IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE ENVISION HEALTHCARE CORP. This Document Relates to: ALL ACTIONS	Case No. 1:18-cv-01068-RGA-SRF CLASS ACTION CONSOLIDATED STOCKHOLDER LITIGATION

BRIEF IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARD

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INTRODUCTION

Lead Plaintiff and his counsel have vigorously litigated this Action over the past two-and-a-half years, resulting in a $17,400,000 Settlement Fund for Envision shareholders.[1] For their diligent work and the outstanding result obtained, Plaintiff's Counsel seeks a fee award of one-third of the Settlement Fund plus reasonable expenses in the amount of $25,904.80 (collectively, the "Fee and Expense Award"). The requested Fee and Expense Award is in line with what this Court and the Third Circuit have found to be appropriate in similar common fund cases, and is fair and reasonable under the applicable factors.

The sizeable monetary recovery obtained for the Settlement Class as a result of Lead Plaintiff's and Lead Counsel's efforts is noteworthy given that monetary settlements in merger-related Section 14 actions are rare.[2] Indeed, three other Envision shareholders and their counsel who filed Section 14(a) actions related to the Acquisition failed to identify the disclosure issues this Action is predicated on, or were unwilling to pursue damages for the Class.[3] Furthermore, unlike securities fraud actions under Section 10(b)—where shareholders often pursue litigation after misconduct is first uncovered by public news sources or the government—Lead Plaintiff and

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[1] The Settlement is memorialized in the Stipulation of Settlement dated October 15, 2020 (D.I. 85). The Parties have agreed to amend the Stipulation of Settlement by modifying the definition of "Released Claims" as it relates to unrelated, ongoing litigation in Tennessee, as reflected in the Amendment to the Stipulation of Settlement (to be filed with the Court this week). Furthermore, all capitalized terms not defined herein have the same meaning set forth in the Stipulation. Additionally, for citations to authority, all internal quotation marks and citations have been omitted unless stated otherwise.

[2] In a 2016 study by Cornerstone Research, out of the hundreds of merger-related class action cases filed during 2015 and the first half of 2016, only six resulted in a monetary recovery for stockholders. Ravi Sinha, *Shareholder Litigation Involving Acquisitions of Public Companies*, 2015 and 1H 2016, at 5 (Cornerstone Research 2016). The study noted that in merger-related class action litigation, "[m]onetary consideration paid to shareholders has remained relatively rare." *Id.*

[3] *Modi v. Envision Healthcare Corporation et al*, No. 3:18-cv-00648 (M.D. Tenn. July 14, 2018); *White v. Envision Healthcare Corporation et al*, No. 1:18-cv-01068 (D. Del. July 19, 2018); *Rosenblatt v. Envision Healthcare Corporation et al*, No. 1:18-cv-01077 (D. Del. July 20, 2018).

Lead Counsel here had to lay their own "groundwork", independently investigate, and uncover facts that supported the asserted claims. *In re Diet Drugs*, 582 F.3d 524, 544 (3d Cir. 2009). This was a difficult task given the information asymmetry shareholders face, but "provide[d] a necessary supplement to [SEC] action." *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

For his efforts, Lead Plaintiff seeks payment from the Settlement Fund pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(4), for time and expenses incurred in representing the Settlement Class in the amount of $10,000 (the "Service Award"). Similar awards have been approved by numerous courts.

As outlined below, both the requested Fee and Expense Award and Service Award are fair and reasonable, warranting approval.

SUMMARY OF LITIGATION AND COUNSEL'S EFFORTS

After Envision announced the Acquisition and presented questionable projections (referred to as the Management Sensitivity Case) to support the Acquisition in its filings with the SEC, Lead Plaintiff filed a class action complaint against Envision and its board of directors (the "Board" or "Individual Defendants"). The Acquisition was submitted for shareholder approval on September 11, 2018. Shortly before, on August 29, 2018, Defendants provided supplemental disclosures to shareholders to try to justify the Management Sensitivity Case.

