

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

JAMES BRYSKI, individually,)
and on behalf of all others similarly situated,)

Plaintiff,)

v.)

NEMERA BUFFALO GROVE LLC,)

Defendant.)

Case No. 2018-CH-07264

Honorable Celia G. Gamrath

PRELIMINARY APPROVAL ORDER

This matter having come before the Court on Plaintiff's Unopposed Motion and Memorandum in Support of Preliminary Approval of Class Action Settlement (the "Motion"), the Court having reviewed in detail and considered the Motion, the Settlement Agreement and Release ("Settlement Agreement") between James Bryski ("Plaintiff") and Nemera Buffalo Grove LLC, ("Defendant", and, together, the "Parties"), and all other papers that have been filed with the Court related to the Settlement Agreement, including all exhibits and attachments to the Motion and the Settlement Agreement, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED AS FOLLOWS:

1. Capitalized terms used in this Order that are not otherwise defined herein have the same meaning assigned to them as in the Settlement Agreement.
2. The terms of the Settlement Agreement are preliminarily approved as fair, reasonable, and adequate. There is good cause to find that the Settlement Agreement was negotiated at arms-length between the Parties, who were represented by experienced counsel.
3. For settlement purposes only, the Court finds that the prerequisites to class action

treatment under Section 2-801 of the Illinois Code of Civil Procedure – including numerosity, commonality and predominance, adequacy, and appropriateness of class treatment of these claims – have been preliminarily satisfied.

4. The Court hereby conditionally certifies, pursuant to Section 2-801 of the Illinois Code of Civil Procedure, and for the purposes of settlement only, the following Settlement Class consisting of:

(1) All current and former workers of Defendant in the State of Illinois (2) who for timekeeping purposes only, had their finger, hand or palm scanned and/or fingerprints or handprints scanned and/or associated biometric data collected, captured, received, converted, stored, obtained, shared, taken, used, disclosed or disseminated by Defendant (3) within the five-year period preceding the date the Complaint was filed to the date of preliminary approval (4) without first providing their written consent prior to the initial scan, collection, capture or receipt of biometric data (“Settlement Class”).

5. For settlement purposes only, Plaintiff James Bryski is hereby appointed as Class Representative.

6. For settlement purposes only, the following counsel are hereby appointed as Class Counsel:

Ryan F. Stephan
Haley R. Jenkins
Stephan Zouras, LLP
100 North Riverside, Suite 2150
Chicago, IL 60606
312-233-1550
312-233-1560 fax
rstephan@stephanzouras.com
hjenkins@stephanzouras.com

7. The Court recognizes that, pursuant to the Settlement Agreement, Defendant retains all rights to object to the propriety of class certification in the Action in all other contexts and for all other purposes should the Settlement not be finally approved, consistent with the provisions in the Settlement Agreement. Therefore, as more fully set forth below, if the Settlement

is not finally approved, and litigation resumes, this Court's preliminary findings regarding the propriety of class certification shall be of no further force or effect whatsoever, and this Preliminary Approval Order will be vacated in its entirety.

8. The Court approves, in form and content, the Notice to Class Members, attached to the Settlement Agreement as Exhibit A, and finds that Exhibit A meets the requirements of Section 2-803 of the Illinois Code of Civil Procedure and satisfy due process.

9. The Court finds that the planned Notice set forth in the Settlement Agreement meets the requirements of Section 2-803 of the Illinois Code of Civil Procedure and constitutes the best notice practicable under the circumstances, where Class Members are current or former employees of Defendant and may be readily ascertained by Defendant's records, and satisfies fully the requirements of due process, and any other applicable law, such that the Settlement Agreement and Final Approval Order will be binding on all Settlement Class Members. In addition, the Court finds that no notice other than that specifically identified in the Settlement Agreement is necessary in the Action. The Parties, by agreement, may revise the Notice in ways that are not material, or in ways that are appropriate to update the document for purposes of accuracy or formatting for mailing or e-mailing.

10. The Court appoints Rust Consulting as Settlement Administrator. The Settlement Administrator is vested with authority to carry out the Notice as set forth in the Settlement Agreement.

