

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

KEEFE JOHN and JILLIAN CATHERINE KLUG,
individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FROEDTERT HEALTH, INC.,

Defendant.

CASE NO.: 23-CV-1935

**AFFIDAVIT OF GARY M. KLINGER IN SUPPORT OF PLAINTIFFS’
 MOTION FOR ATTORNEYS’ FEES, COSTS, EXPENSES
 AND SERVICE AWARDS FOR CLASS REPRESENTATIVES**

I, Gary M. Klinger, being competent to testify, make the following declaration:

1. I am a partner of the law firm Milberg Coleman Bryson Phillips Grossman, PLLC (“Milberg”). I am one of the lead attorneys for Plaintiffs Keefe John and Catherine Jillian Klug (“Plaintiffs”) and have been preliminarily appointed Class Counsel, along with David S. Almeida of Almeida Law Group LLC (“ALG”), for the proposed Settlement Class.¹ I submit this affidavit in support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, Expenses, and Service Awards for Class Representatives (“Motion for Attorneys’ Fees”). Except as otherwise noted, I have personal knowledge of the facts set forth in this affidavit and could testify competently to them if called upon to do so.

2. I have extensive experience in the prosecution of class action litigation generally and privacy-related class action litigation in particular. Milberg has a proven track record of experience in data privacy class action litigation.

¹ Unless otherwise indicated, the defined terms herein shall have the same definition as set forth in the Class Settlement Agreement and Release (“Settlement Agreement”), which was filed with this Court on May 5, 2023.

Class Counsel's Extensive Efforts On Behalf of the Class

3. The attorneys at Milberg who worked on this matter have stayed abreast of all material developments involving the allegations set forth in our clients' Complaint, namely, that Froedtert Health, Inc. ("Froedtert" or "Defendant," together with Plaintiffs, the "Parties") allegedly implemented certain tracking technologies (the "Meta Pixel") on its website and patient portal to collect and to disclose confidential health information of users of those properties with Facebook without informed consent.

4. Litigation concerning tracking technologies generally and the Meta Pixel specifically is a nascent but rapidly developing area of the law. Accordingly, I and my team, along with co-counsel at ALG, spent an inordinate amount of time researching the use of such technologies, analyzing which categories of data collected by the Meta Pixel and shared with third parties constituted protected health information ("PHI") under the Health Information Portability and Accountability Act ("HIPAA"), considering which legal claims potentially "fit" these new technologies, not to mention gathering and reviewing publicly-available information regarding hospitals' and healthcare providers' (including Froedtert's) use of such technologies; conducting further extensive research into data security practices and standards across healthcare entity websites and patient portals; interviewing potential clients and evaluating potential class representatives; conducting a pre-suit investigation into and evaluation of the facts and the merits of Plaintiffs' and Class Members' legal claims; researching law relevant to Plaintiffs' Class Action Complaint and potential defenses thereto; drafting Plaintiffs' initial demand letter and Class Action Complaint; preparing for and attending a full-day mediation with Hon. Stuart E. Palmer (ret.) of JAMS, including researching and preparing a detailed mediation statement; engaging in settlement negotiations with Froedtert prior to the mediation; negotiating and drafting the Class Settlement

Agreement and Release; preparing the Unopposed Motion for Preliminary Approval for Class Action Settlement, Notices, Claim Form and accompanying exhibits for preliminary approval of Settlement; negotiating with settlement administration companies to secure the best notice plan practicable; working with the Settlement Administrator to ensure the timely completion of Notice and processing of claims; monitoring the claims process and corresponding with the Settlement Administrator regarding the same; communicating with defense counsel; and updating and handling questions from our Class Representatives.

5. Throughout this action, Milberg has sought to reach consensus with ALG to manage the administration and work division in this case in a systematic and efficient manner, coordinating work assignments through conference calls, working to avoid duplication of efforts or unnecessary work undertaken, and ensuring that the skills and talents of counsel were put to use in an efficient and effective manner that maximized what each firm and attorney could contribute in a non-redundant way. In addition, I have conferred with my colleagues and team about strategy and case status while being mindful to avoid duplicative efforts within my firm.

Initial Investigation & Pre-Suit Negotiations Including Mediation

6. In the Fall of 2022, after completing our initial assessment of Plaintiffs' claims and suitability as potential class representatives and prior to filing a lawsuit, I, along with attorneys at ALG, approached Froedtert and, ultimately, its retained counsel to explore the possibility of a potential resolution since we believed that early settlement discussions could benefit the Class. Specifically, I, along with the ALG firm, prepared and sent a detailed letter to Froedtert informing it of our clients' concerns with respect to its use of the Meta Pixel on its digital properties. Thereafter, we began discussions with Froedtert's retained counsel about the possibility of engaging in pre-suit negotiations.

