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

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs Lisa Simmons and Kelley Peterson-Small ("Plaintiffs") respectfully submit this Memorandum in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, and in support of the Motion state as follows;

I. INTRODUCTION

On January 23, 2023 this Court preliminarily approved a Class Action Settlement between Plaintiffs and Assistcare Home Health Services, LLC, d/b/a Preferred Home Care of New York/Preferred Gold ("Preferred Home" or "Defendant" and together with Plaintiff, the "Parties") to address the repercussions of the Data Incident.[1]

Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement Agreement only after extensive investigation and negotiations and months of work finalizing the Settlement Agreement and associated exhibits. After this Court granted preliminary approval, the Settlement Administrator—with the help of the Parties—disseminated Notice to the Settlement Class. Individual Notice was provided directly to Settlement Class Members via first class mail. Class Notice was sent to 98.7% of the Settlement Class, and reached 90.3% of the Class, easily meeting the due process standard. *See* Declaration of Settlement Administrator ("Admin. Decl."), attached hereto as Exhibit 1, ¶ 13. The Notice provided each Settlement Class Member with information regarding how to reach the Settlement Website, make a Claim, and how to opt-out or object to the Settlement. As of June 8, 2023, out of 88,058 Settlement Class Members, only eight sought to be excluded from the Settlement, and none have objected.

[1] Unless otherwise noted, capitalized terms used herein have the same definition attributed to them in Plaintiff's Unopposed Motion for Approval of Class Action Settlement and the Settlement Agreement filed therewith.

II. CASE SUMMARY

A. The Data Incident[2]

This class action lawsuit arises from a cyberattack and data breach incident that occurred at Preferred Home, a home-care provider, which offers home health services throughout central New York. *See Class Action Complaint* ("Complaint" or "*Comp.*"), ¶¶ 1-2, 17, 20-23, 29-35. On January 9, 2021, Preferred Home "identified a disruption on its network."[3] A subsequent investigation by Preferred Home revealed that, between January 8, 2021 and January 10, 2021, an unauthorized third-party cybercriminal was able to view, access, and likely exfiltrate the files of approximately 92,283 patients and employees, including Plaintiffs, on Preferred Home's computer network. *See id.* ¶¶ 1, 31, 39. The PII and PHI contained on the computer network was not encrypted. *See id.* ¶ 37. The information compromised during the Data Incident contained Plaintiffs' and Settlement Class Members' personally identifiable information ("PII") and protected health information[4] ("PHI"), including names, addresses. email addresses, phone numbers, demographic information, dates of birth, financial information, such as bank account numbers, and medical information, such as health assessments, physicals, drug screens, vaccinations, TB tests, and Family Medical Leave Act and workers compensation claims, and Social Security numbers,. S*ee id.* ¶¶ 3, 24, 26. Preferred Home did not begin notifying affected individuals about the Data Breach until March 10, 2021. *See id.* ¶¶ 41, 43.

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[2] The facts in this section are those set forth in the Complaint. Defendant makes no admission as to the facts alleged in the Complaint, and Defendant reserves its right to challenge the alleged facts should the Court deny this Motion, in whole or in part.

[3] See Assistcare Home Health Services LLC dba Preferred Home Care of New York/Preferred Gold Notified Individuals of Privacy Incident, Preferred Home Care of New York, https://preferredhcny.com/wp-content/uploads/2021/03/Web-notice.pdf (last visited Oct. 12, 2022).

[4] "PHI" is as defined by the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d *et seq.*

B. Plaintiffs' Complaint and Procedural Posture

On May 14, 2021, Plaintiffs filed a Class Action Complaint ("Complaint" or "*Comp.*") against Preferred Home. **(NYSEF Doc. No. 1.)** Plaintiffs alleged causes of action 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.)**

