**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION**

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| SARA RILEY, individually and on behalf of all others similarly situated,<br><br>*Plaintiff,*<br><br>v.<br><br>CENTERSTONE OF AMERICA, INC., CENTERSTONE OF INDIANA, INC., and CENTERSTONE OF TENNESSEE, INC.,<br><br>*Defendants*. | ) | Case No. 3:22-cv-00662<br><br>Judge William F. Campbell, Jr.<br><br>Magistrate Judge Alistair Newbern |

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

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## I. INTRODUCTION

After months of contentious negotiations, Plaintiff Sara Riley ("Plaintiff") is pleased to report that she has reached a class action settlement that, if approved, will provide compensation and identity theft monitoring services to thousands of patients of Defendants Centerstone of America Inc., Centerstone of Indiana, Inc., and Centerstone of Tennessee, Inc. (collectively "Centerstone" or "Defendants"). As part of the Settlement, Settlement Class Members who submit a valid claim form to the Settlement Administrator will be provided with compensation for ordinary losses, compensation for extraordinary losses, and identity theft monitoring services. [1]

Plaintiff seeks, *inter alia*, certification of the proposed Settlement Class for purposes of settlement under Fed. R. Civ. P. 23(b)(3) and 23(e), and preliminary approval of the Settlement Agreement, the claims procedure, and the proposed Notice. While Plaintiff maintains that even absent a settlement, she would be able to secure class certification and prevail on the merits at trial, success is far from assured, and Defendants have vigorously defended, and would continue to vigorously defend, this case. If approved, the Settlement would bring meaningful relief to consumers as well as certainty and closure to what would be highly contentious and costly litigation.

By any measure, the proposed Settlement, providing for a potential gross Settlement payment of $900,000, is an excellent result. Plaintiff has secured significant benefits for the Settlement Class where success on the merits was far from guaranteed. The Settlement provides Settlement Class Members relief of up to $500 for ordinary losses and up to $2,500 for extraordinary losses due to the Data Breach as well as two years of Identity Theft Monitoring Services.

[1] References herein to "Barney Decl." are to the Declaration of Mason A. Barney, dated May 15, 2023, which is being filed contemporaneously herewith. References herein to "Barney Decl. Ex." are to the exhibits to the Barney Decl. References herein to the "Settlement Agreement" and "Settlement" are to the Settlement Agreement And Release between the Parties dated as of May 15, 2023 and attached as Barney Decl. Ex. 1. Unless otherwise stated, capitalized terms have the same meaning as those terms used in the Settlement Agreement.

As explained in further detail below, the Settlement is fair, reasonable, and adequate, and, in fact, provides substantial benefits to the Settlement Class Members. Certification of the Settlement Class is in the best interests of the putative Class Members and satisfies the requirements for settlement class certification under Fed. R. Civ. P. 23. Accordingly, Plaintiff respectfully requests that the Court enter an order (1) granting preliminary approval of the Settlement; (2) appointing Plaintiff as Class Representative; (3) approving the proposed Notice Plan; (4) appointing Mason A. Barney of Siri & Glimstad LLP as Class Counsel; and (5) scheduling a final approval hearing.

## II. BACKGROUND AND PROCEDURAL HISTORY

This matter concerns a putative class action arising out of a data breach that Centerstone disclosed on or around August 2, 2022 (the "Data Breach") in which an unauthorized party accessed three employees' email accounts between November 4, 2021 and February 14, 2022, and obtained sensitive personal and health related information on thousands of Centerstone's patients. *See* Dkt. No. 1 ("Compl."), ¶¶ 3, 45, 48.

Centerstone is a healthcare services provider offering a range of mental health, substance use disorder treatment. Compl. ¶ 22. 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.* ¶ 23.

### A. The 2019 Breach

The Data Breach Centerstone announced in 2022 was not the first time Centerstone's computer systems were compromised by hackers. In or around August of 2020, Centerstone became aware of suspicious activity related to several of its employees' email accounts. Compl. ¶ 35. An

investigation revealed that certain employee email accounts were accessed without authorization between December 12 and December 16, 2019. *Id.*

An earlier class action complaint was filed in the U.S. District Court for the Middle District of Tennessee against Centerstone on November 20, 2020, *Kenney v. Centerstone*, 20-cv-1007 (M.D. Tenn.) ("*Kenney*"), alleging that Centerstone employees were targeted by a phishing cyberattack, which allowed hackers to gain access to employees' email accounts, expressly designed to gain access to private and confidential data, including (among other things) the Private Information of patients. Complaint, Compl. ¶ 38.

