

GOLDMAN SCARLATO & PENNY, P.C.

Mark S. Goldman (PA Atty. No. 48049)
Eight Tower Bridge, Suite 1025
161 Washington Street
Conshohocken, PA 19428
Tel: (484) 342-0700
goldman@lawgsp.com

Liaison Counsel for Lead Plaintiff and the Settlement Class

POMERANTZ LLP

Patrick V. Dahlstrom
Louis C. Ludwig
Jared M. Schneider
10 South La Salle Street, Suite 3505
Chicago, Illinois 60603
Tel: (312) 377-1181
pdahlstrom@pomlaw.com
lcludwig@pomlaw.com

Co-Lead Counsel for the Settlement Class

LABATON SUCHAROW LLP

Jonathan Gardner
Alfred L. Fatale III
Lisa Streljau
140 Broadway
New York, NY 10005
Tel: (212) 907-0700
jgardner@labaton.com
afatale@labaton.com
lstreljau@labaton.com

THORNTON LAW FIRM LLP

Guillaume Buell
Madeline Korber
1 Lincoln Street
Boston, MA 02111
Tel: (617) 531-3933
gbuell@tenlaw.com
mkorber@tenlaw.com

Co-Lead Counsel for Lead Plaintiff and the Settlement Class

**IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA**

IN RE BRIGHTVIEW HOLDINGS, INC.
SECURITIES LITIGATION

CIVIL ACTION

Consolidated Case No. 2019-07222

**MEMORANDUM OF LAW IN SUPPORT OF CO-LEAD COUNSEL'S
MOTION FOR AN AWARD OF ATTORNEYS' FEES
AND PAYMENT OF EXPENSES**

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Co-Lead Counsel Labaton Sucharow LLP, Thornton Law Firm LLP, and Pomerantz LLP, hereby respectfully request, on behalf of Plaintiff's Counsel, in connection with the proposed settlement of the above-captioned class action: (i) an award of attorneys' fees in the amount of 33 1/3 % of the Settlement Fund, including accrued interest; (ii) payment of litigation expenses incurred by Plaintiff's Counsel in the amount of \$86,071.14, plus accrued interest; and (iii) an award of \$15,000 to Lead Plaintiff Gregory S. McComas for his efforts on behalf of the proposed Settlement Class.¹

The Motion is based on the following memorandum of law and the Declaration of Jonathan Gardner in Support of (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, (the "Gardner Declaration"), submitted herewith.² A proposed final order and judgment, negotiated by the Parties as part of the Settlement, is also submitted herewith.

¹ Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated August 27, 2020 (the "Stipulation"), filed with the Court on August 31, 2020. Labaton Sucharow LLP, Thornton Law Firm LLP, Pomerantz LLP, Goldman, Scarlato & Penny, P.C., and Shaye Fuchs are Plaintiff's Counsel in the Action.

² The Gardner Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the litigation efforts; and the risks and uncertainties of continued litigation, among other things. Citations to "¶" in this memorandum refer to paragraphs in the Gardner Declaration.

All exhibits referenced herein are annexed to the Gardner Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced herein as "Ex. __ - __." The first numerical reference is to the designation of the entire exhibit attached to the Gardner Declaration and the second alphabetical reference is to the exhibit designation within the exhibit itself.

PRELIMINARY STATEMENT AND HISTORY OF THE CASE

Plaintiff's Counsel have vigorously litigated this case on an entirely contingent basis against a tenacious and well-resourced defense. The \$11.5 million proposed Settlement, if approved by the Court, represents a very favorable outcome for the Settlement Class. The Settlement is particularly beneficial in light of the significant litigation risks present in this case. As discussed below, and detailed in the accompanying Gardner Declaration, Defendants advanced strong defenses to Lead Plaintiff's claims and there was considerable uncertainty throughout the case as to whether Lead Plaintiff would be able to achieve a meaningful recovery, if litigation continued.

