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

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. Should preliminary approval be granted, notice will be sent to potential members of the Class advising them of the terms of the Proposed Settlement and their rights with respect thereto, including the right to appear at a final fairness hearing to be scheduled. This motion is also supported by the Settlement Stipulation, dated November 19, 2018, with exhibits attached thereto (the "Stipulation"),[1] the Declaration of Karin E. Fisch in Support of Preliminary Approval of Proposed Settlement dated November 19, 2018, with exhibits attached thereto, and the Report Of David Breshears CPA/CFF, which addresses the amount of alleged class-wide incidental loss of wages and benefits.

Plaintiff believes that the settlement is fair and reasonable. Defendants have agreed "to prohibit management, as part of its Position to Win program or otherwise, from discharging, fining, suspending, expelling, disciplining, or discriminating against any employee, or reducing any employee's hours or denying an employee increased hours, for the purpose of denying that employee coverage, or eligibility for coverage, under the Dave & Buster's Health Insurance Plan or interfering with the attainment of any right to which such employee may become entitled

[1] The Stipulation, together with all attachments thereto, is submitted herewith as Ex. 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.

under the Dave & Buster's Health Insurance Plan," (the "Injunctive Relief"). The Class members will receive significant compensation for their incidental loss of wages and benefits incurred as a result of the alleged ERISA violations. The settlement will avoid substantial risks in litigation precluding the class from any recovery, including, but not limited to, risks that the Court could determine that the monetary relief is not incidental to the equitable relief or that class issues do not sufficiently predominate over individual issues so as to permit class certification.

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 as part of a company-wide program called "Position to Win", causing them to lose health benefits offered to full-time employees or eligibility for such health benefits. Plaintiff alleged that the primary purpose of the reduction in her hours was to deprive her of full-time healthcare benefits in violation of ERISA § 510. The Proposed Settlement includes injunctive relief addressing the alleged misconduct going forward and incidental monetary relief to compensate Class Members for alleged past losses of wages and full-time insurance coverage.

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 settle the action as to the putative Class on terms set forth in a prior stipulation presented to the court in 2017. The Court expressed concern with several aspects of the prior settlement at the

November 30, 2017 hearing scheduled to address preliminary approval and declined to preliminarily approve the original settlement by Order dated December 1, 2017. Counsel for the parties discussed the Court's concerns over a period of time and negotiated the current Proposed Settlement, which modifies the previous agreement, bearing in the mind the specific issues raised by the Court at the previous November 30, 2017 preliminary approval hearing, in its December 1, 2017 and at a status conference with counsel for the parties on January 19, 2018.

After significant arm's-length negotiations which continued after the original preliminary approval hearing, Defendants have agreed to equitable relief that directly addresses the claim in this case that Dave & Buster's engaged in unlawful discriminatory conduct for the purpose of depriving proposed Class Members of full-time insurance benefits in violation of ERISA § 510. Defendants also 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 at a hearing to be scheduled, the Proposed Settlement will resolve all aspects of 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 of 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 Marin 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 as part of the Position to Win program. By letter dated March 10, 2014, Ms. Marin was notified that she no longer qualified for coverage under Dave & Buster's medical plans offered to full-time employees because her employment status had changed to part-time. Ms. Marin commenced this lawsuit on her own behalf, and on behalf of all others similarly situated, alleging that Dave & Buster's had reduced her hours with the specific intent of preventing her from obtaining the full-time 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 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 their first agreement in principle to settle the action as to the putative Class.

Once the parties agreed upon principal terms, additional negotiations ensued regarding the details of the first 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 a stipulation that detailed the terms of their prior settlement. At the preliminary approval hearing held on November 30, 2017, the Court expressed several concerns regarding the terms of the prior settlement and denied Plaintiff's motion for preliminary approval in an Order dated December 1, 2017. Since that time, the parties have engaged in further negotiations regarding certain aspects of the Settlement and further discussions regarding the range of potential losses to Class Members. With the assistance of the Court, the parties were able to agree on the Settlement Agreement submitted herewith.

The previous settlement presented to the Court has been modified to address the concerns raised by the Court at the Preliminary Approval Hearing held on November 30, 2017 and in the Order dated December 1, 2017. Those concerns and the resulting modifications agreed upon are as follows:

Equitable Relief: The Court expressed concern at the November 30, 2017 preliminary approval hearing that the prior proposed settlement did not address the nature of the equitable claims asserted. Specifically, the Court was concerned that the settlement did not prevent Dave & Buster's from paying Class Members as part of the settlement, but then continuing in its alleged discriminatory conduct. The current Proposed Settlement provides the Injunctive Relief which is consistent with the claims asserted.

