

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**JENNIFER BANDY, on behalf of all others
similarly situated,**)
)
Plaintiff,)
)
v.)
)
**TOC ENTERPRISES, INC d/b/a Tennessee
Orthopaedic Clinics, a division of
TENNESSEE ORTHOPAEDIC ALLIANCE,
P.A.,**)
)
Defendant.)

**Case No. 3:23-CV-00598
District Judge Aleta A. Trauger**

SETTLEMENT AGREEMENT

This Settlement Agreement, dated as of the date of final execution, is made and entered into by and among the following Settling Parties (as defined below): Jennifer Bandy (“Plaintiff”), individually and on behalf of the Class Members (as defined below), by and through her counsel of record MASON LLP (“Plaintiff’s Counsel”); and (ii) TOC Enterprises Inc. d/b/a Tennessee Orthopaedic Clinics, a division of Tennessee Orthopaedic Alliance (“Defendant”), by and through its counsel of record, BAKER HOSTETLER LLP. The Settlement Agreement is subject to Court approval and is intended by the Settling Parties to fully, finally, and forever resolve, discharge, and settle the Released Claims (as defined below), upon and subject to the terms and conditions hereof.

INTRODUCTION

This settlement resolves a putative nationwide consumer class action brought by Plaintiff on behalf of herself and a purported class of similarly situated individuals.

I. PROCEDURAL BACKGROUND

This case arises from the alleged compromise of personally identifying information (“PII”) and/or protected health information (“PHI”) (collectively, “Private Information”) following a data security incident Defendant experienced around March 2023 (the “Data Incident”). Plaintiff and Class Members (as defined below) include current and former patients of Defendant whose Private Information was potentially impacted in the Data Incident. Following the Data Incident, Defendant sent notice to the individuals whose Private Information was potentially impacted in the Data Incident.

In response, on July 13, 2023, Plaintiff Cadenas filed a putative class action, captioned *Cadenas, individually and as next friend on behalf of M.C. (minor) v. TOC Enterprises, Inc.*, No. 3:23-cv-00598 (M.D. Tenn.). On July 24, 2023, Plaintiff Cadenas filed an amended complaint, adding Plaintiff Jennifer Bandy. On October 25, 2023, Plaintiffs amended their complaint, removing Plaintiff Cadenas individually, and on behalf of her minor child (M.C.) as Plaintiffs, captioned *Bandy v. TOC Enterprises, Inc., d/b/a Tennessee Orthopaedic Clinics, a division of Tennessee Orthopaedic Alliance, P.A.*, No. 3:23-cv-00598 (M.D. Tenn.). In her Second Amended Complaint, Plaintiff alleged individually and on behalf of a putative nationwide class that, as a result of the Data Incident, Plaintiff and Class Members have suffered or will suffer numerous injuries, including (1) diminution in value of their Personal Information; (2) financial costs incurred mitigating the imminent risk of identity theft; (3) loss of time and loss of productivity incurred mitigating the imminent risk of identity theft; (4) delay in receipt of tax refund monies; and (5) the cost of future identity theft monitoring for the Class. Plaintiff, individually and on behalf of the proposed nationwide class, asserted claims for (i) negligence; (2) negligence *per se*; (3) breach of implied contract; (4) unjust enrichment; (5) violation of the Tennessee Consumer

Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.*; and (6) violation of the ITDA under Tenn. Code Ann. § 47-18-2104.

Recognizing the risk and expenses of prolonged litigation, the Parties agreed to pursue settlement negotiations. After detailed negotiations, the Parties reached a resolution of this matter on a class wide basis. The agreed resolution and settlement is memorialized in this Settlement Agreement.

Pursuant to the terms identified below, this Settlement Agreement provides for the resolution of all claims and causes of action asserted, or that could have been asserted, against the Released Parties (as defined below) relating to the Data Incident and this Litigation, by and on behalf of Plaintiff and Class Members.

II. CLAIMS OF PLAINTIFF AND BENEFITS OF SETTLING

Plaintiff believes that the claims asserted in the Litigation, as set forth in the Second Amended Complaint (the “Complaint”), have merit. Plaintiff and Proposed Class Counsel (as defined below) recognize and acknowledge, however, the expense and length of continued proceedings necessary to prosecute the Litigation against Defendant through motion practice, trial, and potential appeals. Plaintiff has also considered the uncertain outcome and risk of further litigation, as well as the difficulties and delays inherent in such litigation. Proposed Class Counsel are highly experienced in class-action litigation and very knowledgeable regarding the relevant claims, remedies, and defenses at issue in cybersecurity incident litigation in general and in this Litigation in particular. They have determined that the settlement set forth in this Settlement Agreement is fair, reasonable, and adequate, and in the best interests of the Class.

III. DENIAL OF WRONGDOING AND LIABILITY

Defendant denies each and all of the claims and contentions alleged against it in the Litigation. Defendant denies all charges of wrongdoing or liability as alleged, or which could be alleged, in the Litigation. Nonetheless, Defendant has concluded that further litigation would be protracted and expensive, and that it is desirable that the Litigation be fully and finally settled in the manner and upon the terms and conditions set forth in this Settlement Agreement. Defendant has considered the uncertainty and risks inherent in any litigation. Defendant has, therefore, determined that it is desirable and beneficial that the Litigation be settled in the manner and upon the terms and conditions set forth in this Settlement Agreement.

