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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF SAN DIEGO – CENTRAL DIVISION**

11 JUAN C. LOZANO, and his minor son AJL,  
12 individually and on behalf of all others  
13 similarly situated,

13 Plaintiff,

14 vs.

15 CODEMETRO, INC., a California  
16 corporation; and DOES 1-50, inclusive,

16 Defendants.

Case No. 37-2020-00022701-CU-MC-CTL

Assigned for All Purposes to:  
Judge John S. Meyer  
Dept. C-64

**CLASS ACTION**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
PRELIMINARY APPROVAL**

IMAGED FILE – Civil Unlimited  
(Mandatory eFILE Case)

Date: April 2, 2021  
Time: 10:30  
Dept: C-64

Complaint Filed: 07/01/20  
Trial Date: Not Yet Set

**DEMAND FOR JURY TRIAL**

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1 **I. INTRODUCTION**

2 Plaintiff Juan C. Lozano, for himself and his minor son (“Representative Plaintiff”),  
3 individually and on behalf of the Settlement Class (as defined in the Settlement and stated below),<sup>1</sup>  
4 respectfully submits this memorandum of points and authorities in support of Plaintiff’s unopposed  
5 Motion for Preliminary Approval.

6 After contested litigation and months of negotiations, the Settling Parties reached the  
7 Settlement Agreement (the “Settlement”) filed herewith. The Settlement provides that CodeMetro  
8 shall pay \$850,000 into a Settlement Fund to cover the costs of Settlement Class Member benefits  
9 provided for under the Settlement, the costs of notice and settlement administration, and attorneys’  
10 fees, costs, and expenses, and representative service awards as approved by the Court.

11 Under the Settlement, all Settlement Class Members are eligible to claim and receive either  
12 (1) a one-time cash payment (estimated to be in the range of \$132 for California residents and \$66  
13 for non-California residents), (2) reimbursement of up to \$250 for documented lost time or certain  
14 expenses incurred as a result of the Data Incident, or (3) reimbursement of up to \$3,500 for  
15 documented fraudulent or unauthorized charges more likely than not caused by the Data Incident.  
16 The Settlement also enables Settlement Class Members whose Social Security number was included  
17 in the data involved in the Data Incident to claim and receive a free 2-year subscription (but only  
18 one additional year if CodeMetro’s prior one-year offer of credit monitoring was previously  
19 accepted by the Settlement Class Member) to CyberScout’s Package 3—a credit monitoring and  
20 identity theft insurance and restoration product.

21 As detailed herein, the Settlement readily satisfies the applicable preliminary approval  
22 standard and is within the range of fair, reasonable, and adequate.

23 Representative Plaintiff moves this Honorable Court for entry of an Order: (1) granting  
24 preliminary approval of the Settlement; (2) approving the Notice Program, as set forth in the  
25 Declaration of Cameron R. Azari, Esq. on Settlement Notice Plan and Notices attached as Exhibit  
26 A to the Settlement, and directing commencement of notice as set forth in the Settlement and the  
27

28 <sup>1</sup> The definitions in the Settlement are incorporated herein by reference.

1 Notice Program; (3) appointing Epiq Class Action & Claims Solutions, Inc., as Settlement  
2 Administrator; (4) conditionally certifying the Settlement Class for settlement purposes only;  
3 (5) appointing Juan C. Lozano as Representative Plaintiff; (6) appointing as Co-Lead Settlement  
4 Class Counsel, Ben Barnow, Barnow and Associates, P.C., and Timothy G. Blood, Blood Hurst &  
5 O'Reardon LLP ("Co-Lead Settlement Class Counsel"); (7) appointing Erich P. Schork and  
6 Anthony L. Parkhill, Barnow and Associates, P.C., and Leslie E. Hurst and Jennifer L. MacPherson,  
7 Blood Hurst & O'Reardon LLP as Settlement Class Counsel; (8) approving the form and content of  
8 the Email Notice, Postcard Notice, Detailed Notice, and Claim Form attached as Exhibits C–F of  
9 the Settlement, respectively; and (9) scheduling a Final Fairness Hearing to consider entry of a final  
10 order approving the Settlement, final certification of the Settlement Class for settlement purposes  
11 only, and the request for attorneys' fees, costs, and expenses, and a Representative Plaintiff service  
12 award.