On August 9, 2021, Judge Richardson granted final approval of a class settlement in the *Kenney* action whereby Centerstone agreed to compensate the named plaintiffs and Class Members affected by the 2019 Breach. Compl. ¶ 39. That settlement was achieved following an arm's length negotiation and mediation overseen by an experienced, neutral mediator, the Honorable Wayne Anderson (Ret.) of JAMS. *See* Barney Decl. Ex. 2 (*Kenney* Settlement Agreement) p. 1. As part of the settlement, Centerstone represented that it had enhanced information security, including third party security monitoring, third party logging, network monitoring, firewall enhancements, email enhancements, and equipment upgrades, and it committed to implementing additional enhancements in years 2021 and 2022. Barney Decl. Ex. 2 (*Kenney* Settlement Agreement) ¶ 52. The Court found that that settlement was "fair, reasonable, and adequate and [met] the requirements of Rule 23." Barney Decl. Ex. 3 (*Kenney* Final Approval Order) ¶ 6.

**B. The 2021-2022 Data Breach**

Just months after Judge Richardson granted final approval, in February 2022, Centerstone learned of yet more suspicious activity involving an employee's email account. Compl. ¶ 45. Upon discovering this activity, Centerstone began an investigation which determined that an unauthorized party had accessed three employee email accounts between November 4, 2021 and February 14, 2022.

*Id.* However, it did not notify affected individuals until August 2, 2022, approximately six months after the suspicious activity was discovered. *Id.*

Plaintiff and Settlement Class Members first learned about the Data Breach when they received a letter from Centerstone with the subject "Notice of Data Security Incident," which was dated August 2, 2022, approximately six months after Centerstone detected the suspicious activity. Compl. ¶ 48. Approximately 5,300 current and former Centerstone patients received this letter. *See* Barney Decl. ¶ 5. The letter informed Centerstone patients that their data may have been compromised in the Data Breach. *Id.* The letter stated that the information accessed may have included Plaintiff's name, date of birth, Client ID, and doctor's name. *Id.*

Plaintiff alleges that because of the Data Breach, unauthorized users accessed Plaintiff's and Settlement Class Members' personal identifying information ("PII"), including current and former patient names, addresses, dates of birth, Social Security numbers, client IDs, medical diagnosis or treatment information, and health insurance information. *See* Compl. ¶¶ 2, 37, 51. Indeed, Centerstone issued a press release on August 5, 2022 indicating that this information was potentially compromised. *Id.* ¶ 37.

### C. This Litigation

In August 2022, Plaintiff filed her class action lawsuit on behalf of all Centerstone current and former patients whose PII was potentially accessed in the Data Breach. *See* Compl. Plaintiff asserted various claims against Centerstone, including negligence, breach of contract, unjust enrichment, invasion of privacy, and claims under various state consumer laws. *Id.* ¶¶ 120-246.

In October and November 2022, the Parties moved the Court to continue the initial case management conference and to extend the time for Defendants to submit their answer so that the parties could, among other things, conduct settlement negotiations. *See* Dkts. 14, 16. The Court granted those motions. *See* Dkts. 15, 18.

### D. Settlement Negotiations.

Accordingly, the Parties conducted settlement discussions between November 2022 and January 2023. Barney Decl. ¶ 7. Given the similarities between the instant data breach, and that in the *Kenney* matter, the parties were able to use the terms of the settlement agreement in *Kenney* as a starting point, especially since Judge Richardson already approved the terms of that agreement as fair and reasonable. Barney Decl. Ex. 3 (*Kenney* Final Approval Order). The parties then negotiated certain additional issues raised by this breach. Barney Decl. ¶ 7. The parties initially agreed on a term sheet regarding the substantive issues before they discussed either attorneys' fees or a service fee award. *Id.* ¶ 8. In or about late January 2023, the Parties reached a settlement in principle, but then engage in months of further negotiations concerning the specific contours of the Settlement, including, among other issues, details concerning the relief for the Class Members, the scope of the release, and the forms of notice to be provided. *See Id.* ¶ 9. These settlement negotiations directly resulted in the Settlement Agreement, for which Plaintiff now seeks preliminary approval. *Id.* ¶ 10.

On February 16, 2023, the Parties informed the Court that they had reached a settlement agreement in principle and asked that case deadlines be extended such that Plaintiff could file her motion for preliminary approval, Dkt. 30, which she does now.

## III. THE TERMS OF THE SETTLEMENT

### A. The Proposed Settlement Class.

The proposed Settlement would create a nationwide class defined as: "All individuals who were mailed a notification by or on behalf of Centerstone on or about August 2, 2022 regarding the Data Breach." Barney Ex. 1 ¶ 33.

### B. Settlement Relief.

As part of the Settlement, Defendants will provide payments for claimed expense reimbursements by Settlement Class Members, including ordinary and extraordinary expenses, as well as Identity Theft Monitoring Services. In order for Settlement Class Members to receive

reimbursements or Identity Theft Monitoring Services, they must submit a valid claim form, which would include, among other things, attestation for expenses for which they seek reimbursement. *See* Settlement Agreement ¶¶ 2, 5, 39-40, 49.