Lead Plaintiff did not buy the explanations for the Management Sensitivity Case, and pressed forward with this litigation challenging the definitive proxy statement ("Proxy") and Acquisition. In his Amended Complaint, Lead Plaintiff alleged, *inter alia*, that the Proxy misleadingly stated that: (1) the significantly lower Management Sensitivity Case projections reflected "reasonable sensitivities;" (2) the two cases of projections were "equally likely;" and (3) the Acquisition and Merger Consideration were "fair" to the Company's stockholders. D.I. 25.

Lead Plaintiff further alleged that the Proxy was an essential link in the accomplishment of the Acquisition and that, as a result of Defendants' alleged misconduct, Lead Plaintiff and Settlement Class Members suffered damages because the merger consideration was below the fair value of their shares. *Id*.

On September 19, 2019, this Court denied Defendants' motion to dismiss and adopted Judge Fallon's Report and Recommendation dated August 1, 2019, D.I. 54, which found that all of the allegedly false or misleading statements were actionable and that Lead Plaintiff sufficiently stated a claim under Sections 14(a) and 20(a). D.I. 44.

Thereafter, Lead Plaintiff proceeded with discovery, and obtained 184,035 pages of documents from Defendants, as well as over 450,000 pages of documents from Envision's financial advisors, Guggenheim Securities, LLC, Evercore Group L.L.C., and J.P. Morgan Securities LLC (together, the "Financial Advisors"). The documents obtained were the result of a thorough discovery plan, whereby Lead Counsel honed in on the pertinent issues by developing comprehensive search terms and demanding discovery from custodians at both Envision and the Financial Advisors. In addition, Lead Counsel negotiated for search terms on the Individual Defendants' personal email accounts. Lead Counsel carefully reviewed and analyzed the produced discovery, after which time they consulted with a financial expert to assess damages.

Lead Plaintiff also filed a motion for class certification (D.I. 75-77) that addressed a recent ruling from this Court *in Mack v. Resolute Energy Corp.*, which found that damages under § 14(a) cannot be predicated on a theory that merger consideration should have been greater than it was. No. 19-77-RGA, 2020 U.S. Dist. LEXIS 46776, at *31-32 (D. Del. Mar. 18, 2020). Additionally, Lead Plaintiff anticipated that Defendants were likely file motion for judgment on the pleadings in light of *Mack*, and began researching and preparing a potential opposition.

After completing document review and moving for class certification, Lead Plaintiff also explored a resolution of the case and agreed to attend mediation before mediator Michelle Yoshida with Phillips ADR. Lead Counsel thoroughly prepared for mediation and rigorously advocated for the Settlement Class during settlement discussions. Lead Counsel participated in numerous pre-mediation calls with counsel for Defendants and Ms. Yoshida. Lead Plaintiff submitted a detailed mediation statement accompanied by 54 exhibits related to evidence obtained during discovery. Lead Counsel then responded to the list of questions provided by Ms. Yoshida concerning the strengths and weaknesses of his claims. Lead Plaintiff also submitted supplemental briefing regarding economic loss and causation at the request of Ms. Yoshida.

The Settling Parties engaged in a full-day mediation session lasting over 12 hours on July 27, 2020, which, after a mediator's proposal from Ms. Yoshida, culminated in an agreement in principle to settle for $17,400,000.

In sum, Lead Plaintiff's and Lead Counsel's efforts resulted in a significant recovery for Envision shareholders. Therefore, the requested Fee and Expense Award and Service Award should be granted.

