

Order and Judgment Granting Final Approval of Class Action Settlement

Exhibit D to Plaintiffs' Unopposed Motion for Final Approval of Class
Action Settlement Agreement and Entry of Final Judgment

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

WILLIAM BOYKIN AND SALLY)
ROBBINS, on behalf of themselves and)
all others similarly situated,)
)
Plaintiffs,)
)
vs.)
)
)
TENNESSEE ORTHOPAEDIC)
ALLIANCE, P.A.,)
)
Defendant.)

CIVIL ACTION
DOCKET NO. 20-0615-BC

**ORDER AND JUDGMENT
GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

This cause came on to be heard upon the Plaintiffs’ Unopposed Motion for Final Approval of Class Action Settlement and Entry of Final Judgment and the Plaintiffs’ Unopposed Motion for Approval of Attorneys’ Fees, Costs and Expenses, for Approval of Service Awards to Class Representatives, as well as supporting declarations and exhibits (collectively “Final Approval Filings”). Plaintiffs William Boykin and Sally Robbins (“Plaintiffs”), individually and on behalf of the proposed Settlement Class, and Defendant Tennessee Orthopaedic Alliance, P.A. (“Defendant” or “TOA”) have entered into a Settlement Agreement (the “Settlement”) that, if approved by the Court, will resolve the above-captioned litigation in its entirety. Having considered the Final Approval Filings and the Settlement Agreement together with all exhibits and attachments thereto, the record, and the memoranda of law in support thereof, and the Parties’

presentations at the Final Approval Hearing, the Court hereby enters the following Order and these motions are **GRANTED**. Final Judgment will be entered in accordance with this Order.

On September 29, 2020, this court entered an order granting Plaintiffs' Unopposed Motion and Memorandum in Support of Preliminary Approval of Class Action Settlement and Certification of Settlement Class of the settlement agreement (the "Settlement") between Plaintiffs, on their own behalf and on behalf of the Class defined below, and Defendant. ("Preliminary Approval Order"). The Preliminary Approval Order set forth deadlines for administration of the Notice Plan, claims procedures, and specially set the Final Approval Hearing for January 14, 2021. The court incorporates its findings as if fully set forth herein as outlined in the Preliminary Approval Order as it relates to the requirements for certifying a class in Tennessee Rule of Civil Procedure 23.01, 23.02, 23.03 and 23.04.

On October 28, 2020, under the terms of the notice requirements set forth in the Settlement and the Preliminary Approval Order, the Class was apprised of the nature and pendency of the Litigation, terms of the Settlement, and their rights to request exclusion, object, and/or appear at the Final Approval Hearing. On December 2, 2020, Plaintiffs filed (1) Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement and Entry of Final Judgment, (2) Memorandum of Law in Support of Final Approval and Entry of Final Judgment, (3) Plaintiffs' Unopposed Motion for Approval of Attorneys' Fees, Costs and Expenses, and Service Awards to Class Representatives, (4) Memorandum of Law in Support of Attorneys' Fees, Costs and Expenses and for Service Awards to Class Representatives, and (5) various Declarations of Joel R. Rhine, Martin A. Ramey, Micah S. Adkins and Brian Smitheman in support of final approval of the Settlement, service awards, attorneys' fees, expenses and costs.

On January 14, 2021, the Court held a Final Approval Hearing (the "Final Approval Hearing"), to determine, among other things, (1) whether the Settlement is fair, reasonable, and adequate, and (2) whether the Court should enter judgment dismissing all claims in the complaint with prejudice. Prior to the Final Approval Hearing, Class Counsel filed the original and supplemental Declaration of Brian Smitheman regarding Notice Administration, confirming that the Notice Program was completed in accordance with the Parties' instructions and the Preliminary Approval Order. Therefore, the Court is satisfied that Class Members were properly notified of their right to object, opt-out, appear at the Final Approval Hearing in support of, or in opposition to, the proposed Settlement, award of attorneys' fees, costs and expenses, and the payment of Service Awards to the Class Representatives. There has been one objection to the proposed Settlement, one Class Member has opted-out, and ___ Class Members appeared at the Final Approval Hearing.

