UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

In re ENVISION HEALTHCARE CORPORATION SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Civil Action No. 3:17-cv-01112 (**Consolidated with Case Nos. 3:17-cv-01323 and 3:17-cv-01397**) CLASS ACTION Honorable William L. Campbell, Jr. Magistrate Judge Jeffery S. Frensley

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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SECONDARY AUTHORITIES

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs Laborers Pension Trust Fund for Northern California, LIUNA National (Industrial) Pension Fund and LIUNA Staff & Affiliates Pension Fund ("LIUNA Funds") and named plaintiffs Central Laborers' Pension Fund and United Food and Commercial Workers Union Local 655 Food Employers Joint Pension Fund (collectively, "Plaintiffs") respectfully submit this memorandum in support of their motion for: (i) final approval of the proposed settlement of this securities class action; and (ii) approval of the proposed Plan of Allocation.[1]

I. INTRODUCTION

After more than six years of hard-fought litigation, Plaintiffs have reached the proposed $177.5 million cash settlement for the benefit of the Class. As described below and detailed in the Wood Declaration, the Settlement – which represents the second largest securities class action recovery ever in this District – is an excellent result for the Class, as it provides a significant and certain recovery in a case that presented numerous hurdles and risks.

Plaintiffs' decision to settle the Litigation was the product of extensive investigation and hard-fought litigation by experienced counsel, which included substantial discovery efforts and arm's-length settlement negotiations supervised by an experienced mediator. While Plaintiffs believe that their claims had merit and that they could prevail at trial, they also recognize that had the Litigation continued, they faced substantial risks to obtaining any recovery for the Class, let alone a recovery greater than that produced by the Settlement.

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation of Settlement dated September 22, 2023 (the "Stipulation") (ECF 451) or in the accompanying Declaration of Christopher M. Wood in Support of: (1) Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) an Award of Attorneys' Fees and Expenses and Awards to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) (the "Wood Declaration" or "Wood Decl."). Unless otherwise noted, all internal citations and quotations have been omitted and emphasis has been added.

The recovery is remarkable considering the numerous challenges Plaintiffs faced throughout the Litigation. At the pleading stage, the Court dismissed several categories of alleged false and misleading statements, as well as a key Defendant. The Order both impaired Plaintiffs' liability case, and significantly impacted both the scope and complexity of proving class-wide damages. For example, the Order dismissed misstatements concerning Plaintiffs' allegations that Envision unlawfully upcoded the severity of claims and improperly increased hospital admissions in order to boost profits. The Order also dismissed all misstatements that Defendants made at healthcare conferences, all statements relating to Envision's ability to transition in-network in a revenue neutral manner, and all misstatements relating to the adequacy of Defendants' due diligence with respect to certain failing hospital contracts. The Court also deferred ruling on whether certain statements in the Joint Proxy/Registration Statement were forward-looking and could be dismissed under the PSLRA's safe harbor protections. Finally, the Order dismissed all claims against the private equity firm that backed Envision – Clayton, Dubilier & Rice – which Plaintiffs alleged sold substantial amounts of Envision stock at artificially inflated prices during the Class Period.

When Envision filed for bankruptcy in May 2023, after six years of hard-fought litigation, the risks of collecting a substantial judgment escalated significantly. Only the Individual Defendants remained in the case as it headed toward trial. Additionally, many of the insurers that were supposed to provide coverage to the Individual Defendants had refused to do so, and that issue was being separately litigated in Tennessee state court at the time the case settled. After years of contentious litigation and unsuccessful attempts to settle the case, Class Counsel overcame significant obstacles to recovery, and negotiated one of the largest settlements in the nation last year, and the second largest ever in this District.

In light of these considerations, Plaintiffs and Class Counsel believe that the $177.5 million Settlement is eminently fair, reasonable, adequate and easily satisfies the standards of approval under Federal Rule of Civil Procedure ("Rule") 23, as it provides a very favorable result for the Class. The reaction of the Class thus far also supports the Settlement. As discussed below, potential Class Members have been notified of the Settlement in accordance with the Preliminary Approval Order and, to date, not a single Class Member has filed an objection.[2] Nor have any Class Members sought exclusion from the Class. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

Plaintiffs also request that the Court finally certify the Class and approve the proposed Plan of Allocation, which was set forth in the Notice. This Plan governs how claims will be calculated and, ultimately, how the Net Settlement Fund will be equitably distributed to Authorized Claimants. No objections have been filed to the Plan.

