James E. Magleby (7247)
magleby@mcg.law
Jennifer Fraser Parrish (11207)
parrish@mcg.law
MAGLEBY CATAXINOS & GREENWOOD, PC
141 West Pierpont Avenue
Salt Lake City, UT 84101
Telephone: 801.359.9000
Facsimile: 801.359.9011

Tina Wolfson (*pro hac vice*)
twolfson@ahdootwolfson.com
Robert Ahdoot (*pro hac vice*)
rahdoot@ahdootwolfson.com
AHDOOT & WOLFSON, PC
2600 W. Olive Avenue, Suite 500
Burbank, CA 91505-4521
Telephone: 310.474.9111
Facsimile: 310.474.8585

Ben Barnow (*pro hac vice*)
b.barnow@barnowlaw.com
Anthony L. Parkhill (*pro hac vice*)
aparkhill@barnowlaw.com
Riley W. Prince (*pro hac vice*)
rprince@barnowlaw.com
BARNOW AND ASSOCIATES, P.C.
205 West Randolph Street, Ste. 1630
Chicago, IL 60606
Telephone: 312.621.2000
Facsimile: 312.641.5504

Andrew W. Ferich (*pro hac vice*)
aferich@ahdootwolfson.com
AHDOOT & WOLFSON, PC
201 King of Prussia Road, Suite 650
Radnor, PA 19087
Telephone: 310.474.9111
Facsimile: 310.474.8585

Attorneys for Plaintiff Jerry Lukens

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JERRY LUKENS, individually and on behalf of all others similarly situated, **Plaintiff,** **v.** **UTAH IMAGING ASSOCIATES, INC., a Utah corporation,** **Defendant.**	**PLAINTIFF JERRY LUKENS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** **Case No.: 210906618** **Honorable Laura Scott**

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 1

III. SETTLEMENT DISCUSSIONS 2

IV. TERMS OF THE SETTLEMENT 3

A. The Settlement Benefits 3

1. Cash Compensation 4

2. Credit and Identity Theft Monitoring Services 4

3. Reimbursement For Out-Of-Pocket Losses and Lost Time 4

a. Compensation For Ordinary Losses 4

b. Compensation For Lost Time 5

c. Compensation For Extraordinary Losses 5

B. Notice and Settlement Administration 6

C. Opt-Outs and Objections 7

D. Attorneys' Fees, Costs, and Expenses, and Service Award 8

E. Release 8

V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED 8

A. The Terms of the Settlement Are Fair, Reasonable, and Adequate and Warrant Preliminary Approval. 8

1. The Settlement Was Fairly and Honestly Negotiated 11

2. The Judgment of Plaintiff and Defendant Is Fair and Reasonable 13

3. Serious Questions of Law and Fact Exist 14

4. Immediate Recovery Outweighs the Possibility of Future Relief 15

B. The Proposed Class Notice Should Be Approved 16

C. The Court Should Grant Class Certification for Settlement Purposes 17

1. The Class Is Sufficiently Numerous and Joinder Is Impracticable 18

2. Common Questions of Law and Fact Exist 19

VI. THE TYPICALITY REQUIREMENT IS MET 20

VII. PLAINTIFF AND PROPOSED CLASS COUNSEL ADEQUATELY REPRESENT THE CLASS 21

VIII. THE REQUIREMENTS OF RULE 23(b)(3) ARE MET 22

IX. CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Acevedo v. Sw. Airlines Co.,
No. 1:16-cv-00024-MV-LF, 2019 U.S. Dist. LEXIS 213691 (D.N.M. Dec. 10, 2019)........... 10

Adkins v. Facebook, Inc.,
424 F. Supp. 3d 686 (N.D. Cal. 2019) 15

Alvin G. Rhodes Pump Sales v. Indus. Comm'n,
681 P.2d 1244 (Utah 1984)... 10

Amchem Prods. Inc. v. Windsor,
521 U.S. 591 (1997)... 18, 23

Belote v. Rivet Software, Inc.,
No. 12-cv-02792-WYD-MJW, 2013 U.S. Dist. LEXIS 74529 (D. Colo. May 28, 2013) 19

Bracamontes v. Bimbo Bakeries USA, Inc.,
No. 15-cv-02324-RBJ-NYW, 2018 U.S. Dist. LEXIS 224097 (D. Colo. Oct. 10, 2018)........ 15

CGC Holding Co., LLC v. Broad & Cassell,
773 F.3d 1076 (10th Cir. 2014) 10

Christensen v. Miner,
No. 2:18CV37DAK, 2019 U.S. Dist. LEXIS 164572 (D. Utah Sept. 24, 2019)...................... 11

Creazzo v. LenderLive Network, Inc.,
No. 13-cv-03135-RBJ-MJW, 2015 U.S. Dist. LEXIS 71184 (D. Colo. June 2, 2015)............. 9

Ditty v. Check Rite, Ltd.,
182 F.R.D. 639 (D. Utah 1998) 19, 20

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974)... 16

Florece v. Jose Pepper's Rests., LLC,
No. 20-2339-ADM, 2021 U.S. Dist. LEXIS 154392 (D. Kan. Aug. 17, 2021) 18

Gradie v. C.R. Eng., Inc.,
No. 2:16-cv-00768-DN, 2020 U.S. Dist. LEXIS 218287 (D. Utah Nov. 20, 2020)........... 15, 18

In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.,
293 F.R.D. 21 (D. Me. 2013)... 15

In re Motor Fuel Temp. Sales Pracs. Litig.,
286 F.R.D. 488 (D. Kan. 2012).. 10, 16

In re Qwest Commc'ns Int'l Inc., Sec. Litig.,
625 F. Supp. 2d 1133 (D. Colo. 2009)... 13, 14

In re Urethane Antitrust Litig.,
237 F.R.D. 440 (D. Kan. 2006), *aff'd*, 768 F.3d 1245 (10th Cir. 2014).................................. 21

Jaques v. Midway Auto Plaza, Inc.,
2010 UT 54, 665 Utah Adv. Rep. 18, 240 P.3d 769.. 19, 21

