

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

SCOTT PETERSON, on behalf of himself
and all others similarly situated,

Plaintiff,

Civil Action N. 6:19-cv-856-Orl-31LRH

v.

APRIA HEALTHCARE GROUP INC.,

Defendant.

ORDER PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT

Plaintiff has filed a Motion for an Order Preliminarily Approving Class Action Settlement, Conditionally Certifying Proposed Settlement Class, Directing Notice, and Setting Hearing on Final Approval of Settlement (“Motion”) (Doc. 40). Having reviewed the Motion and supporting materials, the Court finds that:

A. Counsel have advised the Court that the parties have agreed, subject to final approval by this Court following notice to the proposed Settlement Class and a hearing, to settle this action on the terms and conditions set forth in the Settlement Agreement and Release of Claims (the “Agreement”).

B. The Court has reviewed the Agreement, as well as the files, records, and proceedings to date in this matter. The terms of the Agreement are hereby incorporated as though fully set forth in this Order. Capitalized terms shall have the meanings attributed to them in the Agreement.

C. Based upon preliminary examination, it appears to the Court that the Agreement is sufficiently fair, reasonable, and adequate to warrant notice to the proposed Settlement Class; that the Settlement Class should be certified for settlement purposes; and that the Court should hold a

hearing after notice to the Settlement Class to determine whether to enter a settlement approval order and final judgment in this action, based upon that Agreement.

Accordingly, it is hereby **ORDERED**:

1. ***Preliminary Approval of Proposed Settlement.*** The Agreement, including all exhibits thereto, is preliminarily approved as fair, reasonable, and adequate. The Court finds that (a) the Agreement resulted from extensive arm's-length negotiations, with participation of an experienced mediator, and (b) the Agreement is sufficient to warrant notice thereof to members of the Settlement Class and the Fairness Hearing described below.

2. ***Class Certification for Settlement Purposes Only.***

(a) Pursuant to Fed. R. Civ. P. 23(b)(3), the Court, for settlement purposes only, conditionally certifies a class consisting of all persons within the United States who, between May 6, 2015 and the present, (1) received a non-emergency call or text message to their cellular telephone numbers; (2) through the use of an automatic telephone dialing system or an artificial or pre-recorded voice; (3) from Defendant; and (4) who were not Apria customers at the time of the calls and text messages. The Settlement Class does *not* include Apria, any entity that has a controlling interest in Apria, or Apria's current or former directors, officers, counsel, and their immediate families. The Settlement Class also does not include any persons who validly request exclusion from the Class, as well as the presiding Judge in the Action, and the Judge's staff and their immediate family members.

(b) In connection with the certification, the Court makes the following preliminary findings:

(1) The Settlement Class satisfies Fed. R. Civ. P. 23(a)(1) because the Settlement Class appears to be so numerous that joinder of all members is impracticable;

(2) The Settlement Class satisfies Fed. R. Civ. P. 23(a)(2) because there appear to be questions of law or fact common to the Settlement Class;

(3) The Settlement Class satisfies Fed. R. Civ. P. 23(a)(3) because the claims of the plaintiff named in the caption appear to be typical of the claims being resolved through the proposed settlement;

(4) The Settlement Class satisfies Fed. R. Civ. P. 23(a)(4) because the named plaintiff appears to be capable of fairly and adequately protecting the interests of the above-described Settlement Class in connection with the proposed settlement and because counsel representing the Settlement Class are qualified, competent and capable of prosecuting this action on behalf of the Settlement Class;

(5) The Settlement Class satisfies the requirements of Fed. R. Civ. P. 23(b)(3) because, for purposes of settlement approval and administration, common questions of law and fact appear to predominate over questions affecting only individual Settlement Class Members and because settlement with the above-described Settlement Class appears to be superior to other available methods for the fair and efficient resolution of the claims of the Settlement Class. The Settlement Class appears to be sufficiently cohesive to warrant settlement by representation.

(c) In making the foregoing findings, the Court has exercised its discretion in conditionally certifying a settlement class.

(d) Scott Peterson is hereby designated as the representative of the Settlement Class.

3. ***Class Counsel.*** The Court appoints John A. Yanchunis and Patrick A. Barthle II of Morgan & Morgan Complex Litigation Group as counsel for the Settlement Class (“Class

Counsel”). For purposes of these settlement approval proceedings, the Court finds that Class Counsel are competent and capable of exercising their responsibilities as Class Counsel.

4. ***Fairness Hearing.*** A hearing shall be held before this Court on October 30, 2020, at 9:00 a.m. (“Fairness Hearing”), as set forth in the Notice (described in Paragraph 5 below), to determine whether the Agreement is fair, reasonable, and adequate and should be given final approval. Papers in support of final approval of the Agreement and Class Counsel’s application for an award of attorneys’ fees, costs and expenses and for service awards to the Class Representative (“Fee and Expense Application”) shall be filed with the Court according to the schedule set forth in Paragraphs 12 and 13, below. The Court may postpone, adjourn, or continue the Fairness Hearing without further notice to the Settlement Class. After the Fairness Hearing, the Court may enter a Settlement Order and Final Judgment in accordance with the Agreement (“Final Judgment”), which will adjudicate the rights of the Settlement Class Members with respect to the claims being settled.