## 13 **II. SUMMARY OF THE LITIGATION**

14 On or around June 19, 2020, CodeMetro sent letters to Representative Plaintiff and others  
15 informing them that CodeMetro was the victim of a ransomware attack on April 21, 2020. *See* Decl.  
16 of Ben Barnow in Support of Motion for Preliminary Approval ("Barnow Decl.") ¶ 4. The letters  
17 stated that prior to deploying the ransomware the criminals were able to access a database server  
18 containing patient information and information for employees of certain providers and deploy tools  
19 to copy and remove some data (the "Data Incident"). The patient information may have included:  
20 (1) information to identify and contact the patient (such as patient name, patient picture, parent/legal  
21 guardian name, guarantor name, address, email address, phone number, date of birth, gender, and  
22 ethnicity); (2) school information (such as school name, Individualized Education Program (IEP)  
23 start and review dates, assessment and psychological evaluation dates, and eligibility type (type of  
24 behavioral or developmental condition or impairment)); (3) health insurance information (such as  
25 payer name, payer contract dates, policy information including type and deductible amount, and  
26 policy ID number); and (4) medical information (such as dates of enrollment with an ABA  
27 provider's services, authorized services, allotted time/number of sessions, diagnostic codes and  
28 modifiers, charge/reimbursement rates, outcomes, and provider names). *Id.* ¶ 4. For patients covered



1 under TRICARE, the health insurance ID number may be a guarantor/legal guardian's Social  
2 Security number. *Id.* ¶ 4.

3 After receiving a letter from CodeMetro, Representative Plaintiff caused this lawsuit to be  
4 initiated on July 1, 2020, asserting claims against CodeMetro relating to the Data Incident. Barnow  
5 Decl. ¶ 5. On August 20, 2020, CodeMetro filed a demurrer and a motion to strike. *Id.* ¶ 6. On  
6 August 27, 2020, the Settling Parties participated in a day-long mediation before the Honorable  
7 Wayne R. Andersen (Ret.) of JAMS. *Id.* ¶ 8. While they were unable to reach an agreement during  
8 that mediation session, the Settling Parties continued to negotiate with the assistance of Judge  
9 Andersen (Ret.) in the weeks following the mediation and ultimately reached agreement on the  
10 material terms of the Settlement in late September 2020. *Id.* ¶ 9. The Settling Parties then spent  
11 substantial but required time working out the language of the Settlement and related documents,  
12 including the notices and the Claim Form. *Id.* ¶ 10. Those negotiations ultimately led to the Settling  
13 Parties' execution of the Settlement on December 16, 2020.

### 14 **III. SUMMARY OF THE SETTLEMENT**

#### 15 **A. The Settlement Class**

16 Under the terms of the Settlement, the Settling Parties agreed to certification of the following  
17 Settlement Class for settlement purposes only:

18 All persons for whom data was stored on the database server at issue in the  
19 Data Incident and whose PII/PHI therefore may have been involved in the  
20 Data Incident.

21 Settlement Agreement ("SA") ¶ 1.17. Excluded from the Class are: (1) CodeMetro and its officers,  
22 directors, employees, principals, affiliated entities, controlling entities, agents, and other affiliates;  
23 and (2) the Judge(s) assigned to this case and any members of their immediate families. *Id.*

#### 24 **B. Settlement Benefits**

25 In summary, the Settlement provides the following benefits:

##### 26 **1. The Settlement Fund**

27 Pursuant to the Settlement, CodeMetro shall pay \$850,000 into the Escrow Account (the  
28 "Settlement Fund"). SA ¶ 2.1. The Settlement Fund shall be used to pay valid claims submitted by  
Settlement Class Members selecting the Protection Plan, Cash Option, Reimbursement of Expenses

1 Option, and Reimbursement of Fraudulent and Unauthorized Charges Option, the costs of notice  
 2 and claims administration, and Court-approved attorneys' fees, costs, and expenses, and  
 3 Representative Plaintiff service awards. *Id.* ¶¶ 2.9–2.10. No portion of the Settlement Fund will  
 4 revert back to CodeMetro. *Id.* ¶ 2.11.

## 5 **2. The Protection Plan Option**

6 CodeMetro shall make available free-of-charge to claiming Settlement Class Members  
 7 whose Social Security numbers were included in the data at issue in the Data Incident a two-year  
 8 subscription (but only one year if CodeMetro's prior one-year offer of credit monitoring was  
 9 previously accepted by the Settlement Class Member) to CyberScout's Package 3 to include:  
 10 (1) single-bureau credit monitoring; (2) dark web monitoring; (3) proactive fraud assistance;  
 11 (4) \$1,000,000 insurance coverage for reimbursement of losses attributable to the Data Incident,  
 12 which shall commence upon enrollment; and (5) identity theft fraud resolution services. SA ¶¶ 2.3,  
 13 2.4. Settlement Class Members eligible for the Protection Plan Option are also eligible to claim and  
 14 receive benefits under the Cash Option, Reimbursement of Expenses Option, or Reimbursement of  
 15 Fraudulent and Unauthorized Charges Option. *See id.*

