UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIA de LOURDES PARRA MARIN, on behalf of herself and all other persons similarly situated,

Plaintiff,

- against -

DAVE & BUSTER'S, INC., and DAVE & BUSTER'S ENTERTAINMENT, INC.,

Defendants.

15 Civ. 3608 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CLASS CERTIFICATION AND APPROVAL OF NOTICE PLAN

Abbey Spanier, LLP
Karin E. Fisch
212 East 39th Street
New York, New York 10016
(212) 889-3700

Frumkin & Hunter LLP
William D. Frumkin
1025 Westchester Avenue
White Plains, New York 10604
(914) 328-0366

Conover Law Offices
Bradford D. Conover, Esq.
Molly Smithsimon, Esq.
345 Seventh Avenue, 21st Floor
New York, New York 10001
(212) 588-9080

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Statutes and Rules

Other Authorities

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff Maria de Lourdes Parra Marin ("Plaintiff" or "Ms. Marin"), by and through her counsel, respectfully submits this memorandum of law in support of her motion for an order preliminarily approving the proposed settlement (the "Proposed Settlement") between Plaintiff and Defendants Dave & Buster's Inc. and Dave & Buster's Entertainment, Inc. (collectively, the "Defendants" or "Dave & Buster's"), conditionally certifying a Settlement Class (as defined below), setting a date for a fairness hearing, and approving the notice program agreed to by the parties. This motion is also supported by the Settlement Stipulation, dated November 17, 2017, with exhibits attached thereto (the "Stipulation"),[1] and the Declaration of Karin E. Fisch in Support of Preliminary Approval of Proposed Settlement dated November 17, 2017, with exhibits attached thereto.

I. INTRODUCTION

Plaintiff submits this memorandum of law in support of preliminary approval of the Proposed Settlement in this action brought on behalf of a class consisting of certain current and former full-time employees of Dave and Buster's who allege that their hours were reduced from full-time to part-time, causing them to lose health benefits or eligibility for such health benefits. Plaintiff alleged that the primary purpose of the reduction in her hours was to deprive her of healthcare benefits in violation of ERISA § 510.

The case was litigated through a motion to dismiss and document discovery. Prior to the commencement of depositions, the parties jointly decided to continue settlement discussions that previously had broken down. On March 20, March 21, and June 30, 2017, the parties participated in private mediation, and on June 30, 2017, reached an agreement in principle to

[1] The Stipulation, together with all attachments thereto, is submitted herewith as Exh. A to the Declaration of Karin E. Fisch in Support of Plaintiff's Motion for Preliminary Approval of Proposed Settlement ("Fisch Decl."). All capitalized terms not otherwise defined herein shall have the same meaning ascribed in the Stipulation.

settle the action as to the putative Class on the terms set forth in the Stipulation. The parties also agreed to a separate severance agreement executed on the same date as the Stipulation. After significant arm's-length negotiations, Defendants have agreed to pay a maximum of $7,425,000 to compensate members of the Settlement Class, as defined below, in exchange for a release of the putative Class claims. The parties have also agreed to a fair and reasonable claims administration process designed to reach as many Class Members as possible, to facilitate participation in the Settlement, and to provide a full explanation of the rights and options of each member of the Settlement Class with respect to the Proposed Settlement. If finally approved, the Proposed Settlement will resolve the action as to the putative Class.

Plaintiff moves this Court to enter a Preliminary Approval Order, submitted herewith as Exhibit B to the Stipulation: (1) granting preliminary approval of the Proposed Settlement; (2) certifying the proposed Settlement Class pursuant to Rule 23(a), 23(b)(2) and 23(b)(3) for purposes of the Settlement; (3) directing that the Settlement Class be given notice of the Proposed Settlement, and Plaintiff's counsel's request for fees and reimbursement of expenses; and (4) scheduling a hearing, no earlier than one hundred and forty five (145) calendar days from the date of the Preliminary Approval Order, at which the Court will consider the Final Approval Motion. As detailed herein, the Proposed Settlement is fair, reasonable, adequate, and worthy of preliminary approval.

