UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

- against -

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

Defendants.

15 Civ. 3608 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE SETTLEMENT, FINAL CERTIFICATION OF A CLASS, AND FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff, Maria De Lourdes Parra Marin ("Ms. Marin" or "Plaintiff"), by and through her counsel, respectfully submits this memorandum of law in support of her motion for an order approving the proposed settlement (the "Proposed Settlement") between Plaintiff and Defendants, Dave & Buster's, Inc., and Dave & Buster's Entertainment, Inc., ("Dave & Buster's" or collectively, the "Defendants"), finally certifying a Settlement Class, approving an incentive award to the Named Plaintiff, and awarding attorneys' fees and expenses to Plaintiff's counsel. This motion also is supported by the Class Action Settlement Agreement, dated November 19, 2018, with exhibits attached thereto (the "Stipulation"), and the Joint Declaration of Karin E. Fisch, Bradford D. Conover and William Frumkin, in Support of Plaintiff's Motion for Final Approval of the Settlement, Final Certification, and Award of Attorneys' Fees And Reimbursement of Expenses (the "Joint Decl."), dated April 25, 2019.

PRELIMINARY STATEMENT

Plaintiff moves for final approval of the Proposed Settlement with all Defendants in this action brought on behalf of a class consisting of certain current and former full-time employees of Dave & Buster's, who alleged that their hours were reduced from full-time to part-time as part of a company-wide program called "Position to Win," causing them to lose health benefits offered to full-time employees or eligibility for such health benefits. Plaintiff alleged that Defendants cut their hours for the primary purpose of eliminating their eligibility for full-time health care coverage in a manner that violated Section 510 of ERISA.

Although the practice of reducing employee hours to less than thirty hours per week to deprive employees of existing health insurance coverage or eligibility under the Affordable Care

Act may not be uncommon, this was one of the first, if not the first, case in the nation challenging the practice under ERISA. As such, the case was novel, risky, and likely to effect change in the way companies make employment decisions going forward.

The case was commenced in 2015, after Ms. Marin was notified in June 2013 that her hours would be reduced from approximately forty hours per week to less than thirty hours per week. By letter dated March 10, 2014, Ms. Marin was notified that she no longer qualified for coverage under Dave & Buster's medical plans offered to full-time employees because her employment status had been changed to part-time. Ms. Marin commenced this lawsuit, after consultation with her attorneys, seeking reinstatement of her full-time status, reinstatement of her eligibility for the healthcare insurance offered to full-time employees, and monetary relief incidental thereto. After a motion to dismiss the complaint was briefed, argued and denied, discovery commenced with Defendants producing over seventy-five thousand documents in several waves.

After document discovery was complete and as depositions were being scheduled, the parties began a nearly year-long process of mediation. After many months of arm's-length negotiations and subsequent renegotiation of specific settlement terms, Defendants agreed to the Proposed Settlement presented to the Court. The Settlement encompasses Injunctive Relief, as defined below, geared specifically to the allegations of the Complaint and the creation of a common fund of $7,425,000 to compensate members of the Settlement Class for their claimed loss of wages and benefits.

Since the Proposed Settlement was preliminarily approved on December 17, 2018, the parties have undertaken the previously planned and approved claims administration process that was designed to provide notice to Class members, facilitate participation in the Settlement, and

provide a full explanation of the rights and options of each member of the Settlement Class with respect to the Proposed Settlement. To date, there have been no objections to the Proposed Settlement or counsel's request for fees and expenses.

If finally approved, the Proposed Settlement will resolve all claims asserted in this litigation. Plaintiff and her counsel believe that the Settlement represents an outstanding achievement in light of the risks of continued litigation, including the risks of proving all aspects of the claims asserted, certifying and maintaining a class, and establishing the availability of a monetary judgment. The Settlement was reached at a time when counsel had developed a thorough understanding of the strengths and weaknesses of the claims and defenses in the litigation. This understanding was based upon counsel's investigation into the facts underlying the claims; motion practice; discussions with counsel for Dave & Buster's regarding the issues raised in the Complaint; significant legal research; the review of over seventy-five thousand documents produced; a lengthy mediation process with an experienced mediator; expert analysis of Class members' loss of wages and benefits; motions for preliminary approval; court appearances and conferences; and prolonged discussions and settlement negotiations with counsel for Defendants.

Given the benefits achieved by Plaintiff, weighed against the risks and delays faced in proceeding with the litigation, the Proposed Settlement warrants approval. Defendants have agreed to an injunction requiring them "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, (the "Injunctive Relief")." The Injunctive Relief insures that Dave & Buster's cannot make certain employment decisions for the purpose of depriving employees of benefits or eligibility for benefits – the very conduct challenged by Plaintiff in this action. In addition, Class members who have not sought exclusion will receive compensation for their incidental loss of wages and benefits incurred as a result of the alleged ERISA violations.

The Proposed Settlement is notable in its provision for the Injunctive Relief, plus a monetary recovery in a meaningful amount, in the face of substantial risk that, absent the Settlement, may have precluded the Class from any recovery. These risks included, but were not limited to, risks that the Court could determine that the monetary relief is not incidental to the equitable relief, as required in an ERISA action, or that class issues do not sufficiently predominate over individual issues so as to permit class certification. This Settlement is clearly a desirable result when weighed against the possibility of adverse litigation rulings, the time and expense of any complex class action litigation, and the risk of a limited recovery or no recovery at all.

On December 17, 2018, the Court issued its Findings and Order Preliminarily Approving Class Action Settlement, Conditional Class Certification, Approval of Notice Plan, and Setting a Date and Time for the Fairness Hearing (the "Preliminary Approval Order"). The Preliminary Approval Order certified the Settlement Class for settlement purposes only; preliminarily approved the Settlement Agreement; set a final fairness hearing date for May 9, 2019; and approved the form of Notice to be disseminated to Class members.

In accordance with the Preliminary Approval Order, the court-approved Settlement Administrator mailed the Class Notice to all members of the proposed Class. *See* Declaration of

Sarah Evans Concerning (I) the Mailing of Notice of Proposed Settlement of Class Action Lawsuit; (II) the Requests for Exclusion Submitted; and (III) the Objections Received (the "Evans Decl."), submitted as Exhibit A to the Joint Declaration of counsel filed herewith. The Notice informed Class members of all material terms of the Settlement, including the definition of the Class, the binding effect of any judgment to be rendered, and instructions for filing objections and exclusion requests. Finally, the Notice informed Class members that court-appointed Class Counsel would apply to the Court for an incentive award of $35,000 for the Named Plaintiff, and an award of attorneys' fees and reimbursement of expenses in an amount not exceeding 33% of the Class Settlement Amount. The deadline for filing objections has passed and, as of the date of the filing of this memorandum, no objections have been received. To date, out of a Class in excess of 2000 employees, only two employees have requested exclusion from the Class.

Plaintiff therefore requests that the Court determine that the Settlement is fair, reasonable and adequate; approve final certification of the Settlement Class; enter a final judgment dismissing all claims against the Defendants; approve an incentive award to the Named Plaintiff; and award attorneys' fees and expenses to Plaintiff's counsel.

LEGAL ARGUMENT

I. SUMMARY OF THE SETTLEMENT

As set forth in the Stipulation, Defendants have agreed to the Injunctive Relief and have agreed to pay $7,425,000, which will be used to compensate members of the Settlement Class for their claimed loss of wages and benefits, after payment of any Court-awarded attorneys' fees and expenses, an incentive award if approved, administration costs, and employment taxes. As detailed in the Stipulation, each Settlement Class member's Individual Settlement Award will be

paid as 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: the Class member's average weekly hours worked both before and after their change from full-time to part-time status; the Class member's rate of pay; the length of time the Class member worked for Dave & Buster's after his or her change in status; and the Class member's enrollment in and/or eligibility for health insurance offered by Dave & Buster's to full-time employees. In other words, each Settlement Class member's recovery will be proportionate to and based upon his or her documented losses resulting from the reduction in his or her hours after implementation of the Position to Win Program.

