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' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Pursuant to Rule 23(e), Plaintiffs Cody Kenney and Melissa Skinner ("Plaintiffs") submit this Memorandum in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

I. INTRODUCTION

On May 7, 2021, this Court preliminarily approved a class action settlement between Plaintiffs and Defendants Centerstone of America, Inc., Centerstone of Indiana, Inc., and Centerstone of Tennessee, Inc. ("Centerstone" or "Defendants"). Plaintiffs' and Class Counsel's efforts created a Settlement Fund of $1,500,000 to cover: (1) up to $3,000 per Settlement Class Member in reimbursements for ordinary expenses, extraordinary expenses, and lost time related to the Data Incident; (2) up to two years of Identity Theft Monitoring Services; and (3) all court approved attorneys' fees, costs, and Plaintiffs' Service Awards. In addition to the benefits described above, the Settlement Agreement provides that Centerstone will implement equitable relief for Settlement Class Members in the form of data security enhancements designed to better protect Settlement Class Members' data in the future.

Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement only after extensive investigation, negotiations, and an all-day mediation with respected JAMS mediator Judge Wayne Andersen (Ret.). 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 and email. The Notice achieved a reach of approximately 94.9% and provided Settlement Class Members with information regarding how to reach the Settlement Website, make a claim, and how to opt-out or object to the Settlement. Out of approximately 63,490 Settlement Class Members, only six have sought to exclude themselves from the Settlement, and *zero* have objected. The Claims Period is still open, and will run through August 21, 2021.

II. CASE SUMMARY[1]

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. Decl. of David K. Lietz in Supp. of Pls.' Mot. for Prelim. Approval of Class Action Settlement ¶ 13.a ("Lietz MPA Decl."), ECF No. 32-2. 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.* ¶ 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.* ¶ 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.* ¶ 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.* ¶ 14.

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[1] Sections II and III have been largely adopted from the Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, filed April 30, 2021 at ECF No. 32-1.

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.* ¶ 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.* ¶ 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.* ¶ 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.* ¶¶ 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*. ¶ 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*. ¶ 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*. ¶ 23.

On March 12, 2021 the Parties attended a full-day mediation via Zoom Video Conference with Judge Wayne Andersen (Ret.). *Id.* ¶ 24. After a full day of arm's-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.* ¶ 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.* ¶ 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.* ¶ 27. The Court issued an Order Preliminarily Approving the Settlement on May 7, 2021.

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 inal approval. *Id.* ¶ 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.* ¶ 29. The Class is made up of approximately 63,490 individuals. Decl. of Andrew Perry Re: Notice Procedures ¶ 5 ("Notice Decl."), filed herewith.

B. Settlement Benefits

The Settlement negotiated on behalf of the Class provides for three separate forms of relief. Lietz MPA Decl. ¶ 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*. ¶ 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.* ¶ 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.* ¶ 30.b.

The Settlement also provides for Identity Theft Monitoring Services to be offered to Settlement Class Members. *Id*. ¶ 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.* ¶ 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*. ¶ 33.

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

C. Attorneys' Fees, Costs, and Plaintiffs' Service Awards

By separate motion, Plaintiffs sought 27 and 1/3% of the Settlement Fund—$410,000—in combined attorneys' fees and costs, as well as a Service Award in the amount of $2,500 to each of the Representative Plaintiffs. *See* Pls.' Mot. for Att'ys' Fees, Costs & Service Awards ("Fees Mot."), ECF No. 39; *see also* Decl. of David K. Lietz in Supp. of Pls.' Fees Mot. ("Lietz Fees Decl."), ECF No. 39-1.

D. The Notice and Claims Process

In accordance with the Preliminary Approval Order, the Parties engaged KCC as the Notice Specialist and Settlement Administrator in this case.

