

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

CHRISTINE BRYANT on behalf of herself)
and all other persons similarly situated, known)
and unknown,)

Plaintiff,

VS.

COMPASS GROUP USA, INC. and 365)
RETAIL MARKETS, LLC,)

Defendants.

Case No. 1:19-cv-06622

Honorable Virginia M. Kendall

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER
UNOPPOSED MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT**

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I. Introduction

On November 2, 2021, this Court granted preliminary approval of the Parties' \$6,800,000.00 non-reversionary class action Settlement under the Biometric Information Privacy Act ("BIPA"). ECF No. 90. As previously detailed by Class Counsel (ECF No. 115, p. 4-6), following preliminary approval, the Parties and the Settlement Administrator collaborated in executing a robust Notice program. Because Defendants did not possess any home addresses or telephone numbers for Settlement Class Members, and possessed email addresses for only approximately 45% of Settlement Class Members, Class Counsel issued over 260 subpoenas to obtain contact information for Settlement Class Members. Class Counsel received over 275 responses and supplemental responses. As a direct result of Settlement Class Counsel's collection efforts, the Settlement Administrator was able to successfully send notice to a total of 55,309 Settlement Class Members by either mail, email and/or text message.

The Settlement represents a fair, adequate, and reasonable resolution of this litigation on a class action basis, and the Motion for Final Approval is uncontested. Not a single Settlement Class Member objected to the Settlement, and there was only one request for exclusion. And remarkably, an impressive 16.97 percent of Settlement Class Members returned claim forms to request payment. If the Court grants final approval of the proposed Settlement, each Settlement Class Participant will receive an estimated net payment of \$413.75. The high notice and claims rate, lack of objections, and only a single exclusion support final approval of the Settlement.

II. Legal Background and Procedural History

Plaintiff set forth the legal background and procedural history of this case in her previous Settlement approval filings, ECF Nos. 87 and 115.

III. Summary of Settlement Terms

The terms of the Settlement are set forth in the Parties' Settlement Agreement, which is attached hereto as Exhibit A, and are briefly summarized here:

A. Class Definition:

The Settlement Class Representative seeks final approval of the following class:

All individuals who scanned their finger(s) in one or more of Defendants' vending systems in Illinois between August 23, 2014 and preliminary approval without first executing a written consent ("the Settlement Class" or "Settlement Class Members"). Excluded from the Settlement Class are persons who timely elect to exclude themselves, the Court and staff to whom this case is assigned, and any member of the Court's or its staff's immediate families.

See ECF No. 90, Preliminary Approval Order ¶ 4; *see also*, Exhibit A, Settlement Agreement, §

II. There are approximately 63,450 Settlement Class Members. Ex. B, Declaration of Due Diligence ("Settlement Administrator Decl."), ¶ 8.

B. Settlement Fund; Allocation of the Fund; Payments to Class Members (Ex. A, Settlement Agreement, § III.2)

While denying all liability and wrongdoing, Defendants have agreed to pay a non-reversionary Gross Fund of \$6,800,000.00 to resolve the claims in this case on a class action basis. The "Net Fund" is the Gross Fund minus the following deductions, which are subject to Court approval: Settlement Class Counsel's attorney fees and costs; the Settlement Administrator's costs; and the Settlement Class Representative's Service Award. The Net Fund shall be distributed pro rata to Settlement Class Members who timely return valid claim forms ("Settlement Class Participants"). Because of this method of allocation to Settlement Class Participants, there will be no unclaimed funds.

C. Uncashed Checks Will Be Distributed to the Unclaimed Property Division (Ex. A, Settlement Agreement, § III.9)

Settlement Class Participants who do not request electronic payment will have 150 days to

cash their settlement payments. Funds from checks not cashed by the deadline will be distributed to the Unclaimed Property Division of the Illinois Treasurer's Office. This will enable Settlement Class Members to request their settlement payments if they miss the check cashing deadline. See <https://icash.illinoistreasurer.gov/app/faq-general> (last visited August 15, 2022) (Illinois "serves as a custodian of the assets [of unclaimed property] and never takes ownership of them.")