TERMS OF SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among Plaintiff, individually and on behalf of the Class Members, Proposed Class Counsel, and Defendant that, subject to the approval of the Court, the Litigation and the Released Claims shall be finally and fully compromised, settled, and released, and the Litigation shall be dismissed with prejudice as to the Settling Parties, the Class, and the Class Members, except those Class Members who lawfully opt-out of the Settlement Agreement, upon and subject to the terms and conditions of this Settlement Agreement, as follows:

1. Definitions

As used in the Settlement Agreement, the following terms have the meanings specified below:

1.1 “Agreement” or “Settlement Agreement” means this agreement.

1.2 “Automatic Credit Monitoring Subclass” means the approximately 934 Persons who previously enrolled in the credit monitoring services offered by Defendant following the Data Incident.

1.3 “Claim” means a claim for settlement benefits made under the terms of this Settlement Agreement.

1.4 “Claims Deadline” means the postmark and/or online submission deadline for Claims, which shall be 90 days after the Notice Date (as defined below). The Claims Deadline shall be clearly set forth in the order granting Preliminary Approval of the settlement, as well as in the Notice and Claim Form.

1.5 “Claim Form” means the form utilized by the Class Members to submit a Settlement Claim (as defined below) for reimbursement. The Claim Form will be substantially in a form as shown in **Exhibit C** attached hereto, which will be available on both the Settlement Website (as defined below) and in paper format, if specifically requested by a Class Member.

1.6 “Class” means all natural persons residing in the United States who were sent notice that their Private Information was potentially impacted in the Data Incident. The Class specifically excludes (i) Defendant and its employees, officers, and directors; (ii) all Persons who timely and validly request exclusion from the Class; (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendere* to any such charge.

1.7 “Class Member(s)” means any Person or Persons who falls within the definition of the Class.

1.8 “Court” means the United States District Court for the Middle District of Tennessee.

1.9 “Data Incident,” means the data security incident experienced by Defendant between March 20, 2023 and March 24, 2023, that involved an unauthorized third party accessing some of Defendant’s systems and potentially impacting the Private Information of Plaintiff and Class Members.

1.10 “Effective Date” means the date when the Settlement Agreement becomes Final (as defined below), which is 31 days after the Court’s granting the Final Approval Order assuming no appeals have been filed. If an appeal is filed, the Effective Date shall be 31 days from when the appeal is decided and a Judgment is entered in this case.

1.11 “Final” means the occurrence of all of the following events: (i) the settlement pursuant to this Settlement Agreement is finally approved by the Court; (ii) the Court has entered a Judgment (as defined below); and (iii) the time to appeal or seek permission to appeal from the Judgment has expired or, if appealed, the appeal has been dismissed in its entirety, or the Judgment has been affirmed in its entirety by the court of last resort to which such appeal may be taken, and such dismissal or affirmance has become no longer subject to further appeal or review. Notwithstanding the above, any order modifying or reversing any attorneys’ fee award or incentive award made in this case shall not affect whether the Judgment is “Final” as defined herein or any other aspect of the Judgment.

1.12 “Final Approval Order” is the order through which the Court grants final approval of class action settlement and finds that this settlement is fair, reasonable, and adequate.

1.13 “Judgment” means a judgment rendered by the Court, substantially in the form as shown in **Exhibit E**.

1.14 “Incentive Award” shall have the meaning ascribed to it as set forth in ¶ 7 of this Settlement Agreement. The Incentive Award requested in this case will be \$2,000 to Plaintiff as Class Representative, subject to Court approval, and will be in addition to any other Settlement benefits Plaintiff may receive.

1.15 “Litigation” means this case, Case No. 3:23-cv-00598, pending in this Court against Defendant.

1.16 “Long Notice” means the long form notice of settlement to be posted on the Settlement Website, substantially in the form as shown in **Exhibit B** hereto.

1.17 “Notice” means the notice form that will be issued or made available to Class Members, including the Short Form Notice, Long Form Notice, Settlement Website, and IVR line apprising Class Members about the settlement.

1.18 “Notice Date” means 60 days after the entry of the Preliminary Approval Order, which is the date that Notice will be sent to Class Members.

1.19 “Objection Date” means the date by which Class Members must mail their objection to the settlement for that objection to be effective. The postmark date shall constitute evidence of the date of mailing for these purposes. The Objection Date shall be 60 days after the Notice Date.

1.20 “Opt-Out Date” means the date by which Class Members must mail their requests to be excluded from the Class for that request to be effective. The postmark date shall constitute evidence of the date of mailing for these purposes. The Opt-Out Date shall be 60 days after the Notice Date.

1.21 “Person” means an individual, corporation, partnership, limited partnership, limited liability company or partnership, association, joint stock company, estate, legal representative,

trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity, and their respective spouses, heirs, predecessors, successors, representatives, or assignees.

1.22 “Plaintiff” and/or “Class Representative” means Jennifer Bandy.

1.23 “Preliminary Approval Order” means the order preliminarily approving the Settlement Agreement and ordering that notice be provided to the Class, substantially in the form as shown in **Exhibit D** hereto. The Settling Parties will prepare a mutually agreeable Preliminary Approval Order to be filed contemporaneously with Plaintiff’s Motion for Preliminary Approval.

1.24 “Proposed Class Counsel” and/or “Class Counsel” means Lisa A. White and Danielle L. Perry of the law firm MASON LLP.

1.25 “Related Entities” means Defendant and its respective past or present parents, subsidiaries, divisions, and related or affiliated entities, and each of its and their respective predecessors, successors, directors, officers, principals, agents, attorneys, insurers, and reinsurers, and includes, without limitation, any Person related to any such entity who is, was or could have been named as a defendant in this Litigation, other than any Person who is found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendere* to any such charge.

