

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 3533

DANIEL GREEN, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

v.

EMERGEORTHO, P.A.,

Defendant.

**ORDER GRANTING UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

THIS MATTER came before the Court on Plaintiff Daniel Green's ("Plaintiff" or "Class Representative") Unopposed Motion for Preliminary Approval of Class Action Settlement ("Motion for Preliminary Approval") filed 9 February 2024 in the above-captioned action. (ECF No. 48.) Plaintiff, individually, and on behalf of the proposed Settlement Class, and Defendant EmergeOrtho, P.A. ("EmergeOrtho" or Defendant"), following good faith, arm's length negotiations, have entered into a Settlement Agreement (the "Settlement Agreement" or "Settlement") that settles the above-captioned litigation (the "Litigation") and provides for a complete dismissal with prejudice of the claims asserted against Defendant in the Litigation on the terms and conditions set forth in the Settlement Agreement, subject to the approval and determination of the Court as to the fairness, reasonableness, and adequacy of the Settlement.

Plaintiff brought this class action against Defendant on 12 September 2022. In the Class Action Complaint ("Complaint"), Plaintiff asserted claims for: (1)

Negligence; (2) Invasion of Privacy; (3) Breach of Fiduciary Duty; (4) Breach of Implied Contract; (5) violations of North Carolina's Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1, *et seq.*, and (6) Unjust Enrichment. (ECF No. 3)

According to the Complaint, Defendant negligently allowed an unauthorized third-party to access Defendant's computer network and exfiltrate unencrypted data (the "Data Breach"), including the removal of highly sensitive personal information and medical records of numerous individuals (the "Private Information"), including current and former patients of Defendant. Defendant provided notice of the Data Breach in or around August 2022. Plaintiff alleges to be among the group of individuals to whom Defendant sent a notification. The Private Information potentially compromised in the Data Breach consisted of first and last name, address, and, in some instances, medical and treatment information, financial account information, date of birth, and Social Security number.

Plaintiff has moved, pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, for an order preliminarily approving the Settlement in accordance with the Settlement Agreement, certifying the Settlement Class for purposes of the Settlement only, appointing Plaintiff as Class Representative, appointing Class Counsel as counsel for the Settlement Class, appointing EisnerAmper as Settlement Administrator, and allowing Notice to Settlement Class Members as more fully described herein.

Having reviewed the Motion for Preliminary Approval and supporting brief and exhibits, the Settlement Agreement and the exhibits attached thereto, and all

prior proceedings herein, the Court **GRANTS** Plaintiff's Unopposed Motion for Preliminary Approval as set forth herein.¹

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. **Class Certification for Settlement Purposes Only.** For settlement purposes only and pursuant to North Carolina Civ. R. 23(c), the Court provisionally certifies, solely for purposes of effectuating the proposed Settlement, a Settlement Class (or "Class") in this matter defined as follows:

"All individuals who were issued notice by EmergeOrtho stating that their Private Information may have been involved in the Data Incident discovered by EmergeOrtho on or about 1 May 2022."

The Settlement Class includes approximately 72,500 people. The Settlement Class specifically excludes: (1) the judge presiding over this Litigation, and members of his direct family; (2) Defendant, its subsidiaries, parent companies, successors, predecessors, and any entity in which Defendant or their parents have a controlling interest and their current or former officers and directors; and (3) Settlement Class Members who submit a valid a Request for Exclusion prior to the Opt-Out Deadline.

2. **Class Findings:** The Court provisionally finds, for settlement purposes only, that: (1) a Settlement Class exists such that shared issues of law or fact predominate over individual issues; (2) the Class Representative is an adequate representative (i.e., he will fairly and adequately represent the Settlement Class, there is no conflict of interest between the Class Representative and the Class, and

¹ Unless otherwise indicated, capitalized terms used in this Order Granting Unopposed Motion for Preliminary Approval of Class Action Settlement ("Preliminary Approval Order") have the same meaning as in the Settlement Agreement.

the named party has a genuine personal interest in the outcome of the case); (3) Settlement Class members are so numerous to make joinder impractical; (4) adequate notice can be given to the Class; and (5) a class action is superior to individual actions for the fair and efficient administration of the controversy.

