IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

CODY KENNEY and MELISSA SKINNER, individually and on behalf of all similarly situated persons, Plaintiffs, v. CENTERSTONE OF AMERICA, INC., CENTERSTONE OF INDIANA, INC., and CENTERSTONE OF TENNESSEE, INC., Defendants.	Case No. 3:20-cv-01007 JUDGE ELI J. RICHARDSON MAGISTRATE JUDGE BARBARA D. HOLMES

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs Cody Kenney and Melissa Skinner ("Plaintiffs") submit this Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement.

I. INTRODUCTION

This case arises from a data incident that Plaintiffs allege compromised their protected health information, and the protected health information of the putative Class. In December 2019, a third party gained access to the email address of several of Defendants' employees (the "Data Breach"). Defendants carried out a forensic investigation and found that an estimated 66,000 of its clients' personal identifying information had been potentially impacted. Plaintiffs allege Centerstone of America, Inc., Centerstone of Indiana, Inc., and Centerstone of Tennessee, Inc.'s ("Centerstone" or "Defendants") failure to secure and safeguard the personal identifying information ("PII") and personal health information ("PHI") that it collected and maintained from Plaintiffs and Class Members (collectively the "Private Information"), and its alleged failure to provide adequate and timely notice of the breach. Centerstone denies all liability.

After extensive arm's length negotiations with the assistance of an independent third-party mediator, the Parties have reached a settlement that is fair, adequate, and reasonable. The agreement provides for monetary relief to be paid by Centerstone to eligible claimants of a Class that includes all individuals who were mailed a notification by or on behalf of Centerstone on or about October 22, 2020 regarding the Data Breach. The monetary relief provides for reimbursements of ordinary and extraordinary expenses reasonably tied to the Data Breach up to $500 and $2,500, respectively. It further requires Centerstone to provide two years of Identity Theft Monitoring Services to valid claimants and to complete a series of ongoing improvements

to its data security systems that began in 2020 and will continue through 2022. Plaintiffs strongly believe the Settlement is favorable for the Settlement Class.[1]

Accordingly, and relying on the following Memorandum of Points and Authorities, the Declaration of Plaintiffs' Counsel David K. Lietz and attached exhibits filed herewith, Plaintiffs respectfully request the Court preliminarily approve the Parties' Settlement Agreement and enter an Order that:

(1) Certifies the Settlement Class for purposes of settlement only;

(2) Preliminarily approves the Settlement Agreement;

(3) Appoints Proposed Settlement Class Counsel, David K. Lietz and Gary M. Klinger of Mason Lietz & Klinger LLP, as Class Counsel;

(4) Appoints Plaintiffs Cody Kenney and Melissa Skinner as Class Representatives;

(5) Approves a customary Short Form Notice to be mailed to Settlement Class Members (the "Short Notice") in a form substantially similar to that attached as Exhibit A to the Settlement Agreement;

(6) Approves a customary Short Form Notice to be emailed to Settlement Class Members (the "Email Notice") in a form substantially similar to that attached as Exhibit B to the Settlement Agreement;

(7) Approves a customary Long Form Notice ("Long Notice") to be posted on the Settlement Website in a form substantially similar to the one attached as Exhibit C to the Settlement Agreement;

[1] *See* Decl. of David K. Lietz ¶ 10 ("Lietz Decl."), filed herewith. The Settlement Agreement ("Agreement" or "Agr.") and related exhibits are attached as an exhibit to the Lietz Decl.

(8) Directs Notice to be sent to the Settlement Class in the form and manner proposed as set forth in the Settlement Agreement and Exhibits A, B, and C thereto;

(9) Appoints KCC to serve as the Settlement Administrator;

(10) Approves the use of a Claim Form substantially similar to that attached as Exhibit D to the Settlement Agreement; and

(11) Sets a hearing date and schedule for Final Approval of the Settlement and consideration of Settlement Class Counsel's Motion for Award of Fees, Costs, Expenses, and Service Awards.

II. CASE SUMMARY

a. Initial Investigation and Communications

Centerstone is a healthcare services provider offering a range of mental health, substance use disorder treatment, pharmaceutical, and social services throughout Tennessee and other states, including Illinois, Indiana, Kentucky, and Florida. *See* Decl. of David K. Lietz ¶ 13.a ("Lietz Decl."), filed herewith. In the ordinary course of receiving treatment and health care services from Centerstone, patients are required to provide sensitive personal and private information such as: dates of birth; Social Security numbers; driver's license numbers; financial account information; payment card information; information relating to individual medical history; insurance information and coverage; information concerning an individual's doctor, nurse or other medical providers; photo identification; employer information; and other information that may be deemed necessary to provide care. *Id.* at ¶ 13.b.