7. On February 9, 2023, the Parties, through counsel, engaged in a full day mediation before Hon. Stuart E. Palmer (Ret.) concerning a possible settlement of the claims to be asserted if the dispute could not be resolved without class-wide litigation.

8. Leading up to the mediation, I and other attorneys at Milberg worked diligently and in concert with attorneys at ALG to prepare a mediation statement in consultation with our clients. Prior to the mediation session with Judge Palmer, the parties exchanged information to prepare for and to facilitate a productive mediation session. Froedtert informally produced certain information relating to its use of the Meta Pixel on its various digital properties and we, in turn, analyzed the data received from Froedtert, including information relating to the different categories of individuals who visited and used its various digital properties as well as the nature and number of Settlement Class Members impacted.

9. Class Counsel's diligence in preparing for mediation, including obtaining upfront information necessary to analyze and assess potential claims and defenses, allowed Class Counsel to negotiate a robust relief package and valuable outcome for the Settlement Class and to determine a fair and efficient structure and distribution plan and to confirm that the Settlement was fair, reasonable, and adequate.

10. Following preliminary agreement on the terms of a class-wide resolution, I, along with attorneys at ALG, worked for weeks negotiating the myriad of details regarding the Settlement and circulating drafts back and forth of the Settlement Agreement and its many exhibits pertaining to preliminary approval.

11. The Settlement Agreement was finalized and executed in or about April 2023.

12. At all times during settlement discussions with Froedtert, the negotiations were adversarial, arm's-length, non-collusive in nature and in good faith. The attorneys on both sides

are very experienced class action and data security and privacy practitioners. Furthermore, it was always Class Counsel's primary goal to achieve the maximum substantive relief possible for the Class Members.

13. Next, Class Counsel solicited and received competing bids from separate third-party administrators for settlement notice and administration. With each of the potential settlement administrators, Class Counsel discussed the notice and distribution plans agreed to in the Settlement. Class Counsel ultimately negotiated an agreement with Kroll Settlement Administration ("Kroll") to act as the Settlement Administrator, subject to the Court's approval.

14. Class Counsel crafted, negotiated, and refined the final notice program and each document comprising the Class Notice—with the assistance of Kroll—to ensure that the information disseminated to Settlement Class Members was clear and concise.

The Commencement of Litigation & Procedural Posture

15. On March 16, 2023, Plaintiffs John and Klug filed this putative class action lawsuit in Milwaukee County Circuit Court where Froedtert maintains its principal office.

16. Plaintiffs filed the Complaint in this Court in order to avoid the risk that the federal court for the Eastern District of Wisconsin might conclude it lacked subject matter jurisdiction over the claims of Plaintiffs and/or the Settlement Class Members given the United States Supreme Court's recent decision in *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021).

17. The Settling Plaintiffs have good faith concerns that the Eastern District of Wisconsin could, *sua sponte*, find it lacked jurisdiction as late as the final approval stage of this case thereby causing the parties to incur significant notice and claims administration costs for

nothing.² However, there is no question as to the jurisdiction of this Honorable Court over the Settlement Class's claims (as Milwaukee, Wisconsin is where Froedtert maintains its principal office).

18. On May 5, 2023, after weeks of additional work preparing and refining the preliminary approval papers (including a motion, memorandum in support as well as the various forms of class notice), Class Counsel filed Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement.

19. On May 23, 2023, the Parties appeared before this Honorable Court on Plaintiffs' Motion for Preliminary Approval, and thereafter, on June 2, 2023, this Honorable Court entered an Order granting the Motion and ordering Plaintiffs' Counsel to carry out its duties to consummate the proposed Settlement.³

The Settlement

20. The Settlement represents an excellent result for the Class and was obtained against a well-funded defense by Froedtert, which was represented by an extremely well-regarded law firm that is particularly experienced and well-versed in data privacy law.

21. This result is even more impressive because, although Plaintiffs believe in the merits of their claims, this Litigation was inherently risky and complex. The claims involve an extremely nascent and rapidly developing area of the law and Plaintiffs faced risks at each stage of litigation.

² On December 6, 2021, a district court dismissed a plaintiff's Complaint in a data breach class action on the basis that the plaintiff lacked standing to bring his claims under *TransUnion*. See *Legg v. Leaders Life Ins. Co.*, No. 21-cv-655, 2021 WL 5772496 (W.D. Okla. Dec. 6, 2021).

³ On or about July 29, 2023, this Court entered an Order transferring this case from the docket of the Honorable Pedro Colon to the Honorable Glenn H. Yamahiro.

22. Aside from the potential that either side will lose at trial, Plaintiffs would likely need to counter a motion to dismiss and/or summary judgment, and both gain and maintain certification of the class. Even if successful with their class certification argument, Plaintiffs would face a near inevitable interlocutory appeal attempt. Without a certified class, no class member would likely receive any recovery. And summary judgment, trial and appeal present significant risks (as well as costs and delay) in any case.