3. **Class Representative and Settlement Class Counsel**: Plaintiff Daniel Green is hereby provisionally designated and appointed as the Class Representative. The Court provisionally finds that the Class Representative is similarly situated to absent Settlement Class Members and therefore typical of the Settlement Class and that he will be an adequate Class Representative. The Court further finds that Mason LLP and Milberg Coleman Bryson Phillips Grossman, PLLC, are experienced and adequate counsel and are hereby provisionally designated as Settlement Class Counsel.

4. **Preliminary Settlement Approval**. The Court hereby preliminarily approves the Settlement, as embodied in the Settlement Agreement, as being fair, reasonable and adequate to the Settlement Class, subject to further consideration at the Final Approval Hearing to be conducted as described below. The Court finds that the proposed Settlement is within the range of reasonableness and that it is worthwhile to provide notice of the proposed Settlement to the Settlement Class.

5. **Jurisdiction and Venue**. The Court concludes that it has subject matter jurisdiction and personal jurisdiction over the parties before it for the purposes of the Settlement. Additionally, venue is proper in this Court.

6. **Final Approval Hearing**. **TAKE NOTICE** that a Final Approval Hearing shall be held on 11 June 2024 at 9:30 AM in Courtroom 6370 of the Mecklenburg County Courthouse located at 832 East Fourth Street, Charlotte, North Carolina 28202 for the following purposes:

- a. To determine whether this matter should be finally certified as a class action for settlement purposes;
- b. To determine whether the proposed Settlement is fair, reasonable, and adequate to the Settlement Class and should be approved by the Court;
- c. To determine whether to enter a Final Approval Order, as defined in the Settlement Agreement;
- d. To determine whether this Litigation should be dismissed with prejudice pursuant to the terms of the Settlement Agreement;
- e. To determine whether Settlement Class Members (except those who have timely and valid requests for exclusion from the Settlement) should be bound by the Release set forth in the Settlement Agreement;
- f. To determine whether the Notice Plan conducted was appropriate;
- g. To determine whether the claims process under the Settlement is fair, reasonable, and adequate and should be approved by the Court;
- h. To determine whether Mason LLP and Milberg Coleman Bryson Phillips Grossman, PLLC, should be appointed as Class Counsel;
- i. To determine whether Daniel Green should be appointed as Class Representative;

- j. To determine whether the requested Class Representative Service Award in the combined amount of \$5,000.00, and Class Counsel's combined Fee Award and Expenses in the amount of \$183,315.00 and costs not to exceed \$25,000.00 should be approved by the Court;
- k. To determine whether the Settlement benefits are fair, reasonable, and adequate; and,
- l. To rule upon such other matters as the Court may deem appropriate.

7. **Retention of Claims Administrator and Manner of Giving Notice.**

Class Counsel is hereby authorized to retain EisnerAmper as the Settlement Administrator (the "Settlement Administrator") to supervise and administer the Notice procedure in connection with the proposed Settlement as well as the processing of Claim Forms as set for more fully below.

8. **Approval of Form and Content of Notice.** The Court (a) approves, as to form and content, the Short Form Notice, Long Form Notice, and Claim Form attached to the Settlement Agreement as Exhibits A, B and C, respectively, and (b) finds that the Notice provided to Settlement Class Members as set forth in the Settlement Agreement (i) is written in plain language, uses simple terminology, and is designed to be readily understandable by Settlement Class Members; (ii) is the best notice practicable under the circumstances; (iii) constitutes notice that is reasonably calculated, under the circumstances, to apprise the Settlement Class Members of the pendency of the Litigation, of the effect of the proposed Settlement (including the releases to be provided thereunder), of Class Counsel's request for Fee Award and

Expenses, of Class Representative's request for a Service Award, of their right to object to the Settlement, of their right to exclude themselves from the Settlement Class, and of their right to appear at the Final Approval Hearing; (iv) constitutes due, adequate and sufficient notice to all persons entitled to receive notice of the proposed Settlement; and (v) satisfies the requirements of Rule 23 of the North Carolina Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), and all other applicable law and rules. The date and time of the Final Approval Hearing shall be included in the Notice before it is distributed so long as that date is known at the time of Notice. Non-material modifications to these forms may be made without further order of the Court. The Settlement Administrator and the parties are directed to carry out the Notice program in conformance with the Settlement Agreement.

