

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

_____)	
EDWARD ZYBURO, on behalf of)	
himself and all others similarly situated,)	CASE NO: 12-cv-06677 (JSR)
)	
Plaintiff,)	
)	
v.)	
)	
NCSPLUS INC.,)	
)	
Defendant.)	

**DECLARATION OF JOHN YANCHUNIS IN SUPPORT OF PLAINTIFF'S MOTION
FOR APPROVAL OF ATTORNEYS' FEES, COSTS AND EXPENSES**

I, John A. Yanchunis, pursuant to 28 U.S.C. §1746, declare as follows:

1. I am an attorney duly admitted to practice law in the state of Florida and I have been permitted to appear in this Court. I was admitted to practice law in Texas in 1980 and Florida in 1981. I practice in the area of consumer class actions, and I have focused my practice in this area for the past 19 years. Previously, I specialized in complex business litigation, ranging from the representation of financial institutions to Fortune 500 companies. I also represented insurance companies in insurance coverage disputes, and was counsel for a very large insurance company handling coverage litigation for asbestos and environmental claims in the southeast United States. In one case in particular, I was lead counsel for 5 insurance companies in a multi-year trial, where my client faced exposure for asbestos coverage in excess of a billion dollars.

2. I maintain my practice in Morgan & Morgan's Complex Litigation Group and lead the National Consumer Class Action section. Morgan & Morgan is the largest exclusively plaintiffs law firm in the state of Florida and one of the largest in the United States, employing over 270 lawyers and 1,600 support staff in offices throughout Florida, Georgia, Mississippi, Tennessee, Kentucky and New York. I and my firm have the financial resources and legal experience to equalize the playing field in furtherance of justice for our clients.

3. Prior to joining Morgan & Morgan in 2011, I was a senior partner at James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A., where I managed the firm's nationwide consumer class action department. Before entering private practice in 1982, I served for two years as a law clerk for the Honorable Carl O. Bue, Jr., a United States District Judge in the Southern District of Texas in Houston, Texas.

4. I have extensive involvement in class action litigation. I have served as co-lead counsel in the successful prosecution of the two largest class action cases in the United States: *Fresco v. Automotive Directions, Inc.*, Case No. 03-61063-JEM (Fresco I), and *Fresco v. R.L. Polk*, Case No. 0:07-cv-60695-JEM (Fresco II) (Southern District of Florida). Additionally, I serve today and have served as lead, co-lead, or class counsel in numerous class actions in a wide variety of areas affecting consumers, including but not limited to, anti-trust, defective products, life insurance, annuities, privacy, breach of contract, civil rights and unfair and deceptive acts and practices. Presently, I serve as co-lead counsel, liaison counsel, and I am on a member of the executive committee on many MDLs. I have also served as co-lead counsel in numerous successful nationwide class action wherein I represented securities brokers who had not been paid commissions from the sale of registered products.

5. Beginning in 2005, and while maintaining a private law practice, I served as lead counsel for the Florida Department of Financial Services and the Florida Department of Insurance Regulation (the insurance regulators in the state of Florida) in their investigations of the insurance industry over issues concerning possible antitrust activity, and other possible unlawful activity and activities regarding the payment of undisclosed compensation to insurance brokers. The litigation and these investigations resulted in millions of dollars in restitution being paid to Florida consumers, and also resulted in significant changes in the way commercial insurance is sold in the state of Florida and across the country.

6. I lecture frequently regarding class litigation, and I have served as an expert to The Florida Bar on the topic of the ethical obligations of class counsel in class action litigation.

7. I have been honored with the prestigious “AV” rating by Martindale-Hubbell. A copy of my resume and the description and qualifications of the attorneys of Morgan & Morgan Complex Litigation Group’s National Consumer Class Action section is attached as composite Exhibit “1.”

8. This declaration is being submitted in support of Plaintiff’s Motion for Approval of Attorneys’ Fees, Costs and Expenses. The declaration supports the professional time, costs and expenses incurred by my firm and my co-counsel in the representation of Plaintiff and the Class, and is up-to-date as of the date of this declaration. The declaration does not cover, of course, the additional labor that will be required to respond to calls and inquiries from Class Members, to prepare for and attend the final fairness hearing scheduled for June 25, 2015 before the Court, or any labor required after the final fairness hearing, including coordination of the settlement benefits distribution to Class Members and, if necessary, the defense of the Court’s Final Judgment on appeal, if any are taken.