1. <u>CAFA Notice</u>

In compliance with the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, KCC compiled a CD-ROM containing required documents and a cover letter (collectively, the "CAFA Notice Packet"). Notice Decl. ¶ 2. On May 10, 2021, KCC caused 61 CAFA Notice Packets to be mailed via Priority Mail to the parties provided, *i.e.*, the U.S. Attorney General, the Attorneys General of each of the 50 states in which Settlement Class Members reside and the District of Columbia, and the Office of the Comptroller of the United States. *Id.* ¶ 3. As of the date of filing, KCC has not received any responses from the recipients of the CAFA Notice Packet. *Id.* ¶ 4.

2. <u>Class Notice</u>

On May 10, 2021, KCC received a list of 63,499 persons identified as the Settlement Class List. The Settlement Class List included name, address, and email address. *Id.* ¶ 5. KCC formatted the mailing list for mailing purposes, removed duplicate records, and processed the names and addresses through the National Change of Address Database ("NCOA") to update any addresses on file with the United States Postal Service ("USPS"). *Id.* KCC identified nine duplicate records

and removed them for notice purposes for a total of 63,490 unique Settlement Class Members. KCC updated its proprietary database with the Settlement Class List. *Id.*

On June 7, 2021, KCC caused the Postcard Notice to be printed and mailed to the 60,524 names and mailing addresses in the Settlement Class List who did not have an email address. *Id.* ¶ 6, Ex. A. Of the 60,524 Postcard Notices sent, 322 were returned with forwarding addresses, and 17,258 were retuned with undeliverable addresses. *Id.* ¶¶ 7–8. KCC reissued Postcard Notices to the 322 forwarding addresses and to updated addresses for 10,693 Settlement Class Members located through credit bureau and/or other public source database address searches. *Id.*

On June 7, 2021, KCC sent an Email Notice to 2,966 emails for Settlement Class Members for whom Defendants provided a last-known email address. *Id.* ¶ 10, Ex. B. There were 424 Settlement Class Members whose Email Notice was undeliverable. *Id.* ¶ 10. After utilizing a search for the last-known email address, KCC sent also sent an Email Notice to 3,308 emails associated with Settlement Class Members whose Postcard Notice was returned undeliverable and for whom they could not find a new mailing address. *Id.* ¶¶ 9, 12. KCC estimates that the Direct Mail and Email Notice reached an estimated 94.9% of the Class. *Id.* ¶ 13.

In addition to the Direct Mail and Email Notice, KCC also established a Settlement Website and Toll-Free telephone hotline to serve as additional resources for Settlement Class Members. *Id.* ¶¶ 14–15. The Settlement Website, www.centerstonesettlement.com, is dedicated to this matter to provide information to the Settlement Class Members, to answer frequently asked questions and file a claim. *Id.* ¶ 14. The website URL was set forth in the Notice. *Id.* Visitors of the Settlement Website can download copies of the Notice and other case-related documents. *Id.* The toll-free telephone hotline, 1-866-204-9286, was established and is maintained for potential Settlement Class Members to call and obtain information about the Settlement, request a Notice, and/or seek

assistance from a live operator during regular business hours. *Id.* ¶ 15. The telephone hotline became operational on June 7, 2021, and is accessible 24 hours per day, 7 days per week. *Id.*

3. Claims, Exclusions, and Objections

Settlement Class Members had until July 22, 2021 to either exclude themselves from or object to the Settlement. *Id.* ¶¶ 16–17. As of July 23, 2021, KCC has received six requests for exclusion. *Id.* ¶ 16, Ex. C. As of the same date, KCC has received no objections to the Settlement. *Id.* ¶ 17.

