

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,

15 Civ. 3608 (AKH)

- against -

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

Defendants.

**DECLARATION OF KARIN E. FISCH  
IN SUPPORT OF PLAINTIFF'S MOTION FOR  
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

1. I am a partner at the law firm of Abbey Spanier, LLP, one of the counsel for Plaintiff in this Lawsuit.

2. This declaration is being submitted in support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, Conditional Class Certification and Approval of Notice Plan, dated November 19, 2018.

3. Attached hereto as Exhibit A is a true and correct copy of the Settlement Agreement between Class Representative Maria de Lourdes Parra Marin, and Defendants Dave & Buster's, Inc. and Dave & Buster's Entertainment, Inc., with exhibits attached thereto.

4. Attached hereto as Exhibit B is the Expert Report of David Breshears, CPA/CFF dated November 19, 2018.

5. Attached hereto as Exhibits C-E are the firm resumes of Abbey Spanier, LLP, Conover Law Offices and Frumkin & Hunter LLP, the three firms seeking to be appointed as Class Counsel in this Action.

I affirm under penalty of perjury that the foregoing is true and correct.

Dated: November 19, 2018

By: /s/ Karin E. Fisch  
Karin E. Fisch

FISCH DECLARATION EXHIBIT A  
(Settlement Agreement)

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,

15 Civ. 3608 (AKH)

- against -

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

Defendants.

**SETTLEMENT STIPULATION**

This Settlement Stipulation is entered into by and between the Class Representative Maria de Lourdes Parra Marin (“**Plaintiff**” or “**Class Representative**” or “**Ms. Marin**”) on behalf of herself and the Settlement Class she seeks to represent, and Defendants Dave & Buster’s, Inc. and Dave & Buster’s Entertainment, Inc. (collectively, the “**Defendants**” or “**Dave & Buster’s**”), to fully and completely settle the putative class claims in the above-captioned matter.

WHEREAS, on May 8, 2015, the Class Representative, on behalf of herself and a “class of persons currently or formerly employed by Dave & Buster’s (i) who were participants in an ERISA health insurance plan sponsored by Dave & Buster’s (the ‘Dave & Buster’s Plan’); and (ii) whose hours were involuntarily reduced by Dave & Buster’s from on or about June 1, 2013 to the present after the enactment of the Patient Protection and Affordable Care Act (‘ACA’), which reductions resulted in either the loss of their insurance coverage under the Dave & Buster’s Plan or being offered only inferior health insurance...”, filed a class action complaint

asserting claims under ERISA § 510 for injunctive relief and alleged lost wages, lost benefits, attorneys' fees and costs, interest, and other relief (the "**Complaint**");

WHEREAS, on July 31, 2015, Defendants filed a motion to dismiss all of Plaintiff's claims, which was fully briefed and argued on January 6, 2016, and the Court denied Defendants' motion on February 9, 2016, *see Marin v. Dave & Buster's, Inc.*, 159 F. Supp. 3d 460 (S.D.N.Y. 2016);

WHEREAS, Defendants answered the Complaint on March 24, 2016 and expressly denied any wrongdoing and all liability, and the Parties thereafter engaged in discovery, including substantial document production by Defendants;

WHEREAS, the Parties engaged in informal settlement discussions both before and after the Court's February 9, 2016 decision; on March 20, March 21, and June 30, 2017, the Parties participated in private mediation; on June 30, 2017, the Parties reached an agreement in principle to settle the Action but that proposed settlement was not approved by the Court; the Parties engaged in further negotiations; and on October 22, 2018, the Parties reached an agreement in principle to settle the Action as to the putative Class on the terms set forth herein;

WHEREAS, Defendants expressly deny that they have committed any wrongdoing or violated ERISA § 510, vigorously dispute the claims asserted in the Action, and continue to assert that they have strong and meritorious defenses to any and all such claims; and

WHEREAS, to avoid uncertainty and the expense and burdens of further litigation, and after substantial arm's-length settlement negotiations, the Class Representative, on behalf of herself and all other similarly-situated individuals, and Defendants desire to resolve the Action;

**NOW, THEREFORE**, the Parties agree as follows:

1. **Definitions.** The following capitalized terms, used in this Settlement Stipulation, shall have the meanings specified below:
  - a. **“Action”** means the case *Maria de Lourdes Parra Marin v. Dave & Buster's, Inc., and Dave & Buster's Entertainment, Inc.*, No. 15 CV 3608 (S.D.N.Y.).
  - b. **“Class Counsel”** means the law firms of Abbey Spanier, LLP, Conover Law Offices, and Frumkin & Hunter LLP.
  - c. **“Class Counsel Attorneys’ Fees and Lawsuit Costs”** means the amount of attorneys’ fees and expenses to be paid to Class Counsel from the QSF (as defined in Section 1(cc)), pursuant to Class Counsel’s motion and subject to the Court’s approval and the terms described in Section 18 below.
  - d. **“Class List”** means a list containing Class Members’ names, Social Security numbers, and last-known street addresses and telephone numbers (including but not limited to mobile phone numbers) and email addresses that Defendants shall provide to the Settlement Administrator, as described in Section 10.
  - e. **“Class Member Settlement Payment”** means, for each Class Member, whether participating or not, his or her individual settlement payment, to be calculated by the Settlement Administrator as described in Section 11 below, and from which the Class Member’s share of payroll taxes shall be deducted.
  - f. **“Class Members”** means the individuals falling within the Settlement Class, as described in Section 4, below.
  - g. **“Class Period”** means the period of time beginning February 1, 2013 through and including the Preliminary Approval Date.

- h. **“Class Released Claims”** means any and all possible claims, complaints, liabilities, promises, obligations, demands, agreements, damages (including back pay), debts, dues, sums of money, covenants, and lawsuits of any nature whatsoever, that were or could have been asserted based on the facts alleged in the Complaint, and all retaliation claims that were or could have been asserted, against the Released Parties in the Action, whether known or unknown, that accrue up through the Preliminary Approval Date including without limitation all claims for restitution (including interest) and other equitable relief, liquidated damages, interest, compensatory damages, punitive damages, penalties of any nature whatsoever, other compensation or benefits, and attorneys’ fees and costs, asserted, or which could have been asserted, against the Released Parties in the Action.
- i. **“Class Representative”** means Plaintiff Maria de Lourdes Parra Marin.
- j. **“Class Settlement Amount”** means seven million four hundred twenty-five thousand dollars (\$7,425,000) to be paid by Defendants to fund the QSF (as defined in Section 1(cc)), which will be available for distribution to Participating Class Members (minus any payments for Settlement Administrator Fees and Costs, Incentive Award, Employee Taxes, and Employer Taxes) and for payment of Class Counsel Attorneys’ Fees and Lawsuit Costs (subject to the Court’s approval, as described in Section 18(a)).
- k. **“Court”** means the United States District Court for the Southern District of New York, and any appellate court which may review any orders entered related to this Settlement Stipulation.

- l. **“Dave & Buster’s Plan”** means any of the health insurance options offered by Dave & Buster’s only to qualifying full-time employees during the Class Period.
- m. **“Defendants’ Counsel”** means Paul, Weiss, Rifkind, Wharton & Garrison LLP.
- n. **“Employee Taxes”** means all employee federal, state, and local payroll taxes, including but not limited to Social Security and Medicare taxes, that are payable by Class Members for the payments made to them under this Settlement Stipulation.
- o. **“Employer Taxes”** means all employer federal, state, and local payroll taxes, including but not limited to Social Security, Medicare, federal and state unemployment taxes, and disability insurance taxes, that are payable by Defendants for the payments made to the Class Members under this Settlement Stipulation.
- p. **“Final Approval Hearing”** means the final hearing scheduled before the Court on the question of whether the Settlement, including payment of Class Counsel Attorneys’ Fees and Lawsuit Costs, Settlement Administrator Fees and Costs, and the Incentive Award (to be paid from the QSF, as defined in Section 1(cc)), should be finally approved as fair, reasonable and adequate as to the Class Members.
- q. **“Final Approval Motion”** means the request for a Final Approval Order. The Final Approval Motion shall be filed with the Court by the Class Representative, on behalf of herself and all other similarly situated individuals.
- r. **“Final Approval Order”** means the Court’s order granting final approval of this Settlement Stipulation.



- s. **“Incentive Award”** means the amount, if any, approved by the Court as a reasonable incentive award to be paid from the QSF (as defined in Section 1(cc)) to the Class Representative.
- t. **“Injunctive Relief”** means the agreement of Dave & Buster’s 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.
- u. **“Net Settlement Amount”** means the remainder of the Class Settlement Amount, which shall be used to pay the Class Member Settlement Payments after deductions for Court-approved Class Counsel Attorneys’ Fees and Lawsuit Costs, Incentive Award, Settlement Administrator Fees and Costs approved by the Court, and Employer Taxes.
- v. **“Notice”** means a document substantially in the form attached hereto as Exhibit A, which shall be issued in English and Spanish, or as otherwise approved by the Court.
- w. **“Notice Period”** means the period beginning immediately after the Settlement Administrator (as defined in Section 1(ff)) first mails the Notice (as defined in Section 1(u)) to any of the Class Members (as defined in Section 1(v)) until the deadline to return a Request for Exclusion, as described in Section 12(h).

- x. **“Participating Class Members”** means Class Members who do not exclude themselves by submitting a timely Request for Exclusion (as defined in Section 1(ee)).
- y. **“Parties”** means Dave & Buster’s and the Class Representative, acting on behalf of herself and all other similarly situated individuals.
- z. **“Preliminary Approval Date”** means the date the Preliminary Approval Order is entered by the Court.
- aa. **“Preliminary Approval Motion”** means the request for a Preliminary Approval Order, which Order shall be substantially in the form attached as Exhibit B, or as otherwise approved by the Court. The Preliminary Approval Motion shall be filed with the Court by the Class Representative, on behalf of herself and all other similarly situated individuals.
- bb. **“Preliminary Approval Order”** means the Court’s order preliminarily approving this Settlement, which Order shall be substantially in the form attached as Exhibit B, or as otherwise approved by the Court.
- cc. **“QSF”** means the qualified settlement fund to be established and administered by the Settlement Administrator and funded by Dave & Buster’s for the purpose of holding the Class Settlement Amount in its entirety. The Parties intend that the settlement fund be a qualified settlement fund within the meaning of Treasury Regulation § 1.468B-1. In no event shall Dave & Buster’s be required to pay an amount in excess of the Class Settlement Amount (as defined in Section 1(j)) to fund the QSF. If the QSF is held in an interest-bearing account, then any interest that accrues shall be included in the Net Settlement Amount. The QSF will be

controlled by the Settlement Administrator subject to the terms of this Settlement Stipulation and the Court's orders.

- dd. **"Released Parties"** means Defendants and any and all of Defendants' past, present, and future parents, subsidiaries, affiliates, and divisions, and each of their past, present, and future shareholders, officers, partners, directors, legal representatives, members, principals, managers, employees, fiduciaries, trustees, employee retirement or benefit plans (and the trustees, administrators, fiduciaries, agents, representatives, insurers and re-insurers of such plans), agents, insurers, re-insurers, heirs, administrators, executors, successors, and assigns, each whether acting in his or her official or individual capacity, and all persons and/or entities acting by, through, under, or in concert with any of them and any individual or entity which could be jointly liable with any of them, each whether acting in his or her official or individual capacity.
- ee. **"Request for Exclusion"** means a written, signed statement that an individual Class Member has decided to opt-out and not be included in this Settlement. Requests for Exclusion must conform to the requirements described in Section 12(h).
- ff. **"Settlement Administrator"** means Strategic Claims Services.
- gg. **"Settlement Administrator Fees and Costs"** means a reasonable amount to be paid to the Settlement Administrator from the QSF for administering the Settlement, subject to the Court's approval and the limitations described in Section 8(e) below.

hh. “**Settlement Check**” means the check that each Participating Class Member will receive, equaling the amount of a Participating Class Member’s Class Member Settlement Payment and Incentive Award (if any), less the Participating Class Member’s share of applicable payroll taxes, to be sent by the Settlement Administrator as described in Section 13(a).

ii. “**Settlement Effective Date**” means:

- (i) If no appeal is taken from the Final Approval Order (as defined in Section 1(r)), thirty-five (35) calendar days after the Court’s entry of the Final Approval Order; or
- (ii) If an appeal or other judicial review of the Final Approval Order has been taken or sought, the date on which all such appeals (including, *inter alia*, petitions for rehearing or reargument, petitions for rehearing *en banc*, and petitions for *certiorari* or any other form of review) have been finally adjudicated and the Final Approval Order can no longer be appealed or reviewed.

jj. “**Settlement Stipulation**” or “**Settlement**” means the terms described in this agreement.

2. **Class Settlement Consideration.** In consideration of the agreements made in this Settlement Stipulation, and in full and complete settlement of the Action as to the putative class claims, Defendants have agreed to the Injunctive Relief and shall pay no more than the Class Settlement Amount (as defined in Section 1(j)), consisting of seven million four hundred twenty-five thousand dollars (\$7,425,000) to be paid by Defendants to fund the QSF (as defined in Section 1(cc)), which will be available for distribution to

Participating Class Members (minus any payments for Settlement Administrator Fees and Costs, Incentive Award, Employee Taxes, and Employer Taxes), and for payment of Class Counsel Attorneys' Fees and Lawsuit Costs (subject to the Court's approval, as described in Section 18(a)).

3. **No Admission of Liability and No Concession as to the Merits.** Dave & Buster's expressly denies that it violated the law in any manner alleged in or related to the Complaint in this Action. The Parties enter into this Settlement Stipulation to avoid the risks, uncertainty, inconvenience, expense, and burden of further disputes and litigation. Neither the Settlement Stipulation nor any of its terms shall constitute an admission or finding of wrongful conduct, acts, or omissions on the part of any Released Party, or be admissible as evidence of any such wrongful act or omission in any judicial, arbitral, administrative, or investigative proceeding.

4. **Settlement Class.**

- a. The Parties shall ask the Court to certify a Settlement Class consisting of two sub-classes:
- (i) **"Lost Hours and Benefits Sub-Class"** – all persons currently or formerly employed by Dave & Buster's as hourly wage, full-time employees, excluding employees in Hawaii, 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.

- (ii) **“Lost Hours and Eligibility Sub-Class”** – all persons currently or formerly employed by Dave & Buster's as hourly wage, full-time employees, excluding employees in Hawaii, 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.

- b. Together, the Lost Hours and Benefits Sub-Class and the Lost Hours and Eligibility Sub-Class are the “Settlement Class.”
- c. 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.

5. **Certification.** The Parties will propose to the Court that the Settlement Class be certified pursuant to Fed. R. Civ. P. 23(b)(2) and 23(b)(3).

6. **Releases.**

- a. **Class Members' Release.** Subject to final approval by the Court of the Settlement, and for good and valuable consideration set forth herein, the receipt and sufficiency of which is hereby acknowledged, all Class Members who do not

exclude themselves by submitting a timely Request for Exclusion (as defined in Section 1(ee)), on behalf of themselves, their spouses, heirs, executors, administrators, successors, assigns, and other personal representatives, freely and unconditionally relinquish, waive, release, and forever discharge each of the Released Parties (as defined in Section 1(dd)) from any and all possible claims, complaints, liabilities, promises, obligations, demands, agreements, damages (including back pay), debts, dues, sums of money, covenants, and lawsuits of any nature whatsoever, that were or could have been asserted based on the facts alleged in the Complaint, and all retaliation claims that were or could have been asserted against the Released Parties in the Action, whether known or unknown, that accrue up through the Preliminary Approval Date, including without limitation all claims for restitution (including interest) and other equitable relief, liquidated damages, interest, compensatory damages, punitive damages, penalties of any nature whatsoever, other compensation or benefits, and attorneys' fees and costs, asserted, or which could have been asserted, against the Released Parties in the Action.

- b. Upon the Settlement Effective Date, all Class Released Claims against Released Parties shall be fully, finally, and forever released, relinquished, and discharged with prejudice and on the merits, without costs to any party (other than as provided herein).
- c. Each Class Member who does not exclude him/herself by submitting a timely Request for Exclusion (as defined in Section 1(ee)) agrees not to institute or receive any other relief from any other suit, administrative claim, or other claim

of any sort or nature whatsoever, and specifically waives any and all claims against the Released Parties for damages or other relief relating to the Class Released Claims that accrue up through the Preliminary Approval Date.

- d. Nothing in the Settlement Stipulation shall be construed to bar any claims of Class Members that arise from conduct arising after the Preliminary Approval Date, nor does this Settlement Stipulation bar any claims to enforce the Settlement Stipulation.
- e. Class Members who do not timely opt out shall, upon the Settlement Effective Date, be deemed to have fully, finally, and irrevocably waived, released, and discharged the Released Parties from any and all Class Released Claims arising at any time through the Preliminary Approval Date, whether or not they cash their Settlement Check.

7. **Mutual Full Cooperation/Submission of Settlement to Court for Approval.**

- a. The Parties will work in good faith with each other and the Settlement Administrator to effectuate the terms of this Settlement Stipulation, including but not limited to, preparing and executing documents necessary to implement this Settlement Stipulation, preparing and filing of a Preliminary Approval Motion, obtaining the Court's preliminary and final approval of this Settlement Stipulation, obtaining certification of the Settlement Class and the appointment of Class Counsel, and defending this Settlement Stipulation from any legal challenge.
- b. Class Counsel shall be responsible for drafting the Preliminary Approval Motion, which draft shall be presented to Defendants' Counsel as soon as practicable before filing. Defendants reserve the right to oppose or supplement the motion as



they deem appropriate. Class Counsel shall use their best efforts to coordinate with Defendants' Counsel regarding the submission of the papers necessary to obtain a Preliminary Approval Order.

- c. Class Counsel shall be responsible for drafting the Final Approval Motion, which draft shall be presented to Defendants' Counsel as soon as practicable before filing. Defendants reserve the right to oppose or supplement the motion as they deem appropriate. The Class Representative, on behalf of herself and all other similarly situated individuals, shall file the Final Approval Motion no later than seven (7) calendar days before the Final Approval Hearing, unless the Court requests otherwise.

8. **Settlement Administrator.**

- a. The Parties have jointly selected and agreed on the Settlement Administrator, who shall serve as the administrator of the Settlement and perform the services described in this Settlement Stipulation and any other services mutually agreed to by the Parties. The Settlement Administrator shall be required to sign a confidentiality and indemnification agreement with the Parties. The Parties shall negotiate and agree expeditiously on such an agreement, the terms of which must be in accordance with the terms of this Settlement Stipulation and acceptable to Defendants.
- b. The Parties, through their counsel, shall cooperate in good faith to resolve any disputes regarding the Settlement Administrator's ability or need to perform certain duties under this Settlement Stipulation, and any unresolved disputes shall be referred to the Court. The Settlement Administrator shall disseminate the

Notice, using the attachment to this Settlement Stipulation and records provided by Dave & Buster's in accordance with this Settlement Stipulation and Court order. The Settlement Administrator shall report on at least a bi-weekly basis, in summary or narrative form, the substance of its findings, as described in Section 8(d).

- c. Dave & Buster's shall provide the Settlement Administrator with certain data regarding the Class Members, as described in accordance with Section 10(b), in order for the Settlement Administrator to perform its duties, provided, however, that the Settlement Administrator shall maintain this data as confidential. All data and information provided by Dave & Buster's shall not be disclosed to the Class Representative or anyone else external to the Settlement Administrator without the written consent of Dave & Buster's. Notwithstanding the immediately preceding sentence, the Settlement Administrator will provide all data and information regarding the Class Members to Class Counsel on an anonymized basis.
- d. The Parties shall have equal access to the Settlement Administrator. The Settlement Administrator shall provide regular reports to the Parties' counsel regarding the status of the mailing of the Notice to Class Members, the claims administration process, and the distribution of payments to Participating Class Members, provided, however, that the Settlement Administrator shall not disclose any identifying information to Class Counsel except pursuant to Sections 8(c) and 10(c) of this Settlement Stipulation.