Having given an opportunity to be heard to all requesting persons in accordance with the Preliminary Approval Order; having heard the presentation by Class Counsel and no objection to the relief sought herein by TOA through its counsel; having reviewed all of the submissions presented with respect to the proposed Settlement; having determined that the Settlement is fair, reasonable and adequate; having considered the Settlement, Plaintiffs' Unopposed Motion for Final Approval of the Class Action Settlement Agreement and Entry of Final Judgment (the "Final Approval Motion"), Plaintiffs' Unopposed Motion for Approval of Attorneys' Fees, Costs and Expenses, and for Approval of Service Awards to Class Representatives (the "Fee Motion"), the declarations supporting these submissions, and all other evidence submitted; and good cause appearing in the record, Plaintiffs' Final Approval Motion is **GRANTED**, Plaintiffs' Fee Motion is **GRANTED**, and:

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. This Order incorporates by reference the definitions in the Settlement Agreement and all exhibits attached thereto, and all terms used herein shall have the same meanings as set forth in the Agreement and its exhibits, unless otherwise set forth herein.

2. This Court has personal jurisdiction over the Defendant and all Settlement Class Members, and subject matter jurisdiction over the claims asserted in the Action for purposes of the Settlement.

3. The Settlement Agreement was entered into in good faith following arm's length negotiations and is non-collusive.

4. The Litigation has sufficiently progressed to have enabled the Parties to have adequately evaluated and considered their respective positions.

5. This Court grants final approval of the Settlement, including but not limited to, the Releases in the Settlement Agreement, and the plans for distribution of the Settlement relief, and finds that it is in all respects fair, reasonable, adequate and in the best interest of the Settlement Class. Therefore, all members of the Settlement Class who have not opted out are bound by this Order.

6. Accordingly, the Court authorizes and directs implementation and performance of all the terms and provisions of the Settlement, as well as the terms and provisions hereof. The Court dismisses the Litigation and all claims asserted therein with prejudice. The Parties are to bear their own costs, except as and to the extent provided in the Settlement and herein.

CLASS CERTIFICATION

7. The previously certified class set forth below (the "Settlement Class") is now finally certified, solely for purposes of this Settlement, pursuant to Tennessee Rule of Civil Procedure 23.03:

All individuals residing in the United States who, on or about February 14, 2020, were notified via mail of a Phishing Attack by Tennessee Orthopaedic Alliance, P.A. that occurred between August and October 2019. Excluded from the Settlement Class are: (1) the Judge presiding over this Litigation, the Judge's immediate family members and any members of the Judge's judicial staff; (2) the officers, directors, and employees of Tennessee Orthopaedic Alliance, P.A.; (3) Class Counsel and their immediate family members; and (4) Settlement Class Members who submit a valid Request for Exclusion prior to the Opt-Out Deadline.

8. For purposes of settlement only, the Court finds that the prerequisites for a class action under Rules 23.01 and 23.02 of the Tennessee Rules of Civil Procedure have been satisfied in that: (a) the Settlement Class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the Settlement Class that predominate over any questions affecting only individual Settlement Class Members; (c) Plaintiffs' claims are typical of the claims of the Settlement Class; (d) Plaintiffs have fairly and adequately protected the interests of the Settlement Class and will continue to do so; (e) Joel R. Rhine, Martin A. Ramey and Micah S. Adkins are adequate Settlement Class Counsel; and (g) a class action is the superior method for the fair and efficient adjudication of this controversy, considering: (i) the interests of Class Members in individually controlling the prosecution of the separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by Class Members; (iii) the desirability or undesirability of concentrating the litigation of these claims in this particular forum; and (iv) the difficulties likely to be encountered in the management of the class action.