As of July 23, 2021, 577 claims have been submitted. *Id.* ¶ 18. The Claims Period will remain open through August 21, 2021. *Id.*

E. Claims Processing and Payment

Class Members have until August 21, 2021 to submit a claim for ordinary and/or extraordinary expense reimbursements, as well as for credit monitoring and identity theft restoration services. Prelim. Approval Order, ECF No. 35. The Settlement Administrator is responsible for reviewing, determining the validity of, and processing all claims submitted by Settlement Class Members. Settlement Agreement ¶ 58 ("Agr."), ECF No. 34. After the Settlement is approved and the time for any appeal has passed, the Settlement Claims Administrator will also be responsible for processing and transmitting Settlement Class Member payments and providing enrollment codes for those Class Members who made a claim for credit monitoring services. *Id.*

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 1982) (citing *Franks*

v. Kroger Co., 649 F. 2d 1216, 1224 (6th Cir. 1981)). Before approving a settlement, however, a district court must conclude that it is 'fair, reasonable, and adequate.'" *Bowman v. Art Van Furniture, Inc.*, No. 17-11630, 2018 WL 6445389, at *3 (E.D. Mich. Dec. 10, 2018) (quoting *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007) ("*Int'l Union*") (citing Fed. R. Civ. P. 23)); *see also* Fed. R. Civ. P. 23(e)(2). "In assessing the settlement, the Court must determine 'whether it falls within the range of reasonableness, not whether it is the most favorable possible result in the litigation." *Raden v. Martha Stewart Living Omnimedia, Inc.*, No. 4:16-cv-12808, 2019 WL 3530822, at *2 (E.D. Mich. Aug. 2, 2019) (internal quotations omitted) (citing *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 (N.D. Ga. 1993)). The Court must also determine whether the Notice provided satisfies the requirements of Rule 23. *Raden*, 2019 WL 3530822, at *2.

V. ARGUMENT

A. The Settlement Administrator Provided Notice Pursuant to this Court's Preliminary Approval Order and Satisfied Due Process as Well as Rule 23.

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 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 909, 921 (6th Cir. 1983). Notice to the settlement class should include individual notice to all members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). The claims rate should not be viewed as a reflection on the adequacy of the notice. *See In re Packaged Ice Antitrust Litig.*, 322 F.R.D. 276, 290–91 (E.D. Mich. 2017) (citing *In re*

Serzone Prods. Liab. Litig., 231 F.R.D. 221, 235–36 (S.D.W. Va. 2005) (concluding that a claims rate of 6,524 claimants out of a settlement class that could have potentially included millions did not demonstrate the inadequacy of the notice, noting that "many factors contribute to the claims response rate," and observing that "claims response levels will tend to vary with the circumstances, types of class notices employed, and size of individual claims involved in each case") (internal quotation marks and citations omitted)).

First, the content of the Notice adequately informed Settlement Class Members of their rights and obligations under the Settlement. The Direct Mail and Email Notice contained a summary of key terms of the Settlement Agreement and directed Settlement Class Members to the Settlement Website and Toll-Free telephone hotline where they could obtain additional information. Notice Decl., Exs. A–B. The Settlement Website, www.centerstonesettlement.com, is dedicated to this matter to provide information to the Settlement Class Members, to answer frequently asked questions and file a claim. *Id.* ¶ 14. The website URL was set forth in the Notice. *Id.* Visitors of the Settlement Website can download copies of the Notice and other case-related documents. *Id.* The toll-free telephone hotline, 1-866-204-9286, was established and is maintained for potential Settlement Class Members to call and obtain information about the Settlement, request a Notice, and/or seek assistance from a live operator during regular business hours. *Id.* ¶ 15. The telephone hotline became operational on June 7, 2021, and is accessible 24 hours per day, 7 days per week. *Id.*

Moreover, the Settlement Administrator—with the assistance of the Parties—has taken extraordinary measures to ensure individual Notice reached as many of the Settlement Class Members as possible. Out of 63,490 Class Members, KCC initially sent Notice via email to the 2,966 individuals for whom Defendants provided a last-known email address, and mailed Postcard

Notices to the 60,524 individuals who did not have an email address. *Id.* ¶¶ 6, 10, Exs. A–B. Of the 60,524 Postcard Notices initially sent, 322 were returned with forwarding addresses, and immediately remailed. *Id.* ¶ 7–8. Using credit bureau and/or other public source database address searches, KCC was able to update addresses for 10,693 individuals whose Postcard Notices were returned as undeliverable and remail. *Id.* ¶¶ 7–8. Upon authorization of the Parties, KCC utilized a reverse search to locate email addresses for 3,308 individuals whose Postcard Notices were returned as undeliverable and for whom KCC could not locate an updated mailing address. *Id.* ¶ 12.