5. ***Notice.*** The Court approves the form and content of the notices substantially in the forms attached as Exhibits B and C to the Agreement. Apria shall comply with the notice requirements of Paragraph 3.03 of the Agreement. In compliance with that Paragraph, Apria shall cause notice to be delivered to all Settlement Class Members through print and Internet publication in the manner set forth in the Agreement by July 17, 2020. Print publication notice shall be substantially in the form attached as Exhibit B to the Agreement, and a notice substantially in the form attached as Exhibit C to the Agreement shall be posted at a website, the Internet address for which shall be disclosed in the print publication notice.

6. ***Filing of CAFA Notice.*** Before the Fairness Hearing, Defendant shall file with the Court proof of their compliance with the notice provisions of the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1715.

7. ***Findings Concerning Notice.*** The Court finds that the Notice and the manner of its dissemination described in Paragraph 5 above and Paragraph 3.03 of the Agreement constitutes the best practicable notice under the circumstances and is reasonably calculated, under all the circumstances, to apprise Settlement Class Members of the pendency of this action, the terms of the Agreement, and their right to object to or exclude themselves from the Settlement Class. The Court finds that the notice is reasonable, that it constitutes due, adequate, and sufficient notice to all persons entitled to receive notice, and that it meets the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and any other applicable laws.

8. ***Exclusion from Class.*** Each Settlement Class Member who wishes to exclude himself or herself from the Settlement Class and follows the procedures set forth in this Paragraph shall be excluded. Any potential member of the Settlement Class may mail a written request for exclusion, in the form specified in the Notice, to the third-party administrator at the address set forth in the Notice. All such written requests must be postmarked by September 18, 2020. All persons who properly request exclusion from the Settlement Class shall not be Settlement Class Members and shall have no rights with respect to, nor be bound by, the Agreement, should it be approved. The names of all such excluded individuals shall be attached as an exhibit to any Final Judgment.

9. ***Right to Abrogate Agreement.*** In the event more than a previously-agreed number of Class Members timely exclude themselves from the Settlement Class, Apria shall have the unilateral right to abrogate the Agreement by written notice of abrogation to Class Counsel in accordance with and subject to the procedures set forth in the Agreement. If Apria exercises its right to abrogate the Agreement, then all aspects of the Agreement and the settlement underlying it, including but not limited to the provisional certification of the Settlement Class for settlement purposes only, shall be altogether null and void, and no aspect of the Agreement, the settlement, or this Order shall serve as legal precedent or as any basis for legal or factual argument in this or any other case.

10. **Claims Procedures.** The Court approves the claims procedures set forth in the Agreement. The Court approves the form and content of the Claim Form substantially in the form attached at the end of Exhibit C to the Agreement. A properly executed Claim Form must be submitted as required in the Notice over the Internet or postmarked no later than October 2, 2020. Such deadline may be further extended by Court Order. Each Claim Form shall be deemed to have been submitted when submitted over the Internet or postmarked (if properly addressed and mailed by first class mail, postage prepaid), provided such Claim Form is actually received no less than thirty (30) days prior to the Distribution Date. Any Claim Form submitted in any other manner shall be deemed to have been submitted when it was actually received at the address designated on the Claim Form.

11. **Costs of Notice and Claims Processing.** All costs of notice to the Class of the pendency and settlement of the Actions and of processing claims shall be paid by Apria separate and apart from the Settlement Fund.

12. **Objections and Appearances.**

(a) **Written Objections.** Any Class Member who has not timely submitted a written request for exclusion from the Class, and thus is a Class Member, may object to the fairness, reasonableness or adequacy of the Agreement, or the Fee and Expense Application. Any Settlement Class Member who wishes to object to the settlement, must file his or her objection in writing to the Court, with copies to be provided to the Settlement Administrator JND Legal Administration; Defendant's counsel (Attn: Sean M. Sullivan, 865 S. Figueroa Street, Suite 2400, Los Angeles, CA 90017-2566); and Class Counsel (Attn: John A. Yanchunis and Patrick A. Barthle II, Morgan & Morgan Complex Litigation Group, 201 North Franklin Street, 7th Floor, Tampa, FL 33602), postmarked no later than September 18, 2020. Class Counsel will file copies with the Court via ECF. Objecting Settlement Class Members must include: (1) the objector's name and address; (2) an explanation of the basis upon which the objector claims to be a

Settlement Class Member, including the cellular telephone number(s) at which they received a non-emergency call or text message, and the dates those calls or text messages were received; (3) all grounds for the objection, including all citations to legal authority and evidence supporting the objection; (4) the name and contact information of any and all attorneys representing, advising, or in any way assisting the objector in connection with the preparation or submission of the objection or who may profit from the pursuit of the objection (the “Objecting Attorneys”), if any; and (5) a statement indicating whether the objector intends to appear at the Final Fairness Hearing (either personally or through counsel who files an appearance with the Court in accordance with the Local Rules). If a Settlement Class Member or any of the Objecting Attorneys has objected to any class action settlement where the objector or the Objecting Attorneys asked for or received any payment in exchange for dismissal of the objection, or any related appeal, without any modification to the settlement, then the objection must include a statement identifying each such case by full case caption. Any objection not timely made in this manner will not be considered.