To achieve the recovery here, Co-Lead Counsel devoted substantial resources to this litigation by, among other things: (i) conducting a thorough investigation of the allegations, including gathering and analyzing information about BrightView's "Managed Exit" initiative under which the Company exited its less profitable contracts and the Company's inability to obtain employees through the H-2B visa program; (ii) preparing and filing two class action complaints; (iii) opposing a petition for dismissal for forum *non conveniens* or to stay the action in light of BrightView's federal forum selection provision, which the Court denied; (iv) opposing Defendants' comprehensive preliminary objections to the amended complaint, which were overruled by the Court; (v) opposing a motion to stay discovery pending the disposition of Defendants' preliminary objections; (vi) moving for class certification; (vii) engaging in discovery including exchange of documents and defending Lead Plaintiff's deposition; (viii) consulting with experts on damages and causation issues; and (ix) engaging in settlement discussions under the guidance of a highly regarded and experienced mediator. At the time the Settlement was reached, Co-Lead Counsel had a deep understanding of the strengths and

weaknesses of the claims and defenses in the Action. *See generally* Gardner Declaration at §§III-V.

Co-Lead Counsel undertook these efforts and achieved the proposed Settlement in the face of substantial challenges with respect to establishing Defendants' liability, particularly with respect to proving materiality, falsity, damages, and overcoming a negative causation defense.

As discussed below, the 33 1/3% fee requested for these efforts is within the range of fees awarded in comparable class action settlements by many courts in Pennsylvania and within the Third Circuit. Additionally, the requested fee has the full support of Lead Plaintiff. *See* Ex. 1 at ¶4.

Finally, the reaction of the Settlement Class to date supports the motion. Pursuant to the Court's Preliminary Approval Order, 17,128 copies of the Notice have been mailed to potential Settlement Class Members and their nominees, and the Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire*. Ex. 2 at ¶¶2-9. The Notice advised potential Settlement Class Members that Co-Lead Counsel would seek fees in an amount not to exceed 33 1/3% of the Settlement Fund and payment of litigation expenses in an amount not to exceed \$150,000. *See* Ex. 2-A at 2, 7. While the November 23, 2020 deadline for Settlement Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no objection has been received.

QUESTIONS PRESENTED

1. Whether the Court should award Plaintiff's Counsel attorneys' fees in the amount of 33 1/3% of the Settlement Fund?

A. Suggested Answer: Yes

2. Whether the Court should approve payment of Plaintiff's Counsel's litigation expenses in the amount of \$86,071.14?

A. Suggested Answer: Yes

3. Whether the Court should award Lead Plaintiff Gregory S. McComas \$15,000 for his efforts on behalf of the proposed Settlement Class in the above-captioned Action?

A. Suggested Answer: Yes

LEGAL ARGUMENT

I. PLAINTIFF’S COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS’ FEES FROM THE COMMON FUND CREATED BY THEIR EFFORTS

It is well settled that attorneys who represent a class and achieve a benefit for class members are entitled to a reasonable fee as compensation for their services. The Supreme Court has long recognized that “a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980);³ *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 197 (3d Cir. 2005) (“attorney[s] whose efforts create, discover, increase, or preserve a [common] fund are entitled to compensation”).⁴

Pennsylvania courts have consistently adhered to this principle. *See, e.g., In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 193 (E.D. Pa. 2000) (“[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on class members.”). Courts have emphasized that the award of attorneys’ fees from a common fund serves to encourage skilled counsel to represent classes of persons who otherwise may not be able to retain counsel to represent them in complex and risky litigation. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (goal of percentage fee awards is to “ensur[e] that competent counsel continue to be willing to undertake

³ All internal quotations and citations are omitted unless otherwise noted.

⁴ Pennsylvania state courts have looked to federal courts in the context of complex class action litigation. *See, e.g., Milkman v. Am. Travellers Life Ins. Co.*, No. 011925, 2002 WL 778272, at *24 (Pa. Com. Pl. Apr. 1, 2002) (citing to Third Circuit and other federal case law when assessing attorneys’ fees in a class action).

risky, complex, and novel litigation”). Indeed, the Supreme Court has repeatedly recognized that private securities actions, such as the instant Action, are “an essential supplement to criminal prosecutions and civil enforcement actions,” brought by the U.S. Securities and Exchange Commission (“SEC”). *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); accord *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide “a most effective weapon in the enforcement’ of the securities laws and are a necessary supplement to [SEC] action”).