ARGUMENT

I. THE REQUESTED FEE AND EXPENSE AWARD SHOULD BE APPROVED

Federal Rule of Civil Procedure 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." And the Supreme Court has recognized that where a common fund has been created for the benefit of a class as a result of counsel's efforts, attorney's fees should be based on a percentage of the fund. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). "The common fund doctrine is 'based on the equitable

notion that those who have benefited from litigation should share its costs,' and that unless the costs of litigation are spread to beneficiaries of the fund they will be unjustly enriched by the attorney's efforts." *Petruzzi's Inc. v. Darling-Delaware Co.*, 983 F. Supp. 595, 603 (M.D. Pa. 1996) (quoting Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 15 (Oct. 8, 1985), 108 F.R.D. 237, 237 (1985)).

In awarding attorneys' fees, "[t]he percentage-of-recovery method is generally favored" over the lodestar method "in cases involving a common fund, and is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *In Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998). And "the PSLRA has made percentage-of-recovery the standard for determining whether attorneys' fees are reasonable." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d Cir. 2005) (citing 15 U.S.C. § 78u-4(a)(6)); *see also In re Telik, 33 Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 (S.D.N.Y. 2008) ("Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions."). The percentage-of-the-fund method is preferred because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 122 (2d Cir. 2005).

Courts may also conduct a "lodestar cross-check" to confirm that any multiplier is within a reasonable range, but the "calculation need entail neither mathematical precision nor bean-counting." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005). A lodestar multiplier of up to four is within the normal "baseline" range, and district courts within the Third Circuit have often found that higher multipliers are appropriate. *See, e.g., In re Valeant Pharm. Int'l Sec. Litig.*, No. 3:15-CV-07658-MAS-LHG, 2020 U.S. Dist. LEXIS 103675, at *72-73 (D.N.J. June

15, 2020) (collecting cases). A lodestar cross-check should "not trump the primary reliance on the percentage of common fund method." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 307.

A. The One-Third Fee Award Should be Approved Under the *Gunter/Prudential* Factors

To determine what constitutes a reasonable award under the percentage-of-recovery approach, the Third Circuit has directed district courts to consider the ten factors identified in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000) and *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) (the "*Gunter/Prudential* factors"). Those factors are:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiff's counsel; (7) the awards in similar cases; (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and (10) any innovative terms of settlement.[4]

Gunter, 223 F.3d at 195 n.1; *Prudential*, 148 F.3d at 336-40; *In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009). Consideration of the relevant factors here supports a fee award of 33.33% of the Settlement Fund, or $5,800,000.

1. The Size of the Fund Created and the Number of Persons Benefitted

Courts have consistently recognized that the result achieved is a major factor to be considered in awarding fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"); *In re ViroPharma Inc. Sec. Litig.*, No. 12-2714, 2016

[4] The fee award reasonableness 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*, 396 F.3d at 301.

U.S. Dist. LEXIS 8626, at *16 (E.D. Pa. Jan. 25, 2016).

The Settlement Fund here falls within the top-range of the few recent (and rare) Section 14(a) merger-related common fund settlements, as reflected in the below table.

Case	Settlement Year	Settlement Amount
Campbell v. Transgenomic, Inc., No. 4:17-CV-3021, (D. Neb.)	2019	$1.95 million
Azar v. Blount International, Inc., et al., No. 3:16-CV-0483-SI (D. Or.)	2019	$3.059 million
Hurwitz v. Mullins, et al., No. 1:15-cv-00711-MAK (D. Del.)	2018	$8 million
Steven Duncan, et al. v. Joy Global, Inc., et al., No. 2:16-cv-01229-PP (E.D. Wis.)	2018	$20 million
In re Hot Topic, Inc. Securities Litigation, No. 2:13-02939-SJO(JCx) (C.D. Cal.)	2015	$15 million

Accordingly, this factor weighs strongly in favor of the requested fee award.

2. The Presence or Absence of Substantial Objections

Courts consider both the number and quality of objections when determining how a class has reacted to a settlement and attorney fee request. *See, e.g., In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) (six objectors were an "extremely limited" number); *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992) (the lack of objections is "strong evidence of the propriety and acceptability" of fee request); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 533 (E.D. Pa. 1990) (considering the absence of serious objection to counsel's fee request). Here, as of the date of this filing, no objections to the Settlement, Fee and Expense Award, or Service Award have been received by Lead Counsel (the objection deadline is January 25, 2021). Declaration of Juan E. Monteverde ("Monteverde Decl.") at ¶ 23. This further weighs in favor of granting the Fee and Expense Award.