11. The distribution of Notice as set forth in the Settlement Agreement shall proceed.

12. Settlement Class Members and other Releasors shall be bound by all determinations and orders pertaining to the Settlement, including the release of all Released Claims to the extent set forth in the Settlement Agreement, whether favorable or unfavorable, unless such

persons request exclusion from the Settlement Class in a timely and proper manner, as hereinafter provided. Settlement Class Members who do not timely and validly request exclusion shall be bound by the Settlement even if they have previously initiated or subsequently initiate litigation or other proceedings against the Defendant or the other Released Parties relating to the claims released under the terms of the Settlement Agreement.

13. Any person within the Settlement Class may request exclusion from the Settlement Class by expressly stating his/her request in a written exclusion request. Such exclusion requests must be received by the Settlement Administrator, by first class mail, postage prepaid, and postmarked, no later than September 4, 2020.

14. In order to exercise the right to be excluded, the exclusion request must provide his/her name and address, a signature, the name and number of the case, and a statement that he or she wishes to be excluded from the Settlement Class. Any request for exclusion submitted via first class mail must be personally signed by the Class Member requesting exclusion. No person within the Settlement Class, or any person acting on behalf of, in concert with, or in participation with that person within the Settlement Class, may request exclusion from the Settlement Class of any other person within the Settlement Class.

15. Any person in the Settlement Class who elects to be excluded shall not: (i) be bound by any orders or the Final Approval Order; (ii) be entitled to relief under the Settlement Agreement; (iii) gain any rights by virtue of this Settlement Agreement; or (iv) be entitled to object to any aspect of the Settlement Agreement.

16. Class Counsel may file any motion seeking an award of attorneys' fees and costs not to exceed 33.3% of the settlement fund (\$166,433.40) in attorneys' fees based on the estimated size of the Class, plus their reasonable costs and expenses, not to exceed two thousand dollars

(\$2,000.00), as well as a Service Award of seven thousand five hundred dollars (\$7,500.00) for the Class Representative, no later than seven (7) days prior to the Final Approval Hearing.

17. Any Settlement Class Member who has not requested exclusion from the Settlement Class and who wishes to object to any aspect of the Settlement Agreement, including the amount of the attorneys' fees, costs, and expenses that Class Counsel intends to seek and the payment of the Incentive Award to the Class Representative, may do so, either personally or through an attorney, by filing a written objection, together with the supporting documentation set forth below in Paragraph 18 of this Order, with the Clerk of the Court, and served upon Class Counsel, Defendants' Counsel, and the Settlement Administrator (Class Counsel) no later than **September 4, 2020**.

Addresses for Class Counsel, Defendants' Counsel, and the Clerk of Court are as follows:

Class Counsel

Ryan Stephan
Haley Jenkins
Stephan Zouras, LLP
100 North Riverside, Suite 2150
Chicago, IL 60606
312-233-1550
rstephan@stephanzouras.com
hjenkins@stephanzouras.com

Defendant's Counsel

Joseph A. Strubbe
Frederic T. Knape
Zachary J. Watters
Vedder Price P.C.
222 N. LaSalle Street
Chicago, Illinois 60601
312.609.7500
jstrubbe@vedderprice.com
fknape@vedderprice.com
zwatters@vedderprice.com

Clerk of Court

50 W. Washington Street
Suite 1001
Chicago, Illinois 60606

18. Any Settlement Class Member who has not requested exclusion and who intends to object to the Settlement must state, in writing, all objections and the basis for any such objection(s), and must also state in writing: (i) his/her full name, address, and telephone number; (ii) the case name and number of this Litigation; (iii) the date range and location during which/at

which he/she was employed by Defendant; (iv) all grounds for the objection, with factual and legal support for the stated objection, including any supporting materials; (v) the identification of any other objections he/she has filed, or has had filed on his/her behalf, in any other class action cases in the last four years; and (vi) the objector's signature. Objections not filed and served in accordance with this Order shall not be received or considered by the Court. Any Settlement Class Member who fails to timely file and serve a written objection in accordance with this Order shall be deemed to have waived, and shall be forever foreclosed from raising, any objection to the Settlement, to the fairness, reasonableness, or adequacy of the Settlement, to the payment of attorneys' fees, costs, and expenses, to the payment of an Incentive Award, and to the Final Approval Order and the right to appeal same.