The settlement provides reimbursement to those who lost money as a result of the Data Breach by: (1) reimbursing for documented, ordinary and unreimbursed out-of-pocket expenses up to $500 per Settlement Class Member; and (2) reimbursement of extraordinary expenses up to $2,500 per Settlement Class Member. *Id.* ¶¶ 39-40. The following are included among ordinary losses: Documented Out-of-Pocket Losses incurred as a result of the Centerstone 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. Ordinary losses also includes documented fees for additional credit reports, credit monitoring, or other identity theft insurance products purchased between August 2, 2022 and the date of the close of the Claims Period; and up to 4 hours of time, at $15/hour, if at least one full hour was spent dealing with the Data Breach. *Id.* ¶ 39a. An expense or loss is considered extraordinary under the Settlement Agreement where: (1) the loss is an actual, documented, and unreimbursed monetary loss; (2) the loss is fairly traceable to the Data Breach; (3) the loss occurred during the period from November 1, 2021 through and including the end of the Claims Period; (4) the loss is not already covered as an "Ordinary Loss"; and (5) the Settlement Class Member made reasonable efforts to avoid, or seek reimbursement for, the loss. *Id.* ¶ 39b.

The Identity Theft Monitoring Services provided by Centerstone will be provided for two years to Settlement Class Members who did not opt in for the credit monitoring services Defendants offered in connection with the August 2, 2022 Data Breach notice. Settlement Agreement ¶ 43. Those Settlement Class Members who elected to receive the one year of monitoring that Defendants offered as part of the August 2, 2022 Data Breach notice will receive one additional year of monitoring

services. *Id.* The Identity Theft Monitoring Services include:

- Real time monitoring of the credit file at all three credit bureaus;
- Dark web scanning with immediate notification of potential unauthorized use;
- Comprehensive public record monitoring;
- Medical identity monitoring;
- Identity theft insurance (no deductible); and
- Access to fraud resolution agents to help investigate and resolve identity thefts.

*Id.*

The Settlement provides for a total gross maximum payment of $900,000, which includes payments for claimed ordinary and extraordinary expense reimbursements by Settlement Class Members, costs for claimed Identity Theft Monitoring Services, settlement administration costs, a service award to Plaintiff, and attorney's fees and costs. *See* Settlement Agreement ¶¶ 19, 50.[2] With regard to settlement administration costs, Centerstone agrees to pay the costs of settlement administration up to a maximum of $75,000. *See* Settlement Agreement ¶ 62.

The Settlement also provides that Centerstone has improved its information security since the Data Breach, and that Centerstone commits to continuing security enhancements in 2023. The enhancements include: third-party security monitoring, third-party logging, network monitoring, firewall enhancements, email enhancements, and equipment upgrades. Settlement Agreement ¶¶ 51-52. Plaintiffs and Defendants will conduct additional confirmatory discovery in the coming weeks, and well before the final approval hearing, to confirm these enhancements and the issues regarding the breach.

[2] The maximum payout here is smaller than in the *Kenney* settlement, but that action had a much larger class size – approximately 66,000 there compared to approximately 5,300 here. *Compare* Barney Ex. 2 p. 29 *with* Barney Decl. ¶ 5.

### C. Notice and Settlement Administration.

The Parties have agreed to retain Postlethwaite & Netterville ("P&N") as the Settlement Administrator to assist with effectuating notice of the settlement. Notice will be provided through email and supplemented with mailed notice to Settlement Class Members whose email addresses are not known or available. Settlement Agreement ¶ 54. Before mailing the notice, the Settlement Administrator will update the addresses provided by Centerstone with the National Change of Address database. *Id.* The notice campaign will point Settlement Class Members to the Settlement Website, where they will be able to obtain a detailed Longform Notice and the procedure under which they may pursue a claim. *Id.* The format and language of each category of notice has been carefully drafted in easy-to-understand language so that the Settlement Class Members are informed of all material aspects of the Settlement, including the benefits they may obtain under the Settlement, their rights to challenge or exclude themselves from the Settlement, and the amount of attorneys' fees being sought. *See* Barney Decl. ¶ 13; Schwartz Decl. ¶¶ 15-16.

### D. Opt-Out and Objection Procedure.

Settlement Class Members will have an opportunity to exclude themselves from the Settlement or object to its final approval. Settlement Agreement ¶¶ 55-56. The Settlement Website and Longform Notice will inform the Settlement Class Members of these rights. Additionally, the Longform Notice will provide information concerning the Settlement Class Members' rights to appear and object at the Final Approval Hearing and will inform them that they will be bound by the release set forth in the Settlement Agreement unless they timely exercise their right to exclusion. *See* Settlement Agreement Ex. C.

### E. Class Counsel Fees and Costs and Plaintiff's Incentive Award.

Proposed Class Counsel will seek Court approval of attorneys' fees of $195,000 (21 $^{2}/_{3}$% of the $900,000 total potential gross Settlement payment), inclusive of all costs and expenses incurred with respect to this action. *See* Barney Decl. ¶ 14. The settlement in the *Kenney* action provided for

a higher percentage for attorney's fees (*i.e.*, 27 1/3% of the maximum recovery amount), but was still approved, indicating that Proposed Class Counsel's request is reasonable. Barney Decl. Ex. 3 (*Kenney* Final Approval Order) ¶ 7.d. *See also 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%").