II. THE REQUESTED ATTORNEYS’ FEES ARE REASONABLE UNDER THE PERCENTAGE OF RECOVERY METHOD OR THE LODESTAR METHOD

A. The Requested Attorneys’ Fees Are Reasonable Applying the Percentage of Recovery Method

In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court recognized that under the common fund doctrine a reasonable fee may be based “on a percentage of the fund bestowed on the class. . . .” *Id.* at 900 n.16. Many courts have recognized that where a common fund has been created for the benefit of a class as a result of counsel’s efforts, the award of counsel’s fees on a percentage-of-the fund basis is the preferred approach. *See, e.g., In re Prudential Ins. Co. Am. Sales Practices Litig.*, 148 F.3d 283, 333 (3d Cir. 1998) (“[t]he percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for failure’”). In the Third Circuit, the percentage-of-recovery method is “generally favored” in cases involving a settlement that creates a common fund. *See Sullivan v. DB Invs. Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (favoring percentage of recovery method “because it allows courts to award fees from the [common] fund in a manner that rewards counsel for success and penalizes it for failure”); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *see also In re CIGNA Corp. Sec. Litig.*, No. 02-8088, 2007 WL 2071898, at *4 (E.D. Pa. July 13, 2007) (“For

many years, both the Supreme Court and Third Circuit have favored calculating attorneys' fees as a percentage of the class recovery.").

The rationale for compensating counsel in common fund cases on a percentage basis is sound. Principally, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. Indeed, one of the nation's leading scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. Professor Silver notes:

The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad. It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the report of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends otherwise. No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.

In view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions. The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this.

Charles Silver, Class Actions In The Gulf South Symposium, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809, 1819-20 (2000) (emphasis added and footnotes omitted).

The requested fee of 33 1/3% here is within the range of percentage fees typically awarded by courts in Pennsylvania and within the Third Circuit. *See Ikon*, 194 F.R.D. at 194 ("Percentages awarded have varied considerably, but most fees appear to fall in the range of

nineteen to forty-five percent.”); *In re Ravisent Techs., Inc. Sec. Litig.*, No. CIV.A.00-CV-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) (“courts within this Circuit have typically awarded attorneys’ fees of 30% to 35% of the recovery, plus expenses”).

A review of attorneys’ fees awarded in class actions with comparably sized (and larger) settlements in both Pennsylvania state and federal courts also supports the fee request. *See, e.g., In re Bridgeport Fire Litig.*, 8 A.3d 1270, 1289 (Pa. Super. Ct. 2010) (affirming award of 33.3% of \$35 million settlement); *In re Herley Indus. Inc. Sec. Litig.*, 2:06-cv-02596-JS, slip op. at 2 (E.D. Pa. Sept. 13, 2010) (awarding 33% of \$10 million settlement) (Ex. 10);⁵ *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 497 (E.D. Pa. 2003) (awarding 33 1/3% of \$7 million settlement and noting that the “33 1/3% fee request in this complex case is within the reasonable range”); *In re Ravisent Techs., Inc. Sec. Litig.*, 2005 WL 906361, at *11 (awarding 33 1/3% of \$7 million settlement); *In re Unisys Corp. Sec. Litig.*, Civ. A. No. 99–5333, 2001 WL 1563721 (E.D. Pa. Dec. 6, 2001) (awarding 33% of \$5,750,000 settlement); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 433 (E.D. Pa. 2001) (awarding a \$16 million fee, which was one-third of \$48 million settlement); *see also Rodriguez v. Fulton Bank, N.A.*, No. 1303748, 2016 WL 7163262 (Pa. Com. Pl. Mar. 7, 2016) (approving a fee of 40% of the cash fund); *Smith v. Upto65.com*, No. GD 08-00651, 2008 WL 4453493 (Pa. Com. Pl. Apr. 11, 2008) (approving fee calculated as forty percent of recovery, in a case where plaintiffs sought to recover funds that were misappropriated by defendants through an online Ponzi scheme).

In sum, the percentage fee requested here is reasonable and within the range of percentage fees awarded in Pennsylvania courts and in connection with similar settlements.

⁵ Unreported “slip” opinions are provided in Exhibit 10 to the Gardner Declaration.

B. The Requested Attorneys' Fees Are Reasonable Applying the Lodestar Method

“Courts will often use more than one method to ensure that an award that would be acceptable under one approach is not entirely inappropriate under another approach.” *Milkman*, 2002 WL 778272, at *24-25 (noting that courts in Pennsylvania use both the lodestar and the percentage of recovery method, and applying both.); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995) (“it is sensible for a court to use a second method of fee approval to cross check its conclusion under the first method”).