- e. The Settlement Administrator shall be paid its reasonable and actual fees and costs from the QSF, which fees and costs shall be subject to approval by the Court. The Settlement Administrator Fees and Costs approved by the Court shall be paid to the Settlement Administrator no later than twenty (20) calendar days after the Settlement Effective Date.
  - f. Should the Settlement Administrator determine that any of the dates and deadlines contained in this Settlement Stipulation are not feasible, the Settlement Administrator shall alert the Parties' counsel and request an alternative date or deadline. The Parties will agree to any reasonable request by the Settlement Administrator to alter dates or deadlines, provided that agreeing to the request would not cause the entire notice and administration process to take longer than one hundred sixty-five (165) days.
9. **Notices Mandated by Statute.** No later than ten (10) calendar days after the date on which the Preliminary Approval Order is entered, the Settlement Administrator shall prepare and mail notices of the Settlement to all "Appropriate Federal Officials" and "Appropriate State Officials," as required by the Class Action Fairness Act, 28 U.S.C. § 1715. The costs related to these Class Action Fairness Act notices shall be paid from the QSF, and are part of the Settlement Administrator Fees and Costs.
10. **Information to be Provided by Defendants.**
- a. Dave & Buster's shall work cooperatively and in good faith with Class Counsel and the Settlement Administrator to facilitate the notice and claims process.
  - b. No later than ten (10) calendar days after the Preliminary Approval Date, Dave & Buster's shall provide to the Settlement Administrator, to the extent Dave &

Buster's has such information, a Class List containing Class Members' names, Social Security numbers, last known street addresses, telephone numbers (including but not limited to mobile phone numbers), and email addresses. No later than ninety (90) calendar days after the Preliminary Approval Date, Dave & Buster's shall also provide the Settlement Administrator with Class Members' payroll data, including wage rate(s), hours worked, and benefits enrollment data. Each Class Member will be assigned a unique, anonymous identification number which shall be utilized consistently on the information provided by Dave & Buster's to the Settlement Administrator pursuant to this Subsection, on all forms sent to Class Members, and in all reports provided by the Settlement Administrator to Class Counsel pursuant to this Settlement Stipulation.

- c. The Settlement Administrator will share anonymized data and information regarding the Class Members with Class Counsel pursuant to Section 8(c). The Settlement Administrator shall respond to general Class Member inquiries, although those seeking legal counsel shall be referred to Class Counsel with any information necessary, including identifying information, to assist Class Counsel in providing guidance to the Class Member. Additionally, if a Class Member contacts Class Counsel regarding his or her potential participation in this Settlement, upon request, the Settlement Administrator shall provide Class Counsel with any and all data about such individual, including any identifying information, (but not about any other Class Member), in order to enable Class Counsel to respond to the Class Member's inquiry. In the event that the Settlement Administrator provides such information to Class Counsel, the

Settlement Administrator shall keep records of the request and the information provided. Except as otherwise provided in Section 8(c) and this Subsection, the Settlement Administrator shall not disclose any identifying information to Class Counsel for Class Members.

11. **Determining Settlement Payments.**

- a. The Parties have agreed to the allocation formula attached as Exhibit C, which is subject to review by the Settlement Administrator. The Settlement Administrator shall calculate each Class Member Settlement Payment using the allocation formula attached as Exhibit C. Such formula may be modified, if necessary, upon written consent of the Parties.
- b. No later than ten (10) calendar days after the Final Approval Hearing, the Settlement Administrator shall calculate each Class Member Settlement Payment (which, as defined in Section 1(e), includes all Class Members, including those Class Members who are not Participating Class Members), after setting aside a portion of the QSF sufficient to pay the Incentive Award, Settlement Administrator Fees and Costs, Class Counsel Attorneys' Fees and Lawsuit Costs, and Employer Taxes. The Settlement Administrator shall then provide its calculations of the Class Member Settlement Payments to Class Counsel and to Defendants' Counsel no later than three (3) calendar days after completing such calculations, provided, however, that the Settlement Administrator shall not disclose any identifying information to Class Counsel for Class Members other than Plaintiff. Class Counsel, Defendants' Counsel, and Dave & Buster's shall have ten (10) calendar days to review, verify, and comment on the calculations

provided by the Settlement Administrator. The Settlement Administrator shall review any comments received from Class Counsel and/or Defendants' Counsel and shall finalize the calculations of the Class Member Settlement Payments no later than five (5) calendar days after receipt of such comments.

- c. The Settlement Administrator shall have sole responsibility for the calculations of Class Member Settlement Payments, except as provided in Subsection 11(b). Defendants, Defendants' Counsel, and Class Counsel shall have no liability, obligation, or responsibility for such calculations. The Settlement Administrator shall agree to indemnify Defendants, Defendants' Counsel, and Class Counsel for costs and liability arising out of any claim regarding the calculations of Class Member Settlement Payments by the Settlement Administrator.

12. **Notice Process.**

- a. Any Class Member who previously released claims that would otherwise be covered by this Settlement Stipulation, or who obtained a final judicial determination concerning claims that would otherwise be covered by this Settlement Stipulation, is not eligible to receive a Class Member Settlement Payment for those claims.
- b. **Form of Notice.** The Notice provided to each Class Member shall inform him/her of: the Settlement; the claims he/she is releasing by not submitting a Request for Exclusion; the formula that will be used to calculate the Class Member Settlement Payments (as set forth in Exhibit C); and identification number(s) that can be used to identify the Class Member. The Notice will explain that the Class Member Settlement Payment will be a proportionate share of the QSF, as determined by

the Settlement Administrator 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; (4) the Class Member's enrollment in and/or eligibility for the Dave & Buster's Plan during the Class Period; and (5) the fact that no compensation for the loss of wages will be given to a Class Member for any period in which such Class Member worked full-time hours, and no compensation for the loss of eligibility for benefits will be given to a Class Member for any period in which such Class Member met Dave & Buster's criteria for granting full-time status to hourly employees and therefore was eligible for health insurance benefits under the Dave & Buster's Plan.

- c. Sending the Notice. No later than thirty (30) calendar days after the Preliminary Approval Date, the Settlement Administrator, to the extent contact information is available, shall send the Notice to each Class Member that has been identified.
- d. Returned Notices. If a Class Member's Notice is returned with a forwarding address, the Settlement Administrator shall promptly re-mail the Notice to the forwarding address. If undeliverable Notices are returned without a forwarding address, the Settlement Administrator shall use standard skip-tracing devices based on LexisNexis or similar databases to obtain forwarding address information and re-mail the Notices to those Class Members. No Notice shall be mailed after the Notice Period, unless otherwise agreed by the Parties or ordered by the Court.

- e. Additional Forms of Notice. If the Court proposes or orders additional forms of notice and settlement administration, such additional costs shall be paid out of the QSF as part of the Settlement Administrator Fees and Costs.
- f. Declaration of Settlement Administrator. The Parties shall provide to the Court with the Final Approval Motion a declaration by the Settlement Administrator detailing its due diligence and summarizing proof of mailing with regard to the Notices and its compliance with the Class Action Fairness Act. The declaration shall also identify the number of Requests for Exclusion and any objections.
- g. Objecting to the Settlement. Class Members may object to the Settlement by following the instructions described in the Notice. To be valid, an objection must be postmarked or otherwise returned (via facsimile or email) to the Settlement Administrator no later than eighty (80) calendar days after the Notice is first mailed to Class Members. The Settlement Administrator shall send to the Parties' counsel copies of all objections no later than two (2) calendar days after their receipt, as they are received, and Class Counsel shall file such objections with the Court prior to the Final Approval Hearing. Dave & Buster's may submit additional records and/or information to the Settlement Administrator and Class Counsel in response to any Participating Class Member's objection, and the Settlement Administrator may consider the information submitted by Dave & Buster's and the Class Member before it makes a decision as to the amount of any payment in accordance with Section 11(a) and (b).



- h. Exclusions from the Settlement. Class Members may exclude themselves from the Settlement by submitting a timely Request for Exclusion to the Settlement Administrator by following the procedures set forth below for opting out:
- (i) Any Class Member who chooses to opt out of the Settlement as set forth in this Settlement Stipulation must submit a written, signed statement to the Settlement Administrator by first-class United States mail (postage prepaid), facsimile, or email that: (1) includes his or her name, address, and telephone number; and (2) unconditionally states an intention to opt out of the Settlement, such as: “I opt out of the class action litigation against Dave & Buster’s.”
  - (ii) To be effective, a Request for Exclusion must be postmarked or otherwise received by the Settlement Administrator no later than eighty (80) calendar days after the Notice is first mailed to Class Members. Requests for Exclusion that are not postmarked or otherwise received by the Settlement Administrator during the Notice Period are null and void, unless otherwise agreed to in writing by the Parties or approved by the Settlement Administrator. It is the responsibility of the Class Member submitting the Request for Exclusion to retain a copy of the Request for Exclusion and proof of timely submission.
  - (iii) The Settlement Administrator will stamp the postmark date or date received on the original of each Request for Exclusion that it receives. The Settlement Administrator shall also send copies of all Requests for Exclusion to Class Counsel and Defendants’ Counsel no later than two (2)

calendar days after their receipt, as they are received, and shall file all Requests for Exclusion with the Court prior to the Final Approval Hearing.

- (iv) Within five (5) calendar days following the end of the Notice Period, the Settlement Administrator shall send a final list of all Requests for Exclusion to Class Counsel and Defendants' Counsel by email. To the extent any Requests for Exclusion are timely postmarked but received after the final list of all Requests for Exclusion is sent to Class Counsel and Defendants' Counsel by email, the Settlement Administrator shall send an updated list of all Requests for Exclusion to Class Counsel and Defendants' Counsel by the next business day following the Settlement Administrator's receipt of any such Requests for Exclusion. The Settlement Administrator will retain the stamped originals of all Requests for Exclusion and originals of all envelopes accompanying Requests for Exclusion in its files until such time as the Settlement Administrator is relieved of its duties and responsibilities under this Settlement Stipulation.
- (v) Upon the Settlement Effective Date, all Class Members who have not properly submitted a Request for Exclusion that satisfies the requirements described in Subsection (h) of this Section will be bound by the Settlement and the terms of this Settlement Stipulation, and will have released their Class Released Claims, as set forth in this Settlement Stipulation and as approved by the Court.

13. **Payments to Participating Class Members/Taxation.**

- a. No later than thirty (30) calendar days after the Settlement Effective Date, the Settlement Administrator shall mail the Settlement Checks to each Participating Class Member (*i.e.*, those Class Members who have not excluded themselves by submitting a timely Request for Exclusion, as defined in Section 12(h)) in the amount of each Participating Class Member's respective Class Member Settlement Payment and Incentive Award (if any) less the Participating Class Member's share of payroll taxes. The Settlement Checks shall be written from the QSF's bank account.
- b. Settlement Checks shall not be re-sent to addresses from which Notices have been returned as undeliverable after two attempts.
- c. The Settlement Administrator will establish, for tax purposes, the allocation of the payments made to the Participating Class Members to wages, non-wages, or such other tax character of such payout as the Settlement Administrator may determine, based on the principles set forth in Treas. Reg. §1.468B-4 by reference to the claims pursuant to which distributions are made and as if Dave & Buster's made such payments directly to the Participating Class Members. An IRS Form W-2 shall be issued for the portion of the Settlement Check designated as "wages." An IRS Form 1099-MISC shall be issued for the portion of the Settlement Check designated as "non-wages."
- d. Each Settlement Check shall expire one hundred and eighty (180) calendar days after it is dated. Any unclaimed funds shall be subject to re-distribution to Class Members, as described in Section 15 below.

- e. Payroll Taxes. The Settlement Administrator shall calculate, report, and pay the payroll taxes owed by Defendants and Participating Class Members from the QSF to the applicable taxing authorities on a timely basis in accordance with applicable law.

14. **Defendants' Right to Rescind the Settlement Stipulation.**

- a. Defendants shall have the right, at their sole option, to void and rescind this Settlement Stipulation if five percent (5%) or more of Class Members exclude themselves from this Settlement.
- b. If five percent (5%) or more of Class Members exclude themselves from this Settlement, the Settlement Administrator will notify the Parties within ten (10) calendar days of having reached the five percent (5%) threshold.
- c. If Defendants wish to exercise their right to void and rescind this Settlement Stipulation under this Section, they must do so by written communication to Class Counsel no later than ten (10) calendar days after the Settlement Administrator provides such notice.

15. **Remaining Funds.** Any funds not claimed by Class Members because: (i) a Class Member cannot be located by the Settlement Administrator during the Notice Period; (ii) a Class Member files a Request for Exclusion to opt out of this Settlement; (iii) a Class Member's Settlement Check has been returned or not cashed within the one hundred eighty (180) calendar-day period provided for doing so; or (iv) for any other reason, shall be re-distributed, 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 Class Member Settlement Payments, if

both Class Counsel and Defendants' Counsel agree that it is cost effective to re-distribute the remaining funds. 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.

16. **Funding the QSF.**

- a. No later than fourteen (14) calendar days after the Preliminary Approval Date, Defendants shall transfer fifty-thousand dollars (\$50,000), into the QSF to cover Settlement Administrator Fees and Costs, as such costs are incurred.
- b. No later than ten (10) calendar days after the Settlement Effective Date, or as soon thereafter as is commercially reasonable to comply with the Settlement Administrator's instructions, Dave & Buster's shall deposit the remainder of the Class Settlement Amount, seven million three hundred seventy-five thousand dollars (\$7,375,000) into the QSF to cover the Class Member Settlement Payments, Class Counsel Attorneys' Fees and Lawsuit Costs, Incentive Award, any remaining Settlement Administrator Fees and Costs, and the Employer Taxes.
- c. Following the release of the Class Settlement Amount by Dave & Buster's, Dave & Buster's shall have no responsibility, financial obligation, or liability whatsoever with respect to the QSF. Rather, the Settlement Administrator shall have sole responsibility for the administration of such funds and income thereon, disbursements of such funds, and payment of the Employee and Employer Taxes,

taxes imposed on the Settlement Fund, and administrative costs in accordance with the terms of Section 13 of this agreement.

17. **Tax Treatment.**

- a. Qualified Tax Status and Tax Responsibilities. The QSF shall be established as a “qualified settlement fund” within the meaning of Section 468B of the Internal Revenue Code of 1986, as amended, and Treasury Regulation Section 1.468B-1, *et seq.*, and shall be administered by the Settlement Administrator under the Court’s supervision. Dave & Buster’s shall hereby be deemed to have made an election under Section 468B of the Revenue Code to have the QSF treated as a “qualified settlement fund.” Dave & Buster’s shall timely furnish a statement to the Settlement Administrator, who shall serve as Trustee of the QSF, that complies with Treasury Regulation Section 1.468B-3(e) and shall attach a copy of the statement to its federal income tax return that is filed for the taxable year in which Dave & Buster’s makes the required payment(s) to the QSF. The Parties shall cooperate to ensure such treatment and shall not take a position in any filing or before any tax authority inconsistent with such treatment. In addition, the Settlement Administrator, as required, shall do all things that are necessary or advisable to carry out the provisions of this Section 17 and ensure that the QSF is treated as a qualified settlement fund under the meaning of the Treasury Regulation.
- b. Taxes Arising Out of Income Earned by the QSF. All taxes arising with respect to the income earned by the QSF, including any taxes or tax consequences that may be imposed upon the Defendants with respect to any income earned by the

QSF for any period during which the settlement fund does not qualify as a “qualified settlement fund” for federal or state income tax purposes and any expenses and costs incurred in connection with the payment of taxes pursuant to this Section (including without limitation, expenses of tax attorneys and/or accountants; mailing, administration, and distribution costs; expenses relating to the filing or the failure to file all necessary or advisable tax returns and taxes imposed on amounts payable to or on behalf of the Defendants pursuant to this Section), shall be paid out of the QSF. The Defendants shall not have any liability or responsibility for any taxes or other tax expenses. The Settlement Administrator shall timely and properly file all informational and other tax returns necessary or advisable with respect to the QSF and the distributions and payments therefrom, including, without limitation, the tax returns described in Treasury Regulation Section 1.468B-2. Such tax returns shall be consistent with the terms herein and in all events shall reflect that all taxes on the income earned by the QSF shall be paid out of the settlement fund. The Settlement Administrator shall also timely pay any applicable taxes and tax expenses out of the QSF, and is authorized to withdraw from the QSF, without prior order of the Court, any amounts necessary to pay such taxes and other tax expenses. Dave & Buster’s shall not have any responsibility or liability for the acts or omissions of Class Counsel, the Settlement Administrator, or their agents, as described herein.

18. **Attorney’s Fees and Lawsuit Costs.**

- a. Class Counsel shall move for Court approval of Class Counsel Attorneys’ Fees and Lawsuit Costs in an amount which does not exceed thirty-three percent (33%)

of the Settlement Amount, and if so, Defendants shall not contest such application. Any Class Counsel Attorneys' Fees and Lawsuit Costs approved by the Court shall be payable solely from the QSF. Pursuant to Fed. R. Civ. P. 23(h) and ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), Class Counsel shall move for Court approval of Class Counsel Attorneys' Fees and Lawsuit Costs simultaneously with their Final Approval Motion. The Class Counsel Attorneys' Fees and Lawsuit Costs awarded to Class Counsel shall be at the sole discretion of the Court, and this Settlement is not contingent upon the Court's approval of such Class Counsel Attorneys' Fees and Lawsuit Costs.

- b. The Settlement Administrator shall pay Class Counsel Attorneys' Fees and Lawsuit Costs awarded by the Court to Class Counsel from the QSF no later than twenty (20) calendar days after the Settlement Effective Date.
- c. Payments made pursuant to this Section 18 shall be reported to all applicable taxing authorities by the Settlement Administrator on IRS Form 1099-MISC.
- d. Any portion of the Class Counsel Attorneys' Fees and Lawsuit Costs not approved by the Court or not sought by Class Counsel shall be included in the Net Settlement Amount and shall be distributed to Participating Class Members in accordance with the terms of this Settlement Stipulation.
- e. Dave & Buster's payment of Class Counsel Attorneys' Fees and Lawsuit Costs as described in this Section shall constitute full satisfaction of Dave & Buster's obligation to pay any person, attorney, or law firm for attorneys' fees, costs, and expenses incurred on behalf of Class Members, and shall relieve Dave & Buster's from any other claims or liability as to any other attorney or law firm or person



for any attorneys' fees, expenses, and costs to which any of them may claim to be entitled on behalf of Class Members that are in any way related to the Class Released Claims (as described in Section 6(a)).

19. **Incentive Award.**

- a. Class Counsel shall move for Court approval of an Incentive Award (not to exceed thirty-five thousand dollars (\$35,000)) for the Class Representative simultaneously with their Final Approval Motion. The Incentive Award shall be at the sole discretion of the Court, and this Settlement is not contingent upon the Court's approval of such Incentive Award.
- b. Any Incentive Award approved by the Court shall be payable solely from the QSF. Defendants shall not oppose Class Counsel's motion for the payment of such Incentive Award, subject to the limitations herein.
- c. Any Incentive Award approved by the Court shall be in addition to the Class Member Settlement Payment otherwise owed to the Class Representative. The Settlement Administrator shall pay such Incentive Award from the QSF no later than twenty (20) calendar days after the Settlement Effective Date.
- d. Payments made pursuant to this Section 19 shall be reported to all applicable taxing authorities by the Settlement Administrator on IRS Form 1099-MISC.
- e. Any portion of the Incentive Award not approved by the Court shall be included in the Net Settlement Amount and shall be distributed to Participating Class Members in accordance with the terms of this Settlement Stipulation.