19. A Settlement Class Member who has not requested exclusion from the Settlement Class and who has properly submitted a written objection in compliance with the Settlement Agreement, may appear at the Final Approval Hearing in person or through counsel to show cause why the proposed Settlement should not be approved as fair, reasonable, and adequate. Attendance at the hearing is not necessary; however, persons wishing to be heard orally in opposition to the approval of the Settlement and/or Plaintiff's Counsels' Fee and Expense Application and/or the request for an Incentive Award to the Class Representatives are required to indicate in their written objection their intention to appear at the Final Approval Hearing on their own behalf or through counsel. For any Settlement Class Member who files a timely written objection and who indicates his/her intention to appear at the Final Approval Hearing on their own behalf or through counsel, such Settlement Class Member must also include in his/her written objection the identity of any witnesses he/she may call to testify, and all exhibits he/she intends to introduce into evidence at the Final Approval Hearing, which shall be attached.

20. No Settlement Class Member shall be entitled to be heard, and no objection shall be considered, unless the requirements set forth in this Order and in the Settlement Agreement are fully satisfied. Any Settlement Class Member who does not make his or her objection to the Settlement in the manner provided herein, or who does not also timely provide copies to the designated counsel of record for the Parties at the addresses set forth herein, shall be deemed to have waived any such objection by appeal, collateral attack, or otherwise, and shall be bound by the Settlement Agreement, the releases contained therein, and all aspects of the Final Approval Order.

21. All papers in support of the final approval of the proposed Settlement shall be filed no later than seven (7) days before the Final Approval Hearing.

22. Pending the final determination of the fairness, reasonableness, and adequacy of the proposed Settlement, no Settlement Class Member may prosecute, institute, commence, or continue any lawsuit (individual action or class action) with respect to the Released Claims against any of the Releasees.

23. A "Final Approval Hearing" shall be held before the Court on **October 5, 2020 at 9:00am** via Zoom (Meeting ID: 928 4730 2982; Password: 411367; Call-In: +1 312 626 6799), or at such other time or location as the Court may without further notice direct, for the following purposes:

- a. to finally determine whether the applicable prerequisites for settlement class action treatment under 735 ILCS 5/2-801 have been met;
- b. to determine whether the Settlement is fair, reasonable and adequate, and should be approved by the Court;
- c. to determine whether the judgment as provided under the Settlement Agreement should be entered, including an order prohibiting Settlement Class Members from further pursuing claims released in the Settlement Agreement;

- d. to consider the application for an award of attorneys' fees, costs and expenses of Class Counsel;
- e. to consider the application for an Incentive Award to the Class Representatives;
- f. to consider the distribution of the Settlement Fund pursuant to the Settlement Agreement; and
- g. to rule upon such other matters as the Court may deem appropriate.

24. The Final Approval Hearing may be postponed, adjourned, transferred or continued by order of the Court without further notice to the Settlement Class. At or following the Final Approval Hearing, the Court may enter a judgment approving the Settlement Agreement and a Final Approval Order in accordance with the Settlement Agreement that adjudicates the rights of all Settlement Class Members.

25. Settlement Class Members do not need to appear at the Final Approval Hearing or take any other action to indicate their approval.

26. All discovery and other proceedings in the Litigation as between Plaintiff and Defendant are stayed and suspended until further order of the Court except such actions as may be necessary to implement the Settlement Agreement and this Order.

27. For clarity, the deadlines set forth above and in the Settlement Agreement are as follows:

Class List Sent to Administrator: (7):	July 14, 2020
Notice to be completed by (14):	July 21, 2020
Objection Deadline (45):	September 4, 2020
Exclusion Request Deadline (45):	September 4, 2020
Fee and Expense Application (83):	September 28, 2020
Final Approval Submissions (83):	September 28, 2020

Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

FILED
10/5/2020 3:51 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018ch07264

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

JAMES BRYSKI, individually,)
and on behalf of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
NEMERA BUFFALO GROVE LLC,)
)
Defendant.)