## 16 **3. The Cash, Reimbursement of Expenses, and Reimbursement of** 17 **Fraudulent and Unauthorized Charges Options**

18 In addition to the benefits made available to certain Settlement Class Members under the  
 19 Protection Plan Option, all Settlement Class Members shall be entitled to claim and receive, at their  
 20 selection, one and only one of the following benefits: (a) Cash Option, (b) Reimbursement of  
 21 Expenses Option, or (c) Reimbursement of Fraudulent or Unauthorized Charges Option. SA  
 22 ¶¶ 2.5(a), 2.6(a), 2.7(a).

23 *Cash Option.* Settlement Class Members claiming the Cash Option shall be entitled to a one-  
 24 time cash payment estimated to be \$132 for California residents and \$66 for non-California  
 25 residents.<sup>2</sup> *See* Barnow Decl. ¶¶ 18–19.

26  
 27 <sup>2</sup> The estimated claims values were arrived at as follows: Settlement Fund (\$850,000) –  
 28 estimated notice and settlement administration costs (\$90,897) – estimated attorneys' fees  
 (\$283,333) – estimated costs and expenses (\$11,414) – estimated service award (\$2,500) – estimated

1 After deducting from the Settlement Fund the value of valid claims submitted under the  
 2 Protection Plan, Reimbursement of Expenses, and Reimbursement of Fraudulent or Unauthorized  
 3 Charges Options, the costs of notice and settlement administration, and attorneys' fees, costs,  
 4 expenses, and service awards as approved by the Court, the remaining amount shall be divided  
 5 among valid Cash Option claimants such that claimants who reside in California shall receive an  
 6 amount that is twice the amount received by claimants residing in other states and the Settlement  
 7 Fund is exhausted. SA ¶ 2.6.

8 *Reimbursement of Expenses.* Settlement Class Members providing the requisite  
 9 documentation shall be entitled to claim and receive up to \$250 as reimbursement of the following  
 10 categories of expenses incurred as a result of the Data Incident and not reimbursed by insurance or  
 11 another third party: (1) documented lost time spent as a result of the Data Incident of up to 4 hours  
 12 at \$20/hour; (2) money spent purchasing police reports because of the Data Incident; (3) late charges  
 13 or other fees (including overdraft fees) paid because of the Data Incident; and (4) other similar  
 14 expenses directly related to the Data Incident and expended in good faith, at the Settlement  
 15 Administrator's discretion. SA ¶ 2.6. If a Settlement Class Member has previous credit monitoring  
 16 and identity theft protection services or other applicable insurance, they must make a claim under  
 17 the insurance offered by that or those policies before submitting a claim under the Reimbursement  
 18 of Expenses Option. *Id.* ¶ 2.6(c).

19 *Reimbursement of Fraudulent and Unauthorized Charges.* Settlement Class Members  
 20 providing the requisite documentation shall be entitled to claim and receive reimbursement of up to  
 21 \$3,500 for actual unreimbursed losses due to fraudulent activity or unauthorized charges more likely  
 22 than not caused by the Data Incident and not reimbursed by insurance or another third party. To  
 23 receive a payment under this option, Settlement Class Members must timely submit a completed  
 24

25 \_\_\_\_\_  
 26 valid Protection Plan claims (\$7,200) – estimated reimbursement option claims (combined)  
 27 (\$10,000) = estimated amount available to pay valid Cash Option claims (\$444,656). Assuming 4%  
 28 of Settlement Class Members submit valid Cash Option claims and that 70% of such claims are  
 submitted by California residents, each California resident submitting a valid Cash Option claim  
 would receive an estimated payment of \$132.47 and each non-California resident submitting a valid  
 Cash Option claim would receive an estimated payment of \$66.24. Barnow Decl. ¶ 19.

1 Claim Form attesting that to the best of their knowledge and belief the claimed losses were more  
2 likely than not caused by the Data Incident along with reasonable documentation showing that the  
3 claimed loss was more likely than not caused by the Data Incident. SA ¶ 2.7. If a Settlement Class  
4 Member has previous credit monitoring and identity theft protection services or other applicable  
5 insurance, they must make a claim under the insurance offered by that or those policies before  
6 submitting a claim under the Reimbursement of Fraudulent and Unauthorized Charges Option. *Id.*  
7 ¶ 2.6(c).