9. On August 31, 2012, Plaintiff filed this suit seeking class action status. The Complaint alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”), and sought certification of the proposed class, statutory damages, and costs on behalf of Plaintiff and the proposed class. (Doc. 1). Defendant answered the Complaint on September 15, 2012. (Doc. 6). On March 5, 2013, Plaintiff filed his Motion for Class Certification and supporting documents. (Docs. 19, 20, 22 and 23). Defendant opposed the Motion, and Plaintiff replied in support of his Motion. (Docs. 24 and 27).

10. Plaintiff proceeded to serve written discovery requests. In its responses, Defendant repeatedly represented that it had no insurance and, therefore, would be unable to cover any class-wide damages. Relying on this representation, Plaintiff petitioned the Court to withdraw his pending Motion for Class Certification and to drop the class claims pled in his original Complaint. (Doc. 29). On April 5, 2013, the Court held a conference on this issue, accepted Plaintiff’s petition in full, and instructed the Clerk to close Plaintiff’s pending Motion for Class Certification. *Id.* On April 22, 2013, Plaintiff filed his Amended Complaint, alleging individual claims for negligent violations of the TCPA (Count I), knowing and/or willful violations of the TCPA (Count II), and violations of the Fair Debt Collection Practices Act (Count III). (Doc. 28).

11. On July 17, 2013, Plaintiff took the Rule 30(b)(6) deposition of Christopher Rehow, a co-owner of Defendant. During the deposition, Rehow divulged that contrary to prior representations Defendant did have insurance. (Doc. 65, Ex. A). A copy of the insurance policy, issued by Continental Casualty Company on November 15, 2011 and providing miscellaneous professional liability coverage in the amount of \$2,000,000, was subsequently provided to Plaintiff’s counsel. (Doc. 65, Ex. B). On July 23, 2013, the parties contacted the

Court regarding Defendant's belated and contradictory revelation of insurance coverage. The Court held an evidentiary hearing on this matter, which began on October 3, 2013, and continued on October 18, 2013. (Doc. 45). At the hearing, Christopher Rekhov and Lynn Goldberg, the co-owners of Defendant, admitted that they had jointly concealed the existence of the insurance policy from their counsel. (Docs. 45 and 46). As a direct result of this concealment, Defendant's discovery responses failed to disclose that Defendant had an insurance policy. *Id.* On October 23, 2013, the Court reinstated the original class action Complaint and Motion for Class Certification, and permitted Plaintiff to submit an application for reimbursement of fees and costs arising from Defendant's misconduct. (Doc. 45).

12. During the commencement of this case, Plaintiff's Counsel made a claim on behalf of Defendant for coverage under the insurance policy revealed during discovery. After this claim was denied, Plaintiff commenced a coverage case styled *Zyburow v. Continental Insurance Company*, Case No. 1:13-cv-06438-JSR T (S.D.N.Y. 2014) (the "**coverage case**"), seeking a determination that the policy provided coverage for the claims advanced in the Complaint. Such a step was necessary as it was Plaintiff's Counsel believed that Defendant's insurer had improperly denied coverage, thereby exposing itself to a bad faith claim with the potential that the insurer would ultimately be responsible for the payment of the judgment for damages entered following the successful resolution of this class action. The coverage case was assigned to this Court. After motion practice, the Court dismissed the coverage case, opining that the filing of such a case was premature before Plaintiff obtained a judgment in his favor and on behalf of the class against Defendant. Unfortunately, it was revealed during the mediation and confirmed via discovery during the mediation process that no such claim against the carrier

existed, thus eliminating what Plaintiff believed to be a significant source of recovery for the class.

13. On August 1, 2014, Plaintiff filed his Notice of Amended Motion for Class Certification. (Doc. 64). After evidentiary hearings on August 29, 2014 and September 2, 2014, the Court granted Plaintiff's Amended Motion for Class Certification on September 16, 2014 and certified a class consisting of "all persons within the United States whose cellular telephones were called by NCSPlus Inc. using an automatic telephone dialing system with the capacity to store or produce telephone numbers, including, but not limited to, an automated dialing machine, auto-dialer or predictive dialer and/or utilizing an artificial or prerecorded voice, without such persons' prior express consent, between August 31, 2008 and August 31, 2012." (Docs. 64 and 77).