9. **Participation in the Settlement.** Settlement Class Members who qualify for and wish to submit a Claim Form shall do so in accordance with the requirements and procedures specified in the Notice and the Claim Form and must do so within ninety (90) days after Notice is mailed to the Settlement Class Members. If a Final Approval Order and Judgment is entered, all Settlement Class Members who qualify for any benefit under the Settlement but fail to submit a claim in accordance with the requirements and procedures specified in the Notice and the Claim Form shall be forever barred from receiving any such benefit, but will in all other respects be subject to and bound by the provisions in the Settlement Agreement, the Release included in that Settlement Agreement, and the Final Approval Order and Judgment.

10. **Claims Process and Distribution and Allocation Plan.** The Settlement Agreement contemplates a process for the Settlement Administrator to assess and determine the validity and value of claims and a payment methodology to Settlement Class Members who submit a timely, valid Claim Form. The Court preliminarily approves the claims process described in the Settlement Agreement and directs the Settlement Administrator to effectuate the distribution of Settlement consideration according to the terms of the Settlement Agreement, should the Settlement be finally approved.

11. **Exclusion from Class.** Any Settlement Class Member who wishes to be excluded from the Settlement Class must mail a written notification of the intent to exclude himself or herself from the Settlement Class to the Settlement Administrator at the address provided in the Notice, postmarked no later than **60 Days after the date Notice is mailed to the Settlement Class Members** (the “Opt-Out/Exclusion Deadline”). The written notification must include at the top of the communication the name of the proceeding, the individual’s full name, current address, personal signature, and the words “Request for Exclusion” or a comparable statement that the individual does not wish to participate in the Settlement.

Any Settlement Class Member who does not timely and validly exclude himself or herself from the Settlement shall be bound by the terms of the Settlement Agreement. If a Final Approval Order and Judgment is entered, any Settlement Class Member who has not submitted a timely, valid written notice of exclusion from the Settlement Class shall be bound by all proceedings, orders, and judgments in this

matter, including but not limited to the Release in the Settlement Agreement if a Final Approval Order and Judgment is entered, including Settlement Class Members who have previously initiated or who subsequently initiate any litigation against any or all of the Released Parties relating to the claims and transactions released in the Settlement Agreement. All Settlement Class Members who submit valid and timely notices of exclusion from the Settlement Class shall not be entitled to receive any benefits of the Settlement.

12. **Objections and Appearances.** No Settlement Class Member shall be heard, and no papers, briefs, pleadings, or other documents submitted by any Settlement Class Member shall be received and considered by the Court, unless the objection is (i) filed with the Durham County Clerk of Superior Court by the Objection/Exclusion Deadline, as specified in the Notice and (ii) mailed first-class postage prepaid to the Settlement Administrator at the address listed in the Notice, and postmarked by no later than the Objection/Exclusion Deadline, as specified in the Notice. For an objection to be considered by the Court, the objection must also include all of the information set forth in Paragraph 83 of the Settlement Agreement, which is as follows: (i) the name of the proceedings; (ii) the Settlement Class Member's full name, current mailing address, and telephone number; (iii) a statement of the specific grounds for the objection, as well as any documents supporting the objection; (iv) the identity of any attorneys representing the objector; (v) a statement regarding whether the Settlement Class Member (or his/her attorney) intends to appear at the Final Approval Hearing; (vi) a statement identifying all class action settlements

objected to by the Settlement Class Member in the previous 5 years; and (vii) the signature of the Settlement Class Member or the Settlement Class Member's attorney. Unless otherwise ordered by the Court, Settlement Class Counsel shall file on the Business Court's electronic docket any written objections and other documents that any Settlement Class Member files with the Settlement Administrator pursuant to this paragraph no later than one business day after the Settlement Class Member makes such filing with the Settlement Administrator.