Once the terms of the Settlement were agreed upon, counsel for the parties negotiated towards an agreement with respect to an award of attorneys' fees and expenses. Plaintiff's counsel applies herein for fees amounting to 30% of the Class Settlement Amount, plus reimbursement of expenses. As discussed in the Joint Declaration and individual firm declarations also filed today, Plaintiff's counsel believes that the fee request is consistent with precedent in this Circuit and is fully supportable when considered utilizing the factors generally considered by courts within the Second Circuit. Class Counsel's efforts to date have been without compensation and the fee has been wholly contingent upon the result achieved. As detailed herein, Plaintiff and her counsel believe that the Settlement is a highly favorable result for the Settlement Class.

II. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. Standards for Approval of a Class Action Settlement

Under Rule 23(e) of the Federal Rules of Civil Procedure, a class action settlement must be approved by the Court. A settlement should be approved if the Court finds it "fair,

reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011). "A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

Recent amendments to Rule 23 expressly address the factors a district court must (and may) consider in evaluating a class action settlement. Rule 23 now requires a court to consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2)(A)-(D).

These factors overlap substantially with the factors courts in this Circuit traditionally considered as identified by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). *See Becker v. Bank of New York Mellon Tr. Co., N.A.*, No. CV 11-6460, 2018 WL 6727820, 2018 U.S. Dist. LEXIS 214823, at *15 (E.D. Pa. Dec. 21, 2018). In

Grinnell, the Second Circuit held that the following factors should be considered in evaluating a class action settlement:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d at 463 (internal citations omitted); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) ("Courts in this Circuit examine the fairness, adequacy and reasonableness of a class action settlement according to the '*Grinnell* factors'").

"In finding that a settlement is fair, reasonable and adequate, not every factor must weigh in favor of settlement but, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Telik*, 576 F. Supp. 2d at 575 (*quoting In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (citation omitted)). In deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611 (LAK), 2007 U.S. Dist. LEXIS 18401, at *7 (S.D.N.Y. Mar. 7, 2007). Moreover, "a presumption of fairness, adequacy, and reasonableness may attach if the Court finds that arm's length negotiations took place between experienced counsel after a period of meaningful discovery." *Collins v. Olin Corp.*, No. 03-CV-945 (CFD), 2010 U.S. Dist. LEXIS 39862, at *9-10 (D. Conn. Apr. 21, 2010) (*citing Wal-Mart Stores, Inc.*, 396 3d at 116; *Manual for Complex Litigation*, Third, § 30.42 (1995)).

B. Application of the Rule 23 and *Grinnell* Factors Supports Approval of the Settlement

1. *Grinnell:* The Complexity, Expense and Likely Duration of the Litigation

Rule 23: The Relief Provided for the Class is Adequate, Taking Into Account the Costs, Risks, and Delay

Courts routinely recognize that "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (citations omitted). The instant case raised complex issues regarding not only liability and damages, but also manageability due to the nature of the wrongs alleged. Defenses to liability, damages, and class certification had been asserted by Defendants in the context of motion practice, informal discussions and, later, in formal settlement negotiations. Defendants also steadfastly denied that the alleged conduct violated ERISA in any way. These defenses would have added to the complexity of an already complex class action case. Without the Settlement, the parties would have embarked on further motion practice, including an extensive motion for class certification; discovery, including multiple depositions; retention of experts; summary judgment; and ultimately trial. All of the foregoing would have extended the case, delaying recovery to members of the Class for years, if at all, while being extremely expensive for the parties.

In response to Defendants' motion to dismiss, the Court agreed with Plaintiff that back pay is recoverable in an ERISA § 510 case in the context of the motion to dismiss. *Marin v. Dave & Buster's, Inc.*, 159 F. Supp. 3d 360 (S.D.N.Y. 2016). However, if Plaintiff did not settle, Plaintiff faced the risk that any claimed monetary losses may exceed the ERISA requirement that damages be "incidental" to the injunctive relief sought. *See Harris v. Finch, Pruyn & Co.*, No.

1:05-CV-951, 2008 WL 4155638, 2008 U.S. Dist. LEXIS 67623, at *23-24 (N.D.N.Y. Aug. 26, 2008) ("A number of courts have determined what relief is 'incidental' by examining the relative monetary values of the legal and equitable relief requested."); *See also In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1261-62 (D. Kan. 2006) ("many of the class members' claims were subject to a variety of defenses that would have barred their ERISA claims entirely."). The Proposed Settlement avoids that risk by providing Injunctive Relief, plus compensation for alleged lost wages and full-time benefits.

Plaintiff also faced a significant risk that individual issues could preclude class certification. Determining the number of employees whose hours were reduced as part of the Position to Win Program arguably could require individualized inquiries, which could have defeated class certification. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011) ("When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class.").

Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay of trial and appeals, as well as the associated expense. Accordingly, this factor supports approval of the Settlement.

2. *Grinnell:* The Reaction of the Class to the Settlement

"[R]eaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re American Bank Note Holographics, Inc. Sec. Litig.*,

127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy").

The Notice informed Class members of their right to object to the Proposed Settlement and of the procedures for doing so. There have been no objections to the Settlement. Equally notable, out of a class consisting of over 2000 Dave & Buster's employees or former employees, there have only been two timely requests for exclusion from the Class.

3. *Grinnell*: The Stage of the Proceedings and the Amount of Discovery Completed Support Approval of the Settlement

***Rule 23:* The Class Representative and Class Counsel Have Adequately Represented the Class**

Courts should consider the stage of the proceedings and the amount of discovery in evaluating a proposed settlement. The purpose of considering the stage of the proceedings is to ensure that the factual record is sufficient to support an informed judgment as to the adequacy of the settlement proposal. *Marisol A. v. Giuliani*, 185 F.R.D. 152, 163 (S.D.N.Y. 1999), *aff'd. sub nom, Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000).

Here, Counsel for Plaintiff were confident regarding the validity of the claims asserted and have vigorously pursued this action to date, but only settled the case at a point in time when they were fully aware of the strengths and weaknesses of the claims asserted. As noted above, Dave & Buster's contested liability and asserted various defenses. The case was successful litigated through a motion to dismiss. *Marin v. Dave & Buster's, Inc.*, 159 F. Supp. 3d 360 (S.D.N.Y. 2016). The parties engaged in extensive document discovery, with over 75,000 documents produced by Dave & Buster's, conducted mediation with an experienced mediator, and engaged in subsequent negotiations lasting nearly a year. Prior to the commencement of

depositions, the parties jointly decided to continue settlement discussions that previously had broken down. On March 20, March 21, and June 30, 2017, the parties participated in private mediation, and on June 30, 2017, reached an agreement in principle to settle the action as to the putative Class on terms set forth in a prior stipulation presented to the Court for preliminary approval in 2017. The Court expressed concern with several aspects of the proposed settlement at the November 30, 2017 hearing scheduled to address preliminary approval, and by Order dated December 1, 2017, declined to preliminarily approve the original settlement. Counsel for the parties discussed the Court's concerns over a period of time and negotiated the current Proposed Settlement, which modified the previous agreement, bearing in the mind the specific issues raised by the Court. Thus, at the time the Settlement was reached, full document discovery was complete and all of the issues underlying the claims asserted had been thoroughly vetted in a manner sufficient to support the reasonableness of the agreement reached. At that stage of the proceedings, the parties had "a clear view of the strengths and weaknesses of their cases." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985). That counsel has made an informed decision on the merits of the Proposed Settlement militates in favor of approval.

With regard to the Rule 23 factor of adequate representation, Plaintiff and Class Counsel vigorously represented the Class through all stages of the litigation process. The interests of Plaintiff were never antagonistic to those of the members of the Settlement Class, and she admirably sought redress for herself and others like her who allegedly lost wages and full-time benefits as a result of a company-wide policy to reduce the number of full-time employees at Dave & Buster's in an effort to stem health insurance costs. Plaintiff has been committed to vigorously prosecuting the claims that she asserted, including by responding to discovery

requests and actively participating in the initial two-day mediation session. There were no unique defenses that applied only to Plaintiff and the interests of the other members of the Settlement Class, therefore, have been and will continue to be protected by Plaintiff.