10676093

Case No. 2018-CH-07264

Honorable Celia G. Gamrath

FILED DATE: 10/5/2020 3:51 PM 2018ch07264

AFFIDAVIT OF JAMES BRYSKI

I, James Bryski, declare under penalty of perjury as follows:

1. I am the Named Plaintiff in the above-captioned case. I submit this affidavit in support of Plaintiff's Unopposed Petition for Approval of Attorneys' Fees and Costs, Reimbursement of Settlement Administration Expenses, and a Service Award to the Named Plaintiff.

2. As Named Plaintiff, I sacrificed my reputation and my ability to obtain future employment by attaching my name as the lead plaintiff on a case against my former employer. I understand there are no protections under the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq.*, or Illinois common law to protect me from retaliation for filing a BIPA lawsuit.

3. I also sacrificed my time to prosecute this lawsuit on behalf of myself and 461 absent Class Members, all of whom will receive the substantial monetary benefits of this Settlement Agreement. I assisted Class Counsel in drafting the original Complaint by relaying what work-related documents I had to substantiate my claims, including onboarding documents and other hiring information. I reviewed the Complaint, First Amended Complaint, and Second Amended Complaint before each was filed. I maintained regular monthly or bi-monthly contact with Class Counsel regarding the various stages of the litigation, including throughout briefing, oral argument, and ruling on Defendant's motion to dismiss, as well as during settlement negotiations. I also reviewed and signed off on the Settlement Agreement for which I now seek approval.

4. I have executed a General Release, attached hereto as Exhibit A, in exchange for the monetary benefits conferred upon me by the Settlement Agreement.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and

correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Date: October 5, 2020

FURTHER AFFIANT SAYETH NAUGHT.

DocuSigned by:
James Bryski
0182DD939F7940B...
James Bryski

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GENERAL RELEASE

To the greatest extent permitted by law, Plaintiff agrees to release Defendant regarding all claims he had or might have as of the time of execution of this Agreement, whether known or unknown. By way of explanation, but not limiting its completeness, Plaintiff fully, finally, and unconditionally releases, compromises, waives, and forever discharges Defendant, its agents, former and present employees, successors, heirs, and assigns and all other such persons, from and for any and all claims, liabilities, suits, discrimination or other charges, personal injuries, demands, debts, liens, damages, costs, grievances, injuries, actions or rights of action of any nature whatsoever, known or unknown, liquidated or unliquidated, absolute or contingent, in law or in equity, which was or could have been filed with any federal, state, local or private court, agency, arbitrator or any other entity, based directly or indirectly upon Plaintiff's employment with Defendant, the cessation of his employment, and any alleged act or omission to act by the Released Parties (as defined in the Settlement Agreement), whether related or unrelated to Plaintiff's employment, occurring and/or accruing prior to the execution by Plaintiff of this Agreement. Plaintiff further waives any right to any form of recovery, compensation, or other remedy in any action brought by him or on his behalf.

JAMES BRYSKI

DocuSigned by:

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JAMES BRYSKI, named Plaintiff

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CERTIFICATE OF SERVICE

I, the attorney, hereby certify that on October 5, 2020, I filed the attached with the Clerk of the Court using the electronic filing system and will serve by electronic mail to all counsel of record as set forth below.

Joseph A. Strubbe
Frederic T. Knape
Zachary J. Watters
VEDDER PRICE P.C.
222 North LaSalle Street
Chicago, Illinois 60601
jstrubbe@vedderprice.com
fknape@vedderprice.com
zwatters@vedderprice.com

/s/ Haley R. Jenkins

Agreement”), attached as Exhibit 1, including the releases of claims as set forth in the Settlement Agreement, and, (2) enter the Proposed Final Approval Order and Final Judgment, attached hereto as Exhibit 2.¹

On July 7, 2020, the Court took the first step in the settlement approval process by entering Preliminary Approval of the Parties’ Settlement Agreement; certifying the Settlement Class as set forth in Sections 37–38 of the Settlement Agreement (the “Settlement Class”) pursuant to Section 2-801 of the Illinois Code of Civil Procedure; appointing the attorneys from Stephan Zouras, LLP as Class Counsel; appointing Plaintiff James Bryski as Class Representative; appointing Rust Consulting (“Rust”), as Settlement Administrator; directing that Notice be mailed to the Settlement Class; and setting a date for the Final Approval Hearing. *See* Preliminary Approval Order, attached hereto as Exhibit 3.

