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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

LISA SIMMONS)
and KELLY PETERSON-SMALL,)
individually and on behalf of all others)
similarly situated,)

Plaintiffs,)

v.)

ASSISTCARE HOME HEALTH)
SERVICES, LLC, d/b/a Preferred Home)
Care of New York/Preferred Gold,)

Defendant.)

Index No. 511490/2021

Judge: Hon. Larry D. Martin

**[PROPOSED] ORDER GRANTING UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT AGREEMENT**

This matter came before the Court on Plaintiff Lisa Simmons and Kelly Peterson-Small’s (collectively, “Plaintiffs” or “Class Representatives”) Unopposed Motion for Preliminary Approval of Class Settlement Agreement. Plaintiffs, individually, and on behalf of the proposed Settlement Class, and Defendant Assistcare Home Health Services, LLC, d/b/a Preferred Home Care of New York/Preferred Gold (“Preferred Home”) have entered into a Settlement Agreement (the “Settlement Agreement”) that settles the above-captioned litigation.

Plaintiffs brought this class action against Preferred Home on May 14, 2021. In the Class Action Complaint (“Complaint”), Plaintiffs asserted claims for: (1) Negligence; (2) Breach of Implied Contract; (3) Violation of the New York General Business Law, § 349; (4) Invasion of Privacy; and (5) Breach of Confidence. (NYSCEF Doc. No. 1.). According to the Complaint, Preferred Home experienced a targeted cyberattack and Data Incident, which resulted in the potential compromise of current and former patient and employee personally identifiable

information (“PII”) and protected health information (“PHI”) (the “Data Incident”). The PII and PHI potentially compromised in the Data Incident consisted of names, addresses, email addresses, phone numbers, demographic information, dates of birth, financial information, such as bank account numbers, Medicaid numbers, and medical information, such as dates of service, incidents involving care, records of complaints regarding service, health assessments, physicals, drug screens, vaccinations, TB tests, and Family Medical Leave Act and workers compensation claims, and, in some instances, Social Security numbers.

On June 30, 2021, Preferred Home filed a Motion to Compel Arbitration, to Stay Action or to Dismiss Complaint, arguing that Plaintiff Peterson-Small’s claims were subject to binding arbitration and that the entire action should be stayed pending the final outcome of that arbitration. **(NYSCEF Doc. No. 17.)** In the alternative, Preferred Home argued that, to the extent any claims in the Complaint were not compelled to arbitration or stayed, such claims were legally insufficient and should be dismissed. *See id.* On February 9, 2022, the Court issued an Order denying Preferred Home’s motion to compel arbitration and to stay the action pending arbitration. **(NYSCEF Doc. No. 36.)** The Court also dismissed Plaintiffs’ causes of action for Violation of the New York General Business Law, § 349 and Breach of Confidence, but denied Preferred Home’s motion in all other respects (the “Lawsuit”). *See id.* After the Court’s ruling on Preferred Homes’ motion, the Parties agreed to mediate the Lawsuit. On March 14, 2022, the Court stayed all proceedings in the matter pending the outcome of the mediation. **(NYSCEF Doc. No. 38.)**

The Parties, through their counsel, have entered into a Settlement Agreement following good faith, arm’s-length negotiations and a mediation overseen by Bennett G. Picker, Esq. of Stradley Ronon Stevens & Young, LLP. The Parties have agreed to settle the Lawsuit, pursuant to the terms of the Settlement Agreement, and subject to the approval and determination of the Court

as to the fairness, reasonableness, and adequacy of the Settlement which, if approved, will result in dismissal of the Lawsuit with prejudice.

Having reviewed the Settlement Agreement, including the exhibits attached thereto, and all prior proceedings herein, and for good cause shown, it is hereby ordered that Plaintiffs' Unopposed Motion for Preliminary Approval is **GRANTED** as set forth herein.¹

1. **Class Certification for Settlement Purposes Only.** For settlement purposes only and pursuant to N.Y. C.P.L.R. Ch. 8, Art. 9, §§ 901(a)(1)-(5) and 902, the Court conditionally certifies the Settlement Class in this matter defined as follows:

All persons Preferred Home identified as being among those individuals impacted by the Data Incident, including all who were sent a notice of the Data Incident.

The Court also conditionally certifies the Settlement Subclass in this matter defined as follows:

All persons Preferred Home identified as being among those individuals potentially impacted by the Data Incident, who were further identified as being among those whose Social Security Numbers were potentially compromised, and who were sent a notice of the Data Incident.