Additionally, 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). Here, Defendants have agreed to pay Plaintiff $2,500 as compensation for her time and effort in serving as Class Representative. *See* Settlement Agreement ¶ 71. The *Kenney* action provided for the same amount of per-plaintiff incentive awards. Barney Decl. Ex. 3 (*Kenney* Final Approval Order) ¶ 7.e.

**F. Release of Liability.**

In exchange for the benefits and relief described above, each Settlement Class Member who does not exclude himself or herself from the Settlement will be deemed to have released and discharged Defendants and the other Released Parties from any and all claims related to the claims brought in this action. *See* Settlement Agreement ¶¶ 27, 68-70.

## IV. PRELIMINARY APPROVAL

The law favors settlement, particularly in class actions and in other complex cases in which substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) (discussing "the federal policy favoring settlement of class actions"); *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981) ("[T]he law generally favors and encourages the settlement of class actions."), *vacated on other grounds and modified*, 670 F.2d 71 (6th Cir. 1982).

Nonetheless, when the parties resolve class action litigation through a class-wide settlement, they must obtain the Court's approval. *See* Fed R. Civ. P. 23(e). Here, the proposed Settlement

provides Settlement Class Members with substantial monetary relief and is a fair and reasonable resolution of this Action. It therefore merits Court approval and the Court's permission to commence notice to the Settlement Class Members. Judicial approval of a proposed class action settlement requires a finding that the agreement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1093 (6th Cir. 2016). Rule 23 directs the Court at the preliminary approval stage to only determine whether it "will be likely" to grant final approval of the proposed Settlement as "fair, reasonable, and adequate," pursuant to Fed. R. Civ. P. 23(e)(2), and certifiable "for purposes of judgment on the proposal" pursuant to Fed. R. Civ. P. 23(e)(1)(B)(ii). The 2019 amendments to Rule 23 build upon the well-established two-step process in this Circuit of performing a "preliminary" evaluation of the fairness of the settlement to determine whether notice is to be sent out, prior to the final fairness inquiry. Conte & Newberg, 4 *Newberg on Class Actions*, § 13:14 (5th ed., June 2019 update). Thus, this first preliminary approval evaluation is not a final fairness or final approval hearing. 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. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Rather, the preliminary approval stage is an "initial evaluation" of the fairness of the proposed settlement based on the written submissions and informal presentation from the settling parties. *Friske v. Bonnier Corp.*, No. 16-cv-12799, 2019 WL 2601349, at *5 (E.D. Mich. June 25, 2019) (citing *Manual for Complex Litigation (Fourth)*, § 21.632 (4th ed. 2004)). Courts must "appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances." *Evans v. Jeff D.*, 475 U.S. 717, 742 (1986). If the Court finds a settlement proposal "within the range of possible approval," the case proceeds to the second step in the review process—the final approval hearing. *Stanley v. Turner Oil & Gas Props., Inc.*, No. 16-

cv-386, 2018 WL 2268138, at *2 (S.D. Ohio Mar. 6, 2018).

In this Circuit, to determine whether the proposed settlement satisfies this standard, "it is worth noting the factors the Court will consider when ultimately determining whether the settlement is fair, reasonable, and adequate." *Hyland v. HomeServices of America, Inc.*, No. 3:05-cv-612-r, 2012 WL 122608 (W.D. Ky. Jan. 17, 2012). These factors include:

> (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 Does 1–2 v. Déjà vu Consulting, Inc.*, No. 17-1801, 2019 WL 2336927, at *4 (6th Cir. June 3, 2019); *People First of Tenn. v. Clover Bottom Dev. Ctr.*, No. 95-cv-1227, 2015 WL 404077, at *2 (M.D. Tenn. Jan. 29, 2015). For purposes of granting preliminary approval, a court may consider these final approval factors, as applicable. *See, e.g., Baker v. American Greetings Corp.*, No. 12-cv-01760, 2013 WL 12136593, at *1 (N.D. Ohio May 22, 2013); *Kizer v. Summit Partners, L.P.*, No. 11-cv-38, 2012 WL 1598066, at *8 (E.D. Tenn. May 7, 2012). Considering these factors, the instant proposed settlement meets the requirements of Fed. R. Civ. P. 23(e), is likely to be found fair, reasonable, and adequate, and should be preliminarily approved.

One need look no further than the prior settlement with Centerstone in the *Kenney* action to see that data breach class actions are regularly certified for settlement. Barney Decl. Ex. 3 (*Kenney* Final Approval Order). *See also 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.

### A. 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 actual damages, along with assurance that they are less likely to be subject to similar breaches in the future due to Centerstone's data security systems. Plaintiff and Class Members will be reimbursed for costs they incurred related to the Data Breach, 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. Settlement Agreement ¶ 39. Each Class Member will also be able to claim two-years of Identity Theft Monitoring Services, which includes Identity Theft Insurance. *Id.* ¶ 43. In addition, 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. *Id.* ¶ 52.

Not only are these terms largely the same as in the previously approved *Kenney* settlement, Barney Decl. Ex. 2 (*Kenney* Settlement Agreement) ¶¶ 39, 43, 52, but these terms are well 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).

