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**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 LEAD PLAINTIFF'S
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT
AND PLAN OF ALLOCATION**

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Lead Plaintiff Gregory S. McComas, Sr. (“McComas” or “Lead Plaintiff”), on behalf of himself and all other members of the proposed Settlement Class, respectfully submits this brief in support of his motion for: (i) final approval of the proposed Settlement of the above-captioned class action (the “Action”); (ii) approval of the proposed plan of allocation for distributing the proceeds of the Settlement to eligible claimants (the “Plan of Allocation”); and (iii) final certification of the 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.

PRELIMINARY STATEMENT AND HISTORY OF THE CASE

As set forth in the Stipulation, Lead Plaintiff has agreed to settle all claims asserted in the Action against Defendants³ or that could have been asserted arising out of the Company’s June

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.

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 negotiations leading to the Settlement; and the risks and uncertainties of continued litigation; among other things. Citations to “¶” in this memorandum refer to paragraphs in the Gardner Declaration.

³ “Defendants” are BrightView Holdings, Inc. (“BrightView” or the “Company”); MSD Partners L.P., MSD Valley Investment, LLC (collectively, “MSD”); Kohlberg Kravis Roberts & Co. L.P., and KKR BrightView Aggregator L.P. (collectively “KKR”); Andrew V. Masterman, John A. Feenan; Louay H. Khatib; James R. Abrahamson, David R. Caro, Paul E. Raether, Richard W. Roedel, and Joshua T. Weisenbeck (collectively the “Individual Defendants”); and Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, KKR Capital Markets LLC, UBS
(. . . continued)

29, 2018 initial public offering of common stock against the Released Defendant Parties, in exchange for the payment of \$11,500,000 (the “Settlement Amount”), for the benefit of the Settlement Class. The terms of the Settlement are detailed in the Stipulation, which was executed by the Parties on August 27, 2020, after a rigorous mediation process that stretched over several weeks and was overseen by a highly regarded and respected mediator, Michelle Yoshida. ¶¶40-44.

As described below and in the accompanying Gardner Declaration, the decision to settle was well-informed by more than a year of contentious and hard-fought litigation that involved a comprehensive investigation before the filing of two complaints; briefing on Defendants’ petition for dismissal for forum *non conveniens* or for a stay in light of BrightView’s federal forum selection provision, which the Court denied; briefing on Defendants’ comprehensive preliminary objections to the amended complaint, which were overruled by the Court; briefing on Defendants’ motion to stay discovery pending the disposition of Defendants’ preliminary objections; moving for class certification; engaging in discovery (which included the exchange of documents by Defendants and Lead Plaintiff, and defending the deposition of Lead Plaintiff); Lead Plaintiff’s consultations with experts; and engaging in settlement discussions under the guidance of highly respected mediator. *See generally* Gardner Decl. at §§III-V.

The \$11.5 million Settlement represents a recovery of between approximately 5.4% and 22.7% of class wide damages (of between \$50.6 to \$212.5 million) estimated by Lead Plaintiff’s

(continued . . .)

Securities LLC, Robert W. Baird & Co. Incorporated, Credit Suisse Securities (USA) LLC, Macquarie Capital (USA) Inc., Jefferies LLC, Mizuho Securities USA LLC, Morgan Stanley & Co. LLC, RBC Capital Markets, LLC, Nomura Securities International, Inc., Stifel, Nicolaus & Company, Incorporated, William Blair & Company, L.L.C., Moelis & Company LLC, and SMBC Nikko Securities America, Inc. (collectively the “Underwriter Defendants”).

consulting damages expert, depending upon whether Lead Plaintiff was able to meet its burden of establishing that all shares purchased from June 29, 2018 (the date of the IPO) through April 16, 2019 (the date of suit) were traceable to the IPO, and whether and to what extent Defendants could meet their burden of establishing a negative causation defense. *See* ¶¶6, 59. Co-Lead Counsel, who have extensive experience and expertise in prosecuting securities class actions, believe that the Settlement represents a very favorable resolution of this complex litigation in light of the specific risks of continued litigation, particularly the challenges regarding materiality, falsity, traceability, negative causation, and damages. Lead Plaintiff, who was actively involved during the course of the Action, diligently represented the Settlement Class and has approved the Settlement. *See* Declaration of Gregory S. McComas, Sr., Ex. 1.⁴

Accordingly, Lead Plaintiff respectfully requests that the Court grant final approval of the Settlement and certify the Settlement Class. In addition, the Plan of Allocation, which was developed with the assistance of Lead Plaintiff’s consulting damages expert, is a fair and reasonable method for distributing the Net Settlement Fund and should also be approved by the Court.