14. The trial of this case was set to begin on January 26, 2015, and Plaintiff's Counsel undertook all work necessary to prepare the case for trial. Due to a conflict on the Court's calendar, the Court reset the trial of the case to begin on February 24, 2015. (Doc. 95). At the time of entry of this order, no additional preparation was needed by Plaintiff's Counsel to try the case.

15. Prior to the scheduled trial of this case, the parties met before a mediator, the Honorable Garrett Brown, Jr. (retired), a former United States District Judge in the District of New Jersey, to explore the potential resolution of the claims on a class-wide basis. Judge Brown is well known as a skilled and experienced mediator who has mediated many complex cases and class actions. These discussions were prompted by the parties' desire to avoid the burden, expense and uncertainties inherent to protracted litigation, and to put to rest any and all claims or

causes of action that have been, or could have been, asserted against Defendant arising out of the claims contained in the complaint.

16. The parties attended a mediation session on February 10, 2015 in New York. As of the date of the mediation and based upon their state of preparedness for trial, Plaintiff's Counsel were well versed on the strengths and weaknesses of their respective positions in the case. During this session, the parties set forth and discussed their respective positions on the merits of the Class claims and the potential for a settlement that would involve class-wide relief. A significant portion of the session was spent discussing Defendant's lack of available assets to satisfy the claims of Plaintiff and the Class in the event that Plaintiff was successful at trial, the presence or lack of a bad faith claim against Defendant's insurer, and the remaining coverage available under the wasting policy issued by Continental Casualty Company to Defendant in the amount of \$2,000,000.00. The parties exchanged offers and counter-offers and negotiated the points of each vigorously. Ultimately, the parties were unable to agree to a settlement during the in-person mediation session.

17. As discussed above, during mediation, Plaintiff's Counsel were provided information (which they later confirmed through a confirmatory process) regarding the possibility that a bad faith claim did not exist against Continental Casualty Company. Plaintiff's Counsel already had concerns regarding Defendant's lack of assets beyond its insurance coverage based upon previously-provided discovery. These factors were significant considerations in the mediation and settlement discussions as it was Plaintiff's Counsel's goal to obtain everything that they could to pay the claims of the Class.

18. Ultimately, the parties were able to reach a settlement whereby a Settlement Fund in the amount of \$1,800,000.00 would be funded entirely from Defendant's insurance policy.

This amount represents almost all of the remaining coverage under Defendant's wasting policy. This "all in" amount was accepted subject to Plaintiff's confirmation that Defendant has no meaningful assets which could be liquidated to satisfy any sum recovered at trial, and that a bad faith claim does not exist in connection with Continental Casualty Company's handling of a claim for coverage under Defendant's policy. Both have been confirmed as accurate through the confirmatory process.

19. After the Court preliminarily approved the Settlement, Class Counsel worked with defense counsel and the Class Administrator to finalize the Class Notice and ensure that all of the information and dates in the Class Notice complied with the procedures set forth in the Order of Preliminary Approval. Class Counsel also drafted content for a dedicated settlement website and worked with their web designer to have the content posted, including several revisions and updates to the content on the website. Class Counsel have also been in communication with a number of Class Members who have called to ask questions regarding the Settlement. This work continues to date and will continue through and beyond the time of final approval. In addition, Class Counsel will expend additional time preparing and filing their forthcoming motion for final approval and supporting documentation.

20. I have been in contact with the Class Administrator and have reviewed reports prepared by the Class Administrator regarding its administration of the Settlement. To date, one Class Member has requested exclusion from the Settlement and no Class Members have objected to the Settlement.

21. Since undertaking the representation of Plaintiff, Plaintiff's Counsel have represented the Class in prosecuting the claims of the Class, including discovery, mediation and the documentation of the settlement. These tasks have included, among other things, meeting

with Plaintiff and co-counsel to gather the facts and analyze the potential claims; investigating the facts in support of Plaintiff's claims; developing a litigation plan; drafting the Complaint and the Amended Complaint; communications with counsel for Defendant; preparing a case management report and attending a case management conference before the Court; propounding and engaging in discovery, including the review of documents; preparing for and taking the deposition of a corporate representative of Defendant; preparing for and attending hearings; keeping Plaintiff advised of the progress of the case, including face-to-face meetings with the client, and numerous phone calls and e-mail exchanges with Plaintiff; researching possible defenses; preparing for and attending the mediation; documenting the settlement agreement and preparing documents in support of preliminary approval of the settlement; overseeing the implementation of the Notice program, communications with the Class Administrator; handling inquiries from Class Members; conferences with co-counsel and Defendant's counsel relating to the issues of settlement; the Notice program and the approval of the settlement; development of a website to provide information to the Class regarding the settlement; legal research, drafting and preparation of the motion for approval of attorneys' fees and costs and a service award to Plaintiff as class representative; and communication with Class Members who contacted Class Counsel regarding the Settlement. Additional work will be required, including preparation of the motion for final approval and the preparation of the necessary declarations in support of the entry of the Final Judgment and Order in this case.