Lawrence v. First Fin. Inv. Fund V, LLC,
No. 2:19-cv-00174-RJS-CMR, 2021 U.S. Dist. LEXIS 162184 (D. Utah Aug. 26, 2021).. 9, 12

Lawrence v. First Financial Investment Fund V, LLC,
336 F.R.D. 366 (D. Utah 2020) 21

Lengel v. HomeAdvisor, Inc.,
No. 15-2198-KHV, 2017 U.S. Dist. LEXIS 10471 (D. Kan. Jan. 25, 2017)........................... 10

Lucas v. Kmart Corp.,
234 F.R.D. 688 (D. Colo. 2006) 12, 14

Marcus v. Kan. Dep't of Revenue,
209 F. Supp. 2d 1179 (D. Kan. 2002).. 11

McGlenn v. Driveline Retail Merch., Inc.,
No. 18-cv-2097, 2021 U.S. Dist. LEXIS 179775 (C.D. Ill. Sep. 21, 2021) 14

McPolin v. Credit Serv. of Logan, Inc.,
No. 1:16-cv-00116 BSJ, 2017 U.S. Dist. LEXIS 59420 (D. Utah Apr. 17, 2017)..................... 9

Nat'l Am. Ins. Co. v. Rodriquez,
No. CV 19-1020 KG/CG, 2021 U.S. Dist. LEXIS 36344 (D.N.M. Feb. 26, 2021) 12

Officers for Justice v. Civil Serv. Com.,
688 F.2d 615 (9th Cir. 1982) 10

Plumb v. State,
809 P.2d 734 (Utah 1990)... 9

Rhodes v. Olson Associates, P.C.,
308 F.R.D. 664 (D. Colo. 2015) 11, 13, 14

Rutter & Wilbanks Corp. v. Shell Oil Co.,
314 F.3d 1180 (10th Cir. 2002) 11

Slusher v. Ospital,
777 P.2d 437 (Utah 1989) 10

Trevizo v. Adams,
455 F.3d 1155 (10th Cir. 2006) 18

Zapata v. IBP, Inc.,
167 F.R.D. 147 (D. Kan. 1996) 11

Other Authorities

4 Newberg on Class Actions, § 11.25 (4th ed. 2002) 9, 10, 17

Manual for Complex Litigation, § 21.612 (4th ed. 2004) 9, 17, 18

Rules

Fed. R. Civ. P. 23 9

Utah R. Civ. P. 23 ..... *passim*

I. INTRODUCTION

Plaintiff Jerry Lukens ("Plaintiff"), individually and as class representative, and Defendant Utah Imaging Associates, Inc. ("UIA" or "Defendant") (collectively, the "Settling Parties" or "Parties") have settled this putative class action arising out of Plaintiff's allegations regarding a Data Incident[1] that occurred on or about September 4, 2021, in which cybercriminals had unauthorized access to Defendant's network. The proposed Settlement, as set forth in the executed Settlement Agreement attached as Exhibit 1, resolves Plaintiff's claims on a class-wide basis, is fair, reasonable, and adequate, and satisfies the criteria for preliminary approval under Utah law.

With this motion, Plaintiff respectfully requests that the Court: (1) conditionally certify the Settlement Class for settlement purposes; (2) appoint Plaintiff as class representative; (3) appoint Andrew W. Ferich of Ahdoot & Wolfson, PC and Ben Barnow and Anthony L. Parkhill of Barnow and Associates, P.C. as Class Counsel; (4) grant preliminary approval of the Settlement; (5) approve the proposed Notice Program and direct its distribution to Settlement Class Members; (6) set deadlines for Settlement Class Members to object or opt out; and (7) schedule a Final Approval Hearing, at which time the Court can consider whether to give final approval to the Settlement and any award of attorneys' fees, costs, expenses and the service award.[2]

II. BACKGROUND

On September 4, 2021, UIA discovered that an unauthorized individual or individuals had gained access to UIA's network systems. UIA conducted an investigation and determined that the

[1] All capitalized terms not separately defined in this motion shall have the same definition provided for in the Settlement Agreement.
[2] UIA does not oppose the relief requested in this motion, and takes no position as to the legal arguments contained in this motion.

personally identifiable information ("PII") and protected health information ("PHI") (collectively, "Private Information") of approximately 583,642 persons may have been accessed in the Data Incident. The unauthorized individual(s) had access to the following Private Information of UIA patients (including Plaintiff): names, mailing addresses, dates of birth, Social Security numbers, health insurance policy numbers, and medical information.

On December 8, 2021, Plaintiff filed a complaint against UIA on behalf of himself and similarly situated individuals. *Lukens v. Utah Imaging Associates, Inc.*, No. 210906618. Plaintiff brought claims for negligence, negligence per se, breach of fiduciary duty, breach of implied contract, unjust enrichment, and violations of the Utah Consumer Sales Practices Act ("UCSPA").

On February 14, 2022, UIA filed a motion to dismiss Plaintiff's complaint, arguing that Plaintiff lacked standing and failed to state his claims. Plaintiff responded to the motion on February 28, 2022, and UIA filed a reply in support of the motion on March 7, 2022. The Court conducted a hearing regarding the motion to dismiss on April 28, 2022, ruling that the motion to dismiss was granted only as to Plaintiff's claim for unjust enrichment and the UCSPA claim, but denied on all other grounds. The Order was entered on May 12, 2022.