#### 8 4. The Costs of Notice and Settlement Administration

9 The costs of providing Notice of the Settlement to the Settlement Class and the costs of  
10 Settlement Administration shall be paid from the Settlement Fund. Barnow Decl. ¶ 2.9.

#### 11 5. Attorneys' Fees, Costs, and Expenses, and Representative Plaintiff 12 Service Award

13 All attorneys' fees, costs, and expenses, and Representative Plaintiff service awards shall be  
14 paid from the Settlement Fund. Aside from the fact that the Settlement would provide for a  
15 Settlement Fund, the Settling Parties did not discuss attorneys' fees, costs, and expenses, or a  
16 Representative Plaintiff service award until after all substantive terms of the Settlement were agreed  
17 upon. SA ¶ 7.1. The amounts of any award of attorneys' fees, costs, and expenses and the  
18 Representative Plaintiff service award are intended to be considered by the Court separately from  
19 the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement. *Id.* ¶ 7.6.

20 Proposed Co-Lead Settlement Class Counsel intend to seek Court-approval for payment  
21 from the Settlement Fund of: (1) \$283,333 for attorneys' fees; (2) reimbursement of reasonable out-  
22 of-pocket costs and expenses; and (3) a service award to Representative Plaintiff in the amount of  
23 \$2,500. *Id.* ¶¶ 7.2–7.3. CodeMetro has agreed not to object to Co-Lead Settlement Class Counsel's  
24 requests. *Id.*

#### 25 IV. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

26 The Court has "broad discretion" in approving a class settlement. *Cellphone Termination*  
27 *Fee Cases*, 186 Cal. App. 4th 1380, 1389 (2010). The required procedures are: (1) preliminary  
28

1 approval of the settlement; (2) notice to class members; and (3) final approval of the settlement after  
2 hearing. *See* Cal. Rules of Court 3.769.

3 At the preliminary approval stage, the Court need only “make a preliminary determination  
4 on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation  
5 of notice of the certification, proposed settlement and date of the final fairness hearing.” Manual for  
6 Complex Litigation, Fourth, § 21.633 (2004); *see also Cellphone Termination*, 186 Cal. App. 4th at  
7 1389; *In re Vitamin Cases*, 107 Cal. App. 4th 820, 824-25 (2003). In considering a proposed  
8 settlement, the Court need not reach any ultimate conclusions on the issues of fact and law which  
9 underlie the merits of the dispute and need not engage in a trial on the merits. *7-Eleven Owners for*  
10 *Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1145 (2000).

11 The Court’s ultimate duty is to determine whether the settlement is fair, adequate and  
12 reasonable. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Cho v. Seagate Tech.*  
13 *Holdings, Inc.*, 177 Cal. App. 4th 734, 742-43 (2009). “In reviewing the fairness of a class action  
14 settlement, ‘due regard should be given to what is otherwise a private consensual agreement between  
15 the parties.’” *Cellphone Termination*, 186 Cal. App. 4th at 1389 (quoting *7-Eleven Owners*, 85 Cal.  
16 App. 4th at 1145).

17 The Court should consider factors, including “the strength of [p]laintiffs’ case, the risk,  
18 expense, complexity and likely duration of further litigation, the risk of maintaining class action  
19 status through trial, the amount offered in settlement, the extent of discovery completed and the  
20 stage of the proceedings, [and] the experience and views of counsel.” *Kullar v. Foot Locker Retail,*  
21 *Inc.*, 168 Cal. App. 4th 116, 128 (2008) (citing *Dunk*, 38 Cal. App. 4th at 1801); *Cellphone*  
22 *Termination*, 186 Cal. App. 4th at 1389. However, fairness is presumed “where: (1) the settlement  
23 is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow  
24 counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the  
25 percentage of objectors is small.” *Dunk*, 48 Cal. App. 4th at 1802; *Cellphone Termination*, 186 Cal.  
26 App. 4th at 1389.

27  
28

1           **A.       The Settlement Is Within the Range of Fair, Reasonable, and Adequate**

2                   **1.       The Settlement Is the Product of Arm's Length Negotiations Conducted**  
3                   **by Experienced and Knowledgeable Class Action Counsel**

4           The Settlement was reached after months of hard-fought, arm's-length negotiations  
5 conducted by experienced attorneys with the assistance of a respected mediator.

6           Proposed Co-Lead Settlement Class Counsel have significant experience prosecuting data  
7 breach consumer class actions, such as this matter, and are well-informed of the legal claims at issue  
8 and the risks of this case. Copies of Proposed Co-Lead Settlement Class Counsels' resumes are  
9 attached as Exhibit A to the Barnow Decl., filed herewith.