These extensive efforts resulted in direct and individual Notice reaching an estimated **94.9% of the Class**—a deliverable rate that exceeds the requirements of due process and Rule 23. *Id.* ¶ 13; *see also Bowman v. Art Van Furniture*, 2018 WL 6445389, at *3 (finding a combined email and mail notice program with a deliverable rate of 92.6% satisfied the requirements of Rule 23 and due process).

Accordingly, the Notice program should be approved as meeting the requirements of due process and Rule 23.

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

Federal Rule 23(e)(2) requires certain factors to be considered by a court before granting final approval of a class action settlement: (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).

Before the 2018 revisions to Rule 23(e), the Sixth Circuit had developed its own list of factors for consideration in determining whether to grant final approval of a class action settlement:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Int'l Union, 497 F.3d at 631; *see also UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). The court may choose to consider only those factors that are relevant to the settlement at hand. *In re Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2018 WL 7108016 (E.D. Mich. Nov. 6, 2018); *see also Grenada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205–06 (6th Cir. 1992).

While there is some overlap between the two sets of standards, as is consistent with practice in the Middle District of Tennessee, Plaintiffs will examine the Settlement for satisfaction of both the Rule 23 factors, as well as the factors historically considered by Sixth Circuit Courts. *See e.g.*, *Hosp. Auth. of Metro. Gov't of Nashville & Davidson Cnty. v. Momenta Pharms., Inc.*, No. 3:15-cv-01100, 2020 WL 3053467 (M.D. Tenn. May 20, 2020) (slip op.) (granting final approval of class action settlement after considering both the requirements set forth in Rule 23 and factors traditionally enumerated by the Sixth Circuit).

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

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1. <u>The Settlement Agreement Meets the Requirements of Rule 23 and Should be Approved.</u>

a. *Class Representatives and Class Counsel have adequately represented the Class.*

The adequacy requirement of Rule 23(e)(2)(A) 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). In the context of settlement, this includes consideration of the nature and amount of discovery undertaken in the litigation. *See* Fed. R. Civ. P. 23(e)(2)(A) advisory committee's note to 2018 amendment. Formal discovery is not required: the relevant inquiry with respect to this factor is whether a plaintiff has "obtained a sufficient understanding of the case to gauge the strengths and weaknesses of the claims and adequacy of the settlement." *N.Y. State Tchrs.' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 236 (E.D. Mich. 2016) (citing *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1015 (S.D. Ohio 2001)); *Sheick v. Auto. Component Carrier LLC*, No. 2:09-cv-14429, 2010 WL 4136958, at *19 (E.D. Mich. Oct. 18, 2010) (quoting *Newby v. Enron Corp.*, 394 F.3d 296, 306 (5th Cir. 2004)); *see also Macy v. GC Servs. Ltd. P'ship*, No. 3:15-cv-819, 2019 WL 6684522, at *2 (W.D. Ky. Dec. 6, 2019) (slip op.).

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 Fees Decl. ¶ 2–3. The Settlement was only reached after Class Counsel had completed an extensive investigation of the case and Centerstone had provided informal discovery related to the merits of Plaintiffs' claims. Lietz MPA Decl. ¶ 22. The informal exchange of information, combined with Plaintiffs' individual research and the relevant experience of Class Counsel, allowed Class Counsel to fully evaluate the strengths and weaknesses of Plaintiffs' case and to conduct informed settlement negotiations. Lietz MPA Decl. ¶ 23.