1.26 “Released Claims” shall collectively mean any and all past, present, and future claims and causes of action including, but not limited to, any causes of action arising under or premised upon any statute, constitution, law, ordinance, treaty, regulation, or common law of any country, state, province, county, city, or municipality, including 15 U.S.C. §§ 45 *et seq.*, and all similar statutes in effect in any states in the United States; violations of all state statutory claims;

negligence; negligence *per se*; breach of contract; breach of implied contract; breach of fiduciary duty; breach of confidence; invasion of privacy; fraud; misrepresentation (whether fraudulent, negligent or innocent); unjust enrichment; bailment; wantonness; failure to provide adequate notice pursuant to any breach notification statute or common law duty; and including, but not limited to, any and all claims for damages, injunctive relief, disgorgement, declaratory relief, equitable relief, attorneys' fees and expenses, pre-judgment interest, credit monitoring services, the creation of a fund for future damages, statutory damages, punitive damages, special damages, exemplary damages, restitution, and/or the appointment of a receiver, whether known or unknown, liquidated or unliquidated, accrued or unaccrued, fixed or contingent, direct or derivative, and any other form of legal or equitable relief that either has been asserted, was asserted, or could have been asserted, by any Class Member against any of the Released Parties based on, relating to, concerning or arising out of the Data Incident. Released Claims shall not include the right of any Class Member, Proposed Class Counsel, or any of the Released Parties to enforce the terms of the settlement contained in this Settlement Agreement, and shall not include the claims of Class Members who have timely excluded themselves from the Class.

1.27 "Released Parties" means collectively, Defendant and the Related Entities and each of their past or present parents, subsidiaries, divisions, and related or affiliated entities, including joint ventures and joint venture partners, and each of their respective predecessors, successors, directors, officers, principals, agents, attorneys, insurers, and reinsurers.

1.28 "Settlement Administration" means the processing and payment of claims received from Class Members by the Settlement Administrator (as defined below).

1.29 “Settlement Administrator” means Epiq Class Action & Claims Solutions, Inc. (“Epiq” or “Settlement Administrator”), a company experienced in administering class action claims generally and specifically those of the type provided for and made in data-breach litigation.

1.30 “Settlement Website” means the website described in ¶ 3.2(c).

1.31 “Settling Parties” means, collectively, Defendant and Plaintiff, individually and on behalf of the Class.

1.32 “Short Notice” means the content of the mailed notice to the Class Members, substantially in the form as shown in **Exhibit A** attached hereto. The Short Notice will direct recipients to the Settlement Website and inform Class Members, among other things, of the Claims Deadline, the Opt-Out Date, the Objection Date, the requested attorneys’ fees, and the date of the Final Fairness Hearing (as defined below).

1.33 “Unknown Claims” means any of the Released Claims that any Class Member, including Plaintiff, does not know or suspect to exist in his/her favor at the time of the release of the Released Parties that, if known by him or her, might have affected his or her settlement with, and release of, the Released Parties, or might have affected his or her decision not to object to and/or to participate in this Settlement Agreement. With respect to any and all Released Claims, the Settling Parties stipulate and agree that upon the Effective Date, Plaintiff intends to and expressly shall have, and each of the other Class Members intend to and shall be deemed to have, and by operation of the Judgment shall have, waived the provisions, rights, and benefits conferred by California Civil Code § 1542, and also any and all provisions, rights, and benefits conferred by any law of any state, province, or territory of the United States (including, without limitation, California Civil Code §§ 1798.80 *et seq.*, Montana Code Ann. § 28-1-1602; North Dakota Cent.

Code § 9-13-02; and South Dakota Codified Laws § 20-7-11), which is similar, comparable, or equivalent to California Civil Code §1542, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Class Members, including Plaintiff, may hereafter discover facts in addition to, or different from, those that they, and any of them, now know or believe to be true with respect to the subject matter of the Released Claims, but Plaintiff expressly shall have, and each other Class Member shall be deemed to have, and by operation of the Judgment shall have, upon the Effective Date, fully, finally and forever settled and released any and all Released Claims. The Settling Parties acknowledge, and Class Members shall be deemed by operation of the Judgment to have acknowledged, that the foregoing waiver is a material element of the Settlement Agreement of which this release is a part.

1.34 “United States” as used in this Settlement Agreement includes all 50 states, the District of Columbia, and all territories.

1.35 “Valid Claims” means timely submitted or postmarked Claims in an amount approved by the Settlement Administrator or found to be valid through the claims processing and/or dispute resolution process described in ¶ 2.5.

2. Settlement Benefits

2.1 Expense Reimbursement.

2.1.1 Documented Ordinary Out-of-Pocket Expenses. All Class Members who submit a Valid Claim using the Claim Form are eligible for the following documented ordinary out-of-pocket expenses, not to exceed \$1,500 per Class Member, that were incurred as a result of the Data Incident: (i) unreimbursed bank fees; (ii) long distance phone charges; (iii) cell phone charges

(only if charged by the minute); (iv) data charges (only if charged based on the amount of data used); (v) postage; (vi) gasoline for local travel; (vii) unreimbursed losses due to fraud or identity theft; and (viii) any other charge or loss reasonably related to the Data Incident incurred by Class Members between March 20, 2023 and the Claims Deadline. To receive reimbursement for the above-referenced out-of-pocket expenses, Class Members must submit a Valid Claim, including documentation supporting their claims, to the Settlement Administrator.