“Under [the lodestar] approach, the initial estimate of a reasonable attorney’s fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Adjustments to that fee then may be made as necessary in the particular case.” *Milkman*, 2002 WL 778272, at *26. Courts in Pennsylvania have recognized that a court may consider the “discretionary application of a fee enhancement to reflect the contingent risk of the particular claim at issue.” *Id.* at *27.

In *Milkman*, the Court of Common Pleas of Pennsylvania considered the degree of risk in the case, the fact that the case was brought on a contingency basis, as well as the relief obtained, in ultimately awarding a 3.0 multiplier on counsel’s lodestar. *Id.* at *28. Likewise, other courts within Pennsylvania have frequently awarded multiples on counsels’ lodestars. *See, e.g., Prudential*, 148 F.3d at 341 (“[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied”); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (awarding multiplier of 6.96).

Here, Plaintiff’s Counsel collectively expended 3,197.32 hours in the prosecution of this case. ¶80; Exs. 3-A, 4-A, 5-A, 6-A, and Ex. 7 (Summary Table of Lodestars and Expenses). Based on Plaintiff’s Counsel’s current hourly rates, the total lodestar is \$2,019,256.20 for work

through on or about November 2, 2020.⁶ *See id.* The hourly rates of Plaintiff’s Counsel range from \$725 to \$1,100 for partners, \$510 to \$775 for of counsels, and \$385 to \$500 for associates and other attorneys. ¶79; Exs. 3-A, 4-A, 5-A and 6-A.

It is respectfully submitted that the hourly rates used in Plaintiff’s Counsel’s lodestar calculation are reasonable in light of prevailing market rates for lawyers with comparable levels of experience and expertise in securities litigation and other complex class action litigation. The rates are also less than, or comparable to, those used by peer defense-side law firms litigating matters of similar magnitude. Sample defense firm rates in 2019 gathered by Labaton Sucharow from bankruptcy court filings nationwide often exceeded these rates. *See* ¶79; Ex. 8.

Accordingly, the requested fee of \$3,832,950 would represent a reasonable “multiplier” of 1.90 on this lodestar. It is respectfully submitted that the lodestar approach supports the requested attorneys’ fee.

III. THE REQUESTED FEES ARE REASONABLE PURSUANT TO THE FACTORS SET FORTH UNDER PENNSYLVANIA RULE OF CIVIL PROCEDURE 1716

In determining the reasonableness of a fee request, Pennsylvania courts consider the following five factors: (1) the time and effort reasonably expended by the attorney in the litigation; (2) the quality of the services rendered; (3) the results achieved and benefits conferred upon the class or upon the public; (4) the magnitude, complexity and uniqueness of the litigation; and (5) whether the receipt of a fee was contingent on success. *See* Pa. R. Civ. P. 1716 (“Rule 1716”); *In re Bridgeport Fire Litig.*, 8A 3d at 1289 (setting forth the Rule 1716 factors); *Milkman*, 2002 WL 778272, at *24 (same).

⁶ The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989).

As set forth below, an analysis of the Rule 1716 factors militate in favor of approving the requested 33 1/3% fee.

A. Time and Effort Expended on the Action

The time and effort expended by Plaintiff's Counsel in prosecuting the Action and achieving the Settlement support the requested fee. As explained in the Gardner Declaration, Plaintiff's Counsel, among other things: (i) conducted a thorough investigation concerning the allegedly misleading misrepresentations and omissions made by Defendants in connection with the Company's June 29, 2018 Offering, including gathering and analyzing information about BrightView's "Managed Exit" initiative under which the Company exited its less profitable contracts, as well as the Company's alleged inability to obtain employees through the H-2B visa program; (ii) prepared and filed two detailed class action complaints; (iii) opposed a petition for dismissal for forum *non conveniens* or to stay the action in light of BrightView's federal forum selection provision, which the Court denied; (iv) researched and drafted an opposition to Defendants' comprehensive preliminary objections to the amended complaint, which were overruled by the Court; (v) opposed a motion to stay discovery pending the disposition of Defendants' preliminary objections to the amended complaint; (vi) moved for class certification; (vii) engaged in discovery including exchanging documents and defending Lead Plaintiff's deposition; (viii) consulted with experts on damages and causation issues; and (ix) engaged in settlement discussions under the guidance of a highly regarded and experienced mediator. *See generally* Gardner Declaration at §§III-V.