The Settlement Class have been notified of the terms of the Settlement, including the monetary relief, the allocation, and their right to object to or opt out of the Settlement. Exhibit 4 (Declaration of Jennifer Mills for Rust Consulting (“Mills Decl.”) ¶ 8; *see also* Mills Decl. Ex. A (Class Notice). Zero individuals in the Settlement Class excluded themselves from the Settlement or objected to the Settlement. *Id.* ¶¶ 12–13. With such overwhelming support for the Settlement and for the reasons stated below, the Court should grant final approval and enter a Final judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

As set forth in greater detail in Plaintiff’s Unopposed Motion and Memorandum in Support of Preliminary Approval of Class Action Settlement (“Preliminary Approval Motion”), Plaintiff James Bryski brought a putative class action on June 8, 2018, against Defendant asserting claims under the Illinois Biometric Information Privacy Act (“BIPA”), 740 ILCS 14/1, *et seq.* and alleging

¹ Capitalized terms not defined herein shall have the meaning set forth in the Settlement Agreement.

that Defendant utilized biometric timekeeping devices at its facilities in Illinois and required its employees to use the devices when clocking in and out of work. Plaintiff further alleged that Defendant disseminated employees' biometric data to at least one third party without consent. Plaintiff alleged that Defendant failed to comply with BIPA by (1) failing to inform individuals in writing that they will be capturing, collecting, storing, using, and disseminating biometric data (*i.e.*, statutorily-defined biometric identifiers and/or information) prior to doing so; (2) failing to obtain a written release for the capture of biometric data prior to such capture; (3) failing to inform individuals in writing of the specific purpose and length of time for which biometric data is captured; and (4) failing to publish a publicly available retention schedule and guidelines for permanently destroying biometric data.

Plaintiff filed an Amended Class Action Complaint on February 21, 2019. The Court granted Plaintiff's motion for leave to file the operative Second Amended Class Action Complaint ("Second Amended Complaint") on June 13, 2019. The Parties fully briefed Defendant's Section 2-619.1 Motion to Dismiss or, Alternatively to Strike Second Amended Complaint, which the Court granted in part and denied in part on January 8, 2020.² In an effort to reach a resolution of this matter, Counsel for the Parties engaged in significant informal settlement discussions via phone and email throughout the spring of 2020. After significant negotiation, the Parties were able to agree on the terms of the final Settlement Agreement, attached as Exhibit 1.

On April 27, 2020, Plaintiff filed the Preliminary Approval Motion requesting, among other relief, that the Court grant Preliminary Approval of the Settlement Agreement and certify the

² Included in the Second Amended Complaint was an individual claim by Plaintiff against Defendant for violation of the Illinois Human Rights Act, 775 ILCS 5/2-101, et seq., which the Court dismissed with prejudice.

Settlement Class for settlement purposes. The Court granted the Preliminary Approval Motion on July 7, 2020. *See* Exhibit 3.

II. SUMMARY OF SETTLEMENT TERMS

The terms of the Settlement are contained in the Settlement Agreement. There are no undisclosed side agreements between the Plaintiff and Defendant.

A. The Settlement Amount and Allocation.

The Settlement Agreement provides that Defendant will pay the gross amount of \$485,100.00, which already has been deposited into an escrow account set up by the Settlement Administrator, based on 462 persons in the Settlement Class, as consideration for Class Members' promises and releases in the Settlement Agreement. Exhibit 1, ¶¶ 34, 41(a). The Settlement Fund shall be allocated on a *pro rata* basis, less Administrative Expenses paid to the Settlement Administrator, a Fee Award to Class Counsel, and a Service Award to the Class Representative. *Id.* ¶¶ 41–42. Settlement Class Members will receive their shares of the Settlement Fund without having to submit a claim form or otherwise “opt in” to the Settlement. *Id.* ¶ 43. Checks to Settlement Class Members shall remain valid and negotiable for one hundred twenty (120) days from the date of their issuance and thereafter automatically be cancelled if not cashed within that time period. *Id.* ¶ 47(d). Within seventy-five (75) days of issuance of settlement checks, the Settlement Administrator shall provide a list of any settlement checks that are not cashed/negotiated within sixty (60) days of issuance to Counsel for the Parties. *Id.* Within ten (10) days thereafter, the Settlement Administrator shall attempt to confirm or obtain valid mailing addresses and send a reminder post-card to affected persons in the Settlement Class. *Id.* Additionally, at the conclusion of the 120-day period, the Settlement Administrator shall provide a list of any settlement checks that are not then cashed/negotiated to Counsel for the Parties. *Id.*