PRELIMINARY APPROVAL AND THE NOTICE PROGRAM

On September 15, 2020, the Court entered an order preliminarily approving the Settlement and approving the proposed forms and methods of providing notice to the Settlement Class (the “Preliminary Approval Order”). Pursuant to and in compliance with the Preliminary Approval Order, through records maintained by BrightView’s transfer agent and information

⁴ 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.

provided by brokerage firms and other nominees, the Court-appointed Claims Administrator A.B. Data Ltd. (“A.B. Data”), caused, among other things, the Notice and Claim Form (together, the “Notice Packet”) to be mailed by first-class mail to potential Settlement Class Members. *See* Declaration of Nancy V. Rogers Regarding: (A) Mailing of the Notice and Proof of Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion and Objections, dated October 29, 2020, Ex. 2 at ¶¶2-8. A total of 17,128 Notice Packets have been mailed as of October 29, 2020. *Id.* at ¶8. On October 12, 2020, the Summary Notice was published in *The Wall Street Journal* and was disseminated over the internet using *PR Newswire*. *Id.* at ¶9 and Exhibits B and C attached thereto. The Notice and Claim Form were also posted, for review and easy downloading, on the website established by A.B. Data for purposes of this Settlement. *Id.* at ¶11.

The Notice described, *inter alia*, the claims asserted in the Action, the contentions of the Parties, the course of the litigation, the terms of the Settlement, the maximum amounts that would be sought in attorneys’ fees and expenses, the Plan of Allocation, the right to object to the Settlement, and the right to seek to be excluded from the Settlement Class. *See generally* Ex. 2-A. The Notice also gave the deadlines for objecting, seeking exclusion, submitting claims, and advised potential Settlement Class Members of the scheduled Settlement Hearing before this Court. *Id.* While the deadline for requesting exclusion or objecting to the Settlement (November 23, 2020) has not yet passed, to date there have been no requests for exclusion and no objections to the proposed Settlement or the Plan of Allocation have been filed.⁵

⁵ Should any objections or requests for exclusion be received, Lead Plaintiff will address them in his reply papers, which are due to be filed with the Court on December 7, 2020.

QUESTIONS PRESENTED

1. Whether the Court should grant final approval to the proposed class action Settlement?

A. Suggested Answer: Yes

2. Whether the Court should finally certify the Settlement Class, for purposes of the Settlement only?

A. Suggested Answer: Yes

3. Whether the Court should approve the proposed Plan of Allocation for distributing the proceeds of the Settlement to eligible Settlement Class Members?

A. Suggested Answer: Yes

LEGAL ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED

A. The Standards for Final Approval of a Class Action

“[S]ettlements are favored in class action lawsuits.” *Dauphin Deposit Bank & Trust Co. v. Hess*, 727 A.2d 1076, 1080 (Pa. 1999). As the United States Court of Appeals for the Third Circuit Court has recognized, “[t]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged.” *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004);⁶ accord, *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (“The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.”);⁷ see also *Moore v. Comcast Corp.*, No. 08-773, 2011 WL 238821,

⁶ 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 a class action settlement).

⁷ All internal quotations and citations are omitted unless otherwise noted.

at *3 (E.D. Pa. Jan. 24, 2011) (“Settlement of complex class action litigation conserves valuable judicial resources, avoids the expense of formal litigation, and resolves disputes that otherwise could linger for years.”).

Pennsylvania Rule of Civil Procedure 1714(a) provides that “no class action shall be compromised, settled or discontinued without the approval of the court after hearing.” In *Brophy v. Phila. Gas Works*, 921 A.2d 80 (Pa. Commw. 2007), the court explained that “a trial court’s approval of a class action settlement as fair involves a two-step process.” *Id.* at 88. Given the Court’s preliminary approval of the Settlement, entry of the Preliminary Approval Order, and dissemination of the Notice, we are now at the second-step, the Court’s consideration of final approval.