9. Pursuant to Rule 23.01 of the Tennessee Rules of Civil Procedure, William Boykin and Sally Robbins are designated as representatives of the Settlement Class (the "Settlement Class Representatives"). The Court concludes that the Settlement Class Representatives have fairly and adequately represented the Settlement Class and will continue to do so.

10. The Court grants Final Approval to the appointment of Joel R. Rhine and Martin A. Ramey of The Rhine Law Firm, P.C. and Micah S. Adkins of The Adkins Firm, P.C. as Class Counsel for the Settlement Class. The Court concludes that Class Counsel have adequately represented the Settlement Class and will continue to do so.

CLASS NOTICE

11. Notice to the Settlement Class fully complied with the requirements of Tennessee Rules of Civil Procedure 23.03 and 23.04, the Preliminary Approval Order, due process, constituted the best notice practicable under the circumstances, was reasonably calculated to provide – and did provide – due and sufficient notice to all persons entitled to notice of the pendency of the Litigation; certification of the Settlement Class for settlement purposes only; the existence and terms of the Settlement; the identity of Class Counsel and appropriate information about Class Counsel's then forthcoming application for attorneys' fees and incentive awards to the Class Representatives; appropriate information about how to participate in the Settlement Class Members' right to exclude themselves; their right to object to the Settlement and to appear at the Final Approval Hearing, through counsel if they desired; and appropriate instructions as to how to obtain additional information regarding this Litigation and the Settlement. In addition, the Notice properly informed Settlement Class Members that any Settlement Class Member who failed to opt-out would be prohibited from bringing a lawsuit against Defendant and the Released Parties

based on or related to any of the claims asserted by Plaintiffs; and it properly notified the Settlement Class of the settlement of the Litigation.

12. With respect to the Settlement Class, this court finds that certification is appropriate under Tennessee Rules of Civil Procedure 23.01, 23.02, 23.03 and 23.04. Notice was given by U.S. Mail in accordance with the Settlement Agreement and the Preliminary Approval Order. The Class Notice, Claim Form, Preliminary Approval Order, Petition for Attorney's Fees and Settlement Agreement were also posted on the Settlement Website at www.TOASettlement.com. These forms of class notice fully complied with the requirements of Rule 23.03, the Preliminary Approval Order and due process, constituted the best notice practicable under the circumstances, and were due and sufficient notice to all persons entitled to notice of the settlement of this lawsuit. A total of _____ valid and timely claim forms (after eliminating duplicates and invalid claims from the original _____ claim forms) were submitted.

OBJECTIONS AND OPT-OUTS

13. One objection was filed by a Settlement Class Member. The court has reviewed the sole objection made by Danny Ray Scarborough, filed on November 10, 2020 (the "Objection").

14. The Objection generally asserts that (a) Mr. Scarborough requests monetary relief of at least \$10,000 per class Member; and (b) Mr. Scarborough wants TOA to pay for attorneys to represent him and all class Members in individual lawsuits that are not yet pending. For the following reasons, the Court overrules the Objection.

15. "[O]nce preliminary approval has been granted, a class action settlement is presumptively reasonable, and an objecting class member must overcome a heavy burden to prove that the settlement is unreasonable." *Peck v. Air Evac EMS, Inc.*, 2020 WL 354307,*9 (E.D. Ky.

2020). “Objections based purely upon individual claims of loss do not warrant disapproval of the proposed settlement.” *Id.* “General objections without factual or legal substantiation carry little weight”, and “[n]one of the objectors has demonstrated the injury-in-fact or redressability required for standing to object.” *Manjunath A. Gokare, P.C. v. Fed. Express Corp.*, 2013 WL 12094870, *23 (W.D. Tenn. Nov. 22, 2013).