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. *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 Settlement came about as the result of protracted, arms' length negotiations after a day-long mediation with a preeminent data breach mediator, Bennett G. Picker of the firm, Stradley Ronon Stevens & Young, LLP, which took place on August 4, 2022. **(NYSCEF Doc. No. 42.)** *See* **(NYSEF Doc. No. 41-2.)** Declaration of Gary M. Klinger in Support of Plaintiffs Unopposed Motion for Preliminary Approval of Class Action Settlement ("Klinger MPA Decl."), ¶ 36. The Parties were able to reach an agreement on all the principal terms of settlement for this

matter at the mediation, subject to final mutual agreement on all necessary documentation. *See* Klinger MPA Decl., ¶ 37. After the mediation, the Parties negotiated and executed a Term Sheet. *See id.* ¶ 38. Since then, the Parties continued to negotiate in good faith and at arms' length, the finer points of the settlement and drafted the Settlement Agreement and accompanying Notice documents and other exhibits. *See id.* ¶ 38. While negotiations were always collegial and professional between the Parties, there is no doubt that the negotiations were also adversarial in nature, with both Parties strongly advocating their respective client's positions. *See id.* ¶ 37. The Settlement Agreement and the various exhibits thereto ("S.A.") were ultimately finalized and signed on October 31, 2022. *See id.* ¶ 38. **(NYSEF Doc. No. 41-1.)** Preliminary approval was granted by this Court on January 23, 2023, and notice to the Settlement Class subsequently issued.

III. SUMMARY OF SETTLEMENT

A. Settlement Benefits

The Settlement Class is defined as:

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

See S.A. ¶ 1.31(a). The Settlement Class is comprised of approximately 92,283 individuals (each, a "Settlement Class Member"). *See* Klinger MPA Decl. ¶ 39. The Settlement Subclass is defined as:

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

See S.A. ¶ 1.31(b). The Settlement Subclass is comprised of approximately 34,938 individuals (each, a "Settlement Subclass Member"), who are included in the 92,283 individuals in the Settlement Class. *See* Klinger Decl. ¶ 40. For avoidance of doubt, Settlement Subclass Members are also Settlement Class Members, and references herein to the Settlement Class include the Settlement Subclass. S.A. ¶ 1.32(a)(iii). In addition, the Settlement Class and Settlement Subclass are combined referred to as the "Settlement Classes." Excluded from the Settlement Class definition 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 Breach or who pleads *nolo contendere* to any such charge.

See S.A. ¶ 1.31(d).

1. Monetary Compensation for Losses

Each Settlement Class Member will be eligible to receive reimbursement for documented monetary losses incurred by him or her as a result of the Data Breach. *See* S.A. ¶ 3. Specifically, each eligible Settlement Class Member may choose from all applicable claim categories below—Claim A (Compensation for Ordinary Losses) and Claim B (Compensation for Extraordinary Losses). The overall compensation cap for any Settlement Class Member is $400.00 for all amounts claimed in Claim A, and $3,500.00 for all amounts claimed in Claim B. *See* S.A. ¶ 3.1.

a. *Claim A: Compensation for Ordinary Losses*.

Settlement Class Members who submit timely, valid claims, with supporting documentation (other than claims for Lost Time (defined below)), are eligible to receive compensation for unreimbursed ordinary losses for up to a total of 400.00 per Settlement Class

Member. *See* S.A. ¶ 3.1(a). Ordinary losses may include: (i) out-of-pocket expenses incurred as a result of the Data Breach, including bank fees, long distance phone charges, cell phone charges (only if charged by the minute), data charges (only if charged based on the amount of data used), postage, or gasoline for local travel; (ii) fees for credit reports, credit monitoring, or other identity theft insurance product purchased between January 8, 2021 and the Claim Deadline; and (iii) up to four (4) hours of lost time ("Lost Time"), calculated at $20/hour, if at least one (1) full hour was spent dealing with the Data Breach, provided that the Settlement Class Member attests that the claimed lost time was spent responding to issues raised by the Data Breach. *See* S.A. ¶ 3.1(a). Claims for Lost Time are subject to the same $400.00 cap on ordinary losses. *See* S.A. ¶ 3.1(a).

b. *Claim B: Compensation for Extraordinary Losses*.

Settlement Class Members who submit timely, valid claims, with supporting documentation, are eligible to receive claim up to $3,500.00 per Settlement Class Member for proven monetary losses if: (a) the loss is an actual, documented, and unreimbursed monetary loss; (b) the loss was more likely than not caused by the Data Breach; (c) the loss occurred between January 8, 2021 and the Claim Deadline; (d) the loss is not already covered by one or more of the normal reimbursement categories; and (e) the Settlement Class Member made reasonable efforts to avoid, or seek reimbursement for, the loss, including, but not limited to, exhaustion of all available credit monitoring insurance and identity theft insurance. *See* S.A. ¶ 3.1(b). The maximum amount any one Claimant may recover under Claim B is $3,500.00. *See* S.A. ¶ 3.1(b).

c. *Credit Monitoring.*

Settlement Class Members will be offered a one (1)-year membership of three bureau (3B) credit monitoring services without the need to file a Claim Form for monetary relief. *See* S.A. ¶

3.1(c). Settlement Subclass Members will be offered an additional one (1)-year membership of 3B credit monitoring (or a total of two (2) years offered). *See* S.A. ¶ 3.1(c).

