

**THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

JAY HEATH, EDWARD SHAPIRO, and  
DAISY BECERRA LOPEZ, individually and  
on behalf of all similarly situated persons,

Plaintiffs,

v.

INSURANCE TECHNOLOGIES CORP. and  
ZYWAVE, INC.,

Defendants.

Case No. 3:21-cv-01444-N

**JOINT DECLARATION OF JOHN A. YANCHUNIS, M. ANDERSON BERRY,  
GARY KLINGER, GARY MASON AND JOSEPH KENDALL IN SUPPORT  
OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT  
OF COSTS AND EXPENSES, AND SERVICE AWARDS**

We, John A. Yanchunis, M. Anderson Berry, Gary Klinger, Gary Mason, and Joseph Kendall, being competent to testify, pursuant to section 1746 of title 28 of the United States Code, declare as follows:

1. John A. Yanchunis is one of the attorneys for Plaintiffs appointed by the Court as Class Counsel in this matter. Mr. Yanchunis submits this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Costs and Expenses, and Service Awards (the "Fee Motion") incurred in connection with the prosecution of the above-captioned action.<sup>1</sup> Unless otherwise stated, he has personal knowledge of the following facts and could and would competently testify thereto. Mr. Yanchunis is a frequent speaker nationally and internationally in the area of privacy and data misuse and data breach litigation.

2. M. Anderson Berry is the head of the complex litigation group at Clayco C. Arnold, A Professional Law Corporation (the "Arnold Law Firm"), one of the attorneys appointed Class

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<sup>1</sup> Class Counsel will allocate the fees among themselves.

Counsel in the matter. Mr. Berry submits this declaration in support of Plaintiffs' Fee Motion. Mr. Berry makes this declaration based on his own personal knowledge, and if called to do so, could and would testify to the matters contained herein.

3. Gary Klinger is a partner at Milberg Coleman Bryson Phillips Grossman, PLLC ("Milberg"), one of the attorneys appointed Class Counsel in this matter. Mr. Klinger submits this declaration in support of Plaintiffs' Fee Motion. Mr. Klinger makes this declaration based on his own personal knowledge, and if called to do so, could and would testify to the matters contained herein.

4. Gary Mason is the founder of Mason LLP, one of the attorneys appointed Class Counsel. Mr. Mason submits this declaration in support of Plaintiffs' Fee Motion. Mr. Mason makes this declaration based on his own personal knowledge, and if called to do so, could and would testify to the matters contained herein.

5. Joseph Kendall is the founder of the Kendall Law Group, PLLC, one of the attorneys appointed Class Counsel. Mr. Kendall submits this declaration in support of Plaintiffs' Fee Motion. Mr. Kendall makes this declaration based on his own personal knowledge, and if called to do so, could and would testify to the matters contained herein.

### **Procedural Background**

6. Plaintiffs Jay Heath and Edward Shapiro filed their original Class Action Complaint on June 18, 2021, asserting causes of action for: (1) Negligence; (2) Negligence *Per Se*; (3) Violation of Maryland's Personal Information Privacy Act; (4) violation of Maryland's Consumer Protection Act; (5) violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law; (6) Declaratory Judgment; and (7) Unjust Enrichment.<sup>2</sup> Plaintiffs sought injunctive and equitable relief, an award of compensatory, statutory, nominal and punitive damages, reasonable fees and costs allowable by law, and any such further relief that the Court

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<sup>2</sup> Complaint, ECF No. 1.

deems proper.<sup>3</sup> Plaintiffs allege the Data Incident put them, and other class members, at risk of imminent, immediate and continuing risk of harm from fraud and identity theft.<sup>4</sup>

7. Soon after, the Parties began discussing the prospect for early resolution after an exchange of information necessary to evaluate the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses. In furtherance of Settlement Negotiations, and in accordance with the Court's Order granting the Parties' Joint Stipulation to Amend, on November 19, 2021, Plaintiffs filed their operative First Amended Complaint, adding Plaintiff Daisy Becerra Lopez, a California Subclass, and two causes of action: (8) violation of California's Consumer Privacy Act (which includes statutory damages); and (9) violation of California's Unfair Competition Law.<sup>5</sup>

8. To further facilitate settlement negotiations, the Parties agreed to mediate Plaintiffs' claims with Christopher Nolland, Esq. Mr. Nolland is a widely-respected mediator based in Texas with decades of experience working as a neutral, both in mediation and arbitration.<sup>6</sup> In advance of mediation, Defendants provided informal discovery related to the merits of Plaintiffs' claims and class certification as well as Defendants' defenses, and the Parties discussed their respective positions on the merits of the claims and class certification. The Parties also fully briefed their respective positions for the mediator.