16. First, there is no factual or legal substantiation of any purported claim made by the Objector as to the unreasonableness of the Settlement. Mr. Scarborough merely alleges that there may have been some use of his personal information but fails to allege any specific facts to support this general allegation. Nonetheless he demands a minimum payment of \$10,000 for himself and to each member of the Settlement Class. It appears unlikely to the court that a jury trial would award monetary damages to Mr. Scarborough or Settlement Class Member based on the bare bones objection absent sufficient factual or legal substantiation of any alleged damages attributable to the Phishing Attack which is the subject of this Litigation.

17. In addition to the monetary component, Mr. Scarborough’s objection seeks attorney’s fees from TOA for future litigation maintained by Class Members. Mr. Scarborough fails to identify any pending litigation, and, in light of the Fraud Resolution Services settlement benefit, it seems unlikely that additional litigation will occur.

18. The Court finds Mr. Scarborough has failed to demonstrate any shortcomings of Settlement, namely, that it is unfair, unreasonable, inadequate or that he otherwise has standing to file an objection.

19. It is also important to note that the Objection fails to comply with all of the procedural requirements set forth in the Preliminary Approval Order Section X in order to make a proper objection to the Settlement. Mr. Scarborough failed to serve Plaintiffs’ and Defense counsel.

Further, the Objection does not set forth the objector's full name, address, email address or telephone number. The Objection contains no basis upon which Mr. Scarborough claims that he is in fact a Settlement Class Member. He does not claim to be a former patient of Defendant or that his PII or PHI was compromised as a result of the Phsihing Attack. The Objection states no specific grounds as to why or how the Settlement is unfair, unreasonable or inadequate. Likewise, the Objection does not provide any legal support as to why the Settlement should not be approved by the Court. Nor does the Objection identify who will testify at the Final Approval Hearing in support of the Objection, any counsel representing the objector, or whether Mr. Scarborough intends to appear himself and/or testify at the Final Approval Hearing.

20. Even should Mr. Scarborough be able to prove his individual claim of loss, this would not warrant disapproval of the proposed Settlement.

21. The Court accordingly overrules the Objection in its entirety.

22. All Settlement Class Members who have not objected to the Settlement in the manner provided in the Settlement are deemed to have waived any objections to the Settlement, including, but not limited to, by appeal, collateral attack, or otherwise.

23. A list of putative members of the Settlement Class who have timely and validly elected to opt-out of the Settlement and the Settlement Class, in accordance with the requirements in the Settlement (the "Successful Opt-Outs"), has been submitted to the Court as an attachment to the Declaration of Brian Smitheman, filed in advance of the Final Approval Hearing. That list is attached as Exhibit A to this Order. The persons listed in Exhibit A are not bound by the Settlement or this Final Approval Order, and He/she/they is/are not entitled to any of the benefits under the Settlement.

CLASS COMPENSATION

24. Heffler Claims Group (the "Settlement Administrator") shall distribute to the Settlement Class Members who submitted timely and valid claim forms remuneration in accordance with the dates and terms enumerated in the Settlement.

AWARD OF ATTORNEYS' FEES AND INCENTIVE AWARD

25. The Court has carefully and separately scrutinized the fairness of Plaintiffs' Motion for Attorneys' Fees, Costs and Expenses and Service Awards. The Rules of the Supreme Court of the State of Tennessee, Rule 8, Rule 1.5 set forth the following factors to be used as guides in determining a reasonable fee:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) Whether the fee is fixed or contingent;
- (9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) Whether the fee agreement is in writing.

Tenn. Sup. Ct. R. 8, Rule 1.5. *See also Eberbach v. Eberbach*, 535 S.W.3d 467, 479 (Tenn. 2017) (citing *Connors v. Connors*, 594 S.W.2d 672, 676-77 (Tenn. 1980) (summarizing "[t]he