3. The Skill and Efficiency of The Attorneys Involved

The quality of the representation is relevant in determining fee awards. "The Third Circuit

has explained that the goal of the percentage fee-award device is to ensure 'that competent counsel continue to undertake risky, complex, and novel litigation.'" *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 747 (E.D. Pa. 2013) (quoting *Gunter*, 223 F.3d at 198). The substantial recovery obtained for the Settlement Class is the direct result of the efforts of skilled attorneys who possess substantial experience prosecuting complex securities and merger class actions. *See* Monteverde Firm Resume (Exhibit 1 to Monteverde Decl.). Indeed, Lead Counsel's reputation as attorneys who zealously litigate cases enabled them to negotiate the outstanding recovery for the benefit of the Settlement Class.

The quality of opposing counsel is also relevant in evaluating the quality of Lead Counsel's services. *See, e.g.*, *In re Ikon*, 194 F.R.D. at 194. Here, Defendants were represented by two of the nation's preeminent defense firms, Simpson Thacher & Bartlett LLP and Wachtell, Lipton, Rosen & Katz, whose experience and skill is widely recognized. Lead Counsel's ability to obtain a favorable settlement for the Settlement Class in the face of this formidable legal opposition further confirms the quality of Lead Counsel's representation and supports the requested fee award.

4. The Complexity and Duration of The Litigation

"Securities class actions are notoriously complex[.]" *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-cv-07192-CM, 2019 U.S. Dist. LEXIS 218116 at *20 (S.D.N.Y. Dec. 18, 2019); *In re Ikon*, 194 F.R.D. at 194 ("The court also acknowledges that securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA."); *In re Genta Sec. Litig.*, No. 04-2123, 2008 U.S. Dist. LEXIS 41658, at *10 (D.N.J. May 28, 2008) ("This [securities class] action involves complex legal and factual issues, and pursuing them would be costly and expensive.").

The $17.4 million recovery here is substantial in light of the complexity of this case and

the significant risks and expenses that the Settlement Class would have faced had this litigation continued. As explained in greater detail in the Lead Plaintiff's Motion for Final Approval of the Settlement and Plan of Allocation filed concurrently herewith, to prevail through summary judgment and trial, Lead Plaintiff would have had to overcome complex and difficult challenges, including proving that each Defendant did not believe the challenged statements were true (subjective falsity) and that each of the challenged statements was actually false (objective falsity). Further, after establishing liability, Lead Plaintiff would have had to overcome Defendants' arguments regarding loss causation (and recent decisions in favor thereof) and, if successful, win the battle of experts to prove damages. Accordingly, this factor also weights in favor of approving the requested fee. Indeed, "[t]he complexity and societal importance of shareholder derivative and class action litigation calls for the involvement of competent counsel. To encourage competent attorneys to represent plaintiffs on a contingent basis in this type of fiscally and socially important litigation, attorneys' fees awarded should reflect this goal." *Cohn v. Nelson*, 375 F. Supp. 2d 844, 863 (E.D. Mo. 2005).

Furthermore, litigating this action also precluded Lead Counsel from devoting resources to other litigation and prosecuting additional cases. Lead Counsel is a boutique firm with just six attorneys, and litigating this action in a successful manner required them to devote a significant percentage of the firm's manpower and resources. This factor further supports awarding the requested Fee and Expense Award. *See Denton v. Pennymac Loan Servs., LLC*, No. 4:16-cv-32, 2017 U.S. Dist. LEXIS 74037, at *24 (E.D. Va. May 12, 2017) (accounting for fact that counsel "is a small law firm and thus representing a client on a contingent fee or fee-shifting basis necessarily involved loss of other opportunities.").