10           On August 27, 2020, the Settling Parties participated in a full-day mediation with the  
11 Honorable Wayne R. Andersen (Ret.) of JAMS. Barnow Decl. ¶ 8. While that mediation session  
12 concluded without the Settling Parties' reaching an agreement, the Settling Parties continued to  
13 negotiate with the assistance of Judge Andersen (Ret.) in the weeks following that mediation session  
14 and finally reached agreement on the material terms of a settlement in late September 2020. *Id.* ¶ 9.  
15 The Settling Parties then spent approximately two months negotiating the language of the Settlement  
16 and related exhibits. *Id.* ¶ 10. That process involved several calls and emails and the exchange of  
17 proposals and counterproposals. *Id.* ¶ 10.

18           Throughout those negotiations, Proposed Co-Lead Settlement Class counsel pursued  
19 informal discovery from CodeMetro that was appropriately targeted at information relevant to the  
20 Settlement. *Id.* ¶ 11; *see In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) ("In  
21 the context of class action settlements, formal discovery is not a necessary ticket to the bargaining  
22 table where the parties have sufficient information to make an informed decision about settlement.")  
23 (citations and quotations omitted); *see also* Manual for Complex Litigation (Fourth) § 13.12 (2004)  
24 (recognizing that the benefits of settlement are diminished if it is postponed until discovery is  
25 completed and approving of targeting early discovery at information needed for settlement  
26 negotiations). Informal discovery is a recognized method of minimizing the cost, delay, and burden  
27 associated with formal discovery. *See* Manual for Complex Litigation (Fourth) § 11.423 (2004).

28

1 Consistent with best practices, the Settlement includes a confirmatory discovery provision  
2 to enable Proposed Co-Lead Settlement Class Counsel to confirm the information provided to them  
3 through the course of settlement negotiations. Pursuant to that provision, CodeMetro will provide  
4 Proposed Co-Lead Settlement Class Counsel with reasonable confirmatory discovery or one or more  
5 declaration confirming the nature and scope of the Data Incident, the size of the Settlement Class,  
6 the nature of information at issue in the Data Incident, CodeMetro's applicable insurance policies  
7 and amount of coverage remaining under same, and the financial condition of CodeMetro. SA  
8 ¶ 10.5.

9 Because the Settlement was negotiated at arm's length by experienced and knowledgeable  
10 counsel with the assistance of a respected mediator, it is entitled to a presumption of fairness. *See*  
11 *Dunk*, 48 Cal. App. 4th at 1802–03.

## 12 2. The Settlement Benefits Are Excellent When Compared to the Costs, 13 Risks, and Delay of Continued Litigation

14 The timely and substantial benefits of the Settlement are excellent taking into consideration  
15 the costs, risks, and delay inherent in continuing to litigate this matter.

16 The Settlement provides certainty of recovery through the creation of an \$850,000  
17 Settlement Fund and includes relief tailored to the harms alleged in the litigation. The Settlement  
18 enables Settlement Class Members to claim, at their selection, one of the following: (1) a one-time  
19 cash payment (estimated at \$132 for California residents and \$66 for non-California residents);  
20 (2) up to \$250 in reimbursement for documented time spent (up to 4 hours at \$20/hour) and certain  
21 documented out-of-pocket expenses related to the Data Incident; or (3) reimbursement of up to  
22 \$3,500 for documented fraudulent or unauthorized charges more likely than not caused by the Data  
23 Incident. The step-up in cash payments to California residents is reflective of the relative strength  
24 of the claims asserted on behalf of these individuals, including under the California Confidentiality  
25 of Medical Information Act, Cal Civ. Code §§ 56, *et seq.*, and the California Consumer Privacy Act  
26 of 2018, Cal. Civ. Code §§ 1798.100, *et seq.*

27 Additionally, all Settlement Class Members whose Social Security Number was involved in  
28 the Data Incident are eligible to claim and receive a 2-free year subscription to CyberScout's

1 Package 3 (or a free 1-year subscription for those Settlement Class Members who accepted  
2 CodeMetro's prior one-year offer of credit monitoring). To receive the benefits of the Settlement,  
3 Settlement Class members need only log onto the settlement website, complete the Claim Form  
4 attached as Exhibit F to the Settlement, and submit appropriate documentation.

5 While Representative Plaintiff and Proposed Co-Lead Settlement Class Counsel believe in  
6 the merit of the claims asserted in the litigation, they also recognize the substantial risks involved  
7 in continuing to litigate this matter. CodeMetro has denied all allegations of wrongdoing and  
8 maintained its positions that Representative Plaintiff cannot state a claim for relief, that a litigated  
9 class should not be certified, that it would not be found liable at trial, and that Representative  
10 Plaintiff would not be able to prove class-wide damages resulting from the Data Incident.