Excluded from the Settlement Classes are:

(i) officers and directors of Preferred Home and/or the Related Entities; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the members of the judiciary who have presided or are presiding over this matter and their families and staff; 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.

For avoidance of doubt, Settlement Subclass Members are also Settlement Class Members, and references herein to the Settlement Class include the Settlement Subclass. In addition, the Settlement Class and the Settlement Subclass are referred to as the "Settlement Classes" combined.

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

The Court conditionally finds, for settlement purposes only, that: (1) the Settlement Classes are so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the Settlement Classes which predominate over any questions affecting only individual class members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Settlement Classes; (4) the representative parties will fairly and adequately protect the interests of the Settlement Classes; (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2. **Class Representatives and Settlement Class Counsel.**

Lisa Simmons and Kelly Peterson-Small are hereby provisionally designated and appointed as the Class Representatives. The Court provisionally finds that the Class Representatives are similarly situated to absent Settlement Class Members and therefore typical of the Class and that they will be adequate Class Representatives.

The Court finds that the following counsel is experienced and adequate counsel and is hereby provisionally designated as Settlement Class Counsel: Milberg Coleman Bryson Phillips Grossman, PLLC.

3. **Preliminary Settlement Approval.** Upon preliminary review, the Court concludes and finds that the proposed Settlement is fair, reasonable, adequate, and in the best interests of the Settlement Classes to warrant providing Notice of the Settlement to the Settlement Classes and accordingly is preliminarily approved.

4. **Jurisdiction.** 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.

5. **Final Approval Hearing.** A Final Approval Hearing shall be held on June 27, 2023 at 2:30 p.m. EDT in the Supreme Court of the State of New York, County of Kings, 360 Adams Street, Courtroom 741, Brooklyn, New York 11201, to determine, among other things, whether: (a) this matter should be finally certified as a class action for settlement purposes pursuant to N.Y. C.P.L.R. Ch. 8, Art. 9, §§ 901(a)(1)-(5); (b) the Settlement Agreement between the Parties should be finally approved; (c) the Settlement and Settlement Agreement should be finally approved as fair, reasonable, adequate, and in the best interests of the Settlement Class pursuant to N.Y. C.P.L.R. Ch. 8, Art. 9, § 908; (d) the action should be dismissed with prejudice pursuant to the terms of the Settlement Agreement; (e) Settlement Class Members (except those who have timely and valid requests for exclusion from the Settlement) should be bound by the releases set forth in the Settlement Agreement; (f) Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards should be approved; (g) Milberg Coleman Bryson Phillips Grossman, PLLC should be appointed as Settlement Class Counsel; and (h) Lisa Simmons and Kelly Peterson-Small should be appointed as Class Representatives.

Plaintiffs' Motion for Final Approval of the Class Action Settlement shall be filed with the Court at least **fourteen (14) Days prior to the date of the Final Approval Hearing**, and Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards shall be filed with the Court at least **fourteen (14) Days prior to the deadline for Settlement Class Members to opt-out of or object to the Settlement.**

6. **Administration.** The Court appoints Postlethwaite & Netterville APC ("P&N") as the Settlement Administrator, with responsibility for the Notice Program and Claims Administration and to fulfill the duties of the Settlement Administrator set forth in the Settlement Agreement. Preferred Home shall pay the Costs of the Notice Program and Claims Administration,

including, but not limited to, the Settlement Administrator's fees, as well as the costs associated with the provision of notice to the Settlement Class Members and administration of the Settlement. Preferred Home shall disclose the necessary PHI and PII to the Settlement Administrator for purposes of the Notice Program and Claims Administration and to fulfill the duties of the Settlement Administrator set forth in the Settlement Agreement only. The Settlement Administrator shall maintain any PII or PHI obtained from Preferred Home in the course of the class notification and claims administration process securely and confidentially and shall use such information solely for purposes of effecting class notice and claims administration under the Settlement Agreement. Other than such disclosures to Settlement Class Counsel as are expressly authorized by the Settlement Agreement, the Settlement Administrator shall not disclose any PII or PHI to any persons or entities not also bound to the confidentiality provisions of the Settlement Administrator's engagement letter with Preferred Home and the Settlement Administrator's Business Associate Agreement with Preferred Home without an additional court order to do so, such disclosures, if any, to be made solely as needed to perform the obligations required under the Settlement Agreement. Such authorized disclosures to Settlement Class Counsel are approved by the Court, provided Settlement Class Counsel shall maintain such information securely and confidentially and shall use such information solely for purposes of complying with the Settlement Agreement. Once the Settlement Administrator's class distributions and settlement administrative duties are complete, the Settlement Administrator shall, upon ten (10) days' notice to all counsel of record, securely destroy all PII or PHI obtained from Preferred Home and all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of such information.