II. BACKGROUND OF THE LITIGATION

This action alleging violations of ERISA § 510 was commenced by Plaintiff on May 15, 2015. Plaintiff is a current employee of Dave & Buster's. Plaintiff alleges that in June of 2013, her hours were reduced from approximately forty hours per week to less than thirty hours per week. By letter dated March 10, 2014, Ms. Marin was notified that she no longer qualified for

coverage under Dave & Buster's medical plans offered only to full-time employees because her employment status had been changed to part-time. Ms. Marin commenced this lawsuit alleging on her own behalf, and on behalf of all others similarly situated, that Dave & Buster's had reduced her hours with the specific intent of preventing her from obtaining the healthcare benefits that she was already receiving under the then-current plan. Plaintiff sought reinstatement of her full-time status, reinstatement of her eligibility for the healthcare insurance offered only to full-time employees, and monetary relief incidental thereto. At all points in this litigation, Defendants denied such allegations, contending that they complied with ERISA at all times and that Plaintiff's claims are not suited for class treatment.

On July 31, 2015, Defendants filed a motion to dismiss all of Plaintiff's claims. The motion was fully briefed and, at oral argument on January 6, 2016, the Court requested supplemental briefing specifically addressing Plaintiff's right to recover lost wages in an action brought under ERISA § 510. After the parties filed supplemental briefing, the Court issued a decision on February 9, 2016, finding that Plaintiff had sufficiently stated "a plausible and legally sufficient claim for relief, including, at this stage, Plaintiff's claims for lost wages and salary incidental to the reinstatement of benefits." *Marin v. Dave & Buster's, Inc.*, 159 F. Supp. 3d 460, 462-63 (S.D.N.Y. 2016). Following the denial of the motion to dismiss, Defendants answered the Complaint on or about March 24, 2016. In the answer, Defendants disputed Plaintiff's contentions, and expressly denied Plaintiff's allegations.

Pursuant to a discovery schedule set by the Court, on July 28, 2016, Plaintiff produced documents responsive to Defendants' discovery requests. Defendants initially produced five separate tranches of documents, the last produced on November 18, 2016. After the production of over 76,000 pages of documents by Defendants, the parties requested an extension of the

discovery deadlines to permit mediation. At that time, the parties exchanged positions regarding the size and composition of the proposed Class in light of the documents produced by Defendants and reviewed by Plaintiff's counsel.

The Mediation

On March 20 and March 21, 2017, the parties and their counsel participated in two full days of mediation in New York City with a private mediator in an effort to resolve the litigation. The parties were unable to reach a settlement at that time. Following the unsuccessful mediation, Plaintiff's counsel continued their review of the documents produced, and counsel for the parties worked to schedule depositions to be held in July and August 2017 in Dallas, Texas. Prior to commencing those depositions, the parties jointly decided to schedule one additional day of mediation. At this third day of mediation on June 30, 2017, the parties reached an agreement in principle to settle the action as to the putative Class on the terms set forth in the Stipulation.

Once the parties agreed upon the Settlement's principal terms, additional negotiations ensued regarding the details of the Proposed Settlement for several months. Those negotiations encompassed many issues including the composition of the Settlement Class, the plan of allocation of the Settlement funds, and the form of the Settlement notice. On November 17, 2017, the parties entered into the Stipulation, submitted herewith, that details the terms of the Proposed Settlement. Plaintiff's counsel agreed to the terms of the Proposed Settlement only after having conducted an investigation relating to the allegations pertaining to each Defendant in the action and the defenses likely to be asserted by Defendants. In connection therewith, Plaintiff's counsel reviewed facts relayed by Plaintiff and other Class Members, as well as the substantial number of documents provided by Defendants in response to Plaintiff's discovery requests. At the time the Proposed Settlement was agreed upon, the parties were well-informed

regarding the facts of the case, the strengths and weaknesses of their respective cases, the number of affected members of the Settlement Class, and the appropriate forms of relief.