II. FACTUAL AND PROCEDURAL HISTORY

The Wood Declaration is an integral part of this submission, and for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Litigation, Class Counsel's efforts on behalf of the Class, the negotiations leading to the Settlement, and the risks and uncertainties of continued litigation.

III. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standards for Final Approval of Class Action Settlement

Rule 23 requires judicial approval for any compromise or settlement of class action claims and states that a class action settlement should be approved if the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). It is well settled within the Sixth Circuit that "federal policy

[2] *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), submitted herewith.

favor[s] settlement of class actions." *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) ("*UAW*"). "'Settlement agreements should therefore be upheld whenever equitable and policy considerations so permit.'" *Robinson v. Shelby Cnty. Bd. of Educ.*, 566 F.3d 642, 648 (6th Cir. 2009). Rule 23(e)(2) provides the courts with four specific factors to consider when determining whether a proposed settlement is "fair, reasonable, and adequate":

> (A) the class representatives and counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
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> (C) the relief provided for the class is adequate, taking into account:
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> (i) the costs, risks, and delay of trial and appeal;
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> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
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> (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and
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> (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). Rule 23(e) factors are not intended to "displace" any previously adopted factors, 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." Advisory Committee Notes to the 2018 Amendments to the Federal Rules of Civil Procedure. "Accordingly, the Court [should] appl[y] the framework set forth in Rule 23, while continuing to draw guidance from the [Sixth] Circuit's factors and relevant precedent." *Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018), *aff'd sub nom. Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020). The Court considered these factors in connection with its consideration of preliminary approval of the Settlement and found that each had been met. *See* ECF 459 at 1-2.

To evaluate the substantive fairness of the settlement, courts in the Sixth Circuit have considered the following factors in determining whether a class action settlement should be approved:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

UAW, 497 F.3d at 631.

In considering these factors, the task of the court "is not to decide whether one side is right or even whether one side has the better of these arguments. . . . The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement." *UAW*, 497 F.3d at 632. That is, these factors should not be applied in a formalistic fashion. *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 140 (W.D. Ky. 1992). Courts are to "'judge the fairness of a proposed compromise,'" "'weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement,'" as opposed to deciding the merits of the case or resolving unsettled legal questions. *Id.* at 631 (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)). "[D]istrict court enjoys wide discretion in assessing the weight and applicability of these factors." *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992); *N.Y. State Tchrs.' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 236 (E.D. Mich. 2016) ("*GMC*"), *aff'd sub nom. Marro v. N.Y. State Tchrs.' Ret. Sys.*, 2017 WL 6398014 (6th Cir. Nov. 27, 2017).

B. The Rule 23 and Sixth Circuit Factors Support Approval

1. The Class Was Adequately Represented

Rule 23(e)(2)(A) requires the Court to consider whether the "class representatives and class counsel have adequately represented the class." The Sixth Circuit looks at two criteria to determine

whether adequacy is met: the representative must (i) "'have common interests with unnamed members of the class,'" and (ii) be willing to "'vigorously prosecute the interests of the class through qualified counsel.'" *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012).

These requirements have easily been met here. Plaintiffs' claims are typical of and co-extensive with the claims of the Class, and they have no antagonistic interests with respect to the Class as a whole. Plaintiffs have amply demonstrated that they have an interest in obtaining the largest possible recovery in this Litigation, as do the other absent Class Members. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members."). Additionally, as detailed in their declarations, Plaintiffs were highly involved in each stage of the Litigation and worked closely with Class Counsel throughout the pendency of this action to achieve the best possible result for themselves and the Class. *See* Declarations of Bryan Berthiaume, Adam Downs, Kenton Day and David A. Cook (collectively, "Plaintiffs' Decls."), submitted herewith.