Any unclaimed or undistributed amounts from the Settlement Fund (including checks disbursed to participating Settlement Class Members that are uncashed after 120 days, for any reason) will be distributed to Prairie State Legal Services as a *cypres. Id.* ¶ 44.

B. Eligible Class Members.

The proposed Settlement would establish a Settlement Class defined as follows:

(1) All current and former workers of Defendant in the State of Illinois (2) who for timekeeping purposes only, had their finger, hand or palm scanned and/or fingerprints or handprints scanned and/or associated biometric data collected, captured, received, converted, stored, obtained, shared, taken, used, disclosed or disseminated by Defendant (3) within the five-year period preceding the date the Complaint was filed to the date of Preliminary Approval (4) without first providing their written consent prior to the initial scan, collection, capture or receipt of biometric data (“Settlement Class”).

Exhibit 1, ¶ 37. The Class size is 462 total members. Mills Decl. ¶ 6.

C. Releases.

The Settlement Agreement provides that Settlement Class Members who do not exclude themselves and the other Releasors will provide the Released Parties a full and complete release of all claims arising out of, related to, or connected with the alleged, non-compliance with BIPA, as set forth in the Second Amended Complaint or otherwise asserted in the Action, and/or the alleged scanning, capture, collection, storage, possession, transmission, purchase, receipt through trade and otherwise, sale, lease, trade, profit, disclosure, re-disclosure, dissemination, transmission, protection, conversion and/or use of biometric identifiers, biometric information or other biometric data in connection with Defendant’s Biometric Timekeeping System used at Defendant’s facilities as set forth in detail in the Parties’ Settlement Agreement. Exhibit 1, Sec. VII.

D. Service Payment to Named Plaintiff, Attorneys' Fees, and Litigation and Administration Costs.

Contemporaneous with this Motion, Plaintiff will apply for Court approval, and Defendants will not oppose, distribution of a Service Award to the Plaintiff, paid out of the Settlement Fund, of \$7,500.00, less applicable withholdings and deductions. Exhibit 1, ¶ 71. In addition, Class Counsel will petition for approval of a Fee Award of \$1161,538.30 and litigation costs not to exceed \$2,000.00. Exhibit 1, ¶ 68. The Parties agree that these sums are fair and reasonable in light of all the facts and circumstances, including the time spent by Class Counsel, their hourly rates, the risks undertaken, and the results achieved.

E. Settlement Administration.

The Parties retained Rust, an experienced class action claims administrator, to administer the Settlement. Exhibit 1, ¶ 33; Mills Decl. ¶ 3. The Settlement Administrator's Administration Expenses will be paid from the Settlement Fund. Exhibit 1, ¶ 41(d). On July 21, 2020, Class Notices were mailed to 462 persons in the Settlement Class contained in the Class List via First Class mail and emailed to 300 Class Members. Mills Decl. ¶¶ 8-9. The Class Notice advised the Settlement Class that they could submit an exclusion and/or objection postmarked by September 4, 2020. Mills Decl. ¶¶ 8-9.

Rust performed 28 address traces on Notices returned as undeliverable for the first time as of September 4, 2020. The address trace utilizes the individual's name, previous address and Social Security Number for locating a current address. Of the 28 traces performed, 22 more current addresses were obtained and Notices were promptly re-mailed to those persons via First Class mail. Of the 28 traces performed, Rust did not obtain updated addresses for six (6) undeliverable Notices. Of the 22 Notices mailed to a more current address identified from trace, five (5) Notices were returned to Rust as undeliverable a second time. As of this date, 11 Notices remain

undeliverable. *Id.* ¶ 10. As of this date, five (5) Notices were returned by the Post Office with forwarding addresses attached as of September 4, 2020. Rust promptly re-mailed Notices to those Class Members via First Class mail. *Id.* ¶ 11.