(b) ***Appearance at Fairness Hearing.*** Any objecting Settlement Class Member who wishes to address the Court at the Fairness Hearing must indicate his or her intent to do so in writing to Class Counsel at the same time that the Settlement Class Member submits the objection. Class Counsel will inform the Court and Defendant’s counsel accordingly. Any Settlement Class Member who does not timely deliver a written objection and notice of intention to appear by September 18, 2020, in accordance with the requirements of this Order, shall not be permitted to object or appear at the Fairness Hearing, except for good cause shown, and shall be bound by all proceedings, orders and judgments of the Court.

(c) ***Papers for Final Approval and for Fees and Expenses.*** Class Representative shall file his motion for final approval of the settlement, and Class Counsel shall file

their Fee and Expense Application, together with all supporting documentation, by August 14, 2020.

(d) **Responses to Objections.** Any responses to objections to the Agreement or the Fee and Expense Application shall be filed with the Court within twenty-one (21) days after the deadline for serving objections.

13. **Dates of Performance.** In summary, the dates of performance are as follows:

(a) Defendant shall send the Notice to potential Settlement Class Members on or before July 17, 2020.

(b) Class Counsel's Fee and Expense Application, and all supporting materials, shall be filed no later than August 14, 2020.

(c) Class Representative's final approval motion, and all supporting materials, shall be filed no later than October 15, 2020.

(d) Settlement Class Members who desire to be excluded shall mail requests for exclusion postmarked by September 18, 2020.

(e) All objections to the Agreement or the Fee and Expense Application shall be filed and served by September 18, 2020.

(f) Responses to objections, if any, and in further support of the Fee and Expense Application, shall be filed by October 9, 2020.

(g) The Fairness Hearing shall be held on October 30, 2020, at 9:00 a.m.

(h) Settlement Class Members who desire to submit Claim Forms shall do so by October 2, 2020.

14. **Effect of Failure to Approve the Agreement.** In the event the Court does not approve the Agreement, or for any reason the Parties fail to obtain a Final Judgment as

contemplated in the Agreement, or the Agreement is terminated pursuant to its terms for any reason, then the following shall apply:

(a) All orders and findings entered in connection with the Agreement shall become null and void and have no further force and effect, shall not be used or referred to for any purposes whatsoever, and shall not be admissible or discoverable in any other proceeding;

(b) The conditional certification of the Settlement Class pursuant to this Order shall be vacated automatically, and the case shall return to its status as it existed before entry of this Order;

(c) Nothing contained in this Order is, or may be construed as, any admission or concession by or against Defendant or Class Representative on any point of fact or law, including, but not limited to, factual or legal matters relating to any effort to certify this case as a class action for purposes of considering settlement approval; and

(d) Nothing in this Order or pertaining to the Agreement shall be used as evidence in any further proceeding in this case, including, but not limited to, motions or proceedings pertaining to treatment of this case as a class action.

15. ***Discretion of Counsel.*** Counsel are hereby authorized to take all reasonable steps in connection with approval and administration of the settlement not materially inconsistent with this Order or the Agreement, including, without further approval of the Court, making minor changes to the content of the Notice that they jointly deem reasonable or necessary.

16. ***Stay of Proceedings Pending Approval of the Settlement.*** All proceedings before the Court are stayed pending final approval of the settlement, except as may be necessary to implement the settlement or comply with the terms of the Agreement.

17. ***Injunction Against Asserting Released Claims Pending Settlement Approval.***

Pending final determination of whether the settlement should be approved, Plaintiff, all Settlement Class Members and any person or entity allegedly acting on behalf of Settlement Class Members, either directly, representatively or in any other capacity, are preliminarily enjoined from commencing or prosecuting against the Released Parties any action or proceeding in any court or tribunal asserting any of the Released Claims, provided, however, that this injunction shall not apply to individual claims of any Settlement Class Members who timely exclude themselves in a manner that complies with this Order. This injunction is necessary to protect and effectuate the settlement, this Order, and the Court's flexibility and authority to effectuate this settlement and to enter judgment when appropriate, and is ordered in aid of the Court's jurisdiction and to protect its judgments pursuant to 28 U.S.C. § 1651(a).

18. ***Reservation of Rights and Retention of Jurisdiction.*** The Court reserves the right to adjourn or continue the date of the Fairness Hearing without further notice to Settlement Class

Members, and retains jurisdiction to consider all further applications arising out of or connected with the settlement. The Court may approve or modify the settlement without further notice to Settlement Class Members.

Dated this 17th day of June, 2020.




GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Presented by:

Morgan & Morgan Complex Litigation Group
Attorneys for Class Representative and the Settlement Class

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