Plaintiffs allege the Data Breach, which occurred between December 12 and December 16, 2019, occurred when unauthorized person(s) accessed email accounts of certain Centerstone

employees. *Id.* at ¶¶ 13.c–d. The email accounts accessed by the Data Breach included information such as: names, dates of birth, Social Security numbers, drivers' license or identification card numbers, medical diagnosis or treatment information, Medicaid and/or Medicare information, and/or health insurance information. *Id.* at ¶ 13.e. The compromised email accounts are thought to have contained messages and email attachments that included the Private Information of approximately 66,000 patients, including Plaintiffs' Private Information. *Id.* at ¶ 14.

b. Procedural Posture

As a result of the Data Breach, Plaintiffs filed their initial Complaint on November 20, 2020, bringing causes of action for: (1) Negligence; (2) Negligence *Per Se*; (3) Breach of Implied Contract in Fact; (4) Violations of the Tennessee Consumer Protection Act; (5) Intrusion Upon Seclusion / Invasion of Privacy; and (6) Unjust Enrichment. *Id.* at ¶ 15.

Soon after, the Parties began discussing the potential for early Settlement after an exchange of information necessary to evaluate the strengths and weaknesses of Plaintiffs' claims and Centerstone's defenses. *Id.* at ¶ 16. The Parties initially agreed to mediation with Judge Jay Gandhi (Ret.) of JAMS in late February 2021, and to conserve judicial and party resources, filed a Joint Motion to Reset the Initial Case Management Conference until after the mediation had been completed. *Id.* at ¶ 17. Although the mediation with Judge Gandhi was cancelled due to unforeseen administrative conflicts, the Parties rescheduled a mediation with Judge Wayne Andersen (Ret.) of JAMS, and filed a second Joint Motion to Reset the Initial Case Management Conference until after the mediation had been completed. *Id.* at ¶¶ 18–19.

c. History of Negotiations

To facilitate their negotiations, the Parties agreed to mediate Plaintiffs' claims with Hon. Wayne Andersen (Ret.) of JAMS. Judge Andersen is an experienced mediator with significant

experience in settling privacy and data breach cases. *Id*. at ¶ 21. In advance of mediation, Centerstone provided informal discovery related to the merits of Plaintiffs' claims and class certification, and the Parties discussed their respective positions on the merits of the claims and class certification. *Id*. at ¶ 22. This informal exchange of information, combined with Plaintiffs' individual research, and the relevant experience of Class Counsel, allowed counsel to fully evaluate the strengths and weaknesses of Plaintiffs' case, and to conduct informed settlement negotiations. *Id*. at ¶ 23.

On March 12, 2021, the Parties attended a full-day mediation via Zoom Video Conference with Judge Wayne Andersen (Ret.). *Id*. at ¶ 24. After a full day of arms' length negotiations, and with the assistance of Judge Andersen, the Parties agreed to a memorandum of understanding describing the essential terms of the Settlement Agreement. *Id*. at ¶ 25. On March 19, 2021, the Parties filed a Joint Notice of Settlement and Motion to Vacate all Deadlines, informing the Court that a Settlement had been reached and that the Parties would file the final agreement and motion for preliminary approval no later than April 30, 2021. *Id*. at ¶ 26. Over the next six weeks or so, the Parties diligently drafted, negotiated, and finalized the Settlement Agreement, Notice Forms, and agreed upon a Claims Administrator. *Id.* at ¶ 27.

Despite the grounds that exist for each of Plaintiffs' claims, which Centerstone denies, none are certain to resolve in Plaintiffs' favor on the merits. Further litigation would subject Plaintiffs to numerous risks, including the risk that they and the other Class Members get no recovery at all. The Settlement provides significant relief to Members of the Class and Plaintiffs strongly believe that it is favorable for the Settlement Class, fair, reasonable, adequate, and worthy of preliminary approval. *Id.* at ¶ 9.

III. SUMMARY OF SETTLEMENT

a. Settlement Class

The Settlement Class includes all individuals who were mailed a notification by or on behalf of Centerstone on or about October 22, 2020 regarding the Data Breach. *Id*. at ¶ 29.

b. Settlement Benefits

The Settlement negotiated on behalf of the Class provides for three separate forms of relief. *Id.* at ¶ 28. First, Centerstone will provide direct monetary relief to Class Members for reimbursement of actual ordinary and extraordinary expenses stemming from the Data Breach. *Id.* Second, Centerstone will provide Identity Theft Monitoring Services for up to two years for Settlement Class Members who submit a claim. *Id.* Further, Centerstone will provide equitable relief in the form of information security enhancements which have been implemented since 2020 and will continue to be implemented through 2022. *Id*.