III. SETTLEMENT DISCUSSIONS

After the Court ruled on the motion to dismiss, the Parties began arm's length negotiations concerning a possible settlement of this matter. Declaration of Ben Barnow ("Barnow Decl."), attached as Exhibit 2, ¶ 3; Declaration of Andrew Ferich ("Ferich Decl."), attached as Exhibit 3, ¶ 5. The Parties eventually agreed to attend a mediation which was held on June 27, 2022. Barnow Decl., ¶ 3; Ferich Decl., ¶ 5. The Parties engaged the Honorable John W. Thornton (Ret.) as a mediator to oversee settlement negotiations in this Litigation. Barnow Decl., ¶ 3; Ferich Decl., ¶

5. In advance of formal mediation, the Parties discussed their respective positions on the merits of the claims and class certification and provided detailed information to the mediator on the relevant facts and law. Barnow Decl., ¶ 4; Ferich Decl., ¶ 6. While the Parties did not reach a settlement during the mediation, the Parties continued to negotiate early resolution of this matter. Barnow Decl., ¶ 5; Ferich Decl., ¶ 7. Following further arm's length settlement negotiations, the Parties reached agreement on the general terms of the Settlement. Barnow Decl., ¶ 6; Ferich Decl., ¶ 8.

The Parties recognize and acknowledge the benefits of settling this Litigation. Absent settlement, Class Counsel believe that Plaintiff would succeed in certifying a litigation class comprised of UIA's current and former patients. Barnow Decl., ¶ 10; Ferich Decl., ¶ 12. Nevertheless, Class Counsel recognize that all litigation has risks and that discovery, class certification proceedings, and trial will be time-consuming and expensive for both parties. Barnow Decl., ¶ 9; Ferich Decl., ¶ 11. Class Counsel also recognize the potential benefits of early resolution, not the least being that Settlement Class Members will have the opportunity to receive identity theft protections and compensation far sooner. Barnow Decl., ¶ 10; Ferich Decl., ¶ 12. Class Counsel have, therefore, determined that the Settlement agreed to by the Parties is fair, reasonable, and adequate. Barnow Decl., ¶ 15; Ferich Decl., ¶ 18.

IV. TERMS OF THE SETTLEMENT

A. The Settlement Benefits

The Settlement requires Defendant to pay a non-reversionary sum of $2,100,000.00 into the Settlement Fund. Settlement Agreement ("S.A.") ¶ 13. Compensation will be paid from the Settlement Fund to Settlement Class Members who submit a timely and valid Claim Form approved by the Settlement Administrator. *See id.* ¶¶ 23–25. Claims will be subject to review for

completeness and plausibility by the Settlement Administrator. *Id.* ¶ 34. For claims deemed invalid, the Settlement Administrator will provide claimants an opportunity to cure. *Id.* ¶ 35. The Settlement Fund will be used to provide the following benefits to the Settlement Class Members:

1. Cash Compensation

Settlement Class Members may select a one-time cash payment (estimated to be approximately $50.00), subject to proration depending on the number of claims filed. S.A. ¶¶ 23, 25. Claimants who select this benefit will not be permitted to select any other benefit. *See id*. ¶ 25.

2. Credit and Identity Theft Monitoring Services

In addition to the benefits described in section IV.A.3, *infra*, Settlement Class Members who do not select the cash fund payment may submit a claim for 24 months of credit monitoring and identity theft insurance. The credit monitoring benefit will have the following features: 1) real time monitoring of the credit file at all three major credit bureaus; 2) identity theft insurance (no deductible) of $1,000,000; and 3) access to fraud resolution agents to help resolve identity thefts. S.A. ¶ 24(d).

3. Reimbursement For Out-Of- Pocket Losses and Lost Time

a. <u>Compensation For Ordinary Losses</u>

In addition to the benefits identified in section IV.A.2, *supra,* Settlement Class Members who do not select the cash fund payment may claim up to $150.00 by submitting a valid and timely Claim Form and supporting documentation for ordinary losses incurred as a result of the Data Incident. Ordinary losses can arise from the following categories:

i. *Out of pocket expenses incurred* as a direct result of the Data Incident, including documented 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, gasoline for local travel, and bank fees, all of which must be more likely than not attributable to the Data Incident, must not have been previously reimbursed or subject to reimbursement by a third-party, and that are reasonably described and supported by an attestation under penalty of perjury. S.A. ¶ 24(a).

ii. *Fees for credit reports, credit monitoring, or other identity theft insurance product* purchased between September 4, 2021 and the Claims Deadline that the claimant attests under penalty of perjury he/she incurred as a result of the Data Incident and not already paid for or reimbursed by a third party. All such fees must be supported by documentation substantiating the full extent of the amount claimed. *Id.*

b. <u>Compensation For Lost Time</u>

Settlement Class Members may claim up to 3.5 hours of lost time, at $25.00 an hour, if at least one-half hour of documented time was spent dealing with the Data Incident. All such lost time must be reasonably described and supported by an attestation under penalty of perjury that the time spent was reasonably incurred dealing with the Data Incident. *Id.* ¶ 24(b).

c. <u>Compensation For Extraordinary Losses</u>

Settlement Class Members may submit claims for up to $5,000.00 in compensation by submitting a valid and timely claim form that proves more likely than not a monetary loss directly arising from identity theft or other fraud perpetuated on or against the Settlement Class Member. Claims under this category must be supported by an attestation under penalty of perjury and documentation substantiating the full extent of the amount claimed. Valid claims under this category must meet the requirements below:

i. The loss is an actual, documented, and unreimbursed monetary loss;

ii. The loss was more likely than not the result of the Data Incident;

iii. The loss is not already covered by the "Compensation for Ordinary Losses" category; and

iv. the Settlement Class Member made reasonable efforts to avoid, or seek reimbursement for, the loss, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance and other available insurance. *Id.* ¶ 24(c).

B. Notice and Settlement Administration

The Parties agreed to the appointment of Epiq as Settlement Administrator (the "Settlement Administrator"). Barnow Decl. ¶ 16; Ferich Decl. ¶ 19; Declaration of Cameron R. Azari ("Azari Decl."), attached as Exhibit 4. The Settlement Administrator will, subject to Court approval, provide notice to the Class in the manner set forth below. The cost of such Notice will be paid from the Settlement Fund. S.A. ¶ 16. Defendant, through the Settlement Administrator, will provide written notice in the form of a Postcard Notice via United States Mail to all Settlement Class Members. *Id.* ¶¶ 44–48; Azari Decl. ¶¶ 22–24. The Settlement Administrator shall perform skip-tracing for any returned mail and shall re-mail notice to any Settlement Class Members whose addresses are uncovered by skip-tracing. S.A. ¶ 29; Azari Decl. ¶ 24. The Settlement Administrator will also create a publicly available website and toll-free hotline devoted to providing relevant information related to the Litigation and settlement and assistance to Settlement Class Members. S.A. ¶ 10(mm), 51–52; Azari Decl. ¶¶ 31–33. The Settlement Administrator will review and evaluate each Claim Form, including any required documentation submitted, for validity, timeliness, and completeness. S.A. ¶¶ 23, 34.