2.1.2 Reimbursement for Attested Lost Time. Class Members are also eligible to receive reimbursement for up to three hours of lost time spent dealing with the Data Incident, calculated at the rate of \$20 per hour, but only if at least one (1) full hour was spent dealing with the Data Incident. Class Members may receive up to three hours of lost time if the Class Member: (i) attests that any claimed lost time was spent responding to issues raised by the Data Incident; and (ii) provides a checkbox-style description. Claims for reimbursement of lost time may be combined with claims for documented out-of-pocket expenses.

2.1.3 Documented Extraordinary Out-of-Pocket Expenses. Class Members are also eligible to receive reimbursement for documented extraordinary out-of-pocket losses, not to exceed \$4,000 per Class Member for documented monetary loss that (i) is actual, documented, and unreimbursed; (ii) was more likely than not caused by the Data Incident; (iii) occurred between March 20, 2023 to the Claims Deadline; and (iv) is not already covered by one or more of the above-referenced reimbursed expenses. Class Members must also provide documentation that he or she made reasonable efforts to avoid, or seek reimbursement for, such extraordinary losses, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance.

2.1.4 Class Members seeking reimbursement under ¶¶ 2.1 or 2.3 must complete and submit a Claim Form to the Settlement Administrator, postmarked or submitted online on or before the 90th day after the deadline for the commencement of notice to Class Members as set forth in ¶ 3.2(d) (the “Claims Deadline”). The Notice to the Class will specify this deadline and other relevant dates described herein. The Claim Form must be verified by the Class Member with a statement that his or her claim is true and correct, to the best of his or her knowledge and belief. Notarization shall not be required. Failure to provide supporting documentation for Out-of-Pocket Losses (other than reimbursement of attested lost time), referenced above, as requested on the Claim Form, shall result in denial of a claim.

2.2 Limitation on Reimbursable Expenses. Nothing in this Settlement Agreement shall be construed as requiring Defendant to provide, and Defendant shall not be required to provide, for a double payment for the same loss or injury that was reimbursed or compensated by any other source. No payment shall be made for emotional distress, personal/bodily injury, or punitive damages, as all such amounts are not recoverable pursuant to the terms of the Settlement Agreement.

2.3 Identity Theft Protection and Credit Monitoring. Class Members may submit a Claim to accept two years of free credit monitoring and identity theft restoration services. The services shall provide one-bureau monitoring for valid Claims. The Automatic Credit Monitoring Subclass will be automatically provided one year of additional 1-bureau credit monitoring services without the need to make any affirmative claim. This one year of credit monitoring is in addition to any credit monitoring previously offered by Defendant following the Data Incident.

2.4 Aggregate Cap. There is no aggregate cap applicable to the Expense Reimbursements described in section 2.1 or the Identity Theft and Credit Monitoring described in

section 2.3. Defendant shall pay all valid claims for Expense Reimbursements and pay for all valid claims for Identity Theft and Credit Monitoring.

2.5 Dispute Resolution for Claims.

2.5.1 The Settlement Administrator, in its sole discretion to be reasonably exercised, will determine whether: (i) the claimant is a Class Member; (ii) the claimant has provided all information needed to complete the Claim Form, including any documentation that may be necessary to reasonably support the expenses described in ¶ 2.1; and (iii) the information submitted could lead a reasonable person to conclude that more likely than not the claimant has suffered the claimed losses as a result of the Data Incident. The Settlement Administrator may, at any time, request from the claimant, in writing, additional information as the Settlement Administrator may reasonably require in order to evaluate the claim, *e.g.*, documentation requested on the Claim Form, and required documentation regarding the claimed losses. The Settlement Administrator's initial review will be limited to a determination of whether the claim is complete and plausible. For any claims that the Settlement Administrator determines to be implausible, the Settlement Administrator will submit those claims to the Settling Parties (Danielle Perry shall be designated to fill this role for all Plaintiff). If, upon meeting and conferring, the Settling Parties disagree as to the Claim validity, then the Claim shall be referred back to the Settlement Administrator for final determination on the Claim's validity.

2.5.2 Following timely receipt of additional information pursuant to a request by the Settlement Administrator under ¶ 2.4.1, the Settlement Administrator shall have 10 days to accept or reject the Claim. If, after review of the Claim and all documentation submitted by the claimant, the Settlement Administrator determines that such Claim is valid, then the Claim shall be paid. If the Claim is not valid because the claimant has not provided the information requested by the

Settlement Administrator, then the Settlement Administrator may reject the Claim without any further action. A defect in one Claim shall not cause rejection of any other Valid Claim submitted by the claimant.

2.5.3 Class Members shall have 10 days from receipt of the approval of a Claim that provides a payment that deviates from the losses described on the Claim Form to accept or reject the Claim.

2.6 Settlement Expenses. All costs for notice to the Class as required under ¶¶ 3.1 and 3.2, Costs of Settlement Administration under ¶¶ 8.1, 8.2, and 8.3, and the costs of dispute resolution described in ¶ 2.5, shall be paid by Defendant separate and apart from any other benefits provided to Plaintiff and the Class.

2.7 Class Certification. The Settling Parties agree, for purposes of this settlement only, to the certification of the Class. If the settlement set forth in this Settlement Agreement is not approved by the Court, or if the Settlement Agreement is terminated or cancelled pursuant to the terms of this Settlement Agreement, this Settlement Agreement, and the certification of the Class provided for herein, will be vacated and the Litigation shall proceed as though the Class had never been certified, without prejudice to any Person's or Settling Party's position on the issue of class certification or any other issue. The Settling Parties' agreement to the certification of the Class is also without prejudice to any position asserted by the Settling Parties in any other proceeding, case, or action, as to which all of their rights are specifically preserved.

