

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

**ORDER ALLOWING PRELIMINARY APPROVAL OF CLASS ACTION  
SETTLEMENT AND DIRECTING NOTICE OF PROPOSED SETTLEMENT**

The Court, having considered Plaintiffs' Assented to Motion for Preliminary Approval of the Class Action Settlement ("Motion for Preliminary Approval"), the supporting Memorandum, the Parties' Settlement Agreement, the proposed Postcard Notice (also known as the "Short-Form Notice"), Long-Form Notice, and Claim Form, and being otherwise advised in the premises, finds and orders as follows:

**PRELIMINARY APPROVAL**

1. The Settlement Agreement is incorporated fully herein by reference. The definitions used in the Settlement Agreement are adopted in this Order and shall have the same meaning ascribed in the Settlement Agreement.

2. The Court has jurisdiction over the claims at issue in this Litigation, Plaintiffs Brent McCullough, Jason Clement, Stephanie Wade, Karen Siegman, and Miriam Shanks (collectively, "Plaintiffs" or "Class Representatives"), individually and on behalf of all others similarly situated

(the “Settlement Class”), and Defendant True Health New Mexico, Inc. (“True Health” and together with Plaintiffs, the “Parties”).

3. The Court grants the Motion for preliminary approval; notice of the Settlement should be provided to the Settlement Class members.

4. Pending the Final Approval Hearing, all proceedings in the Litigation, other than proceedings necessary to carry out or enforce the terms and conditions of the Settlement and this Order, are hereby stayed.

***Procedural Posture and History of Negotiations***

5. This is a putative class action brought by Plaintiffs arising out of a data security incident in which Plaintiffs allege that a ransomware attack occurred on October 5, 2021, and that this attack may have resulted in cyber-criminals accessing and obtaining the PII/PHI of the Settlement Class members (the “Incident”).

6. Plaintiffs filed three putative class actions in this Court: *McCullough v. True Health*, Case No. D-202-CV-2021-06816; *Clement et al v. True Health*, Case No. D-101-CV-2022-00129; and *Shanks v. True Health*, Case No. D-202-CV-2022-00449 (collectively, the “Litigation”). Plaintiffs allege in their Complaints all or some of the following counts: negligence; negligence *per se*; invasion of privacy by intrusion; breach of express contract; breach of implied contract; breach of fiduciary duty; violation of the New Mexico Unfair Practices Act; and unjust enrichment.

7. On March 21, 2022, Plaintiff McCullough, the Clement Plaintiffs, and True Health agreed to consolidate the *McCullough* and *Clement* actions.

8. The parties eventually decided to mediate the Litigation. On July 12, 2022, the Parties participated in a full-day mediation with Mediator Bennett G. Picker, Esq. This mediation

did not result in a settlement. However, the Parties continued to engage in arm's length negotiations until they were able to reach an agreement in principle. Thereafter, the Parties negotiated the details of the Settlement Agreement and its exhibits (attached as Ex. 1 to the Motion for Preliminary Approval). The Settlement Agreement was finalized and executed on October 14, 2022.

***Settlement Benefits***

9. Settlement Class members may qualify and submit a Claim Form for the following settlement benefits:

- a. Ordinary Expense Reimbursement: All Settlement Class members who submit a valid Claim are eligible 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 Incident, including: (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).

The claim form will require reasonable documentation of the ordinary out-of-pocket costs.

- b. Extraordinary Expense Reimbursement: All Settlement Class members who submit a valid Claim 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, as a result of the Incident. This category of compensation requires 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. 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 shall have the right to 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.
- c. Credit Monitoring Protections: True Health will provide two (2) years of three bureau credit monitoring and identity theft insurance for those Settlement Class members who submit valid claims for such monitoring.

### **CLASS CERTIFICATION**

10. For the purposes of settlement only, and pursuant to N.M. R. Civ. P. Dist. Ct. 1-023 (“Rule 1-023”), the Court provisionally certifies the class, defined as follows: “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.”

11. The Court provisionally finds, pursuant to Rule 1-023, that, for purposes of this settlement only, the: (a) the Settlement Class is so numerous that joinder of all Settlement Class members is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the Class Representatives' claims are typical of the Settlement Class's claims; (d) the Class Representatives will fairly and adequately protect the Settlement Class's interests; and (e) questions of law or fact in this Litigation predominate over any questions affecting only individual members of the Settlement Class, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

#### **SETTLEMENT CLASS COUNSEL AND THE CLASS REPRESENTATIVES**

12. Plaintiffs Brent McCullough, Jason Clement, Stephanie Wade, Karen Siegman, and Miriam Shanks are hereby provisionally designated and appointed as the Class Representatives. The Court provisionally finds that the Class Representatives are similarly situated to absent Settlement Class members, and are typical of the Settlement Class, and, therefore, the Court preliminarily approves them as adequate Class Representatives.

