the Settlement Class Members with an available mailing address, which resulted in 64,235 identified Settlement Class Members that were sent a Postcard Notice (seven records had a mailing address that was not mailable).

Individual Notice – Direct Mail

10. On February 13, 2023, Epiq sent 64,235 Postcard Notices to all identified Settlement Class Members with an associated physical address. The Postcard Notices were sent via United States Postal Service ("USPS") first-class mail. The Postcard Notice clearly and concisely summarized the case, the Settlement, and the legal rights of the Settlement Class Members. In addition, the Postcard Notice directed the recipients to the settlement website where they can access additional information.

11. Prior to sending the Postcard Notice, all mailing addresses were checked against the National Change of Address ("NCOA") database maintained by the USPS to ensure address information for members of the Settlement Class was up-to-date and accurately formatted for mailing.[4] In addition, the addresses were certified via the Coding Accuracy Support System ("CASS") to ensure the quality of the zip code, and were verified through Delivery Point Validation ("DPV") to verify the accuracy of the addresses. This address updating process is standard for the industry and for the majority of promotional mailings that occur today.

[4] The NCOA database is maintained by the USPS and consists of approximately 160 million permanent change-of-address (COA) records consisting of names and addresses of individuals, families, and businesses who have filed a change-of-address with the Postal Service™. The address information is maintained on the database for 48 months and reduces undeliverable mail by providing the most current address information, including standardized and delivery-point-coded addresses, for matches made to the NCOA file for individual, family, and business moves.

12. The return address on the Postcard Notices is a post office box that Epiq maintains for this case. The USPS automatically forwards Postcard Notices with an available forwarding address order that has not expired ("Postal Forwards"). Postcard Notices returned as undeliverable were re-mailed to any new address available through USPS information, (for example, to the address provided by the USPS on returned mail pieces for which the automatic forwarding order has expired, but is still within the time period in which the USPS returns the piece with the address indicated), and to better addresses that were found using a third-party lookup service. Upon successfully locating better addresses, Postcard Notices were promptly remailed. As of April 24, 2023, Epiq has remailed 2,947 Postcard Notices where a forwarding address was provided, or a better address was identified using a third-party lookup service.

13. Additionally, a Long Form Notice and/or Claim Form were mailed to all persons who requested one via the toll-free telephone number or by mail. As of April 24, 2023, 21 Long Form Notices and/or Claim Forms have been mailed as a result of such requests.

Notice Results

14. As of April 24, 2023, a Postcard Notice was delivered to 62,485 of the 64,242 unique, identified Settlement Class Members. This means the individual notice efforts reached approximately 97.2% of the identified members of the Settlement Class.

Settlement Website

15. On February 10, 2023, Epiq established a dedicated website for the Settlement with an easy to remember domain name (www.THNMSettlement.com). Relevant documents, including the Long Form Notice, Postcard Notice, Claim Form, Settlement Agreement, Preliminary Approval Order, and Motion for Attorneys' Fees, Costs, Expenses and Service Awards, are included on the settlement website. In addition, the settlement website includes relevant dates, answers to frequently asked questions ("FAQs"), instructions for how members of the Settlement Class were able to opt-out (request exclusion) from or object to the Settlement, contact information for the Claims Administrator, and how to obtain other case-related information. The settlement website also provides the opportunity for members of the Settlement Class to file an online Claim Form. The website address was prominently displayed in all notice documents.

16. As of April 24, 2023, there have been 2,644 unique visitor sessions to the settlement website and 9,535 website pages presented.

Toll-Free Number and Other Contact Information

17. On February 10, 2023, a toll-free telephone number (1-877-506-4514) was established for the Settlement. Callers are able to hear an introductory message and also have the option to learn more about the Settlement in the form of recorded answers to FAQs, and to request that a Long Form Notice and/or Claim Form be mailed to them. This automated phone system continues to be available 24 hours per day, 7 days per week. During standard business hours, callers are able to talk with a service agent. The toll-free telephone number was prominently displayed in all notice documents.