III. THE PROPOSED SETTLEMENT

As set forth in the Stipulation, Defendants have agreed to pay a maximum amount of $7,425,000 into a Qualified Settlement Fund ("QSF") to fully resolve the claims asserted in this Action and to compensate Class Members. After payment of any Class Counsel Attorneys' Fees and Lawsuit Costs, Settlement Administrator Fees and Costs, and Employer Taxes, the remaining funds will be paid out automatically to Class Members based upon data contained in the records of Dave & Buster's. As detailed in the Stipulation, each Class Member Settlement Payment will be a proportionate share of the QSF, as determined by the Settlement Administrator chosen by the parties pursuant to a formula and based on a number of factors, including: (1) the Class Member's wages during the Class Period; (2) the extent of the Class Member's reduction in hours during the Class Period; (3) the duration of the Class Member's employment at Dave & Buster's during the Class Period; and (4) the Class Member's enrollment in and/or eligibility for medical benefits offered to full-time employees by Dave & Buster's (the "Dave & Buster's Plan") during the Class Period.

The terms of the Proposed Settlement are set forth in full in the Stipulation. Sections 11 and 13 set out details regarding the exact manner in which the funds will be distributed, including tax treatment of Class Member Settlement Payments. Section 15 of the Stipulation provides for a reversion to Defendants of the first $300,000 of funds not claimed by Class Members due, for example, to opt-outs, Class Members who cannot be located, or uncashed checks. Any amount over $300,000 remaining in the QSF following any reversion to Dave & Buster's will be re-distributed if both Class Counsel and Defendants' Counsel agree that it is cost

effective to do so, after payment of any unpaid costs or fees incurred in administering such re-distribution, to those Class Members whose Settlement Checks were cashed, following the same pro-rata formula used to calculate the initial Class Member Settlement Payments. The plan of allocation is also described in the proposed Notice, which is attached as Exhibit A to the Stipulation. If any funds remain in the QSF following one hundred eighty (180) calendar days (i) after such re-distribution, or (ii) after reversion to Dave & Buster's, if no re-distribution occurred, then such balance shall be contributed to non-sectarian, not-for-profit, 501(c)(3) organization(s) jointly designated by Class Counsel and Dave & Buster's.

IV. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

Plaintiff respectfully submits that the Proposed Settlement achieves a result that is fair, reasonable, and adequate, and readily meets the criteria applicable at preliminary approval. The Proposed Settlement was the result of months of arm's-length negotiations among experienced counsel for the parties.

Under Fed. R. Civ. P. 23(e), a class action cannot be settled without the approval of the Court. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). Approval of a proposed settlement is a matter within the broad discretion of the district court. *See In re Warner Comms. Sec. Litig*., 798 F.2d 35, 37 (2d Cir. 1986). The procedure for approving a class action settlement consists of two steps: (1) a preliminary fairness evaluation; and (2) a final approval order issued after notice of the settlement is disseminated and a hearing to consider the fairness of the proposed settlement has been held. *See e.g. In re NASDAQ Market-Makers Antitrust Litig*., 176 F.R.D. 99, 102 (S.D.N.Y. 1997); *In re Initial Pub. Offering Sec. Litig*., 226 F.R.D. 186, 191 (S.D.N.Y. 2005); *In re Holocaust Victim Assets Litig*., 105 F. Supp. 2d 139, 143-44 (E.D.N.Y. 2000).

"In terms of the overall fairness, adequacy and reasonableness of the settlement, a full fairness analysis is unnecessary at this [preliminary approval] stage." *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 34 (E.D.N.Y. 2006). Rather, "preliminary approval is appropriate where the proposed settlement is merely within the range of possible approval." *Id.* "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re NASDAQ*, 176 F.R.D. at 102.

"If the court preliminarily approves the settlement, it must direct the preparation of notice of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing." *In re Initial Pub. Offering*, 226 F.R.D. at 191. Class Members may then present arguments and evidence for and against the terms of the settlement before the Court decides whether the settlement terms are fair, reasonable, and adequate. *Id*.