11 While Proposed Co-Lead Settlement Class Counsel disagree with CodeMetro's views  
12 regarding the merits, they are mindful of the inherent problems of proof and possible defenses to  
13 the claims asserted in the litigation. They also recognize the difficulties in establishing liability on  
14 a class-wide basis through summary judgment or even at trial and in achieving a result better than  
15 that offered by the Settlement here. Prosecuting this litigation through trial and appeal would likely  
16 be lengthy, complex, and impose significant costs on all parties. *See, e.g., In re Austrian & German*  
17 *Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000) (recognizing that "[m]ost class  
18 actions are inherently complex and settlement avoids the costs, delays, and multitude of other  
19 problems associated with them"). Continued proceedings necessary to litigate this matter to final  
20 judgment would likely include substantial motion practice, extensive fact discovery, class  
21 certification proceedings, further dispositive motions and, of course, a trial and appeal. Given the  
22 complex nature of the Data Incident, a battle of the experts at trial is almost a certainty and, as such,  
23 continued proceedings would likely include substantial expert discovery and significant motion  
24 practice.

25 The timely and significant benefits provided to Settlement Class Members under the  
26 Settlement, when compared to the risks, costs, and delay of continuing to litigate this matter, support  
27 the Settlement is fair, reasonable, and adequate, and should be preliminarily approved.  
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1           **B.       The Notice Program Should Be Approved**

2           “When the court approves the settlement or compromise of a class action, it must give notice  
3 to the class of its preliminary approval and the opportunity for class members to object and, in  
4 appropriate cases, opt out of the class.” *Cho*, 177 Cal. App. 4th at 746 (citing Cal. Rules of Court  
5 3.769). California Rule of Court 3.769(f) provides that “notice must contain an explanation of the  
6 proposed settlement and procedures for class members to follow in filing written objections to it and  
7 in arranging to appear at the settlement hearing and state any objections to the proposed settlement.”  
8 The rules also specify the content of the notice to class members. Cal. Rules of Court 3.766. The  
9 “notice ... must fairly apprise the class members of the terms of the proposed compromise and of  
10 the options open to dissenting class members.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th  
11 224, 251 (2001); *Cellphone Termination*, 186 Cal. App. 4th at 1392.

12           The Settling Parties agreed upon Epiq Class Action & Claims Solutions as the Settlement  
13 Administrator to provide notice and settlement administration and request the Court’s approval of  
14 Epiq as the Settlement Administrator. Epiq has significant experience as a class action notice  
15 provider and settlement administrator. *See* Decl. of Cameron R. Azari, Esq. on Settlement Notice  
16 Plan and Notices (“Azari Decl.”) ¶¶ 5–10, attached as Exhibit A to the Settlement.

17           The Notice Program includes: (1) direct Email Notice to every Settlement Class Member  
18 CodeMetro has an email address for; (2) direct Postcard Notice to every Settlement Class Member  
19 CodeMetro is unable to provide an email address for but does have a mailing address; (3) a  
20 settlement website established to allow Settlement Class Members to obtain information regarding  
21 the Settlement, access important documents regarding the Settlement, and file claims online; and  
22 (4) a toll-free number to provide Settlement Class Members with information regarding the  
23 Settlement. *Id.* ¶¶ 12–13. The direct notice aspect of the Settlement is expected to reach  
24 approximately 90% of Settlement Class Members. *Id.* ¶ 13. The Notice Plan readily satisfies the  
25 “best practicable” standard. *Id.* ¶¶ 13, 24–28.

26           The notice content is also accurate, informative and meets the requirements of Rule 3.769(f).  
27 Notice is designed in a reader-friendly format that follows the format and content of the Federal  
28 Judicial Center’s model class notices. Azari Decl. ¶¶ 22–23. The notice provides information about

1 the terms of the settlement, informs of the Fairness Hearing, and explains Class Members' rights to  
2 opt out, object or appear and the procedures and deadlines for doing so. *See Wershba*, 91 Cal. App.  
3 4th at 251-52.

4 **V. THE SETTLEMENT CLASS SHOULD BE CONDITIONALLY CERTIFIED FOR**  
5 **SETTLEMENT PURPOSES ONLY**

6 The Settling Parties request that the Court conditionally certify the Settlement Class for  
7 settlement purposes only. The California Supreme Court recognizes the importance class actions  
8 play in the enforcement of consumers' rights and therefore, encourages courts to be procedurally  
9 innovative towards the certification of consumer protection claims. *See In re Tobacco II Cases*,  
10 46 Cal. 4th 298, 313 (2009); *Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 266 (2018).  
11 California Rule of Court 3.769(d) allows the Court to certify a class for purposes of settlement at  
12 the preliminary approval stage.