C. Opt-Outs and Objections

The Short Form Notice shall inform each Settlement Class Member of his or her right to request exclusion from the Settlement Class and not to be bound by the Settlement, if, before the Opt-Out Deadline, the Settlement Class Member personally completes and mails a request for exclusion to the Settlement Administrator at the address set forth in the Postcard Notice. For a Settlement Class Member's Opt-Out Request to be valid, it must (a) state his or her full name, address, and telephone number; (b) contain the Settlement Class Member's personal and original signature (or the original signature of a person previously authorized by law, such as a trustee, guardian or person acting under a power of attorney to act on behalf of the Settlement Class Member with respect to a claim or right such as those in the Litigation); and (c) state unequivocally the Settlement Class Member's intent to be excluded from the Settlement Class and from the Settlement. S.A. ¶¶ 55–57.

Furthermore, Settlement Class Members will be able to object to the Settlement by filing with the Court and serving a written objection to the Settlement to Class Counsel and Defendant's Counsel. *Id.* ¶ 62. Each Objection must (a) set forth the Settlement Class Member's full name, current address, and telephone number; (b) contain the Settlement Class Member's original signature; (c) state that the Settlement Class Member objects to the Settlement, in whole or in part; (d) set forth a statement of the legal and factual basis for the Objection; and (e) provide copies of any documents that the Settlement Class Member wishes to submit in support of his/her position. *Id.* ¶¶ 63–64.

D. Attorneys' Fees, Costs, and Expenses, and Service Award

Class Counsel shall request the Court approve an award of attorneys' fees not to exceed $700,000, and reasonable litigation costs and expenses, as well as a Service Award of $3,000 to the named Class Representative, which shall, if approved by the Court, be paid from the Settlement Fund. S.A. ¶¶ 68-69. The Service Award reflects the work the Class Representative has performed in assisting Class Counsel with this Litigation, including numerous telephonic conferences with Class Counsel. Barnow Decl., ¶ 12; Ferich Decl., ¶ 14. This Settlement would not have been possible without the efforts and assistance of the Class Representative, who put his name on the line and sacrificed his personal time to participate in and advance this Litigation. Barnow Decl., ¶ 12; Ferich Decl., ¶ 14.

E. Release

In exchange for the relief described above, Settlement Class Members who do not opt out of the Settlement will fully release UIA for all claims and causes of action pleaded or that could have been pleaded that are related in any way to the activities stemming from the Data Incident (the "Plaintiff's Released Claims" defined in the Settlement Agreement at ¶ 10(aa)). S.A.¶¶ 86–94.

V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

A. The Terms of the Settlement Are Fair, Reasonable, and Adequate and Warrant Preliminary Approval.

The Settlement represents a fair, reasonable, and adequate resolution of this Litigation and is worthy of notice to, and consideration by, the Settlement Class Members. It will provide significant financial relief to participating Settlement Class Members as compensation for

Plaintiff's Released Claims, and will relieve the Settling Parties of the burden, uncertainty, and risk of continued litigation.

Under Utah law, the Court must approve of the Settlement prior to the Settlement taking effect. *See* Utah R. Civ. P. 23(e). Courts review proposed class action settlements using a well-established two-step process. Conte & Newberg, 4 Newberg on Class Actions, § 11.25, at 38–39 (4th ed. 2002); *see e.g.*, *McPolin v. Credit Serv. of Logan, Inc.*, No. 1:16-cv-00116 BSJ, 2017 U.S. Dist. LEXIS 59420, at *11 (D. Utah Apr. 17, 2017) (preliminarily approving class action settlement and setting briefing schedule for final approval motion).[3] The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." Newberg, § 11.25, at 38–39. "In granting preliminary approval, courts apply a less stringent standard than at the final approval stage." *Creazzo v. LenderLive Network, Inc.*, No. 13-cv-03135-RBJ-MJW, 2015 U.S. Dist. LEXIS 71184, at *3 (D. Colo. June 2, 2015). The preliminary approval hearing is not a fairness hearing, but rather a hearing to ascertain whether there is a reason to notify the class members of the proposed settlement and to proceed with a fairness hearing. Newberg, § 11.25, at 38–39; *Lawrence v. First Fin. Inv. Fund V, LLC*, No. 2:19-cv-00174-RJS-CMR, 2021 U.S. Dist. LEXIS 162184, at *17 (D. Utah Aug. 26, 2021) (analyzing the fairness and reasonableness of a class settlement and approving a notice plan). 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. Manual for Complex Litigation, § 21.632 (4th ed. 2004). If the Court finds the settlement proposal "within the range of

---

[3] Utah courts can look to federal court cases analyzing Fed. R. Civ. P. 23 in analyzing Utah R. Civ. P. 23. *See Plumb v. State*, 809 P.2d 734, 738 n.4 (Utah 1990).

possible approval," the case proceeds to the second step in the review process: the final approval hearing. Newberg, § 11.25, at 38–39; *Lengel v. HomeAdvisor, Inc.*, No. 15-2198-KHV, 2017 U.S. Dist. LEXIS 10471, at *17 (D. Kan. Jan. 25, 2017).