13. The Court finds that Ben Barnow and Anthony L. Parkhill of Barnow and Associates, P.C. and Andrew W. Ferich of Ahdoot & Wolfson PC are experienced and adequate counsel and are provisionally designated as Class Counsel.

#### **NOTICE TO SETTLEMENT CLASS**

14. The forms of the Claim Form, Postcard Notice, and Long Form Notice, attached as **Exhibits 1-A, 1-B, and 1-C**, respectively, to the Motion for Preliminary Approval, are preliminarily approved. The parties have maintained the Notice contains all essential elements required to satisfy New Mexico requirements and Due Process. The parties also maintain that the form, content, and method of providing notice to the Settlement Class, as described in the

Settlement Agreement, including the exhibits thereto: (a) constitute the best practicable notice to the Settlement Class; (b) are reasonably calculated to apprise Settlement Class members of the pendency of the action, the terms of the Settlement, their rights under the Settlement, including, but not limited to, their rights to object to Settlement; and (c) are reasonable and constitute due, adequate, and sufficient notice to all Settlement Class members. The Parties, by agreement, may revise the Notice in ways that are appropriate to update the Notice for purposes of accuracy and clarity, and may adjust the layout of those notices for efficient electronic presentation and mailing.

15. The parties maintain the Notice Program set forth in the Settlement Agreement satisfies Rule 1-023, provides the best notice practicable under the circumstances.

16. Within fifty-five (55) days after entry of this Order (the “Notice Date”), the Settlement Administrator shall mail the Postcard Notice to all Settlement Class members in the manner set forth in the Settlement Agreement. Contemporaneously with the mailing, the Settlement Administrator shall cause copies of the Settlement Agreement, Postcard Notice, Long-Form Notice, and Claim Form, in forms available for download, to be posted on a website developed for the Settlement (“Settlement Website”).

### **CLAIMS, OPT-OUTS, AND OBJECTIONS**

17. The parties maintain the timing of the claims process is structured to ensure that all Settlement Class members have adequate time to review the terms of the Settlement Agreement, make a claim, or decide whether they would like to object.

18. Settlement Class members will have one hundred and eighty (180) Days after the Notice Date to complete and submit a claim to the Settlement Administrator.

19. Settlement Class members have the right and ability to exclude themselves from the Settlement Class. In order to validly be excluded from the Settlement, the Settlement Class

member must send a letter to the Claims Administrator no later than sixty (60) days after the Notice Date, stating he or she wants to be excluded from the Settlement in either the Action, and include his or her name, address, and signature. If the opt-out is untimely or otherwise fails to comply with any of the provisions for a valid opt-out, it shall not be considered a valid opt-out. All Persons who submit valid and timely notices of their intent to be excluded from the Settlement Class shall not receive any benefits of and/or be bound by the terms of this Settlement Agreement.

20. Settlement Class members who comply with the requirements of this paragraph may object to the Settlement. A Settlement Class member who seeks to object to the Settlement must file timely, written notice of his or her objection. This Objection must state: (a) the objector's full name, address, telephone number (if any), and email 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; (h) the objector's signature or the signature of the objector's duly authorized lawyer or other duly authorized representative; (i) 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 (j) a list, by case number, court, and docket number, of all other cases in which the objector has been a named plaintiff in any class action or served as a lead plaintiff or class representative.

21. To be timely, Objections must be filed with the Court and served on Class Counsel and Defendant's Counsel no later than sixty (60) Days after the Notice Date (the "Objection Deadline").

22. Class Counsel and Defendant's Counsel may, but need not, respond to the Objections, if any, by means of a memorandum of law served prior to the Final Approval Hearing.

23. An objecting Settlement Class member has the right, but is not required, to attend the Final Approval Hearing. If an objecting Settlement Class member intends to appear at the Final Approval Hearing, either with or without counsel, he or she must also file a notice of appearance with the Court (as well as serve the notice on Class Counsel and Defendant's Counsel) by the Objection Deadline.

24. Any Settlement Class member who fails to timely file and serve an Objection and notice, if applicable, of his or her intent to appear at the Final Approval Hearing in person or through counsel pursuant to the Settlement Agreement, as detailed in the Long-Form Notice, and otherwise as ordered by the Court, 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.

25. 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.

#### **ADMINISTRATION OF THE SETTLEMENT**



26. Class Counsel and True Health have created a process for assessing the validity of claims and a payment methodology to Settlement Class members who submit timely, valid Claim Forms. The Court acknowledges the Settlement benefits to the Settlement Class, and the plan for distributing Settlement benefits as described in Section VI of the Settlement Agreement.