20. **Responsibility for Any Additional Taxes.**

- a. Should any taxing authority determine that any additional taxes are payable for the payments made to any Participating Class Member or the Plaintiff under this Settlement (other than taxes attributed to the wage portion of the Settlement, which will be deducted from the QSF and paid, as required, to the applicable taxing authorities by the Settlement Administrator), such Participating Class Member or Plaintiff shall be solely responsible for the payment of those taxes, plus applicable interest.
  - b. As the Settlement Administrator shall be responsible for paying the Employee and Employer Taxes out of the QSF, to the extent that there is an error regarding the payroll taxes owed by each of Participating Class Members and Defendants, the Settlement Administrator shall indemnify the Participating Class Members and/or Defendants for any penalty or interest arising out of an incorrect allocation, calculation, or reporting, or late payment of the same.
  - c. Any non-wage amounts paid from the QSF will be reported, if required, to the IRS on IRS Form 1099-MISC.
  - d. Class Counsel agree that they shall be solely responsible for the payment of any and all taxes due as a result of Class Counsel's receipt of payments made for Class Counsel Attorneys' Fees and Lawsuit Costs under this Settlement.
21. **Settlement Payments Do Not Trigger Additional Benefits.** All payments to Participating Class Members and Plaintiff shall be deemed to be paid to such Participating Class Members and Plaintiff solely in the year in which such payments actually are received by the Participating Class Members and Plaintiff. The Parties agree and the Class Members acknowledge that, notwithstanding any contrary language or

agreement in any benefit or compensation plan document that might have been in effect during the period covered by this Settlement, the payments provided for in this Settlement Stipulation are the sole payments to be made to the Class Members and Plaintiff with respect to the claims released herein, and that the Class Members and Plaintiff are not entitled to any new or additional compensation or benefits as a result of having received such payments.

22. **Settlement Contingent on Court Approval.**

- a. This Settlement Stipulation is contingent upon the Court's approval of the Settlement. If the Court does not grant preliminary or final approval or the Settlement Effective Date does not occur, this Settlement Stipulation may be voided at any Party's option, in which case this Settlement Stipulation (including its Exhibits) will become null and void, and shall not be used for any purpose, including, without limitation, in connection with this Action or any other lawsuit, administrative or other legal proceeding, claim, investigation, or complaint. In such an event, the Parties shall resume the Action, unless the Parties jointly agree to seek reconsideration or appellate review of the decision denying preliminary or final approval, or attempt to renegotiate the Settlement and seek Court approval of a renegotiated settlement.
- b. In the event any such reconsideration and/or appellate review is denied, or a mutually agreed-upon settlement is not approved:
  - (i) The Parties shall be deemed to have reverted *nunc pro tunc* to their respective statuses as of the date and time immediately before the execution of this Settlement Stipulation and they shall proceed in all

respects as if this Settlement Stipulation and related orders had not been executed and without prejudice in any way from the negotiation, fact, or terms of this Settlement, and without prejudice to the claims, defenses, or rights of any Party. In that event, any class or sub-class certified for purposes of settlement shall be decertified. Dave & Buster's shall retain the right to assert all applicable defenses and challenge all claims and allegations, including but not limited to contesting whether this Action should be maintained as a class action and contesting the merits of the claims being asserted by Plaintiff in this Action. Class Members retain the right to assert all applicable claims and allegations in the ongoing Action.

- (ii) If the Settlement Administrator has already sent copies of the Notice to Class Members, the Settlement Administrator shall provide notice to Class Members that the Settlement did not receive final approval and that, as a result, no payments will be made to Class Members under the Settlement. Such notice shall be mailed and emailed to the Class Members using the addresses used by the Settlement Administrator in sending the Notice, and the cost of such notice shall be shared by the Parties.

23. **Non-Disclosure and Communications.**

- a. Aside from the disclosures in the Notice attached hereto as Exhibit A and in court papers, or as otherwise permitted or required by law, the Parties and their counsel agree to maintain the confidentiality of the negotiation (including all drafts) and mediation process that led to this Settlement Stipulation, as well as the information and documents exchanged between the Parties and the mediator

during the mediation process, which were exchanged solely for purposes of settlement and compromise only. Any information provided to Class Counsel by Defendants pursuant to this Settlement Stipulation or otherwise in connection with implementation of the Settlement shall be used solely for purposes of implementing this Settlement and for no other purpose.

- b. The Parties and their counsel shall not, directly or indirectly, publicly disseminate any information about the Settlement, this Settlement Stipulation, or the Settlement negotiations, or otherwise publicize the existence or terms of the Settlement, this Settlement Stipulation, or the negotiations leading up to the Settlement and Settlement Stipulation, except that i) to the extent that the Parties or their counsel receive any inquiry about the Settlement or the Settlement Stipulation, they shall be permitted to respond by stating that the Parties have reached an agreement that they believe is a fair and reasonable settlement of the disputed claims, may provide information that is in the public record, and may also refer the inquirer to the contents of publicly filed documents; and ii) the Parties' counsel may post publicly available information about the Settlement or the Settlement Stipulation on their firm websites or in firm materials. For avoidance of doubt, unless an inquiry is received such that (i) in Subsection 23(b) above would apply, the Parties and their counsel agree that they may not discuss the Settlement, this Settlement Stipulation, or the Settlement negotiations in any press release, at any press conference, or at any private or public conference or panel, unless any such conference or panel is conducted solely for members of the Parties' counsel's firms.

- c. Parties and their counsel shall not issue any notice of or written communication regarding the Settlement or Settlement Stipulation to Class Members (other than Class Counsel's communications with the Class Representative, Class Members who have previously contacted or spoken to Class Counsel, or in response to any inquiry by a Class Member) except for the Notice issued by the Settlement Administrator, as set forth in this Settlement Stipulation.
- d. Nothing in this Section is intended to, nor shall it be construed to, violate any ethical obligations of, or interfere with the ability to practice law of, any counsel, including the ability of Class Counsel to provide advice to any Class Member or any current or future client.
- e. Nothing in this Settlement Stipulation shall prevent Defendants from filing any required regulatory disclosures or prevent the Parties or their counsel from complying with their obligations under the law.
- f. Plaintiff and Class Counsel shall promptly notify Defendants' Counsel, via facsimile or email, of any third-party demand or requirement by any law, rule, or regulation, by subpoena, or by any other administrative or legal process to disclose non-public information concerning this Settlement, and shall not make any such disclosure until at least five (5) calendar days after the notice is provided, except if an earlier production is court-ordered, so that Defendants' Counsel may seek a protective order or other appropriate remedy prior to such disclosure. Should disclosure be required hereunder, Plaintiff and/or Class Counsel shall furnish only that portion of the information pertinent to this

Settlement legally required to be disclosed and shall use reasonable efforts to obtain confidential treatment thereof by the recipient.

- g. Defendants shall not retaliate against Plaintiff or any Class Member because of such individual's participation in this Settlement. Defendants will not discuss any aspect of the Settlement with Class Members or other employees unless such persons have a business reason to know or have job functions related to the processing of any aspect of this Settlement.

- 24. **Return of Documents/Data.** No later than sixty (60) calendar days after the Settlement Effective Date, Class Counsel will return or destroy all non-public documents and information produced by Dave & Buster's in this Action other than Class Counsel's work product, and will provide written notice of such to Defendants' Counsel in accordance with the notice provisions herein.
- 25. **Computing Time.** All events and deadlines referenced in this Settlement Stipulation shall be computed in accordance with Rule 6 of the Federal Rules of Civil Procedure.
- 26. **Dismissal with Prejudice.** Upon the Settlement Effective Date, Plaintiff's and all Class Members' (other than those who have filed a Request for Exclusion with the Settlement Administrator as described in Section 12(h)) claims against Dave & Buster's shall be dismissed with prejudice.
- 27. **Complete Agreement.** No representation, promise, or inducement has been offered or made to induce any Party to enter into this Settlement Stipulation, which contains the entire, complete, and integrated statement of all settlement terms as to the putative class claims in the Action and supersedes all previous oral or written agreements, except that it is agreed that as to Plaintiff's individual claims, Plaintiff will enter into a separate

severance agreement with Defendants, which will be simultaneously executed on the same date as this Settlement Stipulation. This Settlement Stipulation may not be amended or modified except by a writing signed by the Parties' authorized representatives.

28. **Knowing and Voluntary Agreement.** The Parties enter into this Settlement Stipulation knowingly, voluntarily, and with full knowledge of its significance. The Parties have not been coerced, threatened, or intimidated into signing this Settlement Stipulation and have consulted with legal counsel regarding the Settlement Stipulation.
29. **Notifications and Communications.** Any notifications required by this Settlement Stipulation shall be submitted either by any form of overnight mail or in person to:

COUNSEL FOR PLAINTIFF AND THE CLASS

Karin E. Fisch, Esq.  
Abbey Spanier, LLP  
212 East 39th Street  
New York, New York 10016

Bradford D. Conover, Esq.  
Molly Smithsimon, Esq.  
Conover Law Offices  
345 Seventh Avenue, 21<sup>st</sup> Floor  
New York, New York 10001

William Frumkin, Esq.  
Elizabeth Hunter, Esq.  
Frumkin & Hunter LLP  
1025 Westchester Ave, Suite 309  
White Plains, New York, 10604

COUNSEL FOR DEFENDANTS

Jack Baughman, Esq.  
Maria H. Keane, Esq.  
Paul, Weiss, Rifkind, Wharton & Garrison LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064



30. **Severability.** In the event that any part of this Settlement Stipulation is found to be illegal, invalid, inoperative, or unenforceable in law or equity, such finding shall not affect the validity of any other part of this Settlement Stipulation, which shall be construed, reformed, and enforced to effect the purposes thereof to the fullest extent permitted by law.
31. **Captions and Interpretations.** Section or paragraph titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Settlement Stipulation or any provision hereof. Each term of this Settlement Stipulation is contractual and not merely a recital.
32. **Binding on Assigns.** This Settlement Stipulation shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, trustees, executors, administrators, successors, and assigns.
33. **Enforcement of Settlement Stipulation and Governing Law.** This Settlement Stipulation shall be governed by and construed in accordance with the laws of the State of New York, without regard to choice of law principles. The Court shall retain jurisdiction over actions or proceedings based upon, including the enforcement of, this Stipulation or any of its terms. All Parties to this Stipulation shall be subject to the jurisdiction of the Court for all purposes related to this Stipulation.
34. **Settlement Stipulation Form and Construction.**
- a. The terms and conditions of this Settlement Stipulation are the result of lengthy, carefully considered, arm's-length negotiations between the Parties, and this Settlement Stipulation shall not be construed in favor of or against any of the

Parties by reason of their participation in the drafting of this Settlement Stipulation.

- b. This Settlement Stipulation may be executed in electronic counterparts, and when each Party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterparts, shall constitute one binding Settlement Stipulation.
  - c. This Settlement Stipulation shall be construed and interpreted to effectuate the intent of the Parties, which is to provide, through this Settlement, for a complete resolution of the Action.
  - d. All of the exhibits to be attached hereto shall be incorporated by reference as though fully set forth herein. In the event that there exists a conflict or inconsistency between the terms of this Stipulation and the terms of any exhibit to be attached hereto, the terms of this Stipulation shall prevail.
  - e. This Stipulation and its exhibits constitute the entire agreement among the Parties, and no representations, warranties, or inducements have been made to the Parties concerning this Stipulation or its exhibits, other than the representations, warranties, and covenants contained and memorialized in such documents.
35. **Parties' Authority.** The signatories below represent that they are fully authorized to enter into this Settlement Stipulation and bind the Parties hereto and the Class Members to the terms and conditions thereof.

IN WITNESS THEREOF, the Parties each voluntarily and without coercion have caused this  
Settlement Stipulation to be signed on the dates entered below:

Louise Parra M.  
Maria de Lourdes Parra Marin

11-8-18  
Date

STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF NEW YORK    )

On this 8<sup>th</sup> day of November, 2018, before me personally came Maria de Lourdes Parra Marin, to me known and known to me to be the person described in and who executed the foregoing Settlement Stipulation, and she duly acknowledged to me that she executed the same.

Molly Smithsion  
Notary Public

MOLLY SMITHSIMON  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 025M6200051  
Qualified in Kings County  
My Commission Expires January 26, 2019 May 12, 2022

Counsel for Plaintiff and Class Members:

FRUMKIN & HUNTER LLP

---

William D. Frumkin

1025 Westchester Ave, Suite 309  
White Plains, New York, 10604

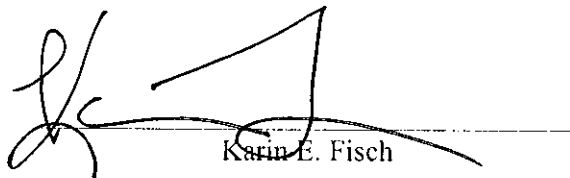
CONOVER LAW OFFICES

---

Bradford D. Conover

345 Seventh Avenue, 21st Floor  
New York, NY 10022

ABBHEY SPANIER LLP



---

Karin E. Fisch

212 East 39th Street  
New York, NY 10016

Counsel for Plaintiff and Class Members:

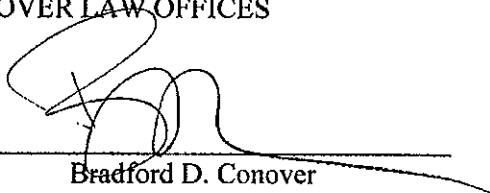
FRUMKIN & HUNTER LLP

---

William D. Frumkin

1025 Westchester Ave, Suite 309  
White Plains, New York, 10604

CONOVER LAW OFFICES



Bradford D. Conover

345 Seventh Avenue, 21st Floor  
New York, NY 10022

ABBAY SPANIER LLP

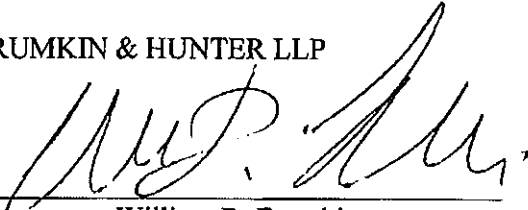
---

Karin E. Fisch

212 East 39th Street  
New York, NY 10016

Counsel for Plaintiff and Class Members:

FRUMKIN & HUNTER LLP

  
\_\_\_\_\_  
William D. Frumkin

1025 Westchester Ave, Suite 309  
White Plains, New York, 10604

CONOVER LAW OFFICES

\_\_\_\_\_  
Bradford D. Conover


345 Seventh Avenue, 21st Floor  
New York, NY 10022

ABBAY SPANIER LLP

\_\_\_\_\_  
Karin E. Fisch

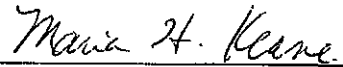
212 East 39th Street  
New York, NY 10016

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

  
\_\_\_\_\_  
Robert Edmund  
Senior Vice President and General Counsel

Counsel for Defendants:

PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON LLP



---

Maria H. Keane

1285 Avenue of the Americas  
New York, New York 10019



**EXHIBIT A TO SETTLEMENT AGREEMENT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

**NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION LAWSUIT**

*Marin, et al. v. Dave & Buster's, Inc., et al.*, No. 15 Civ. 3608 (AKH)

Class Member Identification Number: \_\_\_\_\_

If You Were A Full-Time Employee of Dave & Buster's  
On Or After February 1, 2013 And Had Your Hours Reduced  
To Part-Time At Any Time On Or After May 8, 2013  
You May Receive A Payment From A Class Action Settlement

*A Federal Court preliminarily approved this Settlement and authorized this notice. It is not a solicitation from a lawyer. You are not being sued.*

- The Settlement will provide a total of \$7,425,000 to pay claims to current and former employees of Dave & Buster's, Inc. ("Dave & Buster's") and to pay attorneys' fees and costs to counsel for the Class in this lawsuit.
- The Settlement also will prohibit Dave & Buster's 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, as more fully described below.
- The Court has not decided who is right and who is wrong. This Settlement was entered into voluntarily between the Parties and their attorneys without any findings of liability.
- This Notice explains how you may participate in the Settlement.
- You can, if you wish, opt out of the Settlement, but if you do so and you still wish to pursue claims against Dave & Buster's, you will have to commence a new action and represent yourself in that case or obtain new lawyers to represent you. You can also object to the Settlement (but if you object, you cannot opt out). **Your legal rights are affected whether you act or don't act. Read this Notice carefully.**
- If you do not opt out of the Settlement, you will be mailed a Settlement Check upon Final Approval of this Settlement by the Court.

Any questions? Read on. You can also visit [www.\\_\\_\\_\\_\\_.com](http://www._____.com).

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:</b>	
<b>DO NOTHING NOW AND DEPOSIT OR CASH THE CHECK THAT YOU WILL RECEIVE IN THE MAIL IF THE SETTLEMENT IS APPROVED BY THE COURT</b>	This is a way to get payment.
<b>EXCLUDE YOURSELF BY _____, 2019 [110 days after preliminary approval]</b>	Get no payment. This is the only option that allows you to ever be part of any other lawsuit against the Defendants about the legal claims in this case.
<b>OBJECT BY _____, 2019 [110 days after preliminary approval]</b>	Write and tell the Court about why you don't like the Settlement. You may object <b>and</b> receive payment.
<b>GO TO A HEARING ON _____, 2019</b>	Ask to speak in Court on _____, 2019 at _____m. about the fairness of the Settlement.

### **BASIC INFORMATION**

#### **1. Why did I get this Notice?**

Dave & Buster's records show that you worked full-time for Dave & Buster's on or after February 1, 2013 and that your hours were reduced to part-time at some point on or after May 8, 2013.

The Court directed that this Notice be sent to you because you have a right to know about a proposed settlement of a class action lawsuit and about your options before the Court decides whether to approve the Settlement. If the Court approves it, and after any objections and appeals are resolved, an administrator appointed by the Court will make the payments that the Settlement allows. You can stay informed about the progress of the Settlement by going to [www.\\_\\_\\_\\_\\_.com](http://www._____.com).

This Notice explains the lawsuit, the Settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them.

The Court in charge of the case is the United States District Court for the Southern District of New York, and the case is known as *Maria de Lourdes Parra Marin, on behalf of herself and all other persons similarly situated v. Dave & Buster's, Inc., and Dave & Buster's Entertainment, Inc.*, No. 15 CV 3608 (S.D.N.Y.).

## **2. What is a class action and who is involved?**

In a class action lawsuit, one or more persons called “Plaintiffs” or “Class Representatives” sue on behalf of other people who may have similar claims. All these people are a “Class” or “Class Members.” The Class Representative who sued – and all of the Class Members like them – are called the Plaintiffs. The companies they sued (in this case Dave & Buster’s and Dave & Buster’s Entertainment, Inc.) are called the Defendants. One court resolves the issues for everyone in the Class – except for those people who choose to exclude themselves from the Class. Judge Alvin K. Hellerstein will supervise the process of approving the Settlement of this class action.