The payments available to Settlement Class Members are divided into two separate categories. *Id*. at ¶ 30. The first category is to provide expense reimbursement for out-of-pocket expenses up to $500 per Class Member, 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; fees for credit reports, credit monitoring, or other identity theft insurance product purchased between October 22, 2020 and the date of the Preliminary Approval Order; up to four hours of documented lost time spent dealing with the Data Breach, *e.g.*, time spent dealing with replacement card issues, reversing fraudulent charges, rescheduling medical appointments and/or finding alternative medical care and treatment, retaking or submitting to medical tests, locating medical records, retracing medical history, and any other demonstrable form of disruption to medical care and

treatment (calculated at the rate of $15 per hour). *Id.* at ¶ 30.a. The second category of payments to Class Members is for reimbursement of more extraordinary expenses up to $2,500 per Class Member for monetary out-of-pocket losses claimed to have occurred as a result of Data Breach, incurred between December 12, 2019 and the end of the claims period. *Id.* at ¶ 30.b.

The Settlement also provides for Identity Theft Monitoring Services to be offered to Settlement Class Members. *Id*. at ¶ 31. Class Members who did not opt-in to the credit monitoring services offered by Centerstone in connection with the notice sent by or on behalf of Centerstone are eligible to claim two years of credit monitoring. *Id*. Class Members who elected to receive the initial year of monitoring offered by Centerstone are eligible to claim an additional year through the Settlement. *Id*. The Identity Theft Monitoring Services will include: (i) real time monitoring of the credit file at all three bureaus; (ii) dark web scanning with immediate notification of potential unauthorized use; (iii) comprehensive public record monitoring; (iv) medical identity monitoring; (v) identity theft insurance (no deductible); and (vi) access to fraud resolution agents to help investigate and resolve identity thefts. *Id*.

The additional equitable relief—provided for in the form of information security enhancements—will include third party security monitoring, third party logging, network monitoring, firewall enhancements, email enhancements, and equipment upgrades designed to better protect Plaintiffs' and Class Members' private information and personal health information in the future. *Id.* at ¶ 32. Centerstone began making these enhancements in 2020, and will continue to implement them through 2021 and 2022. *Id.*

The Settlement Benefits (excluding the equitable relief) are subject to a Maximum Payout of $1,500,000, which includes payments for claims made, cost of identity theft monitoring

services, Settlement Administration costs, service awards to the named Plaintiffs, and attorneys' fees and costs. *Id*. at ¶ 33.

The Settlement benefits are provided in exchange for a release of claims reasonably related to the Data Breach. *Id.* at ¶ 34.

c. The Notice and Claims Process

After reviewing bids from multiple providers, the Parties agreed to use KCC as the Notice Specialist and Settlement Administrator in this case. *Id.* at ¶ 35. The Notice and Claim Forms negotiated by the Parties are clear and concise, and inform Settlement Class Members of their rights and options under the Settlement, including detailed instructions on how to make a claim, object to the Settlement, or opt-out of the Settlement. *Id.* at ¶ 36, Exs. A, B, C, D. The current and agreed upon Notice Plan calls for direct and individual Notice to be provided to Settlement Class Members via email or mail to the email address or postal address provided when the Settlement Class Members conducted transactions with Centerstone. *Id.* at ¶ 37. Prior to mailing the Notice, the Settlement Administrator will update the addresses provided by Centerstone with the National Change of Address database. *Id*. at ¶ 38. Notice is to be completed by or before 30 days after entry of Preliminary Approval. *Id*. at ¶ 39. The Claims Administrator will conduct address searches and re-mail any Notices that are returned undeliverable. *Id.* at ¶ 40.

The Claims Administrator will also establish a dedicated Settlement Website and will maintain and update the website throughout the claim period, with the forms of Short Notice, Long Notice, and Claim Form approved by the Court, as well as the Settlement Agreement, contact information for Class Counsel, Centerstone's Counsel and the Administrator. *Id.* at ¶ 41. Settlement Class Members will be able to submit Claim Forms through the Settlement Website.

Id. The Claims Administrator will also make a toll-free help line available to provide Settlement Class Members with additional information about the Settlement. *Id.* at ¶ 42.

The timing of the claims process is 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 if they would like to opt-out or object. *Id.* at ¶ 43. Class Members will have 75 days from the completion of the Notice mailing to submit their Claim Form to the Claims Administrator, either by mail or online. *Id.* at ¶ 44. The Claims Administrator is given the authority to assess the validity of claims, and to ask for additional documentation. *Id.* at ¶ 45.

Any Class Member who wishes to opt-out of the Settlement will have until 45 days after the completion of Notice to provide written notice that they would like to be excluded from the Settlement Class. *Id.* at ¶ 46. The Request for Exclusion must include the name of the proceeding, the individual's full name, current address, personal signature, and the words "Request for Exclusion" or a comparable statement that the individual does not wish to participate in the Settlement at the top of the communication. *Id*. at ¶ 47.