F. Objections and Opt-Outs.

The deadline to object or opt out of the Settlement was September 4, 2020. Mills Decl. ¶ 8. That deadline has now passed. Zero persons in the Settlement Class requested exclusion from the Settlement or objected to the Settlement. *Id.* ¶¶ 12-13.

III. THE PROPOSED SETTLEMENT SHOULD BE FINALLY APPROVED BECAUSE IT IS A FAIR, REASONABLE AND ADEQUATE RESOLUTION OF A BONA FIDE DISPUTE OVER PLAINTIFFS' BIPA CLAIMS.

Under Section 2-806 of the Illinois Code of Civil Procedure, class claims may be settled only with court approval. 735 ILCS 5/2-806. The purpose of the court's approval is to ensure that the proposed settlement agreement is "fair, reasonable, and in the best interest of the class." *Steinberg v. Sys. Software Associates, Inc.*, 306 Ill. App. 3d 157, 169 (1st Dist. 1999). The approval of any proposed class action settlement is typically exercised in the two-step process of "preliminary" and "final" approval. Manual for Complex Litigation § 30.41 (3d ed. 2000).

The second and final step of the approval process follows a hearing at which time any objections by class members may be considered. The Court then determines whether the settlement is "fair and reasonable and in the best interest of all those who will be affected by it." *GMAC Mortgage Corp. of PA v. Stapleton*, 236 Ill. App. 3d 486, 493 (1st Dist. 1992). "In a class action, the court is the guardian of the interests of the absent class members." *Waters v. City of Chicago*, 95 Ill. App. 3d 919, 924 (1st Dist. 1981).

Courts favor the settlement of class action litigation. Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("Newberg"), § 11.41 (4th ed. 2002) ("The compromise of complex

litigation is encouraged by the courts and favored by public policy.”). “In reviewing a proposed settlement, the court should consider the judgment of counsel and the presence of good faith bargaining.” *Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir. 1976) *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).³ Courts usually refuse to substitute their business judgment for that of counsel, absent fraud or overreaching. *Id.*

In determining whether the settlement is fair, reasonable, and adequate, courts examine several factors, including: (1) the strength of the plaintiff’s case compared with the terms of the proposed settlement; (2) the defendant’s ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and, (8) the stage of proceedings and the amount of discovery completed. *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990). All of these factors weigh in favor of Final Approval of the Settlement Agreement in the Action.

A. The Settlement Fund Is Substantial Given the Strengths of Plaintiff’s Claims and Attendant Risks.

Defendant has agreed to settle the Action on behalf of individuals who worked for Nemera for \$485,100.00 for a Settlement Class of 462 persons, with net individual payments of approximately \$659. In addition, the Settlement Fund covers: (1) all attorneys’ fees and costs approved by the Court in connection with all of Class Counsel’s representation of Plaintiff and the Settlement Class as the Fee Award; (2) the fees and costs of the Settlement administration activities by the Settlement Administrator as the Administrative Expenses not to exceed \$15,000; and (3)

³ Section 2-801 of the Illinois Code of Civil Procedure is modeled after Rule 23 of the Federal Rules of Civil Procedure. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 125 (2005) (citations omitted). Because of the association between these two provisions, federal decisions interpreting Rule 23 are persuasive authority regarding issues of class certification in Illinois. *Id.* (citations omitted).

any Court-approved service payment to the Plaintiff as the Service Award. For each check not cashed/negotiated within 120 days after issuance, funds will be to Prairie State Legal Services as a *cy pres*. Exhibit 1, ¶ 44.

B. Defendant's Ability to Pay.

Defendant's ability to pay a judgment or a settlement was not a factor in the Parties' Settlement.

C. Litigation Through Trial Would Be Complex, Costly, and Long.

By reaching a favorable Settlement prior to class certification briefing or trial, Plaintiff seeks to avoid significant expense and delay, and instead ensure recovery for the Settlement Class. “[A]n integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation.” *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985). Although Class Counsel believes Plaintiff's case is strong, it is subject to considerable risks and costs if the Action is not settled.