3. Order of Preliminary Approval and Publishing of Notice of Fairness Hearing

3.1. As soon as practicable after the execution of the Settlement Agreement, Proposed Class Counsel shall submit this Settlement Agreement to the Court, and Proposed Class Counsel will file a motion for preliminary approval of the settlement with the Court requesting entry of a

mutually agreeable Preliminary Approval Order in the form substantially similar to **Exhibit F** in both terms and cost, requesting, *inter alia*:

- a) certification of the Class for settlement purposes only pursuant to ¶ 2.7;
- b) preliminary approval of the Settlement Agreement as set forth herein;
- c) appointment of Proposed Class Counsel as Class Counsel;
- d) appointment of Plaintiff as Class Representative;
- e) approval of a customary form of Short Notice to be mailed to Class Members in a form substantially similar to **Exhibit A**, attached hereto.
- f) approval of the Long Notice to be posted on the Settlement Website in a form substantially similar to **Exhibit B**, attached hereto, which, together with the Short Notice, shall include a fair summary of the Settling Parties' respective litigation positions, the general terms of the settlement set forth in the Settlement Agreement, instructions for how to object to or opt-out of the settlement, the process and instructions for making claims to the extent contemplated herein, the requested attorneys' fees, and the date, time and place of the Final Fairness Hearing;
- g) approval of the Claim Form to be used by Class Members to make a Claim in a form substantially similar to **Exhibit C**, attached hereto; and
- h) appointment of Epiq as the Settlement Administrator.

The Short Notice, Long Notice, and Claim Form have been reviewed and approved by the Settlement Administrator but may be revised as agreed upon by the Settling Parties. Immaterial revisions to these documents may be made prior to dissemination of Notice. Any changes to the Preliminary Approval Order, Short Notice, Long Notice, and Claim Form that do not materially

affect the substance of the Settlement Agreement that the Court may require will not invalidate this Settlement Agreement

3.2 Defendant shall pay for providing notice to the Class in accordance with the Preliminary Approval Order, and the costs of such notice, together with the Costs of Settlement Administration. Any attorneys' fees, costs, and expenses of Plaintiff's Counsel, and an incentive award to the Class Representative, as approved by the Court, shall be paid by Defendant as set forth in ¶ 7 below. These costs, fees, and expenses shall be paid by Defendant separate and apart from all other benefits provided to Plaintiff and the Class. Notice shall be provided to Class Members by the Settlement Administrator as follows:

- a) *Class Member Information:* Within 14 days of entry of the Preliminary Approval Order, Defendant shall provide the Settlement Administrator with the name and physical address of each Class Member (collectively, "Class Member Information") that Defendant possess.
- b) The Class Member Information and its contents shall be used by the Settlement Administrator solely for the purpose of performing its obligations pursuant to this Agreement and shall not be used for any other purpose at any time. Except to administer the Settlement as provided in this Agreement, or to provide all data and information in its possession to the Settling Parties upon request, the Settlement Administrator shall not reproduce, copy, store, or distribute in any form, electronic or otherwise, the Class Member Information.
- c) *Settlement Website:* Prior to the dissemination of the Notice, the Settlement Administrator shall establish the Settlement Website (www.TOCsettlement.com) that will inform Class Members of the terms of this Settlement Agreement, their

rights, dates and deadlines and related information. The Settlement Website shall include, in .pdf format and available for download, the following: (i) the Long Notice; (ii) the Claim Form; (iii) the Preliminary Approval Order; (iv) this Settlement Agreement; and (v) any other materials agreed upon by the Parties and/or required by the Court. The Settlement Website shall provide Class Members with the ability to complete and submit the Claim Form electronically and shall have a “Contact Us” page whereby Class Members can send an email with any additional questions to a dedicated email address and send hardcopy documents to a designated Post Office box established by the Settlement Administrator.

d) *Short Notice:* Within 60 days of entry of the Preliminary Approval Order, and subject to the requirements of this Settlement Agreement and the Preliminary Approval Order, the Settlement Administrator will provide Notice to the Class as follows:

- Via postcard to the postal address that Defendant provided to the Settlement Administrator. Before any mailing under this paragraph occurs, the Settlement Administrator shall run the postal addresses of Class Members through the USPS National Change of Address database to update any change of address on file with the USPS;
- in the event that a Short Notice is returned to the Settlement Administrator by the USPS because the address of the recipient is not valid, and the envelope contains a forwarding address, the Settlement Administrator shall re-send the Short Notice to the

forwarding address within 7 days of receiving the returned Short Notice;

- in the event that subsequent to the first mailing of a Short Notice, and at least 14 days prior to the Opt-Out Date and the Objection Date, a Short Notice is returned to the Settlement Administrator by the USPS because the address of the recipient is no longer valid, i.e., the envelope is marked “Return to Sender” and does not contain a new forwarding address, the Settlement Administrator shall perform a standard skip trace, in the manner that the Settlement Administrator customarily performs skip traces, in an effort to attempt to ascertain the current address of the particular Class Member in question and, if such an address is ascertained, the Settlement Administrator will re-send the Short Notice within 7 days of receiving such information. This shall be the final requirement for mailing.
 - The date of the first mailing of the Short Notice shall be deemed the “Notice Date” for purposes of calculating the opt-out and objection deadlines, and all other deadlines that flow from the notice commencement date.
- e) Publishing, on the Notice Date, the Short Notice, the Claim Form and the Long Notice on the Settlement Website as specified in the Preliminary Approval Order, and maintaining and updating the Settlement Website throughout the claim period;

- f) A toll-free help line shall be made available to provide Class Members with additional information about the settlement and to respond to Class Members' questions. The Settlement Administrator also will provide copies of the Short Notice, Long Notice, and paper Claim Form, as well as this Settlement Agreement, upon request to Class Members; and
- g) Contemporaneously with seeking Final approval of the Settlement, Proposed Class Counsel and Defendant shall cause to be filed with the Court an appropriate affidavit or declaration with respect to complying with this provision of notice.