Likewise, Class Counsel are experienced in ERISA and complex class action litigation, and have successfully prosecuted numerous ERISA cases and class actions in courts throughout the United States and in this Circuit, as discussed in greater detail below and in the accompanying Joint Declaration, individual firm declarations, and supporting exhibits.

4. *Grinnell:* The Risks of Establishing Liability Support Approval of the Settlement

***Rule 23*: The Relief Provided for the Class is Adequate, Taking Into Account Risks, Cost and Delay**

In analyzing the parties' risks of establishing liability, the Court does not "[need to] decide the merits of the case or resolve unsettled legal questions." *Marisol A.*, 185 F.R.D. at 164 (*citing Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)). Instead, the Court must weigh the likelihood of success by the plaintiff against the relief offered by the settlement. *Id.*

Proving liability here was far from assured. In their motion to dismiss, Defendants argued that back pay is not an available remedy in an ERISA § 510 claim and that claims for back pay are not incidental to injunctive relief. In response, Plaintiff argued that an ERISA § 510 plaintiff can recover back pay because the back-pay award is intertwined with the equitable relief. The Court, in the context of the motion to dismiss, agreed with Plaintiff that back pay is recoverable in an ERISA § 510 case. *Marin v. Dave & Buster's, Inc.*, 159 F. Supp. 3d 360 (S.D.N.Y. 2016). However, if this case were not settled, Defendants could and would revisit the arguments that back pay is not an available remedy in an ERISA § 510 claim, and that Plaintiff's claim for back pay are not sufficiently incidental to the injunctive relief.

Second, Plaintiff contends that class certification is premised on the Class suffering a common loss in wages and benefits because of the Position to Win Program, which allegedly was a program expressly aimed at depriving the Class of their full-time insurance benefits or eligibility for full-time benefits. Plaintiff would rely on substantial evidence of a company-wide policy in support of class certification. However, Defendants would argue, as they have during this litigation, that class treatment would be inappropriate because the Position to Win Program was not discriminatory, was implemented without consideration of any ERISA-protected right, and each decision made to reduce or not reduce a Dave & Buster's employee's hours was made on a case-by-case basis, taking into consideration the individual employee's work performance, availability, and tenure.

In addition to these looming issues, Defendants argued that they did not violate ERISA and raised other defenses to the claims asserted, including that the Position to Win program had valid business purposes (*e.g.*, to better manage the hours of its workforce given the seasonality of its business), and that eligibility for or enrollment in current benefits were not factors considered by the managers when making their decisions to reduce hours.

In light of these risks, Plaintiff believes the Settlement represents an excellent result, achieving (1) Injunctive Relief that prohibits "management, as part of its Position to Win program or otherwise, from discharging, fining, suspending, expelling, disciplining, or discriminating against any employee, or reducing any employee's hours or denying an employee increased hours, for the purpose of denying that employee coverage, or eligibility for coverage, under the Dave & Buster's Health Insurance Plan or interfering with the attainment of any right to which such employee may become entitled under the Dave & Buster's Health Insurance Plan." and (2) compensation for some significant portion of alleged incidental losses to Class

Members resulting from the change in wages and full-time benefits. All of these very real risks were taken into account by Plaintiff and considered in conjunction with the Proposed Settlement and militate in favor of approval.

5. *Grinnell:* The Risks of Establishing Damages Support Approval of the Settlement

***Rule 23*: The Relief Provided for the Class is Adequate, Taking Into Account Risks, Cost and Delay**

While Class Counsel believed that they could prove damages, they were cognizant of the fact that any fact-finder "could be swayed by experts for the Defendants, who [c]ould minimize the amount of Plaintiffs' losses." *Maley*, 186 F. Supp. 2d at 365. Further, in this case, the availability of any monetary damages was a hotly-contested issue. Disputes over damages would likely have been subject to expert testimony, summary judgment, and trial, and therefore, it is impossible to predict with certainty which arguments would find favor with the Court. During the course of settlement negotiations, the parties had very different approaches to assessing monetary losses to the members of the Class whether through lost wages or lost benefits.

In this case in particular, assessment of damages could have been individualized and therefore complex. Defendants have argued that there may be employees in the class who whose hours were reduced for reasons other than the Position to Win program. Defendants may have argued that such individualized assessments will preclude class certification. As a result, if individual damage issues outweighed class issues, class certification could have been denied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011) ("When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute.). Again, Plaintiff weighed these risks against Defendants' willingness

to agree to the Injunctive Relief and to provide prompt payment of a substantial portion of the Class members' alleged wage and benefits losses.

6. *Grinnell:* The Risks of Maintaining the Class Action through Trial Support Approval of the Settlement

***Rule 23*: The Relief Provided for the Class is Adequate, Taking Into Account Risks, Cost and Delay**

Defendants have stipulated to class certification for settlement purposes only and the Class was preliminarily certified by the Court in its December 17, 2018 Preliminary Approval Order. However, in the absence of the Proposed Settlement, Plaintiff faced the possibility that this case would be found to be unsuitable to proceed on a class basis. While Plaintiff believed that the case was suitable for class certification and the Court made express factual findings in that regard in its Preliminary Approval Motion, there could have been no assurance that, in absence of this Settlement, the litigation could have been maintained as a class action through trial for the reasons noted above, including the potential for individual issues with respect to causation and damages. The Proposed Settlement avoids this uncertainty.

7. *Grinnell:* The Ability of Defendants to Withstand a Greater Judgment

Presumably, Dave & Buster's could have withstood a judgment greater than $7,425,000. However, courts in this Circuit have held that "where, as here, the other *Grinnell* factors weigh in favor of approval, this factor alone does not suggest the settlement is unfair." *In re Giant Interactive Grp.*, 279 F.R.D. at 162; *In re Global Crossing*, 225 F.R.D. at 460 (defendant's ability to pay is less important than other factors, especially where "the other *Grinnell* factors weigh heavily in favor of settlement approval."). Under these circumstances and considering that the Settlement provides Injunctive Relief and incidental monetary compensation for alleged

lost wages and benefits, Defendants' ability to pay is of less significance in light of all other factors discussed herein. *See In re Telik*, 576 F. Supp. 2d at 580.

8. *Grinnell:* The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation Support Approval of the Settlement

***Rule 23:* The Relief Provided for the Class is Adequate, Taking Into Account Risks, Cost and Delay**

Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *23-24 (S.D.N.Y. Dec. 23, 2009) (citing cases). Rather, "in any case there is a range of reasonableness with respect to a settlement." *Id.* at *24 (*citing Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

"[T]here is no particular number that must be reached for this percentage to be reasonable. Rather, the settlement amount must be located within a range of reasonableness ... —a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Romero v. La Revise Assocs., L.L.C.*, 58 F. Supp. 3d 411, 421 (S.D.N.Y. 2014) (approving settlement of 40% of potential recovery). "Moreover, the settlement amount must be judged 'not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case.'" *Shapiro v. JPMorgan Chase & Co.*, No 11 Civ. 8331, 2014 WL 1224666, 2014 U.S. Dist. LEXIS 37872, at *45 (S.D.N.Y. March 21, 2014). "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *In re Global Crossing*, 225 F.R.D. at 461. Further, "the overall value of the settlement comprises monetary as well as non-monetary relief." *See, e.g., Velez v. Novartis*

Pharm. Corp., No. 04 CIV 09194 CM, 2010 WL 4877852, 2010 U.S. Dist. LEXIS 125945, at *13 (S.D.N.Y. Nov. 30, 2010) (both monetary and non-monetary relief considered in calculating value of settlement).