22. The following is a compilation of professional time incurred by counsel representing Plaintiff and the Class:

MORGAN & MORGAN COMPLEX LITIGATION GROUP

Attorney	Hours	Rate	Total
John A. Yanchunis (admitted 1980)	182.00	\$900.00	\$163,800.00

Jonathan Cohen (admitted 2006)	333.40	\$500.00	\$166,700.00	
Marcio Valladares (admitted 1993)	2.5	\$550.00	\$1,375.00	
William P. Howard (admitted 1997)	302	\$550.00	\$166,100.00	
Domenico Minerva (admitted 2007)	9.8	\$450.00	\$4,410.00	
Elizabeth S. Metcalf (admitted 2009)	11	\$450.00	\$4,950.00	
Roger A. Sachar, Jr. (admitted 2008)	1.5	\$425.00	\$637.50	
Peter G. Safirstein (admitted 1986)	73	\$725.00	\$52,925.00	
David Sclafani	10.75	\$275.00	\$2,956.25	
			Lodestar	\$563,853.75
			Expenses	\$145,471.94
			Firm Total	\$709,325.69

DOGALI LAW GROUP, P.A.

Attorney	Hours	Rate	Total	
Geoffrey E. Parmer (admitted 1993)	184.30	\$400.00	\$73,720.00	
			Lodestar	\$73,702.00
			Expenses	\$644.20
			Firm Total	\$74,364.20

TOTAL FEES AND EXPENSES OF ALL PLAINTIFFS' COUNSEL

	Lodestar	\$637,555.75
	Costs	\$146,116.14

23. I assert that the attorneys' fees sought in Plaintiff's Motion for Approval of Attorneys' Fees, Costs and Expenses and Service Award to Plaintiff as Class Representative are reasonable and constitute fair and reasonable compensation for undertaking this case on a contingency basis, and for obtaining the substantial relief for Plaintiff and the Class.

24. In addition to the time expended, my firm also incurred \$145,471.94 in expenses and the Dogali Law Group, P.A. incurred \$644.20 in expenses, which were reasonably and

necessarily committed to the prosecution of the litigation. These expenses are broken down as follows:

Morgan & Morgan Complex Litigation Group

Description	Subtotals	Totals Per Category
Printing and Copying		\$2,337.30
Black & white photocopies/printing at \$0.10 per page	\$1,801.30	
Preparation fee to Richo (an outside vendor) to prepare binders for hearing on preliminary approval	\$480.85	
Copy costs from Tampa Legal for Expert Discovery Printing	\$32.10	
Document request from Madison County	\$1.05	
Color Printing	\$22.00	
Court Fees		\$2,447.60
Fees for Certificates of Good Standing from The Florida Bar	\$68.00	
Filing Fee filing case in state court in Hillsborough County	\$410.00	
Filing Fee and Certified Mail for Service of Summons	\$356.60	
Filing Fee Hillsborough County	\$413.00	
Filing Fee Federal Court	\$400.00	
David Mitchell Pro Hac Vice Application S.D.N.Y.	\$200.00	
Jonathan Cohen Pro Hac Vice Application S.D.N.Y.	\$200.00	
Daniel Mitchell Pro Hac Vice Application S.D.N.Y.	\$200.00	
John Yanchunis Pro Hac Vice Application S.D.N.Y.	\$200.00	
Professional Services		\$106,630.26
PACER Service Center	\$183.80	
Wireless Block Identifier & Wireless Ported Numbers	\$2,220.00	
Video Deposition of Corporate Representative Christopher Rekhov	\$977.50	
Expert fee to Hansen & Levey Forensics	\$3,000.00	
Expert fee to Brenda Mulder, PA	\$3,187.50	
Expert fee to Hansen Legal Technologies, Inc.	\$7,440.00	
Service of Process to Investigative Service of Tampa	\$364.25	
TLO, LLC – background search (witnesses)	\$59.00	
OPSEC Investigation – background search (witnesses)	\$1,070.00	
Mediation Fee to JAMS	\$8,687.09	
Analytics Consulting, LLC, Cost of Notice to the Class of the Order Certifying Class	\$77,046.82	