For the purpose of preliminary approval, the Court's primary function "is to ensure that the requirements of Rule 23 are satisfied, not to make a determination on the merits of the putative class's claims." *CGC Holding Co., LLC v. Broad & Cassell*, 773 F.3d 1076, 1087 (10th Cir. 2014). Preliminary approval is appropriate "where the proposed settlement 'appears to the be product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.'" *In re Motor Fuel Temp. Sales Pracs. Litig.*, 286 F.R.D. 488, 492 (D. Kan. 2012). Because the essence of every settlement is compromise, courts should not reject a settlement, let alone a preliminary approval motion, solely because it does not provide a complete victory. *See Acevedo v. Sw. Airlines Co.*, No. 1:16-cv-00024-MV-LF, 2019 U.S. Dist. LEXIS 213691, at *10 (D.N.M. Dec. 10, 2019) ("An evaluation of the benefits of the settlement also must be tempered by the recognition that any compromise involves concessions on the part of the parties. Indeed, the very essence of a settlement agreement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'") (quoting *Officers for Justice v. Civ. Serv. Comm'n of Coty & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982)). Utah has strong judicial and public policy favoring settlements. *See*, *e.g.*, *Slusher v. Ospital*, 777 P.2d 437, 441 (Utah 1989) (stating that "[t]he public policy is to encourage settlements); *Alvin G. Rhodes Pump Sales v. Indus. Comm'n*, 681 P.2d 1244, 1248 (Utah 1984) ("The law generally encourages settlements.").

In the Tenth Circuit, courts consider the following factors in determining whether a proposed settlement is "fair, reasonable, and adequate": "(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable." *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002). Even a preliminary application of these factors to this Litigation demonstrates that the proposed settlement is "fair, reasonable, and adequate."

1. The Settlement Was Fairly and Honestly Negotiated

With respect to the first factor, the Court must "ensure that the agreement is not illegal, a product of collusion, or against the public interest." *Christensen v. Miner*, No. 2:18CV37DAK, 2019 U.S. Dist. LEXIS 164572, at *16 (D. Utah Sept. 24, 2019). Class Counsel have extensive class action experience, specializing in data breach litigation, and "weight is given to their favorable judgment as to the merits, fairness, and reasonableness of the settlement." *Rhodes v. Olson Assoc., P.C.*, 308 F.R.D. 664, 667 (D. Colo. 2015); *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002) ("Counsels' judgment as to the fairness of the agreement is entitled to considerable weight."). The experience of Class Counsel demonstrates that the Class was well-represented at the bargaining table, and weighs in favor of approval of the Settlement in this Litigation. *See*, *e.g.*, *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 161 (D. Kan. 1996) ("In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to vigorously prosecute the action on behalf of the class.").

Here, the Settlement Agreement is the product of arm's length settlement negotiations that took place over the course of several months among experienced counsel on both sides. Alternative dispute discussions began in May 2022, and consisted of extensive telephonic conferences and consistent email communications. Barnow Decl., ¶ 3; Ferich Decl., ¶ 5. As a result of these resolution efforts, the Parties mutually agreed to submit to an all-day, formal mediation session before the Honorable John W. Thornton (Ret.) on June 27, 2022. Barnow Decl., ¶ 3; Ferich Decl., ¶ 5. The negotiations before Judge Thornton were hard-fought and did not initially result in a final agreement on all terms of the Settlement. Barnow Decl., ¶ 5; Ferich Decl., ¶ 7. However, following formal mediation, the Parties' settlement discussions continued and ultimately culminated in an agreement providing various categories of relief to the Class which Class Counsel fervently believe to be fair. Barnow Decl., ¶ 6; Ferich Decl., ¶ 8.

District Courts within the Tenth Circuit have found similar circumstances showed that a settlement reached through arms-length negotiations was fair and reasonable. *See*, *e.g.*, *Lawrence*, 2021 U.S. Dist. LEXIS 162184, at *8 (granting preliminary approval of a settlement reached "through arms-length negotiations and vigorous advocacy."); *Nat'l Am. Ins. Co. v. Rodriquez*, No. CV 19-1020 KG/CG, 2021 U.S. Dist. LEXIS 36344, at *9 (D.N.M. Feb. 26, 2021) (concluding that "arms-length negotiation after private mediation" established settlement was fairly and honestly negotiated); *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006) (finding that negotiations between experienced counsel allowed the court to presume the resolution represented an arm's-length settlement). The Settlement, negotiated after significant litigation, between experienced counsel, and with the assistance and oversight of an experienced neutral, was thus fairly and honestly negotiated.

2. The Judgment of Plaintiff and Defendant Is Fair and Reasonable

The extensive experience both Plaintiff's Counsel and Defendant's Counsel have pertaining to the resolution of data breach class actions also affords weight to the judgment of the Parties in reaching the Settlement. *See In re Qwest Commc'ns Int'l Inc., Sec. Litig.*, 625 F. Supp. 2d 1133, 1138 (D. Colo. 2009) ("[I]t is the judgment of Interim Class Counsel, who specialize in this type of litigation, that the settlement is fair and reasonable[,]" which "is entitled to some weight in considering this factor."); *see also* Barnow Decl. ¶¶ 19–29; Ferich Decl. ¶¶22-36. As evidenced above, the Parties achieved settlement of this Litigation only after extensive and informed arm's-length negotiations.

Plaintiff's Counsel conducted extensive pre-suit investigation into the claims in this lawsuit and the underlying facts of the Data Incident at issue here, spoke with numerous Settlement Class Members, and exerted various additional efforts to institute this Litigation against Defendant on behalf of the estimated 583,642 individuals whose sensitive information was potentially exposed. Counsel's pre-suit preparation, in addition to the extensive preparation for settlement negotiations, informed their views on the strength of Plaintiff's claims and the defenses to liability. Plaintiff and Defendant have engaged in a detailed consideration of the facts, risks and terms of the proposed Settlement. On their judgment, the Parties' Counsel recommend this settlement, which provides an immediate benefit to the Settlement Class, and which represents a fair, reasonable, and adequate resolution of the claims alleged. *See Rhodes*, 308 F.R.D. at 667 ("Class Counsel are experienced in consumer class actions, and weight is given to their favorable judgment as to the merits, fairness, and reasonableness of the settlement.").