23. Based on information exchanged between the parties, the Settlement Class, defined as “all persons who logged into a MyChart patient portal account at least once between February 1, 2017 and May 23, 2022,” consists of approximately 459,044 Settlement Class Members.

24. If approved, Froedtert will establish a \$2,000,000 non-reversionary Settlement Fund through which Settlement Class Members will have an opportunity to submit a claim for a *pro rata* share of the settlement fund to compensate them for their losses.

25. In order to be eligible to receive monetary payment, a Class Member need only submit a Claim Form prior to the Claim Deadline, and that form requires only that Class Members attest that they logged into a MyChart patient portal account through Froedtert’s Website at least once between February 1, 2017 and May 23, 2022.

26. To determine the precise Cash Fund Payment for each Settlement Class Member, the Settlement Administrator will first distribute monies from the Settlement Fund as outlined in the Settlement Agreement.

27. The Parties, through counsel, negotiated the Settlement Benefits (and structure) as fair compensation by discussing the type of personal information allegedly collected and shared with Facebook as well as the amount of damages this sharing caused Class Members. These benefits to the Class outweigh the risk, time delay and net expected value of continued litigation.

28. The Settlement allows Class Counsel to make an application to the Court for an award of reasonable attorneys' fees, costs and expenses (*i.e.*, the Fee Award and Costs) to be paid from the Settlement Fund. The Parties did not discuss or agree to the amount to be applied for (*i.e.*, the Settlement does not include a "clear sailing provision"). Accordingly, Class Counsel requests an attorneys' fee award of \$700,000, and the Long Form Notice discloses this amount. This requested amount represents approximately 35% of the Net Settlement Fund.

29. Class Counsel will make an application to the Court for \$3,500 for each of the two Class Representatives (the "Service Awards"). Plaintiffs have been actively engaged in this litigation and were essential to the success achieved. The Settlement would not have been possible without the effort and commitment of Plaintiffs.

30. In addition to lending their names to the lawsuit, among other things, they provided information to Class Counsel, gathered documents, reviewed pleadings, stayed updated about the litigation, and reviewed and approved the Settlement.

31. The Parties did not discuss the payment of Service Awards to Class Representatives until after the substantive terms of the Settlement had been agreed upon. Plaintiffs' support for the Settlement as fair, reasonable, and adequate is not conditioned upon the Court's award of the requested Service Awards, and in the event the Court declines to approve, in whole or in part, the payment of the Service Awards, the remaining provisions of the Settlement Agreement shall remain in full force and effect. The finality or effectiveness of the Settlement is not dependent on the Court awarding Class Representatives the Service Awards.

Preliminary Approval of the Settlement

32. After the Settlement, Class Counsel prepared and filed the Motion for Preliminary Approval, which included voluminous supporting documents, declarations, and exhibits.

33. On June 2, 2023, this Court preliminarily approved the Settlement and ordered that the Settlement Class be given notice. *See* Preliminary Approval Order. The Court appointed Plaintiffs Keefe John and Jillian Catherine Klug as Class Representatives; and David Almeida of ALG and me as Class Counsel and Kroll as Settlement Administrator. *Id.*, ¶¶ 2 & 6. The Court also approved the forms of notice which state the amount of fees that would be requested, the fact that litigation costs and expenses would be requested and the amount of service awards that would be requested and approved the plan for providing notice to the Settlement Class. *Id.*, ¶¶ 7 & 8.

34. Kroll reports that 459,044 Class Members were sent Notice via first class U.S. mail and/or email on July 7, 2023—the Notice Date.

35. As of August 21, 2023, Kroll reports that, out of the approximately 459,044 Class Members who were sent Notice, thirty (30) Class Members submitted requests for exclusion from the Settlement (meaning only .007% of the Settlement Class has requested exclusion from the Settlement).

36. As of the date of filing, Class Counsel has received *zero* objections to either the Settlement Agreement in general or to the proposed attorneys' fees and/or costs—the amount of which was made known to the Settlement Class via the Court-approved Notice—in particular.

37. In the Preliminary Approval Order, the Court set the final approval hearing for September 29, 2023 and ordered that the Motion for Attorneys' Fees be heard at that hearing.

38. Plaintiffs will file a declaration from Kroll certifying completion of notice and detailing the status of the claims administration process with their Motion for Final Approval on September 15, 2023. Plaintiffs will also file a [Proposed] Order and Judgment Granting Final Approval of Class Action Settlement, covering the requested fees, costs, expenses, and Service Awards, with Plaintiffs' Motion for Final Approval.