3.3 The Short Notice, Long Notice, and other applicable communications to the Class may be adjusted by the Settlement Administrator, respectively, in consultation and agreement with the Settling Parties, as may be reasonable and not inconsistent with such approval. The notice program shall commence within 60 days after entry of the Preliminary Approval Order and shall be completed within 74 days after entry of the Preliminary Approval Order.

3.4 Proposed Class Counsel and Defendant's counsel shall request that after Notice is completed, the Court hold a hearing (the "Final Fairness Hearing"), in person or via remote or telephonic means to be posted on the Settlement Website, and grant final approval of the settlement set forth herein, and request that the Final Fairness Hearing occur on a date that is convenient for the Court and is at least 135 days after entry of the Preliminary Approval Order.

4. Opt-Out Procedures

4.1 Each Person wishing to opt-out of the Class shall individually sign and timely submit written notice of such intent to the designated Post Office box established by the Settlement Administrator. The written notice must clearly manifest a Person's intent to be excluded from the

Class. To be effective, written notice must be postmarked no later than 60 days after the date on which the notice program commences pursuant to ¶ 3.2(d).

4.2 All Persons who submit valid and timely notices of their intent to be excluded from the Class, as set forth in ¶ 4.1 above, referred to herein as “Opt-Outs,” shall not receive any Settlement benefits of, and will not be bound by, the terms of this Settlement Agreement. All Persons falling within the definition of the Class who do not submit a valid and timely request to be excluded from the Class in the manner set forth in ¶ 4.1 above shall be bound by the terms of this Settlement Agreement and Judgment entered thereon.

4.3 In the event that within 10 days after the Opt-Out Date, there have been requests for exclusions totaling more than 40 individuals, Defendant shall have the right to terminate the Settlement Agreement in its entirety.

5. Objection Procedures

5.1 Each Class Member desiring to object to the Settlement Agreement shall submit a timely written notice of his or her objection by the Objection Date. Such notice shall state: (i) the objector’s full name, address, telephone number, and e-mail address (if any); (ii) information identifying the objector as a Class Member, including proof that the objector is a member of the Class (e.g., copy of notice, copy of original notice of the Data Incident); (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable; (iv) the identity of any and all counsel representing the objector in connection with the objection; (v) a statement as to whether the objector and/or his or her counsel will appear at the Final Fairness Hearing; (vi) the objector’s signature and the signature of the objector’s duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation); and (vii) a list, by case name, court, and docket number, of all other cases in

which the objector and/or the objector's counsel has filed an objection to any proposed class action settlement within the last three (3) years. To be timely, written notice of an objection in the appropriate form must be filed with the Clerk of the Court and contain the case name and docket number *Bandy v. TOC Enterprises, Inc.*, No. 3:23-cv-00598 (M.D. Tenn.) no later than 60 days from the date on which notice program commences pursuant to ¶ 3.2(d), and served concurrently therewith upon Proposed Class Counsel, Lisa A. White and Danielle L. Perry of the law firm MASON LLP, 5335 Wisconsin Ave NW, Suite 640; and counsel for Defendant, Casie D. Collignon of BAKER HOSTELLER LLP at 1801 California Street, Suite 4400, Denver, CO 80202.

5.2 Any Class Member who fails to comply with the requirements for objecting in ¶ 5.1 shall waive and forfeit any and all rights he or she may have to appear separately and/or to object to the Settlement Agreement and shall be bound by all the terms of the Settlement Agreement and by all proceedings, orders and judgments in the Litigation. The exclusive means for any challenge to the Settlement Agreement shall be through the provisions of ¶ 5.1. Without limiting the foregoing, any challenge to the Settlement Agreement, the final order approving this Settlement Agreement, or the Judgment to be entered upon final approval shall be pursuant to appeal under the Federal Rules of Appellate Procedure and not through a collateral attack.

6. Releases

6.1 Upon the Effective Date, each Class Member who has not timely and validly excluded himself or herself from the Settlement, including Plaintiff, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims as against all Released Parties. Further, upon the Effective Date, and to the fullest extent permitted by law, each Class Member who has not timely and validly excluded himself or herself from the Settlement, including Plaintiff, shall, either directly,

indirectly, representatively, as a member of or on behalf of the general public or in any capacity, be permanently barred and enjoined from commencing, prosecuting, or participating in any recovery in any action in this or any other forum (other than participation in the settlement as provided herein) in which any of the Released Claims is asserted.

6.2 Upon the Effective Date, Defendant shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged Plaintiff, each and all of the Class Members, Proposed Class Counsel and Plaintiff's Counsel, of all claims, including Unknown Claims, based upon or arising out of the institution, prosecution, assertion, settlement, or resolution of the Litigation or the Released Claims. Any other claims or defenses Defendant may have against such Persons including, without limitation, any claims based upon or arising out of any retail, banking, debtor-creditor, contractual, or other business relationship with such Persons that are not based upon or do not arise out of the institution, prosecution, assertion, settlement, or resolution of the Litigation or the Released Claims are specifically preserved and shall not be affected by the preceding sentence.