The value of this benefit to the Settlement Class is significant. The least expensive 3B credit monitoring product available in the retail marketplace today costs $16.67 per month.[5] Using the least expensive product available on the market, the potential value of one (1) year of this benefit is as high as $200.04 per Settlement Class Member.

Preferred Home's and/or its insurers' maximum payment obligation under the Settlement Agreement for any and all payments under ¶¶ 3.1(a)-(c) is $1,000,000, and payments to Settlement Class Members who make Valid Claims shall be reduced on a *pro rata* basis according to the number of claims made if the total exceeds the overall $1,000,000 cap. *See* S.A. ¶ 3.2.

2. Injunctive Relief

Plaintiffs also negotiated for and received commitments from Preferred Home that it will continue to provide security for current and former patient and employee PII and PHI going forward. *See* Klinger MPA Decl. ¶ 48. Preferred Home has agreed to pay the costs of these security-related measures separate and apart from other settlement benefits. *Id*.

3. Confirmatory Discovery

Preferred Home agrees to provide confirmatory discovery on establishing the appropriateness of the settlement terms contemplated under Federal Rule of Civil Procedure 23(b)(1) and N.Y. C.P.L.R. Ch. 8, Art. 9, §§ 901 *et seq*.

4. Release

The relief provided to Settlement Class Members in the Lawsuit is tailored to the claims that have been pleaded or could have been pleaded that are related in any way to the activities

[5] https://www.identityguard.com/plans (last visited Oct. 12, 2022).

stemming from the Data Breach. *See* Klinger MPA Decl. ¶ 50. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims related to the Data Breach. *Id*. ¶ 51.

B. Notice And Claims

1. Direct Mail Notice

The Parties agreed and the Court approved Postlethwaite & Netterville, APAC ("P&N") as the Notice Specialist and Claims Administrator in this case. The cost of Notice and Claims Administration will be paid by Defendant separate and apart from the Settlement Payment available to Settlement Class Members, and is a separate benefit to the Class that is estimated to be worth approximately $112,937. Admin Decl. ¶ 16.

P&N received the class data from Defendant, in one Excel file with a total of 93,198 records. Admin. Decl. ¶ 5. The Class Member population consists of 88,058 unique records. *Id*. P&N coordinated and caused the Postcard Notice to be mailed via First-Class Mail to Settlement Class Members for which a mailing address was available from the class data. *Id*. ¶ 6. The Postcard Notice included ((a) general case information, (b) rights and options as a Class Member, including the right to be excluded from or object to the Settlement Agreement, and the dates by which to act on those options, (c) the date of the Final Approval Hearing, (d) the phone number to contact the Settlement Administrator for general information or to request additional documents, and (e) the web address to the case website for access to additional information.) *Id.* The Notice mailing was completed on or before February 21, 2023, in accordance with the Amended Preliminary Approval Order. *Id*.

Prior to the mailing, all mailing addresses were checked against the National Change of Address ("NCOA") database maintained by the United States Postal Service ("USPS"). *Id*. ¶ 7. In

addition, the addresses were certified via the Coding Accuracy Support System ("CASS") to ensure the quality of the zip code and verified through Delivery Point Validation ("DPV") to verify the accuracy of the addresses. *Id.*

As a result of these efforts, in the initial mailing campaign, P&N executed Postcard Notice mailings to 86,922 Class Members (98.7% of the Class) that passed address validation. *Id.* ¶ 7. Of those Notices mailed, 9,458 (10.7%) were returned as undeliverable. *Id.* ¶ 12. P&N executed supplemental mailings to 2,651 Class Members (3% of the Class) whose initial Notices were not deliverable but for whom they could obtain alternative mailing addresses through (1) forwarding addresses provided by the USPS, (2) via skip trace searches using the LexisNexis third party vendor database, or (3) requests received directly from Settlement Class Members. *Id* ¶ 7. 581 of the supplemental mailings were returned as undeliverable. *Id.* ¶ 14. Thus, as of June 10, 2023 Notice was received by 79,534 Class Members, or 90.3% of the Settlement Class. *Id.* ¶ 14.