### B. The First Factor Favors Preliminary Approval Because the Settlement Was Reached After Arm's-Length Negotiations.

Because of the strong public policy favoring settlement, class action settlement agreements enjoy a presumption of validity. *Salinas v. U.S. Express Enters., Inc.*, No. 13-cv-00245-TRM- SKL, 2018 WL 1477127, at *2 (E.D. Tenn. Mar. 8, 2018) (citing *Little Rock Sch. Dist. v. Pulaski Cty.*

*Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990)). Nonetheless, the first factor to be considered in determining a proposed settlement's fairness, reasonableness, and adequacy is whether the settlement poses a risk of fraud or collusion. As discussed above, the Parties conducted arm's-length settlement negotiations over the span of several months. *See Bronson v. Bd. of Educ. of City Sch. Dist. of Cincinnati*, 604 F. Supp. 68, 78 (S.D. Ohio 1984) (approving settlement where there was no hint of collusion in the negotiating process). There is no indication of fraud or collusion in any of those negotiations. This conclusion is supported by the attestation in the Settlement Agreement that "the amount of the attorneys' fee and Litigation Costs and Expenses were negotiated after the relief for the class members was negotiated and agreed upon." Settlement Agreement ¶ 74. *See also Gascho v. Global Fitness Holdings, LLC*, No. 2:11-cv-436, 2014 U.S. Dist. LEXIS 46846, at *74 (S.D. Ohio Apr. 4, 2014) ("The risk of collusion is also lessened in this action because the parties negotiated the payment of attorneys' fees and costs after having reached agreement on the relief to the Class and Subclasses.").

Furthermore, the Parties were guided in their negotiations by the terms of Centerstone's settlement in the *Kenney* litigation, which was reached with the assistance of retired judge and experienced mediator Wayne Anderson (Ret.) of JAMS, and previously approved by this Court. Barney Decl. Ex. 2 (*Kenney* Settlement Agreement) p. 1. Accordingly, this first factor weighs in favor of preliminarily approving the Settlement.

### C. The Second Factor Favors Preliminary Approval Because Continued Litigation Would Be Expensive and Unpredictable.

The second factor is the complexity, expense, and duration of the pre-settlement litigation. Even though Plaintiff believes that her case is strong, all cases, including this one, are subject to substantial risk. Although nearly all class actions involve a high level of risk, expense, and complexity, this is an especially complex case in an especially risky arena. Historically, data breach cases face substantial hurdles in surviving even the pleading stage. *See, e.g., Hammond v. The Bank*

*of N.Y. Mellon Corp*., 2010 WL 2643307, at *1-2 (S.D.N.Y. June 25, 2010) (collecting dismissed data breach cases). 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). Even cases of similar widespread notoriety and implicating data more sensitive than at issue here have been found wanting at the district court level. *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Liti*g., 266 F. Supp. 3d 1, 19 (D.D.C. 2017), *reversed in part*, 928 F.3d 42 (D.C. Cir. June 21, 2019). As one federal district court recently observed in finally approving a data breach settlement with similar class relief: "Data breach litigation is evolving; there is no guarantee of the ultimate result." *Fox v. Iowa Health Sys*., No.: 3:18-cv-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021) (citing *Gordon v. Chipotle Mexican Grill, Inc*., No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases . . . are particularly risky, expensive, and complex.")).

To the extent courts have gradually accepted this relatively new type of litigation, the path to a class-wide monetary judgment remains unforged. For now, data breach cases are among the riskiest and most uncertain of all class action litigations, making settlement the more prudent course where, as here, a reasonable one can be reached. The damages methodologies, while theoretically sound in Plaintiff's view, remain largely untested in a disputed class certification setting and unproven in front of a jury. As in any data breach case, establishing causation on a class-wide basis is rife with uncertainty.

In sum, further litigation, perhaps for years, would pose a severe disadvantage to the Settlement Class Members, especially given the valuable benefits offered to them under this proposed Settlement. Therefore, this factor also weighs in favor of preliminary approval, as it permits the Settlement Class Members to obtain meaningful relief now, instead of years from now or perhaps

never at all.

### D. The Third Factor Favors Preliminary Approval Because the Parties Have Exchanged Key Information in Anticipation of Settlement.

The third factor in weighing a settlement's fairness, reasonableness, and adequacy is the amount of discovery completed. While the Parties have not engaged in significant formal discovery, the Parties have exchanged key information as part of the settlement process that would have otherwise been disclosed through normal discovery procedures. For example, the parties have exchanged information regarding the class size and the data extracted. The settlement negotiations have allowed the Parties to informally discover key factual matters and the discovery exchanged has permitted Plaintiff and proposed Class Counsel to obtain information sufficient to fairly assess the prospects of success at trial versus the negotiated outcome, as well as the reasonableness of the relief ultimately obtained. Furthermore, the Settlement Agreement requires Centerstone to provide additional confirmatory discovery, including regarding the remedial measures and security enhancements as provided for in Fed. R. Civ. P. 23(b)(1), all of which will be completed well before final approval. Settlement Agreement ¶ 53. Thus, this factor weighs in favor of preliminary approval.

