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 FINAL APPROVAL OF THE SETTLEMENT AND PLAN OF ALLOCATION

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INTRODUCTION

Lead Plaintiff Jon Barrett ("Lead Plaintiff") respectfully submits this brief in support of his motion for final approval of the Settlement, which provides Envision shareholders with a $17.4 million common fund. The Settlement resolves claims that the 2018 acquisition of Envision by KKR was accomplished by means of a materially false and misleading proxy statement, in violation of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934.[1]

The Settlement satisfies Rule 23's requirements for final approval. It falls within approximately the top-third of the range of securities settlements in 2019, the majority of which included cash consideration between $5 million and $24 million.[2] The Settlement also falls within the top-end of the few recent (and rare) Section 14(a) merger-related settlements, as illustrated 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

[1] The Settlement is embodied 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). All capitalized terms not defined herein have the same meaning as set forth in the Stipulation. Additionally, for citations to authority, all internal quotation marks and citations have been omitted unless stated otherwise.

[2] Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements—2019 Review and Analysis*, Cornerstone Research, at 4 (2020) (last accessed on January 11, 2021), available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2019-Review-and-Analysis).

As elaborated on below, Lead Plaintiff respectfully submits that the Settlement and all relief requested in connection with its effectuation are fair, reasonable, and adequate, warranting final approval.

BACKGROUND AND RELEVANT PROCEDURAL HISTORY

I. LITIGATION

This is a securities class action against Envision Healthcare Corporation ("Envision") and its board of directors ("Individual Defendants") for alleged violations of sections 14(a) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") in connection with the acquisition ("Acquisition") of Envision by Kohlberg Kravis Roberts & Co. L.P. ("KKR"). D.I. 25. The Acquisition was completed on October 11, 2018. *Id*.

On December 13, 2018, Lead Plaintiff filed his Amended Complaint, which identified five materially false and/or misleading statements relating to the purported fairness of the Acquisition and Envision's financial projections. *Id*. Lead Plaintiff defeated Defendants' motion to dismiss and their objections to Judge Sherry R. Fallon's Report and Recommendation (D.I. 44), which this Court adopted on September 19, 2019. D.I. 54.

On November 26, 2019, the parties attended a case management conference to resolve their scheduling disputes, which resulted in the entry of a case schedule with a trial date set for October 4, 2021. D.I. 68. Lead Plaintiff and Lead Counsel proceeded to conduct discovery, which resulted in the production of 184,035 pages of documents containing e-mail communications, board materials and presentations, financial data and projections, analyst reports, and other merger related documents from Envision and the Individual Defendants. Declaration of Juan E. Monteverde ("Monteverde Decl.") at ¶ 11. Lead Plaintiff also obtained discovery from Envision's financial advisors (i) Guggenheim Securities, LLC; (ii) Evercore Group L.L.C.; and (iii) J.P.

Morgan Securities LLC (together, the "Financial Advisors"), which resulted in the production of an additional 450,000 pages of documents. *Id*.

On April 13, 2020, Lead Plaintiff moved for class certification. D.I. 75.

II. SETTLEMENT DISCUSSIONS, MEDIATION, AND SETTLEMENT

After Lead Plaintiff completed document review and moved for class certification, the parties engaged in discussions to explore a potential settlement. Monteverde Decl. at ¶ 13. On May 7, 2020, the Court entered the parties' stipulation requesting an extension of certain deadlines, including the deadline for Defendants' opposition to class certification, D.I. 78, which enabled the parties to explore a settlement in mediation with Michelle Yoshida ("Ms. Yoshida") of Phillips ADR Enterprises.

Lead Counsel thoroughly prepared for mediation and rigorously advocated for Lead Plaintiff and the class during settlement discussions. Lead Counsel participated in numerous pre-mediation calls with counsel for Defendants and Ms. Yoshida. Lead Plaintiff submitted a comprehensive mediation statement accompanied by 54 exhibits related to evidence obtained during discovery. *Id*. at ¶ 14. Lead Plaintiff also responded to a list of questions provided by Ms. Yoshida concerning the strengths and weakness of the claims. Lead Plaintiff also submitted supplemental briefing regarding economic loss and causation at the request of Ms. Yoshida. *Id*.