3. Serious Questions of Law and Fact Exist

The third factor of this Court must consider requires examination into whether questions of law and fact exist to justify the settlement. *See In re Qwest*, 625 F. Supp. 2d at 1138 ("The presence of such doubt augurs in favor of settlement because settlement creates a certainty of some recovery, and eliminates doubt, meaning the possibility of no recovery after long and expensive litigation."). This element does not require the Court to undergo a meticulous analysis of the merits of the case. *Lucas*, 234 F.R.D. at 693. Rather, the Court must determine whether it is reasonable for the parties to conclude that serious questions of law and fact exist to preclude certainty as to the result of the litigation. *Id*.

Based on the history of the Litigation here, as well as the contentious and extensive negotiations between the Parties, it is "reasonabl[e] [to] conclude that there are serious questions of law and fact that exist that could significantly impact this case if it were further litigated." *Rhodes*, 308 F.R.D. at 667. Class Counsel has conducted a thorough investigation into the facts of this Litigation, and has expended substantial time conducting analyses as to Plaintiff's claims, including review of documents in preparation for litigating this Litigation and discovery in this Litigation. Plaintiff's claims have already been the subject of motion practice in this Litigation, with a majority of the claims surviving Defendant's Motion to Dismiss. *See* the Court's May 12, 2022 Order at 2–3. While Plaintiff believes the claims alleged would ultimately prevail at trial, Plaintiff is acutely aware of the vulnerabilities inherent in data breach class action lawsuits that create risk as to Plaintiff's success. *See*, *e.g.*, *McGlenn v. Driveline Retail Merch., Inc.*, No. 18-cv-2097, 2021 U.S. Dist. LEXIS 179775, at *25 (C.D. Ill. Sep. 21, 2021) (finding that "increased risk of future harm" following a data breach is insufficient to survive a motion for summary judgment);

Adkins v. Facebook, Inc., 424 F. Supp. 3d 686, 691 (N.D. Cal. 2019) (granting motion to certify injunctive only class, but denying motion to certify damages and issues classes in data breach class action); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 33 (D. Me. 2013) (denying class certification in data breach action based on lack of predominance). These cases demonstrate the existence of several substantial legal questions that place in doubt whether Plaintiff could obtain a favorable judgment on the merits.

Ultimately, irrespective of how strongly Plaintiff feels about the Litigation, there is a risk that a jury might accept one or more of Defendant's arguments to the contrary and award nothing at all or less than the $2,100,000 that, if approved, will be available as part of the Settlement. Given the uncertain nature of data breach class actions, the Settlement here presents a strategically sound, fair, and reasonable agreement that solidifies immediate relief to the Class.

4. Immediate Recovery Outweighs the Possibility of Future Relief

Courts have been clear that early settlements are to be encouraged. *See Gradie v. C.R. Eng., Inc.*, No. 2:16-cv-00768-DN, 2020 U.S. Dist. LEXIS 218287, at *41 (D. Utah Nov. 20, 2020) ("Immediate recovery under the Settlement is considerably preferable here to only a potential for recovery many years into the future."); *Bracamontes v. Bimbo Bakeries USA, Inc.*, No. 15-cv-02324-RBJ-NYW, 2018 U.S. Dist. LEXIS 224097, at *7–*8 (D. Colo. Oct. 10, 2018) (finding that "the value of recovery at this stage in the case outweighs the possibility of future relief.").

The benefit of immediate recovery here cannot be overstated. Plaintiff obtained a $2.1 million non-reversionary cash fund on behalf of the Class. Not only does the Settlement provide for sizeable monetary relief, it also includes practical obligations on behalf of Defendant, which Plaintiff and Class Counsel consider significant. As discussed above, the claims asserted in this

Litigation present risk at later stages of litigation. The Settlement provides for significant, immediate relief for the Class and avoids these risks, which weighs heavily in favor of preliminary approval.

There should be no question that the proposed settlement is fair, reasonable, and adequate and that preliminary approval is appropriate here, "where the proposed settlement 'appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.'" *In re Motor Fuel Temp. Sales Pracs. Litig.*, 286 F.R.D. at 492.

B. The Proposed Class Notice Should Be Approved

Under Utah R. Civ. P. 23(c)(2), the court must direct to the members of the class the best notice practicable under the circumstances. Notice is sufficient under Utah law if it advises each member that: "(A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel." Utah R. Civ. P. 23(c)(2).

The proposed Notice in this Litigation satisfies the requirements of Utah R. Civ. P. 23(c)(2) and due process. The Settlement contemplates a notice plan designed to reach as many potential Settlement Class Members as possible: direct notice of the Settlement will be sent by U.S. Mail. *See* Azari Decl. ¶¶ 22-24; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) (holding that mailing direct notice to class members is the "best notice practicable"). This direct notice process should be effective at reaching the Settlement Class Members given that skip-

tracing for any returned mail shall be performed followed by a re-mailing of the notice to any Settlement Class Member whose address is uncovered through this process. Azari Decl. ¶ 24. Settlement Class Members will have the option to either mail Claim Forms or to submit their claims via Claim Forms available on the Settlement Website. *Id*. ¶¶ 31, 33. Additionally, the Settlement Agreement provides for the right to request exclusion from the Class and not participate in the Settlement Agreement. *Id*. at ¶ 56. To avoid being bound by the Settlement Agreement, a Class Member need only submit a request for exclusion to the Settlement Administrator by the Opt-Out Deadline, and the Settlement Agreement outlines in detail the information required to submit a valid request for exclusion. *Id*. at ¶¶ 56–57. The proposed Claim Form, Long Form Notice, and Postcard Notice include such information and are attached as Exhibits A, B, and C to the Settlement Agreement.

The proposed method of notice comports with Utah R. Civ. P. 23(c)(2) and should be approved.

C. The Court Should Grant Class Certification for Settlement Purposes

Pursuant to the Settlement, the Court should certify the following Settlement Class:

> All persons whose PII and/or PHI was potentially compromised as a result of the Data Incident that Defendant discovered on or about September 4, 2021, including all persons who were sent a letter notifying them of the Data Incident.