## **3. What is the lawsuit about?**

The Plaintiff in this case alleges that Defendants, as part of the Position to Win Program, reduced the hours of certain Dave & Buster’s employees from full-time to part-time in order to avoid having to offer and pay for employee health benefits. Plaintiff alleged that cutting those hours for the purpose of depriving employees of benefits was a violation of federal law. Plaintiff sought reinstatement of hours and benefits, and lost wages and benefits incidental to the reinstatement of hours and benefits. Dave & Buster’s denies that it violated any law and maintains that it has consistently acted in accordance with all governing laws at all times. Dave & Buster’s agreed to settle the lawsuit to avoid continued litigation, but specifically denies any wrongdoing or liability. The Parties’ claims are more fully described in the Complaint and in other documents on file with the Court.

## **4. Who is in the Class?**

The Class consists of certain employees of Dave & Buster’s who were full-time on or after February 1, 2013 and who had their hours reduced to part-time at any time on or after May 8, 2013. Employees in Hawaii are not part of the Class. If you choose to exclude yourself from the Class, you will not be in the Class.

## **5. Why is there a Settlement?**

The Court did not decide in favor of the Plaintiff or Defendants. Instead, both sides agreed to a Settlement. That way, they avoid the cost of a trial, and the people affected will get compensation. The Class Representative and the Class’ lawyers think the Settlement is best for all Class Members.

### **THE SETTLEMENT BENEFITS**

**6. What does the Settlement provide?**

Pursuant to the Settlement Stipulation, Dave & Buster's has agreed to pay up to \$7,425,000 to settle the class claims in this case. In addition to the Settlement Payments to the Class Members, the money in the qualified settlement fund will be used to pay for fees and costs of Class Counsel, any Incentive Award to the Class Representative, the costs of notice and administration of the Settlement, and payroll taxes.

The Settlement also will provide Injunctive Relief in the form of an agreement by Dave & Buster's to prohibit management, as part of its Position to Win program or otherwise, from discharging, firing, 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 cannot retaliate against you for participating in this Class Action.

**7. What will a Class Member receive from the Settlement?**

You will be paid a proportionate share of the Class Settlement Amount, as determined by the Settlement Administrator in accordance with a Court-approved formula, and based on a number of factors, including: your average weekly hours worked both before and after your change from full-time to part-time status; your rate of pay; the length of time you worked for Dave & Buster's after your change in status; and your enrollment in and/or eligibility for health insurance offered by Dave & Buster's to full-time employees.

**8. How can I get a payment?**

You will receive a Settlement Check in the mail after the Court gives its final approval of the Settlement, as long as you do not return a written request to exclude yourself from the Settlement, as discussed below.

You will receive IRS Forms W-2 and/or 1099-MISC with the Settlement Check. Each Class Member's tax obligation, including the determination thereof, is the Class Member's responsibility. Neither Plaintiff, Dave & Buster's, their counsel, nor the Claims Administrator is providing tax advice to Class Members.

**9. When would I get my payment?**

The Court will hold a hearing on \_\_\_\_\_, 2019, at \_\_\_\_ .m. to decide whether to approve the Settlement. If the Court approves the Settlement, there may be appeals after such approval, which could delay payments. Resolving appeals can take time. Please be patient. You can stay informed about the progress of the Settlement by going to [www.\\_\\_\\_\\_\\_.com](http://www._____.com). **Keep the Settlement Administrator informed of any changes in your name and address during this time.**

**10. What am I giving up to get a payment or stay in the Class?**

If you stay in the Class, that means that you can't sue, continue to sue, or be part of any other lawsuit against Defendants about the legal issues in this case. It also means that the Court's orders will apply to you and legally bind you. If you do not exclude yourself from the Settlement, you are agreeing to a "release of claims" as described in the Settlement Stipulation. If you believe you have other claims against Dave & Buster's which you wish to preserve, you should consult with an attorney.

**EXCLUDING YOURSELF FROM THE SETTLEMENT**

If you don't want a payment from this Settlement, and you want to keep the right to sue or continue to sue the Defendants on your own about the issues in this case, then you must do something to get out of this case. This is called "excluding yourself from" or "opting out" of the Settlement.

**11. How do I get out of the Settlement?**

**If you wish to exclude yourself from the Settlement, you must submit a written request. To do so, you must send a written, signed statement to the Settlement Administrator stating "I opt out of the Marin, et al. v. Dave & Buster's, Inc., et al. Class Action" or words to that effect that clearly express your desire to exclude yourself from this Settlement and litigation. Be sure to include your name, address, telephone number, and the last four digits of your social security number, as well as the Class Member Identification Number listed on the first page of this Notice. The letter must be signed by you.**

To be effective, the Request for Exclusion must be mailed, emailed, or faxed to the Settlement Administrator on or before \_\_\_\_\_ [110 days after preliminary approval]. It must be sent to the Settlement Administrator at the mailing address, email address, or fax number listed below.

If you submit your request for exclusion by mail, the letter must be mailed to D&B Settlement Administrator, c/o Strategic Claims Services, 600 N. Jackson Street, Suite 3, Media, PA 19063-2561.

[Email & Fax Information for Strategic Claims Services]

**12. If I exclude myself, can I get money from the Settlement?**

If you exclude yourself from the Class – which is also sometimes called "opting-out" of the Class – you will not get any money from the Settlement. If you exclude yourself, you will not be legally bound by the Court's orders or judgments in this lawsuit.

**13. If I don't exclude myself, can I sue Defendants for the same thing later?**

No. Unless you exclude yourself, you give up the right to sue the Defendants for the claims that this Settlement resolves. If you have a pending lawsuit against the Defendants involving any claim whatsoever, even if it is unrelated to wages or benefits, speak to your lawyer in that lawsuit right away. The exclusion deadline is explained above in Section 11.

**THE LAWYERS REPRESENTING YOU**

**14. Do I have a lawyer in this case?**

Yes. The Court has appointed the following law firms as Class Counsel: Abbey Spanier, LLP, 212 East 39th Street, New York, New York 10016; Conover Law Offices, 345 Seventh Avenue, 21<sup>st</sup> Floor, New York, New York 10001, [brad@conoverlaw.com](mailto:brad@conoverlaw.com); and Frumkin & Hunter LLP, 1025 Westchester Ave, Suite 309, White Plains, New York, 10604. Unless you choose to hire your own attorney, these attorneys will represent you as part of the Class. You have the right to hire your own attorney.

**15. How will Class Counsel be paid?**

Class Counsel will ask the Court for attorneys' fees and expenses in an amount not exceeding 33% of the Class Settlement Amount. To date, Class Counsel has received no payment for fees and expenses advanced on behalf of the Class. Class Counsel will also ask for a payment of \$35,000 to the Class Representative for her efforts in this case. The Court may award less than the amounts requested by Class Counsel.

Class Counsel's attorneys' fees and lawsuit costs and any payments to the Class Representative will be paid out of the Class Settlement Amount.

**OBJECTING TO THE SETTLEMENT**

You can tell the Court that you don't agree with the Settlement or some part of it.

**16. How do I tell the Court that I don't like the Settlement?**

If you are a Class Member, you can object to the Settlement if you don't like it. You can give reasons why you think the Court should not approve it. The Court will consider your views. To object, you must send a letter saying you object to "**Marin, et al. v. Dave & Buster's, Inc., et al.**" You must include your name, address, telephone number, the last four digits of your social security number, your Class Member Identification Number listed on page 1 of this Notice, the dates that you worked at Dave & Buster's, your signature, the detailed reasons you object to the Settlement, and whether you are represented by your own lawyer.

To be considered by the Court, a timely objection must be submitted by a Class Member who has not requested exclusion from the Class, and state the specific reason for each objection, including



any legal support that the objector wishes to bring to the Court's attention, and copies of any documentary evidence. You must also state whether you will appear at the hearing on \_\_\_\_\_ in person or not.

To be effective, your objection must be mailed, emailed, or faxed to the Claims Administrator on or before \_\_\_\_\_ [110 days after preliminary approval]. It must be sent to the Claims Administrator at the mailing address, email address, or fax number listed below.

If you submit your request to object by mail, the letter must be mailed to D&B Settlement Administrator, c/o Strategic Claims Services, 600 N. Jackson Street, Suite 3, Media, PA 19063-2561.

[Email & Fax Information for Strategic Claims Services]

**17. What is the difference between objecting and excluding?**

Objecting is simply telling the Court that you don't like something about the Settlement. You can object only if you stay in the Class. Excluding yourself is telling the Court that you don't want to be part of the Class. If you exclude yourself, you cannot object because the case no longer affects you.

**THE COURT'S FAIRNESS HEARING**

The Court will hold a hearing to decide whether to approve the Settlement. You may attend and you may ask to speak, but you don't have to attend or speak.

**18. When and where will the Court decide whether to approve the Settlement?**

The Court will hold a Fairness Hearing on \_\_\_\_\_, 2019 at \_\_\_\_\_ m. at Courtroom 14D in the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. Judge Hellerstein will listen to people who have asked to speak at the hearing. At or after the hearing, the Court will decide whether to approve the Settlement. The Court may also decide how much to pay Class Counsel. We do not know how long the decision will take. The Court may postpone and/or reschedule the hearing without giving you any further notice. Information about any changes to the date of the hearing and the outcome of the hearing will be posted at [www.\\_\\_\\_\\_\\_.com](http://www._____.com) as it becomes available.

**19. Do I have to come to the hearing?**

No. Class Counsel will answer questions the Court may have. But, you are welcome to come to the hearing at your own expense. If you send an objection, you don't have to come to Court to talk about it. As long as you mail your written objection in on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.



**20. May I speak at the Fairness Hearing?**

You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter saying it is your "Notice of Intention to Appear in **Marin, et al. v. Dave & Buster's, Inc., et al.**" Be sure to include your name, address, telephone number, and signature. Your Notice of Intention to Appear must be postmarked no later than \_\_\_\_\_, 2019 and be sent to the Clerk of the Court at the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York 10007, to Class Counsel, and to Defendants' Counsel at the addresses listed in the answer to Question 16. Include on the envelope and your correspondence the following: "No. 15 CV 3608 (S.D.N.Y.)". You cannot speak at the hearing if you exclude yourself.

**21. What happens if the Court does not approve the Settlement?**

If the Settlement is not finally approved by the Court, the case will proceed forward to trial or other resolution by the Court as if there had been no Settlement.

**GETTING MORE INFORMATION**

**22. How do I get more information?**

This Notice summarizes the proposed Settlement. More details are in a Settlement Stipulation. You can get a copy of the Settlement Stipulation by visiting the website, [www.\\_\\_\\_\\_\\_.com](http://www._____.com), where you will find the Settlement documents, a change of address form, and other information. If you need additional information, you should write to Class Counsel (at the addresses set out in the answer to question 14 above) or call 1-\_\_\_\_\_.  
\_\_\_\_\_.

---

**Please Do Not Call The Court or The Court Clerk.**

**EXHIBIT B TO SETTLEMENT AGREEMENT**

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,

15 Civ. 3608 (AKH)

- against -

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

Defendants.

**[PROPOSED] FINDINGS AND ORDER PRELIMINARILY APPROVING  
CLASS ACTION SETTLEMENT, CONDITIONAL CLASS CERTIFICATION  
APPROVAL OF NOTICE PLAN, AND  
SETTING A DATE AND TIME FOR THE FINAL APPROVAL HEARING**

Presented to the Court for preliminary approval is a settlement of the litigation. The terms of the Proposed Settlement are set out in the Settlement Stipulation ("Stipulation") executed by counsel for the Parties on November 19, 2018.<sup>1</sup>

Upon reviewing Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Conditional Class Certification and Approval of Notice Plan and the Declaration of Karin E. Fisch and documents attached thereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Class Certification. The Court preliminarily finds, for settlement purposes only, that the requirements of the United States Constitution, the Federal Rules of Civil Procedure, the

---

<sup>1</sup> Capitalized terms not otherwise defined in this Order shall have the same meaning ascribed to them in the Stipulation.

Local Rules of the United States District Court for the Southern District of New York and any and all other applicable laws have been met as to the “Settlement Class” defined below, in that:

- a. The Settlement Class is cohesive and well defined;
- b. The members of the Settlement Class are reasonably ascertainable from records kept by Defendants, and the members of the Settlement Class are so numerous that their joinder before the Court would be impracticable;
- c. Based on allegations in the Complaint, there are one or more questions of fact and law common to the Settlement Class;
- d. Based on allegations in the Complaint, the claims of the Plaintiff are typical of the claims of the Settlement Class;
- e. Plaintiff will fairly and adequately protect the interests of the Settlement Class in that: (i) the interests of Plaintiff and the nature of her alleged claims are consistent with those of the members of the Settlement Class; (ii) there appear to be no conflicts between Plaintiff and the Settlement Class; and (iii) Plaintiff and the members of the Settlement Class are represented by qualified, reputable counsel who are experienced in preparing and prosecuting complicated class actions; and
- f. Common issues of law and fact predominate over individual issues and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2. Based on the findings set out in paragraph 1 above, the Court preliminarily certifies a class (the “Settlement Class”) for settlement purposes only under Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3), consisting of two subclasses:

**“Lost Hours and Benefits Sub-Class”** means all persons currently or formerly employed by Dave & Buster’s as hourly wage, full-time employees, excluding

employees in Hawaii, 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, excluding employees in Hawaii, 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.

3. The Court preliminarily appoints Plaintiff Maria de Lourdes Parra Marin as Class Representative for the Settlement Class and appoints Abbey Spanier, LLP, Conover Law Offices and Frumkin & Hunter LLP as Class Counsel.

4. Preliminary Findings Concerning Proposed Settlement. The Court preliminarily finds that the Proposed Settlement should be approved as: (i) the result of serious, extensive arm's-length and non-collusive negotiations; (ii) fair, reasonable, and adequate; (iii) having no obvious deficiencies; (iv) not improperly granting preferential treatment to Plaintiff or segments of the Settlement Class; (v) falling within the range of possible approval; and (vi) warranting

notice to Settlement Class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the Proposed Settlement.

5. Final Approval Hearing. A hearing is scheduled for \_\_\_\_\_, 2019 (the “Final Approval Hearing”) to determine, among other things:

- a. Whether the Settlement should be finally approved as fair, reasonable, and adequate;
- b. Whether the action should be dismissed with prejudice pursuant to the terms of the Stipulation;
- c. Whether the Notice: (i) constituted appropriate notice; and (ii) met all applicable requirements of the Federal Rules of Civil Procedure and any and all other applicable laws;
- d. Whether Class Counsel adequately represented the Settlement Class for purposes of entering into and implementing the Stipulation;
- e. Whether the allocation formula as set forth in Exhibit C to the Stipulation should be approved; and
- f. Whether the application for Class Counsel Attorneys’ Fees and Lawsuit Costs and Plaintiff’s Incentive Award filed by Class Counsel should be approved.

6. Notices. A proposed form of Notice is attached to the Stipulation as Exhibit A. The Court finds that the form fairly and adequately: (i) describes the terms and effect of the Stipulation and of the Settlement; (ii) notifies the Settlement Class concerning the proposed allocation formula and distribution; (iii) notifies the Settlement Class that Class Counsel will seek Attorneys’ Fees and Lawsuit Costs not to exceed thirty-three percent (33%) of the

Settlement Amount; (iv) gives notice to the Settlement Class of the time and place of the Final Approval Hearing; and (v) describes how the recipients of the Notice may exclude themselves from the Settlement or object to any aspect thereof. The Court directs that, consistent with the Stipulation, the Settlement Administrator:

- No later than thirty (30) calendar days after entry of this Order, cause the Notice, with such non-substantive modifications thereto as may be agreed upon by the Parties to be mailed, by first-class mail, postage prepaid, to each Class Member that had been identified.
- At or before the Final Approval Hearing, the Settlement Administrator shall file with the Court a proof of timely compliance with the foregoing mailing and publication requirements.

7. Exclusion Requests. Members of the Settlement Class may exclude themselves from the Settlement Class and from participation in the proceeds of the Proposed Settlement by submitting a timely Request for Exclusion to the Settlement Administrator as directed in the Notice. Any member of the Settlement Class who does not provide the Settlement Administrator with a timely Request for Exclusion shall be bound by all the terms and conditions of the Proposed Settlement, including the release of identified claims, whether or not he or she received or cashes his or her Settlement Check.

8. Objections to Settlement. Any member of the Settlement Class who wishes to object to the fairness, reasonableness or adequacy of the Settlement, to the plan of allocation and distribution as set forth in Exhibit C to the Stipulation, to any term of the Stipulation or to Class Counsel's application for Attorneys' Fees and Lawsuit Costs may file an Objection by following the instructions in the Notice. The addresses for service on counsel are as follows:

Plaintiff's Counsel/Class Counsel:

Karin E. Fisch ABBEY SPANIER, LLP 212 East 39th Street New York, New York 10016	William D. Frumkin Elizabeth E. Hunter FRUMKIN & HUNTER LLP 1025 Westchester Avenue, Suite 309 White Plains, New York 10604
Bradford D. Conover, Esq. Molly Smithsimon, Esq. CONOVER LAW OFFICES 345 Seventh Avenue, 21 <sup>st</sup> Floor New York, New York 10001	

Defendants' Counsel:

Jack Baughman, Esq. Maria H. Keane, Esq. PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP 1285 Avenue of the Americas New York, NY 10019-6064
--

Any member of the Settlement Class or other person who does not timely file and serve a written objection complying with the terms of this paragraph and the Notice shall be deemed to have waived, and shall be foreclosed from raising, any objection to the Proposed Settlement, and any untimely objection shall be barred.

9. Appearance at Fairness Hearing. Any objector who files and serves a timely, written objection may appear at the Fairness Hearing either in person or through counsel retained at the objector's expense. Objectors or their attorneys intending to appear at the Fairness Hearing must so state in their objection and must state the specific reason for each objection, including any legal support that the objector wishes to bring to the Court's attention, and copies of any documentary evidence. Any objector who does not timely file and serve a timely



objection and state their of intention to appear shall not be permitted to appear at the Fairness Hearing, except for good cause shown.

10. Service of Papers. If it appears that any objections were not properly served, the Parties shall furnish each other's counsel with copies of any and all such objections that come into their possession promptly after learning of the deficiency in service. Class Counsel shall file all objections with the Court prior to the Final Approval Hearing

11. Fee Petition. Class Counsel shall file an application Attorneys' Fees and Lawsuit Costs no later than seven (7) calendar days prior to the Fairness Hearing, *i.e.*, \_\_\_\_\_, 2019.

12. Injunction. Pending the final determination of the fairness, reasonableness and adequacy of the Proposed Settlement, all members of the Settlement Class are enjoined from instituting or commencing any action against Released Parties based on the Released Claims, and all proceedings in this action, except those related to approval of the Proposed Settlement, are stayed.

13. Termination of Settlement. This Order shall become null and void and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing as of the date of execution of the Stipulation, if the Settlement is terminated in accordance with the Stipulation or does not receive final approval. In such event, Section 22 of the Stipulation shall govern the rights of the Parties.

14. Use of Order. This Order is entered in compromise of disputed claims and does not reflect admissions of liability of any kind, whether legal or factual by the Released Parties. The Released Parties specifically deny any liability or wrongdoing. Plaintiff specifically believes she would have a good chance of prevailing in the event of trial, but settle in recognition

of the inherent uncertainty of litigation. Neither the fact nor the terms of this Order shall be construed or used as an admission, concession, or declaration by or against Released Parties of any fault, wrongdoing, breach, or liability or as a waiver by any Party of any arguments, defenses, or claims he, she, or it may have, including, but not limited to, any objections by Released Parties to class certification in the event that the Stipulation is terminated or not given final approval.