Reverter: The Court expressed concern that the previous settlement contained a reverter to Defendants in the event that Class Members did not cash their settlement checks or opted out of the cash payment. The current Proposed Settlement provides that any funds not claimed by Class Members for any reason will be redistributed to Class Members whose Settlement Checks

were cashed on a pro rata basis. No funds will revert to Defendants, but rather will augment the recoveries of participating Class Members.

Class Certification: The Court was concerned with the certification of a class under Fed. R. Civ. P. 23(b)(2) and (b)(3) in light of the lack of equitable relief in the prior settlement. The parties have now agreed to the Injunctive Relief. The monetary component of the Proposed Settlement is intended to compensate Class Members for their potential incidental loss of wages and benefits. Because of the nature of the claim and the incidental monetary portion of the Settlement, Plaintiff respectfully requests that the members of the Class be offered opt-out rights to the extent that any employee wishes to pursue an individual claim for any reason. This can be accomplished in one of two ways as addressed below.

Monetary Award: Prior to the mediation, the parties separately assessed potential wage and insurance losses to employees that resulted from Defendants' alleged discriminatory conduct. Plaintiff's counsel analyzed documents produced by Defendants in an effort to quantify the potential wage and insurance losses to the Class as a whole. Based upon the documents provided, Plaintiff arrived at a range of values and believed that the monetary portion of the prior settlement fell within the range of reasonableness for a class action settlement. At the November 2017 hearing, the Court expressed its belief that the parties should be able to arrive at a more accurate figure than had been provided by Plaintiff. Using additional data provided by Defendants, Plaintiff has arrived at a more accurate assessment of potential incidental wage and premium losses in the amount of approximately $21.8 million. *See* Report of David Breshears, CPA/CFF, submitted herewith. Plaintiff continues to believe that the Proposed Settlement falls within the range of reasonableness in light of the risks of continued litigation and is in the best interests of the Class.

III. THE PROPOSED SETTLEMENT

As set forth in the Stipulation, Defendants have agreed to equitable relief that addresses the exact issue raised in the Complaint. Specifically, Dave & Buster's has agreed "to prohibit management, as part of its Position to Win program or otherwise, from discharging, fining, suspending, expelling, disciplining, or discriminating against any employee, or reducing any employee's hours or denying an employee increased hours, for the purpose of denying that employee coverage, or eligibility for coverage, under the Dave & Buster's Health Insurance Plan or interfering with the attainment of any right to which such employee may become entitled under the Dave & Buster's Health Insurance Plan." Dave & Buster's also has agreed to pay a maximum amount of $7,425,000 into a Qualified Settlement Fund ("QSF"). This agreement is intended to fully resolve the claims asserted in this Action. 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. Any amount remaining in the QSF following a reasonable period after the initial mailing of checks 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. There will be no reversion of funds to Dave & Buster's. If any funds remain in the QSF following one hundred eighty (180) calendar days after such re-distribution, 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.

Plaintiff's counsel agreed to the terms of this 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. Plaintiff's counsel also believe that the Proposed Settlement address the Court's previous stated concerns raised on November 30, 2017 and in the December 1. 2017 Order.

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, two phases of mediation, and additional negotiations to address concerns with the Settlement raised by the Court. 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.

Plaintiff believes that a settlement of $7,425,000, an amount in excess of 33.3% of the $21,130,816 in total potential damages suffered by the class, plus the Injunctive Relief, is reasonable and fair given the risks of litigation. If Plaintiff were to proceed with litigation and not settle, then she and the Class Members she seeks to represent will face a substantial risk of no recovery. Defendants have advanced, among others, two notable arguments in their defense in this action, first, that back pay is not a remedy that is recoverable under ERISA § 510, and, second, that individual employee issues may preclude class certification.

In their motion to dismiss, Defendants argued that back pay is not an available remedy in an ERISA § 510 discrimination claim and that claims for back pay are not incidental to injunctive relief. In response, Plaintiff argued that, after the Supreme Court's decision in *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), 122 S. Ct. 708 (2002) an ERISA § 510 plaintiff can recover back pay because the back-pay award is intertwined with the equitable

relief. *Simons* v. *Midwest Telephone Sales & Service, Inc.*, 462 F. Supp. 2d 1004 (D. Minn. 2006); *Porter* v. *Elk Remodeling, Inc.*, 2010 WL 2640162 (E.D. Va. July 1, 2010); *Perez* v. *Brain*, 2015 WL 3505249 (CD. Cal. Jan. 30, 2015); *Wiideman* v. *DaimlerChrysler Corp.*, 2006 WL 2850577 (E.D. Mich. Oct. 3, 2006).