The Proposed Settlement bears all of the marks of an arm's-length transaction. This case settled only after motion practice, settlement discussions between counsel that initially were not successful, significant documentary discovery, and ultimately two phases of mediation. Each side represented their clients' respective positions with vigor and settlement negotiations were hard-fought, and contentious at times. There is no suggestion that the integrity of the negotiating process might have been compromised in any way. Further, nothing in the course of the negotiations or the substance of the agreement indicates that the Proposed Settlement is outside the range of possible approval.

Courts recognize that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *See In re Global Crossing Sec. & ERISA Litig.*,

225 F.R.D. 436, 461 (S.D.N.Y. 2004). Counsel for Plaintiff support the Proposed Settlement on the grounds, among other things, that acceptance of the prompt and significant payment to Class Members is in the best interest of Plaintiff and the Settlement Class, after considering (i) the benefit that Plaintiff and the Settlement Class will receive from the Proposed Settlement in the form of a cash payment representing lost wages and for one sub-class, lost employer contributions to healthcare premiums; (ii) the attendant risks of litigation, including complicated issues of law specific to this case; and (iii) the desirability of permitting the Proposed Settlement to be consummated as provided by the terms of the Stipulation. The arm's-length nature of the negotiations, the participation of experienced advocates throughout the process, and no obvious deficiencies in the Settlement terms each support the conclusion that the Proposed Settlement is fair, reasonable, and adequate to the Settlement Class.

The Proposed Settlement achieves a result that is fair, reasonable, adequate, and worthy of judicial approval. Counsel for Plaintiff urge preliminary approval of the Proposed Settlement based upon their experience, their knowledge of the strengths and weaknesses of the case, the likely recovery at trial, and all other factors considered in evaluating proposed class action settlements. Counsel for Plaintiff also request preliminary approval of the Settlement in light of the fact that public interest favors settling litigation, particularly class actions such as this. *See Bano v. Union Carbide Corp*., 273 F.3d 120, 129-30 (2d Cir. 2001).

V. THE SETTLEMENT CLASS SHOULD BE CONDITIONALLY CERTIFIED

Prior to granting preliminary approval of a settlement, the Court should determine that the proposed settlement class is a proper class for settlement purposes. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997); MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.632 (2004). Courts often provisionally certify the class along with preliminary approval of the

settlement. *See In re Stock Exchs. Options Trading Antitrust Litig.*, 99 Civ. 0962 (RCC), 2005 U.S. Dist. LEXIS 13734, at *16 (S.D.N.Y. July 8, 2005); *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 347 (S.D.N.Y. 2005). Plaintiff seeks to certify an opt-out class solely for purposes of the Proposed Settlement and for appointment of Ms. Marin as the Class Representative and her counsel as Class Counsel.

For purposes of this Settlement only, the parties agree that the "Settlement Class" shall consist of two sub-classes defined in Section 4(a) of the Stipulation:

> **"Lost Hours and Benefits Sub-Class**" means all persons currently or formerly employed by Dave & Buster's as hourly wage, full-time employees who were enrolled in full-time healthcare insurance benefits under the Dave & Buster's Plan at any point from February 1, 2013 through the Preliminary Approval Date, and whose full-time hours were reduced to part-time by Dave & Buster's at any time between May 8, 2013 and the Preliminary Approval Date, which reductions resulted in the loss of wages and the loss of full-time healthcare insurance benefits under the Dave & Buster's Plan, except that employees who were promoted to management or a position at headquarters at any point during the Class Period are excluded from this sub-class; and
>
> "**Lost Hours and Eligibility Sub-Class**" means all persons currently or formerly employed by Dave & Buster's as hourly wage, full-time employees at any point from February 1, 2013 through the Preliminary Approval Date, and whose full-time hours were reduced to part-time by Dave & Buster's at any time between May 8, 2013 and the Preliminary Approval Date, which reductions resulted in the loss of wages and the loss of eligibility for full-time healthcare insurance benefits under the Dave & Buster's Plan, except that employees who were promoted to management or a position at headquarters at any point during the Class Period are excluded from this sub-class.