15. Continuance of Hearing. The Court may in its discretion continue the Final Approval Hearing without further written notice.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

---

The Honorable Alvin Hellerstein  
United States District Court Judge

EXHIBIT C TO SETTLEMENT AGREEMENT

**EXHIBIT C**

*Marin v. Dave & Buster's, Inc., et al.*, No. 15 Civ. 3608 (AKH)

The Settlement Administrator will determine each Class Member's proportionate share of the Net Settlement Amount, based exclusively on the information provided by Dave & Buster's and pursuant to the following formula.

(1) The "Net Settlement Amount" will be calculated as follows:

The Gross Settlement Amount of \$7,425,000 less:

- a. The amount of Court-approved Class Counsel Attorneys' Fees and Lawsuit Costs (which, for projection purposes, will be assumed to be \$2,475,000, the maximum to be sought by Class Counsel for fees and costs);
- b. Any Court-approved Incentive Award to the Class Representative (which, for projection purposes, will be assumed to be \$35,000, the maximum to be sought by Class Counsel for the incentive award);
- c. The Court-approved Settlement Administrator Fees and Costs; and
- d. The Employer Taxes payable for the settlement payments made to the Class Members under the Settlement Stipulation.

(2) The projected (but also not guaranteed) settlement payment ("Projected Settlement Payment") for each Class Member in the Lost Hours and Eligibility Sub-Class will be calculated as follows:

- a. For each of the January 1, 2013 to June 30, 2013, September 1, 2013 to February 28, 2014, October 6, 2013 to October 5, 2014, October 6, 2014 to October 4, 2015, October 5, 2015 to October 4, 2016, and October 6, 2016 to October 5, 2017 periods (each a "Benefits Eligibility Period" and collectively, the "Benefits Eligibility Periods"), calculate the average number of weekly hours worked;
- b. For each Benefits Eligibility Period in which the Class Member's average weekly hours were greater than or equal to 30, assign a lost wages value of zero dollars (\$0) for that period;
- c. For each Benefits Eligibility Period in which the Class Member's average weekly hours were fewer than 30:
  - i. assign as a lost hours value the difference between the average weekly hours for all weeks worked during such period and the

average weekly hours in the preceding period in which the Class Member's average weekly hours were greater than or equal to 30;

- ii. calculate the average hourly wages for such period; and
- iii. multiply the lost hours value by the average hourly wages by the number of weeks worked in such period, which will yield an estimated lost wages value for such period.

d. All calculations pursuant to Section (2)c.iii. will be totaled for each Class Member.

(3) The Projected Settlement Payment for each Class Member in the Lost Hours and Benefits Sub-Class will be calculated as follows:

- a. For each Benefits Eligibility Period, calculate the average number of weekly hours worked;
- b. For each Benefits Eligibility Period in which the Class Member's average weekly hours were greater than or equal to 30, assign a lost wages value of zero dollars (\$0) for that period;
- c. For each Benefits Eligibility Period in which the Class Member's average weekly hours were fewer than 30:
  - i. assign as a lost hours value the difference between the average weekly hours for all weeks worked during such period and the average weekly hours in the preceding period in which the Class Member's average weekly hours were greater than or equal to 30;
  - ii. calculate the average hourly wages for such period; and
  - iii. multiply the lost hours value by the average hourly wages by the number of weeks worked in such period, which will yield an estimated lost wages value for such period.
- d. For each Benefits Eligibility Period following the period in which the Class Member's average weekly hours were fewer than 30, and the class member was not eligible to enroll in full-time benefits, multiply Dave & Buster's then-current monthly contribution to the health insurance plan in which the Class Member had previously been enrolled by the number of months in the periods following the period in which the Class Member's average weekly hours were fewer than 30. This will yield an estimated lost benefits value for such periods.
- e. All calculations pursuant to Sections (3)c.iii. and (3)d will be totaled for each Class Member.

(4) Each Class Member's proportionate share of the Net Settlement Amount will be calculated as follows:

- a. The Projected Settlement Payments for all Class Members will be totaled ("Total Projected Settlement Payments");
- b. Each Class Member's Projected Settlement Payment will be divided by the Total Projected Settlement Payments, which will yield the percentage of the Net Settlement Amount to be assigned to each Class Member;
- c. For each Class Member, multiply the Net Settlement Amount by the percentage assigned to such Class Member, which will yield each Class Member's proportionate share of the Net Settlement Amount;
- d. The Settlement Administrator will then deduct from each Class Member's proportionate share of the Net Settlement Amount the appropriate Employee Taxes from the lost wages value.

**FISCH DECLARATION EXHIBIT B**

(Expert Report of David Breshears, CPA/CFF)

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

CASE NO. 15-CV-3608 (AKH)

MARIA de LOURDES PARRA MARIN  
v.  
DAVE AND BUSTER'S INC., and DAVE AND BUSTER'S ENTERTAINMENT, INC.

EXPERT REPORT OF DAVID BRESHEARS, CPA/CFF



**I. Introduction**

1. The opinions expressed in this report are my present opinions subject to the following reservations. Amendments or additions to this report may be required should my retention be expanded by Plaintiff and additional evidence and/or testimony is provided to me.

**II. Assignment**

2. I have been retained by counsel for the Plaintiff in the matter of Maria de Lourdes Parra Marin, on behalf of herself and all other persons similarly situated ("Plaintiff") v. Dave and Buster's, Inc., et al. ("Defendants"). Plaintiff seeks to represent all persons currently or formerly employed by Dave and Buster's as hourly wage, full-time employees and whose full-time hours were involuntarily reduced to part-time level by Dave and Buster's after the enactment of the Affordable Care Act (ACA). Plaintiff claims that this reduction in hours resulted in the loss of wages and insurance coverage.
3. I have been asked by counsel to review the hours and benefits data provided to me by the parties to determine the putative class's potential incidental loss of wages and benefits by calculating the amounts by which employees' hours and wages were reduced as compared to what such hours and wages would have been had the employees remained full-time (the "Potential Incidental Reduction in Wages and Lost Full Time Benefits").

**III. Summary of Expert Qualifications**

4. I am a Certified Public Accountant, licensed in the State of California, and Certified in Financial Forensics. I am currently a partner at Hemming Morse, LLP, CPAs, Forensic and Financial Consultants. My work in the accounting profession includes experience as an auditor and as a consultant. My expert qualifications, including my testimony, are described in **Exhibit A** hereto.
5. I have consulted on and/or testified in over 250 matters involving wage and hour-related disputes, including those arising under the FLSA and the California Labor Code. These matters have involved allegations of unpaid overtime, off-the-clock work, meal and rest break violations, employment misclassification, time shaving, unpaid or under accrued fringe benefits, record keeping violations, unreimbursed business expenses, and other accounting and damage related matters.
6. My firm has been compensated for my review and analysis in this matter at my standard hourly rate of \$475 per hour. Others have assisted me in my work and my firm has been compensated for their work at their standard hourly rates.

**IV. Summary of Opinions**

7. Based on my analysis of the wage data provided, I have calculated total wages as a result of a reduction in full-time hours of \$21,886,116 for 2,091 employees during the period of January 1, 2013 through October 5, 2018.
8. Based on my analysis of the benefits data provided, I have calculated total employer contribution to benefits as a result of a reduction in full-time hours of \$700,129 for 267 employees during the period of September 1, 2013 through January 31, 2018.

understanding that there are the “lookback periods” used by Dave & Buster’s in the ordinary course of business in assessing employees’ status for eligibility purposes.

16. I determined the average amount of weekly hours worked in each of the above defined periods. If an employee’s average weekly hours worked in a prior period were greater than 30, and the subsequent period shows an average weekly hours below 30, I calculated the decrease in hours from the prior period to the current period as the value in the reduction in hours, if any. If the average weekly hours worked per period returns to 30, then no reduced hours were determined, and that period became the new benchmark for wages going forward. I repeated the same process through Period 6, calculating a decrease in hours from the last eligible period over 30 hours.<sup>3</sup> This decrease in hours I considered to be the average reduced hours per week in a period.
17. I multiplied the average reduced hours per week in a period by the number of weeks that the employee worked in each period which determined the average cumulative reduced hours for the entire period. I then multiplied the average reduced hours per period by the average wage rate in effect during that period to determine the total wages for reduced hours.
18. For example, an employee worked an average of 32.37 hours prior to December 31, 2012 and 32.10 hours in Period 1, but because this employee still works over 30 hours per week, no reduced hours are recorded. In Period 2, this employee works an average of 27.32 hours per week, therefore I have calculated 4.78 (i.e. 32.10 minus 27.32) reduced hours worked per week in that period. This employee works 53 weeks in Period 2, therefore I have determined 253.34 (53\*4.78) reduced hours in that period. Their average wage rate in Period 2 is \$20.41 therefore the wages for reduced hours in that period is \$5,170.82 (\$20.41\*253.34).
19. I have been asked to exclude from my analysis any employee who worked less than 365 days when the wages period for damages began because a Dave & Buster’s employee is not eligible for full time benefits until that employee has worked 365 days. I have also been asked to exclude any employees in the data provided that relate to Hawaii, as they are not a part of this class. The total Potential Incidental Reduction in Wages, after exclusions, is \$21,886,116.

*The Potential Incidental Loss in Full Time Benefits*

20. I have also been asked by counsel to calculate the Potential Incidental Loss in Full Time Benefits for employees per period using different timeframes. The following table represents the periods used to determine the loss of full time benefits and the respective periods in which eligibility for such benefits is determined:

Lookback Period: Benefits				
Period	Begin Receiving Benefits Date	End Receiving Benefits Date	Beginning Eligibility Determination Date <sup>4</sup>	Ending Eligibility Determination Date
0	2/1/2013	8/31/2013	7/1/2012	12/31/2012
1	9/1/2013	3/31/2014	1/1/2013	6/30/2013
2	4/1/2014	12/31/2014	9/1/2013	2/28/2014
3	1/1/2015	12/31/2015	10/6/2013	10/5/2014
4	1/1/2016	12/31/2016	10/6/2014	10/4/2015
5	1/1/2017	12/31/2017	10/5/2015	10/4/2016
6	1/1/2018	12/31/2018	10/6/2016	10/5/2017

<sup>3</sup> If the number of hours in the following period were greater than the previous, then no reduced hours were determined.

<sup>4</sup> Fisch Declaration Stipulation of Settlement Exhibit C.

21. I calculated for each employee the average weekly hours worked in each period mentioned in paragraph 20. I captured the decrease in hours from period to period, if any, from the last eligible period over 30 hours and I considered that to be the average reduced hours per week in a period.
22. If monthly benefits were paid on an employee's behalf, and the following period showed both average reduced hours per week greater than zero (i.e. average weekly hours in the period dropped below 30) and benefits paid of zero, I calculated the loss of full time benefits.<sup>5</sup> I applied the preceding period's average monthly benefit amount to the current calculated period as lost benefits.
23. Because the employer's contributions to benefits are paid on a monthly basis, I divided the total weeks worked in each of the periods by an average amount of weeks per month to obtain the applicable months per period, and then multiplied those months to the monthly loss of full time benefits calculated in paragraph 22. I considered this amount to be total lost benefits.
24. For example, Dave and Buster's paid an average of \$324.86 per month in Period 2 on an employee's behalf for benefits. In Period 3, Dave and Buster's paid \$0 in benefits and reflected 27.86 average hours worked per week (a decrease of 3.60 from the previous 31.46 average). Since the employee had reduced hours and no benefits were paid, I applied the \$324.86 from the preceding period as lost full time benefits in Period 3. This employee worked 53 weeks in Period 3, in which I divided by 4.35 weeks per month to get 12.18 applicable months worked in the period (i.e. 365 days divided by 12 months = 30.42 days per month divided by 7 = 4.35 weeks per month). The \$324.86 in monthly loss in full time benefits times 12.18 applicable months in the period results in \$3,962.40 in total lost full time benefits in Period 3.
25. I have also been asked to exclude from these calculations potential benefits damages due to any employees who worked less than 365 days or who worked at a store in Hawaii. The total *Potential Incidental Loss in Full Time Benefits*, after exclusions, is \$700,129.
26. *Total Potential Incidental Reduction in Wages and Lost Full Time Benefits* is \$22,586,244.

Dated: November 19, 2018  
Concord, CA

  
David M. Breshears, CPA/CFF

---

<sup>5</sup> If an employee did not receive benefits during any period, then no loss in full time benefits would be calculated.



HEMMING  
MORSE, LLP

CERTIFIED PUBLIC ACCOUNTANTS,  
FORENSIC AND FINANCIAL CONSULTANTS

Exhibit A  
CURRICULUM VITAE

[www.hemming.com](http://www.hemming.com)

## David M. Breshears, CPA/CFF

### Employment & Education

2012 – Present	<b>Hemming Morse, LLP</b> <i>Certified Public Accountants, Forensic and Financial Consultants</i> Partner
1999 – 2011	<b>Hemming Morse, Inc.</b> Director, 2011 Manager, 2006-2010 Associate Staff Accountant
1998	<b>California State University, Chico</b> B.S. Accounting

### Professional & Service Affiliations

- Certified Public Accountant,  
State of California, since 2006
- Certified in Financial Forensics, since 2008
- American Institute of Certified Public Accountants
- California Society of Certified Public Accountants
- Association of Certified Fraud Examiners  
(Associate Member)

page 1 of 6

Walnut Creek Office  
1340 Treat Boulevard  
Suite 209  
Walnut Creek, CA 94597  
Tel: 415.836.4000  
Fax: 415.777.2062



HEMMING  
MORSE, LLP

CERTIFIED PUBLIC ACCOUNTANTS,  
FORENSIC AND FINANCIAL CONSULTANTS

CURRICULUM VITAE

[www.hemming.com](http://www.hemming.com)

## David M. Breshears, CPA/CFF

### Presentations & Seminars

- *"E-Discovery & Electronically Stored Information 101"*  
Beeson Tayer & Bodine, May 2013
- *"How to Collect, Produce, and Use E-Documents: A Practical Primer"*  
BASF - Labor & Employment Conference, Yosemite, February 2013
- *"Forensic Accounting for Today's Busiest Practice Areas"*  
Continuing Education of the Bar-California, March 2012
- *"Utilizing Experts in Wage and Hour Litigation"*  
Buchalter Nemer, July 2011
- *"Class Action Employment Litigation"*  
California Society of Certified Public Accountants-  
State Steering Committee, August 2010
- *Adjunct Professor, Golden Gate University,*  
*Wage & Hour Damages, Spring 2009, Fall 2009,*  
*Spring 2010*

### Testimony

#### Trial

- **Stacy Ernst, et al v. City of Chicago (2017)**  
U.S. District Court, Northern District of Illinois, Eastern  
Division, Case No. 1:08-cv-04370
- **Sanchez, et al. v. McDonald's Restaurants of  
California, Inc. (2017)**  
Superior Court of the State of California County of Los  
Angeles, Case No. BC499888
- **Honora Keller et al v. The Board of Trustees of  
California State University (2015)**  
Superior Court of the State of California County of San  
Francisco, Case No. CGC-09-490977
- **Amanda Quiles, et al v. Koji's Japan Incorporated,  
et al. (2014)**  
Superior Court of the State of California, County of  
Orange, Case No. 30-2010-00425532-CU-OE-CXC
- **Ming-Hsiang Kao v. Joy Holiday, Joy Express, Inc.,  
et al. (2014)**  
Superior Court of the State of California County of San  
Mateo, Case No. CIV509729
- **Salinas, et al. v. Imperial Irrigation District (2014)**  
Superior Court of the State of California City and  
County of Riverside, Case No. 10017367
- **Amerman v. Gurvinder Musafar (2013)**  
Superior Court of the State of California County of  
Santa Clara, Case No. 112CV226364
- **Michael J. Pexa v. Farmers Group, Inc. (2012)**  
Superior Court of the State of California County of  
Sacramento, Case No. 34-2009-00034950
- **Marina Puchalski and Rajeev Chhibber v. Taco Bell  
Corp. (2012)**  
Superior Court of the State of California County of San  
Diego, Case No. GIC 870429
- **Maria Martinez and Juana Guzman v. Jatco, Inc.  
(2011)**  
Superior Court of the State of California County of  
Alameda, Case No. RG08397316

page 2 of 6



HEMMING  
MORSE, LLP

CERTIFIED PUBLIC ACCOUNTANTS,  
FORENSIC AND FINANCIAL CONSULTANTS

CURRICULUM VITAE

www.hemming.com

## David M. Breshears, CPA/CFF

Testimony continued

Deposition

- **Som Swamy, et al. v. Title Source, Inc (2018)**  
U.S. District Court, Northern District of California  
Case No. 17-CV-01175-JCS
- **Bernstein, et al. v. Virgin America, Inc. (2017)**  
U.S. District Court, Northern District of California  
Case No. 15-CV-02277-JST
- **Marley Castro et al. v. ABM Industries, Inc. et al (2017)**  
Superior Court of the State of California County of Alameda, Case No. RG14745764
- **Starvona Harris and Jonathan Strickland v. Best Buy Stores, L.P. (2017)**  
U.S. District Court, Northern District Of California  
Oakland Division, Case No. 4:17-CV-00446 HSG
- **David Collinge, et al. v Intelliquick Delivery, Inc., et al. (July 2017)**  
U.S. District Court, District of Arizona  
Case No. CV12-00824-PHX-JWS
- **Stacy Ernst, et al v. City of Chicago (2017)**  
U.S. District Court, Northern District of Illinois, Eastern Division, Case No. 1:08-cv-04370
- **Sanchez, et al. v. McDonald's Restaurants of California, Inc. (2017)**  
Superior Court of the State of California County of Los Angeles, Case No. BC499888
- **David Collinge, et al. v Intelliquick Delivery, Inc., et al. (February 2017)**  
U.S. District Court, District of Arizona  
Case No. CV12-00824-PHX-JWS
- **Salazar, et al. v. McDonald's Corp., et al. (2016)**  
U.S. District Court, Northern District of California  
Case No. 3:14-cv-02096-RS
- **Jamie Steeb v. Overlake Hospital Medical Center (2016)**  
Superior Court of the State of Washington for King County, Case No. 15-2-16399-0 SEA
- **Bernstein, et al. v. Virgin America, Inc. (2016)**  
U.S. District Court, Northern District of California  
Case No. 15-CV-02277-JST
- **John Hance, et al. v. Super Store Industries (2016)**  
Superior Court of the State of California County of Stanislaus, Case No. 673904
- **Daniel Villalpando v. Exel Direct Inc. (2016)**  
U.S. District Court, Northern District of California Case No. 3:12-cv-04137-JCS
- **Chris Elliott, et al. v. Schlumberger Technology Corporation (2016)**  
U.S. District Court, District Court of North Dakota, Fargo Division, Civil Action No. 3:13-cv-00079
- **Sanchez, et al. v. McDonald's Restaurants of California, Inc. (2015)**  
Superior Court of the State of California County of Los Angeles, Case No. BC499888
- **Betelhem Shiferaw v. Sunrise Senior Living Management, Inc. (2015)**  
U.S. District Court, Central District of California  
Case No. 2:13-cv-02171-JAK-PLA
- **Honora Keller et al v. The Board of Trustees of California State University (2015)**  
Superior Court of the State of California County of San Francisco, Case No. CGC-09-490977
- **Ming-Hsiang Kao v. Joy Holiday, Joy Express, Inc., et al. (2014)**  
Superior Court of the State of California County of San Mateo, Case No. CIV509729

page 3 of 6

Walnut Creek Office  
1340 Treat Boulevard  
Suite 209  
Walnut Creek, CA 94597  
Tel: 415.836.4000  
Fax: 415.777.2062