6.3 Notwithstanding any term herein, neither Defendant nor its Related Person, shall have or shall be deemed to have released, relinquished or discharged any claim or defense against any Person other than Plaintiff, each and all of the Class Members, Proposed Class Counsel, and Plaintiff's Counsel.

6.4 Nothing in this ¶ 6 shall preclude any action to enforce the terms of this Settlement Agreement by Plaintiff, Class Members, Proposed Class Counsel, or Defendant.

7. Plaintiff's Counsel's Attorneys' Fees, Costs, and Expenses; Incentive Award to Plaintiff

7.1 The Settling Parties did not discuss the payment of attorneys' fees, costs, expenses and/or incentive award to Plaintiff, as provided for in ¶¶ 7.2 and 7.3, until after the substantive terms of the settlement had been agreed upon, other than that Defendant would not object to a request for reasonable attorneys' fees, costs, expenses, and incentive award to Plaintiff as may be ordered by the Court. Defendant and Proposed Class Counsel then negotiated and agreed to the provisions described in ¶¶ 7.2 and 7.3. Defendant shall pay any attorneys' fees, costs, expenses and/or incentive award to Plaintiff, as provided for in ¶¶ 7.2 and 7.3, separate and apart from any benefits provided to Class Members and the costs of notice and Settlement Administration.

7.2 Subject to Court approval, Defendant has agreed not to object to a request by Proposed Class Counsel for attorneys' fees, inclusive of any costs and expenses of the Litigation in an amount not to exceed \$150,000 to Proposed Class Counsel. Proposed Class Counsel, in their sole discretion, shall allocate and distribute any amounts of attorneys' fees, costs, and expenses awarded by the Court among Class Counsel.

7.3 Subject to Court approval, Defendant has agreed not to object to requests for an incentive award in the amount of \$2,000 to the Named Plaintiff.

7.4 If awarded by the Court, Defendant shall pay the attorneys' fees, costs, expenses, and incentive award to Plaintiff, as set forth above in ¶¶ 7.2, 7.3, and 7.4, within 30 days after the Effective Date. Proposed Class Counsel shall thereafter distribute the award of attorneys' fees, costs, and expenses among Plaintiff's Counsel and incentive award to Plaintiff consistent with ¶¶ 7.2 and 7.3.

7.5 The amount(s) of any award of attorneys' fees, costs, and expenses, and the incentive award to Plaintiff, are intended to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the settlement. Plaintiff shall file any motion seeking an award of attorneys' fees, costs, and expenses, and the incentive award to Plaintiff at least 14 days prior to the Objection Date. These payments will not in any way reduce the consideration being made available to the Class as described herein.

7.6 No order of the Court, or modification or reversal or appeal of any order of the Court, concerning the amount(s) of any attorneys' fees, costs, expenses, and/or incentive award ordered by the Court to Proposed Class Counsel or Plaintiff shall affect whether the Judgment is Final or constitute grounds for cancellation or termination of this Settlement Agreement.

8. Administration of Claims

8.1 The Settlement Administrator shall administer and calculate the claims submitted by Class Members under ¶ 2.1. Proposed Class Counsel and Defendant shall be given reports as to both claims and distribution and have the right to review and obtain supporting documentation to the extent necessary to resolve settlement administration issues. The Settlement Administrator's determination of whether a Settlement Claim is a Valid Claim shall be binding, subject to the dispute resolution process set forth in ¶ 2.5. Defendant shall pay in full all claims deemed to be Valid Claims.

8.2 Checks for Valid Claims shall be mailed and postmarked within 60 days of the Effective Date. Class Members may choose to be paid via electronic payment, pre-paid credit card, or check.

8.3 All Class Members who fail to timely submit a claim for any benefits hereunder within the time frames set forth herein, or such other period as may be ordered by the Court, or

otherwise expressly allowed by law or the Settling Parties' written agreement, shall be forever barred from receiving any payments or benefits pursuant to the settlement set forth herein, but will in all other respects be subject to, and bound by, the provisions of the Settlement Agreement, the releases contained herein and the Judgment.

8.4 No Person shall have any claim against the Settlement Administrator, claims referee, Defendant, Released Parties, Proposed Class Counsel, Plaintiff, Plaintiff's Counsel, and/or Defendant's counsel based on distributions of benefits to Class Members.

9. Conditions of Settlement, Effect of Disapproval, Cancellation, or Termination

9.1 The Effective Date of the settlement shall be conditioned on the occurrence of all of the following events:

- a) the Court has entered the Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing, as required by ¶ 3.1;
- b) Defendant has not exercised its option to terminate the Settlement Agreement pursuant to ¶ 4.3;
- c) the Court has entered the Judgment granting final approval to the settlement as set forth herein; and
- d) the Judgment has become Final, as defined in ¶ 1.11.

9.2 If all conditions specified in ¶ 9.1 hereof are not satisfied, the Settlement Agreement shall be canceled and terminated subject to ¶ 9.4 unless Proposed Class Counsel and counsel for Defendant mutually agree in writing to proceed with the Settlement Agreement.

9.3 Within 10 days after the Opt-Out Date, the Settlement Administrator shall furnish to Proposed Class Counsel and to Defendant's counsel a complete list of all timely and valid requests for exclusion (the "Opt-Out List").