2. Settlement Post Office Box, Website, Toll-Free Number, and Email Address.

Throughout the notice and claims process, P&N maintained a dedicated Post Office Box for the Settlement Program. Admin Decl. ¶ 8. This P.O. Box serves as a location for the USPS to return undeliverable program mail to P&N and for Settlement Class Members to submit claims forms, Exclusion Requests and other settlement-related correspondence. *Id.* The P.O. Box address appears prominently in all Notices and in multiple locations on the Settlement Website. P&N monitors the P.O. Box daily and uses a dedicated mail intake team to process each item received. *Id.*

On February 21, 2023, P&N published the Settlement Website, www.assistcaredatasettlement.com. *Id.* ¶ 10. Visitors to the Settlement Website can download the Long Form Notice, the Claim form, the Settlement agreement and other Court Documents. *Id.*

Visitors were also able to find answers to frequently asked questions, submit claims electronically, important dates and deadlines, and contact information for the Settlement Administrator. *Id*. As of June 8, 2023, the Settlement Website has received 3,900 unique visitors and 6,817 page views. *Id*.

P&N also established a toll-free telephone number, 1-844-573-0047 (the "Toll-Free Number"), which is available twenty-four hours per day. *Id*. ¶ 9. Settlement Class Members can call and interact with an interactive voice response ("IVR") system that provides important settlement information and offers the ability to leave a voicemail message to address specific requests or issues. *Id*. The Toll-Free Number appeared in all Notices, as well as in multiple locations on the Settlement Website. As of June 8, 2023 P&N received 2,656 calls to the toll-free number. *Id*. Finally, P&N established an email address, info@AssistCareDataSettlement.com, to provide an additional option for Settlement Class Members to address specific questions and requests to the Settlement Administrator for support. *Id*. ¶ 12.

3. Claims.

The timing of the Claims Process was structured to ensure that all Class Members have adequate time to review the terms of the Settlement Agreement, compile documents supporting their Claim, and decide whether they would like to opt-out or object. Lietz Decl., ECF 33, ¶ 60. The deadline to submit a claim was May 22, 2023. As of June 8, 2023, P&N has received 1,325 timely-filed claims. Admin Decl. ¶ 13.

4. Requests For Exclusion and Objections

Settlement Class Members were provided up to and including April 24, 2023—ninety (90) days from the issuance of the Preliminary Approval Order—to object to or to submit a request for exclusion from the Settlement. (**NYSCEF Doc. No. 42.)** Similar to the timing of the Claims Process, the timing with regard to objections and requests for exclusion was structured to give

Settlement Class Members sufficient time to access and review the Settlement documents—including Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, which was filed fourteen (14) days prior to the deadline for Settlement Class Members to object or exclude themselves from the Settlement. As of June 8, 2023, P&N had received only eight (8) requests for exclusion. Admin Decl. ¶ 14. The Settlement Agreement directed that objections be filed with the Court and served on Class Counsel and Counsel for the Defendant. As of June 8, 2023, P&N was not aware of and had not received any objections. *Id.* ¶ 15. As of June 12, 2023, Class Counsel had not received any objections to the Settlement Agreement or to the motion for fees, costs, and Service Awards. *See* Declaration of Gary M. Klinger in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Klinger MFA Decl."), attached hereto as **Exhibit 2**, at ¶ 2.

IV. ARGUMENT

A. The Settlement is Fair, Reasonable, and Adequate, and Should be Approved

New York courts strongly favor settlements as a matter of public policy. *See IDT Corp. v. Tyco Grp., S.A.R.L.*, 13 N.Y.3d 209, 213 (2009) ("[s]tipulations of settlement are judicially favored and may not be lightly set aside.").[6] Strong policy considerations favor settlements because "[a] negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit." *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 383 (1993); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (courts should be "mindful of the 'strong judicial policy in favor of settlements'"). When considering whether to finally approve a class action settlement, New York courts focus their inquiry on "'the fairness of the settlement, its adequacy, its reasonableness, and the best interests

[6] Unless otherwise noted, all citations are omitted and emphasis is added.