appropriate factors to be used as guides in fixing reasonable attorney's fees"). The lawful allowance of attorney fees by a Trial Court is a matter of discretion with that Court. *Hobson v. First State Bank*, 801 S.W.2d 807, 813 (Tenn. App. 1990). The factors to be considered by the Court when determining the reasonableness of attorneys' fees "are not exclusive and each factor may not be relevant in every case." *Miller v. Deloitte Services LP*, 3:18-CV-00581, 2019 WL 2543526, at *3 (M.D. Tenn. June 19, 2019) (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176-77 (Tenn. 2011) (quoting Tenn. Sup. Ct. R. 8, RPC 1.5(a)). "Tennessee has 'no fixed mathematical rule' for determining what a reasonable fee is." *Wright ex rel.*, at 176 (Tenn. 2011). "[U]ltimately the reasonableness of the fee must depend upon the particular circumstances of the individual case." *Id.* at 177.

26. Here, the total benefits under the Settlement includes up to \$2,000.00 for each Settlement Class Member. The benefits also include substantial monetary value for credit and identity monitoring protection, fraud resolution services, and the value of the enhanced data security measures implemented by the Defendant for the protection of current and former patients' data. To date, _____ valid and timely claims (after eliminating duplicates and invalid claims from the original _____ claims) were submitted, out of a total of _____ Class Members. After giving the matter careful consideration, including the standards for awarding attorneys' fees in class actions, the fee affidavits, the lack of opposition to same, and analyzing Class Counsels' "lodestar", the Court approves the Fee Motion.

27. The Court awards Settlement Class Counsel the sum of \$255,300.00 as an award of attorneys' fees, costs and expenses to be paid within ten (10) days of the Effective Date, in accordance with the Settlement Agreement, and the court finds this amount of fees and costs to be fair and reasonable.

28. The Court grants Settlement Class Counsel's request for Service Awards to the Class Representatives and awards \$3,850 to each. The court finds that this payment is justified by the Class Representatives' service to the Settlement Class. This payment shall be made within ten (10) days of the Effective Date.

OTHER PROVISIONS

29. The Parties to the Settlement Agreement shall carry out their respective obligations thereunder.

30. Neither the Agreement nor the Settlement contained therein, nor any of the negotiations, discussions, proceedings connected with them, nor any act performed or document executed pursuant to or in furtherance of the Agreement or the Settlement is, or may be deemed to be used as, an admission or evidence of: (a) the validity of any of the allegations in the Litigation or the validity of any Released Claim; (b) any wrongdoing or liability of the Defendant or its respective Related Persons; or (c) any fault of omission of any of the Defendant or its respective Related Persons, whether in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. The Released Persons, Plaintiffs, Class Members, and Settlement Class Counsel may file the Agreement and/or the Judgment in any other action that may be brought against 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 theory of claim preclusion or issue preclusion or similar defense or counterclaim, including, without limitation, specific performance of the Settlement embodied in the Agreement as injunctive relief. The Parties may file the Agreement and/or the Judgment in any proceeding that may be necessary to consummate or enforce the Agreement, Settlement, or Judgment.

31. In the Preliminary Approval Order, this Court approved Heffler Claims Group as the Settlement Administrator. The Settlement Administrator shall make all distributions to the Settlement Class Members pursuant to the terms of the Settlement Agreement and this court's orders.

32. The Court hereby retains continuing jurisdiction over: (1) implementation of the Settlement; and (2) the Parties and the Settlement Class Members for the purpose of construing, enforcing, and administering the Settlement Agreement and all orders and judgments entered in connection therewith.

33. The Court finds that during the course of the Litigation, the Parties and their respective counsel at all times complied with the requirements of Tennessee Rule of Civil Procedure 11.

IT IS SO ORDERED this the ____ day of _____, 202__.

PATRICIA HEAD MOSKAL
CHANCELLOR, PART I

Approved for Entry:

/s/ Micah S. Adkins

Micah S. Adkins

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CERTIFICATE OF SERVICE

I certify that on December 2, 2020, I caused the foregoing paper to be filed electronically using the Davidson County Chancery Court E-Filing System, which will electronically serve notification of same on the following counsel of record:

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/s/ Micah S. Adkins
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