In light of the above efforts, Plaintiff's Counsel expended more than 3,197 hours prosecuting this Action with a lodestar value of \$2,019,256.20. *See* Ex. 7. At all times, Co-Lead Counsel took care to staff the matter efficiently and to avoid duplication of effort. The substantial time and effort devoted to this case by Plaintiff's Counsel, and their effective

management of the litigation, was critical to obtaining the favorable result achieved by the Settlement. Co-Lead Counsel's efforts will continue, if the Court approves the Settlement, as they work through the settlement administration process, assist Settlement Class Members, and distribute the Settlement proceeds, without seeking any additional compensation.

Accordingly, the amount of time and effort devoted to this Action by Plaintiff's Counsel confirm that the fee award requested is reasonable.

B. Skill and Quality of Plaintiff's Counsel

The quality of the legal representation also supports the requested fee award. The Explanatory Comment to Rule 1716 explains, in discussing the "quality of services rendered" factor, that "[c]ounsel who possess or are reputed to possess more experience, knowledge and legal talent are entitled to and generally command compensation superior to counsel who are less endowed." *See also In re ViroPharma Inc. Sec. Litig.*, No. CV 12-2714, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016) (the skill and efficiency of attorneys are measured by, among other things, "the standing, experience and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel").

Plaintiffs' Counsel have each earned a reputation for excellence through many years of litigating complex civil actions, particularly the prosecution of securities class actions. As set forth in the firm résumés filed concurrently herewith, Plaintiff's Counsel's experience, resources, and high-quality attorneys have allowed them to obtain significant recoveries throughout the country on behalf of their clients. *See* Exs. 3-D, 4-C, 5-C, and 6-C.

The quality of opposing counsel is also important in evaluating the quality of the work done by Plaintiff's Counsel. *See, e.g., In re ViroPharma*, 2016 WL 312108, at *16. Plaintiff's Counsel were opposed in this Action by experienced and skilled counsel from the law firms of Kramer Levin Naftalis & Frankel LLP; Morgan, Lewis & Bockius LLP; Dechert LLP; Skadden,

Arps, Slate, Meagher & Flom LLP; Pietragallo Gordon Alfano Bosick & Raspanti, LLP, all excellent law firms with well-deserved reputations for vigorous advocacy on behalf of their clients. In the face of such knowledgeable and experienced opposition, Plaintiff's Counsel were able to develop a case that was sufficiently strong to enable a settlement in an amount that Plaintiff's Counsel believe is highly favorable to the Settlement Class.

C. The Result Achieved

Courts have consistently recognized that the result achieved is an important factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical factor is the degree of success obtained”); *In re ViroPharma Inc.*, 2016 WL 312108, at *16. Here, Plaintiff's Counsel, on behalf of Lead Plaintiff, have secured a Settlement that provides for a substantial and certain payment of \$11,500,000. The Settlement is greater than the median value of securities class action settlements in actions asserting claims under the Securities Act. For the ten years from 2010 through 2019, the median settlement amount in such cases was \$7.2 million. *See* Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements – 2019 Review and Analysis*, at 7 (Cornerstone Research 2020), Ex. 9.

Furthermore, as detailed in the Gardner Declaration, according to Lead Plaintiff's consulting loss causation and damages expert, assuming Lead Plaintiff was able to establish liability and assuming that all shares purchased from the date of the IPO through April 16, 2019 (the date of suit) were traceable to the IPO, and without factoring in Defendants' negative causation arguments, maximum aggregate damages are estimated to be approximately \$212.5 million, making the Settlement a recovery of 5.4% of damages. However, Defendants would have vigorously pursued their negative causation arguments at every stage of the litigation and, if Defendants succeeded in this regard (and only those dates when there was a statistically significant price drop are counted), estimated aggregate damages decrease to \$74 million,

making the Settlement a recovery of 15.5% of damages. Further, if Lead Plaintiff was unsuccessful in proving traceability for shares purchased after the date of the IPO (and if Defendants' negative causation arguments are credited), aggregate damages fall further to \$50.6 million, making the Settlement a recovery of 22.7% of damages. ¶¶6, 59.