9. This informal exchange of information, combined with Plaintiffs' individual research, and the relevant experience of Class Counsel,<sup>7</sup> allowed counsel to fully evaluate the strengths and weaknesses of Plaintiffs' case, and to conduct informed settlement negotiations.

10. On December 13, 2021, the Parties attended a full-day mediation via Zoom Video Conference with Mr. Nolland. After a full day of arms' length negotiations, and with the assistance of Mr. Nolland, the Parties agreed to the essential terms of the settlement agreement. Over the next

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<sup>3</sup> *Id.*

<sup>4</sup> Compl. ¶ 4.

<sup>5</sup> See Joint Stipulation of Consent for Leave to Amend, Doc 18; Order, Doc. 23; Compl.

<sup>6</sup> <https://nolland.com/profile> (last accessed June 2, 2022).

<sup>7</sup> Class Counsel's experience and firm resumes are in the record, ECF Nos. 35.1 and 35.3.

months, the Parties diligently drafted, negotiated, and finalized the settlement agreement, notice forms, and agreed upon a claims administrator and Identity-Theft Protection provider.

11. Through the efforts of Class Counsel, and with the assistance of Mr. Nolland, the Parties reached a Settlement (“Settlement” or “Agr.”) that was preliminarily approved by the Court on March 21, 2022 (the “Preliminary Approval Order”) that created a Nationwide Settlement Class and California Settlement Subclass (collectively, the “Settlement Class”).

### **The Settlement**

12. The Settlement provides for a Nationwide Class defined as: “All individuals whose [personal identifying information (“PII”)] was potentially subjected to the Data Breach, as confirmed by Defendants’ business records.”<sup>8</sup> The Settlement also provides for a California subclass defined as: “All residents of California at the time of the Data Breach whose PII was potentially subjected to the Data Breach, as confirmed by Defendants’ business records.”<sup>9</sup>

13. The Nationwide Class includes 4,341,523 individuals who had PII compromised by the Data Incident, up to approximately 318,091 of whom are also a part of the California Subclass.<sup>10</sup> Excluded from the Settlement Class are the Court, the officers and directors of Defendants, persons who have been separately represented by an attorney and entered into a separate settlement agreement in connection with the Data Incident, and persons who timely and validly request exclusion from the Settlement Class.<sup>11</sup>

14. The settlement negotiated on behalf of the Class provides for an \$11,000,000 Settlement Fund to cover three separate tiers of class relief, attorneys’ fees and costs, Plaintiffs’ service awards (subject to court approval), and the costs of settlement administration.<sup>12</sup>

15. The three separate tiers of relief created by the Settlement include: (1) a “Tier One” fund providing for the payment of \$100 to \$300 for each California Subclass Member, subject to

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<sup>8</sup> Agr. § III.1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* § III.2.

<sup>12</sup> *Id.* § IV.6.

potential *pro rata* reduction; (2) a “Tier Two” fund providing for reimbursement of up to \$5,000 of out-of-pocket expenses per class member, including payment for up to eight hours of attested lost time, compensable at the rate of \$25 per hour; and (3) 12-months of Aura’s Financial Shield® Identity-Theft Protection product, automatically provided to every Settlement Class Member.<sup>13</sup>

16. Based on our years of practice litigating class and other complex actions, we endorse the Settlement and believe it benefits and provides relief to the Settlement Class Members. Of the various forms of relief available in national consumer protection class actions (injunctive, declaratory, coupons, gift cards, cash compensation, etc.), the relief obtained by Class Counsel in this case is of the most preferable form: cash compensation plus mitigative relief.