13 California Code of Civil Procedure § 382 authorizes the use of the class action device and  
14 provides the procedural framework for certification of class actions. It is well-established that trial  
15 courts should use a "lesser standard of scrutiny" in certifying a settlement class than a litigation  
16 class. *See Dunk*, 48 Cal. App. 4th at 1807 n.19; *Wershba*, 91 Cal. App. 4th at 240. That is because  
17 the trial court's fairness review of the settlement protects the interests of the putative class members.  
18 *Dunk*, 48 Cal. App. 4th 1807 n.19; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1987). The  
19 Settlement Class is well suited for class certification.

20 **A. The Class Is Numerous**

21 Numerosity is met if a proposed class is so large that joinder of all members would be  
22 impracticable. Code of Civ. Proc. § 382; Civ. Code § 1781(b)(1). Because the Settlement Class is  
23 estimated to include more than 98,700 individuals, joinder of all its members in one proceeding  
24 would be impracticable. The numerosity requirement is satisfied. *See Rose v. City of Hayward*, 126  
25 Cal. App. 3d 926, 934 (1981).

26 **B. Issues of Law and Fact Common to All Settlement Class Members Predominate**

27 The test for predominance does not require that each and every issue in the case be identical  
28 for each and every class member. *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 338

1 (2004). Rather, the “ultimate question” is whether “the issues which may be jointly tried” or “are so  
2 numerous or substantial that the maintenance of a class action would be advantageous to the judicial  
3 process and to the litigants.” *Collins v. Rocha*, 7 Cal. 3d 232, 238 (1972). “[T]hat each class member  
4 might be required ultimately to justify an individual claim does not necessarily preclude  
5 maintenance of a class action.’ Predominance is a comparative concept, and ‘the necessity for class  
6 members to individually establish eligibility and damages does not mean individual fact questions  
7 predominate.’” *Marler v. E.M. Johansing, LLC*, 199 Cal. App. 4th 1450, 1462-63 (2011) (quoting  
8 *Sav-On*, 34 Cal. 4th at 334).

9 Several questions of law and fact common to all Settlement Class Members exist including,  
10 without limitation: (a) whether Defendant had a duty to implement and maintain reasonable security  
11 procedures and practices appropriate to the nature of the PII/PHI it collected from Plaintiff and  
12 Settlement Class Members; (b) whether Defendant breached its duties to protect the PII/PHI of  
13 Plaintiff and each Settlement Class Member; and (c) whether Plaintiff and Settlement Class  
14 Members are entitled to statutory damages, actual damages, and other equitable relief. The  
15 predominance requirement is satisfied.

16 **C. Representative Plaintiff’s Claims Are Typical of the Claims of the Settlement**  
17 **Class**

18 A representative plaintiff’s claims are typical if they are significantly similar to those of the  
19 other class members. *Daniels v. Centennial Grp., Inc.*, 16 Cal. App. 4th 467, 473 (1993); *see also*  
20 *Sav-On*, 34 Cal. 4th at 338. The typicality requirement does not focus on the personal characteristics  
21 of the representative plaintiff or his individual circumstances with respect to the class, but rather  
22 upon the typicality of the proposed representative’s claims as they relate to the defendant’s conduct  
23 and activities. *Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983).

24 Representative Plaintiff’s and all other Settlement Class Members’ claims arise from  
25 CodeMetro’s alleged failure to implement and maintain reasonable security measures and the  
26 resulting Data Incident. As a result, the typicality requirement is satisfied.

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1           **D. Representative Plaintiff and Proposed Co-Lead Settlement Class Counsel Are**  
 2           **Adequate**

3           The class representative must also “adequately represent the class.” *Richmond v. Dart Indus.,*  
 4 *Inc.*, 29 Cal. 3d 462, 470 (1981). This requirement is met if the class representative is represented  
 5 by counsel qualified to conduct the pending litigation and the named plaintiff’s interests are not  
 6 antagonistic to the class. *Id.*; *see also Marler*, 199 Cal. App. 4th at 1459. Both requirements are met  
 7 here. Co-Lead Settlement Class Counsel are indisputably experienced in prosecuting class action  
 8 litigation, including complex data breach cases, and thus are “qualified, experienced and generally  
 9 able to conduct the proposed litigation.” *Miller v. Woods*, 148 Cal. App. 3d 862, 874 (1983).