**Milberg Will Continue to Commit Significant Efforts and Resources
to This Litigation for the Benefit of the Class**

39. Since the Court granted preliminary approval on June 2, 2023, and continuing to today, I have continued to work with Froedtert, Mr. Almeida and Kroll regarding claims administration and processing, as well as answering Class Members' questions about the settlement and the process.

40. I anticipate that my firm will continue to expend significant attorney time and resources, given the future work still needed for completion of the Settlement, including: continuing to monitor the claims process; helping preparing a Motion for Final Approval of Class Action Settlement ("Motion for Final Approval"); preparing for and attending the Final Approval Hearing; continuing to respond to Class Member inquiries; responding to Class Member challenges; responding to any requests for exclusion or objections; addressing any appeals; and working with Froedtert and Kroll on the distribution of benefits to the Settlement Class.

The Contingent Nature of the Case

41. My Firm and ALG prosecuted this case on a purely contingent basis.

42. Our fees were not guaranteed—the retainer agreement with Plaintiffs does *not* provide for fees apart from those earned on a contingent basis and, in the case of class settlement, approved by the Court. As such, the firms assumed a significant risk of nonpayment or underpayment.

43. In addition to accepting considerable risk in litigating this action, Class Counsel committed their time and resources to this case without any guarantee of compensation, whatsoever, only achieving the Settlement after considerable negotiations.

44. This matter has required me, and other attorneys at my Firm, to spend time on the investigation and litigation of this matter that could have been spent on other matters.

45. This case has consumed, at various times during its pendency, significant amounts of my time and my Firm's time. Such time could otherwise have been spent on other fee-generating work. Because our Firm 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.

46. Litigation is inherently unpredictable and therefore risky; here, that risk was very real and high, due to the rapidly evolving case law pertaining to the extremely nascent nature of pixel-related privacy litigation not to mention the state of data privacy law in general.

47. Therefore, despite my Firm's devotion to the case and our confidence in the claims alleged against Froedtert, there have been many factors beyond our control that posed significant risks. Had Froedtert prevailed on the merits, on class certification or on appeal, I and my firm might have recovered nothing for the time and expense invested in representing the Class.

Costs & Expenses

48. Due to the early stage of litigation and efficiency by which Class Counsel was able to obtain this significant settlement, costs and expenses incurred by Plaintiffs are low. My firm has advanced \$20,045.58 in out-of-pocket costs and expenses pertaining to this litigation. These costs expenses are comprised of:

<u>Description</u>	<u>Amount</u>
Mediation Fees	\$7,281.56
Experts	\$12,500.00
Pro Hac Vice Fee	\$250.00
Notice Letter	\$14.02
TOTAL	\$20,045.58

These costs and expenses are fully documented, and in my opinion, were necessary and reasonable. Moreover, this amount does not include internal and other additional costs that Class Counsel

incurred in this litigation but, in an exercise of discretion, do not seek to recover. Additional costs and expenses may be incurred before our work is done in this case as is true of the additional services which we will provide to the Settlement Class.

49. As of August 22, 2023, the Claims Administrator reports that the costs of Claims Administration through completion of the Settlement are estimated to be \$269,429.60.

50. After taking into account deductions for Administrative Expenses, which include the costs of Notice and settlement administration through completion of the Settlement estimated to be \$269,429.60, litigation costs and expenses amounting to \$20,302.78 (which includes expenses incurred by ALG), and Service Awards of \$3,500 to each of the two Class Representatives amounting to \$7,000, the Net Settlement Fund amounts to \$1,703,267.62.

51. Class Counsel's fee request of \$700,000 equates to 35% of the Gross Settlement Fund and approximately 40% of the estimated Net Settlement Fund, which is consistent with the market rate in the Seventh Circuit. *See, e.g., Karpilovksy v. All Web Leads, Inc.*, No. 2017-cv-01307 (N.D. Ill. Aug. 8, 2019), ECF No. 173 (approving fees amounting to 35% of the entire settlement fund, which amounted to approximately 38% of the net settlement fund); *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

52. The fees contemplated under Class Counsel's representation agreements for cases in this District and elsewhere generally fall within the one-third (33.33%) to 40% range.

53. Based on my experience and my knowledge regarding the factual and legal issues in this matter, and given the substantial benefits provided by the Settlement, it is my opinion that the proposed Fee Award and Costs and Service Awards are reasonable.

54. In the opinion of the undersigned and other Class Counsel, the settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class.

* * * * *

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct, and that this affidavit was executed in Chicago, Illinois on this 22nd day of August, 2023.

Gary M. Klinger

Gary M. Klinger
MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN PLLC
227 W. Monroe Street, Suite 2100
Chicago, IL 60606
Phone: (866) 252-0878
gklinger@milberg.com

SUBSCRIBED and SWORN to
Before me this 22nd day of August, 2023.

Sandra A. Passanisi

Sandra A. Passanisi
My Commission Expires:

