IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DAVID CORNEJO, individually and on behalf of all others similarly situated,

Plaintiff,

v.

AMCOR RIGID PLASTICS USA, LLC, a Delaware limited liability company.

Defendant.

Case No.: 18-cv-07018

Hon. Martha M. Pacold

PLAINTIFF'S MOTION FOR AND MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Circuit Court of Appeals Cases

United States District Court Cases

Illinois Supreme Court Cases

Illinois Appellate Court Cases

Illinois Circuit Court Cases

Miscellaneous Authority

I. INTRODUCTION

Plaintiff David Cornejo ("Plaintiff") brought this class action lawsuit alleging that his employer, Defendant Amcor Rigid Plastics USA, LLC ("Defendant" or "Amcor"), violated Illinois' Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.*, by collecting employee fingerprints without providing the requisite disclosures or obtaining informed written consent. After exchanging informal discovery and months of arm's-length negotiations, the Parties have reached a class-wide settlement that provides top-of-the-market relief for the Settlement Class, and provides Amcor with a limited release.[1]

In the short history of BIPA settlements, the relief to the class has had a wide range. Some have been for zero cash and given the class credit monitoring. *E.g.*, *Carroll v. Crème de la Crème, Inc.*, 2017-CH-01624 (Cir. Ct. Cook Cty. Jun. 6, 2018). Others have required class members to make claims in order to receive relief that are capped at a certain amount, with the inevitable remaining settlement funds reverting to the defendant. *E.g.*, *McGee v. LSC Commc'ns*, 2017-CH-12818 (Cir. Ct. Cook Cty.) ($750 per claimant, reverting funds to the defendant); *Marshall v. Lifetime Fitness, Inc.*, 2017-CH-14262 (Cir. Ct. Cook Cty.) ($270 per claimant with credit monitoring, reverting funds to defendant). In the leading settlements in the employment context, however, the settlement secures significant monetary relief sent directly to the class—with no need for a claims process. *E.g.*, *Edmond v. DPI Specialty Foods*, 2018-CH-09573 (Cir. Ct. Cook Cty.) (fund constituting $1,000 per person with direct checks); *Watts v. Aurora Chicago Lakeshore Hosp. LLC*, 2017-CH-12756 (Cir. Ct. Cook Cty.) (fund constituting $1,000

[1] Unless otherwise specified, all capitalized terms are defined in the Stipulation of Class Action Settlement (the "Settlement" or "Agreement"), which is attached as Exhibit 1.

per person with direct checks); *Lloyd v. Xanitos*, 2018-CH-15351 (Cir. Ct. Cook Cty. Jul. 25, 2019) (fund constituting $1,300 per person with direct checks).

This Settlement is a market-topping example of that last category: Amcor has agreed to create a fund consisting of $1,400.00 per Settlement Class member, and—after fees and costs are deducted—checks will be sent directly to the class on a *pro rata* basis. The monetary relief is higher than all but one approved BIPA settlement of which counsel is aware.[2] There is no reversion to Defendant—the relief to the class is transparent and equitably provided. The Settlement, on these terms alone, readily deserves preliminary approval.

Moreover, Amcor will receive only a limited release of liability. Amcor has agreed to a release only of BIPA claims arising under 740 ILCS 14/15(a) and (b)—that is, Amcor's alleged failure to (a) develop a publicly-available retention policy and (b) obtain informed consent to possess, collect, or store biometric data. The other prongs of BIPA's requirements under 740 ILCS 14/15(c), (d), and (e) are not settled through the case—that is, any (c) sale, lease, trade or profit of biometric data, (d) disclosure or dissemination of biometric data, or (e) inadequate security practices concerning biometric data, if any. No other BIPA settlement to date has provided class members such extraordinary monetary relief while providing the defendant with only a partial release.

Class action settlements are reviewed for approval in a well-established two-step process. 4 NEWBERG ON CLASS ACTIONS § 13:10 (5th ed. 2011). First, the Parties present the settlement agreement for preliminary approval to the Court, and the Court determines whether it will "likely be able to" grant final approval of the agreement, determining whether the Class should be

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[2] The class in the case was approximately half the size. *See Morris v. Imperial Towers Condo Ass'n.*, 2018-CH-00989 (Cir. Ct. Cook Cty.) (creating $120,000 claims-made settlement fund for approximately 60-member class).

notified of the settlement, conditionally certifying the class, and setting the case for a final fairness hearing. *Id.*; *see also* Fed. R. Civ. P. 23(e)(1)(B). If preliminarily approved, notice is then sent to the Settlement Class and any objections or exclusions from the Settlement Class are collected. Second, the Court holds a final fairness hearing to determine whether the settlement is "fair, reasonable, and adequate," and should be finally approved. *See* 4 NEWBERG ON CLASS ACTIONS § 13:39; *see also* Fed. R. Civ. P. 23(e)(2).

This matter is at that first stage. Given the extraordinary relief proposed by the Settlement Agreement and limited nature of the release to Defendant, the Court should not hesitate to find that the Settlement is well within the range of possible approval and should, accordingly, preliminarily approve it and direct notice to the Settlement Class.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Illinois' Biometric Information Privacy Act

A brief history and overview of BIPA gives further context to the reasonableness of the proposed Settlement. In the early 2000's, a company called Pay By Touch began installing fingerprint-based checkout terminals at grocery stores and gas stations in major retailers throughout the State of Illinois to facilitate consumer transactions. (Class Action Complaint, "Compl.," ¶¶ 11–12.) The premise was simple: swipe your credit card and let the machine scan your index finger, and the next time you buy groceries or gas, you won't need to bring your wallet—you'll just need to provide your fingerprint. But by the end of 2007, Pay By Touch had filed for bankruptcy. (*Id.*) When Solidus, Pay By Touch's parent company, began shopping Illinois consumers' fingerprints as an asset to its creditors, a public outcry erupted.[3] Though the

[3] *See*, *e.g.*, Meg Marco, *Creepy Fingerprint Pay Processing Company Shuts Down*, CONSUMERIST, available at https://goo.gl/rKJ8oP (last accessed Jan. 26, 2020); Matt Marshall,

bankruptcy court eventually ordered Pay By Touch to destroy its database of fingerprints (and their ties to credit card numbers), the Illinois Legislature took note of the grave dangers posed by the irresponsible collection and storage of biometric data without any protections. *See* Ill. House Transcript, 2008 Reg. Sess. No. 276.

Recognizing the "very serious need" to protect Illinois citizens' biometric data—which includes retina scans, fingerprints, voiceprints, and scans of hand or face geometry—the Illinois Legislature unanimously passed BIPA in 2008 to provide individuals recourse when companies failed to appropriately handle their biometric data in accordance with the statute. (*See* Compl. ¶ 13; 740 ILCS 14/5.) Thus, BIPA makes it unlawful for any private entity to "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:"

> (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored;
>
> (2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
>
> (3) receives a written release executed by the subject of the biometric identifier or biometric information . . . .

740 ILCS 14/15(b). BIPA also requires any company in possession of biometric data to establish a publicly-available retention schedule and guidelines for permanently destroying biometric data. 740 ILCS 14/15(a).

BIPA has other requirements as well. It requires companies in possession of biometric data to protect the data from disclosure using a reasonable standard of care, 740 ILCS 14/15(e), prohibits companies from selling or otherwise profiting from a person's biometric data, 740

Pay By Touch In Trouble, Founder Filing For Bankruptcy, VENTURE BEAT, available at http://goo.gl/xT8HZW (last accessed Jan. 26, 2020).

ILCS 14/15(c), and prohibits them from disclosing or disseminating biometric data except with consent or under limited circumstances. 740 ILCS 14/15(d). To enforce the statute, BIPA provides a civil private right of action and allows for the recovery of statutory damages in the amount of $1,000 for each negligent violation—or $5,000 for each willful violation—plus costs and reasonable attorneys' fees. *See* 740 ILCS 14/20.

As the Illinois Supreme Court assessed the legislature's intent in passing BIPA, the statute:

> vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent . . . . These procedural protections are particularly crucial in our digital world because technology now permits the wholesale collection and storage of an individual's unique biometric identifiers—identifiers that cannot be changed if compromised or misused. When a private entity fails to adhere to the statutory procedures . . . the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized. This is no mere 'technicality.' The injury is real and significant.

Rosenbach v. Six Flags Entm't Corp., 2019 IL 123186, ¶ 34 (internal citations and quotations omitted). Believing that the statute vested him with these rights—even before the Illinois Supreme Court's ruling—Plaintiff filed this suit to enforce them.

B. Plaintiff's Allegations and Defendant's Fingerprint Scanning System.

Plaintiff claims that Amcor used a fingerprint scanning system to regulate and monitor its employees' working hours. (Compl. ¶ 22.) He alleges that when he first began working for Amcor, the company required him—and all other new employees—to scan his fingerprint to enroll him in Amcor's employee fingerprint database, and subsequently used his fingerprint in order to "punch" in to or out of work. (*Id*. ¶¶ 21–22, 28–29.) Although Amcor reaps a benefit from the decrease in "buddy punching" (one employee clocking in, or out, for another), Plaintiff alleges that Amcor failed to comply with any one of BIPA's requirements when Amcor collected

his fingerprints. (*Id*. ¶¶ 30–32.) In sum, Plaintiff alleges that Amcor violated BIPA by collecting, using, and storing its employees' biometric information without obtaining written informed consent. (*Id*. ¶¶ 43, 47–51.) Plaintiff further alleges that Amcor failed to develop or comply with any written policy for permanently destroying biometric information. (*Id*. ¶ 50.) Plaintiff did not allege violations of 740 ILCS 14/15(c)-(e). Defendant, for its part, denies that it has engaged in any wrongdoing.

C. Litigation, Negotiation, and Settlement.

On September 11, 2018, Plaintiff Cornejo filed this lawsuit in the Circuit Court of Cook County seeking redress on behalf of himself and a putative class of Illinois employees for Defendant's alleged BIPA violations. After removing the case to federal court, Defendant moved to dismiss, arguing that Plaintiff failed to state a claim under BIPA because he did not allege any "actual harm" beyond BIPA's explicit prohibitions, and thus he was not a person "aggrieved by a violation of [the] Act," 740 ILCS 14/20. (Dkt. 7.) In the alternative, Defendant sought to stay all proceedings because the Illinois Supreme Court in *Rosenbach*, 2019 IL 123186, was soon expected to decide the question at issue—whether a BIPA plaintiff must allege any "actual harm" or some adverse effect to recover under the statute. In any event, the Parties fully briefed Defendant's motion, with Plaintiff vigorously arguing that both the text and purpose of BIPA establishes that persons "aggrieved" are those who have had their BIPA-protected privacy rights violated, and such persons need not allege any "actual harm" to state a claim under the statute. (Dkt. 13.)

On January 25, 2019, the Supreme Court issued its decision in *Rosenbach*, siding with Plaintiff's interpretation of the statute. Citing the decision, Judge Kennelly denied Defendant's motion, ordered Defendant to answer the complaint, and ordered the Parties to engage in

settlement negotiations. (Dkt. 17.)[4] To ensure well-informed negotiations, the Parties exchanged informal discovery related to the size and composition of the putative class and the underlying facts of the case. (Declaration of J. Eli Wade-Scott, "Wade-Scott Decl.," attached hereto as Exhibit 2, at ¶ 5.) With that information in hand, and after several months of arm's-length negotiations, the Parties ultimately reached an agreement on the principal terms of the Settlement in late July 2019. (*Id*.) The Parties then prepared and negotiated the final terms of the settlement over the next several months, resulting in the final executed Settlement Agreement now before the Court. (*Id*.)

III. TERMS OF THE SETTLEMENT AGREEEMENT

The terms of the Settlement are set forth in the Stipulation of Class Action Settlement and are briefly summarized here:

A. Class Definition.

The Settlement Class is "all employees or independent contractors of Defendant who used a finger scanner for timekeeping purposes in the State of Illinois between September 11, 2013 and the date of Preliminary Approval." (Agreement § 1.23.)[5]

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[4] This case was reassigned from Judge Kennelly to Judge Pacold on August 23, 2019. (*See* dkt. 27.)

[5] Excluded from the Settlement Class are (a) any Judge or Magistrate presiding over this action and members of their families; (b) Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest; (c) persons who properly execute and file a timely request for exclusion from the Settlement Class; (d) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; and (e) the legal representatives, successors, or assignees of any such excluded persons. (*Id.*) These exclusions are standard in class action settlement agreements and do not materially change the Settlement Class definition.

B. Settlement Payments.

The Settlement provides that Defendant will satisfy its monetary obligations by sending checks directly to Settlement Class Members, without the need for submitting a claim form. Defendant has agreed to pay $1,400.00 per member of the Settlement Class into the Settlement Fund; based on Defendant's representation that there are 125 members of the Settlement Class, Defendant is required to contribute at least $175,000.00 to the Settlement Fund. If there are any additional members, Defendant will pay an additional $1,400.00 per member. After payment of settlement administration expenses, costs, attorneys' fees, and any incentive award, each Settlement Class Member is estimated to receive a check for approximately $750.00.

C. Injunctive and Prospective Relief.

Defendant has agreed to implement policies and procedures to comply with BIPA should it continue to collect or retain fingerprint data, including by establishing a written retention policy for collected fingerprint data, providing written releases to its employees, and making all BIPA-mandated disclosures. (Agreement § 2.2.) Defendant has further agreed to destroy all fingerprint data of former employees and independent contractors within its possession. (*Id.*)

D. Release of Liability.

In exchange for the relief described above, Defendant will receive only a partial release of its BIPA liability. Specifically, Amcor and its agents will be released only from claims arising from 740 ILCS 14/15(a) and 740 ILCS 14/15(b)— Defendant's failure (as alleged in the complaint) to provide a retention policy concerning biometric identifiers and/or biometric information, and Defendant's alleged failure to obtain informed consent to possess, collect, or store biometric identifiers and/or biometric information). (Agreement §§ 1.18; 3.1.) The release does not extend to any other claims, including claims arising from 740 ILCS 14/15(c), 740 ILCS

14/15(d), or 740 14/15(e) or arising from the facts underlying those claims (*i.e.*, any sale, lease, trade or profit by Defendant from biometric identifiers and/or information; any disclosure, redisclosure, or other dissemination of biometric identifiers and/or information by Defendant, or Defendant's inadequate security practices concerning biometric identifiers and/or information, if any). (*Id.* § 1.18)

E. Payment of Settlement Notice and Administrative Costs.

Defendant has agreed to pay from the Settlement Fund all expenses incurred by the Settlement Administrator in, or relating to, administering the Settlement, providing Notice, mailing checks, and any other related expenses. (Agreement § 1.21.)

F. Payment of Attorneys.

Defendant has agreed to pay Plaintiff's reasonable attorneys' fees to proposed Class Counsel in an amount to be determined by the Court. (Agreement § 8.1.) Proposed Class Counsel has agreed, with no consideration from Defendant and no "clear-sailing agreement," not to seek more than 35% of the Fund in attorneys' fees. (*Id.*) Defendant has also agreed to pay Plaintiff an incentive award in the amount of $5,000 from the Settlement Fund, subject to Court approval, in recognition of his efforts as Class Representative. (*Id.* § 8.3.)

IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES.

Before the Court can preliminarily approve the proposed Settlement and direct notice to the Settlement Class, it must certify the class for settlement purposes, which requires a finding that the Court "will likely be able to certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(ii); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). District courts are given broad discretion to determine whether class certification is appropriate. *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008).

To merit certification, the Settlement Class must first satisfy the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *see Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 460 (2013). Additionally, because the Settlement provides for monetary relief, the Settlement Class must also satisfy the requirements of Rule 23(b)(3): that (i) common questions of law or fact predominate over individual issues and (ii) a class action is the superior device to resolve the claims. *Amchem*, 521 U.S. at 615–16. Finally, a certified class must be ascertainable; that is, "defined clearly and based on objective criteria." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015). As explained below, the proposed Settlement Class satisfies all of the Rule 23(a) and 23(b)(3) prerequisites and is ascertainable, and thus, should be certified for settlement purposes.

A. The Numerosity Requirement is Satisfied.

A class action may proceed when the proposed class is so numerous as to render joinder impractical. Fed R. Civ. P. 23(a)(1). "A plaintiff need not plead or prove the exact number of class members to establish numerosity under Rule 23(a)(1), and the court may make common sense assumptions to determine numerosity." *Barnes v. Air Line Pilots Ass'n, Int'l*, 310 F.R.D. 551, 557 (N.D. Ill. 2015) (citing collected Seventh Circuit cases). While there is no magic number at which joinder becomes unmanageable, courts have typically found that numerosity is satisfied when the class comprises forty (40) or more people. *See*, *e.g.*, *id.* (certifying class of 120 members). Here, the proposed Settlement Class is sufficiently numerous, as Defendant has represented that at least 125 Amcor employees and independent contractors fall within the Settlement Class. (Agreement § 10.1.) The numerosity requirement is readily satisfied.

B. Common Issues of Fact and Law Predominate.

Rule 23(a)(2) instructs that a class may be certified only if there exist "questions of law or fact common to the class." Where, as here, the class seeks monetary relief, the common questions must "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). *See also Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 374 (7th Cir. 2015) ("The question of commonality and predominance overlap in ways that make them difficult to analyze separately."). Common questions are those "capable of class-wide resolution" such "that determining the truth or falsity of the common contention will resolve an issue that is central to the validity of each claim." *Id.* (citing *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011)). "What matters to class certification…[is] the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of this litigation." *Wal-Mart*, 564 U.S. at 350 (quotation marks omitted). As such, "the critical point is the need for *conduct* common to members of the class." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (quotation marks omitted). When "the defendant's allegedly injurious conduct differs from plaintiff to plaintiff . . . no common answers are likely to be found." *Id.* (quotation marks omitted). But when "the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members," class treatment is appropriate. *Id.*

Here, common issues of law and fact clearly predominate. Plaintiff and the proposed Settlement Class's claims are based upon the same common contention and course of conduct by their employer: Amcor violated BIPA by collecting employee fingerprints without obtaining informed written consent. (*See* Compl. ¶¶ 20–24, 28–33.) This contention raises several issues of law and fact common to the Settlement Class that will predominate over any individualized issues, including: (1) whether Amcor collected, captured, or otherwise obtained Plaintiff's and

the class's biometric identifiers or information (as defined by 740 ILCS 14/10); (2) whether Amcor properly informed Plaintiff and the class of its purposes for collecting, using, and storing their biometric information, 740 ILCS 14/15(b); (3) whether Amcor obtained any written releases to collect, use, and store Plaintiff's and the class's biometric information, *id.*; (4) whether Amcor developed a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric information, 740 ILCS 14/15(a); and (5) whether Amcor's alleged violations of BIPA were committed negligently, 740 ILCS 14/20 (an aggrieved party may recover damages "against a private entity that negligently violates a provision of this Act . . . ."). Since each of these questions will prove to have a common, class-wide answer, and these questions will predominate over the litigation, the commonality and predominance requirements are satisfied.

C. The Typicality Requirement is Satisfied.

The next prerequisite—typicality—requires that a class representative has claims that are typical of those of the putative class members. Typicality examines whether there is "enough congruence between the named representative's claim and that of unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011). Where a named plaintiff's claim "arise[s] from the same events or course of conduct that gives rise to the putative class members' claims," typicality is satisfied. *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1026 (7th Cir. 2018). In other words, when the basis of the suit is the defendant's systematic business practices toward the named plaintiff and the members of the proposed class, typicality is generally satisfied.

Here, there is nothing separating Plaintiff's BIPA claim from that of any other Settlement Class Member. He alleges that, like every other member of the Settlement Class, he (i) was

required to enroll in Amcor's fingerprint timeclock system by scanning his finger, (ii) used Amcor's fingerprint timeclocks to punch in and out of his shifts, (iii) was identified by the timeclock each time he scanned his finger, and (iv) was never given any BIPA-compliant notices, disclosures, or requests for consent from Amcor. Because he was subject to the same employment practices as everyone else, Plaintiff's BIPA claims will "stand or fall on the same facts as the claims of the putative class members." *Ziemack v. Centel Corp.*, 163 F.R.D. 530, 534 (N.D. Ill. 1995). Plaintiff's claims are therefore typical of the Settlement Class's claims.

D. The Adequacy Requirement is Satisfied.

The final Rule 23(a) prerequisite—adequacy—requires a finding that the class representative has and will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is twofold: "adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interests of the class members." *Starr v. Chi. Cut Steakhouse*, 75 F. Supp. 3d 859, 874 (N.D. Ill. 2014) (quoting *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 598 (7th Cir. 1993)). To assess adequacy, courts examine whether "the named plaintiff has [(1)] antagonistic or conflicting claims with other members of the class; or (2) has a sufficient interest in the outcome of the case to ensure vigorous advocacy; and (3) has counsel that is competent, qualified, experienced and able to vigorously conduct the litigation." *Osada v. Experian Info. Sols., Inc.*, 290 F.R.D. 485, 490 (N.D. Ill. 2012) (quoting *Quiroz v. Revenue Prod. Mgmt., Inc.*, 252 F.R.D. 438, 442 (N.D. Ill. 2008)) (internal quotation marks omitted).

Here, both Plaintiff and proposed Class Counsel have and will continue to adequately represent the Settlement Class. Because Plaintiff suffered the same alleged injury as every other member of the Settlement Class—the collection and storage of his fingerprint data without his

informed written consent, (Compl. ¶¶ 28–33)—his interest in redressing Defendant's alleged violations of BIPA is identical to the interests of all other members of the Settlement Class. Thus, Plaintiff does not have any interests antagonistic to those of the Settlement Class—his pursuit of this litigation under this minimally-tested and still-evolving statutory regime should be clear evidence of that. Put simply, Plaintiff's interests are entirely representative of and consistent with the interests of the Settlement Class.

Likewise, proposed Class Counsel Jay Edelson, Ari J. Scharg, and J. Eli Wade-Scott of Edelson PC have extensive experience in litigating class actions of similar size, scope, and complexity to the instant action; indeed, the firm filed the first-ever class action under BIPA against Facebook, *Licata v. Facebook, Inc.*, 2015-CH-05427 (Cir. Ct. Cook Cty. Apr. 1, 2015), secured the first-ever adversarially-certified BIPA class in that case, and defended the ruling in the Ninth Circuit, *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1267 (9th Cir. 2019) (upholding adversarial BIPA class certification), *cert. denied Facebook, Inc. v. Patel*, No. 19-706, 2020 WL 283288, at *1 (U.S. Jan. 21, 2020)). The firm also obtained the first-ever settlement under BIPA in 2016. *See Sekura v. L.A. Tan Enters., Inc.*, 2015-CH-16694 (securing $1.5 million common fund and future compliance with BIPA). Outside of BIPA, the firm has, for more than a decade, been a national leader in plaintiffs' privacy litigation. (*See* Firm Resume of Edelson PC, attached hereto as Exhibit 2-A to Declaration of J. Eli Wade-Scott.) They regularly engage in major complex litigation involving consumer privacy, have the resources necessary to conduct litigation of this nature, and have frequently been appointed lead class counsel by judges of this Court and courts throughout the country. (*Id.*) The firm has, numerous times, been recognized by courts for its leadership in privacy litigation. *E.g.*, *Barnes v. Aryzta*, No. 17-cv-7358, dkt. 71 (N.D. Ill. Jan. 22, 2019) (endorsing expert opinion finding that Edelson PC "should 'be counted

among the elite of the profession generally and [privacy litigation] specifically' because of [the firm's] expertise in the area"); *In re Netflix Privacy Litig.*, No. 11-cv-00379, dkt. 59 (N.D. Cal. 2011) (appointing Edelson PC as Interim Class Counsel in adversarial leadership dispute, during which the court noted that the Edelson firm "specializes in class actions relating to consumer technology and privacy issues" and that the "firm's significant and particularly specialized expertise in electronic privacy litigation and class actions, renders them superior to represent the putative class"); *In re Facebook Privacy Litig.*, No. 10-cv-02389, dkt. 69 (N.D. Cal. 2010) (noting that the attorneys at Edelson are "pioneers in the electronic privacy class action field, having litigated some of the largest consumer class actions in the country on this issue"). The firm was recognized by Law360 as a "Practice Group of the Year" for 2019 in three categories—Class Action, Consumer Protection and Cybersecurity[6]—and for three years running as an "Illinois Powerhouse," alongside Kirkland & Ellis, Sidley Austin, Mayer Brown, Dentons, and Jenner & Block.[7] Edelson has been the only plaintiffs' firm, as well the only firm with fewer than 100 attorneys, to make the latter list. Proposed Class Counsel have diligently investigated, prosecuted, and dedicated substantial resources to the claims in this action and will continue to do so throughout its pendency. (Wade-Scott Decl. ¶ 4.)

Proposed Class Counsel David Fish of the Fish Law Firm, P.C. is a deeply experienced employment class action attorney. (*See* Declaration of David Fish, "Fish Decl.," attached hereto

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[6] *Law360 Names Practice Groups of the Year*, LAW360 (Jan. 12, 2020), https://www.law360.com/articles/1228868/law360-names-practice-groups-of-the-year.

[7] Lauraann Wood, *Illinois Powerhouse: Edelson*, LAW360 (Sept. 3, 2019), https://www.law360.com/articles/1193728/illinois-powerhouse-edelson; Diana Novak Jones, *Illinois Powerhouse: Edelson PC*, LAW360 (Aug. 28, 2018), https://www.law360.com/articles/1076447/illinois-powerhouse-edelson-pc; Diana Novak Jones, *Illinois Powerhouse: Edelson PC*, LAW360 (October 5, 2017), https://edelson.com/wp-content/uploads/2016/05/Illinois-Powerhouse-Edelson-PC.pdf.

as Exhibit 3, at ¶¶ 3, 7.) David Fish is a leader in the area of employment law, having served on bar association councils, as well as routinely presented and published on employment law issues facing plaintiffs. (*Id.* ¶¶ 4–6.) The Fish Law Firm has regularly litigated and settled labor-related lawsuits, including a host of class actions focused on protecting the rights of thousands of Illinois employees. (*Id.* ¶ 3); *see also*, *e.g.*, *Pietrzycki v. Heights Tower Serv., Inc.*, 197 F. Supp. 3d 1007, 1019 (N.D. Ill. 2016) (appointing David Fish class counsel after noting his "litigation experience in labor/employment cases as well as class actions," as well as his and his firm's diligence). Their work has been, and will continue to be, directly beneficial to the claims of Plaintiff and the Class through the pendency of this action.

Accordingly, because Plaintiff will fairly and adequately protect the interests of the class, and because he and the Settlement Class are amply represented by qualified counsel, the adequacy requirement is satisfied.

E. A Class Action Is a Superior Method of Resolving the Controversy.

Rule 23(b)(3) additionally requires that "a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The rule sets forth four criteria germane to this requirement. All counsel in favor of certification.

The first factor, individual class members' interest in individually controlling the action, Fed. R. Civ. P. 23(b)(3)(A), weighs in favor of certification. There is no indication any class member has brought an individual BIPA suit against Amcor and, given Plaintiff's allegation that Amcor did not institute any BIPA-specific policies or develop written materials for its employees addressing their statutory rights, (Compl. ¶¶ 20–26), it's likely that "many class members may be unaware of their rights under [BIPA]." *Bernal v. NRA Grp. LLC*, 318 F.R.D. 64, 76 (N.D. Ill. 2016). Both considerations support the notion that class members' interests in individual suits is

minimal. *Id.* Further, while BIPA provides for liquidated damages, the relatively modest recovery ($1,000 or $5,000, depending on whether a violation is negligent or reckless) compared to the high costs of retaining adequate counsel "is not likely to provide sufficient incentive for members of the proposed class to bring their own claims." *Jackson v. Nat'l Action Fin. Servs., Inc.*, 227 F.R.D. 284, 290 (N.D. Ill. 2005) (discussing the FDCPA's $1,000 statutory damages provision); *see also In re Facebook Biometric Info. Privacy Litig.*, 326 F.R.D. 535, 548 (N.D. Cal. 2018) ("While not trivial, BIPA's statutory damages are also not enough to incentivize individual plaintiffs given the high costs of pursuing discovery on Facebook's software and code base and Facebook's willingness to litigate the case.").

The second factor, the extent and nature of other proceedings, Fed. R. Civ. P. 23(b)(3)(B), also weighs in favor of certification. There are no other known actions that have progressed to any extent addressing the conduct alleged here. Thus, "'the extent and nature of any litigation concerning the controversy already begun by or against class members' is not a factor" counseling against certification. *Bernal*, 318 F.R.D. at 76 (quoting Fed. R. Civ. P. 23(b)(3)(B)) (internal quotation marks omitted).

Third, it is plainly desirable to concentrate the litigation—and to undergo the settlement approval process—in this forum, *see* Fed. R. Civ. P. 23(b)(3)(C), given that this case concerns a proposed class of Illinois plaintiffs seeking relief from Amcor's Illinois-based alleged conduct. *Barnes*, 310 F.R.D. at 562 (third factor met where defendant conducted business and the events giving rise to plaintiffs' claims occurred within the court's district); *Ramirez v. GLK Foods, LLC*, No. 12-C-210, 2014 WL 2612065, at *9 (E.D. Wis. June 11, 2014) (events in forum giving rise to lawsuit support concentration in the forum).

Finally, the fourth factor—"the likely difficulties in managing a class action," Fed. R. Civ. P. 23(b)(3)(D)—also weighs in favor of certification, as no management problems ought to arise here. There is clear predominance of common issues, as explained above, and the fact that the entire Settlement Class is readily identifiable from Amcor's records will streamline the notice process and allow for checks to be mailed directly to the approximately 125 Settlement Class Members without the burden of a claims process. *Bernal*, 318 F.R.D. at 76; 2 NEWBERG ON CLASS ACTIONS § 4:72 (5th ed. 2011) ("Courts generally hold that if the predominance requirement is met, then the manageability requirement is met, as well."). Thus, consolidating class members' claims in one proceeding will generate economies of time and expense and promote legal uniformity.

More generally, Rule 23's superiority standard requires that the court recognize "the costs *and benefits* of the class device." *Mullins*, 795 F.3d at 663 (emphasis in original). Here, requiring individual cases "would make no sense," because "each class member here would entail the same discovery and require multiple courts to weigh the same factual and legal bases for recovery." *Bernal*, 318 F.R.D. at 76. Rule 23's superiority requirement is therefore satisfied.

F. The Class Is Ascertainable.

Finally, the proposed Settlement Class definition meets Rule 23's implicit requirement of "ascertainability," which "requires that a class . . . be defined clearly and based on objective criteria." *Mullins*, 795 F.3d at 659. "Whether a class is ascertainable depends on 'the adequacy of the class definition itself,' not 'whether, given an adequate class definition, it would be difficult to identify particular members of the class,'" although Plaintiff here would meet both standards. *Toney v. Quality Res., Inc.*, 323 F.R.D. 567, 581 (N.D. Ill. 2018) (citing *Mullins*, 795 F.3d at 658).

Here, the Settlement Class definition is based solely on objective criteria: either an Illinois-based Amcor employee or independent contractor had his or her finger scanned by Amcor's biometric time clocks during the relevant time period or did not. Moreover, each Settlement Class member can be easily identified through Amcor's records. Because the class is "defined clearly [and] membership [is] defined by objective criteria," it is ascertainable. *Mullins*, 795 F.3d at 657.

For all of these reasons, maintenance of this action as a class action is appropriate. The Court should therefore certify the Settlement Class for settlement purposes.

V. PLAINTIFF'S COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL

Under Rule 23, "a court that certifies a class must appoint counsel . . . [with the] ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the Court considers proposed Class Counsel's: (1) work in identifying or investigating the potential claim, (2) experience in handling class actions, other complex litigation, and the types of claims asserted in the action, (3) knowledge of the applicable law, and (4) resources that it will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)–(iv).

As discussed above, proposed Class Counsel have extensive experience in litigating consumer privacy class actions in general, and BIPA class actions specifically; have thoroughly investigated the claims at issue; and have the resources necessary to conduct this litigation. (*See* Wade-Scott Decl. ¶¶ 2, 3; *see also* Exhibit 2-A.) And as a result of their efforts here, proposed Class Counsel have secured a settlement that provides top-of-the-market monetary relief in a BIPA settlement to date, preserves class members' BIPA claims under sections 14/15(c), (d), and (e), and provides the prospective relief necessary to protect their privacy interests going forward.

Thus, the Court should appoint Jay Edelson, Ari J. Scharg, and J. Eli Wade-Scott of Edelson PC and David Fish of the Fish Law Firm PC as Class Counsel.

VI. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Rule 23(e) requires judicial approval of all proposed class action settlements. As discussed above, the procedure for review of a proposed class action settlement is a familiar two-step process—preliminary and final approval—which was recently codified under Rule 23(e). Fed. R. Civ. P. 23(e)(1)-(2) (eff. Dec. 1, 2018); *see* 4 Newberg on Class Actions § 13:1 (5th ed.). The first step—preliminary approval—is a preliminary, pre-notification inquiry to determine whether the court "will likely be able to approve the proposal under Rule 23(e)(2)," finding that it is sufficiently fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(1)(B). In other words, at this stage, the Court needs to determine whether the proposed settlement is "within the range of possible approval" such that there is "reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982). The Manual for Complex Litigation characterizes the preliminary approval stage as an "initial evaluation" of the fairness of the proposed settlement made by a court on the basis of written submissions and informal presentations from the settling parties. *Manual for Complex Litig.* § 21.632 (4th ed. 2004). This initial evaluation "is a bit less strenuous than the final fairness assessment," given that at this early stage the Court need only determine whether the proposed settlement is "likely" to be found fair, reasonable, and adequate. *Wyms v. Staffing Sols. Se., Inc.*, No. 15-cv-0643-MJR-PMF, 2016 WL 6395740, at *4 (S.D. Ill. Oct. 28, 2016). Once preliminary approval is granted, class members are notified of the settlement, and the court and parties proceed to the second step—the final fairness determination. *Gautreaux*, 690 F.2d at 621.

While "[f]ederal courts naturally favor the settlement of class action litigation," a multi-factor test must be used to determine whether the proposed settlement is likely to be found fair, reasonable, and adequate. *In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 345 (N.D. Ill. 2010) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)) (internal quotations omitted). Rule 23(e)(2) directs courts to 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 c 8461, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019).[8]

The proposed Settlement in this case—which creates a fund constituting $1,400 per person, strong prospective relief, sends checks directly to class members, and preserves their BIPA claims against Amcor under 740 ILCS 14/15(c), (d), and (e)—easily satisfies these factors.

A. Plaintiff Cornejo and Proposed Class Counsel Have Adequately Represented the Settlement Class.

The first Rule 23(e)(2) factor considers whether the class representative and class counsel have adequately represented the class. Fed. R. Civ. P. 23(e)(2)(A). The focus of this analysis is

[8] Federal Rule of Civil Procedure 23 was amended on December 1, 2018 to refine the standards for approval of proposed class action settlements under Rule 23(e)(2). Notably, the factors to be considered under the amended Rule 23 "overlap with the factors previously articulated by the Seventh Circuit, which include: (1) the strength of the plaintiff's case compared to the terms of the settlement; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement; (4) the presence of collusion in gaining a settlement; (5) the stage of the proceedings and the amount of discovery completed." *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *2 (S.D. Ill. Dec. 16, 2018) (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)); *see also* Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.").

"on the actual performance of counsel acting on behalf of the class" throughout the litigation and in settlement negotiations. Fed. R. Civ. P. 23(e) Advisory Committee's Note to 2018 Amendment. In considering this factor, courts are to examine whether plaintiff and class counsel had adequate information to negotiate a class-wide settlement, taking into account (i) the nature and amount of discovery completed, whether formally or informally, and (ii) the "actual outcomes" of other, similar cases. *Id.*; *see In re AT & T Sales Tax Litig.*, 789 F. Supp. 2d 935, 966 (N.D. Ill. 2011) (approving settlement where the parties had not conducted any formal discovery but engaged in considerable informal discovery). Ultimately, this factor is generally satisfied where the named plaintiff participated in the case diligently, and where class counsel fought hard on behalf of plaintiff and the class throughout the litigation. *See Snyder v. Ocwen Loan Servicing, LLC*, No. 14 C 8461, 2018 WL 4659274, at *3 (N.D. Ill. Sept. 28, 2018).

Here, Plaintiff Cornejo has been involved in nearly every aspect of this case, including by helping his attorneys investigate his BIPA claims and prepare the Class Action Complaint and Demand for Jury Trial, preserving documents, conferring with Class Counsel throughout the litigation, and reviewing and approving the Settlement Agreement before signing it. (Wade-Scott Decl. ¶ 7.) Without Mr. Cornejo stepping up to represent the class and taking on these tasks as the lead plaintiff—particularly in the far more uncertain legal environment pre-*Rosenbach*—the relief secured for the Settlement Class wouldn't have been possible. Given his efforts and aligned interest with the class, there can be no doubt that Mr. Cornejo has only acted in the best interest of the Settlement Class and has adequately represented them.

Likewise, proposed Class Counsel's performance in this case demonstrates that their representation has been beyond adequate, especially when considering (i) the investigation and informal discovery conducted and (ii) the benefits of the Settlement compared to similar privacy

settlements, including those under BIPA. First, the considerable amount of investigation and informal discovery completed by Plaintiff's counsel ensured that they had adequate information to assess the strength of the case and engage in settlement discussions. Since the outset of this case, Plaintiff's counsel has investigated Amcor and the technology it used to allegedly collect the Settlement Class Members' fingerprint data. (Wade-Scott Decl. ¶ 4.) The facts underlying Plaintiff's allegations in this case—though by no means their legal import—are now substantially undisputed: Amcor used a fingerprint-scanning time clock to verify its employees' identities without complying with BIPA. *See In re AT & T Mobility*, 270 F.R.D. at 350 (approving settlement where "the focus of th[e] litigation appears to be more on legal than factual issues, and there is no indication that formal discovery would have assisted the parties in devising the [p]roposed [s]ettlement [a]greement"). Furthermore, the Parties conducted informal discovery concerning the underlying facts of the case and the number of class members. Only then, and upon Judge Kennelly's order, did the Parties begin to engage in class-wide settlement discussions. (*See* dkt. 17; Wade-Scott Decl. ¶ 5.) In short, the issues in this litigation have crystallized sufficiently for Plaintiff and his counsel to assess the strengths and weaknesses of their negotiating position (based upon the litigation to date, the anticipated outcomes of fact and expert discovery, and additional motion practice) and evaluate the appropriateness of any proposed resolution. *See Bayat v. Bank of the West*, No. 13-cv-2376, 2015 WL 1744342, at *6 (N.D. Cal. Apr. 15, 2015) (concluding that sufficient discovery had been completed to evaluate the settlement even though parties reached an early settlement "because the issues in this case are straightforward and not particularly fact intensive").

Second, the Settlement achieved by Plaintiff's counsel excels in comparison to other statutory privacy settlements, including BIPA settlements, both in terms of monetary relief, ease

of administration, and the limited scope of the release. If approved, each Settlement Class Member will be sent a check for more than $750, without the burden, expense and delay of submitting a claim, in exchange for releasing only their BIPA claims under 740 ILCS 14/15(a) and (b)—they can still bring claims against Defendant under 740 ILCS 14/15(c), (d), and (e) if Defendant has violated those provisions. Even with this partial release, the Settlement dwarfs the amounts recovered in many other statutory privacy class actions.

The result in this action appears against a historical backdrop in which privacy class actions have commonly secured no relief to the class or only *cy pres* relief. *See*, *e.g.*, *Lane v. Facebook, Inc.*, 696 F.3d 811, 820–22 (9th Cir. 2012) (resolving tens of millions of claims under the Electronic Communications Privacy Act ["ECPA"] for a $9.5 million *cy pres*-only settlement—amounting to pennies per class member—where $10,000 in statutory damages were available per claim); *In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at *3–5 (N.D. Cal. June 2, 2011) (resolving tens of millions of claims, again under the ECPA, for $8.5 million *cy pres*-only settlement); *see also Frank v. Gaos*, 139 S. Ct. 1041, 1047–48 (2019) (Thomas, J., dissenting) ("Whatever role *cy pres* may permissibly play in disposing of unclaimed or undistributable class funds . . . *cy pres* payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney's fees). And the settlement agreement here provided no other form of meaningful relief to the class.").

As discussed above, BIPA settlements have ranged widely. One finally-approved BIPA settlement provided only credit monitoring, and provided *no* monetary relief for the class. *Carroll*, 2017-CH-01624. Of the BIPA settlements that have provided monetary relief, many have required an unnecessary claims process and have reverted funds to the defendant. *E.g.*, *McGee*, 2017-CH-12818 ($750 per claimant, reverting funds to the defendant); *Marshall*, 2017-

CH-14262 ($270 per claimant with credit monitoring, reverting funds to defendant). For BIPA cases brought by employees against employers, however, it is possible to use a highly equitable direct-checks model without a claims process, because the class is easily ascertainable and the employer has high-quality contact information for the class. Even on this model—in which all class members receive checks—the monetary relief provided can still be substantial. *E.g.*, *Edmond*, 2018-CH-09573 (fund constituting $1,000 per person with direct checks); *Watts*, 2017-CH-12756 (fund constituting $1,000 per person with direct checks); *Lloyd*, 2018-CH-15351 (fund constituting $1,300 per person with direct checks).

This Settlement is unparalleled in that it adopts the direct-checks model while providing top-of-the-market relief—at $1,400 per person, counsel is aware of only one approved settlement that tops it with half the class size—and while providing the Defendant with a limited release. The Settlement, for a class of this size, is unparalleled. Finally, aside from the monetary relief, the non-monetary benefits created by the Settlement—Amcor's agreement to destroy former employees' biometric data and comply with BIPA going forward—also demonstrate Plaintiff's and proposed Class Counsel's outstanding representation of the class. (*See* Agreement § 2.2.) This prospective relief aligns perfectly with both the goals of BIPA and those of this lawsuit, as it will ensure that Defendant's past, current, and future employees are protected as the legislature intended.

In the end, if the Settlement is approved, the Settlement Class will reap its valuable benefits thanks to Plaintiff's and proposed Class Counsel's hard work pursuing this case and representing their interests. This factor is well satisfied.

B. The Settlement Was Reached as a Result of Arm's-Length Negotiations Between the Parties.

The second Rule 23(e)(2) factor looks to whether the parties negotiated the settlement at

arm's length. Fed. R. Civ. P. 23(e)(2)(B). The answer here is easy: yes. Following the Illinois Supreme Court's decision in *Rosenbach*, Judge Kennelly directed Plaintiff to tender his initial settlement demand, which Plaintiff did only after receiving some informal discovery from Defendant regarding the class size. (*See* dkt. 17.) Over the course of the next several months, the Parties engaged in multiple rounds of vigorous negotiations concerning both the terms and structure of the Settlement, eventually reaching agreement on the principal terms of the Settlement in July 2019. And even after the principle terms were determined, it took the Parties several more months and considerable negotiation to reach the detailed terms of the Settlement now before the Court. (Wade-Scott Decl. ¶ 5.) The arm's-length nature of these negotiations is further confirmed by the Settlement itself: it is non-reversionary, provides significant cash payments to Settlement Class Members, and contains no provisions that might suggest fraud or collusion, such as "clear sailing" or "kicker" clauses regarding attorneys' fees. *See Snyder*, 2019 WL 2103379, at *4 (approving settlement where "there is no provision for reversion of unclaimed amounts, no clear sailing clause regarding attorneys' fees, and none of the other types of settlement terms that sometimes suggest something other than an arm's length negotiation"). For these reasons, there should be no question that the Settlement here was the result of good-faith, arm's-length negotiations and is entirely free from fraud or collusion. *See Schulte v. Fifth Third Bank*, No. 09-CV-6655, 2010 WL 8816289, at *4 n.5 (N.D. Ill. 2010) (noting that courts "presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered") (internal quotation marks omitted).

C. The Settlement Treats All Settlement Class Members Equally.

The next Rule 23(e)(2) factor considers whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Here, given that each

Settlement Class Member has nearly identical BIPA claims for monetary and injunctive relief, the proposed Settlement treats each of them identically. In terms of monetary relief, Defendant has agreed to contribute $1,400.00 per member of the Settlement Class to the Settlement Fund, from which each Settlement Class Member will receive a single, *pro rata* cash payment. (Agreement §§ 1.25, 1.26, 2.1); *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"). And because checks will be sent directly to class members without a claims process, each and every Settlement Class Member will receive a check. The Settlement also provides for identical prospective relief requiring Amcor to destroy each Settlement Class Member's biometric data and comply with BIPA going forward in a uniform manner. (Agreement § 2.2.) Further, in terms of the release, each Settlement Class Member will be releasing the same BIPA claims against Amcor, only under 740 ILCS 14/15(a) and (b), while preserving their claims under 740 ILCS 14/15(c), (d) and (e). (*Id.* §§ 1.18; 3.1.) Because the Settlement treats each member of the Settlement Class equally, this factor is well satisfied.

D. The Relief Secured for the Settlement Class Is Adequate and Warrants Approval.

The final and most substantive 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; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreements made in connection with the proposed settlement. *Id.* As explained below,

each of these sub-factors demonstrate that the Settlement provides extraordinary relief to the class and should be approved.

1. The cost, risk, and delay of further litigation compared to the Settlement's benefits favors final approval.

In evaluating the adequacy of the relief provided to the class, courts should first compare the cost, risks, and delay of pursing a litigated outcome to the settlement's immediate benefits. Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note to 2018 amendment. The Settlement here warrants approval because it provides immediate relief to the Settlement Class while avoiding potentially years of complex litigation and appeals. *Goldsmith v. Tech. Sols. Co.*, No. 92 C 4374, 1995 WL 17009594, at *4 (N.D. Ill. Oct. 10, 1995) ("As courts recognize, a dollar obtained in settlement today is worth more than a dollar obtained after a trial and appeals years later."). And in light of BIPA's relative infancy, absent the Settlement, the Parties were likely to litigate a number of issues that are either still being resolved by the courts or are matters of first impression. *See*, *e.g.*, *In re Southwest Airlines Voucher Litig.*, No. 11-cv-8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013) (noting that "legal uncertainties at the time of settlement favor final approval"); *Pichler v. UNITE*, 775 F. Supp. 2d 754, 759 (E.D. Pa. 2011) (approving class action settlement in light of the complexity of future litigation on issues of first impression). For instance, Amcor was likely to argue that the information captured by its fingerprint scanners were not actually "biometric identifiers" or "biometric information" subject to BIPA. And like numerous other BIPA defendants, Amcor was expected to assert that it informed employees of the extent of its purposes for collecting fingerprints and obtained consent to collect them. Plaintiff intended to defeat these legal and factual arguments at summary judgment and/or trial, and is confident he could have done so, but the Settlement provides nearly

full relief to the Settlement Class without the delay necessitated by briefing and a trial on these questions.

Likewise, the Parties also would have been forced to litigate the issue of class certification adversarially. *See* Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note to 2018 Amendment (instructing courts to consider the likelihood of certifying the class for litigation in evaluating this sub-factor). Although Plaintiff believes this case is amenable to class certification given Defendant's uniform conduct, and that he would ultimately prevail on certification issues, that process is by no means risk-free. And even if Plaintiff had succeeded at class certification, summary judgment, and/or trial, Plaintiff expected that Defendant would argue for a reduction in damages based on due process in light of the significant potential statutory damages at issue. *See*, *e.g.*, *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003).

Protracted litigation would also consume significant resources, including the time and costs associated with formal written and oral discovery, securing expert testimony on complex biometric and data storage issues, and again, motion practice, trial and any appeals. It is possible that "this drawn-out, complex, and costly litigation process . . . would provide [Settlement] Class Members with either no in-court recovery or some recovery many years from now . . ." *In re AT & T Sales Tax Litig.*, 789 F. Supp. at 964. Because the proposed Settlement offers immediate—and substantial—monetary relief to the Settlement Class and a prompt end to Defendant's alleged misconduct while avoiding the need for extensive and drawn-out litigation, preliminary approval is appropriate. *See*, *e.g.*, *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation.").

2. The method of distributing relief to the Settlement Class Members is effective and supports preliminary approval.

The next sub-factor evaluates whether the settlement's proposed method of distributing relief to the class is effective. Fed. R. Civ. P. 23(e)(2)(C)(ii). 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." 4 NEWBERG ON CLASS ACTIONS § 13:53. The proposed Settlement here does just that by sending checks directly to every class member without the need to submit a claim form, meaning every Settlement Class Member will receive a cash payment and won't need to wait on an expensive and protracted claims process. *See Taylor v. Sunrise Senior Living Mgmt., Inc.*, 2017-CH-15152 (Cir. Ct. Cook Cty. Feb. 14, 2018) (granting final approval of BIPA settlement similarly providing settlement checks directly to class members); *Lloyd*, 2018-CH-15351 (same); *see also* 4 NEWBERG ON CLASS ACTIONS § 13:53 ("[A] settlement without a claims-made procedure (where a sum certain is disgorged from the defendant) is more likely to be found fair, reasonable, and adequate."). There can be no doubt that the proposed settlement administration plan is the most effective and feasible method of distributing monetary relief to the Settlement Class Members.

3. The terms of the requested attorneys' fees are reasonable.

The third and final relevant sub-factor[9] considers the adequacy of the relief provided to the class taking into account "the terms of the requested attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). If the Settlement is preliminarily approved, proposed

[9] The fourth sub-factor, which requires the parties to identify any side agreements made in connection with the settlement, Fed. R. Civ. P. 23(e)(2)(C)(iv), is not applicable here as the written Settlement Agreement provided to the Court represents the entirety of the Parties' proposed Settlement. (Wade-Scott Decl. ¶ 6.) Since there are no side agreements to be identified, this sub-factor weighs in favor of preliminary approval.

Class Counsel plans to petition the Court for an award of reasonable attorneys' fees after the Settlement Class has received notice of the Settlement. The Settlement's contemplated method of calculating attorneys' fees (i.e., the percentage-of-the-fund method) and its limit on attorneys' fees (i.e., no more than 35% of the non-reversionary Settlement Fund) are reasonable and predicated on the outstanding relief provided to the Settlement Class. To be sure, the percentage-of-the-fund method has been used to determine a reasonable fee award in every BIPA class action settlement creating a common fund to date, and a 35% award falls comfortably within the range of typical fee awards in these cases. *See, e.g.*, *Sekura*, 2015-CH-16694 (awarding 40% of fund); *Zepeda v. Intercontinental Hotels Grp., Inc.*, 2018-CH-02140 (awarding 40% of fund); *Svagdis v. Alro Steel Corp.*, No. 2017-CH-12566 (awarding 40% of fund); *see also* 5 NEWBERG ON CLASS ACTIONS § 15:83 (noting that, generally, "50% of the fund is the upper limit on a reasonable fee award from any common fund"). Accordingly, that the Settlement permits the Court to award 35% of the fund in attorneys' fees is more than appropriate. Finally, if approved, the Settlement provides that attorneys' fees will be paid within six business days after final judgment, including any appeals. (Agreement §§ 1.8, 8.2.) These terms are reasonable and should be preliminarily approved.

For these reasons, Plaintiff and proposed Class Counsel submit that the monetary and prospective relief as well as the limited release provided by the Settlement weighs heavily in favor of a finding that it is fair, reasonable, and adequate, and well within the range of possible approval. The Court should grant preliminary approval.

VII. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED IN FORM AND SUBSTANCE.

Rule 23 and Due Process require that for any "class proposed to be certified for purposes of settlement under Rule 23(b)(3)[,] the court must direct to class members the best notice

practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Rule 23(e)(1) similarly provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a [proposed settlement, voluntary dismissal, or compromise.]" Fed. R. Civ. P. 23(e)(1). Notice may be provided to the class via "United States mail, electronic means, or other appropriate means." Fed. R. Civ. P. 23(c)(2)(B) (eff. Dec. 1, 2018). The substance of the notice to the Settlement Class must describe in plain language the nature of the action, the definition of the class to be certified, the class claims and defenses at issue, that class members may enter an appearance through counsel if so desired, that class members may request to be excluded from the Settlement Class, and that the effect of a class judgment shall be binding on all class members. *See* Fed. R. Civ. P. 23(c)(2)(B).

Here, the Settlement contemplates a multi-part Notice Plan. First, Defendant will provide the Settlement Administrator with a list of all names, e-mail addresses, and U.S. Mail addresses of the Settlement Class. (Agreement § 4.1(a).) Once provided, the Settlement Administrator will send direct Notice by e-mail to all members of the Settlement Class for whom a valid e-mail address is identified in Defendant's records. (Agreement § 4.1(b); *see* Exhibit 1-A.) If no e-mail address is available for any class members, or if any e-mail transmissions result in "bounce-back[s]," the Settlement Administrator will send those class members direct postcard Notice by First Class U.S. Mail. (Agreement § 4.1(b); *see* Exhibit 1-B.)

To ensure a comprehensive Notice, the e-mail and postcard Notice will direct class members to a Settlement Website, which will provide class members 24-hour access to further information about the case, including important Court documents and a detailed "long form" Notice document. (Agreement § 4.1(c); *see* Exhibit 1-C.) Supporting the e-mails, postcards, and

Settlement Website will be a toll-free telephone line through which class members can contact Class Counsel and the Settlement Administrator to obtain additional information about the Settlement.

In sum, the proposed methods for providing notice to the Settlement Class comports with both Rule 23 and Due Process, and thus, should be approved.

VIII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order (i) granting preliminary approval of the Parties' proposed Class Action Settlement Agreement, (ii) certifying the proposed Settlement Class for settlement purposes, (iii) approving the form and content of the Notice to the members of the Settlement Class, (iv) appointing Plaintiff David Cornejo as Class Representative, (v) appointing Jay Edelson, Ari J. Scharg, and J. Eli Wade-Scott of Edelson PC and David Fish of the Fish Law Firm PC as Class Counsel, (vi) scheduling a final fairness hearing in this matter, and (vii) providing such other and further relief as the Court deems reasonable and just.[10]

Respectfully submitted,

DAVID CORNEJO, individually and on behalf of all others similarly situated

Dated: January 27, 2020

By: /s/ J. Eli Wade-Scott
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[10] Plaintiff intends to submit a proposed Preliminary Approval Order for the Court's convenience and to propose future case deadlines.

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