The Parties have agreed that the Court should make preliminary findings and enter an order granting provisional certification of the Settlement Class as part of the Settlement Agreement, as well as appoint Plaintiff and his counsel to represent the Settlement Class. "The validity of use of a temporary settlement class is not usually questioned." Newberg, § 11.22. The Manual for Complex Litigation explains the benefits of settlement classes:

> Settlement classes—cases certified as class actions solely for settlement—can provide significant benefits to class members and enable the defendants to achieve final resolution of multiple suits. Settlement classes also permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved[.] . . . An early settlement produces certainty for the plaintiffs and defendants and greatly reduces litigation expenses.

Manual for Complex Litigation (Fourth) § 21.612. Prior to granting preliminary approval of a class action settlement, a court should determine that the proposed settlement class is a proper class for settlement purposes. *Id.* § 21.632; *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). A class may be certified under Utah R. Civ. P. 23(a) if the following "prerequisites" are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law 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. In this Litigation, the Settlement Class meets all of the applicable certification requirements.

1. The Class Is Sufficiently Numerous and Joinder Is Impracticable

Numerosity is met where "the class is so numerous that joinder of all members is impracticable." Utah R. Civ. P. Rule 23(a). "[T]here is no set formula to determine if the class is so numerous that it should be so certified." *Florece v. Jose Pepper's Rests., LLC*, No. 20-2339-ADM, 2021 U.S. Dist. LEXIS 154392, at *6 (D. Kan. Aug. 17, 2021) (quoting *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006)). The inquiry is "fact specific" and the court has "wide latitude . . . in making this determination." *Id.* at *7. Here the Settlement Class encompasses approximately 583,642 individuals. *See Gradie*, 2020 U.S. Dist. LEXIS 218287, at *17 ("[T]he numerosity requirement is easily met by this Class of more than 12,800 members."). This class is sufficiently numerous such that joinder would be impracticable, given the number of individuals

in the Settlement Class and that absent a class action, few members could afford to bring an individual lawsuit over the amounts at issue since each individual member's claim is relatively small. *See Belote v. Rivet Software, Inc.*, No. 12-cv-02792-WYD-MJW, 2013 U.S. Dist. LEXIS 74529, at *4 (D. Colo. May 28, 2013) (finding that numerosity is met where "there are approximately 125 class members" and "the cost of litigation . . . is high compared to recovery.").

2. Common Questions of Law and Fact Exist

Commonality requires only that a single issue of fact or law be common to each class member. *Ditty v. Check Rite, Ltd.*, 182 F.R.D. 639, 642 (D. Utah 1998). The presence of individual factual issues "does not necessarily prevent a [] court from finding commonality." *Jaques v. Midway Auto Plaza, Inc.*, 2010 UT 54, 665 Utah Adv. Rep. 18, 240 P.3d 769, 777. The court "is given wide discretion in determining commonality, because it is in the best position to determine the facts of the case and the consequences of alternative methods of resolving the case." *Id.* at 776 (internal quotations omitted).

In this Litigation, common questions of law and fact include a) whether Defendant unlawfully maintained or failed to prevent the potential disclosure of Plaintiff's and Settlement Class Members' PII/PHI; b) whether Defendant failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of the information potentially compromised in the Data Incident; c) whether Defendant's data security systems prior to and during the Data Incident complied with applicable data security laws and regulations including, e.g., HIPAA; d) whether Defendant's data security systems prior to and during the Data Incident were consistent with industry standards; e) whether Defendant owed a duty to Settlement Class Members to safeguard their PII/PHI; f) whether Defendant breached a duty to Settlement Class

Members to safeguard their PII/PHI; g) whether computer hackers obtained Settlement Class Members' PII/PHI in the Data Incident; h) whether Defendant knew or should have known that its data security systems and monitoring processes were deficient; i) whether Plaintiff and Settlement Class Members suffered legally cognizable damages as a result of Defendant's misconduct; j) whether Defendant owed a duty to provide Plaintiff and Settlement Class Members notice of this Data Incident, and whether Defendant breached that duty; k) whether Defendant's conduct was negligent; l) whether Defendant's acts, inactions, and practices amount to acts of intrusion upon seclusion under the law; n) whether Defendant's acts violated Utah law; and o) whether Plaintiff and Settlement Class Members are entitled to damages, treble damages, civil penalties, punitive damages, and/or injunctive relief. These all raise questions that can be answered on a class-wide basis and, thus, commonality is readily satisfied here.

VI. <u>THE TYPICALITY REQUIREMENT IS MET</u>

The question of typicality is closely related to the preceding question of commonality. *Id.* at 778. A named plaintiff's claim is typical of the class "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and [is] based on the same legal theory." *Id.* (quoting *Ditty*, 182 F.R.D. at 642 (alterations in original)).

Plaintiff's claims are typical of the Settlement Class because they arise out of the same course of conduct by Defendant—the Data Incident—and rest on exactly the same legal theory—whether, in the first instance, Defendant owed Plaintiff and Settlement Class Members a duty to adequately protect their PII/PHI and whether Defendant breached these duties. By virtue of the allegations in this Litigation, "[P]laintiff['s] claims are typical of those in the [Settlement] class because the claims all depend on proof of the [] violation by the defendants, not on the

[P]laintiff[’s] individual positions.” *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 447 (D. Kan. 2006), *aff’d*, 768 F.3d 1245 (10th Cir. 2014).

VII. PLAINTIFF AND PROPOSED CLASS COUNSEL ADEQUATELY REPRESENT THE CLASS

Utah law requires that “[t]he representative parties will fairly and adequately protect the interest of the class.” Utah R. Civ. P. 23(a). The two factors that must be considered in determining whether the class representatives will fairly and adequately represent the interests of the class members are “(1) whether the representatives have interests antagonistic to those of the class and (2) the class attorney's qualifications, experience, and ability to conduct the litigation.” *Jaques*, 240 P.3d at 778.