The opinion of the expert retained by Plaintiff, David Breshears, whose Affidavit was submitted in connection with Plaintiff's motion for preliminary approval, is that the total potential incidental reduction in wages and lost full-time benefits amounts to approximately $22,586,244. The Settlement includes Injunctive Relief prohibiting Dave & Buster's from factoring benefits into certain employment decisions, thus precluding comparable losses in the future, plus the payment of $7,425,000, representing more than one-third of the alleged lost wages and benefits. The payments to members of the Class may also increase as subsequent distributions are made of unclaimed funds. Further, the agreed-upon Injunctive Relief significantly enhances the monetary value of the settlement by many multiples into the future.

The Proposed Settlement thus is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. *See In re WorldCom, Inc. ERISA Litig.*, No. 02 CIV. 4816 (DLC), 2004 WL 2338151, at *7 (S.D.N.Y. Oct. 18, 2004) (approving settlement where "[t]he amount of the Settlement Fund, even before it is reduced by attorney's fees, is at best about one-third or at worst less than 10% of the damages estimated by the plaintiffs."); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 462 (E.D. Pa. 2008) (in ERISA action, finding "Settlement Agreement fund of $14.4 million represents approximately 20% of the 'best possible' recovery if all theories of recovery and damages were accepted by the Court."); *Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 281 F. Supp. 3d 833, 847 (N.D. Cal. 2017) (finding settlement substantively reasonable where ERISA "class members are scheduled to receive 37% of the pension benefits they should have received during

the four-year Payment Period had the 2012 Amendment not gone into effect, less a pro rata share of attorneys' fees and expenses."); *Pfeifer v. Wawa, Inc.*, No. CV 16-497, 2018 WL 4203880, at *9 (E.D. Pa. Aug. 31, 2018) (in an ERISA case, approving "$25 million settlement [that] thus represents 25 percent of the best possible recovery."); *In re Royal Dutch/Shell Transp. Sec. Litig.*, No. CIV.A. 04-374 JAP, 2018 WL 4203880, at *22 (D.N.J. Dec. 9, 2008) (approving settlement representing "nearly 18.2% of the maximum likely-case recoverable damages according to Lead Plaintiffs' analysis—and the Settlement Agreement provides for definite and prompt benefits, which are more valuable than a speculative future payment."); *Grinnell*, 495 F.2d at 455 & n. 2 (in theory, even a recovery of only a fraction of one percent of the potential recovery could be a reasonable and fair settlement); *In re Air Cargo Shipping Servs. Antitrust Litig.*, Case No. 06–MD–1775, 2009 WL 3077396, 2009 U.S. Dist. LEXIS 88404, at *72-73 (E.D.N.Y. Sept. 25, 2009) (approving settlement in price-fixing class action representing approximately 10.5% of the surcharges incurred by class members during the class period); *In re Med. X–Ray Film Antitrust Litig*., CV–93–5904, 1998 WL 661515, 1998 U.S. Dist. LEXIS 14888, *15 (E.D.N.Y. Aug. 7, 1998) (granting final approval to antitrust class action settlement representing approximately 17% of the estimated best possible recovery)**.**

An immediate recovery of losses incurred, when balanced against the risks of further litigation with further costs, is by any measure an excellent result. Accordingly, the eighth and ninth *Grinnell* factors support approval of the Settlement.

9. *Grinnell*: The Proposed Settlement is Procedurally Fair

***Rule 23:* The Proposal Treats Class Members Equitably Relative to Each Other and the Proposal was Negotiated at Arm's Length**

"In addition to ensuring the substantive fairness of the settlement through full consideration of the *Grinnell* factors, the Court must also 'ensure that the settlement is not the

product of collusion.'" *In re Global Crossing*, 225 F.R.D. at 461 (*quoting In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998)). However, "[a]s long as the integrity of the negotiating process is ensured by the Court, it is assumed that the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides." *Banyai v. Mazur*, No. 00 Civ. 9806 (SHS), 2007 U.S. Dist. LEXIS 22342, at *37 (S.D.N.Y. Mar. 27, 2007) (approving settlement reached after months of good faith, arms-length negotiations) (*quoting In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 132 (S.D.N.Y. 1997)).

Here, the Proposed Settlement bears all of the markings of an arm's length transaction. The Court is aware of the long mediation process leading up to the Proposed Settlement. Counsel for the parties argued steadfastly for their clients' respective positions from day one. The case presented a new theory of liability, raised complex issues regarding class certification and damages, and required extensive work to assess the law and craft a fair and reasonable settlement. It would be an understatement to say that counsel vigorously represented their clients; the negotiations were at times contentious and always at "arm's length."

There also is no suggestion that the integrity of the negotiating process might have been compromised in any way, including by any expectation of excessive compensation to counsel for Plaintiff. Class Counsel, first and foremost, were concerned with the recovery for the Class. Where, as here, the "settlement is the result of arm's length negotiations conducted by experienced counsel after adequate discovery … then it is entitled to '[a] strong initial presumption of fairness.'" *In re Global Crossing*, 225 F.R.D. at 461 (citation omitted).

The Settlement Agreement also treats each Class Member in the same manner. Assessment of the adequacy of a plan of allocation of settlement proceeds in a class action under

Rule 23 is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair, reasonable and adequate. *In re Am. Bank Note*, 127 F. Supp. 2d at 430 (approving settlement plan of allocation because, among other things, "the opinion of experienced and informed counsel is entitled to considerable weight"). "'When formulated by competent and experienced counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.'" *In re Telik*, 576 F. Supp. 2d at 580 (*quoting In re Global Crossing*, 225 F.R.D. at 462)). Numerous courts have affirmed that "a plan of allocation need not be perfect." *In re EVCI Career Colls. Holding Corp. Sec. Litig*., No. 05 Civ. 10240, 2007 U.S. Dist. LEXIS 57918, at *32 (S.D.N.Y. July 27, 2007) (citing cases). "In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel." *Id.* at *32-33 (*citing In re PaineWebber*, 171 F.R.D. at 133) (additional citations omitted). Courts also consider the class' reaction to a plan of allocation. *Id.* at *33-34 (approving plan where no class member objected).

The Settlement Agreement specifies the proportionate allocation of the Settlement Fund to the Class members based on their average hourly pay rate, the length of their employment, their reduction in hours, and loss of benefits. Thus, apart from a reasonable incentive award for the Named Plaintiff addressed below, each Class Member will be treated equally. The Plan of Allocation was negotiated between counsel at arm's length, and Class Counsel vetted the Plan of Allocation with their consulting experts. Accordingly, the Plan of Allocation should be approved as fair, reasonable and adequate.

III. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE UNDER FEDERAL RULE OF CIVIL PROCEDURE 23

The Preliminary Approval Order certified the Class pursuant to Rules 23(a) and (b)(2) and (3) of the Federal Rules of Civil Procedure. Preliminary Approval Order at ¶2. In the

Preliminary Approval Order, the Court recognized that, for purposes of Settlement, the requirements for Rule 23 have been satisfied, including that: (a) the Settlement Class is cohesive and well-defined; (b) the members of the Settlement Class are so numerous that their joinder would be impracticable; (c) based on the allegations of the Complaint, there are questions of law and fact common to the Settlement Class; (d) the claims of Plaintiff are typical of the claims of the Settlement Class; (e) Plaintiff will fairly and adequately represent the interests of the Settlement Class in that her claims are consistent with the claims of other Class members, she has no conflicts with other members of the Class, and she has retained qualified, reputable, and experienced counsel; (f) Class Counsel have fairly and adequately represented the interests of the Settlement Class; and (g) common issues of law and fact predominate over individual issues. Preliminary Approval Order at ¶1. The Court preliminarily certified the Class based on these specific findings, appointing Plaintiff as class representative and her counsel as Class Counsel. *Id*. at ¶¶2-3.

Plaintiff respectfully requests that the Court finally certify the Class for settlement purposes based upon these same findings. The "Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement." *In re EVCI*, 2007 U.S. Dist. LEXIS 57918, at *35 (*citing Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982)). The Supreme Court has confirmed the viability of such certifications. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-22 (1997).