D. Release of Claims (Ex. A, Settlement Agreement, § III.3)

Settlement Class Members who do not timely and validly exclude themselves from the Settlement will release the Released Parties¹ from all claims arising out of or relating to the collection, storage, possession, disclosure or use of data derived from fingerprints or finger scanning at Vending Systems of Defendants in Illinois between August 23, 2014 and preliminary approval, whether asserted or unasserted, including but not limited to claims under the Illinois Biometric Information Privacy Act, including statutory and common law claims, as well as related claims for liquidated damages, penalties, attorney fees and costs, expenses, and interest.

E. Settlement Administration (Ex. A, Settlement Agreement, § III.4.)

Analytics Consulting, LLC ("Settlement Administrator") has administered the Class Notice and claims process and will administer the remainder of the Settlement. Plaintiff's Motion for Attorney's Fees, Litigation Costs, Service Award, and Settlement Administration Costs filed on May 31, 2022 (ECF No. 115), requested \$105,486 for the Settlement Administrator's costs,

¹ The term "Released Parties" means Defendants and their current and former owners, affiliates, parents, subsidiaries, divisions, officers, directors, shareholders, agents, employees, attorneys, insurers, benefit plans, predecessors, successors; Defendants' vendors New Age Pavilions, LLC, Avanti Markets, Inc. BBV Slabb, LLC and their respective current and former owners, affiliates, parents, subsidiaries, divisions, officers, directors, shareholders, agents, employees, attorneys, insurers, benefit plans, predecessors, and successors; and all of "Defendants' Customers," which are defined as persons and entities at whose premises Defendants located or operated vending systems used by the Settlement Class Members in Illinois and all persons or entities with a contractual or business relationship with Defendants pursuant to which Defendants located or operated vending systems used by the Settlement Class Members in Illinois.

which is the amount Analytics has incurred and will incur for completion of the administration of the Settlement. Ex. B, Settlement Administrator Decl., ¶31.

F. The Notice Process Was Successful (Ex. B, Settlement Administrator Decl.)

The Settlement Administrator implemented a robust class notice program to ensure that Settlement Class Members learned of their rights in the Settlement. The notice explained to Settlement Class Members (1) what the Settlement is about; (2) how to request payment, exclusion, and/or submit an objection; (3) how to obtain more information about the Settlement; (4) the monetary terms of the Settlement and how individual payments will be calculated; (5) the maximum amounts to be requested for attorney fees, costs, settlement administration, and a Service Award; and (6) the final approval hearing details. Ex. B, Settlement Administrator Decl. ¶¶ 4, 11.

The Notice Program also included a Settlement website, www.FingerScanVendingSettlement.com, which included the Settlement Notice, the Settlement Agreement, the Preliminary Approval Order, Court Order Dated March 8, 2022, and the Motion for Attorney Fees, Litigation Costs, Service Award, and Settlement Administration Costs. Ex. B, Settlement Administrator Decl., ¶10.

The Notice process was extensive. First, where mailing addresses were available for Settlement Class Members, the Settlement Administrator provided the Notice and Claim Form by direct mail. Before mailing, the Settlement Administrator updated Settlement Class Members' addresses by running their names and addresses through the National Change of Address database (NCOA). Ex. B, Settlement Administrator Decl., ¶9. Partial addresses not updated by NCOA were manually researched and corrected where possible. *Id.* The mailing included a pre-paid envelope for Settlement Class Members to return a Claim Form. *Id.* ¶11. For Settlement Class Members

whose notices were returned as undeliverable without a forwarding address, the Settlement Administrator ran a database search to locate an updated address and mailed the Notice and Claim Form to the updated address. *Id.* ¶18.

Second, where email addresses were available for Settlement Class Members, the Settlement Administrator sent the following email:

Compass Group USA, Inc. and 365 Retail Markets, LLC settled a class action lawsuit that claims they violated Illinois law by collecting fingerprint scan data from Illinois users of vending machine systems without written notice and consent. To determine if you are eligible to participate in the settlement, please visit the settlement website and review the Notice of Class Action Settlement: www.FingerScanVendingSettlement.com. If you are eligible to participate in the settlement, you must submit a completed Claim Form to request payment by July 29, 2022. The Claim Form is available on the settlement website.

Ex. B, Settlement Administrator Decl., ¶12.

Third, where cell phone numbers were available for Settlement Class Members, the Settlement Administrator sent the following text message:

You may be entitled to payment in a class action settlement if you scanned your finger(s) in certain vending systems in Illinois without first providing written consent. To learn more, click **here**.

Id., ¶13. The link took Settlement Class Members to the Settlement website. *Id.*

Fourth, where email addresses were available for Settlement Class Members, the Settlement Administrator targeted the following Facebook advertisement to accounts linked to email addresses for Settlement Class Members:

Compass Group USA, Inc. and 365 Retail Markets, LLC have settled a class action lawsuit that claims they violated Illinois law by collecting fingerprint scan data from Illinois users of their vending machine systems without written notice and consent. To learn if you are eligible to request a payment in the settlement, click **here**.

Ex. B, Settlement Administrator Decl., ¶17.

Fifth, 90 days into the 120-day Notice period, the Settlement Administrator sent the

following reminder via email and text message to all Settlement Class Members who had not returned Claim Forms and for whom the Settlement Administrator had email addresses and/or cell phone numbers:

- Reminder email: “You previously received an email about the settlement of a class action lawsuit that claims Compass Group USA, Inc. and 365 Retail Markets, LLC violated Illinois law by allegedly collecting fingerprint scan data from Illinois users of vending machine systems without written notice and consent. If you are a Settlement Class Member, the deadline for you to return a Claim Form and request a settlement payment is July 29, 2022. You can return a Claim Form through the settlement website www.FingerScanVendingSettlement.com. **If you do not fill out a Claim Form by the deadline, you will not get money.**
- Reminder text message: “You were sent notice of a lawsuit settlement for individuals who scanned their finger(s) at certain vending systems in Illinois without first providing written consent. To request payment, you must complete a **Claim Form** by July 29, 2022.”

Ex. B, Settlement Administrator Decl., ¶¶21-22. The **Claim Form** link took Settlement Class Members to the portion of the Settlement website where they could complete and return an electronic Claim Form. *Id.*

This extensive notice program was only made possible through Plaintiff’s counsel’s third-party subpoena efforts. Plaintiff’s counsel issued over 260 subpoenas to obtain contact information for Settlement Class Members, and engaged in a conferral process with numerous respondents to navigate subpoena responses in the face of year-end business closures, coronavirus outbreaks, and data accessibilities issues. ECF No. 115-1 (Declaration of Maureen A. Salas), ¶¶13, 16, 19. For those subpoena recipients who did not provide any response, Plaintiff filed a motion to compel responses. See ECF No. 100. As a result of these efforts of collecting Settlement Class Member information through the subpoena process, the Settlement Administrator was able to mail over 41,000 notices via U.S. Mail, send over 55,000 notices via email, and send over 32,000 notices via text message. Ex. B, Settlement Administrator Decl., ¶¶11, 15.

Out of 63,450 Settlement Class Members, notice was sent to 55,309 Settlement Class Members by either mail, email, or text message. Ex. B, Settlement Administrator Decl., ¶19. Notice was not issued to 8,141 Settlement Class Members for whom Analytics had no contact information. However, many of the entries identified on the Class List for whom Analytics had no contact information were for sham names. *Id.* For example, the following entries were included in the Class List: aa bb, A AAA, aa hji8, BIG PAPA, BIG RED, 210503 McGilvery, 278008 Falkner, 111133231 11133231, CH CH, COOP DOG, KKE CCC, KO, SOURCEBOOKS SOURCEBOOKS, SPARE1 SPARE, CARD SEATED PORTER, CARL CARL, YTRG HHHHHH. *Id.* Of the 55,309 individuals sent notice by either mail, email or text message, Notices were undeliverable to 6,039 Settlement Class Members. *Id.* Excluding the 6,039 Settlement Class Members whose notice was undeliverable, Notice was successfully delivered to 49,270 out of 63,450 Settlement Class Members, or 77.65%. This Notice delivery rate exceeds the 70 percent delivery threshold considered adequate by the influential Federal Judicial Center. *See* FJC, Judges' Class Action Notice & Claims Process Checklist & Plain Language Guide, at 3 (2010), available at <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf>.

The objection and exclusion deadline was July 29, 2022. Zero (0) objections and one (1) request for exclusion were received. *Id.* ¶¶ 29-30. Domonique Williams submitted a valid request for exclusion. *Id.* ¶ 29.

G. The Settlement Administrator's Settlement Class Audit (Ex. B, Settlement Administrator Decl.)

Consistent with the timetable provided in the Settlement Agreement, the Settlement Administrator provided counsel for the Parties with a report containing the information provided in the Claim Forms and its recommendation regarding approval. Ex. A, Settlement Agreement, § III.5.k. The Settlement Administrator has approved 10,750 Claim Forms, which equates to a

16.94% claims rate. Ex. B, Settlement Administrator Decl., ¶ 23.

The Settlement Administrator reported that it received 4,373 Claim Forms from individuals who were not identified on the Class List. Ex. B, Settlement Administrator Decl., ¶26. The majority of these Claim Forms (4,198) were filed between May 2, 2022 and May 5, 2022, immediately after the organization Top Class Actions posted details about the Settlement on its website and included a link to submit a claim form. *Id.*, ¶25. Although the Settlement Class is defined to include individuals who scanned their fingers in one or more of Defendants' vending systems *in Illinois*, over 85% of the individuals who were not identified on the Class List and submitted Claim Forms between May 2, 2022 and May 5, 2022, reside outside of the State of Illinois. *Id.* ¶25. After conferring with the Parties, the Settlement Administrator took the following actions with respect to individuals who filed Claim Forms and who were not identified on the Class List: it approved 66 Claims that identified a location where Defendants placed a vending machine; it denied 914 Claims that identified using a vending machine outside the state of Illinois; it sent a deficiency notification for 3,388 Claims with an opportunity to cure the deficiency by providing the name and address where the individual used a vending system; and it sent a deficiency notification to 5 individuals whose signature did not match the name associated with the claim number. *Id.* ¶26. As of August 30, 2022, 82 individuals responded to the deficiency notifications, and those responses are being reviewed by Analytics to determine whether the deficiency was cured. *Id.* ¶27.

H. The Claims Rate Is Outstanding

Over 16% of Settlement Class Members have submitted a valid Claim Form. Ex. B, Settlement Administrator Decl., ¶23. This claims rate is excellent; it far exceeds the 9 percent median rate in class settlements. *See* Federal Trade Commission, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns, p. 11 (Sept. 2019), available at <https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective->

[analysis-settlement-campaigns/class_action_fairness_report_0.pdf](#) (median claims rate for settlements studied was 9%). Likewise, the claims rate here exceeds the approximately 12.5 percent claims rate in a recent BIPA settlement against a payroll vendor, ADP, and the approximately 10 percent claims rate in another recent BIPA settlement against a timekeeping software company, NovaTime Tech., Inc. See footnotes 5 and 6, *infra*.

I. Service Award (Ex. A, Settlement Agreement, § III.8)

Consistent with the Settlement Agreement and Class Notice, Plaintiff has requested that the Court award the Settlement Class Representative up to \$10,000 as a Service Award for her work in prosecuting this lawsuit on behalf of the Settlement Class, answering initial mandatory discovery, and recovering money for the Settlement Class. Settlement Class Counsel made this request in Plaintiff's Motion and Memorandum of Law in Support of Her Request for Attorney's Fees, Litigation Costs, Service Award, and Settlement Administration Costs, filed on May 31, 2022. ECF No. 115 at 17-19. As represented in the Class Notice, the Settlement Administrator posted a copy of the motion for Service Awards on the Settlement website during the objection/exclusion period so that Settlement Class Members could evaluate the request when deciding how to exercise their rights. Ex. B, Settlement Administrator Decl., ¶10.

J. Attorney Fees and Costs (Ex. A, Settlement Agreement, § III.7)

Plaintiff filed a request for attorney fees of \$2,223,906 and costs of \$12,795.89 on May 31, 2022. ECF No. 115. Consistent with Rule 23(h) of the Federal Rules of Civil Procedure, Plaintiff filed her request for fees and costs during the Class Notice process and the Notice was posted on the Settlement website. Furthermore, the Class Notice informed Settlement Class Members of the maximum amounts to be requested and how they could obtain a copy of Plaintiff's fee petition.

IV. The Court Should Grant Final Approval

The Court preliminarily approved the Parties' settlement on November 2, 2021. ECF No. 90. Plaintiff now requests that the Court grant final settlement approval, the final step for approval of a class action settlement. *Manual for Complex Lit.*, at § 21.632–34.

Federal Rule of Civil Procedure 23(e) governs court approval of class action settlements and mandates that “claims, issues, or defenses of a certified class...may be settled...only with the court’s approval . . . after a hearing and only on finding that it is fair, reasonable, and adequate[.]” Fed. R. Civ. P. 23(e); *Am. Int’l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 CV 2898, 2012 WL 651727, at *1 (N.D. Ill. Feb. 28 2012); *Uhl v. Thoroughbred Tech. and Telecommunications, Inc.*, 309 F.3d 978 986 (7th Cir. 2002). Rule 23(e)(2) sets out that a court must consider whether (1) the class representative and class counsel have adequately represented the class; (2) the settlement was negotiated at arm’s length; (3) the settlement treats class members equitably relative to each other; and (4) the relief provided for the class is adequate. Fed. R. Civ. P. 23(e)(2) (eff. Dec. 1, 2018); *see, e.g., Snyder v. Ocwen Loan Servicing, LLC*, No. 14 cv 8461, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019).

As the Advisory Committee for the 2018 amendments to Rule 23 recognized that “each circuit has developed its own vocabulary for expressing these concerns[.]” the Court should also take into account the factors set out by the Seventh Circuit. These factors are: “(1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed.” *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014) (“Wong factors”).

Courts in the Seventh Circuit continue to analyze the *Wong* factors in tandem with the Rule 23(e)(2) factors to ensure that a settlement is fair, reasonable, and adequate. *See, e.g., In re NCAA Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202, 217 (N.D. Ill. 2019); *Charvat v. Valente*, No. 12-CV-05746, 2019 WL 5576932, at *5 (N.D. Ill. Oct. 28, 2019); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *2 (S.D. Ill. Dec. 16, 2018). “‘The most important factor relevant to the fairness of a class action settlement is the strength of plaintiff’s case on the merits balanced against the amount offered in the settlement.’” *Wong*, 773 F.3d at 863-64 (7th Cir. 2014) (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 n.44 (7th Cir. 1979)). The following discussion, beginning with the *Wong* factors, demonstrates that the Settlement is fair, reasonable, adequate, and deserving of final approval.

A. *Wong* Factors 1 & 2: Strength of the Case for Plaintiff and the Settlement Class on the Merits, Balanced Against the Extent of the Settlement Offer; the Complexity, Length, and Expense of Further Litigation

Plaintiff claims that she and potential class members are entitled to \$1,000 per violation if they are able to prove Defendants’ alleged violations of BIPA were “negligent.” 740 ILCS 14/20(1).² The Settlement represents a gross recovery of approximately \$632.55 per Settlement Class Participant and a net recovery of approximately \$413.75 per Settlement Class Participant. Ex. B, Settlement Administrator Decl., ¶128. The recovery falls within the range of other similar BIPA class settlements where Illinois state and federal courts have granted preliminary and final approval:

² While BIPA allows recovery of \$5,000 for “intentional” or “reckless” violations, 740 ILCS 14/20(2), Plaintiff did not think she had a reasonable chance of proving intentional or reckless conduct. Complying with BIPA is simple and straightforward and Defendants’ Biometric Vending Systems implemented written disclosures and consents promptly after this lawsuit was filed.

BIPA SETTLEMENT CHART

(ECF No 87-2, Declaration of Zachary C. Flowerree, at ¶ 21.)

| Case | Judge | Date | Class Size Estimate | Per Class Member | Attorney Fees |
|---|--------------|---------------|----------------------------|--|--------------------------------------|
| <i>Marshall v. Life Time Fitness, Inc.</i> , 17-CH-14262 (Cir. Ct. Cook Cty.) | Tailor | Aug. 7, 2019 | 6,000 | \$270 net ³ | One-third of fund \$2.4 million fund |
| <i>Prelipceanu v. Jumio Corp.</i> , 18-CH-15883 (Cook Cnty.) | Mullen | July 21, 2020 | Thousands | \$262.28 net per claimant ⁴ | 40% of \$7 million fund |
| <i>Kusinski v. ADP, LLC</i> , 17-CH-12364 (Cook Cnty.) | Atkins | Feb. 10, 2021 | 320,000 | \$380.76 net per claimant ⁵ | 35% of \$25 million fund |
| <i>Thome v. NovaTime Tech., Inc.</i> , 1:19-cv-06256 (N.D. Ill.) | Kennelly | March 8, 2021 | 68,213 | \$365 per claimant ⁶ | 33.3% of \$4.1 million fund |
| <i>Miracle-Pond v. Shutterfly, Inc.</i> , 19-CH-07050 (Cook Cnty.) | Mitchell | Sept. 9, 2021 | 1,552,555 | \$80 per claimant estimate | 35% of \$6.75 million fund |

The Settlement also represents a meaningful recovery when compared against average recoveries in class action settlements. *See In re Ravisent Techs., Inc. Sec. Litig.*, No. Civ.A. 00-cv-1014, 2005 WL 906361, at *9 (E.D. Pa. Apr. 18, 2005) (approving settlement, which amounted to 12.2% of damages, and citing a study by Columbia University Law School, which determined that

³ The settlement also included dark web monitoring that the parties valued at \$130 per class member.

⁴ The parties' settlement agreement and filings did not disclose the number of class members in this \$7 million settlement or the ultimate net per person recovery. Class counsel's fee petition represented that "thousands" of class members had filed claims. Legal websites state that class members who submitted claims received up to \$262.28 per person. *See* <https://topclassactions.com/lawsuit-settlements/lawsuit-news/illinois-jumio-biometric-class-action-settlement/> (last visited Oct. 26, 2021).

⁵ In their final approval motion, plaintiffs reported the claims rate was 12.5 percent. In their preliminary approval filings, plaintiffs estimated the claims rate at 20 percent, which would have provided approximately \$250 per claimant. Legal websites reported claimants receiving \$380.76 at the lower 12.5 percent claims rate. <https://topclassactions.com/lawsuit-settlements/closed-settlements/1003858-adp-bipa-class-action-settlement/> (last visited Oct. 26, 2021).

⁶ In the final approval motion, plaintiff reported the claims rate was 10 percent. The settlement also allows plaintiff to seek additional settlement funds based on an insurance policy assignment that the defendant provided plaintiff.

“since 1995, class action settlements have typically recovered between 5.5% and 6.2% of the class members’ estimated losses.”) (internal citations omitted).

The Settlement here is also strong because Defendants could have obtained a victory or greatly reduced the potential class recovery based on its defenses in the lawsuit, including:

- (1) that Defendants’ biometric timekeeping system does not collect biometric identifiers or biometric information as defined by BIPA;
- (2) that the statute of limitations under BIPA is one year instead of five years, an issue currently on appeal at the time before the Illinois Supreme Court;⁷
- (3) that BIPA is unconstitutional “special legislation” in violation of the Illinois Constitution; and
- (4) that any liquidated damages imposed would be excessive in light of the alleged harm and so would violate Defendants’ due process rights.

Regardless of the outcome of the above defenses, if the litigation had continued, it would have been complex, expensive, and protracted. Plaintiff would have likely served an expert witness report about how Defendants’ timekeeping system collected biometric identifiers and/or biometric information covered by BIPA. This likely would have resulted in Defendants hiring their own expert witness. Following that additional discovery, Plaintiff would have filed a motion for class certification. Instead of expensive, complicated, and protracted litigation, this Settlement provides significant monetary relief to Settlement Class Participants now.

B. Wong Factors 3 & 4: Amount of Opposition to the Settlement and Reaction of Class Members to the Settlement

The lack of opposition to a class action settlement “indicates that the class members

⁷ See *Tims v. Black Horse Carriers, Inc.*, Case No. 127801, pending before the Illinois Supreme Court.

consider the settlement to be in their best interest.” *Am. Int’l Grp., Inc.*, 2012 WL 651727, at *6. The objection deadline was July 29, 2022. Not a single person objected to the Settlement. *See* Ex. B, Settlement Administrator Decl. ¶30. This is powerful evidence of the Settlement Class’s support for the Settlement. *McDaniel v. Qwest Commc’ns Corp.*, No. 05 CV 1008, 2011 WL 13257336, at *4 (N.D. Ill. Aug. 29, 2011) (finally approving settlement with no objections and noting that “[a]n absence of objection is a ‘rare phenomenon[]’ and ‘indicates the appropriateness of the request[]’”) (citations omitted); *see also Retsky Family Ltd. P’ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *3 (N.D. Ill. Dec. 10, 2001).

C. Wong Factor 5: Opinion of Competent Counsel

Plaintiff’s Counsel recommends this Settlement without hesitation. This recommendation is based on Settlement Class Counsel’s substantial experience in class litigation and settlements in comparable BIPA litigation. ECF No. 87-2, Flowerree Decl. ¶19, Firm Resume. That knowledge and experience were applied in analyzing the possible recovery against the risk, cost and delay explained above. Therefore, this factor weighs strongly in favor of approval. *See Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982) (“The court also was entitled to ‘rely heavily on the opinion of competent counsel’ advanced by the proponents”) (citation omitted).

D. Wong Factor 6: Stage of Proceedings and the Amount of Discovery Completed

This case settled after Plaintiff defeated Defendant Compass’s Motion to Dismiss, handled an appeal to the Seventh Circuit that provided clarity on Article III standing, responded to required initial mandatory discovery, and reviewed critical documents in advance of mediation. The case was sufficiently advanced for the Parties to form a realistic assessment of the potential recovery against the risk of loss.

E. Alternatively, or Cumulatively, Approval Should Be Granted According to the Fed. R. Civ. P. 23(e)(2) Factors

1. Class Representative and Class Counsel have Adequately Represented the Class

The first Rule 23(e)(2) factor, whether the class representative and class counsel have adequately represented the class, focuses on class counsel's and the class representatives' performance as it relates to the "conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e), Advisory Committee's Note to 2018 Amendment. This factor is generally satisfied where the named plaintiffs participated in the case diligently, and class counsel fought vigorously in the litigation. *Snyder*, 2018 WL 4659274, at *3. In considering this factor, courts are to examine whether the plaintiff and class counsel had adequate information to negotiate a class-wide settlement, taking into account the nature and amount of discovery completed, whether formally or informally. *Id.* at *4; *see also In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 966 (N.D. Ill. 2011) (St. Eve, J.) (approving settlement where the parties had not conducted any formal discovery but engaged in considerable informal discovery). This inquiry is coextensive with the Seventh Circuit's direction to consider the "stage of the proceedings and the amount of discovery completed." *See Wong*, 773 F.3d at 863.

The knowledge and negotiating position, vigor, participation, and conduct of Plaintiff and Settlement Class Counsel have not changed since this Court granted preliminary approval. Plaintiff's interests have remained aligned with the Settlement Class through the Notice process and preparation for the final approval hearing. Without Plaintiff stepping up to represent the class and taking on these tasks as the lead plaintiff, the relief secured for the Settlement Class likely wouldn't have been possible. Given her efforts and aligned interest with the class, there can be no doubt that she has only acted in the best interest of the Settlement Class and has adequately represented them.