Similarly, Class Members who wish to object to the terms of the Settlement Agreement must do so in writing, and send their objection the Settlement Administrator 45 days from the date on which Notice is completed. *Id.* at ¶ 48. The written objection must include (i) the name of the proceedings; (ii) the Settlement Class Member's full name, current mailing address, and telephone number; (iii) a statement of the specific grounds for the objection, as well as any documents supporting the objection; (iv) a statement as to whether the objection applies only to the objector, to a specific subset of the Class, or to the entire Class; (v) the identity of any attorneys representing the objector; (vi) a statement regarding whether the Settlement Class

Member (or his/her attorney) intends to appear at the Final Approval Hearing; and (vii) the signature of the Settlement Class Member or the Settlement Class Member's attorney. *Id.* at ¶ 49.

IV. LEGAL AUTHORITY

Federal Courts strongly encourage settlements, particularly in class actions and other complex matters where inherent costs, delays, and risks of continued litigation might otherwise outweigh any potential benefit the individual Plaintiff—or the class—could hope to obtain. *See Ohio Pub. Int. Campaign v. Fisher Foods, Inc.*, 546 F. Supp. 1, 6 (N.D. Ohio Apr. 27, 1982) (citing *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981)). A class action may not be settled however without notice of the proposed settlement to all settlement class members and the approval of the court. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–21 (1997) (citing Fed. R. Civ. P. 23(e)). Before granting final approval of a class action settlement, the Court must follow a three-step process. *Levell v. Monsanto Rsch. Corp.*, 191 F.R.D. 543, 550 (S.D. Ohio Feb. 7, 2000) (citing *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990)); *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986); *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983); *Bronson v. Bd. of Educ. of City Sch. Dist. of Cincinnati*, 604 F. Supp. 68, 71 (S.D. Ohio 1984); *see also Todd v. Retail Concepts, Inc.*, No. 3:07-0788, 2008 WL 3981593, at *2 (M.D. Tenn. Aug. 22, 2008). First, the Court must preliminarily approve the proposed settlement. Second, class members must be given notice of the proposed settlement. *Id.* And finally, a hearing must be held, after which the Court will decide whether the proposed settlement is fair, adequate, and reasonable, and consistent with the public interest. *Id.* This case is before the Court at the first, or preliminary approval, stage.

While courts have applied different standards at the preliminary approval stage, "it is clear the bar is lower for preliminary approval than it is for final approval." *Garner Props. & Mgmt.,*

LLC v. City of Inkster, 333 F.R.D. 614, 621 (E.D. Mich. Jan. 17, 2020). A settlement agreement should be preliminarily approved if it (1) "does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment to class representatives or of segments of the class, or excessive compensation for attorneys," and (2) "appears to fall within the range of possible approval." *Id.* (quoting *Sheick v. Auto. Component Carrier, LLC*, No. 09-14429, 2010 WL 3070130, at *11 (E.D. Mich. Aug. 2, 2010)); *see also Doe 1 v. Deja Vu Servs., Inc.*, No. 2:16-cv-10877, 2017 WL 490157, at *1 (E.D. Mich. Feb. 7, 2017) (same); *see also Berry v. Sch. Dist. of Benton Harbor*, 184 F.R.D. 93, 97 (W.D. Mich. 1998) ("Unless it appears that the compromise embodied in the agreement is illegal or tainted with collusion, the court must order that notice be given to the class of the proposed agreement and must order a fairness hearing") (citing *Williams v. Vukovich*, 720 F.2d at 921).

In making a preliminary assessment of the proposed settlement agreement, a Court's "intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 350–51 (N.D. Ohio 2001) (quoting *Officers for Just. v. Civ. Serv. Comm'n of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217, 103 S. Ct. 1219, 75 L. Ed. 2d 456 (1983)). A preliminary fairness assessment "is not to be turned into a trial or rehearsal for trial on the merits," for "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Id.* Rather, the Court is to conduct a threshold examination of the overall fairness and adequacy of the settlement in light of the likely outcome and the cost of continued litigation. *In re Inter-Op Hip*

Prosthesis Liab. Litig., 204 F.R.D. at 350–51 (citing *Ohio Pub. Int. Campaign v. Fisher Foods, Inc.,* 546 F. Supp. at 7).

V. ARGUMENT

a. The Settlement Class Should be Preliminarily Approved.

Plaintiffs here seek certification of a Settlement Class consisting of Plaintiffs and all individuals who were mailed a notification by or on behalf of Centerstone on or about October 22, 2020 regarding the Data Breach. *See* Lietz Decl. ¶ 29; *see also* Agr. ¶ 34. The *Manual for Complex Litigation (Fourth)* advises that in cases presented for both preliminary approval and class certification, the "judge should make a preliminary determination that the proposed class satisfies the criteria." § 21.632.

Because a court evaluating certification of a class action that settled is considering certification only in the context of settlement, the court's evaluation is somewhat different than in a case that has not yet settled. *Amchem Prods.*, 521 U.S. at 620. In some ways, the court's review of certification of a settlement-only class is lessened: as no trial is anticipated in a settlement-only class case, the case management issues inherent in the ascertainable class determination need not be confronted. *See id.* Other certification issues however, such as "those designed to protect absentees by blocking unwarranted or overbroad class definitions" require heightened scrutiny in the settlement-only class context "for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id*.

Under Rule 23 a party seeking certification of a class must demonstrate four things: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the

claims and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*., 722 F.3d 838, 850 (6th Cir. 2013) (citing Fed. R. Civ. P. 23(a)). Additionally, pursuant to Rule 23(b), Plaintiffs must also demonstrate that common questions of law or fact predominate over individualized issues, making the class device the superior mechanism for resolving the case. *Id*. at 851.

Class actions are regularly certified for settlement. In fact, similar data breach cases have been certified—on a *national* basis—including most recently the record-breaking settlement in *In re Equifax. See* Final J. & Permanent Inj., *In re Equifax, Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT (N.D. Ga. July 25, 2019), ECF No. 773; *see, also, e.g., In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482 (D. Minn. 2015); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig*., 851 F. Supp. 2d 1040 (S.D. Tex. 2012). This case is no different. Because the proposed Settlement Class meets all of the class action requirements under the Federal Rules of Civil Procedure, this Court should certify the class for purposes of settlement.

i. The proposed Class is sufficiently numerous.

While there is no fixed point where the numerosity requirement is met, as a general rule where a class contains at least forty (40) individuals, courts have recognized a rebuttable presumption that joinder is impracticable. *Davidson v. Henkel*, 302 F.R.D. 427, 436 (E.D. Mich. 2014) (noting that the modern trend is to require a minimum of 21 to 40 class members). Numbering approximately 66,000 individuals, the proposed Settlement Class substantial in size, and easily satisfies Rule 23's numerosity requirement. *See Daffin v. Ford Motor Co*., 458 F.3d 549, 552 (6th Cir. 2006) (recognizing that "while there is no strict numerical test, 'substantial' numbers usually satisfy the numerosity requirement"). Joinder of the 66,000 individuals whose

personal information was impacted by the Data Breach is clearly impracticable—thus the numerosity prong is satisfied.

ii. Questions of law and fact are common to the Class.

The threshold for meeting the commonality requirement of Fed. R. Civ. P. 23 is a low one. Commonality looks to the questions of law or fact among the class members generally, and seeks "to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see also* 1 *Newberg on Class Actions* § 3:26 (5th ed. 2018). Not all questions of law and fact raised need to be common across the class. *Garner Props. Mgmt., LLC v. City of Inkster*, 333 F.R.D. at 623. Class claims must be based on at least one common allegation "capable of class wide resolution—which means 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." *Wal-Mart Stores, Inc.*, 564 U.S. at 350.

Here, Plaintiffs can demonstrate numerous common issues exist. Plaintiffs allege Centerstone had a policy and practice of failing to adequately safeguard the records of Plaintiffs and Class Members. They further allege that Centerstone's data security safeguards at the time of the breach were common across the Class, and those applied to one Class Member did not differ from those safeguards applied to another.

Other specific common questions at issue include:

- Whether Centerstone unlawfully used, maintained, and/or disclosed Plaintiffs' and proposed Class Members' Personal Information;
- Whether Centerstone unreasonably delayed in providing notification of the Data Breach;

- Whether Centerstone failed to maintain reasonable security procedures and practices appropriate to the nature and scope of information compromised in the breach; and
- Whether Centerstone's conduct rose to the level of negligence.

These common questions, and others alleged by Plaintiffs in their Complaint, are central to the causes of action brought here and can be addressed on a class-wide basis. Thus, Plaintiffs have met the commonality requirement of Rule 23.

iii. Plaintiffs' claims and defenses are typical to those of the Settlement Class.

A plaintiff will satisfy the typicality requirement of Rule 23 where their "claim arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Beattie v. CenturyTel, Inc*., 511 F.3d 554, 561 (6th Cir. 2007). "In determining whether the requisite typicality exists, a court must inquire whether the interests of the named plaintiff are 'aligned with those of the represented group,' such that 'in pursuing his own claims, the named plaintiff will also advance the interests of the class members.'" *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. at 623 (quoting *In re Am. Med. Sys., Inc*., 75 F.3d 1069, 1082 (6th Cir. 1996)).

Plaintiffs' claims are typical of those of other Class Members because they and the other Class Members allege their Private Information was misused, disclosed, and/or inadequately safeguarded by Centerstone. Plaintiffs allege that in allowing—or not taking reasonable measures to prevent—the Data Breach, Centerstone caused them and other Class Members to live with the anxiety of not knowing if and when their most private health information could be made public. These claims arise out of the same legal theory and are typical of those of other Class Members, who were also subject to and notified of the Data Breach.

iv. Plaintiffs will adequately protect the interests of the Class.

The adequacy requirement of Rule 23 is satisfied where (1) the representative has common interests with unnamed members of the class, and (2) it appears that the representatives will vigorously prosecute the interests of the class through qualified counsel. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976).

Here, Plaintiffs are Members of the Class who allege the same injuries and seek, like other Class Members, both reimbursement for costs incurred due to the Data Breach and protections from potential negative consequences of the Data Breach, as well as assurances that the Private Information that Centerstone holds is and will remain better safeguarded than it was at the time of the Data Breach. As such, their interests and the interests of their counsel are not inconsistent with those of other Class Members.

Further, counsel for Plaintiffs have decades of combined experience as vigorous class action litigators and are well suited to advocate on behalf of the Class. *See* Lietz Decl. ¶ 4–10, Ex. 2.

v. Common issues predominate over individualized ones, and class treatment is superior to individualized litigation.

Common questions of law and fact predominate here because the most significant aspects of the case arise out of a common nucleus of operative facts and can be resolved for all Settlement Class Members. *See* Fed. R. Civ. P. 23(b)(3); *see also Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352–53 (6th Cir. 2011). By the very class definition, each of the Settlement Class Members' private information was potentially impacted by the same Data Breach for which Centerstone sent notice. As such, any claims of Class Members arise out of the same common nucleus of operative facts—the Data Breach and the circumstances that both allowed it to happen and led to the delay in notice.

To meet the superiority prong for class certification, a plaintiff must demonstrate that a class action is superior to other available methods for fairly and efficiently adjudicating this controversy. Fed. R. Civ. P. 23(b)(3). Implied within the requirement of superiority is a need that all class members be ascertainable, so that they can be notified of the action and any settlement. *See Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc*., 863 F.3d 460, 466 (6th Cir. 2017). Here, because all claims on behalf of Plaintiffs and approximately 66,000 Class Members arise out of the same Data Breach, and Centerstone has *already* provided individualized notification of the Data Breach, Class Members are easily ascertainable, and a class action is vastly superior to attempting to litigate each Class Member's claims individually.

b. The Settlement Terms are Fair, Adequate, and Reasonable.

At the preliminary approval stage, the Court does not finally decide whether the settlement is fair and reasonable. *See In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. at 337 (explaining that preliminary approval "is only the first step" in a process which may or may not result in final approval of a settlement). Rather, the Court must simply determine whether the settlement is fair enough that it is worthwhile to expend the effort and costs associated with sending potential class members notice and processing opt-outs and objections. *See* 1 *Newberg on Class Actions* § 13:10 (5th ed. 2018).

Under Rule 23(e)(2), in order to give a settlement final approval, the court must consider whether the proposed settlement is "fair, reasonable, and adequate after considering whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate; and (D) the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(A)–(D). In determining whether the relief provided is adequate, Courts must consider: (i) the costs, risks, and

delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

At the preliminary approval stage, courts need not make a final determination of every factor. While the exact factors examined at the preliminary approval stage vary, approval is often granted where a settlement (i) has potential for final approval as being fair, adequate and reasonable; (ii) is the product of serious, informed, arms-length non-collusive negotiations; (iii) has no obvious deficiencies; (iv) does not improperly grant preferential treatment to Class Representatives; (v) falls sufficiently within the range of possible approval; and (vi) does not disclose grounds to doubt its fairness. *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. at 621; *see also Bailey v. Verso Corp*., 337 F.R.D. 500, 506 (S. D. Ohio Feb. 22, 2021) (noting regular consideration of similar factors on preliminary approval) (internal quotation marks omitted); *Thacker v. Chesapeake Appalachia, L.L.C.*, 259 F.R.D. 262, 270 (E.D. Ky. 2009) (same). Approval of a class settlement is discretionary, and a Court's decision will only be upended upon a showing of an abuse of discretion. *Robinson v. Shelby Cnty. Bd. of Educ.*, 566 F.3d 642, 647 (6th Cir. 2009); *Laskey v. UAW*, 638 F.2d 954, 957 (6th Cir. 1981).