5. The Risk of Nonpayment

"Courts routinely recognize that the risks created by undertaking an action on a contingency fee basis militates in favor of approval." *In re Schering-Plough Corp.*, 2012 U.S. Dist. LEXIS 75213, at *19 (D.N.J. May 31, 2012). Where, as here, Lead Counsel's representation is undertaken on a wholly contingent basis, they assume a substantial risk that they might not be compensated for their efforts. *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525, 2007 U.S. Dist. LEXIS 87428, at *3 (D.N.J. Nov. 28, 2007). As the Fourth Circuit long ago recognized:

> The contingency of compensation . . . is highly relevant in the appraisal of the reasonableness of any fee claim. The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

McKittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967); *see also Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988) ("[W]hen attorneys' receipt of payment is contingent on the success of the litigation, reasonable compensation may demand more than the hourly rate multiplied by the hours worked, for that is exactly what the attorneys would have earned from clients who agreed to pay for services regardless of success.").

Lead Counsel "accepted the responsibility of prosecuting this class action on a contingent fee basis and without any guarantee of success or award." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 281 (3d Cir. 2009). As discussed above and in the Final Approval Motion, in prosecuting this case, Lead Counsel faced risks in establishing liability and damages, as well as certifying and maintaining a certified class through judgment and any appeal. *In re Rite Aid*, 396 F.3d at 304.

Accordingly, this factor weighs in favor of approving the Fee and Expense Award.

6. The Amount of Time Devoted to the Case by Plaintiff's Counsel and Lodestar Crosscheck

Since the inception of the case, Plaintiff's Counsel have expended 3,449.5 hours in the prosecution of this litigation, with a resulting lodestar of $2,415,265.00. *See* Monteverde Decl. at ¶ 32. They also incurred $25,904.80 in litigation expenses. *Id*.

Plaintiff's Counsel vigorously prosecuted this action, including by: conducting a thorough pre-suit investigation; drafting the initial complaint; drafting the motion for appointment of lead plaintiff and lead counsel; conducting further factual investigation and research and drafting the amended complaint; defeating Defendants' Motion to Dismiss and objections to Judge Fallon's Report & Recommendation; thoroughly conducting discovery and document review; drafting the class certification motion; engaging with a financial expert to assess potential damages; drafting mediation briefs; and conducting adversarial settlement negotiations which resulted in the excellent Settlement. In discovery, Lead Counsel reviewed and analyzed 184,035 pages of documents containing e-mail communications, board materials and presentations, financial data and projections, analyst reports, and other merger related documentation from Defendants and non-Defendant employees of Envision, and an additional 450,000 pages of documents from Envision's Financial Advisors. From this haystack, Lead Counsel was able to find the requisite needles, successfully use them to stitch together compelling evidence to support Lead Plaintiff's theory of the case, convince Defendants to come to the settlement table, and eventually secure the $17.4 million Settlement Fund. At all times, Lead Counsel conducted their work with skill and efficiency, conserving resources whenever possible. The foregoing required a significant commitment of time and resources by Lead Counsel, who took on the risk of recovering nothing for their efforts.

As noted above, the Court may also conduct a "lodestar cross-check" to confirm the

reasonableness of a percentage-of-recovery fee award and ensure that any multiplier is within a reasonable range, but the "calculation need entail neither mathematical precision nor bean-counting[,]" and should "not trump the primary reliance on the percentage of common fund method." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306-07. A lodestar "cross-check" is performed by first determining the lodestar, which requires "multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *Id.* at 305. In determining the lodestar, "district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *Id*. at 306-07; *see also Kirsch v. Delta Dental*, 534 F. App'x 113, 117 (3d Cir. 2013) ("When the lodestar method is used only as a cross-check, it is appropriate to apply an abridged analysis . . . .").