7. **Notice to the Class.** The proposed Notice Program set forth in the Settlement Agreement, the Short Form Notice, and the Claim Form, which are attached to the Settlement

Agreement as Exhibits A-C, respectively, satisfy the requirements of N.Y. C.P.L.R. Ch. 8, Art. 9, §§ 904 and 908 and constitute reasonable notice of the commencement of the action and are hereby approved. Non-material modifications to these exhibits may be made without further order of the Court. The Settlement Administrator and Preferred Home are directed to carry out the Notice Program in conformance with the Settlement Agreement.

Within **seventy-five (75) days from the date of this Order** (the “Notice Deadline”), the Settlement Administrator and Preferred Home shall initiate the Notice Program, which shall be completed in the manner set forth in Section 5 of the Settlement Agreement.

8. **Findings and Conclusions Concerning Notice.** The Court finds that the form, content, and method of giving notice to the Settlement Class as described in Paragraph 7 of this Preliminary Approval Order and the Settlement Agreement (including the exhibits thereto) constitutes reasonable notice of the commencement of the action to the Settlement Classes pursuant to N.Y. C.P.L.R. Ch. 8, Art. 9, §§ 904 and 908. Specifically, the Notice is written in plain language, uses simple terminology, and is designed to be readily understandable by Settlement Class Members. Moreover, the Notice is clear and straightforward: it apprises Settlement Class Members of the pendency of the Lawsuit; describes the essential terms of the Settlement; defines the Settlement Classes; clearly describes the options available to the Settlement Classes and the deadlines for taking action; explains procedures for making claims, objections, or requesting exclusion; provides information that will enable Settlement Class Members to calculate their individual recovery; discloses the Plaintiffs’ requested attorneys’ fees, costs, and expenses, and Class Representatives’ requested Service Awards; describes the date, time, and place of the Final Approval Hearing; and prominently displays the address and phone number of proposed Settlement Class Counsel. Finally, direct mailing, combined with publishing on the Settlement

Website, is designed to be the best reasonable notice of the commence of the action to reach the Settlement Class Members under the circumstances. The Court concludes that the Notice Program meets all applicable requirements of law pursuant to N.Y. C.P.L.R. Ch. 8, Art. 9, §§ 904 and 908.

9. **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 **ninety (90) Days from the date of this Order** (the “Opt-Out Date”). The written notification must include: (a) the case name, *Simmons v. Assistcare Home Health Services, LLC, d/b/a Preferred Home Care of New York/Preferred Gold*, Index No. 511490/2021; (b) the Settlement Class Member’s full name, address, and telephone number; (c) the Settlement Class Member’s personal and original signature (or the personal and original signature of a Person previously authorized by law to act on behalf of the Settlement Class Member with respect to the claims asserted in this Lawsuit); and (d) state unequivocally the Settlement Class Member’s intent to be excluded from the Settlement.

The Settlement Administrator shall provide the Parties with copies of all completed opt-out notifications, and a final list of all who have timely and validly excluded themselves from the Settlement Class, which Settlement Class Counsel may move to file under seal with the Court no later than **ten (10) Days prior to the Final Approval Hearing**.

Any Settlement Class Member who does not timely and validly exclude herself or himself from the Settlement shall be bound by the terms of the Settlement Agreement. If a Final 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 set forth in the Final Order and

Judgment, including Settlement Class Members who have previously initiated or who subsequently initiate any litigation against any or all of the Released Persons 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.

10. **Objections.** A Settlement Class Member who complies with the requirements of this Paragraph may object to the Settlement and to Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards for the Class Representatives..