17. The result achieved in this Settlement is notable because the Parties were able, through capable and experienced counsel, to reach a negotiated Settlement without involvement of the Court in discovery disputes. Class Counsel worked on behalf of the Settlement Class to obtain information from Defendants regarding the Data Incident and used that information (along with our experience and the knowledge gained from other data breach class actions) to negotiate the Settlement.

18. Our years of experience representing individuals in complex class actions—including data breach actions—contributed to an awareness of Plaintiffs’ and the Class’ settlement leverage, as well as their needs. Although we believe that our clients would ultimately prevail in the litigation on a class-wide basis, data breach class actions are still new and can present novel and complex issues, making a successful outcome difficult to predict. Also, a successful outcome would ensue, if at all, only after prolonged and arduous litigation with an attendant risk of drawn-out appeals.

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<sup>13</sup> The amounts designated for Tier One and Tier Two are fungible: should the number and value of claims exceed the amount designated for a given Tier’s fund, the residue from either fund will be transferred before the administrator resorts to any *pro rata* reduction. For detailed information on the relief, see ECF No. 35, pp. 4-8.

19. Moreover, the Settlement reached here is notable for the simplicity of the claims process and the speed with which counsel was able to secure a fair, reasonable and favorable settlement.

20. Among national consumer protection class action litigation, data breach cases are some of the most complex and involve a rapidly evolving area of law. As such, these cases are particularly risky for plaintiffs' attorneys. Accordingly, the value of the services received by the Plaintiffs and the Settlement Class in this case is commensurate with the attorneys' fees, costs and expenses, and service awards sought here.

21. Furthermore, data privacy and the security of one's PII, especially Social Security and drivers' license numbers, as here, are of utmost importance. Perpetrators of data breaches exploit lost or stolen PII and use it to commit a multitude of crimes, wreaking havoc on consumers. It follows that holding companies like Defendants accountable for failing to adequately secure PII in their possession is vital not only to help consumers recover the damages they suffer as a result of such data breaches, but also to incentivize companies to prioritize data security.

22. In the process of reaching this Settlement, this case was defended by highly qualified and nationally recognized counsel with a great deal of experience in data breach cases. This Settlement occurred as the result of lengthy, arm's-length negotiations facilitated by a nationally recognized mediator.

23. Finally, Notice of the Settlement has been given in accordance with the terms in section VII of the Settlement Agreement. As of June 2, 2022, no Settlement Class Members have objected to the Settlement, including the requested attorney fees, reimbursement of expenses or the service awards to Plaintiffs. Moreover, only 12 people have opted out of the Settlement.

#### **Time and Expenses**

24. Each of us served as the principal lawyers in charge of all aspects of the litigation and worked collaboratively in the case to ensure that Plaintiffs and the Class which they sought to represent were zealously represented, while also ensuring efficiency and reducing duplicative effort.

25. In prosecuting this case, Class Counsel performed a significant amount of work including, in particular:

- a. before filing the complaint, investigated the potential claims against Defendants, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact on consumers;
- b. conducted a pre-suit factual investigation including interviewing the Plaintiffs and reviewing their documents, background and damages, and continued the investigation during the pendency of this case, by attempting to locate and interview potential witnesses and reviewing hundreds of pages of public documents, including Defendants' public statements, letters to consumers, and websites, developing information from third-parties, and scouring internet websites for information about the Data Incident and Defendants' business operations in general and specifically pertinent to the Data Incident;
- c. Assisted in drafting and filing Plaintiffs' complaint, amended complaint and other filings;
- d. Discussed with Defendants the potential for early resolution, and exchanged confidential information in advance of the mediation, which information provided by Defendants aided Plaintiffs' counsel in developing an understanding of the Data Incident, the breadth of the Data Incident, the size and composition of the Class and the potential damages to Class Members;
- e. reviewed and analyzed documents produced by Defendants and solicited bids from claims administrators and Identity-Theft Protection services providers;
- f. conducted direct negotiations with Defendants through its counsel, then drafted a lengthy mediation brief and prepared for and participated in a global mediation session with Defendants and mediator Mr. Nolland on December 13, 2021, as well as engaged in follow-up communications after the mediation to resolve this

matter, which proved successful in resolving the claims and resulted in the terms that would become the present Settlement;

- g. prepared the Settlement Agreement and supporting documents, including the Notice, Summary Notice, claim form, proposed preliminary and proposed final approval orders;
- h. prepared and submitted Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (ECF Nos. 34-35) which was ultimately granted when the Court preliminarily approved the Settlement (ECF No. 39); and
- i. when necessary, conferred with one another about the status, strategy, and direction of the case and settlement negotiations.