Class Counsel has also adequately represented the Class. Class Counsel is highly experienced in securities litigation, with a long and successful track record representing investors in this District, as well as in courts throughout the country. *See* Declaration of Spencer A. Burkholz Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("RGRD Decl."), Ex. E; *see also* Declaration of Jerry Martin Filed on Behalf of Barrett Johnston Martin & Garrison, PLLC in Support of Application for Award of Attorneys' Fees and Expenses ("Barrett Johnston Decl."), Ex. B, submitted herewith. Class Counsel had a strong appreciation of the strengths and weaknesses of the case before agreeing to the Settlement, and believes it is in the best interest of the Class. Counsel incurred over $1,500,000 in

expenses and expended over 50,000 hours during a span of over six years vigorously pursuing the Litigation. RGRD Decl., ¶¶4-13; Barrett Johnston Decl., ¶¶4-9. Accordingly, this factor is easily satisfied and warrants final approval. *See UAW*, 497 F.3d at 626 (representation was adequate because class counsel "***was willing to, and indeed did, commit substantial 'resources . . . to represent[ ] the class***'").

2. The Absence of Fraud or Collusion Favors Approval

Rule 23(e)(2)(B) and the first *UAW* factor, which analyze whether the Settlement was reached at arm's length and without fraud or collusion, also support approval. "'Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.'" *In re Se. Milk Antitrust Litig.*, 2013 WL 2155379, at *6 (E.D. Tenn. May 17, 2013). *See also Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *4 (S.D. Ohio Feb. 18, 2021). "Courts consistently approve class action settlements reached through arms-length negotiations after meaningful discovery." *Id.*

Here, the proposed Settlement was reached after more than six years of litigation, with each side vigorously advocating its respective positions. Indeed, the Settlement was reached only after arm's-length negotiations facilitated by an experienced and well-respected mediator, the Honorable Layn R. Phillips (Ret.). Wood Decl., ¶¶96, 98. The Settlement negotiations were extensive, and included the exchange of briefs, mediation sessions, then follow-up discussions. *Id.* Plaintiffs and Defendants ultimately agreed to settle only after Judge Phillips issued a mediator's proposal. As such, the Settlement warrants approval given that the "'participation of an independent mediator . . . [which] virtually insures that the negotiations were conducted at arm's length and without collusion.'" *See Arledge v. Domino's Pizza, Inc.*, 2018 WL 5023950, at *2 (S.D. Ohio Oct. 17, 2018).

3. The Relief Provided to the Class Is Adequate

Under Rule 23(e)(2)(C), the Court must consider whether the relief provided for the class is adequate, taking into account "the costs, risks, and delay of trial and appeal" and other factors. This factor essentially incorporates the second and fourth *UAW* factors: (i) the complexity, expense, and likely duration of the litigation; and (ii) the likelihood of success on the merits. Each of these factors supports approval.

a. The Complexity, Expense, and Likely Duration of the Litigation

"Courts have consistently held that the expense and possible duration of litigation are major factors to be considered in evaluating the reasonableness of a settlement." *In re Delphi Corp. Sec., Derivative & ERISA Litig.*, 248 F.R.D. 483, 497 (E.D. Mich. 2008). Most class actions are "'inherently complex'" and "'[s]ettlement avoids the costs, delays, and multitude of other problems associated with them.'" *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473, at *2 (E.D. Mich. Jan. 20, 2015). Indeed, courts have consistently recognized that "'[s]ecurities class actions are often "difficult and . . . uncertain."'" *See, e.g.*, *New Eng. Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 631 (W.D. Ky. 2006), *aff'd sub nom. Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008).

There is no doubt that this Litigation involves complex issues relating to falsity, materiality, scienter, loss causation, and damages.

This Litigation was filed over six years ago. Discovery was largely complete, with more than 3.2 million pages of documents produced and 57 depositions taken. Plaintiffs' class certification motion was pending, and summary judgment motions were on the horizon. This Settlement avoids

the risks of a lengthy trial, and the certain appeal by the non-prevailing party.[3] "As the Settlement provides an immediate, significant, and certain recovery for Class members, this factor favors the Court's approval of the Settlement." *See GMC*, 315 F.R.D. at 236.

b. The Likelihood of Success on the Merits

"'The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured.'" *Karpik*, 2021 WL 757123, at *5 (quoting *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 245 (6th Cir. 2011)). In other words, when considering this factor, the Court must balance the likelihood of success on the merits against the relief offered in the Settlement. *UAW*, 497 F.3d at 631.