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: (a) electronically filed with the Clerk of Court by the Objection Date as set forth in the Settlement Agreement; or (b) mailed first-class postage prepaid to the Clerk of Court, Settlement Class Counsel, and Preferred Home's Counsel at the addresses listed in the Notice, and postmarked by no later than the Objection Date set forth in the Settlement Agreement, and 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 7.1 of the Settlement Agreement, which is as follows:

- a. The case name, *Simmons v. Assistcare Home Health Services, LLC, d/b/a Preferred Home Care of New York/Preferred Gold*, Index No. 511490/2021;
- b. The objector's full name, current address, telephone number, and email address (if any);
- b. The objector's original signature;
- c. Information identifying the objector as a Settlement Class Member, including proof that the objector is within the Settlement Class (e.g., copy of Notice or copy of original notice of the Data Incident);

- d. A statement of all grounds for the objection, including any legal support for the objection that the objector believes applicable;
- e. Identification (including address) of all counsel representing the objector;
- f. Whether the objector and/or his or her counsel will appear at the Final Approval Hearing; and
- g. A list of all persons who will be called to testify at the Final Approval Hearing in support of the objector's objection;
- h. A statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and
- i. The signature of the objector's duly authorized attorney or other duly authorized representative, along with documentation setting forth such representation.

Any Settlement Class Member who fails to comply with the provisions in this Paragraph 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 Preliminary Approval Order, and by all proceedings, orders, and judgments in this matter, including, but not limited to, the Release in the Settlement Agreement, if the Final Order and Judgment is entered.

Any Settlement Class Member, including a Settlement Class Member who files and serves a written objection, as described above, may appear at the Final Approval Hearing, either in person or through counsel hired at the Settlement Class Member's expense, to object to or comment on the fairness, reasonableness, or adequacy of the Settlement, or Plaintiffs' Attorneys' Fees, Costs, Expenses, and/or Service Awards Requests for Class Representatives.

If the Final 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 action or in any other proceeding or from challenging or opposing, or seeking to reverse, vacate, or modify any approval of the

Settlement Agreement, and Plaintiffs' Attorneys' Fees, Costs, Expenses, and/or Service Awards Requests for Class Representatives.

11. **Claims Process and Distribution and Allocation Plan.** Class Representatives and Preferred Home have created a process for assessing and determining 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 plan for remuneration described in Section 3 of the Settlement Agreement and directs that the Settlement Administrator effectuate the distribution of Settlement consideration according to the terms of the Settlement Agreement, should the Settlement be finally approved.

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. If the Final 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 Order and Judgment.

12. **Termination of Settlement.** This Preliminary Approval 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 Preliminary Approval Order, relating to the Settlement shall be used or referred to for any purpose whatsoever.

13. **Use of Order.** This Preliminary Approval Order shall be of no force or effect if a Final 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 Preferred Home of any fault, wrongdoing, breach, liability, or the certifiability of any class. Nor shall this Preliminary Approval Order be construed or used as an admission, concession, or declaration by or against the Class Representatives 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 Lawsuit or in any other lawsuit.

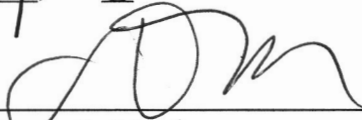
14. **Stay of Proceedings.** Except as necessary to effectuate this Preliminary Approval Order, all proceedings and deadlines in this matter are stayed and suspended pending the Final Approval Hearing and issuance of the Final Order and Judgment, or until such further order of this Court.

15. **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.

16. **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 Preliminary Approval Order include, but are not limited to:

EVENT	DATE
Notice Deadline	75 days after Preliminary Approval
Deadline for Plaintiffs to File Motion for Attorneys' Fees, Costs, and Service Awards	14 days prior to Opt-Out and Objection Dates
Deadline for Settlement Class Members to Opt-Out of Settlement	90 days after Preliminary Approval
Deadline for Settlement Class Members to Object to Settlement	90 days after Preliminary Approval
Deadline for Class Members to Submit Claim Forms (Electronically or Postmarked by Mail)	90 days after Notice Deadline
Deadline for Plaintiffs to File Motion for Final Approval of Settlement	14 days before Final Approval Hearing
Final Fairness Hearing	June 27, 2023 2:30 p.m. (EDT) Courtroom 741

IT IS SO ORDERED this 10 day of JANUARY, 2023.



Hon. Larry D. Martin
Justice of the Supreme Court
Second Judicial District

**HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT**

Addendum:

The undersigned Parties agree to the [Proposed] Order Granting Unopposed Motion for Preliminary Approval of Class Action Settlement on November 21, 2022.

Respectfully submitted,

/s/ Gary M. Klinger

Gary M. Klinger (admitted *pro hac vice*)

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