Whether certified for settlement or litigation purposes, a class must meet each of the four requirements of Rule 23(a) and at least one of the three requirements of Rule 23(b). *See In re Marsh & McLennan*, 2009 U.S. Dist. LEXIS 120953, at *27-28. At the same time, however, a district court "[c]onfronted with a request for settlement-only class certification, ... need not

inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620 (internal citation omitted). Here, nothing has changed since Plaintiff's motion for preliminary approval was filed that would cause the Court to revisit its analysis of the requirements of Rule 23. Based upon its prior findings and the analysis of the Rule 23 factors set out in Plaintiff's memorandum in support of preliminary approval, the Court should finally certify the Class for settlement purposes only.

IV. THE NOTICE PROGRAM MET THE REQUIREMENTS OF DUE PROCESS AND FEDERAL RULE OF CIVIL PROCEDURE 23

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

The Settlement Administrator has completed mailing the Notice as set forth in the Stipulation and approved in the Preliminary Approval Order. *See* Evans Decl. The notice process was discussed extensively at the preliminary approval hearing and it was determined that a mailing was the best way to reach Class Members. The Notice, sent in both English and Spanish, had an excellent chance of reaching all members of the Settlement Class as each is a current or former full-time employee of Dave & Buster's. Furthermore, as permitted by the Stipulation, Notices were redirected as necessary to the appropriate people based upon additional research regarding proper addresses and a small percentage of the Notices sent were returned as

undeliverable. The Notice described the general terms of the Proposed Settlement set forth in the Stipulation, the definition of the Class certified, the binding effect of any judgment rendered with respect to Defendants, and the date and time of the Settlement Hearing at which the Court would consider whether the Settlement is fair, reasonable, and adequate and in the best interests of the Class. Accordingly, Plaintiff submits that the Notice program fully satisfied the requirements of due process and Rule 23.

V. THE INCENTIVE AWARD FOR THE NAMED PLAINTIFF IS REASONABLE

Plaintiff also requests that the Court award a $35,000 incentive payment to the Named Plaintiff, who participated actively in this case. In the Stipulation of Settlement, the parties agreed that "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." to be paid out of the Qualified Settlement Fund. Docket 71-1 at §19(a).

"Courts consistently approve [incentive] awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation." *Anwar v. Fairfield Greenwich Ltd*., No. 09-CV-118, 2012 U.S. Dist. LEXIS 78929, 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012). In considering whether to grant an incentive award, courts will consider "(1) the personal risk incurred by the named plaintiffs; (2) time and effort expended by the named plaintiffs in assisting the prosecution of the litigation; and (3) the ultimate recovery in vindicating statutory rights." *Bozak v. FedEx Ground Package Sys., Inc*., No. 3:1 1-CV-00738, 2014 U.S. Dist. LEXIS 106042, 2014 WL 3778211, at *4 (D. Conn. July 31, 2014); *see also Dornberger v. Metro. Life Ins. Co*., 203 F.R.D. 118, 124 (S.D.N.Y. 2001) ("An incentive award is meant to compensate the named plaintiff for any personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit.").

Here, Ms. Marin, the sole Named Plaintiff, commenced this case, at risk to herself, as she continued to be employed by Dave & Buster's at all relevant times and exposed herself to the risk of retaliation. She was an active participant in the case, staying abreast of all significant developments, offering her assessment of the facts, providing responses to discovery, and participating in person at all days of the first mediation. She was dedicated to seeking redress for herself and the other employees she sought to represent. She, no doubt, would have remained an active participant in the litigation, had it not been settled, including sitting for a deposition and appearing at trial.

The $35,000 incentive award sought here is within the range awarded by courts within this circuit to named plaintiffs in similar cases. *See, e.g.*, *Amara v. CIGNA Corp.*, No. 3:01-CV-2361 (JBA), 2018 U.S. Dist. LEXIS 202717, at *11 (D. Conn. Nov. 29, 2018)(in ERISA class action, award of $50,000 to three named plaintiffs); *Kifafi v Hilton Hotels Ret. Plan*, 999 F. Supp. 2d 88, 105 (D. D.C. 2013) (in ERISA class action, $50,000 incentive award to lead plaintiff); *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chas Bank, N.A.*, 09 Civ. 686, 2012 U.S. Dist. LEXIS 79418, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (in ERISA class action, awarding $50,000 to each of the three named plaintiffs).

Here, the incentive award provided for in the Settlement Agreement is reasonable and compensates Ms. Marin for the risk she undertook in attaching her name to this litigation and for the time and effort she expended in assisting with the prosecution of this action. The proposed incentive payment amounts to $35,000, or less than .5% of the total Settlement Fund. This amount is reasonable. *See Chambery v. Tuxedo Junction Inc.*, No. 12–CV–06539 EAW, 2014 U.S. Dist. LEXIS 101939, 2014 WL 3725157, at *11 (W.D.N.Y. July 25, 2014) (approving enhancement awards totaling roughly 5% of the total settlement fund); *Frank v. Eastman Kodak*

Co., 228 F.R.D. 174, 187–88 (W.D.N.Y. 2005) (approving enhancement award to class representative totaling 8.4% of the total settlement fund). Plaintiff therefore requests that the Court approve the requested incentive award.

VI. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE

In the Stipulation of Settlement, the parties agreed that "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.", (Doc. 17-1 at § 18(a)).

In accordance with the Court's Preliminary Approval Order (Doc. 72), the court-approved Settlement Administrator mailed the Class Notice to all potential class members. The Notice informed Class members of all material terms of the Settlement, including that the court-appointed Class Counsel would apply to the Court for an award of attorneys' fees and reimbursement of expenses in an amount not exceeding 33% of the Class Settlement Amount, and an incentive fee of $35,000 for the Named Plaintiff. The deadline for objecting to the attorneys' fee request was March 27, 2019. To date, no objection has been received. *See Amara v. CIGNA Corp.*, No. 3:01-CV-2361 (JBA), 2018 U.S. Dist. LEXIS 202717, at *7-8 (D. Conn. Nov. 29, 2018)("This small number of objections compared to 80% affirmative class responses without objections also weights in favor of this fee award.").

Plaintiff has determined to request a fee award here of 30% of the settlement amount, plus reimbursement of expenses. Class Counsel respectfully submits that this fee request is appropriate when considered in light of the nature of the litigation, the manner in which the case was litigated, and the desire of counsel to ensure the greatest possible recovery for members of the Settlement Class. The Settlement was achieved through the skill, creativity, perseverance

and hard work of Class Counsel. This was one of the first, if not the first, cases in the nation, after the enactment of the Affordable Care Act, challenging the practice of reducing employee hours to deprive employees of eligibility for health benefits under ERISA. As such, the case was novel and risky. The Settlement is likely to effect change in the way companies make employment decisions going forward, which further justifies the fees requested by Class Counsel.[1] The fee and expense request is also fair and reasonable when considered in light of the relevant factors in this Court.

A. The Legal Standards Governing the Award of Attorneys' Fees

Pursuant to the "common fund" doctrine, established in *Trustees v. Greenough*, 105 U.S. 527, 532-33 (1881), attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work. *In re Telik*, 576 F. Supp. 2d at 584-85. The Supreme Court has recognized that lawyers who recover a common fund for the benefit of persons other than their client are entitled to a reasonable attorney's fee from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Fees and expenses are paid from the common fund so that all class members contribute equally toward the costs associated with litigation pursued on their behalf. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) ("The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost."). The common fund doctrine has been applied in ERISA class actions within the Second Circuit. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010).