### E. The Fourth Factor Favors Preliminary Approval Because Plaintiff's Ultimate Success is not Guaranteed and the Settlement Provides Significant Benefits in the Face of Substantial Risk and Uncertainty.

The fourth factor, Plaintiff's likelihood of success on the merits, favors preliminary approval for the same reasons as the second factor. Plaintiff cannot guarantee ultimate success. While Plaintiff believes her claims against Centerstone are strong and that she would ultimately defeat Centerstone's various defenses and prevail at class certification, she is also aware that Centerstone's defenses, if successful, could result in Plaintiff and the proposed Settlement Class Members receiving no relief whatsoever. Centerstone is comprised of large, well-funded entities that can, and will, aggressively and competently defend itself through class certification, summary judgment, and trial.

Taking these realities into account, and recognizing the risks involved in any litigation, the

settlement relief represents an excellent result for the Settlement Class. With this Settlement, Plaintiff and the proposed Settlement Class will have the opportunity to seek reimbursement and receive Identity Theft Monitoring Services *now*, instead of years from now—or perhaps never. In other words, "[t]he Settlement eliminates all of these risks and replaces them with the certainty . . . of recovery." *Manjunath A. Gokare, P.C. v. Fed. Express Corp.*, No. 2:11-CV-2131-JTF-CGC, 2013 U.S. Dist. LEXIS 203546, at *20 (W.D. Tenn. Nov. 22, 2013). As such, the immediate relief provided to the Settlement Class under the Settlement Agreement weighs heavily in favor of its approval compared to the inherent risk and delay of continued litigation, trial, and appeal.

### F. The Fifth Factor Favors Preliminary Approval Because Proposed Class Counsel Have Significant Experience Negotiating and Effectuating Settlements on a Class Basis.

As the fifth factor in the fairness, reasonableness, and adequacy determination, the Court may consider the opinions of Class Counsel and Plaintiff. Proposed Class Counsel has extensive experience in national class action litigation and extensive experience in negotiating settlements on a class basis, and being appointed as class counsel in class action cases. *See* Barney Decl. ¶¶ 15-18 and Ex. 4. Where, as here, the Parties are represented by counsel with such extensive class action experience, and no evidence exists of collusion or bad faith, the judgment of Plaintiff and Proposed Class Counsel concerning the adequacy of the settlement merits deference. *See, e.g., In re Regions Morgan Keenan Sec., Derivative & ERISA Litig.*, No. 07-cv-2784, 2016 WL 8290089, at *6 (W.D. Tenn. Aug. 2, 2016); *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 532–33 (E.D. Ky. 2010) ("In deciding whether a proposed settlement warrants approval, the informed and reasoned judgment of plaintiffs' counsel and their weighing of the relative risks and benefits of protracted litigation are entitled to great deference."); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Ford Motor Corp.*, No. 07-cv-14845, 2008 WL 4104329, at *26 (E.D. Mich. Aug. 29, 2008) ("Class Counsel here fully support the proposed settlement. The endorsement of the parties'

counsel is entitled to significant weight, and supports the fairness of the class settlement."). Likewise, Plaintiff supports this settlement believing it both fair and reasonable. Barney Decl. ¶ 11.

Class Counsel and Plaintiff have concluded that the proposed Settlement is in the best interests of the Settlement Class. Thus, the Court should lend those conclusions considerable weight such that this factor heavily supports preliminary approval of the Settlement.

**G. The Sixth Factor is Neutral at The Preliminary Approval Stage.**

At the final approval stage, the Court should weigh the reactions of absent class members, but this sixth factor is neutral at the current preliminary approval stage. Evaluating their reactions now is impossible, given that the plan to notify the absent Settlement Class Members will only be commenced upon preliminary approval. Nonetheless, as discussed herein, the notice plan constitutes the best practicable notice to the Settlement Class Members and satisfies the due process requirements of Fed. R. Civ. P. 23, and proposed Class Counsel anticipate that the Settlement Class Members will overwhelmingly be satisfied with the Settlement—as Plaintiff is. Prior to final approval of the Settlement, the absent class members will be afforded an opportunity to object to the proposed Settlement, at which time their reactions may be properly assessed. Thus, at this stage, this factor is neutral and should not impede preliminary approval.

**H. The Seventh Factor Favors Preliminary Approval Because Settlement Will Resolve Both Pending Actions and Conserve Judicial Resources.**

Preliminary approval of the proposed Settlement is in the public interest because the Settlement would avoid the difficulty, expense, and unpredictability of prolonged litigation in multiple different federal courts. "There is a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources." *Thomson v. Morley Co., Inc.*, No. 22-cv-10271, 2022 U.S. Dist. LEXIS 201703, at *16-17 (E.D. Mich. Nov. 4, 2022) (internal quotation omitted).