Thus, the recovery here is between 5.4% - 22.7% of estimated damages and a very favorable result that supports the fee request. *See, e.g., In re Greenwich Pharm. Sec. Litig.*, No. 92-3701, 1995 WL 251293, at *5 (W.D. Pa. Apr. 26, 1995) (approving \$4.375 million settlement that obtained 4.4% of estimated maximum damages); *Schuler v. Meds. Co.*, No. 14-1149, 2016 WL 3457218, at *8 (D.N.J. June 24, 2016) (approving \$4,250,000 settlement that reflected approximately 4.0% of estimated recoverable damages and noting percentage "falls squarely within the range of previous settlement approvals"); *see also* Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation at §I.B.2.

D. The Magnitude, Complexity and Uniqueness of the Litigation

Here, at every turn, the litigation raised difficult legal and factual issues that required creativity and sophisticated analysis. As one court stated, "[s]ecurities litigation is tough stuff." *W. Palm Beach Police Pension Fund*, 2017 WL 4167440, at *8; *see also In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. at 179 (noting the "inherently complicated nature of large class actions alleging securities fraud...").

As detailed in the Gardner Declaration, the Action alleged violations of the Securities Act, raising a panoply of difficult legal and factual issues that required sophisticated analysis of the Offering Documents, BrightView's Managed Exit initiative, the H-2B visa program, and BrightView's financial results. *See, e.g.,* Gardner Declaration at §§II-III. For example, among other things, Defendants filed a petition for dismissal for forum *non conveniens* or for a stay

while the Delaware Supreme Court resolved an appeal of an order in a case pending in the Court of Chancery regarding the validity of federal forum selection provisions in the certificates of incorporation of several companies. ¶¶17-19. While the Court denied Defendants’ petition, had the Parties not agreed to settle, Defendants would have continued to challenge Lead Plaintiff’s choice of forum. Indeed, after the Court had denied Defendants’ petition, the Delaware Supreme Court reversed the lower court’s order and upheld the facial validity of corporations’ forum selection clauses leaving it up to each individual state court to access whether to enforce it. *See Salzberg v. Sciabacucchi*, 227 A.3d 102, 116 (Del. 2020); ¶¶19, 50. Had there not been a settlement, Defendants would have undoubtedly reasserted their challenge to this forum. Even if the case proceeded before this Court, the complexity, expense, and duration of continued litigation through further briefing on jurisdictional issues, class certification, summary judgment, preparing and trying the case before a jury, subsequent post-trial motion practice, and a likely appeal of the Court’s rulings on class certification, summary judgment, post-trial motions, and a jury verdict would be significant.

Notably, Defendants would have continued to raise and press a strong “negative causation” defense, arguing that the alleged materially misleading statements and omissions in the Registration Statement did not cause a substantial portion of the damages Lead Plaintiff claimed, because most of the declines in the stock prices after the Offering were caused by other factors. *See, eg.*, ¶¶55-61.

Barring a settlement, there is no question that this case would be litigated for years, taking a considerable amount of court time and costing millions of additional dollars, with the possibility that the end result would be no better for the class, and might be worse. *See W. Palm Beach Police Pension Fund v. DFC Global Corp.*, No. 13-6731, 2017 WL 4167440, at *8 (E.D.

Pa. Sept. 20, 2017) (noting that the complexity of the case and duration of the litigation weighed in favor of requested fee where “significant discovery was still left to be conducted... and motion practice and jury preparation was on the horizon”).

E. Whether the Receipt of a Fee was Contingent on Success

Plaintiff’s Counsel undertook this Action on a wholly contingent-fee basis, assuming a significant risk that the Action would yield no recovery and leave them uncompensated. Courts have consistently recognized that this risk is an important factor favoring an award of attorneys’ fees. *See, e.g., Milkman*, 2002 WL 778272, at *25 (“The risk to Class Counsel in this matter was great, as receiving attorneys’ fees was entirely contingent on a successful outcome of the litigation.”); *see also W. Palm Beach Police Pension Fund*, 2017 WL 4167440, at *8 (“There is a greater risk of nonpayment for cases taken on a contingent fee basis.”); *In re ViroPharma*, 2016 WL 312108, at *16 (“Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval.”).