Plaintiffs believe the evidence showed that: Envision's out-of-network billing practices were knowingly improper and unsustainable and Defendants knowingly made false statements concerning Envision's billing practices and out-of-network exposure. Wood Decl., ¶92(b). Plaintiffs also believe significant evidence demonstrated that contrary to Defendants' public assertions, Envision did, in fact, engage in the intentional, pervasive, and unsustainable practice of balance billing patients, *id.*, ¶92(c), and that Defendant hid from investors the fact that throughout 2014 and 2015, approximately 30 of the Company's new hospital contracts were significantly underperforming. *Id.*, ¶92(d).

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[3] *See Olden v. Gardner*, 294 F. App'x 210, 217 (6th Cir. 2008) (affirming settlement and noting that, among other factors in favor of settlement, "[f]ollowing the trial, there would most likely have been an appeal that would have required an additional investment of substantial resources and time"); *Se. Milk*, 2013 WL 2155379, at *5 ("[T]he likelihood of an appeal was great . . . [and] [t]he Court agrees with plaintiffs that the immediate recovery of substantial monetary and structural relief provided by the settlement far outweighs the risk and commitment of time inherent in further litigation of this complex matter, especially in view of the risks, expenses and delays noted above."); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2010 WL 3341200, at *4 (W.D. Ky. Aug. 23, 2010) ("Even if litigation is successful for the plaintiff class, appeals are likely to delay any sort of meaningful relief. In contrast, the settlement provides recovery without delay.").

Plaintiffs believe they would establish that Defendants' misstatements and omissions caused Envision's common stock to trade at inflated prices, thereby causing harm to Class Members when the risks and conditions concealed by Defendants' misrepresentations and omissions were revealed.[4] *Id.*, ¶6. Specifically, Plaintiffs alleged that Defendants' misrepresentations concealed material risks to the Company's business, which were revealed through public disclosures on: October 22, 2015, when Envision disclosed an earnings and reduced fiscal year 2015 guidance shortfall caused by underperforming contracts in its EmCare segment; February 28, 2017, when Envision disclosed lower-than-expected fourth quarter 2016 results and reduced 2017 EBITDA expectations; July 24, 2017, when an exposé in *The New York Times* and a study by the National Bureau of Economic Research revealed Envision had a distinct out-of-network strategy that involved taking over hospital emergency rooms; and October 31, 2017, when Envision disclosed a third quarter 2017 guidance miss, a fiscal year guidance reduction, and a projection of zero growth for fiscal year 2018. *Id.*, ¶6.

Nevertheless, Plaintiffs are also cognizant of the fact that there was no guarantee that they would prevail at trial with respect to any of their claims. Indeed, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel Energy, Inc., Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005).[5]

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[4] Plaintiffs also believed they would prevail on their negligence-based claims against all 23 individual defendants arising out of misstatements and omissions concerning out-of-network exposure and expected synergies in the Joint Proxy/Registration Statement filed on October 21, 2016. Wood Decl., ¶92(e).

[5] *See, e.g.*, *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74 (2d Cir. 2023) (class decertified following more than 12 years of litigation and appellate and Supreme Court review); *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (vacating $2.46 billion PSLRA judgment against securities fraud defendants and remanding for a new trial on limited issues); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (reversal on loss causation grounds of $81 million jury verdict in favor of plaintiffs against an accounting firm and judgment entered for defendant); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512

Here, as detailed in the Wood Declaration, there were numerous potential defenses available to Defendants that could reduce, or preclude entirely, any recovery by the Class. Defendants argued that the remaining alleged misstatements were inactionable forward-looking statements or inactionable puffery. Wood Decl., ¶93(b). Defendants have also contended throughout the Litigation that Envision adequately disclosed its out-of-network billing and the transition to in-network billing with analysts and investors as early as May 2016. *Id.*, ¶93(c). Defendants argued that the market was aware of, and actively discussing, Envision's out-of-network billing practices and any associated risk. *Id*.