Translation Services – to translate to English from Chinese documents produced by Defendant	\$105.00	
Westlaw Charges - Research	\$148.39	
Thomson Reuters – Research	\$95.00	
Trial - Supplies (boxes, pads, notebooks)	\$49.70	
Deposition (x2) and Hearing (x9) Transcript Fees	\$1,996.21	
Telephone and Faxing		\$413.25
Facsimile	\$21.00	
Telephone Charges - Long Distance	\$392.25	
Shipping and Postage		\$602.96
FedEx	\$520.98	
Postage	\$81.98	
Travel Expenses		\$33,040.57
Travel costs for William Howard for attendance at Evidentiary Hearing on February 1, 2013	\$1,224.84	
Travel costs for Hansen & Levey Forensics (expert) for attendance at Evidentiary Hearing on February 1, 2013	\$1,528.66	
Travel costs for William Howard for attendance at Depositions of Corporate Representative and Plaintiff on June 17, 2013	\$2,038.00	
Travel costs for William Howard and David Mitchell for attendance at Hearing (Pending Issues) on September 12, 2013	\$2,289.47	
Travel costs for William Howard and David Mitchell for attendance at Evidentiary Hearing on October 3, 2013	\$2,441.53	
Travel costs for William Howard and David Mitchell for attendance at Hearing (Declaratory Action) on October 18, 2013	\$3,027.17	
Travel costs for William Howard for attendance at Evidentiary Hearing on July 25, 2014	\$1,660.73	
Travel costs John Yanchunis for Meeting with Opposing Counsel to Discuss Settlement on July 24, 2014	\$397.64	
Travel costs for William Howard on August 29, 2014 for hearing on motion for class cert.	\$1,234.01	
Travel costs for John Yanchunis on August 29, 2014 for hearing on motion for class cert.	\$933.33	

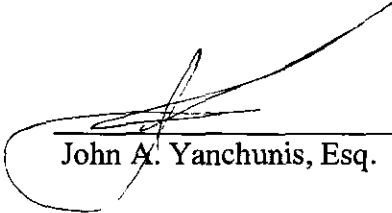
Travel costs for Jonathan Cohen on August 29, 2014 for hearing on motion for class cert.	\$1,388.51
Travel by Edward Zyburo on September 9, 2014 for continued hearing on motion for class cert	\$2,993.97
Travel by John Yanchunis for continued hearing on motion for class cert. on September 9, 2014	\$1,221.03
Travel by William Howard for continued hearing on motion for class cert. on September 9, 2014	\$2,805.12
Travel by John Yanchunis for Preliminary Approval Hearing on November 25, 2014	\$849.61
Travel by Jonathan Cohen for Preliminary Approval Hearing on November 25, 2014	\$896.03
Travel by William Howard for Preliminary Approval Hearing on November 25, 2014	\$1,043.81
Travel by John Yanchunis for Mediation on February 10, 2015	\$1,220.75
Travel by Jonathan Cohen for Mediation on February 10, 2015	\$1,437.21
Travel by William Howard for Mediation on February 10, 2015	\$816.27
William Howard Trial Prep Lunch on February 18, 2015	\$51.70
Travel by John Yanchunis for Attendance at Preliminary Approval Hearing on March 13, 2015	\$1,541.18
Total	\$145,471.94

Dogali Law Group, P.A.

Totals Per Category	
Travel Expenses	
Travel by Geoffrey Parmer for Hearing on October 9, 2012	\$342.58
Meal in NYC for Hearing on October 9, 2012	\$12.67
Taxi from LGA to Midtown for Hearing on October 9, 2012	\$40.30
Taxi from Court to LGA for Hearing on October 9, 2012	\$40.00
Hotel in NYC for Hearing on October 9, 2012	\$208.65

25. The above expenses pertaining to this case are reflected in the books and records of the referenced law firms. These books and records are prepared from expense vouchers, check records, and other documents, and are an accurate record of the expenses. With respect to the expenses relating to Internet research and services of \$1,092.31, those expenses were incurred solely for research of factual and legal issues in this case.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of May, 2015 at Tampa, Florida.



John A. Yanchunis, Esq.