## V. PROPOSED SETTLEMENT CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

At the preliminary approval stage, the Parties must show, at least conditionally, that the proposed Settlement Class meets the requirements of Fed. R. Civ. P. 23. *See Manual for Complex Litigation (Fourth)*, § 21.632 ("The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)."). As set forth below, the proposed Settlement meets these requirements.

### A. The Court Will Likely Find that the Proposed Settlement Class Meets All Requirements For Certification For Purposes Of Settlement Under Federal Rule 23.

Though the Court at the preliminary approval stage only needs to determine whether a settlement class is "likely" certifiable, the proposed Settlement Class here surpasses that low hurdle. Rule 23(a) allows for class certification where: (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 or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

#### i. The Numerosity Requirement is Met.

Fed. R. Civ. P. 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable." While there is no specific numerical threshold, "[w]hen class size reaches substantial proportions . . . the impracticability requirement is usually satisfied by the numbers alone." *Rosiles-Perez v. Superior Forestry Serv., Inc.*, 250 F.R.D. 332, 338 (M.D. Tenn. 2008) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (internal quotations and citations omitted)).

Here, the Parties estimate that the Settlement Class encompasses approximately 5,300 Centerstone patients. Barney Decl. ¶¶ 5. These numbers easily satisfy numerosity. *Skeete v. Republic Schools Nashville*, No. 16-cv-0043, 2017 WL 2989189, at *3 (M.D. Tenn. Mar 21, 2017) (finding the numerosity requirement was met where plaintiffs "proffered evidence of potentially thousands of

individuals" in the putative class).

**ii. The Commonality and Typicality Requirements are Met.**

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. 614, 623 (E.D. Mich. 2020). 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*, 564 U.S. at 350. A proposed class satisfies Rule 23(a)(2)'s "commonality" requirement when "it is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." *Bacon v. Honda of America Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004). The existence of one common issue is sufficient. *Rosiles-Perez*, 250 F.R.D. at 339.

Here, the commonality requirement is met because all of the Settlement Class Members had PII that was potentially accessed as part of the Data Breach. Additionally, Plaintiff alleges that Centerstone had a policy and practice of failing to adequately safeguard Class Members' records and that Centerstone's data security safeguards at the time of the Data Breach were common across the Class, such that safeguards applicable to one Class Member did not differ from those safeguards applied to another.

As for the typicality requirement, Rule 23(a)(3) requires that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." A class representative's claim is typical "if it 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." *Rosiles-*

*Perez*, 250 F.R.D. at 341 (quoting *In re Am. Med. Sys. Inc.*, 75 F.3d at 1082). "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*, 333 F.R.D. at 623 (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082).

Here, Plaintiff's claims are typical of the claims of the Settlement Class Members because they all arise out of the Data Breach. Plaintiff alleges that in allowing—or not taking reasonable measures to prevent—the Data Breach, Centerstone caused her 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. Accordingly, the proposed Settlement Class and Plaintiff satisfy the typicality requirement.

**iii. The Class Representative and proposed Class Counsel will fairly and adequately protect the interests of the Settlement Class.**

When analyzing Rule 23(a)(4)'s adequacy requirement, courts in the Sixth Circuit consider two elements: (1) whether the class representatives have common interests with unnamed members of the class, and (2) whether it appears that the class representatives will vigorously prosecute the interests of the class through qualified counsel. *Rosiles-Perez*, 250 F.R.D. at 342 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1083). *See also Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). As for the first element, there are no conflicts of interest between Plaintiff and the unnamed class members, and they share the common interest of seeking redress for injuries caused by the Data Breach. Regarding the second element, Class Counsel has substantial experience vigorously litigating class actions, including consumer class actions and data breach class actions, and are well suited to advocate on behalf of the Settlement Class. *See* Barney Decl. ¶¶ 15-18, Ex. 4. Accordingly, Rule 23(a)(4)'s adequacy requirement is satisfied.

### iv. Conditional certification of the Settlement Class is appropriate under Rule 23(b)(3).

The Claims of Plaintiff and the Settlement Class also meet the predominance and superiority requirements of Fed. R. Civ. P. 23(b)(3), which allows class actions where "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The factors assessed in evaluating predominance and superiority include (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)–(D).

Here, the Settlement Class Members do not have substantial interests in pursuing their claims individually, as their financial losses or expected financial losses are relatively small, and would not incentivize litigation on an individual basis. To the Parties' knowledge, this Action is the only judicial proceeding concerning the Data Breach. As for the third factor, it is desirable and efficient to concentrate the litigation here in Tennessee, where the Action was brought. As set forth in the Settlement Agreement and its Exhibits, the plan for effectuating notice and processing claims does not present administrative difficulties, as the Settlement Class Members have already been reasonably identified and the process of obtaining the Settlement's benefits has been designed to minimize the time and effort Settlement Class Members will expend gaining the benefits of this Settlement. In any case, where "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

Further, the Settlement Class Members' shared questions of law and fact predominate over any

questions affecting individual members. This Action and the Settlement address the Data Breach, from which the Settlement Class's PII was allegedly compromised. Each Settlement Class Member received a notice alerting them to the Data Breach. Thus, the elements of any given Settlement Class Member's claim will be based on the same class-wide proof applicable to the other Settlement Class Members. Notably, this degree of predominance exceeds the requirements of Rule 23(b). *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 858 (6th Cir. 2013) ("A plaintiff class need not prove that each element of a claim can be established by classwide proof.").