27. The Court appoints Epiq Class Action and Mass Tort Solutions, Inc. as the Settlement Administrator.

28. The Court directs the Settlement Administrator to effectuate the distribution of Settlement benefits according to the terms of the Settlement Agreement should the Settlement be finally approved.

29. Settlement Class members who qualify for Settlement benefits and who wish to submit a Claim Form shall do so in accordance with the requirements and procedures specified in the Notice.

30. If Final Judgment is entered, all Settlement Class members who fail to submit a claim in accordance with the requirements and procedures specified in the Notice shall be forever barred from receiving any Settlement benefit and will in all other respects be subject to and bound by the provisions of the Settlement Agreement, including the Releases contained therein, and the Final Approval Order and Judgment.

31. Prior to the Final Approval Hearing, Class Counsel and True Health shall cause to be filed with the Court an appropriate affidavit or declaration regarding compliance with the provisions of the Settlement Agreement relating to the Notice Program.

### **FINAL APPROVAL HEARING**

32. A Final Approval Hearing shall be held not less than 130 days following the entry of this Order, *to wit*, on **May 10, 2023 at 10:00 a.m.**, at the Second Judicial District Court of New

Mexico, Courtroom 716, located at 400 Lomas Blvd NW, Albuquerque, NM 87102, to be noticed on the Settlement Website.

33. The Court may require or allow the Parties and any objectors to appear at the Final Approval Hearing by telephone or videoconference.

34. At the Final Approval Hearing, the Court will determine whether: (1) this Litigation should be finally certified as a class action for settlement purposes pursuant to the New Mexico Rules of Civil Procedure for the District Courts; (2) the Settlement should be finally approved as fair, reasonable, and adequate; (3) Class Counsel's application for attorneys' fees, costs, and expenses should be approved; (4) the Class Representatives' requests for service awards should be approved; (5) the Parties, their respective attorneys, and the Settlement Administrator should consummate the Settlement in accordance with the terms of the Settlement Agreement; (6) Settlement Class members should be bound by the Releases set forth in the Settlement Agreement; and (7) the Litigation should be dismissed with prejudice pursuant to the terms of the Settlement Agreement.

35. Plaintiffs' application for attorneys' fees, costs, expenses, and service awards and all supporting papers shall be filed with the Court no later than fourteen (14) Days prior to the Objection Deadline.

36. Plaintiffs' Motion for Final Approval of the Class Action Settlement and all supporting papers shall be filed with the Court no later than fourteen (14) Days after the Objection Deadline.

**RELEASE**

37. Upon entry of the Court's Final Approval Order and Judgment, the Class Representatives and all Settlement Class members, whether or not they have filed a Claim Form

within the time provided, shall be permanently enjoined and barred from asserting any claims (except through the Claim Form procedures) against True Health and the Released Persons arising from the Released Claims, and the Representative Plaintiffs and Settlement Class members conclusively shall be deemed to have fully, finally, and forever released any and all such Released Claims.

**TERMINATION**

38. In the event that the Effective Date does not occur, class certification shall be automatically vacated and this Preliminary Approval Order, and all other orders entered and releases delivered in connection herewith, shall be vacated and shall become null and void.

**SUMMARY OF DEADLINES**

39. The preliminarily approved Settlement shall be administered according to its terms pending the Final Approval Hearing. Deadlines arising under the Settlement and this Order include, but are not limited to:

<b>EVENT</b>	<b>DATE</b>
Defendant to provide the Class Member Information to Settlement Administrator	10 Days after entry of Preliminary Approval Order
Notice Date	45 Days after Settlement Administrator receives the Class Member Information
Deadline for Plaintiffs to File Motion for Attorneys’ Fees, Costs, Expenses, and Service Awards for Class Representatives	45 Days after Notice Date
Opt-Out and Objection Deadlines	60 Days after Notice Date
Deadline for Class Members to Submit Claim Forms	180 Days after Notice Date
Deadline for Plaintiffs to File Motion for Final Approval of Class Action Settlement	14 Days prior to Final Approval Hearing
Final Approval Hearing	not less than 130 Days after the entry of this Order

40. Upon application of the Parties and good cause shown, the deadlines set forth in this Order may be extended by order of the Court, without further notice to the Settlement Class. Settlement Class members must check the Settlement Website regularly for updates and further detail regarding extensions of these deadlines. The Court reserves the right to adjourn or continue the Final Approval Hearing, and/or to extend the deadlines set forth in this Order, without further notice of any kind to the Settlement Class.

IT IS SO ORDERED.



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ERIN B. O'CONNELL  
DISTRICT COURT JUDGE

*This Order may deviate from the proposed form(s) of Order originally submitted.*

Submitted by:  
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