The Supreme Court has emphasized that private securities actions such as this provide “‘a most effective weapon in the enforcement’ of the securities laws and are ‘a necessary supplement to [SEC] action.’” *Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 310. Indeed, there have been many class actions in which plaintiffs’ counsel took on the risk of pursuing claims on a contingent basis, expended thousands of hours and dollars, yet received no remuneration whatsoever despite their diligence and expertise. *See* ¶¶84-89. For example, Labaton Sucharow tried *In re JDS Uniphase Securities Litigation*, Case No. C-02-1486 CW (EDL) slip op, (N.D. Cal. Nov. 27, 2007) through to a disappointing verdict for the defendants, receiving no compensation and expending millions of dollars in time and expenses. ¶86. *See also In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff’d*, 627 F.3d 376 (9th Cir. 2010) (granting summary judgment to defendants after eight years of

litigation, and after plaintiff's counsel incurred over \$6 million in expenses and worked over 100,000 hours, representing a lodestar of approximately \$48 million). Plaintiff's Counsel are aware of many other hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts by members of the plaintiff's bar produced no fee for counsel. See, e.g., *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1998) (reversing plaintiffs' jury verdict for securities fraud); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing \$81 million jury verdict and dismissing case with prejudice); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); ¶87. Even plaintiffs who get past summary judgment and succeed at trial may find a judgment in their favor overturned on appeal or on a post-trial motion. See, e.g., *Glickenhau & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (reversing and remanding jury verdict of \$2.46 billion after 13 years of litigation on loss causation grounds and error in jury instruction under *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S.Ct. 2296 (2011)); ¶87.

Here, because Plaintiff's Counsel's fee was entirely contingent, the only certainty was that there would be no fee without a successful result and that such result would only be realized after significant amounts of time, effort, and expense had been expended. Unlike counsel for the Defendants, who were paid and reimbursed for their out-of-pocket expenses on a current basis, Plaintiff's Counsel have received no compensation for their efforts or any expense reimbursement during the course of the Action. Plaintiff's Counsel have risked non-payment of \$86,071.14 in expenses and \$2,019,256.20 in time worked on this matter, knowing that if their efforts were not successful, no fees or expenses would be paid.

For all the foregoing reasons, Co-Lead Counsel respectfully request that the Court award Plaintiff's Counsel attorneys' fees in the amount of 33 1/3% of the Settlement Fund.

IV. PLAINTIFF'S COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED

Plaintiff's Counsel have incurred expenses in the aggregate amount of \$86,071.14 in prosecuting the Action. *See* Exs. 3-B, 3-C, 4-B, 5-B, 6-B, and 7. These expenses are outlined in Plaintiff's Counsel's individual fee and expense declarations submitted to the Court concurrently herewith. *Id.*

The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the costs are of the type typically billed by attorneys to paying clients in the private marketplace. *See W. Palm Beach Police Pension Fund*, 2017 WL 4167440, at *9 ("counsel are 'entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action'"); *ViroPharma*, 2016 WL 312108, at *18 (same); *Hall v. AT&T Mobility LLC.*, No. 07-5325, 2010 WL 4053547, at *23 (D.N.J. Oct. 13, 2010) ("Courts have generally approved expenses arising from photocopying, use of the telephone and fax, postage, witness fees, and hiring of consultants."). The categories of expenses for which counsel seek payment here are the type of expenses routinely charged to fee paying clients and, therefore, should be paid out of the common fund.

One of the main expenses here relates to work performed by Lead Plaintiff's consulting experts (\$32,471.25 or approximately 38% of total expenses). As discussed in the Gardner Declaration, the services of consulting experts were necessary for preparing estimates of damages, analyzing causation issues, and assisting with the preparation of the Plan of Allocation.

¶97. Plaintiff's Counsel received crucial advice and assistance from such experts throughout the

course of the Action and utilized these experts in order to efficiently frame the issues, gather relevant evidence, make a realistic assessment of provable damages, and structure a resolution of the Action.

Plaintiff's Counsel also incurred costs related to travel and working late hours, such as working meals, lodging, and transportation, which total \$14,802.94. ¶99. Co-Lead Counsel also paid \$13,980 in mediation fees assessed by the Mediator in this matter. ¶100.

Computerized research totals \$11,141.69. These are the charges for computerized factual and legal research services, including PACER, Westlaw, LexisNexis Risk Solutions and LexisNexis. These services allowed counsel to perform media searches on the Company, obtain analysts' reports and financial data for the Company, and conduct legal research. It is standard practice for attorneys to use LEXIS/Nexis and Westlaw to assist them in researching legal and factual issues and reimbursement is proper. ¶98.