The Court agreed with Plaintiff that back pay is recoverable in an ERISA § 510 case in the context of the motion to dismiss. *Marin v. Dave & Buster's, Inc.*, No. 1:15-cv-036082016 WL 526542 (S.D.N.Y. Feb. 19, 2016). However, if this case were not settled, Defendants could and would revisit the arguments that back pay is not an available remedy in an ERISA § 510 discrimination claim and that claims for back pay are not incidental to injunctive relief. Defendants might also argue that the size of the back-pay award in comparison to the injunctive relief takes this case out of the line of precedent holding that back-pay is incidental to the equitable relief. *Harris v. Finch, Pruyn & Co.*, No. 1:05-CV-951, 2008 WL 4155638, at *7 (N.D.N.Y. Aug. 26, 2008) ("A number of courts have determined what relief is 'incidental' by examining the relative monetary values of the legal and equitable relief requested."). Here, Plaintiff believes that the monetary value of the Injunctive Relief is significant in comparison the monetary component of the Proposed Settlement. Absent settlement, Defendants will likely argue to the contrary.

Second, Plaintiff contends that class certification is premised on the Class suffering a common loss in wages and benefits because of the Position to Win Program, which allegedly was a program expressly aimed at depriving the Class of their full-time insurance benefits or eligibility for full-time benefits. Plaintiff would rely on substantial evidence of a company-wide policy in support of class certification. However, Defendants would argue, as they have during this litigation, that class treatment would be inappropriate because the Position to Win Program

was not discriminatory, was implemented without consideration of any ERISA-protected right, and each decision made to reduce or not reduce a Dave & Buster's employee's hours was made on a case-by-case basis, taking into consideration the individual employee's work performance, availability, and tenure. Defendants also did and would continue to argue that sorting through which employees suffered reduced hours because of Position to Win and which employees reduced their hours voluntarily for other reasons involves an individual analysis of each employee's circumstances, grounds for denial of class certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362–63 (2011) ("When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class."). Here, based on extensive document discovery, Plaintiff believes that the company-wide Position to Win Program accounts for the reduction in hours for the vast majority of the Class. However, if the case were not settled, Defendants would argue to the contrary.

In addition to these two looming issues, Defendants argued that they did not violate ERISA, raising other defenses to the claims asserted, including that the Position to Win program had valid business purposes, including to better manage the hours of its workforce given the seasonality of its business, and that eligibility for or enrollment in current benefits were not factors considered by the managers when making their decisions to reduce hours.. Under these circumstances, Plaintiff believes the Settlement represents an excellent result, achieving (1) Injunctive Relief that prohibits "management, as part of its Position to Win program or

otherwise, from discharging, fining, suspending, expelling, disciplining, or discriminating against any employee, or reducing any employee's hours or denying an employee increased hours, for the purpose of denying that employee coverage, or eligibility for coverage, under the Dave & Buster's Health Insurance Plan or interfering with the attainment of any right to which such employee may become entitled under the Dave & Buster's Health Insurance Plan." and (2) compensation for some portion of alleged incidental losses to Class Members resulting from the change in wages and full-time benefits. 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 an injunction and payment to Class Members for alleged incidental monetary losses 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 both the Injunctive Relief and a significant cash payment; (ii) the attendant risks of litigation, including complicated issues of law specific to this case and risks regarding class certification; 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.

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 a 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, excluding employees in Hawaii, 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, excluding employees in Hawaii, 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. <u>The Requirement of Numerosity is Satisfied</u>

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 2100, 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.

Plaintiff alleges that Dave & Buster's implemented a Position to Win Program (PTW) the common purpose of which was to cut the hours worked by full-time employees' to under thirty in order to cut healthcare costs at Dave & Buster's. Plaintiff alleged, and would have sought to prove on a class-wide basis, that the PTW program had the effect of depriving full-time employees of their existing full-time insurance benefits and eligibility for such benefits in a manner that violated ERISA. Accordingly, the alleged harm to all members of the proposed Class can be redressed in a uniform manner through the Injunctive Relief and cash component of the Proposed Settlement.