HEMMING  
MORSE, LLP

CERTIFIED PUBLIC ACCOUNTANTS,  
FORENSIC AND FINANCIAL CONSULTANTS

CURRICULUM VITAE

[www.hemming.com](http://www.hemming.com)

## David M. Breshears, CPA/CFF

Testimony continued

*Deposition* continued

- **Fraser, et al. v. Patrick O'Connor & Associates, L.P. (2014)**  
U.S. District Court, Southern District of Texas  
Case No. 4:11-cv-03890
- **Salinas, et al. v. Imperial Irrigation District (2014)**  
Superior Court of the State of California City and County of Riverside, Case No. 10017367
- **Smith, et al. v. Family Video Movie Club, Inc. (2013)**  
U.S. District Court, Northern District of Louisiana  
Case No. 1:11-cv-01773
- **Lang v. DirecTV, Inc. (2013)**  
U.S. District Court, Eastern District of Louisiana  
Case No. 2:10-cv-01085-NJB-SS
- **Sabas Arredondo, et al. v. Delano Farms Company, et al. (2013)**  
Eastern District of California, Fresno Division  
Case No. 1:09-cv-01247-LJO-DLB
- **Gabriel Fayerweather v. Comcast Corporation (2012)**  
Superior Court of the State of California County of San Diego, Case No. C-08-01470
- **Green v. Konica Minolta Business Solutions U.S.A., Inc. (2012)**  
U.S. District Court, Northern District of Illinois  
Eastern Division, Case No. 11-CV-03745 (N.D. Ill.)
- **Marina Puchalski and Rajeev Chhibber v. Taco Bell Corp. (May 2012)**  
Superior Court of the State of California County of San Diego, Case No. GIC 870429
- **Marina Puchalski and Rajeev Chhibber v. Taco Bell Corp. (April 2012)**  
Superior Court of the State of California County of San Diego, Case No. GIC 870429
- **Martin Marine v. Interstate Distributor Co. (2012)**  
Superior Court of the State of California County of Alameda, Case No. RG073582777
- **Maria Martinez and Juana Guzman v. Jatco, Inc. (2011)**  
Superior Court of the State of California County of Alameda, Case No. RG08397316

page 4 of 6



HEMMING  
MORSE, LLP

CERTIFIED PUBLIC ACCOUNTANTS,  
FORENSIC AND FINANCIAL CONSULTANTS

CURRICULUM VITAE

[www.hemming.com](http://www.hemming.com)

## David M. Breshears, CPA/CFF

### Selected Case Experience

- Engaged as damage expert by plaintiff, to analyze and quantify; meal and rest period claims, improper distribution of gratuities, and off-the-clock hours, for an upscale restaurant chain.
- Engaged as damage expert by defendant, a farm labor contractor, to evaluate claims related to off-the-clock hours worked and expense reimbursement for small tools for over 20,000 employees.
- Engaged as neutral accounting expert by plaintiff and defendant to calculate potential unpaid hours worked and additional overtime premiums for commission bonuses, for a manufacturing/engineering firm.
- Expert for the plaintiff. Retained to determine the frequency and magnitude of time shaving claims of a mid-size manufacturing firm.
- Provided consulting services to defense counsel in a class-action wage and hour matter, which alleged that hundreds of County employees were paid improper overtime wages under the FLSA. Prepared analyses using hours worked records, compensation data, employee records, and other data to determine the proper calculation of employees' regular rate of pay and related overtime compensation.
- Assisted counsel in preparing a case involving unpaid overtime, meal and rest break violations, and off-the-clock time for an employee of a hotel chain. Reviewed employment history files, time records, and other documents to determine the number of potential violations and to quantify damages.
- Assisted expert for plaintiffs' counsel in a class-action wage and hour matter, which alleged that over 250 small business banking officers were improperly classified as exempt. Reviewed statistical sample of hours worked, salary and commission related earnings, paid time off records, and other data to determine the damages related to unpaid overtime and missed meal breaks.
- Assisted expert for plaintiffs' counsel in a class action matter against a fortune 500 company, which alleged that a class of several hundred individuals was misclassified as independent contractors in the state of Washington. Prepared analysis of average earnings across all class members and performed comparison to national averages for similarly situated employees and independent businesses. Performed business valuation services to determine economic value of independent contractor assets and to incorporate any discounts that may apply related to the controls and requirements of the customer/employer operating agreement.
- Assisted expert for plaintiffs' counsel in a class-action matter against a Fortune 500 company, which alleged that over 75,000 California employees were required to pool their tips with supervisory employees in direct violation of the California Labor Code.

page 5 of 6





HEMMING  
MORSE, LLP

CERTIFIED PUBLIC ACCOUNTANTS,  
FORENSIC AND FINANCIAL CONSULTANTS

CURRICULUM VITAE

[www.hemming.com](http://www.hemming.com)

## David M. Breshears, CPA/CFF

### Selected Experience continued

- Provided consulting services to plaintiffs' counsel in a class-action wage and hour matter, which alleged that hundreds of employees were not paid the proper "living wage" in accordance with the company's contractual obligation. Created a database of hours worked and earnings information from paper and electronic records, and then providing damages estimates based on a variety of assumptions and legal theories.
- Advised counsel on class certification issues by applying economic and statistical approaches to analyze evidence relating to class member variation, if any, and to determine both liability and damages.
- Consulted for Health Provider in a dispute involving a guaranteed maximum price contract for the construction of various structures. Assisted the expert in analyzing construction costs incurred and calculating the amount due to the general contractor.
- Performed statistical and contractual analysis for labor settlement or arbitration purposes, including analysis of pay and benefits, job content, productivity, labor costs, and profitability.
- Consulted clients in their efforts to identify overpayments of construction projects; discover errors and identify unreasonable project charges; identify weaknesses in contractual agreements; reduce risks of fraud, waste, and abuse; and recover payments made in error.
- Prepared financial analyses in connection with assignments involving fraud, contract disputes and lost profits.
- Performed extensive research for a variety of cases, including cases involving fraud, contract disputes, and lost profits.
- Created various databases and/or tested the accuracy of databases created by others in order to assimilate large amounts of information to be presented in a meaningful manner.
- Managed audit engagements from planning to reporting, including delegation and review of staff assignments and control of time and expenses.
- Prepared and examined financial reports including research and analysis of technical accounting issues.
- Analyzed client accounting systems and related controls and developed specific recommendations for improvements.

page 6 of 6

Exhibit B

**Maria de Lourdes Parra Marin v. Dave and Buster's Inc.**  
**Exhibit B**

01Hours and Earnings\_1  
01Hours and Earnings\_2  
01Hours and Earnings\_3  
0401June 2013 Benefits  
0402September 2013 Benefits  
0403February 2014 Benefits  
0404April 2014 Benefits  
0405October 2014 Benefits  
0406January 2015 Benefits  
0407October 2015 Benefits  
0408January 2016 Benefits  
0409October 2016 Benefits  
0410January 2017 Benefits  
0411October 2017 Benefits  
0412January 2018 Benefits  
02MGR Within Range

FISCH DECLARATION EXHIBIT C

(Firm Resume of Abbey Spanier, LLP)

## **ABBAY SPANIER, LLP**

Abbey Spanier, LLP (“Abbey Spanier”) specializes in large, complex litigation in the fields of securities, mergers and acquisitions, corporate governance, consumer protection, unfair employment practices and antitrust. The Firm has litigated thousands of cases in both state and federal courts throughout the United States. Since the early 1960s, Abbey Spanier has been committed to litigating with the highest level of excellence and integrity. We are committed to protecting shareholders and victims of corporate wrongdoing.

The Firm prides itself on the aggressive pursuit of our clients’ goals and on the excellence of our work. Abbey Spanier fights to achieve the very best possible result for our clients no matter how difficult the obstacles or well financed the opposition.

Over the last four decades, this Firm has been lead or co-lead counsel in cases resulting in billions of dollars in recoveries on behalf of investors and aggrieved parties. Abbey Spanier has served as a lead counsel in some of the largest securities fraud class action settlements. Among the more prominent of these cases are: *In re BankAmerica Corp. Sec. Litig.* (\$490 million recovery); *In re Adelphia Communications Corp. Sec. and Derivative Litig.* (\$455 million recovery) and *In re Waste Management Inc., Sec. Litig.* (\$220 million recovery).

### **THE FIRM’S RECENT ACHIEVEMENTS**

*In re Vivendi Universal, S.A., Securities Litigation, Civil Action No. 02-cv-5571 (RJH/HBP) (S.D.N.Y.)*. Abbey Spanier serves as Lead Plaintiffs’ Counsel in this long pending securities fraud class action against defendants Vivendi Universal, S.A., and its two most senior officers, Jean Marie Messier and Guillaume Hannezo. On January 29, 2010, a three month long securities fraud trial against Vivendi culminated with a jury verdict finding Vivendi liable for securities fraud. After discharging the jury, in describing the work of the attorneys trying the Vivendi case, Judge Richard J. Holwell stated, “I can only say that this is by far the best tried case that I have had in my time on the bench. I don’t think either side could have tried the case better than these counsel have.” As of 2010, the Vivendi case is just one of nine securities class actions tried to verdict based on wrongs committed following the passage of the Private Securities Litigation Reform Act in 1995. At the time of the verdict, Abbey Spanier estimated that investors from France, England, and the Netherlands, as well as the United States could recover as much as \$9.3 billion, or €6.6 billion.

*In re Adelphia Communications Corp. Securities and Derivative Litigation, 03 MD 1529 (LMM) (S.D.N.Y.)*. This action arose out of one of the most egregious financial frauds ever uncovered at a public company. From 1998 through 2002, Adelphia Communications Corporation – the nation’s sixth largest cable company – systematically and fraudulently failed to report billions in loans. In 2006, Plaintiffs entered into partial settlements in the aggregate amount of \$455 million with the Company’s independent auditors, Deloitte & Touche, LLP, investment banking firms which underwrote offerings of Adelphia securities, and lending banks. Judge Lawrence M. McKenna observed: “If the Lead Plaintiff(s) had been represented by less tenacious and competent counsel, it

is by no means clear that [they] would have achieved the success [they] did here on behalf of the Class.”

*In re Medco Health Solutions Pharmacy Benefits Management Litig.*, Case No. 03-MD-1508 (CS) (S.D.N.Y). Abbey Spanier was one of two lead counsel in this case where plaintiffs were the trustees and beneficiaries of employee welfare benefit plans that directly or indirectly contracted with Medco Health Solutions which, at the time the case was commenced, was owned by drug manufacturer Merck & Co., Inc. Plaintiffs brought the action alleging that Medco had breached its fiduciary duty under the Employee Retirement Income Security Act of 1974 by failing to act in their best interest in its capacity as a pharmaceutical benefits manager for the plans. Specifically, plaintiffs alleged that Medco managed its formularies and implemented programs in ways that tended to favor Merck products. The case was litigated through summary judgment motions and a settlement that provided a cash settlement fund in the amount of \$42.5 million and significant changes in practice at Medco. The settlement was approved by the Court and the settlement fund was distributed to those class members that submitted identification forms in early 2010.

*Braun and Hummel v. Wal-Mart Stores, Inc.*, Case Nos. 3127 and 3757 (Court of Common Pleas, Philadelphia County). Plaintiffs in this class action on behalf of 186,000 current and former hourly employees obtained a \$78 million jury verdict against Wal-Mart and an express finding that Wal-Mart acted in bad faith in failing to pay class members for missed rest breaks and off the clock work. The verdict was hailed as the largest jury verdict in the Commonwealth of Pennsylvania in 2006. On October 3, 2007, the Court of Common Pleas ordered Wal-Mart to pay an additional \$62.3 million in statutory damages to class members. The trial court stressed the importance of compensating workers for their time: “The law in its majesty applies equally to highly paid executives and minimum-wage clerks,” he wrote. “Just as highly paid executives’ promised equity interests . . . are protected fringe benefits and wage supplements . . . , so too [are] the monetary equivalents of ‘paid break’ time cashiers and other employees were prohibited from taking.” On June 1, 2011, the Superior Court of Pennsylvania affirmed the \$150 million judgment against Wal-Mart. *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super 2011), *cert. denied*, 2016 WL 1278624 (U.S. Apr. 4, 2016). The three judge panel held that there was sufficient evidence in the record to conclude that Wal-Mart breached its contract with its hourly employees and violated the state’s labor laws. In December 2014, the Pennsylvania Supreme Court affirmed the judgment. *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014), *cert. denied*, 2016 WL 1278628 (U.S. Apr. 4, 2016). In April 2016, the United States Supreme Court denied Wal-Mart’s petitions for certiorari. *Id.*

*Iliadis, et al. v. Wal-Mart Stores, Inc.*, Case No. A-69-06 (Supreme Court New Jersey, Middlesex County). Abbey Spanier prevailed in its quest to overturn the trial court’s refusal to certify a class of 72,000 current and former Wal-Mart employees who were forced to work off the clock and miss meal breaks. The New Jersey Supreme Court reversed the trial court and the Appellate Division and remanded the case for entry of an order certifying the class, stating:

‘When the organization of a modern society, such as ours affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy – or at least to deter – that conduct.’ Here,

the class action is just such a procedural device. By equalizing adversaries, we provide access to the courts for small claimants. By denying shelter to an alleged wrongdoing defendant, we deter similar transgressions against an otherwise vulnerable class – 72,000 hourly paid retail workers purportedly harmed by their corporate employer’s uniform misconduct. Individually, the aggrieved Wal-Mart employees lack the strength in terms of resources and motivation to assert their grievances in court. Collectively, as a class, they are able to pursue their claims. (Citation omitted).

*In re Tele-Communications, Inc. Shareholders Litigation*, C.A. No. 16370 (Del. Ch.). This litigation arose out of the 1998 merger of Tele-Communications, Inc. (“TCI”) and AT&T Corp. Plaintiffs alleged that defendants breached their fiduciary duty to the holders of TCI shares by insisting that a 10% premium be paid to the holders of super-voting TCI shares, held primarily by TCI insiders. The premium was alleged to be the product of unfair dealings and agreed to without any meaningful protections for class members. After overcoming defendants’ motion for summary judgment, the case was settled days before trial was to begin in the Chancery Court. Chancellor Chandler, commenting on the \$52 million settlement in February 2007, stated: “Attorneys on both sides were excellent and performed at the highest levels of professionalism, representing their clients in this matter, and I compliment you all for that.”

*In re Merrill Lynch & Co., Inc Research Reports Securities Litigation*, 2 MDL 1484 (JFK) (S.D.N.Y.). This case, brought on behalf of Merrill Lynch mutual fund investors, was resolved while on appeal from its dismissal by the district court, and following the Second Circuit’s dismissal of a related case. Judge John Keenan, commenting on the \$39 million settlement in January 2007, stated: “[I]t is beyond dispute that plaintiffs’ counsel conducted this litigation with great skill and tenacity. The high quality of representation provided by lead counsel is evident from both the record of this case and the resumes that the lead counsel have submitted to the Court...Abbey Spanier [has] tremendous experience in the field of complex securities class litigation.”

*In re Asia Pulp & Paper Securities Litigation*, 01-CV-7351 (JES) (S.D.N.Y.). This securities class action raised several complex issues with respect to the efficiency of the market for foreign securities and the enforceability of a judgment against a foreign entity. Observing that lead counsel litigated the case “efficiently”, the District Court approved the \$46 million settlement of this action in July 2006.

*Semerenco v. Cendant Corp.*, 98-4734 (WHW) (D.N.J.). Just prior to the announcement that it was restating its financial statements, Cendant was the victor in a 1998 takeover battle for American Bankers Insurance Co. (“ABI”). Abbey Spanier represented ABI shareholders in this securities class action who alleged that ABI’s stock price was artificially inflated by Cendant’s false financial statements. In a precedent setting decision, the Third Circuit Court of Appeals reversed the dismissal of the action and expanded the right to sue beyond direct purchasers from the issuer. The \$26 million settlement of this action was approved by the District Court in July 2006.

*Tooley v. Donaldson, Lufkin & Jenrette, Inc., et al.*, C.A. No. 18414-NC (Del. Ch.). This class action, brought on behalf of DLJ shareholders alleging the board’s breach of fiduciary duty, was initially dismissed on standing grounds without any resolution as to the sufficiency of

plaintiffs' pleaded claims. On their second appeal to the Delaware Supreme Court, plaintiffs obtained a reversal of the dismissal of their pleading. The landmark decision by the Supreme Court represented a departure from earlier Delaware authority on the distinction between direct and derivative actions. The *Tooley* Court expressly disapproved both the concept of special injury and the concept that a claim is necessarily derivative if it affects all stockholders equally. As a result of *Tooley*, the analysis now turns solely on who suffered the alleged harm and who would benefit from any recovery or other remedy (the corporation or the suing stockholders).

## PROMINENT CASES

The success of Abbey Spanier in prosecuting large, complex litigation in the fields of securities, mergers and acquisitions, corporate governance, consumer protection, unfair employment practices and antitrust is demonstrated by the significant results the Firm has achieved for its clients and others. The following is a representative list of some of the more notable cases and settlements achieved as a result of Abbey Spanier's efforts:

### SECURITIES FRAUD LITIGATION

*In re Adelphia Communications Corp Securities and Derivative Litigation*, 03 MD 1529 (LMM) (S.D.N.Y.) (\$455 million recovery);

*In re BankAmerica Corp. Sec. Litig.*, MDL No. 1264 (E.D. Mo.) (\$490 million recovery);

*In re Waste Management, Inc. Sec. Litig.*, Master File No. 97-C-7709 (N.D. Ill.) (\$220 million recovery);

*In re Petro-Lewis Sec. Litig.*, No. 84-C-326, (D. Colo.) (\$100 million recovery);

*In re Chambers Development Sec. Litig.*, 92 Civ. 0679 (W.D. Pa.) (\$95 million recovery);

*In re Wedtech Corp. Sec. Litig.*, No. 86 Civ. 8628 (S.D.N.Y.) (\$77.5 million recovery);

*In re IDB Communications Group, Inc. Sec. Litig.*, Master File No. CV 94-3618 (C.D. Cal.) (\$75 million recovery);

*In re Westinghouse Sec. Litig.*, No. 91-354 (W.D. Pa.) (\$67.5 million recovery);

*In re Nat'l. Health Laboratories Sec. Litig.*, CV-92-1949 (S.D. Cal.) (\$64 million recovery);

*In re Nat'l. Medical Enterprises Sec. Litig.*, CV-91-5452-TJH (C.D. Cal.) (\$60.7 million recovery);

*In re Salomon, Inc. Sec. Litig.*, Nos. 91 Civ. 5442, 91 Civ. 5471, (S.D.N.Y.) (\$54.5 million recovery);

*In re Integrated Resources Sec. Litig.*, Master File No. 89 Civ. 4255 (S.D.N.Y.) (\$54 million recovery);

*In re LILCO Sec. Litig.*, No. 84 Civ. 0588 (E.D.N.Y.) (\$48.5 million recovery);

*In re Crazy Eddie Sec. Litig.*, No. 87 Civ. 0033 (E.D.N.Y.) (\$42 million recovery);

*In re Leslie Fay Cos. Sec. Litig.*, No. 92 Civ. 8036 (S.D.N.Y.) (\$35 million recovery);

*In re Datapoint Sec. Litig.*, C.A. No. SA-82-C.A. 3348 (S.D.Tex.) (\$22 million.) The Firm acted as lead trial counsel in a securities fraud action tried to a plaintiffs' verdict before a jury against Peat Marwick Mitchell & Co.;

*In re PSINet Sec. Litig.*, Civ. No. 00-cv-1850-A (E.D.Va) (\$17.8 million recovery);

*Hirsch v. PSS World Medical, Inc.*, Civ. No. 3:98-cv-502-J-32TEM (M.D. Fl.) (\$16.5 million recovery); and

*Cheney v. Cyberguard Corp. et al.*, C.A. No. 98-6897 (S.D. Fla.) (\$10 million recovery).