[1] The ACA Times recently reported regarding this case: "While the case continues, it serves as a cautionary tale for other employers that are attempting to avoid the ACA's employer mandate. All signs point to the ACA employer mandate remaining in place and that those organizations that try to circumvent it will be facing ESRPs that range from tens of thousands to millions of dollars." https://acatimes.com/after-settlement-rejected-dave-busters-court-case-continues/

The Second Circuit has approved two methods to calculate reasonable attorneys' fees in common fund cases: the "percentage method" and the "lodestar method." *Goldberger*, 209 F.3d at 47-48. This is true in the context of cases brought under ERISA. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 146; *In re Polaroid ERISA Litig.*, No. 03 Civ. 8335 (WHP), 2007 U.S. Dist. LEXIS 51983, at *5-6 (S.D.N.Y. July 19, 2007). The percentage method is the simpler method of the two and involves awarding counsel a percentage of the recovery as a fee. *Goldberger,* 209 F.3d at 47-48. The lodestar method requires the court to scrutinize the fee petition to ascertain the number of hours reasonably billed, then multiply that figure by an appropriate hourly rate. *Id.*

District courts may use either method when considering attorneys' fees, but the trend is toward use of the percentage method. *In re Marsh ERISA Litig*., 265 F.R.D. at 146 ("A district court has discretion to use either method, although the trend in this Circuit is toward the percentage method."); *Wal-Mart Stores*, 396 F.3d at 121-22 ("The trend in this Circuit is toward the percentage method ... which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation") (citations omitted); *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig*., MDL Docket No. 1500, 02 Civ. 5575, 2006 U.S. Dist. LEXIS 78101, at *24 (S.D.N.Y. Sep. 28, 2006)("Although the Second Circuit has vested the lower courts with the option of using either the percentage or lodestar methods, every significant Southern District opinion facing the issue since *Goldberger* has embraced the percentage approach, without much case-specific analysis of the choice.")(gathering cases); *Kemp-Delisser v. Saint Francis Hosp. & Med. Ctr*., No. 15-cv-1113 (VAB), 2016 U.S, Dist. LEXIS 152496, at *45-46 (D. Conn. Nov. 3, 2016)("Many courts in the

Second Circuit favor the percentage of fund method for awarding attorneys' fees in class action settlements.").

"The Second Circuit encourages using the lodestar method only as a cross-check for the percentage method." *In re Marsh & McLennan*, 2009 U.S. Dist. LEXIS 120953, at *43 (*citing Goldberger*, 209 F.3d at 50); *see also Mendes-Garcia v. 77 Deerhurst Corp*., 11 Civ. 2797 (PGG), 2014 U.S. Dist. LEXIS 188290, at *15 (S.D.N.Y. 2014) (internal quotation marks omitted)("trend in the Second Circuit has been to apply the percentage-of-recovery method and loosely use the lodestar method as a 'baseline' or 'cross check.'").

B. Application of the *Goldberger* Factors Justifies an Award of the Percentage Fee Requested

Second Circuit jurisprudence has established six factors that a reviewing court should consider in evaluating what constitutes a reasonable fee:

(1) the time and labor expended by counsel;
(2) the magnitude and complexities of the litigation;
(3) the risk of the litigation;
(4) the quality of representation;
(5) the requested fee in relation to the settlement; and
(6) public policy considerations.

Goldberger, 209 F.3d at 50 (*quoting In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989) (summarizing *Grinnell*)); *see also In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816, 2005 U.S. Dist. LEXIS 28686, 2005 WL 3116188, at *7 (S.D.N.Y. Nov. 22, 2005). The *Goldberger* factors "need not be applied in a formulaic way" because each case is different "and in certain cases, one factor may outweigh the rest." *In re Rite-Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005). "What constitutes a reasonable fee is properly committed to the sound discretion of the district court." *Goldberger*,

209 F.3d at 47. Consideration of these six factors demonstrates that the fee requested by Class Counsel in this case is reasonable.

1. The Time and Labor Expended

The time and labor expended by Class Counsel support the reasonableness of the 30% fee requested. Class Counsel devoted a significant amount of time to researching and commencing the action in 2015; defending a motion to dismiss in 2015, which was denied in 2016; conducting and analyzing extensive document discovery of over 75,000 pages of documents in 2016 and 2017; participating in three days of mediation in March and June 2017; engaging in extensive negotiations that resulted in the prior stipulation of settlement in November 2017; presenting the settlement at an initial preliminary approval hearing in November 2017, which was denied in December 2017; renegotiating and revising of the settlement in 2018; re-submitting the current Settlement for preliminary approval in November 2018; defending of the Settlement at the second preliminary approval hearing; and overseeing notice to the class and other settlement administration matters. From the inception of this case, Class Counsel spent over 2,389 hours in prosecuting this case on behalf of the Settlement Class for an aggregate lodestar of $1,437,787.50 and incurred $91,461.24 in expenses, as documented in the accompanying Joint Declaration and individual firm declarations. Class Counsel believes this commitment of time and labor was necessary and was also responsible for the superior result achieved here for the Class.

2. The Magnitude and Complexities of the Litigation

The magnitude and complexities of this litigation also support the reasonableness of the fee requested by Class Counsel. "Courts generally recognize that 'ERISA concerns a highly specialized area of law' that can be extremely complex." *Kemp-Delisser*, 2016 U.S. Dist. LEXIS

152496, at *48 (quoting *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 350 (S.D.N.Y. 2014) ("ERISA concerns a highly specialized area of law. … Class Counsel asserts that relatively few lawyers have the expertise to litigate the types of claims in this case. These considerations suggest that a higher fee is warranted in ERISA cases as compared with some other types of cases.")).

In particular, here, as discussed in detail above, this case presented complex issues under ERISA and Defendants asserted many defenses to Plaintiff's claims, as well as to the propriety of class certification, in the context of negotiating the terms of the Settlement. Class Counsel confronted complex legal issues that were raised by Defendants in this action, including the novel issue of applicability of ERISA § 510 to employer actions taken in contemplation of the requirements of the Affordable Care Act, and the unsettled issue of availability of back pay as a remedy under ERISA § 510. In addition to the fact that this case presented complex legal issues, it also presented complex settlement issues, which required creative thinking to craft a settlement.

3. The Risk of the Litigation

The risks involved in this litigation also support the reasonableness of the fee requested by Class Counsel. "The Second Circuit has identified 'the risk of success as perhaps the foremost factor to be considered in determining' a reasonable award of attorneys' fees." *In re Global Crossing*, 225 F.R.D. at 467 (citing *Goldberger*) (internal quotation marks omitted); *In re Telik*, 576 F. Supp. 2d at 592 ("Courts have repeatedly recognized 'that the risk of the litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award to plaintiffs' counsel in class actions.").

Here, as discussed above, litigating this case would have presented many real risks. The amount of fees requested reflects these risks, but also has been tempered to reflect that these risks diminished as the parties determined to head down the settlement path. Plaintiff's claims involved further risk in that they concerned the very new interplay between ERISA and the Affordable Care Act. *See In re Marsh ERISA Litig*., 265 F.R.D. at 147 ("ERISA law is still developing. One reason is the newness of the statute, but it is also true that ERISA was designed primarily to regulate traditional defined benefit plans … The unsettled nature of the law applicable to Plaintiffs' claims--especially as it existed more than five years ago when this case was filed--increases the risks for Plaintiffs' Counsel.").

4. The Quality of Representation

The quality of representation delivered in the litigation also supports the reasonableness of the fee sought. To evaluate the "quality of representation," courts in the Second Circuit "review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008).

Plaintiff was represented by Abbey Spanier, LLP, Frumkin & Hunter LLP, and Conover Law Offices. Each firm has a long history of being actively engaged in complex federal civil litigation. This experience allowed counsel to identify the complex issues involved in resolving this case and to formulate strategies to effectively achieve the goals of Plaintiff and the Class that she sought to represent. As one Court in this district has recognized, Class Counsel Abbey Spanier LLP is "well known and experienced in class action litigation...[and the] quality of their work is, of course, best shown in the results they have achieved here: an all cash settlement of just under $455 million." *See In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 (LMM), 2006 U.S. Dist. LEXIS 84621, at *14-15 (S.D.N.Y. Nov. 16, 2006). The

attorneys at Frumkin & Hunter LLP complemented the class experience of Abbey Spanier with their extensive experience in ERISA litigation, and Conover Law Offices was initially retained by Ms. Marin and added their extensive experience in employment discrimination litigation.