The other expenses for which Plaintiff's Counsel seek payment are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, duplicating costs, long distance telephone and facsimile charges, court fees, and postage and delivery expenses. ¶101.

In sum, Plaintiff's Counsel's expenses, in an aggregate amount of \$86,071.14, were reasonable and necessary to the prosecution of the Action and should be approved.

V. LEAD PLAINTIFF'S REQUEST FOR A SERVICE AWARD

Lead Plaintiff Gregory S. McComas, Sr. seeks an award of \$15,000 for the time and effort he dedicated to serving as Lead Plaintiff in the Action and ensuring that the Settlement Class was adequately represented. His efforts are described in his declaration, filed concurrently herewith. *See* Ex. 1. at ¶¶2-5.

Such awards have been regularly provided by courts in Pennsylvania. *See, e.g., Milkman*, 2002 WL 778272, at *31 (awarding payment to class representatives in the amounts of \$10,000, \$7,500, and \$5,000); *Rodriguez v. Fulton Bank, N.A.*, No. 1303748, 2016 WL 7163262 (Pa. Com. Pl. Mar. 7, 2016) (awarding class representative a service award of \$5,000); *Public Emps.' Ret. Sys. of Miss. v. Endo Int'l plc, et al.*, No. 2017-02081-MJ, slip op. at 14 (Pa. Comm. Pl. Dec. 5, 2019) (awarding plaintiff a service award in the amount of \$21,602.50) (Ex. 10); *see also W. Palm Beach Police Pension Fund*, 2017 WL 4167440, at *10 (awarding lead plaintiffs \$5,560, \$7,080, and \$9,000 for their work relating to the representation of the class).

Awards to lead plaintiffs in federal securities class actions are also regularly made. *In re Oppenheimer Rochester Funds Grp. Sec. Litig.*, No. 09-md-02063, slip op. at 5 (D. Colo. Nov. 6, 2017) (awarding \$74,000 in lost wages and expenses to lead plaintiff) (Ex. 10); *In re Satyam Comput. Servs. Ltd. Sec. Litig.*, No. 09-MD-2027-BSJ, slip op. at 3-4 (S.D.N.Y. Sept. 13, 2011) (awarding \$193,111 to lead plaintiffs) (Ex. 10); *In re Marsh & McLennan Co. Sec. Litig.*, No. 04-cv-08144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009) (awarding \$144,657 to the New Jersey Attorney General's Office and \$70,000 to the Ohio Funds). In fact, courts "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005).

For the foregoing reasons, it is respectfully submitted that an award of \$15,000 to Lead Plaintiff would be reasonable under the circumstances before the Court.

CONCLUSION

For all the foregoing reasons, Co-Lead Counsel respectfully request that the Court award attorneys' fees in the amount of 33 1/3% of the Settlement Fund, \$86,071.14 in litigation expenses incurred in connection with the prosecution of the Action, and \$15,000 to Lead Plaintiff for his efforts on behalf of the Settlement Class.

Dated: November 9, 2020

Respectfully submitted,

GOLDMAN SCARLATO & PENNY, P.C.

/s/ Mark S. Goldman

Eight Tower Bridge, Suite 1025
161 Washington Street
Conshohocken, PA 19428
Tel: (484) 342-0700
goldman@lawgsp.com

*Liaison Counsel for Lead Plaintiff and the
Settlement Class*

LABATON SUCHAROW LLP

Jonathan Gardner*
Alfred L. Fatale III*
Lisa Strejlau*
140 Broadway
New York, NY 10005
Tel: (212) 907-0700
jgardner@labaton.com
afatale@labaton.com
lstrejlau@labaton.com

THORNTON LAW FIRM LLP

Guillaume Buell*
Madeline Korber*
1 Lincoln Street
Boston, MA 02111
Tel: (617) 531-3933
gbuell@tenlaw.com
mkorber@tenlaw.com

*Co-Lead Counsel for Lead Plaintiff and the
Settlement Class*

POMERANTZ LLP

Patrick V. Dahlstrom*

Louis C. Ludwig*

Jared M. Schneider*

10 South La Salle Street, Suite 3505

Chicago, Illinois 60603

Tel: (312) 377-1181

pdahlstrom@pomlaw.com

lcludwig@pomlaw.com

Co-Lead Counsel for the Settlement Class

* admitted *pro hac vice*