Likewise, Settlement Class Counsel worked vigorously to protect the interests of the Settlement Class and ensure that the Settlement Class was represented. The considerable amount of investigation completed by Plaintiff's Counsel ensured that they had adequate information to assess the strength of the case and engage in settlement discussions. Finally, Settlement Class Counsel ensured the Settlement Class received adequate notice of the Settlement through the subpoena process and protected the value allocated to the Settlement Class by assisting the Settlement Administrator in the audit process.

2. The Settlement Is the Product of Arm's-Length, Non-Collusive Negotiations

Under Rule 23(e)(2), a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. *See Wong*, 773 F.3d at 864. The Parties reached a Settlement after a private mediation with retired Judge James Holderman. The Settlement was the result of non-collusive negotiations.

3. The Settlement Treats Members of Respective Settlement Classes Equally

Next, Rule 23(e)(2) requires the proposed settlement to treat class members "equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Given that the Settlement Class here has the same BIPA claims, the Settlement treats each of them identically and provides pro rata settlement payments to all Settlement Class Participants. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855 (1999) (where class members are similarly situated with similar claims, equitable treatment is "assured by straightforward pro rata distribution of the limited fund").

4. Relief Secured for the Settlement Class Warrants Final Approval

The final and most important factor under Rule 23(e)(2) examines whether the relief provided for the class is adequate. Fed. R. Civ. P. 23(e)(2)(C). In making this determination, Rule 23 instructs courts to take into account several sub-factors, including (i) the cost, risks, and delay of trial and appeal; (ii) the effectiveness of the proposed method of distributing relief to the class; and (iii) the terms of any proposed award of attorneys’ fees, including timing of payment. *Id.* This analysis necessarily encompasses two of the *Wong* factors. The first Seventh Circuit factor “[is the] most important factor relevant to the fairness of a class action settlement[;]” it is critically important for a settlement to meet this standard. *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d at 958 (internal quotations omitted).

Defendants raised significant defenses in the lawsuit, which Plaintiff outlined in Section IV.A. of this Memorandum. Based on those defenses, Defendants could have defeated or greatly reduced any recovery in this lawsuit. Apart from the merits of Defendants’ defenses, additional litigation would have carried expense and delay. Instead of further risks and delay, this Settlement offers substantial value relative to the strength of Plaintiff’s claims.

The “effectiveness of [the]...method of distributing relief to the class” weighs strongly in favor of the adequacy of this Settlement under Rule 23(e)(2)(C)(ii) and the first Seventh Circuit factor. An effective distribution method “get[s] as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible.” William B. Rubenstein, 4 *Newberg on Class Actions* § 13:53. This Settlement requires full distribution of the Net Fund directly to Settlement Class Members who submit valid claim forms, with no reversion. This is an optimal method of distributing relief to the class and fully satisfies Rule 23(e)(2)(C)(ii).

The final relevant sub-factor considers the adequacy of the relief provided to the class taking into account “the terms of [the] proposed award of attorney’s fees, including timing of

payment[.]” Fed. R. Civ. P. 23(e)(2)(C)(iii). As Settlement Class Counsel explained in their request for fees and costs, ECF No. 115, their request for one-third of the Gross Fund, after deducting administration costs and Service Awards, is inline with the Seventh Circuit precedent and is equal to or below the fees awarded in other class settlements, including similar BIPA class settlements. *See* BIPA Settlement Chart, at IV.A., *supra*. And the Settlement provides for payment of any attorney fees after final approval at the same time as payments to Settlement Class Members. Ex. A, Settlement Agreement § III.5.p. Settlement Class Counsel will receive no special priority. As a result, Rule 23(e)(2)(C)(iii) supports final approval.

V. Conclusion

Because the Settlement makes significant monetary relief available to Settlement Class Members who might have recovered nothing without the Settlement, the Court should grant final approval and enter the proposed Final Approval Order, which will be submitted to the Court via its proposed order email address.

Dated: September 1, 2022

Respectfully submitted,

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