The standard for determining whether to grant final approval to a class action settlement is whether the proposed settlement falls within a “range of reasonableness” after considering the following seven factors: (1) the risks of establishing liability and damages; (2) the range of reasonableness of the settlement in light of the best possible recovery; (3) the range of reasonableness of the settlement in light of all the attendant risks of litigation; (4) the complexity, expense, and likely duration of the litigation; (5) the state of proceedings and the amount of discovery completed; (6) the recommendations of competent counsel; and (7) the reaction of the class to the settlement. *Dauphin*, 727 A.2d at 1078; *accord Buchanan v. Century Fed. Sav. & Loan Ass’n.*, 393 A.2d 704, 709 (Pa. Super. Ct. 1978) (citing *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975)).⁸

⁸ Federal Rule of Civil Procedure 23(e), to the extent its consideration is helpful to the Court, was amended to, among other things, specify that in considering approval of a settlement, courts should assess whether: (i) the class representatives and class counsel have adequately represented the class; (ii) the settlement was negotiated at arm’s-length; (iii) the relief is adequate
(. . . continued)

Since a settlement is a compromise, the trial court should not decide the merits of the case. *See Buchanan*, 393 A.2d at 710-11. Moreover, the trial court should not attempt to substitute its own judgment for that of the parties, but rather must consider all relevant factors and view the negotiated settlement as a whole. *See e.g., Dauphin*, 727 A.2d at 1078 (“As with valuation problems in general, there will usually be a difference of opinion as to the appropriate value of a settlement. For this reason, judges should analyze a settlement in terms of a ‘range of reasonableness’ and should generally refuse to substitute their business judgment for that of the proponents.”).

**B. Application of the Relevant Factors Supports
Final Approval of the Settlement**

1. The Risks Associated with Continued Litigation

“One very significant factor in determining whether a settlement is reasonable is the risk involved in proving liability and damages.” *Treasurer of State v. Ballard, Spahr, Andrews & Ingersoll LLP*, 866 A.2d 479, 484 (Pa. Commw. 2005). “The risks surrounding a trial on the merits are always considerable.” *Milkman*, 2002 WL 778272, at *13. A reviewing court “must recognize the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Id.* Although Lead Plaintiff believes that the case against Defendants is very strong, that confidence must be tempered by the fact that the Settlement is certain and that every case involves significant risk of no recovery, particularly in a complex case such as the one at bar. Here, there was no Company admission, or

(continued . . .)

given “the costs, risks, and delay of trial and appeal,” “the effectiveness of distributing the relief to the class”, “the terms of any proposed award of attorney’s fees,” and “any agreements required to be identified under Rule 23(e)(3)”; and whether (iv) the settlement treats class members equitably relative to each other. *See* amendments to Rule 23(e)(2)(A)-(D). Many of these considerations are already among the factors that courts within Pennsylvania weigh and each are readily satisfied here, as discussed below.

parallel governmental proceeding, which would have aided Lead Plaintiff in proving key elements of the case. There is no question that to prevail here, Lead Plaintiff would have confronted a number of legal and factual challenges, while trying to prove difficult securities claims.

Furthermore, the Delaware Supreme Court's recent decision in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020) ("*Blue Apron*"), posed a significant risk to Lead Plaintiff's ability to continue to litigate the Action in this court. ¶50. In *Blue Apron*, the Delaware Supreme Court upheld the facial validity of a corporation's forum selection clause, leaving it up to each individual state court to assess whether to enforce such provisions. 227 A.3d at 108, 109; ¶50. *Blue Apron* would have potentially reopened the question of whether the forum selection clause contained in BrightView's corporate charter should be enforced. Lead Plaintiff believes the Court could find the clause unenforceable, but assuming *arguendo* that the clause were to be enforced, this case would instead have to proceed in federal court where the parties would re-litigate the same issues already decided here. Defendants would likely present arguments such as those stated *supra*, as well as potentially argue that Lead Plaintiff's claims are time-barred from being recommenced in federal court. This all would have resulted in significant delays in the litigation.

(a) **Risks Concerning Liability**

The claims in the Action arise from Sections 11 and 15 of the Securities Act. To prevail, Lead Plaintiff would need to prove the existence of material omissions, misrepresentations, or undisclosed known trends and uncertainties at the time of the Company's Offering.