The Agreement reached by Parties here meets the standards set forth by Federal Rules of Civil Procedure and Courts in this Circuit, and warrants preliminary approval.

i. <u>The Settlement Agreement is the result of informed, non-collusive, arm's length negotiations between the Parties.</u>

Courts recognize that arm's-length negotiations conducted by competent counsel are prima facie evidence of fair settlements. "A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 *McLaughlin on Class Actions* §

6:7 (8th ed. 2011). Indeed, settlements are regularly granted approval where a court find that they are the product of informed, non-collusive, arm's-length negotiations. *See In re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000, 2011 WL 3878332, at *2 (E.D. Tenn. Aug. 31, 2011) (finding a settlement negotiated by able experienced lawyers with the help of a capable mediator was negotiated at "arm's length" and warranted approval); *Bronson v. Bd. of Educ. of City Sch. Dist. of Cincinnati*, 604 F. Supp. at 78 (approving settlement where there was no hint of collusion in the negotiating process).

The settlement here is the result of intensive arm's-length negotiations between attorneys experienced in both class actions generally, and data breach cases in particular. *See* Lietz Decl. ¶¶ 4–10, Ex. 2. The agreement was reached with the assistance of retired judge and respected mediator Hon. Wayne Andersen (Ret.), and was only finalized after a full-day mediation and weeks of post-mediation negotiations. Lietz Decl. ¶¶ 21–27. As such, this factor weighs in favor of preliminary approval.

ii. The Settlement Agreement will likely be approved as fair, reasonable, and adequate at Final Approval.

1. The Settlement provides significant relief for real harms, as well as protection against the risk of further harm for Settlement Class Members.

The Settlement guarantees Class Members relief for real harms and assurance that they are less likely to be subject to similar breaches due to Centerstone's data security systems in the future. Not only can Plaintiffs and Class Members be reimbursed for costs they incurred related to the Data Breach and make a claim for two-years of Identity Theft Monitoring Services, but, due to the equitable relief provided for in the Settlement, they can rest assured that Centerstone will have increased ability to protect their personal information and private health information from the risk of similar data incidents in the future. Expense reimbursement will run up to $500 per person for

standard expenses delineated in the Settlement agreement and up to $2,500 per person for other extraordinary expense reimbursements also described in the Settlement Agreement. *See* Lietz Decl. ¶ 30; *see also* Agr. ¶¶ 39.a–b, 43, 52.

This Settlement Agreement includes terms within the range of those approved by other courts for similar data breaches. *See, e.g.,* Order Granting Final Approval, *Fulton-Green v. Accolade, Inc*., No. 2:18-cv-00274 (E.D. Pa. Sept. 24, 2019), ECF No. 39 (granting approval of data breach class action settlement providing for expense reimbursement up to $1,500 per class member, and increased cyber security measures of undisclosed worth for two years following the Data Incident); Order & J., *Mowery v. Saint Francis Healthcare Sys.*, No. 1:20-cv-00013 (E.D. Mo. Dec. 22, 2020), ECF No. 43 (approving settlement in healthcare data breach matter providing for up to $180 in reimbursements per class member, as well as one-year credit monitoring and identity theft restoration services).

This proposed Settlement provides full, fair, and adequate compensation for any actual injuries sustained as a consequence of the Data Breach. Moreover, the substantial and immediate benefits achieved by the Settlement avoid the risks, uncertainties, and delays of continued litigation. If this lawsuit were to continue, Plaintiffs and Class Members would face a number of difficult challenges, including surviving a motion to dismiss, obtaining class certification, and maintaining certification through trial and likely motions for summary judgment. Thus, absent a settlement, Plaintiffs face serious obstacles in this lawsuit. This is another indication that the proposed Settlement is fair, reasonable, and adequate and should be approved.

2. Continued litigation will result in increased cost, complexity, and substantial risk for Plaintiffs and Settlement Class Members.

The value achieved through the Settlement Agreement is guaranteed, where chances of prevailing on the merits are uncertain. While Plaintiffs strongly believe in the merits of their case,

they also understand that Centerstone will assert a number of potentially case-dispositive defenses. 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(RMB)(RLE), 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). Class certification is another hurdle that would have to be met—and one that been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013). Because the "legal issues involved in [in data breach litigation] are cutting-edge and unsettled . . . many resources would necessarily be spent litigating substantive law as well as other issues." *In re Target Corp. Customer Data Sec. Breach Litig*., No. 14-2522 (PAM/JJK), 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015).

While Plaintiffs are confident in the merits of their claims—it is obvious that their success at trial is far from certain. Through the Settlement, Plaintiffs and Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

3. Experienced Counsel support Settlement.

Despite the early stage of litigation, Plaintiffs here were able to complete an independent investigation of the facts to reach a full understanding of the value of the case, as well as the attendant risks of continued litigation. Lietz Decl. ¶¶ 11–14. It is the strong opinion of proposed Settlement Class Counsel that the Settlement presents a favorable result for the Class. *Id.* at ¶ 9.

iii. The Settlement Agreement has no obvious deficiencies.