26. Records kept by Class Counsel of the aforementioned work reflect that attorneys and paralegals worked a combined 734.10 hours, through June 3, 2022, on this litigation, which, multiplied by the current hourly rates amounts to \$587,409.90 in lodestar. *See* Exhibit A. Class Counsel's current rates are also appropriate in light of prevailing rates for similar legal services provided by lawyers of reasonably comparable skill, experience, and reputation. Many other courts have found Class Counsel's current rates to be reasonable in a settlement context.

27. The 734.10 hours do not include time Class Counsel will spend on continuing services to the Class, including drafting and filing the final approval motion, attending the final settlement hearing, responding to Class Members' inquiries, supervising the claims administration in the review and processing of claims, and overseeing the distribution of payments and of Identity-Theft Protection services to Class Members.

28. Separately, the time described above does not include charges for expense items. With respect to the unreimbursed expenses, Class Counsel has spent a total of \$8,666.63 for this litigation, including necessary costs associated with research, filing fees, and mediation. *See* Ex. A.

### Detail of Time and Expenses

29. Class Counsel kept contemporaneous records and provided detailed itemizations of their time, lodestar and expenses in Exhibit A to this joint declaration. The hours, lodestar and expense information are as follows:

	<b>Hours</b>	<b>Lodestar</b>	<b>Expenses</b>
Morgan & Morgan	351.30	\$330,660.00	\$2,402.55
Arnold Law Firm	193	\$121,064.50	\$2,810.08
Mason LLP	124.08	\$82,415.60	\$3,052.00
Milberg Coleman Bryson Phillips Grossman PLLC	36.60	\$28,534.80	0
Joe Kendall Law Group, PLLC	29.10	\$24,735.00	\$402.00
<b>Total</b>	<b>734.10</b>	<b>\$587,409.90</b>	<b>\$8,666.63</b>

30. Plaintiffs' requested fee award represents a 6.24 multiplier of Class Counsel's collective lodestar. Because there is additional work required to obtain final approval, monitor the Settlement, and assist Class Members, this multiplier will ultimately decrease.

31. The weighted average hourly rate for work performed by Plaintiffs' counsel and their paraprofessionals/staff, calculated by dividing the total amount of fees by the total amount of hours worked, is \$800 per hour.

32. Class Counsel undertook this litigation on a purely contingent basis, with no assurance of recovery of expenses or attorneys' fees. The nature of contingency fees is that they are inherently uncertain and require counsel to assume more risk than in cases where compensation is based on billable hours. Accordingly, the percentage of fee applied to the total recovery obtained for the client reflects the uncertain nature of contingency fee agreements, and the fee percentage is generally one third of the total recovery and can be higher where risk and likely case expenses are expected to be relatively high. The fee percentage is always in addition to case expenses incurred in furtherance of the clients' cases.

33. The Fee Motion comports with the terms of the Settlement Agreement. The Settlement Agreement reflects Plaintiffs' counsel would apply for and Defendants would not object to a fee request of an amount not to exceed 33 percent (or \$3,666,666.67) of the Settlement

Fund. Settlement Agreement, § 10.2. This provision was negotiated only after all of the other settlement terms had been finalized.

34. The time described above does not include charges for expense items. The table above further reflects that, with respect to unreimbursed costs and expenses (which have been advanced and not yet reimbursed). Plaintiffs' counsel incurred, in the aggregate, \$8,666.63, through June 3, 2022, including necessary costs associated with research, filing fees, mail, mediation and travel, in line with the terms of the Settlement Agreement, pursuant to which Plaintiffs' counsel may seek their reasonable costs and expenses from the Settlement Fund (not to exceed \$30,000). *Id.*; and see Ex. A.