of the class members.'" *Hosue v. Calypso St. Barth, Inc.*, No. 160400/2015, 2017 WL 4011213, at *2 (Sup. Ct., N.Y. Cnty. Sept. 12, 2017). Specifically, New York courts consider the following factors: (i) the likelihood that plaintiff will succeed on the merits; (ii) "the extent of support from the parties"; (iii) "the judgment of counsel"; (iv) the presence of good faith bargaining; and (v) the complexity and "nature of the issues of law and fact." *See Fernandez v. Legends Hosp., LLC*, No. 152208/2014, 2015 WL 3932897, at *2 (Sup. Ct., N.Y. Cnty. June 22, 2015). In addition, courts have noted that finding "adequacy" involves "balancing the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 73 (2d Dept. 2006); and whether the settlement was "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." (*Fiala v. Metro. Life Ins. Co., Inc.*, 899 N.Y.S.2d 531, 538 (Sup. Ct., N.Y. Cnty. 2010)).

As discussed herein, these factors, outlined in *In re Colt Indus. S'holder Litig.,* 155 A.D.2d 154 (1st Dept. 1990) and commonly referred to as the "*Colt* factors", all strongly favor approval in the instant matter.

1. Likelihood of Success on the Merits and Related Litigation Risk

When assessing a proposed settlement of a class action, courts first take into consideration Plaintiffs' ultimate "likelihood of success on the merits." *Gordon v. Verizon Comm'cns*, 148 A.D.3d 146, 162 (1st Dept. 2017); *Colt*, 155 A.D.2d at 160.

Due at least in part to their cutting-edge nature and the rapidly evolving law, data breach cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp*., No. 08 Civ. 6060, 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56

stage). As one federal district court recently observed in finally approving a settlement with similar class relief:

> Data breach litigation is evolving; there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc*., No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases ... are particularly risky, expensive, and complex.").

Fox v. Iowa Health Sys., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021).

To the extent the law has gradually accepted this relatively new type of litigation, the path to a class-wide monetary judgment remains unforged, particularly in the area of damages. For now, cybersecurity incident cases are among the riskiest and most uncertain of all class action litigation, making settlement the more prudent course when a reasonable one can be reached. The damages methodologies, while theoretically sound in Plaintiffs' view, remain untested in a disputed class certification setting and unproven in front of a jury. And as in any cybersecurity incident case, establishing causation on a class-wide basis is rife with uncertainty. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013).

Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g., In re Hannaford,* 293 F.R.D. 21. Further, if Plaintiffs are successful in obtaining certification of a litigation class, the certification would not be set in stone. *Long v. HSBC USA Inc*., No. 14 -cv-6233, 2015 WL 5444651, at *11 (S.D.N.Y. Sep. 11, 2015) ("A contested motion for certification would likely require extensive discovery and briefing, and, if granted, could potentially result in an interlocutory appeal pursuant to Fed. R. Civ. P. 23(f) or a motion to decertify by defendants, requiring additional briefing."). Plaintiffs would likely face several strong legal defenses and difficulties in demonstrating causation and injury. Such defenses, if successful, could drastically decrease or eliminate any recovery for Plaintiffs and putative class

members. Given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits. Given the risks, costs, and potential delays inherent in litigating this class action to judgment, this factor weighs heavily in favor of final approval. *See Babcock v. C. Tech Collections, Inc.*, No. 1:14-cv-3124, 2017 WL 1155767 (E.D.N.Y. Mar. 27, 2017) (class settlement "eliminates the risk, expense, and delay inherent in the litigation process.")

While Plaintiffs are confident in the strength of their claims, they are also pragmatic in their awareness of the various defenses available to Defendant, as well as the risks inherent to continued litigation. Defendant consistently denied the allegations raised by Plaintiffs and made clear at the outset that it would vigorously defend the case. Through the Settlement, Plaintiffs and Class Members gain significant benefits without having to face further risk of not receiving any relief at all. This weighs in favor of final approval.

2. Judgement of Counsel, Extent of Support from the Parties, and Presence of Good Faith Bargaining

Colt factors two through four – the support of the parties, the judgment of counsel, and whether the parties bargained in good faith – also strongly support approval.