Accordingly, the Settlement meets the requirements of Rule 23(e)(2)(A).

b. The proposal was negotiated at arm's length.

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 "arms length" and warranted approval); *Bronson v. Bd. of Educ. of City Sch. Dist. of Cincinnati*, 604 F. Supp. 68, 78 (S.D. Ohio June 22, 1984) (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 MPA Decl. ¶¶ 4–10, Ex. 2. The Agreement was reached with the assistance of retired federal judge and

respected mediator Hon. Wayne Andersen (Ret.) and was only finalized after a full-day mediation and weeks of post-mediation negotiations. Lietz MPA Decl. ¶¶ 21–27. As such, this Settlement meets the requirements of Rule 23(e)(2)(B) and should be approved.

c. The relief provided for the Class is adequate.

Fed. R. Civ. P. 23(e)(2)(c) requires examination of the relief provided by the Settlement. The Settlement negotiated on behalf of the class provides for significant relief. The Settlement, if approved, will create a benefit of $1,500,000 from which Settlement Class can make a claim for up to $500 per person in ordinary expense reimbursements and lost time, $2,500 per person in extraordinary expense reimbursements, and up to 24-months of credit monitoring and Identity Theft Protection Services. Lietz MPA Decl. ¶ 33. In addition to the $1,500,000 Fund, since 2020 and continuing through 2022, Centerstone will implement data security enhancements designed to increase the safety of Plaintiffs' and Class Members' PII and PHI. *Id*. ¶ 32.

The relief provided compares favorably with other settlements finally approved in similar healthcare data breach cases. *See, e.g.*, *Mowery v. Saint Francis Healthcare Sys.*, No. 1:20-cv-00013-SPC (E.D. Mo. Dec. 22, 2020) (providing up to $280 in value to Settlement Class Members in the form of: reimbursement up to $180 of out of pocket expenses and time spent dealing with the data breach; credit monitoring services valued at $100; and equitable relief in the form of data security enhancements); *Baksh v. IvyRehab Network, Inc.*, No. 7:20-CV-01845 (S.D.N.Y. Jan. 27, 2021) (providing up to $75 per class member out of pocket expenses incurred related to the data breach and $20 reimbursement for lost time, with payments capped at $75,000 in aggregate; credit monitoring for claimants; and equitable relief in the form of data security enhancement); *Bailey v. Grays Harbor Cnty. Pub. Hosp. Dist.*, No. 20-2-00217-14 (Wash. Super. Ct. Grays Harbor Cnty. May 27, 2020) (providing up to $210 per class member for reimbursement of ordinary expenses

and time spent dealing with the data breach, up to $2500 for extraordinary losses, and equitable relief in the form of security enhancements valued at no less than $480,000); *see also* 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 non-healthcare related 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).

(i) The costs, risks, and delay of trial and appeal weigh in favor of approval.

The relief provided for by the Settlement Agreement is significant, especially in light of the costs, risks, and delay of further litigation. 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. 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.

(ii) The effectiveness of any proposed method of distributing relief to the Class, including the method of processing Class Member claims, is objective, efficient, and fair.

As described in Section III.C, *supra*, all Class Members have until August 20, 2021 to submit a claim for ordinary and/or extraordinary expense reimbursements, as well as for credit monitoring and Identity Theft Restoration Services. Prelim. Approval Order, ECF No. 35. The Settlement Administrator is responsible for reviewing, determining the validity of, and processing all claims submitted by Settlement Class Members. Agr. ¶ 58. After the Settlement is approved and the time for any appeal has passed, the Settlement Claims Administrator will also be responsible for processing and transmitting Settlement Class Member payments and providing enrollment codes for those Class Members who made a claim for credit monitoring services. *Id.*

As such, the Settlement provides for effective processing and distribution of relief and should be approved.

(iii) The attorneys' fees, costs, and Service Awards that Plaintiffs have requested are fair and reasonable.