Plaintiffs also faced risks in establishing causation and damages. Defendants argued that other factors caused the declines in the price of Envision's common stock. *Id.*, ¶93(d). For example, Defendants repeatedly argued that the Envision stock price decline on November 1, 2017 was caused by developments unrelated to Plaintiffs' out-of-network billing allegations, including a reduction in anesthesia reimbursements, a decline in emergency department volumes, and two major hurricanes in Texas and Florida. *Id*.[6]

Class Counsel was fully informed of the strengths and weaknesses of Plaintiffs' case, including the many complicated and nuanced legal issues that would have to be resolved in Plaintiffs' favor in order to achieve a successful result. In short, continued litigation would be hard

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(S.D.N.Y. 2011) (declining to enter judgment on jury verdict in favor of plaintiffs and modifying class definition after intervening change in Supreme Court precedent), *aff'd*, 838 F.3d 223 (2d Cir. 2016); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (setting aside jury verdict in favor of plaintiffs and granting securities defendants' post-trial motion for judgment as a matter of law), *aff'd sub nom. Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012); *Erica P. John Fund, Inc. v. Halliburton Co.*, 2015 WL 10714013, at *3 (5th Cir. Nov. 4, 2015) (granting a "third interlocutory appeal in a [securities] case that has remained in the class certification stage for thirteen years," with two successive appeals to the U.S. Supreme Court).

[6] Plaintiffs faced further collectability risk as a result of Envision's bankruptcy and ongoing disputes regarding the availability of certain insurance coverage. *Id.*, ¶93(g).

fought, and expensive, and a positive result was far from assured. *See Bartell v. LTF Club Operations Co.*, 2020 WL 7062834, at *4 (S.D. Ohio Aug. 7, 2020) ("In summary, continued litigation in the face of strong opposition and the 'substantial ground for disagreement' that exists as to the merits of Plaintiff's claims creates substantial risk to the Class. When balanced against the substantial benefits provided, this factor weighs in favor of approving the proposed Settlement.").

Despite these risks, Plaintiffs obtained a very favorable recovery. The Settlement far exceeds the $46 million average recovery in securities class action settlements nationwide in 2023 according to data from NERA. *See, e.g.*, Edward Flores and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review*, at 18, Figure 17 (NERA Jan. 23, 2024).[7] The proposed Settlement is an excellent result for the Class and is certainly within the range of what would be determined to be fair, reasonable, and adequate.

4. The Stage of Proceedings and Amount of Discovery Engaged in by the Parties Supports Approval

"The relevant inquiry with respect to this factor is whether the plaintiff has obtained a sufficient understanding of the case to gauge the strengths and weaknesses of the claims and the adequacy of the settlement." *GMC*, 315 F.R.D. at 236. Here, Class Counsel undoubtedly had a thorough understanding of the strengths and weaknesses of Plaintiffs' claims. During the Litigation, Class Counsel had, among other things:

- researched and drafted numerous complaints;
- successfully defeated, in whole or part, Defendants' motion to dismiss the complaints;
- requested, subpoenaed, negotiated for, and reviewed and analyzed millions of pages of evidence produced by Defendants and third parties;
- sought written discovery from Defendants;

[7] The Settlement also represents the second largest securities settlement ever in this District.

- responded to discovery propounded by Defendants;
- moved twice for class certification;
- conducted or defended 57 fact and expert depositions;
- litigated a number of discovery disputes concerning the scope of party and third-party discovery; confidentiality designations; and attorney-client privilege, work product and reliance on counsel assertions;
- retained experts in the fields of healthcare economics, financial valuation, and market efficiency damages;
- engaged in settlement negotiations with a nationally recognized mediator; and
- assessed the risks of prevailing on Plaintiffs' claims at trial.

See generally Wood Decl.

There can be no question that by the time the Settlement was reached, Plaintiffs and Class Counsel "had sufficient information to evaluate the strengths and weaknesses of the case and the merits of the Settlement," *GMC*, 315 F.R.D. at 237, and reached the well-informed decision to enter into this Settlement. Accordingly, this factor supports approval of the Settlement.

5. Class Counsel and Plaintiffs Endorse the Settlement

In assessing the fairness of a proposed settlement, courts consider counsel's endorsement of the settlement, which "is entitled to significant deference." *Id.* at 238; *accord IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583, 597 (E.D. Mich. 2006) ("The judgment of the parties' counsel that the settlement is in the best interest of the settling parties 'is entitled to significant weight, and supports the fairness of the class settlement.'"). This is especially true where, as here, the stage of the proceedings indicates that counsel and the court are fully capable of evaluating the merits of plaintiffs' case and the probable course of future litigation. *See Armstrong v. Gallia Metro. Hous. Auth.*, 2001 WL 1842452, at *3-*4 (S.D. Ohio Apr. 23, 2001).

Here, as a result of the settlement evaluation process, Class Counsel carefully considered and evaluated the relevant legal authorities and evidence gathered to support the claims asserted against Defendants; the likelihood of prevailing on these claims; and the risk, expense, and duration of continued litigation, including the recoverability of a verdict. Based on these considerations, Class Counsel concluded that the Settlement is not only fair and reasonable but is a highly favorable result for the Class. *Karpik*, 2021 WL 757123, at *6. Likewise, Plaintiffs approve the Settlement. *See* Plaintiffs' Decls, submitted herewith. "Their support also favors approval." *Karpik*, 2021 WL 757123, at *6. Accordingly, this factor supports final approval.

6. The Reaction of the Class Supports Final Approval

To further support approval of a settlement, courts have also looked to the reaction of the class. *Poplar Creek*, 636 F.3d at 244; *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). "The lack of objections by class members in relation to the size of the class highlights the fairness of the settlements to unnamed class members and supports approval of the settlements." *Se. Milk*, 2013 WL 2155379, at *6. Here, as detailed *infra*, Section VI, as of February 13, 2024, the Claims Administrator has disseminated over 146,600 Postcard Notices to potential Class Members and nominees. To date, not one Class Member has objected to any aspect of the Settlement.[8] Nor have any Class Members requested exclusion from the Class. Thus, this factor favors approval of the Settlement.

7. Public Interest Favors Approval of the Settlement

The Supreme Court has repeatedly recognized "that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), and

[8] As set forth in the Notice, the deadline to provide the Court and counsel with objections is February 29, 2024.

"'there is a strong public interest in encouraging settlement of complex litigation and class action suits because they are "notoriously difficult and unpredictable" and settlement conserves judicial resources.'" *GMC*, 315 F.R.D. at 241-42. As discussed herein, the Settlement provides $177.5 million in cash, plus interest. The Settlement puts an end to this six-year-old Litigation, which, absent settlement would have continued in this Court, Bankruptcy Court, Tennessee state court, and likely in the Sixth Circuit. Thus, the Settlement also furthers public policy by conserving judicial resources. *See In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 376 (S.D. Ohio 2006) ("[T]here is certainly a public interest in settlement of disputed cases that require substantial federal judicial resources to supervise and resolve.").

8. Other Rule 23(e)(2) Factors Support Final Approval

Rule 23(e)(2), as amended, also considers: (i) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class members' claims; (ii) the terms of any proposed award of attorneys' fees, including timing of payment; (iii) any agreement made in connection with the proposed settlement; and (iv) the equitable treatment of class members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii), (iii), & (iv); Fed. R. Civ. P. 23(e)(2)(D). Each of these additional considerations also supports final approval of the Settlement.

First, the method for processing Class Members' claims and distributing relief to eligible claimants are well-established and effective. Here, the Court-appointed Claims Administrator will review and process the claims under the guidance of Class Counsel, allow claimants an opportunity to cure any deficiencies in their claims or request the Court review a denial of their claims, and, lastly, mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund (per the proposed Plan of Allocation), *see infra* Section IV. *See, e.g.*, *GMC*, 315 F.R.D. at 233-34, 245 (approving settlement with a nearly identical distribution process).

Second, as discussed in the accompanying fee and expense memorandum, Class Counsel is applying for an award of thirty percent of the common fund fee award as compensation for the services it rendered on behalf of the Class, as well as payment of litigation costs and expenses. The proposed attorneys' fees are reasonable in light of the work performed and the results obtained, and a thirty percent award is consistent with, if not below, attorneys' fee percentages that courts have approved in similar cases. *See, e.g.*, *Schuh v. HCA Holdings, Inc.*, 2016 WL 10570957, at *1 (M.D. Tenn. Apr. 14, 2016) (awarding 30% of a $215 million recovery).[9] Notably, approval of the requested fees is separate from consideration of approval of the Settlement, and the Settlement may not be terminated based on any ruling on attorneys' fees. *See* Stipulation, ECF 451, ¶6.4.

Third, Plaintiffs and Defendants entered into a confidential agreement establishing conditions under which Defendants may terminate the Settlement if a certain threshold of Class Members exclude themselves. *Id.*, ¶7.3. This type of agreement is a standard provision in securities class action settlements and has no negative impact on the fairness of the Settlement. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018) (approving settlement with similar confidential agreement).

Fourth, under the proposed Plan of Allocation, each Authorized Claimant will receive his, her, its, or their *pro rata* share of the Net Settlement Fund based on their Recognized Claim as calculated by the Plan of Allocation.

Accordingly, each relevant factor supports final approval of the Settlement.

[9] Additional jurisprudence supporting this award is included in the Memorandum of Law in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Expenses and Awards to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4), submitted herewith.

IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

Approval of the Plan of Allocation requires that it is fair, reasonable, and adequate. *See, e.g.*, *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *15 (E.D. Mich. Dec. 13, 2011). """Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable."""" *Id.*

Here, the proposed Plan of Allocation is fair, reasonable and adequate. The Plan of Allocation is based on Plaintiffs' damages expert's event study and analysis of the movement in Envision stock during the Class Period. Wood Decl., ¶¶101-104. The Plan of Allocation ensures that the Net Settlement Fund will be fairly and equitably distributed to those who have suffered losses. Moreover, the Plan of Allocation was disclosed in the Notice and, to date, there have been no objections to the Plan of Allocation. *See* Murray Decl., Ex. B. Thus, the Plan of Allocation is fair and reasonable.

V. THE COURT SHOULD CERTIFY THE CLASS

The Court is hearing the proposed Settlement prior to any hearing or ruling on class certification, making it necessary for the Court to certify a class pursuant to Rule 23 prior to approving the proposed Settlement. In certifying a class for purposes of settlement, courts are afforded broad discretion. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). Here, all the requirements for class certification are met.[10]

Each of the four Rule 23(a) prerequisites to class certification – (a) numerosity; (b) commonality; (c) typicality; and (d) adequacy of representation – is satisfied. First, numerosity is

[10] The Court preliminarily certified the Class in connection with its consideration of preliminary approval of the Settlement. ECF 459 at ¶2. Nothing has changed since that time which would require a different result here, and Plaintiffs respectfully incorporate herein their arguments in support of class certification in the Memorandum of Law in Support of Plaintiffs' Unopposed Motion for: (I) **Error! Main Document Only.**Preliminary Approval of Settlement; (II) Class Certification for Settlement Purposes; and (III) Approval of Notice to the Class. ECF 450 at §IV.

satisfied in cases involving nationally traded securities such as Envision common stock. *In re Accredo Health, Inc.*, 2006 U.S. Dist. LEXIS 97621, at *17 (W.D. Tenn. Mar. 7, 2006). Second, commonality exists where, as here, all Members of the Class purchased Envision common stock subject to the same alleged misrepresentations and omissions. *Ross v. Abercrombie & Fitch, Co.*, 257 F.R.D. 435, 442 (S.D. Ohio 2009). Third, typicality is satisfied by Plaintiffs having suffered losses following the disclosures, as the other Class Members did. *Am. Med. Sys.*, 75 F.3d at 1082. Fourth, Plaintiffs are adequate representatives because they have no conflicts with the other Class Members, and have been actively involved in the case, maintaining communication with Class Counsel, who are qualified, experienced, and able to conduct the Litigation. *Id.* at 1083; *In re Direct Gen. Corp. Sec. Litig.*, 2006 WL 2265472, at *4 (M.D. Tenn. Aug. 8, 2006). *See* Plaintiffs' Decls.

A proposed class action must also satisfy one of the tests of Rule 23(b). Plaintiffs bring this Litigation under Rule 23(b)(3): predominance of common questions of fact or law and superiority of the class action device as the method of adjudication. Each is readily satisfied here.

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The predominance requirement is "readily met" in securities class actions. *Id.* at 625. Here, common questions of law and fact predominate over individual questions because the alleged misstatements and omissions affected all Members of the Class in the same manner (*i.e.*, through public statements to the market). *See Bovee v. Coopers & Lybrand*, 216 F.R.D. 596, 607 (S.D. Ohio 2003) (noting when fraud-on-the market theory is invoked, courts agree that legal and factual issues common to all members of class predominate). Additionally, the class action mechanism is the best method of resolving all the individual claims aggregated in this matter because the controversy for

each Class Member is identical and will result in the adjudication of all claims in one suit and one forum. *Amchem*, 521 U.S. at 615.

In short, because the class action device is far superior to any other means available to this Court, the requirements of Rule 23(b)(3) are met.

VI. THE NOTICE OF SETTLEMENT SATISFIES RULE 23 AND DUE PROCESS REQUIREMENTS

Rule 23(e)(1)(B) requires that notice of the proposed settlement be given "in a reasonable manner to all class members who would be bound by the proposal." Rule 23(c)(2)(B) further requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In addition to the requirements of Rule 23, the Constitution's Due Process Clause also guarantees unnamed class members the right to notice of certification or settlement. In securities class actions, the notice must contain the information outlined in Rule 23(c)(2)(B) and the PSLRA. *See* 15 U.S.C. §78u-4(a)(7). A notice of settlement satisfies due process when it is "'reasonably calculated to reach interested parties.'" *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008). The notice program utilized here, as set forth in the Preliminary Approval Order, easily meets these requirements.

In accordance with the Preliminary Approval Order, the Claims Administrator has disseminated over 146,600 copies of the Postcard Notice[11] via First-Class Mail or email to potential Class Members and nominees. *See* Murray Decl., ¶¶4-11. The Claims Administrator also caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over the *Business Wire*. *Id.*, ¶12. In addition, a dedicated toll-free telephone number and website were established to

[11] Class Members also requested 14 Claim Packages, which were provided by Gilardi. *Id.*, ¶¶10-11.

assist potential Class Members with inquiries regarding the Litigation, the Settlement, and the claims process. *Id.*, ¶¶13-14.

The Notice provides Class Members, among other things, (i) an explanation of the nature of the Litigation and the claims asserted; (ii) the definition of the Class; (iii) the basic terms of the Settlement, including the amount and releases; (iv) the Plan of Allocation and estimated average recovery; (v) dates and deadlines for certain Settlement-related events; (vi) the reasons the parties are proposing the Settlement; (vii) the maximum amount of attorneys' fees and expenses that will be sought; (viii) a description of Class Members' right to request exclusion or to object to the Settlement, the Plan of Allocation, and/or the maximum attorneys' fees or expenses; (ix) notice of the binding effect of a judgment on Class Members; and (x) a way of obtaining additional information about the Litigation, by contacting Class Counsel or the Claims Administrator, or visiting the Settlement website. *See* Fed. R. Civ. P. 23(c)(2)(B); 15 U.S.C. §78u-4(a)(7). The Notice also provides recipients with information on how to submit a Proof of Claim and Release. *See* Murray Decl., Ex. B.

Plaintiffs and their counsel have satisfied all of the elements of the notice plan approved by the Court. *See generally* Murray Decl. Accordingly, the notice program implemented in this Litigation constitutes "the best notice . . . practicable under the circumstances" and satisfies the requirements of due process, Rule 23, and the PSLRA. *See* Fed. R. Civ. P. 23(c)(2)(B); *see also GMC*, 315 F.R.D. at 242 (finding similar notice program "satisfied Rule 23's notice requirement"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 11669877, at *3 (E.D. Tenn. Apr. 30, 2014) (finding that dissemination of notice by first class mail and posting on a hosted website satisfied the requirements of Rule 23).

VII. CONCLUSION

Counsel obtained an outstanding result for the Class. For the foregoing reasons, Plaintiffs respectfully request that the Court: (i) approve the $177.5 million Settlement as fair, reasonable, and adequate; (ii) approve the Plan of Allocation as fair and reasonable pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3); and (iii) certify the Class for settlement purposes.

DATED: February 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on February 15, 2024, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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