13. Any Settlement Class Member who fails to comply with the provisions in Paragraph 12 may waive and forfeit any and all rights he or she may have to object, and shall be bound by all the terms of the Settlement Agreement, this Order, and by all proceedings, orders, and judgments in this matter, including, but not limited to, the Release in the Settlement Agreement if a Final Approval Order and Judgment is entered. If a Final Approval Order and Judgment is entered, any Settlement Class Member who fails to object in the manner prescribed herein shall be deemed to have waived his or her objections and shall be forever barred from making any such objections in this Litigation or in any other proceeding or from challenging or opposing, or seeking to reverse, vacate, or modify any approval of the Settlement Agreement, the motion for Service Award, or the motion for Fee Award and Expenses.

14. **Termination of Settlement.** This Order shall become null and void and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing as of the date of the execution of the Settlement Agreement, if the Settlement is not finally approved by the Court or is terminated in

accordance with the Settlement Agreement. In such event, the Settlement and Settlement Agreement shall become null and void and be of no further force and effect, and neither the Settlement Agreement nor the Court's orders, including this Order, relating to the Settlement shall be used or referred to for any purpose whatsoever.

15. **Use of Order.** This Order shall be of no force or effect if a Final Approval Order and Judgment is not entered or there is no Effective Date and shall not be construed or used as an admission, concession, or declaration by or against Defendant of any fault, wrongdoing, breach, liability, or the certifiability of any class. Nor shall this Order be construed or used as an admission, concession, or declaration by or against the Class Representative or any other Settlement Class Member that his or her claim lacks merit or that the relief requested is inappropriate, improper, unavailable, or as a waiver by any Party of any defense or claim he, she, or it may have in this litigation or in any other lawsuit.

16. **Stay of Proceedings and Temporary Injunction.** Until otherwise ordered by the Court, the Court stays all proceedings in the Litigation other than proceedings necessary to carry out or enforce the terms and conditions of the Settlement Agreement. Pending final determination of whether the Settlement should be approved, the Court bars and enjoins Plaintiff, and all other members of the Settlement Class, from commencing or prosecuting any and all of the Released Claims against the Released Entities.

17. **Settlement Fund.** The contents of the Settlement Fund shall be deemed and considered to be *in custodia legis* of the Court and shall remain subject to the jurisdiction of the Court, until such time as funds shall be distributed pursuant to the Settlement Agreement and/or further order of the Court.

18. **Taxes.** The Settlement Administrator is authorized and directed to prepare any tax returns and any other tax reporting form for or in respect to the Settlement Fund, to pay from the Settlement Fund any taxes owed with respect to the Settlement Fund, and to otherwise perform all obligations with respect to taxes and any reporting or filings in respect thereof without further order of the Court in a manner consistent with the provisions of the Settlement Agreement.

19. The Court retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement.

20. **Continuance of Hearing.** The Court reserves the right to adjourn or continue the Final Approval Hearing and related deadlines without further written notice to the Settlement Class. If the Court alters any of those dates or times, the revised dates and times shall be posted on the Settlement Website maintained by the Settlement Administrator.

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

<u>Grant of Preliminary Approval</u>	
EmergeOrtho provides list of Settlement Class Members to the Settlement Administrator	+7 days after Preliminary Approval
Long Form and Short Form Notices Posted on the Settlement Website	+30 days after Preliminary Approval
Notice Deadline	+30 days after Preliminary Approval
Class Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Class Representative Service Award	-14 days prior to the Objection Deadline and Opt-Out Deadline
Objection Deadline	+60 days after Notice Deadline
Exclusion Deadline	+60 days after Notice Deadline
Claims Deadline	+90 days after Notice Deadline
Settlement Administrator Provide List of Objections/Exclusions to the Court and Settlement Administrator	+7 days after deadline for Opt-Out
<u>Final Approval Hearing</u>	11 June 2024 at 9:30 AM
Motion for Final Approval	-14 Days before Final Approval Hearing
<u>Final Approval</u>	
Effective Date	+1 day after all conditions met pursuant to ¶ 30 of Settlement Agreement
Payment of Attorneys' Fees and Expenses Class Representative Service Award	+30 days after Effective Date
Payment of Claims	+45 days of the Effective Date, or +60 days after the Claims Deadline, whichever is later
Settlement Website Deactivation	+90 days after Effective Date

SO ORDERED, this the 23rd day of February, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge