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

LEAD PLAINTIFF'S BRIEF IN SUPPORT OF HIS MOTION FOR PRELIMINARY APPROVAL OF THE SETTLEMENT, CERTIFICATION OF THE SETTLEMENT CLASS, AND APPROVAL OF THE NOTICE TO THE CLASS

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I. INTRODUCTION

Lead Plaintiff[1] Jon Barrett ("Lead Plaintiff") respectfully submits this brief in support of his motion for preliminary approval of the proposed Settlement. After substantial completion of document discovery, consultation with a nationally recognized damages expert and a comprehensive mediation process, Lead Plaintiff has secured a cash settlement in the amount of $17,400,000 for the benefit of the Settlement Class. Settlements in merger litigation that secure additional cash consideration for shareholders are unusual but – as a direct result of the extraordinary efforts of Lead Plaintiff and his counsel to identify facts that can support monetary relief for shareholders – that is exactly what this Settlement achieves for Envision shareholders. In fact, this Settlement falls within the top-range of securities settlements in 2019, the majority of which included cash consideration between $5 million and $25 million.[2] This Settlement, achieved after significant discovery and arm's-length negotiations under the auspices of a capable mediator, easily falls within the range of reasonableness to warrant preliminary approval.

Accordingly, Lead Plaintiff respectfully requests that the Court enter the proposed Preliminary Approval Order, which will: (1) preliminarily approve the terms of the proposed Settlement as set forth in the Stipulation; (2) conditionally certify the Settlement Class for purposes of providing notice; (3) approve the form and method for providing notice of the proposed Settlement and Final Approval Hearing to the Settlement Class; and (4) schedule the Final Approval Hearing at which the Court will consider the request for final approval of: (a) the proposed Settlement, (b) final certification of the Settlement Class, Lead Plaintiff, and Lead

[1] All capitalized terms that are not defined herein have the same meanings as set forth in the Stipulation of Settlement (the "Stipulation") dated October 15, 2020 and filed contemporaneously herewith.

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

Counsel, (c) the proposed Plan of Allocation, and (d) Lead Counsel's application for an award of attorneys' fees and expenses, including an award to Lead Plaintiff for his representation of the Settlement Class.

II. HISTORY OF THE LITIGATION

A. Commencement of the Action

On August 9, 2018, Lead Plaintiff filed a class action complaint on behalf of the public common stockholders of Envision Healthcare Corporation ("Envision") against Envision and its board of directors (the "Board" or "Individual Defendants"). Lead Plaintiff alleged Defendants violated sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and SEC Rule 14a-9 promulgated thereunder in connection with the acquisition of Envision by Kohlberg Kravis Roberts & Co. L.P. ("KKR") through its affiliate Enterprise Parent Holdings Inc. (the "Acquisition"). D.I. 1. The Acquisition was completed on October 11, 2018.

On October 30, 2018, Jon Barrett moved before this Court to consolidate the related actions,[3] to appoint him as Lead Plaintiff, and to approve his selection of Monteverde & Associates PC as Lead Counsel and Cooch and Taylor, P.A. as Liaison Counsel. D.I. 3-6. On November 5, 2018, the Court granted the motion. D.I. 7.

On December 13, 2018, Lead Plaintiff filed the Amended Class Action Complaint (the "Amended Complaint"). D.I. 25. The Amended Complaint reasserted the allegations in the Complaint and sought to recover damages on behalf of Lead Plaintiff and all others similarly situated. On February 11, 2019, Defendants filed their motion to dismiss the Amended Complaint

[3] Two other actions alleging violations of Section 14(a) in connection with the merger were filed in this District. *See White v. Envision Healthcare Corp.*, No. 1:18-CV-1068-UNA (D. Del. July 19, 2018); *Rosenblatt v. Envision Healthcare Corp.*, No. 1:18-CV-1077-RGA (D. Del. July 20, 2018). A similar action was also filed in Tennessee, *Modi v. Envision Healthcare Corp.*, No. 3:18-CV-648-WDC (M.D. Tenn. July 14, 2018), that was voluntarily dismissed on November 16, 2018.

(the "Motion to Dismiss"). D.I. 29-31-1. On April 12, 2019, Lead Plaintiff filed his opposition and concurrently filed a motion to strike (the "Motion to Strike") exhibits Defendants had relied upon in support of their Motion to Dismiss. D.I. 33-35.

On April 29, 2019, the Motion to Strike and Motion to Dismiss were referred to Magistrate Judge Sherry R. Fallon. Defendants filed their reply on May 13, 2019. D.I. 37-39. Argument was heard on July 29, 2019, and on August 1, 2019, Magistrate Judge Fallon issued a Report and Recommendation ("R&R") denying the Motion to Dismiss. D.I. 44.

On August 15, 2019, Defendants filed their objection to the R&R. D.I. 47. On September 16, 2019, Lead Plaintiff responded to those objections (D.I. 52) and on September 19, 2019, the Court overruled Defendants' objections, finding the R&R "comprehensive" and adopting the factual findings and legal conclusions in the R&R. D.I. 53 at *2.

On November 7, 2019, Defendants filed their answers to the Amended Complaint. D.I. 57-58. Thereafter, on December 4, 2019, the Court issued a Scheduling Order. D.I. 68. Pursuant to the Scheduling Order, on April 13, 2020, Lead Plaintiff moved for class certification. D.I. 75-77. Defendants' opposition motion remained pending when, on May 7, 2020, the Court entered the parties' stipulation requesting an extension of certain deadlines so they could attempt to mediate the dispute. The parties agreed to mediate with Michelle Yoshida ("Ms. Yoshida") of Phillips ADR Enterprises. D.I. 78. After reviewing all discovery produced in this Action, Lead Counsel thoroughly prepared for mediation and submitted additional briefing on legal issues raised by Ms. Yoshida. Mediation was held on July 27, 2020. After considering the likely risks of further litigation weighed against a mediator's proposal from Ms. Yoshida, Lead Plaintiff agreed to settle the Action in exchange for a common fund of $17,400,000.00. On July 30, 2020, Lead Plaintiff filed the Notice of Settlement. D.I. 82.

B. Discovery Undertaken by Lead Plaintiff

Lead Plaintiff conducted thorough fact discovery relating to claims at issue in this Action. Specifically, Lead Plaintiff obtained discovery from Envision and the Individual Defendants that included 184,035 pages of documents containing e-mail communications, board materials, financial data and projections, analyst reports, and Merger related documentation. Lead Plaintiff also secured 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. Lead Plaintiff thoroughly reviewed all produced discovery and consulted with his damage's expert. Lead Plaintiff also collected documents and produced discovery to Defendants.

C. Settlement Negotiations and Mediation

Significant discovery had been completed and reviewed by counsel before Lead Plaintiff agreed to explore possible settlement with Defendants through mediation. Given the advanced stage of document discovery, counsel was well-positioned to evaluate the case, including to evaluate damages and the risks of success on various legal issues.

Lead Counsel thoroughly prepared for mediation to rigorously advocate 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. 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 culminated in an agreement in principle at around 10 p.m. to settle for $17,400,000. 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.

III. TERMS OF THE PROPOSED SETTLEMENT

On October 14, 2020, after significant arm's-length negotiations, the Settling Parties executed and filed with the Court the Stipulation, which sets forth the full and final terms of the proposed Settlement resolving the claims of the Settlement Class against Defendants.

As a result of the Settlement, Envision shall cause the Settlement Amount of $17,400,000 to be paid into the Escrow Account and distributed to Authorized Claimants in accordance with the Plan of Allocation described fully in the Notice. Stipulation at 13.

IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Lead Plaintiff respectfully submits that the Settlement achieved in this Action satisfies the standard for preliminary approval, and eventually final approval, because it is "likely" to be fair, reasonable and adequate. Fed. R. Civ. P. 23(e)(1)(B).

A. The Standards for Preliminary Approval of a Proposed Settlement

Rule 23(e)(1) of the Federal Rules of Civil Procedure requires court approval of any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a class action. This involves two stages: preliminary approval followed by notice to the class, and then final approval after a hearing. *Curiale v. Lenox Grp., Inc*., No. 07-1432, 2008 U.S. Dist. LEXIS 92851, at *10 (E.D. Pa. Nov. 14, 2008) (citing Manual for Complex Litigation §21.632 (4th ed. 2004)); *see also In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 197 (E.D. Pa. 2014) ("*Nat'l Football League Players' I*").[4]

[4] All internal citations have been omitted, unless otherwise noted.

The Third Circuit 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. "In evaluating a settlement for preliminary approval, the court need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute." *Thomas v. NCO Fin. Sys.*, No. 00-5118, 2002 U.S. Dist. LEXIS 14157, at *14 (E.D. Pa. Aug. 1, 2002). And "[t]he preliminary approval decision is not a commitment [to] approve the final settlement; rather, it is a determination that there are no obvious deficiencies and the settlement falls within the range of reason." *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438 (E.D. Pa. 2008); *Nat'l Football League Players' I*, 301 F.R.D. at 198 ("In making a preliminary determination, my first and primary concern is whether there are any obvious deficiencies that would cast doubt on the proposed settlement's fairness.").

Under Rule 23(e), which was amended effective December 1, 2018, preliminary settlement approval and dissemination of notice is appropriate if "the court will likely be able to [] approve the proposal under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1)(B). To determine whether the Settlement is "likely" to be found "fair, reasonable, and adequate," the Court should 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 by the settlement is adequate, and (D) the proposal treats Class Members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). Sub-parts (A) and (B) focus on "'procedural' concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement," while sub-parts (C) and

(D) implicate a "'substantive' review of the terms of the proposed settlement." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment.[5]

B. The Settlement Is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed and Experienced Counsel

For preliminary approval, the courts in this Circuit consider whether: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; and (3) whether the proponents of the settlement are experienced in similar litigation. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995). The "[s]atisfaction of these factors establishes an initial presumption of fairness." *Harlan v. Transworld Sys., Inc.*, 302 F.R.D. 319, 324 (E.D. Pa. 2014); *see also In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) ("*Nat'l Football League Players' II*").

First, the Settlement is the result of a mediator's proposal after arm's-length negotiations conducted by experienced counsel under the supervision of Ms. Yoshida, a well-respected mediator with extensive experience in federal securities litigation. The participation of an independent mediator in settlement negotiations "virtually insures that the negotiations were conducted at arm's length and without collusion between the parties." *Bredbenner v. Liberty Travel, Inc.*, No. 09-905 (MF), 2011 U.S. Dist. LEXIS 38663, at *30 (D.N.J. Apr. 8, 2011); *see also In re Delphi Corp. Sec. Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 498 (E.D. Mich. 2008). Moreover, the Settling Parties exchanged detailed briefs prior to the mediation and participated in a full day of mediation during which the strengths and weaknesses of the Settling Parties' respective claims and defenses were extensively debated. And "there is nothing to indicate that the proposed settlement is not the result of good faith, arms-length negotiations between adversaries."

[5] "The goal of this amendment is not to displace any factor [developed by federal courts], but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."

Gates, 248 F.R.D. at 444 (granting preliminary approval where settlement negotiations occurred "before an experienced mediator").

Second, Lead Plaintiff has vigorously litigated this Action since inception, and mediation took place only after the completion of document discovery. Prior to the mediation, Lead Plaintiff also prevailed in substantial motion practice after Defendants attempted to dismiss this Action twice. Indeed, on August 1, 2019, Judge Fallon issued a Report & Recommendation ("R&R") denying defendants' motion to dismiss (D.I. 44), and on September 19, 2019, this Court overruled Defendants' objections finding the R&R "comprehensive" and adopting the factual findings and legal conclusions in the R&R. D.I. 53. Lead Plaintiff also filed a motion for class certification with supporting memorandum of law and exhibits. D.I. 75-77.

In addition, and as described above, Lead Plaintiff obtained and evaluated significant document discovery before attending mediation and consulted with a damages expert. As a result, Lead Counsel demonstrated a thorough understanding of the facts and law at issue during mediation. Accordingly, there can be no question that at the time the Settlement was reached, Lead Plaintiff and his counsel were well informed and aware of the strengths and weaknesses of the claims and defenses at issue, as well as the fairness of the Settlement. *See In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 630 (E.D. Pa. 2004) (granting approval where "the parties conducted adequate investigation and discovery to gain an appreciation and understanding of the relative strengths and weaknesses of the claims and defenses asserted.").

Finally, as numerous Courts have recognized, the opinion of experienced counsel regarding the merits of a settlement is entitled to considerable weight. *See In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 503-04 (W.D. Pa. 2003); *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995). Here, Lead Counsel has extensive experience in securities litigation and, based

upon that experience, is well-positioned to evaluate the settlement and to determine it is in the best interests of the Settlement Class. Lead Counsel's conclusion is predicated on counsel's knowledge of the strengths and weaknesses of the Settlement Class' claims based on the evidence adduced to date, as well counsel's analysis of Defendants' legal and factual arguments and the risk that the Court or a jury may have ruled in favor of Defendants, resulting no recovery for the Settlement Class. Lead Counsel's opinion should therefore be afforded considerable weight. *See Alves v. Main*, No. 01-789, 2012 U.S. Dist. LEXIS 171773, at *72 (D.N.J. Dec. 4, 2012), *aff'd*, 559 Fed. App'x 151 (3d Cir. 2014) ("courts in this Circuit traditionally attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class").

Under these circumstances, the Settlement is entitled to a presumption of fairness, adequacy, and reasonableness sufficient to warrant preliminary approval.

C. The Relief Provided from the Settlement Is Adequate

This Settlement should also receive preliminary approval because the proposed Settlement is an excellent result given the numerous and substantial risks faced in this litigation. *See, e.g.*, *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (indicating that the risk of establishing liability is another factor courts consider in assessing the fairness of a settlement).

While Lead Plaintiff believes the claims asserted in the Action have merit and are supported by the evidence obtained in discovery, Lead Plaintiff and the Settlement Class nevertheless faced significant obstacles to recovery. Even assuming Lead Plaintiff defeated Defendants' motions for summary judgment, the Settlement Class faced significant time and expense preparing the case for trial, where there would be a substantial risk that the Settlement Class might not be able to establish loss causation, nor prove damages in excess of the amount secured through the Settlement.

In the Amended Complaint, Lead Plaintiff alleges that Defendants fabricated the Management Sensitivity Case in order to make the Acquisition appear fair to shareholders. D.I. 25. Throughout this Action, however, Defendants have vehemently denied the claims asserted by Lead Plaintiff. Defendants continue to maintain that Lead Plaintiff and the Settlement Class cannot prevail because, among other things, (i) the evidence will not support Lead Plaintiff's theory of the case and (ii) the Management Sensitivity Case reflects a downside scenario, which turned out to be more optimistic than Envision's actual financial performance in 2018 and 2019. Thus, proving liability at summary judgment and trial would be a difficult and complex process with no guarantee of success.

Moreover, even if liability were established, the Settlement Class still faced considerable risk establishing loss causation and proving damages. While Lead Plaintiff contends that his theory of loss causation and economic loss are appropriate, throughout this litigation Defendants have repeatedly emphasized that several recent court decisions, including rulings by this Court, reject Lead Plaintiff's position. Thus, Lead Plaintiff faced real risks that he would not be able to establish loss causation and damages.

Even if Defendants' legal arguments regarding loss causation and damages were rejected, Lead Plaintiff faced significant risks in *proving* that Envision's stock price would have been higher than $46 per share if stockholders had voted to reject the Acquisition. At all relevant times, Envision's stock price was below the Merger Consideration of $46 per share, and Envision's stock price would likely have fallen even further if the Acquisition failed. So, the loss causation and damages issues would be subject to complex and conflicting expert testimony.[6]

[6] "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." *In re*

In short, the Settlement Class faced numerous obstacles in proving Defendants were liable and in establishing damages. The Settlement eliminates these risks of continued litigation, which warrants granting preliminary approval. *See Nat'l Football League Players' I*, 301 F.R.D. at 199; *Gates*, 248 F.R.D. at 444-45. Accordingly, preliminary approval should be granted.

V. CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS FOR SETTLEMENT PURPOSES IS APPROPRIATE

In granting preliminary settlement approval, the Court should also conditionally certify the Settlement Class for purposes of the Settlement under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. Courts have long acknowledged the propriety of a settlement class. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-22 (1997). A settlement class, like other certified classes, must satisfy all the requirements of Rules 23(a) and (b), although the manageability concerns of Rule 23(b)(3) are not at issue. *See id.* at 593. As demonstrated below, the proposed Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3).

1. The Settlement Class Satisfies the Requirements of Rule 23(a)

Certification is appropriate under Rule 23(a) if: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy"). Fed. R. Civ. P. 23(a); *see also Amchem*, 521 U.S. at 613. As discussed below, the proposed Settlement Class meets each of these requirements.

Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985), *aff'd* 798 F.2d 35 (2d Cir. 1986).

a. The Numerosity Requirement is Satisfied

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds forty, the numerosity prong has been met." *Vinh Du v. Blackford,* 2018 U.S. Dist. LEXIS 167103, at *7-8 (D. Del. Sep. 28, 2018). Here, the numerosity requirement is plainly satisfied as thousands of stockholders were affected by the Acquisition and the Proxy.

b. The Commonality Requirement is Satisfied

"Rule 23(a)(2)'s commonality requirement 'does not require identical claims or facts among class member[s].'" *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 597 (3d Cir. 2012). "For purposes of Rule 23(a)(2), even a single common question will do." *Id.*

In a securities case like this, it is beyond dispute that "the class members share similar questions of law," since they each "must prove that [defendants'] course of conduct violated the federal securities laws." *In re Vicuron Pharm. Inc. Sec. Litig.*, 233 F.R.D. 421, 426 (E.D. Pa. 2006) (noting that Rule 23(a)(3) is "[o]ften described as 'easy commonality'"). This Court has noted that "the commonality requirement has been permissively applied in the context of securities fraud class actions." *In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 296 (D. Del. 2003).

Here, common questions of law and fact include whether Defendants violated § 14(a) and § 20(a) by preparing and disseminating a materially false or misleading Proxy, and whether Lead Plaintiff and the Settlement Class Members were damaged as a result. *See id.* The statements alleged to have violated Rule 14a-9 are all contained in the same SEC filing, which was disseminated to all Settlement Class Members. These facts more than suffice to satisfy the commonality requirement.

c. The Typicality Requirement is Satisfied

Rule 23(a)(3) requires that representative plaintiffs' claims be "typical" of those of other class members. FED. R. CIV. P. 23(a)(3). "The typicality threshold is low," and "where claims of the representative plaintiffs arise from the same alleged wrongful conduct on the part of the defendant, the typicality prong is satisfied." *Blackford*, 2018 U.S. Dist. LEXIS 211796, at *9 (citing *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 532 (3d Cir. 2004)). Here, Lead Plaintiff's and Settlement Class Members' claims all arise from Defendants' authorization of the Proxy, such that typicality is satisfied.

d. The Adequacy Requirement is Satisfied

"Under Rule 23(a)(4), adequate representation requires a showing that (1) the plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation, and (2) the representative plaintiffs' interests are not antagonistic to those of the class." *DaimlerChrysler*, 216 F.R.D. at 299 (citing *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975)).

Here, Lead Plaintiff is an adequate class representative, as he purchased his shares prior to the Acquisition and so suffered the same injury as the proposed Settlement Class. *See* D.I. 1. Lead Plaintiff communicated with Lead Counsel and was apprised of counsel's progress in the litigation, and neither Lead Plaintiff nor Lead Counsel has interests that are antagonistic to those of the Settlement Class. Furthermore, Lead Counsel has invested considerable time and resources into the prosecution of this action, which enabled Lead Counsel to negotiate an outstanding Settlement for the Settlement Class. Thus, the adequacy requirement is satisfied.

2. The Requirements of Rule 23(b)(3) Are Satisfied

Lead Plaintiff seeks certification of the Settlement Class pursuant to Rule 23(b)(3). A class action seeking an award of damages is appropriately certified under Rule 23(b)(3) if "the court

finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Skeway v. China Nat. Gas, Inc.*, 304 F.R.D. 467, 475 (D. Del. 2014) (quoting Fed R. Civ. P. 23(b)(3)). When assessing predominance and superiority, the court may consider that the class will be certified for settlement purposes only, and that a showing of manageability at trial is not required. *See Amchem*, 521 U.S. at 618.

a. Common Legal and Factual Questions Predominate

The predominance requirement "asks whether common issues of law or fact in the case predominate over non-common, individualized issues of law or fact." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 361, 370 (3d Cir. 2015). "[P]redominance does not require that common questions will be answered, on the merits, in favor of the class." *Id.* at 371.

Here, questions common to all Settlement Class Members substantially predominate over any individualized issues. In *DaimlerChrysler*, which also involved alleged violations of Sections 14(a) and 20(a) of the Exchange Act, the court found that common issues predominated, noting:

> The common questions of law and fact in this case are the paradigm of those present in a securities fraud class action, including (1) whether Defendants violated . . . Sections 10(b), 14(a) and 20 of the Securities Exchange Act; (2) whether Defendants made misrepresentations or omissions of material fact regarding the . . . merger . . . in the Proxy/Prospectus and to the investing public; (3) whether Defendants acted knowingly or recklessly in making the alleged false and misleading statements or in concealing their wrongdoing; and (4) whether the market price of [Defendant's] common stock was artificially inflated or distorted during the Class Period due to Defendants' conduct."

216 F.R.D. at 296; *see also In re Tyson Foods, Inc.*, 2003 U.S. Dist. LEXIS 17904, at *9 (D. Del. Oct. 6, 2003) (finding, in matter alleging Exchange Act violations, that common issues included "(1) whether the federal securities laws were violated by the defendants; (2) whether representations made to the investing public . . . during the Class Period omitted and/or

misrepresented material facts . . .; (3) whether defendants failed to disclose material facts necessary to not mislead the investing public; and (4) whether the members of the Proposed Class have sustained damages…").

Similarly, the common legal and factual issues in this action include: (1) whether Defendants' acts violated Sections 14(a) and 20(a) of the Exchange Act; and (2) whether Defendants' misrepresentations and omissions caused the losses alleged by Lead Plaintiff. The same alleged course of conduct by Defendants form the basis of all Settlement Class Members' claims. As set forth above, there are numerous common issues relating to Defendants' liability at the core of this action, which predominate over any individualized issues. The predominance requirement of Rule 23(b)(3) is therefore satisfied.

b. A Class Action is Superior to Other Methods of Adjudication

Rule 23(b)(3) sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation:

> (A) the class members' interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by . . . class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."

Fed. R. Civ. P. 23(b)(3). The superiority requirement is easily satisfied, as courts in the Third Circuit have concluded that the class action device is usually the superior method by which to redress injuries to a large number of individuals. *See, e.g.*, *In re Heckmann Corp. Sec. Litig.*, No. 10-378-LPS-MPT, 2013 U.S. Dist. LEXIS 79345, at *26 (D. Del. June 6, 2013) (superiority requirement "easily satisfied" in cases where there are large numbers of potential claimants who suffer damages too small to justify a suit against a large corporate defendant).

The Stipulation provides Settlement Class Members with the ability to obtain prompt and certain relief, and there are well-defined administrative procedures to assure due process. This includes the right of any Settlement Class Member dissatisfied with the Settlement to object to it, or to exclude themselves. The Settlement also relieves the substantial judicial burdens that would result from repeated adjudication of the same issues in thousands of individualized trials against Defendants, by affording settlement relief to a Settlement Class through conditional certification of this case as a class action. And because the parties seek to resolve this case through a settlement, any manageability issues that could have arisen at trial are irrelevant. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 302-303 (3d Cir. 2011); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 269 (3d Cir. 2009). Finally, the complexity of the claims asserted against Defendants and the high cost of individualized litigation make it unlikely that the vast majority of Settlement Class Members would be able to obtain relief without class certification.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, preliminary certification of the proposed Settlement Class is appropriate.

VI. THE NOTICE PROGRAM SATISFIES DUE PROCESS REQUIREMENTS AND IS SUFFICIENT UNDER RULE 23 AND THE PSLRA

Rule 23(e) of the Federal Rules of Civil Procedure requires that all members of the class be notified of the terms of any proposed settlement. Fed. R. Civ. P. 23(e)(1). "The notice is designed to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." *In re Wilimington Trust Sec. Litig.*, No. 10-cv-0990-ER, 2018 U.S. Dist. LEXIS 114132 at *16 (D. Del. July 10, 2018). Furthermore, in securities class actions, the PSLRA requires that the notice provide the following information:

> (1) "[t]he amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis;" (2) "[i]f the

> parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a statement from each settling party concerning the issue or issues on which the parties disagree;" (3) "a statement indicating which parties or counsel intend to make . . . an application [for attorneys' fees or costs], the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought;" (4) "[t]he name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members;" and (5) "[a] brief statement explaining the reasons why the parties are proposing the settlement."

15 U.S.C. § 78u-4(a)(7).

Here, the proposed form of the Notice meets these requirements. *See* Ex. A-1 to the Stipulation. The Notice describes the Settlement and sets forth the Settlement Amount in the aggregate and on an average per share basis. The Notice describes the Settling Parties' disagreement over damages and liability. The Notice sets out the limits on attorneys' fees and expenses Lead Counsel intend to seek from the Settlement Fund. It also describes the certification of the Settlement Class and the proposed Plan of Allocation. The Settling Parties agreed on the form of the Notice to be disseminated to all persons who fall within the definition of the Settlement Class and whose names and addresses have been or can be identified from or through Envision's transfer records. The Notice also summarizes the nature, history, and status of the Action; sets forth the definition of the Settlement Class; states the Settlement Class' claims and issues; discusses the rights of persons who fall within the definition of the Settlement Class (including the right to be excluded or object to Settlement and all relief requested in connection thereto) and summarizes the reasons the Settling Parties are proposing the Settlement.

Further, the Notice includes detailed information on the process and requirements for requesting exclusion from the Settlement Class. The Notice informs the Settlement Class that no affirmative action is required to be part of the Settlement. The Notice provides instructions on the

timing and process for completing and submitting the Proof of Claim form that accompanies the Notice. The Notice also informs Settlement Class Members that copies of the Notice and Proof of Claim form may be obtained by writing the Claims Administrator, or by accessing the documents on the Settlement website and provides the name and address for the Claims Administrator.

The Notice concisely explains the Settlement Class Members' opt-out rights, including the timing and method to opt-out. For those Settlement Class Members who do not wish to opt-out, the Notice provides that they can object to the Settlement or the request for fees and expenses. The Notice also explains the difference between objecting to the Settlement and opting out of the Settlement.

The Notice will set forth the date, time, and place of the final approval hearing, along with procedures for commenting on the Settlement, and includes addresses for the Court, Lead Counsel, and counsel for Defendants. In addition, the Claims Administrator will send the Notice to record holders and entities which commonly hold securities in "street name" as nominees for the benefit of their customers who are the beneficial purchasers or holders. Lead Plaintiff further proposes to distribute electronically a Summary Notice through *PRNewswire*. The Notice and Summary Notice are attached to the Stipulation as Exhibits A-1 and A-3. These proposed methods of giving notice (similar, if not identical, to the methods used in countless other securities class actions) have been "found to be satisfactory and meet[] due process." *In re Celera Corp. Sec. Litig.*, No. 5:10-CV-02604-EJD, 2015 U.S. Dist. LEXIS 42228, at *18-19 (N.D. Cal. Mar. 31, 2015).

The contents of the Notice and Summary Notice satisfy the requirements of Rule 23 and the PSLRA. Accordingly, the Court should approve the proposed Notice and Summary Notice.

VII. PROPOSED SCHEDULE OF EVENTS

The proposed Preliminary Approval Order includes the following schedule:

Notice mailed to the Settlement Class ("Notice Date")	21 calendar days after entry of the Preliminary Approval Order
Summary Notice published	10 calendar days after the Notice Date
Deadline for filing briefs in support of the Settlement, certification of the Settlement Class, Plan of Allocation, or request for an award of attorneys' fees and expenses	35 calendar days prior to the Final Approval Hearing
Deadline for requesting exclusion from the Settlement Class and objecting to the Settlement, Plan of Allocation, or request for an award of attorneys' fees and expenses	21 calendar days prior to the Final Approval Hearing
File declaration confirming mailing and publishing Notice and Summary Notice	7 calendar days prior to the Final Approval Hearing
Reply papers in support of the Settlement, Plan of Allocation, or request for an award of attorneys' fees and expenses	7 calendar days prior to the Final Approval Hearing
Final approval hearing	At the Court's convenience, but no less than 110 calendar days after entry of the Preliminary Approval Order
Last day for submitting Proof of Claim and Release forms	120 calendar days after the Notice Date or such other time as set by the Court

VIII. CONCLUSION

For the reasons set forth above, the proposed Settlement warrants this Court's preliminary approval, and entry of the Preliminary Approval Order.

Dated: October 15, 2020

Respectfully submitted,

COOCH AND TAYLOR, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2020, I electronically filed **Lead Plaintiff's Brief in Support of Motion for Preliminary Approval of The Settlement** with the Clerk of Court using CM/ECF which will send notification of such filing to those registered as CM/ECF participants.

/s/ Blake A. Bennett
Blake A. Bennett (#5133)

Delaware Counsel for Lead Plaintiff