Defendants have vigorously contested these claims and would have continued to argue and present evidence that the Registration Statement did not contain material omissions or misrepresentations. For example, Lead Plaintiff alleges that the Registration Statement failed to

disclose that, at the time of the Offering, BrightView had begun a “Managed Exit” initiative, in which it was canceling or declining low-profit contracts around the country, and that at the time of the Offering, BrightView was unable to obtain sufficient employees through the H-2B visa program as it had previously heavily relied on. ¶¶10, 13-16. Defendants have repeatedly argued that the H-2B visa issues were known to investors at the time of the Offering, and Defendants would have presented evidence at both the summary judgment stage and trial in an effort to establish this defense. ¶¶21, 48-49, 51. Further, Defendants have argued that none of Lead Plaintiff’s alleged misstatements or omissions were material, pointing to the risk disclosures in the Registration Statement, the percent of lost total revenue as a result of the Managed Exit strategy and the short-term effect of the H-2B visa shortage on adjusted EBIDTA in the third quarter of 2018. ¶¶22, 49.

The Underwriter Defendants would likely have raised additional arguments at summary judgment and trial, including that they conducted robust and thorough due diligence during the offering process to confirm the accuracy and truthfulness of the Registration Statement’s disclosures, including participating in extensive meetings with key management at the Company and reviewing relevant key documents. ¶53.

(b) Risks Concerning Negative Causation and Damages

Even assuming that Lead Plaintiff successfully established each of the elements of liability at trial (and the verdict was upheld on appeal), Lead Plaintiff still faced substantial obstacles to proving damages. Defendants would have likely pursued a negative causation defense to diminish the Securities Act’s statutory damages calculation, which captures the entire decline in the share price between the Offering and the filing of the complaint. Defendants would have argued that damages should be limited to the price declines on certain “corrective disclosure” dates, and to investors who purchased shares in the Registration Statement and held

them through one or more of those dates. Defendants would likely argue that factors other than the allegedly undisclosed trends and business practices caused the decline of BrightView's share price after the Offering. ¶55.

Specifically, Defendants would likely argue that Lead Plaintiff cannot recover for the price decline that took place between the June 29, 2018 Offering and the August 9, 2018 price drop because there was no allegedly corrective information disclosed to the market prior to the August 2018 disclosure. ¶56. Defendants would also argue that Lead Plaintiff cannot recover the full amount of the decline that occurred following the August 9, 2018 disclosure because the full drop in price was only partly due to BrightView's Managed Exit initiative and/or labor shortage. *Id.* Defendants would also argue that Lead Plaintiff cannot recover any damages for any decline in BrightView's share price after August 9, 2018 because the relevant information was fully revealed by the August 9, 2018 disclosure, if not before. ¶57. Thus, Defendants would have contended that the February 8, 2019 alleged corrective disclosure was not actionable, and that any decline in BrightView's share price on that date could not have been caused by the disclosures of allegedly undisclosed problems at the time of the Offering. *Id.* Finally, Lead Plaintiff would have the burden of proving that all shares of BrightView's stock purchased in the open market after the IPO were traceable to the Offering in order for those shares to be damaged. ¶58.

Though Lead Plaintiff would have counter arguments to the above, Lead Plaintiff's consulting loss causation and damages expert analyzed these anticipated negative causation arguments and estimated that that if such arguments were successful (and only those dates when there was a statistically significant price drop are counted), aggregate damages are approximately \$74 million (making the Settlement a recovery of 15.5% of damages). ¶59. Additionally, 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). *Id.*

Though Lead Plaintiff believes that Defendants' arguments take too narrow a view of the connection between the allegations and the price declines and that Defendants would be unable to meet their burden of proving that factors other than the allegedly omitted and misstated information caused the price declines, there was no certainty that Lead Plaintiff would prevail. As the case proceeded, the Parties' respective damages experts would strongly disagree with each other's assumptions and their respective methodologies, and there was no certainty concerning which expert would be credited by the jury, or the Court. Accordingly, the risk that the jury would credit Defendants' damages position over that of Lead Plaintiff had considerable consequences, even assuming liability was proven. *See, e.g., In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 492 (E.D. Pa. 2003) ("The conflicting damage theories of defendants and plaintiffs would likely have resulted in an expensive battle of the experts and it is impossible to predict how a jury would have responded.").

2. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and all the Attendant Risks of Litigation Support Approval of the Settlement

As described above and in the Gardner Declaration, though Lead Plaintiff's consulting damages expert estimated maximum class-wide statutory damages of approximately \$212.5 million, Defendants and their experts would have made several credible arguments that damages should be much lower. While Co-Lead Counsel would work extensively with Lead Plaintiff's damages expert with a view towards presenting compelling arguments to the jury and prevailing on these matters at trial, Defendants would have put forth well-qualified experts of their own showing that any damages Lead Plaintiff could have recovered would have been significantly, if

not entirely, diminished by negative causation arguments. If successful, damages could be as low as \$74 million or \$50.6 million. ¶59.

The Settlement, therefore, recovers between approximately 5.4% and 22.7% of estimated damages. This recovery falls well within the range of reasonableness that courts regularly approve in similar circumstances. *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”); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving \$40.3 million settlement representing approximately 6.25% of estimated damages and noting was at the “higher end of the range of reasonableness of recovery in class actions securities litigation”); *McPhail v. First Command Fin. Planning, Inc.*, No. 05cv179-IEG- JMA, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding a \$12 million settlement recovering 7% of estimated damages was fair and adequate); *In re Omnivision Techs, Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (\$13.75 million settlement yielding 6% of potential damages after deducting fees and costs was “higher than the median percentage of investor losses recovered in recent shareholder class action settlements”); *Int’l Bhd. of Elec. Workers Local 697 Pension Fund v. Int’l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving \$12.5 million settlement recovering about 3.5% of the maximum damages that plaintiffs believe could be recovered at trial and noting that the amount is within the median recovery in securities class actions settled in the last few years).

The Settlement also presents a favorable recovery considering that it 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.

Lead Plaintiff respectfully submits that the Settlement is squarely within the range of reasonableness in light of the best possible recovery and the attendant risks of the litigation.

3. Complexity, Expense, and Duration of Continued Litigation

Final approval is also supported by the complexity, expense, and likely duration of continued litigation. In evaluating the settlement of securities class actions, courts have repeatedly recognized that such litigation is complex and uncertain. *See, e.g., In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 501 (W.D. Pa. 2003) (“[T]his has been, and will continue to be, a very expensive case to prosecute and defend in light of the complexity of the issues and necessity for expert witnesses.”); *In re Suprema Specialties, Inc. Sec. Litig.*, No. 02-168, 2008 WL 906254, at *5 (D.N.J. Mar. 31, 2008) (finding complexity of the securities class action supports final approval). As the court noted in *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000), which is equally applicable here:

[i]n the absence of a settlement, this matter will likely extend for . . . years longer with significant financial expenditures by both defendants and Lead Plaintiffs. This is partly due to the inherently complicated nature of large class actions alleging securities fraud: there are literally thousands of shareholders, and any trial on these claims would rely heavily on the development of a paper trail through numerous public and private documents.

Id. at 179.

Here, at every turn, the litigation raised difficult legal and factual issues that required creativity and sophisticated analysis. The complexity, expense, and duration of continued

litigation through further briefing on 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 forum *non conveniens*, class certification, summary judgment, post-trial motions, and a jury verdict would be significant. 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.

The Settlement, therefore, provides sizeable and tangible relief to the Settlement Class now, without subjecting Settlement Class Members to the risks, duration, and expense of continuing litigation.

4. State of the Proceedings

The state of the proceedings and the amount of discovery completed are also factors courts consider in determining the fairness, reasonableness, and adequacy of a settlement. "Through this lens, [the] courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Milkman*, 2002 WL 778272, at *18.