On July 7, 2021, Plaintiffs moved for an award of attorneys' fees and costs equal to 27 and 1/3% of the Settlement Fund, as well as Service Awards in the amount of $2,500 to each of the Representative Plaintiffs. As discussed at length in Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards and Memorandum in Support at ECF No. 39, Plaintiffs' requests are reasonable and in line with those regularly granted by Sixth Circuit Courts. *See Hosp. Auth. of Metro. Gov't of Nashville & Davidson Cnty.*, 2020 WL 3053468 (awarding one-third fee); *Schuh v. HCA Holdings, Inc.*, No. 3:11-CV-01033, 2016 WL 10570957, at *1 (M.D. Tenn. Apr. 14, 2016)

(awarding 30% fee); *Garden City Emps.' Ret. Sys. v. Psychiatric Sols., Inc*., No. 3:09-CV-00882-WJH, 2015 WL 13647397, at *1 (M.D. Tenn. Jan. 16, 2015) (awarding 29% fee); *Fitzgerald v. P.L. Mktg., Inc*., No. 2:17-cv-02251, 2020 WL 3621250 (W.D. Tenn. July 2, 2020) (approving fees equal to 33 and 1/3% of the $1,575,000 settlement fund); *In re Se. Milk Antitrust Litig*., No. 2:07-cv-208, 2012 WL 12875983, at *2 (E.D. Tenn. July 11, 2012) (collecting cases and noting that a 33.33 percent attorney's fee "is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit"); *see also Fitzgerald v. P.L. Mktg., Inc.*, 2020 WL 3621250, at *11 (approving service award of $7,500 to plaintiffs who participated in client interviews and produced relevant documents); *Salinas v. U.S. Xpress Enters., Inc.*, No.1:13-cv-00245, 2018 WL 1477127, at *10 (E.D. Tenn. Mar. 8, 2018) (collecting cases in which courts approved service payments to name plaintiffs between $7,500 and $10,000); *Osman v. Grube, Inc.*, No. 3:16-cv-00802, 2018 WL 2095172, at *2 (N.D. Ohio May 4, 2018) (approving $7,500 service payment to named plaintiff). No Class Members have objected to Plaintiffs' request for fees, costs, and Service Awards. Notice Decl. ¶ 16.

(iv) No additional agreements are required to be identified under Rule 23(e)(3).

There are no additional agreements that require identification and/or examination under Rule 23 (e)(3).

d. The Settlement treats Class Members equitably relative to each other.

Under the terms of the Settlement, the Class Members will be treated equitably to each other. Each Class Member has had, and will until August 21, 2021 continue to have the opportunity to make a claim from the Settlement fund based on the amount of expenses they have incurred and time they have spent dealing with any fall-out from the Data Incident. Moreover, any Class

Member can make a claim for 24-months of credit monitoring and identity theft protections. As such, each Class Member has an equal opportunity to benefit from the Settlement.

Moreover, Plaintiffs' modest requested service award of $2,500 represents a fraction of the amount that *any* Class Member can make a claim for. Thus, there is no concern that they may be being treated unequitable or compromising the interest of the class for personal gain:

> 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. The members' incentives are thus aligned.

Greenberg v. Procter & Gamble Co. ("In re Dry Max Pampers Litig."), 724 F.3d 713, 722 (6th Cir. 2013) (quoting *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) (citing *Radcliffe v. Experian Info. Sols*., 715 F.3d 1157, 1161 (9th Cir. 2013))). Accordingly, this factor weighs in favor of settlement approval.