18. As of April 24, 2023, there have been 145 calls to the toll-free telephone number representing 666 minutes of use, and service agents have handled 42 incoming calls representing 437 minutes of use and 14 outbound calls representing 25 minutes of use.

19. A postal mailing address and an email address were established, providing members of the Settlement Class with the opportunity to request additional information or ask questions.

Requests for Exclusion

20. The deadline to request exclusions from the Settlement or to object to the Settlement was April 14, 2023. As of April 24, 2023, Epiq has received seven requests for exclusion. As standard practice, Epiq is in the process of conducting a complete review of all the requests for exclusion received. There is a possibility that after detailed review and input from counsel, the total number of requests for exclusion may change due to incomplete/invalid requests. Since the deadline to request exclusion recently passed, it is possible that Epiq may receive additional timely postmarked requests for exclusion. If so, I will provide a supplemental declaration to the court. The Request for Exclusion Report is included as **Attachment 1**.

Claim Submissions & Distribution Options

21. The Notices provided a detailed summary of the relevant information about the Settlement, including the settlement website address and how members of the Settlement Class

can file a Claim Form online or by mail.

22. The deadline for members of the Settlement Class to file a Claim Form is August 14, 2023. As standard practice, Epiq is in the process of conducting a complete review and audit of all Claim Forms received. There is a likelihood that after detailed review, the total number of Claim Forms received will change due to duplicate and denied Claim Forms, though Epiq does not anticipate this change to be substantial.

CONCLUSION

23. In class action notice planning, execution, and analysis, we are guided by due process considerations under the United States Constitution, by local rules and statutes, and further by case law pertaining to notice. This framework directs that the notice plan be designed to reach the greatest practicable number of potential class members and, in a settlement class action notice situation such as this, that the notice or notice plan itself not limit knowledge of the availability of benefits—nor the ability to exercise other options—to class members in any way. All of these requirements were met in this case.

24. The Notice Plan included an extensive individual notice effort to the identified members of the Settlement Class. The individual notice efforts of the Notice Plan alone reached approximately 97.2% of the Settlement Class. The individual notice efforts were supplemented with a dedicated settlement website. The FJC's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, which is relied upon for federal cases and is illustrative for state court cases, states that "the lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the Settlement Class. It is reasonable to reach between 70–95%."[5] Here, the Notice Plan we developed and implemented achieved a reach toward the high-end of that standard.

25. The Notice Plan followed the guidance for satisfying due process obligations that a notice expert gleans from the United States Supreme Court's seminal decisions, which emphasize

[5] FED. JUDICIAL CTR, JUDGES' CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE 3 (2010), available at https://www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0.

the need: (a) to endeavor to actually inform the Settlement Class, and (b) to ensure that notice is reasonably calculated to do so:

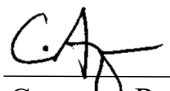
a. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," *Mullane v. Central Hanover Trust*, 339 U.S. 306, 315 (1950); and

b. "[N]otice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (citing *Mullane*, 339 U.S. at 314).

26. The Notice Plan in this case provided the best notice practicable under the circumstances, conformed to all aspects of the New Mexico Rule of Civil Procedure for the District Courts 1-023 regarding notice, comported with the guidance for effective notice articulated in the Manual for Complex Litigation, Fourth and applicable FJC materials, and exceeded the requirements of due process, including its "desire to actually inform" requirement.

27. The Notice Plan schedule afforded enough time to provide full and proper notice to members of the Settlement Class before the opt-out and objection deadlines.

I declare under penalty of perjury that the foregoing is true and correct. Executed April 26, 2023.



Cameron R. Azari, Esq.

Attachment 1

True Health New Mexico

Case No. D-202-CV-2021-06816

Requests for Exclusion as of April 24, 2023

Postmark Deadline to Request Exclusion:
April 14, 2023

	Class Member Name
1	Michael Kovach
2	Jillian Kovach
3	Kimberly Kovach
4	Nicholas Kovach
5	Marc Nelson
6	Liam Fitzpatrick
7	Evangelene Ecalinea