### INDIVIDUAL ACTION

*State of New Jersey v. Gemstar - TV Guide Int'l et al.*, Case No. GC030987 (Cal. Super. Ct.) (In an individual action on behalf of the State of New Jersey the State recovered approximately 50% of its losses, or about nine times more than shareholders received in the average class action settlement.)

### CORPORATE GOVERNANCE AND SHAREHOLDER RIGHTS

*In re Cox Communications, Inc. Shareholders Litig.*, Consolidated C.A. No. 613-NC, Delaware Court of Chancery (\$700 million increase in purchase price);

*In re Seagate Technology, Inc. Sec. Litig.*, C.A. No. 17932-NC, Delaware Court of Chancery (\$200 million increase in purchase price);

*In re AXA Financial, Inc. Shareholders Litig.*, C.A. No. 18268-NC, Delaware Court of Chancery (\$631 million increase in purchase price);

*In re Warner-Lambert Company Shareholders Litig.*, C.A. No. 17519-NC Delaware Court of Chancery (Warner-Lambert shareholders received approximately \$20 billion more than the value of the originally proposed merger with American Home Products.);

*In re Cyprus Amax Minerals Company Shareholders Litig.*, C.A. No. 17383-NC, Delaware Court of Chancery (\$900 million benefit to shareholders);

*In re Tele-Communications, Inc. Shareholders Litigation*, C.A. No. 16370 (Del. Ch.) (\$52 million benefit to shareholders);

*Lang v. The Reader's Digest Association, Inc., et al.*, C.A. 19574-NC, Delaware Court of Chancery (\$21 million increase to shareholders in recapitalization);



*In re RJR Nabisco, Inc. Sec. Litig.*, C.A. No. 10389 Delaware Court of Chancery (\$55 million increase in purchase price);

*In re Liberty Media Corp. Sec. Litig.*, C.A. No. 13168 Delaware Court of Chancery (\$44 million increase in purchase price);

*In re Fort Howard Corp. Sec. Litig.*, C.A. No. 9991 Delaware Court of Chancery (\$13.4 million increase in purchase price);

*In re Waste Management, Inc. Shareholders Deriv. Litig.*, C.A. No. 17313, Delaware Court of Chancery (\$24.6 million benefit);

*In re Morrison Knudson Corporation Deriv. Litig.*, C.A. No. 14032, Delaware Court of Chancery (Corporate governance changes requiring that board be comprised of non-employee directors and new directors; old board required to surrender significant retirement benefits);

*In re Paramount Communications, Inc. Sec. Litig.*, C.A. No. 13117, Delaware Court of Chancery (shareholders received an additional \$2 billion);

*Schoenfeld v. XO Comm.*, Index No. 01-018358, New York Supreme Court (Successful attack on restructuring plan resulting in \$8.33 million benefit to shareholders and participation in rights offering);

*Glancy v. Sternlicht*, Civ. No 204982 (Md. Cir. Ct.) (Shareholder derivative action asserting claims on behalf of Starwood Hotels & Resorts Worldwide for various directors' alleged usurpation of corporate opportunity resulting in substantial changes to corporate governance);

*Joseph v. Shell Oil Co.*, 501 A.2d 409 (Del. Sup. 1985) (Landmark decision – first successful injunction action challenging disclosure. \$200 million shareholder recovery);

*Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 Delaware Court of Chancery (Landmark decision - successfully challenged “dead hand” poison pill); and

*Cede & Co. v. JRC Acquisition Corp.*, C.A. No. 18648-NC (Del. Ch.) (Represented The Royce Funds at trial in an appraisal action in connection with a “going private” transaction.)

## CONSUMER LITIGATION

*Henry v. Sears, Roebuck & Co.*, No. 98 C 4110 (N.D. Ill.) (\$156 million settlement on behalf of Sears Credit card holders, representing approximately 66% of all class members damages distributed automatically to each class member without filing a proof of claim form);

*Kropinski v. Johnson & Johnson*, Docket No. L-8886-96, New Jersey Superior Court; and

*Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002).

## **ANTITRUST LITIGATION**

*In re Nine West Shoes Antitrust Litigation*, 80 F. Supp. 2d 181 (S.D.N.Y.) (This action was brought on behalf of purchasers of shoes sold by Nine West and its affiliates. The action alleged a combination of vertical and horizontal price-fixing and resulted in a decision imposing *per se* price-fixing liability despite the fact that the defendants only had a twenty percent market share. As a result of that decision, Nine West entered into an agreement with the Attorneys General of all 50 States and all United States Territories to settle the price-fixing claims for \$54 million, to be distributed to women's groups throughout the country.)

## **THE FIRM'S LAWYERS**

The Firm's attorneys represent one of the most experienced and skilled legal teams concentrating in class action litigation. Each member of the Firm has successfully prosecuted complex class and derivative actions and individual actions involving some of the largest corporations in the United States.

## **ATTORNEYS**

**ARTHUR N. ABBEY** – Mr. Abbey received his B.A. from Hofstra University in 1957, his L.L.B. from New York Law School in 1959, and his M.B.A. from New York University Graduate School of Business Administration in 1961. He is admitted to the Bar of the State of New York, United States District Courts for the Southern and Eastern Districts of New York, most of the Circuit Courts of Appeals and the United States Supreme Court.

Mr. Abbey is the Firm's chief trial attorney, and has been lead counsel for many major class action securities matters, including one of the largest class action securities cases to go to trial, *In re Vivendi Universal, S.A. Securities Litig.*, 02 Civ. 5571 (RJH/HBP) (S.D.N.Y.) which culminated with a jury verdict finding Vivendi Universal, S.A. liable for securities fraud on all 57 material misstatements. As of 2010, the Vivendi case was just one of nine securities class actions tried to verdict based on wrongs committed following the passage of the PSLRA.

Mr. Abbey, the Senior and Founding Partner of Abbey Spanier, is a leading practitioner in the field of securities, antitrust and consumer litigation. As a result of his expertise in class and complex litigation, Mr. Abbey has negotiated hundreds of class action settlements achieving extraordinary results for class members.

Mr. Abbey is recognized as an authority on class and complex litigation, securities fraud and corporate governance, contests for corporate control and directors' and officers' insurer's liability. He is frequently asked to lecture and serve on panels before the plaintiffs' and defendants' bar and Corporate America alike on these issues as well as other complex litigation issues.

Mr. Abbey currently serves as Chairman of the Board of Trustees of New York Law School, Chairman of the Board of Trustees of the Federal Bar Council and Chairman of the Joint Audit Committee of the Federal Bar Council and the Federal Bar Foundation.

On May 14, 2013, Mayor Michael Bloomberg presented to Arthur N. Abbey with New York Law School's President's Medal of Honor. The award is given annually to the Law School's most outstanding and accomplished alumni and its most generous benefactors, and acknowledges those who have made significant contributions to the history of the Law School by their exemplary professional lives and their generosity.

**KARIN E. FISCH** – Ms. Fisch received her A.B. from Cornell University, College of Arts and Sciences in 1988, and her J.D. from Fordham University School of Law in 1992, where she was Managing Editor of the *Fordham Urban Law Journal*. She is admitted to the Bar of the State of New York, the United States District Court for the Southern District of New York and the Courts of Appeals for the Second, Third and Fifth Circuit.

Ms. Fisch specializes in shareholder class action and derivative litigation. In 2008, Ms. Fisch successfully briefed and argued a motion for a preliminary injunction after full expedited discovery in *In re The TriZetto Group, Inc. Shareholders Litig.*, C.A. No. 3694-VCN (Del. Ch.). Ms. Fisch was also part of the team that litigated *In re Sovereign Bancorp Inc., Shareholder Litig.*, Case No. 2587 (Court of Common Pleas, Philadelphia County), to its successful conclusion after full expedited discovery and an evidentiary hearing on plaintiffs' motion for a preliminary injunction. Other notable cases in which Ms. Fisch was an active participant are: *In re Telecommunications, Inc. Shareholders Litig.*, C.A. No. 16370 (Del. Ch.); *In re Seagate Technology, Inc. Sec. Litig.*, C.A. No. 17932-NC (Del. Ch.); *In re Liberty Media Corp. Sec. Litig.*, C.A. No. 13168 (Del. Ch.); and *Schoenfeld v. XO Comm.*, Index No. 01-018358 (N.Y. Sup.).

Ms. Fisch also leads the Abbey Spanier team litigating cases within several of Abbey Spanier's other practice areas including: Antitrust (*In re Hypodermic Product Antitrust Litig.*, MDL No. 1730 (D.N.J.)); and ERISA litigation (*In re Medco Health Solutions, Inc. Pharmacy Benefits Management Litig.*, 03 MDL 1508 (S.D.N.Y.)).

**NANCY KABOOLIAN** – Ms. Kaboolian received her B.A. from the State University of New York at Fredonia in 1979 and her J.D. from New York Law School in 1989. She is admitted to the Bar of the State of New York and the United States District Courts for the Southern and Eastern Districts of New York.

Ms. Kaboolian has litigated complex class actions in state and federal courts across the country for her entire career. Ms. Kaboolian manages the Firm's case development team responsible for highlighting and analyzing potential new cases. Her responsibilities include overseeing the Firm's institutional investor monitoring program. In addition, Ms. Kaboolian performs a variety of research projects for the Firm's institutional clients to evaluate current trends in class action litigation and class action settlements. She is the liaison with the Firm's institutional clients and prepares all presentations and reports for those clients. Ms. Kaboolian is responsible for spearheading the Firm's business and development initiatives as well as managing its marketing and social network efforts.

**STEPHEN T. RODD** – Mr. Rodd received his J.D. degree in 1974 from New York University Law School, where he was a Root-Tilden Scholar and an Editor of the *Journal of International Law and Politics*. The University of Kansas is his undergraduate alma mater, where he received his B.A.

degree in 1969. He is a member of the Bar of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, the Second, Fifth and Sixth Circuit Courts of Appeals, and the United States Supreme Court.

Mr. Rodd was lead attorney for the litigation team in *In re Vivendi Universal, S.A. Sec. Litig.* class action, culminating in a three month trial and jury verdict finding defendant Vivendi Universal, S.A. liable for securities fraud on each of the 57 material misstatements alleged by plaintiffs. Vivendi is just one of nine securities class actions tried to verdict based on wrongs committed following the passage of the PSLRA. In addition, Mr. Rodd serves as lead counsel for plaintiffs in an action seeking restitution from the French railway, Société Nationale des Chemins de Fer Français (SNCF) in connection with the conduct of deportation trains in France during World War II.

Mr. Rodd has served as lead counsel or co-lead counsel in many other cases that have achieved significant benefits for shareholders including: *In re Crazy Eddie Sec. Litig.*, No. 87 Civ. 0033 (E.D.N.Y.), *In re Wedtech Corp. Sec. Litig.*, No. 86 Civ. 8628 (S.D.N.Y.) and *In re BankAmerica Corp. Sec. Litig.*, MDL No. 1264 (E.D. Mo.).

Mr. Rodd is currently serving on the Board of Directors of MFY Legal Services, Inc. He has participated in numerous conference panels on class action law and procedures, including an event sponsored by the Young Lawyers Section of the Paris Bar Association, at the invitation of the French consumer organization, Que Choisir. Other notable panels include the PLI Consumer Financial Services Litigation seminar, the ACI D&O Liability Conference, the NIRI Southwest Regional Conference panel on SEC Regulation and the PLI conference on Hot Securities Issues in a Down Economy.

**JUDITH L. SPANIER** – Ms. Spanier received her B.A. from Cornell University, College of Arts and Sciences in 1975, and her J.D. from New York University School of Law in 1978. She is admitted to the Bar of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York and the Second, Ninth and Tenth Circuit Courts of Appeals.

Ms. Spanier has served as lead counsel or co-lead counsel in numerous cases that have achieved significant benefits on behalf of shareholders including *In re Adelphia Comm. Corp. Sec. & Deriv. Litig.*, 3 MDL 1859 (S.D.N.Y.); *In re Tele-Communications, Inc. Shareholders Litig.*, C.A. No. 16370 (Del. Ch.) and *In re Waste Management, Inc. Shareholders Deriv. Litig.*, C.A. No. 17313, (Del. Ch.). Ms. Spanier successfully argued the appeal before the Delaware Supreme Court in *In re Primedia, Inc. Derivative Action; Kahn v. Kolberg Kravis Roberts & Co., et al.*, No. 436, 2010, 2011 Del. LEXIS 313 (Del. Sup. Ct. June 20, 2011). The Delaware Supreme Court reversed the dismissal of the shareholder derivative lawsuit on behalf of Primedia Inc. (PRM) seeking to recoup monies arising out of alleged insider trading in Primedia's securities by Kolberg Kravis Roberts & Co. ("KKR") the Company's controlling shareholder.

Ms. Spanier was one of the lead trial attorneys in *Braun and Hummel v. Wal-Mart Stores, Inc.*, Case Nos. 3127 and 3757 (Court of Common Pleas, Philadelphia County). The lawyers on the Braun/Hummel trial team were named as finalists by Public Justice for the 2007 Trial Lawyer of the Year Award. In addition, Ms. Spanier argued the successful appeal to the New Jersey Supreme Court from the denial of class certification in *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88 (2007).

Ms. Spanier was also on the plaintiff's lead counsel teams in several large consumer class actions including *Henry v. Sears, Roebuck*, No. 98 C 4110 (N.D. Ill.) (class action on behalf of an 11 million member class).

Ms. Spanier was a member of the Labor and Employment Committee of the New York City Bar Association. She has lectured or served as a panelist at various Glasser Legal Works Panels on "Litigation and Resolution of Complex Class Actions"; a panel member in a July 2008 PLI seminar, "Class Action Litigation 2008: Prosecution and Defense Strategies"; and a December 11, 2008 New York City Bar Association seminar, "Securities Litigation During the Credit Crisis: Current Developments and Strategies." Recently, Ms. Spanier was a Faculty Lecturer at a June 14, 2012 New York City Bar Association seminar, "Staying on Top of the Latest Developments in Wage & Hour Law: Key Court Decisions, Government Initiatives & Compliance Challenges."

**JULIE SULLIVAN** – Ms. Sullivan received her B.A., summa cum laude, from Yale College in 1983, and her J.D. from Yale Law School in 1990. She is admitted to the Bar of the State of New York and the United States District Court for the Southern District of New York.

Ms. Sullivan has concentrated her practice in shareholder class action and derivative litigation, having previously worked at other prominent plaintiffs firms.

FISCH DECLARATION EXHIBIT D  
(Firm Resume of Conover Law Offices)

## CONOVER LAW OFFICES

Conover Law Offices is a boutique litigation firm committed to achieving justice. The firm provides a variety of litigation services to individuals, as well as small businesses. The firm's small size allows for flexibility to accommodate clients whose resources may be outmatched by adversaries. The firm focuses on employment, civil and human rights, and small business and commercial disputes.

The firm's employment practice includes contract, wage and hour, disability, gender, race, national origin, religious, alien status, and age discrimination and retaliation. The firm's civil rights practice includes police misconduct and claims of discrimination by students. The firm's commercial practice focuses on consumer fraud, class actions, commercial, copyright, contract and international disputes.

### Sample of Reported Decisions

*Pesce v. New York City Police Dep't*, 159 F. Supp. 3d 448 (S.D.N.Y. 2016) (jury award of back pay to NYPD applicant and hiring as police officer in disability discrimination case);

*Meregildo v. Diaz*, No. 151905/13, 2017 WL 4891688, at \*1 (N.Y. App. Div. Oct. 31, 2017) (affirming dismissal of employer's breach of good faith claim against employee);

*Ng v. Adler*, 518 B.R. 228 (E.D.N.Y. 2014); *In re Adler*, 372 B.R. 572 (Bkrcty. E.D.N.Y. 2007); *In re Adler*, 395 B.R. 827 (Bkrcty E.D.N.Y. 2008); *In re Adler*, 467 B.R. 279 (Bkrcty. E.D.N.Y. 2012); *In re Adler*, 494 B.R. 43 (Bkrcty. E.D.N.Y. 2013) (award after trial to defrauded overseas agent of over \$1 million and finding debt based on fraudulent bankruptcy filing by garment importer non-dischargeable);

*Doe v. Madison Third Bldg. Companies, LLC*, 121 A.D.3d 631 (1 Dept. 2014) (dismissal of building owner's summary judgment motion as untimely in negligence and sexual assault claim);

*Hanley v Chicago Tit. Ins. Co.*, 12 CIV. 4418 ER, 2013 WL 3192174 (SDNY June 24, 2013) (employer's motion to dismiss denied in age discrimination claim);

*Chisholm v. Mem'l Sloan-Kettering Cancer Ctr.*, 824 F. Supp. 2d 573, 576 (S.D.N.Y. 2011) (post trial award of back and front pay and remittitur on punitive damage award in excess of \$1 million); *Chisholm v. Memorial Sloan-Kettering*, 748 F.Supp.2d 319 (S.D.N.Y. 2010) (dismissal of defamation claim);

*Sasikumar v Brooklyn Hosp. Ctr.*, 09 CV 5632 ENV RML, 2011 WL 1642585 (EDNY May 2, 2011) (granting plaintiff's motion to compel discovery in national origin discrimination case);

*Zustovich v Harvard Maintenance, Inc.*, 73 Fed R Serv 3d 462 (SDNY Mar. 20, 2009) (denying employer's motion to dismiss plaintiff's age and national origin discrimination claims);



*Brown v Tomcat Elec. Sec., Inc.*, 03-CV-5175 (FB)(JO), 2007 WL 2461823 (EDNY Aug. 27, 2007) (FLSA) (granting employer's motion to dismiss prevailing wage claims);

*Dornberger v. Metropolitan Life Ins. Co.*, 203 F.R.D. 118 (S.D.N.Y. 2001) (approving class action settlement in excess of \$20 million in insurance fraud case); *Dornberger v. Metropolitan Life Ins. Co.*, 961 F. Supp. 506 (S.D.N.Y. 1997); *Dornberger v. Metropolitan Life Ins. Co.*, 182 F.R.D. 72 (S.D.N.Y. 1998);

*Melendez v Intl. Serv. Sys., Inc.*, 97 CIV. 8051 DAB, 1999 WL 187071 (SDNY Apr. 6, 1999) (granting plaintiff's motion to amend complaint in national origin discrimination case);

*Fox v City Univ. of New York*, 1999 WL 33875 (SDNY Jan. 26, 1999); *Fox v City Univ. of New York*, 1998 WL 273049 (SDNY May 27, 1998); *Fox v City Univ. of New York*, 69 Empl Prac Dec P 44274 (SDNY July 10, 1996); *Fox v. City University of New York*, 187 F.R.D. 83 (S.D.N.Y. 1999) (granting plaintiff's motion for new trial on damages after jury verdict in race discrimination case); and

*Andriotty v Suffolk County*, 97 CV 5553, 1998 WL 661464 (EDNY Aug. 4, 1998) (granting motion to amend complaint to assert race and gender discrimination claims by 25 police cadets).

### **Attorneys**

#### **Bradford D. Conover**

##### **Employment**

Bradford D. Conover has over 30 years of litigation experience in both New York and Connecticut. His practice for the past two decades has focused on civil rights and employment discrimination claims, including sexual harassment, race, disability, national origin, age, and wage and hour claims.