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 contends that she 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 offered to full-time employees. 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 offered to full-time employees. 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 full-time 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. Plaintiff asserts that 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 Both Rule 23(b)(2) and 23(b)(3) are Satisfied

The Proposed Settlement includes an injunction and incidental monetary relief. The equitable relief addresses future conduct and the incidental relief compensates Class Members for the alleged past harm. Cases brought under ERISA § 510 fall under the remedies provision of ERISA § 502(a)(3), which allows a participant, beneficiary, or fiduciary to sue "to enjoin any act or practice which violates" ERISA or "to obtain other appropriate equitable relief." 29 U.S.C. 1132(a)(3). Relief can be awarded even where there is a monetary component to the relief

sought, so long as the monetary relief is incidental to the equitable remedy. *See Russell v. Northrop Grumman Corp*., 921 F. Supp. 143, 152-53 (E.D.N.Y. 1996)(back pay awarded to § 510 employee against employer is restitutionary and incidental to other equitable relief); *Resner v. Arc Mills, Inc.*, No. 95-CIV-2924(JSM) 1996 WL 554571, at *2 (S.D.N.Y. Sept. 30, 1996) ("They are also entitled to equitable relief provided under § 502(a)(3) which may include lost wages or benefits."). Back pay also can be considered equitable in nature under certain circumstances. *See, e.g., Cigna Corp. v. Amara*, 131 S.Ct. 1866, 1880 (2011)(clarifying that "the fact that ... relief takes the form of a money payment does not remove it from the category of traditionally equitable relief."); *Russell*, 921 F. Supp. at 151-52 (holding that when lost wages "restore the status quo and return the amount rightfully belonging to another," they will be regarded as restitutionary and equitable.); *Dobson v. The Hartford Fin. Servs. Grp., Inc.*, No. 3:99-cv-2256 (JBA), 2002 U.S. Dist. LEXIS 17682, at *6-7 (D. Conn. Aug. 2, 2002)("disgorgement of profits earned on wrongfully withheld benefits is an equitable remedy under ERISA § 502(a)(3)").

Once settlement discussions progressed to a point where it appeared that a part of the relief granted would be monetary, due process concerns regarding payment of money without a corresponding right to opt out of the Proposed Settlement were implicated. However, 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 back-pay 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 *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 eligibility for 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"). Under the terms of the Proposed Settlement, Defendants have agreed to final injunctive relief respecting the Class as a whole.

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, Plaintiff asserts that 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.

As an alternative to a hybrid class, the Court may certify a Class under Rule 23(b)(2) but allow Class Members to opt-out of the Class. A court always has broad discretion under Rule 23(c)(2)(A) and 23(d) with respect to notice and other aspects of class certification in an action certified under 23(b)(2). Several courts have exercised that discretion by certifying a class but allowing opt-out rights to account for the facts that (1) there would be a monetary component to

any recovery and (2) some class members might have stronger cases that they might want to pursue. For example, in *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588, 603-05 (E.D. Mich. 1996), a group of retirees sued the corporate defendant under ERISA for failing to provide post-retirement medical benefits. Concerned that certain class members might have claims that they wished to pursue individually, the Court, relying on Fed. R. Civ. P. 23(d)(2), found it appropriate to require that class members be notified and provided with an opportunity to opt out of the 23(b)(2) class. *Id*. Similarly in *In Penson v. Terminal Transp. Co.*, 634 F.2d 989, 993–94 (5th Cir. 1981), an employment discrimination case under Title VII, the plaintiff sought reinstatement, back pay, and injunctive relief. There, the court held that "a district court, however, acting under its Rule 23(d)(2) discretionary power, may require that an opt-out right and notice thereof be given should it believe that such a right is desirable to protect the interests of the absent class members." *Id*. (citations omitted). Finally, in *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 464 (N.D. Cal. 1994), *as amended on denial of reconsideration* (Sept. 15, 1994), the court certified a (b)(2) class of disabled persons suing for injunctive relief and damages under the ADA, but required notice and the opportunity to opt out, taking into account the specific facts and circumstances of that case.

Thus, as an alternative to certifying a hybrid class, the Court may exercise its discretion under Rule 23(d)(2) to certify a 23(b)(2) class, but with notice and opt-out rights. The result is the same either way – the injunctive relief is binding with respect to Dave & Buster's, but Class Members have the right to exclude themselves from the incidental monetary relief for any reason, including should they wish to pursue individual claims arising out of the conduct set forth in the Complaint. Either way, the Proposed Notice will stay the same and has been drafted to comply with the more stringent requirements of Rule 23(b)(3).

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 20, 2018

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