Continued litigation carries with it a decrease in the time value of money, for “[t]o most people, a dollar today is worth a great deal more than a dollar ten years from now.” *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002). Here, further litigation would certainly result in fully briefed motions for class certification and summary judgment, among other contested matters. and would prolong the risk, time, and expense associated with a complex trial for damages. Any judgment would likely be appealed, further extending the litigation. These costs of further litigation are considerable in terms of both time and money but would not reduce the risks that litigation holds for the Settlement Class. The proposed Settlement, on the other hand, provides immediate benefits.

Under these circumstances, the benefits of a guaranteed recovery today as opposed to an uncertain result in the future, are readily apparent. As one court noted, “[t]he bird in the hand is to be preferred to the flock in the bush and a poor settlement to a good litigation.” *Rubenstein v. Republic Nat’l Life Ins. Co.*, 74 F.R.D. 337, 347 (N.D. Tex. 1976). This factor therefore weighs in favor of Final Approval.

D. There Is No Opposition to the Settlement.

The absence of objections by persons in the Settlement Class is significant in determining whether the proposed Settlement is reasonable to the Settlement Class as a whole. *See Hispanics United of DuPage County v. Village of Addison, Illinois*, 988 F. Supp. 1130, 1166, 1169 (N.D. Ill. 1997) (“the court may approve a fair settlement over objections by some or even many Class Members”); *Mangone v. First USA Bank*, 206 F.R.D. 222, 226-27 (S.D. Ill. 2001) (same). Here, no individual in the Settlement Class has requested exclusion from the Settlement. Mills Decl. ¶ 12. No person in the Settlement Class objected to the Settlement. *Id.* ¶ 13. Thus, this factor also favors Final Approval of the Settlement.

E. The Settlement Is the Result of Arm’s-Length Negotiations, Without Any Hint of Collusion.

There is plainly no collusion or fraud with respect to this proposed Settlement, which was reached after months of negotiation between experienced BIPA counsel. As a distinguished commentator on class actions has noted, there is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm’s length by counsel for the class, is presented for court approval. *Newberg* §11.41 at 11-88. In this case, as explained above, the terms of the Settlement were reached during extensive arm’s-length negotiations by experienced counsel after thorough investigation, analysis, and motion practice. Therefore, as there was no deceit or collusion, this factor supports Final Approval of the Settlement.

F. Competent Counsel for All Parties Endorse this Agreement.

Courts are “entitled to rely heavily on the opinion of competent counsel.” *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982) (quoting *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 325 (7th Cir. 1980)). Class Counsel are competent and experienced in class actions, particularly employment class actions, and are familiar with the strengths and weaknesses of the claims and defenses. *See* Exhibit 5, Aff. of Ryan F. Stephan and Stephan Zouras, LLP Firm Resume. Using that litigation experience and their intimate knowledge of the facts of the case and the legal issues facing the Settlement Class, Class Counsel were capable of making, and did make, well informed judgments about the value of the claims, the time, costs and expense of protracted litigation, discovery, and appeals, and the adequacy of the settlement reached. Defendants’ counsel also endorse this Settlement. This factor therefore weighs in favor of Final Approval.

G. Discovery Has Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly.

This Action was resolved in principle approximately two years after it was filed. Though the Parties did not engage in formal discovery, this period involved extensive research, analysis, investigation, and exchange of information regarding the scope of the class size and Defendants’ biometric timekeeping policies and practices. The stage of litigation has advanced to a state that Class Counsel could fairly and fully evaluate the value of the Settlement – indeed, class certification, further dispositive motion practice, and trial preparation were the immediate tasks at hand. Given the significant amount of time and resources spent by the Parties advancing the lawsuit, this factor favors Final Approval.

IV. CONCLUSION

For the reasons set forth above and because all relevant factors weigh in favor of Final Approval of the Settlement, Plaintiff respectfully requests that the Court grant his Unopposed

Motion for Final Approval of Class Action Settlement and enter the Proposed Final Approval Order and Final Judgment, attached hereto as Exhibit 2.

Date: September 29, 2020

Respectfully Submitted,

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