First, as discussed above, the Settlement has received strong support from the Settlement Class, with only eight (8) opt outs and no objections, a fact which is indicative of a class's approval of a proposed settlement. *See, e.g.*, *Pressner v. MortgageIT Holdings, Inc.*, No. 602472/2006, 2007 WL 1794935, at *2 (Sup. Ct., N.Y. Cnty. May 29, 2007) (approving settlement where there was no objection to the proposed settlement).

Second, Class Counsel has concluded that the proposed settlement is fair, reasonable, and adequate, particularly given the risks, costs, and uncertainties of continued litigation.

Klinger MPA Decl. ¶ 27. New York courts give counsel's views regarding settlement considerable weight, *see MortgageIT*, 2007 WL 1794935., at *2, and it is further respectfully submitted that the experience and expertise of Settlement Class Counsel here makes this factor weigh even more heavily in favor of approval. *See Generally* Klinger MPA Decl. and Milberg Firm Resume attached thereto.

Third, the Settlement is a product of protracted, good faith negotiations. Negotiations in this matter began only after Defendant filed a Motion to Compel Arbitration, Stay Action, and Dismiss Complaint, which the Parties fully briefed, and on which the Court issued ruling. While always professional, there is no doubt the negotiations were contentious and hard fought by all Parties and the case only settled after a mediation session with a highly regarded third party mediator. Accordingly, the "good-faith negotiation" factor also strongly supports approval of the Settlement. *Gordon,* 148 A.D.3d at 157 (courts should presume that negotiations have been conducted at arm's length and in good faith absent evidence to the contrary).

3. Complexity and Nature of Case

Finally, courts look to the complexity and nature of the case (which is closely related to Plaintiffs' likelihood of success). *See Saska v. Metro. Museum of Art*, 54 N.Y.S.3d 566, 570 (Sup. Ct., N.Y. Cnty. 2017) (evaluating the first and fifth *Colt* factors together in granting final approval); *City Trading Fund v. Nye*, 72 N.Y.S.3d 371, 393 (Sup. Ct., N.Y. Cnty. 2018) (same).

As discussed above, data breach litigation is difficult, complex, and the rapid evolution of caselaw make outcomes uncertain. Moreover, while early settlement has allowed costs to stay modest, and the Settlement Agreement provides for such costs to paid for separate and apart from the funds available to the Class—protracted litigation would only serve to increase costs and have a potentially negative affect on Class recovery, which is itself far from certain. Continued litigation

would also increase the burden on the Court, without any guaranteed benefit to Plaintiff or Settlement Class Members. "Complex litigation . . . 'can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.'" *Woodward v. NOR–AM Chem. Co.*, No. Civ-94-0870, 1996 WL 1063670, at *21 (S.D. Ala. May 23, 1996) (quoting *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992)). Where a settlement, such as the one reached here, "will alleviate the need for judicial exploration of . . . complex subjects [and] reduce litigation costs" this factor weighs in favor of approval. *See Lipuma v. Am. Express Co.*, 406 F. Supp. 2d at 1324 (S.D. Fla. 2005).

B. The Settlement Class Should be Certified

For settlement purposes only, Plaintiffs seek certification of the Settlement Class. The Court preliminary certified the Settlement Class in its Preliminary Approval Order, and nothing has changed since it did so. As all required elements of CPLR 901 and 902 are satisfied here, the court should confirm its prior ruling and finally certify the Settlement Class for approval.

1. The Settlement Class Satisfies CPLR 901

CPLR 901 requires that the elements of numerosity, predominating common issues, typicality, adequacy, and superiority are satisfied. As will be discussed in more detail in this section, the Settlement Class satisfies each of these requirements.

i. Numerosity

Numerosity requires that the class be "so numerous that joinder of all members, whether otherwise required or permitted is impracticable." CPLR 901(a)(1). Courts have held that where a putative class contains forty or more members, numerosity is typically presumed. "One leading scholar has offered the following guideline: 'If the class has more than forty people in it, numerosity is satisfied....' Our research has supported this guideline." *Wood River Area Dev.*

Corp. v. Germania Fed. Sav. & Loan Ass'n, 198 Ill. App. 3d 445, 450 (5th Dist. 1990) (citing Arthur Miller, *An Overview of Federal Class Actions: Past, Present, and Future, Federal Judicial Center* 22 (1977)*; see also Borden v. 400 E. 55th St. Assocs., L.P.*, 24 N.Y.3d 382, 399 (2014) (classes with as few as 18 members may satisfy numerosity); *Pennsylvania Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014) ("Numerosity is presumed for classes larger than forty members."). With a class size of roughly 92, 283, the Settlement Class clearly satisfies the numerosity requirement.