2. The Settlement Also Warrants Approval in Light of the Factors Traditionally Considered by Sixth Circuit Courts.

First, there is no risk of fraud or collusion: Class Counsel vigorously negotiated the settlement over multiple months and came to an agreement with Centerstone only after a full-day mediation with Hon. Wayne Andersen (Ret.) of JAMS. Lietz MPA Decl. ¶¶ 21–27. Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless contrary evidence is offered. *People First of Tenn. v. Clover Bottom Dev. Ctr.*, No. 3:95-cv-1227, 2015 WL 404077 (M.D. Tenn. Jan. 29, 2015) (quoting *In re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000, 2013 WL 2155379, at *4 (E.D. Tenn. May 17, 2013)); *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 WL 6209188, at *14 (E.D. Mich. Dec. 13, 2011). As discussed further *supra* at Section V(B)(1)(ii), this factor weighs in favor of settlement approval.

Second, the complexity, expense and likely duration of the litigation weigh in favor of Settlement. The Settlement provides immediate relief and protections for Class Members, where continued litigation would lead to inevitable delay of an uncertain outcome. "Most class actions are inherently complex and settlement avoids the costs, delays and a multitude of other problems associated with them." *People First of Tenn.*, 2015 WL 404077 (quoting *In re Se. Milk Antitrust Litig.*, 2013 WL 2155379, at *4); *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001). The same is particularly true here, where the quickly evolving nature of data breach cases leads to further uncertainty and risk. Accordingly, this factor weighs in favor of settlement approval.

Third, as discussed *supra* at Section V(B)(1)(i), Plaintiffs have conducted sufficient discovery to "obtain[ ] a sufficient understanding of the case to gauge the strengths and weaknesses of the claims and adequacy of the settlement." *N.Y. State Tchrs.' Ret. Sys.*, 315 F.R.D. at 236 (E.D. Mich. 2016) (citing *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d at 1015); *Sheick*, WL 4136958, at *19 (quoting *Newby v. Enron Corp.*, 394 F.3d at 306); *see also Macy v. GC Servs. Ltd. P'ship*, 2019 WL 6684522, at *2. Thus, this factor weighs in favor of settlement approval.

Fourth, success in continued litigation is uncertain. While Plaintiffs are confident in the strength of their claims, they are also pragmatic in their awareness of the various defenses available to Centerstone, as well as the risks inherent to continued litigation. Centerstone has consistently denied the allegations raised by Plaintiffs and made clear at the outset that they would vigorously defend the case. Moreover, data breach cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. Bank of N.Y. Mellon Corp.*, 2010 WL 2643307, at *1 (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). Here, Settlement provides a guaranteed and significant positive outcome for Class Members, and thus should be approved.

Fifth, experienced Class Counsel strongly believe that the Settlement Agreement is favorable for the Settlement Class; fair, reasonable, and adequate; and worthy of final approval. Lietz Fees Decl. ¶ 21. The Class Representatives have also reviewed and approve of the Settlement. *See* Agr., ECF No. 34. Class Counsel have decades of combined experience as vigorous class action litigators and a demonstrated track record of successfully litigating data breach cases on behalf of their clients and classes. *See* Lietz Fees Decl. ¶ 2–3. In fact, since Class Counsel's current firm's inception in March 2020, the partners have been appointed class counsel in a number of data breach and privacy class actions, including: *Baksh v. IvyRehab Network, Inc.*, No. 7:20-CV-01845 (S.D.N.Y. Sept. 23, 2020), ECF No. 40 (class counsel in a data breach class action settlement involving 125,000 individuals with a settlement value of $12.8 million; final approval granted); *In re GE/CBPS Data Breach Litig.*, No. 1:20-cv-02903 (S.D.N.Y. June 11, 2020), ECF No. 35 (appointed lead counsel in nationwide class action); *Mowery v. Saint Francis Healthcare Sys.*, No. 1:20-cv-00013-SRC (E.D. Mo. Aug. 17, 2020), ECF No. 36 (appointed class counsel; settlement value of over $13 million); *Chatelain v. C, L & W PLLC*, No. 50742-A (Tex. 42d Dist. Ct. Taylor Cnty. Nov. 6, 2020) (appointed class counsel; settlement valued at over $7 million); *Jackson-Battle v. Navicent Health, Inc.*, No. 2020-CV-072287 (Ga. Super. Ct. Bibb Cnty. Apr. 21, 2021) (appointed class counsel in data breach case involving 360,000 patients; settlement valued at over $72 million); *Bailey v. Grays Harbor Cnty. Pub. Hosp. Dist.*, No. 20-2-00217-14 (Wash. Super. Ct. Grays Harbor Cnty. May 27, 2020) (appointed class counsel in hospital data breach class action involving approximately 88,000 people; final approval granted); *In re Canon*