The Action has been hotly contested from its inception approximately a year and a half ago. Accordingly, at the time the Parties agreed to settle, Lead Plaintiff and Co-Lead Counsel had a thorough and realistic understanding of the strengths and weaknesses of the claims and defenses asserted. Their knowledge was based on, among other things, counsel's rigorous investigation before filing two complaints (which involved, among other things, an independent investigation involving the identification and contact of 57 former employees of the Company with potentially relevant knowledge, 18 of whom were interviewed on a confidential basis); 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; opposing Defendants'

comprehensive preliminary objections to the amended complaint, which were overruled by the Court; opposing a motion to stay discovery pending the disposition of Defendants’ preliminary objections; moving for class certification; engaging in discovery including the exchange of documents and defending Lead Plaintiff’s deposition; consulting with experts on damages and causation issues; and engaging in settlement discussions under the guidance of a highly regarded and experienced mediator, Michelle Yoshida.⁹ See generally Gardner Declaration at ¶¶III-V.

In sum, Lead Plaintiff and Co-Lead Counsel had a full understanding of the likelihood of success and the potential recovery at trial at the time the Settlement was entered into.

5. Recommendation of Competent Counsel

In evaluating the fairness of a settlement, the “opinion of experienced counsel is entitled to considerable weight.” *Fischer v. Madway*, 485 A.2d 809, 813 (Pa. Super Ct. 1984); *Shaev v. Sidhu*, No. 0983, 2009 Phila. Ct. Com. Pl. LEXIS 63, at *30 (Pa. Com. Pl. Mar. 5, 2009) (“Although a judge must take care that there is no collusion between the proponents of the proposed class action settlement, if no indicia of collusion are present, and while there was extensive, adversarial discovery, then ‘the recommendations and opinions of counsel are entitled to substantial consideration.’”); see also *Alves v. Main*, No. 01-cv-789, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) *aff’d* by, 559 F. App’x. 151 (3d Cir. 2014) (“[C]ourts in this Circuit traditionally attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class.”); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 543 (D.N.J. 1997) *aff’d*, 148 F.3d 283 (3d Cir. 1998) (“[T]he Court credits the

⁹ See *Todd v. STAAR Surgical Co.*, No. 14-5263, 2017 WL 4877417, at *2 (C.D. Cal. Oct. 24, 2017) (discussing and approving settlement “conducted with the help of experienced mediator Michelle Yoshida”).

judgment of Plaintiffs' Counsel, all of whom are active, respected, and accomplished in this type of litigation.”).

The Settlement was negotiated by counsel who are experienced in complex securities litigation and who were acting in an informed manner. *See* ¶¶90-94; Exs. 3-D, 4-C, 5-C, and 6-C. The work conducted by Co-Lead Counsel is detailed above and set forth in the Gardner Declaration. *See generally* Gardner Declaration at ¶¶III-V.

As a result, Lead Plaintiff and Co-Lead Counsel had a sound basis for assessing the strengths and weaknesses of the claims and Defendants' defenses when they entered into the arm's-length Settlement. Their judgment that the Settlement is in the best interest of the Settlement Class should therefore be given substantial weight.

6. Reaction of the Settlement Class to Date

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, A.B. Data, began mailing copies of the Notice and Claim Form to potential Settlement Class Members and nominees on September 29, 2020. *See* Ex. 2 at ¶¶2-8. As of October 29, 2020, A.B. Data has mailed a total of 17,128 copies of the Notice Packet (consisting of the Notice and Claim Form) to potential Settlement Class Members and their nominees. *Id.* at ¶8. In addition, a Summary Notice was published in *The Wall Street Journal* and transmitted over the internet using *PR Newswire* on October 12, 2020. *Id.* at ¶9. The Notice set out the essential terms of the Settlement and informed potential Settlement Class Members of, among other things, their right to opt out of the Settlement Class or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the November 23, 2020 deadline set by the Court for Settlement Class Members to exclude themselves or object has not yet passed, to date, no objections to the Settlement or the Plan of Allocation have been filed and no requests for exclusion from the Settlement Class have been received by the Claims Administrator. As

provided in the Preliminary Approval Order, Lead Plaintiff will file reply papers on December 7, 2020, addressing any requests for exclusion and any objections that may be submitted.

* * *

For all the foregoing reasons, Lead Plaintiff respectfully requests that the Court grant final approval to the proposed Settlement.