Before founding Conover Law Offices in 2001, Mr. Conover was of counsel at Dickerson & Reilly, NY, NY, focusing on international, employment, commercial and maritime litigation; an associate at Orlando Conseils, NY, NY, focusing on international, commercial and employment litigation in the NY branch of law firm based in Paris, France; an associate at Collier, Cohen, Shields & Bock, NY, NY, focusing on general commercial, securities, real estate, products liability litigation; and an associate at D'Andrea & Rosenfeld, Stamford, CT, focusing on commercial and real estate litigation. Mr. Conover was a partner in the firm Conover & Zayas LLP before founding Conover Law Offices. While at Conover & Zayas LLP, Mr. Conover served as co-lead counsel in the class action *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 123 (S.D.N.Y. 2001) ("settlement provides a total value of \$20.8 million to the class" of insured).



## Education

B.A. from Trinity College in 1981  
J.D. from New York Law School in 1984

## Admissions

1984, State of Connecticut  
1985, State of New York  
1987, U.S. District Court, District of Connecticut  
1988, U.S. District Court, Southern and Eastern Districts of New York  
1995, U.S. Court of Appeals, First Circuit  
2010, U.S. Court of Appeals, Second Circuit

## Memberships

National Employment Lawyers Association  
National Employment Lawyers Association New York  
The Association of the Bar of New York  
Advisory Board Member Epilepsy Foundation

## **Molly Smithsimon**

Molly Smithsimon joined the firm in 2007. Her diverse practice includes representing individuals, classes and collectives, and companies in matters including employment discrimination; wage claims; and tort and contract disputes. An experienced litigator, she has briefed appeals at both the Second Circuit Court of Appeals and the First Department Appellate Division and has tried civil rights cases before juries in federal court.

She also represents executives and employees in negotiating employment contracts, severance pay, and separation agreements. Ms. Smithsimon is a certified mediator and supports resolving litigation through alternative dispute resolution when appropriate.

Previously, Ms. Smithsimon was Director of the Tenant Advocacy Project at Community Service Society. During law school, Ms. Smithsimon worked with the Lawyers' Committee for Civil Rights in San Francisco, California and at the Women's Law Project in Philadelphia, Pennsylvania.

## Education

B.A. from Brown University in 1993  
J.D. from University of Pennsylvania in 2002

#### Admissions

U.S. Court of Appeals, Second Circuit.  
U.S. District Court, Southern and Eastern Districts of New York.  
New York.

#### Publications

Private Lives, Public Spaces: The Surveillance State, *Dissent Magazine*, Winter 2003 at 43. Reprinted in Howard P. Chudacoff et al., *Major Problems in American Urban and Suburban History*, (2d ed. 2005).

#### Memberships

New York County Lawyers Association  
National Employment Lawyers Association/New York.

FISCH DECLARATION EXHIBIT D  
(Firm Resume of Frumkin & Hunter, LLP)

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,

15 Civ. 3608 (AKH)

- against -

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

Defendants.

**DECLARATION OF WILLIAM FRUMKIN  
IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT,  
CONDITIONAL CLASS CERTIFICATION AND APPROVAL OF NOTICE PLAN**

**WILLIAM D. FRUMKIN**, an attorney admitted to practice *pro hac vice* before this Court declares, pursuant to 28 U.S.C. §1746, under penalties of perjury that the following is true and correct:

1. I am a partner of the firm of Frumkin & Hunter LLP. This declaration is submitted in Support of Plaintiff's Motion for Preliminary Approval. This declaration is based upon my own personal knowledge and my review of files maintained by this law firm.
2. I believe that my experience and qualifications support my ability to adequately represent the class in this case.
3. I attended the State University of New York at Stony Brook and received a Bachelor of Arts degree in 1974. I then worked as a Social Worker for the next five (5) years and

obtained a Masters Degree in Social Work from the University of California at Los Angeles in 1981. I received a J.D. Degree from Pace University School of Law in 1986, graduating with honors.

4. After my graduation from law school, I worked for two (2) years for the Law Firm of Raymond G. Kuntz, P.C., located in Bedford, New York. While employed there, I represented six (6) school districts in a variety of labor and employment matters.

5. Since then (for the past approximately 29 years ), I have worked almost exclusively in the ERISA/employee benefits and labor and employment fields, as an associate with the Law Offices of Donald Sapir for seven years; then as a partner in the firm of Sapir & Frumkin LLP for eighteen years; and as a partner in the firm of Frumkin & Hunter for almost five years.

6. I was admitted to practice law and I am in good standing in the State of New York (November 1987) and I am also admitted and I am in good standing in the State of Connecticut (December 1986), the United States District Courts for the Southern (November 1987), Eastern (February 1994), Northern (January 1997), and Western (January 1998) Districts of New York, and the United States Court of Appeals for the Second Circuit (June 1993) and the United States Supreme Court (March 2010). I have also been admitted pro hac vice to various federal courts.

7. I have litigated matters in the federal district courts, the Second Circuit Court of Appeals, the New York State Appellate Division, the Supreme Court of the State of New York, the Family Court of the State of New York, the New York State Unemployment Insurance Board and Workers' Compensation Board, as well as various arbitrations.

8. I have been an attorney of record and actively participated in the following ERISA cases that resulted in the following favorable reported decisions (in addition to many other non-ERISA cases and reported decisions not listed here):

- a. *Alcantara v. Bakery & Confectionary Union & Indus. Int'l Pension Fund Pension Plan*, 751 F.3d 71, 74 (2d Cir. N.Y. May 1, 2014)(affirming district court holding that the anti-cutback rule in ERISA § 204(g) precludes plan amendments that reduce retirement-type subsidies for Plaintiffs-Appellees who ceased employment without satisfying the preamendment conditions for the subsidy, but who could later satisfy the conditions without returning to work), affirming *Martinez v. Bakery & Confectionary Union & Indus. Int'l Pension Fund (In re Bakery & Confectionary Union & Indus. Int'l Pension Fund Pension Plan)*, 865 F. Supp. 2d 469, 470 (S.D.N.Y. June 6, 2012)
- b. *Kuhbier v. McCartney*, 2017 U.S. Dist. LEXIS 33231, \*1 (S.D.N.Y. Mar. 8, 2017)(holding that the plan is governed by ERISA; granting in part Plaintiff's motion for summary judgment and denying Defendants' motion) and *Kuhbier v. McCartney, Verrino & Rosenberry Vested Producer Plan*, 95 F. Supp. 3d 402, 419 (S.D.N.Y. Mar. 25, 2015)(denying defendants' motion to dismiss because there were issues of fact regarding whether the plan was covered by ERISA).
- c. *Marin v. Dave & Buster's, Inc.*, 159 F. Supp. 3d 460, 462 (S.D.N.Y. Feb. 9, 2016)(denying Defendants' motion to dismiss and holding that Plaintiff's complaint states a plausible and legally sufficient claim under ERISA section 510 for relief, including Plaintiff's claim for lost wages and salary incidental to the reinstatement of benefits)
- d. *Cherniak v. Solow Realty & Dev. Co., LLC*, No. 12-CIV-5564 (HB), 2013 U.S. Dist. LEXIS 99937 (S.D.N.Y. July 17, 2013) (denying defendants' motion for partial judgment on the pleadings seeking dismissal of plaintiff's state law claims on the ground of ERISA preemption.)
- e. *Crabtree v. Cent. Fla. Invs, Inc.*, NO. 6;12-CV-656-Orl-36TBS, 2012 U.S. Dist. LEXIS 177357 (M.D. Fla. Dec. 14, 2012)(in an ERISA case, granting in part Plaintiff's Motion to Dismiss, and dismissing the Defendant's counterclaims for declaratory judgment and rescission.)
- f. *Crabtree v. Cent. Fla. Inv, Inc.*, No. 6;12-cv-656-ORL-31TBS, 2013 U.S. Dist. LEXIS 35289 (M.D. Fla. Mar. 14, 2013)(in an ERISA case, denying the Defendant's motion for leave to amend its counterclaim to assert aclaim for rescission under ERISA.)

- g. *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706 (2d Cir. 2001)(holding that the district court erred in concluding, as a matter of law, that the employee had not alleged facts sufficient to show her eligibility under the FMLA.)
- h. *Tocker v. Philip Morris Cos.*, 470 F.3d 481 (2d Cir. 2006) (vacated and remanded that part of the judgment that dismissed the employee's breach of fiduciary duty claim).
- i. *Fehn v. Group Long Term Disability Plan for Employees of JP Morgan Chase Bank*, 07 Civ. 8321 (WCC), 2008 U.S. Dist. LEXIS 50060 (S.D.N.Y. June 30, 2008), reconsideration denied by *Fehn v. Group Long Term Disability Plan*, 2008 U.S. Dist. LEXIS 58329 (S.D.N.Y., July 30, 2008) (A counterclaim brought by the disability plan benefits administrator seeking reimbursement for excess benefits failed to state an equitable claim under 29 U.S.C.S. § 1132(a)(3)(B) and was dismissed).

9. I have been extensively involved with various legal and professional organizations, committees, and boards within the fields of ERISA/employee benefits, and labor and employment law. I am a former Co-Chair of the National Employment Lawyers Association, ERISA Committee; a former member of the Executive Board of the National Employment Lawyers Association, New York affiliate; a former President of the National Employment Lawyers Association, New York affiliate; a former Co-Chair of the Westchester County Bar Association Labor and Employment Law Committee; former Co-Chair of the New York State Bar Association, Labor and Employment Law Section Employee Benefits Committee; current Co-Chair of the New York State Bar Association, Labor and Employment Section Continuing Legal Education Committee; current member of the Executive Committee of the New York State Bar Association, Labor and Employment Law Section; a former member of the Mayor's Advisory Committee for the Disabled, City of White Plains; a Member of the American Bar Association Labor and Employment Law Section, Employee Benefits Committee, and a Member of the Board of Directors, Westchester Disabled on the Move, Inc.

10. I have published extensively with respect to ERISA/employee benefits, including the following articles (and not including dozens of publications on other employment and labor topics):

- a. William Frumkin and Louis Santangelo, "Vanity" and Relief Under ERISA for Breach of Fiduciary Duties, 216 N.Y.L.J. No. 10, at 1, col. 1 (April 24, 1996).
- b. William Frumkin and Louis Santangelo, Material Misrepresentation and Breach of Fiduciary Duties Under ERISA, 1 Inside Employee Rights Litigation, No. 12, at 6, col. 1 (October, 1997).
- c. Donald Sapir and William Frumkin, Material Misrepresentation and Breach of Fiduciary Duties After Varsity, Employee Rights and Responsibilities Committee Newsletter, Vol. 3, No. 1, at 9, col. 1 (Spring, 1998).
- d. William Frumkin, Cash Balance Conversion of Traditional Pension Plans, 1 Employee Rights Quarterly. No.1, at 74 (Summer 2000).
- e. William Frumkin, Employee Benefits Law, Second Edition, 2005 Cumulative Supplement, ABA Section of Labor and Employment Law, Contributing Author.
- f. William Frumkin, Potential Loss of Back Pay in ERISA Retaliation Cases, New York Law Journal, April 30, 2008.
- g. William Frumkin and Elizabeth Hunter, Leveling the Playing Field for ERISA Participants, New York Law Journal, August 28, 2012.

11. I have also lectured extensively with respect to ERISA/employee benefits, including the following presentations (and not including dozens of presentations on other employment and labor topics):

- a. October 1992 ERISA: A Tool for the Employee Advocate. (Severance Pay Claims), National Employment Lawyers Association, San Francisco, California.
- b. May, 1994 Presenting and Defending Employee Benefit Claims, (Plaintiff's Perspective), New York State Bar Association, New York City.



- c. November 1994, ERISA: A Tool for the Employee Advocate, (Severance Pay Claims), Washington, D.C.
- d. June, 1994, Litigating ERISA Claims, National Employment Lawyers Association Annual Convention, Blaine, Washington.
- e. April, 1996, ERISA Practice and Procedure, NY/NELA, New York City.
- f. June, 1998, The Use of Benefit Issues to Enhance Settlements in Employment Discrimination Cases, National Employment Lawyers Association, Monterey, California.
- g. October, 1998, ERISA From the Plaintiff's Perspective, Practicing Law Institute, 27th Annual Employment Law Conference, New York City.
- h. October, 1998, ERISA Preemption, New York State Bar Association, Labor and Employment Law Section Annual Meeting, Ithaca, New York.
- i. March, 1999, ERISA's Uses in Settling Employment Discrimination Claims, National Employment Lawyers Association (New York Chapter) Spring Conference, Syracuse, New York.
- j. October, 1999, ERISA From the Plaintiff's Perspective, Practicing Law Institute, 28th Annual Employment Law Conference, New York City.
- k. October, 2000, ERISA: A Tool for the Employee Advocate, National Employment Lawyers Association, Denver, Colorado.
- l. October, 2000, ERISA from the Plaintiff's Perspective, Practicing Law Institute, 29th Annual Employment Law Conference, New York City.
- m. October, 2000, ERISA Severance Benefit Issues, New York State Bar Association Labor and Employment Law Section Annual Meeting, Captiva Island, Florida.
- n. October, 2001, ERISA from the Plaintiff's Perspective, Practicing Law Institute, 30th Annual Employment Law Conference, New York City.
- o. April, 2002, The Employee Benefit Traps - Essential Information for the Employment and Labor Lawyer, New York State Bar Association, Labor and Employment Law Section Annual Meeting, Bolton Landing, New York .

- p. October, 2002, The Aftermath of Enron for ERISA Practitioners, New York State Bar Association Fall Meeting, Cornell University, Ithaca, New York.
- q. December, 2002, GA/NELA Chapter Annual Conference: "Identifying ERISA Issues in Employment Cases and using them to Enhance Settlements," Jamaica, W.I.
- r. April, 2003, Using ERISA to Enhance Settlements, NELA Spring Conference, New York, New York.
- s. January, 2006, ABA Employee Benefits Mid-Winter Meeting - Disclosure Issues Under ERISA, Key Biscayne, Florida.
- t. June, 2007, "Representing Workers In ERISA Benefits Claims Litigation: Fiduciary Breach Litigation," National Employment Lawyers Association Annual Convention, San Juan, Puerto Rico.
- u. June 25, 2010, National Employment Lawyers Association National 21st Annual Convention - NELA at 25: Don't Stop Believing, "ERISA for Plaintiffs' Employment Lawyers," Washington, D.C.
- v. April 1, 2011, New York State Bar Association Labor & Employment Law Section Committee on Employee Benefits CLE Seminar, "Benefits, Healthcare and the Workplace in Today's Difficult Economy," Concierge Conference Center, New York, New York.
- w. November 3, 2011, ABA Section of Labor and Employment Law 5th Annual CLE Conference, "What Every Reasonably Insecure (Attorney) Should Know About ERISA," Seattle, Washington.
- x. May 18, 2012, NELA/NY Spring Conference, The Supreme Court Levels the Playing Field for ERISA Participants in Amara, Yale Club, New York, New York. (William Frumkin and Elizabeth Hunter).
- y. September 21-23, 2012, New York State Bar Association Labor & Employment Law Section Fall Meeting, "The Impact of the Supreme Court's Ground Breaking Amara Decision for ERISA and Employment Attorneys," Kaatskill Mountain Club Resort, Hunter, New York.
- z. October, 2013, The Affordable Care Act: Overview of the New Law Including Retaliation and Employer Mandate Provisions, NY/NELA, New York City.

12. In connection with my employment with this firm, I regularly read literature related to ERISA and labor and employment law case developments. I also regularly attend local, state, and national conferences and seminars related to ERISA/employee benefits and labor and employment topics.

13. My law partner, Elizabeth Hunter, also has the qualifications and experience to adequately represent the class.

14. Ms. Hunter graduated from the University of California at Berkeley School of Law, where she served as a member of the California Law Review and as a Senior Articles Editor of the Berkeley Journal of Employment and Labor Law.

15. Ms. Hunter was admitted to the California State Bar in 2005 (but has been on inactive status since approximately 2008), and was admitted to practice before the United States District Court for the Northern District of California and the United States Court of Appeals for the Ninth Circuit in 2006. She was admitted to the New York State Bar in 2007. She was admitted to practice before the United States District Courts for the Southern District of New York in 2007, the Eastern District of New York in 2011, and the Northern District of New York in 2011. She was also admitted to practice before the bar of the United States Court of Appeals for the Second Circuit in 2011. In addition, she has also been admitted pro hac vice in the District of New Jersey since 2012.

16. The vast majority of Ms. Hunter's practice has been devoted to the representation of clients (primarily employees) in employment and employee-benefit matters.

17. Ms. Hunter was an attorney of record and actively participated in the following ERISA cases that resulted in the following favorable reported decisions (which I have described

in greater detail above), which do not include several favorable reported decisions in other areas of employment and labor law:

- a. *Alcantara v. Bakery & Confectionary Union & Indus. Int'l Pension Fund Pension Plan*, 751 F.3d 71, 74 (2d Cir. May 1, 2014), affirming *Martinez v. Bakery & Confectionery Union & Indus. Int'l Pension Fund (In re Bakery & Confectionery Union & Indus. Int'l Pension Fund Pension Plan)*, 865 F. Supp. 2d 469, 470 (S.D.N.Y. June 6, 2012)
- b. *Kuhbier v. McCartney*, 2017 U.S. Dist. LEXIS 33231, \*1 (S.D.N.Y. Mar. 8, 2017) and *Kuhbier v. McCartney, Verrino & Rosenberry Vested Producer Plan*, 95 F. Supp. 3d 402, 419 (S.D.N.Y. Mar. 25, 2015).
- c. *Marin v. Dave & Buster's, Inc.*, 159 F. Supp. 3d 460, 462 (S.D.N.Y. Feb. 9, 2016)]
- d. *Cherniak v. Solow Realty & Dev. Co., LLC*, No. 12-CIV-5564 (HB), 2013 U.S. Dist. LEXIS 99937 (S.D.N.Y. July 17, 2013)
- e. *Crabtree v. Cent. Fla. Invs, Inc.*, NO. 6;12-CV-656-Orl-36TBS, 2012 U.S. Dist. LEXIS 177357 (M.D. Fla. Dec. 14, 2012) and *Crabtree v. Cent. Fla. Inv, Inc.*, No. 6;12-cv-656-ORL-31TBS, 2013 U.S. Dist. LEXIS 35289 (M.D. Fla. Mar. 14, 2013).

18. Ms. Hunter has written articles and given presentations on ERISA/employee benefits and employment law issues for the New York Law Journal, the Practising Law Institute, the National Employment Lawyers' Association, the New York chapter of the National Employment Lawyers' Association, and the New York State Bar Association, including the following ERISA articles and presentations (and not including many other presentations on other employment and labor law issues):

- a. William Frumkin and Elizabeth Hunter, *Leveling the Playing Field for ERISA Participants*, New York Law Journal, August 28, 2012.
- b. May 18, 2012, NELA/NY Spring Conference, *The Supreme Court Levels the Playing Field for ERISA Participants* in Amara, Yale Club, New York, New York.

- c. June, 2014, ERISA On The Map: Recent Developments, Hot Topics & Strategies For Success, Boston, Massachusetts.

19. Ms. Hunter is a member of bar associations and professional organizations, including the American Bar Association, the New York State Bar Association, the National Employment Lawyers' Association, and the Orange County Bar Association. She has been on the board of Women's Bar Association of Orange and Sullivan Counties for the last 3 years, and is currently serving as Treasurer. She regularly attends conferences and seminars on ERISA and employee benefits topics.

Dated: November 17, 2017  
White Plains, New York

/s/ William D. Frumkin  
William D. Frumkin