35. Upon information and belief, the expenses pertaining to this case are reflected in the books and records of Class Counsel, and included in Exhibit A. The total of the expenses for which Plaintiffs' counsel seek reimbursement, and which Defendants have agreed to pay, was calculated from receipts, expense vouchers, check records and other documents maintained by the respective law firms.

36. Plaintiffs' counsel incurred costs conducting online research, court fees, mediation fees and travel expenses. Counsel will likely incur addition expenses, including travel and research costs related to final approval. These costs also reflect typical expenses of the type ordinarily passed on to a fee-paying clients in a general legal practice and are also typically recoverable in a specialized complex class action practice as they are necessary and reasonable to prosecuting a class action.

37. Generally, Class Counsel should be awarded a fair and reasonable attorneys' fee and reimbursed for the expenses they incurred in the investigation, prosecution, negotiation and Settlement of this action, and which Defendants may pay out of the Settlement Fund.

38. Class Counsel invested substantial time, effort, and resources into the litigation of this risky and uncertain case with no guarantee or promise of return on their investment. Class Counsel seek reimbursement of their lodestar already incurred and for time to be spent wrapping up the litigation. The pursuit of this litigation was an economic risk for Class Counsel and diverted

their resources from other less risky cases. Moreover, Class Counsel also bore the risk that any judgment would become uncollectable for myriad reasons.

39. This matter has required us, and other attorneys at our law firm, to spend time on this litigation that could have been spent on other matters. At various times during the litigation of this class action, this lawsuit has consumed significant amounts of our time and our firms' time. Such time could otherwise have been spent on other fee-generating work. Because our firms undertook representation of this matter on a contingency-fee basis, we shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment.

40. If not devoted to litigating this action, from which any remuneration is wholly contingent on a successful outcome, the time our firms spent working on this case could and would have been spent pursuing other potentially fee generating matters.

41. Litigation is inherently unpredictable and therefore risky. Here, that risk was very real, due to the rapidly evolving nature of case law pertaining to data breach litigation, and the state of data privacy law. Therefore, despite our firms' devotion to the case and our confidence in the claims alleged against Defendants, there have been many factors beyond our control that posed significant risks.

42. An award of the requested fees, costs and expenses is justified under the circumstances of this case, in light of the risk, work performed, and the results achieved is justified. The Settlement makes available an immediate cash payment to Settlement Class Members and provides for necessary and mitigative Identity-Theft Protection services to protect Class members' PII.

43. Based on our years of practice litigating complex class actions, Plaintiffs' requested attorneys' fees, costs and expenses sought here are reasonable and have been agreed to by Defendants.

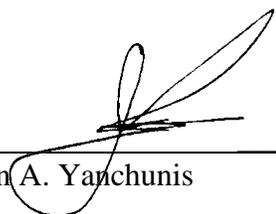
### Service Awards

44. Pursuant to the Settlement Agreement, Plaintiffs will each be awarded, subject to Court approval, \$2,000 for their services as the Class Representatives, for a total of Six Thousand Dollars (\$6,000.00). *See* Settlement Agreement, § 10.1.

45. The Plaintiffs here have been instrumental in assisting Plaintiffs' counsel throughout this proceeding. Their involvement was not merely nominal. Upon information and belief, they initiated and remained in contact with Plaintiffs' counsel; considered and questioned various pleadings in this case, including the Complaint, amended complaint and settlement papers; monitored and periodically visited with Plaintiffs' counsel; provided background documents and followed the progress of this litigation; and have been actively involved in the prosecution of the case, to ensure that Class members received the best recovery possible given the particular circumstances and risks of the case. Accordingly, we support the Court's approval of service awards to the Plaintiffs for their investment of time and energy in this class action.

\* \* \* \* \*

We declare under penalty of perjury of the laws of the United States that the foregoing is true and correct, and that this declaration was executed, respectively, in Tampa, Florida; Fair Oaks, California; Chicago, Illinois; Washington DC; and Dallas, Texas, on this 3rd day of June, 2022.



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John A. Yanchunis



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M. Anderson Berry

[Signatures continue on following page.]

*Gary M. Klinger*  
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Gary Klinger

*GEM*  
\_\_\_\_\_  
Gary Mason

*Joe Kendall*  
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Joseph Kendall