ii. Commonality and Typicality

Commonality is satisfied where "common questions of law and fact… predominate over individual issues." *Pruitt v. Rockefeller Ctr. Props., Inc.,* 167 A.D.2d 14, 21 (1st Dept. 1991). *see also Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015) (commonality "is satisfied if there is a common issue that 'drive[s] the resolution of the litigation' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'"). Typicality requires that claims or defenses of the representative parties are typical of the claims or defenses of the class. CPLR 901 (a)(3).

Here, each Settlement Class member has a common core of factual and legal issues with the rest of the class, namely, that they were patients and employees of Preferred Home, provided highly sensitive information to Preferred Home, Preferred Home implemented inadequate data security to safeguard that sensitive information, and the information was potentially exposed during the Data Incident. Each Class member received a notice from Preferred Home specifically stating that their information may have been compromised as a result of the data breach. Each of the Class member's claims center on whether Preferred Home adequately safeguarded their sensitive information or whether they knowingly used deficient data security measures that

resulted in the data breach. Consequently, numerous legal and factual issues are common to Plaintiffs and other Settlement Class Members. Those common issues include:

a. Whether Preferred Home owed a duty to exercise reasonable care in collecting, storing, and/or safeguarding Plaintiffs' and Settlement Class Members' PII and PHI;

b. Whether Preferred Home breached that duty by implementing knowingly deficient data security measures that caused the data breach;

c. Whether Preferred Home knew or should have known that its unreasonable security measures were incapable of protecting the PII and PHI of Plaintiffs and Settlement Class Members and may result in a data breach; and

d. Whether the Data Incident caused Plaintiffs and the Class harm;

These common questions are central to the Plaintiffs' cases and can be addressed on a class-wide basis because they all tie back to the same common nucleus of operative facts—the Data Incident and Preferred Home's data protection measures. Further, all Plaintiffs and Class Members claims arise out of the same course of conduct – Preferred Home's alleged failure to reasonably protect the Settlement Class Members' PII and PHI – and assert the same theories of liability. The commonality and typicality requirements have clearly been met.

iii. Adequacy

"Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Meachum v. Outdoor World Corp.* 654 N.Y.S.2d 244 (1996), *quoting Susman v. Lincoln American Corp.,* 7th Cir., 561 F.2d 86, 90, *citing Wetzel v. Liberty Mutual Insurance Co.,* 3d Cir., 508 F.2d 239, 247, *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.ed.2d 679.

Here, the Class Representatives and proposed Settlement Class Counsel meet the test of adequacy. First, there is no conflict between Plaintiffs and the Settlement Class Members. Plaintiffs allege they were harmed in the same way as all other class members, by Preferred Home's failure to adequately secure their PII and PHI, resulting in the Data Incident. Plaintiffs and all Settlement Class and Settlement Subclass Members seek relief for similar injuries arising out of the same event. In light of this common event and injury, the named Plaintiffs have every incentive to vigorously pursue the class claims, and no conflict exists. Further, Settlement Class Counsel are well-qualified to represent the class. Settlement Class Counsel has extensive experience in data privacy and consumer class actions and are leaders in the field. The excellent results obtained by this settlement confirm counsel's adequacy. Thus, the requirements of adequacy are satisfied.

iv. Superiority

It would be prohibitively costly to require individual Settlement Class Members to litigate their own individual claims. Additionally, because Plaintiffs seek to certify their claims here for purposes of settlement, there will be no issues with the manageability and resolution of thousands of claims the courts could face should Settlement Class Members be able to overcome the barriers to filing individual lawsuits. Proceeding by class action is thus a far more efficient mechanism to resolve data breach litigations such as this one. *See Stecko v. RLI Ins. Co.*, 121 A.D.3d 542, 543 (1st Dept. 2014) (class action was "'superior vehicle' . . . 'since the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court'"); *In re SunEdison, Inc.*, 329 F.R.D. at 144 ("Generally, securities actions 'easily satisfy' the superiority requirement 'because "the alternatives are either no recourse for

thousands of stockholders" or "a multiplicity and scattering of suits with the inefficient administration of litigation"""). CPLR 901(5)'s superiority requirements are thus met.