The two sub-classes together comprise the Settlement Class. A member of the Settlement Class may be a member of the Lost Hours and Benefits Sub-Class or the Lost Hours and Eligibility Sub-Class, but not both. Any persons who exclude themselves from the Settlement Class during the Notice Period as directed in the Stipulation shall not be a member thereof.

Federal Rule of Civil Procedure 23(a) sets forth the requirements for class certification:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition, for a class action to be maintainable, it must satisfy one of the subsections of the Federal Rules of Civil Procedure 23(b). Plaintiff contends that these requirements are met for settlement purposes, as set forth below.

A. The Requirement of Numerosity is Satisfied

In order to satisfy the numerosity requirement of Rule 23(a)(1), the class must be so large that joinder of all members would be impracticable. The numerosity requirement does not mandate that joinder of all parties be impossible – only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate. *Central States Se. and Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 244-45 (2d Cir. 2007). Numerosity is generally presumed when the proposed class would have at least 40 members. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (*citing* 1 Newberg On Class Actions 2d, § 3.05 (1985 ed.)); *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 83 (S.D.N.Y. 2007); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 466 (S.D.N.Y. 2005). Based upon the information contained in documents produced in discovery, Plaintiff estimates that the potential number of Class Members in the Settlement Class is approximately 1200, an amount sufficient to satisfy the numerosity requirement of Rule 23.

B. The Requirement of Commonality is Satisfied

Rule 23(a)(2) requires Plaintiff to demonstrate that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Not every issue must be identical as to each

class member, but . . . plaintiff must identify some unifying thread among the members' claims that warrants class treatment." *Vivendi*, 242 F.R.D. at 84 (citation, brackets and quotation marks omitted). The commonality requirement is generally considered a low hurdle that "has been applied permissively" by courts in the context of complex class action litigation. *See Vivendi*, 242 F.R.D. at 84. "The critical inquiry is whether the common questions are at the core of the cause of action alleged." *Labbate-D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 456 (E.D.N.Y. 1996). Among these questions are whether Defendants' actions as described in the pleadings violated ERISA and whether the alleged harm to the members of the Settlement Class can be redressed in a uniform manner.

C. The Requirement of Typicality is Satisfied

Typicality "requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Reade-Alvarez*, 237 F.R.D. at 32. The focus of the typicality inquiry is often the defendants' behavior. *See In re IGI Sec. Litig.*, 122 F.R.D. 451, 456 (D.N.J. 1988) ("it is the *defendants*' course of conduct . . . upon which the court must focus in determining typicality.") (emphasis in original). Plaintiff here stands in the exact same position as do other employees of Dave & Buster's who had their hours cut from full-time to part-time and lost healthcare benefits or eligibility for healthcare benefits. Plaintiff alleges a nationwide centralized policy and practice by Dave & Buster's to reduce full-time employees to part-time employees for the purpose of depriving them of existing healthcare benefits or eligibility for such benefits. Accordingly, Plaintiff's claims and the claims of the Class Members arise out of the same alleged conduct by Defendants, and are

based on the same legal theories. Plaintiff's claims are thus typical of those of all members of the Settlement Class.

D. The Requirement of Adequate Representation is Satisfied

The final requirement of Rule 23(a) is adequacy of representation. To meet the adequacy requirement, "the representatives' interests must not conflict with the class members' interests, and . . . the representatives and their attorney must be able to prosecute the action vigorously." *In re Livent Inc. Noteholders Sec. Litig.*, 210 F.R.D. 512, 516 (S.D.N.Y. 2002). Both requirements are met here.

First, the interests of Plaintiff are not antagonistic to those of the members of the Settlement Class. Plaintiff has sought redress for herself and others like her who allegedly lost wages and benefits as a result of a company-wide policy to reduce the number of full-time employees at Dave & Buster's in an effort to stem health insurance costs. Plaintiff has been committed to vigorously prosecuting the claims that she asserted, including responding to discovery requests and actively participating in the initial two-day mediation session. There are no unique defenses that apply only to Plaintiff. The interests of the other members of the Settlement Class, therefore, have been and will continue to be protected by Plaintiff. Moreover, the respective claims of Plaintiff and the Settlement Class arise from the same alleged wrongful conduct, involve the same legal theories, and require the same proof. *See Livent*, 210 F.R.D. at 516-17 ("The commonality and typicality requirements blend together in determining whether the representative plaintiffs' claims are typical enough of the classwide claims that the representatives will adequately represent the class.") (citations and quotation marks omitted).