After the lodestar is determined, "[t]he crosscheck is performed by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier." *Milliron v. T-Mobile United States*, 423 F. App'x 131, 135 (3d Cir. 2011). "The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *Rite Aid*, 396 F.3d at 306-07. The Third Circuit has repeatedly observed that multipliers "'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *In re Diet Drugs*, 582 F.3d at 545 (quoting *In re Prudential*, 148 F.3d at 341); *Schuler v. Meds. Co.*, No. 14-1149 (CCC), 2016 U.S. Dist. LEXIS 82344, at *28 (D.N.J. June 24, 2016) (multiplier of 3.57 reasonable under the Third Circuit's precedent); *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d at 172 (noting the Third Circuit's prior "approv[al] of a lodestar multiplier of 2.99 in ... a case [that] was neither legally nor factually complex"); *In re Cendant Corp. Prides Litig.*, 243 F.3d at 741-42 (remanding the case and suggesting that a lodestar

multiplier of 3 would be appropriate, even though the Third Circuit found the case was lacking in legal and factual complexity). Furthermore, "[w]hile multipliers of one to four are a common baseline, courts in the Third Circuit recognize that larger settlements or earlier settlements can — and often do — produce higher multipliers[,]" which are appropriate in such circumstances. *In re Valeant Pharm. Int'l Sec. Litig.*, 2020 U.S. Dist. LEXIS 103675, at *72-73 (citing cases where approved fees reflected multipliers of 6.16, 4.69, and 6.96).

The fee requested here represents a lodestar multiplier of approximately 2.4, well within the range of multipliers routinely approved in the Third Circuit, and is appropriate given the risks involved and the quality of counsel's work, described above.

7. Awards in Similar Cases

While the Third Circuit has not set a benchmark percentage fee for common fund cases, the Court has noted that reasonable percentage based fee awards generally range from 19% to 45% of the common fund. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995).[5]

Here, Plaintiff's Counsel is requesting a fee of one-third, which is fair and reasonable in light of the size of the Settlement Fund and their work and efforts over the past two-and-a-half years. Indeed, "scores of cases exist where fees were awarded in the one-third to one-half of the settlement fund", *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134 (D.N.J. 2002), and a law professor's review of "289 settlements ranging from under $ 1 million to $ 50 million" found that the median fee percentage was one-third. *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735

[5] The lower percentages are generally found to be appropriate in settlements much larger than the one here, as the percentage generally "will decrease as the size of the fund increases." *In re Cendant Corp. Prides Litig.*, 243 F.3d at 736 (noting that percentages on the lower end of the range were awarded where recoveries exceeded $100 million).

(E.D. Pa. 2001); *see also* Glaberson *v. Comcast Corp.*, No. 03-6604, 2015 U.S. Dist. LEXIS 127370, at *46 (E.D. Pa. Sep. 22, 2015) ("courts within the Third Circuit frequently award fees of one-third of the value of class action settlements.") (collecting cases involving settlements of $17.55, $20, $37.5, $75, $150, and $250 million); *Bodnar v. Bank of Am., N.A.*, No. 14-3224, 2016 U.S. Dist. LEXIS 121506, at *14 (E.D. Pa. Aug. 4, 2016) (awarding 33% fee of a $27.5 million common fund, and approving a service award of $10,000).

In sum, the requested Fee and Expense Award is squarely in line with numerous similar cases in this Circuit awarding attorneys' fees equal to one-third of the settlement amount (plus expenses and service awards), and should be approved.

8. The Value of Benefits Attributable to the Efforts of Class Counsel Relative to the Efforts of Other Groups, Such as Government Agencies Conducting Investigations

Here, "[t]he entirety of the value achieved for the Class was attributable to Class counsel; no other groups, such as government agencies conducting investigations, were involved in this case." *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 421 (E.D. Pa. 2010). This is notable given that in "the typical" securities litigation, "government prosecutions" or public news reports "frequently lay the groundwork for private litigation[.]" *Diet Drugs*, 582 F.2d at 544. As such, this factor supports the requested fee.