Also 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 In re Sonic Corp.*, No. 20-0305, 2021 U.S. App. LEXIS 25403, at *4 (6th Cir. Aug. 4, 2021); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466 (6th Cir. 2017). Here, because all claims on behalf of Plaintiff and approximately 5,300 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 claim individually.

Relatedly, a "class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *In re Sonic*, 2021 U.S. App. LEXIS 25403, at *4 (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-38 (6th Cir. 2012)). That is the case here, where the class is defined to include all those who received a Data Breach notice from Centerstone on or about August 2, 2022.

In sum, the proposed Settlement Class meets all the requirements for class certification under Fed. R. Civ. P. 23 and will likely be found certifiable.

### B. The Proposed Notice Plan Satisfies Due Process and the Requirements of Federal Rule 23.

When a class is certified through settlement, due process and Rule 23 require that the court

"direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Where, as here, a class is certified pursuant to Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must contain specific information in plain, easily understood language, including the nature of the action, the class definition, the claims, and the rights of class members. Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii). 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 909 (6th Cir. 1983).

As discussed above, the Parties have agreed to a comprehensive notice plan that more than satisfies Due Process and Rule 23 requirements. The notice plan is designed to reach as many potential Settlement Class Members as possible. Under the notice plan, the Settlement Administrator will send direct notice of the Settlement via email to all Settlement Class Members, or a postcard notice where email addresses cannot be found. Settlement Agreement ¶ 55. Additionally, the Settlement Administrator will establish a Settlement Website featuring the relevant court documents and notices. *Id.* In compliance with Rule 23(e)(4), all of the notices will inform Settlement Class Members of their right to object to or exclude themselves from the Settlement. *See* Settlement Agreement ¶¶ 56-57. Finally, in accordance with the Class Action Fairness Act, 28 U.S.C. § 1715, and no later than ten days after filing the Agreement with the Court, Defendants will send required notice to the appropriate government entities. In sum, because the proposed notice plan effectuates direct notice to all Settlement Class Members and fully apprises Settlement Class Members of their rights, it complies with the requirements of Fed. R. Civ. P. 23 and Due Process and merits approval.

### C. Plaintiff's Counsel Should Be Appointed Class Counsel.

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the Court must consider proposed counsel's work in identifying or investigating potential claims; experience in handling class actions or other complex litigation, and the types of claims asserted in the case; knowledge of the applicable law; and resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i–iv).

As described in detail above, proposed Class Counsel have diligently investigated Plaintiff's claims and the feasibility of class certification and have devoted and will continue to devote substantial time and resources to this litigation. Barney Decl. ¶ 11. As previously noted, Proposed Class Counsel has extensive experience with class actions, including class actions related to data breaches. *Id.* ¶¶ 15-18, Ex. 4. Accordingly, the Court should appoint Plaintiff's counsel Mason A. Barney Esq. as Class Counsel for the proposed Settlement Class pursuant to Rule 23(g).

## VI. PROPOSED SCHEDULE OF EVENTS

In connection with preliminary approval of the Settlement, the Court must set a final approval hearing date, dates for promulgating Notice and deadlines for objecting to the Settlement and filing papers in support of the Settlement. The Parties propose the following schedule:

| Event | Deadline |
|---|---|
| Defendant to provide Settlement Class Member contact information to the Settlement Administrator | 21 days after entry of the Preliminary Approval Order |
| Notice Date | 30 days after entry of the Preliminary Approval Order |
| Deadline to submit Motion for Attorneys' Fees and Costs and Service Award | 14 days before the Objection Deadline |
| Objection Deadline | 45 days from the Notice Date |
| Opt-Out Deadline | 45 days from the Notice Date |

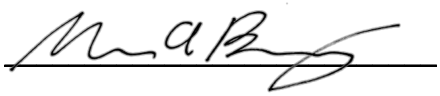
| Event | Deadline |
|---|---|
| Claims Deadline | 90 days from the Notice Date |
| Motion for Final Approval | 45 days from the Claims Deadline and at least 14 days before Final Approval Hearing |
| Final Approval Hearing | At least 149 days from Preliminary Approval Order |

## VII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order in the form attached as Barney Ex. 5 (1) granting preliminary approval of the Settlement; (2) appointing Plaintiff as Class Representative; (3) approving the proposed Notice Plan; (4) appointing Mason A. Barney of Siri & Glimstad LLP as Class Counsel; and (5) scheduling a final approval hearing.

Dated: May 15, 2023

Respectfully submitted,

By: 

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*Counsel for Plaintiff and Proposed Class Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2023, a true and correct copy of Plaintiff's Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement was served on all counsel of record via the Court's ECF system.

/s/ Mason A. Barney