Here, Plaintiff’s interests are entirely representative of and consistent with the interests of the proposed Settlement Class. Plaintiff’s pursuit of this matter has demonstrated that he has been, and will remain, a zealous advocate for the Settlement Class. *See Lawrence v. First Fin Investment Fund V,* LLC, 336 F.R.D. 366, 378 (D. Utah 2020) (adequacy found where the named plaintiff participated in the case diligently and class counsel fought hard on behalf of plaintiff and the class throughout the litigation). Plaintiff has demonstrated that he is well-suited to represent the Settlement Class, as he has prosecuted this Litigation on behalf of and to the benefit of the Settlement Class. Plaintiff has already provided information for pleadings and settlement discussions, informal discovery, engaged with Class Counsel regarding the Litigation, participated in the settlement negotiations via email, phone or text messaging, and approved the proposed Settlement terms. *See* Barnow Decl. ¶ 12; Ferich Decl. ¶ 14.

Similarly, Class Counsel are among the most highly experienced data breach class action attorneys in the United States and are well-qualified to represent the Settlement Class. Barnow

Decl. ¶ 13; Ferich Decl. ¶¶ 15, 16. Their performance demonstrates that their representation has been beyond adequate in this matter, especially when considering the investigation and informal discovery conducted, and the benefits of the Settlement compared to similar data breach settlements. Indeed, Class Counsel has worked diligently on behalf of the Class to obtain the appropriate and significant relief now before the Court. Barnow Decl. ¶¶ 17–18; Ferich Decl. ¶¶ 20-21. If the Settlement is approved, the Settlement Class will reap its valuable benefits thanks to Plaintiff's and proposed Class Counsel's hard work pursuing this Litigation and representing their interests. As such, adequacy is satisfied.

VIII. THE REQUIREMENTS OF RULE 23(b)(3) ARE MET

In addition to the prerequisites under Utah R. Civ. P. 23(a), a class certified under Rule 23(b)(3) must have "questions of law or fact common to the members of the class [that] predominate over any questions affecting only individual members," and a class action must be "superior to other available methods for the fair and efficient adjudication of the controversy. Utah R. Civ. P. 23(b)(3). "Predominance is usually present when the action is based on a common course of conduct on the part of defendant." *Miller v. Basic Research, LLC*, 285 F.R.D. 647, 657 (D. Utah 2010). The current conduct at issue deals with Defendant's data privacy practices, which affected each putative Class Member in the same way, and whether Defendant had a duty to safeguard Plaintiff's and Settlement Class Members' sensitive personal and health information and provide adequate notice of the Data Incident. Because the existence of a duty to safeguard Plaintiff's and Settlement Class Members' personal information is a dispositive issue, a determination on that issue alone will resolve one way or another all of Plaintiff's claims. Therefore, common issues predominate here.

Further, this Litigation is particularly well-suited for class treatment because the claims of the Plaintiff and the Settlement Class Members involve identical alleged violations. Absent a class action, most members of the Settlement Class would find it too costly to litigate their claims. It is, thus, unlikely that individuals would invest the time and expense necessary to seek relief through individual litigation. Moreover, because the Litigation will now settle, the Court need not be concerned with issues of manageability relating to trial. When "confronted 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.

A class action is the superior method of resolving large scale claims if it will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* at 615. Accordingly, a class action is the superior method of adjudicating this Litigation and the proposed Settlement Class should be certified.

IX. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order (i) granting preliminary approval of the Parties' proposed Settlement Agreement, (ii) certifying the proposed Settlement Class for settlement purposes, (iii) approving the form and content of the Notice to the members of the Settlement Class, (iv) appointing Plaintiff Jerry Lukens as Class Representative, (v) appointing Andrew W. Ferich of Ahdoot & Wolfson, PC and Ben Barnow and Anthony L. Parkhill of Barnow and Associates, P.C., as Class Counsel, (vi) set deadlines for

Settlement Class Members to object or opt out; and (vii) schedule a final approval hearing, at which time the Court can consider whether to give final approval to the Settlement.

DATED this 28th day of April, 2023.

MAGLEBY CATAXINOS & GREENWOOD, PC

/s/ Jennifer Fraser Parrish
James E. Magleby
Jennifer Fraser Parrish
141 West Pierpont Avenue
Salt Lake City, UT 84101
Telephone: 801.359.9000
Facsimile: 801.359.9011

Andrew W. Ferich (*pro hac vice*)
aferich@ahdootwolfson.com
AHDOOT & WOLFSON, PC
201 King of Prussia Road, Suite 650
Radnor, PA 19087
Telephone: 310.474.9111
Facsimile: 310.474.8585

Tina Wolfson (*pro hac vice*)
twolfson@ahdootwolfson.com
Robert Ahdoot (*pro hac vice*)
rahdoot@ahdootwolfson.com
AHDOOT & WOLFSON, PC
2600 W. Oliver Avenue, suite 500
Burbank, CA 91505-4521
Telephone: 310.474.9111
Facsimile: 310.474.8585

Ben Barnow (*pro hac vice*)
Anthony L. Parkhill (*pro hac vice*)
Riley W. Prince (*pro hac vice*)
BARNOW AND ASSOCIATES, P.C.
205 W. Randolph Street, Suite 1630
Chicago, IL 60606
Telephone: 312.621.2000
Facsimile: 312.641.5504

Attorneys for Plaintiff Jerry Lukens

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY CATAXINOS & GREENWOOD, 141 W. Pierpont Avenue, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), of the Utah Rules of Civil Procedure, a true and correct copy of the foregoing **PLAINTIFF JERRY LUKENS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** was delivered to the following this 28th day of April, 2023, through the Court's electronic filing system:

Scott D. Sweeney
scott.sweeney@wilsonelser.com
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
1225 17th Street, Suite 1700
Denver, Colorado

David Ross (*admitted pro hac vice*)
david.ross@wilsonelser.com
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
1500 K. Street, NW, Suite 330
Washington, DC 2005

Attorneys for Defendant Utah Imaging Associates, Inc.

/s/ Hi Evan Gibson