The quality and vigor of opposing counsel is also significant in considering the quality of services rendered by Plaintiff's counsel, as measured by the result achieved. *Maley*, 186 F. Supp. 2d at 373; *see also In re Global Crossing*, 225 F.R.D. at 467 ("[T]he quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."). Defendants here were represented by very skilled and highly respected counsel from Paul Weiss with well-deserved reputations for vigorous advocacy in the defense of complex civil cases. The quality of Class Counsel's representation of Plaintiff and the Class, as measured by the results achieved, Class Counsel's experience, and the quality of the opposition, all strongly support the reasonableness of the fee request.

5. The Requested Fee in Relation to the Settlement

The requested fee in relation to the settlement also supports the reasonableness of the fee sought. Class Counsel respectfully submit that the attorneys' fees request in this case, $2,227,500, which is 30% of the Settlement Fund, is reasonable. The fee sought, which is less than the percentage Defendants have agreed not to oppose (Docket 71-1 at section 18(a)), was the product of arm's-length negotiation between counsel.

The fee sought by Class Counsel, when assessed as a percentage of the recovery, is within the range awarded in federal courts in the Second Circuit. "District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez*. 2010 U.S. Dist. LEXIS 125945, at *59 (S.D.N.Y. Nov. 30, 2010)(gathering cases with awards in the range of or above 30%). In January of 2019, the late Judge Stein awarded a fee amounting to one-third of a

$6.9 million settlement amount in an ERISA fee and proprietary fund case. *Leber, et al. v. The Citigroup 401(k) Plan Investment Committee, et al.*, Civ. A. No. 07-cv-9329-SHS (S.D.N.Y. Jan, 3, 2019) (awarding one-third of settlement fund, plus reimbursement of over $374,000 in expenses). In addition, "in many ERISA company stock cases, courts have awarded fees of 30%..." *In re Marsh ERISA Litig*., 265 F.R.D. at 149 (finding 33.3% fee of recovery of $11,665,500 in an ERISA class action to be "fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in this Circuit and elsewhere," and gathering five ERISA class action cases in which fees of 30% were awarded); *see also Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C*., 504 F.3d 229, 249 (2d Cir. 2007)("30% of the settlement fund was reasonable" in an ERISA class action).

Moreover, it is worth noting that, although the amount sought here for attorneys' fees is based upon a percentage of the incidental monetary relief amount of $7,425,000, the actual value of the Settlement is greater when the value of the Injunctive Relief is considered. As discussed above, the Injunctive Relief has a significant value to the Class and to other employees of Defendants in that it effectively prevents potentially enormous future losses of wages and benefits, an amount that is likely many multiples of the monetary portion of the Settlement. Consequently, the amount sought for attorneys' fees is actually less than 30%, when the full value of the monetary and Injunctive Relief portions of Settlement are taken into account.

Plaintiff also respectfully submits that an award of attorneys' fees in the amount of $2,227,500 is further warranted by the unique circumstances of this case where Class Counsel have played and will continue to play an active role in the claims process so as to facilitate payment of the maximum amount of settlement funds to the Class members.

6. Public Policy Considerations

Public policy considerations are also relevant to evaluating the reasonableness of the fee request. *See Goldberger*, 209 F.3d at 50; *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071, 2005 U.S. Dist. LEXIS 24890, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding"). Congress passed ERISA to promote the important goal of protecting the interests of participants and their beneficiaries in employee benefit plans. *See Marsh*, 265 F.R.D. at 149-50; *Slupinski v. First Unum Life Ins. Co*., 554 F.3d 38, 47 (2d Cir. 2009)("Congress intended the fee provisions of ERISA to encourage beneficiaries to enforce their statutory rights.").

Here, Class Counsel's willingness to assume the risks of contingent litigation on behalf of employees who had lost their health benefits or eligibility for such benefits resulted in a substantial benefit to the Class. This settlement is likely to dissuade other employers from reducing employee hours to deprive them of existing medical benefits or eligibility under the Affordable Care Act. The Court should award fees that adequately compensate Class Counsel, taking into account the risks undertaken, for enforcing ERISA in circumstances like these where individual class members have suffered significant losses yet might not be able to proceed individually. *See Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496, at *53 ("public policy considerations therefore justify the proposed fee award, as Class Counsel 'should receive a reasonable attorney's fee for their efforts,' to ensure that Plan participants have a remedy."). Public policy considerations therefore favor the granting of Class Counsel's fee application.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Percentage Fee Requested

In *Goldberger*, the Second Circuit held that even in cases in which the percentage method is chosen, "documentation of hours" remains "a [useful] 'cross-check' on the reasonableness of the requested percentage." 209 F.3d at 50. The lodestar analysis has two fundamental components: examining the attorney time records for reasonableness, and establishing appropriate hourly billing rates. *Id.* at 47. "[W]here used as a mere cross-check, [however], the hours documented by counsel need not be exhaustively scrutinized by the district court....Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case...." *Id.* at 50. (citation omitted). Plaintiff's counsel's work performed in this case, charged at current hourly rates,[2] results in a lodestar of $1,437,787.50.

1. The Hours and Rates are Reasonable

The hours expended by Class Counsel were reasonable, even to the extent that they are based on the work of three firms. As this Court has recognized, "a reasonable amount of collaboration among attorneys … is appropriate." *Westchester Teamsters Local 456 Annuity Fund v. Fleet Nat'l Bank*, No. 02 Civ. 6664 (AKH), 2007 U.S. Dist. LEXIS 14352, at *11-12 (S.D.N.Y. Feb. 20, 2007), citing *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 297 (1st Cir. 2001) ("Given the complexity of modern litigation, the deployment of multiple attorneys is sometimes an eminently reasonable tactic.") and *Aiello v. Town of Brookhaven*, No.

[2] "[T]he Supreme Court and other courts have held that the use of current rates is proper since such rates more adequately compensate for inflation and loss of use of funds." *In re EVCI*, 2007 U.S. Dist. LEXIS 57918, at *54-55 n.6 (S.D.N.Y. July 27, 2007)(*citing Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1153 (2d Cir. 1983) (use of current rates appropriate where services were provided within two to three years of fee application)).

94-CV-2622 (FB), 2005 U.S. Dist. LEXIS 11462, 2005 WL 1397202 at *4 (E.D.N.Y. June 13, 2005) (upholding award for overlapping work in complex case).

A reasonable hourly rate is one which is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to . . . as the prevailing market rate." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); *City of Detroit v. Grinnell Corp*., 560 F.2d 1093, 1098 (2d Cir. 1977) (courts look to "the hourly rate normally charged for similar work by attorneys of like skill in the area"), abrogated on other grounds by *Goldberger v. Integrated Res., Inc*., 209 F.3d 43 (2d Cir. 2000). "The relevant community, in turn, is the district in which the court sits." *Blum,* 465 U.S. 895 n.11.