10           Representative Plaintiff’s interests are also aligned with the interests of the other Settlement  
 11 Class Members. *Richmond*, 29 Cal. 3d at 470 (“[O]nly a conflict that goes to the very subject matter  
 12 of the litigation will defeat a party’s claim of representative status.”).

13           **E. Class Action Treatment Is Superior**

14           “A class action also must be the superior means of resolving the litigation, for both the parties  
 15 and the court.” *Harper v. 24 Hour Fitness, Inc.*, 167 Cal. App. 4th 966, 974 (2008) (quoting *Newell*  
 16 *v. State Farm Gen. Ins. Co.*, 118 Cal. App. 4th 1094, 1101 (2004)). Judicial economy, efficiency,  
 17 and promoting uniformity of decisions are paramount in deciding whether a class action is superior.  
 18 2 *Newberg on Class Actions*, § 4:39 (4th ed. 2010); *see also Linder v. Thrifty Oil Co.*, 23 Cal. 4th  
 19 429, 446 (2000). In the context of settlement, class resolution is typically superior. *See Dunk*, 48  
 20 Cal. App. 4th at 1807 n.19; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998).

21           A class action is the only reasonable method to fairly and efficiently adjudicate Settlement  
 22 Class Members’ claims against CodeMetro. *See, e.g., Phillips Co. v. Shutts*, 472 U.S. 797, 809  
 23 (1985) (“[c]lass actions . . . permit the plaintiffs to pool claims which would be uneconomical to  
 24 litigate individually . . . [in such a case,] most of the plaintiffs would have no realistic day in court  
 25 if a class action were not available”). Settlement Class Members likely would be unable or unwilling  
 26 to shoulder the great expense of litigating the claims on their own against CodeMetro given the  
 27 comparatively small size of each individual Settlement Class Member’s claims. *See Mace v. Van*  
 28 *Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (stating that the “policy at the very core of the

1 class action mechanism is to overcome the problem that small recoveries do not provide the  
2 incentive for any individual to bring a solo action”). The superiority requirement is satisfied.

3 **VI. FAIRNESS HEARING**

4 The date by which Settlement Class Members must object or opt out is based on the date set  
5 for the Fairness Hearing and the completion of notice. Based upon the estimated time needed for  
6 implementing the Notice Plan, the parties request that the Court set the Fairness Hearing  
7 approximately 100 days out.

8 **VII. CONCLUSION**

9 For the foregoing reasons, Representative Plaintiff respectfully requests that the Court grant  
10 this motion and enter an Order: (1) granting preliminary approval of the Settlement; (2) approving  
11 the Notice Program, as set forth in the Declaration of Cameron R. Azari attached as Exhibit A to the  
12 Settlement, and the commencement of notice to the Settlement Class as set forth in the Settlement  
13 and the Notice Program; (3) appointing Epiq Class Action & Claims Solutions as Settlement  
14 Administrator; (4) conditionally certifying the Settlement Class for settlement purposes only;  
15 (5) appointing Juan C. Lozano as Representative Plaintiff; (6) appointing as Co-Lead Settlement  
16 Class Counsel Ben Barnow, Barnow and Associates, P.C., and Timothy G. Blood, Blood Hurst &  
17 O'Reardon LLP (“Co-Lead Settlement Class Counsel”); (7) appointing Erich P. Schork and  
18 Anthony L. Parkhill, Barnow and Associates, P.C., and Leslie E. Hurst and Jennifer L. MacPherson,  
19 Blood Hurst & O'Reardon LLP as Settlement Class Counsel; (8) approving the form and content of  
20 the Email Notice, Postcard Notice, Detailed Notice, and Claim Form attached as Exhibits C–F of  
21 the Settlement, respectively; and (9) scheduling a Final Fairness hearing to consider entry of a final

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1 order approving the Settlement, final certification of the Settlement Class for settlement purposes  
2 only, and the request for attorneys' fees, costs, and expenses, and the Representative Plaintiff service  
3 award.

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Dated: February 1, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

*Juan C. Lozano v. Codemetro, Inc.*

San Diego Superior Court – Central  
Case No. 37-2020-00022701-CU-MC-CTL

I hereby certify that on February 1, 2021, I electronically filed the foregoing with the Clerk of the Court using One Legal Online Court Services, and electronically served the foregoing upon the attorney of record for each party in this case at the e-mail address(es) registered for such service through One Legal Online Court Services. Parties may access this filing through the Court’s website.

I certify under penalty of perjury that the foregoing is true and correct. Executed on February 1, 2021.

*s/ Janet Kohnenberger*

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