9.4 In the event that the Settlement Agreement or the releases set forth in ¶¶ 6.1, 6.2, and 6.3 above are not approved by the Court or the settlement set forth in the Settlement Agreement is terminated in accordance with its terms: (i) the Settling Parties shall be restored to their respective positions in the Litigation and shall jointly request that all scheduled Litigation deadlines be reasonably extended by the Court so as to avoid prejudice to any Settling Party or Settling Party's counsel; (ii) the terms and provisions of the Settlement Agreement shall have no further force and effect with respect to the Settling Parties and shall not be used in the Litigation or in any other proceeding for any purpose, and (iii) any judgment or order entered by the Court in accordance with the terms of the Settlement Agreement shall be treated as vacated, *nunc pro tunc*. Notwithstanding any statement in this Settlement Agreement to the contrary, no order of the Court or modification or reversal on appeal of any order reducing the amount of attorneys' fees, costs, expenses, and/or incentive award shall constitute grounds for cancellation or termination of the Settlement Agreement. Further, notwithstanding any statement in this Settlement Agreement to the contrary, Defendant shall be obligated to pay amounts already billed or incurred for costs of notice to the Class, and Settlement Administration, and shall not, at any time, seek recovery of same from any other party to the Litigation or from counsel to any other party to the Litigation.

10. Miscellaneous Provisions

10.1 The Settling Parties (i) acknowledge that it is their intent to consummate this Settlement Agreement; (ii) agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Settlement Agreement; and (iii) agree to exercise their best efforts to accomplish the terms and conditions of this Settlement Agreement.

10.2 The Settling Parties intend this settlement to be a final and complete resolution of all disputes between them with respect to the Litigation. The settlement compromises claims that

are contested and shall not be deemed an admission by any Settling Party as to the merits of any claim or defense. The Settling Parties each agree that the settlement was negotiated in good faith by the Settling Parties and reflects a settlement that was reached voluntarily after consultation with competent legal counsel. The Settling Parties reserve their right to rebut, in a manner that such party determines to be appropriate, any contention made in any public forum that the Litigation was brought or defended in bad faith or without a reasonable basis. It is agreed that no Party shall have any liability to any other Party as it relates to the Litigation, except as set forth in the Settlement Agreement.

10.3 Neither the Settlement Agreement, nor the settlement contained herein, nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement or the settlement (i) is or may be deemed to be or may be used as an admission of, or evidence of, the validity or lack thereof of any Released Claim, or of any wrongdoing or liability of any of the Released Parties; or (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Released Parties in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. Any of the Released Parties may file the Settlement Agreement and/or the Judgment in any action related to the Data Incident that may be brought against them or any of them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar, or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

10.4 The Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of all Settling Parties or their respective successors-in-interest.

10.5 The Settlement Agreement, including all exhibits hereto, contains the entire understanding between Defendant and Plaintiff to settle this matter and supersedes all previous negotiations, agreements, commitments, understandings, and writings between Defendant and Plaintiff in connection with the settlement of this matter. Except as otherwise provided herein, each party shall bear its own costs. This Agreement supersedes all previous agreements made between Defendant and Plaintiff.

10.6 Proposed Class Counsel, on behalf of the Class, and Defendant's counsel are expressly authorized to take all appropriate actions required or permitted to be taken by the Class pursuant to the Settlement Agreement to effectuate its terms, and also are expressly authorized to enter into any modifications or amendments to the Settlement Agreement on behalf of the Class which they deem appropriate in order to carry out the spirit of this Settlement Agreement and to ensure fairness to the Parties.

10.7 Each counsel or other Person executing the Settlement Agreement on behalf of any party hereto hereby warrants that such Person has the full authority to do so.

10.8 The Settlement Agreement may be executed in one or more counterparts. All executed counterparts shall be deemed to be one and the same instrument. A complete set of original executed counterparts shall be filed with the Court.

10.9 The Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto. No assignment of this Settlement Agreement will be valid without the other party's prior, written permission.

10.10 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of the Settlement Agreement, and all parties hereto submit to the

jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in the Settlement Agreement.

10.11 As used herein, “he” means “he, she, or it;” “his” means “his, hers, or its,” and “him” means “him, her, or it.”

10.12 All dollar amounts are in United States dollars (USD).

10.13 If a Class Member opts to receive settlement benefits via mailed check, cashing the settlement check is a condition precedent to any Class Member’s right to receive settlement benefits. All settlement checks shall be void 90 days after issuance and shall bear the language: “This check must be cashed within 90 days, after which time it is void.” If a check becomes void, the Class Member shall have until six months after the Effective Date to request re-issuance. If no request for re-issuance is made within this period, the Class Member will have failed to meet a condition precedent to recovery of settlement benefits, the Class Member’s right to receive monetary relief shall be extinguished, and there shall be no obligation to make payments to the Class Member for expense reimbursement or any other type of monetary relief. The same provisions shall apply to any re-issued check. For any checks that are issued or re-issued for any reason more than 180 days after the Effective Date, requests for re-issuance need not be honored after such checks become void.

10.14 The Settlement Website and IVR line shall be deactivated 180 days after the Effective Date.

10.15 All agreements made and orders entered during the course of the Litigation relating to the confidentiality of information shall survive this Settlement Agreement.

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IN WITNESS WHEREOF, the parties hereto have caused the Settlement Agreement to be executed by their duly authorized attorneys.

AGREED TO BY:

MASON LLP

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Lisa A. White
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