II. THE COURT SHOULD GRANT FINAL CERTIFICATION OF THE SETTLEMENT CLASS

The Court previously granted preliminary certification of the Settlement Class for settlement purposes. *See* Preliminary Approval Order at ¶¶2-4. Nothing has occurred since then to cast doubt on whether the applicable prerequisites of the Pennsylvania Rules of Civil Procedure have been met. Accordingly for all the reasons stated in Lead Plaintiff's Unopposed Motion for (I) Preliminary Approval of Settlement, (II) Certification of the Settlement Class, and (III) Approval of the Notice to the Settlement Class, and Lead Plaintiff's previously filed Motion to Certify the Class, Lead Plaintiff requests that the Court reaffirm its determinations and finally certify the Settlement Class for purposes of carrying out the Settlement pursuant to Pa. R. Civ. P. 1702, 1708 & 1709, appoint Gregory S. McComas, Sr. as Class Representative, Labaton Sucharow LLP, Thornton Law Firm LLP, and Pomerantz LLP as Co-Class Counsel, and Goldman Scarlato & Penny, P.C. as Liaison Counsel.

III. THE PLAN OF ALLOCATION FOR DISTRIBUTING RELIEF TO THE SETTLEMENT CLASS IS FAIR, ADEQUATE, AND REASONABLE AND SHOULD BE APPROVED

At the final Settlement Hearing, the Court will be asked to approve the proposed Plan of Allocation for distributing the proceeds of the Settlement to eligible claimants.

The proposed Plan of Allocation, which is reported in full in the Notice (*see* Ex. 2-A at 9-11), was drafted with the assistance of Lead Plaintiff's consulting damages expert. It is designed

to equitably distribute the Settlement proceeds among the members of the Settlement Class who were allegedly injured by Defendants' alleged misrepresentations and who submit valid Claim Forms that are approved for payment. The plan is consistent with the statutory measure of damages under Section 11 of the Securities Act.

As explained in the Gardner Declaration, the Claims Administrator will calculate claimants' "Recognized Losses" using the transactional information provided by claimants in their Claim Forms, which can be mailed to the Claims Administrator, submitted online using the settlement website, or, for large investors, with hundreds of transactions, via e-mail to the Claims Administrator's electronic filing team. Because most securities are held in "street name" by the brokers that buy them on behalf of clients, the Claims Administrator, Co-Lead Counsel, and Defendants do not have Settlement Class Members' transactional data and a claims process is required. Because the Settlement does not recover 100% of alleged damages, the Claims Administrator will determine each eligible claimant's *pro rata* share of the Net Settlement Fund based upon each claimant's total Recognized Losses. ¶¶70-71.

In general, the Recognized Loss Amounts calculated under the Plan are based on the statutory formula for damages under Section 11(e) of the Securities Act, 15 U.S.C. §77k(e). Using the Plan of Allocation, the Claims Administrator will calculate a Recognized Loss Amount for each purchase of BrightView publicly traded common stock during the period from June 28, 2019 through April 16, 2019 that is listed in the Claim Form and for which adequate documentation is provided. ¶71.

Once the Claims Administrator has processed all submitted claims, notified claimants of deficiencies or ineligibility, processed responses, and made claim determinations, distributions will be made to eligible claimants in the form of checks and wire transfers. After an initial

distribution of the Net Settlement Fund, if there is any balance remaining in the Net Settlement Fund (whether by reason of tax refunds, uncashed checks or otherwise) after at least six (6) months from the date of initial distribution, the Claims Administrator will, if feasible and economical, after payment of Notice and Administration Expenses and Taxes, if any, re-distribute the balance among eligible claimants who have cashed their checks. These re-distributions will be repeated until the balance in the Net Settlement Fund is no longer feasible to distribute. See Stipulation at ¶26; Ex. 2-A at ¶74. Any balance that still remains in the Net Settlement Fund after re-distribution(s), which is not feasible or economical to reallocate, after payment of any outstanding Notice and Administration Expenses or Taxes, will be donated as follows: 50% of the unclaimed balance to the Pennsylvania Interest on Lawyers Trust Account Board and 50% of the unclaimed balance to the Consumer Federation of America, a private, non-profit, non-sectarian 501(c)(3) organization, or as otherwise approved by the Court. Stipulation at ¶26; Ex. 2-A at ¶74.

CONCLUSION

For all the foregoing reasons, Lead Plaintiff respectfully requests that the Court finally approve the proposed Settlement, finally certify the Settlement Class for purposes of the Settlement only, and approve the proposed Plan of Allocation.

Dated: November 9, 2020

Respectfully submitted,

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