U.S.A. Data Breach Litig., No. 1:20-cv-06239-AMD-SJB (E.D.N.Y. Mar. 9, 2021), ECF No. 19 (appointed co-lead counsel); *Carrera Aguallo v. Kemper Corp.*, No. 1:21-cv-01883-MMP (YBK) (N.D. Ill. Apr. 30, 2021), ECF No. 19 (appointed co-lead interim class counsel). Their collective judgment that the settlement is in the best interests of the class weighs heavily in favor of the Court's final approval. *People First of Tenn.*, 2015 WL 404077, at *3; *Todd v. Retail Concepts, Inc.*, No. 3:07-0788, 2008 WL 3981593, at *5 (M.D. Tenn. Aug. 22, 2008).

Sixth, after completion of notice as approved by this Court—including an additional and supplemental e-mail append search and notice to individuals whose postcard mailing was returned undeliverable--and the close of the objection period, only six Class Members have requested exclusion, and *zero* Class Members have objected to the Settlement. Notice Decl. ¶¶ 15–16. The lack of objections and small number of exclusions strongly support approval of the Settlement. *See In re Regions Morgan Keegan Secs., Derivative & ERISA Litig.*, No. 2:09-md-2009-SMH, 2014 WL 12808031, at * 4 (W.D. Tenn. Dec. 24, 2014) ("If only a small number of objections are received from a large class, that fact can be viewed as indicative of the adequacy of the settlement") (collecting cases); *see also Hosp. Auth. of Metro. Gov't of Nashville & Davidson Cnty.*, 2020 WL 3053467 (approving class action settlement with zero objections); *People First of Tenn.*, 2015 WL 404077, at *3 (approving settlement with limited objections); *Johnson v. W2007 Grace Acquisition I, Inc.*, No. 13-2777, 2015 WL 12001269, at *9 (W.D. Tenn. Dec. 4, 2015) (granting final approval of a settlement with 2,200 potential class members and 144 objectors).

And finally, the proposed Settlement benefits the public interest. "[T]here is a public interest in settlement of disputed cases that require substantial federal judicial resources to supervise and resolve." *People First of Tenn.*, 2015 WL 404077, at *3 (citing *In re Se. Milk Antitrust Litig.*, 2013 WL 2155379, at *7). Moreover, "[t]here are strong and important public

interests in deterring identity theft and ensuring that private companies comply with applicable federal laws." *Todd v. Retail Concepts, Inc.*, 2008 WL 3981593, at *5. Accordingly, the public interest weighs in favor of settlement approval.

VI. CONCLUSION

Plaintiffs have negotiated a fair, adequate, and reasonable Settlement that will provide Class Members with both significant monetary and equitable relief. For the reasons discussed above, and for those described in Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 32-34) and Plaintiffs' Motion for Attorneys' Fees, Costs and Service Awards (ECF No. 39), Plaintiffs respectfully request this Court enter the proposed Final Approval Order filed herewith, finally certify the Settlement Class and appoint Class Counsel and Plaintiffs as representatives for the Class, award Plaintiffs each a Service Award in the amount of $2,500, grant Class Counsel attorneys' fees and costs in the amount of $410,000 (approximately 27 and 1/3% of the total Settlement value), and grant final approval of this Settlement.

Dated: July 26, 2021

Respectfully submitted,

By: */s/ David K. Lietz*

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