Second, the requirement of adequacy of representation is met by the qualifications of counsel for Plaintiff herein. The attorneys at Abbey Spanier, LLP, Conover Law Offices, and

Frumkin & Hunter LLP are experienced in ERISA and complex class action litigation and have successfully prosecuted numerous ERISA cases and class actions in courts throughout the United States and in this Circuit. *See* Fisch Decl. Exs. B-D. Counsel for Plaintiff were confident regarding the validity of the claims asserted and have vigorously pursued this action to date.

E. The Requirements of Rule 23(b)(2) and 23(b)(3) are Satisfied

One of the more interesting issues that arose during the negotiation of the Proposed Settlement was whether money damages are an available remedy pursuant to Rule 23(b)(2), under which the case was originally brought, given the equitable nature of the relief originally sought. In negotiations, Defendants asserted that back pay is not available under ERISA § 510 and that *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), precludes an award of back-pay pursuant to Rule 23(b)(2). Plaintiff, on the other hand, asserted that appropriate equitable relief in this case could take several forms, including reinstatement of lost benefits and wages incidental to reinstatement. The issue was briefed as part of the motion to dismiss process and this Court allowed Plaintiff's claim for back pay wages and lost benefits to proceed at that stage as incidental to a request for reinstatement. *See Marin v. Dave & Buster's*, 159 F. Supp. 3d at 462-63.

Once settlement discussions progressed to a point where it appeared that the relief granted would be monetary, without reinstatement of hours or insurance coverage, due process concerns regarding payment of money without a corresponding right to opt out of the Proposed Settlement were implicated. Plaintiff thus pointed out that Courts within the Second Circuit have certified class actions under Rule 23(b)(2), Rule 23(b)(3) or Rule 23(c)(4) since *Dukes*, exercising their discretion where necessary to address due-process concerns, by bifurcating liability and damage assessments and using other tools at their disposal in the remedial phase of

the litigation. *See, e.g.*, *Houser v. Pritzker*, 28 F. Supp. 3d 222, 254 (S.D.N.Y. 2014) ("certifying the Plaintiff's proposed liability and injunctive relief class will materially advance the litigation and make the proceeding more manageable."). In cases like *Houser*, a Title VII case, the plaintiff asked the Court to certify a 23(b)(2) class for purposes of determining liability and affording injunctive relief, after which the Court could move on to the remedial phase of the case to determine the availability of damages. *See* 28 F. Supp. 3d at 254 ("certifying the Plaintiff's proposed liability and injunctive relief class will materially advance the litigation and make the proceeding more manageable."); *see also Little v. Washington Metropolitan Area Transit Authority, et al.*, 249 F. Supp. 3d 39, 425-26 (D.C. Cir 2017) (pointing out that a court can exercise its discretion to certify a single class under Rule 23(b)(2) to address issues of liability and injunctive relief and leave incidental damages calculations to individualized hearings). Plaintiff submits that certification of a Settlement Class under Rule 23(b)(2) and 23(b)(3) is appropriate here as well, given the nature of the relief sought and the structure of the Proposed Settlement.

Rule 23(b)(2) applies to cases where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This case centered on what Plaintiff alleged was a company-wide directive to cut the hours of Dave & Buster's employees to save on healthcare costs. Plaintiff brought this case pursuant to ERISA § 510, which prohibits an employer taking an employment action with the specific intent to interfere with benefits. *See Cioinigel v. Deutsche Bank Americas Holding Corp.*, No. 12 CIV. 434 (KBF), 2013 WL 120618, at *2 (S.D.N.Y. Jan. 10, 2013) (a plaintiff "states a claim under section 510 if he alleges that defendant interfered with his employment relationship with the

intent of preventing him from obtaining his … benefits"). Had this case continued to trial, Plaintiff would have pursued her claims for reinstatement to full-time status and eligibility for healthcare benefits, and incidental damages, as permitted under ERISA § 502(a)(3).