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. *Id*. at ¶ 15. On July 28, 2020, the Settling Parties executed a term sheet memorializing the key terms of the Settlement, and Lead Plaintiff filed a notice of settlement on July 30, 2020. D.I. 82. Thereafter, on October 14, 2020, after further arm's-length negotiations, the Settling Parties executed and filed the Stipulation, establishing a Settlement Fund

of $17,400,000 to be distributed to Authorized Claimants in accordance with the Plan of Allocation described fully in the Notice and detailed below. D.I. 85.

III. PRELIMINARY APPROVAL AND NOTICE TO THE SETTLEMENT CLASS

On October 16, 2020, the Court entered an order preliminarily certifying the Settlement Class (including preliminary certifying Lead Plaintiff as class representative and Lead Counsel as class counsel), preliminarily approving the Settlement, approving the form and methods for class notice, and setting a final approval hearing for February 16, 2021 (the "Preliminary Approval Order"). D.I. 88. Pursuant to the Preliminary Approval Order, the Notice has been mailed to records holders as well as brokers who hold shares in street name for Envision shareholders during the Class Period, and Summary Notice was distributed via PRNewswire. Monteverde Decl. at ¶ 22.

ARGUMENT

I. THE SETTLEMENT CLASS SHOULD RECEIVE FINAL CERTIFICATION

The Court should grant final certification of the Settlement Class under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. Lead Plaintiff explained why class certification is warranted in his brief in support of the motion for preliminary approval, D.I. 87 at 11-16, and he incorporates those same points here by reference. *See Keller v. TD Bank*, N.A., No. 12-5054, 2014 U.S. Dist. LEXIS 155889, at *13 n.9 (E.D. Pa. Nov. 4, 2014) (noting same practice). On October 16, 2020, the Court preliminarily certified the Settlement Class so that notice could be sent to the Settlement Class Members, and found that all prerequisites for class certification under Rules 23(a) and (b)(3) had been satisfied. D.I. 88. Since then, no material facts regarding any of the factors for class certification have changed. Accordingly, final certification of the Settlement Class is warranted. *See In re Merck & Co.*, No. 08-1974, 2012 U.S. Dist. LEXIS 201472, at *14 (D.N.J.

Sept. 28, 2012) ("Nothing has changed in the record that would compel the Court to reach a different conclusion with respect to the final, rather than preliminary, approval of the Settlement Class.").

II. THE SETTLEMENT WARRANTS FINAL APPROVAL

Under Rule 23(e), a class action cannot be settled without court approval. The Third Circuit Court of Appeals has reiterated the long-standing principle that there is a "strong presumption in favor of voluntary settlement agreements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010). "This presumption is especially strong in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Id.* at 595.

To be approved, a class action settlement must be fair, adequate, and reasonable. Rule 23(e)(2); *Halley Honeywell Int'l, Inc.*, 861 F.3d 481, 488 (3d Cir. 2017). In *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the Third Circuit advised district courts to consider the following factors in deciding whether to approve a proposed settlement of a class action under Rule 23(e):

> (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 ....

Id. at 157.

The 2018 Amendments to Rule 23 also provide direction to courts considering whether to approve a settlement. Rule 23(e)(2) provides that the court should consider whether:

> (A) the class representatives and 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).

The 2018 Advisory Committee Notes to Rule 23 recognize that each circuit has developed its own list of factors to be considered in determining whether a proposed class action is fair, and explain that the goal of the 2018 amendment was not to displace those factors, but rather, to focus the parties on the "core concerns" that motivate the fairness determination. *See Huffman v. Prudential Ins. Co. of Am.*, No. 2:10-cv-05135, 2019 U.S. Dist. LEXIS 58667, at *7 (E.D. Pa. Apr. 4, 2019). As set forth below, all the applicable factors support final approval of the Settlement.

A. Lead Plaintiff and Lead Counsel Have Adequately Represented the Class

Adequate representation is demonstrated when: "(1) the plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation, and (2) the representative plaintiff's interests are not antagonistic to those of the class." *In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 299 (D. Del. 2003) (citing *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975)). [3]

Here, as reflected in its firm resume, Monteverde possesses extensive experience litigating complex class actions on behalf of shareholders in the context of mergers. *See* Monteverde Firm Resume (Exhibit 1 to Monteverde Decl.). In 2020, on the heels of trial in the Delaware Court of

[3] The adequacy inquiry of Rule 23(e)(2) is coextensive with the adequacy inquiry of Rule 23(a), which deals with class certification. *See Feller v. Transamerica Life Ins. Co.*, No. 16-cv-01378 CAS (GJSx), 2019 U.S. Dist. LEXIS 19440, at *33 (C.D. Cal. Feb. 6, 2019) (explaining that its analysis of adequacy under Rule 23(e)(2) was "subsumed" in its discussion of Rule 23(a)(4) adequacy); *see also O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2019 U.S. Dist. LEXIS 54608, at *19 (N.D. Cal. Mar. 29, 2019) (applying conventional Rule 23(a)(4) adequacy standards in connection with proposed settlement).

Chancery, Monteverde recovered a $6.5 million common fund for U.S. Geothermal shareholders in merger litigation alleging breaches of fiduciary duty. *Id*. In 2019, Monteverde also recovered common funds in merger-related litigation for the shareholders of Hansen Medical ($7.5 million) and ClubCorp ($5 million). *Id*. In 2018, Monteverde procured a $17.5 million settlement in connection with the sale of American Capital Ltd. in Maryland state court. *Id*. And Monteverde recently procured a $1.95 million settlement for shareholders in a Section 14(a) action after prevailing on appeal in the Eighth Circuit. *Campbell v. Transgenomic, Inc.*, 916 F.3d 1121 (8th Cir. 2019). As a result of these settlements, Monteverde has been recognized in the Top 50 in the 2018 and 2019 ISS Securities Class Action Services Reports. *Id*. Monteverde is also responsible for improving the law for shareholders in the 9th Circuit by lowering the standard of liability from scienter to negligence in tender offers under Section 14(e) of the Exchange Act. *Varjabedian v. Emulex Corp*., 888 F.3d 399 (9th Cir. 2018).

By virtue of their extensive experience litigating securities and fiduciary duty class action cases in the context of corporate mergers, Lead Counsel were able to effectively prosecute the Litigation. Specifically, Lead Plaintiff and Lead Counsel vigorously prosecuted this action 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 $17.4 million Settlement.

Furthermore, Lead Plaintiff is and has been an adequate class representative, as he

purchased his shares prior to the Acquisition and thus suffered the same injury as the proposed Settlement Class. *See* D.I. 4-2. Lead Plaintiff also communicated with Lead Counsel regarding the progress of the litigation and settlement, and neither Lead Plaintiff nor Lead Counsel have interests that are antagonistic to those of the Settlement Class. Based on the lack of conflict and vigorous prosecution of the litigation, adequacy is satisfied here.

B. The Settlement Was Negotiated at Arm's Length

When a proposed settlement is the result of arm's length negotiations between experienced, capable counsel after sufficient discovery, there is typically a presumption that it is fair and reasonable. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002).

Lead Plaintiff and Defendants, through their counsel, engaged in arm's-length negotiations under the supervision of Mediator Yoshida and only settled upon a mediator's proposal on July 27, 2020. "The participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties." *Rose v. Travelers Home & Marine Ins. Co.*, No. 19-977, 2020 U.S. Dist. LEXIS 126761 at *17 (E.D. Pa. July 20, 2020). Under the circumstances, it is clear that the Settlement is not the result of fraud, collusion, or abandonment of the interests of the Class, but rather, is the result of extensive and informed arm's-length negotiations between highly experienced counsel.

C. The Settlement Provides Substantial Relief for the Class

Most of the factors from *Girsh* and 23(e)(2)(C) are aimed at analyzing the same issue—whether the settlement amount is adequate given the facts of the litigation. The Settlement here provides an immediate and substantial cash benefit to the Settlement Class in the amount of $17,400,000, which is an outstanding result in light of the relevant considerations.

1. <u>The complexity, expense, and likely duration of the litigation.</u>

The first *Girsh* factor, and Rule 23(e)(2)(C)(i), address the complexity, cost, and likely duration of the litigation, taking into account the "probable costs, in both time and money, of continued litigation." *In re Cendant Corp. Litig.*, 264 F.3d 201, 233 (3d Cir. 2001).

"Securities fraud class actions are notably complex, lengthy, and expensive cases to litigate." *In re Par Pharm. Sec. Litig.*, No.: 06-3226, 2013 U.S. Dist. LEXIS 106150, at *13 (D.N.J. July 29, 2013); *see also In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525, 2007 U.S. Dist. LEXIS 87428, at *8 (D.N.J. Nov. 28, 2007) (noting damages in securities action "would likely require extensive and conceptually difficult expert economic analysis"); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("The court also acknowledges that securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA."). And with the complex legal and factual issues present here—*i.e.*, Defendants' state of mind, the reasonableness of financial projections and a sensitivity analysis, healthcare payor disputes, and the proper analysis of loss causation under Section 14(a)—this case is no exception.

Moreover, without settlement, this case could have continued for years before any final resolution was achieved. The Parties still needed to conduct depositions, including expert depositions, brief dispositive issues, including summary judgment and Daubert motions, prepare for and conduct the trial, and resolve any potential appeals therefrom.[4] These proceedings would be increasingly expensive—with costs in the hundreds of thousands to potentially millions of

[4] Indeed, even where shareholders prevail at trial in securities actions, there is no guarantee that a jury verdict will stand. *See, e.g.*, *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008) (overturning a jury verdict in plaintiffs' favor on loss causation grounds), *rev'd and remanded on other grounds*, 2010 U.S. App. LEXIS 14478 (9th Cir. 2010); *In re BankAtlantic Bancorp, Sec. Litig.*, No. 07-61542-CIV-UNGARO, 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011) (court granted defendants' judgment as a matter of law on the basis of loss causation, overturning jury verdict and award in plaintiff's favor), *aff'd sub nom. Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012).

dollars—and would delay any potential recovery, including a possible recovery of less than the Settlement Amount, for years.

2. The reaction of the Settlement Class.

The second *Girsh* factor looks to the reaction of the class to the settlement and "attempts to gauge whether members of the class support the settlement." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 438 (3d Cir. 2016). Here, to date, there have been no objections or opt-outs requested. Monteverde Decl. at ¶ 23.

3. The stage of the proceedings and the amount of discovery completed.

The third *Girsh* factor requires the Court to evaluate whether Plaintiff had an "adequate appreciation of the merits of the case before negotiating" settlement. *In re Prudential Ins. Co of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998). There is no requisite amount of discovery that must be completed, and the fundamental question is whether "a reasonable amount of discovery has been taken" such that "both parties have a fairly accurate view of their risks of continued litigation." *Good v. Nationwide Credit, Inc.*, 314 F.R.D. 141, 158 (E.D. Pa. 2016); *Rossini v. PNC Fin. Servs. Grp., Inc.*, No. 2:18-cv-1370, 2020 U.S. Dist. LEXIS 113242, at *35-37 (W.D. Pa. June 26, 2020) ("The goal is to find the sweet spot—a point where the parties have the key information they need to settle in a cost-effective way, without undermining their incentive to settle early. As a result, this factor does not, and should not, require the parties to complete exhaustive or extensive discovery before settlement, so long as they have exchanged enough critical information related to the strengths and weaknesses of the claims and defenses.").

Here, Lead Plaintiff and Lead Counsel reviewed more than 600,000 pages of documents obtained in discovery from Defendants and relevant third parties, consulted with a financial expert,

and engaged in arm's length negotiations under the supervision of an experienced securities mediator, Ms. Yoshida, who made a mediator's proposal resulting in this Settlement. Based on the stage of the litigation and the amount of information obtained, Lead Plaintiff and Lead Counsel "have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 699 (S.D.N.Y. 2019); *see also Cruz v. JMC Holdings, Ltd.*, No. 16-9321 (KSH) (CLW), 2019 U.S. Dist. LEXIS 169071, at *13 (D.N.J. Sep. 30, 2019) ("Critically, named plaintiffs' counsel gained an adequate appreciation of the merits of the case before negotiating the settlement [] by engaging in a full-day mediation session with a JAMS mediator[.]").

4. The risks of establishing liability, damages, and maintaining the class action through trial.

The fourth, fifth, and sixth *Girsh* factors, and Rule 23(e)(2)(C)(i), focus on the risks of establishing liability, establishing damages, and maintaining certification throughout trial. These factors "balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement." *Prudential*, 148 F.3d at 319. As to the risks of establishing liability, this factor "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 814 (3d Cir. 1995). As to damages, this factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Cendant Corp.*, 264 F.3d at 238–39 (quoting *Gen. Motors*, 55 F.3d at 816). Finally, the applicable analysis measures the likelihood of obtaining and keeping class certification if the action were to proceed to trial. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004).

Lead Plaintiff asserted claims under Section 14(a) of the Exchange Act, alleging that the

Proxy misleadingly stated that, *inter alia*: (1) the significantly lower Management Sensitivity Case projections reflected "reasonable sensitivities;" (2) the two projections cases 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 all other Settlement Class Members were damaged from the inadequate consideration offered in the Acquisition. *Id*. While Lead Plaintiff and Lead Counsel believe in the merits of these claims, they recognize that continued litigation through trial and likely appeals posed significant risks that made any recovery uncertain.

To prevail at trial, Lead Plaintiff would have had to demonstrate: "(1) a proxy statement contained a material misrepresentation or omission which (2) caused the plaintiff injury and (3) that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 228 (3d Cir. 2007). However, since the challenged statements from the Proxy were statements of opinion, Lead Plaintiff faced the increased burden of proving that these statements were subjectively false (not believed by Defendants) and objectively false. *In re Reliance Sec. Litig.*, 135 F. Supp. 2d 480, 514 (D. Del. 2001).

And, even if Lead Plaintiff established liability, he would still face the uphill battle of demonstrating damages that resulted from the statements in the Proxy. In 2020, this Court held in *Mack v. Resolute Energy Corp*. that a theory of damages under Section 14(a) cannot be predicated on the idea that the merger consideration should have been higher. No. 19-77-RGA, 2020 U.S. Dist. LEXIS 46776, at *29-37 (D. Del. Mar. 18, 2020). Therein, the Court reasoned:

> [W]hile it may reasonably be possible to allege that the merger consideration should have been greater than it was (and this is the basis for Delaware's appraisal statute,

> see infra note 7) and it may even be possible to speculate that at some undetermined time in the future, the stock would appreciate enough to exceed what was given in the merger, it is virtually impossible to plausibly allege that if the merger had been voted down, Resolute stock would have been trading at over $35 per share (or close to that) on March 1, 2019. In the context of the federal securities statutes at issue in this case, a plaintiff cannot say that the merger consideration should have been greater than it was, and that shortfall is the measure of the harm, because to do so then would mean that it was not the material omission that caused the harm, but that the failure of Resolute to negotiate a better deal was the cause of the harm.

Id. at *31-32.

While Lead Plaintiff believes that he could distinguish *Mack* from the instant case—the most obvious grounds being that the misstatements at issue here relate directly to the fairness of the merger consideration—the Court's decision still unquestionably increased the risk that, had the case continued forward without settlement, the class could receive no damages at all or damages far less than the Settlement Amount.

Moreover, proving damages would require complicated expert testimony and use of methodologies that are debated amongst valuation experts. *See In re Datatec*, 2007 U.S. Dist. LEXIS 87428 at *8 ("This securities fraud class action involves accounting and damages issues, the resolution of which would likely require extensive and conceptually difficult expert economic analysis."). Defendants would have presented their own facts and experts to demonstrate that the merger consideration was fair and that the fairness opinion valuations set forth in the Proxy were sound.[5] "A jury would therefore be faced with competing expert opinions representing very different damages estimates, thus adding further uncertainty as to how much money -- if any -- the Class might recover at trial." *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003);

[5] And, if allowed into evidence, the fact that the actual financial results for Envision came in below even the Sensitivity Case following the consummation of the Acquisition would weigh in Defendants' favor.

see also In re Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) ("In this battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions."). Although Lead Plaintiff has adequate grounds to argue that the Class was damaged and Envision was worth more than the consideration provided by the Acquisition, Defendants have consistently denied that Envision stockholders sustained any damages as a result of any alleged misconduct, in light of: the financial information available regarding Envision at the time of the Acquisition; the state of Envision's business; the state of the industry in which Envision participated; and the robust sales process leading up to the Acquisition.

In sum, the value of the immediate cash benefit to the Settlement Class is more than fair, adequate, and reasonable in light of the risks Lead Plaintiff and the class faced in prevailing on their claims.

5. The ability of the Defendant to withstand a greater judgment.

The seventh *Girsh* factor weighs the ability of the defendant to withstand a greater judgment. This factor is "relevant where a settlement in a given case is less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement." *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011). While this factor is not particularly relevant here,[6] the balance of other more applicable factors supports approval of this Settlement. *See In re Processed Egg Prod. Antitrust Litig.*, MDL No. 08-md-2002, 2016 U.S. Dist.

[6] In April 2020, multiple articles were published announcing that Envision was on the brink of filing for bankruptcy. Doherty, Katherine, *Envision Healthcare to Consider Bankruptcy Filing*, (April 20, 2020), available at: https://www.bloomberg.com/news/articles/2020-04-20/kkr-s-envision-healthcare-said-to-consider-bankruptcy-filing. However, even if the Company were to file for bankruptcy, given the D&O insurance, it is not certain that a collectability issue existed.

LEXIS 85853, at *46 (E.D. Pa. June 30, 2016) ("Even if the Court were to presume that the defendants' resources far exceeded the settlement amount, in light of the balance of the other factors considered which indicate the fairness, reasonableness, and adequacy of the settlement, the ability of the defendants to pay more, does not weigh against approval of the settlement.").

6. The range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation.

The eighth and ninth Girsh factors, and Rule 23(e)(2)(C)(i), assess the range of reasonableness of the settlement fund in light of the best possible recovery and the risks of litigation. These factors assess "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing . . . compared with the amount of the proposed settlement." *Prudential*, 148 F.3d at 322.

As courts in this Circuit have noted, "in conducting the analysis, the court must guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 324 (3d Cir. 2011). Indeed, even recoveries representing a very small percentage of the defendant's maximum exposure (which the Settlement Amount here does not) may be found fair, adequate, and reasonable. *See, e.g., Newbridge Networks Sec. Litig.*, No. 94-1678-LFO, 1998 U.S. Dist. LEXIS 23238, at *8 (D.D.C. Oct. 23, 1998) (finding "an agreement that secures roughly six to twelve percent of a *potential* trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted range of reasonableness."); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses"). As stated above, in 2019, the majority of securities settlements provided cash

consideration between $5 million and $24 million.[7] And this range includes numerous Section 10(b) settlements where there was an actual stock-price *drop* at issue, as opposed to a merger that provided shareholders with a *premium* above the market price.

The analysis under the eighth and ninth *Girsh* factors is highly context specific. They "evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case." *In re Merck & Co.*, 2012 U.S. Dist. LEXIS 201472, at *12. As in *In re Merck & Co.*, the "benefit conferred by the Settlement in this case" is "substantial" and "represents a better option than little or no recovery at all." *Id.* Given the potential defenses and uncertainty inherent in this Action, Lead Plaintiff and Lead Counsel submit that the Settlement represents a good value for the Settlement Class.

7. The effectiveness of the proposed method of distributing relief to the Class.

Rule 23(e)(2)(C)(ii) examines the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims. The proposed method for distributing relief to Settlement Class Members here is effective and equitable. As described in greater detail below, when practicable, the Settlement Fund will be distributed on a pro-rata basis to eligible Settlement Class Members who had standing to bring a damages claim related to the Proxy and Acquisition. This is the most effective method of distributing the relief to the Settlement Class.

8. The terms of the proposed award of attorneys' fees.

Rule 23(e)(2)(C)(iii) looks at the terms of any proposed award of attorneys' fees, including timing of payment. Contemporaneously with this motion, Plaintiff's Counsel has filed their motion

[7] Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements—2019 Review and Analysis*, at 4 (2020).

for approval of an award of attorneys' fees of $5,800,000 and litigation expenses of $25,904.80. As explained in greater detail therein, their request is consistent with the Settlement Agreement and Notice, and is fair and reasonable.

9. The Settling Parties Have a Side Agreement.

Rule 23(e)(2)(C)(iv) requires the disclosure of any side agreement. The Settling Parties have entered into a Supplemental Agreement to set a blow provision for the opt-out threshold as discussed in ¶ 7.4 of the Stipulation. D.I. 85. Such agreements are commonly entered into in securities class action settlements. *See* 7 Newberg on Class Actions § 22:59 (5th ed.).

D. The Proposed Settlement Also Satisfies the *Prudential* Factors

The Third Circuit has also identified additional nonexclusive factors for courts to consider in evaluating proposed settlements. *In re Prudential*, 148 at 283. The *Prudential* factors[8] often overlap with the *Girsh* factors, and only the *Prudential* factors relevant to the litigation in question need be addressed. *See In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010); *In re Prudential*, 148 F.3d at 323-24.