2. CPLR 902's Discretionary Factors Also Support Certification

The five discretionary CPLR 902 factors also support certification. Factors one (the interest of class members in individually prosecuting their claims), two ([in]efficiency of multiple actions), four (desirability of concentrating claims in the particular forum), and five (difficulty of managing class-wide action), are substantively identical to CPLR 901's commonality, typicality, and superiority factors. As discussed above, these factors are equally well-satisfied for purposes of CPLR 902. *Nawrocki v. Proto Constr. & Dev. Corp.*, No. 104229/2007, 2010 WL 1531428, at *5 (Sup. Ct., N.Y. Cnty. April 7, 2010) (describing CPLR 902 factors as '"implicit in CPLR 901'"). Factor 3, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, is inapplicable here as, to the Parties' knowledge there are no other litigations pending related to this matter.

The relevant CPLR 901 and 902 factors support final certification of the Settlement Class and Subclass.

3. Notice of the Settlement Satisfies Due Process.

The method for processing Settlement Class Members claims weighs in favor of final approval. CPLR 904 requires that reasonable notice of the commencement of a class action and shall be given to the class in such a manner as the Court directs. As discussed in greater detail above, the Notice Program was carried out in the manner approved by this Court in the Preliminary Approval Order entered on January 23, 2023. *See* Admin. Decl., generally. Notice was successfully disseminated to the Class and the response was overwhelmingly positive. For the reasons contemplated by this Court in issuing the Preliminary Approval Order, and taking into account the

success of the Notice program discussed above, the Court should find that Notice was proper and effective.

4. The Terms of the Proposed Award of Attorneys' Fees and Costs and the Service Award to Each Plaintiff Weighs in Favor of Final Approval.

On April 10. 2023, Plaintiffs moved for an award of combined attorneys' fees and expenses of $235,000, and a Service award of $1,500 to each Representative Plaintiff. **(NYSCEF Doc. No. 43.)**. The fees requested represented a 1.53 lodestar multiplier through a date just prior to the fee motion. That multiplier is well within the range of what courts in this jurisdiction deem reasonable. The lodestar multiplier will be even lower after the additional hours spent seeking final approval are added. After that, more hours will be expended shepherding the Settlement through to the Effective Date and payment to the Settlement Class. By the close of this case, the requested fees will definitely represent a modest multiplier of less than 1.53, and perhaps will represent no multiplier at all. As set out more fulsomely in the attorneys' fee motion, the fees are fully justified by the lodestar and the results obtained for the Settlement Class.

Also, there has been no objection to the requested attorneys' fees. The Notices to the Class apprised the Class of the amount of fees that Plaintiffs' Counsel would seek, and the Motion for Attorneys' Fees was filed prior to the objection deadline, specifically to give Class Members an opportunity to review the request and raise objections. Yet no Class Member objected, which is further evidence of the reasonableness of the fee request.

Plaintiffs further requested Service Awards of $1,500 to each Representative Plaintiff to compensate them for the significant efforts they put forth on behalf of the Settlement Class. Without Plaintiffs' efforts in commencing and prosecuting this action, there would be no recovery here. The Service Awards requested were relatively modest, and reasonable in light of the valuable

contributions Representative Plaintiffs made to the Litigation on behalf of all Settlement Class Members.

Because the attorneys' fees and expenses, and service awards Plaintiffs seek are in line with typical awards in this jurisdiction, this factor weighs in favor of final approval.

V. CONCLUSION

Plaintiffs have negotiated a fair, adequate, and reasonable Settlement that guarantees Settlement Class Members who make a Claim significant relief in the form of cost and time reimbursements, financial asset and credit monitoring protections, and equitable relief consisting of increased data security safeguards. The Settlement Agreement was reached only after extensive arm's-length negotiations, and an assessment of both the *Colt* factors and CPLR 901 and 902 factors weighs in favor of Final Approval. For the reasons discussed above, and for those described in Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Plaintiffs' Motion for Attorneys' Fees, Costs and Service Awards, Plaintiffs respectfully request this Court enter the proposed Final Approval Order filed herewith, finally certify the Settlement Class and appoint Settlement Class Counsel and Plaintiffs as representatives for the Class.

Dated: June 13, 2023

Respectfully submitted,

s/ Gary M. Klinger

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