To certify a class under Rule 23(b)(3), a court must find that the common issues of fact and law predominate over individual issues. *In re Visa Check/MasterMoney Antitrust Litig*., 280 F.3d 124, 132-33 (2d Cir. 2001). To satisfy this requirement, it must be shown that the issues subject to generalized proof predominate over the issues subject to only individualized proof. *Id*. at 136. As noted above, Plaintiff alleged that Defendants violated ERISA in a uniform manner. For the purposes of providing a remedy as part of the Proposed Settlement, common issues still predominate, as the effect of Defendants' alleged initiative to cut costs is able to be proven on a class-wide basis and the methodology for assessing that impact is similar across all members of the Settlement Class. Rule 23(b)(3) also requires that the class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Here, potential class members are dispersed throughout the country and many of them do not have alleged damages to a degree where it would be cost-effective for them to seek recovery of their own. *See In re Blech Sec. Litig.*, 187 F.R.D. 97, 107 (S.D.N.Y. 1999). Resolution of this case through a class action will achieve economies of time, effort, and expense and will promote uniformity in treatment of all Settlement Class Members without sacrificing procedural fairness. Accordingly, certification of the Settlement Class under Rule 23(b)(2) for the purposes of liability and Rule 23(b)(3) for the remedial phase, thus allowing Class Members to opt out, is appropriate for settlement purposes.

VI. THE NOTICE PROGRAM IS APPROPRIATE

Under Rule 23(c)(2)(B), this Court is to direct to the members of the Settlement Class "the best notice practicable under the circumstances, including individual notice to all members who can be identified though reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The form of notice must fairly apprise the prospective members of the class of the terms of the proposed settlement, and the options that are open to them in connection with the proceedings, including the option to withdraw from the case. *See Weinberger v. Kendrick*, 698 F.2d 61, 70-71 (2d Cir. 1982); *Reade-Alvarez*, 237 F.R.D. at 34-35. The standard for the adequacy of notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 113 (2d Cir. 2005).

Here, it is expected that the proposed Notice will reach many members of the Settlement Class, as each is a current or former full-time employee of Dave & Buster's. Furthermore, as part of the settlement process, Defendants have agreed to provide additional information regarding each potential Class Member that will aid the Settlement Administrator in disseminating the Notice to the proper parties. The proposed Notice describes the general terms of the Proposed Settlement set forth in the Stipulation, the definition of the Settlement Class and sub-classes for which certification is being sought, and the binding effect of any judgment rendered in the Action with respect to Defendants. The Notice also apprises all potential Class Members of their rights with respect to the Settlement, including the rights to opt out or to object. The date and time of the Final Approval Hearing will be added to the Notices before they are sent to the Settlement Class. Plaintiff believes that this notice program is reasonable and appropriate; will provide due, adequate, and sufficient notice to all persons entitled to be

provided with notice; and meets the requirements of Rule 23 of the Federal Rules of Civil Procedure and the Due Process Clause of the United States Constitution.

VII. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant preliminary approval of the Proposed Settlement and enter the proposed Preliminary Approval Order, submitted herewith as Exhibit B to the Stipulation.

Dated: November 17, 2017

Respectfully submitted,

ABBEY SPANIER, LLP

By: */s/ Karin E. Fisch*_____
Karin E. Fisch
kfisch@abbeyspanier.com
212 East 39th Street
New York, New York 10016
(212) 889-3700

FRUMKIN & HUNTER LLP
William D. Frumkin
wfrumkin@frumkinhunter.com
Elizabeth E Hunter
1025 Westchester Avenue, Suite 309
White Plains, New York 10604
(914) 328-0366

CONOVER LAW OFFICES
Bradford D. Conover, Esq.
Molly Smithsimon, Esq.
345 Seventh Avenue, 21st Floor
New York, New York 10001
(212) 588-9080

Counsel for Plaintiff