While prior to the Final Approval Hearing Plaintiffs will submit a formal Motion for Approval of Attorneys' Fees, Costs, and Plaintiffs' Service Awards, below is a brief summary and explanation of why the fees, costs and service award Plaintiffs intend to seek are reasonable and

should be approved. In short, the fees and service awards requested are reasonable, well withing the range of those accepted by Sixth Circuit Courts, and should be preliminarily approved.

1. Class Representatives' requested service award is reasonable and does not constitute improper preferential treatment.

While the Sixth Circuit has not explicitly approved the practice of providing service awards (also referred to as "incentive" awards), they are regularly approved to the extent they are not so large as to create a "divergence of interests between the named representatives and the class." *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. at 621 (citing *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013). The Sixth Circuit has raised concern where the named plaintiff's service award leaves them no reason to pay any attention to the mechanism by which the class members must make their recovery. "The propriety of incentive payments is arguably at its height when the award represents a fraction of a class representative's likely damages; for in that case the class representative is left to recover the remainder of his damages by means of the same mechanisms that unnamed class members must recover theirs." *In re Dry Max Pampers Litig.*, 724 F.3d at 722. Still, courts in this Circuit regularly award service awards to named plaintiffs. *See, e.g., Lonardo v. Travelers Indem. Co.*, 706 F. Supp 2d 766, 787 (S.D. Ohio Mar. 31, 2010) (awarding each of three class representatives $5,000).

Class Representatives here will seek a service award of $2,500 each for their contributions to the class. Lietz Decl. ¶ 52. The service award is meant to compensate Plaintiffs for their efforts which include maintaining contact with counsel, assisting in the investigation of the case, remaining available for consultation throughout mediation and for answering counsel's many questions. *Id*. at ¶ 53. The reward that they will request does not run afoul of Sixth Circuit guidance: it is *less than* the up to $3,000 recoverable by each Class Member, and the Class Representatives will still have to go through the same claims process as the Class Members to

receive reimbursement for expenses and Identity Theft Protection Services. As such, this factor weighs in support of preliminary approval.

2. Attorneys' fees requested are within the range of those regularly accepted by Sixth Circuit Courts.

Plaintiffs here intend to seek $410,000 in attorneys' fees and costs—27.3% of the potential gross Settlement. This falls well within the ordinary range for attorneys' fees in approved class action settlements. *See In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532–33 (E.D. Mich. 2003) (noting "the ordinary range for attorneys' fees [is] between 20%-30%"). As such, the requested attorneys' fees do not provide justification for denial of preliminary approval.

c. The Proposed Settlement Administrator Will Provide Adequate Notice.

To satisfy due process, notice to class members must be the best practicable, and reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Fed. R. Civ. P. 23(e); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Notice provided to the class must be "the best practicable under the circumstances" and sufficient to allow class members "a full and fair opportunity to consider the proposed decree and develop a response." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *Williams v. Vukovich*, 720 F.2d at 921.

The Notice and Claim Forms negotiated by the Parties are clear and concise, and inform Settlement Class Members of their rights and options under the Settlement, including detailed instructions on how to make a claim, object to the Settlement, or opt-out of the Settlement. *Id.* at ¶¶ 35–39, Exs. 1A, 1B, 1C. Settlement Class Members will receive direct and individual Notice of the Settlement via email to the email address provided when the Settlement Class Members conducted transactions with Centerstone, and where no email address was provided, via postal address provided when the Settlement Class Members conducted transactions with Centerstone.

Id. at ¶ 37. After receiving addresses for Class Members, the Settlement Administrator will update the addresses provided by Centerstone with the National Change of Address database summary notice to each of the approximate 66,000 Class Members. *Id.* at ¶ 38. Where postcards are returned undeliverable, the Settlement Administrator will process the undeliverable mail, conduct address searches and re-mail the postcards. *Id.* at ¶ 40. The Settlement Administrator will also maintain a Settlement Website on which Class Members can obtain additional information regarding the case, access case documents, review answers to frequently asked questions, access Notice documents, and submit Claim Forms. *Id.* at ¶ 41. Additionally, the Settlement Administrator will maintain a toll-free telephone line to handle any client inquiries and fulfill all additional Notice packet requests. *Id*. at ¶ 42.

Plaintiffs have negotiated a Notice Program that is reasonably calculated under all the circumstances to apprise Class Members of the pendency of the action and afford them an opportunity to present their objections. The combination of the direct mailing to each and every Class Member as well as the 75 days provided to make a claim ensures maximum participation. As such this Court should approve the Notice Program negotiated by Plaintiffs.

VI. CONCLUSION

Plaintiffs have negotiated a fair, adequate, and reasonable Settlement that will provide Class Members with both significant monetary and equitable relief. For and the above reasons, Plaintiffs respectfully request this Court grant Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and allow Notice to be sent to the Class.

Dated: April 30, 2021

Respectfully submitted,

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