The hourly rates upon which Class Counsel's lodestar is based are reasonable. *See In re Marsh ERISA Litig*., 265 F.R.D. at 146 (recognizing reasonableness of rates ranging from $125.00 for administrative personnel to $775.00 for senior lawyers). Similar rates have been awarded recently by courts in this District in other complex class actions. *See, e.g., U.S., ex rel Fox Rx, Inc. v. Omnicare, Inc.*, No. 12cv275 (DLC), 2015 WL 1726474, 2015 U.S. Dist. LEXIS 49477, at *5 (S.D.N.Y. April 15, 2015) (partner rate of $836, and associate rates of $631.75/hour found to be reasonable); *Dorchester Fin. Holdings Corp. v. Banco BRJ, S.A*., No. 11-CV-1529 (KMW) (KNF), 2015 WL 1062327, 2015 U.S. Dist. LEXIS 29848, *3 (S.D.N.Y. Mar. 3, 2015) (partner rates $800 and $855 per hour, associate rates $550 and $600 per hour); *In re Hi-Crush Partners L.P. Sec. Litig*., No. 12-civ-8557(CM), 2014 WL 7323417, 2014 U.S. Dist. LEXIS 177175, at *38 (S.D.N.Y. Dec. 19, 2014) (attorney rates between $425 to $825 per hour); *Themis Capital v. Democratic Republic of Congo*, No. 09 Civ. 1652 (PAE), 2014 WL 4379100, 2014 U.S. Dist. LEXIS 124208, *21 (S.D.N.Y. Sept. 4, 2014) (partner rate $871 per hour); *In re*

Flag Telecom Holdings, Ltd. Sec. Litig., No. 02-cv-3400(CM)(PED), 2010 WL 4537550, 2010 U.S. Dist. LEXIS 119702, at *75 (S.D.N.Y. Nov. 8, 2010) ("median billing rates for partners at many leading law firms exceeds $900/hour") (emphasis in original); *see also Severstal Wheeling, Inc. v. WPN Corp.*, No. 10 Civ. 954, 2016 U.S. Dist. LEXIS 53563, at *12-13 (S.D.N.Y. Apr. 21, 2016) ("Although counsel's rates are higher than those awarded in ERISA benefit claim cases litigated in this district, such cases involve a relatively simpler set of issues. … By contrast, although this case arises out of ERISA, the litigation involved a much more complicated set of legal and factual issues … As such, this case more suitably falls within the general category of complex commercial litigation, for which firms in this district often charge rates higher than those claimed here.").

Moreover, Class Counsel's rates have been approved by other courts. Abbey Spanier LLP's hourly rates are the same as or similar to those which have been accepted by courts in this District in other complex class action litigation in which Abbey Spanier was lead counsel. *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02-cv-5571 (SAS)(S.D.N.Y. April 29, 2016); *In re Road Runners Litig*., No. 1:16-cv-00450 (KBF) (S.D.N.Y Feb. 10, 2017). Frumkin & Hunter LLP's rates of $700 and $500 for William Frumkin and Elizabeth Hunter, respectively, were recently found to be reasonable in another ERISA class action in the Northern District of California. *See Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 281 F. Supp. 3d 833, 853 (N.D. Cal. 2017). Bradford Conover's 35 years of employment litigation experience and Molly Smithsimon's 15 years of similar experience fully support their hourly rates of $550 and $450, respectively**.** *See* the individual firm declarations annexed to the Joint Declaration submitted herewith.

2. The Lodestar Cross-Check Results in a Low Multiplier

"The Second Circuit encourages the practice of performing a lodestar 'cross-check' on the reasonableness of a fee award based on the percentage approach. … The lodestar multiplier enhances the lodestar figure 'by an appropriate multiplier to reflect litigation risk, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors.'" *In re EVCI*, 2007 U.S. Dist. LEXIS 57918, at *53-54 (citing *In re Global Crossing*, 225 F.R.D. at 466); *see also In re AOL Time Warner*, 2006 U.S. Dist. LEXIS 78101, at *84 (S.D.N.Y. Sep. 28, 2006)("It bears emphasis that the lodestar computation here is a cross-check, calculated with less precision than would be required if lodestar were the primary methodology. Thus, although a multiplier of 3.69 is on the higher side, the lodestar cross-check is sufficiently within bounds to sustain the fairness of the award.").

Here, the requested amount for attorneys' fees based upon a percentage of 30% is $2,227,500, which represents a multiplier of 1.55 to Class Counsel's combined lodestar of $1,437,787.50. This multiplier of 1.55 is very reasonable compared to those found to be reasonable in other ERISA class actions. *See In re Colgate-Palmolive*, 36 F. Supp. 3d at 353 (in 53 ERISA cases, "the implied multiplier ranged from less than one to eight times the lodestar, and nine cases had multipliers greater than four. The median multiplier was 2.1 with a standard deviation of 1.6."); *In re Global Crossing* 225 F.R.D. at 469 (lodestar multiplier of 2.16 "falls comfortably within the range of lodestar multipliers . . . in common fund cases in the Southern District of New York"); *In re AIG ERISA Litig.*, No. 04 Civ. 9387, Order (S.D.N.Y. Oct. 7, 2008) (30% fee; 1.1 multiplier); *In re Xerox Corp. ERISA Litig*., No. 02 Civ. 1138, Order (D. Conn. Apr. 14, 2009) (30% fee; 1.6 multiplier). This cross-check multiplier of 1.55 is also very reasonable compared to other complex class actions in this Circuit. *See Wal-Mart*, 396 F.3d at

123 ("Here, the lodestar yields a multiplier of 3.5, which has been deemed reasonable under analogous circumstances."); *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, 2015 U.S. Dist. LEXIS 121574, at *61 (S.D.N.Y. Sept. 9, 2015) (4.87 multiplier well within range where "[c]ourts regularly award lodestar multipliers from 2 to 6 times lodestar in this Circuit"); *Velez*, 2010 U.S. Dist. LEXIS 125945, at *64 ("multiplier of 2.4 … falls well within (indeed, at the lower end) of the range of multipliers accepted within the Second Circuit"); *In re Telik, Inc.*, 576 F. Supp. 2d at 590 ("In contingent litigation, lodestar multipliers of over 4 are routinely awarded by courts, including this Court."); *Maley*, 186 F. Supp. 2d at 369 (4.65 multiplier "well within the range awarded by courts in this Circuit and courts throughout the country").

"Moreover, courts in this Circuit have recognized that where 'class counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will actually be significantly lower.'" *Velez*, 2010 U.S. Dist. LEXIS 125945, at *65 (citing cases). Here, the reasonableness of the fee is supported by the fact that Class Counsel will continue to incur additional fees and expenses in overseeing the administration of the Settlement.

Class Counsel respectfully submits that the requested fee be awarded, because it accurately reflects the significant time and labor expended, the complexities of the litigation, the substantial risks undertaken in pursuing the matter on a contingency basis, the high quality of representation, and the reasonable relationship between the fee sought and the amount of the settlement.

VII. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFITS OBTAINED FOR THE CLASS

"It is well-established that counsel who create a common fund like this one are entitled to the reimbursement of the reasonable litigation costs and expenses ...." *In re Marsh ERISA Litig*., 265 F.R.D. at 150. "'Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.'" *In re EVCI*, 2007 U.S. Dist. LEXIS 57918, at *57 ; *see also In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 178 (S.D.N.Y. 2007) ("Counsel is entitled to reimbursement from the common fund for reasonable litigation expenses."). Courts generally award Class Counsel "reimbursement for expenses such as mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type 'the paying, arms' length market' reimburses attorneys." *Anwar v. Fairfield Greenwich Ltd.*, No. 09-CV-118 (VM), 2012 U.S. Dist. LEXIS 78929, at *9 (S.D.N.Y. June 1, 2012)(citing *In re Global Crossing*, 225 F.R.D. at 468). Here, Plaintiff's expenses are relatively minimal ($91,461.24). The vast majority are for experts, consultants, document analysis technology service fees, and mediation fees. Class Counsel should be awarded reimbursement of all of their expenses. *See In re Colgate-Palmolive*, 36 F. Supp. 3d at 353 ("The lion's share of these expenses was for experts (approximately $490,000) and mediation (approximately $25,000), both critically important to this litigation. Courts routinely award such costs.").

Plaintiff also seeks approval of the fees and expenses of the Settlement Administrator which are payable from the Settlement Fund. Stipulation ¶8.e. To date, the Settlement Administrator has utilized $40,950.04 of the $50,000 advanced after preliminary approval, and estimates that an additional $50,000 will be required to complete the distribution. Evans Decl. at

¶12. Plaintiff requests the Court's permission to advance another $50,000 to the Settlement Administrator at this time. A final accounting will be presented to the Court for approval prior to the final distribution.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval of the Settlement, certify the Class for settlement purposes, approve the requested incentive award, and approve the requested fees and expenses to Plaintiff's counsel.

Dated: April 25, 2019
New York, New York

Respectfully submitted,

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