The few distinct *Prudential* factors that are relevant to this action support granting final approval. As discussed above, the substantive issues were mature, although there is an argument that loss causation had become more difficult to meet in Section 14(a) actions. The Parties had

[8] These are: (1) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; (2) the existence and probable outcome of claims by other classes and subclasses; (3) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved or likely to be achieved for other claimants; (4) whether class or subclass members are accorded the right to opt-out of the settlement; (5) whether any provisions for attorneys' fees are reasonable; and (6) whether the procedure for processing individual claims under the settlement is fair and reasonable. *In re Pet Food*, 629 F.3d at 350.

completed fulsome document discovery, and, therefore, had an adequate opportunity to develop their knowledge and arguments and properly evaluate the potential outcomes at trial. Moreover, there are no sub-classes and all Settlement Class Members have the right to opt-out of the Settlement. Settlement Class Members will also be able to review the petition for attorneys' fees and expenses and have more than sufficient time to object to those requests. In sum, all of the applicable *Prudential* factors further support granting final approval.

E. The Settlement Treats All Class Members Equitably

Rule 23(e)(2)(D) looks at whether class members are treated equitably. Here, the method for distributing the Net Settlement Fund to the Settlement Class is simple and equitable. To obtain a payment, Settlement Class Members must submit a Proof of Claim and Release form (the "Proof of Claim")[9] with their name, contact information, number of shares of Envision stock owned on the applicable dates, and other information pertinent to the ownership of Envision stock. The Settlement Class Members will all be treated equitably relative to each other because each Authorized Claim shall receive his, her, or its *pro rata* share of the Net Settlement Fund based on their recognized losses, which flows directly from the number of shares of Envision common stock purchased, sold, or held from August 10, 2018, the record date for voting on the Acquisition, through and including October 11, 2018, when the Acquisition was completed. Moreover, approving Lead Plaintiff's request for a service award would "not constitute inequitable treatment of class members." *In re Extreme Networks, Inc. Sec. Litig.*, No. 15-cv-04883-BLF, 2019 U.S. Dist. LEXIS 121886, at *26 (N.D. Cal. July 22, 2019).

In sum, each factor identified under Rule 23(e)(2), including the procedural fairness and substantive adequacy of the $17,400,000 million recovery, is satisfied. Lead Plaintiff and Lead

[9] Attached to the Stipulation as Exhibit A-2. D.I. 85.

Counsel obtained this recovery in the absence of parallel governmental actions. Given the litigation risks involved, the complexity of the underlying issues, and the skill of defense counsel, the Settlement is an excellent result. It could not have been achieved without zealous advocacy by Lead Plaintiff and Lead Counsel. Lead Plaintiff and Lead Counsel respectfully submit that the Settlement is fair, reasonable, and adequate, and that it meets each of the Rule 23(e)(2) and *Girsh* factors.

III. THE PLAN OF ALLOCATION SHOULD BE APPROVED

Lead Plaintiff also seeks approval of the Plan of Allocation of Settlement proceeds, which was set forth in the Notice disseminated to the Settlement Class. *See* D.I. 85. "A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable and adequate." *Hill v. State St. Corp.*, 2014 U.S. Dist. LEXIS 179702, at *27 (D. Mass. Nov. 26, 2014). "A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis.'" *Id*. (quoting *In re IMAX Secs. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012)); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel."). "In determining the fairness, reasonableness and adequacy of a proposed plan of allocation, courts give great weight to the opinion of qualified counsel." *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 U.S. Dist. LEXIS 124269, at *66 (D.N.J. Dec. 8, 2008).

Here, the Plan of Allocation provides for a per-share distribution to those Settlement Class Members who were holders of record of Envision common stock entitled to vote on the Acquisition and received the merger consideration in the Acquisition. The Plan of Allocation is similar to plans approved by federal courts across the country in post-merger Section 14(a) cases where a common fund was obtained. *See Campbell v. Transgenomic, Inc.*, No. 4:17-CV-3021, 2020 U.S. Dist.

LEXIS 97063 (D. Neb. June 3, 2020); *Duncan v. Joy Global Inc et al*, Case No. 2:16-cv-01229, Dkt. No. 77 (E.D. Wis.); *In re Hot Topic, Inc. Sec. Litig.*, No. 2:13-cv-02939, Dkt. No. 86, 103 (C.D. Cal.). In sum, the Plan of Allocation here is fair and reasonable, and is also supported by authority in other post-merger Section 14(a) actions.

CONCLUSION

For the foregoing reasons, the proposed Settlement and Plan of Allocation warrant the Court's final approval.

Dated: January 12, 2021

Respectfully submitted,

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