9. The Percentage Fee That Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Arrangement at the Time Counsel Was Retained

This factor also weighs in favor of approving the requested award, as "[t]he attorneys' fees request of one-third of the settlement fund . . . comports with privately negotiated contingent fees negotiated on the open market." *Schuler*, 2016 U.S. Dist. LEXIS 82344, at *29.

10. Any Innovative Terms of Settlement

Although this was a complex case, the terms of the Settlement are straightforward. As such, "this factor neither weighs in favor nor against the proposed fee request." *Med. Mut. of Ohio v. Smithkline Beecham Corp.*, 291 F.R.D. 93, 105 (E.D. Pa. 2013).

B. The Requested Litigation Expenses Are Reasonable and Should be Approved

Plaintiff's Counsel also respectfully requests that the Court reimburse $25,904.80 in litigation expenses that they advanced in the prosecution of this Action. All of these expenses, which are set forth in Monteverde Decl. ¶¶ 29-32, were reasonable and necessary for the prosecution of this Action and should be approved. *See In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001) ("Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action."); *In re Ikon*, 194 F.R.D. at 192 ("There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund.").

II. THE SERVICE AWARD FOR LEAD PLAINTIFF SHOULD BE APPROVED

Lead Plaintiff seeks a $10,000 Service Award for time and expenses incurred in representing the Class, pursuant to 15 U.S.C. § 78u-4(a)(4). In enacting the statute, Congress "recognize[d] that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grant[ed] the courts discretion to award fees accordingly." H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995). Courts routinely approve such awards, which are warranted because the lead plaintiff "performed a public service through [their] willingness to step forward and represent [the Company] and its shareholders." *In re Cendant Corp.*, 232 F. Supp. 2d 327, 344 (D.N.J. 2002).

Lead Plaintiff dedicated approximately 50 hours of his time to communicating with Lead Counsel, reviewing case documents (including the complaints, motions and briefs, court orders, discovery, mediation papers, and settlement documents), and searching for and collecting documents in response to Defendants' discovery requests—all to ensure the positive resolution of the litigation on behalf of Envision shareholders. *See* Declaration of Lead Plaintiff Jon Barrett (Exhibit 3 to the Monteverde Decl.). The $10,000 requested Service Award amounts to approximately $200 per hour that Lead Plaintiff devoted to this litigation, which is well below Lead Plaintiff's normal rate of compensation as a practicing anesthesiologist. *Id.*; s*ee also Mauss v. NuVasive, Inc.*, No. 13cv2005 JM (JLB), 2018 U.S. Dist. LEXIS 206387, at *27 (S.D. Cal. Dec. 5, 2018) (considering lead plaintiff's normal rate of pay in granting award).

The requested Service Award is fair, reasonable, and well within the range courts have deemed appropriate. *See, e.g., Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 153 (E.D. Pa. 2000) (awarding multiple plaintiffs $10,000 each); *Todd v. STAAR Surgical Co.*, No. CV 14-5263 MWF (GJSx), 2017 U.S. Dist. LEXIS 176183, at *15 (C.D. Cal. Oct. 24, 2017) (collecting "numerous cases in which service awards of $10,000 or more are found reasonable."). Moreover, the Notice to the Settlement Class specifically stated that Lead Plaintiff would seek a $10,000 award (D.I. 85 at 57) and to date, no objections to the award have been made. *See* Monteverde Decl. at ¶ 23; *see also In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 U.S. Dist. LEXIS 27013, at *50 (D.N.J. Nov. 9, 2015) (collecting cases and awarding $ 60,000, in total, for the two named plaintiffs based in part on the fact that "The Settlement Notice advised Class members that Class Counsel would apply for such an incentive award. No Class member objected.").

CONCLUSION

For the foregoing reasons, Plaintiff's Counsel's requested Fee and Expense Award and

Lead Plaintiff's Service Award should be approved in full.

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Respectfully submitted,

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